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INTEREST GROUPS AND SUPREME COURT APPOINTMENTS

Martin Shapiro*

The role of interest groups in Supreme Court appointments could be considered with one of two purposes in mind: to illuminate our understanding of interest groups, or to increase our understanding of the Court and its place in American politics. These two purposes lead in quite different directions. For instance, suppose we were to discover that interest groups had tried, but utterly failed, to influence appointments, and yet found they claimed credit for influencing such appointments. If those claims were credited by the contributors to the groups, we might conclude that credit claiming for Supreme Court appointments was an important aspect of group maintenance strategies. While this finding would be important for the study of interest groups, it would add little from the standpoint of studying the Court. For this second purpose, once we found that groups had no influence on the appointments, our interest in them would rapidly decline. At most we would remain interested in the data only to the extent of seeking to discover whether the false claims of influence were sufficiently widely believed to effect the Court's reputation for political neutrality. Indeed, it is my contention that interest groups play a small role in the appointment process and ought not be of great interest to students of the Supreme Court.

Two caveats are in order. First, any claim to scientific generalization about Supreme Court appointments is highly dubious. The total number of these events is very small, and the total number within any reasonably fixed historical and political context is tiny. Moreover, the sequencing of Presidential nominations to the Court is often a major determinant of outcome and, for that reason, each nomination is unique. That a Dixiecrat-Republican coalition defeated Justice Fortas's nomination as Chief Justice immediately before a Republican President nominated a Southerner to the Court accounts for much of the response of the liberal Democratic senators who successfully fought Clement Haynsworth's appointment. This unique set of circumstances defeats one of the few generalizations that might otherwise be made about the appointments process—that appointments get through the Senate easily when it is early in a President's term. Special circumstances break through gen-

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eral rules so repeatedly in appointments to the Supreme Court that nothing much of science may remain.

The second caveat reinforces the first. Theories of critical elections, no matter how under-specified, teach us that American politics undergoes major changes from time to time. Clearly, American politics has gone through such a change, or several of them, during the post-World War II period, although no one can agree when or how many changes there were or whether they count as a critical realignment. What is crucial for our purposes, however, is clear enough. Before and immediately after World War II, Democrats controlled both the Presidency and Congress. Now, Republicans control the Presidency well over half the time, never win the House, and only occasionally control the Senate. During a portion of the post-World War II period, a Republican/conservative-Democrat coalition controlled the Senate to some degree. Such cross-party control is only partial and always problematic. Moreover, even that coalition has now largely disappeared and the most typical situation is a relatively conservative Republican President facing a relatively liberal Democratic Senate. This structural shift narrows the stock of relevant appointment events to a precious few. It is not at all clear that the experience of any President previous to Eisenhower can be employed in building currently applicable generalizations. Even an attempt to build two theories, one for post-war Republican Presidents facing Democratic Senates and the other for post-war Presidents facing a Senate of their own party, founders, because some post-war Democratic Senates had working Republican-Dixiecrat coalitions while others did not.

This study limits itself to the role of interest groups in the Senate confirmation proceedings. The appointment process for Supreme Court Justices may be divided roughly into three interactive stages: preparing a list of prospects; Presidential choice; and Senate confirmation. Preparing a list is something close to a non-event. Lots of names float about; nearly anybody can suggest nearly anybody, including themselves. It is difficult to measure success at this stage. Virtually any interest group that has any but the most overtly hostile relationship with the Administration will be listened to politically, and just about any name can go on the “long list” imagined to exist somewhere. The President’s decision is a clear and definite event. Like most exercises of Presidential discretion, however, it is an individualized, personal decision. It would be difficult to build generalizations that encompass individuals of such differing characters, purposes, and situations. Senate confirmation is also an event, and the Senate is easier to study than is the thought process of the President.

The political theory of interest groups has made some advances since the construction of the group theory of politics by Bentley, Truman, Latham, and others. Early group theory tended to depict government institutions as little more than arenas for group struggle, and government officials as little more than respondents to interest group
Interest Groups

pressure. It later became clear that government actors responded to internal institutional norms and exercised considerable personal discretion. Weak as party discipline often was, party rather than interest group affiliation was typically the best, if far from a perfect, predictor of legislative and executive branch behavior. The key question became, just how much pressure can interest groups apply to members of Congress, bureaucrats, and political employees of the executive branch? Most interest groups, even those such as the labor unions which claim large memberships, could not deliver many votes at election time. Few citizens took direct voting orders from particular groups. Few consciously identified their own fate with the issue positions of particular organized groups, and few were very aware of candidates’ positions on those issues when the moment came to enter the voting booth. Moreover, most business people and other members and supporters of organized groups that employed lobbyists were not keen on lobbying activity. Many lobbyists seemed to spend more time lobbying their clients for support than lobbying Congress and the Executive. Studies showed that political officials resented pressure from groups that opposed their personal policy preferences and appreciated support from friendly groups.

This greater awareness of the independence of government actors has led to exchange theories of interest group influence. To wield influence over policy choices by government actors, groups must have something to give those actors in exchange. Theories for exchanges between groups and bureaucrats have been worked out in some detail by Niskanen and Chubb. Our concern is with congressional behavior. Attempts to work out exchange models for congressional behavior typically specify an exchange of campaign contributions for votes on proposed legislation of interest to groups making the contributions. Such theories do not posit a literal exchange by explicit agreement, but a tacit one based on the parties’ expectations. The rationale flows from the earlier attacks on group theory. Members of Congress want to be re-elected. Interest groups may not be able to deliver votes, but they can provide campaign dollars that produce votes. At the same time, interest groups want favorable government policies. Congressional votes deliver such policies. A basis for an exchange exists and constitutes the “pressure” of pressure groups. These theories are fueled by the rise of political action committees in the wake of the Campaign Financing Act and by the rapidly escalating amounts spent on congressional campaigns.

Despite this basis for exchange behavior, any direct relationship be-

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1 W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1974).
tween group contributions and congressional voting is very difficult to discern. Indeed, the relationship between money and elections is itself highly problematic. Incumbents enjoy a great advantage in election prospects, and they also receive far larger campaign contributions than nonincumbents. Thus the chicken and egg problem arises: do incumbents win because they get more money or do they get more money because people prefer to give money to prospective winners?

To deal with the issue of incumbents and campaign financing, Jacobson and Kernell have developed a theory of campaign entrepreneurship. According to their theory, most incumbents are invulnerable because of name recognition; a record of services to individual constituents; the reluctance of a district to lose the influence that seniority exercises in Congress by electing a new member; the proclivity of contributors to back incumbents; the reluctance of parties to replace incumbents with new candidates; and the prevalence of safe seats in which winning the nomination of one party is tantamount to winning the general election. Incumbents are likely to be defeated only in districts where neither party normally expects more than sixty-five percent of the vote; where reapportionment has rendered a safe seat unsafe; or where the incumbent suffers some special vulnerability such as extreme age or scandal. Absent such vulnerability, neither money nor attractive candidates will enter the primary and general election races against the incumbent. Interest groups and individuals with money to spend on congressional elections will invest in those districts where incumbents are vulnerable. Scenting some chance of winning, persons who make attractive alternative candidates will come forward to challenge the incumbents in those districts.

