

Constitutional Hardball and Judicial Nominations

Development of the American Constitution

Studying American Politics

Institutions



Behavior



Research Interests

- I study the federal judiciary and the American legal system
- Judicial Behavior- how (and why) do judges make decisions?
- Political Science says judges are rational/strategic actors
- Are they susceptible to bias?



Source: NPR

Terms from Our Reading

- **“Pre-Constitutional” Understandings-** “unwritten norms of government practice that emerge in a decentralized fashion and are regularly followed out of a sense of obligation but are not directly enforceable in court.”
- **Constitutional Hardball-** “political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings.”
- **“Logic of Escalation”-** increased instances of hardball, usually as a response to other instances of hardball by the opposing party, leading to an increase disregard for pre-constitutional understandings

Questions to Keep in Mind

1. Is hardball in the judiciary problematic?
2. Is there someone to blame?
3. What comes next?

Illustrations of Hardball in Filling the Courts

Senatorial Courtesy



Source: Des Moines Register

Confirmation Politics



Source: POLITICO

Senatorial Courtesy

Senatorial Courtesy

- Historically, presidents have consulted home state senators when nominating prospective judges to seats on the federal bench
- Even at the intermediate Court of Appeals, states are assigned seats that their senators have responsibility over
- Senators play a role in selection and in confirmation via the blue slip
- The influence of **minority party** senators has varied over time based on the rules of the Chairman of the Judiciary Committee

UNITED STATES SENATE
Committee on the Judiciary

October 5, 2011

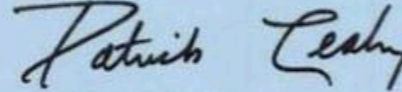
Dear Senator Menendez:

Please give me your opinion concerning the following nomination now pending before the Senate Judiciary Committee:

Patty Shwartz, of New Jersey, to be United States Circuit Judge for the Third Circuit

Please return this form as soon as possible to the Committee office in Dirksen 246.

Sincerely,



PATRICK LEAHY

Hand delivered to SH-528 Chairman

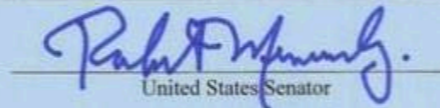
REPLY

TO: Senator Leahy, Chairman

I approve

I oppose

Comments: _____



United States Senator

Source: Brennan Center

Example of a Blue Slip (2011)

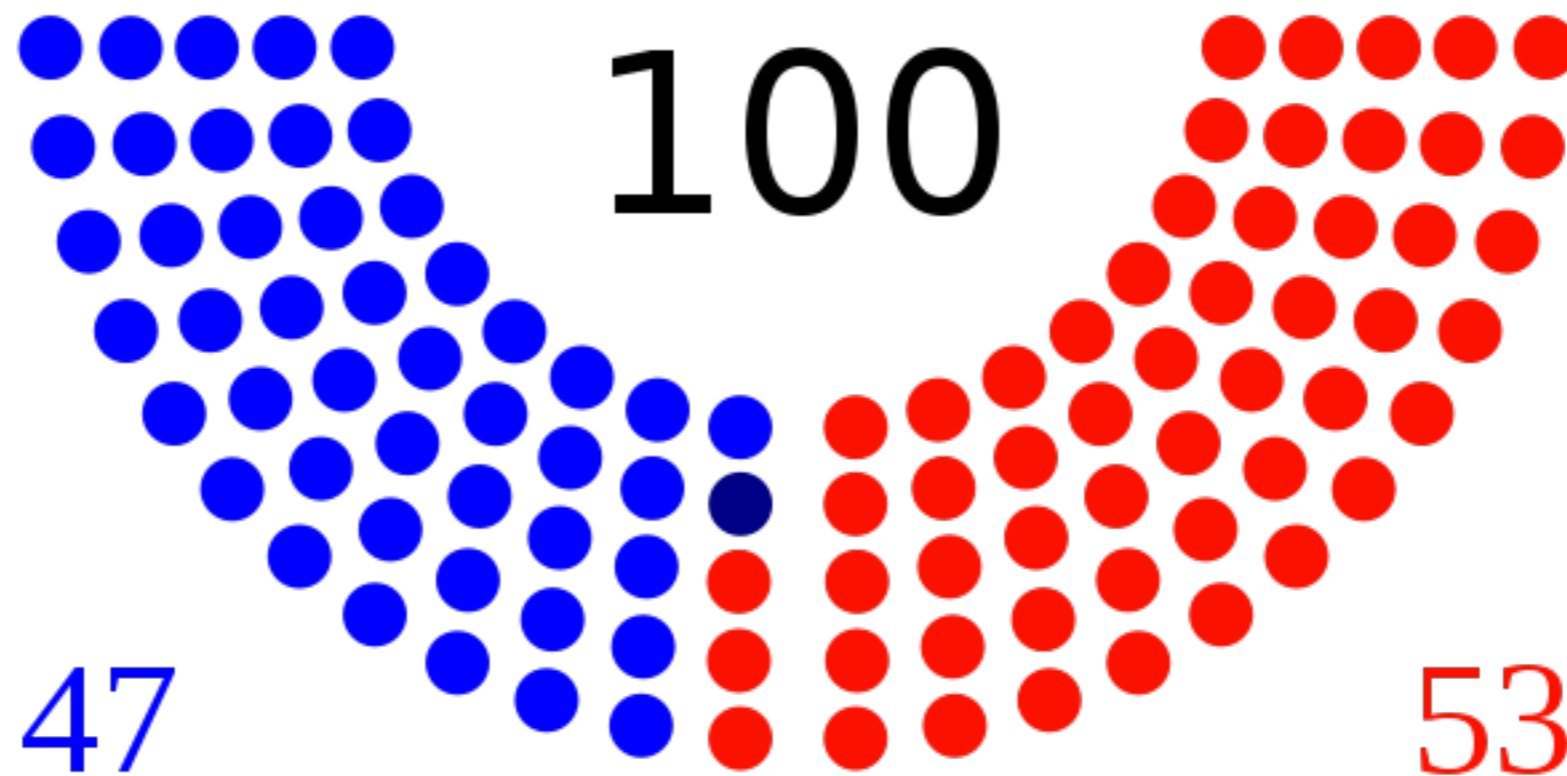
Why Would Senatorial Courtesy Change?

