PART I

WHAT HAPPENED

1
Then and Now

> He [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.
>
> **—U.S. Constitution, Article II, Section 2**

On January 31, 1941, James McReynolds announced his retirement as an associate justice of the Supreme Court. McReynolds, appointed by President Woodrow Wilson in 1914, was one of the notorious "Four Horsemen," a bloc of justices who consistently voted to strike down as unconstitutional President Franklin Roosevelt's New Deal measures between 1933 and 1937. Although the court would eventually endorse the New Deal in full in 1937, McReynolds continued to oppose it until the bitter end of his tenure on the bench.

McReynolds's retirement granted Roosevelt, now in his third presidential term, his sixth Supreme Court appointment. During his first term, Roosevelt had no opportunity to alter the court's membership and end the reign of the Four Horsemen. Following his landslide re-election in 1936, Roosevelt proposed court packing—increasing the number of justices to give a favorable majority—as a way to break the logjam. While Congress soundly rejected the court packing plan, Roosevelt ultimately prevailed, as a majority of the court dropped its opposition to the New Deal that year.[1] Then, a combination of five retirements and deaths between 1937 and 1940 granted Roosevelt the opportunity to greatly reshape the court.

A few months after McReynolds' announcement, Chief Justice Charles Evans Hughes announced his retirement as well. Roosevelt now had the rare opportunity to select a new chief and simultaneously replace an associate justice. The master politician eagerly grasped the chance, converting it into a "triple play." First, he nominated sitting Justice Harlan F. Stone to replace Hughes as chief justice. Then he nominated Senator James Byrnes, a strong New Dealer who had supported court packing, to replace McReynolds. Finally, he nominated his attorney general, Robert Jackson, to replace Stone as associate justice. In one stroke, the triple play replaced 22% of the court's membership and produced a much friendlier chief justice.

Roosevelt officially submitted all three nominations to the Senate on June 12, 1941. Democrats overwhelmingly controlled the 77th Senate and saw eye-to-eye with the

Making the Supreme Court: The Politics of Appointments, 1930–2020. Charles M. Cameron and Jonathan P. Kastellec, Oxford University Press. © Oxford University Press 2023. DOI: 10.1093/oso/9780197680544.003.0001

president on judicial matters. Nevertheless, one might have expected the august body to review the three appointments with a degree of due diligence. For example, Byrnes, a power broker in the Democratic Party, had enjoyed a long and distinguished career as a House member and senator from South Carolina—but he never attended law school nor practiced at the Supreme Court Bar.[2] Such diligence would not come due, however—the Senate confirmed Byrnes on the same day it received his nomination! The Senate's reviews of Stone and Jackson were only slightly less perfunctory; unlike Byrnes, both were referred to the Senate Judiciary Committee for a hearing. But the hearing was brief, and the Senate quickly confirmed both nominees by voice vote, with not even a single dissent sounded against them. Within a span of five years, Roosevelt had appointed an astounding eight justices.[3] The court that had so famously frustrated the president would no longer pose any obstacle to his agenda.

Seventy-five years later, things looked quite different. In February 2016, Justice Antonin Scalia died suddenly while on a hunting trip. Scalia's death created an unexpected opportunity for President Barack Obama—in his last year in office—to make a third appointment to the court. The Senate had confirmed his first two appointments, Sonia Sotomayor and Elena Kagan, with minimal fuss in 2009 and 2010, respectively. But Democrats overwhelmingly controlled the Senate in those years. Although fewer than 10 Republican senators voted "yea" on either nominee, the GOP's opposition did little to impede Sotomayor and Kagan's smooth paths to confirmation.

The political landscape in 2016 was quite different, however. The 2014 midterm elections placed Republicans in control of the Senate. Within mere hours of Scalia's death, the new Senate Majority Leader, Mitch McConnell of Kentucky, threw down the gauntlet, stating in a press release that Senate Republicans had no intention of filling the vacancy before the inauguration of the next president in 2017.[4]

A month later, President Obama nominated Merrick Garland, a widely respected judge on the U.S. Court of Appeals for the D.C. Circuit, to replace Scalia. In 2009 and 2010, Obama had placed Garland on the short list of candidates for the vacant seats. But he passed over Garland in favor of Sotomayor and Kagan, purportedly to "save" him for possible future appointment under divided party government. Indeed, relative to the larger pool of potential Democratic nominees, Garland was noticeably less liberal and also somewhat older than a typical modern nominee. In fact, in 2010, Senator Orrin Hatch, a Republican and a former chair of the Senate Judiciary Committee, had urged Obama to nominate Garland to replace Justice John Paul Stevens, stating that Garland would be a "consensus nominee" and confirmed with broad bipartisan support.[5]

Six years later, however, Obama's selection of Garland met a brick wall. Under McConnell's leadership, the Senate took no action on Garland's nomination. The Judiciary Committee held no hearings, and no floor vote was ever scheduled. Though some nominees prior to the Civil War and then again during Reconstruction and the late nineteenth century were rejected quite summarily by the Senate, the tactic of refusing to take *any* action on a Supreme Court nominee appears to be unprecedented.[6] Nine months after Scalia's death and eight months after Garland's

nomination, Donald Trump shockingly upset Hillary Clinton in the 2016 presidential election, thereby dooming the already slim prospects of a Garland confirmation in the lame duck period. Garland's nomination would end with no bang and barely a whimper on January 3, 2017, the day the 114th Congress officially ended.

The successful deep-sixing of Garland gave Trump the rare opportunity to enter office with a Supreme Court vacancy in hand. Trump had invoked the vacancy as a campaign issue, pledging to appoint conservative justices in Scalia's mold; he even took the unprecedented step of publicizing during the campaign a list of potential nominees from whom he would choose.[7] On January 31, 2017, Trump kept his promise. From his public list, he picked Neil Gorsuch, a judge on the Tenth Circuit Court of Appeals, to replace the conservative icon Scalia.

By all accounts, Gorsuch was highly qualified, having served on the Court of Appeals for a decade—indeed, the American Bar Association gave Gorsuch its highest rating of "well qualified." When George W. Bush nominated Gorsuch to the Tenth Circuit in 2006, Democrats joined Republicans in confirming him unanimously. Now, with the Senate in Republican hands, a smooth elevation of the president's pick to the highest court might have seemed likely. But McConnell's blockade of Garland had enraged liberal activists, groups, and voters, and many Democratic senators pledged to do everything they could to block Gorsuch's path.

The main procedural tool available to Senate Democrats was the filibuster. The 2016 elections had left Republicans with a narrow majority (52 to 48), which meant that if enough Democrats stood together, Gorsuch would not achieve the 60 votes required to overcome a filibuster. Indeed, on April 6, a cloture vote to move Gorsuch's nomination to a final vote received only 55 votes in favor, five short of the 60-vote threshold. If the process had ended there, Scalia's seat would have continued to sit vacant. But Senate rules depend upon the preferences of the majority. The next day, McConnell turned the tables on the Democrats by exercising the "nuclear option"—introducing a measure to change the cloture threshold for Supreme Court nominations to a simple majority. In 2013, Democrats had used the same tactic to quash persistent minority Republican opposition to Obama's appeals court nominees—but only for lower federal court nominations.[8] Now, a majority of Republicans voted to remove the filibuster for Supreme Court nominees as well, paving the way for Gorsuch to be confirmed the next day by a vote of 54–45.

In the end, the fact that Gorsuch, not Garland, replaced Scalia meant that the court would remain broadly conservative in its overall trajectory, rather than moving to the left for the first time in several decades.[9] In short, the policy consequences of the appointment politics of 2016 and 2017 were substantial. Moreover, the death of the filibuster for Supreme Court appointments seemed to foretell a future of extremist nominees—from both parties.

* * *

If Roosevelt and his advisors could have looked into a crystal ball and foreseen the confirmation story of 2016, they would have been astounded. The rancor and

divisiveness of the politics would have reminded them of Reconstruction, the key experience of their parents' generation. What new Civil War could have triggered this partisan battle over Supreme Court appointments? Conversely, Obama and McConnell probably never spent much time studying Roosevelt's brilliant triple-play appointments of 1941. The politics of the early 1940s would have seemed as distant from their reality, and as irrelevant, as life on Mars.

What produced the sea-change in appointment politics between 1941 and 2016?[10] This question lies at the heart of this book. Answering it requires a journey through American history and politics. It also requires the tools of modern political science.

1.2 The Pelican Problem

Supreme Court appointments have rarely been subjects for works of popular culture. But there is one high-profile exception: *The Pelican Brief*, the 1992 pot-boiler novel by John Grisham, which was turned into a movie starring Julia Roberts and Denzel Washington the following year. In typical Grisham style, the plot of *The Pelican Brief* favors intrigue and action over verisimilitude. But, if you indulge us, the plot is actually instructive for our theoretical approach in this book.

In the novel, an oil developer has a project tied up in litigation by an environmental group. The case seems likely to head to the Supreme Court. If the high court rules in a liberal, pro-environment fashion, the developer stands to lose billions. So what is the poor developer to do? Ask his lawyers to write a really good brief? Fortunately for the novel's readers, a demented legal genius in the developer's law firm suggests a somewhat more aggressive litigation strategy: simultaneously assassinate two Supreme Court justices. The legal genius's elaborate calculations show that their likely replacements will alter the balance of power on the court, leading to a conservative outcome and assuring the developer and his law firm an enormous financial windfall.[11]

Of course, we do not endorse assassination as a means of advancing one's legal and financial goals. But as political scientists, we could not help but be impressed by the actions of the legal genius, who performed a social science *tour de force*. First, he understood the court so well that he could accurately predict how replacing any Supreme Court justice and changing the ideological mix on the court would affect case outcomes. Second, he understood presidential politics so well that he could accurately forecast the likely ideology of a president's nominee based on the president's ideology, the make-up of the Senate, and other relevant factors surrounding a nomination. Third, he understood the behavior of the Senate, interest groups, the media, and public opinion so well that he could accurately foresee the outcome of the confirmation process for any given Supreme Court nominee.

We call this analytical challenge "the Pelican Problem." In a nutshell, the task of solving the Pelican Problem means:

- Predict the likely ideology of a Supreme Court nominee chosen by any given president under any given circumstances;
- Forecast the outcome of the confirmation battle for any given nominee; and
- Foresee the broad policy consequences of replacing any Supreme Court justice with a new justice.

Finally, because we have rather "high church" tastes in social science, it also means:

- Use political science theory to ground the predictions and forecasts.

If one can solve the Pelican Problem, one can claim to understand the politics of Supreme Court nominations.

Can real-world political scientists follow in the footsteps of Grisham's legal genius and actually crack the Pelican Problem? Remarkably, for a time it looked like the answer was "yes." Starting in the late 1980s, political scientists created a simple, clear, and logical theory of Supreme Court appointment politics: Move-the-Median (MTM) Theory. As a social science theory, MTM is quite elegant; for any vacancy, it makes predictions about the type of nominee a president should select, whether the Senate should vote to confirm or reject a nominee, and the impact of a nominee on the court's decision making. Unfortunately, it turned out that these predictions fall short when applied to the real world of nomination politics. In a 2016 article in the *American Political Science Review*, we undertook an exhaustive review of MTM theory's predictions and arrayed them against a great deal of newly available data. We showed that, for nomination politics since 1930, MTM theory does a rather poor job of predicting the ideology of nominees, the voting decisions of individual senators, and the success and failure of nominations in the Senate.[12] These shortcomings in turn mean that the theory also does not satisfactorily predict changes in the court's decision making.[13] To be clear, our point here is not that MTM theory tells us nothing about nomination politics. But these shortcomings do mean that a satisfactory *collective explanation* of changes in Supreme Court appointment politics over time with respect to presidents, senators, and the court—as well as additional relevant actors, such as the mass public and interest groups—will have to go beyond the narrow confines of MTM theory.

So where does that leave us? Most political science books articulate a single theory and provide evidence evaluating the theory's predictions throughout the book. Ideally, one might prefer a unified theory of Supreme Court nominations that solves the Pelican Problem for the 90 years from 1930 to 2020. Such a revised theory would have to include a powerful meta-account of American political history, explaining the transformation in appointment politics over these nine decades and showing how larger changes in American politics drove the transformation.

