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The Senatorial Courtesy Game: Explaining the Norm of Informal Vetoes in Advice and Consent Nominations

Despite the contentiousness of advice and consent nominations, the Senate usually rejects a candidate to whom a home senator objects. Using game theory, this article explains the persistence of senatorial courtesy and maps its effects on which candidates succeed. The greater salience of a home nomination allows retaliation and reciprocity in a repeated game to elicit support for a veto, even under adverse conditions. Comparative statics indicate the range of the president's feasible nominees and show which players gain and lose from the practice. Most notably, the president can benefit from an exercise of senatorial courtesy.

Introduction

Presidential nominations subject to the advice and consent of the Senate, including federal judgeships, raise some of the most controversial issues that representatives face. Nominations are often the subject of intense and bitter political battles, both within the Senate and between the Senate and the executive. Yet even when supporters of a nominee control a majority of votes, those majorities routinely allow one senator to thwart the nomination, under the informal norm of senatorial courtesy. Senatorial courtesy is an unwritten rule followed in both the United States Senate and the New Jersey Senate: when a nominee for a state or district position is opposed by the senator representing that constituency, the Senate will vote down the nomination or will never address it, allowing it to lapse. Senators relinquishing their power to support a nominee in this way are not aberrations; senatorial courtesy has persisted since George Washington's presidency.

Senatorial courtesy is controversial for many reasons,[1] but two institutional effects are particularly significant. First, senatorial courtesy is a countermajoritarian force within the Senate, made exceptional because it is not enforced by any written rule. The informal nature of senatorial courtesy raises the question, Why do majorities of senators

continue to follow a norm that seemingly disadvantages them?[2] The first half of this article answers this question. In a repeated game, each senator expects to be in the majority more often than to be the lone individual asserting the right of veto; but if senators care significantly more about nominations that directly affect their own state than other states, then they will support the dissenting voice out of an expectation of future reciprocity.

The second institutional effect of senatorial courtesy is that it imposes an additional check on the president's nomination power: nominations are subject not just to the advice and consent of the Senate, but to the whim of one or two individuals who share the nominee's home state. This effect raises the question of whether or not senatorial courtesy systematically disadvantages the president; the second half of this article uses spatial models to assess the comparative statics of the nomination process, with and without senatorial courtesy exercised. I show that, overall, the president is in fact advantaged by senatorial courtesy. In certain circumstances, the president can control which senator has the power to exercise senatorial courtesy, and so can actually increase presidential influence on confirmation, as compared to when the fate of the nomination is determined by the median senator.

Other spatial models of appointments construct the appointment process as a product of the interaction between the president and the median of the Senate.[3] This model's results indicate that purely presidential–median-senator models are incomplete because they do not account for the role of the home state senator in the nomination process. Also, the results herein show that senatorial courtesy does not harm the interests of the president. This finding suggests that the interests of the president and any potential veto points do not constitute a zero-sum game, and any rigorous nomination model needs to account for this complexity. Before beginning the game, some clarification of key terms is necessary.

Explaining Senatorial Courtesy

Senatorial courtesy seems to present a paradox because it involves senators voluntarily refraining from exercising their constitutional prerogative to advise on the nominations of judges, U.S. attorneys, U.S. marshals, and other officeholders. The seeming paradox can be explained by the persuasive effect of reciprocity and retaliation. Senators support vetoes by home state senators because they expect to one day be in a like position, and they hope that their past support of senatorial courtesy will be reciprocated.

If a senator thinks it is likely that in the future she will have a strong preference over a nominee from her home state, then she may be willing to forego acting on a weak preference over a nominee from a different state, in expectation that other senators will likewise forego asserting their rights over nominees from her state. Similarly, if there is an expectation that senators will pay each other this courtesy, then senators who decline to do so are likely to face retaliation when they attempt to claim senatorial courtesy themselves.

This logic all depends on senators having a greater interest in the nominations affecting their own state than in any other nominations; scholars of both Congress and the judiciary agree that this is generally the case (see Chase 1977, 7; Smith 1999, 319). If senators are pure reelection seekers, then nominations affecting their own constituency are likely to be more salient to the community, and so more valuable to the senators (Segal, Cameron, and Cover 1992, 110). Even if senators have substantive policy preferences, policy outcomes that affect the senators' state are still likely to be more salient.

There are three ambiguities in the border of the norm of senatorial courtesy that require clarification. First, senatorial courtesy can extend beyond the ability of senators to veto a nominee from their home state of whom they do not approve, to placing a positive expectation on the president to consult with the home state senators prior to making any nomination. The expectation may be even greater, requiring the president to choose between nominees the home state senators jointly recommend.

This additional requirement is simply a logical extension. The consultation requirement "operates prospectively to determine the character of the nomination on the basis of the anticipated reaction of the confirming body…The President is only accommodating himself beforehand to the same criterion that will be applied formally when his selection is submitted" (Cole 1934, 876). On this reasoning, if the president expects an exercise of senatorial courtesy, and if there is a cost for the president in failing to have a nominee accepted,[4] then a rational president will consult with home state senators prior to making a nomination, or even choose from among their proposed nominees. As such, consultation is not a separate norm but a natural corollary of the practice of senatorial courtesy.

Second, senatorial courtesy can apply to national and regional offices, including executive positions and the U.S. Court of Appeals, with the senator from the state from which the nominee hails considered the home state senator. Recent examples of senatorial courtesy's application to court of appeals judges include President Clinton's nominations of Barbara Durham to a seat on the Ninth Circuit at the behest

of Senator Slade Gorton of Washington[5] and of H. Lee Sarokin to satisfy Senator Bill Bradley of New Jersey. Sarokin was confirmed with the help of 14 Republicans, despite being seen as soft on crime and far outside the mainstream on law enforcement, because Senator Bradley had supported Reagan nominees.[6] In addition, both Michigan senators have been using senatorial courtesy to block four nominees from their state to the Sixth Circuit for more than a year.[7] President Carter's effort to institute a merit selection for federal judges failed because, even among Democrats, the majority of senators continue to rely on senatorial courtesy.

Many nonjudicial officers are also subject to senatorial courtesy, such as heads of departments and offices, including the Justice Department,[8] centers such as the National Humanity Center and the National Endowment for the Humanities,[9] and executive advisory councils, such as the General Advisory Committee of the Arms Control Disarmament Agency.[10] Thus, there are two categories of senatorial courtesy, one that applies to state-based federal offices, the other to regional or national federal offices. The operation of the norm for nominations to the two types of offices differs somewhat, a difference accounted for in the game, but the essential concept is the same.

