

# SHOW ME THE MONEY:

## AN EMPIRICAL ANALYSIS OF INTEREST GROUP OPPOSITION TO FEDERAL COURTS OF APPEALS NOMINEES

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### ABSTRACT

*Contemporary views of the federal judicial appointment process are grounded in themes of obstruction and gridlock. Within this environment, interest groups find fertile ground to target, and sometimes successfully oppose, judicial nominees that once automatically moved through the appointment process and ended in confirmation. While interest group involvement and influence is an accepted fact, much less is known about the efficacy of these groups in carrying out their objective of correctly identifying ideological outlier nominees. This article asks the question: Do interest groups correctly identify and target nominees who are ideological outliers? The article implements a research design that evaluates whether those nominees opposed by interest groups are substantively different than arguably similar but unopposed nominees. The article adopts alternative theories of interest group motivations within the screening role: 1) policy promotion, and 2) group maintenance. Using matched-pair cohorts from the population of Clinton and W. Bush Administration appointments to the United States Courts of Appeals the article compares the dissenting behavior of the matched pairs. The expectation is that, if interest groups are correctly opposing outlier nominees, those who are confirmed despite opposition, should demonstrate outlier behavior in decision making, particularly in their dissenting behavior. Do opposing interest groups accurately identify the most ideologically extreme nominees? The answer is a discernible no. We conclude that there are no substantive differences between the dissenting behavior of targeted and untargeted nominees. Perhaps more interesting, the true relationship might actually be reversed, and controversial nominees are less likely to dissent (and to dissent in salient policy issue areas), than similar non-controversial nominees. These findings call into question the function of interest groups in the confirmation process. The assumption is that these groups are identifying ideological outliers and taking steps to prevent those nominees from being confirmed. This article undermines that thesis and proposes that groups actually target nominees in a way that best*

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*serves to increase the membership and financial well-being of the group instead.*

*“[M]ore than ever before, judicial selection is prone to manipulation by forces outside the Senate, especially mobilization and counter-mobilization by organized interests.”<sup>1</sup>*

## I. INTRODUCTION

Contemporary views of the federal judicial appointment process are uniformly grounded in themes of obstruction and gridlock.<sup>2</sup> Within this environment, interest groups find fertile ground to target, and sometimes successfully oppose, judicial nominees that once automatically moved through the appointment process and ended in confirmation. The interaction of interest group opposition to judicial nominees has been characterized as the sounding of a *fire alarm* that alerts like-minded senators to the presence of nominees with outlier ideological characteristics.<sup>3</sup> Like other aspects of congressional oversight,<sup>4</sup> these senators rely on the information that interest groups provide because they are unable, or unwilling, to gather the information themselves. In essence, the screening of federal judicial nominees has been outsourced to a number of policy-oriented interest groups that do the background vetting of nominees to the life-tenured seats on courts.

While interest group involvement and influence is an accepted fact, much less is known about the efficacy of these groups in carrying out their objective of blocking ideological outlier nominees to these courts. Given the insulation of a life tenure appointment, one can anticipate that these nominees will exhibit at least some variance within their decision calculi once making the federal bench.<sup>5</sup> Thus, this article asks the relevant question: *Do interest groups identify and target nominees who are ideological outliers?* To answer it, we implement a research design that evaluates whether those nominees opposed by interest groups are substantively different than arguably similar but unopposed nominees.

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1. Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499, 502 (1998).

2. See generally LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005); NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (2005); AMY STEIGERWALT, *BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS* (2010); Lauren C. Bell, *Senatorial Discourtesy: The Senate's Use of Delay to Shape the Federal Judiciary*, 55 POL. RES. Q. 589 (2002); Sara A. Binder & Forrest Maltzman, *Congress and the Politics of Judicial Appointments*, in CONGRESS RECONSIDERED 297 (Lawrence Dodd and Bruce Oppenheimer ed., 2005).

3. Nancy Scherer, Brandon L. Bartels & Amy Steigerwalt, *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process*, 70 J. POL. 1026, 1029 (2008).

4. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

5. See Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007).

In developing the framework for the analysis, we utilize alternative theories of interest group motivations within the screening role: 1) *policy promotion*, and 2) *group maintenance*. We gain the empirical leverage necessary to evaluate these theories by taking advantage of the fact that interest groups are not always successful in their opposition. We study matched-pair cohorts<sup>6</sup> from the population of Clinton and W. Bush Administration appointments to the United States Courts of Appeals (“USCA”). Within each pair, one member represents an opposed but successful nomination and the other is an unopposed and successful appointee. Finally, we look at the most salient, visceral, and clear expression of ideological position-taking on these courts: the act of penning a separate dissent.<sup>7</sup>

Do opposing interest groups get it right? The answer according to this study is a discernible *no*. We conclude that there are no substantive differences between the dissenting behavior of targeted and untargeted nominees. Perhaps more interesting, the true relationship might actually be reversed, and controversial nominees are less likely to dissent (and to dissent in debated policy issue areas), than similar non-controversial nominees. The findings here call into question the function of interest groups in the confirmation process. The assumption is that these groups are identifying ideological outliers and taking steps to prevent those nominees from being confirmed. This article undermines that thesis and proposes that groups actually target nominees in a way that best serves to increase the membership and financial well-being of the group.

The article begins in Part I by telling the story of how interest groups became an active player in the confirmation of nominees to the courts of appeals. Part II sets out the theoretical model for understanding interest group motivations to label certain nominees as “controversial”: the policy proponent motivation and the group maintenance motivation. Part III sets out several empirical tests of the policy proponent motivation theory. It also provides the results of those tests, which undermines the policy proponent theory of interest group involvement, and raises serious questions about interest group influence on the “advice and consent” function in the appointment process.

## II. THE RISE OF INTEREST GROUP INVOLVEMENT

The U.S. Constitution sets out the process for the appointment of certain federal officers, including judges, to the USCA. Article II, Section 2 provides that these officers are to be appointed by the president and confirmed through

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6. A matched-pair cohort matches individuals from two data sets who share certain baseline characteristics, but experience different outcomes. See generally Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth Stuart, *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANALYSIS 199, 200 (2007) (outlining benefits of matched-pair studies in limiting influence of model-based assumptions).

7. VIRGINIA HETTINGER, STEFANIE LINDQUIST & WENDY MARTINEK, JUDGING ON A COLLEGIATE COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 86 (2007); Virginia Hettinger, Stefanie Lindquist & Wendy Martinek, *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123, 124 (2004).

the “advice and consent” of the Senate. These appointees serve “during good Behavior,” which in practice has meant for life.<sup>8</sup> This particular arrangement of presidential nomination and Senate confirmation was a compromise between large and small state interests at the Constitutional Convention.<sup>9</sup> However, the Constitution provides no further guidance beyond that general division of authority. Because a successful confirmation requires both executive and legislative action, the president and members of the Senate have wrestled over the establishment and enforcement of institutional rules and norms in this realm, and over time, the balance of power has fluctuated between the branches.<sup>10</sup>

The appointment process has tended to be a tug-of-war between the president and the Senate, but recently the confirmation game has begun to accommodate outside interest group influence. To understand how and why this change occurred, it is important to set out the changing role of federal courts in developing and implementing policy and how that motivated interest groups to pursue their policy goals through systemic litigation strategies, which led these groups to be concerned about the judges who were ultimately deciding whether the litigation would be a success. The following section will discuss the rise in the participation of interest groups within the confirmation process of judicial nominees over time, from an original emphasis on the Supreme Court to the current interest in lower federal court nominees.

#### A. THE SUPREME COURT AS POLICY MAKER

The story of federal courts as robust policy makers traces back to the Judiciary Act of 1925.<sup>11</sup> Prior to the 1925 Act, almost all litigants had an appeal of right to the Supreme Court. This appeal of right combined with the explosion of federal laws and regulations prompted by the events such as the industrial revolution, the increase in federal crimes (including drug crimes and prohibition laws), and the increase in post-World War I government contract and bankruptcy claims<sup>12</sup> led to “clogged dockets and delayed judgments.”<sup>13</sup> These events prompted the Supreme Court, led by the lobbying of Chief Justice Howard Taft, to seek docket relief from Congress.<sup>14</sup>

The Judiciary Act of 1925 gave the Supreme Court the flexibility it sought. The Court was able to select its own docket, deciding only those

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8. U.S. CONST. art. III, § 1.

9. Felix A. Nigro, *Senate Confirmation*, 42 GEO. L.J. 241, 241 (1954).

10. Marcus Hendershot, *From Consent to Advice and Consent: Cyclical Constraints Within the District Court Appointment Process*, 63 POL. RES. Q. 328, 328 (2010); Bell, *supra* note 2, at 592; SCHERER, *supra* note 2, at 7; SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 358 (1997).

11. See Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 1 (2003).

12. *Id.* at 2; ALPHEUS T. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 88–89 (1964) (providing examples of the expansion of the federal government through “[a]nti-narcotic and smuggling laws, auto-theft and white-slave statutes, income-tax violations” which all “swelled the volume of litigation and swamped Court dockets.”).

13. MASON, *supra* note 12, at 88.

14. *Id.* at 106–14.

cases it viewed as most important and worthy of setting national precedent. To give a sense of how much the discretionary docket has affected the Court's output, between 1915 and 1925, the Supreme Court docket averaged 332 orally argued cases per term, while the current average is fewer than one hundred per term.<sup>15</sup> The Act's passage allowed the Court to move away from docket-consuming economic disputes.<sup>16</sup> Meanwhile, President Roosevelt's court-packing plan and the Court's subsequent "switch in time that saved nine" foreshadowed a shift in the Court's agenda to cases involving individual rights and liberties.<sup>17</sup> In the prescient footnote four of *United States v. Carolene Products* (1938), Justice Stone indicated that while economic legislation would receive a presumption of validity, the Court might view laws directed against minority groups with "more searching inquiry."<sup>18</sup> By the 1950s, that footnote had taken life and the Court was addressing cases dealing with privacy and civil rights and liberties.<sup>19</sup> In addition to the discretionary docket changing the types of cases the Court could choose to hear, the Court's agenda further expanded in the 1970s with Congress' adoption of several pieces of environmental legislation, moving these disputes, which were traditionally left to the states, into federal court.<sup>20</sup>

#### B. INTEREST GROUPS TAKE NOTICE OF COURTS AS POLICY MAKERS

It is unsurprising that the shift in the Court's docket led to a change in the strategic use of the courts. When the federal government's regulatory footprint was small and federal courts primarily addressed disputes between private parties, policy-based groups had little incentive to concern themselves with the litigation. Groups were left to lobby lawmakers by using the threat of electoral opposition if a representative failed to vote consistent with the group's interest. When all voices are equal, this rough-and-tumble of the political marketplace results in compromise legislation representative of the interests involved consistent with James Madison's description in Federalist No. 10.<sup>21</sup> However, problems arise when certain groups are denied the right to participate in the marketplace or the marketplace is hostile to their interests. Schattschneider found that the interests represented at the legislative level are upper-class and business-oriented and the "notion that the pressure system is automatically representative of the whole community

15. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1229 (2012).

16. See RICHARD L. PACHELLE, THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 87–91 (1991).

17. *Id.*

18. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

19. CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND THE SUPREME COURTS IN COMPARATIVE PERSPECTIVE 26–27 (1998).

20. Richard J. Lazarus, *The Greening of America and the Graying of the United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 76 (2001) ("[P]rior to 1970, environmental protection law in the United States was essentially nonexistent. Of course, there were a few, isolated states pursuing fledgling efforts, and there were common law property and tort doctrines . . . . But there was nothing even remotely resembling a comprehensive legal regime for regulating pollution of the air, water, or land.").

21. THE FEDERALIST NO. 10 (James Madison).

is a myth,” concluding that the successful interests “sing[] with a strong upper-class accent.”<sup>22</sup>

The policy agenda expansion of the federal courts gave incentive to the excluded chorus to look to the judiciary, hoping that branch would be more sympathetic to their concerns. Richard Courtner said of these excluded groups:

[T]hey are highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals they are almost compelled to resort to litigation.<sup>23</sup>

Courts, of course, do not guarantee victory for these groups for several reasons.<sup>24</sup> Federal Courts are limited by the need for real cases and controversies between petitioners with conflicting interests and standing. Individual litigants may be more interested in resolving their own case than setting precedent for future cases. In addition, the cases pursued may not be ideal to further the group’s broader goals.<sup>25</sup> To further the analogy, policy making through the judiciary runs the risk of promoting numerous discordant voices on a topic. For those seeking policy victories through courts, there is a need for strategy to select, develop, and litigate cases in a manner that comports with an overarching strategic policy goal. This type of collective action requires the resources and expertise that interest groups can and do provide.

This group-based policy consciousness developed in the late 1800s with the formation and rise of groups such as the National Association for the Advancement of Colored People (“NAACP”). By coming together and creating a carefully planned litigation campaign against racially discriminatory policies, the group was able to effectively challenge segregation both in public schools and public accommodations.<sup>26</sup> In 1954, the group enjoyed its most vaunted victory with the United States Supreme Court decision *Brown v. Board of Education of Topeka, Kansas*.<sup>27</sup>

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22. ELMER E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 35 (1960).

23. Richard C. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. PUB. L. 287, 287 (1968).

24. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 12 (2nd ed. 2008); see also Dara E. Purvis, *Evaluating Legal Activism: A Response to Rosenberg*, 17 BUFF. J. GENDER L. & SOC. POL’Y 1, 8 (2009); DAVID A. SCHULTZ, *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* 186 (1998).

25. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 96 (1974).

26. JACK GREENBERG, *JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION* 17 (1977); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION* 105–08 (1987).

27. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

While *Brown* was a victory for the NAACP's policy objectives, it also provoked those opposing integration to attempt to vindicate their view in the courts.<sup>28</sup> *Brown* was not the only decision of the Court that engendered organized political pushback. The Warren Court's opinions on the constitutional rights of criminal defendants, pressed by sympathetic interest groups, also triggered substantial organized opposition. For example, conservative circles perceived the *Miranda v. Arizona* decision, which required officers to warn arrestees of their constitutional rights before interrogating them, as hamstringing police.<sup>29</sup> Other opinions that raised group ire include *Escobedo v. Illinois* (1964), holding that suspects have a Sixth Amendment right to legal counsel during police interrogations,<sup>30</sup> and *Mallory v. United States* (1956), holding that certain confessions were inadmissible if obtained after an unreasonable delay.<sup>31</sup> In the presidential campaigns of 1964 and 1968, both Barry Goldwater and Richard Nixon campaigned on the position that they would appoint judges to reverse the liberal decisions of the Warren Court.<sup>32</sup>

Successful litigation ultimately bred imitation, and the ideological orientations of groups rapidly expanded. In fact, the increased opportunity and incentive to influence policy, resulted in an explosion in the number of interest groups after World War II.<sup>33</sup> While the Warren Court decisions prompted conservative groups to counter-mobilize and push opposing views of social policy, such right-leaning groups had been in existence for some time. Epstein traces the roots of conservative groups' litigation strategies as early as 1900.<sup>34</sup> However, it was the litigation strategy/counter-strategy of the Warren Court era that began to crystallize modern interest group involvement in litigation.

### C. LOOSENING OF CONSTITUTIONAL STANDING REQUIREMENTS

Operating parallel to interest group involvement, and facilitating and perhaps even responding to these groups, was the expansion of standing doctrine in federal courts, which operates as a bar to litigation. There are two justifications for the existence of a standing doctrine. The first is to preserve the separation of powers between the legislative and judicial branches—preventing courts from making decisions that are best left to the political arms of government.<sup>35</sup> A high bar on standing means that the court defers to

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28. Opposition—which played out largely in the federal courts—manifested in state officials, states' rights councils, or citizens' councils that organized throughout the South. *See, e.g., J.W. PELTASON, 58 LONELY MEN 35–36 (1971).*

29. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

30. *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

31. *Mallory v. United States*, 354 U.S. 449, 455 (1957).