A single unified grand narrative like this may exist. But if so, we have been unable to find it. Consequently, we pursue a different approach to history and politics. Rather than forge a single master narrative covering nine decades of history—one theory

to rule them all!—we deploy multiple mechanisms. By a "mechanism," we mean a well-elaborated causally oriented account of a political phenomenon. We examine several mechanisms because different processes worked themselves out over time, intersecting and interacting in ways not really intended or foreseen by actors focused myopically on their own affairs and narrow concerns. Also, because we are committed to the social science school of methodological individualism, our mechanisms focus on human beings—presidents, senators, justices, interest groups, and voters—who have agency and goals, and make choices to advance their goals. We employ this "rational choice" approach because it usually makes intuitive sense and comports well with quantitative and qualitative data—not just roll call votes, survey responses, and election returns, but also the evidence one finds in diaries, memoirs, recorded conversations and telephone calls, oral histories, speeches, contemporary reportage, investigative journalism, and academic histories—all of which we use in this book.[14]

So, in lieu of a single unified solution to the Pelican Problem, we present what we believe is a coherent overall account of the history of Supreme Court appointment politics from 1930 to 2020. In a nutshell, we argue that the growth of federal judicial power from the 1930s onward created a multitude of politically active groups struggling to shape judicial policy. Over time, some of these groups moved beyond lobbying the court and began seeking to influence who sits on it. As a result, presidential candidates increasingly pledged to select justices who conformed to policy litmus tests (mostly for Republicans) and diversity demands (mostly for Democrats). Once in office, these presidents re-shaped the executive selection system from casual and haphazard to meticulous and effective. As a result, presidents gained the ability to deliver to the groups precisely what they had promised. The groups also transformed the public face of appointments, pushing the process from a brief and usually closed affair to a highly visible political campaign mobilizing public opinion via intensive media coverage focused on controversy. In turn, confirmation voting in the Senate gained an engaged and attentive audience, whose presence pressured senators into ideologically polarized voting. The result is a new politics of appointments biased toward selecting and placing consistent judicial ideologues on the court—and only such ideologues.

If this account is correct, the implications for the future of the U.S. Supreme Court—and for the court's place in the American political system—are profound.

1.3 A Lens on American Politics

A study of the history of Supreme Court appointments naturally draws the interest of die-hard aficionados of the court (like us). But such a study also has the potential to be much more than a chronicle of nominees and justices, a re-telling of half-remembered dramas from days gone by. It can—we claim—train a sharp lens on American government and how it functions. A multiple-mechanism history of appointment politics offers a powerful device—a laboratory of sorts—for studying the origins,

evolution, and consequences of the American governmental process, and a new American politics.

1.3.1 A Separation-of-Powers Laboratory

These are bold claims! What is their basis?

First, Supreme Court nominations constitute the *same political event* occurring rather frequently and fairly regularly over an *extended period*. So they allow one to observe and measure what changes in the process and what doesn't, over time. In terms of being a regularly occurring event, Supreme Court appointments are similar to, say, elections to the U.S. House of Representatives. Unlike elections, however, every Supreme Court nomination puts America's distinctive governance system, based on the separation of powers (SOP), through its paces. The president and Congress always interact, sometimes vigorously; but interest groups, the media, and citizens can join the interbranch bargaining, all against the backdrop of judicial policymaking. Supreme Court appointment politics do not implicate the entire governmental process; federalism, for example, plays little role. However, as a device for revealing change and continuity in the performance of the SOP system, and as a venue for thinking about mechanisms and institutions, Supreme Court appointment politics shines.

Figure 1.1 interrogates our claims about "rather frequently," "fairly regularly," and "extended period." It presents a timeline of our primary 90-year period of study, 1930 to 2020. This era saw 54 Supreme Court nominations, beginning with Herbert Hoover's selection of Charles Evans Hughes as Chief Justice and ending with Donald Trump's nomination of Associate Justice Amy Coney Barrett. The nominations span nine decades, and feature the involvement of 15 presidents and 29 Senates. (A table containing information on each nominee appears in the Appendix.)

In the figure, the lower graph gives the name of each nominee and the year of nomination, the name and party of the nominating president, and whether the nomination succeeded or failed. So it is a handy overview of the whole history. The top part of the figure shows the incidence of nominations, with a thin vertical bar indicating the date of each nomination. On average, a nomination occurred about every 20 months. The figure reveals, however, that many periods saw flurries of nominations, while others witnessed "dry" spells for nominations. One five-year gap occurred after Cardozo's nomination in 1932, coinciding with Roosevelt's famous confrontation with the court. The longest dry spell occurred between 1995 and 2004. From our perspective, this unusually long hiatus is not so concerning because both presidents who served in this period, Bill Clinton and George W. Bush, made nominations. More problematic were the sparse nominations of the 1970s; not only did Jimmy Carter have no opportunity to alter the court, this period saw a dramatic growth in the number of interest groups (both generally and with respect to Supreme Court nominations). Nonetheless, on average, Supreme Court nominations

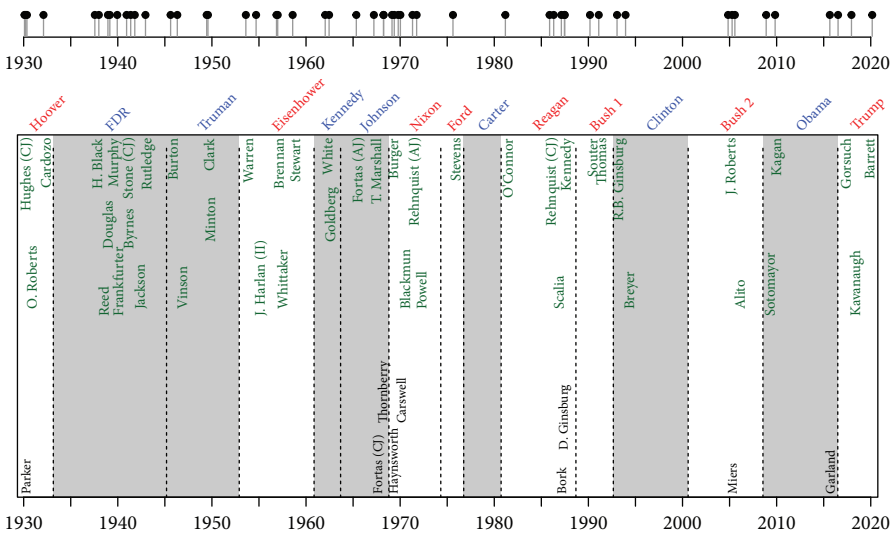

Fig. 1.1 The timeline of Supreme Court nominations, 1930–2020. The top panel shows the incidence of nominations. In the bottom panel, successful nominees are depicted at the top of the plot (in green text), while unsuccessful nominees are at the bottom of the plot. Shaded areas depict Democratic presidents, white areas denote Republican presidents, and the dotted vertical lines separate individual presidents.

occurred with sufficient frequency that we can conclude that appointment politics constitute a suitable laboratory for studying the evolution of the separation-of-powers system.

1.3.2 The New American Politics

Before entering our "separation-of-powers laboratory," it is helpful to review the big changes that transformed American politics during the last half of the twentieth century and the first decades of the twenty-first century. These changes helped drive the transformation of Supreme Court appointment politics.

There are many ways to tell a "big picture" story about the emergence of the new American politics. Our version naturally looks ahead to appointment politics, which affects what we emphasize and what we downplay. For example, war has been a huge driver of political change, but it plays little role in our story.[15] Similarly, the rise of income inequality has exerted a profound effect on American politics, but is not central to our story.[16] Finally, race and identity politics make an appearance, but they are somewhat secondary to the larger political story about changes in focus and preferences that we tell.[17] Our rendition of the "big story" focuses on five changes. They are:

1. The growth of government and the concomitant rise of a powerful judicial state;
2. The stunning proliferation of interest groups, activists, firms, and wealthy individuals vying to shape government policy, including federal judicial policy;
3. The capture of the political parties by interest groups, activists, and issue enthusiasts, leading to an astounding ideological polarization of elites;
4. The remarkable rise in the frequency of divided party government; and
5. The emergence of a new electorate, one better sorted into parties by ideology, but retaining huge disparities in political knowledge between the most- and least-engaged citizens.

Each of the five changes was important in itself. Together, they interact to create a new politics of American governance, and a new politics of Supreme Court appointments.

1.3.3 The Growth of Government and the Rise of the Judicial State

Figure 1.2 describes a revolution in American government and society. It depicts per capita federal expenditures in real terms, from 1900 to 2020.[18] In 1900 the federal government spent about $160 per person (using constant 2015 dollars). As late as 1930, the beginning of the period we study, the federal government expended only about $400 per person. The reason for the tiny numbers is simple: in practical terms the federal government did almost nothing. The military was puny, social insurance programs almost non-existent, and public improvements few and far between. But

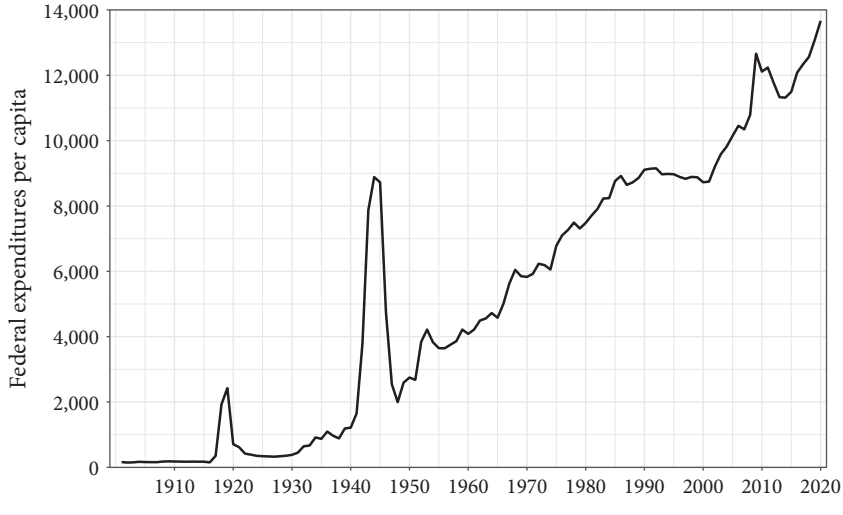

Fig. 1.2 Real Per Capita Federal Expenditures, 1900–2020, per person in 2015–constant dollars.

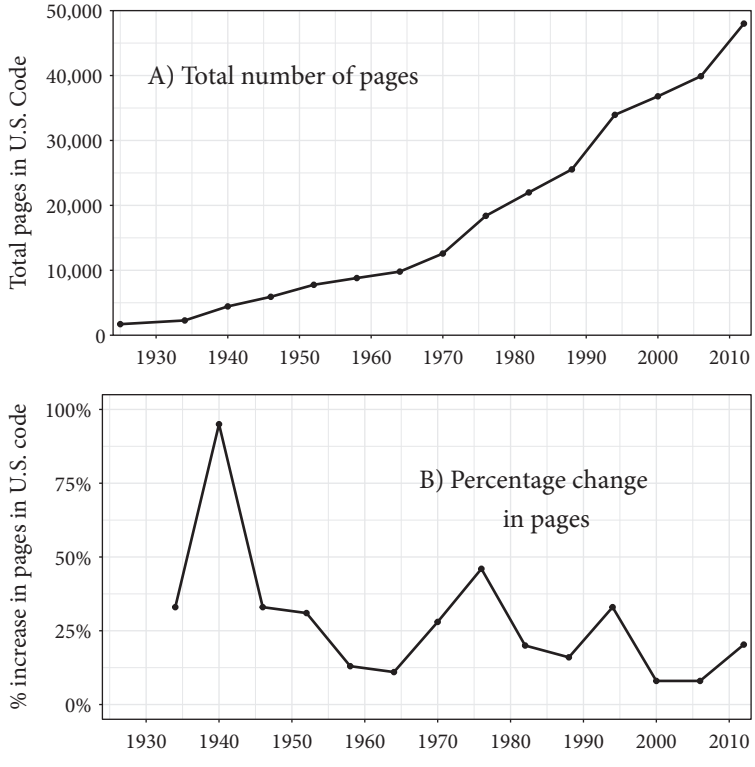

Fig. 1.3 Pages in the U.S. Code, 1925–2012. A) The total pages in the U.S. Code at each revision from 1925 forward. B) The percentage increase in pages from one revision to the next.

this situation changed dramatically, and growth in expenditures continued its upward trend even after the sharp spike generated by World War II.

Figure 1.3A displays a perhaps more subtle trend. It shows the number of pages in the U.S. Code, the omnibus compilation of federal statutory law, which provides a rough measure of the "size," or volume, of federal law.[19] As shown, the Great Depression (1929 to 1939) doubled the volume of law compiled in the U.S. Code, but that was just the beginning of a continued and ever-increasing upward trend. Figure 1.3B depicts the percentage increase in pages from one revision to the next, and shows that the change between the 1930s and 1940s was by far the largest. But also notable were surges in the 1970s and the 1990s.