The incumbent in this scenario is rather like the member of the herd shadowed by wolves. As long as she appears a normal, invulnerable animal like most of the others, no attack will occur. Signs of weakness bring on the wolves. Members of Congress are far less interested in voting for or against a bill because their vote will bring in campaign funds than they are in voting in a way that preserves their invulnerability— which in turn will bring the campaign funds they need and keep the wolves from their door.

This theory helps to explain why the only direct effect of contributions on congressional voting occurs on bills of great complexity and low public visibility, where there is a great disparity between the amounts of contributions made by the opposing interests. Only in such circum-

4 Schroedel, Campaign Contributions and Legislative Outcomes, 39 WEST. POL. Q. 371 (1986).
7 Schroedel, supra note 4.
stances does a direct exchange of campaign contributions for congressional votes seem possible. A member of Congress is likely to make a direct exchange of vote for contribution only when she does not anticipate that a particular vote can possibly increase her vulnerability in the next election. In any circumstance where vulnerability might increase, the gain of the campaign contribution is outweighed by the losses that increased vulnerability entail, including the losses in other campaign contributions.

The question remains: what pressure can pressure groups bring to bear on Congress if they cannot deliver votes nor assure that campaign contributions will not be offset by increases in incumbent vulnerability? This question is especially acute in the area we are examining: the votes of Senate Judiciary Committee members and the Senate as a whole on Supreme Court appointments. The Judiciary Committee is high in the Senate committee pecking order. Most of its members have seniority, and are firmly entrenched incumbents who have no trouble filling their campaign coffers (although one or more of them may occasionally be vulnerable because of advanced age or changes in voting demographics). The Supreme Court nominations that inspire substantial interest group activity are likely to be highly visible ones. At the same time, few nominations have the directly measurable dollars and cents value to particular groups with money to spend for campaigns that many proposed statutory provisions with low visibility do. There would appear to be few offerors and few takers of an exchange of campaign contributions for committee votes in Court appointment situations.

In light of the difficulties of exchange theories, it might be well to return to a simple vision of interest groups, one that takes them almost at face value. Interest groups say they represent the public or some segment of it. Members of Congress may take the level and diversity of interest group activity as a surrogate measure of voter arousal and sentiment. Of course, such a measure must be heavily discounted. Orchestrated letter writing campaigns, inflated claims of numbers represented and votes deliverable, and other devices lobbyists use to exaggerate their constituencies are well known. On the other hand, interest group activity creates a multiplier effect in public sentiment. Such activity often increases the saliency of issues which might otherwise be of very low visibility. The claim to represent voter interest may be self-fulfilling, because interest group activity will create enough visibility to get voters interested. Of course, from any given interest group’s point of view, the wrong voters may get interested, that is, those who hold opposing views to that of the group. Interest group activity is probably a better surrogate of the overall level of voter attention than of voter support for one position or another.

Why should the incumbent who appears invulnerable care about the level and direction of voter sentiment? The power of incumbency is not
simply a product of winning with the incumbent designation next to the name on the ballot; incumbents use the opportunities provided by their office to actively increase their electoral strength. With large voting swings between elections, for instance, a safe seat is now one where the incumbent wins not fifty-five or sixty, but sixty-five or seventy percent of the vote. Incumbents are constantly on the lookout for issues on which they can take positions that will attract higher proportions of their total constituencies. While the voters may never know, and certainly will not remember, most of their representatives' votes on particular legislative measures, they will have a general impression of where the incumbent stands on major issues. Additionally, part of the incumbency advantage is that incumbents are known, and challengers are unknown. Incumbents are known in part because they can use their office to take stands that will be reported in the media. While focusing on incumbent invulnerability may sometimes create the impression that the incumbent’s principal concern is to avoid acting in such a way as to inspire the entry of opposing money and candidates, there is also a positive side to incumbency, building and maintaining support. Where incumbents see high levels of group activity, they are identifying issue areas that may become of sufficient public concern to render stands noticeable to their constituents. They certainly use interest group lineups as some indication of which stand might improve their support levels at home.

We must look more closely at Supreme Court appointments as occasions on which senators may take stands that might increase their incumbency advantages to apply this model of interest group activity. To do so, we must take into account the peculiar and ambivalent attitudes of Americans toward the Court itself and toward appointments to it. Americans see the Supreme Court as a part of government, and thus of politics, and yet see it as an independent Court standing above politics. They view the appointment process as both political and nonpolitical. In making nominations, the President is seen as a partisan political leader entitled to take party ties, personal loyalty, campaign exigencies, regional and interest group loyalties, and political ideology into account in choosing nominees. At the same time, the President is supposed to choose highly qualified persons—good lawyers with judicial temperament and the highest moral standards—to be Justices. The two attitudes are typically combined in the often expressed senatorial view that the President is entitled to his nominee unless, of course, the nominee is unqualified.

The view of the appointment process as a politically partisan one, and the view of it as a search for those highly qualified to join an independent judiciary, have had alternating periods of dominance in Amer-

Interest groups may play some role in the confirmation process precisely because of this ambivalence about politics. When a nomination comes to be defined as a political one, the political vision will dominate. When a nomination is not defined as political, the independence vision will dominate and the President will be allowed his appointment unless some important moral failing is discovered in the nominee. The domination of one mode does not eliminate entirely the influence of the other. There are, of course, some cases in between that will be noted later.

A number of factors may contribute to defining a nomination as political. For example, if the nomination comes very late in the President's term, so that its defeat might leave appointment to the next President, an element of politics enters the process no matter how routine the nomination. This element is a two-edged sword. The party not holding the Presidency is automatically alerted to a political opportunity, but because the independence vision is always present, the challenging party must not appear to be blocking an appointment merely to shift it over to the next President who may be its own. On the other hand, a President will be aware of the greater political charge of a nomination late in the term and must take this factor into account when deciding whom to nominate. This factor is, of course, purely structural and interest groups are irrelevant to it.

A second structural factor is party control—whether the Senate is controlled by the same party as the Presidency, and whether the Judiciary Committee is controlled by senators loyal to the President. Where the same party controls both Presidency and Senate, few nominations will be defined as political. Fellow partisans will define any one of their number as a distinguished lawyer rather than a suspect politician. It is the other party who plays politics rather than dedicating itself to public service. Exceptions arise when the Senate is nominally of the same party as the President but is actually controlled or heavily influenced by a coalition of senators of a political ideology widely differing from that of the President. Such a conservative coalition dominated the Senate during parts of the Roosevelt and Truman Administrations and defeated the
Fortas nomination to Chief Justice in the Johnson Administration. Under such conditions, a nomination from a wing of the President’s party that is most at ideological variance with the coalition may well be defined as political. It is here that interest groups may play a part; the level of their activity informs senators that the appointment is viewed by their constituents as an attack by the President on the anti-Presidential coalition.

The relationship between the nominee and the President is a third factor contributing to the definition of a nomination as political. If the nominee has been a close political collaborator of the President, particularly in matters of a partisan and controversial nature, that fact signals a political nomination. It is not cronyism which is the issue, but the perceived threat to judicial independence in a President putting “his person” on the Court to do the President’s bidding. This perception hung over Johnson’s attempt to elevate Fortas to Chief Justice. Interest groups play little part in triggering this perception.

