Bias, the Bar, and the Big Picture: Mass Political Change’s Effect on the U.S. Courts of Appeals

James Sieja
University of Wisconsin-Madison
sieja@wisc.edu

Abstract

Recent work on potential bias in the ABA ratings of federal judges has sparked some controversy, showing that the ABA Standing Committee on the Federal Judiciary (SCFJ) systematically rates Republican nominees to the U.S. Courts of Appeals lower than Democratic nominees. This paper builds on that research in two ways. (1) Using hypotheses derived from the issue evolution and conflict extension frameworks, it suggests a mechanism for the observed change from professionally-motivated to politically-influenced ratings from the SCFJ. (2) It shows that the anti-Republican bias remains even if all nominees (1953-2011) officially rated by the ABA are included in the analysis, and it demonstrates that the SCFJ was not politically biased from the Eisenhower through Carter administrations. Finally, it replicates Smelcer, Steigerwalt, and Vining’s (2012) basic finding that the SCFJ biases its ratings against Republican nominees by making it harder for them to receive the highest “well qualified” designation, all else equal.

Paper prepared for presentation at the American Politics Workshop
University of Wisconsin-Madison
April 16, 2012
Introduction

How do changes in the structure of mass politics affect elite institutions? While this question has been addressed with regard to Congress (e.g., Binder 2003) and presidential-congressional interaction (Devins 2008, Andres 2005, Owens 2004, Bond and Fleisher 2000), comparatively little work in this vein has focused on the federal court system. By examining the American Bar Association’s involvement in the judicial appointment process, specifically its ratings of nominees to the U.S. Courts of Appeals, this paper begins to close the gap in systematic knowledge of the relationship between partisan change and the judicial branch. The ABA ratings, while not dispositive, have a considerable effect on who sits in the lower tiers of the federal judicial hierarchy, and ample evidence exists that “where [litigants] stand depends on who sits” (Rowland and Todd 1991, Ho and Ross 2010). Additionally, the biographies of judges have a demonstrable impact on case outcomes (see Epstein, Knight, and Martin 2003, 961-965, for a review). As a result, if certain types of judges are systematically disadvantaged by ABA ratings, it likely has an effect on case outcomes, too.

While the case outcome effect is technically beyond the scope of this analysis, I will demonstrate that there is evidence that certain aspects of a nominee’s background disadvantage her in the ABA’s rating system. Also, I will suggest a mechanism, based in theories of partisan change, which generated the evidence. Taken together, these findings show that changes in the structure of politics “outside” institutions affect outcomes in important, albeit indirect, ways. In addition to this primary goal, this paper serves at least two other important functions. It both extends Smelcer, Steigerwalt, and Vining’s (2012) research on the determinants of ABA ratings and replicates their initial findings.
This paper proceeds in five parts. First, there are brief reviews of existing works regarding mass ABA ratings, mass political change, and the federal courts. From those works, I introduce the established theories for evaluating ABA ratings. Since a goal of this paper is to look at the determinants of ABA ratings over time, I then append those theories to two competing theories of partisan change in post-war American politics. Third, I describe the data and methods. Fourth, I present the results of the tests, and discuss how they support (or do not support) existing theory. Finally, I conclude with some thoughts on the implications of these results and suggestions for future research.

**Bias and the Bar: What We Know So Far**

Scholars have recently returned their attention to an important stage in the nomination and confirmation process for federal judges: the ratings nominees receive from the American Bar Association’s Standing Committee on the Federal Judiciary (SCFJ). This rating reflects the SCFJ’s opinion on whether the nominee is “well qualified,” “qualified,” or “not qualified” to serve on the federal bench. Given the rating and its own subsequent evaluation of the nominee in special hearings, the Senate Judiciary Committee then decides whether or not to report the nomination to floor of the Senate, where the full chamber can accept, reject, or filibuster the motion to confirm.

The recent attention, though, is due to a perception that the Standing Committee’s ratings, instead of being a reflection of only the nominee’s professional competence, integrity, and judicial temperament, also reflect a perceived partisan bias of the ABA itself. Specifically, conservatives argue that the ABA has a liberal bias, and thus the nominees of Republican presidents are systematically rated lower than the nominees of Democratic presidents. As
evidence of the former claim, conservatives point to the ABA House of Delegates’ adoption of pro-abortion, anti-death penalty, and pro-immigration stances, in addition to the SCFJ’s controversial rating of Robert Bork. Yet evidence for the latter claim requires more than anecdotal or correlational accounts. Many factors go into an ABA rating, for which all should be accounted before accepting or rejecting claims of bias from either side.

“Either side” is appropriate here because, over the course of its involvement in the nomination process, both liberals and conservatives have leveled the same charge: the SCFJ is biased against their nominees. Indeed, Grossman (1965) points out that it was Wisconsin Republican Senator Alexander Wiley who, in 1946, first invited the ABA to participate in the vetting process in order to “stem the tide of ‘leftist’ judges periodically appointed during Democratic administrations” (64). Goldman (1997) notes the frustration Presidents Truman, Kennedy, and Johnson experienced in dealing with an SCFJ that, if it did not favor Republican nominees, at least strongly urged “bipartisanship” in picking federal judges. President Carter went so far as to demote the ABA from the traditional “screening” function it held since the Eisenhower administration to a “post-selection check” (Slotnick 1983a). Rather than effectively exercising a pre-nomination veto over candidates it considered “not qualified,” the SCFJ, during and after Carter’s term, rated a candidate after the president selected, but before he officially nominated, her.¹ George W. Bush pushed the SCFJ’s involvement in the process to after the nomination had been transmitted to the Senate (Epstein and Segal 2005, 23).