This explosion in law-making translated into a tremendous increase in federal programs, all of which required funding. By 1940, the New Deal social insurance programs had almost tripled federal governmental expenditures in ten years, to about $1,200 per head. This increase involved a titanic struggle between President Roosevelt and Congress versus the Supreme Court.[20] As remarkable as the New Deal was, the next half-century saw an even more jaw-dropping change as the volume of law and

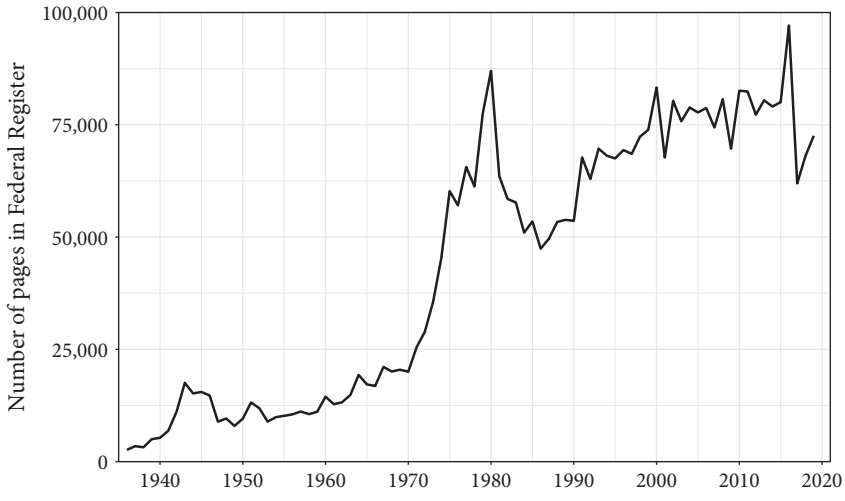

Fig. 1.4 The number of pages in the Federal Register, 1936–2019.

expenditures rose hand-in-hand. Between 1940 and 1965, the U.S. Code doubled in size and per capita real expenditures quadrupled. Between 1965 and 2010, the code nearly quintupled in size, while expenditures nearly tripled, rising to just over $12,000 per capita (in 2015 constant dollars). In other words, between 1930 and 2010 real per capita expenditures increased more than 30-fold. The volume of federal statutory law, as measured by pages in the U.S. Code, increased 15-fold. Changes of this magnitude are not evolutionary; they are *revolutionary*.

With the federal government expanding at this rapid rate, Congress turned to the executive branch to implement these new programs, thereby giving rise to the "administrative state." As a simple measure of the size of the administrative state, consider Figure 1.4, which shows the number of pages in the Federal Register, the official record for agency rules in the U.S. federal bureaucracy. The number of pages exploded in the 1970s, reflecting the new regulatory authority created by statutes passed in the 1960s and early 1970s. While the number of pages would dip in the 1980s, it has since climbed to levels roughly 30-times greater than those in the 1930s.[21]

The rise of the administrative state raises several serious constitutional questions. What restricts the agencies to actions authorized by the duly elected agent of the people, Congress? What compels bureaucrats to respect citizens' rights, and those of other people who reside in the country? The Constitution is silent on these matters, for the obvious reason that no one in 1789 anticipated the future shown in Figures 1.2–1.4.

Once the dust settled from World War II, Congress filled this constitutional gap by passing the Administrative Procedures Act of 1946, which created a formal role for courts to review the rules issued by federal agencies. Courts were to act as the guardians of the people against potential agency overreach.[22] This produced an immediate consequence that is very important for our story: a vast expansion in the

responsibilities of federal courts. Bluntly, federal courts received a hunting license in all the policy arenas that federal agencies inhabit. In other words, every expansion of federal regulatory authority meant an expansion in the power of the judicial state.

But this is not all. At the same time that Congress created an administrative state, it also revised the meaning of federal citizenship. Congress, with some help from the court, created many new rights for whole classes of citizens, and many new obligations for others.[23] Examples include new rights in areas such: federal voting; equal treatment in private establishments regardless of race; freedom from sexual harassment in the workplace; freedom from age discrimination in the workplace; humane treatment for those incarcerated in state prisons; access to birth control and a fundamental right to abortion (until 2022); and many others. The federal courts play a central role in defining and enforcing these rights, which became precious possessions for many—and unwelcome burdens for others.[24]

Can we measure the expansion of federal judicial power? A simple albeit crude measure of the activity of the federal judicial state is the caseload of the federal Courts of Appeals.[25] These courts do not have discretionary dockets, unlike the U.S. Supreme Court, which chooses how many cases it hears. So the caseload in the lower courts is a better reflection of the number of legal challenges that litigants bring to federal courts. In addition, appellate cases are important cases, in the sense that litigants are willing to spend considerable time and money pursuing them.

The data on federal appellate caseload, shown in Figure 1.5, is thus informative. In 1900 the U.S. Courts of Appeals heard few cases—litigants commenced about 1,000 cases at the turn of the twentieth century. By 1930 this number had increased to about 2,500, and further increased to about 3,500 in 1940. The caseload then increased only gradually until the late 1960s and early 1970s, when it exploded. The caseload increased from about 9,000 in 1968 to about 50,000 in 2017. From 1930 to 2010,

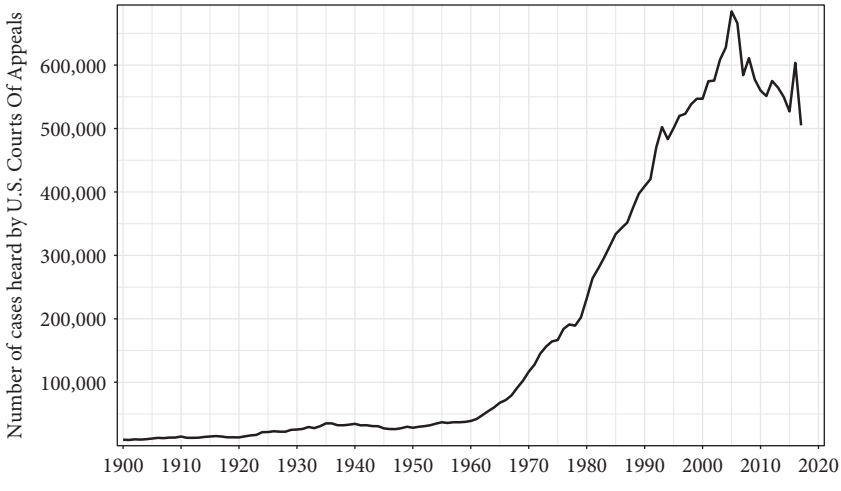

Fig. 1.5 Number of cases commenced in the U.S. Courts of Appeals, 1900–2017.

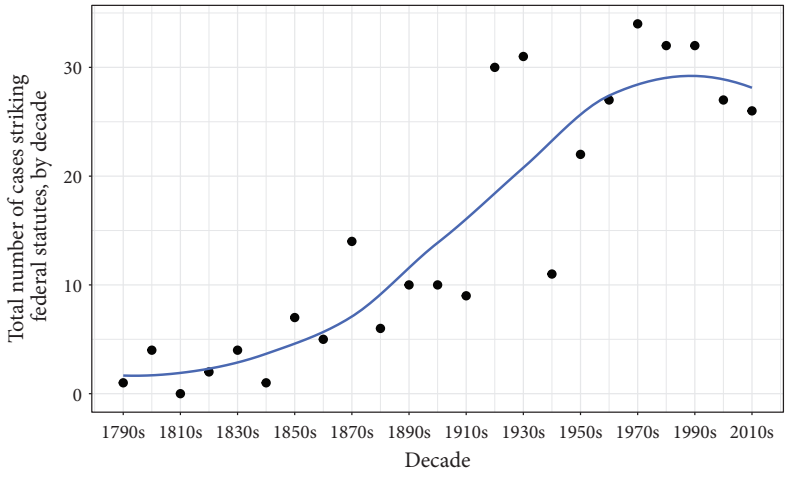

Fig. 1.6 The exercise of judicial review over time. The figure shows the number of federal statutes struck down by the Supreme Court, by decade, between 1790 and 2020. The blue line is a loess line. See note 27 for a description of these lines, which appear throughout the book.

the workload of the courts of Appeals increased 20-fold, an enormous growth in the activity and reach of the federal judiciary.

Of course, it matters not just how many cases courts hear, but what decisions they make. As a simple indicator of judicial power, consider Figure 1.6—the points show the number of federal statutes struck down by the Supreme Court, by decade, between 1790 and 2020.[26] The line (called a loess line) is the fit from a non-parametric regression, which summarizes the trend over time.[27] Early in the nation's history, the stock of federal statutes was quite small; the Supreme Court, on average, struck relatively few federal statutes as unconstitutional. As the federal government grew in size—and as the court's power increased—the number of laws struck down by the court grew markedly. In recent decades, the court has struck down about 30 federal laws per decade, or an average of three per year.[28] Of course, some of the policies overturned are more liberal statutes, and some more conservative. So which justices are doing the reviewing of statutes will matter a great deal.

In short, the last half of the twentieth century saw the rise of a new entity, a powerful and active federal judicial state that now touches the lives, and affects the livelihoods, of virtually all Americans.

1.3.4 From Pluralism to Hyper-Pluralism

In 1926, a promising graduate student at Johns Hopkins University, E. Pendleton Herring, came up with an interesting idea for his political science dissertation. Herring had noticed that Washington, D.C., was overrun with groups, stating, "The cast iron

dome of the Capitol has strange magnetic powers. It is the great hive of the nation to which each busy big and little association sooner or later wings its way."[29] His dissertation, which was published in 1929 as *Group Representation Before Congress*, studied the groups and their methods. His census of Washington groups found about 500, and he guessed that there might be as many as 1,000. Imagine, 500 groups!

In the mid-1970s, the Columbia Books publishing company saw a commercial opportunity. Venders, the press, firms, congressional staff, and individuals wanted to be able to find and contact the organized groups with offices in Washington. And the groups wanted to be found. If Columbia Books compiled and sold a directory of the groups, it might be a commercial success. Hence was born *Washington Representatives*. The industrious compilers of repeated editions of the directory probably did not anticipate that future political scientists would pore over their work, sometimes even turning it into data.[30] Such compilations were made in the years 1981, 1991, 2001, 2006, and 2011.

The simplest use of the directory is just to count the number of organizations with offices in Washington. Figure 1.7 displays the number of unique groups from the Washington Representatives study in the publication years; for reference, we also include Herring's estimate from 1929. The figure shows an explosion in the number of groups, with a 30-fold increase between 1929 and 2011.

When he reviewed Herring's book for the *American Political Science Review* in 1929, Peter Odegard (1929, 470), another future star in the profession, stressed the continuity of Herring's Washington with that of previous generations. "There may

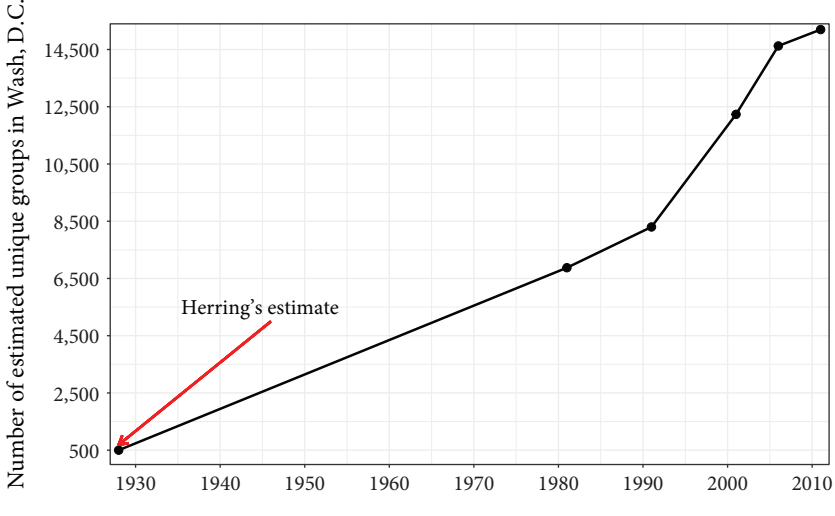

Fig. 1.7 The growth of unique groups from the Washington Representatives Study, 1929–2011. The first point shows Herring's estimate of 500 groups in 1929. The later points show the estimates from the various iterations of the Washington Representatives Study.

have been fewer organized minorities in the old days; there may have been less lobbying; but it is a difference in degree, not in kind," he declared. But Figure 1.7 shows a change in the size of the Washington, D.C. interest group universe between 1930 and 2020 that goes beyond a difference in degree. As Stalin supposedly quipped, "Quantity has a quality all its own." The American polity has transitioned from pluralism to something different, which we call hyper-pluralism.[31]

The explanation for the emergence of hyper-pluralism is fairly straightforward. When the federal government did almost nothing, there was little point in lobbying it—and few people did. A somewhat bigger and more active federal government offered somewhat better returns on time and effort invested in influence peddling, so more groups came. And when the federal government became a leviathan, throngs of groups, associations, firms, wealthy individuals, and professionals set up shop on the Potomac, seeking a piece of the action—or protection from it. Today, no cause is too obscure, nor seemingly too vile; every conceivable interest that can pay has its advocate in the nation's capital.[32]

So too with the judicial state. Judicial lobbying at the Supreme Court comes in the form of so-called amicus briefs submitted by interested groups, firms, and state and local governments. These "friends of the court" advance arguments favoring one side or the other in a given case, and one or several judicial policies over others. Submitting amicus briefs is certainly "lobbying." But it is a genteel version compared to what goes on in Congress or state legislatures, where lobbyists can legally make nominal "campaign contributions" that open doors and grease the legislative skids.