The third ambiguous aspect of the operation of senatorial courtesy relates to the extent to which senatorial courtesy is respected by opposition and majority party senators. Early accounts of senatorial courtesy suggest that the norm was only respected within party limits. More recent accounts indicate that senatorial courtesy is respected across party lines (see, for example, Chase 1977, 9–10). Because the operation of senatorial courtesy is often informal and not recorded, the details of its operation cannot be known with certainty, but we know of examples, such as the Michigan case, in which senatorial courtesy was respected across party lines, both within the Senate and between the White House and the home state senators.[11]

Binder, one of the few contemporary scholars to write in detail on senatorial courtesy, initially suggested that, unlike blue slips, senatorial courtesy applies only to members of the president's party (2003); Binder's more recent work with Maltzman (2004) finds senatorial courtesy to be statistically significant across party lines, at least within the first few weeks of the nomination process. The reason for this inconsistency may be that both of Binder's articles assume that the Senate rules governing the blue-slip process determine the nature of the norm of senatorial courtesy; instead, senatorial courtesy predates any rule, and the rule appears to exist as a formalization of the norm. This article shows that the practice of senatorial courtesy creates self-

enforcing equilibria, and self-enforcing equilibria can be broader than the requirement of formal rules, including applying across party lines.

In summary, senatorial courtesy can extend to minority party members, multistate offices, and presidential consultation with home state senators. Before continuing, it is worth noting what senatorial courtesy is not. It is not simply courtesy among senators. Nor is it the practice of not opposing the nomination of members of Congress to offices requiring confirmation. Nor is it the practice of holds, which are suspensions that can be put on any matter, including a nomination, by any senator. Holds are sometimes used to delay a nomination so as to force or prevent some separate action and are lifted once that action is taken (see, for example, *Congressional Quarterly* 1988, 376). The current Republican leadership in the Senate has indicated its intention not to continue to respect holds but has not made such a statement in relation to senatorial courtesy.[12] What remains is to determine when upholding senatorial courtesy is a stable equilibrium.

The Senatorial Courtesy Game

The game models both negotiations among small groups of senators and the exercise of senatorial courtesy within the full Senate. The starting premise is of differentiated intensity among the players. The home state senator, who chooses whether or not to invoke senatorial courtesy, has the greatest intensity of preferences and thus the most extreme negative and positive payoffs, depending on the outcome.[13] Initially, I assume the intensity condition required for equilibria sustaining senatorial courtesy, but later I identify the extent of this requirement.

I capture uncertainty as to tenure with the discount factor, δ, which renders later rounds less important than earlier rounds of play.[14] This discounting captures the extent that present benefits are valued more than the promise of later rewards. For example, a senator who fears failure to gain reelection would have a greater discount factor than a senator with a safe seat. Additionally, the discount factor can account for different senators' expectations over when a vacancy in their state is likely to arise. Consequently, senators from California may discount less than senators from New Hampshire, since they expect to be the home state senator sooner because of the sheer number of nominees from California.

The players are a Home State Senator (HSS)[15] and all other state senators, labeled "voting senators" (V_1, V_2, . . ., V_{99}). At this stage, the president is not a player. I initially assume an equal and independent probability of any player being HSS in any given round.

That is, each state is treated equally by the president, without favor, and is equally likely to receive a nominee.[16] Although presidential favor is a strategic consideration reflected in the payoffs of the senators, the game is initially a game against nature. Once senatorial courtesy is exercised, HSS needs majority support to succeed in the exercise. If senatorial courtesy fails, then the nominee is appointed. Communication is possible, and complete information, common knowledge, and perfect anticipation are assumed.

The game begins when HSS exercises senatorial courtesy. The voting senators play simultaneously. Each voting senator has the strategic set containing the strategies "support senatorial courtesy" (SC) and "oppose courtesy" (OC), that is, voting against or in favor of the president's nominee, respectively.

Payoffs are immediately realized at the end of each round. The game is only interesting in cases where the voting senators must choose between pursuing their own preferences and supporting senatorial courtesy, that is, when HSS opposes the candidate but it is not in the voting senators' short-term interests—represented in the stationary game—to support senatorial courtesy. The payoffs for the voting senators for cooperating and defecting are normalized at 0 and 1, respectively.

If a senator genuinely supports the nominee, then he or she has a strictly dominant strategy of defecting from senatorial courtesy in the stationary game.[17] Constructed in this way, the game creates a worst-case scenario for the norm of senatorial courtesy, to test its resilience and to avoid the trivial outcome in which voting senators have a short-term interest in opposing the nominee.

Figure 1 shows the payoffs in the stationary game with three players once HSS has chosen to exercise senatorial courtesy. The payoff for HSS in the stationary game is $\alpha > 1$ if HSS gains majority support and $\beta < 0$ if HSS fails. The key question is what α and β need to be for senators to have an incentive to respect each other's exercises of senatorial courtesy in anticipation of future support of their own exercises.

Results

The possibility that any voting senator will become HSS in a future round enables the current HSS to use punishment strategies to elicit cooperation from a voting senator in the current round. Here, two classic game theory punishment strategies are considered: a grim trigger strategy—cooperate if cooperate, defect forever otherwise—and tit-for-tat—cooperate if cooperate, defect for one round if defect, then cooperate again if cooperate.

FIGURE 1
Payoff Matrix when HSS Exercises Senatorial Courtesy

V2

	SC	OC
SC	0, 0, α	0, 1, α
OC	1, 0, α	1, 1, β

V1

Where HSS has exercised senatorial courtesy; $\alpha > 1$; $\beta < 0$; payoffs are (V1, V2, HSS).

In a group of three senators, an equilibrium outcome of support-ing senatorial courtesy is induced by a grim trigger strategy if the discount factor $\delta \geq 3/(\alpha - \beta + 1)$ [18] and by tit-for-tat if $\delta \geq 3/(\alpha - \beta - 2)$.[19] So the requisite patience to sustain an equilibrium that supports senatorial courtesy decreases as α and β increase; greater intensity supports a broader range of equilibria.