Regarding partisan bias claims, Grossman’s (1965) seminal work on the SCFJ’s rating system describes an ABA that is largely concerned with the professional qualifications of

¹ President Obama has (rhetorically, at least) returned to the pre-Carter method of selecting nominees.
potential nominees and not their politics. Grossman also warns, though, that the rating process is “clearly susceptible to misuse” (126). Later investigations have been prompted by discontinuities in the ABA’s involvement in the nomination process. Writing in the shadow of Carter and Reagan’s difficulties with the SCFJ, Slotnick (1983a, 1983b) focuses on two years of Carter nominees. He finds that demographic and background characteristics primarily drive ABA ratings. In the same vein, Haire (2001) finds that legal experience and demographic characteristics of judges affected their ABA ratings.

Shortly after the George W. Bush administration’s relegation of the SCFJ to a post-nomination role, Lindgren (2001) compared the ABA ratings of confirmed judges nominated by the president’s father and President Clinton and concluded that evidence of a bias against conservative nominees existed. Lott (2001), however, shows that the bias disappears with better control variables, using the same data. Moreover, Saks and Vidmar (2001) criticize Lindgren explicitly (and Haire implicitly) for using only confirmed nominees. To get a clearer, more complete picture of the ABA ratings, they argue that, at minimum, unconfirmed nominees should be included in the analysis.

The most complete and sophisticated analysis of ABA ratings is Smelcer, Steigerwalt and Vining’s (2012) study (hereafter SSV). Using data on all rated nominees to the Courts of Appeals from the Carter through Bush II administrations, they employ matching methods to demonstrate that Republican nominees are systematically denied the ABA’s top rating of “well qualified.” Republican nominees are not, however, more likely to be rated “not qualified” than their Democratic counterparts. Additionally, they explore alternative explanations for the apparent bias – a “strategic” explanation involving divided government and an “extremism”
explanation based on Federalist Society members’ ubiquity in Republican presidents’
nominations – but they find that substantive bias remains after controlling for these factors.
The present analysis takes the SSV study as its starting point and places the ratings process in
the wider political context.

**The Professional and Political Theories in the Context of Partisan Change**

Two basic theories guide evaluations of ABA ratings: the professional theory and the
political theory (SSV 2012). The professional theory argues that the SCFJ rates nominees
exclusively on their legal experience. Conversely, the political theory holds that the SCFJ
primarily focuses on a nominee’s partisan political leanings when rating. The fundamental
expectations of the two theories are thus straightforward. If the SCFJ rates nominees pursuant
to the professional theory, then a nominee with more legal experience will receive a higher
rating than a nominee with less legal experience. If the SCFJ’s behavior is more in line with the
political theory, then a nominee who is closer to the committee ideologically will receive a
better rating than one who is farther away.

[Table 1 about here]

SSV outline several hypotheses for each of the theories, and they are summarized in
Table 1. On the one hand, the professional theory hypotheses are not time-bound. The
professional theory asserts that the SCFJ assigns its ratings based on objective criteria. These
criteria, with a few minor adjustments, do not change over time. On the other hand, based on
the brief narrative introduced above, one of the hypotheses generated from the political theory
should have effects conditional on the time-period under evaluation. Following contemporary
criticisms of the SCFJ, I expect Republican nominees sent up during and after Reagan’s
administration to receive lower ratings than Democratic nominees in the same time period. Given earlier Democratic president’s difficulties with the ABA, I expect Democratic nominees to be disadvantaged in the pre-Reagan years. The political theory of ABA ratings allows for this “drift” over time in the preferences of the SCFJ, as long as one of the actors involved – the ABA itself or the president’s judicial nomination team – changes its preferences.

The apparent change in direction from which partisan criticism of the SCFJ came over the course of post-war American history presents some interesting questions. Do any of the partisan criticisms directed at the SCFJ – the early Democratic or contemporary Republican ones – have merit? If yes, which ones? More importantly, if there is a change in the determinants of ABA ratings, what might this change illustrate regarding the well-documented changing structure of post-war American politics? Answers to the latter question not only advance a “big picture” understanding of American politics by connecting the ABA ratings controversy to the structural forces at work during the same period. They also indicate how the changing structure of politics can indirectly influence institutional outcomes, even within an institution the Framers explicitly designed to be insulated from such effects (Hamilton 1992 [1788]).

With respect to how elites and the mass public perceive political issues, issue evolution and conflict extension attempt to explain the process of mass partisan change. Issue evolution describes a process in which partisans “evolve” on a particular political question, often adopting the opposite view on a subject from the one a previous generations of their co-partisans had (Carmines and Stimson 1989). A classic example of issue evolution is the Democratic Party’s adoption of a strong pro-civil rights stance after long being the party of the Old Confederacy.
From the issue evolution perspective, the mechanism effecting partisan change is elites “moving first” (Carmines and Wagner 2007). That is, elite partisan actors – most prominently members of Congress – decide to change their positions on issues, which subsequently results in their mass-level co-partisans’ switches, either to their party’s new position or to the other party.

In contrast, the conflict extension view of change asserts that it comes about when new activists enter a party’s coalition (Miller and Schofield 2003). These activists bring with them new ideas about what ought to be on the political agenda, thus “extending” political conflict to issues that hitherto had not been matters for public discussion (Layman, et al 2010). These new activists are not partisan elites; they are more like Wilson’s (1962) “amateurs.” A recent example of conflict extension is abortion politics. Before Roe v. Wade, it was an “under the radar” issue, but after the decision new, socially-conservative activists moved en masse into Republican Party in order to foster political conflict on the issue.

While informing important research on the other branches of government, issue evolution, conflict extension, and polarization, which is their common upshot, have not received much attention in the judicial politics field. Smith (1990) examined whether or not Reagan’s appointees to the federal appeals courts were any more conservative in en banc decisions than previous Republican ones. Despite the Reagan Justice Department’s rigorous ideological screening process (Goldman 1997), Reagan’s judges were not more extreme than their Republican predecessors. At the Supreme Court level, Distlear and Baum (2001) noted a growing congruence between justice ideology and the ideology of their law clerks, and that ideology played an increasingly important role in clerk selection during the 1990s. They
interpreted this as evidence of growing polarization on the Supreme Court itself. Though these studies incorporate polarization and take its potential impact on outcomes seriously, a major flaw common to both is the lack of theoretical mechanism to explain why and how the (potential) polarization could occur. The inclusions of issue evolution and conflict extension in this paper aim to correct that flaw.