Figure 1.8 shows the increase of judicial lobbying over time.[33] The dashed line shows the number of amicus briefs filed in each Supreme Court term between 1917

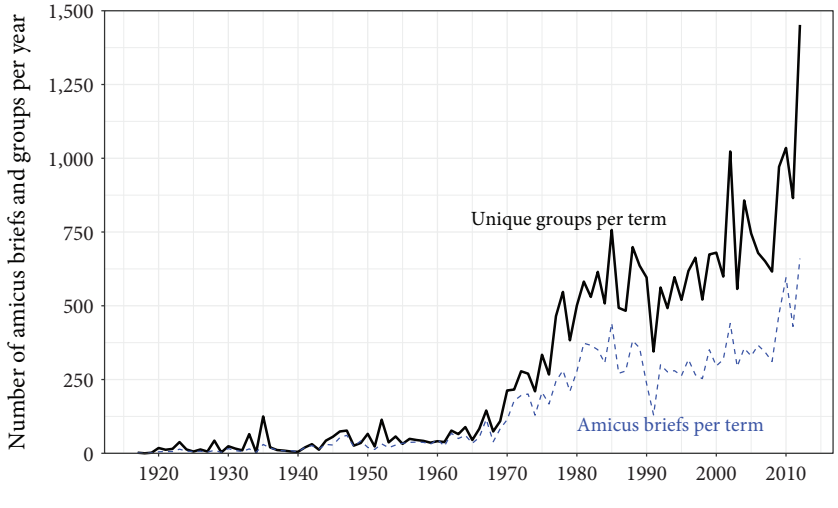

Fig. 1.8 Lobbyists before the U.S. Supreme Court, 1917–2012. The figure shows the number of briefs and the number of unique groups signing onto briefs per term of the United States Supreme Court.

and 2012. The solid line shows the number of unique groups signing onto briefs in each term; this line is higher because multiple groups may sign on to a single brief.

As shown, the number of annual briefs did not change much between 1917 and about 1970, averaging about 25 or so per term. But then, the number of briefs exploded during the 1970s, reaching a new plateau in the mid-1980s of about 350 per term, a 14-fold increase. Growth resumed in the 2000s; between 2005 and 2012 the average number of briefs per term was 450. All told, by this measure, judicial lobbying increased about 40-fold between 1930 and 2012, with almost all the growth occurring since about 1970. A similar pattern appears in the number of unique groups signing briefs; that number increased 60-fold, from 24 in 1930 to nearly 1,500 in 2012.

In short, more than just Mr. Smith went to Washington. The formerly sleepy little town now fairly swarms with Herring's "bees." Eagle eyes monitor every congressional bill, every regulation, every federal court case. At every turn, paid supplicants besiege members of Congress, the managers of the administrative state, and the black-robed rulers of the judicial state. Indeed, the advocates sometimes write the bills, provide language for the regulations, and pen parts of the legal opinions.[34]

Would it not seem strange if the supplicants did not conclude that better results might follow from not just lobbying government officials, but actually changing the decision makers themselves?

1.3.5 The Polarization of Political Elites

The previous subsection documented the dramatic increase in lobbying by interest groups, issue enthusiasts, firms, and wealthy individuals to influence decisions and even change decision makers. We now address the fascinating outgrowth of those efforts: polarization of America's political class into two sides with wildly divergent views.

Measures of such polarization have become central material in the scholarly study of American politics, in part because they raise interesting and critical questions. One such measure, presented in Figure 1.9, is something of a triumph of modern political science, based on the pioneering work of Keith Poole and Howard Rosenthal (1997). Here's what they did. First, use every recorded roll call vote in Senate history to derive the ideological "ideal point" of every senator who ever served, using sophisticated scaling methods derived from psychometrics. In doing so, take care that the scores are comparable over time. The famous scores that result, the so-called NOMINATE scores, run from −1 (for an extreme liberal) to +1 (for an extreme conservative). Next, in each senate, find the ideological score of the "average" Republican and the "average" Democrat, where average means the median member of the party—the member whose score divides the party membership exactly in half, so one-half has a higher score and one-half a lower one. What is the difference in the party medians? This is the data displayed in the figure, for the Senate from 1867, which marks both the end of the Civil War and the emergence of the Republican and Democratic parties

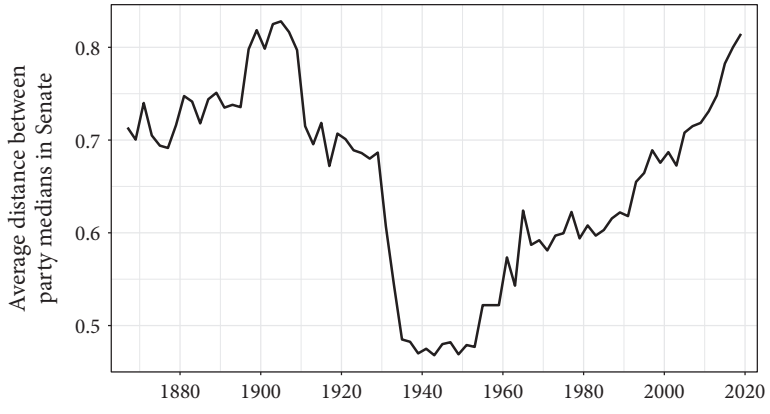

Fig. 1.9 Ideological Polarization in the U.S. Senate, 1867–2020. The figure shows the difference in ideology scores of the median Republican senator and median Democratic senator, using first-dimension NOMINATE scores.

as the mainstays of American politics, to 2020. The difference in average scores provides a measure of party polarization—probably the best such measure we are likely to get.[35]

Figure 1.9 is not just a technological marvel, but it also raises several intriguing substantive questions about why we see such peaks and valleys in party polarization. If we focus on the 1870s, for example, party polarization is hardly surprising following a civil war with three-quarters of a million battle deaths. Similarly, party polarization in the 1880s and 1890s is no mystery. Mass urbanization, industrialization, immigration, wild economic booms and busts, and gigantic disparities in wealth wrenched the fabric of American society. In both cases, party polarization reflected significant divisions in society.

But the dramatic rise in polarization since about 1980 is more puzzling. While many scholars and commentators have offered explanations for this puzzle, most do not stand up to scrutiny. For example, some suggested gerrymandering was the culprit; others pointed to changes in congressional procedures. We know the gerrymandering hypothesis doesn't hold water because polarization patterns are similar in the House (with gerrymandering) and the Senate (no gerrymandering). Likewise, congressional procedure cannot be the answer because we know most state legislatures also polarized.[36] The correct explanation has to be something stretching across the entire country and reaching from the top to the bottom in American politics.

A further puzzle is that American political elites polarized starting in about 1980 *while the public showed no such movement*—at least not initially. Careful studies of public opinion data find no comparable mass polarization in the 1980s and 1990s, excepting a few issues like abortion and affirmative action.[37] As we discuss below, the public has now begun to display the same kind of polarization, but elites clearly polarized first, in the virtual absence of ideological polarization in the mass electorate.[38] So the question remains: why did party polarization happen absent social polarization?

Political scientists and political historians have begun to connect the dots. The evidence points to the *party system itself*. This finding would not have surprised an earlier generation of scholars, like V. O. Key (1942) and E. E. Schattschneider (1942), who placed political parties at the center of American politics. That generation of political scientists would have turned immediately to the party system as the polarizing force.[39] To a younger generation of political scientists, however, trained to see the political parties as "weak," antiquated, moribund, and virtually irrelevant, the parties seemed like the least-likely suspects. The story that is emerging is surprising to many and remains controversial.

The story goes something like this. The parties familiar to Key and Schattschneider were local and state organizations run by professional politicians as businesses. The "owner-operators" of the parties were rent-seekers who made politics pay. They had no interest in ideology *per se*. The rise of an American middle-class in the late nineteenth century created businessmen and voters who found the rent-seeking machines financially burdensome and morally repugnant. Their antipathy set off one of the great reform battles in American history.[40] Over time, the reformers prevailed almost everywhere and put the parties out of the rent-seeking business.

With rent-seeking vanquished, middle-class reformers lost interest in the parties. But the parties did not go away. Though grievously wounded, they remained the main vehicle for selecting candidates for elected office. As such, they eventually drew the attention of a new cast of characters, neither Boss Tweed-style rent-seekers nor Teddy Roosevelt-style reformers. The new actors were "amateur Democrats" on one side and "suburban warriors" on the other—in other words, the same sort of ideologically motivated activists who filled the ranks of the proliferating social groups of the 1970s.[41]

The political scientist James Q. Wilson summarized his observations from field-work among the amateur Democrats in the early 1960s:

> The amateur believes that political parties ought to be programmatic, internally democratic, and largely free of reliance on material incentives such as patronage. A programmatic party would offer a real policy alternative to the opposition party. A vote for the party would be as much, or more, a deliberate vote for a clear and specific set of proposals, linked by a common point of view or philosophy of government, as it would be a vote for a set of leaders. The programmatic basis of one party would, to some extent, compel an expression of purpose by the opposing party and thus lead to the realignment of both parties nationally, with liberals in one and conservatives in the other (Wilson 1962, 16–17).

The "amateur Democrats" slowly took over the local, state, and finally national parties on the Democratic side.[42] Something similar happened in the Republican Party, especially after the Goldwater debacle of 1964. As they took control of the parties, the well-intentioned activists became "the polarizers," in the apt phrase of political historian Sam Rosenfeld (2017).

This story is hardly complete. It may still seem surprising that party activists could have so dramatic an impact on members of Congress, state legislatures, governors, even city councils. After all, candidates still have to get elected. And the general public does not share the hardened convictions and passionate enthusiasms of the polarizers. Brilliant fieldwork by Bawn et al. (2023) documents how the polarizers work in practice to control the selection of House candidates. Even in the parties' somewhat debilitated state, party leaders work relentlessly to find and advance ideological champions. Party activists, affiliated groups, firms, and wealthy individuals support the champions and enable them to run professional, competitive campaigns. In addition, moderates considering a candidacy are deterred from running by the levels of existing polarization.[43] At the end of the day, voters can only choose between what is offered to them; they can't vote for people who aren't on the ballot. And if the people deciding who gets on the ballot are the polarizers, they will happily trade away popularity in order to gain extremity, and still often prevail at the ballot box.[44]

This is but a sketch of a complex story. The story continues to unfold, with the recent unraveling of the traditional Republican coalition. But, the bottom line is clear, at least for our purposes: beginning in the late 1970s or early 1980s, America's political class polarized. It is now deeply polarized, with the two sides committed to wildly divergent goals.

1.3.6 The Resurgence of Divided Party Government

Polarized elites by themselves do not imply a crisis in governance. California, for example, has deeply polarized political elites.[45] But the state government passes laws and pursues a relatively coherent set of priorities, for good or for ill. It can do so because the liberal party controls every lever of power worth controlling while the conservative party is an impotent rump. The mirror image prevails in Kansas, which, until recently, was effectively a one-party state controlled by the conservative party.[46] Changes in state policy, which have been dramatic, reflected changes in the strength of different factions within the Republican Party.

The situation at the national level resembles neither California nor Kansas because neither the liberal nor the conservative party reliably controls all the levers of power all the time. Instead, divided party government often prevails, meaning one ideologically extreme and coherent party controls part of the government, while the other equally extreme but coherent party controls another part. Under the American constitutional design, this is a prescription for conflict and gridlock.

Figure 1.10 presents the basic story, focusing on control of the presidency and the Senate (since the House plays no role in confirmation politics). The "rug" (i.e. hash marks) at zero denotes a Congress in which one party controlled both the Senate and presidency; the rug at one indicates a Congress in which different parties controlled the Senate and presidency. The loess lines indicates the local probability of divided party control of the Senate and presidency.

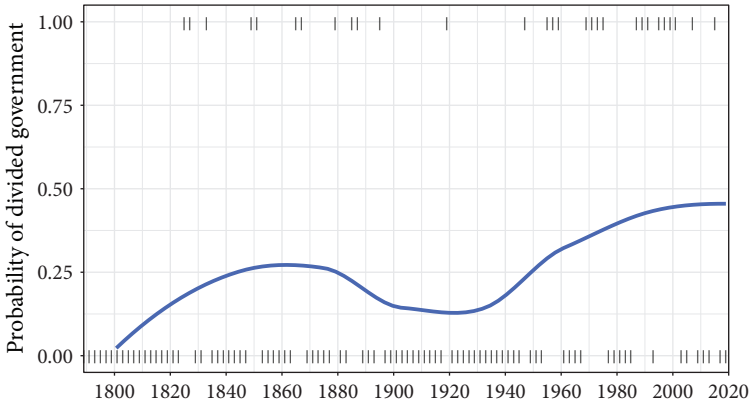

Fig. 1.10 The probability of divided party control of the Senate and the presidency from 1789 to 2020. The rugs indicate occurrences of unified (bottom) and divided (top) government. The blue line is a loess line.

