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## Navigating the Path of the Supreme Appointment

Charles W. "Rocky" Rhodes  
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NAVIGATING THE PATH OF THE SUPREME APPOINTMENT

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# NAVIGATING THE PATH OF THE SUPREME APPOINTMENT

CHARLES W. “ROCKY” RHODES\*

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Progressives thought they had cause to celebrate. A Democrat in the White House, a Senate controlled by Democrats, and two announced Supreme Court vacancies in less than a one-year period. The stars appeared to be aligned perfectly—not just one, but two opportunities for bold nominations of liberal judicial visionaries, like the icons of the Warren Court, to battle the Roberts Court’s conservative stalwarts, Justices Scalia and Thomas.

The first appointment opportunity even arrived early during the first year of President Barack Obama’s first term, an optimal window for Presidents to secure confirmation.<sup>1</sup> The Democrats controlled fifty-nine seats in the Senate, with one more Democratic Senator most likely on the way as an election contest was winding down,<sup>2</sup> minimizing the

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\* Godwin Ronquillo PC Research Professor and Professor of Law, South Texas College of Law. I would like to thank Brian Carl for his outstanding research assistance on this Article.

1. Justice David Souter announced he would retire at the end of the October 2008 Supreme Court Term on May 1, 2009, less than four months after President Obama’s inauguration on January 20, 2009. Based on past history, the President has the greatest likelihood of a judicial nominee being confirmed during the first year of the term, with the odds of confirmation decreasing each subsequent year. See, e.g., Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8, 10-11 (1996); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 200-01 (2002). The last year of a presidential term, in which the President is either a lame duck or in the midst of an election, is especially bad, as in a number of instances the Senate has delayed consideration of the nomination in order to keep the vacancy for the next President to fill. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 31 (5th ed. 2008) (listing a dozen historical examples); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 123 (rev. ed. 2003) (discussing study finding a ninety percent confirmation rate during the first three years of a presidential term, but less than sixty-seven percent the last year).

2. After the nomination was announced, but before confirmation hearings began, Democrat Al Franken was sworn in as the Senator from Minnesota, giving the Democrats sixty seats in the Senate. Monica Davey & Carl Hulse, *Minnesota Court Rules Democrat Won Senate Seat*, N.Y. TIMES, July 1, 2009, at A1; Dana Milbank, *The Al Franken Decade Begins 30 Years*

likelihood of any potential filibuster.<sup>3</sup> The President also enjoyed a public approval rating of approximately sixty-five percent during the weeks between Justice Souter's resignation announcement and his nominee's introduction.<sup>4</sup> It appeared that any nominee acceptable to the members of his own party would be confirmed easily.

But, despite these favorable circumstances, President Obama refrained from a bold nomination of a progressive visionary.<sup>5</sup> Instead, President Obama opted for a rather predictable (and politically expedient) nominee, Judge Sonia Sotomayor.<sup>6</sup> I describe the nomination as predictable primarily because I predicted it on a live radio program three days after Justice Souter announced his resignation and weeks before the nomination was announced.<sup>7</sup> It is not that I claim any special powers of foresight—instead, the nomination followed the fairly typical, recent pattern of “promoting” sitting judges of the federal circuit courts of appeals. These promotions typically involve judges with impeccable academic and professional credentials but without too much of a paper trail on controversial political and judicial issues, such as abortion, privacy rights, affirmative action, gay and lesbian rights, and gun rights.<sup>8</sup> Judge Sotomayor not only perfectly fit these usual criteria, but she is also an embodiment of the American dream, rising from

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Late, WASH. POST, July 7, 2009, at A2.

3. Under Senate rules, sixty Senators can invoke cloture and end a filibuster. S. Doc. No. 110-9, at 16 (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_documents&docid=f:sd009b.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:sd009b.110.pdf). One study concluded that the Senate confirms ninety percent of the Supreme Court nominees when it is controlled by the President's party, but only fifty-nine percent when the President's party is in the minority. SEGAL & SPAETH, *supra* note 1, at 201.

4. Jeffrey M. Jones, *Obama Approval Compares Favorably to Prior Presidents*, GALLUP (May 29, 2009), <http://www.gallup.com/poll/118928/obama-approval-compares-favorably-prior-presidents.aspx> (noting Obama averaged a sixty-five percent job approval rating in May 2009). President Obama's approval rating, however, had dropped approximately ten percent by the time of the confirmation vote. Jeffrey M. Jones, *Amid Debate, Obama Approval Rating on Healthcare Steady*, GALLUP (Aug. 12, 2009), <http://www.gallup.com/poll/122255/amid-debate-obama-approval-rating-healthcare-steady.aspx> (noting an August approval rate of fifty-four percent). According to one study, the President's approval rating has been a better predictor of a Senator's confirmation vote than the Senator's own party affiliation. See SEGAL & SPAETH, *supra* note 1, at 206-13.

5. See Shahid Buttar, *Bush v. Gore Rears Its Head (Part III): Souter's Resignation as an Invitation to Balance a Politicized Court*, HUFFINGTON POST (May 12, 2009, 3:34 PM), [http://www.huffingtonpost.com/shadid-buttar/bush-v-gore-rears-its-hea\\_b\\_201947.html](http://www.huffingtonpost.com/shadid-buttar/bush-v-gore-rears-its-hea_b_201947.html) (identifying Professor Pamela Karlan and Governor Jennifer Granholm as bold, visionary choices); Dahlia Lithwick, *The Sad State of the Liberal Law Student*, SLATE (Apr. 15, 2010, 6:39PM), <http://www.slate.com/id/2249535> (identifying Dawn Johnsen, Eric Holder, Pamela Karlan, John Payton, Laurence Tribe, Goodwin Liu, David Cole, and Walter Dellinger as progressive legal champions).

6. Ralph Lindeman, *Senate Votes 68-31 to Confirm Sotomayor to Seat on Supreme Court*, 78 U.S.L.WK. 2073 (2009).

7. *NewsRadio 740*, KTRH (May 4, 2009, 11:09:35AM), available at [www.ktrh.com/cc-common/podcast/single\\_podcast.html?podcast=newscasts.xml](http://www.ktrh.com/cc-common/podcast/single_podcast.html?podcast=newscasts.xml). I did mention one other possible female federal appellate judge, but named Judge Sotomayor first.

8. See *infra* Parts II.C, II.D & III.

humble beginnings to the pinnacle of success.<sup>9</sup> And, of course, the nomination of the first Latina to the Court undoubtedly was a shrewd political move designed to secure additional Hispanic support for the Democratic Party.<sup>10</sup> Her confirmation was a foregone conclusion from the beginning.<sup>11</sup>

Although the political conditions surrounding President Obama's second opportunity to nominate a Supreme Court Justice were not quite as favorable, the Republicans seemed to have little realistic hope of derailing the President's nominee when Justice John Paul Stevens announced, approximately fifteen months into Obama's tenure as President, that he would retire at the end of the October 2009 Term.<sup>12</sup> The Democrats, at that time, still enjoyed a significant numerical advantage over the Republicans in the Senate, even though they no longer controlled the sixty votes necessary to invoke cloture and end a filibuster.<sup>13</sup> While the President's public approval numbers had dropped

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9. Judge Sotomayor was raised by her Puerto Rican parents in the housing projects of the Bronx. Scott Shane & Manny Fernandez, *A Judge's Own Story Highlights Her Mother's*, N.Y. TIMES, May 28, 2009, at A16. Her father, a factory worker, passed away when she was nine, and her mother worked as a nurse to support the family. *Id.*

10. See, e.g., Ellis Cose, *What Sotomayor Is Starting: The Evolution of Latino Politics*, NEWSWEEK, Aug. 31, 2009, at 29 (opining that, although the Republican opposition to Sotomayor's confirmation would not have short-term effects on the midterm elections, it would drive more Latinos from the Republican Party); Kathy Kiely, *Sotomayor Confirmed with Few GOP Votes*, USA TODAY, Aug. 7, 2009, [http://www.usatoday.com/news/washington/judicial/2009-08-05-sotomayor\\_N.htm](http://www.usatoday.com/news/washington/judicial/2009-08-05-sotomayor_N.htm) (explaining Democrats view the nomination as an opportunity to cement the political loyalties of an ethnic group comprising fifteen percent of the American population); Kathy Kiely, *Republican Support for Sotomayor Looks Paltry*, USA TODAY, Aug. 4, 2009, [http://www.usatoday.com/news/washington/judicial/2009-08-03-sotomayor\\_N.htm](http://www.usatoday.com/news/washington/judicial/2009-08-03-sotomayor_N.htm) (noting Democrats hope to capitalize on Republican Party's opposition to Sotomayor with "the nation's fastest-growing voting bloc"). My description of Judge Sotomayor as the first Latina Justice obviates the need to address whether Justice Benjamin Cardozo, a descendant of Sephardic Jews from the Iberian Peninsula, should be considered the first Hispanic Justice. My own view is that, irrespective of the resolution of Justice Cardozo's ethnicity, Justice Sotomayor is undoubtedly the first Supreme Court Justice projecting a Hispanic identity. She has frequently characterized herself as a Latina. See, e.g., Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002). There is no similar evidence that Justice Cardozo ever viewed himself as Latino or Hispanic. See ANDREW KAUFMAN, *CARDOZO* 3-4, 6-8 (1998) (describing the importance of Cardozo's Sephardic Jewish ancestry).

11. On August 6, 2009, the Senate confirmed her as the 111th Justice of the Supreme Court of the United States in a sixty-eight to thirty-one vote. See, e.g., Amy Goldstein & Paul Kane, *Sotomayor Wins Confirmation: Senate Votes 68 to 31 for Judge Who Will Be First Hispanic to Serve on High Court*, WASH. POST, Aug. 7, 2009, at A1. During her confirmation hearings, Senator Lindsey Graham acknowledged that she would be confirmed in the absence of a "complete meltdown," which he did not envision would occur. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 26 (2009) [hereinafter *Sotomayor Hearing*] (statement of Sen. Graham).

12. See James Oliphant et al., *Battle Looms as Justice Stevens Says He's Retiring*, L.A. TIMES, Apr. 10, 2010, <http://articles.latimes.com/2010/apr/10/nation/la-na-justice-stevens10-2010apr10>.

13. See *id.* Massachusetts' election of Republican Senator Scott Brown to replace deceased Democratic Senator Ted Kennedy had resulted in fifty-nine—rather than sixty—Democratic Senators. Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement Is Political Test for*

into the slightly negative range, the President appeared to have been granted a final opportunity—especially with looming midterm elections that would likely curtail his partisan support in the Senate—for appointing “an assertively liberal” jurist.<sup>14</sup>

But once again, the President’s choice was measured. Although he bucked the almost three-decade trend of nominating a sitting federal appellate judge, thereby ensuring that the Roberts Court would no longer be comprised solely of Justices who previously had served as judges on a circuit court,<sup>15</sup> his choice was hardly a progressive revolutionary. Solicitor General Elena Kagan had a distinguished—albeit relatively brief—career in both academia and government service. She had been confirmed a little over a year earlier as Solicitor General, the first woman to hold that post, and had argued six cases on behalf of the United States Government in front of the Supreme Court in her position as the so-called “Tenth Justice.”<sup>16</sup> Before her appointment as Solicitor General, her six-year tenure as dean of the Harvard Law School won her accolades from across the ideological spectrum for her recruitment of several high-profile conservative professors, her efforts to improve the collegiality of the institution, and her fund-raising abilities.<sup>17</sup> Her paper trail on controversial political and judicial issues was not long, especially for an academic—indeed, her scholarship provided little insight on her overarching judicial philosophy, decisionmaking methodology, or doctrinal views, except for her support of First Amendment values (even when in conflict with other progressive ideals),<sup>18</sup> her essentially pragmatic approach to administrative law issues related to the institutional interrelationship

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*Obama*, N.Y. TIMES, Apr. 9, 2010, <http://www.nytimes.com/2010/04/10/us/politics/10stevens.html>.

14. Oliphant et al., *supra* note 12. As Justice Stevens announced his retirement, President Obama’s weekly job approval rating fell to forty-seven percent, the lowest of his administration to that date. Frank Newport, *Obama Weekly Approval at 47%, Lowest Yet by One Point*, GALLUP (Apr. 12, 2010), <http://www.gallup.com/poll/127316/obama-weekly-approval-lowest-yet-one-point.aspx>.

15. See, e.g., Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833, 833 (2009) [hereinafter *Circuit Effects*]. Justice Alito’s replacement of Justice O’Connor in 2006 marked the first time in the Court’s history the entire membership of the Court had been elevated from the federal appellate bench. *Id.* at 833.

16. Robert Barnes, *In Kagan’s Work As Solicitor General, Few Clues to Her Views*, WASH. POST, May 13, 2010, at A3 (quoting the title of LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987)). Part III contains a more in-depth examination of the role of the Solicitor General.

17. See Christi Parsons, *U. of C. Law Faculty Didn’t Back Kagan*, CHI. TRIB., May 30, 2010, <http://www.chicagotribune.com/news/local/ct-met-kagan-chicago-20100530,0,1471697.story>; Stolberg & Savage, *supra* note 13.

18. See, e.g., Elena Kagan, *When A Speech Code Is A Speech Code: The Stanford Policy and the Theory of Incidental Restraint*, 29 U.C. DAVIS L. REV. 957, 961-65 (1996) (arguing against constitutionality of Stanford code prohibiting racist and sexist expression); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 878 (1993) (arguing that any efforts to regulate pornography and hate speech subverting First Amendment premise of viewpoint neutrality would—and should—fail).

between agencies and the three branches of government,<sup>19</sup> and her backhanded compliment of Justice Scalia's jurisprudence as infused with much "quality and intelligence (even if ultimate wrong-headedness)."<sup>20</sup> Although some Republican Senators objected to her relative lack of "real-world" experience as a judge and a practicing attorney,<sup>21</sup> several well-known conservatives viewed her favorably and much less objectionable than other potential nominees, primarily due to her open-minded approach to considering arguments from differing ideological perspectives.<sup>22</sup> While she did not enjoy the same level of public support as other recent successful nominees,<sup>23</sup> which was probably partially attributable to her lack of prior experience as a judge,<sup>24</sup> she was easily confirmed as the 112th Justice—and fourth female Justice—of the United States Supreme Court.<sup>25</sup>

While both his nominees successfully navigated the path to a Supreme Court appointment, why did President Obama fail to nominate at least one progressive champion, with a defined constitutional vision, when he had a generally supportive Senate and (during the first nomination) a favorable political climate? And why did he adhere to the typical practice over the last four-plus decades of tapping either a sitting jurist or an individual with a close institutional relationship to the Supreme Court, rather than selecting a higher profile political or philosophical leader?

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19. See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 261-65 (2001) (proposing judicial review of agency decisions should be dependent on the level in the administrative hierarchy of the final agency decisionmaker); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319-31 (2001) (urging constitutionality of presidential directives to agency officials within the sphere of their delegated discretion unless Congress has delegated the decisionmaking authority to an individual agency or has clearly stated a contrary intent).

20. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 934 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)).

21. See, e.g., *Confirmation Hearing on the Nomination of Elena Kagan to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *Kagan Hearing*], 2010 WL 2564591, at \*\*6, 17-18, 22 (June 28, 2010).

22. See, e.g., *id.*, at \*\*59, 128 (June 30); *Conservative Friends Rise in Support of Kagan*, MSNBC.COM (May 14, 2010), [http://www.msnbc.msn.com/id/37156197/ns/politics-more\\_politics/t/conservative-friends-rise-support-kagan/](http://www.msnbc.msn.com/id/37156197/ns/politics-more_politics/t/conservative-friends-rise-support-kagan/); Ilya Somin, *Don't Dismiss Elena Kagan*, FORBES (May 11, 2010), <http://www.forbes.com/2010/05/11/elena-kagan-supreme-court-opinions-contributors-ilya-somin.html>.

23. See, e.g., Jeffrey M. Jones, *Support for Confirming Kagan Trails That of Recent Nominees*, GALLUP (June 4, 2010), <http://www.gallup.com/poll/139367/Support-Confirming-Kagan-Trails-Recent-Nominees.aspx>.

24. See *infra* Part III.

25. See, e.g., Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan's Nomination to Supreme Court*, WASH. POST (Aug. 6, 2010), <http://washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html>. Republican Senator Orrin Hatch remarked during Kagan's confirmation hearing, "Something tells me this is likely to be your last confirmation hearing." *Kagan Hearing*, *supra* note 21, 2010 WL 2564591, at \*11 (June 28).

Although both of his selections comport with those made by other recent Presidents, it has not always been this way. The Supreme Court Justices appointed since our Nation's founding have had a wide variety of backgrounds, including a former President, members of the President's cabinet, other executive branch officials, members of Congress, state governors, academics, and even attorneys in private practice.<sup>26</sup> In fact, a number of the great or near-great Justices in the annals of the Supreme Court had *never* been judges or held the Solicitor General's post as the mythical "Tenth Justice" before their appointment, including Chief Justices Charles Evans Hughes, Earl Warren, and William Rehnquist, and Justices Louis Brandeis, Benjamin Curtis, William Douglas, Felix Frankfurter, and Joseph Story.<sup>27</sup> Plus, a number of the Supreme Court's most highly regarded jurists had articulated or demonstrated a definitive political or judicial vision before their appointment, such as Chief Justices John Marshall and William Howard Taft, and Justices Oliver Wendell Holmes, Jr., Louis Brandeis, Benjamin Cardozo, Hugo Black, Felix Frankfurter, and Robert H. Jackson.<sup>28</sup> All of these Justices may not be icons to everyone, but there is no doubt that without these jurists the United States Supreme Court would not be the same institution that it is today.

What has changed to account for current preferences in the Supreme Court nomination and appointment process? In searching for the answer to this question, I begin with the one recent nomination that fell outside the parameters of these current preferences, the unsuccessful nomination by President George W. Bush of his White House Counsel, Harriet E. Miers. I then examine the evolution of the Senate's confirmation practices using the lens of confirmation battles throughout American history, demonstrating from these episodes that public involvement in the confirmation process, via both institutional and political mechanisms, has increased markedly over the last century.

I next theorize that, as the Court has become more involved in politically charged social issues during recent times, the Court's

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26. ABRAHAM, *supra* note 1, at 47-49.