When the game is expanded from 3 senators to 100, equilibria become harder to sustain because the probability of being HSS drops from 1 in 3 to 1 in 50, drastically decreasing the expected value of being HSS in the future. Equilibria supporting senatorial courtesy require $\delta \geq 50/(\alpha - \beta + 1)$ for the grim trigger strategy and $\delta \geq 50(\alpha - \beta - 49)$ if tit-for-tat is played.

An intensity factor can capture the relationship between α and β, which can then be mapped against the requisite patience to sustain equilibria when senatorial courtesy is respected. The ranges of all pos-sible equilibria for these two punishment strategies when $\alpha = -\beta$,[20] varying across all possible discount factors, are presented in Figure 2.

The minimum intensity required to sustain an equilibrium exists when legislators are infinitely patient: $\delta = 1$. As can be seen in Figure 2A, in a small group negotiation, if legislators are infinitely patient, then α and $-\beta$ only need to each be greater than or equal to 1. That is, each value needs only equal the difference in value for voting senators between defecting and cooperating. This positive result does not depend upon infinite patience: equilibria for both strategies require an intensity

FIGURE 2
The Intensity-Patience Relationship, by Strategy

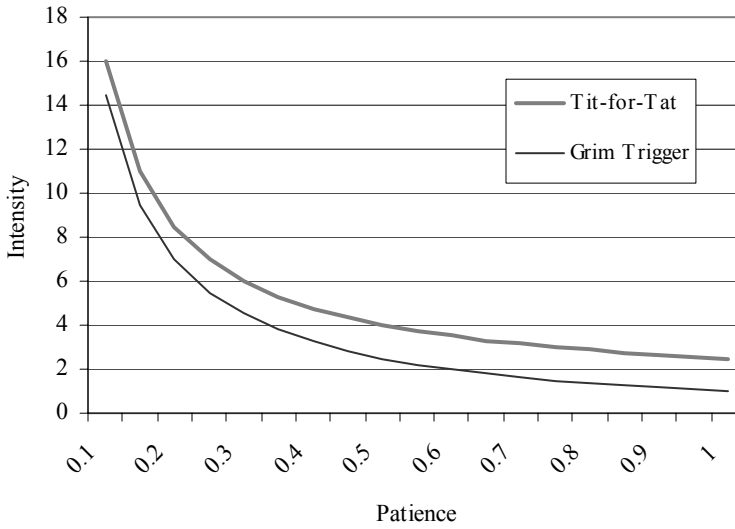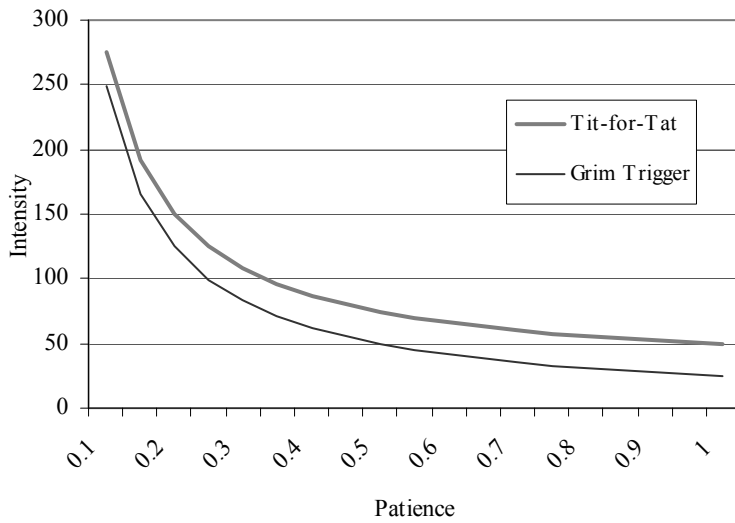Figure 2A: Three-Player Negotiation

Figure 2B: The Full Senate

factor up to 4 whenever $\delta \geq \frac{1}{2}$. So, for any reasonable level of discounting, senators need only value influencing their own state's next nomination as much as four other nominations for senatorial courtesy to be followed. This first result is a positive beginning for explaining the senatorial courtesy norm because for small groups the intensity condition may require only equal value being given to one's own state.

As Figure 2B illustrates, when senators try to convince the full Senate to respect senatorial courtesy, the conditions for success become more stringent. Using the incumbency advantage as a proxy for likely senatorial discounting of the value of future nominations, when $\delta = .9$, we find the value to HSS of a successful exercise and the cost of failure each have to be almost one-quarter of the sum total of the difference in utility for all the voting senators between defecting and cooperating when a grim trigger strategy is played, or almost half the sum total when tit-for-tat is played.

It is possible to have equilibria that support the norm of senatorial courtesy in the full Senate in the worst-case scenario, where 99 of 100 senators support the nominee, but the equilibria require stringent intensity conditions. Support for the norm under these circumstances may seem unlikely: if 99 senators support a nominee, then will respect for HSS's view, or fear of HSS's retaliation, be great enough to overcome such popularity? Although equilibria can be found to support senatorial courtesy even under these adverse conditions, the limits of the norm have been identified: the senatorial courtesy fails when the intensity condition is not met.

In practice, such stringent conditions do not normally apply. It is possible to capture a more realistic characterization of the conditions that senatorial courtesy would have to meet in practice by using party as a proxy for ideological division over nominees. Support for senatorial courtesy is not strictly tied to party, but party can be used to represent ideological division. This method allows us to approximate how difficult it is for a home state senator in an ideological minority to successfully invoke senatorial courtesy.

Since World War II, party division in the Senate has ranged from a 50–50 to a 36–64 split; the average margin was 12.4. As can be seen in Table 1, faced with an average ideological divide, senators only need to care up to twice as much about their own state's nominations as other state's nominations. During the Senate's strongest partisan division in the modern era, a margin of 32, senators need to care less than three times as much about their own state's nominations. Even with intense discounting, the intensity requirement remains below four. Although party is not a perfect proxy for ideological position, these figures illustrate that senatorial courtesy can be expected to be quite robust even under strong partisan division.

TABLE 1
Requisite Intensity Factor,
Using Party as a Proxy for Nominee Support

	Average partisan division (12)		Maximum margin (32)	
	Grim trigger strategy[a]	Tit-for-tat[b]	Grim trigger strategy[c]	Tit-for-tat[d]
Minimum intensity factor ($\delta = 1$)	0.64	1.77	0.97	2.44
Intensity factor with incumbency advantage ($\delta = .9$)	0.76	1.90	1.04	2.49
Intensity factor if $\delta = \frac{1}{2}$	1.77	2.91	2.44	3.91

[a]From endnote 19: $\delta \geq (25/11)/(\alpha - \beta + 1)$.
[b]From endnote 20: $\delta \geq 25/(11\alpha - 11\beta - 14)$.
[c]$\delta \geq (25/9)/(\alpha - \beta + 1)$.
[d]$\delta \geq 25/(9\alpha - 9\beta - 17)$.