As shown in the figure, divided control of the presidency and Senate has been a regular occurrence throughout American history, though never the dominant pattern. A rarity early in the Republic, divided party control increased in frequency and rose to a modest height prior to the Civil War and during Reconstruction (about 25% or so, for divided Senate-presidency control).[47] The probability of divided party control of the Senate and presidency then fell dramatically for the next half-century. This period saw leading political scientists formulate (fanciful) theories of "realigning elections" leading to long bouts of one-party control of government.[48] Starting in the late 1940s, however, divided party government rose from the grave. And with a vengeance! Today we live in the greatest era of divided party government in American history. At present, the probability of split party control of the Senate and presidency is almost 50%.

What lies behind the undulations in the graph? One factor is the geographic distribution of party members, which may make it possible or even probable for one party to control the presidency (which hinges on the Electoral College) while the other controls the Senate (or House). At various times in American history, the geographic distribution of the parties intersected with America's strange electoral system to create frequent divided party government.[49] That is the situation today.

A second factor is also important, particularly when the parties are programmatic, distinct, extreme, and distant from many voters. This factor involves the thermostatic quality of "public mood."[50] Public mood refers to the public's general tendency toward liberalism and conservatism. When one party controls the government and enacts policies, public mood shifts away from it. This famously occurs at midterm elections but is more pervasive than that. It is almost as if Americans lean against the winds blowing from the extremist parties.

In the American separation–of–powers system, the combination of extreme parties and divided party government is explosive. The combination leads to presidential impeachments, legislative gridlock, aggressive use of presidential executive orders, congressional sabotage of the executive—and failed or near-failed Supreme Court nominations.

1.3.7 Ideologically Sorted, Informationally Bifurcated

In 1964, Philip Converse wrote a revolutionary study of the American electorate, an analysis that remains required reading in graduate programs more than half a century later. Converse's article summarized and codified what political scientists and social psychologists had learned from the polling revolution of the 1950s and early 1960s. His study extended over 75 pages but we can emphasize two important takeaways for our purposes.

The first is that most Americans did not follow politics closely and knew astoundingly little; they could not correctly answer the most elementary questions about civics, and they were often somewhat confused about which issues went with which, in terms of political ideology as defined by elites. Converse said these voters showed little "ideological constraint."[51] A few citizens, however, knew a huge amount about politics and issues. Some of these citizens may have had professional reasons to acquire political information. Generally, though, they were simply people who found politics fun and engaging.

The second important takeaway involves the link between partisanship and political ideology. In the 1950s and early 1960s, the Republican Party included Northeastern liberals, Western conservatives, and Midwestern moderates. Similarly, the Democratic Party included Northern liberals, Southern conservatives, and Western moderates. Thus, the political parties of the 1950s and early 1960s were "big tent" parties that attracted many different kinds of people. As a result, in terms of voter identification with the parties, both parties out-numbered self-declared Independents. Figure 1.11, which is based on Figure 2.7 in Fiorina (2017), shows the percentage of self-identified Democrats (both strong and weak), Republicans (both strong and weak), and Independents, based on the quadrennial American National Election Survey between 1952 and 2020. Since 1972, the percentage of Independents has either rivaled or outpaced the percentage of Democrats, which in turn have always been larger than the percentage of Republicans.

How should one apply the lessons of Converse today? First, it is simply not the case that knowledge about politics is distributed randomly across the population. Rather, as one might expect, the extent to which people follow politics and are knowledgeable correlates with education, news consumption, and whether a person identifies with either the Democratic or Republican party (versus Independents). Moreover, citizens who have more extreme ideology (i.e. those who are increasingly liberal or conservative, relative to moderates) are also more likely to be politically informed.[52]

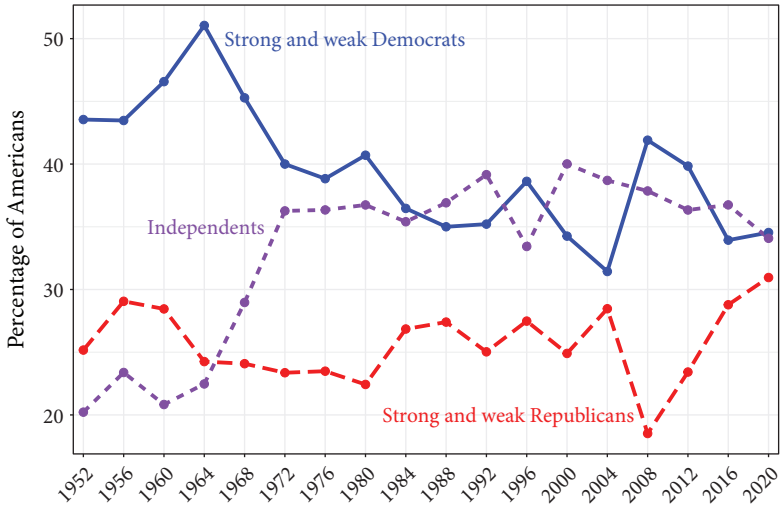

Fig. 1.11 Changes in self-identified party identification, 1952–2020. Percentages based on the ANES' 7-point party identification scale. "Strong" and "weak" responses are coded as partisans, while "Independent Democrat," "Independent Independent," and "Independent Republican" responses are coded as Independents.

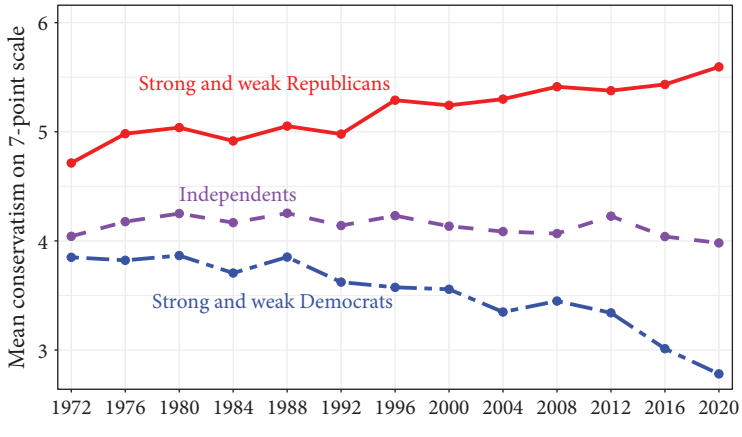

Fig. 1.12 Ideology and partisanship, 1972–2020. The lines show the mean ideology on a 7-point scale (from liberal to conservative) broken down by partisanship.

These facts affect the politics of accountability in Supreme Court nominations. In Chapter 11, we show that these factors now predict whether Americans know how their senators voted on Supreme Court nominees.

Second, the relationship between partisanship and political ideology has changed dramatically, as seen in Figure 1.12. For each ANES survey from 1972 to 2020, we coded the ideology of respondents, as measured by the standard 7-point scale,

which runs from more liberal to more conservative.[53] We then calculated the mean ideology score broken down by partisanship for each year. Not surprisingly, the figure shows a clear ordering with Republicans always more conservative on average than Independents, who in turn are more conservative then Democrats. In the 1970s, the differences were not so great; the difference between Democrats and Republicans in 1972, for example, is only about 1 point, on average, on the 7-point scale. But the figure reveals the clear emergence over time of a high degree of overlap between party and ideology, with Republicans identifying increasingly as conservative and Democrats identifying increasingly as liberal. Meanwhile, the reported ideology of Independents has been stable over time.

Not surprisingly, political scientists have spilled considerable ink over exactly how the transformation happened. Did the heterogeneous people calling themselves Democrats convert to liberalism? Did the heterogeneous people who called themselves Republicans convert to conservatism? Or, did conservative Democrats switch to the Republican Party, liberal Republicans switch to the Democratic Party, while people in-between tended to become Independents? The latter possibility, sometimes called "the partisan sort," seems more consistent with the data.[54] An important implication is that Americans have not transformed fully into two partisan camps. Recall from Figure 1.11 that Independents now constitute as large a camp as either of the two parties. However, the two groups of well-sorted partisans lie very far from one another ideologically. Perhaps not surprisingly, their members increasingly detest one another.[55] Moreover, because partisanship, ideology, race, education, and class are linked more tightly, some analysts see a rise in identity politics and affective polarization, in which partisan divisions transcend mere policy differences.[56]

The new realities of the mass public has important implications for the job of senators, and therefore for the politics of Supreme Court nominations. Senators have always engaged in high-profile position-taking and obsequious pandering to popular views.[57] However, the changes in the electorate elevate the importance of these activities, and modify how they operate. On many issues, senators may see little reason to represent moderates, who mostly don't pay attention or don't much care. But same-party partisans present a very different audience. These voters care intensely about some issues, follow high-profile events in Washington, know how their senators voted in major controversies, they sometimes contribute time and money to campaigns, and—most critically—many participate in primaries. Bucking mobilized, in-party partisans can abruptly end a political career. Consequently, it mostly does not happen.

1.4 The Politics of Supreme Court Appointments

A laboratory for studying the evolution of the SOP system would hold little interest if nothing changed. One could study the system, but time, sequence, and feedback would matter little. However, dramatic changes mark Supreme Court appointments

politics over our 90-year period. These changes reflect the larger changes in American politics.

1.4.1 The Process

Let's begin with an overview of the modern process of Supreme Court appointments. Figure 1.13 lays it out schematically. The figure is not formalist—it reflects what actually occurs, though in somewhat stylized fashion. In the figure, key decisions or actions by players are indicated by boxes. The actors are in bold type. The solid lines connecting boxes represent a time line, so there is a sequence of actions. The dashed line reflects feedback from earlier actions. The six phases of the process are the following:

Setting the Stage describes what occurs before a vacancy on the court even takes place. Presidents, of course, have the final say in who gets nominated. But our account emphasizes the decision by groups and activists to enter the realm of appointment politics in the first place and then have a say in who gets nominated and confirmed.

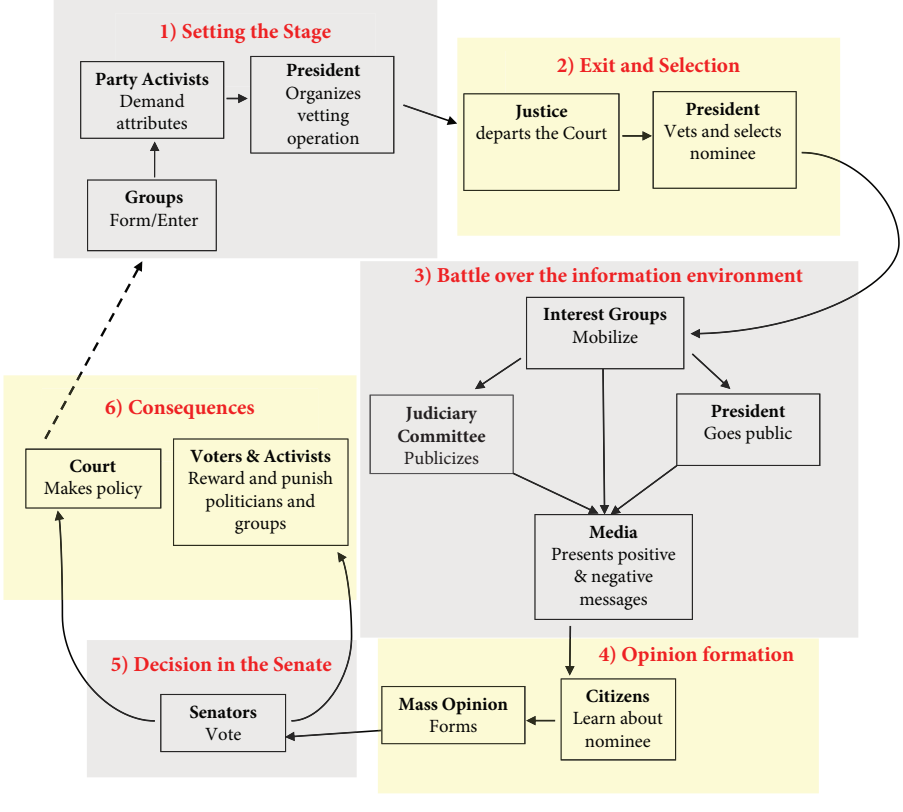

Fig. 1.13 The Supreme Court appointments process—a dynamic view.