27. *Id.* at 42-44 (listing prior federal and state judicial experience of United States Supreme Court Justices). Of course, when Hughes and Rehnquist were appointed Chief Justice, both had prior federal judicial experience, but neither had any judicial experience when initially appointed as an Associate Justice. Hughes was serving as governor of New York when he was appointed as an Associate Justice in 1910. He left the Court six years later in an unsuccessful bid to become President of the United States, and then subsequently served as President of the American Bar Association, Secretary of State for Presidents Harding and Coolidge, and a Justice of the Permanent Court of International Justice before being appointed Chief Justice of the United States in 1930. See Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353, 361-62 (2005). Rehnquist was serving as assistant attorney general for the Office of Legal Counsel in the Department of Justice when he was nominated for the Supreme Court. ABRAHAM, *supra* note 1, at 252.

28. Cf. ABRAHAM, *supra* note 1, at 66, 124-28, 130-31, 141-44, 160-62, 167-71, 172-76, 182-85 (discussing backgrounds of Marshall, Holmes, Taft, Brandeis, Cardozo, Black, Frankfurter, and Jackson).



legitimate exercise of the power of judicial review requires, in the public's eye, a greater separation from ordinary politics. Although "[a]ll legal scholars—and judges and lawyers—are in some sense legal realists,"<sup>29</sup> and therefore acknowledge that judicial interpretation depends at least partially on the identity of the judge, the extent of that realism, at least to large portions of the public, does not currently extend to selecting predominantly political actors or inflexible doctrinaires to the bench. The perception that Supreme Court Justices' allegiance should be to the Constitution and the law—not to a personal ideological or jurisprudential vision, or one side or another in the partisan fray—is a powerful image, which may be compromised by appointing those recently involved in the ugly game of politics. While predominantly critiqued by academics and Court watchers,<sup>30</sup> Chief Justice Roberts struck a powerful chord with the public by his analogy of a judge to an umpire calling balls and strikes.<sup>31</sup> Irrespective of its accuracy, that is the current favored public portrait of justice, rather than the politician or instrumentalist visionary in robes.<sup>32</sup> Indeed, Judge Sotomayor's testimony during her confirmation hearing bears witness to this fact, as she expressly disavowed President Obama's emphasis on "empathy," instead presenting a view of the judicial role reminiscent of Chief Justice Roberts' testimony.<sup>33</sup> This certainly was not happenstance.<sup>34</sup>

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29. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 589 (2002).

30. See, e.g., Michael P. Allen, *A Limited Defense of (At Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 526 n.4 (2009) (collecting critical commentary); Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006) (positing "it is hard to think of a less apt analogy"); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006) ("No serious person thinks that the rules that judges in our system apply . . . are given to them the way the rules of baseball are given to umpires."); L.A. Powe, Jr., *Judges Struck by Lightning: Some Observations on the Politics of Recent Supreme Court Appointments*, 39 ARIZ. ST. L.J. 875, 882 (2007) (describing the analogy as "absurd[]"). Cf. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 166 (2006) (arguing that "there is something to the umpire analogy—although not as much as Justice Roberts's testimony suggests").

31. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) [hereinafter *Roberts Hearing*] (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States).

32. See, e.g., Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 24 (2007) (noting that the umpire analogy "tapp[ed] into many if not most Americans' attitudes about judges"); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 711 n.38 (2007) (surmising Judge Roberts "may have been politicking by telling Senators and the public what he thought they wanted to hear").

33. *Sotomayor Hearing*, *supra* note 11, at 120-21 ("[J]udges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. . . . We don't apply feelings to facts.").

34. Cf. Josh Gerstein, *Supreme Court Snoozer for Sotomayor*, POLITICO (Aug. 6, 2009, 6:27 PM), <http://www.politico.com/news/stories/0809/25895.html> (noting White House apparently acquiesced in Sotomayor's blunt repudiation of empathy in judging).

As the public has become increasingly involved in the confirmation process, the current popular image of judges as neutral referees commands additional respect. And this conception has been realized through appointing to the High Court those who at least superficially appear less enmeshed in identity politics—those engaged in a role in the judicial system (especially federal appellate judges) who have exhibited a propensity for independent, open-minded decisionmaking. Challenging this public conception is a difficult undertaking, as President George W. Bush learned the hard way.

#### I. THE HARRIET MIERS NOMINATION<sup>35</sup>

The following could accurately describe Supreme Court nominee Harriet Miers' career before she joined the Bush Administration:

The Republican President's nominee for the Supreme Court had never been a judge—at any level. Instead, the nominee had predominantly represented corporate clients since graduating from a law school close to home. The nominee's primary qualifications were an extremely successful private practice, admirable service in various important positions in state and national bar associations, and active involvement in state and local political bodies. Yet because the nominee's career had primarily revolved around representing corporations, the nominee's views on abortion, affirmative action, or gay and lesbian rights were unknown. Nor did the nominee have relevant prior experience in litigating most of the other myriad of constitutional issues the Supreme Court regularly had to confront.

But this description is also accurate with respect to the prior legal experience of Lewis F. Powell, Jr., who was confirmed almost unanimously by the Senate (with only a single dissenting vote) in 1971.<sup>36</sup> Although Ms. Miers and Justice Powell had similar backgrounds in many respects, she had to withdraw her nomination for the Supreme Court, primarily as a result of stringent opposition from both sides of the political spectrum regarding her qualifications for the position and her lack of prior constitutional experience.

Why the different treatment? One argument might be that, while the backgrounds of Lewis Powell and Harriet Miers are similar, they are

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35. In the interest of full disclosure, I first met Harriet Miers when she was President of the State Bar of Texas and then, a few years later when our respective firms merged, I worked with her on an appellate matter before she departed for the Bush Administration and I became a full-time professor. I, like many attorneys who litigated disputes either with or against her, had a high regard for her ethics, professionalism, and legal talents based on that experience. See, e.g., William McKenzie, *When Conservatives Get to Know Her, They'll Respect Her*, DALLAS MORNING NEWS, Oct. 4, 2005, at 19A; Allen Pusey, *Record offers few clues to Miers' views*, DALLAS MORNING NEWS, Oct. 4, 2005, at 1A. Since our departures from Locke Liddell & Sapp LLP, we've only seen each other or otherwise communicated a handful of times, predominantly at bar events or receptions.

36. JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 1-10 (1994).

not identical. The close-to-home law school Justice Powell attended, Washington and Lee, is more prestigious than Harriet Miers' alma mater, Southern Methodist University. Justice Powell graduated first in his class, and proceeded to earn an LL.M. from Harvard University before beginning his law practice.<sup>37</sup> Justice Powell also accomplished more in national bar associations, as he served as President of both the American Bar Association (ABA) and the American Academy of Trial Attorneys.<sup>38</sup> During his time as ABA President, he mostly "talked about crime" (despite his utter lack of criminal experience) and frequently criticized the decisions of the Warren Court, which led to national recognition and an appointment on the Commission on Law Enforcement and the Administration of Justice.<sup>39</sup> And Lewis Powell's leadership on the Richmond school board and then the board of education in Virginia during the aftermath of *Brown v. Board of Education*<sup>40</sup> was a higher profile political position than being director of the Texas Lottery Commission or a one-term member of the Dallas City Council.<sup>41</sup>

On the other hand, Harriet Miers' feats may be more impressive because of the gender bias obstacles that she had to overcome. When she graduated from law school females were a rarity at prestigious Texas law firms, which is aptly illustrated by the fact that she was the first female attorney her firm hired.<sup>42</sup> And she had several other trailblazing firsts, including becoming the first female President of the State Bar of Texas, the first female managing partner of a major Texas law firm, and the first female President of the Dallas Bar Association.<sup>43</sup> Although she was never president of the ABA, she did serve as chair of both the Board of Editors for the ABA Journal and the ABA's Commission on Multijurisdictional Practice.<sup>44</sup> She also had her own high-profile cause in the ABA, spearheading the failed attempt to have the ABA remain neutral regarding abortion rights rather than continuing its pro-choice stance.<sup>45</sup> And, of course, she had served in the

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37. *Id.* at 39.

38. *Id.* at 1-10, 195-203.

39. *Id.* at 210-14.

40. 347 U.S. 483 (1954).

41. *Cf.* ABRAHAM, *supra* note 1, at 320.

42. *See, e.g.*, Todd S. Purdum & Neil A. Lewis, *Court in Transition: Woman in the News; Hard-Working Advocate for the President*, N.Y. TIMES, Oct. 4, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9C01E5DD1130F937A35753C1A9639C8B63>.

43. *Id.*

44. *Harriet E. Miers Profile*, WASH. POST, Oct. 27, 2005; Locke Lord Bissell & Liddell, Harriet Miers, <http://www.lockelord.com/hmiers/> (last visited July 2, 2011). Before she joined the Bush Administration, she was one of two candidates for the number two position at the American Bar Association, the chair of the House of Delegates. *Id.* As a result, many viewed her as being "on track to become president of the American Bar Association." Purdum & Lewis, *supra* note 42.

45. Purdum & Lewis, *supra* note 42.

executive branch for several years, eventually obtaining the prestigious position of White House Counsel.<sup>46</sup>

So why was Justice Powell so overwhelmingly deemed qualified to sit on the Supreme Court while Harriet Miers, at least in the minds of many, was not? Certainly reports of Ms. Miers' poor performance in interviews with Senators after her nomination led to questions regarding her intellectual qualifications for the Court.<sup>47</sup> But the campaign against her appointment began well before these reports surfaced.<sup>48</sup> It is therefore difficult to view these reports as the initial *cause* of the dissatisfaction against her, although certainly they provided vital (and probably lethal) ammunition for her detractors.

Some have ventured that she was disqualified by the appearance of political cronyism through her long-time service as George W. Bush's private attorney and then presidential counsel (in contrast, Justice Lewis Powell only met President Richard Nixon once before his appointment, and his qualifications greatly exceeded those of other potential nominees President Nixon released to the ABA for evaluation).<sup>49</sup> In the past, this would not have been a disqualification, as approximately sixty percent of all confirmed Supreme Court Justices personally knew their nominating President before their nomination.<sup>50</sup> Yet a variant of this argument, predominantly raised by President Bush's own party, did contribute to her withdrawal.<sup>51</sup>

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46. ABRAHAM, *supra* note 1, at 320. Interestingly, William Rehnquist also was a legal advisor to the White House, serving as Assistant Attorney General for the Office of Legal Counsel, when he was first nominated for the Supreme Court by Richard Nixon, who referred to him as "the President's lawyer's lawyer." *Id.* at 252.

47. *See id.* at 320. She also was harmed by the public disclosure of her personal correspondence to then-Governor Bush during the 1990s and columns written for the Texas Bar Journal while she was president of the State Bar of Texas, which her critics derided as fawning and clumsy. *See* Charles Babington, *Miers Hit on Letters and the Law*, WASH. POST, Oct. 15, 2005, at A7. Her candidacy then took another blow when her response to the Judiciary Committee's questionnaire was viewed as inadequate by both the chair and ranking member. Elisabeth Bumiller & Carl Hulse, *Bush's Court Choice Ends Bid After Attack by Conservatives*, N.Y. TIMES, Oct. 28, 2005, at A1; Robin Toner et al., *Steady Erosion in Support Undercut Nomination*, N.Y. TIMES, Oct. 28, 2005, at A16.

48. *See, e.g.*, Patrick J. Buchanan, *Miers' Qualifications Are 'Non-Existent,'* HUMAN EVENTS ONLINE (Oct. 3, 2005), <http://www.humanevents.com/article.php?id=9444> ("[H]er qualifications for the Supreme Court are non-existent. She is not a brilliant jurist, indeed, has never been a judge."); Charles Krauthammer, *Withdraw this Nominee*, WASH. POST, Oct. 7, 2005, at A23 (describing Miers as a constitutional "tabula rasa").

49. ABRAHAM, *supra* note 1, at 14-15, 319-20; JEFFERIES, *supra* note 36, at 10, 219-20.

50. JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 251-52 (2005); *see also* ABRAHAM, *supra* note 1, at 3 (discussing several examples where personal and political friendship was the determinative factor in a presidential nomination); GERHARDT, *supra* note 1, at 201 (noting most nominees had a "close personal or professional relationship with the president or those responsible for advising the president on the nominations he should make").

51. ABRAHAM, *supra* note 1, at 320. As Professor Abraham noted, "it is almost impossible for the chief executive to select and see confirmed a candidate for the federal bench without the approval or at least the tolerance of the political leaders of the candidate's own party." *Id.* at 21.

The crux of the socially conservative opposition was lingering doubts regarding her views of the judicial role in areas such as abortion, race and sexual orientation discrimination, and privacy rights generally.<sup>52</sup> Yet candidly objecting to the uncertainty of her positions on these issues—which deeply divide the American populace—would contradict the public’s expectation (and a frequently expressed Republican mantra)<sup>53</sup> that Supreme Court Justices follow the law, not their own personal beliefs. So instead, the majority of her conservative opponents focused on her supposed lack of relevant experience, immediately deriding her qualifications on the day she was nominated as “non-existent.”<sup>54</sup> In the colorful words of commentator Charles Krauthammer, President Bush nominated “a constitutional tabula rasa to sit on what is America’s constitutional court[,] . . . [which was] an exercise of regal authority with the arbitrariness of a king giving his favorite general a particularly plush dukedom.”<sup>55</sup> Stated more plainly, she had never been a judge, or held another position (such as Solicitor General) closely associated with the Supreme Court. She was a political appointee, without experience in impartial, nonpartisan decisionmaking. She did not have a sufficient understanding of constitutional law, preventing her, in today’s parlance, from correctly calling “balls and strikes.” And it was these complaints that resonated with the public—even though her legal background in many respects mirrored that of previously confirmed nominees—rather than the true source of her intraparty opposition, which was the depth of her ideological commitment to their beliefs.

The ready acceptance of the experience complaint indicates that background necessary for a Supreme Court appointment has changed. A cursory glance at the past confirms that something is afoot. In the three decades from 1937 to 1967, *only eight* of the *twenty-one* individuals nominated for the Supreme Court were either sitting judges or the Solicitor General,<sup>56</sup> with *only five* of the nominees serving on

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52. See *id.* at 320. Although her long-time friend, Justice Nathan Hecht of the Texas Supreme Court, had repeatedly reaffirmed in interviews that she was pro-life, and earlier in her career she had attempted to pass an ABA resolution requiring neutrality in the abortion debate (rather than the ABA’s then-existing and still continuing platform supporting the right to choose), conservative activists still feared that she was a “stealth nominee” in the mold of Justice David Souter who would not sufficiently advance the Republican agenda. See Pusey, *supra* note 35.

53. See, e.g., Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010) (providing numerous examples of Republican political rhetoric against activist judges substituting personal views for constitutional commitments).

54. Buchanan, *supra* note 48.

55. Krauthammer, *supra* note 48.

56. Justices Wiley B. Rutledge, Sherman Minton, John Marshall Harlan (II), Charles Evans Whittaker, and Potter Stewart were serving on the federal courts of appeals when nominated for the Supreme Court, Justice William Brennan was serving as a state supreme court judge, and Justices Stanley Reed and Thurgood Marshall were each serving as the Solicitor General of the United States. See ABRAHAM, *supra* note 1, at 163-230. Justice Robert

federal appellate courts.<sup>57</sup> In contrast, in the four decades since the nominations of Justices Powell and Rehnquist in 1971, *fourteen* of the *fifteen* individuals nominated have been sitting judges or the Solicitor General (all except unsuccessful nominee Harriet Miers), with *twelve* of the *fifteen* serving on federal appellate courts.<sup>58</sup> It is not that recent Presidents have not considered nominations outside these parameters—President Clinton, for instance, openly approached or strongly considered New York Governor Mario Cuomo, Senate Majority Leader George Mitchell, Interior Secretary Bruce Babbitt, and Education Secretary Richard Riley, but various political factors interfered with nominating each of them.<sup>59</sup> The reality is, as President Clinton learned, that certain experience—particularly (although not exclusively) as a federal circuit judge—is now an accepted norm for Supreme Court nominees.<sup>60</sup>

But why has this norm developed? Scholars have routinely described the phenomenon, but have had difficulty explaining the underlying normative reasons for the shift.<sup>61</sup> In my view, part of the answer is that the steady expansion of public participation in the confirmation process over the last two centuries has changed the political calculus regarding the necessary background experience for the High Court.

## II. THE CHANGING CONFIRMATION PROCESS

The Constitution does not define the Senate's role in Supreme Court appointments beyond merely stating that it is to provide "[a]dvice and [c]onsent;"<sup>62</sup> thus, the Senate has created its own procedures.<sup>63</sup> Over the

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H. Jackson had also previously been the Solicitor General, but was Attorney General at the time he was nominated to the Court. *Id.* at 184.

57. David A. Yalof, *Dress Rehearsal Politics and the Case of Earmarked Judicial Nominees*, 26 CARDOZO L. REV. 691, 695 (2005). It was more likely that a Supreme Court nominee was a Senator or a member of the President's Cabinet than a judge during this time—three Senators, three U.S. Attorneys General, one Secretary of the Treasury, and one Secretary of Labor were nominated to serve on the Supreme Court from 1937 to 1967. *Id.*

58. The twelve nominated federal judges are Justice Stevens in 1975, Chief Justice Rehnquist and Justice Scalia in 1986, Judge Robert H. Bork and Justice Kennedy in 1987, Justice Souter in 1990, Justice Thomas in 1991, Justice Ginsburg in 1993, Justice Breyer in 1994, Chief Justice Roberts in 2005, Justice Alito in 2006, and Justice Sotomayor in 2009. President Reagan had announced his intention to nominate another federal appellate judge in 1987, Judge Douglas H. Ginsburg, but Judge Ginsburg withdrew his name from consideration before an official nomination had been made. Justice Sandra Day O'Connor was serving as a state court appellate judge when she was nominated in 1981, and Justice Elena Kagan was serving as Solicitor General of the United States at the time of her nomination in 2010. See ABRAHAM, *supra* note 1, at 233-324; *Conservative Friends Rise in Support of Kagan*, *supra* note 22.

59. Mark Silverstein & William Haltom, *You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J.L. & POL. 459, 460-61, 471-72 (1996); Yalof, *supra* note 57, at 696.

60. Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 905-10 (2003).