32. SCHERER, *supra* note 2.

33. JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS 36–37 (1991).*

34. LEE EPSTEIN, *CONSERVATIVES IN COURT 154 (1985).*

35. *See generally Lexmark Int'l v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (finding standing based on three principles: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the

elected branches, denying litigants the opportunity to challenge an action or assert a claim for violation of rights. The second reason to bar cases based on standing is to prevent those with only an ideological stake in the outcome of a matter from having access to courts. Standing requires the litigant to have suffered a concrete harm due to a violation of their rights.<sup>36</sup>

Beginning in the 1950s, the Supreme Court recognized the standing of interest group organizations, meaning that a group could bring suit on its own behalf without naming an individual member as a party. For example, in 1958, the Court in *NAACP v. Alabama* held that the NAACP had standing to assert the First Amendment rights of its members in challenging a court order to disclose the group's membership lists.<sup>37</sup> In subsequent cases, the Court further expanded the rules and recognized the standing of an organization to sue when it could show that an action harmed just one of its members.<sup>38</sup> By liberalizing the standing doctrine, federal courts cleared the way for newly-forming groups to become lead plaintiffs in cases and pursue collective policy goals versus those of individual citizens.<sup>39</sup>

In addition to loosening the general standing requirement, Congress also expanded the authority of groups to sue within the environmental context through the introduction of citizen-suit provisions. Coupled with the recognition of organizational standing, citizen-suit provisions overhauled the role of interest groups in the litigation process. It provided groups with an opportunity to sue to enforce statutes in an area where the government lacked the resources, monitoring capability, or wherewithal to pursue a violator.<sup>40</sup>

#### D. EXPANDED USE OF AMICUS CURIAE BRIEFS

A related institutional change that opened up additional avenues for interest group influence was the use of amicus curiae, or friend of the court, briefs. In the early history of the Court, third persons with an interest in a case, but who were not named as a party, utilized the brief as a mechanism to let the Court know that third party's position.<sup>41</sup> With the rise of interest groups and the expanding Supreme Court docket, the nature of the briefs changed and they became an avenue for expressing broader policy positions. An early use of the brief by the NAACP was in *Guinn v. United States* (1915), in which the group said that its involvement as an amicus was appropriate because of "the vital importance of these questions to every citizen of the United States, whether white or colored . . ."<sup>42</sup> Use of the brief

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zone of interests protected by the law invoked.") (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

36. *Id.* at 125.

37. 360 U.S. 240, 241 (1959).

38. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.").

39. See generally Jeanne A. Compitello, *Organizational Standing in Environmental Litigation*, 6 *TOURO L. REV.* 295 (1990).

40. Mark Seidenfeld & Janna S. Nugent, *The Friendship of the People: Citizen Participation in Environmental Enforcement*, 73 *GEO. WASH. L. REV.* 269, 283 (2005).

41. Samuel Krislov, *The Amicus Brief: From Friendship to Advocacy*, 72 *YALE L.J.* 694, 694–95 (1963).

42. *Id.* at 707.

to further policy goals became so widespread that, by 1963, “an increased reliance on litigation as a means of vindicating minority rights otherwise difficult to obtain through the political process . . . resulted in civil rights organizations such as the ACLU, and the American Jewish Congress, being among the most active filers of amicus curiae briefs over the past few years.”<sup>43</sup> Thus, use of amicus briefs to further the policy goals of groups provided another avenue to influence the Court and further directed interest group activity toward the judicial branch.

The strategic use of amicus briefs and their impact on judges and justices has continued into the modern era. Both conservative and liberal interests file amicus briefs to influence court decisions.<sup>44</sup> There is some dispute over whether interest group amici are providing new information to the justices<sup>45</sup> or whether they primarily reiterate the positions set out by the parties.<sup>46</sup> The reality is, however, that the number of briefs filed influences the ideological direction of Supreme Court justice’s votes.<sup>47</sup> With the rise of the importance of the USCA in policy-making, studies have found that groups also expend the resources necessary to produce a brief to influence USCA judges, as well.<sup>48</sup>

#### E. DEVELOPMENT OF INTEREST GROUP ATTENTION TO COURT NOMINEES

With the rise of group interest in litigation to pursue a policy agenda, it is only natural that groups would also be interested in influencing the judges that sit on those courts. The reality is that since George Washington groups have viewed Supreme Court vacancies as an appropriate venue for partisan and institutional fights over judicial philosophy. In modern times, nominees to the Supreme Court have garnered attention because of the uniquely important status of that court, including its discretionary docket, focus on salient policy issues, few members and infrequent vacancies, and highly visible nomination and confirmation process. For these reasons, studies of interest group involvement in the appointment and confirmation process have traditionally focused on Supreme Court nominees<sup>49</sup> and on the incentives and motivations of the traditional players in the confirmation

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43. *Id.* at 710.

44. PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 56 (2008).

45. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae participation in the U.S. Supreme Court Litigation*, 38 L. & SOC’Y REV. 807, 808 (2004).

46. See James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997).

47. COLLINS, *supra* note 44.

48. See, e.g., Wendy L. Martinek, *Amici Curiae in the U.S. Courts of Appeals*, 34 AM. POL. RES. 803, 818 (2006).

49. See, e.g., Caldeira & Wright, *supra* note 1, at 499; JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 49 (1998); L. Marvin Overby et al., *Courting Constituents? An Analysis of the Supreme Court Vote on Clarence Thomas*, 86 AM. POL. SCI. REV. 997, 998 (1992); Jeffrey A. Segal, Charles M. Cameron & Albert D. Cover, *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992).

game: the president<sup>50</sup> and the Senate.<sup>51</sup> Notable examples of nominees that were confirmed despite facing stiff interest group opposition include Brandeis (Johnson), Rehnquist (Nixon), Clarence Thomas (H.W. Bush), and Kavanaugh (Trump). Three Supreme Court nominees have been rejected by the Senate since the Nixon presidency: Clement Haynsworth (Nixon), Harrold Carswell (Nixon), and Robert Bork (Reagan). Two have been withdrawn: Douglas Ginsburg (Reagan) and Harriet Miers (W. Bush). Of these nominations, Bork represents a turning point in the role of interest group involvement in the confirmation process.

While Supreme Court vacancies continue to prompt strong interest group involvement, the general increase in the role of federal courts as policy-makers across a variety of areas<sup>52</sup> has heightened group interest in lower federal court judges. Two events reduced the role of the Supreme Court in deciding the vast majority of cases. First was the Judiciary Act of 1925, which eliminated the mandatory docket and allowed the justices to accept far fewer cases. After recognition of a discretionary docket, the Court amended the Supreme Court Rules to add Rule 10 which provides that certiorari would only be granted for “compelling” reasons such as a conflict between the federal circuits or when there is “an important question of federal law” that should be settled by the Court.<sup>53</sup> This led to the adoption of the Rule of Four, requiring at least four Justices to vote in favor of taking a case for certiorari to be granted. Because of these changes, the number of cases decided by the Supreme Court has plummeted.<sup>54</sup> Thus, while the Supreme Court maintains its importance in national life, and vacancies mobilize interest groups on both sides, its role in rectifying incorrect decisions by lower courts is reduced. This is occurring in a world of increasing federal court jurisdiction and policy-making. In approximately 99% of cases, the Courts of Appeal are the courts of last resort for litigants.

#### F. THE RISE OF THE IMPORTANCE OF COURTS OF APPEALS NOMINEES

From the perspective of interest groups, nominations to lower courts have been viewed historically as less important than those for the Supreme Court, with patronage primarily guiding selection. Senators view these positions as important to support electoral goals and fight to protect their prerogatives. Groups understand senatorial protectionism and rarely interfere, even today, if a home state senator supports a nominee. This same hands-off approach also applied (although less so) to USCA positions for several reasons. First, and foremost, as set out above, when the policy-making sphere of federal courts was minimal it was not worth expending resources in the fight over nominees, but that has changed with the increase

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50. See 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, 1071–72 (1999).

51. See JOSEPH P. HARRIS, *ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 65–78 (1953).

52. See H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 114 (1991).

53. Daniel R. Coquillette et al., 23 MOORE'S FED. PRAC. § 5:10.01 (3d. ed. 2018), LEXIS.

54. See David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 779 (1997).

in the importance of the lower federal courts in establishing policy. There were also institutional restraints that made involvement in the confirmation process of USCA appointees difficult. Until the adoption of the Seventeenth Amendment in 1913, state legislators selected senators—making it problematic to tie positions on nominations with electoral consequences. Furthermore, until 1929, the Senate decided most nominations in executive session, giving outside groups little opportunity to publicly assert their influence.<sup>55</sup> However, this perception that lower federal court judgeships were not worth the fight changed as the structural and political context shifted.

The opening up of the Supreme Court docket and expanding federal court jurisdiction created a trickle-down impact on the USCA. These courts were tasked with both implementing the decisions of the Supreme Court and defining the parameters of the rights recognized by the Court. As the lower courts became more active players in the direction and outcomes of controversial public policy battles (e.g., segregation, privacy rights, criminal justice, and environmental concerns), groups adjusted accordingly.<sup>56</sup> Groups sought to break into the previously closed confirmation system.<sup>57</sup>

Consider the fall-out from the Supreme Court's decisions dealing with social policy areas. While the Court established the precedent, judges at the district court and USCA level were left to interpret the opinion and enforce its commands. This fact made the selection of lower federal judges an important issue not just of patronage, but also of politics. For example, Southern senators during integration felt that if they could not overturn the *Brown* decision itself, they were determined to keep control of the judges charged with enforcing it, and during that time Democratic presidents capitulated to keep the southern Democrats in the party.<sup>58</sup>

#### G. USCA JUDGES AS POTENTIAL SUPREME COURT NOMINEES

The Courts of Appeal have also gained in importance because they have become a training ground for Supreme Court nominees. As of 2004, seven of nine Justices had served on the USCA.<sup>59</sup> In 2017, eight of the nine Justices previously served.<sup>60</sup> Thus, in the contemporary chess match over the make-up of the Court, interest groups have begun to make early moves against lower court nominees on the fast track for future elevation.

It is rare that groups will come out and publicly assert that future promotion is the reason for their opposition (preferring to focus on ideological concerns). However, in late 2003, several internal memos prepared by the staff of Democratic Senators Edward Kennedy (D-MA) and Richard Durbin (D-IL) were leaked. These memos, often summarizing the position of influential interest groups, provide frank insight into the

55. MALTESE, *supra* note 49, at 37.

56. Donald Songer, *The Circuit Courts of Appeals*, in *AMERICAN COURTS: A CRITICAL ASSESSMENT*, 35 (John B. Gates & Charles A. Johnson eds., 1991).

57. Binder & Maltzman, *supra* note 2, at 312–13.

58. PELTASON, *supra* note 28, at 40.

59. SCHERER, *supra* note 2, at 20.

60. Justice Kagan did not previously serve on the court of appeals.

motivation for opposing certain nominees of President George W. Bush. A memo to Senator Durbin from an aide noted that interest groups considered Miguel Estrada, a nominee to the Court of Appeals for the District of Columbia Circuit, to be “extremely dangerous” because “he has a minimal paper trail, he is Latino, and the White House seems to be grooming him for a Supreme Court appointment.”<sup>61</sup> Therefore, not only have courts of appeal gained in importance because of decisions impacting policy, but also because of the institutional reality of elevation from the Court of Appeals to the Supreme Court.

#### H. POLITICAL CONTEXT AND THE RULES OF THE CONFIRMATION GAME

As lower courts both decided cases that were engendering cross-cutting tensions within party coalitions<sup>62</sup> and began to serve as an incubator for the Supreme Court, interest groups insisted that lower federal court nominees be ideologically compatible with their views. Group mobilization also occurred to defend those targeted nominees or to promote nominees sympathetic to the counter-position.<sup>63</sup> This placed pressure on a confirmation process traditionally limited to the president and senators.

To grasp the challenges that interest groups faced when trying to exert influence on the confirmation of these judges, it is important to understand the historical foundation of the selection process. The Senate held the upper hand in the confirmation game for most of the nation’s history by creating and strictly adhering to senatorial courtesy—a longstanding and informal norm of reciprocity.<sup>64</sup> Courtesy is based on institutional respect for the prerogative of individual senators. Under courtesy, if a vacancy requiring advice and consent occurs in one state, other senators will approve the nominee only if the nominee is supported by the home-state senators. In turn, supportive senators expect the objecting senator to reciprocate the ‘courtesy’ when an opening occurs within their own states. Courtesy is strongest with regard to life tenured positions clearly affiliated with state boundaries (e.g., a district court judgeship) and are weakest when a position does not match up to a particular geographic area (e.g., a Supreme Court Justice or a cabinet position). Positions on the USCA fall in the middle of this continuum. These are courts of life tenure, but they cover groups of states, providing less justification for a senator to claim courtesy with regards to a vacancy. However, senators have informally assigned seats on the appellate courts to particular states and still make claims on that basis. It is not uncommon for

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61. David Von Drehle, *Turmoil Over Court Nominees*, WASH. POST (Jan. 3, 2004), [https://www.washingtonpost.com/archive/politics/2004/01/03/turmoil-over-court-nominees/03fe6d85-344b-4486-a089-8d53c1404d81/?utm\\_term=.d8eeafa39761](https://www.washingtonpost.com/archive/politics/2004/01/03/turmoil-over-court-nominees/03fe6d85-344b-4486-a089-8d53c1404d81/?utm_term=.d8eeafa39761).

62. See generally V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1984) (discussing the influence of the lower courts on party coalitions within Congress).

63. EPSTEIN, *supra* note 34, at 154, 156.

64. HARRIS, *supra* note 51; Sarah A. Binder & Forrest Maltzman, *The Limits of Senatorial Courtesy*, 29 LEG. STUD. Q. 5, 6–7 (2004); Tonja Jacobi, *The Senatorial Courtesy Game: Explaining the Norm of Informal Vetoes in Advice and Consent*, 30 LEGIS. STUD. Q. 193, 193–96 (2005).

a senator to argue that someone from that senator's state should fill a particular vacancy based on the residence of the predecessor judge.<sup>65</sup>

During the Senate-dominated era, which lasted through the Franklin D. Roosevelt Administration, presidents found themselves motivated to swiftly fill judicial vacancies but were constrained by the existing courtesy norm.<sup>66</sup> As a result, presidents would begrudgingly follow the Senate's lead on the selection of nominees.<sup>67</sup> With free rein to select nominees for positions with strong courtesy ties, senators sought to further their own electoral goals by using these vacancies as patronage opportunities and rewarding political supporters. In this era, political support and electoral success took priority during the selection of nominees; issues of ideology or even candidate qualifications were often of secondary import.<sup>68</sup> Consistent with the idea that presidents were appointing and the Senate was confirming nominees on bases other than ideology, Scherer found a lack of ideological decision-making for lower court judges appointed during the Harding, Coolidge, and Hoover Administrations, as well as those seated during Franklin Roosevelt's first term.<sup>69</sup>

This inside game for lower federal court nominees continued even as federal court jurisdiction expanded. The one exception to this was the ABA which gained influence in the appointment process when President Eisenhower asked the group to rate prospective nominees.<sup>70</sup> While the involvement of the ABA might have shifted appointment considerations at the presidential level, the introduction of ABA ratings had few effects on confirmation in the Senate, where the norm of senatorial courtesy remained strong.<sup>71</sup> Caldeira and Wright aptly termed the relationship between the President, Senate, and ABA as the "cozy triangle," an indication of how the relationship was both uncontentious and symbiotic.<sup>72</sup>

## I. THE CIVIL RIGHTS DIVIDE

As civil rights issues moved onto the national agenda and political parties slowly began to take clear policy positions on these conflicts, presidents were in a difficult position. Democrats were motivated to hold their ideologically fractured party together by appeasing the solid South<sup>73</sup> and the judicial selection process was subject to this appeasement strategy. The state of the Democratic Party, combined with the norm of seniority in the Senate, gave southern senators an inordinate amount of leverage. Faced with James Eastland of Mississippi, an arch-segregationist, as Chair of the

65. EPSTEIN & SEGAL, *supra* note 2, at 20–27; CALVIN G. MACKENZIE, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 124 (1981); HARRIS, *supra* note 51, at 66.