I do not suggest that senatorial courtesy determines the fate of all nominees; some nominees are exceptionally salient to many senators, as the recent public battle and filibuster over Miguel Estrada illustrates.[21] Binder and Maltzman's (2004) findings suggest senatorial courtesy is very effective in the weeks following a vacancy, but lengthy nominations come to be dominated by other dynamics of the selection process. This complication makes sense: nomination periods are likely to be lengthy when numerous senators have strong feelings about the nominee, and the senatorial courtesy intensity condition will not be met. Nevertheless, in the majority of nominations, senatorial courtesy is determinative, and these low intensity factors explain why. If most senators are moderately patient and care more about having a veto over nominees from their own state than the outcome of between one and four other nominees not from their state, then there exist equilibria where senators respect the norm of senatorial courtesy.

It is unlikely that a minimum-winning coalition will form that will undermine these results. Although a strategy of cooperating only within a coalition of 51 senators strictly dominates the strategy of cooperating with all senators, literature on coalitions suggests that senators favor universalist coalitions (for example, Weingast 1979). When senatorial courtesy is placed in the broader context of other senatorial interactions, a minimum-winning coalition becomes hard to sustain because senatorial preferences may be heterogeneous over different issues. If

there is high correlation between senators' views on nominations and other issues, then a minimum-winning coalition would leave itself highly vulnerable to turnover changes. If correlation between issue preferences is low, then senators expect to need to form different coalitions on other topics, and so gain from universalism. Either way, a minimum-winning coalition respecting senatorial courtesy would not be effective in the long run.

The difference in the equilibria achieved in the three-player game and the full Senate game illustrates that, as the size of the chamber increases, sustaining an equilibrium where senatorial courtesy is respected requires the absolute value of the payoffs to HSS to increase dramatically relative to the payoffs of the voting senators. Consequently, all other things being equal, senatorial courtesy and other like norms become harder to sustain in a large chamber than in a small chamber. We could predict, then, that norms are likely to be more influential in the Senate than in the House. Many accounts have made empirical claims that this is the case in the U.S. Congress (see, for instance, Matthews 1959); this model shows that these differences are likely to be systematic.

Additionally, these results indicate an effect of the incumbency advantage: the higher the senators' expectation of reelection, the lower the senators' requisite intensity of preferences needs to be in order for senators to be willing to engage in logrolling behavior.

More broadly, these results have implications as to when legal regulation of norms is appropriate. There may be more need to regulate the effect of norms on small groups than on large groups, as smaller groups are more conducive to the development of collusive norms, such as antitrust activity.

The conditions for equilibria supporting senatorial courtesy have been established. In the next section, I examine the effect of the existence of senatorial courtesy on which candidates are nominated and confirmed, and, in so doing, I demonstrate who is advantaged and who is disadvantaged by its operation.

The Complication of the Strategic President

The president has three means of influencing the Senate in advice and consent nominations. First, the president has gatekeeping power: the choice to nominate or not nominate a candidate. If the president chooses not to nominate anyone, no other actor can do so. As such, the president is the agenda setter and enjoys all the advantages associated with that position (Baron and Ferejohn 1989).

Second, the president has the ability to choose a nominee who reflects his or her own ideological position, but this power is subject to the need to gain confirmation. The president will choose the candidate closest to his or her ideal point who will garner the support required for confirmation. In the absence of senatorial courtesy, the pivot point for successful confirmation is the median senator; with senatorial courtesy, if the norm operates prospectively as discussed, every candidate not endorsed by HSS will be vetoed, and the president will ultimately be forced to nominate HSS's favored choice. If the intensity factor is satisfied, then HSS can expect senatorial support vetoing any nominee up to the point H, HSS's ideal point. So H replaces M as the relevant pivot once the intensity factor is satisfied.[22] Thus, the president's nomination power is subject to the limits of the pivotal vote, whether that is the Senate median or HSS. This limitation changes the equilibrium, the president's feasible choice of nominees who will receive confirmation.[23]

Third, under some circumstances, the president has the power to determine who is HSS in a given round. As discussed in the previous section, there are two types of nominations subject to senatorial courtesy: those for multistate federal offices and those for single-state federal offices. For national and regional offices, the president can sometimes choose from which state to draw a nominee. In these cases, the president makes two choices in one action: in addition to choosing an actual candidate, who can represent any point on or beyond the ideological spectrum of senatorial preferences, the president effectively chooses which two of the hundred senators are the home state senators in any round.
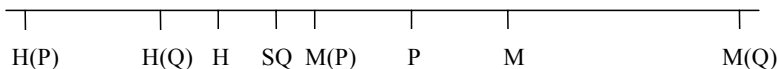
In the following section, I explore how the equilibrium candidate varies with different distributions of preferences between the president, the median senator, and the home state senator, and different status quos in the absence of a nominee.

Comparative Statics of a Full Senate and a President

To assess how a successful exercise of senatorial courtesy affects the type of candidate nominated by the president and confirmed by the Senate, I tailored this model for a multijudge panel, although variations may be possible for other positions. I use the multijudge forum because it provides a meaningful status quo: without a nomination, the ideological makeup of the bench will be that of the status quo in the absence of a new nominee. Again, I assume full information and anticipation of other players' moves for all players.

The method used in this model follows that initiated by Weingast and Moran (1983), further developed for open-rule chambers by

FIGURE 3
Preferences of Players

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H(P)       H(Q)  H   SQ M(P)  P          M           M(Q)
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Ferejohn and Shipan (1990), and generalized by Krehbiel (1998). The home state senator, the median senator, and the president are represented in a one-dimensional Euclidean policy space. Preferences are assumed to be monotonic within that space. Figure 3 illustrates one distribution of preferences, for an example position of the status quo.