61. See *Circuit Effects*, *supra* note 15, at 840-68.

62. U.S. CONST. art. II, § 2, cl. 2.

last two centuries, the Senate's incremental changes to these procedures have had a dramatic cumulative effect on the appointments process. Early on, before the Civil War, the Senate's practices were closed, ad hoc, and informal.<sup>64</sup> While the Senate slightly formalized its role in the postbellum period, it was not until after Senators became accountable to the public for their election in the early twentieth century that the Senate's practices began slowly evolving into today's model.<sup>65</sup>

The changed mechanics of the Senate's institutional role in the confirmation process transformed the defining characteristics of successful and unsuccessful judicial nominations. Retracing the evolution of the Senate's practices and judicial nomination outcomes provides a historical perspective for understanding the development of the modern expectations regarding Supreme Court nominees.

#### A. *From the Founding to the Civil War*

During the tenures of this nation's first few Presidents, the Senate did not have a specified committee to consider judicial nominations, instead addressing all but one nomination in the first instance before the entire Senate.<sup>66</sup> In 1816 the Senate first created standing committees to assist in the conduct of its business, relying on its power to devise rules for its own proceedings as authorization for delegating some functions to groups of Senators.<sup>67</sup> One of the committees created at that time was the Senate Judiciary Committee, which was to assist in undertaking the Senate's "[a]dvice and [c]onsent" role.<sup>68</sup>

Yet even after the Judiciary Committee's creation, the Senate confirmation process remained exceedingly informal and hidden from public view in the years before the Civil War.<sup>69</sup> The Senate's procedures

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63. See U.S. CONST. art. I, § 5, cl. 2 (providing that "[e]ach House may determine the Rules of its Proceedings").

64. See *infra* section II. A.

65. U.S. CONST. amend. XVII.

66. DENIS STEVEN RUTKUS & MAUREEN BEARDEN, CONG. RESEARCH SERV., RL33225, SUPREME COURT NOMINATIONS, 1789-2009: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT 5 (2009). The one exception occurred for the nomination of Alexander Wolcott in 1811, which was first referred to a select committee composed of three Senators. *Id.* On the same day the select committee reported on his nomination, the Senate overwhelmingly rejected his confirmation, with only nine votes in favor and twenty-four against. *Id.* at 20 (Table 1). On a percentage basis, this was the most lopsided full Senate vote against confirmation in American history. For the reasons underlying his lack of support, see *infra* note 80 and accompanying text.

67. GERHARDT, *supra* note 1, at 15-16; RUTKUS & BEARDEN, *supra* note 66, at 5.

68. Cf. David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 491 (2005) (noting the Senate Judiciary Committee's role in judicial nominations since 1816).

69. Cf. JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 88 (1995) (opining that current knowledge of the early Supreme Court confirmation process is incomplete, due to the want of surviving Judiciary Committee records before the Civil War and

at the time required a motion before a nomination could be referred to the Judiciary Committee, allowing the Senate to act on approximately one out of every three Supreme Court nominations without a Committee referral.<sup>70</sup> Even if the matter was referred to the Judiciary Committee, it typically merely reported back to the Senate without an official recommendation or even a recorded vote tally regarding the nomination.<sup>71</sup> Neither the Committee nor the Senate as a whole spent long investigating and debating the merits of the nominee—in the vast majority of cases, the Senate’s final action occurred within a week after receiving the nomination from the President.<sup>72</sup> All of the proceedings, in both the Judiciary Committee and on the Senate floor, routinely occurred in a closed executive session, shielded from public view.<sup>73</sup> This secrecy extended to voting, as Senators usually voted, particularly if confirmation appeared likely, through an unrecorded voice vote rather than a roll call vote.<sup>74</sup>

This process did not allow for much public input, especially considering communication channels were much slower than today. But soliciting the general public’s opinion was not a concern of Senators at the time. Because Senators were selected by the legislatures of their state rather than through popular elections, they had little connection to the state polity.<sup>75</sup> Only a select few citizens with political or financial clout and close connections to Senators could hope to have any impact on the confirmation process; the general public could only read press accounts and write correspondence destined to be ignored.<sup>76</sup>

The important influences on antebellum Senators were the political institutions that controlled their reelection and advancement opportunities—their state’s legislature and their political party. Senators frequently received voting advice or instructions from both

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the Senate’s closed sessions that prevented full press coverage).

70. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 17 (2010).

71. RUTKUS & BEARDEN, *supra* note 66, at 8.

72. RUTKUS, *supra* note 70, at 5.

73. *Id.* at 20. The Senate has always considered itself to be in “executive session” when undertaking its constitutional “advice and consent” duties on nominations made and treaties negotiated by the executive, the President of the United States. RICHARD S. BETH & BETSY PALMER, CONG. RESEARCH SERV., RL33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789-2009 3 (2009). There is even a separately kept official record of the Senate for procedural actions taken related to executive business, the Executive Journals of the Senate. *See id.* at 2. Until 1929, all executive sessions of the Senate were closed to the public unless ordered open by a majority vote of the Senate. *See infra* Part II.C.

74. BETH & PALMER, *supra* note 73, at 5; RUTKUS & BEARDEN, *supra* note 66, at 11.

75. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

76. GERHARDT, *supra* note 1, at 212-13. While it was not uncommon for prominent local citizens to petition the President to nominate a particular individual, such campaigns usually were unsuccessful. William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 4-5 (1990). The press remained the primary conduit of information for most citizens, although reporting at the time was highly partisan, as newspapers were frequently aligned with one of the major political parties. *See id.*



sources.<sup>77</sup> Disregarding either could potentially have severe repercussions on their future political careers. Not surprisingly, then, the types of issues Senators considered controlling in the confirmation process for Supreme Court nominees mirrored the then-prevailing concerns of state legislators and political parties regarding such appointments—specifically federal/state relations, national party politics, and political rivalries.

In fact, all the failed Supreme Court nominations before the Civil War can at least partially be attributed to one or more of these concerns. The Senate first rejected a Supreme Court nominee in 1795, when President George Washington nominated John Rutledge to replace Chief Justice John Jay.<sup>78</sup> Senators from Rutledge's own political party defeated his confirmation primarily due to Rutledge's vigorous public criticism of the Jay Treaty (which had been negotiated by his predecessor and enthusiastically ratified by the same Federalist Senators considering his nomination).<sup>79</sup> President James Madison's nomination of Alexander Wolcott was likewise rebuffed in part due to the Senate's objections to his robust partisan enforcement of the Embargo and Non-Intercourse Acts as a United States custom inspector.<sup>80</sup> President James Polk's nomination of fellow Democrat George W. Woodward was blocked by a group of Democratic Senators, including Senator Cameron from Woodward's home state, who were opposed to Woodward's "gross nativist American sentiments" that contravened their efforts to position the party as favorable to immigrants.<sup>81</sup> Thus, the Senate's rejection of several antebellum nominees can be described as political reprisals against the candidate for crossing party lines or otherwise drawing the ire of Senators.

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77. GERHARDT, *supra* note 1, at 66.

78. Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1202 (1988).

79. *Id.* Rutledge had aligned himself with the opposition party by referring to the treaty negotiated by his fellow Federalists as a "puerile production" containing the "grossest absurdities." SOUTH CAROLINA STATE-GAZETTE, July 17, 1795, in 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 at 766 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter DOCUMENTARY HISTORY]. Based on these and similar remarks, some Federalists even questioned his mental stability, with Alexander Hamilton arguing he was "deranged." See David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900, 903 (1990); see also Correspondence from Secretary of State Edmund Randolph to President George Washington Dated July 29, 1795, in DOCUMENTARY HISTORY 773.

80. ABRAHAM, *supra* note 1, at 32, 71; GERHARDT, *supra* note 1, at 163. Senators also raised questions regarding his legal qualifications and ethics. ABRAHAM, *supra* note 1, at 32; MALTESE, *supra* note 69, at 34.

81. ABRAHAM, *supra* note 1, at 32; MALTESE, *supra* note 69, at 35; Keith E. Whittington, *Presidents, Senates and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 430 (2006). Not only did Woodward's and Cameron's home state of Pennsylvania have a large ethnic population, but Woodward had also campaigned against Cameron for the Senate. MALTESE, *supra* note 69, at 35.

Many other nominees were rejected as a result of political opposition to a nominating President, especially one that was soon departing the White House. The nominations of John Crittenden by John Quincy Adams, of George Badger, Edward Bradford, and William Micou by Millard Fillmore, and of Jeremiah Black by James Buchanan were all unsuccessful because the Senate wanted to preserve the vacancies for the next President.<sup>82</sup> President John Tyler, who had alienated both political parties, had the roughest experience, nominating four men to the Supreme Court who were not confirmed due to the Senate's (ultimately correct) belief that he would not be reelected and concerns that at least one of the nominees was an ardent supporter of state's rights.<sup>83</sup>

Thus, the fact that the confirming Senators were beholden to political parties and state legislatures, not the public at large, lurked beneath the surface in all the early rejected judicial nominations. The importance of political parties and the federal/state dynamic was at an apogee before the Civil War, and these influences left their mark on the procedures employed during, and the final outcomes of, Senate consideration of Supreme Court nominees. Although certainly Senators were also concerned in rare instances that a nominee did not have the intellectual or ethical capacity for service on the High Court, a nominee's lack of prior judicial or appellate experience was not viewed as disqualifying.<sup>84</sup> In fact, some of the rejected nominees had impeccable prior legal and judicial experience (including one with the rare credential at the time of prior experience in the relatively minuscule ranks of the federal judiciary).<sup>85</sup> And the backgrounds of the successful nominees further confirm the irrelevancy of prior judicial experience during this period. Thirty-one of the first thirty-four appointed Supreme Court Justices had no prior federal judicial experience, with their previous state judicial experience varying widely, as approximately one-

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82. ABRAHAM, *supra* note 1, at 31; GERHARDT, *supra* note 1, at 58.

83. GERHARDT, *supra* note 1, at 56-57. President Tyler has been described as the President without a party as he had left the Democrats to become the running mate of Whig Henry Harrison, but then he opposed many key Whig initiatives after succeeding to the presidency on Harrison's death. ABRAHAM, *supra* note 1, at 85-86.

84. See, e.g., ABRAHAM, *supra* note 1, at 32 (relating that President Madison's nominee Alexander Wolcott was rejected in part due to Senators' views that he possessed questionable morals and lacked legal acumen, in addition to his objectionable extremely partisan behavior).

85. *Id.* at 58-59, 85-87, 92 (describing the prior state judicial experience of several rejected nominees, including John Rutledge, Edward King, George W. Woodward, and Jeremiah S. Black). Rutledge even had prior federal judicial experience, having previously been appointed to the Supreme Court by President Washington in 1789 before resigning in 1791 to become chief justice of South Carolina. In the years before 1789, he chaired the South Carolina delegation to the First Continental Congress, served as president of the South Carolina Republic and governor of South Carolina, presided as chief judge of the South Carolina Court of Chancery, and attended the Constitutional Convention where he chaired the Committee of Detail. MALTESE, *supra* note 69, at 26; Monaghan, *supra* note 78, at 1202; Whittington, *supra* note 81, at 428.

third had none, almost half had between one-half and six years, and the remainder had extensive years of service on the state bench.<sup>86</sup> The only institutional norm that had developed in the antebellum years was Justices had to be distinguished or well-connected lawyers who were not on the wrong side of national party politics.

### *B. The Postbellum Era Into the Twentieth Century*

After the Civil War, the Senate slightly formalized its “[a]dvice and [c]onsent” procedures, adopting a rule in 1868 that all presidential nominations “shall, unless otherwise ordered by the Senate, be referred to appropriate committees . . . .”<sup>87</sup> This shifted the default procedure from a requirement that a motion be made to refer the nomination to the Judiciary Committee to a presumption that the referral would be made in the absence of an order to the contrary. As a result, since 1868 almost all Supreme Court nominations have been referred to the Committee, with the exception of a few bypasses for current or former Senators or other individuals well-known to the Senate.<sup>88</sup> Almost contemporaneously, the Judiciary Committee began its still-continuing practice of including within its reports explicit recommendations on the nominee’s confirmation.<sup>89</sup>

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86. ABRAHAM, *supra* note 1, at 42-44 (Table 2). Justices Trimble, Barbour, and Daniel were the only members of the Court with prior federal judicial experience at the time of their nomination. *Id.* at 42. Nominees with prior federal judicial experience were rare in part because the federal judiciary as a whole was only a fraction of its size today, greatly limiting the available pool of candidates.

87. FLOYD M. RIDDICK, HISTORY OF THE COMMITTEE ON RULES AND ADMINISTRATION—UNITED STATES SENATE, S. Doc. No. 96-27, at 26 (1980).

88. RUTKUS, *supra* note 70, at 17-18. Only seven (of ninety-six) Supreme Court nominations since 1868 have not been referred to the Judiciary Committee—former Secretary of War Edwin M. Stanton in 1869, Senator Edward D. White in 1894 and his nomination again in 1910 for the position of Chief Justice, former United States Representative and Attorney General Joseph M. McKenna in 1897, former President William Howard Taft in 1921, former Senator George Sutherland in 1922, and Senator James F. Byrnes in 1941. RUTKUS & BEARDEN, *supra* note 66, at 5-6 n.12-13. Sometimes Senators or commentators attribute these instances in which a nomination was not referred to the Committee as evincing a tradition or “unbroken custom” of senatorial courtesy to current or former colleagues. *See, e.g., Nomination of Senator Byrnes To Be Associate Justice of the Supreme Court*, 87 CONG. REC. 5062 (1941). However, on several other occasions, the Senate followed its standard practice and referred presidential nominations of current and former Senators to the Judiciary Committee, as in the 1887 nomination of former Senator and Secretary of the Interior Lucius Lamar, the 1893 nomination of former Senator and Judge Howell E. Jackson, the 1937 nomination of Senator Hugo Black, the 1945 nomination of Senator Harold H. Burton, and the 1949 nomination of former Senator and Judge Sherman Minton. RUTKUS, *supra* note 70, at 17-18; RUTKUS & BEARDEN, *supra* note 66, at 27, 28, 33, 34 (Table 1). These examples illustrate that, in actual practice, the Senate does not have an “unbroken custom” or “tradition” regarding whether its colleagues should be referred to the Judiciary Committee when nominated for the Supreme Court—instead, the decision has historically been made on a case-by-case basis. In the event a President nominates a Senator to the Court in the foreseeable future, the public presumably would not accept a decades-old, intermittently followed relic of senatorial favoritism as a sufficient justification for pretermittting the standard scrutiny of judicial nominees. *Cf. infra* Part III.

89. RUTKUS & BEARDEN, *supra* note 66, at 9. The Committee usually makes a favorable or

Despite these new practices, though, the Judiciary Committee's procedures were much different during the latter half of the nineteenth century than in modern times. The Committee did not hold public hearings, but instead considered nominations in secretive, closed-door sessions.<sup>90</sup> As the *New York Times* reported in 1881, the "Judiciary Committee of the Senate is the most mysterious committee in that body, and succeeds better than any other in maintaining secrecy as to its proceedings."<sup>91</sup> The nominee did not testify,<sup>92</sup> in fact, with apparently only one exception, no one outside the Senate participated in the executive sessions considering judicial confirmations.<sup>93</sup> The whole affair was typically cursory. In the vast majority of cases, the Committee concluded its review less than a week after the Senate received the nomination.<sup>94</sup> Upon receiving the committee's recommendation, the Senate typically took final action within a matter of days, frequently with an unrecorded voice vote, unless the nomination had generated internal controversy.<sup>95</sup> The entire confirmation process remained shielded, at least for the most part, from public influences.

This secrecy was by design. Senators were still being selected by state legislatures rather than directly by the polity, so public perception was rarely a motivating consideration for either the procedures or outcomes of Supreme Court confirmations.<sup>96</sup> Senators were beholden to their party and their state legislatures, and the underlying concerns of those institutions predominantly drove the process. Thus, despite the fact that almost all nominations were referred to the Judiciary Committee for reporting, the mechanics—as well as the results—of the confirmation process had not changed appreciably.

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unfavorable recommendation, but has, on four occasions, reported the nomination while explicitly declining to make a recommendation. *Id.*

90. Law, *supra* note 68, at 491; Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 623 (2005).

91. *The Electoral Count*, N.Y. TIMES, Jan. 30, 1881.

92. MALTESE, *supra* note 69, at 93-97. On rare occasions, however, nominees would communicate with the Senate Judiciary Committee in writing. *See id.* at 95-97.

93. *See id.* at 88. In 1873, the Senate Judiciary Committee conducted closed hearings involving subpoenaed documents and outside witness testimony to consider President Grant's nominee George Williams. *Id.* This was only done, however, after the Senate had recommitted his nomination to the Committee to investigate controversies regarding his use of public funds that arose after his nomination reached the Senate floor. *Id.* at 94; RUTKUS & BEARDEN, *supra* note 66, at 6 n.14. Other than this one instance, the only voices heard in the Committee before the twentieth century apparently belonged to other Senators.

94. *See* RUTKUS & BEARDEN, *supra* note 66, at 25-30 (Table 1) (listing elapsed days from each nomination's receipt in the Senate to the final vote of the Judiciary Committee).

95. RUTKUS, *supra* note 70, at 5. Although roll call votes did become more common in the postbellum period than in earlier years, the Senate still decided the fate of the majority of nominations through unrecorded voice votes. BETH & PALMER, *supra* note 73, at 8.

96. *Cf.* MALTESE, *supra* note 69, at 36-44 (describing the singular confirmation fight before the twentieth century where public perception influenced Senators, when the Grange mounted a strong, yet ultimately unsuccessful, attempt to block the confirmation of Stanley Matthews to the Supreme Court in 1881 as a result of his close ties to the railroad industry).

The same dispositive factors underlying unsuccessful Supreme Court nominations in the antebellum era accordingly explain almost all the defeated nominations in the immediate postbellum era. For example, the post-Civil War Senate refused to allow its political nemesis, President Andrew Johnson, any appointment, going so far as to abolish seats on the Supreme Court to prevent nominations.<sup>97</sup> President Ulysses Grant's nomination of the undoubtedly qualified Ebenezer R. Hoar was defeated because Hoar had antagonized his fellow Republicans in the Senate by both his opposition to the impeachment of Andrew Johnson and his interference with their control over political spoils appointments to governmental offices.<sup>98</sup> President Grant's nominee and close personal friend Caleb Cushing was rejected because of his wishy-washy political commitments, having morphed in his career from a Whig to a Democrat to a Johnson supporter to a Republican.<sup>99</sup> And finally, during President Grover Cleveland's second term, he was thwarted in two attempts to nominate a New Yorker to fill the seat vacated by the death of New York Justice Samuel Blatchford because New York Senator David B. Hill invoked senatorial courtesy,<sup>100</sup> hoping to secure the seat for one of his own preferred candidates.<sup>101</sup> Once again, national party politics and political affronts appear to explain the rejected nominees in the first few decades after the Civil War.