The most important factor in triggering the political vision is the ideological stance of the nominee. Precisely because politics is seen by Americans as a legitimate aspect of the selection of Justices, the fact that a nominee has been a prominent actor in party affairs does not necessarily or even frequently trigger a political response. It will not do so when the Senate is dominated by the same political forces as the Presidency and the nominee. Even when the Senate is of one persuasion and the President and nominee are of another, the nomination may fit in the non-disputatious, independence mode. Traditionally, when the nominee was a senator of the President’s party this was most true, but it was also true when the nominee was a prominent elected politician or cabinet member of the President’s party. In the absence of aggravating factors, such nominations are considered part of the legitimately political aspect of the appointment process and do not inspire political controversy. It is a paradox arising from American ambivalence about the Court that the most open and routine patronage appointments to the Supreme Court are not treated as political.

It is not, therefore, strong party identification that turns a particular nomination into a political matter, but the identification of the nominee with a distinctly conservative or liberal ideology. This identification may derive from previous political activities, the nominee’s writings, judicial record, or the kind of clients that the nominee has served in law practice. In general, a Republican President may appoint a Republican Justice even when the Senate is controlled by Democrats, but Democratic senators may redefine the situation if the nominee is far enough to the right in the Republican Party or has made a career as a “railroad lawyer.”

In speaking of the political mode we have really been dealing with partisan party politics. Yet today we live in an era of single issue politics. The nomination of someone strongly identified with a highly partisan
position on one of the single issues of the day, particularly one in which the Court plays a major rule, may for that reason come to be defined as political. In examining the political versus independent judiciary modes, we have been looking at pictures in the heads of senators—whether they perceive the situation as one in which the nominee is entitled to her opinions and the President to appoint whom he pleases, or one in which it is legitimate to oppose candidates because they are too extreme.

How does this rather abstract analysis tie to the “electoral connections” of the senators? A nomination will appear political if active or passive support will put the senator at electoral risk. Risk situations are easiest to see in single issue politics. If the nominee is an extreme partisan on a single issue, support of the nomination will put senators whose constituencies contain a public on the other side of that issue at risk. Senators whose constituencies contain major forces on both sides of an issue are under strong pressure to define the nomination as in the independence mode. If the nominee has enthusiastically served interests which are very conservative or liberal, strongly identified with one party or the other, or inimical to the citizens of a given state, then support for the nomination will put some senators at risk. Senators from Montana must define as political the nomination to the Court of the chief counsel of Anaconda Copper. Passive support for a standard Democratic nominee does not put a Republican senator at risk, however, because that senator’s constituents are ambivalent about whether Supreme Court nominations ought to be treated politically.

The other side of the coin from avoiding risk is taking a stand to improve incumbency support. Supreme Court nominations are ideal stance taking occasions. A senator can be for or against a nominee without having to pay the piper in the next appropriations bill or creating any direct and immediate dollar costs to any constituents. A stance against a nominee may enforce incumbency advantage in those few instances when a segment of the state’s voters are both interested in a single issue and overwhelmingly on one side, the issue comes before the Supreme Court, and the voting alignment on the Court is such that the nomination can be made salient to the public. Opportunity for stance taking also arises when a nominee is identified as a conservative Republican or a liberal Democrat and the state’s voters are overwhelmingly at the opposite end of the party spectrum.

The Bork nomination is a prime example. It was defined as political in part because Bork had strong positions on a number of single issues. For most Democratic and many Republican senators, conflicting single issue constituents created grave dilemmas. Most senators confronted pro- and anti-abortion constituencies and civil rights groups confronting majority public opinion opposed to affirmative action and so on. The Court’s voting alignment made the Bork nomination far more salient to single issue constituents than did the Scalia nomination. Many senators,
therefore, had strong reasons to keep the Bork nomination in the nonpolitical mode and avoid stance taking.

One option open to senators was to define the nomination as one of partisan party politics and then vote for their party. Bork's nomination came near the end of a Republican President's second term. Bork's record identified him as a relatively extreme conservative, and the nomination came at the end of a long and very open campaign by the Reagan Administration to fill the federal bench with conservative Republicans. If constituents accepted the definition then they could hardly blame their senator for voting with her party no matter how that vote affected a single issue. Moderate Republican senators with marginal seats, who depended in part on Democratic votes, would have the least opportunity to take this option and would have to calculate their single issue gains and losses in deciding how to vote.

Where a nomination, for whatever reason, shifts from the independence mode—where Presidents are entitled to their choice and nominees to their constitutional views—to the political mode, position taking and risk avoidance becomes important to senators. Interest group activity will provide messages to senators about whether there is sufficient public interest to trigger the political mode. High levels of group activity may be an important factor in creating sufficient public sentiment to pull that trigger. Whether senators say to themselves, "all that group activity shows that people care" or "all that group activity is going to make people care" makes little difference.

The model propounded here is that high levels of group activity will be one factor triggering the political mode. This will allow senators to believe that they may legitimately vote for or against an appointment on party, conservative-liberal, or single issue lines. The independence mode, however, never entirely disappears. To the extent that senators opposed to nominees on political grounds can find convenient character flaws on which to hang their political opposition, they will do so and exaggerate those flaws as much as possible. They take a political stance favored by those of their constituents who have a political stake while not offending the belief in a nonpolitical court. When senators can play up those flaws, they may pull in senators who do not see the matter as falling in the political mode by showing that a negative vote is justified in the independence mode.

The Haynesworth nomination is a good example. Haynesworth's conservatism made him a political target for liberals, and his stances on economic and civil rights questions made him a target for labor union and civil rights groups. Signaling through their high level of activity and by seizing and blowing up a technical and trivial conflict of interest problem, these groups were able to shift some Democrats to the political mode and to convince others that a vote against Haynesworth on character would mend their party and interest group constituency fences while
remaining in the independence mode. All this is not to say that fitness problems are never genuine and decisive. Carswell's astonishing reversal rates and lack of judicial craftsmanship rendered him ultimately indefensible.

Senators on the Judiciary Committee are, of course, particularly important to the confirmation process. The Judiciary Committee traditionally has been a high prestige committee composed of senior senators with safe seats. Previously that also meant a disproportionate share of Southern conservative Democrats and rural state Republicans, usually conservative, but today there are relatively few really safe Senate seats, and the Judiciary Committee is not as safe from party constituency sentiment as it once was. Indeed, the rise of single issue politics leaves nearly all senators more sensitive to constituency pressure than they once were, although fewer members of the Judiciary Committee than of the Senate as a whole need be particularly concerned with insuring their re-elections. In most instances they can rely on appeals to the independence mode to cool down constituencies and reduce vulnerability at the next election.

Unless a particular nomination is highly salient because a constituency is overwhelmingly on one side of a single issue and the nominee on the other, Judiciary Committee members are particularly unlikely to be attracted by the stance taking opportunities offered by opposition to the nomination. The safer their seats, the less need to take stances. The independence mode offers them cover for avoiding stance taking where they confront opposing single issue groups in their constituency.

Judiciary Committee members may be more likely to invoke the independence mode than other senators, for two institutional reasons: First, that mode gives greater prestige to members of the Judiciary Committee because they are perceived as independent judges of the character of the nominees and guardians of the independence of the judiciary, rather than party hacks. Second, members of most Senate committees, including the Judiciary Committee, tend to treat matters falling within the jurisdiction of their committees as more a matter of objective decision and less a matter of partisanship. Nonpartisan stances are typical of most Senate committees in their presentations to the whole membership. This nonpartisan stance has been important to the prestige of the Judiciary Committee and is reinforced by the American vision of an independent federal judiciary.