Conventional wisdom seems to suggest that the issue evolution perspective and mechanism is correct. Democratic presidents and liberal interest groups complained about the ABA’s perceived conservatism before Reagan. After Reagan, Republican presidents and conservative interest groups complained about its perceived liberalism. This suggests that either the parties or the ABA changed their views on what views a good federal judicial nominee should have. If the data ultimately bear out the issue evolution thesis, then the pre-Reagan years should be characterized by an anti-Democratic bias from the SCFJ, while the Reagan and post-Reagan years should be characterized by an anti-Republican bias from the SCFJ.

If the current ratings controversy is due to conflict extension, however, the data should show something different – the professional theory exclusively operative before 1980, and the political theory operative after 1980. This pattern would indicate that judicial nominations were not a political issue in the first period, but a change occurred around 1980 which caused political conflict to extend to these nominations.

**Data and Methods**

This investigation follows SSV’s study of ABA ratings, with a few modifications. I examine all U.S. Courts of Appeals nominees whom the SCFJ rated officially, including failed
nominations, from the beginning of Eisenhower’s first term to November 10, 2011. I do not look at nominees who were not rated by the ABA, nor do I include the many nominees whom presidents and senators suggested the ABA rate provisionally (see, for example, Goldman 1997, 178). While I do not count re-nominations of an individual by the same president, I count as a separate case a subsequent nomination by a different president. The unit of analysis, then, is the nominee-president. Over the 58 years under consideration, there are 579 unique nominee-president observations. From 1953 to 1980, the number of observations is 223; post-1980 there are 356 nominees.

The dependent variable is a three-point ordinal scale representing the nominee’s majority ABA rating, from “not qualified” to “well qualified.” I use a three-point scale instead of the standard six-point scale for several reasons. Until the Carter administration, the ABA did not offer split ratings like “well qualified/qualified” or “qualified/not qualified.” The difference across time periods is compounded by the fact that until 1989, nominees could receive an “exceptionally well qualified” rating. While the latter does not pose as much of a problem – the top two categories can be condensed easily without much loss in variation or the possibility of incorrect inference (Martinek, Kemper, and Van Winkle 2002) – the former problem is a difficult one. Since the analysis relies on estimating coefficients for the same covariates on two subsets

---

2 A possible concern is that there are nominees who receive different ratings when they are subsequently nominated again, and those different ratings are discarded by not including re-nominations. There are three reasons why this is not a problem for this study. First, the trichotomous dependent variable absorbs many of the rating changes because, in the main, the assigned majority rating does not change. Second, after that variance is absorbed, only two rating changes, Terrence Boyle and Henry Saad (both Bush II nominees) remain. Third, counting re-nominations does not change the results appreciably. In general, the autocorrelation induced by including repeat observations only inflates standard errors of the coefficient estimates.
of the data, a common dependent variable is useful. It makes comparing effect sizes and predicted probabilities across models easier. Ultimately, I accept the SCFJ’s position that “[t]he majority rating represents the Committee’s official rating of the prospective nominee” (American Bar Association 2009, 6). Additionally, estimating the models with the expanded scale, after controlling for the possibility of split ratings beginning in 1979, does not change the substantive results presented here.

For the professional theory, independent variables include the number of years a nominee has served as a federal judge, years served as a state judge, years in private legal practice, years as a government attorney (including attorney general, whether elected or not), whether or not the nominee was ever a law professor, and whether or not the nominee held a federal appeals court clerkship. For the political theory, independent variables include whether the nominating president was a Republican (1) or Democrat (0) and whether or not the nominee has partisan political experience. Minority status, gender, and age are included as control variables. The former two variables are coded 1 if a minority or a woman. Summary statistics for these variables are listed in Table 2.

I collected these data from a range of sources. The Federal Judicial Center’s History of the Federal Judiciary database, Martinek’s (2005) Lower Federal Court Confirmation Database, 1977-2004, and the Auburn database (Zuk, Barrow, and Gryski 1996) provided most of the biographical data and ABA ratings. For later unconfirmed Bush II and Obama nominees, biographical data came from publicly available on-line curriculum vitae and résumés. In addition, the Senate Judiciary Committee has recently begun posting the materials (2011a, b) on-line for judicial nominees, including the unclassified version of the ABA questionnaire each
nominee fills out. Finally, I thank Professors Sheldon Goldman and Sarah Binder for the ABA ratings of many unconfirmed and early nominees, especially those during the Eisenhower administration.

I estimate three ordered logit models with the data: one on the nominations pooled across the entire 58 years under study, the second on nominees from Eisenhower through Carter, and the third from Reagan to 2011. I cluster standard errors on year of nomination to capture correlated errors due to yearly changes in the composition of the SCFJ.³ Professional theory independent variables include the number of years a nominee has served as a federal judge, years served as a state judge, years in private legal practice, years as a government attorney (including attorney general, whether elected or not), whether or not the nominee was ever a law professor, and whether or not the nominee held a federal appeals court clerkship. Political theory variables include whether the nominating president was a Republican (1) or Democrat (0) and whether or not the nominee has partisan political experience. Minority status, gender, and age are included as control variables. The former two variables are coded 1 if a minority and a woman. Summary statistics for these variables are listed in Table 2.