This is not to say that a nominee's personal characteristics and qualities, including legal abilities and ethical principles, were not important to the Senate. The Senate refused to act on another of President Grant's nominees, Attorney General George H. Williams, primarily because of Williams' mediocre (at best) legal talents, including

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97. ABRAHAM, *supra* note 1, at 31, 99.

98. *Id.* at 32; GERHARDT, *supra* note 1, at 163. As Attorney General, Hoar had championed civil service reform for governmental offices, contravening the will of Senators who preferred to reward patrons with these positions. Whittington, *supra* note 81, at 431. In addition, President Grant acted on Hoar's unilateral recommendations in filling a number of new federal circuit court judicial positions, disregarding the preferences of Senators, who believed they had a right to be consulted. MOORFIELD STOREY & EDWARD W. EMERSON, EBENEZER ROCKWOOD HOAR: A MEMOIR 182 (1911). These perceived affronts to Senators, combined with Hoar's brusque manner, badly alienated many even within his own party, which led to his defeat. *See id.*

99. ABRAHAM, *supra* note 1, at 35; GERHARDT, *supra* note 1, at 163.

100. "Senatorial courtesy" is a term describing the deference owed to Senators in the appointments process. Although there are various forms of senatorial courtesy, Senator Hill was relying on the senatorial expectation that Presidents will consult and heed the advice of a Senator before nominating an individual from a Senator's home state. *Cf.* GERHARDT, *supra* note 1, at 143-44.

101. ABRAHAM, *supra* note 1, at 114-15; GERHARDT, *supra* note 1, at 64, 138. Senator Hill was a rival of President Cleveland within the Democratic Party, and, rather than supporting Cleveland loyalist nominees William B. Hornblower and Wheeler H. Peckham, he wanted to reward one of his own supporters with the seat. ABRAHAM, *supra* note 1, at 114-15. President Cleveland eventually circumvented Senator Hill's opposition by nominating the majority leader of the Senate, Louisiana Senator Edward D. White, for the position. GERHARDT, *supra* note 1, at 64-65.

his underwhelming performance as Attorney General.<sup>102</sup> Nevertheless, no specified legal experiences were viewed as a prerequisite to service on the Court during this period. Indeed, just as in the antebellum era, some of the rejected nominees had impeccable past legal experience, including judicial service.<sup>103</sup> On the other hand, the legal backgrounds of the confirmed nominees (just as in the antebellum era) varied widely, with some having prior federal judicial experience, others having served as state judges, and the rest without any prior time on the bench.<sup>104</sup>

The successful nominees did share two essential characteristics: (1) their legal talents had come to the attention of the right people, and (2) they were on the right side of party politics. Those were the defining requirements of confirmation throughout the nineteenth century, and indeed all that the Senate's procedures were designed to unearth.

### C. *The Twentieth Century Transformation*

After Senators became subject to popular elections in the twentieth century, their increased public accountability modified the institutional forces affecting the appointment process, eventually culminating in a markedly different Senate confirmation practice. The Seventeenth Amendment to the United States Constitution, ratified in 1913, established that the people, rather than the legislators, of a state would choose their Senators.<sup>105</sup> As a result, Senators' job performances—including their role in the appointment process—became subject to public scrutiny through the ballot box.<sup>106</sup> The party machinery and state legislators were no longer their direct supervisors—instead, the voters were. Not surprisingly, the influence of constituents and interest groups on Senators waxed while party allegiance waned.<sup>107</sup>

Senators eventually realized that conducting the Senate's business in the public eye was necessary when elections were decided by the polity.<sup>108</sup> Although the Senate inched quite cautiously towards opening its previously closed proceedings on presidential nominations, each crack in the doorway led to additional efforts to influence the process. In the end, the dynamics for Supreme Court confirmation had been

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102. ABRAHAM, *supra* note 1, at 35.

103. *See id.* at 31-32, 99, & 114-15.

104. *See id.* at 42-43 (Table 2).

105. U.S. CONST. amend. XVII.

106. *Cf.* Robin M. Wolpert & James G. Gimpel, *Information, Recall, and Accountability: The Electorate's Response to the Clarence Thomas Nomination*, 22 LEGIS. STUD. Q. 535, 542 (1997) (concluding a Senator's disregard of constituent opinion on Supreme Court nominees may impact his or her subsequent reelection chances).

107. GERHARDT, *supra* note 1, at 59. A recent study found a direct relationship between a Senator's confirmation vote and constituent opinion on the nominee. Jonathan P. Kastellec et al., *Public Opinion and Senate Confirmation of Supreme Court Nominees*, 72 J. POL. 767, 769 (2010).

108. Whittington, *supra* note 81, at 434.

reshaped: what had been a battle primarily between a Senate concerned with party politics and the President became a strategic interplay between the President, the Senate, the public at large, hundreds of interest groups, and the media. The Seventeenth Amendment fundamentally altered what Professor Michael Gerhardt has called the “institutional dynamics” governing the confirmation process.<sup>109</sup>

The ongoing development of these new institutional dynamics corresponded with the additional layers of public scrutiny employed in the Senate’s confirmation process. These layers, though, were not added in a linear progression, but developed tentatively over time, with some backtracking. The Senate first opened its proceedings to public scrutiny in cases involving controversial candidates, or those objectionable to powerful institutional actors. In these cases—and these cases only—Senate consideration included open, public hearings before a subcommittee of the Senate Judiciary Committee, testimony from the nominee or special interest groups, or public debates on the nomination on the Senate floor. Over a period of several decades, as the Supreme Court’s decisions increasingly aroused public opinion, such procedures, which were initially performed on an ad hoc basis in exceptional cases, became the norm for addressing all Supreme Court nominations.

The first step occurred in 1916, when a Judiciary Committee subcommittee held the first ever public hearing on a Supreme Court appointment to consider President Woodrow Wilson’s nominee Louis Brandeis.<sup>110</sup> The nomination of Brandeis, the first Jewish member of the Court, was extremely controversial, predominantly because of anti-Semitism, but also because conservative financial and political interests feared that Brandeis, who had been an active legal crusader for labor interests, was a radical progressive.<sup>111</sup> Brandeis supporters successfully pushed for his hearings to be held in the public view, believing that such scrutiny would limit the opportunity for anonymous character slanders and back-room compromises to derail his confirmation.<sup>112</sup> Still, the confirmation battle was, as expected, ugly. Despite some of the unsubstantiated charges leveled against him, Brandeis did not personally testify at the hearing.<sup>113</sup> A number of other individuals, though, were summoned to testify for and against him in the public

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109. GERHARDT, *supra* note 1, at 7.

110. Law, *supra* note 68, at 491; Resnik, *supra* note 90, at 623.

111. ABRAHAM, *supra* note 1, at 142-143. Brandeis had been an active advocate on behalf of labor and the downtrodden through his law practice, his writings, his congressional testimony, and his counsel to prominent progressive politicians, horrifying corporate interests with his support of maximum work weeks and minimum wages for workers, competition between businesses, and a graduated income tax. MALTESE, *supra* note 69, at 49-50.

112. GERHARDT, *supra* note 1, at 322.

113. ABRAHAM, *supra* note 1, at 154. Although Brandeis did not testify, he did meet informally with some Senators outside the hearing process and communicated with witnesses appearing on his behalf. *See, e.g.*, ALPHEUS THOMAS MASON, *BRANDEIS* 468, 476-77, 491-92, 503-04 (1946).

proceedings, including individuals sympathetic to opposing interests, such as the consumer and labor supporters who were instrumental in his eventual confirmation, and the business interests that unsuccessfully opposed him.<sup>114</sup>

But the Brandeis hearings did not establish a binding precedent in favor of public hearings for subsequent Senate confirmations. In evaluating the next six Supreme Court nominations, the Senate reverted to its traditional nineteenth century practices—closed sessions for all parts of the confirmation process and an expedient final disposition of the nomination.<sup>115</sup>

The next key step towards the modern confirmation process occurred in 1925, when the Senate considered President Calvin Coolidge's nomination of Harlan Fiske Stone. Although Stone's distinguished career included acclaimed service as a professor and dean at Columbia Law School and as the Attorney General who cleaned house after the Teapot Dome scandal, his nomination was opposed when it reached the Senate floor by a powerful Senator and his allies who were upset that Stone had continued an investigation of the Senator while he was Attorney General.<sup>116</sup> His nomination was therefore recommitted to the Judiciary Committee, which arranged public hearings on a judicial nomination for only the second time.<sup>117</sup> At the urging of President Calvin Coolidge, Stone requested and was allowed to testify in front of the subcommittee, the first nominee to do so.<sup>118</sup> His frank and distinguished testimony regarding his actions as Attorney General assisted his cause, and the Judiciary Committee recommended confirmation.<sup>119</sup> The nomination returned to the full Senate, where the Senate waived its long-standing rule requiring closed sessions for executive business and openly debated his nomination before confirming him overwhelmingly.<sup>120</sup>

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114. GERHARDT, *supra* note 1, at 69-70. The Committee summoned witnesses who could discuss Brandeis' previous conduct as an attorney rather than seeking testimony from representatives of organized interest groups. MALTESE, *supra* note 69, at 51. Due to the nature of Brandeis' private legal practice, however, these witnesses usually were affiliated with, or at least sympathetic to, the interests either of big business or of labor. See Ross, *supra* note 76, at 7-9 (detailing affiliations of testifying witnesses during the Brandeis hearings).

115. RUTKUS & BEARDEN, *supra* note 66, at 31-32 (Table 1). Indeed, the Senate confirmed two Supreme Court nominees during this period with exceptional speed, confirming William Howard Taft as Chief Justice in 1921 on the same day his nomination reached the Senate and confirming George Sutherland as an Associate Justice in 1922 on the very same day he was nominated. ABRAHAM, *supra* note 1, at 146-48.

116. Michael J. Gerhardt, *Toward A Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 491 (1998).

117. Law, *supra* note 68, at 491; Resnik, *supra* note 90, at 623.

118. Law, *supra* note 68, at 491-92.

119. Gerhardt, *supra* note 116, at 491.

120. 66 CONG. REC. 3050 (1925). The Senate confirmed the nomination in a 71-6 vote. *Id.* at 3057.



After Justice Stone's appointment and before the next Supreme Court nomination, the Senate amended its standing rules to provide that its sessions on executive nominations and treaties would be open to the public unless ordered closed by a majority vote.<sup>121</sup> Several factors triggered this reversal of long-standing Senate tradition. A number of Senators had been seeking such a change for some time, wanting the public (who were now their electors) to have greater awareness of senatorial affairs.<sup>122</sup> The needed catalyst to spur the change occurred when national media outlets disclosed the secret vote tallies from Senate roll call votes on two nominations considered in executive session in 1929.<sup>123</sup> Despite speculation that Senators in favor of opening Senate proceedings engineered the leak to assist their cause, the precise source of the report was not discovered during the public hearings that followed.<sup>124</sup> But the whole affair had its intended purpose—the Senate realized that it was futile to maintain its traditional veil of secrecy on executive business against rebellious Senators and mounting public political pressure.

With an open confirmation process, the public, for the first time, could actively monitor the Senate's role in Supreme Court appointments. Although this did not yet always translate into public involvement in the confirmation decision, the public now had the *opportunity within the process* to have their voices heard. Indeed, within a year of this change, for the first time in American history, public interest groups successfully thwarted a Supreme Court nominee's confirmation.<sup>125</sup>

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121. Standing Rules of the Senate, Rule 31, S. Doc. No. 110-9, at 43 (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_documents&docid=f:sd009b.110](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:sd009b.110).

122. GERHARDT, *supra* note 1, at 67.

123. JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 249-255 (1953). The two nominations were for Roy O. West to become Secretary of the Interior and for Irvine Lenroot to serve on the Customs Court of Appeals. *See id.*

124. GERHARDT, *supra* note 1, at 67.

125. HARRIS, *supra* note 123, at 127-32. Interest groups had been involved in confirmation fights as far back as fifty years earlier, when the National Grange and other farm groups mounted a strong, yet ultimately unsuccessful, campaign against the nomination of Stanley Matthews to the Supreme Court. *See* ROBERT A. KATZMANN, *COURTS AND CONGRESS* 34 (1997); MALTESE, *supra* note 69, at 36-43. The Grange was concerned that Matthews, whose career as both an attorney and Senator primarily involved representing the interests of railroads, would invalidate both recently enacted federal legislation requiring the railroads to pay interest on federally issued bonds and state laws regulating railroad rates on farm products. MALTESE, *supra* note 69, at 38-39. Although the first Matthews nomination by lame duck President Rutherford Hayes died in the Judiciary Committee at the end of the Senate session, Matthews was immediately renominated by incoming President Chester Garfield. *Id.* at 41-42. The newly composed Senate confirmed Matthews by a single vote, overriding the adverse recommendation from the Judiciary Committee and the continued objections of the Grange, which had protested in a correspondence campaign that his career representing railroad interests disqualified him from sitting on the nation's High Court. *Id.* at 42-43.

Labor groups were intermittently involved in a handful of nominations in the early twentieth century, primarily through correspondence directed to the President or to Senators.

The separate lobbying efforts of the American Federation of Labor (AFL) and the National Association for the Advancement of Colored People (NAACP) were instrumental in defeating Republican President Herbert Hoover's 1930 nomination of Judge John J. Parker to the Supreme Court.<sup>126</sup> The AFL complained that Judge Parker was "unfriendly" to labor based on a case in which he upheld a yellow dog contract, and the NAACP pointed to remarks he made while campaigning for governor in 1920 that black participation in politics was "a source of evil and danger."<sup>127</sup> Both the AFL and NAACP requested and were granted the opportunity to testify before the subcommittee investigating Judge Parker—the first time organized advocacy groups had representatives testify before Senators considering a Supreme Court nominee.<sup>128</sup> In addition, telegrams from both labor and civil rights organizations across the country flooded into Senate offices, urging that Parker should not be confirmed.<sup>129</sup> These efforts had their intended impact, causing just enough Republican Senators to defy their party and vote against Parker after realizing they could not support his nomination without alienating vital, organized constituencies.<sup>130</sup>

After Judge Parker's defeat, not only did interest groups know their participation could make a difference, but Senators recognized the

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*See id.* at 47-49. But as a result of the closed Senate confirmation procedures before 1916, these efforts had minimal impact. The first truly modern confirmation battle, involving interest groups on both sides and testifying witnesses before the Judiciary Committee, did not occur until the Brandeis nomination in 1916. *See supra* notes 110-114 and accompanying text. Labor interests won that battle when Brandeis was confirmed, and they were victorious again when Judge Parker's nomination was defeated in 1930. *See infra* notes 126-130 and accompanying text.

126. HARRIS, *supra* note 123, at 127-32; GERHARDT, *supra* note 1, at 70.

127. ABRAHAM, *supra* note 1, at 32-33. The focal point of labor's objections was his opinion in *International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927), which upheld a permanent injunction in favor of Red Jacket preventing any efforts to unionize its workforce after a violent conflict erupted in the area between union and corporate interests. Although *Red Jacket* was consistent with binding Supreme Court precedent, labor nonetheless objected that its tone indicated Judge Parker agreed with the anti-labor decisions of the Supreme Court. MALTESE, *supra* note 69, at 58-59. The NAACP was even more offended by Judge Parker's campaign statements during his run for governor, in which he tried to distance himself from Democratic charges that he supported equal political power for black voters. *See id.* at 59.

128. *Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Subcomm. of the S. Comm. on the Judiciary*, 71st Cong. 24-43, 74-78 (1930).

129. Ross, *supra* note 76, at 11-12 (detailing that the subcommittee received more than one thousand letters opposing Parker's confirmation from interested organizations and private citizens and that some individual Senators received dozens of letters and hundreds of telegrams).

130. MALTESE, *supra* note 69, at 58-63. At the time, African American voters still largely voted for the party of Lincoln, and some Republican Senators, especially from the Midwest, also were sympathetic to labor interests. The combination of both these separate constituencies was just enough to prevent his appointment, as seventeen Republicans joined twenty-four Democrats to defeat Parker's confirmation by a forty-one to thirty-nine vote. *See id.* at 58-69.

continued need for public input in confirmation proceedings. In furtherance of this recognition, the predominant purpose of the early public hearings held before Judiciary Committee subcommittees was to provide a communications avenue for those desiring to raise objections against the nominee.<sup>131</sup> The extent of public opposition to the nominee therefore actuated the process. If the nominee had little opposition, as frequently occurred, the hearings consisted solely of the testimony of a handful of adverse witnesses; these hearings sometimes concluded in a matter of minutes.<sup>132</sup> Other times, a hearing was not held at all, either because no public witnesses sought to present their views or Senators concluded that public input was immaterial to the decision.<sup>133</sup> Every once in a while, however, interest groups and other public witnesses became actively involved, stretching the hearings over several days.<sup>134</sup> Although such participation by interest groups only rarely occurred before 1949, the key was the opportunity now existed.<sup>135</sup> Eventually, this opportunity became a standard part of the confirmation process—since 1949, all individuals nominated to the Supreme Court have faced public scrutiny during an open hearing before the Senate Judiciary Committee prior to their confirmation vote.<sup>136</sup>

Shortly after 1949, another practice became accepted that has likewise increased the public scrutiny of Supreme Court nominees—the nominees' testimony in front of the Senate Judiciary Committee. Although Harlan Stone testified before a subcommittee in 1925, it took another three decades before this became a standard practice.<sup>137</sup> During the 1930s and 1940s, nominees intermittently appeared to publicly testify before the subcommittee, but typically only if Senators had specific concerns related to the nominee's character or ethics that had been raised by testifying witnesses or other Senators.<sup>138</sup> But the

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131. RUTKUS, *supra* note 70, at 20.