There is one countervailing force of sporadic and unpredictable importance. Precisely because the Judiciary Committee attracts senior members, one or more of its members may be vulnerable on age grounds and so will be inclined to avoid electoral risk. Where such a senator's constituents are overwhelmingly of one party and the nominee becomes clearly labeled as a representative of the extreme wing of the other party,
the senator may attempt to strengthen partisan ties by shifting from the independence to the political mode.

Generally then, there will be an inclination among all senators and particularly those on the Judiciary Committee, to stay in the independence mode. That mode increases their individual prestige and the prestige of their institutions, reduces the risks of electoral opposition, particularly where the nomination raises single issue politics interest, and provides an opportunity to take a stance in favor of good character and judicial independence. Interest group activity is a countervailing force to this tendency to adopt the independence mode. High levels of interest group activity signal and create partisan interest among both constituents and senators which may lead to a nomination being labeled political. Interest group activity is thus one factor among several—such as control of the Senate and the Presidency by opposing parties; nearness to the end of a President’s term; the identification of the candidate with extreme conservatism or liberalism; and close divisions on a highly activist Court—that may shift the Senate into the political mode.

As long as senators persist in the independence mode, they will perceive interest group activity in negative ways—as unpatriotic, unseemly, and disrespectful of their roles as senators and of the role of the Judiciary Committee. If senators shift to the political mode, do interest groups become influential in determining their final votes—that is, are interest groups important not only in triggering the political mode, but in determining actual outcomes once the political mode is triggered?

Answers to this question may vary depending on whether the political mode is essentially a party or a single issue politics one. Where a Supreme Court nomination turns into a general battle between the Democratic and Republican parties, interest groups might wield some influence over the votes of a few senators from states that are closely divided electorally between the two parties. Group impact, however, is likely to be almost zero on most senators, for a number of reasons. Even if the confirmation battle is close to their re-election, so long as the battle is a straight partisan one it becomes only a tiny element in the senator’s overall record. To the extent that the voters are casting ballots on partisan considerations, confirmation of a nominee will be a small and not very important event in the record of any senator. Interest groups can hardly threaten a firmly conservative or liberal senator by highlighting her confirmation vote at the next election if the senator anticipates a party line fight at that election. Moreover, interest groups whose own fortunes are tied to one party or the other cannot plausibly claim they will deny support to a senator who is on their side on most matters simply because she votes for or against a particular court appointment. If a Democratic senator with an eighty-five percent support score for liberal measures chose to vote against the Fortas appointment as Chief Justice, could the AFL-CIO really deny its support in the next primary?
Where confirmation is defined in single issue terms, interest groups focused on those issues may be more influential. Their money and votes plausibly flow to particular senators on the basis of those senators' confirmation votes. Most obviously, this was the circumstance in the Bork nomination. Pro-choice groups might credibly threaten to shift money and/or votes on the basis of a senator's vote on the Bork nomination no matter what the senator's party affiliation or ideological stance. Such groups, while generally part of a Democratic left alliance, are weakly connected to it because abortion is the only issue they care about. They are part of a Democratic coalition only because Republicans choose to be on the other side. Because of the perceived balance of votes on the Court on the abortion question, such groups could also claim that a senator's vote on Bork was so important that it would be the only Senate vote that counted to them in deciding whether to support the senator in the future. In short, where a single issue cuts across party lines, where the issue is extremely important to those engaged in it, and is perceived to be deeply affected by a particular Supreme Court appointment, an interest group identified with that issue may plausibly claim that it will deliver or withhold support on the basis of a senator's confirmation vote.

Labor's reaction to the Haynesworth and Carswell nominations is instructive. The unions mounted a major campaign in the Haynesworth matter, but only went through the motions over Carswell. Labor is so identified with the Democratic Party that in most instances it can hardly threaten to alter its support or opposition for any senator on the basis of a Supreme Court confirmation vote. In the Fortas case, Republican Senator Griffin of Michigan led the opposition and was approached by the unions. But they could make no headway given their commitment to electing Democratic senators from Michigan. In the Haynesworth matter, the unions could approach many middle-of-the-road senators with the claim that Haynesworth had been anti-union in Fifth Circuit cases involving what the unions viewed as a crucial fight to organize North Carolina textile workers. Votes on his confirmation were particularly important to labor and might have been a determining factor in deciding on union support in the next election. Carswell was far more conservative than Haynesworth, and he was also less favorable to civil liberties. Labor and civil liberties groups had been actively allied in the Haynesworth case just a few months previously. Carswell was a general right wing Dixiecrat or Dixie Republican, he was not particularly anti-labor, and his appointment to the Court would not necessarily hurt labor any more than the appointment of another conservative. Labor claims that support would go on the basis of Carswell confirmation votes rather than overall conservative-liberal records and votes on measures important to unions would not have been plausible to most senators and were not made.

None of these propositions is easily tested against the dozen or so
Supreme Court appointments of recent years that did not meet with very substantial Senate resistance. Before turning to the instances in which nominations were defeated, one event, the nomination of Justice Scalia, provides evidence on the two model hypothesis. Why wasn't Justice Scalia's appointment successfully resisted by a Democratic Senate? Scalia was firmly identified as a Republican partisan. He had been an assistant attorney general in the Nixon Justice Department and was deeply involved in Nixon's assertion of what Democrats call "imperial Presidential prerogatives." He was part of the long-term Reagan campaign to make the federal courts conservative and espoused a judicial self-restraint philosophy from which an anti-Roe v. Wade position could easily be inferred. Pro-choice groups did become active. Like Bork, he had a huge corpus of academic writing and opinions that could be successfully mined for anti-New Deal constitutional law and administrative law nuggets. Yet the shift from the independence model to the political model was not successfully accomplished. And without that shift, most senators were content to let the President have his way.

The shift failed to take place for various reasons. The appointment was relatively early in the incumbency of a popular President. The voting alignment on the Court was neither closely divided nor clearly partisan. In the absence of a major moral qualifications issue in which partisanship could be clothed, the Democrats had neither strong incentives nor a good justification for shifting to a partisan mode.

Given voting alignments on the Court and Scalia's less than clear position, pro-choice groups could not persuade senators that the Scalia confirmation was sufficiently vital to allow them to mobilize votes against confirming senators at the next elections. Scalia's civil rights positions were not sufficiently well marked to engender strong civil rights group opposition. The same situation existed for labor unions.

The pattern of interest group activity and non-activity foreshadowed the pattern of Senate activity. Strong opposition from the whole array of Democratically allied interest groups might have moved Democratic senators to take up partisan banners, but that opposition did not arise. In spite of the strongly partisan aspects of the Scalia nomination, the Democrats in the Senate were not willing to move into a fully partisan mode.

Some patterns emerge when we turn to the defeated nominations. A particular set of interest groups are traditionally allied to the Democratic Party. These have principally been labor, civil rights, and farm groups, although the farm groups have not had much of a stake in post-World War II Supreme Court appointments. Strong response by labor and civil rights groups is not likely to signal senators that they will gain or loose votes or money on the basis of the side they take on confirmation, since these groups have little choice but to support Democrats anyway. Few

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10 410 U.S. 113 (1973).
court nominations are going to matter enough to them to cause them to vary the strength and direction of their senatorial campaign support from the normal pattern. In recent years, pro-choice groups have joined the Democratic interest group coalition. Much more than the other members of the coalition, however, the pro-choice forces, because they are essentially part of single issue and not party politics, can threaten a direct exchange of votes for approved action.