Results and Discussion

Results of the ordered logit regressions are presented in Table 3. I find support for both the professional and political theories in the pooled Model 1 and Model 3, which comprises the

³ Alternative clustering options include no clustering, clustering by nominee (to account for correlated errors if she is nominated again by a subsequent president), and clustering by president. None of these alternatives changes the substantive results.
nominees from Reagan on. On the professional side of the coin, years as a federal judge and holding a federal appellate clerkship have, across all models, consistent, positive, and statistically significant effects. On the political side, being nominated by a Republican president has a negative effect in Models 1 and 3. Overall, the models perform well. The significant Wald statistic indicates that each model is an improvement over one with no covariates.  

In regard to the comparisons of the pre- and post 1980 ABA SCFJs, the results in Table 3 are in line with the expected pattern from the conflict extension mechanism of partisan change. In the period 1953 to 1980, the only significant predictors of ABA ratings are professional in nature: years as a federal judge and former appellate clerkship. To be sure, prior partisan political experience is also statistically significant and negative. Recall, though, that this indicator does not distinguish between political experience in the Republican Party or Democratic Party. In all likelihood, it is capturing the fact that governors, senators and other members of congress do not have the time to practice law in the courtroom, a critical factor the SCFJ considers explicitly in its evaluation. Thinking about the political experience variable this

---

The ordered logit model makes the parallel regression assumption; that is, the covariates have the same effect across each “separate” logistic regression within the model. In these models, for example, it assumes the covariates have the same effect when moving from a “not qualified” to “qualified” rating as they do when moving from a “qualified” to “well qualified” rating. There are two tests of the assumption: the likelihood-ratio test and the Brant test. The likelihood-ratio test fails to reject the parallel regression assumption in Models 1 and 3, and it rejects it in Model 2. Since the Brant test assesses the assumption with regard to individual covariates, it requires some variation within a covariate at each interval, in the same way a covariate would not work within a logit model if all of the “zeroes” had the same value for it. Given the small number of “not qualified” ratings, Brant tests on all three models do not work if the model retains all 11 covariates. However, Brant tests of minimally restricted (dropping only the covariates whose values do not vary among “not qualified” nominees) models fail to reject the parallel regression assumption in all three cases and for all retained variables. Note that this problem cannot be solved by expanding the scale to include split ratings because no nominee has yet received a split, majority-“not qualified” rating.
way, its failure to obtain statistical significance in the post-1980 period underscores the shift from purely professional to political and professional considerations by the SCFJ. As already indicated, the post-1980 era is characterized by a blend of the professional and political theories. In short, some actor – the ABA SCFJ, the Reagan justice department or another – consciously or unconsciously extended partisan conflict to the ABA rating process.

[Table 4a about here]

Since the ordered logit model returns log-odds regression coefficients, Table 3 is not useful for much beyond showing which covariates have a statistically significant effect on the dependent variable. To see the stark differences in substantive effects between when the ABA acts purely professionally and when politics are mixed in, the second and third columns of Table 4a present the change in predicted probability for each outcome. Continuous variables are held at their mean values, and indicator variables, except president’s party, are assigned their modal values, which is zero for each. In Table 4a, the second and third columns follow the same general pattern, but the critical differences are in magnitude and statistical significance. The changes in predicted probabilities are smaller in the second column than the third, and all of the confidence intervals in the second column include zero, which would indicate no change between a Democratic and Republican president.\(^5\) In contrast, the change in predicted probabilities is about three percentage points higher in the third column than the second. Also, the confidence intervals for “qualified” and “well qualified” do not overlap zero; this is another indicator that the move against Republican nominees is real and has had a significant effect.

\(^5\) The point estimate for “not qualified” is higher in the second column than the third. However, the confidence interval is much wider, it overlaps zero, and the substantive difference between a 0.6 percentage point change and a 0.2 percentage point change is negligible.
Further illustrating this point is a test of comparable former federal appellate clerks in Table 4b. This table displays essentially the same information as Table 4a, but in this table the predictions show the change in probability of receiving a certain rating if the two hypothetical nominees were both federal appellate clerks. In Model 2, there is essentially no difference between former clerks nominated by Republicans and Democrats. This is wholly consistent with the professional theory. Looking at the point estimates of change, the differences decrease in magnitude around seven percentage points from Table 4a to Table 4b for Model 2. In the next column, though, Model 1’s decrease in the magnitude of the change is only four percentage points from Table 4a to Table 4b. Not only is the difference in changes smaller, but also comparing Republican and Democratic former clerks does not erase the significant change in predicted probabilities. The SCFJ is still statistically more likely to rate Republican former appellate clerks lower than Democratic former appellate clerks, all else equal. Setting the information in these two columns side-by-side demonstrates clearly the effect of the SCFJ acting purely professionally, in contrast to when it takes politics into account.

By uncovering evidence suggestive of conflict extension affecting the determinants of ABA ratings, these results represent an important step forward in the study of the federal court system and the indirect effect changes in the structure of mass politics can have on it. They also comport with some of SSV’s (2012) major findings: (1) there is an anti-Republican bias in ABA nominations in the recent past, and (2) this bias is confined to the top rating. In a sense, Republicans nominees now are not being “curved down” because of their perceived partisanship, but are hitting a “glass ceiling” because of it.
Though the standard way to demonstrate the change in predicted probabilities is to vary one measure while holding all others at their means or modes, this procedure could mask important differences in the effect of party at other values of the independent variables. Since an observed regularity in ABA ratings bias is that it is more akin to a “glass ceiling” than a “curve down,” it is useful to explore some of these alternate values to see if the effect is consistent. Tables 5a, 5b, and 5c present three alternative ways of specifying the values of the independent variables. The cell entries represent the same information as in Tables 4a and 4b: the change in predicted probability of a given rating, switching from a Democratic to Republican nominee, all else constant. On the whole, these alternative specifications support the “glass ceiling” conclusion drawn above, though one of them shows that this pattern is altered in narrow, yet important, circumstances.