132. RUTKUS & BEARDEN, *supra* note 66, at 7 n.18.

133. *Id.* at 32-34. One out of every three nominees between 1925 and 1949 did not receive a hearing. *See id.* at 32-34 (table indicating that no hearing was held for five of the fifteen nominations between 1930 and 1946—Charles Evan Hughes, Owen J. Roberts, Hugo Black, James F. Byrnes [who was not referred to the Committee], and Harold H. Burton). Three of these five nominees were current or former Senators, and one had previously served as an Associate Justice on the Supreme Court.

134. *See, e.g.*, MALTESE, *supra* note 69, at 104-07 (describing the confirmation hearings for Felix Frankfurter in 1939, which extended over three days and consisted of testimony of the nominee, representatives of three organized interest groups, and other assorted witnesses).

135. *Id.* at 89-91 (highlighting that representatives from organized interest groups only testified in two public hearings of thirteen nominations between 1930 and 1949).

136. RUTKUS & BEARDEN, *supra* note 66, at 7 (noting that all the individuals nominated for the Supreme Court since 1949 have had a Committee hearing except for Harriet Miers, whose nomination was withdrawn before hearings could be held).

137. KATZMANN, *supra* note 125, at 19. Even as late as 1949, Sherman Minton refused to testify before the committee, asserting that his record as a Senator and federal appellate court judge spoke "for itself." *Id.* at 21. The Committee eventually agreed, because he was confirmed. *Id.*

138. *See id.* at 20. For example, Felix Frankfurter testified in 1939, primarily responding

Judiciary Committee's examination practices changed shortly after the Supreme Court's decision in *Brown v. Board of Education*.<sup>139</sup>

*Brown*, of course, was a watershed decision and a pivotal moment in the American constitutional tradition. Although its basic mandate that racial segregation in education cannot be equal within the meaning of the Equal Protection Clause is well accepted today, many in the Deep South unfortunately resisted this revolutionary change to their historical practices.<sup>140</sup> This resistance extended to certain segregationist Senators from southern states, who pressed nominees for the Supreme Court soon after the issuance of *Brown* to appear before the Judiciary Committee and discuss their views on desegregation and other issues.<sup>141</sup> These appearances began the still-continuing practice of attempting to ascertain a nominee's approaches to—and views on—legal issues through pointed Committee examination. In years since, all Supreme Court nominees have appeared before the Committee to answer questions related to their judicial philosophy, the role of precedent, and even their opinions regarding specific cases.<sup>142</sup>

Yet the duration and the specificity of the questioning of the nominee have intensified over time. Between 1955 and 1967, a nominee's testimony—while a routine part of the proceedings—typically lasted for

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to charges raised by witnesses against him regarding his ties to and activities for the Communist Party (none) and the American Civil Liberties Union (where he was an active member of its national committee), although the questions also addressed other matters as well. *See id.* Similarly, Robert H. Jackson was called to testify in 1941 to defend his decision as Attorney General to refrain from prosecuting two journalists for allegedly defaming a Senator. *Id.* at 20-21. But the questioning of the nominee was the exception, not the rule, in the thirties and forties, only occurring when Senators believed the nominee needed to respond to a particular matter. Just two months after Frankfurter's testimony, for instance, William O. Douglas waited outside the hearing room to testify, but was informed that no one had any questions for him. ABRAHAM, *supra* note 1, at 177. And in 1930, the Committee rejected a motion to have Judge Parker testify in person. WILLIAM C. BURRIS, DUTY AND THE LAW: JUDGE JOHN J. PARKER AND THE CONSTITUTION 84-85 (1987).

139. 347 U.S. 483 (1954).

140. *See, e.g.*, THE RISE OF MASSIVE RESISTANCE 67-91 (1969).

141. Gerhardt, *supra* note 116, at 471. The first nominee after *Brown*, John Marshall Harlan (II), evaded answering questions about *Brown*, but Senators became more insistent in their questioning about *Brown* in subsequent nominations, especially during Potter Stewart's 1958 confirmation hearing. *See* David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1069 (2008) (book review). During Harlan's hearing, he predominantly responded to Senators' questions about national sovereignty issues and the treaty power. KATZMANN, *supra* note 125, at 21.

142. Gerhardt, *supra* note 116, at 471; *see, e.g.*, KATZMANN, *supra* note 125, at 21-28. Of course, a long-standing debate exists regarding the propriety of nominees answering questions that concern issues likely to become before the Court. *Id.* at 19. The uneasy compromise of the Senate Judiciary Committee has been that Senators are free to ask any questions, and the nominee is free to refrain from answering as a result of the impropriety of the question. *Cf. Nomination of Potter Stewart to Be Associate Justice of the United States, Hearing before the S. Comm. on the Judiciary*, 86 Cong. 41-44 (1958). As a practical matter, this compromise means that the nominee typically answers the questions only to the extent necessary to be confirmed. *Ginsburg Marches Past Hearings on Near-Certain Path to Court*, 51 CONG. Q. WKLY. REP. 1956, 1958 (1993) (statement of Sen. Arlen Specter).

only a few hours during a day or two in front of the Committee, and usually was somewhat broad brushed.<sup>143</sup> But as the Warren Court expanded protections for criminal defendants and provided additional legal protections to the economically and politically disadvantaged, politicians directed the public's attention to the Supreme Court and its role in the American political process.<sup>144</sup> Richard Nixon's 1968 presidential campaign even appeared at times to be more against the Warren Court than against his Democratic opponent.<sup>145</sup> As nationwide public and political attention focused on the Supreme Court, the Senate Judiciary Committee's confirmation role undertook additional import. Senators accordingly devoted more time and effort during the hearings to a substantive examination of nominees' judicial philosophies and views on specific legal issues.<sup>146</sup>

The publicized campaign against the Court also increased the involvement of public interest organizations in the confirmation process. After the Parker nomination in 1930 and until 1968, a grand total of twenty-eight representatives of interest groups testified, appearing in a mere nine out of the twenty-five nominations considered by the Senate.<sup>147</sup> But since 1968, interest groups have been involved in every confirmation hearing except one, usually with several—and in some instances dozens—of organizations testifying through representatives.<sup>148</sup>

This enhanced senatorial and interest group attention contributed to the onslaught of four failed Supreme Court nominations between 1968 and 1970. The frustrations of many public interest organizations with the Warren Court's decisions on criminal justice, racial relations, religious liberty, and voting practices helped block President Lyndon B. Johnson's 1968 nominations of Associate Justice Abe Fortas to become Chief Justice and Judge Homer Thornberry to replace Fortas as a

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143. KATZMANN, *supra* note 125, at 18, 22-24.

144. Law, *supra* note 68, at 519.

145. JOHN MORTON BLUM, *YEARS OF DISCORD*, 313 (1991); KATZMANN, *supra* note 125, at 25; see Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 *ARIZ. ST. L.J.* 709, 715 (2009).

146. KATZMANN, *supra* note 125, at 24-26.

147. MALTESE, *supra* note 69, at 90 (Table 5). As discussed previously, in some of these instances, no hearing was held. See *supra* text accompanying note 133. But even if these nominations are not considered, organized interests testified in less than half of the hearings held. One interest group testified during Stanley Reed's confirmation hearing, three during Felix Frankfurter's, ten during Tom Clark's, one during Sherman Minton's, two during Earl Warren's, seven during John Marshall Harlan's, two during Byron White's, and one during both Abe Fortas's and Thurgood Marshall's. MALTESE, *supra* note 69, at 90 (Table 5).

148. MALTESE, *supra* note 69, at 90 (table 5). The one exception was Judge Harry Blackmun in 1970. See *id.* Judge Blackmun was President Nixon's third attempt to fill a vacant Supreme Court seat, with interest groups contributing to the defeat of the first two candidates. See *infra* notes 150-152 and accompanying text. After two successful battles, interest groups apparently did not want to expend any more capital on opposing a candidate that, from their perspective, was relatively palatable.

Justice, although the President's lame-duck status also played a role.<sup>149</sup> In addition, civil rights and labor groups, as they had done forty years earlier against Judge Parker, rallied against President Nixon's nominees Judge Clement F. Haynsworth and Judge G. Harold Carswell,<sup>150</sup> even though other factors also contributed to their defeats, including party politics and judicial character.<sup>151</sup> While the Fortas, Haynsworth, and Carswell nominations were initially reported favorably out of the Judiciary Committee, their confirmation hopes were dashed as internal and external scrutiny intensified and public pressure mounted against their nominations.<sup>152</sup>

The scrutiny of Supreme Court nominees has since only escalated as the Court's involvement in contentious social issues burgeoned and the

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149. JOHN MASSARO, SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 1-2, 16-20, 24-27 (1990). President Johnson nominated sitting Associate Justice Abe Fortas to replace Earl Warren as Chief Justice and federal appellate judge Homer Thornberry to fill Fortas' position. ABRAHAM, *supra* note 1, at 31. Although the Judiciary Committee, by an eleven to six vote, reported the Fortas nomination favorably, several committee members strongly dissented to the recommendation, predominantly complaining about his adherence—and contributions—to the judicial philosophy of the Warren Court. *See Exec. Rep. 90-8, Nomination of Abe Fortas to Be Chief Justice of the United States Supreme Court*, 90 Cong. 15-44 (1968). He had been a reliably liberal vote in civil rights cases, frequently joining with Chief Justice Warren and Justices Douglas, Brennan, and Marshall to reach an instrumentalist result. The Senate filibustered the Fortas nomination once it reached the floor for a number of reasons, including his judicial philosophy, ethical concerns regarding his acceptance of a huge lecture fee, his continued close relationship with President Johnson, and political opposition to President Johnson during the last year of his presidency. ABRAHAM, *supra* note 1, at 227-28. Because the nomination of Fortas for Chief Justice failed, the nomination of Judge Thornberry for Associate Justice was withdrawn because no vacant Associate Justice positions existed. *See id.* at 228.

150. MALTESE, *supra* note 69, at 72; MASSARO, *supra* note 149, at 3-4, 21-23. In circumstances eerily reminiscent of the Judge Parker confirmation fight, the AFL-CIO complained that several of Judge Haynsworth's labor opinions for the Fourth Circuit indicated an anti-labor bias, particularly seven decisions reversed by the Supreme Court. MALTESE, *supra* note 69, at 72. Moreover, the NAACP and other African American leaders complained that his rulings were racially insensitive, pointing to three cases where he dissented from judgments favorable to civil rights claims and another three cases where the result he joined impeded educational desegregation efforts (and were later reversed by the Supreme Court). *Id.* And, like what occurred to Judge Parker, labor and civil rights groups flooded the Senate with mail and telegrams opposing him. Ross, *supra* note 76, at 16-18.

The complaint against Judge Carswell was more obvious—while running for the Georgia legislature, he urged in a speech before the American Legion on August 2, 1948 that “segregation of the races is proper and the only practical and correct way of life” and that he would always be governed by a “firm, vigorous belief in the principles of white supremacy.” MALTESE, *supra* note 69, at 135.

151. ABRAHAM, *supra* note 1, at 33. President Nixon mismanaged both nominations by adopting a confrontational rather than collaborative posture with the Senate, which was controlled by the opposition party. MASSARO, *supra* note 149, at 96-104, 124-33. Ethical questions also dogged Judge Haynsworth regarding his failure to recuse from cases involving corporations in which he had made investments, and Judge Carswell's professional qualifications and intellectual abilities were widely perceived as inadequate. KATZMANN, *supra* note 125, at 25; MASSARO, *supra* note 149, at 6-7.

152. *See* KATZMANN, *supra* note 125, at 24-25; RUTKUS & BEARDEN, *supra* note 66, at 35-36 (Table 1). The Senate Judiciary Committee did not issue a report on Judge Thornberry because it was awaiting the resolution of the Fortas nomination before doing so. *See id.*

spotlight of television illuminated the Senate's hearings and debates. The Senate Judiciary Committee's first gavel-to-gavel television broadcast of its hearings occurred in 1981, for the nomination of the Supreme Court's first female Justice, Sandra Day O'Connor.<sup>153</sup> Television coverage then expanded in 1986 with broadcast coverage of the Committee hearings, the subsequent Senate floor debate, and the confirmation vote for Associate Justice William H. Rehnquist to become Chief Justice and Judge Antonin Scalia to become an Associate Justice.<sup>154</sup>

Due to its familiarity today, the influence of television on the process is easily discounted, but it should not be. The first impact is that broadcasted hearings tend to be much longer. A study by Professors Ringhand and Collins reveals that, since 1986, hearings, on average, have involved approximately four times the amount of commentary by nominees and Senators than pre-1986 hearings.<sup>155</sup> Many Senators apparently view televised hearings as an opportunity to communicate their political and legal visions to their constituents and the nation at large (thereby bolstering their reelection hopes), which has substantially lengthened the duration of the hearings.<sup>156</sup> A closely related consequence of televised proceedings is the marked increase in the elapsed time between the President's announcement of the nomination and the commencement of public confirmation hearings on the nominee. Before televised hearings, the Senate Judiciary Committee began ninety percent (twenty-seven out of thirty) of its public hearings within thirty days of the presidential nomination.<sup>157</sup> But since the proceedings have been televised, that percentage has almost completely flipped—televised hearings almost never begin less than thirty days after the nomination.<sup>158</sup> Before being ready for their close-up

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153. GERHARDT, *supra* note 1, at 238; KATZMANN, *supra* note 125, at 9. Although the Committee typically prohibited any televised coverage of Supreme Court confirmation hearings before 1981, there were at least a few instances when portions of hearings were broadcast. See RUTKUS, *supra* note 70, at 21 n.79 (discussing television and newsreel coverage of portions of the William J. Brennan and Felix Frankfurter confirmation hearings).

154. RUTKUS, *supra* note 70, at 35 n.139. Today, of course, the proceedings are typically broadcast on several cable and broadcast channels and on Internet web sites.

155. Lori A. Ringhand & Paul M. Collins, Jr., *May It Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939-2009*, 60 AM. U. L. REV. 589-99 (2011).

156. *Cf., e.g., Kagan Hearing*, *supra* note 21, 2010 WL 2600871, at \*114 (statement of Senator Leahy) (alluding to the propensity of some Senators to give "10, 15-minute speeches" on strongly held personal beliefs rather than ask questions of the nominee).

157. See RUTKUS & BEARDEN, *supra* note 66, at 31-37 (Table 1). Two of the exceptions were for Justices William J. Brennan and Potter Stewart, both of whom received recess appointments and were thus already serving on the Court, reducing the necessity for prompt action. See *id.* at 34-35. The other exception was for John Marshall Harlan, whose nomination commenced the modern standard practice of nominee testimony. See *id.*; see *supra* text accompanying notes 141-142.

158. See RUTKUS & BEARDEN, *supra* note 66, at 37-40 (Table 1). The exceptions are as follows: the hearing for Justice O'Connor began twenty-one days after it was received in the

on a national stage, Senators apparently prefer to have a longer time to prepare.

This additional delay has, in turn, created a larger window for interest group mobilization and participation before the Judiciary Committee. Televising the proceedings only raises the stakes for such organizations, because it provides a means of obtaining free exposure to a large audience.<sup>159</sup> The number of witnesses representing organized interests has accordingly increased dramatically since televised hearings began, with ten to fifteen testifying representatives being normal, and many more for controversial nominees.<sup>160</sup> A mutually reinforcing relationship often develops between special interests, the media, and the public at large. When special interest activities are reported by the media, these reports generate public interest in the nomination.<sup>161</sup> As public interest mounts, this feeds more interest group participation, which can lead to additional media accounts.<sup>162</sup> Public interest groups, the media, and the public at large have thus become integral parts of the confirmation process.

The President and the Senate must now take account of the strategic interplay between these various forces, which has completely transformed a confirmation process that once was designed to be a matter of party politics without public involvement. These new dynamics have fundamentally altered the unwritten rules for obtaining confirmation. Although nominees were blocked with some frequency during the eighteenth and nineteenth centuries, these rejections predominantly resulted from partisan national politics or sectional or personal rivalries. Sometimes this partisanship and rivalry enveloped a nominee's stance on a political issue, such as Rutledge's criticism of the Jay Treaty, Wolcott's partisan enforcement of the Embargo Acts, or Hoar's opposition to patronage and the impeachment of Andrew Johnson. But these were not issues that would come before the Court for resolution—they were instead matters of political loyalty and rivalry.

In contrast, though, the nominee's anticipated approach to judging legal issues confronted by the Court was at least a factor in all the failed Supreme Court nominations in the twentieth century. Judge

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Senate, the hearing for Justice Kennedy (the third nominee announced by President Reagan for that vacancy) began fourteen days after Senate receipt, and the hearing for Justice Ruth Bader Ginsburg began twenty-eight days after she was nominated. All other nominees have had to wait from thirty-nine to seventy days from the official announcement of their nominations until the beginning of their hearings. *Id.*

159. *Cf.* Silverstein & Haltom, *supra* note 59, at 464-66 (detailing that modern interest groups since President Reagan frequently devote full-time staffs to monitoring the nomination and confirmation of judicial candidates).

160. *See* MALTESE, *supra* note 69, at 90-91 (Table 5).

161. *Cf.* KATZMANN, *supra* note 125, at 34-35.

162. *See id.* at 35-36.



Parker's decisions on labor issues and his comments on race, Justice Fortas' role in Warren Court decisions objectionable to many conservatives, Judge Haynsworth's appellate decisions on labor and desegregation, and Judge Carswell's prior announced support of segregation and white supremacy all involved current judicial—and not merely political—issues. As public involvement in the confirmation process increased, and the Court's decisions became a more vital aspect of American life, the nominee's judicial philosophy became paramount. It no longer sufficed that the nominee was a well-connected attorney on the right side of party politics. The process was now designed to obtain at least a partial view of his or her vision of the judicial role.

In the midst of this transformation of the confirmation process, nominees with relevant prior judicial experience, particularly on federal appellate courts, became the norm. The trend began in earnest with President Dwight D. Eisenhower, who stated—after his disappointment with the direction charted for the Court by his first Supreme Court appointment, Chief Justice Earl Warren—he preferred a nominee with prior judicial service that would “provide an inkling of his philosophy.”<sup>163</sup> Senators concurred, pressing the White House for nominees with prior judicial experience, arguing that decisions departing from historical understanding (such as *Brown*) would be less likely without as many politicians and academics on the bench.<sup>164</sup> Before Eisenhower assumed office in 1953, only sixteen percent of the Supreme Court Justices in American history had previously served on the federal appellate courts.<sup>165</sup> Since Eisenhower appointed Warren, two-thirds of the Justices have had prior experience on the federal appellate courts, and, of the remaining one-third, almost forty percent had previously served as a state judge or the Solicitor General.<sup>166</sup>

This trend for nominating sitting judges only accelerated after the Burger Court became enmeshed in politically divisive social issues in the 1970s, such as the death penalty, affirmative action, and abortion.<sup>167</sup> Since 1972, all but two of the successful Supreme Court appointees have

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163. DWIGHT D. EISENHOWER, *THE WHITE HOUSE YEARS: MANDATE FOR CHANGE*, 1953-1956, at 230 (1963).