Union opposition to Haynesworth is an exception in which the unions could portray their stake as so high that they really would affect incumbent senators at their next re-election bid. In the Haynesworth case the union and civil rights Democratic group coalition signaled the Senate—through its high level of activity—to move from the nonpartisan to the partisan mode. They assisted in unifying Northern and Southern Democrats into a single Democratic response. The contrast to the Fortas case is instructive. Democratic interest groups were not active early and independently, but were enlisted piecemeal by the Administration to twist individual senators' arms. Clearly, they were message carriers in the Administration's campaign rather than independent actors. The failure of interest groups that might be expected to support a liberal Democratic Justice to become active may be explained in various ways. Fortas had been a highly visible Johnson adviser on the Vietnam War, at a point in the Johnson Administration when civil rights groups were allied with anti-war groups. Fortas did not have a liberal record on economic questions to inspire union support. Anti-Semitic groups were active in opposition to Fortas, and Jewish groups may have adopted a low profile in the belief that their open support would increase anti-Semitic tendencies among Southern senators. Johnson and Fortas, as pre-eminent Washington insiders, preferred informal inter-elite lobbying to formalized stances by pressure groups.

A far more parsimonious explanation is possible. Barring very special circumstances, it is advantageous to the nomination to maintain the independence model rather than shift to the partisanship model. The nominating President and all supporters of the nomination will prefer that it be treated as routine and nonpartisan. Only opponents will shift to a partisan mode, and then only if the line-up in the Senate is such that partisanship may lead to the nomination's defeat. Thus, we would not expect pro-Fortas groups to become active until opponents had been successful at defining the nomination as partisan. Pro-Fortas groups would then become active in attempting to win the partisan struggle. That is precisely what happened.

If this theory is correct, we should expect anti-Fortas groups to have been active early in the hopes of generating partisanship. Where the

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President is Republican and the Senate Democratic, the Democratic interest groups hope to stir their Senate party to action and win. Where the President and Senate are both Democratic, Republican interest groups see little payoff in a partisan definition of a nomination. One would not expect business groups to enter the Fortas fray early even if they were anti-Fortas. Group opposition to Fortas would have to come not from Republican groups, but from special groups that could trigger not only Republican opposition but also the conservative Republican Dixiecrat coalition which might muster enough votes to block the nomination. These groups include anti-integration groups, tough on crime groups, and anti-obscenity groups. In fact, such groups were about the only active groups in the Fortas drama. Some of those groups did have something to exchange for Senate votes. Anti-integration groups could offer liberal Southern senators like Russell a little less trouble in the next primaries. Anti-obscenity groups could claim enough single issue passion to move a few votes at the next election on the basis of a senator’s confirmation vote. The same holds true for the anti-crime forces.

Nevertheless, the array of anti-Fortas groups was not a very powerful one, either in terms of votes or campaign financing. Anti-integration groups had nothing much to offer Northern senators and were so firmly involved with Southern ones that they could not have abandoned them even if they voted for confirmation. Anti-crime and anti-obscenity groups had little money to offer and the Fortas advancement was not sufficiently significant as an anti-crime and anti-obscenity matter to determine many votes at the next elections. Additionally, the Fortas advancement to Chief Justice would not change the disparate voting alignments on the Court.

Anti-crime and anti-obscenity groups could, however, be efficient signalers that there would be partisan advantages in future elections to opposing the nomination. By the strength of their opposition, they could demonstrate that there were votes to be garnered in future elections by taking a position against the confirmation. The Fortas nomination was an early glimpse by senators of the possibility of lifestyle campaign issues. Interest groups helped define the Fortas vote as a position taken on lifestyle issues that would be usable in future campaigns.

A few centrist Democratic senators from Northern states could see an opportunity to remain good liberals on economic questions while shifting to conservatism on lifestyle issues, thus improving their re-election opportunities. Senator Lausche of Ohio did seem to respond to anti-obscenity interest group pressure. Indeed, at the moment of final collapse, the obscenity issue seemed to exert more pull on Northern Democrats and centrist Republicans than any other.

The overall role of interest groups in defeating the Fortas promotion was extremely minor, however. The situation created so many pressures to shift from the nonpartisan to the partisan mode that pressure group
signaling was neither a necessary nor a sufficient cause of the shift. The shift occurred almost entirely within the realm of the elite politics of senators and the President. The nomination came very late in the term of a discredited Democratic President who had announced he would not run again. The election of a Republican was not quite but almost a foregone conclusion. Although there was a Democratic majority in the Senate, there was also a clear chance of forming a strong enough Republican Dixiecrat coalition to defeat cloture and run the nomination out of time before the next election. The very terms of Chief Justice Warren's retirement—namely, that he would retire only if and when a nominee of President Johnson was confirmed—further emphasized the partisanship potential of an end of term appointment. Although the old line Senate Republican leadership was willing to maintain the nonpartisan mode in exchange for various Presidential favors, younger and more partisan Republican senators shifted to the partisan mode immediately. From the beginning they asked often and loudly why this Democratic President, disavowed by the American people, should be allowed to choose the next Chief Justice rather than a new Republican President? That a number of senators were willing to openly proclaim this partisan mode from the start indicates the strong potential for a shift from the normal nonpartisan to the partisan mode in this particular confirmation situation.

The shift was further encouraged by another feature of the Fortas episode. The proposal was to advance a sitting Justice who sat in the controlling liberal majority to the Chief’s spot. Moreover, because he had argued and won *Gideon v. Wainright*, Fortas had become peculiarly identified with the Court’s major expansion of rights of the accused. He was less identified with civil rights but was nonetheless firmly in the desegregation camp. The manner of Chief Justice Warren’s projected departure left the impression that Warren and Johnson had hand-picked Fortas to carry on the Warren crusades. His proposed promotion not only set the stage perfectly for a Senate referendum on the policies of the Warren Court, but also created the perfect conditions for the coalescence of the conservative Republican Dixiecrat coalition that might be able to win a partisan battle at least by filibustering and staving off cloture. Being anti-crook went down well with Northern constituents and being segregationist went down well with Southern ones for whom a tad of anti-Semitism also may well have existed.

Once the shift to a partisan mode occurred, the participants sought to discover moral disqualifications in the candidate. The first of these was the "separation of powers" issue. Fortas had gone on advising Johnson after his appointment to the Court. Some senators pretended to take this all very seriously, but not seriously enough to really dig out the extraordinarily high level of continuing entanglement of Fortas with his

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Presidential client. The incidents in which Fortas played a fairly active role in advising on proposed policies that might subsequently be subject to constitutional challenge could probably have been dug out with a little hard spade work, but Fortas's Senate opponents never really tried. Everybody knew that other Justices had advised earlier Presidents. Separation of powers was little more than pro forma camouflage for partisanship.

The obscenity issue which was raised somewhat later was a largely fraudulent, but more effective, one. Fortas had not been a Court spokesman on obscenity. He usually voted with the majority that had moved to a hard-core pornography standard. That standard itself however was a moderate one that still withheld first amendment protections from obscene publications if juries were prepared to find them obscene. Various senators professed themselves to be so shocked by various peep shows that they could not in conscience vote for a Supreme Court Justice who had voted with a majority of Justices to refuse to condemn them. Indeed, the key materials which led to these senators' outraged condition had been involved in cases in which the Court had simply refused to act, rather than explicitly approving the materials. The obscenity issue tied to Fortas was so fake and tied with such poor string that it could not have held on in anything other than a totally partisan atmosphere.