Once they do, the activists carry their passionate convictions about the need for judicial change into the presidential primaries and into the party convention. They seek to influence the choice of presidential nominee; they also often leave their fingerprints on the party platform in the form of demands (i.e. "litmus tests") on future nominees. While many scholars of American politics see party platforms as meaningless guff or campaign blather written by the candidate himself, we see the platforms as "accountability contracts" between the presidential nominee and the policy activists who control or influence the party. They are a statement of demands and expectations that the president (if elected) ignores at his peril, at least if he wishes to remain in the good graces of the activists whose contributions of time, money, and effort are essential for a successful campaign.

Once elected, the president assembles a managerial team and organizes the White House. The people he chooses, and the procedures he puts in place, will determine what his policy priorities actually are in practice. As the mantra goes, "personnel is policy"—but so is organization and procedure. The president's people and procedures strongly affect what he can accomplish in office. One part of the White House operation may be a judicial selection operation aimed at fulfilling the president's obligations under his accountability contract with party activists. The judicial selection operatives (whether inside the White House or in the Justice Department) will be tasked with identifying, screening, and vetting candidates to fill anticipated vacancies in the judicial state, including the high court. The team will often assemble a preliminary "short list" of potential nominees in the event of a vacancy.

The early work pays off in Stage 2, *Exit and Selection*, which is triggered by the exit of a justice from the court, either by death or retirement. The president will review the short list, or assemble one if none has been readied. He may order or engage in additional vetting. Then, he will make his choice.

Stage 3, *The Battle over the Information Environment*, begins with the president's announcement of the nominee. Interest groups may mobilize, organizing protests, demonstrations, and letter-writing. Sometimes they, or wealthy individuals, will mount paid media campaigns. The hearings in the Judiciary Committee become a natural focus for media attention. The appearance and grilling of the nominee is a modern high point. In addition, the president may mount his own media campaign by "going public" in support of the nomination. Scandals often play a large role in media coverage, which may be intense or may be sparse, depending on the overall visibility of the nomination.

Stage 4, *Opinion Formation*, is an immediate consequence of media coverage. If the nomination remains obscure, the public will hardly notice the event at all and opinion will remain inchoate. But if the coverage is intense, the public may actually notice the nomination and form opinions about whether the nominee should be confirmed.

Stage 5 is the *Decision in the Senate*. In some cases, the battle over the information environment may damage the nominee so badly that the president withdraws the nomination. But this is rare. More typically, the nomination moves to the Senate for

a vote. If the Senate rejects the nominee, the president selects another nominee, and the process resumes. But more typically the Senate confirms the nominee.

Stage 6, *Consequences*, reflects the fact confirmation does not end the process, as appointments to the court have several consequences (as the legal genius in *The Pelican Brief* appreciated so well). The policy impact of the nominee on the court may be large or small, and may be predictable and anticipated or erratic and unexpected. But while the appointment of a single justice only rarely shifts the direction of the court, the confirmation of several like-minded justices can have dramatic effects. In turn, policy outputs can bring political consequences—the population of the groups may change, and activists may change in response to the court's actions. This population shift is an example of what political scientists call "policy feedback." Here, the entry of new groups and activists feeds back into Stage 1, *Setting the Stage*—for the next nomination or series of nominations. And so the cycle continues.

1.4.2 The Changes

Figure 1.13 describes the nomination process as it exists today. If we compare that process with the one familiar to Herbert Hoover, Franklin Roosevelt, Harry Truman, or Dwight Eisenhower, what is different? Table 1.1 summarizes the differences, highlighting 12 attributes of appointment politics. The table identifies the chapter(s) in which we cover the respective topics; the attributes are listed in roughly the chronological order they appear in the book. The 12 changes are summarized below; this subsection also provides a roadmap to the book by identifying the chapters covering each change. Finally, the endnotes in this section discuss how our approach both fits into and is distinguishable from the existing literature on Supreme Court nominations, where relevant.

Party & Activist Interest in the Court

In our telling, the demands of party activists and party-affiliated interest groups loom large. The reason is, those demands force the president to change how he finds nominees and who he selects from among the short-listed candidates. In the early period, party activists rarely cared about the court and asked for nothing from the president. Today, party activists and party-affiliated groups care intensely about the court, and insist that the president deliver a nominee who meets the demands laid out in party platforms. The rising influence of party-affiliated groups may be the single most important change in the process, because so much else follows.[58]

In Chapter 2, we present a systematic overview of the two parties' judicial agendas, based on new evidence on the party platforms from 1928 to 2020 and the parties' stands on the Supreme Court and judicial nominations. In particular, we document the parties' focus on particular "hot-button" Supreme Court cases and issue areas. We also scrutinize policy requirements for Supreme Court nominees—that is, "litmus tests"—as well as calls for diverse and high-quality nominees. The result is the first

Table 1.1 Supreme Court Appointment Politics, 1930–2020: The attributes of nomination politics, then and now. The chapter column summarizes the chapter(s) in which a given attribute is examined.

Attribute	Then	Now	Chapter
Party & Activist Interest in the Court	Almost non-existent	Systematic and pervasive	2
Presidential Vetting	Casual, little formal process	Careful, formalized, meticulous	3
Nominee Characteristics	Often cronies, politicos, patronage nominees	Legal technicians with extensive track records	4, 9
Interest Group Mobilization	Rare, modest in scope	Routine, coordinated, sometimes massive	5
Media Coverage	Perfunctory absent scandals	At least moderate, often intense	6
Presidents Going Public	Rare, reactive	Routine, prospective	6
Senate Hearings	Non-existent or desultory	Intense, media-oriented	7
Public Opinion	Opinion formation rare	Opinion formation frequent, heavily polarized by party	7, 10
Senate Voting	Many voice votes, rarely polarized	Conflictual and partisan	8, 11
Voter Electoral Response	Non-existent	Measurable retrospective voting	11
Appointee Behavior on Court	Occasionally erratic	Very predictable, high policy reliability	12
Exits from the Court	Little evidence of strategic retirements	Some recent strategic retirements—more likely going forward	13

systematic overview of the parties' judicial agendas. Next, by examining delegates to the national conventions, we present suggestive evidence that evaluates the sources of these agendas. The chapter demonstrates that, before 1970, both parties had only limited and sporadic interest in the Supreme Court. However, while both expanded their Supreme Court agendas in the early 1970s, starting in the 1990s the Republican Party became much more focused on the court than the Democratic Party. The GOP also became much more demanding of the policy stances of judicial nominees, while Democrats placed greater emphasis on diversity and quality. The result today is a striking asymmetry between the parties in their approaches to the Supreme Court.

Presidential Vetting

As a result of pressure from party activists and affiliated groups, presidential vetting and selection procedures changed dramatically. In Chapter 3, we trace the evolution of

the selection and vetting process over almost a century. Nominee selection started as a small, lightly staffed, under-institutionalized, and often erratic endeavor. Over time, it grew into a large, professionally staffed, systematic, and bureaucratized machine run out of the White House; indeed presidents today employ a virtual law firm embedded in the White House that generally conducts thorough and diligent reviews of potential nominees.

Our review of the history identifies three distinct organizational modes of selecting nominees: no delegation, external delegation, and internal delegation. A simple framework explains the president's organizational preference. Critical are the president's interest in judicial policy, and the availability and location of specialized expertise in the form of a legal policy elite. The chapter documents the growth of professionalization and institutional sophistication in selection and vetting, with the result that modern nominees are all highly qualified individuals with predictable opinions on policy questions.[59]

Nominee Characteristics

Changes in presidential vetting produced dramatic changes in judicial selection, as the characteristics of Roosevelt's and Truman's nominees were extraordinarily different from those of Obama and Trump. Cronies and politicos were replaced by nickel-plated legal technicians. We explore these changes in the nominees in Chapters 4 and 9.

First, in Chapter 4, we systematically describe changes in the characteristics of every nominee between 1930 and 2020, as well as those of candidates the presidents considered but did not ultimately select—that is, the "short list." We first focus on the major considerations for nomination politics today: ideology, qualifications, diversity, and age. We then consider religion and geography. We show a significant transformation from 1930 to 2020 in both the characteristics among the men (and now women) who have been considered for the court and in the nominees themselves. All told, even as the justices have become more ideologically polarized in the modern period, on every other dimension (except diversity), the court has become more homogenous. Today, a justice is very likely to be: a former judge on the Courts of Appeals; in their mid-50s; from the East Coast; a graduate of Harvard, Yale, or Columbia; and Catholic or Jewish. Noticeably absent are practicing politicians (such as Earl Warren), who used to be common on the court. This narrowing affects both who sits on the Supreme Court and the manner in which they make decisions.

In contrast to the descriptive approach in Chapter 4, in Chapter 9 we develop and test a new theory of presidential selection of nominees, the "characteristics approach." The key idea is that a Supreme Court nominee is a bundle of characteristics, and it is those characteristics that presidents value rather than the nominee *per se*. We focus on four of the characteristics discussed in Chapter 4: ideology, policy reliability, race, and gender. At various times and to various degrees, presidents value these characteristics. But beyond a minimal level, none comes for free. If presidents desire characteristics,

they must "pay" for them by searching for nominees, vetting them carefully, and perhaps overcoming political opposition. For each characteristic, presidents must weigh benefits against costs. We then marshal a variety of empirical evidence in support of the characteristics theory, which results in two important findings. First, presidents care deeply about the characteristics of their nominees. Second, other changes in the process (such as the role of interest groups in helping vet potential nominees) mean the "cost" of obtaining these characteristics declined dramatically over the past decades, which helps explains the much more professionalized nominees that we regularly see today.

Interest Group Mobilization

As we noted above, interest groups emerge as a prime mover in the political transformation. Using an original dataset of newspaper reporting, Chapter 5 examines the growth and changes in interest group participation in the nomination process. First, we document a sizable increase in interest group activity over time. From 1930 to 1970, there was relatively little mobilization, with zero groups mobilizing in many nominations. After 1970, and in particular after Robert Bork's nomination in 1987, mobilization became routine for most nominees, with many groups participating in confirmation politics. Second, while past mobilization largely focused on opposition to a nominee, today groups mobilize about equally on both sides. Third, the calculus of interest groups appears to have changed significantly over time, with a shift from "opportunistic mobilization" based on a nominee's qualifications to more routine mobilization more heavily influenced by a nominee's ideological extremity. The data also reveal significant shifts in both the types of groups that routinely mobilize and the tactics they employ. Finally, the mobilizers appear to be quite polarized and many groups on the right are distant ideologically from those on the left (e.g. the Judicial Crisis Network and Demand Justice). In sum, our results illustrate how the interest group environment in Supreme Court nominations moved from a relatively sparse ecology characterized by occasional, generally opportunistic mobilization that focused on traditional forms of lobbying, to a dense ecology characterized by routine, intense, highly ideological, and very visible contention. The explosion of group participation in nominations accords perfectly with the general trend in American politics toward hyper-pluralism that we described earlier.[60]

Media Coverage

As nominations changed from usually sleepy affairs to high-stakes battles royale, media coverage of nominations changed accordingly. In Chapter 6, we examine these changes using original datasets of newspaper reporting (i.e. "hard news"), broadcast, and cable television coverage, as well as editorials, about every nominee from 1930 to 2020. We find that most nominations from 1930 to around 1960 received very little media attention. Hard news coverage of a nominee tended to focus on the nominee's background/biography, judicial philosophy, and economic issues, in accordance with the high salience national issues of the day. Occasionally, a scandal or controversy

attracted media attention. Newspaper editorials, providing the views of media elites, generally supported nominees and the president; outright opposition to nominees was rare. Importantly, these editorials focused on the qualifications of a nominee as the key evaluative criterion, rather than on ideological considerations.

Beginning in the 1960s, the court became more involved in social issues, and the national political agenda shifted toward such issues. Nominations increased in duration, and the volume of media coverage increased concomitantly. Public hearings before the Senate Judiciary Committee became standard for every nominee, providing focal points for each nomination. Hard news coverage shifted toward a focus on contentious social issues like civil rights, the death penalty, and (especially) abortion. When a nominee scandal occurred, the media significantly increased their coverage of that nominee. Elite media opinion increasingly polarized along ideological lines over time. The cumulative effect of these changes on media coverage has been huge. Some early nominations were practically invisible in the media. Today, coverage is always substantial and sometimes extraordinary.[61]

Presidents Going Public

In addition to presidential changes in the selection process, presidents have also become much more actively involved in the media fray. In the past, they would rarely "go public" over nominees. Today presidents routinely use the "bully pulpit" as part of the nomination campaign—we document this rise in Chapter 6, as well as the effect of going public on the amount of media coverage of a nomination.

Senate Hearings

In the early period, the Judiciary Committee sometimes skipped hearings altogether. When they were held, the hearings were usually brief and pro-forma. As nominations became media circuses, the hearings changed into theatrical platforms where senators grandstand for their constituents, posturing for the cameras by flinging constitutional law "gotcha" questions at the nominee, or heaping him or her with fulsome praise. Scandals add an additional fillip. We do not devote much time in the book to the hearings, as they have been extensively studied by previous scholars.[62] However, in Chapter 7, we examine whether the hearings seem to change public opinion about nominees.