164. *Circuit Effects*, *supra* note 15, at 835-36.

165. *Id.* at 839.

166. Twenty-four Justices have served on the Supreme Court after Chief Justice Earl Warren's appointment, with sixteen of them having prior federal judicial experience—Justices Harlan, Whittaker, Stewart, Marshall, Burger, Blackmun, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Roberts, Alito, and Sotomayor. See ABRAHAM, *supra* note 1, at 44; Kiely, *supra* note 10. Of the remaining jurists, Justices Brennan and O'Connor were state court judges when appointed, Justice Kagan was Solicitor General, Justice Goldberg was Secretary of Labor, Justices White and Rehnquist served in the Attorney General's office, and Justices Fortas and Powell were well known private practitioners (and, in the case of Fortas, a well-known advisor to the president). See *id.*

167. See, e.g., *Bd. of Regents v. Bakke*, 438 U.S. 265 (1978) (affirmative action); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty).

been elevated from a position on the federal appellate bench, with the exceptions being Justice Sandra Day O'Connor, who was serving on a state appellate bench, and Justice Elena Kagan, who was serving as Solicitor General.<sup>168</sup> The current confirmation process thereby apparently favors prior appellate judicial experience, as long as the nominee has not been too forthright with his or her personal opinions prejudging the controversial issues confronted by the Court.

#### *D. The Modern Process*

After decades of evolution during the twentieth century, the Senate confirmation process has now stabilized. Once the President nominates a candidate, the Senate Judiciary Committee begins reviewing the nominee's background, qualifications, prior judicial opinions, and other writings. The nominee is also expected to complete a detailed Committee questionnaire, which includes questions on the nominee's professional history, financial affairs, jurisprudential views, and any potential legal or ethical breaches.<sup>169</sup> Contemporaneously with the Judiciary Committee's review, the nominee visits individual Senators in their offices and prepares for the upcoming Committee hearing, which usually occurs six to nine weeks after the nomination.<sup>170</sup>

The televised confirmation hearing begins with each member of the Judiciary Committee making opening remarks; then the nominee is introduced to the Committee through "presenters" and allowed to make an opening statement.<sup>171</sup> After the opening formalities, each Senator on the Committee has the opportunity to examine the nominee for a pre-established length of time during two or more rounds of questioning, usually over three or more days.<sup>172</sup> The Committee then hears testimony from public witnesses, including the chair of the ABA's Standing Committee on the Federal Judiciary, legal scholars, other lawyers, and representatives of various organizations and interest groups regarding the nominee.<sup>173</sup> Sometime during the hearing, the Committee also holds, as a matter of course, a closed-door session with the nominee to discuss any material confidential information (whether or not such information

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168. See *supra* note 58 and accompanying text.

169. RUTKUS, *supra* note 70, at 22.

170. *Id.* at 22-25. This courtesy call practice apparently became the norm during Justice O'Connor's confirmation in 1981, see *id.*, even though earlier nominees had occasionally informally met with Senators. See, e.g., ALPHEUS THOMAS MASON, *BRANDEIS* 503-04 (5th ed. 1966) (describing a dinner meeting between Brandeis and two Senators who were wavering on his confirmation). Today, the nominees typically meet with the entire membership of the Judiciary Committee and almost every other Senator before the confirmation hearing. See, e.g., *Sotomayor Hearing*, *supra* note 11, at 58 (statement of Judge Sotomayor) (indicating that she had met with eighty-nine Senators and the entire membership of the Judiciary Committee before her hearing).

171. RUTKUS, *supra* note 70, at 29.

172. *Id.*

173. *Id.* at 31.

actually exists).<sup>174</sup> After the hearing, the Judiciary Committee reconvenes and reports the nomination with either a favorable, unfavorable, or no recommendation to the entire Senate.

Assuming the nomination is not stalled either through Judiciary Committee or Senate inaction or through a filibuster on the Senate floor, Senate leaders schedule, either through motion or unanimous consent, a time for debate on the appointment. After debate the Senate then votes in a recorded roll call whether to confirm the nomination.<sup>175</sup>

The process, which typically stretches over two to three months, provides ample opportunity for scrutinizing the nominee's record and obtaining public viewpoints regarding the nominee's suitability for a lifetime appointment to the High Court. The glare from this extended public spotlight has influenced all the institutional actors involved in judicial appointments, including the media, special interest groups, Senators, the President, and nominees.<sup>176</sup>

These new institutional dynamics shaped the failed 1987 Supreme Court nomination of Judge Robert H. Bork.<sup>177</sup> Judge Bork, among his many other qualifications, had served on the United States Court of Appeals for the District of Columbia, as Solicitor General of the United States, and as a law professor at Yale University.<sup>178</sup> However, in his numerous writings and speeches, Bork had castigated many aspects of the Supreme Court's constitutional decisionmaking. His targets included the methodology employed to establish the right to privacy and particularly the right to an abortion; the constitutional foundation for the principle of one-person, one-vote; and the respect owed to precedent not based on original intent.<sup>179</sup> A concerted campaign formed almost immediately to derail his nomination.<sup>180</sup> Civil rights organizations, pro-choice groups, and women's rights organizations banded together to

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174. *Id.* at 31-32. This has been the Judiciary Committee's practice since 1992, after the public hearing regarding sexual harassment claims against Justice Clarence Thomas in 1991. Senator Joseph Biden explained then that the hearings would be conducted in all subsequent cases, "even where there are no major investigative issues to be resolved, so that the holding of such a hearing cannot be taken to demonstrate that the committee has received adverse confidential information about the nominee." 138 CONG. REC. 16320 (1992) (statement of Sen. Biden). Recently, the session has occurred immediately after or in the midst of the nominee's testimony, see Ralph Lindeman, *U.S. Supreme Court Nominee Kagan Pledges to Support 'Modest' Role for Court*, 78 U.S.L.WK. 2778 (2010), although in other instances the session occurred after hearing from all witnesses.

175. RUTKUS, *supra* note 70, at 46. Every confirmation decision since 1967 has been through a recorded roll call rather than a voice vote. See *id.*

176. GERHARDT, *supra* note 1, at 67-69.

177. The Bork confirmation battle has been the subject of much scholarly analysis. See, e.g., Symposium, *The Bork Nomination: Essays and Reports*, 9 CARDOZO L. REV. 1 (1987).

178. ABRAHAM, *supra* note 1, at 266, 281-82; GERHARDT, *supra* note 1, at 183.

179. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-20 (1971); cf. GERHARDT, *supra* note 1, at 183; KATZMANN, *supra* note 125, at 28-29.

180. KATZMANN, *supra* note 125, at 28-29.

voice their vehement disapproval.<sup>181</sup> Bork's opponents not merely bombarded the Senators with objections to his appointment, but also undertook an extensive media campaign, with television, radio, and print advertisements, as well as press briefings to influence media reports.<sup>182</sup> The opposition also participated en masse during his confirmation hearings, which lasted for twelve days stretched over the last half of September, involving more than one hundred testifying witnesses.<sup>183</sup> After conducting these lengthy hearings, the Senate Judiciary Committee reported the nomination unfavorably, and the full Senate concurred, rejecting him in a forty-two to fifty-eight vote.<sup>184</sup> The Senate's rejection of Bork's nomination emphasized the importance in the modern judicial appointments process of the public's perception regarding the nominee's approach to judging.<sup>185</sup>

Although some contend that the public should not undertake such a role in the appointments process,<sup>186</sup> the public's present participation, I believe, serves a necessary purpose. The Supreme Court's legitimacy depends, to an extent, on sociological public acceptance of its role in adjudging whether legislative or executive acts comply with the Constitution under principles of judicial review. The public's current input into the process, as I argue below, aids its acceptance of the modern pervasiveness of the Court in American lives.

### III. THE TWENTY-FIRST CENTURY PUBLIC VISION OF THE LEGITIMATE JUDICIAL ROLE

The just-described history of the institutional dynamics of the appointments process reveals the ever-increasing involvement of the public and its impact on confirmation outcomes. I turn now to offering a theoretical justification for this state of affairs. I begin with a discussion of the interconnection between the judiciary and the people, illustrating the need for the judicial craft to be accepted at some level by the public for the Supreme Court to exercise authority. I then examine popular conceptions of the judicial role and hypothesize that public trust is currently enhanced by Supreme Court appointees who boast prior

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181. MALTESE, *supra* note 69, at 89, 91-92.

182. KATZMANN, *supra* note 125, at 35-36; MALTESE, *supra* note 69, at 89, 91-92; Ross, *supra* note 76, at 23-24.

183. See *Exec. Report 100-7, Nomination of Robert H. Bork to be Associate Justice of the United States Supreme Court*, 100 Cong. 2 (1989).

184. RUTKUS & BEARDEN, *supra* note 66, at 38.

185. See MASSARO, *supra* note 149, at 159, 163-68 (detailing Senators' objections to Bork's judicial philosophy); Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19 (noting that Bork's nomination was defeated "largely because of his positions on abortion, civil rights and civil liberties"). Judge Bork's position on these issues undertook additional importance as he was being nominated to replace Justice Lewis Powell, who frequently served as the Court's centrist swing vote. KATZMANN, *supra* note 125, at 28.

186. See DAVID M. O'BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 8-11 (1988).

judicial or analogous experience indicating an open mind. I finally test this theory with recent examples of confirmed Justices, demonstrating the successful nominees had at least some prior track record of open-minded decisionmaking.

#### A. *The Need for Public Acceptance*

The theoretical position of judicial review within the framework of our constitutional democratic republic is difficult to justify.<sup>187</sup> The text of the Constitution does not explicitly grant the federal judiciary the power to decide the constitutionality of the acts of coequal branches of the government.<sup>188</sup> Without a textual basis, this power appears in tension with the central idea of a democracy, “that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy.”<sup>189</sup> Under judicial review, five (of the current nine) unelected Justices appointed for life by the President with the advice and consent of the Senate may negate the determination of the democratic, politically accountable branches regarding the constitutionality of either a legislative or executive act. This has been frequently argued to be “a counter-majoritarian force in our system” and “a deviant institution in the American democracy.”<sup>190</sup>

These complaints are not new. The Court’s first use of judicial review to invalidate federal legislation in *Marbury v. Madison*<sup>191</sup> was criticized by many contemporaries.<sup>192</sup> For decades afterwards even respected jurists dissented from the premise that judges could exercise such power.<sup>193</sup> Presidents and legislators have also voiced strenuous objections, going so far as to ignore or refuse to follow judicial decisions.<sup>194</sup>

Yet the institutional role of the Supreme Court in exercising judicial review survives to this day. Although the extent of its intrusion into the affairs of other governmental departments has varied over time, the legal legitimacy of its articulated role has always depended to some extent, and continues to depend, upon sociological public acceptance of the practice.<sup>195</sup> As Alexander Hamilton explained in *The Federalist*, the

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187. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (describing the “academic obsession” with establishing an accepted theoretical justification for judicial review).

188. See U.S. CONST. art. III.

189. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 27 (2d ed. 1986).

190. See, e.g., *id.* at 16, 18.

191. 5 U.S. (1 Cranch) 137 (1803).

192. See, e.g., Thomas Jefferson, *Letter to Mrs. John Adams, Sept. 11, 1804*, in 11 THE WRITINGS OF THOMAS JEFFERSON 49-53 (1903).

193. See, e.g., *Eakin v. Raub*, 12 Serg. & Rawle 330, 344-382 (Pa. 1825) (Gibson, J., dissenting).

194. See, e.g., Abraham Lincoln, *First Inaugural Address*, in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 5, 9-10 (1897).

195. See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 209-10 (1960); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV.

Court has “neither FORCE nor WILL but merely judgment.”<sup>196</sup> Without the power to command the military or to direct the public treasury, the Supreme Court relies on the acceptance of the other branches and the acquiescence of the public itself to support its decisions invalidating executive and legislative acts. The public must believe, or at least acquiesce in the belief, that the Supreme Court’s position in American government is appropriate for our society.<sup>197</sup>

Some have argued that, due to the relative lack of public understanding of the Supreme Court’s role and its decisions, this may mean “scarcely more than that the public . . . ha[d] not mounted a revolt.”<sup>198</sup> I believe, however, that public evidence of acceptance can be described in more tangible terms.

The people have had ample opportunities to prohibit or constrain judicial review during the more than 200 years of its practice in America. But we have not done so. The clearest evidence is contained in state constitutions, which are closer to the majoritarian influences of the populace, as state charters typically have been adopted, and must be amended, through the majority vote of the polity.<sup>199</sup> Yet judicial review has never been banned in any one of the approximately 150 state constitutions ratified during our nation’s history, even when a subsequent state constitution was adopted after the populace was cognizant of the practice.<sup>200</sup>

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L. REV. 1787, 1792 (2005).

196. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

197. Cf. SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 77 (expanded ed. 1981) (“Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.”); KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 7 (2006) (maintaining that the people have the “responsibility to judge the Court, and it is our judgment that must be decisive in the end”).

198. Fallon, *supra* note 195, at 1825.

199. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 25-27 (1998) (detailing that the people of every state except Delaware ratify all state constitutional changes).

200. Cf. *id.* (enumerating the various ways in which citizens may amend the constitution of their state). For example, under the 1836 Republic of Texas Constitution, the Supreme Court of the Republic of Texas struck down several legislative acts as unconstitutional. See, e.g., David P. Currie, *The Constitution of the Republic of Texas Part 2 of 2: The Decisions*, 8 GREEN BAG 2D 239, 239-40, 239-40 nn.1-8 (2005) (citing cases). One opinion even offered a ringing endorsement of judicial review in a system of separation of powers:

[T]he judiciary is not only a co-ordinate branch of the government, but a check interposed to keep the other branches . . . within the letter and spirit, the requisitions, the limitations and landmarks of the immutable constitutive law; that the exertion of this great and paramount duty is essential to the existence and transmission of freedom; and that this court is the last resort in which the rights of the people are protected, the constitution vindicated and the government preserved.

Stockton v. Montgomery, Dallam 473, 480-81 (Tex. 1842). If the citizens of Texas disagreed with this assessment, they would presumably have prohibited or limited the power of judicial review in one of the five statehood constitutions ratified after this decision. But Texans—or, for

It is not as if the state polity views itself as incompetent to fashion such a change. Constitutional provisions in a handful of states preclude judicial review of certain questions, such as recall,<sup>201</sup> or provide definitive structural limitations on the use of judicial review, such as super-majority requirements.<sup>202</sup> But no state—despite the frequent amendments to state constitutions that can even be accomplished by citizen initiatives in some states<sup>203</sup>—bars the judiciary from having the final word on the constitutionality of a statute.

Although citizens do not have the same direct avenues of constitutional reform available at the federal level, other methods exist to limit the influence of the judiciary. A strong enough concerted effort by citizens could effect constitutional change through the amendment process.<sup>204</sup> Even without a constitutional amendment, constituents could pressure Congress to strip the Supreme Court of aspects of its jurisdiction,<sup>205</sup> or to alter the Court's size to achieve certain objectives.<sup>206</sup> While such statutory measures are proposed frequently, their lack of success over the last century evinces more than just a failure to revolt—it indicates a general acceptance of the Supreme Court's position in the American political framework. Opinion polls are in accord—the Supreme Court, and its institutional role in interpreting the Constitution, has the current support of the vast majority of Americans.<sup>207</sup>

But past and current acceptance does not necessarily translate into continued future support. The legitimacy of the Judicial Branch depends ultimately on public perception that it can be trusted to engage in impartial decisionmaking in a nonpartisan fashion, as even the Supreme Court itself has recognized.<sup>208</sup> “We the People” therefore must

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that matter, citizens in any other state—have not done so.

201. See, e.g., MICH. CONST. art. II, § 8 (stating recall of public officials “shall be a political rather than a judicial question”).

202. See, e.g., NEB. CONST. art. V, § 2 (mandating that legislation shall not “be held unconstitutional except by the concurrence of five [of seven] judges”); N.D. CONST. art. VI, § 4 (precluding the supreme court from declaring “a legislative enactment unconstitutional unless . . . four of the [five] members of the court so decide”).

203. TARR, *supra* note 199, at 25-27, 34-37. Although limitations exist on citizen initiative constitutional amendments, *see id.*, the availability of the process is nonetheless important.

204. See, e.g., U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

205. See, e.g., RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 319-57 (5th ed. 2003) (discussing history of jurisdiction-stripping efforts).

206. See, e.g., WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995) (discussing President Roosevelt's failed attempt to pack the Supreme Court with additional Justices).

207. See, e.g., Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 640 (1992) (reporting high levels of public support for retaining the Supreme Court and its role in judicial review); James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 358-62 (2003) (discussing various opinion polls finding widespread support for the Court as interpreter of the Constitution).

208. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“The legitimacy of the

continue to accept the judiciary as the appropriate institution to declare the meaning of the Constitution and laws of the United States. The judiciary's fitness to undertake this role requires a judicial process viewed by the American people as both sufficiently principled in application and appropriately distinct from ordinary politics.<sup>209</sup>

The necessity of a principled and distinct judicial process has become more vital during the last half century as the Court's decisions have increasingly encountered aroused public opinion. If the public views these controversial decisions as ordinary politics masquerading through judicial decrees, the sociological acceptance of the Supreme Court's unique role in the American governmental structure will be lost. The Supreme Court cannot be viewed as a super legislature, or some type of "revolt" may indeed be forthcoming, abolishing or curtailing judicial review and the Court's institutional power. For its constitutional decisions on culturally divisive political issues to be respected, the Court must be perceived as engaging in a principled application of the judicial craft that differs from legislative and executive actions. The public's conception of the Supreme Court's decisionmaking process is therefore paramount.