The real moral issue was Fortas's various off the bench moneymaking activities. Leads to some of these activities surfaced very early, but even through the time of the first Fortas hearings remarkably little was done to develop them. If the shift to partisanship had not already occurred and the chance of a successful filibuster had not been clear from the start, the confirmation proceedings would not have been dragged on long enough to allow time for the most damaging charges to appear and be convincingly developed. In fact, the major evidence in the Wolfson Foundation matter which ultimately led to Fortas's resignation was not developed until after the promotion had been defeated. At the time of the defeat only a partial version of the American University seminar scandal had surfaced. The moral disqualification debate was never more than partisanship, Republican versus Democratic and conservative versus liberal, with touches of single issue politics showing here and there. Most senators who created and followed this partisan model did not do so because they were pressured or even signaled by groups, but because the major characteristics and conditions of the nomination itself moved them from the nonpartisan to the partisan mode.

As in the Fortas defeat, groups played a similarly peripheral role in the Carswell defeat. Groups aligned with the Democratic Party had played an important signaling role in the shift of the Haynesworth case to the partisan mode; they might have been expected to do the same in the Carswell case. In fact, labor union opposition to Carswell was more or less perfunctory and only civil rights groups were vocally opposed.
from the start. The sequencing of the nominations alone indicated that partisanship might be in order. The same Republican President faced the same Democratic Senate and now nominated a weak and undistinguished candidate to further a partisan strategy. Democratic senators wanted to treat the matter as a partisan one and did not want to give the Republican President the partisan advantage of being able to claim that the Democratic Party was a bunch of liberal Yankee anti-Southerners. The perfect opportunity arose when law professionals asserted the nominee's professional incompetence.

It would be misleading to portray this situation as one in which the bar, as an interest group, intervened to defeat a nomination. The Democrats, in a partisan mode, wanted to defeat a Republican nomination. They were embarrassed only by the partisan disadvantage of knocking out a second Southerner. When the fact that the candidate was incompetent became known, Democratic senators—freed of their partisan disadvantage—could pursue their partisan goal. They could defeat a Republican nominee because they could claim he was incompetent, not because he was Southern. Just as we should not kill the messenger of defeat, we should not award the field marshal's baton to the messenger of victory. The bar did not beat Carswell, it just brought the news that the senators were hoping for.13

The Bork nomination is crucial for testing the role of interest groups, particularly in the light of the Scalia and Kennedy confirmations which framed it. (The Ginsberg matter is a replay of Carswell. Democrats, unwilling to lose partisan advantage by seeming too partisan, won on what can be portrayed as nonpartisan, moral disqualification grounds.) Every time we are tempted to reach a conclusion about Bork, we must test it by asking: Why didn't the same thing happen to Scalia or Kennedy? Scalia is like Bork in the sense that both were former academicians and District of Columbia Circuit judges who had taken conservative and/or judicial self-restraint stands in their writings. Kennedy is like Bork in providing another conservative vote on a closely balanced Court. All three were Republican nominees to a Democratic Senate at the culmination of a long-term, openly partisan campaign by a Republican President to transfer the judiciary to Republican hands. Again the uniqueness of each nomination may defeat all such comparative efforts. Scalia's nomination came long before the end of the Reagan term and

13 The ABA Committee on the Judiciary has not been treated as an interest group for purposes of this analysis. It is rather unique in its claim to represent impartial, special expertise about judicial qualifications rather than the interests of its members. Its claim is false, but enjoys some measure of congressional and popular belief. The ABA Committee has neither money nor votes to exchange. Precisely because of its claim, it does not signal the political interest of voters in a nomination. It is best seen as a special instrument whereby essentially partisan considerations can be camouflaged, as "moral" or "professional qualifications" considerations, both by the Committee and by whatever senators find the Committee's recommendations useful.
before the Court was perceived to be at a tipping point. The very appointment of Scalia made the Bork nomination more crucial to liberals. The Kennedy nomination, coming after the Bork defeat and near the end of the Reagan term, caught Democrats in the bind of having to appear partisan in order to be partisan, because no moral disqualification grounds were present. Had the Kennedy nomination come as late in a President's term as had the Fortas nomination, there would have been a real hope of delaying until the next Presidency without appearing to sacrifice the Court's integrity to partisan advantage.

Were it not for the ease of the Scalia nomination, the most parsimonious explanation of the Bork defeat would run as follows: No previous Presidential Administration had engaged in such a self-conscious, openly declared, partisan, systematic, bureaucratized appointment campaign designed to ensure the dominance of its political viewpoint in the federal judiciary. The impact of this campaign was increased by the change in progress within the judiciary—most of the retiring judges were New Deal appointees and the Reagan strategy of appointing young people would have long lasting effects.

The Reagan campaign was not entirely unique. The Federalists had enjoyed a special opportunity to pack the judiciary. President Johnson had effectively packed the judiciary with liberal Democrats, and Roosevelt's four terms had a comparable effect. The presence of the conservative Southern wing of the Democratic Party and the patronage patterns of Democratic Presidents muted the liberal Democratic packing. After early New Deal days the packing was not a self-proclaimed crusade but resulted from the sheer impact of a great number of appointments over a long period of time.

Reagan was engaged in a far more forced draft campaign of changing the party allegiance of federal judges than any of his predecessors. Reaganites loudly proclaimed their effort to shift the basic ideology of the judiciary from liberal to conservative. When Democrats proclaimed that the Senate ought not examine how a nominee will vote in particular cases, but ought to examine her basic judicial or constitutional philosophy, they were choosing partisan politics. The whole point of the Reagan judicial appointment campaign was that the federal judiciary had been filled with New Deal Democrats who had turned American constitutional law into a branch of liberal Democratic ideology and the courts into a production center of the rights industry operated by a social democratic elite. Precisely because Democrats had succeeded so well in dominating the federal courts with an ideology of rights created by and for Democrats, the partisan Republican response was one of choosing judges who had a different constitutional philosophy. In the circumstances of the day, to say that the Senate had a duty to examine a nominee's basic judicial philosophy was really to say that a Democratic Senate ought to block further Republican attempts to pack the federal judiciary.
These same factors give meaning to the Democratic critique of Bork as being outside the "mainstream" of American constitutional law. As his defenders pointed out, Bork had written nothing that was not also written by many others, and it was within the mainstream of scholarly give-and-take on constitutional questions. The judicial self-restraint themes of Hand and Frankfurter had been the predominant theory of the Harvard Law School under Freund until the conversion of Cox and Chayes and the ascension of Tribe. Bork's statements on *Griswold* had been made by hundreds of constitutional law teachers, in classrooms and in print. His views on desegregation and affirmative action have their roots in the most famous article of modern constitutional scholarship, Wechsler's neutral principles piece. His views on freedom of speech are those of the civil libertarian, Meiklejohn. Post-Skokie and feminist free speech scholarship has been a veritable flood of anti-free speech writing best understood as the study of speech regulation, rather than freedom of speech. If there is any stream in which Bork is in the center, it is the one driven by the work of Schauer.