66. SCHERER, *supra* note 2, at 21.

67. HARRIS, *supra* note 51, at 79.

68. *Id.* at 80.

69. *See generally* SCHERER, *supra* note 2.

70. Joel B. Grossman, *The Role of the American Bar Association in the Selection of Federal Judges: Episodic Involvement to Institutionalized Power*, 17 *VAND. L. REV.* 785, 805 (1964).

71. *Id.* at 807.

72. Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships*, in *CONTEMPLATING COURTS* 44 (Lee Epstein ed., 1995).

73. KEY, *supra* note 62, at 315.

Senate Judiciary Committee from 1956 through 1978, Democratic presidents nominated judges that would keep Southern senators in the party.<sup>74</sup>

In effect, judicial nominations became side-payments to satisfy these powerful senators rather than an opportunity for a president to further a political or ideological agenda. For example, President Kennedy appointed Harold Cox to a district court position in Mississippi. Cox, an unapologetic racist and segregationist who gained a reputation for refusing to follow Supreme Court opinions on civil rights, was also the college roommate of Senator Eastland.<sup>75</sup> The end result of this appeasement was the continuation of a Senate-dominated appointment process with a subtle shift from judges being selected for patronage purposes to judges being selected with an eye toward their obstructive stance on civil rights.

The party-sustaining era ended as the parties became more ideologically homogenous. Southern Democrats realigned and shifted their party affiliation to the socially conservative Republican Party.<sup>76</sup> With this movement, Democrats were no longer forced to placate Southern senators.

The Senate itself, long a bastion of norms and rules that empowered senators with the most seniority, changed starting in the late 1950s through the 1970s. The once closed, rigidly-structured chamber was altered by newly elected members who demanded additional access to positions of power.<sup>77</sup> In addition, with the rise of television coverage of proceedings, individual senators began utilizing these opportunities to make direct appeals to constituents and, more importantly, organized interests. President Johnson once said that in the Senate the president only had to deal with the whales and the minnows would loyally follow.<sup>78</sup> The change in the Senate seniority rules made every senator a whale, and incentivized interest groups to attempt to persuade even junior senators to use their institutional powers to further the groups' goals.

#### J. IMPACT OF VOTER REALIGNMENT ON THE CONFIRMATION PROCESS

The change to a more decentralized Senate and more ideologically homogenous parties signaled what Scherer terms the "modern party system" of judicial appointment and a move away from the "old party system."<sup>79</sup> In this new party system, the balance of power in the confirmation game shifted from the Senate to the president. As party members began holding similar ideological positions, the need for presidential compromise to hold the party

74. *Id.* at 807.

75. STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969* 272 (1976).

76. See Nicholas Valentino & David O. Sears, *Old Times There are Not Forgotten: Race and Partisan Realignment in the Contemporary South*, 46 *AM. J. POL. SCI.* 672, 673 (2005); see also EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 73-74 (1989).

77. NELSON POLSBY, *HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE* 13, 22, 24, 27 (2004); BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* 41-42 (1989).

78. MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE POLITICS OF SUPREME COURT CONFIRMATIONS* 19 (2nd ed. 2007).

79. SCHERER, *supra* note 2.

together was eliminated. The primary incentive became loyalty to the party, which could be demonstrated by support of the president's nominees. This coincided with the predominant incentive of the president to install like-minded judges to establish an ideological legacy on a federal bench making pivotal policy decisions.

In many ways, the Carter Administration marks the beginning of the modern confirmation process. Carter campaigned as a political outsider and as the proponent of integrity in the federal government. He established the United States Circuit Judge Nominating Commission just four weeks after taking office.<sup>80</sup> Through two executive orders, Carter instructed the Commission to “recommend for nomination as circuit judges persons whose character, experience, ability, and commitment to equal justice under law, fully qualify them to serve in the Federal judiciary” and “to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees.”<sup>81</sup> Carter intended this Commission to move the selection of judges away from patronage and toward merit and diversity, and simultaneously away from the Senate and to the president.

At this same time, the Omnibus Judgeship Act of 1978 created 152 new judicial officers—thirty-five at the USCA level.<sup>82</sup> This provided Carter an unprecedented opportunity to reconfigure the federal judiciary. While interest groups did not have a formal role within the selection of nominees, the groups were involved throughout the process, providing names both for members of the selection committees and for individuals to be interviewed for vacancies.<sup>83</sup> The committee procedure, although only lasting for Carter's one-term presidency, eroded the influence of individual senators and provided an opening for interest groups to become involved in the confirmation game.

The creation of so many new judicial positions meant that Carter filled a disproportionate number of seats on the federal courts. President Reagan sought to reverse what he saw as the liberal leaning of the federal bench and deviated even further from the traditional model. He moved the selection process firmly into the executive branch to retain greater control and to vet more thoroughly the ideological bona fides of potential nominees. Nominee selection fell to the newly created Office of Legal Policy.<sup>84</sup> The president expected nominees to come to Washington and be interviewed and approved by the Justice Department.<sup>85</sup> Reagan's desire to fully vet nominees was consistent with his promotion of the New Right<sup>86</sup>—a combination of religious and conservative organizations that became active after the Supreme Court's 1973 decision in *Roe v. Wade* recognized a constitutional

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80. GOLDMAN, *supra* note 10, at 358–59.

81. Larry C. Berkson, Susan Carbon & Alan Neff, *A Study of the U.S. Circuit Judge Nominating Commission: Findings, Conclusions and Recommendations*, 63 JUDICATURE 104, 105 (1979).

82. GOLDMAN, *supra* note 10.

83. Berkson, Carbon & Neff, *supra* note 81, at 106.

84. GOLDMAN, *supra* note 10, at 291.

85. Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 318–19 (1989).

86. HERMAN SCHWARTZ, *RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS* 52 (2004).

right to abortion. The New Right's primary motivation was social policy issues (as opposed to the Old Right's emphasis on individual liberty and economic freedom): "They are against abortion, gun control, sex education, ERA, dealings with Communist regimes, and high taxes; while they favor censorship, restoration of religious values, support for anticommunist guerrilla movements, and self-determination for states and municipalities."<sup>87</sup> They wanted judges who would vote consistently with these closely held values. The mobilization and voting power of this religiously fueled and self-proclaimed "moral majority" gave further incentive for Republican presidents and senators to pay close attention to a nominee's ideological preferences.

#### K. NEW TOOLS OF OPPOSITION: THE EXAMPLE OF BORK

The crossroads of interest group involvement in the confirmation process is the battle over Robert Bork's nomination to the Supreme Court in 1987 to replace Lewis Powell. The discussion could appropriately be termed "B.B." and "A.B." (before Bork and after Bork). Before Bork, interest groups mobilized and expressed an interest in contested policy issues, but found their primary outlet in litigation, legislation, and small-scale lobbying of senators over Supreme Court nominees. After Bork, groups saw the judicial appointment process at every level as an avenue for influence.

The Bork nomination came at a time of discontent with both liberal and conservative groups. President Reagan's explicit statement that he was going to replace the liberal judiciary with true conservatives aggrieved liberals. Conservative groups, fretting over the large number of liberal nominees confirmed under Carter, mobilized to ensure the judiciary would be remade in their own image.<sup>88</sup>

The Bork nomination was defeated with a combined attack on his policy positions and a grassroots lobbying effort against the nomination.<sup>89</sup> The pivotal aspect of the Bork contest cannot merely be found in the level of interest group opposition.<sup>90</sup> Appointments as early as Brandeis were forcefully opposed. What made it a turning point was that groups learned how to effectively oppose a nominee and they learned that this activity could benefit groups beyond the outcome of a particular nomination.<sup>91</sup>

Consider how the opposition to Bork evolved. The day after the nomination, the liberal group People for the American Way sent out what were termed "editorial memos" to newspapers and reporters.<sup>92</sup> This was traditional advocacy that had occurred in prior opposition. Other liberal groups would be expected to send out similar statements. Shortly after the nomination, however, the groups established a coordinated opposition. They

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87. PAUL GOTTFRIED & THOMAS FLEMING, *THE CONSERVATIVE MOVEMENT* 89–90 (1988).

88. HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 58–62 (1988).

89. ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 131–57 (1989).

90. *Id.*

91. *Id.*

92. *Id.* at 133.

met and agreed that they would avoid single-issue advocacy such as abortion or affirmative action (even if that was what the group cared about) and collectively oppose across a number of fronts.<sup>93</sup> As one liberal public relations leader put it: “We put out a three-page memo, listing the key themes and making sure that everyone in the coalition was singing from the same sheet.”<sup>94</sup> Thus, a mechanism for coalition building was established early in the timeline and the resulting strategy was focused upon broadly framing the nomination in such a way that it benefited the collective of interests.

In addition, and equally important, groups realized that opposition to judicial nominees could cause the interest groups to become the news. As Bronner aptly notes, People for the American Way

[L]earned to use paid advertisements to get free media. Indeed, that was one of its main goals. By producing a catchy commercial, the organization itself made news. That is, television news producers were attracted to the ads as phenomena in and of themselves. They would do a story on the ads, using them as proof of the commitment of the group and show the ads for free.<sup>95</sup>

In a telling statement that reveals just how much group maintenance became as important as policy goals, consider this statement from Jackie Blumenthal of People for the American Way in discussing the Bork nomination strategy: “Jerry Falwell needed an enemy to prosper. He and others used liberalism; the Trilateral Commission, communism. So we have done the same with figures like Bork.”<sup>96</sup> Thus, for interest groups, Bork was a case study in the benefits of opposition, both as a matter of policy and prosperity (group maintenance).

After Reagan, George H.W. Bush continued the march toward a judiciary dominated by lifetime-serving, conservative-leaning judges. Once again, liberal interest groups gained the public’s eyes and ears by opposing Clarence Thomas’ nomination to the Supreme Court using the same tactics developed in the Bork battle. Although the opposition to Thomas was ultimately unsuccessful, it provided another opportunity for groups to motivate the base, and publicize their chosen issues.

#### L. SENATE RESPONSE TO INTEREST GROUP INVOLVEMENT

During the period between the Carter and H.W. Bush administrations, the predominant incentives of the appointment process were altered. While senators focus on reelection,<sup>97</sup> presidents—constitutionally limited to two terms—are more interested in installing similarly-minded judges to establish an ideological legacy on the bench. In addition, as Segal and others point out, having representatives in the judicial branch allows a president to impact areas of law and policy that would be impossible through the legislative

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93. *Id.*

94. *Id.* at 147.

95. *Id.* at 149.

96. *Id.* at 154.

97. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6, 9 (1974).

process.<sup>98</sup> To achieve this goal, presidents select nominees with an eye toward their positions on policy. When presidents began to actively and openly seek nominees that fit a particular ideological mold, interest groups that either supported or opposed that ideological bent became active.

With interest groups pressing for more influence, senators faced the problem of how to respond. Would they attempt to maintain traditional leverage within the confirmation process by enforcing the norm of senatorial courtesy or would they appease newly activated interest groups that could impact their reelection chances? After all, the Senate still held the power to withhold its “advice and consent” from presidential appointees. Perhaps unsurprisingly, senators selected the path of least resistance to their primary goal—reelection.<sup>99</sup>

Interest groups, through mobilization, can have a direct impact on a senator’s reelection campaign. For example, when Senator Diane Feinstein cast the deciding vote in the Senate Judiciary Committee in favor of Leslie H. Southwick, a nominee to the Fifth Circuit Court of Appeals by President George W. Bush opposed by a number of liberal interest groups, she faced immediate public condemnation. Nan Aron, president of the Alliance for Justice, said, “[The vote on Southwick] was a test of whether Democrats were up to the task of applying scrutiny to Bush’s judicial nominees.”<sup>100</sup> Becky Dansky of the National Gay and Lesbian Task Force said that gay and lesbian Californians “are not going to be silent” about the Feinstein vote.<sup>101</sup>

The changing nature of the process also meant that Senators had to be concerned about more than just the home-state Senator’s opinion of a nominee. The move of Presidents Carter and Reagan from ad hoc patronage-based appointments to more systematic evaluations of nominee ideology meant that there were additional publicly available methods for groups to evaluate and comment on nominees.<sup>102</sup> For example, since 1979, each nominee has been required to complete a detailed questionnaire requiring extensive background information, and the responses are made publicly accessible. These additional layers of evaluation provided a “greater number of veto points [and] enhanced opportunities to interest groups to participate in confirmation politics.”<sup>103</sup> In fact, Senator Edward Kennedy, chairman of the Senate Judiciary Committee in the late 1970s, allowed interest groups to participate formally in the confirmation process by testifying at confirmation hearings (although this policy has not been followed by subsequent chairs of the committee).<sup>104</sup>

As the selection process opened up, the back-room deals that historically determined the fate of nominees during the patronage era became open to

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98. Jeffrey A. Segal, Richard J. Timpone & Robert M. Howard, *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557, 557 (2000).

99. MAYHEW, *supra* note 97.

100. Bob Egelko, *Feinstein Draws Fire Over Vote for Judge*, S.F. CHRON., August 4, 2007, at B1.

101. *Id.*

102. GOLDMAN, *supra* note 10, at 358.

103. LAUREN C. BELL, WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION 69 (2002).

104. *Id.*

scrutiny. These changes essentially nationalized the USCA confirmation process. Under increased scrutiny, senators no longer relied on reciprocating courtesy norms to determine their position (at least with regard to those nominees opposed by interest groups) but now sought to “score points” with the leaders of interests groups.<sup>105</sup> It is important to note, however, that interest group involvement did not kill senatorial courtesy. Senators want as much information as possible while expending as few resources as possible.<sup>106</sup> That means if interest groups do not oppose a nominee, senators will not have an incentive to do so and can rely on the opinion of other senators (particularly home state senators) to, as Kingdon describes it, to go with the “herd” and support the nominee.<sup>107</sup>

Senatorial courtesy is crippled, however when interest groups identify a nominee as “controversial.” When that happens, senators need an alternative method of evaluation. Of course, it is possible that unaffiliated senators could assume the task and vet each nominee’s positions and qualifications using their own staffs. However, with limited time and resources, these senators do not have the incentive to expend resources on the nomination of a judge whose decisions will not necessarily impact their constituents or reelection prospects. Thus, instead of filling the information gap themselves, senators rely on sympathetic interest groups as third party informants on ideological outlier nominees.

Those groups, in turn, make it clear that the position a senator ultimately takes upon the nominee matters. The nature of senatorial response is borne out by memos between staff members and Democratic members of the Senate Judiciary Committee leaked during the George W. Bush Administration. They provide not only details on the background of nominees that groups found objectionable, but guidance on how and when nominees should be handled. For example, in a memo relaying a telephone call between a leader of the NAACP Legal Defense Fund and a staff member of Senator Edward Kennedy (D-MA), the group encouraged delayed consideration of a nominee to the Sixth Circuit not only because of her policy positions but also because the group did not want the nomination to be considered until after the Sixth Circuit handed down a decision in which the group had an interest.<sup>108</sup> The memos demonstrate that these groups are intimately involved in selecting the judges to oppose, and providing strategies of how and when to oppose the nominations. Going against interest group positions cannot only impact a like-minded senator’s reelection chances, but could also directly impact support and fundraising if the senator seeks to run for the presidency. These groups have long memories and play important roles in mobilizing voter bases.

Once an interest group comes out in opposition, senators have a strong incentive to follow suit and oppose the nominee. Scherer et al., drawing from literature on interest group monitoring of bureaucracy, term this as

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105. SCHERER, *supra* note 2, at 21.

106. STEIGERWALT, *supra* note 2, at 97–98.

107. JOHN W. KINGDON, CONGRESSMEN’S VOTING DECISIONS 243–44 (1973).

108. Memorandum from Staff of Senator Edward Kennedy to Senator Edward Kennedy, Call from Elaine Jones re Scheduling of 6th Circuit Nominees (Apr. 17, 2002).