H is the position of the home state senator, M is the position of the median senator, and P is the position of the president. The status quo (SQ) is the average ideological position of the relevant bench in the absence of a new nominee. All players are indifferent between a nominee at the point SQ and no nomination being made.[24] All players are assumed to care only about the ideological position of the nominee and to be unconcerned with the practicalities of the operation of the judiciary: for example, whether or not the judiciary is understaffed.[25]
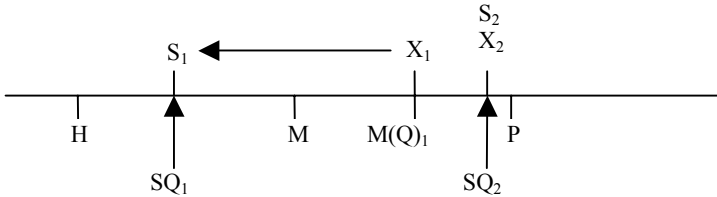
M(Q) is the point to the right of M, when the status quo is on the median senator's left and vice versa, that the median senator regards as indifferent to the point SQ; likewise M(P) is the point of indifference for M on the opposing side of P. Similarly, H(Q) is the point of indifference to SQ for H, and H(P) is the point of indifference to P for H. Note that symmetry does not need to be assumed.

The significance of the indifference points is to determine the boundaries of the president's power of nomination. Player i prefers anything in the range i(Q) to SQ. For example, in Figure 3, M will tolerate any point as far right as M(Q) in favor of SQ when faced with a dichotomous choice.

The policy space represents a continuum relevant to the players, for example, liberal-conservative. I consider three cases, varying which player lies between the other two players on the ideological continuum, where H < M < P, H < P < M, and P < H < M. The opposite ideological distributions are merely inversions; consequently, the three cases examined here represent all possible permutations of positioning between the three players.

For each case, I consider the equilibrium outcome under two systems: one with and one without an exercise of senatorial courtesy. This approach makes an assessment of the effect of senatorial courtesy possible. For each case, I summarize the continuous functions of the equilibria mapped on the range of possible status quos.

FIGURE 4
The Effect of Two Contrasting Status Quos in Case 1

Case 1: H < M < P. In the absence of senatorial courtesy, when the status quo is to the right of the president, the median senator prefers the president's nominee. But the president can also have his or her ideal nominee supported when the status quo is to the extreme left, as long as $P < M(Q)$. Between $M(P)$ and P, however, the president, anticipating the median senator's indifference function, will nominate a candidate at $M(Q)$, such that the median senator is always indifferent between the candidate and the status quo. Without senatorial courtesy, the equilibrium outcome is $M(Q)$[26] if $P > M(Q)$, and P otherwise. Inversely, but by the same logic, in the range $M < Q < P$, the equilibrium outcome is SQ. The president only has to alter the choice of candidate to satisfy the median senator when the status quo is close to the point M.

　　With senatorial courtesy, the results are identical when the $SQ \geq M$, but when $SQ < M$, the results are radically different. When the status quo lies between H and M, the home state senator will veto any nominee to the right of SQ because HSS prefers no nominee to a nominee in line with the president's preferences. As SQ moves to the left of M, the equilibrium outcome moves away from P rather than toward P as it did in the absence of senatorial courtesy. To the left of H, as the distance between H and $H(Q)$ increases, the equilibrium outcome once again approaches P, giving the president greater latitude in nomination.

　　Figure 4 provides two examples. At SQ_2, between M and P, the outcome is unchanged. At SQ_1, between H and M, the equilibrium outcome moves from $X_1 = M(Q)_1$ to $S_1 = SQ_1$. The results for the continuum of possible status quo Case 1 distributions appear in Figure 5.

Case 2: H < P < M. In this situation, without senatorial courtesy, at any point $SQ < P$, the median senator prefers P to SQ, so P is the equilibrium. When $P < SQ < M$, these preferences are reversed and the equilibrium outcome is SQ. When $M < SQ$, however, the median senator is indifferent between $M(Q)$ and SQ, so the president will

nominate M(Q) if P < M(Q), and P otherwise. With senatorial courtesy, the results are inverted. H(P) < SQ < P results in equilibria tracking H(Q).[27] But when SQ > P, the home state senator prefers P.

Case 3: P < H < M. When SQ < H, the equilibria achieved are identical with and without senatorial courtesy. When H < SQ < M without senatorial courtesy, however, the median senator prefers the status quo to the president's nominee, and so the equilibria is SQ. In the same region, the home state senator prefers any point to the left of H(Q). As such, the equilibrium outcome with senatorial courtesy is H(Q) if H(Q) < H(P), and P otherwise. When H(P) < SQ < M(P), the equilibrium outcome is M(Q) without senatorial courtesy, and P with senatorial courtesy.

Figure 5 summarizes the results for the continuum of possible status quo case distributions. The x-axis represents one possible position for each player, and the y-axis indicates the equilibrium outcomes (a player's movement left or right within the parameters of the case changes the angle of the equilibrium lines but not their general nature). The figure maps the equilibrium outcome for each possible status quo. For example, in Figure 5A, in the absence of senatorial courtesy, every point to the left of H results in an equilibrium outcome of P's ideal preference, but with senatorial courtesy, the equilibrium outcome ranges between P and H, approaching H as the status quo approaches H. If the president did not need the advice and consent of the Senate at all, then all equilibrium outcomes in each case would be a horizontal line at point P.

The variation in the continua of equilibria found under the two conditions shows that senatorial courtesy can dramatically influence the type of candidate nominated by the president. Consequently, the refinement this model provides of the median voter model should render more accurate predictions of presidential candidates in advice and consent nominations.

This analysis also indicates which players are advantaged and disadvantaged by the existence of the norm of senatorial courtesy. For distributions equivalent to Case 1, the existence of senatorial courtesy harms the interests of the president. The battle over judicial nominations between 2001 and 2004 is analogous to Case 1 scenarios: a rightwing president faces a moderate median;[28] the president's choice of nominees is being blocked by a more liberal veto point, in this case a filibuster of 45 senators. As can be seen in Figure 5A, the range of equilibria under senatorial courtesy in this type of case is equal to or farther from the president's preferences than the range of equilibria without senatorial courtesy.