When Bork's opponents claimed he was out of the mainstream, what they meant was that Bork challenged the dominance of New Deal and post-New Deal Democratic commentators over constitutional law—a dominance so complete that every casebook, treatise, and handbook used to teach constitutional law in American law schools is the product of Democrats writing from Democratic perspectives.

The drive to defeat Bork was the functional equivalent of the Federalist appointment of Marshall—an attempt to secure a period of control for a currently dominant but challenged constitutional ideology. Centered on civil rights and liberties created by Democratic elites for Democratic clienteles, constitutional law has become the platform of the Democratic party. The defeat of Bork, so long as his replacement was only a standard Republican, would project that ideological dominance well into the future.

This argument explains not only the Bork battle, but the Kennedy peace. Yet couldn't all the same arguments have been made about Scalia? The simplest reply would be that Scalia had done little writing about constitutional law matters and was an administrative law expert. He had not earned a living, as Bork had, by challenging the Democratic rights industry. While in a Republican Justice Department he had supported a strong Presidency in the style that used to be part of the Democratic canon, but had recently become an anathema to Democrats for other reasons. Scalia was a Republican, and a conservative, but he was

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not, as Bork was, a direct threat to Democratic dominance of constitutional law.

Interest groups may be a part of the explanation. Although Scalia’s opposition to *Roe v. Wade*\(^\text{17}\) might easily be guessed, he was not on record as opposing the constitutional right to privacy and the derived right to abortion. His conservatism was sufficiently amorphous that particular interest groups could not pretend the animus toward him that they could exercise against Bork. Feminist groups were active early-on against Bork, attacking him for his argument that the equal protection clause was intended to protect blacks and not women. (This was a result of Bork’s attempts to catch Democrats in a contradiction. For when Justice Marshall and others had defended affirmative action, they had argued that because the fourteenth amendment had been enacted to protect blacks, it could not be used to protect whites against reverse discrimination.) Pro-choice groups raised an alarm, not only because Bork had taken an anti-*Roe* stance, but because now that Scalia was on the Court, Bork’s vote might be the crucial one in overturning *Roe*. Liberal Democratic academics, masquerading as an interest group centered on expertise, pressed the anti-mainstream charge and attacked Bork’s originalism or interpretivist stances. Originalism was simply a neat rhetorical transposition of conservatism in general and anti-abortion in particular, and allowed the academic pressure group to attack Bork under the banner of professional expertise and concern rather than under its true Democratic partisan flag. If openly proclaimed, its real Democratic partisanship would have robbed it of what a pressure group must have to legitimate its participation—a special concern other than that of citizens in general.

Labor groups were also involved. The AFL-CIO was enlisted to prepare a special report carefully exaggerating Bork’s anti-union voting record as a judge. The union campaign raises a familiar chicken and egg problem: did interest group activity trigger partisanship or vice versa? It was not really clear whether it was in labor’s interest to oppose Bork. Unionized labor has been a principal beneficiary of cartel creating government regulation of business in the United States. Bork’s anti-regulatory views were opposed to the interests of the unions. On the other hand, Bork’s antitrust views, no matter what his intentions, clearly favor the cartelization of the American economy and hence favored union interests. It is not clear whether union opposition was of the Haynesworth sort, a product of real union animus, or a “going along with” the other Democratic groups. It is clear that associations of minority police officers were pushed by civil rights groups into actively opposing Bork, to counter police associations who liked his jurisprudence on the rights of the accused.

The Bork nomination faced early, united, and vociferous opposition

\(^{17}\) 410 U.S. 113 (1973).
of the traditional alliance of interest groups allied to the Democratic Party—union and civil rights groups. Feminist and pro-choice groups played a dual role. By the time of the Bork nomination, such groups had become a part of the Democratic alliance. At the same time, pro-choice groups still retained some flavor of a single issue interest group, cutting across party partisan alignments. These groups became potent arousers and supporters of the Democratic cause. They not only signaled Democrats that the Bork nomination ought to be defined as an occasion for attacking the Republican Party, but they could also reach moderate Republicans from marginal constituencies who feared the potency of this important single issue. This is analogous to the impact of the obscenity issue on centrist Democratic senators in the Fortas promotion episode. Pro-choice groups could claim that this single issue was hot enough to move some voters out of their normal voting patterns.

How confident can we be, however, that the Bork episode confirms the signaling theory of interest groups? Not very. In the Fortas nomination the shift took place in the minds of key Republican senators and key Dixiecrats independently of interest group activity and when they faced a President with majority control of the Senate. With Bork, a firmly Democratic Senate faced a Republican President making an openly partisan nomination. Shift to a partisan mode clearly suggested itself without the signaling of interest groups. Of the three major attacks on Bork, one came from the unions and another from feminist groups, but the third emanated from the staff of the Judiciary Committee directed by its Democratic Chair, Senator Biden.

Interest group opposition to Bork may have been important in providing Democratic senators with rhetoric in which to clothe their partisan opposition. But do we really need interest groups to help explain the Scalia, Bork, and Kennedy nominations at all? In all three, a Democratic Senate faced a Republican President clearly making a calculated partisan appointment. In all three, the stage was set for a shift from the normal to the partisan mode. Nevertheless, the dominance of the non-partisan mode in the twentieth century indicates that a strong trigger for the shift is necessary. Scalia came too early for the trigger. His appointment would not endanger the preponderance of Warren Court thinking on the Court. Kennedy was far too inarticulate a conservative to justify extraordinary Democratic attacks. Only Bork provided a situation in which the Court was closely balanced and partisan attacks against the nominee could be rhetorically phrased in terms of character flaws. Bork could be opposed not as a Republican, but as an extremist. The same opportunity would have faced the Senate Democratic majority with or without interest group activity, and might have dictated the same results no matter what such groups did or did not do. The Senate Democrats orchestrated interest groups to help construct a partisan atmosphere, but once the senators chose to trigger the partisan mode they had the votes to
win. The Senate hearings were scripted by the Biden Committee report and the interest groups spoke the lines that the Democratic leadership proposed. Rather than interest group activity, it was Court alignment and Bork's intellectual position that combined to trigger the partisan mode.

Apart from the triggering function, interest groups may have played a role in Bork's defeat during the nomination process. Unions have some money and few votes but can hardly credibly threaten to withdraw their support from Democrats and give it to Republicans over a matter as peripheral to their interests as the Bork nomination. Black civil rights groups have little money and all their votes are going to go Democratic no matter what. (Latin groups played no particular role in the Bork hearings.) Pro-choice groups were different. In reality they did not have quite such a large stake in the Bork nomination as they claimed, because Bork's appointment would not have turned the Court around on abortion. It would only have made Justice O'Connor's vote pivotal, and while opposing the outcome in Roe, she did proclaim a constitutional right to privacy and a derived right to abortion. Nonetheless, the real stakes were high enough—and the proclaimed stakes certainly high enough—that pro-choice groups could threaten some marginal Republican senators with a loss of votes on this potent issue. A few Republican votes were important to the Democrats in converting the real partisanship into the gloss of "extremism" and thus paying some homage to the normal confirmation mode. Direct group pressure, then, probably did play a marginal role of this sort in the Bork defeat.