“sound[ing] a ‘fire alarm’” that senators heed, “because interest groups represent the views of key constituents in the two major parties—they not only care about the make-up of the lower federal courts but who also are the most mobilized voters. . . .”<sup>109</sup> A senator that fails to take into account the position of interest groups could find themselves faced with a primary challenger pointing to interest group “score cards” in challenging the incumbent’s record.

Studies have focused on the impact of the rise of interest group involvement,<sup>110</sup> the evolution of the confirmation process to include these groups,<sup>111</sup> and group influence on senatorial response to targeted nominees.<sup>112</sup> They demonstrate that interest group involvement in the confirmation process has consequences—even if a large majority of the nominees ultimately are confirmed.<sup>113</sup> Under the old system, nominees were confirmed quickly. However, as the system opened up, rubber stamp confirmation eroded.<sup>114</sup> Nominees opposed by interest groups suffer significantly more delay than non-opposed nominees do.<sup>115</sup> In fact, Scherer et al. also found that interest group opposition is the most important variable in whether a nomination faces delay and possibly even defeat.<sup>116</sup> That article found that interest group opposition was more important than, *inter alia*, a) quality of the nominee by ABA rating, b) the race or gender of the nominee, c) presidential approval rating, d) year of presidential term, or e) the presence of divided government.<sup>117</sup>

#### M. WHAT MOTIVATES INTEREST GROUPS TO OPPOSE A PARTICULAR NOMINEE?

By the time of Bill Clinton’s presidency, interest groups had created a fully functioning opposition machine. The structure was established: Republican presidents nominate ideological outlier conservative nominees that liberal groups mobilize to stop and Democratic presidents nominate ideological outlier nominees that conservative groups mobilize to stop. This approach works well with Supreme Court vacancies, where all resources can be directed toward the publicly visible and drawn out contests over nominees. Problems arise, however, in implementing this opposition model at the lower court level, where the resource expenditure can quickly outweigh the benefit of opposition.

109. Scherer, Bartels & Steigerwalt, *supra* note 3, at 1029.

110. *Id.* at 1026.

111. BELL, *supra* note 103.

112. STEIGERWALT, *supra* note 2.

113. Roger Hartley & Lisa Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259, 259, 265 (2002).

114. Hendershot, *supra* note 10, at 328–29 (2010).

115. Bell, *supra* note 2; Hartley & Holmes, *supra* note 113; David Nixon & David L. Goss, *Confirmation Delay for Vacancies of the Circuit Courts of Appeals*, 29 AM. POL. RES. 246, 246–47, 253 (2001). *See generally* Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190 (2002).

116. Scherer, Bartels & Steigerwalt, *supra* note 3.

117. *Id.*

For lower federal court nominees, outside groups typically must make a calculation in deciding which nominees to oppose. They are forced to be more selective in their opposition, since not every nominee can be framed as an outlier. Here, groups are likely to face defensive home state senators with courtesy ties. The lay of the battleground differs and these groups must maintain some measure of credibility in order to successfully oppose nominees.

Conservative groups faced such a conundrum after the election of Bill Clinton in 1992. The groups viewed Clinton as a threat to the conservative legacy of the Reagan and H.W. Bush administrations, and adopted the same tactics used by liberal groups in the Bork nomination fight. Clinton, for his part, continued the tradition started by Reagan and localized nominee vetting within the executive branch.<sup>118</sup> Conservative interest groups mobilized. The goal was to oppose Clinton nominees and to inflict revenge for Bork, a classic example of a “tit for tat” game.<sup>119</sup> Thus, the groups developed a concerted strategy to encourage defeat or delay of Clinton nominees.<sup>120</sup>

Liberal interest groups in the subsequent George W. Bush Administration likewise adopted a similar strategy, repeating the cycle and ratcheting up the level of appointment gridlock further. The conundrum, however, was *which* of the nominees to oppose.

Opposition in the Clinton and George W. Bush Administrations took place in a post-Bork atmosphere of ideological screening and fire alarm oversight. Groups had adapted, from perceiving the courts as a mechanism to pursue policy goals through litigation campaigns to viewing these appointment contests (demonstrated by the Bork nomination) as yielding direct benefits for the group itself. It was during this period that group formation generally subsided. Free Congress Foundation (the primary conservative coalition group) was formed in 1977; the contra-wise liberal People for the American Way was formed in 1981.

By the Clinton and W. Bush presidencies, liberal and conservative groups (and the umbrella groups the individual groups belonged to) were fully ingrained in the confirmation contest. These organized groups now faced an ongoing dilemma: identifying which nominees to oppose. On one hand, groups could focus on reliably vetting the policy positions of nominees and sound the alarm only on those nominees with outlier policy positions that would truly hurt the collective movement (i.e., those motivated by policy goals). Alternatively, these groups could strategically oppose nominees who were not truly ideological outliers, but who were being considered at a time and during a political context when groups felt empowered to attack a nominee and obtain public credit for the opposition (i.e., motivated by group maintenance goals).

Whether interest groups are pursuing policy objectives or are acting to maintain the group has significant consequences for the judiciary (and the process for selecting the members of the judiciary). For example, liberal

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118. Sheldon Goldman & Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 JUDICATURE 265, 265–68 (1999).

119. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

120. Bell, *supra* note 2.

interest groups successfully framed George W. Bush's nominee Charles Pickering as insensitive to civil rights, which led to the defeat of his nomination.<sup>121</sup> Similarly, conservative group framing of Clinton nominee Charles Stack as an unqualified political crony, led to the withdrawal of his nomination.<sup>122</sup> Even if interest groups cannot ultimately defeat the nomination, they can still cause significant delay, which taxes nominees' resources and discourages qualified nominees from accepting a nomination.

Interest group involvement in the process has effects that reverberate past individual nominees. There are institutional consequences as the USCA must have judges to function. The delay and defeat of nominees creates a backlog of unfilled positions. For example, the situation became so bad under President Clinton that Chief Justice Rehnquist chastised the Republican-led Senate in one of his Year End reports during the Clinton presidency: "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice."<sup>123</sup> Delay in and of itself is not inherently bad. As Campbell notes, there are arguments in favor of a more robust and open confirmation process:

Opening the judicial confirmation process to debate is certainly more democratic than a nominee being selected in an efficient, closed system in which patronage is the primary consideration. Outside involvement can expose legitimate concerns about a nominee that might not otherwise be brought to light. In addition, with the increasing importance of the federal courts in interpreting and determining issues of public policy, a more vigorous debate over individual nominees can and should be expected.<sup>124</sup>

The benefits are lost, however, if interest groups are doing nothing more than engaging in opposition because the group anticipates it will benefit financially. Because the majority of lower court nominees are confirmed, both controversial and non-controversial, it raises an interesting issue of whether interest groups *get it right* when they choose to oppose nominees. Those nominees that withstand interest group opposition and are confirmed have a job for life (absent an impeachable offense). That job security insulates these judges from having to temper their votes in the future opinions they write. We seek to understand whether opposed but successfully appointed judges are systematically different than those that have unopposed pathways to the bench.

Generally stated, the empirical literature's operating thesis is that federal judges decide cases through a process that references their own political

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121. Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U. CAL. DAVIS L. REV. 695, 718 (2002).

122. Eric Schmitt, *Court Nominee Steps Down in Gain for Dole*, N.Y. TIMES, May 10, 1996 at A28.

123. Neil A. Lewis, *Hatch Defends Senate Action on Judgeships*, N.Y. TIMES, Jan. 1, 1998, at A14.

124. Donald E. Campbell, "To Advice and ~~Consent~~ Delay": *The Role of Interest Groups in the Confirmation of Judges to the Federal Courts of Appeal*, 8 NW. J. L. & SOC. POL'Y 1, 31 (2012).

preferences.<sup>125</sup> We would anticipate that these ideological influences are inversely related to the level of court (i.e., attitudes are most influential at the Supreme Court and least influential for the district courts). In terms of effects related to interest group vetting and the lower courts, Scherer found that the rise of interest group participation is associated with the direction of decision-making at the USCA level.<sup>126</sup> In an analysis of decisions of appellate court judges from Harding through Clinton, Scherer found a correlation between the ideology of the appointing president and the decisions of their judges. Scherer determined that a Carter or Clinton judge was 27% more likely to rule in favor of a plaintiff in racial discrimination cases than their Republican-nominated counterparts were.<sup>127</sup> Similarly, Kuersten and Songer evaluated decisions of USCA judges between Presidents Truman and H.W. Bush and found a statistically significant relationship between the ideological direction of the president and their confirmed nominees.<sup>128</sup> Nonetheless, it is far from clear if these opposing groups are accurate in their evaluations of nominees' prospects for ideological decision-making after taking a seat on the bench. No studies to date have compared rulings of judges labeled controversial and their non-controversial counterparts. This article does so with the intent of better understanding the motives and implications of greater interest group influence with the judicial appointment process.

### III. INTEREST GROUP MOTIVATIONS: POLICY CONCERNS OR GROUP MAINTENANCE?

This article evaluates two contrasting theories of interest group motives for the opposition of a USCA nominee: *policy promotion* and *group maintenance*. Our starting point for consideration of these theories lies in the fact that unequivocal policy victories are often rare for policy-oriented groups. While victories in small policy skirmishes may satisfy a core constituency, interest groups require a message with a broader appeal to motivate its base and recruit new members. USCA nominations can provide that opportunity. Groups can oppose a nominee in a manner similar to a popular election or a piece of legislation. Shogan puts it succinctly: “[P]residential appointments increasingly are viewed as just another political

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125. SCHERER, *supra* note 2; Michael W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 623, 629 (2001); Donald Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 673–75 (1994); Donald R. Songer & Sue Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 963 (1992); see also Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955–1986*, 43 W. POL. Q. 317 (1990).

126. See generally SCHERER, *supra* note 2.

127. *Id.*

128. See Ashlyn Kuersen & Donald Songer, *Presidential Success Through Appointments to the United States Courts of Appeals*, 31 AM. POL. RES. 107 (2003).

trophy and the confirmation process just another political battleground.”<sup>129</sup> In this context, the contested nominee becomes the face of everything the group opposes. The attendant public relations push and realized media attention can gain the interest group not only a concrete victory (the defeat/delay of a nominee) but also a justification for the group’s continuing existence. In the future, other vacancies are certain to occur, and the successful opposition of one nominee provides a recurring basis to seek public support for the group’s policy position and pay the group’s administrative expenses.

Opposing judicial nominees has costs, however. Presidents nominate numerous individuals to fill spots on the USCA (e.g., President Clinton made eighty-seven nominations and President George W. Bush also nominated eighty-seven). Unlike the Supreme Court, where vacancies are few and far between and naturally generate interest from the media and the public, participation at the appellate level requires a resource maximization calculation by interest groups. Each group must determine how it can get the most out of the time and resources it has invested in an appointment contest. It simply is not effective to go all-in and oppose every nominee. Thus, these groups must keep their powder dry and pick-and-choose their battles.

Even if a group has the financial resources to oppose every nominee, there are other factors that would weigh against the strategy. Groups must select optimal nominees to oppose lest they fall into a dilemma akin to *Peter and the Wolf*. If groups labeled every nominee as controversial they lose credibility; eventually senators and the public would stop listening. Ultimately, an undifferentiated shotgun approach to nominee opposition could jeopardize the interest group role within the confirmation process. Because members and potential recruits would see opposition as unproductive, interest groups may lose the ability to prosper from their role in the process. Given that members do not want their donations going to activities that have no pay off, interest groups must limit their opposition to a number of nominees that they can label as *controversial* and have a convincing argument against confirmation.

Interest group scholars have found that to understand interest group actions, one must understand interest group incentive structures.<sup>130</sup> There are two primary incentives that motivate group behavior: 1) promoting a particular ideological position; and 2) obtaining the resources necessary to sustain the group itself.<sup>131</sup> In the world of opposition to judicial nominees, each of these motivations can lead to a distinct set of strategies. Importantly for our purposes, opposition on *policy* grounds is substantively different than opposition based on *group maintenance* goals.

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129. Robert Shogan, *The Confirmation Wars: How Politicians, Interest Groups, and the Press Shape the Presidential Appointment Process*, in OBSTACLE COURSE: THE REPORT OF THE TWENTIETH CENTURY FUND ON THE PRESIDENTIAL APPOINTMENT PROCESS 87, 152 (1996).

130. See generally Peter B. Clark & James Q. Wilson, *Incentive Systems: A Theory of Organizations*, 6 ADMIN. SCI. Q. 129 (1961).

131. See BELL, *supra* note 103; TERRY M. MOE, *THE ORGANIZATION OF INTERESTS: INCENTIVES AND THE INTERNAL DYNAMICS OF POLITICAL INTEREST GROUPS* (1988).

## A. THE POLICY MOTIVATION FRAMEWORK

Interest groups form to promote or oppose a particular policy position. For issue-based groups, monitoring and responding to challenges to their policy “niche” is a primary goal.<sup>132</sup> Groups seek to influence governmental policies or decision-making related to the group’s particular area of interest at all levels of policy-making—both formal and informal. Groups may seek to persuade legislators to sponsor or oppose a bill that impacts the group’s interests<sup>133</sup> through informal electoral pressure or formal lobbying by testifying before congressional committees.<sup>134</sup> They may assert their influence in administrative bodies that are adopting rules and regulations viewed as threatening the group’s ideological position.<sup>135</sup> Groups may also turn to the courts, either by engaging in litigation or by filing amicus curiae briefs in pending litigation.<sup>136</sup> At the Supreme Court level, groups can also influence whether the Court agrees to hear a case by filing amicus briefs at the certiorari stage.<sup>137</sup>

In the context of judicial appointments, groups attempt to ensure that nominees with opposing policy preferences are not confirmed.<sup>138</sup> After all, hostile courts can turn back groups’ hard-won policy victories and more favorable courts can further new ones. While interest groups are no longer able to formally testify at hearings before the Senate Judiciary Committee, they do seek to inform senators about those nominees that present the greatest threat to their policy goals. Groups carry out their role by vetting the population of judicial nominees and selecting specific nominees to oppose (i.e., the sub-sample of *controversial* nominees). They will then provide the requisite background information and present a case for obstruction to senators in an effort to persuade them to act. Interest group leaders anticipate that ideologically aligned senators will act to further shared interests or face the electoral consequences of inaction.

In this framework, the primary objective of the organization is not material gain, but rather to serve the vetting function through reliable and valid information that helps senators better understand the policy positions of nominees. This policy-based opposition is an inherently limited approach;

132. Virginia Gray & David Lowery, *A Niche Theory of Interest Representation*, 58 J. POL. 91, 108 (1996) (concluding “interest group niches – and thus the structure of interest group communities – are more strongly determined by the internal needs of organized interests than by their patterns of interface with government.”).

133. Richard A. Smith, *Interest Group Influence in the U.S. Congress*, 20 LEGIS. STUD. Q. 89, 95 (1995).

134. Roy B. Flemming, Michael C. MacLeod & Jeffery Talbert, *Witnesses at the Confirmations? The Appearance of Organized Interests at Senate Hearings of Federal Judicial Appointments*, 51 POL. RES. Q. 617, 617-21 (1998).

135. Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 108 (2006).

136. Karen O’Connor & Lee Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. POL. 479, 479 (1983); Susan M. Olson, *Interest-Group Litigation in Federal District Court: Beyond Political Disadvantage Theory*, 52 J. POL. 854, 855–64 (1990).

137. See generally Caldeira & Wright, *supra* note 1.

138. KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 361–62 (1986); GEORGE WATSON & JOHN A. STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS 102–04 (1995).

groups will look to oppose only those nominees that have expressed a clear ideological preference. This is analogous to the Solberg and Waltenburg finding that interest groups are motivated by policy success (versus *group maintenance*) when filing amicus briefs.<sup>139</sup> They participate in the fewest number of cases because the groups are looking to expend resources only in those cases where there is a legitimate chance of influencing policy.<sup>140</sup>

Interest groups anticipate that judicial nominees who are ideologically extreme will decide cases based on that ideology—a position that has robust support in the judicial decision-making literature.<sup>141</sup> In short, if interest groups are opposing nominees because of inherent policy motivations, then an opposed judge's decision-making behavior should be substantively different than a similar unopposed nominee's behavior.