[Tables 5a and 5b about here]

Each of the tables is based on a hypothetical nominee. Table 5a shows how partisanship affects a nominee with merely the minimum amount of private practice experience suggested by the ABA guidelines (American Bar Association 2009). The changes in predicted probabilities follow a pattern – negligible for “not qualified,” considerably positive for “qualified,” and considerably negative for “well qualified” – consistent with the “glass ceiling” argument. It is important to note, however, that the magnitude of the change is between two and four

6 The minimum amount of private practice experience varies across Models 2 and 3 because of a change the ABA made to its evaluation criteria before the during the Carter administration. Carter desired to appoint more women and minorities to the federal bench, but because of discrimination in law school admittance and legal firms’ hiring practices, many potential nominees in these categories would be automatically “not qualified,” given the ABA’s standard of 15 years of courtroom experience. To accommodate this, the ABA revised its standard to 12 years (Epstein and Segal 2005, 73-74). Also, age is adjusted across Models 2 and 3 to reflect that post-Carter nominees tend to be younger in general (see Table 2).
percentage points higher in Table 5a than in Table 4a, suggesting that younger, less-experienced Republican nominees are treated more harshly than their Democratic counterparts, relative to the comparison of two “average” nominees from each party. Based on a potential young nominee who has minimal private experience, is a (former) law professor, and has two years experience on the federal bench, Table 5b exhibits many of the same properties as Table 5a. The changes are higher in magnitude than Table 4a, and they show the familiar “glass ceiling” effect.

[Table 5c about here]

Table 5c, however, indicates what sorts of conditions have to hold in order for the “curve down” effect to be observed. Because many of the variable values in this case align with one of President Obama’s highly controversial Ninth Circuit Court of Appeals nominee’s résumé, I call this the “Goodwin Liu Test.” This potential nominee has no judicial experience, two years in private practice, is a law professor, has some partisan political experience, is a minority, and is 40 years old. The “curve down” can be observed in two ways. First, the change in predicted probability of a “not qualified” rating is substantively significant. Instead of the less than 1.5 percentage point differences observed in Tables 4a through 5b, the change for Model 1 in the Liu Test is 3.6 percentage points, and it is more than two percentage points for Model 3. Though it is not statistically significant, the change for “not qualified” in Model 2 is

7 To be fair, this is not an exact test of Professor Liu’s background; he was a federal appellate clerk as well. I do not fully report the parallel “clerk test” for these three alternative specifications for space reasons. All of them support the “curve down” explanation of ABA bias, and two of the three imply attenuation of the effect size from non-clerk test. Somewhat interestingly, for the Goodwin Liu Clerk Test, the change in predicted probability at the “not qualified” level decreases, but the total effect increases, i.e. the magnitude for Model 1 “well qualified” increases from -0.084 to -0.125.
nevertheless six percentage points. Second, the predicted probability changes for the “qualified” rating across all models are not statistically significant. This suggests that the statistically significant negative change at the highest category is dispersed more evenly between the lower two categories, which is more in line with a “curve” style bias.

The alternative tests underscore the importance of the conflict extension mechanism. Table 2 shows that, on average, recent nominees are not only younger than their pre-Reagan counterparts, but they also have greater variation in experience. As new activists (either on the ABA’s SCFJ or within the Justice Department) with novel ideas about what constitutes a “well-qualified” nominee came on the scene, they could take advantage of the greater variation in professional experience to translate their ideas into standards. As more nominees are like Goodwin Liu and fewer are like Lester Cecil, a 66-year-old Eisenhower appointee with 33 years of judicial service, raters and screeners have more leeway to argue whether or not a given nominees is (well) qualified. Activists who may have started to populate the SCFJ in the mid- to late 1970s had the opportunity to extend partisan conflict to concepts like “compassion,” “open-mindedness,” and “equal justice under the law” (American Bar Association 2009), which would have afforded them an opportunity to codify ideological considerations into the ABA rating system.

Finally, to get a better sense of how substantively significant the negative coefficient on Republican president is by itself, compare the first and third columns in Tables 4a and 4b as above. The third column of this table shows that, over the past 30 years, a nominee selected by a Republican president is 12.5 percentage points less likely to receive a majority “well qualified” rating from the SCFJ than a similarly-experienced Democratic nominee. Over the whole of the
ABA’s involvement in rating nominees, Republican nominees are about 10.6 percentage points less likely to receive a majority “well qualified” rating. The bias is not so large as to appreciably increase the probability a nominee receive the lowest “not qualified” rating in any case; the 95 percent confidence intervals on both of those changes in predicted probabilities overlap zero.

To see how this bias might be attenuated by a nominee’s status as a former federal clerk, consider the first and third columns of Table 4b. Even with this particularly consistent and important indicator of professional experience, nominees of Republican presidents are still 8.6 percentage points less likely to receive a majority “well qualified” rating in the recent past, and 6.3 percentage points less likely to receive this rating over time. Again, this bias seems to operate at the “well qualified” level; Republican ex-federal clerks are no more likely to receive a “not qualified” rating than their Democratic counterparts. These results are not very surprising, but they do replicate SSV’s work (Model 3) and extends their analysis to include all rated nominees from 1953 (Model 1).