- Institutional Changes- the rules of the Senate may change in a way to favor the role of an individual senator or vice versa
- Partisan Changes- the willingness of the Senate's political parties to delegate power to individual senators as a result of partisan episodes
- Using statistical techniques we find, noticeable decreases in individual senator influence in 1988, 1995, and 2014
- Can you guess why?

Confirmation Politics

Requirements for Confirmation

- The Constitution says the Senate must advise and consent to the President's nomination of any Article III judge
- Formally, confirmation is obtained by a nominee receiving a majority of the votes of present senators (or a tie with a vote from the Vice President)
- In reality, for much of the Senate's history nominees must advance through the Judiciary Committee and survive a filibuster
- Post-1975, surviving a filibuster requires a cloture motion with support from 3/5 of the senators elected and serving



Republicans Take the Senate (1980)

Robert Bork (1987)

- Bork was a vocal Conservative legal scholar
- He had previous partisan experience in the Nixon Administration
- Democrats led by Joe Biden and Ted Kennedy controlled the hearings
- Nomination rejected 42-58



Source: The USA Today

Clarence Thomas (1991)



Source: ABC News

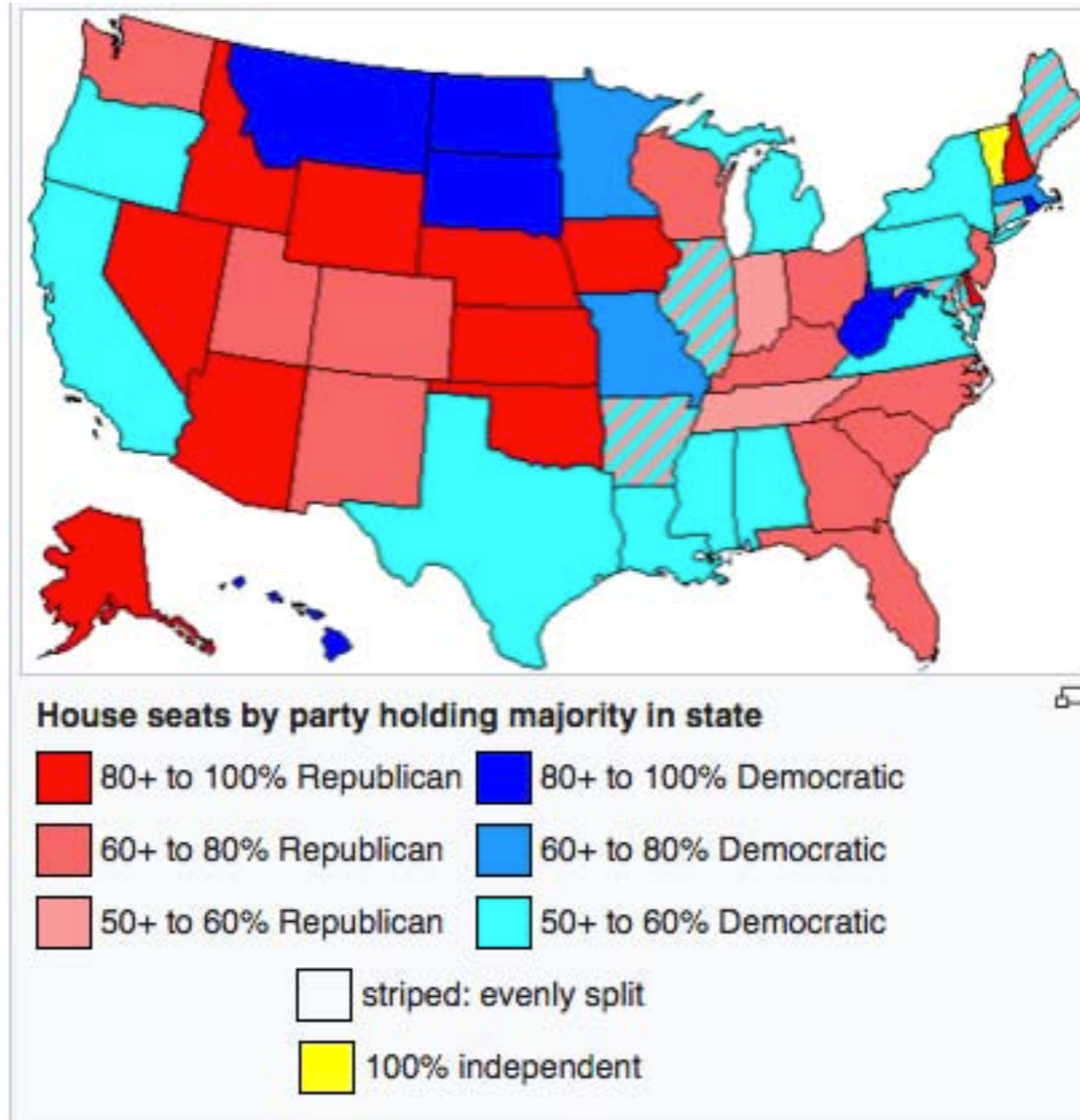
- Thomas was another vocal Conservative legal mind, nominated to replace Thurgood Marshall
- A former subordinate, Anita Hill, accused Thomas of sexual harassment
- During confirmation hearings Thomas accused his opponents of playing hardball
- Nomination confirmed 52-48

“The Ginsburg Rule”

- Ginsburg was a prominent ACLU attorney and gender equality activist prior to her nomination
- Aware of the difficulties previous nominees had faced, she refused to hint at how she would rule on theoretical cases
- This policy has been exercised by most nominees since her hearings



Source: The Wall Street Journal



Republicans Take the House (1994)

Gingrich's Strategy