## B. THE GROUP MAINTENANCE FRAMEWORK

The *group maintenance* framework posits that interest groups are primarily motivated by concerns about organizational preservation when opposing nominees. As James Wilson famously said, “Whatever else organizations seek, they seek to survive.”<sup>142</sup> Survival in this context is equated with group maintenance: maintaining the current enrollment base and recruiting new members. Even if organization leaders would prefer to solely pursue policy goals, the reality is that they must ensure that their organization remains solvent.<sup>143</sup> Therefore, interest groups have to make decisions that from a policy perspective might not be optimal, but act to further the fundamental maintenance goal.<sup>144</sup>

The fact that groups have bills to pay and do so largely through membership dues (i.e., larger rolls provide the resources that a group needs to further its purpose), has two relevant consequences. First, groups must offer members and potential members something of innate value.<sup>145</sup> In this specific context, groups can utilize the confirmation process “to show their members that they are proactive and effective advocates” thus justifying the member's (or potential member's) interest in the organization and the extension of financial support.<sup>146</sup> Second, groups must be able to demonstrate success and claim the credit for that success. If a group can show that it has

139. Rorie S. Solberg & Eric N. Waltenburg, *Why Do Interest Groups Engage the Judiciary? Policy Wishes and Structural Needs*, 87 SOC. SCI. Q. 558, 558 (2006).

140. The vetting function generally increases in importance as you move from members of the Senate Judiciary Committee to non-member senators. These non-judiciary committee senators will rely almost exclusively on interest group evaluations and the constituent-based responses that these groups can trigger. See STEIGERWALT, *supra* note 2.

141. See, e.g., ROBERT CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* (1983); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 6-25* (2002); Songer & Davis, *supra* note 125; Songer & Haire, *supra* note 125.

142. JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973).

143. MOE, *supra* note 131.

144. Rorie Spill, *Choosing Among the Branches: Strategic Advocacy by Interest Groups*, 22 AM. REV. POL. 375, 376 (2001).

145. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION 2-3* (1971).

146. BELL, *supra* note 103.

“won” a political battle, then that group will remain relevant and appeal to current and potential members to fill the group’s coffers to continue the fight.

A final factor that weighs in favor of a *group maintenance* explanation is the bandwagon effect. Because of the contemporary proliferation of interest groups, groups must be concerned about losing members or resources to competing interest groups. This means that groups must monitor the activities of other similarly minded groups. When a competitor group makes the decision to go on record opposing a nominee, like-minded groups feel the pressure to join in the opposition lest the competition appear more active, obtain more publicity, claim more credit, and reap scarce resources.

If opposition to judicial nominees were a no-cost strategy, maintenance-minded interest groups would simply oppose all nominees. However, opposing every nominee would cause the groups to lose credibility with sympathetic senators. As Scherer suggests, liberal interest groups “firmly believe that Democratic senators on the Judiciary Committee will only vote against so many judicial nominees in deference to the president. How many ‘no’ votes each senator has is a huge question for these groups.”<sup>147</sup> This sentiment likely applies equally to conservative groups. Therefore, liberal and conservative groups alike must conduct a cost-benefit calculus before they oppose a current nominee.

If the organizational maintenance framework is correct, then groups’ decisions to oppose nominees should be based upon an ever-varying mixture of policy and non-policy criteria associated with each individual nominee. In short, interest groups should decide to oppose nominees whenever there are cues—based either on the political context or ad hoc nominee characteristics—that predict a reasonable likelihood of success. Within this framework, the nominee’s ideological preference really is just a means to an end or an opportunity to credit claim upon victory. Therefore, under a *group maintenance* framework we do not anticipate a substantive difference between the subsequent behavior of controversial and non-controversial nominees once they reach the bench.

### C. A FOCUS ON DISSENTING BEHAVIOR

This article seeks to understand the differences that may, or may not, exist between opposed and unopposed USCA judges’ decision-making calculi. The challenge is to isolate those cases where they express their own independent positions. One can identify ideology directly and unequivocally when a judge dissents, where the judge is writing unhindered by the need to reach a majority or the need to adopt language that will mollify a colleague. Justice Scalia expressed the role of the dissent succinctly: “to be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one’s colleagues; to address precisely the points of law that one considers important and *no others*. . . .”<sup>148</sup> It is this individual nature of the dissents that make them a useful test of ideological position-taking.

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147. SCHERER, *supra* note 2, at 131.

148. Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 42 (1994).

Dissenting judges write separately primarily to express policy positions that differ from the majority.<sup>149</sup> Judges incur costs in writing dissents, including the time it takes to write and edit the opinion as well as allocating staff resources to the effort. However, time and resources expended might actually be the least significant cost. Panels on the USCA gravitate toward consensus and the issuance of a dissent violates that norm.<sup>150</sup> The cost of dissent will almost always outweigh the benefits given that the Supreme Court rarely cites the dissenting opinions of appellate courts and the contemporary Court takes so few cases.<sup>151</sup> In situations where judges do dissent, they are willing to step out on their own and bear all the corresponding costs of expressing an ideological position that runs counter to the majority. Because dissenting judges are expressing a position that violates the norm of collegiality, the fact that they decide to write a dissent is significant. Dissents are by definition a statement of the judge's position unbound by external considerations.<sup>152</sup>

Putting this in the context of the above frameworks, if interest groups are pursuing *policy promotion* goals and label a prospective nominee as *controversial* then the dissenting behavior of the nominee-judge should exhibit systematic differences when compared to otherwise similar but untargeted judges. If, on the other hand, a group's opposition is based on *group maintenance*, then the dissenting behavior of controversial judges should not be systematically different than otherwise similar but untargeted judges.

#### IV. EMPIRICAL EVIDENCE ON INTEREST GROUP OPPOSITION

To empirically evaluate the *policy promotion* and *group maintenance* frameworks of interest group opposition to USCA nominees, we focused on the consecutive two-term Clinton and W. Bush Administrations. Both administrations experienced significant obstruction to their judicial nominees and the sampling strategy provides the benefit of capturing opposition to prospectively liberal and conservative nominees to the USCA. The focus on these earlier administrations is also necessary to provide adequate time on the bench with which to observe dissensus. The final year of the Bush administration in 2008 provided a lapsed period of at least six years to capture patterns of dissent for all prospective nominees.

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149. Hettinger, *supra* note 7; Stefanie A. Lindquist, Wendy L. Martinek & Virginia A. Hettinger, *Splitting the Difference: Modeling Appellate Court Decisions with Mixed Outcomes*, 41 L. & SOC'Y REV. 429 (2007).

150. Joshua Fischman, *Interpreting Circuit Court Voting Patterns: A Social Interactions Framework*, 31 J. L. ECON. & ORG. 808, 809 (2012).

151. Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 102 (2011).

152. Thus, Justice Scalia—a prolific dissenter—could say in his *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) dissent: “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.” And in dissent in *Boumediene v. Bush*, 553 U.S. 723, 827 (2008): “The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.” These quotes are indicative of the freedom that dissenting judges have.

To identify controversial nominees, we replicated the procedure followed by Scherer, Bartels and Steigerwalt.<sup>153</sup> Using their guidelines, we identified forty-one USCA nominees that faced interest group opposition during the two administrations (the controversial nominees). Of the forty-one controversial nominees, twenty-two ultimately were confirmed by the Senate and represent our potential sample of controversial-but-confirmed nominees to the USCA.

We then matched each controversial judge with a non-controversial judge on a number of nominee-specific and political context variables<sup>154</sup> found to be relevant to interest group involvement. Following the estimation of the nearest-neighbor match for each controversial nominee, we utilized Westlaw searches to identify any dissenting opinion associated with our sample of judges through the end of the 2014 calendar year. The searches resulted in 1,674 observed dissents that were associated with forty-one different judges. For each of these cases we applied the standard case type, issue type, and direction coding established by the *U.S. Court of Appeals Database*.<sup>155</sup> For the final sample estimates, we were forced to exclude three pairs of judges due to an early termination event (i.e., death, resignation, or taking senior status) of one of the matched cohorts.<sup>156</sup> Thus, the time series considers the dissent activity of nineteen controversial labeled judges and nineteen matched pair judges (see Table 1 below). For each pair, we calculated the minimum service period and created a uniform timeframe for comparing dissent frequency. Each of the nineteen pairs had at least six years of observation and some pairs provided as many as eighteen years.

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153. Scherer, Bartels & Steigerwalt, *supra* note 3.

154. Variables matched on include gender (male 0, female 1); race or ethnicity (a dichotomous control for African American, Asian, or Latino/a nominees); ABA rating (a dichotomous control for "not qualified," "qualified" or "well qualified" ratings); appointing president (Clinton 0, Bush 1); circuit (a dichotomous variable for each circuit); the nomination year (a continuous variable from 1992 to 2008); the year in the presidential term of the nomination (coded 1 through 8); the number of home state senators not of the party of the president (from 0 to 2); whether there was divided government at the time of the nominee's initial nomination (0 unified, 1 divided) and the absolute ideological distance between the president and most distant home state senator on Poole and Rosenthal's (1997) interparty and intraparty dimensions.

155. DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS* (2003).

156. The three pairs omitted included Lee Sarokin/Charles R. Wilson because Sarokin retired two years after receiving his commission; Susan Nielson/Dennis Shedd because Nielson died a month after receiving her commission; and Franklin Van Antwerpen/Timothy Tymkovich because Van Antwerpen assumed senior status two years after receiving his commission.

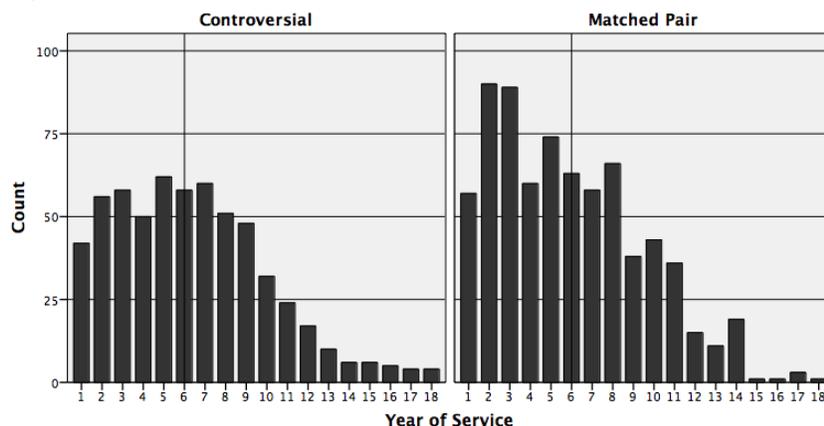
**Table 1. Dissent sample of controversial and matched pair nominees**

Controversial Nominee				Matched Pair Nominee			
Judge	President	Commission	Circuit	Judge	President	Commission	Circuit
Daughtry, Martha	Clinton	11/22/93	6	Ikuta, Sandra	Bush	06/23/06	9
Barkett, Rosemary	Clinton	04/15/94	11	Stewart, Carl	Clinton	05/09/94	5
Wood, Diane P.	Clinton	06/30/95	7	Sykes, Diane	Bush	07/01/04	7
McKeown, M. Margaret	Clinton	04/08/98	9	Rawlinson, Johnnie B.	Clinton	07/26/00	9
Fletcher, William A.	Clinton	10/09/98	9	Smith, Milan	Bush	05/18/06	9
Fisher, Raymond	Clinton	10/12/99	9	King, Robert	Clinton	10/09/98	4
Berzon, Marsha	Clinton	03/16/00	9	Callahan, Consuelo M.	Bush	05/28/03	9
Smith, Lavenski	Bush	07/19/02	8	Riley, William J.	Bush	08/03/01	8
Smith, D. Brooks	Bush	08/02/02	3	Marcus, Stanley	Clinton	11/12/97	11
McConnell, Michael W.	Bush	11/26/02	10	Prado, Edward C.	Bush	05/05/03	5
Bybee, Jay S.	Bush	03/21/03	9	Bea, Carlos	Bush	10/01/03	9
Sutton, Jeffrey S.	Bush	05/05/03	6	Colloton, Steven M.	Bush	09/10/03	8
Cook, Deborah	Bush	05/07/03	6	Smith, Norman Randy	Bush	03/19/07	9
Fisher, D. Michael	Bush	12/11/03	3	McKee, Theodore	Clinton	06/09/94	3
Owen, Priscilla	Bush	06/03/05	5	Motz, Diana	Clinton	06/16/94	4
McKeague, David	Bush	06/10/05	6	Dennis, James	Clinton	10/02/95	5
Pryor, Jr., William H.	Bush	06/10/05	11	Gibbons, Julia	Bush	07/31/02	6
Holmes, Jerome	Bush	08/09/06	10	Benton, William D.	Bush	07/02/04	8
Haynes, Catharina	Bush	04/18/08	5	Hardiman, Thomas M.	Bush	04/02/07	3

Note: Three pairs were omitted from the event count model analysis because one of each of the matched pairs did not serve long enough to satisfy the six-year parameter of the analysis: Lee Sorkin retired two years after receiving his commission; Susan Nielson died a month after receiving her commission; and Franklin Van Antwerpen assumed senior status two years after receiving his commission.

## A. VISUALIZING THE EVIDENCE OF DISSENT

Figure 1 provides a graph of the number of dissents by controversial judges and their non-controversial match in the aggregate. It shows that, on the whole, controversial judges write fewer dissents. The pattern holds in the six-year sample period when the dissents of each of the nineteen controversial judges and their matched pair are captured. It similarly holds for most of the remaining sample period in which the pairs of judges drop from the sample over time. The only period in which controversial judges evince greater levels of dissent are in the far reaches of the sample period (e.g., fifteen through eighteen years of service) when the graph is capturing only one or two individuals.



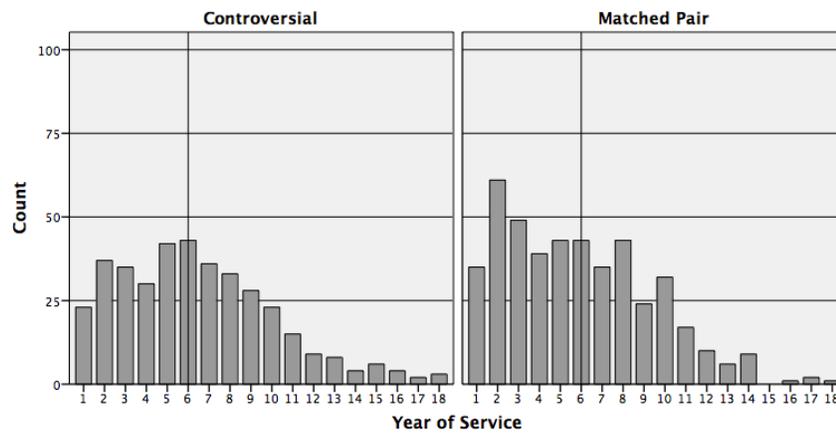
Note: Dissents in three-judge panel decisions only. Plot comprises controversial nominations that occurred during the consecutive Clinton and W. Bush Administrations. The plot presents dissent activity for 19 opposed but ultimately confirmed nominees to the USCA and the 19 matched pair nominees that were never labeled as controversial. Each matched pair in the plot had at least six years of observations. The initial period of observation begins on the calendar year following the date of successful confirmation.