**Conclusion and Directions for Future Research**

This paper has accomplished three goals. First, it suggested a possible mechanism, conflict extension, for the change from the SCFJ’s purely professional approach in the first period to its mixed approach during the second. The change itself is important because ABA ratings affect who gets on the federal appellate bench, which can affect both who has their appeals heard and the disposition of those appeals. Again, this paper is only a first step in explicating this process, and it does not look at judicial outcomes *per se*. It is not much of a stretch, though, to suggest that the conflict extension mechanism could help solve the puzzle Goldman (1997) and Smith (1990) identified: why an allegedly hyper-ideological screening
process in the Reagan Justice Department did not result in hyper-ideological appellate judges. If
Reagan’s shift to the Right was balanced with the SCFJ’s shift to the Left, it might have resulted
in the empirically moderate Reagan judges.\(^8\)

Second, it extends SSV’s work by showing anti-Republican bias remains when all
nominees, going back to the beginning of the ABA’s systematic involvement in the nomination
process during the Eisenhower administration, are included in the analysis. It also showed that
the balance of evidence weighs against bias claims – from either Republicans or Democrats – in
the period before the Reagan administration. This finding runs counter to some conventional
wisdom that the SCFJ was biased against early liberal nominees. Third, it replicated SSV’s most
basic finding regarding the SCFJ’s recent bias against Republican nominees to the U.S. Courts of
Appeals. This paper is a completely independent reproduction of SSV’s findings on substantially
the same data.\(^9\)

To put some of the findings in terms that will be familiar to judicial politics scholars, the
ABA’s early involvement in rating judicial nominees is analogous to its following a “legal model”
approach to the task. According to the legal model of judicial decision-making, judges look to
objective criteria – the plain text of the law or Constitution, the facts of the case, or a particular
jurisprudential view (Richards and Kritzer 2002) – to make their ruling. In the same vein, the
SCFJ appears to have looked at objective, professional criteria early on to formulate its ratings

\(^8\) A concrete example of this is the SCFJ’s treatment of Robert Bork, who was the only judge or
justice to receive a “well qualified/not qualified” split rating. To the extent this provided cover
for senators to vote against and ultimately defeat Bork, it resulted in the appointment of the
current median justice, Anthony Kennedy.

\(^9\) Though I collected some of the data from many of the same sources, I neither asked for nor
received SSV’s actual data set. I compiled this data set independently, and the results bear out
the same conclusions.
for judicial nominees. While the SCFJ’s involvement in the later period on the surface seems to follow a more “attitudinal” (Segal and Spaeth 1993, 2002) approach to ratings, asserting that it is purely attitudinal, as some conservative critics have done, would overstate the case.

Instead, the SCFJ appears to be acting more in line with a strategic model (Epstein and Knight 1998). The SCFJ’s ratings have an element of policy motivation to them, but the committee is nevertheless constrained. In the judicial arena, prominent constraints include precedent (Hansford and Spriggs 2008) and norms of collegiality (Maltzman, Spriggs, and Wahlbeck 1999). In these data, the SCFJ is clearly constrained by the amount of federal judicial experience in a nominee’s background, and to a smaller extent by whether or not the nominee was a federal appellate clerk. Ultimately, the SCFJ cannot rate purely on its attitudinal preferences, whatever they may be. It has to consider a nominee’s résumé if she has a certain type of experience, in the same way Supreme Court justices must consider precedent if the precedent has certain characteristics (Hansford and Spriggs 2008).

The results also point to many opportunities for future research. If the conflict extension explanation is accurate, scholars should examine who extended the conflict as well as looking directly at institutional outcomes. Conventional wisdom regarding the former would point to the Reagan Justice Department, particularly Attorney General Ed Meese, and its desire to reshape the “activist” federal judiciary of the 1960s and 1970s with conservative judges. In this account, the ABA and the SCFJ stay neutral, and their apparent political bias is the result of the Republican Party moving from the middle. Classic conflict extension occurs when new partisan activists enter the political arena. In this case, the new activists could be young, conservative, Justice Department staffers who preliminarily vet potential nominees, or they could be young,
liberal lawyers entering the ranks of the ABA and getting on the SCFJ in time to rate slightly more conservative nominees lower than these nominees otherwise would have been. SSV (2012) provide a fairly direct test of the former “conservative activist” hypothesis when they control for Federalist Society membership and find the bias remains. Thus, an analysis of the changing membership in the SCFJ may be more fruitful.

In addition, the results suggest an untold race and politics story. Interestingly, minority status is not a significant predictor of ABA rating in the early period. The coefficient on minority status is negative and statistically significant in the later period, suggesting that minority nominees were rated lower than their white counterparts. This finding runs counter to a few existing narratives, most prominently that early minority nominees should face more discrimination than later ones, given changes in social norms over the past 60 years. One possible explanation for this finding is that, because they had reached such high status in their profession in the face of considerable overt racism, the earlier minority nominees represented the absolute best minority lawyers and judges in the country. As a result, even if the SCFJ wanted to rate them lower than their white counterparts, it was constrained by the minority nominees’ imposing qualifications. In regard to the later period finding, it is possible that Republican minority nominees are responsible for the results. Republican presidents might have to promote lower quality minority nominees, given the dearth of minority elites in the Republican Party. Both of these suppositions deserve a fuller investigation than they could receive here.

Along the same lines, the break-up of the one-party South could also play a role in the apparent bias against Republican nominees. Many of the new U.S. Courts of Appeals seats
created in the late-1970s and early-1980s were seats to be filled by southern judges.

Republican presidents – Reagan and George H.W. Bush – had to fill these seats, but the existing “bench” of Republican legal professionals in the South was short, given the long post-Civil War dominance of Southern Democracy. As a result, Republican nominees could be rated lower because Republican presidents had to nominate less “objectively” well-qualified southern Republicans to new southern judgeships. Alternatively, the expansion of the federal bench could have led to lower quality nominees across the board, so that the bias against Republicans exists only because Republican presidents made more nominations.  