### *B. The Public View of Judges and Judging*

Yet the difficulty is that the vast majority of the public is relatively ignorant regarding judicial outputs and the methods of constitutional interpretation employed by the courts. The uniform assessment of scholars is that public "salience of the output of courts is low,"<sup>210</sup> with surveys revealing a quite minimal public awareness of Supreme Court decisions.<sup>211</sup> Under these circumstances, how is the *process* of principled constitutional decisionmaking by the Supreme Court to be distinguished in the public mind from any resulting controversial *decisions*?

The public does so today, I believe, through attention to the inputs into the decisionmaking process, that is, the Justices themselves. In other words, "We the People" ensure our check on judicial practices by providing popular input during the appointments process regarding the characteristics and qualities of an appropriate judicial nominee. Although

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Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

209. Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865-66 (1992).

210. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2620 (2003).

211. See, e.g., Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357, 360-64 (1968). While a recent study concluded that the public's knowledge of the Supreme Court is greater than typically supposed, the study did not measure the public's "substantive knowledge about the Court's involvement in [public policy] issues." JAMES L. GIBSON & GREGORY CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 29 (2009).



the public may not entirely comprehend the Supreme Court's output of judicial decisions, the public does often form strong opinions regarding the individuals who should be engaged in those determinations.<sup>212</sup>

The current popular preference envisions Supreme Court adjudication as a higher discipline that entails appropriate judicial and legal experience to perform well.<sup>213</sup> The public's ideal Supreme Court nominee is experienced as a neutral arbiter applying established legal principles fairly and impartially to litigants. Two separate opinion polls conducted after Justice Souter retired but before President Obama announced his nomination of Judge Sotomayor establish the importance of judicial experience. In one poll, forty-five percent of Americans viewed judicial experience as the "single most important factor" in choosing a Supreme Court nominee, far outpacing shared ideology with the President or racial, ethnic, gender, or sexual orientation diversity.<sup>214</sup> Both polls revealed that approximately ninety percent of Americans consider prior service on the bench "important" for a nominee, a level of agreement no other qualification came even close to matching.<sup>215</sup> Yet this prior judicial experience should not, in the public's view, demonstrate an affinity to employ the judicial power to correct social inequities or promote social justice. A Rasmussen poll taken during Sotomayor's confirmation hearings indicated that eighty-three percent of those surveyed believe that the judiciary "should apply the law equally to all Americans rather than using the law to help those who have less power and influence."<sup>216</sup> A nominee preferred by the public, then, does not identify with particular litigants or issues, but instead is experienced in applying legal principles to presented factual circumstances without evident predispositions.

This predominant public ideal should not be a surprise, as it encapsulates the typical public justification of the judicial enterprise. As

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212. Studies and polls during confirmation proceedings this century reveal that, during most nominations, close to nine in ten Americans formulate definitive opinions regarding whether a Supreme Court nominee should be confirmed. *See, e.g.*, James L. Gibson & Gregory A. Caldeira, *Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination*, 53 AM. J. POL. SCIENCE 139, 145 (2009) (finding that approximately nine in ten Americans had an opinion on Alito's confirmation and his political ideology on an eleven-point scale). However, a larger percentage than usual had no opinion on whether Justice Kagan should be confirmed, with twenty-two percent having no opinion. Jeffrey M. Jones, *Americans Favor Confirming Kagan to High Court, 44% to 34%*, GALLUP (July 15, 2010), <http://www.gallup.com/poll/141329/americans-favor-confirming-kagan-high-court.aspx>.

213. *Cf.* GERHARDT, *supra* note 1, at 283.

214. Dana Blanton, *Fox News Poll: Pick Supreme Court Justice Based on Experience*, FOX NEWS (May 14, 2009), <http://www.foxnews.com/story/0,2933,520209,00.html>.

215. *Id.*; CNN Poll: *Race, gender not important in Supreme Court pick*, CNN POLITICAL TICKER (May 18, 2009, 6:16 PM), <http://politicalticker.blogs.cnn.com/2009/05/18/cnn-poll-race-gender-not-important-in-supreme-court-pick/>.

216. *See* Dahlia Lithwick, *The Sotomayor Test: Will She Limit Obama's Next Pick?*, NEWSWEEK, Aug. 3, 2009, at 27.

Alexander Hamilton opined in his defense in *The Federalist* of the entrustment of judicial review to a life-tenured federal judiciary, the Justices of the Supreme Court “should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”<sup>217</sup> The Court’s power is merely its “judgment,”<sup>218</sup> which must be according to law. Chief Justice John Marshall later similarly referred to courts as “the mere instruments of the law.”<sup>219</sup> Modern political campaigns, especially but not exclusively on the Republican side, have emphasized a similar vision of restrained judicial decisionmaking.<sup>220</sup> The same themes have also been reinforced during recent confirmation hearings, from Chief Justice Roberts’ umpire analogy to Justice Sotomayor’s disavowal of the influence of “feelings” on the judicial craft.<sup>221</sup> While many citizens still appreciate the impact of a judge’s own jurisprudential philosophy, these repeated public statements have created a popular conception of the ideal judge as being constrained by legal rules that bar elevating personal values over the American constitutional tradition.

Nominees serving on the federal appellate bench typically epitomize these passive virtues. Once appointed to the bench, a federal appellate judge appears far removed from politics. The judge does not have to seek reelection, preventing any need for associating with political factions, raising money from special interests, or expressing personal preferences on issues of identity politics. The judge gains experience in both appellate judicial decisionmaking and analyzing legal principles in varied factual scenarios,<sup>222</sup> but always with the plausible claim that the result was dictated not by the judge’s own preferences, but by binding Supreme Court or circuit precedent. As long as the judge refrains from needlessly indicating personal predispositions in judicial opinions or public fora, experience as a federal appellate judge matches the public’s current expectations regarding Supreme Court nominees.

This match is more difficult for modern state judges to achieve, despite a similar opportunity to engage in impartial and open-minded decisionmaking. Because approximately eighty percent of the states use

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217. THE FEDERALIST NO. 78, *supra* note 196, at 471.

218. *Id.* at 465.

219. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824).

220. See, e.g., Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 366-69 (2003).

221. See *supra* notes 31-34 and accompanying text.

222. In this respect, a federal circuit court judge possesses better experience for the Supreme Court than a federal district judge. A federal district judge does not have nearly the opportunities to review decisions of other judicial officers, and even less opportunity to work with a collegial body in crafting opinions. There are also many more district court judges than federal court judges, making it more difficult for a district court judge to garner attention for impartial decisionmaking and judicial restraint. Otherwise, however, federal district judges do have the experience that the public perceives as beneficial for Supreme Court nominees.

popular elections to select at least some of their judges,<sup>223</sup> state judges frequently must associate with political parties, raise campaign funds, and even express opinions on controversial topics. While candidates for judicial office used to be prohibited from announcing views on disputed legal or political issues by the judicial conduct codes of most states, the Supreme Court in *Republican Party of Minnesota v. White*<sup>224</sup> invalidated these prohibitions on free speech grounds.<sup>225</sup> As a result, interest groups and voters now expect state judicial candidates to express their views on topics such as gay and lesbian rights, abortion rights, school prayer, and religious displays.<sup>226</sup> The failure to do so in a contested election may be determinative to the outcome.<sup>227</sup> Yet expressing views on these issues, especially if those views are designed to appeal to a particular constituent base, raises doubts regarding the role of such personal values in constitutional adjudication, particularly if the state judicial candidate is nominated for the Supreme Court. All the responding Republican candidates for open Texas Supreme Court seats in the 2010 primary, for example, in answering the questionnaire of the Liberty Institute,<sup>228</sup> expressed their disagreement with the United States Supreme Court's decisions in *Lawrence v. Texas*,<sup>229</sup> *Santa Fe Independent School District v. Doe*,<sup>230</sup> and *Roe v. Wade*.<sup>231</sup> While publicly announcing disagreement with these decisions may be necessary for election in a contested Republican primary in Texas, these critiques will spur vehement public opposition against the nomination of any of these candidates for the United States Supreme Court.

State judges avoiding these political pitfalls still have two other potential stumbling blocks on the path to a Supreme Court appointment. The first concerns the jurisdiction of their courts. Because the subject matter jurisdiction of the state courts is much broader than that of the federal courts,<sup>232</sup> state judges only address the legal

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223. See Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 618, 618 n.294 (2007).

224. 536 U.S. 765, 788 (2002).

225. *Id.*

226. See, e.g., LIBERTY INSTITUTE, FREE VOTERS GUIDE: 2010 GENERAL ELECTION 7 (2010) (on file with author) (publicizing judicial candidate responses to queries on the right of judges to display the Ten Commandments in the courtroom, the right to homosexual sexual relationships, abortion, and prayer at school football games).

227. See *id.* at 11 (noting "some candidates refused to answer our questionnaire despite our numerous communications with them. We listed their phone numbers and encourage you to call and ask them where they stand on these important issues.").

228. See *id.* at 7.

229. 539 U.S. 558 (2003) (invalidating Texas criminal prohibition against same-sex sexual conduct).

230. 530 U.S. 2900 (2000) (disallowing prayer over the loudspeakers before Texas public high school football game).

231. 410 U.S. 113 (1973) (invalidating Texas law banning abortions).

232. The subject matter jurisdiction of the state courts includes interpreting the state's constitution and laws and developing the common law of contracts, torts, property, and family relationships, in addition to exercising concurrent power with the federal courts on certain

principles routinely considered by the federal courts in a small fraction of their cases, which means that state judges usually will have less familiarity and experience with these issues. Further, in the typical case not presenting a dispositive federal issue, state courts are immune from United States Supreme Court review, requiring state jurists to stake out their own positions on state constitutional, state statutory, and state common law matters. While this arguably provides a better window into the jurist's approach to the judicial craft, the additional information may indicate predispositions raising public concern.

State judges also have another disadvantage compared to federal appellate judges—national visibility. There are approximately 1300 state court appellate judges in the United States,<sup>233</sup> compared to only 179 federal appellate court judges.<sup>234</sup> In addition to their ranks being more than ten times smaller, federal appellate court judges have already navigated the federal appointment process at least once, obtaining familiarity with both the procedures and the relevant institutional actors. As a result, there may be an advantage for a state court judge to have at least some federal appellate court experience before being nominated for the Supreme Court.<sup>235</sup> Without that experience, a state jurist—at least one who has exhibited fidelity to the public's preferred vision of judicial restraint—is hard-pressed to attract the national stature for a Supreme Court nomination, unless the President is seeking a nominee with a precise combination of personal characteristics, experiences, and jurisprudential views that greatly reduces the potential pool of candidates.<sup>236</sup>

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issues of federal law.

233. THE COUNCIL OF STATE GOVERNMENTS, 42 BOOK OF THE STATES 298-301 (2010).

234. *The U.S. Courts of Appeals and the Federal Judiciary*, FEDERAL JUDICIAL CENTER, [http://www.fjc.gov/history/home.nsf/page/courts\\_of\\_appeals.html](http://www.fjc.gov/history/home.nsf/page/courts_of_appeals.html) (last visited July 2, 2011).

235. See, e.g., ABRAHAM, *supra* note 1, at 290-91 (discussing Justice Souter's extremely short tenure on the federal circuit court before being nominated for the United States Supreme Court).

236. This occurred with both of the Supreme Court Justices appointed since 1955 directly from a state court. President Ronald Reagan promised during his presidential campaign he would appoint the "most qualified woman that [he] could possibly find" to fill one of the first Supreme Court vacancies in his administration. See Ronald Reagan, Remarks Announcing the Intention to Nominate Sandra Day O'Connor To Be an Associate Justice of the Supreme Court of the United States (July 7, 1981), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RONALD REAGAN, 1981 596 (1982). President Reagan also desired a candidate with demonstrably conservative judicial views, and the pool of conservative Republican women lawyers at the time—and especially judges—was pretty thin. Only forty-six women had been appointed as federal judges from 1789 until 1981, with forty of those receiving appointments from Democrat Jimmy Carter during the previous presidential term. ABRAHAM, *supra* note 1, at 264. As a result, it is not surprising that President Reagan turned to the state courts to find his preferred candidate. The same is also true, although probably to a lesser extent, with respect to President Eisenhower's appointment of William Brennan in 1956, when the Republican President certainly appreciated the opportunity to appoint an experienced state court Democratic jurist of the Roman Catholic faith to shore up several vital constituencies before the election, such as Catholics and "Eisenhower Democrats." KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA

In contrast, the Solicitor General—the chief advocate for the United States before the Supreme Court—has the stature for an appointment, even though the decisionmaking expected of judges and the Solicitor General differs.<sup>237</sup> By tradition and practice, the Solicitor General does undertake certain quasi-judicial determinations, which explains the common reference to the position as the “Tenth Justice.”<sup>238</sup> These include an objective—rather than a partisan—appraisal of the constitutional and legal merits of every case the government appeals to determine whether the case is worthy of Supreme Court review.<sup>239</sup> In addition, the Court specifically seeks the Solicitor General’s assistance by requesting the office’s views on approximately twenty cases each term.<sup>240</sup> In some respects, then, the Solicitor General is “a silent partner in the Supreme Court’s jurisprudence,” generally (but not always) tending to “mirror the Supreme Court’s institutional views about the role of law in our society and the special responsibility and expertise of the judiciary ‘to say what the law is.’”<sup>241</sup> On the other hand, the Solicitor General still must answer to the Attorney General, and ultimately the President, unlike a federal judge.<sup>242</sup> Moreover, the Solicitor General remains the lead appellate advocate for the government, even if his or her advocacy must be tempered to some degree by the Supreme Court’s expectations. Balancing these competing obligations is no easy task, but a Solicitor General who does fulfill the office’s quasi-judicial functions in an apolitical and nonpartisan manner has experience in the type of impartial decisionmaking that can satisfy public expectations for a Supreme Court nominee.<sup>243</sup>

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89-90 (1993).

237. By statute, the Solicitor General must be “learned in the law” and assist the Attorney General. Act of June 22, 1870, Ch. 150, § 2, 16 Stat. 162, codified at 28 U.S.C. § 505 (2006). Over the 140 years since the creation of the position, the Solicitor General has been vested by both federal regulations and by practice with essentially exclusive authority to represent the United States before the Supreme Court. *See, e.g.,* Rex. E. Lee, *Lawyeering in the Supreme Court: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1059, 1067 (1988).

238. *Cf.* Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 572 (1988). This moniker, however, is not truly appropriate as the Supreme Court communicates with the Solicitor General through public external channels rather than through the internal deliberative process.

239. *See, e.g.,* Paul D. Clement, *The Intra-Executive Separation of Powers*, 59 EMORY L.J. 311, 314-23 (2009); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1495 (2008).

240. *See* Clement, *supra* note 239, at 328.

241. Burt Neuborne, *In Lukewarm Defense of Charles Fried*, 21 LOY. L.A. L. REV. 1069, 1069 (1988).

242. 28 U.S.C. § 505.

243. Of the forty-five individuals confirmed by the Senate as Solicitor General, five have later served on the Supreme Court: William Howard Taft, Stanley Reed, Robert H. Jackson, Thurgood Marshall, and Elena Kagan, with Reed, Marshall, and Kagan being nominated for the Supreme Court during their tenure in the office. Office of the Solicitor General, *About the Office*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/osg/aboutosg/osghistlist.php> (last visited July 2, 2011). The Senate Judiciary Committee highlighted the importance of this position in 1967 when reporting on the Supreme Court nomination of then-

Such expectations are almost impossible to satisfy, however, for modern nominees with extensive legislative or executive political backgrounds. Political officials typically must associate with partisan factions, seek money and support from special interests, and express personal preferences on political issues. Political officials do not act as neutral decisionmakers, but usually advocate for or work towards a particular policy goal. Because a politician's appeals to and political representation of constituents does not necessarily indicate an approach to resolving judicial controversies, the public has very little information to ensure that, once elevated to the bench, the politician does not attempt to enshrine political policy preferences as the fundamental law of the land.

The racist statements Judges Parker and Carswell made during their respective political campaigns for elected offices in the South during the Jim Crow era provide a telling example.<sup>244</sup> Although such sentiments were an unfortunate reality in southern politics at that time, and, at least in the case of Judge Parker, may not have evinced his true approach to adjudicating racial issues,<sup>245</sup> the public could not be sure. Were Judge Parker's racist statements solely political spin to obtain the governorship? Or were the statements his true guiding principles that he would seek to elevate to constitutional status if he served on the High Court? The doubt certainly justified the NAACP's strident objections to his confirmation. Most elected and even appointed officeholders take stands on other divisive issues that may engender similar doubts in the minds of at least some of the public regarding their ability to maintain an impartial, nonpartisan approach to judging.

Presidents are certainly aware of the public's preference for nominees with judicial experience evincing nonpartisanship and impartiality, as the use of polling data in the appointments process is now a common practice.<sup>246</sup> Even Presidents, such as Bill Clinton,

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Solicitor General Thurgood Marshall:

rarely in our history have we had a man who established a national reputation as a leading trial and appellate litigator, who then sat successfully on the Federal appellate bench and then served as the Government's chief appellate litigator in the office of the Solicitor General. There can be no better preparation and qualification for the Supreme Court.

Sen. Rep. No. 90-13, 90th Cong., 1st Sess., *Nomination of Thurgood Marshall* 1 (1967).

244. See *supra* Part II.C.

245. See MALTESE, *supra* note 69, at 59-69. After his defeated nomination, Judge Parker continued to serve on the court of appeals, where his judicial record on racial relations was, at least according to one of his opponents in the confirmation fight, "above reproach." DONALD J. LISIO, *HOOPER, BLACKS, AND LILY-WHITES: A STUDY OF SOUTHERN STRATEGIES* 229 (1985). Yet, on the other hand, Professor Lively has identified several objectionable decisions Judge Parker authored after his confirmation battle resisting desegregation of public schools. Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 570-72 (1986).

246. GERHARDT, *supra* note 1, at 214.

desiring to break the mold have reached the reluctant conclusion that the safest approach to ensure confirmation is nominating a federal appellate judge, or someone with analogous experience, with a fair-minded reputation.<sup>247</sup> Such nominees experienced in impartial decisionmaking most closely correspond with the public's current conception of an ideal Supreme Court Justice, assisting the present sociological acceptance of the Court as an institution.