The Scalia, Bork, and Kennedy trilogy indicates that the nonpartisan mode remains the norm even when Republican Presidents face Democratic Senates. Even when the shift to the partisan mode occurs, this nonpartisan norm is sufficiently dominant that partisan majorities will seek a "character" cover to disguise their partisanship. In the Bork nomination, Democratic and Republican were renamed mainstream and nonmainstream. Indeed, the comparative ease of availability of such a cover is one factor in determining whether the shift in mode occurs. There is a large array of factors leading to the shift. None is necessary or sufficient. The mix in each instance is different. Sequencing renders each situation unique. Fortas and Bork shared the misfortune of facing a long, building opposition to a judicial movement—Fortas became a surrogate for the Warren Court, and Bork for the Reagan conversion of the lower federal courts.

Some single issue interest groups sometimes play a significant part in shifting the votes of a few senators who are in the moderate wing of their parties and are elected in marginal states. Such groups can claim to be passionate enough about an issue to deliver votes on the basis of a senator's confirmation behavior. Pro-choice forces played this role in the Bork defeat, but the politics are complex. Pro-choice forces could move
a few moderate Republican senators from marginal states into the Democratic camp. But pro-choice groups also posed problems for the Democrats. Abortion is one of those issues on which all party politicians have more to lose than to gain. At the time of the Bork nomination, the Republican Party had identified itself as anti-abortion, but the Democrats had desperately tried to avoid total commitment on the other side. Democrats had everything to gain and nothing to lose in this situation. They were already enjoying a gender advantage and Republican commitment to the pro-life position could only widen it. Anti-abortion voters were firmly driven into the Republican camp in McGovern days and were not likely to be regained. Since the Republicans were firmly anti-abortion, Democrats picked up single issue pro-choice voters without a full commitment to freedom of abortion. Stopping short of total commitment helped mend Democratic fences with one of the party’s traditional constituencies, Catholic ethnic voters. Early and extremely vocal pro-choice opposition to Bork created the possibility that a Democratic defeat of Bork would be read as a Democratic commitment to freedom of choice.

Indeed, the Bork defeat did become a stepping-stone to such a commitment and to the prominence of abortion as a campaign issue in the Dukakis-Bush Presidential race. Certainly at the time of the hearings Democrats maneuvered cautiously to avoid defining the Bork nomination as a single issue pro-choice campaign. For many Democratic senators seeking to position themselves outside the abortion controversy, the vibrant pro-choice opposition to Bork created electoral risks as well as opportunities. Under these circumstances, sticking to the nonpartisan mode would have been their best bet. If they did move to partisanship, it was important for them to do so under banners that did not carry pro-choice as their only symbol.

For this reason, it seemed desirable to submerge pro-choice groups with labor and civil rights groups. By packaging pro-choice as part of an alignment of traditional Democratic groups against the nomination—that is, the long-standing labor, civil rights coalition that had also defeated Haynesworth—Senate Democrats could cast Democratic votes against Bork rather than pro-abortion votes. The catch-22 for the Democrats was that all this moved the Party further into a pro-choice stance. Labor, which really had no great stake in the Bork matter, was pushed to the forefront for this reason.

Freedom of speech questions were given prominence for similar reasons. Freedom of speech delivers neither election votes nor campaign financing, but it could render opposition to Bork not simply the Democratic Party as a coalition of groups versus Bork, but the Democratic Party as the liberal party versus the conservative Bork. Bork could be portrayed as not merely anti-civil rights, but as anti-civil rights and liberties. To the extent that Democrats could hold civil liberties firmly at-
tached to civil rights, they could defeat the claim that the Democratic Party is a servant of special interests, and continue to claim that it is the party of social justice. Civil rights, standing alone—particularly affirmative action—are too clearly the naked claim of the special interest of blacks and browns against whites. If one says civil rights and liberties fast enough to run all the words together, one gets a much nicer image of the Democratic Party. Integrating pro-choice into this same rapidly uttered catch phrase had the same advantage of disguising naked self-interest and defeating the claim that the Democratic Party is a party of interests.

One constant in the role of interest groups can be perceived. Civil rights made it easy to go to partisanship. The Supreme Court had become the pre-eminent symbol of civil rights. A labor-civil rights coalition defeated Haynesworth, civil rights defeated Carswell, anti-civil rights defeated Fortas, and a pro-choice, civil rights coalition defeated Bork. If Bork could not have been portrayed as unwilling in desegregation and anti-affirmative action, his partisan defeat would have more clearly labeled the Democratic Party as the pro-abortion party. Without civil rights, it would have been easier and very tempting to stick to the nonpartisan mode.

If civil rights are central, then group politics, in the sense of direct pressure on individual senators, plays little part in confirmation battles. Civil rights groups are so tied to the Democratic Party that they can hardly threaten Democratic senators with the withdrawal of votes or campaign efforts. At most they could threaten intervention in the next primary, an extremely weak threat for most incumbent Democratic senators.

What civil rights groups can do, particularly when allied with labor or feminists, is to signal to Democratic senators that there is a defensible reason to shift from the nonpartisan to the partisan mode, and that a substantial body of public sentiment will countenance the shift. The data is so scant that it will be impossible to tell whether Democratic senators have been moved toward the partisan mode by independent group signaling, or have chosen the partisan mode and then orchestrated the groups. Obviously, in some instances a cadre of Democratic senators may choose the mode and then orchestrate the groups to signal the rest of their Democratic colleagues. Nevertheless, the early and independent role of civil rights groups in the Haynesworth and Bork cases is obvious, as is the absence of strong civil rights group opposition to Scalia and Kennedy.

To put the matter slightly differently, the New Deal and post-New Deal Democrats persuaded the nation that the Supreme Court ought to produce civil rights, just as they persuaded the nation that the Presidency ought to produce federal programs that spend money. The latter persuasion has faded somewhat; the former persuasion remains in spite of the Fortas case. Where a Republican Supreme Court nominee can be por-
trayed as a wrecker who would stop the Supreme Court rights factory, Democrats find themselves on winning ground. The Supreme Court is now the one area of government in which the high production of new benefits is seen as an unmixed and unquestioned virtue. Perhaps this is so because the Court is the one area of government in which high production of benefits is not perceived as entailing a high production of costs. The opposition of civil rights groups to a nomination signals an enormous partisan advantage to Democrats—an instance in which they can be for government benefits with no taxes—any politician's dream.

In summary, single interest groups may directly influence a few senators' votes in confirmation battles. Early civil rights groups activities, particularly in coalition with other Democratic Party linked groups, will signal Democratic senators that a switch from the nonpartisan to the partisan mode will have public support and may yield advantage to the Democratic Party. That signaling function may be seen as having increased significance in a period in which the general proclivity of the Senate Democrats is to switch to the partisan mode. This is especially true today, as American voters return Republican Presidents and Democratic senators. On the other hand, this new situation may so over-determine confirmation episodes that interest group activity itself is of virtually no importance. Whenever a Republican President nominates someone who can easily be portrayed as partisan—that is, as very opposed to many of the government benefits generated by the Supreme Court—Democratic senators may switch to the partisan mode. Once they switch, they have the votes. With or without interest group activity, Republican Presidents facing a permanently Democratic Senate must expect trouble unless they fully exploit the political power of the nonpartisan image of the Supreme Court by offering nominations which do not appear to undercut the nonpartisan nature of the Court. A Republican President must often lose if he strips himself of the only armor he enjoys against the voting power of the Senate.