Another opportunity for exploration should look at the consequences of the changing role the ABA played in the nomination process over the course of its involvement. Early presidents, notably Richard Nixon, pledged not to nominate anyone preliminarily rated “not qualified” by the SCFJ. This gave the ABA an informal veto over whom the president eventually nominated, and it probably affects some of the first period results in the analysis above. While this paper and the best contemporary work on ABA ratings have attempted to limit selection effects by including failed nominations as well as confirmed ones, there is another set – those considered, informally rated, then not formally nominated – whose

\[\text{\textsuperscript{10}}\text{A common analogy here is to expansion in professional sports, particularly Major League Baseball. Before the addition of teams in the 1960s, both leagues had eight squads with 25-man rosters, for a total of 400 players. Now, there are 30 teams with 25-man rosters. This means that there are 350 more “Major League” ballplayers in today’s game than in the 1950s. Certainly some of these “extra” players would not have been considered for promotion past the AA-level, much less to the majors, in the earlier era. In the same way, many nominees probably would not have made it past the preliminary ABA rating stage when there were fewer seats to fill on the federal bench.}\]

\[\text{\textsuperscript{11}}\text{Nixon broke his promise by nominating, at the behest of Senator Lowell Weicker, former Connecticut Governor Thomas Meskill. Nixon formally nominated Meskill on August 8, 1974.}\]
inclusion would improve potential results markedly. Currently, the primary difficulty in using these data is their unsystematic character.

Finally, the following points deserve reiteration. (1) The conflict extension thesis is supported, but more work is needed to determine more precisely which political actor(s) effected the change. In addition, more can be done to tie explicitly this change to changes in outcomes on the U.S. Courts of Appeals. (2) The bias against Republican nominees does not act as a general “curve down” in the ratings, except in narrow (but quite possible) circumstances. It acts more like a “glass ceiling,” making it harder for Republican nominees to receive a majority “well qualified” rating. As a result, Republican nominees are more likely to receive majority “qualified” ratings, but they are not more likely to receive majority “not qualified” ratings. (3) The bias against Republican nominees since the Reagan administration is real.
References


Andres, Gary. “Polarization and White House/Legislative Relations: Causes and Consequences of Elite-Level Conflict.” Presidential Studies Quarterly. 35: 761-770.


<table>
<thead>
<tr>
<th>Professional Theory</th>
<th>Contemporary Political Theory (pre-Reagan)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The more years a nominee has served as a judge, the higher her ABA rating will be.</td>
<td></td>
</tr>
<tr>
<td>2. The more years of legal experience in a nominee’s background, the higher her ABA rating will be.</td>
<td></td>
</tr>
<tr>
<td>3. A nominee who has a background in legal academia will receive a lower ABA rating than one with other legal experience.</td>
<td></td>
</tr>
<tr>
<td>4. A nominee who has served as a federal appellate clerk will receive a higher ABA rating than one who did not.</td>
<td></td>
</tr>
<tr>
<td>1. Nominees submitted by Republican (Democratic) presidents will receive lower ABA ratings than nominees submitted by Democratic (Republican) presidents.</td>
<td></td>
</tr>
<tr>
<td>2. Nominees with a partisan political background will receive lower ratings than nominees without such a background.</td>
<td></td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>--------------------------------</td>
</tr>
<tr>
<td></td>
<td>Mean</td>
</tr>
<tr>
<td>Majority ABA Rating</td>
<td>1.663</td>
</tr>
<tr>
<td>Years as Federal Judge</td>
<td>3.451</td>
</tr>
<tr>
<td>Years as State Judge</td>
<td>2.727</td>
</tr>
<tr>
<td>Years in Private Practice</td>
<td>12.693</td>
</tr>
<tr>
<td>Law Professor</td>
<td>0.295</td>
</tr>
<tr>
<td>Federal Appellate Clerk</td>
<td>0.176</td>
</tr>
<tr>
<td>Republican President</td>
<td>0.573</td>
</tr>
<tr>
<td>Political Experience</td>
<td>0.204</td>
</tr>
<tr>
<td>Minority</td>
<td>0.136</td>
</tr>
<tr>
<td>Gender</td>
<td>0.150</td>
</tr>
<tr>
<td>N</td>
<td>579</td>
</tr>
</tbody>
</table>
Table 3: Ordered Logit Models of ABA Ratings for Circuit Court Nominees

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Coefficient (RSE)</td>
<td>p value</td>
<td>Coefficient (RSE)</td>
</tr>
<tr>
<td>Federal Judge (Years)</td>
<td>0.144 (0.028)</td>
<td>0.000</td>
<td>0.095 (0.039)</td>
</tr>
<tr>
<td>State Judge (Years)</td>
<td>0.049 (0.024)</td>
<td>0.042</td>
<td>0.064 (0.037)</td>
</tr>
<tr>
<td>Private Practice (Years)</td>
<td>0.025 (0.018)</td>
<td>0.175</td>
<td>0.024 (0.022)</td>
</tr>
<tr>
<td>Government Attorney (Years)</td>
<td>0.016 (0.023)</td>
<td>0.479</td>
<td>-0.040 (0.041)</td>
</tr>
<tr>
<td>Law Professor</td>
<td>-0.027 (0.212)</td>
<td>0.897</td>
<td>-0.259 (0.402)</td>
</tr>
<tr>
<td>Federal Appellate Clerk</td>
<td>0.847 (0.295)</td>
<td>0.004</td>
<td>2.071 (0.943)</td>
</tr>
<tr>
<td>Republican President</td>
<td>-0.551 (0.195)</td>
<td>0.005</td>
<td>-0.541 (0.339)</td>
</tr>
<tr>
<td>Political Experience</td>
<td>-0.653 (0.265)</td>
<td>0.014</td>
<td>-0.961 (0.445)</td>
</tr>
<tr>
<td>Minority</td>
<td>-0.634 (0.238)</td>
<td>0.008</td>
<td>-0.400 (0.330)</td>
</tr>
<tr>
<td>Gender</td>
<td>-0.218 (0.268)</td>
<td>0.416</td>
<td>-0.994 (0.623)</td>
</tr>
<tr>
<td>Age</td>
<td>0.020 (0.021)</td>
<td>0.331</td>
<td>0.023 (0.033)</td>
</tr>
<tr>
<td>N</td>
<td>579</td>
<td></td>
<td>223</td>
</tr>
<tr>
<td>Wald χ²</td>
<td>49.50</td>
<td></td>
<td>23.88</td>
</tr>
<tr>
<td>Prob &gt; χ²</td>
<td>0.000</td>
<td></td>
<td>0.013</td>
</tr>
<tr>
<td>Log likelihood</td>
<td>-350.987</td>
<td></td>
<td>-132.230</td>
</tr>
</tbody>
</table>