FIGURE 5
Continuum of Equilibria for All Status Quo Positions
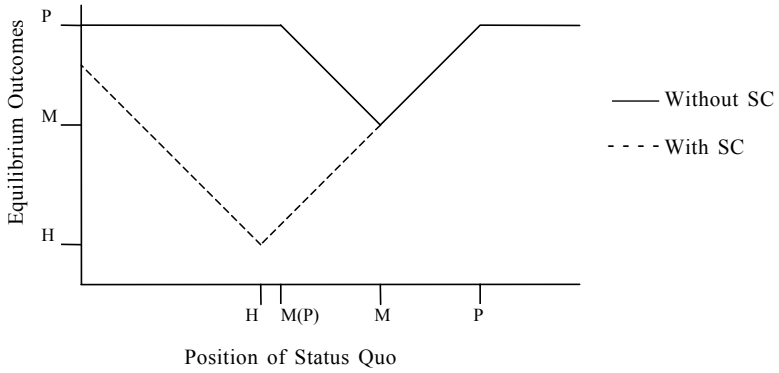
Figure 5A: Case 1
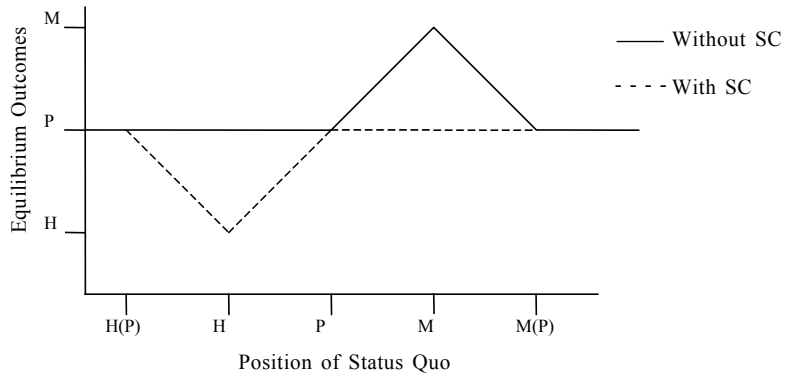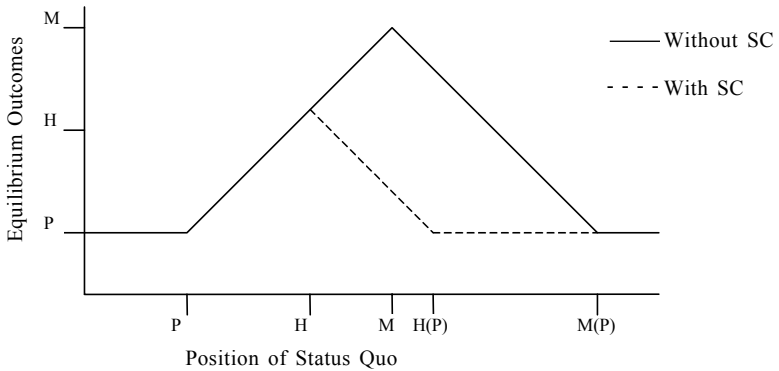

Figure 5B: Case 2

Figure 5C: Case 3

In Case 2, the president's fortunes depend on the distribution of status quos and the relative space between the players. If the status quos were distributed symmetrically around the ideal point of the president, then Case 2 would in effect be neutral overall for the president: when the president is closer to the median senator, the president prefers not to have senatorial courtesy; when the president is closer to the home state senator, the president is in fact advantaged by the norm. But symmetry is an unreasonable assumption here. As such, the effect of senatorial courtesy in Case 2 distributions is neutral on expectation but is variable in application.

In Case 3, in contrast, the president is consistently advantaged by the existence of senatorial courtesy for any point between P and M(Q), and neutral beyond those points. All equilibrium candidates between H and M(P) are farther from the median senator's preferences than in the case without senatorial courtesy. Returning to the example of the current president's battle with the 107th and 108th Congress, for the president to take advantage of the effect of senatorial courtesy when he has a choice of nominees from among more than one state, the president must choose nominees from states whose senators are more right-wing than the median senator. Assuming party accurately reflects ideology, the president can exploit senatorial courtesy to draw the equilibrium nominee closer to his ideal point by nominating a candidate from a dual-Republican state.

Overall, the median senator's preferences are less represented under a system of senatorial courtesy than without the norm. This is an expected result and explains the need for threats of retaliation or promises of reciprocity modeled in the initial game. It is easy to conclude that, on expectation of an equal probability of the three distributions, the president is generally neither advantaged nor disadvantaged by senatorial courtesy. This finding alone is contrary to the intuitive conclusion that an extra veto mechanism on the president's nominations would harm the president's interests. But, in fact, the results are stronger than a conclusion of neutral effect: when it comes to filling multistate federal offices, the president can actually be advantaged by the norm of senatorial courtesy.

If the president has the flexibility to nominate candidates who inspire preferences like those illustrated in Case 3, or a mixture of Cases 2 and 3, then the president will achieve the confirmation of candidates closer to his or her preferences than would be possible in the absence of senatorial courtesy. To be advantaged by senatorial courtesy, the president only needs to choose candidates from states that are closer to his or her preferences than the median senator is.
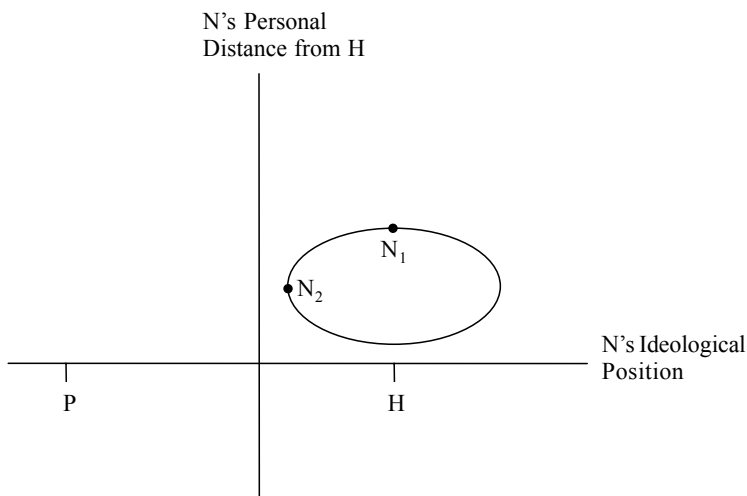
The president's strategic power in relation to circuit court nominations is somewhat limited by another norm that seats in any circuit are traditionally reserved for specific states. The power of this norm is uncertain: on occasion, both senators and presidents have overcome this constraint. In the case of the blocked Michigan nominees mentioned earlier, Senators Levin and Stabenow threatened to extend their blockade to all six vacancies for the Sixth Circuit, not just those typically reserved for Michigan. When North Carolina's Senator Helms continued to block all of President Clinton's African-American candidates to the Fourth Circuit, Clinton eventually nominated Roger Gregory from Virginia during recess. This breach of the reserved seat norm did not receive strong senatorial backlash; in fact, when the Democrats took over the Senate, President Bush was pressured to nominate Gregory permanently. These cases suggest that presidents may have some leeway in mixing up appointments among states within circuit courts, and so senatorial courtesy could render the president advantaged, not just neutral, for court of appeals seats also.