**Figure 1. Aggregate matched pair dissent frequency—all issue types**

This initial data runs counter to the policy proponent hypothesis. In fact, it turns the hypothesis on its head. Judges labeled as controversial by interest groups dissent *less* frequently than their non-controversial matches. The findings raise questions about the policy proponent hypothesis. One explanation is that these judges really are outliers but strategically suppress writing a dissent because they do not want positions to come back to haunt them if they are eventually nominated to the Supreme Court (e.g., a *prospective elevation* hypothesis). We will come back to this hypothesis later when we consider ideological position-taking within these dissents.<sup>157</sup>

157. There is also a second alternative hypothesis. These controversial judges may be suppressing dissents because they were labeled as controversial by interest groups. It may be that these judges do not want to confirm the frame that interest groups placed on them during the confirmation battle despite the fact that the label is correct. Of course this hypothesis must account for the fact that these judges

This counterintuitive pattern continues when we dig further into the data and focus on case specific factors. One area where we would anticipate ideological outlier judges to be more likely to distinguish their positions is in the hotly contested civil liberties and rights issue types (i.e., criminal procedure, civil rights, First Amendment and privacy disputes). Figure 2 plots the aggregate number of dissents in civil liberties cases, and the evidence is telling. On the whole, controversial judges are dissenting less frequently than their match when deciding these salient and controversial issue types. The pattern holds in the early part of the sample and for the most part in the waning portion of the sample period as well. There are sporadic instances when opposed judges dissent more than their matched colleagues, but the pattern is clear: controversial-labeled judges who faced obstruction to their confirmation seem to have a lower propensity to write separately in dissent once they take the bench. This is the case for all the issue types in the sample, but importantly it is the case for the most controversial issues in the sample too.



Note: Plot specific to cases with criminal and civil liberties issue types (i.e., Songer issue coding 1-5). Dissents in three-judge panel decisions only. Plot comprises controversial nominations that occurred during the consecutive Clinton and W. Bush Administrations. The plot presents dissent activity for 19 opposed but ultimately confirmed nominees to the USCA and the 19 matched pair nominees that were never labeled as controversial. Each matched pair in the plot had at least six years of observations. The initial period of observation begins on the calendar year following the date of successful confirmation.

**Figure 2. Aggregate matched pair dissent frequency—criminal and civil liberties cases**

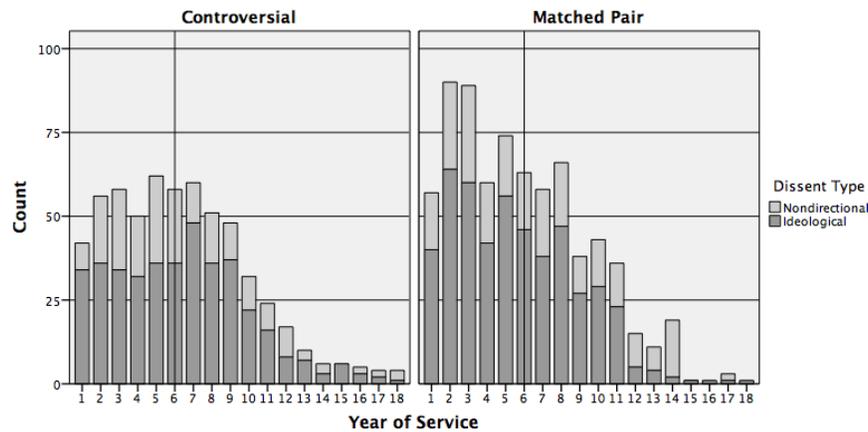
Up until this point, the data does not provide much support for the policy proponent hypothesis. In fact, the evidence seems to run directly counter to it, and suggests that controversial labeled judges are dissenting less frequently than their matched pair. Obviously, these patterns of dissent could be the function of a number of alternative explanations. One important limitation on the data evaluated thus far is that it does not take into account

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serve lifetime appointments and do not need interest group support or approval in the future. This hypothesis must be left to be explored in future research.

the ideological direction of the dissents. The policy proponent framework predicts not just that controversial judges will dissent, but that they will dissent in a direction consistent with their anticipated ideology: 1) Democratic appointees should be expected to dissent in a liberal direction; and 2) Republican appointees should be predisposed to dissent in a conservative direction.

Figure 3 provides some insight in this respect. It offers a plot of dissents consistent with the judges' partisan ideological direction versus those that were either opposite their partisan expectation or unclear (e.g., jurisdictional dissents, etc.). With more nuanced evidence, we again find that controversial judges are dissenting at a less frequent rate. In terms of aggregate counts, the nineteen controversial judges collectively are writing twenty-five to thirty-five dissents in the expected direction per year. On the other hand, the nineteen non-controversial judges are issuing forty to sixty dissents in the expected direction per year. These results indicate that the magnitude of difference is substantial. The validity of the policy proponent hypothesis is again called into question.

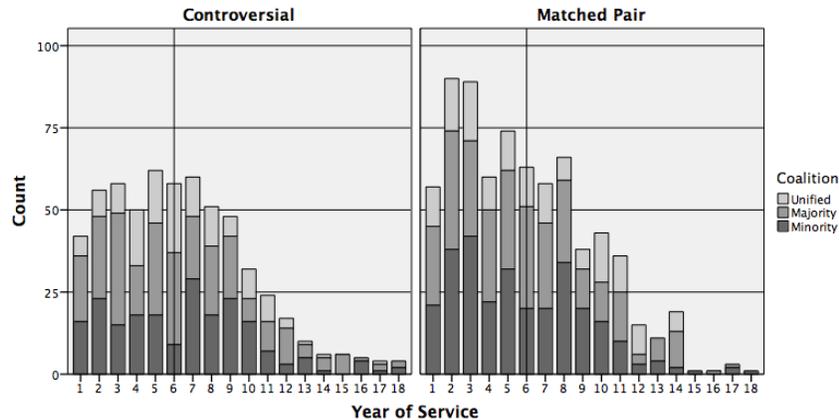


Note: Plot specific to dissents that are ideologically consistent with the nominee's party affiliation (Democrat appointee - liberal; Republican appointee - conservative). Dissents in three-judge panel decisions only. Plot comprises controversial nominations that occurred during the consecutive Clinton and W. Bush Administrations. The plot presents dissent activity for 19 opposed but ultimately confirmed nominees to the USCA and the 19 matched pairs nominees that were never labeled as controversial. Each matched pair in the plot had at least six years of observations. The initial period of observation begins on the calendar year following the date of successful confirmation.

**Figure 3. Aggregate matched pair dissent frequency—ideologically consistent positions**

Before moving to the event count analysis, we have one final plot to present. The underlying issue type of the case is not the only factor that will influence an outlier judge's dissent calculus. The likelihood of dissent is also predicated on the ideological makeup of the panel as well. If controversial appointees are dissenting fewer times because they are being placed on panels of like-minded judges more often than their matched counterpart, then the observed disparity would be spurious and not necessarily meaningful.

To better examine this premise, Figure 4 evaluates Cross and Tiller's whistleblower thesis, looking at situations where the dissenting judge was on a panel with two judges appointed by a president of the opposing party.<sup>158</sup> After considering panel composition, the results once again show that controversial labeled judges are less frequently writing in dissent. Even when they are on panels where they are the only judge of their party, they hold their pens. The uncontroversial matched pair on the other hand are more likely write a dissent. In short, and counter to expectations, it is judges that did not face interest group opposition during confirmation that are more often dissenting and potentially bringing circuit conflicts and compliance problems to the attention of the Supreme Court.<sup>159</sup>



Note: Plot designates partisan panel construct. Unified represents all three judges of same party. Majority occurs when nominee and another judge are of same party. Minority occurs when the other two judges are of the opposing party. Dissents in three-judge panel decisions only. Plot comprises controversial nominations that occurred during the consecutive Clinton and W. Bush Administrations. The plot presents dissent activity for 19 opposed but ultimately confirmed nominees to the USCA and the 19 matched pairs nominees that were never labeled as controversial. Each matched pair in the plot had at least six years of observations. The initial period of observation begins on the calendar year following the date of successful confirmation.

**Figure 4. Aggregate matched pair dissent frequency—by panel composition**

The initial evidence is mounting that a controversial label applied by interest groups does not exhibit much validity when evaluated from a policy-based motivation perspective. On the whole, controversial appointees that reach the USCA tend to dissent less than their non-controversial matches. Throughout years of service, the group of controversial judges dissent less frequently than their non-controversial counterparts. When considering the nature of the cases being heard, controversial judges are dissenting less often

158. See generally Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155 (1998).

159. See Songer, Segal & Cameron, *supra* note 125.

in controversial cases and less often in the expected partisan-ideological direction. Finally, the makeup of the assigned panel does not appear to change this result. Looking only at those dissents issued from a partisan minority position (i.e., the whistleblower context), we find that controversial labeled judges issued fewer separate opinions than their noncontroversial counterparts who were not targeted by interest groups.

#### B. CONTROVERSIAL NOMINEES AND THE LIKELIHOOD OF DISSENT

The graphical analysis of dissent casts some doubt on the viability of the policy proponent theory of interest group opposition, but it does not provide inferential support for either the policy or group maintenance perspectives. To provide more rigorous leverage on the research question, this section attempts to draw inferences through negative binomial event count models that evaluate the likelihood of dissent activity behavior after controlling for the ideological characteristics of the judge, the prevailing circuit, and the Supreme Court.

We begin with the sample of data depicted above: the nineteen pairs of controversial and matched-pair judges that participated in at least six calendar years of service on courts of appeal. To provide fully balanced panel data, and to eliminate estimation issues involving missing data, we limited this event count sample to the first six calendar years of service for each judge. The sample period runs from the beginning of the calendar year after receiving their commission through the end of the sixth calendar year of service. In this instance, then, we have a cross-sectional time series of six service years for thirty-eight judges, yielding 228 observations of annual dissent counts. The six-year sample captures a total of 761 dissenting opinions.

To assess systematic differences in the likelihood of issuing a dissent, we utilize four unique dependent variables. First, we consider the aggregate number of dissents by the controversial appointees and their matches (Figure 1). Second, we look at dissents in criminal and civil liberties cases where we anticipate that ideological outlier judges should be more frequently be writing separately (see Figure 2). Third, we look only at those dissents that emerge with an ideological direction consistent with partisan-ideological expectations (i.e., Democratic appointee dissents in a liberal direction and Republican appointee dissents in a conservative direction; Figure 3). Fourth, we test a hypothesis related to dissents when the judge is in a whistleblower situation (Figure 4) by calculating and modeling the number of dissents when the sample judge is the only Democratic/Republican appointee on the panel.

#### C. INDEPENDENT VARIABLES

To operationalize the policy proponent hypothesis, we include a dichotomous variable that simply identifies controversial labeled judge versus the matched pair judge. This will capture any systematic differences in the dissent patterns that may exist between successful controversial and

noncontroversial judges. Parameter results and tests of significance will be used to evaluate the viability of the policy proponent hypothesis.<sup>160</sup>

Given that the data takes the form of aggregated annual event counts, the adoption of an alternative control variable is to some extent limited within this particular analysis. Since judge-specific annual counts act as the unit of analysis, we are unable to control for specific case level characteristics such as issue types or collegial relationships amongst different panels. Data about the annual agenda constructions of the USCA are not available, but neutral criteria of case assignment and rotation of judges among panels does help reduce potential bias in issue distribution and collegial effects.

The event count analysis thus requires independent variables with an annual unit of analysis. The ideal point position data available through Epstein et al.'s Judicial Common Space provides precisely the data needed.<sup>161</sup> The first independent variable controls for differences in the ideology between the dissenting judge and their circuit. The second variable controls for the difference in ideology between the judge's circuit and the U.S. Supreme Court. In particular, we control first for the circuit median for the year in which the case was decided. We then control for the absolute distance between that median and the individual judge's common space position. These two variables control for any variance in dissent related to the liberal or conservative leanings of the circuit and the judge's relative position within that circuit.

Moving up a level (but still using the Judicial Common Score measures), the third independent variable controls for the annual median position of the U.S. Supreme Court. The fourth independent variable controls for the absolute distance between the circuit median and the Supreme Court median. These last two variables similarly control for the liberal or conservative balance of preferences on the Supreme Court and the position of the judge's circuit relative to the Court. With these control variables in place we test for systematic differences in the dissenting activity of controversial judges versus non-controversial judges after accounting for the ideological context of the appellate hierarchy surrounding these judges.

#### D. RESULTS OF THE NEGATIVE BINOMIAL REGRESSIONS

Estimation results can be found in Table 2. In each model specification, the parameter result associated with controversial judges is insignificant and

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160. In this configuration, the null hypothesis is that no systematic difference in dissent activity exists between controversial labeled judges and otherwise similar judges. While the null position generally is consistent with that of a group maintenance framework—interest groups target those nominees with characteristics that suggest success and credit claiming opportunities are likely (not ideological policy screening), we must be clear that the failure to reject the null hypothesis does not provide inferential support for the group maintenance hypothesis. Null results are not evidence of conclusive relationships. If we had some *a priori* evidence of the magnitude of the policy proponent relationship it would be possible to conduct an inferential test that the observed relationships are significantly different than that *a priori* value. This would in essence provide inferential leverage that the relationship is actually zero. In the absence of that information, however, we are not able to draw clear inferential results on the viability of the policy proponent hypothesis but can only suggest that null results are generally consistent with group maintenance theories of group opposition.

161. Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007).

exhibits no discernible relationship after controlling for the ideological position of the judge, the circuit and the Supreme Court. We find no evidence of systematic differences in controversial labeled judges' dissenting patterns within aggregate dissent counts, dissents associated with civil liberties issues, dissents that match partisan-ideological expectations, nor dissents from a minority whistleblower position. The controversial judge parameter does turn to the anticipated positive direction in the last model specification associated with the whistleblower dissents, but that parameter result is the weakest of all the presented model specifications and is not informative in any sense.

In short, we find no evidence at all that is consistent with the "fire alarm"<sup>162</sup> or policy proponent view of interest group participation in the judicial appointment process. These series of null findings are generally consistent with the group maintenance view of interest group participation,<sup>163</sup> but null findings are not indicative of conclusive results. We cannot confirm that group maintenance theories explain the likelihood of USCA dissent frequency. We can merely say the lack of significant results are consistent with the expectations of the theory.

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162. Scherer, Bartels & Steigerwalt, *supra* note 3.

163. See BELL, *supra* note 103, at 69; MOE, *supra* note 131.

**Table 2. Negative binomial regression event count estimates of the likelihood of a dissent**

Parameter Est.	All Issues Types			Civil Liberties			Ideologically Consistent			Whistle Blower		
	$\beta$	(s.e.)	$\rho$	$\beta$	(s.e.)	P	$\beta$	(s.e.)	$\rho$	$\beta$	(s.e.)	$\rho$
Controversial <sup>a</sup>	-.08	.23	.71	-.08	.24	.74	-.15	.26	.55	.06	.34	.85
Circuit Median <sup>b</sup>	.18	.34	.60	.17	.37	.64	.04	.38	.93	-.53	.50	.29
Judge-Median <sub>cahs</sub> <sup>c</sup>	.28	.40	.70	.57	.43	.19	.88	.45	.05	2.01	.60	.001
USSC Median <sup>b</sup>	-1.24	.42	.003	-1.10	.46	.02	-1.19	.47	.01	-	.66	.01
Circuit-USSC <sub>cahs</sub> <sup>c</sup>	-.54	.71	.45	-.54	.82	.51	-.30	.82	.71	-.34	1.22	.78
Constant Value	2.32	.52	.000	2.80	.97	.004	2.34	.80	.004	.60	.60	.31
Function Est.												
ln(t)	2.45	.42		3.19	.86		2.75	.64		1.78	.43	
ln(s)	1.31	.34		1.06	.33		1.00	.34		.60	.40	
r	11.64	4.95		24.33	20.92		15.66	10.01		5.95	2.58	
s	3.73	1.27		2.91	.95		2.71	.91		1.81	.73	
Model Fit												
Log Likelihood		-483.09			-403.33			-409.21			-298.95	
X <sup>2</sup> Test		12.20	.03		11.45	.04		15.60	.01		23.37	.000
N observations		228			228			228			228	

Note: Data represent a balanced cross-sectional event count of the six calendar years after confirmation event. 19 controversial nominees and 19 noncontroversial matched pair nominees (38 nominees \* six years = 228 obs). <sup>a</sup> Identifies controversial nominees versus non-controversial nominees. <sup>b</sup> Median positions of circuit and Supreme Court with judicial common space scores. <sup>c</sup> Absolute distance calculation between the judge and circuit median or the circuit median and Supreme Court median. Probabilities are two-tailed tests.