- After becoming leader, Gingrich would no longer allow moderate Republicans to vote with majority Democrats
- In order to get legislation passed, Democrats now needed all wings of the party to vote in unison
- This meant Conservative Democrats from the South occasionally had to cast votes too socially Liberal for their constituents
- The GOP campaigned on this in the South forcing retirements and defeating incumbents

The Gingrich Senators

- The new GOP majority was made of ambitious members that became senators
- Examples include: Lindsey Graham, Rick Santorum, and Richard Burr
- Confirmation became more contentious



Source: Getty Images

Supreme Court confirmation votes in the U.S. Senate

YEAR	NOMINEE	YES	NO
2017	Neil M. Gorsuch	54	45
2010	Elena Kagan	63	37
2009	Sonia Sotomayor	68	31
2005	Samuel A. Alito, Jr.	58	42
2005	John G. Roberts, Jr.*	78	22
1994	Stephen G. Breyer	87	9
1993	Ruth Bader Ginsburg	96	3
1991	Clarence Thomas	52	48
1990	David H. Souter	90	9
1987	Anthony M. Kennedy	97	0
1987	Robert H. Bork	42	58
1986	Antonin Scalia	98	0

Going “Nuclear” (2013)



Source: The Daily Show

- During the Obama Admin., Republicans filibustered more executives nominations than any minority party in history
- Upset by the obstruction Majority Leader Harry Reid threatened to “go nuclear”
- On 11/21/2013 Reid and the Democrats eliminate the filibuster for non-SCOTUS nominations

Merrick Garland (2016)

- Republicans win a majority in the Senate in 2014
- In 2016, Justice Antonin Scalia dies and President Obama nominates Merrick Garland to the Supreme Court
- The Republicans, citing the approaching Presidential election, do not consider the nomination
- Donald Trump is elected President in 2016



Source: NPR

Gorsuch and Nuclear Completion (2017)



Source: The Boston Globe

- President Trump now nominates Neil Gorsuch to fill Scalia's seat
- Democrats intend to filibuster Gorsuch's nomination as revenge for Merrick Garland
- Majority Leader Mitch McConnell cites the 2013 ruling as precedent and eliminates the filibuster for SCOTUS nominations
- Gorsuch is confirmed 54-45