Public Opinion

The broader changes in media coverage coincided with dramatic changes in public opinion on Supreme Court nominees. We examine these changes in public opinion in Chapters 7 and 10.

Chapter 7 provides the most comprehensive look at public opinion on Supreme Court nominees to date. Using a dataset of every available public poll between 1930 and 2020 that asked the public their views on a Supreme Court nominee, we show that polling on nominees did not become commonplace until the 1980s. When polling did exist, many people had no opinion, and those who did generally favored

nominees absent some scandal. We demonstrate that high-quality nominees and those that display path-breaking diversity traits receive a boost in public opinion. Most dramatically, though, in the twenty-first century public opinion on nominees has become sharply polarized by party, as citizens who identify with the president's party are likely to support a nominee and members of the opposite party are likely to oppose a nominee. This polarization bodes poorly for a return to the "normal" nomination politics of the mid-twentieth century. The chapter also examines so-called "campaign effects"—e.g. did hearings and scandals affect public opinion? Except for the Bork nomination, campaign effects were usually modest. However, scandal did have a palpable impact in the Kavanaugh and Thomas nominations, but this effect was mediated by citizens' party affiliation. All told, the chapter provides the most comprehensive look at public opinion on Supreme Court nominees to date.

In Chapter 10, we develop a theory of public opinion that seeks to disentangle policy evaluation from partisan evaluation. In particular, we create a new theoretical framework for studying individual level answers to the standard "approve"/"disapprove"/"don't know" question for assessing approval of nominees; the framework draws on modern choice theory and cognitive science and simultaneously incorporates information, evaluations, and an explicit theory of the survey response. We show that citizens are capable of evaluating the ideology of nominees. In turn, because of the increased extremity of nominees over time, ideological assessments play a larger role in the calculus of citizens than before. At the same time, partisan attachments have also increased, meaning both party and ideology play key roles in shaping public approval and disapproval of nominees. Finally, there is a substantial gap in utility for nominees between presidential co-partisans, on the one hand, and Independents and out-partisans on the other. The former are well served by presidential selection of ideologically extreme nominees, but the others much less so.

Senate Voting and Voter Electoral Response

The climax of the nomination process is the decision in the Senate, which we examine in Chapters 8 and 11.

Chapter 8 describes changes in Senate voting on nominees over time, back to 1789. First, we show that contentiousness in the Senate—by which we mean the levels of opposition to a nominee—has ebbed and flowed over time. However, the modern period has seen the peak in contentiousness. In earlier eras, confirmation votes were often voice votes or nearly unanimous roll call votes. Today, Senate votes on nominees are always roll call votes, with the voting nearly perfectly breaking down upon party lines. We also show that ideological distance between senators and the nominee is now is a much better predictor of a vote against confirmation than it used to be.

Chapter 11 seeks to explain these changes by linking senators' voting decisions to their constituents, using the logic of accountability. In the past, because most

nominations were not very visible, most voters either did not know of or care about most nominees. This, in turn, meant that senators did not have to worry much about their votes on nominees from an electoral perspective.[63] Over time, as nominations became more visible and contentious, more voters became informed about nominations, and their opinions began to break down more along party lines. We also show that recent confirmation votes cause changes in voter support of senators. In sum, the fact that public opinion on nominees is heavily polarized by party, combined with the fact that voters hold senators accountable for their confirmation votes, helps explain the dramatic shift to near party-line voting on nominees that we have witnessed this century.

Appointee Behavior on the Court

As we discussed above, the changes in the nomination politics do not end with confirmation. Perhaps the most important consequence is changes in the voting behavior of confirmed justices, which we examine in Chapter 12. We show that in the past justices selected on the basis of patronage or cronyism would often prove independent or at least erratic on the court. And, even if not erratic, voting in early periods was much more heterogeneous across "party lines." Today, justices are selected for ideological fealty, and their voting behavior is much more predictable. The result is a "judicial partisan sort," leading to ideologically polarized blocs on the court.[64]

We also connect the voting behavior of justices back to the changes in party platforms and presidential selection that we documented in earlier chapters. We show that justices selected with litmus tests in mind do deliver on those implicit guarantees, and that better-vetted nominees vote more reliably. We then show that as the court's composition veers left or right, case disposition and the content of majority opinions follow. As in the executive branch, "personnel is policy" on the Supreme Court.

All in all, changes in the selection process have produced a very different Supreme Court than the one that existed even 50 years ago.

Exits from the Court

Finally, when and why justices exit the court is potentially significant—whether justices deliberately time their exits to help a like-minded president choose their successors. The historical evidence for strategic departures is mixed at best.[65] In the book, we do not directly examine changes in retirements across time. However, in Chapter 13, we conduct simulations of the future ideological trajectory of the court that examine how a greater likelihood of strategic retirements going forward would affect future ideological trajectory of the court.

Summary

One can summarize these changes to nomination politics rather succinctly: a casual, amateur, and erratic process, accountable to no one, has become an organized, professionalized, predictable process that is accountable to highly engaged interests. Collectively, the changes summarized in Table 1.1 amount to a revolution in Supreme

Court appointment politics, a revolution that reflected the larger changes in American politics.

1.5 How to Read This Book

Making the Supreme Court has three parts. Part I, *What Happened*, details the history of Supreme Court appointments in the twentieth and early twenty-first centuries. Part II, *Why It Happened*, digs into the Pelican Problem by examining the mechanisms driving the history. Part III, *How It Matters, and What the Future Holds*, explores the consequences of appointment politics, another part of the Pelican Problem, as well as possible paths the court might take; it also examines potential reforms for the selection and retention of justices.

The result is a very long book that perhaps not everyone will want to read cover to cover (though we hope you do!). If not, we suggest five different ways to "read" it, depending on your interests.

1. **A Social Science History of Supreme Court Appointments (Chapters 2–8)** *What Happened* is a self-contained history of Supreme Court appointment politics from 1930 to 2020. Its seven chapters are fact-oriented but not a chronology. Rather, they follow the sequence laid out in Figure 1.13, moving from Setting the Stage, to Exit and Selection, to the Battle over the Information Environment, to Opinion Formation, and finally to Decision in the Senate. These chapters document the unlikely transformation of a sleepy, low-conflict process into the site for some of the biggest brawls in contemporary American politics.
2. **A Study of Political Parties and Interest Groups (Chapters 2, 5, and 12)** Interest groups emerge as a prime mover in the transformation of appointment politics. Chapters 2 and 5 develop three themes: an explosion in the number of groups, big changes in who they were, and shifts in what they did. Chapter 5 focuses on their participation in nomination campaigns. Chapter 2 traces their impact on the political parties, judicial agendas, which (we argue) become the judicial agendas of presidents. Here, partisan asymmetry stands out. Finally, Chapter 12 shows how the changes in the party agendas led to more reliable justices being selected—in particular, justices who would carry out the parties' new "litmus tests" for nominees.
3. **A Study of Presidents, Politicization, and Institutional Design (Chapters 3, 4, and 9)** Modern presidents try to manage federal administrative agencies by filling the agencies' top ranks with team-playing political appointees, a technique political scientists call "politicization."[66] Chapters 3, 4, and 9 show how presidents brought politicization to the Supreme Court. Chapter 9 explores the presidential logic of judicial politicization; it develops and tests a new theory. Pursuing its logic, presidents re-organized their process for selecting

nominees (Chapter 3). They also dramatically altered whom they considered and the type of person they chose (Chapter 4).

4. **A Study of Public Opinion and Democratic Accountability (Chapters 6, 7, 8, 10, and 11)** Supreme Court appointments now involve a full-throated political campaign waged over every vacancy, albeit an unusual one. Rather than two candidates competing for the ballot of a swing voter, two sides compete for public opinion and the votes of senators—votes for which citizens may (and sometimes do) hold their representatives accountable. While nominations differ from typical campaigns, many of the same fundamental questions about public opinion and democratic accountability still arise. Chapters 6 (media coverage of nominees), 7 and 10 (public opinion), and 8 and 11 (senators' voting decisions and electoral accountability) provide the first historical analysis of these unique political campaigns, as well as the nature of public opinion on nominees and its consequences for senators.
5. **A Study of the Supreme Court (Chapters 4, 12–14)** *Making the Supreme Court* is about appointment politics, but inevitably about the Supreme Court too. Chapters 4, 12, and 13 study how appointment politics altered the composition of the court, how the court's composition affected its decisions, and what the future may hold for the court. Finally, Chapter 14 discusses how Americans should evaluate the tradeoffs in reforming the Founders' 230-year-old selection and retention system for Supreme Court justices.

We offer a final word about "how to read this book." In 1959, British scientist and novelist C. P. Snow penned a short book about the mutual incomprehension between "the two cultures" of natural science and the humanities. Snow's two cultures have come to the social sciences as well, and with a vengeance. In *Making the Supreme Court*, we try to bridge the chasm between social scientists and sophisticated generalists in two ways. First, the history in Part I is accessible to anyone with a tolerance for graphs and data displays. Part I is serious social science history but, we hope, readily comprehensible to the curious. Ultimately, however, the deep "why" and "so what" questions of Parts II and III demand heavier artillery than simple graphs. So there we deploy the game theory, structural estimation, instrumental variables, simulations, and other methods demanded by some very tough nuts to crack. We refer readers interested in the more technical details to the online Appendix (and sometimes to our published academic journal articles). In addition, citations to and discussion of relevant studies and literatures mainly appear in the notes (as well as in the Appendix). Nonetheless, some of what remains will challenge even sophisticated readers. We hope the importance of the questions, and the interest of the answers, warrant the effort.

Finally, in addition to what you read in these pages, we have created a website for the book—`www.makingthesupremecourt.com`—that contains the supplemental Appendix, which reports additional analyses and discussions in several chapters. The website also houses all the data used in the book, including:[67]

- Data on party and presidential interest in the Court, including the use of "litmus tests" for Supreme Court nominees (Chapter 2).
- Data on the type of selection process employed by the president (Chapter 3).
- Data on the background characteristics of Supreme Court nominees, and those who made the president's "short list" (Chapters 4 and 9).
- Data on interest group participation in Supreme Court confirmation battles (Chapters 5).
- Data on media coverage of Supreme Court nominees (Chapter 6).
- Data on public opinion of nominees (Chapters 7, 10, and 11).
- Data on Senate roll call voting on Supreme Court nominees (Chapters 8 and 11).
- Data on Supreme Court decision making as a function of changes in appointment politics (Chapter 12).
- Simulated data on the future ideological composition of the court (Chapters 13 and 14).

We hope this data will prove useful to scholars of Supreme Court nominations for years to come.

Notes

Chapter 1

1. See Shesol (2011) for an excellent history of the run-up to the court packing plan and its defeat.
2. See Robertson (1994).
3. Roosevelt would go on to make one more appointment, in 1943. His total of nine appointments was exceeded only by President George Washington, who appointed the initial justices to the court in 1789.
4. See Everett and Thrush (2016).
5. With respect to Garland's ideology, a statistical analysis by Clark, Gordon, and Giles (2016) placed him squarely in the ideological center of the D.C. circuit. See Baker and Zeleny (2010) and Ferraro (2010) on Obama's consideration of Garland in 2010.
6. See Rutkus and Bearden (2012) for a comprehensive report on Senate actions on Supreme Court nominees from 1789 to 2012. See Chafetz (2017*b*) for a qualitative historical account of how to think about "precedent" in the Senate's treatment of nominees; Chafetz also nicely places the Senate's exercise of its advice and consent powers over time within the context of legislative obstructionism in general.
7. Rappeport and Savage (2016).
8. The 2013 nuclear option also lowered the voting threshold to a simple majority for all executive appointments (e.g. cabinet appointments), other than Supreme Court justices. Importantly, manipulating Senate rules over nominations for partisan gains is not a recent innovation. Binder and Maltzman (2009, ch. 2) present evidence that the institution of "blue slips" in the Senate—through which senators can impede or even block the confirmation of nominees from their home states—came about in 1913 as a means, in part, for Senate Democrats to streamline their agendas.
9. See Cottrell and Shipan (2016). In Chapter 13, we conduct a simulation analysis to assess how much Trump's victory in 2016 affected the long-run composition of the court.
10. As we discuss in Chapter 8, the contentiousness of Supreme Court nominations has ebbed and flowed throughout American history; the middle of the nineteenth century, for example, saw many nominees either rejected or hotly debated. We show, however, that the systematic level of rancor and contention over Supreme Court nominees, as evidenced by the Garland affair, has now reached an unprecedented level.
11. The judicial preferences involved in the novel are actually historically illuminating. One of the justices targeted (Abraham Rosenberg) is a liberal lion who closely resembles Justice William Brennan, who had left the real-life Supreme Court in 1990; today, we would expect any liberal justice to be broadly pro-environment. The second targeted justice (Glenn Jensen) was thought to be a "strict constructionist" when he was appointed by a Republican president, but turned out to be quite idiosyncratic in his ideology, taking the liberal position in many areas of the law—including on the environment—and conservative positions in others. Such a justice was certainly plausible in the early

1990s; indeed, Jensen is likely modeled after Justice David Souter, who took the bench in 1990. But, as we document in several chapters in this book, real-life presidents have taken concrete steps to ensure that modern-day justices do not exhibit such ideological flexibility in their voting patterns. More recently, a Supreme Court nominee plays a farcical, if somewhat secondary, role in the 2021 comedy *Don't Look Up*. In the movie, the president (played by Meryl Streep) is caught up in a sex scandal with her nominee, a small-town sherriff with no legal experience. To distract from the scandal, the president decides to use nuclear weapons to destroy an incoming comet, whose collision with Earth would essentially end life on Earth. Suffice it to say that Streep's character is miles away from the legal genius of *The Pelican Brief*. But, like with Justice Jensen, *Don't Look Up*'s sherriff would have zero chance of being confirmed by the Senate today, even if a hapless president attempted to appoint such a nominee.