There are, however, significant relationships to be found within the alternative ideological controls. Throughout the four models, the median position of the Supreme Court is significantly associated with the likelihood of USCA judges' dissent counts. Here, the relationship suggests that appellate court judges issue fewer dissents as the Supreme Court leans more conservative. The result might suggest that a more conservative Court may be less active in responding to the visible cues of circuit conflicts at the certiorari stage, which suppresses one justification for dissenting.<sup>164</sup> Alternatively, the result could suggest that more conservative Courts generally engage in less aggressive stances toward compliance activity (e.g., the Rehnquist Court's decline in case load).

Looking at the last two specifications in Table 2, ideologically consistent dissents and whistleblower dissents, we find positive relationships associated with the preferences of the USCA judges. The parameter controls for the absolute difference between the judge's ideal point and the circuit median, meaning ideologically dissimilar judges are more prone to issue dissents. This result here is intuitive and would certainly match existing expectations. In terms of dissents that are ideologically consistent or those stemming from a minority position on a three judge panel, we find that more ideologically distant judges are more likely to be writing separately.

The results of the negative binomial event count specifications force us to accept the null hypothesis that no systematic difference exists between those USCA judges previously labeled as controversial and their nearest neighbor (noncontroversial) match, and is more consistent with the group maintenance framework of interest group participation within the judicial appointment process.<sup>165</sup>

#### E. CONTROVERSIAL NOMINEES AND THE LIKELIHOOD OF IDEOLOGICALLY CONSISTENT DISSENTS

The empirical evidence indicates that the policy proponent framework has no support when considering annual event count data. However, the case specific information collected on each dissent provides the opportunity to perform another analysis that considers the likelihood that dissents are consistent with partisan-ideological expectations. For this particular analysis the dependent variable (dissent direction) has three ordinal categories: -1 (dissent is opposite of partisan expectation), 0 (dissent is unclear or ideologically neutral), and 1 (dissent is consistent with partisan expectation).

Dissenting in an expected direction means that a Republican appointee should be writing dissents with conservative policy stances and a Democratic appointee should be writing dissents with liberal policy stances. Looking at the dissenting behavior over the 1,674 cases studied, the aggregate numbers indicate that the studied judges are dissenting in the expected direction in 1,141 (68%) cases when they issued a dissent. These judges issued dissents counter to the expected direction in 351 (21%) of the cases, and issued

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164. PERRY, *supra* note 52, at 252.

165. It is important to stress again that this null result does not indicate the absence of a relationship between those controversial and non-controversial nominees/judges.

ideologically neutral or unclear dissents in 182 (11%) of the cases. Because this analysis is concerned with the individual decision-making calculus and not the likelihood of an event, the sample is not limited to those with a sufficient number of years of service. Thus, the ordered logical regression considers all twenty-two pairs of judges where both members of the pair were confirmed.

#### F. CONTROVERSIAL NOMINEE CONTROL

The primary independent variable of interest again is whether the judge was labeled as controversial, but it is interacted with a number of independent variables to assess whether the controversial label has a combined effect associated with alternative explanations and control strategies. These interactions are constructed with variables associated with whistleblower panels, dissenting judge-panel median distances, specific issue types, and temporal changes in ideological dissent patterns.

These additional interactions will yield inferences about additive relationships between the two control variables. For example, the combination of the controversial and whistleblower controls allows us to evaluate whether there is an additive relationship for those controversial nominees found in the minority of a three-judge panel. The model first controls for the controversial label and then separately for the minority panel position. It then controls for the concurrence of both situations to see if there is an additional significant effect. This allows us to evaluate whether controversial labeled judges act differently than their non-controversial match in certain defined situations and provides a robust test of the policy proponent hypothesis.

#### G. BASELINE MODEL SPECIFICATION

We begin with a baseline model specification that focuses on independent variables associated with the origin of the decision being appealed. The baseline specification includes a series of dichotomous control variables associated with appeals that were initially heard by: 1) specialty federal courts; 2) state courts; or 3) federal agency decisions. This leaves appeals of USDC decisions (or those of federal magistrates) as the uncontrolled null specification.

The baseline specification then incorporates several control variables that address the aspect of the decision being appealed. These dichotomous variables identify questions associated with different stages of the lower court decision-making process. We control for: 1) pretrial matters such as injunctions, interlocutory appeals, and mandamus questions; 2) summary judgments and dismissals; 3) questions associated with plea bargains; 4) post-trial matters such as attorney fees, costs, damages and settlement orders; and 5) other miscellaneous questions that did not involve a trial outcome. This series of variables leaves the uncontrolled null specification as the outcome of bench or jury trials.

The last two variables in the baseline specification address outside amicus brief participation and effects associated with the power of judicial review. We include a continuous variable for the natural log of the number

of amicus briefs filed before the circuit court to assess the effects of outside participation within the case. We also include a dichotomous control that identifies whether the USCA decision containing the dissent includes a finding of unconstitutionality. This captures any difference associated with USCA panel majorities that exercised the power of judicial review and struck down an action or outcome.

With these series of control variables in place the null specification of the baseline model is clear and intuitive. The uncontrolled category is represented by appeals associated with single judge USDC trial outcomes that had no amicus participation and that did not result in a finding of unconstitutionality at the USCA level.

#### H. PARTISAN AND IDEOLOGICAL MODEL SPECIFICATIONS

In addition to the baseline model specification, we tested two separate model specifications with alternative strategies that control for the ideological context surrounding these judges' dissents. We operationalized this through a simple partisan strategy related to Cross and Tiller's whistleblower thesis.<sup>166</sup> We include a dichotomous variable identifying decisions wherein the dissenting judge was on a panel with two opposing party appointees (i.e., the dissenting judge was potentially in the minority). We also interacted this variable with the controversial identifier to determine whether controversial labeled judges have a greater propensity to express their ideological stance when they were on their own from a partisan standpoint.

The second model specification uses continuous measures of ideology to control for the ideological context of the USCA decision. Using the Judicial Common Space ideal point values of each USCA judge,<sup>167</sup> we first control for the ideological disparity of the three-judge panel.<sup>168</sup> We include a continuous independent variable associated with standard deviation of preference points on the panel. We then introduce an absolute distance calculation that controls for the distance between the dissenting judge's ideal point and the panel median. This latter distance measure is interacted with the controversial identifier to evaluate whether those judges were more likely to take ideologically consistent stances in more polarized panel settings.

#### I. ISSUE TYPE SPECIFICATION

Building on the results of the continuous ideological model specification, we then introduce additional independent variables that control for differences in likelihood of dissent direction on the basis of particular issue types. We include three dichotomous controls that identify: 1) criminal issue types; 2) an umbrella category of civil liberties and rights cases that

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166. Cross & Tiller, *supra* note 158.

167. Epstein, *supra* note 161.

168. For panels that included judges from federal specialty courts sitting by designation (i.e., U.S. Court of International Trade), we used the Poole and Rosenthal presidential ideology score as a proxy for the judge's ideological ideal point. See KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997).

included civil rights, First Amendment, due process, and privacy issue types; and 3) a final category of federalism and miscellaneous issue types. This configuration leaves union and economic activity as the uncontrolled null category.

We also introduced interactive variables that control for controversial labeled judges hearing these three issue categories. This will allow us to distinguish whether controversial labeled judges are more likely to take ideologically consistent positions when they hear controversial issue types (i.e., criminal, civil liberties and rights, and federalism or miscellaneous issues).

#### J. SUPREME COURT ELEVATION SPECIFICATION

The final model specification evaluates the premise that controversial labeled judges are more likely to be attacked by interest groups because they are seen as viable candidates for elevation to the U.S. Supreme Court. The notion here is that the patterns in aggregate dissent found above (see Figures 1, 2, and 3) are likely related to judges who are hoping to insulate themselves from yet another confirmation contest for the Supreme Court.

If it is the case that these controversial labeled judges are holding their pens in order to obfuscate their true ideological leanings, then we should find a systematic amount of temporal variance within the likelihood of dissent direction over time. As the judge spends more time on the USCA bench and the window for elevation closes we anticipate that they no longer seek to insulate themselves from criticism and more feel free to express their policy positions through dissents.

To test this aging-out hypothesis, we again started with the continuous ideology specification and added a continuous temporal counter that represented the natural log of the number of years of service on the USCA bench. This control will evaluate whether all the judges exhibit temporal variance in their directional dissents, but we also included an interaction variable with the controversial label to evaluate whether these controversial labeled judges change at a substantively different rate than their matched pair cohorts.

#### K. BASELINE MODEL RESULTS

The baseline model estimates can be found in the left hand column of Table 3, where we find a null result for the controversial labeled judge identifier. In this instance, the standard error term is greater than the parameter estimate, suggesting that the parameter magnitude and direction are indeterminate. On that basis we are left to accept the null hypothesis that there is no substantive difference between the ideological consistency of controversial labeled judges' dissents versus their matched pair. Thus, we find no statistical support for the policy proponent theory of group opposition during confirmation. Again, this result is consistent with the group maintenance hypothesis, but does not necessarily confirm it.

Whereas the controversial variable is not statistically significant, the baseline model does provide some useful insights on the likelihood of dissent

direction. Independent variables associated with the court of origin offer some marginal evidence ( $p < .10$  single-tailed) that cases emerging from federal specialty courts and federal agency rulings are less likely to be associated with an ideologically consistent dissent. Two of the variables relating to the type of appeal being heard meet traditional levels of significance ( $p < .05$  level two-tailed) however. Those dissents involving pretrial matters and those involving summary judgment or dismissals were both less likely to conform with *a priori* partisan-ideological expectations. Null findings are associated with other appeal types such as plea bargains, post-trial matters and other motions.

The control associated with the number of amicus briefs filed at the USCA level shows a null result, but those USCA cases that involved an unconstitutional finding of law were significantly more likely to elicit an ideologically consistent dissent. The parameter result is reasonably robust ( $p < .01$  two-tailed) and intuitive since it suggests that our sample of judges were more likely to publish conflicting rationale when the majority has exercised the power of judicial review.

**Table 3. Ordered logistic regression estimates of the likelihood of an ideologically consistent dissent**

Parameters	Baseline			Whistleblower			Ideology		
	$\beta$	(s.e.)	0	$\beta$	(s.e.)	0	$\beta$	(s.e.)	0
Controversial <sup>a</sup>	-.03	.10	.77	-.08	.13	.54	.00	.14	.99
Whistleblower <sup>b</sup>				.94	.15	.000			
Whistleblower*Controversial				.26	.23	.28			
Panel Disparity <sup>c</sup>							2.93	.43	.000
Judge – Median <sub>cont</sub> <sup>d</sup>							1.12	.30	.000
Judge – Median*Controversial							.31	.43	.47
Specialty Court Appeal <sup>e</sup>	-.47	.32	.15	-.46	.35	.19	-.55	.38	.14
Agency Appeal <sup>f</sup>	-.24	.19	.20	-.36	.20	.07	-.47	.20	.02
State Court Appeal <sup>g</sup>	.53	.79	.50	.81	.79	.30	.60	1.02	.56
Pretrial Matter <sup>h</sup>	-.42	.22	.05	-.57	.22	.01	-.44	.23	.05
Summ. Judgment or Dismissal <sup>i</sup>	-.32	.15	.03	-.38	.16	.02	-.34	.16	.03
Plea Barrain <sup>j</sup>	.42	.37	.25	.26	.37	.49	.29	.37	.42
Post-Trial Matter <sup>k</sup>	.09	.36	.80	-.09	.39	.81	-.28	.40	.49
Other Motion or Order <sup>l</sup>	-.10	.21	.65	-.20	.22	.36	-.17	.22	.44
Amicus Briefs <sub>non</sub> <sup>m</sup>	-.07	.10	.52	-.09	.10	.39	-.10	.10	.33
Unconstitutional Ruling <sup>n</sup>	.73	.27	.01	.67	.27	.01	.56	.28	.05
Model Fit									
Log Likelihood		-1376.46			-1332.23			-1305.57	
X <sup>2</sup> Test		20.19	.04		106.95	.000		143.93	.000
N observations		1673			1673			1673	

Note: Data represent dissents of 22 controversial and 22 noncontroversial matched pair nominees from the date of confirmation through December 31, 2014 (n = 1,673). <sup>a</sup>Identifies controversial nominees versus non-controversial nominees. <sup>b</sup>Measurement of the makeup of the three-judge panel based on appointing president. <sup>c</sup>Calculation of the standard deviation of judges on the three-judge panel using Judicial Common Space scores. <sup>d</sup>Absolute distance between the median member of the three-judge panel and the dissenting judge. <sup>e</sup>When appeals originate from specialized federal courts. <sup>f</sup>When appeals originate from federal agencies. <sup>g</sup>When appeal originates from state courts. <sup>h</sup>Indicates appeal from pre-trial decisions (i.e., injunctions or interlocutory appeals). <sup>i</sup>Indicates appeals from grants or denials of summary judgment or dismissals. <sup>j</sup>Indicates an appeal from plea agreements entered into by criminal defendants. <sup>k</sup>Indicates an appeal from plea agreements entered into by criminal defendants. <sup>l</sup>Indicates an appeal from a post-trial order. <sup>m</sup>The log of the number of amicus briefs filed at the court of appeals. <sup>n</sup>Indicates the panel majority held an action unconstitutional. Probabilities are two-tailed tests.

The baseline model thus indicates that the court of origin, the nature of the appeal, and judicial review can explain some of the variance in the likelihood of our sample of judges taking ideologically consistent positions within their dissents. Nevertheless, the predictive value of the overall model should not be overstated. The baseline model specification is not necessarily a strong predictor of dissent direction. As we will see, the models perform substantially better once we introduce controls related to the ideological composition of the panel and the issue types of the cases.

#### L. PARTISAN AND IDEOLOGICAL MODEL RESULTS

The partisan whistleblower specification is found in the middle column of Table 3 and it controls for the partisan makeup of the three-judge panels. Even after controlling for the partisan make up of these panels, the key independent variable that controls for controversial labeled judges remains insignificant. The standard error term continues to be greater than the estimate, suggesting that the result is uninformative.

The new variable testing whether judges dissent differently when they are in a potential partisan minority is significantly different than zero ( $p < .001$ ). This robust finding suggests that panel composition clearly affects judges' dissent calculi. We find strong support for Cross and Tiller's whistleblower thesis,<sup>169</sup> but it is not necessarily a factor that operates differently between controversial-labeled judges and the judge's matched pair. The interactive variable controlling for those controversial labeled judges found in whistleblower situations is not significant. The standard error value is smaller than the parameter estimate, but the result does not approach even the most relaxed standards of statistical inference. The parameter is positive in direction but the result is so marginal as to not yield any substantive conclusion.

The inclusion of the partisan whistleblower control does tend to improve the performance of the other specified control variables. The two origin variables controlling for specialty federal courts ( $p < .10$  single-tailed) and federal agency decisions ( $p < .05$  single-tailed) yield negative and marginally significant results. Appeals of pretrial matters ( $p < .05$  two-tailed) and summary judgments or dismissals ( $p < .05$  two-tailed) improve slightly with the panel composition control. The positive association between unconstitutional findings and ideologically consistent dissents remains undisturbed by the alternative model specification.

In general, the model performs much better than the baseline specification. The addition of the panel composition controls results in a substantial reduction in the likelihood function (i.e., a 44 point reduction in the log likelihood value from -1376 to -1332). The Wald value associated with the overall model shows an increase that now yields a significant result at the highest  $p < .001$  level. On the whole, then, the inclusion of the partisan controls for panel composition had the desired effect of improving our knowledge of dissent direction. It did not, however, act to confirm the policy

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169. Cross & Tiller, *supra* note 158.

proponent theory of group opposition in any sense. The results continue to be more consistent with the group maintenance theory of group opposition, but are not conclusive proof of that hypothesis.