Statistically significant results at the 0.05 level are shaded in gray. Robust standard errors are clustered on year of nomination. P-values reported are for two-tailed tests.
### Table 4a: Marginal Effects of President’s Party on ABA Majority Ratings for Circuit Court Nominees

<table>
<thead>
<tr>
<th>ABA rating (majority)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Qualified</td>
<td>0.003 (-0.000, 0.007)</td>
<td>0.006 (-0.003, 0.014)</td>
<td>0.002 (-0.001, 0.005)</td>
</tr>
<tr>
<td>Qualified</td>
<td>0.103 (0.033, 0.173)</td>
<td>0.089 (-0.024, 0.202)</td>
<td>0.123 (0.022, 0.223)</td>
</tr>
<tr>
<td>Well Qualified</td>
<td>-0.106 (-0.178, -0.034)</td>
<td>-0.095 (-0.214, 0.024)</td>
<td>-0.125 (-0.226, -0.023)</td>
</tr>
</tbody>
</table>

All continuous variables held at their within-group means. All indicator variables held at their modes. 95% CI calculated using the delta method.

### Table 4b: Marginal Effects of President’s Party on ABA Majority Ratings for Former Federal Law Clerks

<table>
<thead>
<tr>
<th>ABA rating (majority)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Qualified</td>
<td>0.001 (-0.000, 0.003)</td>
<td>0.001 (-0.001, 0.002)</td>
<td>0.001 (-0.001, 0.003)</td>
</tr>
<tr>
<td>Qualified</td>
<td>0.062 (0.020, 0.103)</td>
<td>0.018 (-0.014, 0.050)</td>
<td>0.086 (0.014, 0.159)</td>
</tr>
<tr>
<td>Well Qualified</td>
<td>-0.063 (-0.105, -0.021)</td>
<td>-0.019 (-0.052, 0.014)</td>
<td>-0.087 (-0.161, -0.014)</td>
</tr>
</tbody>
</table>

All continuous variables held at their within-group means. Federal Appellate Clerk held at 1; all other indicator variables held at their modes. 95% CI calculated using the delta method.
Table 5a: The “Minimally Experienced Young White Male”

<table>
<thead>
<tr>
<th>ABA rating (majority)</th>
<th>Republican President (Model 1: 1953-2011) Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Republican President (Model 2: 1953-1980) Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Republican President (Model 3: 1981-2011) Δ in Pr(ABA rating) (95% conf. interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Qualified</td>
<td>0.007 (-0.000, 0.015)</td>
<td>0.010 (-0.008, 0.029)</td>
<td>0.005 (-0.002, 0.012)</td>
</tr>
<tr>
<td>Qualified</td>
<td>0.128</td>
<td>0.113</td>
<td>0.151</td>
</tr>
<tr>
<td>Well Qualified</td>
<td>(-0.039, 0.216)</td>
<td>(-0.037, 0.262)</td>
<td>(0.018, 0.284)</td>
</tr>
<tr>
<td>Qualified</td>
<td>(-0.228, -0.042)</td>
<td>(-0.288, 0.042)</td>
<td>(-0.293, -0.019)</td>
</tr>
</tbody>
</table>

All professional theory variables held at zero, except private practice years. Private practice years set to 15 for Models 1 and 2, and 12 for Model 3. Age held at 43 years old (Models 1 and 2) or 40 years old (Model 3). 95% CI calculated using the delta method.

Table 5b: The “Upwardly-Mobile Law Professor”

<table>
<thead>
<tr>
<th>ABA rating (majority)</th>
<th>Republican President (Model 1: 1953-2011) Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Republican President (Model 2: 1953-1980) Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Republican President (Model 3: 1981-2011) Δ in Pr(ABA rating) (95% conf. interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Qualified</td>
<td>0.008 (-0.001, 0.016)</td>
<td>0.015 (-0.013, 0.042)</td>
<td>0.005 (-0.002, 0.011)</td>
</tr>
<tr>
<td>Qualified</td>
<td>0.128</td>
<td>0.118</td>
<td>0.151</td>
</tr>
<tr>
<td>Well Qualified</td>
<td>(-0.039, 0.217)</td>
<td>(-0.027, 0.265)</td>
<td>(0.020, 0.282)</td>
</tr>
<tr>
<td>Qualified</td>
<td>(-0.229, -0.042)</td>
<td>(-0.299, 0.034)</td>
<td>(-0.290, -0.021)</td>
</tr>
</tbody>
</table>

Federal judicial experience set at two years, with three years private practice. Law professor held at 1; all other variables held at zero. Age set to 43 years old (Models 1 and 2) or 40 years old (Model 3). 95% CI calculated using the delta method.
Table 5c: The “Goodwin Liu Test”

<table>
<thead>
<tr>
<th>ABA rating (majority)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
<th>Δ in Pr(ABA rating) (95% conf. interval)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Qualified</td>
<td>0.036 (-0.005, 0.077)</td>
<td>0.060 (-0.062, 0.182)</td>
<td>0.022 (-0.014, 0.057)</td>
</tr>
<tr>
<td>Qualified</td>
<td>0.048 (-0.019, 0.115)</td>
<td>0.026 (-0.093, 0.144)</td>
<td>0.071 (-0.032, 0.174)</td>
</tr>
<tr>
<td>Well</td>
<td>-0.084 (-0.147, -0.020)</td>
<td>-0.086 (-0.168, -0.004)</td>
<td>-0.093 (-0.200, 0.015)</td>
</tr>
<tr>
<td>Qualified</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Private practice experience set to two years. Law professor, political experience, and minority status held at 1. Age set to 40 years old in all models. All other variables set to zero. 95% CI calculated using the delta method.