If the president cannot overcome the expectation of circuit court vacancies being filled by nominees from particular states, then the president will be unable to strategically exploit senatorial courtesy. Then, for circuit courts, like district courts, the president will be neither advantaged nor disadvantaged; on expectation, the effect of senatorial courtesy will be neutral from the president's perspective. But if the seating norm continues to be malleable, then like other multistate seats, such as executive positions, the president may still be able to take advantage of the existence of senatorial courtesy by favoring Case 3 nominees.

In fact, this analysis understates the president's ability to manipulate senatorial courtesy to presidential advantage. Thus far, this analysis has modeled a single continuum, salient to all players. As previously mentioned, exercises of senatorial courtesy can be entirely idiosyncratic; consequently, senators may invoke senatorial courtesy because of a personal dislike of a nominee. Senatorial courtesy's history stems from patronage, and senators may have an interest in controlling nominations within their states to reward their supporters and check their opponents. These idiosyncratic and personal concerns can be considered a second axis, with greater distance from the senator's ideal point representing the extent of the senator's personal animosity to the nominee. This scenario is illustrated in Figure 6.

The oval in Figure 6 represents H's indifference range in two dimensions. Even if H can gain support for a nominee at his or her ideological ideal point (N_1), H still prefers any nominee within the oval to N_1 and is indifferent between N_1 and N_2.

FIGURE 6
Senatorial Preferences in Two Dimensions

In most cases, the president and the median senator are likely to be indifferent along the y-axis because this axis is personal to HSS. Consequently, the president can use the y-axis as leverage against the senator, to pull the equilibrium outcome toward the president's own ideal point. As such, the president has an additional strategic advantage when senatorial courtesy is driving the nomination process. This analysis applies for any status quo and, consequently, buttresses the results already described.

This analysis has revealed mechanisms by which the president can exploit senatorial courtesy to systematically bias the process in his or her favor. Not only does the repeated game of senatorial courtesy overcome the disadvantage for voting senators in supporting the norm and so convert their opposition to support, but overall the president is also advantaged.

Conclusion

Given the institutional importance and political contentiousness of advice and consent nominations, any factor that has a striking effect on the outcome of such nominations deserves close scrutiny. In this article, I have shown senatorial courtesy to potentially have such a dramatic effect, yet it is an underanalyzed mechanism of influence. Until now,

political science has lacked a thorough explanation of why senatorial courtesy is supported, a systematic exploration of the conditions under which it operates, and a means of predicting its effects.

The expectation of future reciprocity or retaliation in a repeated game explains why senatorial courtesy persists. As long as there is an adequate difference in the intensity of preferences between when a senator is the home state senator compared to when the senator is not, equilibria supporting the norm can be sustained even under quite adverse conditions. Those challenging conditions include a low probability of being home state senator in any round, coalitions of senators with shared preferences who could benefit from partial defection from senatorial courtesy, and the scenario of all senators possessing a dominant strategy of defecting from the norm.

None of these factors prevent the persistence of the norm. Nevertheless, the level of opposition to a nominee, the size of the chamber, the probability of being home state senator, and the consistency of ideology of any coalition can vary the point of equilibria. Consequently, these factors can influence the formation and persistence of senatorial courtesy and other similar norms. As such, the results indicate which factors can be manipulated by constitutional crafters or institutional reformers wishing to encourage or limit the formation of similar informal rules.

Senatorial courtesy alters the range of feasible nominees that the president will nominate and the Senate will confirm. The consistent direction of this change is away from the preferences of the median senator. This result was to be expected, and the mechanism of reciprocity and retaliation in the game accounts for how this bias does not undermine senatorial support for the norm. The more surprising result is that although senatorial courtesy provides another veto point on presidential nominations, overall the president is not disadvantaged by senatorial courtesy and is even advantaged if he or she chooses nominees from states whose home state senators are closer to presidential preferences than the median senator is.

To be complete, spatial models of the nomination process need to factor in the possibility of an exercise of senatorial courtesy and so should include the home state senator as a potential veto point. Failure to do so cannot be defended by equating or replacing the median senator with the home state senator. By definition, the median senator lies in a moderate position within the Senate. In contrast, the home state senator can lie anywhere on the spectrum of senatorial ideology, and may even be an extreme outlier. Thus, a complete model of the nomination process should include the home state senator as a veto point. Senatorial courtesy

can be excluded from models of the nomination process for the sake of parsimony, but the norm must be recognized as an important element of the nomination process.

Throughout this game, all players have been assumed to have full information and to perfectly anticipate the future course of play. Because senatorial courtesy has been shown to be robust, it follows that the president will anticipate such support for any exercise of senatorial courtesy and so will nominate a candidate within the feasible range of nominees dictated by the home state senators' preferences. By this logic, senatorial courtesy should never be exercised in the first place. This anticipation may explain why open conflict over the exercise of senatorial courtesy is seen only rarely, as compared to the number of advice and consent nominations made and compared to other forms of nomination controversy. Of course, the fact that some conflicts do arise means that mistakes are made: players lack full information or fail to anticipate in every case. The assumptions made herein, and thus the results found, are unlikely to exactly mirror reality. No doubt, complications could be added to improve the accuracy of this representation. Nevertheless, this article provides at least the beginnings of a systematic model of the important influence of senatorial courtesy on highly salient political nominations.

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NOTES

1. Martin summarizes the common complaints: "First, the practice threatens the independence of appointees. Second, the practice discourages qualified people from seeking or accepting nominations. Third, the custom lessens public confidence in the legislature, appointees and . . . government generally. Finally, the practice is an unreasonable and unfair method of determining the nominees' fitness for appointment" (2000, 7). Numerous efforts to prohibit and reform the norm in New Jersey, through revision of Senate rules, constitutional amendments, and legal challenges, have all failed. Senatorial courtesy has been legally challenged in three cases, all of which have been unsuccessful: *Kligerman* v. *Lynch* (1966), *Passaic County Bar Association* v. *Hughes* (1969), and *De Vesa* v. *Dorsey* (1993).