The alternative ideological specification is set out in right hand column of Table 3 and evaluates the effects of continuous ideological measures on the likelihood of a judge dissenting in the anticipated ideological direction. All of the baseline variables are retained and the two new variables are added along with an interaction term.

After controlling for the ideological composition of the three judge USCA panel with more refined continuous measures of judges' preference points, the specification continues to exhibit null findings with respect to the primary independent variable: the controversial judge identifier. More importantly however, this particular model makes the finding clear cut. In this specification, the associated parameter estimate is exactly .00 and the resulting standard error term of .14 generates a  $p < .99$  level of inference. That is fairly indicative of the weakness of the controversial label, but again null results are not conclusive of the null hypothesis. This result tends to undermine the notion that controversial labels and interest group opposition are valid indicators of a nominee's outlier ideological characteristics.

The new continuous ideology controls in turn are very robust performers. The ideological disparity of the three-judge panel is positive and significant at the most stringent ( $p < .001$  two-tailed level). Likewise, the measure of absolute distance between the dissenting judge and the panel median is positive and significantly different at the highest probability level. Both panel disparity and dissenter polarity are more likely to be associated with ideologically consistent policy stances within the sample of judges. These values easily allow us to reject the null hypothesis that ideological context of the panel is not associated with the directional consistency of dissenting opinions.

Nonetheless, the interaction between the absolute distance calculation and the controversial judge identifier is not informative. Again, the standard error term is greater than the associated parameter estimate, meaning that we must accept the null hypothesis that the combined effect of the controversial label and ideological polarity is zero. This really is the most on point test of the policy proponent hypothesis. The control strategy would suggest that controversial labeled judges should be more likely to be taking consistent ideological stances in their dissents when they are ideologically isolated from the rest of the panel. The null result found here fails to confirm this premise and continues to call into question the viability of the policy proponent hypothesis. If interest groups are targeting ideological outliers, then that outlier status should be most prominent when the judge sits on a panel of judges farthest from their ideological ideal point. The inferential evidence simply does not back up that position.

The inclusion of the more accurate ideological controls refines several of the other parameter results. The origin of an appeal from a federal agency maintains significance at the  $p < .05$  (two-tailed) probability. The nature of the appeal variables controlling for pretrial matters and summary judgment diminish slightly but continue to meet the traditional  $p < .05$  (two-tailed)

standard. Cases in which the majority declared an action unconstitutional continues to be significant at the  $p < .05$  (two-tailed) level.

Overall, the model performs substantially better than the baseline model and the partisan whistleblower model too. The log likelihood falls to -1306 (i.e. a 26 point reduction from the whistleblower model and a 70 point reduction from the baseline model). The increase indicates that when controlling for the effects of ideology on dissenting behavior, it is better to use these nuanced continuous ideal point measures than the dichotomous identifiers used in the whistleblower model. With that in mind, we will continue to use these two ideological controls in the remaining two model specifications.

#### M. ISSUE TYPE MODEL RESULTS

The issue type specification is found in the middle column of Table 4 and it adds control variables related to more controversial issue types: 1) criminal; 2) civil liberties and rights; and 3) federalism/miscellaneous. After controlling for these different issue types, the key independent variable that identifies controversial labeled judges remains insignificant. For the first time in these different model specifications, however, the parameter value is in the expected positive direction. The standard error of the estimate is greater than the parameter value, suggesting the result is uninformative with respect to direction or magnitude. The policy proponent thesis continues to fall short when subjected to empirical tests.

**Table 4. Ordered logistic regression estimates of the likelihood of an ideologically consistent dissent**

Parameters	Baseline			Issue Type			Supreme Court Elevation		
	$\beta$	(s.e.)	0	$\beta$	(s.e.)	0	$\beta$	(s.e.)	0
Controversial <sup>a</sup>	-0.03	.10	.77	.08	.14	.57	-0.02	.28	.95
Panel Disparity <sup>b</sup>				3.29	.44	.000	3.30	.44	.000
Judge – Median <sup>c,d</sup>				1.15	.23	.000	1.15	.23	.000
Criminal Issue				1.13	.23	.000	1.13	.17	.000
Criminal Issue*Controversial				.04	.30	.90			
Civil Liberty or Right Issue				.75	.18	.000	.85	.14	.000
Civil Liberty*Controversial				.24	.27	.38			
Federalism or Misc. Issue				-.81	.89	.37	-1.81	.41	.000
Federalism*Controversial				-1.40	1.01	.17			
Year of Service <sup>e,f</sup>							-0.04	0.10	.66
Year of Service*Controversial							.08	0.15	.58
Specialty Court Appeal	-0.47	.32	1.15	.09	.39	.82	.09	.39	.81
Agency Appeal <sup>g</sup>	-.24	.19	.20	.11	.21	.61	.05	.21	.81
State Court Appeal <sup>h</sup>	.53	.79	.50	.43	.88	.62	.41	.87	.64
Pretrial Appeals <sup>b</sup>	-.42	.22	.05	.09	.23	.69	.08	.23	.74
Summ. Judgment or Dismissal <sup>i</sup>	-.32	.15	.03	.17	.16	.30	.15	.16	.36
Plea Bargain <sup>j</sup>	.42	.37	.25	.06	.38	.87	.05	.38	.89
Post-Trial Matter <sup>k</sup>	.09	.36	.80	.21	.41	.61	.18	.40	.66
Other Motion or Order <sup>l</sup>	-.10	.21	.65	.19	.24	.43	.19	.23	.43
Amicus Briefs <sup>m,n</sup>	-.07	.10	.52	-.07	.10	.53	-.06	.11	.55
Unconstitutional Ruling <sup>a</sup>	.73	.27	.01	.33	.30	.28	.36	.30	.23
Log Likelihood		-1376.46						-1251.25	
X <sup>2</sup> Test				20.19	.04				
N observations				1673		1673			230.46
									.000

Note: Data represent dissents of 22 controversial and 22 noncontroversial matched pair nominees from the date of confirmation through December 31, 2014 (n = 1,673). <sup>a</sup> Identifies controversial nominees versus non-controversial nominees. <sup>b</sup> Measurement of the makeup of the three-judge panel based on appointing president. <sup>c</sup> Absolute distance between the median member of the three-judge panel and the dissenting judge. <sup>d</sup> Log of Year of the dissenting judge's term in which the dissent was issued. <sup>e</sup> When appeals originate from specialized federal courts. <sup>f</sup> When appeals originate from federal agencies. <sup>g</sup> When appeal originates from state courts. <sup>h</sup> Indicates appeal from pre-trial decisions (i.e., injunctions or interlocutory appeals). <sup>i</sup> Indicates appeals from grants or denials of summary judgment or dismissals. <sup>j</sup> Indicates an appeal from plea agreements entered into by criminal defendants. <sup>k</sup> Indicates an appeal from plea agreements entered into by criminal defendants. <sup>l</sup> Indicates an appeal from a post-trial order. <sup>m</sup> The log of the number of amicus briefs filed at the court of appeals. <sup>n</sup> Indicates the panel majority held an action unconstitutional. Probabilities are two-tailed tests.

The three new variables controlling for issue type are robust predictors of dissent direction. Parameters show that appeals involving criminal issues and civil liberties and rights issues are significantly ( $p < .001$  two-tailed) more likely to be associated with an ideologically consistent dissent. The parameter controlling for federalism and miscellaneous issue types does not reject the null hypothesis, suggesting they are not distinguishable from the null category of labor and economic regulations issue types. These findings suggest that the judges dissenting in cases raising hot-button criminal or civil liberties/rights cases are more likely to take dissenting policy stances that are consistent with a priori partisan expectations.

The interactive issue type variables either fail to reject the null or run counter to the policy proponent theory. The interactive variables associated with criminal and civil liberties/rights cases are both insignificant and offer no support for the premise that controversially labeled judges are somehow unique. The interactive variable associated with federalism and miscellaneous issue types provides the sole evidence that controversially labeled judges may be systematically different than their matched pair cohorts. The parameter result is negative and marginally significant at the  $p < .10$  one-tailed standard. However, the negative direction of the estimate suggests that these controversially labeled judges are less likely to be ideologically consistent with partisan expectations in those issue areas. In cases involving federalism and miscellaneous issues, these controversially labeled judges are more likely to be writing dissents that are ideologically neutral or that run counter to partisan stances. This result represents the only inferential evidence that would support the group maintenance theory of interest group opposition. The result suggests that controversial appointees are less likely to be ideological outliers within certain narrow issue areas. The result is marginal in terms of strength, but it clearly does not support the policy proponent or fire alarm oversight view of interest group appointment conflict.

The inclusion of the issue type controls does not disturb results associated with the ideological disparity of the three-judge panel nor the distance between the dissenting judge and the panel median. Both remain positive and significant at the  $p < .001$  (two-tailed) level. In both instances, the parameter value increased suggesting that issue controls help refine our understanding of ideological context on the panel.

On the other hand, the inclusion of the issue type controls tends to eliminate the effectiveness of the rest of the baseline model controls. With the inclusion of the issue type controls, none of the baseline model results hold. Each control for origin, question type, amicus participation and unconstitutional holdings is no longer significant. The resulting substantive conclusion, then, is that issue type and ideological context are the core predictors of dissent direction and consistency. This aspect is clear, as the issue type model specification performs better than any other specification. It is the one that minimizes the likelihood function at  $-1249$ , which is a substantive improvement from the previous ideology specification it is based upon. In sum, this is a well-performing model that leads to the conclusion that dissenting behavior is impacted by ideology and issue type and not by being labeled controversial. Even when the controversial label has some

borderline effect—federalism and miscellaneous cases—the direction is opposite of expectations. This model does not confirm the policy proponent theory of interest group opposition. The results continue to be more consistent with the group maintenance theory of group opposition, here they are marginally significant at least in terms of a narrow subset of federalism and miscellaneous issue types.

#### N. SUPREME COURT ELEVATION MODEL

The final model is set out in the right hand column in Table 4. The model addresses the question of whether judges who are labeled controversial act strategically and suppress dissents because they seek to position themselves for elevation to the Supreme Court. The hypothesis in this instance is that dissents could harm their chances of being nominated or confirmed to the next level. The first thing that stands out in this model is the lack of significance, yet again, of the controversial variable. The standard error term exceeds the parameter coefficient, and the parameter value reverts to being negative.

The new variable evaluating changes in the dissenting behavior of judges over time shows no strength. The standard error is greater than the parameter value, providing no conclusion related to temporal maturation of dissent consistency. The interactive term between the controversial label and the temporal control again produces a null result for the policy proponent theory. The standard error term exceeds the parameter value here as well. Therefore, we find no evidence that the number of years on the bench affects the dissenting behavior of judges generally or when controlling for controversial labels. The lack of a significant finding, while not conclusive, casts doubt on the proposition that judges are suppressing ideological dissents until later in their tenure when the hope of elevation to the Supreme Court has passed.

The ideology and issue control variables remain unchanged with one exception. The panel effects variables remain significant at the  $p < .001$  level with essentially the same coefficient values. The issue controls for criminal issues as well as civil rights/liberties remain significant at the  $p < .001$  level, while the federalism/miscellaneous issue control now is significant at the  $p < .001$  level and has a negative coefficient value meaning that judges are less likely to dissent in the ideologically expected direction in those cases.

Overall, however, this model performs well but not quite as well as the issue type model. The addition of the temporal dissent control results in an increase in the likelihood function makes the model perform marginally less well than the issue type model (i.e., a two-point increase from -1249 to -1251). The Wald value associated with the overall model continues to be significant at the highest  $p < .001$  level.

On the whole, the lack of any temporal pattern in the dissenting behavior of the sample of judges does call into question the hypothesis that judges are consciously altering their dissent activity to insulate themselves from future group opposition. Considering these findings along with the issue type model, we find that judges are dissenting in the expected direction in certain high-profile issue types, but that the ideological positions taken in dissenting

opinions are not contingent upon the anticipation of elevation or past opposition to a judge as being an ideological outlier.

#### O. RESULTS OF ANALYSIS

The findings of this empirical analysis raises clear challenges to the premise that interest groups are efficaciously engaging in policy evaluation for senators. The simple fact is that the quantitative evidence does not support the hypothesis that interest groups are motivated to label nominees as controversial because those nominees are valid ideological outliers.

In this analysis we have presented graphical analysis of matched pair dissent activity, negative binomial event count estimations of the likelihood of dissent, and an ordered logistic regression of ideological position taking in dissenting opinions. In the aggregated evidence of dissenting behavior, the non-controversial judges actually dissented more often than the controversial matched pair. This counterintuitive result held when incorporating into the analysis the issues types such as criminal procedure and civil rights and the ideological distance of the members of the panel—where you would expect controversial judges to be the most active.

The analysis then moved from describing the dissenting behavior to seek inferences about the likelihood of issuing a dissent. Controlling for the ideological makeup of the dissenting judge, the circuit, and the Supreme Court, the results of these models were not conclusive. We found no systematic difference in controversial judges' dissenting patterns within aggregate dissent counts, dissents in civil liberties cases, dissents that were consistent with *a priori* partisan policy positions, or when the dissenting judge was in a minority whistleblower situation. In short, because of the lack of such findings, we must instead accept the null hypothesis that there is no systematic difference in the dissenting activity of controversial and non-controversial judges. These null findings are generally consistent with group maintenance hypothesis and run counter to the premise that interest groups targeted these appointees on the basis of ideological extremity.

The final quantitative analysis performed modeled the likelihood of these judges taking ideologically consistent policy stances within their dissents. After running five different model specifications, the results suggest that there was no systematic difference in the dissent behavior of controversial labeled judges versus otherwise similar matched pair judges. The models clearly show that ideological composition of the USCA panels and underlying issue types of appealed decisions affect the ideological consistency of dissenting opinions. They do not show that previously obstructed judges are somehow unique or different.

While we are limited in what we can infer from these findings, the results raise substantial questions about the validity of the policy proponent theory. Interest groups' strategies in obstruction is best described as "mix and match"—interest groups appear to be looking for any ad hoc reason to successfully oppose a nominee to the USCA. Typically, groups will focus on ideology if they cannot find a non-policy based justification for opposition. Such an approach would explain the lack of significant findings for the dissent behavior of controversial labeled judges. Groups obstruct when the

political context seems most conducive to the defeat of a nominee because it establishes a valuable credit claiming opportunity. While ideology may be one factor in that calculation, it certainly is not the most important and these groups do not appear to be prospectively capable of identifying outlier behavior for those nominees that are able to overcome their opposition and reach the USCA bench.

## V. CONCLUSION

The empirical evidence does not yield any robust evidence of a systematic relationship between interest group opposition of judicial nominees and their subsequent dissent activity upon the USCA bench. In fact, to the extent that marginal evidence does exist, it points in the opposite direction – controversial labeled nominees appear more likely to hold their pens. This suggests that the vetting of nominees conducted by interest groups is not particularly valid in terms of identifying ideological outliers.

The *group maintenance* framework would suggest that the identification of ideological outliers is not really all that critical to those interest groups participating within the judicial appointment process. Instead, it emphasizes that groups participate in order to seek out opportunities to score points and claim credit when the targeted nominees succumb to obstruction and gridlock. The above results would be supportive of that premise. Whether looking at the raw number of dissents associated with opposed and unopposed nominees, the likelihood of issuing a dissent, or the ideological consistency of observed dissents, we find no evidence that interest group opposition can be tied to substantive differences in judges' behavior.

There is no doubt that we are limited in what we can infer from these findings. However, these results raise substantial questions about the validity of the *policy promotion* theory that underlies the current literature on interest group involvement in the judicial appointment process. Our results also raise significant questions about the benefit of interest group involvement in the confirmation process of federal judges. This evidence suggests that interest groups are not conducting an effective vetting function for senators, but rather seem to be using the confirmation process as a mechanism for gaining publicity and expanding membership and group resources. That proposition would suggest their participation in effect undermines the constitutional Advice and Consent obligation placed upon the Senate and that some nominees are needlessly pushed aside for ulterior motives.