12. We expand upon the theoretical nuances of move-the-median theory and its empirical shortcomings in Chapter 9.
13. In particular, Cottrell, Shipan, and Anderson (2019) find that the location of the median justice (in terms of the court's voting behavior) moves in the direction of the president even following nominations where the president should have been constrained in his ability to move the median, given the alignment of the president, the median senator, and the status quo on the court. In Chapter 12, we show the predictive effect of the location of the median justice on the court's dispositions and majority opinions diminishes once one accounts for the ideological structure of the court in a more nuanced fashion.
14. There are numerous qualitative accounts of Supreme Court nominations over time. These range from a singular focus on particular nominees (e.g. Danelski 1964, Todd 1964) to sweeping historical coverage (Abraham 2008, Maltese 1995, Wittes 2009). In addition, there exist several excellent journalistic or "insider" accounts of particular eras of nominations or particular nominees. Greenburg (2007), for example, provides a wealth of useful background information on Republican nominees in the 1980s, 1990s, and 2000s. John Dean's (2001) play-by-play account of Richard Nixon's selection of William Rehnquist in 1971 (and Dean's role in it) is riveting. So too is Gitenstein's 1992 retelling of Robert Bork's nomination in 1987, based on his experience as chief counsel of the Senate Judiciary Committee, then chaired by Joe Biden. Finally, Mayer and Abramson (1995) offer an intensive study of Clarence Thomas' controversial nomination and confirmation.
15. On the role of war in transforming societies, see Saldin (2010) and Morris (2014).
16. For that version, see McCarty, Poole, and Rosenthal (2006) and Hacker and Pierson (2020).
17. In Chapter 2, we show that the Democratic Party has been more likely to emphasize increasing the diversity of the federal judiciary relative to the Republican Party. In Chapter 9, we show that this asymmetric interest in diversity produced a more diverse pool of judges from which Democratic presidents could draw their Supreme Court nominees, compared to Republican presidents. In Chapter 8, we show that the Supreme Court's landmark 1954 decision in *Brown v. Board of Education* injected racial considerations into nomination politics through the end of the 1960s, as seen in Southern Democrats' opposition to several nominees in the following two decades. Finally, Chapter 5 details the modern influx of identity politics groups to the cast of groups that mobilize around nominations.
18. The data come from obamawhitehouse.archives.gov/omb/budget/Historicals. As Clark (2019, 153) notes, the beginning of the twentieth century marked the period right after

the national economy was transformed from local and agrarian-based to a unified, manufacturing-intensive economy.

19. The code is revised every six years—page counts are for the titles in the Code, excluding supplements and indices.
20. Leuchtenburg (1996).
21. As Mashaw (1994) and Kalen (2015) note, the mid-twentieth century witnessed a shift from agencies making policy through administrative adjudication to rulemaking. The Federal Register only captures the latter, so just looking at changes in its size may overstate the growth of the administrative state. Nevertheless, its overall growth since the 1970s is undeniable.
22. Shapiro (1988).
23. Epp (1998).
24. See Staszak (2014) and Burbank and Farhang (2017). Also, a third reason bears brief mention. During the late twentieth century, Congress federalized parts of criminal law in order to demonstrate toughness in the so-called "war on drugs," which also served to increase federal caseloads (Alexander 2020).
25. The data comes from the Federal Judicial Center: www.fjc.gov/history/courts/caseloads-us-courts-appeals-1892-2017.
26. The data comes from Whittington (2022).
27. Throughout the book, we summarize time trends using such lines, which are called "loess lines" (short for "locally weighted smoothing"); these lines can generally be interpreted as moving averages. In the interest of presentational clarity, we usually do not display confidence intervals for these loess lines, but readers should keep in mind that there is uncertainty in the underlying trends.
28. Figure 1.6 only includes data for cases in which the court reviewed the constitutionality of federal statutes. However, through its exercise of vertical judicial review, the court has struck down many more state laws (Casper 1976, Lindquist and Corley 2013, Kastellec 2018). Including these cases (which are harder to measure) would only further highlight the court's increased power.
29. The full quotation appears in Herring (1929, 17). We borrow the verb "overrun" from Odegard (1929).
30. See Schlozman and Tierney (1986) and Schlozman, Verba, and Brady (2012).
31. The term "hyper-pluralism" is most commonly used in the political theory literature on democracy to describe a situation in which a sufficient number of comprehensive conceptions of the common good exist such that broad agreement is very difficult (see e.g. Ferrara 2014). The term has sporadically been employed in the interest group literature (see e.g. Berkman 2001, Norris 2002). Diven (2006) offers perhaps the most straightforward definition: "The theory of hyper-pluralism suggests that a large number of competing interests, and efforts by policy makers to satisfy those interests, result in complicated, piecemeal policy making that is neither efficient nor effective in achieving its multiple objectives."
32. This argument has roots in classic political science, e.g. Schattschneider (1935) ("a new policy creates a new politics") and particularly David Truman's (1951) "disturbance theory" of interest group formation. Drutman (2015) has some similarities. More broadly, our argument accords with analyses of "policy feedback" (e.g. Pierson 1993), although that literature often stresses changes in the attitudes of mass publics rather than growth

in interest groups and lobbyists (Mettler 2005). It also resonates with related arguments about policy feedback advanced by public choice-oriented scholars (e.g. Higgs 1991). We return to the theme of policy feedback in the concluding chapter.

33. These counts are based on the data collected by Box-Steffensmeier and Christenson (2012). Compared to the counts of groups, in many ways the data on judicial lobbying are even better because we can rely on detailed Supreme Court records rather than old commercial directories.
34. For example, on state regulation, see Hertel-Fernandez's (2019) study of the influence of the American Legislative Exchange Council (ALEC). On federal regulations, see Yackee (2006). On the influence of lobbying on judicial outcomes, see Collins, Jr., Corley, and Hamner (2015).
35. In Chapter 8, we describe in greater detail how to think about the concept of ideology with respect to nomination politics and what NOMINATE scores are capturing.
36. Shor and McCarty (2011).
37. DiMaggio, Evans, and Bryson (1996).
38. As we discuss in detail in Chapter 10, party polarization can arise both from politicians becoming more extreme or from the parties being better sorted; it is difficult to disentangle the two. In addition, in the middle of the twentieth century a lot of extremity fell on the "second dimension" of American politics, which was generally characterized by differences over race, which we discuss in Chapter 8—see also Poole and Rosenthal (1997).
39. Mayhew (2014).
40. Boulay and DiGaetano (1985).
41. See Wilson (1962) and McGirr (2002).
42. See Schickler (2016) and Carr, Gamm, and Phillips (2016).
43. Hall (2019).
44. Calvert (1985) and Wittman (1983) explain the underlying logic.
45. Shor and McCarty (2011).
46. On the long history of one-party Republican dominance of Kansas, see Flentje and Aistrup (2010). On the centrist Republican backlash to "the Kansas experiment"—an extreme supply-side tax cut that resulted in slashed expenditures on roads and schools—see Berman (2017).
47. At any given point, the probability is higher for any type of non-unified government; e.g. a Republican president and a Democratic House. We focus just on the Senate and presidency since the House has no role in confirmations.
48. See Mayhew (2002).
49. See Alesina and Rosenthal (1995) and Rodden (2019).
50. See Wlezien (1995) and Stimson (2018).
51. Some contemporary studies, using different data and techniques, find more "constraint"—see e.g. Fowler et al. (2022).
52. Fowler et al. (2022).
53. The question wording is: "We hear a lot of talk these days about liberals and conservatives. Here is a seven-point scale on which the political views that people might hold are arranged from extremely liberal to extremely conservative."
54. See Levendusky (2009) and additionally Fiorina, Abrams, and Pope (2006). Note, however, that political scientists are not unanimous about conversion versus sorting; see e.g. Abramowitz (2010).

55. See Iyengar and Westwood (2015).
56. As discussed in Mason (2018).
57. This is one of the major points of David Mayhew's classic 1974 book, *Congress: The Electoral Connection*.
58. As noted above, our emphasis on this change stands out from much of the literature on Supreme Court nominations. For instance, Epstein and Segal's (2005) *Advice and Consent: The Politics of Judicial Appointments* provides a comprehensive account of selection and confirmation at all levels of the federal judiciary. However, their sketch of the process (on p. 23) only posits a very narrow role for party elites and interest groups (through participation in the Senate Judiciary Committee hearings), whereas we argue that the influence of interest groups and party elites is both manifest across the process and creates feedback effects that affect both the upstream and downstream decisions of other actors.
59. From the perspective of presidential politics, Yalof (2001) provides a canonical account of how presidents from Truman to Clinton organized and undertook their selections of Supreme Court nominees. Nemacheck (2008) offers a key innovation by collecting data on individuals on the "short list" for most vacancies between 1930 and 2005. Our chapters on presidential selection and the attributes of the nominees build directly off these important studies.
60. As we discuss in more detail in Chapter 5, our arguments here align with and build upon excellent work on the role of interest groups in lower court confirmations and nominations, including Bell (2002), Scherer, Bartels, and Steigerwalt (2008), Steigerwalt (2010), and Steigerwalt, Vining, Jr., and Stricko (2013).
61. In many ways our descriptive account of media coverage of nominations dovetails quite well with the thesis in Davis' (2017) *Supreme Democracy: The End of Elitism in Supreme Court Nominations*. Davis argues that in recent decades Supreme Court nominations have transformed from "insider"-driven affairs in which presidents and senators acted mainly on their own to what are now highly visible affairs in which many different actors, including the public, play a role. However, moving beyond just the coverage itself, whereas Davis argues that this transformation represents the end of elitism, we see a substantial role in modern nomination politics for organized interests—beyond even what a cursory glance at nominations today would suggest. In our telling, the elitism of nomination politics is certainly different than it was in the early part of the twentieth century, but it has by no means disappeared.
62. Both Collins and Ringhand (2013) and Farganis and Wedeking (2014) offer excellent analyses of changes over time in the Senate Judiciary Committee's hearings on nominees. Perhaps because they are both visible and offer a range of potential data based on the back-and-forth between nominees and senators, the hearings have received an outsized degree of attention from political scientists. In addition to these books, there are also a number of published articles: see e.g. Rees III (1982), Guliuzza III, Reagan, and Barrett (1994),Williams and Baum (2006), Shapiro (2012), and Chen and Bryan (2018). Also, for more sympathetic views of the value of the hearings, see Schoenherr, Lane, and Armaly (2020) and Chafetz (2020). In Chapter 7, we show that for most nominees, the hearings have little effect on aggregate public opinion, suggesting perhaps that the hearings are over-studied relative to their importance.
63. Our arguments here about changes in Senate voting align nicely with the theory and evidence presented in Sarah Binder and Forrest Maltzman's (2009) *Advice and Dissent*.

Their book, however, focuses exclusively on appointments and confirmations to the lower federal courts, and not the Supreme Court.

64. Our arguments and evidence here dovetail nicely with that of Devins and Baum's (2019). The core argument of their book is that the current partisan polarization on the court—i.e. the fact that Democratic and Republican appointees have sorted into reliable liberal and conservative blocs—is driven by the larger polarization among elites. In broad measure we agree, and present evidence to this effect in several chapters. But whereas Devins and Baum emphasize a social-psychological explanation in which the justices' world views are shaped by interactions with like-minded elites, our posited causal mechanisms throughout the book are nearly uniformly drawn from rational choice institutionalism.
65. We discuss the academic literature on this question in detail in Chapter 13.
66. See e.g. Moe (1985) and Lewis (2008).
67. Some of these data were collected for our published papers on Supreme Court nominations. In nearly every case, however, we have backdated the relevant data to 1930 or updated the relevant data to 2020, or both. While much of our data is original, we also build on existing data collection efforts by many scholars and institutions, as we note in the acknowledgments section. The website also contains complete replication code for all the analyses that appear in the book.