2. Most exercises of senatorial courtesy are backroom negotiations that never result in formal action and so are difficult to quantify. Consequently, most studies have relied on anecdotal evidence (see, for example, Cole 1937, Goldman 1997, and Harris 1952). No prior formal conceptual framework of senatorial courtesy exists.

3. See Segal, Cameron, and Cover 1992, 102; Moraski and Shipan 1999, 1071; and Snyder and Weingast 2000, 275. Some models also include a filibuster pivot. For simplicity, I exclude the filibuster pivot in this model because the effect of that mechanism is well understood; see Krehbiel 1998.

4. For a good discussion as to why this failure cost is likely, see Moraski and Shipan 1999, 1072.

5. Durham eventually had to withdraw for health reasons.

6. "The Lessons of H. Lee Sarokin," *Washington Times,* 7 October 1994, sec. A.

7. At the urging of White House counsel Alberto Gonzales, the chair of the Senate Judiciary Committee, Senator Hatch, has stated he intends to proceed with hearings nevertheless. Michigan's Republican House members have expressed concern, however, that instead the president will choose nominees from other states to fill the slots ("House Colleagues Deal Blow to Mich. Senators," *The Hill,* 30 July 2003).

8. For example, Walter Dellinger was blocked by Senators Helms and Faircloth as nominee to head the Justice Department's Office of Legal Counsel ("No More Talk against Nominee," *Washington Post,* 8 October 1993, sec. A).

9. Senator East of North Carolina reportedly blocked President Reagan's nomination of William Bennett to the presidency of the National Humanity Center, but East later announced that he was satisfied with the nomination ("Bennett Is Sworn in at Humanities Endowment," *New York Times,* 27 December 1981). Senator Pell of Rhode Island long delayed, but ultimately allowed, President Ford's reappointment of Dr. Ronald Berman as chair of the National Endowment for the Humanities ("Opinion," *Wall Street Journal,* 15 September 1976).

10. Senators Warner and Byrd successfully thwarted President Reagan's nomination of Admiral Zumwalt to the Arms Control Advisory Board, even though the nomination had been unanimously approved both in committee and on the floor. The senators objected to not having been notified of the nomination and demanded that the nomination be sent back to the Senate, to allow them to successfully invoke senatorial courtesy ("Senatorial Courtesy," *Washington Post,* 4 October 1982, sec. A).

11. Most accounts necessarily underestimate the extent to which senatorial courtesy is invoked since exercises of senatorial courtesy only become known when they draw conflict.

12. The White House reportedly attempted to postpone the battle over nominees by focusing on nominees likely to have their senators' support ("White House Expected to Announce Federal Appellate Court Nominations," CNN, 7 May 2001). The Senate also changed the blue-slip process to require both home state senators to object to the nominee. This article shows that home state senators may still be successful in exercising senatorial courtesy, even with a more restrictive rule.

13. This analysis assumes senators are responsive to the constituencies they represent, but electoral, strategic, and substantive considerations can all be captured by the payoffs without upsetting the relative intensity of the home state senators' preferences.

14. The possibility of any individual senator failing to gain reelection is relevant to that senator's own payoffs, which is captured in the δ term. But the possibility of any other senator failing to gain reelection does not affect the outcome, except when the equilibrium depends on a similarity of views among senators, as discussed later. Once an equilibrium exists, new senators will have the same expected values as previous

senators: the Home State Senator in any round does not need to know the payoffs of any individual senator, only the distribution from which senatorial preferences are drawn. As such, every stage of the game is the same, regardless of changes in personnel.

15. There are always two home state senators, but to rigorously test the limits of senatorial courtesy, this game assumes only one home state senator opposes the nominee.

16. $pr(S_1 = HSS) = 1/n$, $pr(S_1 = V_i) = (n - 1)/n$.

17. The stationary game is not a prisoner's dilemma because once the home state senator has chosen to exercise senatorial courtesy, mutual defection by the two voting senators is the best outcome for both players in the given round. This scenario constitutes a more stringent test than a prisoner's dilemma would.

18. Under a grim trigger strategy, the voting senators will then have an incentive to cooperate if the value of cooperating in the first round plus the value of cooperating in future rounds, discounted perpetually, is greater than the value of defecting in the first round plus the value of defecting under perpetual punishments, discounted perpetually. That is, $\alpha.\delta/(1 - \delta).1/n \geq 1 + \delta/(1 - \delta).(n - 1)/n + \beta.\delta/(1 - \delta).1/n$.

19. Under a tit-for-tat strategy, the voting senators will want to cooperate if the value of cooperating in the first round plus the value of cooperating in the second round, discounted for one round, is greater than the value of defecting in the first round, plus the value of cooperating in the second round while being punished, discounted for one round. That is, $\alpha.\delta/n \geq 1 + \delta.(n - 1)/n + \beta.\delta/n$.

HSS will always want to cooperate because it is always true that the value of perpetual cooperation is greater than the value of defecting in the first round and being punished for one round: $\alpha.\delta/n \geq \delta.(n - 1)/n + \beta.\delta/n$.

And the home state senator will always want to punish a defection as $\delta.(n - 1)/n \geq 0$.

20. This range of possible equilibria could be constructed for any intensity factor and is not dependent on α equaling $-\beta$.

21. See Binder 2003 for examples of failure of senatorial courtesy.

22. For more theory on how a veto allows a pivotal voter to realize his or her ideal point, see Krehbiel 1998; for evidence that senatorial courtesy operates this way in practice, see, for example, Corwin 1939, 25 and Goldman 1997.

23. Note that this is necessarily a simplified model, and other players may be influential, such as committee chairs (see Binder and Maltzman 2004) and the filibuster pivot (see Krehbiel 1998).

24. This model does not include expectations of changes in the administration, which could undermine senatorial indifference between the status quo and no nominee being confirmed.

25. Recent years have seen extended judicial vacancies, suggesting that this lack of concern is a reasonable assumption for courts other than the Supreme Court.

26. If M's preferences are symmetrical, then $M(Q) = 2M - SQ$.

27. $H(Q) = 2H - SQ$ under symmetry.

28. This was clearly true for the 107th Congress, as illustrated by the change of power caused by Jim Jeffords's switch. The median became either Jeffords or the most moderate of the 51 Republicans, depending on who the home state senator was in a given case.

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