Kavanaugh (2018)

- Justice Anthony Kennedy, the Court's median justice retired in 2018
- President Trump nominates Brett Kavanaugh to fill the position
- Dr. Christine Blasey Ford accuses Kavanaugh of committing sexual assault during their high school years
- Kavanaugh and Republicans allege hardball by Democrats. He is ultimately confirmed 50-48

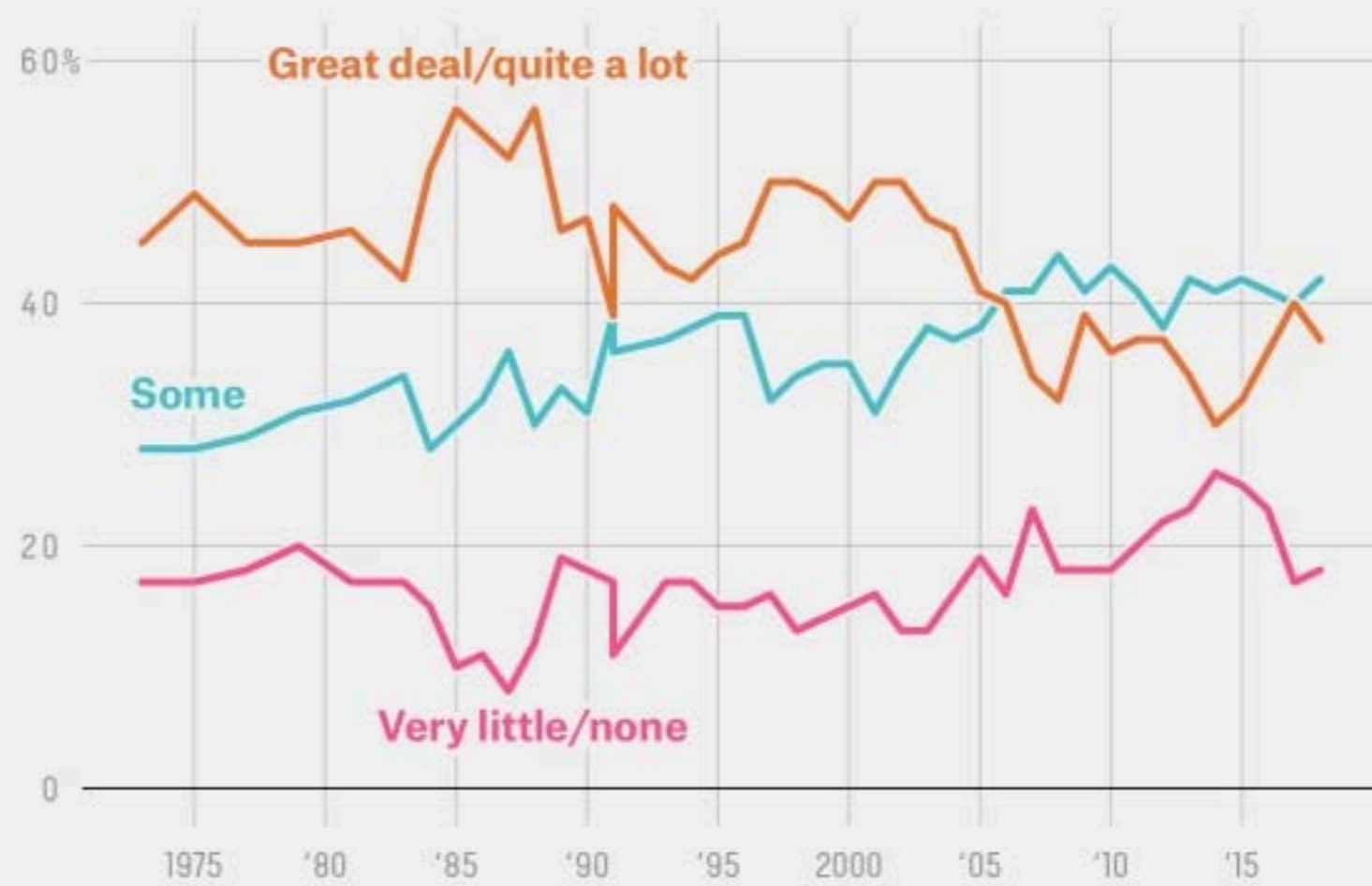


Source: The Hill

**Is this trend
problematic?**

Faith in the Supreme Court has eroded

Share of respondents by confidence in the Supreme Court



FiveThirtyEight

SOURCE: GALLUP

Source: FiveThirtyEight

**Should anyone be
blamed for this trend?**



Source: ABC News

What comes next?