This is not to say that the sociological acceptance of the Supreme Court has always depended—or will always depend—on the public's conception of the appropriate nominee. Prevailing American constitutional jurisprudential theory has not been consistent over time.<sup>248</sup> Early Americans, for instance, often articulated a “departmental” constitutional theory, allowing each governmental organ to express its own constitutional views in the ordinary course of its affairs, with final constitutional authority vested in the citizenry,<sup>249</sup> who typically mobilized through political parties.<sup>250</sup> The judicial function in some respects during this period was only marginally separated in both theory and practice from ordinary politics—partially explaining the rash of nineteenth century Supreme Court nominees rejected on purely partisan political grounds.<sup>251</sup> The Supreme Court's docket has likewise changed. For the first 150 years of its existence, the Supreme Court issued only a handful of decisions protecting individual civil rights and liberties outside the economic sphere.<sup>252</sup> But then the Warren Court in the 1950s shifted the Court's emphasis from commercial and

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247. Yalof, *supra* note 57, at 696-700.

248. See CHARLES D. KELSO & R. RANDALL KELSO, *THE PATH OF CONSTITUTIONAL LAW* (2007); see also Charles W. “Rocky” Rhodes, *The Impact of American Lockean Constitutional Theory on Economic Markets*, in *SELECTED ESSAYS ON CURRENT LEGAL ISSUES* 49, 50-51 (2008).

249. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 105-09 (2004).

250. RICHARD FRANKLIN BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* ix-x (2004) (detailing voting practices in the nineteenth century, which depended on party affiliation as parties distributed “tickets” for voters to deposit in ballot boxes).

251. See *supra* Parts II.A-B. Of course, this view of judging had its downside. The public legitimacy and acceptance of the Court suffered at times, such as during the judiciary's partisan enforcement of the Alien and Sedition Acts, see ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 95-96 (2d. ed. 1994), after the horrid decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), which sullied the Court's reputation for decades thereafter, see CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS, AN INTERPRETATION* 50-51 (1936), and during the Civil War and the aftermath of Reconstruction. See Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 *CARDOZO L. REV.* 1, 8-20 (1983) (explaining how the Court's participation in decisions regarding the Civil War, Reconstruction, and the legality of paper currency, along with Justices serving to resolve the disputed Hayes-Tilden presidential election of 1876, caused the Court to be predominantly viewed in partisan political terms).

252. See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936); *Powell v. Alabama*, 287 U.S. 45 (1932); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

property concerns to safeguarding individual rights and employing legal principles to accomplish social objectives.<sup>253</sup>

As the objections of some politicians and segments of the public to the sociological impact of the Warren Court intensified, prior judicial decisionmaking experience became a preferred qualification for Supreme Court nominees.<sup>254</sup> And in the years since the Court first became involved in many of the hot-button political identity issues that dominate today's headlines, such as abortion, affirmative action, and gay and lesbian rights, almost every successful nominee has had judicial experience.<sup>255</sup> While the judicial experience norm may be a relatively recent phenomenon in American constitutional history, the timing of its adoption corresponds with the Supreme Court's increasing forays into issues of identity politics.

The public's vision counsels moderation regarding these issues, rather than the elevation of visionaries to the High Court. Because almost all the Supreme Court Justices viewed as great did not have prior federal appellate judicial experience, and many did not have any previous relevant decisionmaking experience as a judge or in the office of Solicitor General, the modern norm for Supreme Court nominees appears somewhat counterintuitive at first blush.<sup>256</sup> On the other hand, the elusive nature of Supreme Court greatness depends in large measure on the vantage point and perception of the beholder. Many of the great Justices were not always popular with the public in their own day (including Chief Justices Marshall and Warren), or were marginalized to a predominantly dissenting role (as was the case for the first Justice Harlan and Justice Brandeis).<sup>257</sup> Much of juridical greatness is a matter of vision, being "on the right side as judged by subsequent history."<sup>258</sup> The reverence of Court watchers for previously inexperienced but visionary jurists has not influenced the general public's current perception of the appropriate qualifications of Justices. And the current public perception of judiciousness provides the needed sociological acceptance of the Court, not the judgment of history.

The judiciousness envisioned for the ideal Supreme Court nominee requires more than mere past experience as a judge or in another neutral decisionmaking role. The confirmation percentage of nominees with prior judicial experience historically approximates the confirmation percentage for nominees without such experience; in fact,

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253. KELSO & KELSO, *supra* note 248, § 14.2.4; BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 277-85 (1993).

254. *See supra* Part II.C.

255. *See id.*

256. ABRAHAM, *supra* note 1, at 42-44.

257. *See* SCHWARTZ, *supra* note 253, at 86, 187 & 251.

258. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1087-88 (2001).



all the twentieth century nominees who were not confirmed had previously served on the federal appellate bench.<sup>259</sup> But the twentieth century's rejected nominees all expressed views or performed actions that cast public doubt on their ability to remain impartial and within the expected judicial role. Judge Parker's judicial decisions and his gubernatorial campaign speech caused labor groups and African Americans to doubt that he could be fair and impartial to their interests.<sup>260</sup> Justice Fortas' liberal voting record made conservatives doubt his impartiality, and his continued extrajudicial role in actively advising President Johnson while serving on the Supreme Court caused many to doubt his nonpartisanship.<sup>261</sup> The judicial decisions of Judge Haynsworth and Judge Carswell were perceived by opponents as biased against labor and civil rights groups.<sup>262</sup> Finally, Judge Bork had expressed strong opinions in his academic writings that certainly could cast doubt on his ability to have an open mind.<sup>263</sup> These rejections demonstrate that appropriate prior experience alone is not sufficient—the experience must also indicate the nominee appears to have an open mind without prejudices favoring immoderate viewpoints, as aptly illustrated by recent nominees who successfully navigated the process.

### C. *The Path of Successful Nominees*

The successful nominees since the Bork nomination share several characteristics. First, all were either sitting federal appellate court judges or the Solicitor General of the United States at the time of their nomination, and all had impeccable academic credentials and prestigious prior legal experience. Second, their prior judicial decisions and writings were well within the accepted boundaries of the mainstream, avoiding extreme positions. And finally, during their confirmation hearings, they refused to commit to specifics, instead offering generalities regarding their judicial philosophy and promises to maintain an open mind.

Justice Sotomayor provides a good example. She avoided expressing views on most currently controversial legal issues during her seventeen years as a federal district court and circuit court judge. She never had to rule on a case directly implicating the scope of constitutionally protected abortion rights.<sup>264</sup> In the most high-profile racial

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259. *Circuit Effects*, *supra* note 15, at 833.

260. *See supra* Part III.C.

261. ABRAHAM, *supra* note 1, at 226-27.

262. *See supra* Part III.C.

263. *See supra* Part III.D.

264. She was, however, involved in a few cases that were tangentially related to abortion. *See, e.g.*, *Center for Reproductive Law & Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002) (upholding federal government's policy prohibiting foreign organizations receiving United States funds from performing or supporting abortions against free speech, due process, and equal protection challenges).

discrimination case that came before her, she joined a per curiam order affirming the district court without any independent legal analysis, even though the Supreme Court viewed the case as important enough to grant certiorari and reverse.<sup>265</sup> In her only Second Amendment case, Judge Sotomayor joined another per curiam opinion which followed existing Supreme Court precedent and refused to incorporate the Second Amendment to apply against the states.<sup>266</sup> Thus, her perspectives on Supreme Court precedents in these areas prior to her confirmation were, to a large extent, unknown.<sup>267</sup>

The same could be said about her general legal philosophy. In opinions she authored, she avoided any indications of a grand judicial vision, the role of American history and tradition in legal meaning, or a preference for any particular modality of constitutional interpretation. Instead, her decisions embodied the judicial humility and restraint the public apparently desires in a Supreme Court Justice.<sup>268</sup> Her opinions were thorough and well researched, almost comparable to a student authored law review article—exhaustive research on all legal propositions, frequently with lengthy footnotes, application of these principles to the controversy before her, and a narrow holding.

Her opponents, therefore, had to attack her based on the Justice they feared she would become on the Supreme Court rather than the judge she had been. The predominant complaint focused on her speeches and

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265. Ricci v. DeStafano, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009). The panel members were taken to task by some members of the Second Circuit for failing to properly analyze the case. *See id.* (Cabranes, J., dissenting from denial of rehearing en banc).

266. Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009). Although some Republicans seized on this opinion as a basis for opposition against her, the Second Circuit properly acted with judicial restraint in this case. Although certainly *District of Columbia v. Heller*, 554 U.S. 570 (2008), undercut the basis for the Supreme Court's decisions in *Presser v. Illinois*, 116 U.S. 252 (1886), and *United States v. Cruikshank*, 92 U.S. 542 (1875), that the Fourteenth Amendment did not protect against state restriction of gun rights, the responsibility of a lower federal court is to follow even questionable Supreme Court precedent until it is overruled. Although the Supreme Court determined that *Presser* and *Cruikshank* were not controlling in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), this was a decision appropriate for the Supreme Court—rather than a lower federal court—to make. Interestingly, though, once on the Supreme Court, Justice Sotomayor joined the dissent in *McDonald*, despite her statement during her confirmation hearing that she understood “the individual right fully that the Supreme Court recognized in *Heller*.” *Sotomayor Hearing*, *supra* note 11, at 60.

267. *But see McDonald*, 130 S. Ct. at 3136 (Breyer, J., dissenting, joined by Ginsburg & Sotomayor, JJ.) (arguing that “the Framers did not write the Second Amendment in order to protect a private right of armed self-defense.”).

268. *See, e.g., Hayden v. Pataki*, 449 F.3d 305, 368 (2d Cir. 2006) (Sotomayor, J., dissenting) (“The duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created. . . . I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it.”) Notably, the Republican attacks on her jurisprudence focused on her failure to be more activist in protecting preferred conservative individual rights, i.e., reverse discrimination and gun rights, against governmental intrusions. *See supra* notes 265-266 and accompanying text; *see also Sotomayor Hearing*, *supra* note 11, at 7-8, 74-77, 86-94; Charlie Savage, *Uncertain Evidence for ‘Activist’ Label on Sotomayor*, N.Y. TIMES, June 20, 2009, at A10.

writings in which she had emphasized the role of her Latina experiences in judging.<sup>269</sup> But this tactic was hindered when her opponents could not demonstrate that any of her judicial decisions in seventeen years evinced such biases.<sup>270</sup> She was also faulted for the per curiam opinions on the racial discrimination and Second Amendment cases, but much of that criticism was blunted by those cases being unanimous and at least arguably based on binding precedent.<sup>271</sup> Although she might have been more vulnerable in the absence of her federal court service, her record was too much to overcome, especially in light of her testimony before the Senate Judiciary Committee.

Her testimony on the judicial role fit comfortably within the public's preferred vision. She refused to subscribe to President Obama's favored judicial quality of empathy, explaining that judges apply "law to facts," not "feelings to facts."<sup>272</sup> She repeatedly reinforced a limited role for the judiciary, with the Court merely applying established legal principles from precedent to decide cases, with due deference to the political branches of government.<sup>273</sup> Even her detractors on the Senate Judiciary Committee reluctantly admitted her testimony resembled their own preferences, but they still feared she would lose her restraint on the Supreme Court, leading thirty-one Senators to vote against her.<sup>274</sup> Of course, it is conceivable they are correct.<sup>275</sup> But in the meantime she has secured her place on the Supreme Court.

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269. See, e.g., *Sotomayor Hearing*, *supra* note 11, at 16-18, 21 (statements of Senators Sessions, Grassley, Kyl, and Cornyn).

270. Cf. *id.* at 27 (statement of Senator Graham) (acknowledging that her prior judicial record did not indicate result-oriented rulings based on biases or prejudices).

271. See, e.g., *id.* at 7-8, 74-77, 86-94.

272. *Id.* at 120-21. In her prepared statement, she described her judicial philosophy as:

fidelity to the law. The task of a judge is not to make law. It is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms, interpreting statutes according to their terms and Congress's intent, and hewing faithfully to precedents established by the Supreme Court and my circuit court.

In each case I have heard, I have applied the law to the facts at hand. The process of judging is enhanced with the arguments and concerns of the parties to the litigation are understood and acknowledged. That is why I generally structure my opinions by setting out what the law requires and then explaining why a contrary position, sympathetic or not, is accepted or rejected. That is how I seek to strengthen both the rule of law and faith in the impartiality of our judicial system.

*Id.* at 59.

273. See, e.g., *id.* at 59, 79, 95-96, 120-21, 134-35, 346, 350.

274. See Kane & Goldstein, *supra* note 11.

275. After her first year of service, her critics undoubtedly felt that their opposition was justified when, despite her intimations to the contrary during her confirmation hearing, she joined Justice Breyer's dissenting opinion in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3136 (2010) (Breyer, J., dissenting), which contended that "the Framers did not write the Second Amendment in order to protect a private right of armed self-defense."

Justice Kagan did so as well. Although Justice Kagan never previously served in the judiciary,<sup>276</sup> she likewise avoided expressing personal views on most pressing constitutional issues. Her law review articles generally avoided politically controversial topics, while exhibiting a careful understanding of opposing legal arguments and calculated restraint in articulating conclusions;<sup>277</sup> in a number of respects these academic writings could be described as judicious, if not judicial.<sup>278</sup> Because her academic writings and speeches provided little insight on her views on disputed legal issues, Senators opposing her nomination attempted to construct her positions from documents, papers, and memoranda she had authored while an associate White House counsel and deputy director of the domestic policy council for President Clinton, while a law clerk to Justice Thurgood Marshall, and even while an undergraduate and law student.<sup>279</sup> But Solicitor General Kagan dismissed the relevance of these writings, repeatedly arguing that her own earlier political or personal views—or the views of her employers—were irrelevant to the process of judging, which is “law all the way down.”<sup>280</sup>

She repeatedly returned to the generally accepted themes she described in her opening statement, explaining that the judicial function requires considering the arguments of the parties with an open mind, safeguarding the rule of law, exercising judicial restraint, and rendering impartial justice.<sup>281</sup> She pledged to “consider every case

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276. She was nominated to the District of Columbia Circuit Court of Appeals in 1999 by President Clinton, but the Republican-controlled Senate Judiciary Committee took no action on her nomination. Lindeman, *supra* note 174, at 2779.

277. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 878 (1993); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29 (1992). While her articles addressed some issues of controversy with the academy, the topics were not the culturally divisive political and legal issues, such as abortion, affirmative action, gay and lesbian rights, and gun rights. Further, even when she did address some specific issues that could be of political concern, such as pornography, hate speech, and student speech codes, her writing was more theoretical and analytical rather than offering concrete suggestions for establishing new legal doctrine.

278. Indeed, at least one of her former colleagues at the University of Chicago had no qualms about expressing his conclusion that her scholarship demonstrated she was not a “natural academic.” Parsons, *supra* note 17 (quoting Richard A. Epstein).

279. See, e.g., *Kagan Hearing*, *supra* note 21, 2010 WL 2564591, at \*\*6, 18, 23-24 (June 28); 2010 WL 2600846, at \*\*60-62 (June 29). Many Republican Senators also strongly criticized her decision as Harvard Law School Dean to have military recruiters work through a student veterans’ group rather than the school’s recruiting offices to seek to employ Harvard Law graduates. See, e.g., 2010 WL 2564591, at \*6 (June 28); 2010 WL 2600871, at \*136 (June 30). They also decry her “associat[ion]” throughout her career with “well-known activist judges.” See, e.g., 2010 WL 2564591, at \*7 (June 28); 2010 WL 2600871, at \*\*135-36 (June 30).

280. See, e.g., *id.*, 2010 WL 2600846, at \*\*14, 55, 139, 148 (June 29); 2010 WL 2600871, at \*\*13, 131 (June 30).

281. *Id.*, 2010 WL 2564591, at \*\*65-66 (June 28).

impartially, modestly, with commitment to principle, and in accordance with law.”<sup>282</sup> This pledge, she believed, necessitated deference to the political branches, a limited role for the courts, respect for precedent, and case-by-case decisionmaking, rather than attempting to further some grand judicial vision or theory.<sup>283</sup>

She articulated a pragmatic approach to constitutional interpretation, evaluating constitutional text, original intent, history, precedent, and underlying precedential principles, with the priority of these modalities dependent on the particular provision at issue.<sup>284</sup> The judicial role fundamentally depends on the text and meaning of the Constitution, she continued, “[s]o in that sense, we are all originalists.”<sup>285</sup> She referred to precedent as an “enormously important principle of the legal system,”<sup>286</sup> which lends “predictability and stability in the law” and ensures judicial humility and constraint by ensuring that judges do not import inappropriate considerations into the decisionmaking process.<sup>287</sup> As a result, it had to be “a very extraordinary circumstance or a very unusual circumstance for a court to overturn a precedent.”<sup>288</sup> She opined that her pragmatic philosophy rejected the instrumentalist vision of constitutional evolution through judicial fiat.<sup>289</sup>

Even though she had not been a judge, she understood the Court should not be viewed as a political body, but as a nonpartisan adjudicator with exclusive allegiance to the rule of law.<sup>290</sup> As evidence of her ability to be an open-minded, temperate, and balanced decisionmaker, she pointed to her experiences as Solicitor General and dean.<sup>291</sup> She explained that the Solicitor General is a “legal officer,” who typically does not participate in “policy issues,” based on the “long and historic tradition that the solicitor general’s office has of representing the long-term interests of the United States government.”<sup>292</sup> As a result of this role, she had a new-found appreciation and respect for both the institution and individual Justices on the Supreme Court.<sup>293</sup> Despite the continued objections to her relative lack of “real world” experience and

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282. *Id.* at \*67; 2010 WL 2600846, at \*24 (June 29). Although she originally stated that would be her sole pledge, she also pledged to reread *The Federalist* in response to questioning by Senator Coburn. *Id.*, 2010 WL 2600871, at \*113 (June 30).

283. *See* 2010 WL 2600846, at \*\*112-13 (June 29).

284. *Id.* at \*\*13-14, 78, 146; 2010 WL 2600871, at \*97 (June 30).

285. 2010 WL 2600846, at \* 5 (June 29).

286. *Id.* at \*46.

287. *Id.* at \*\*112, 128; *see also* 2010 WL 2600871, at \*3 (June 30).

288. 2010 WL 2600846, at \*145 (June 29).

289. *Id.* at \*123.

290. 2010 WL 2600871, at \*5-6 (June 30).

291. 2010 WL 2600846, at \*26 (June 29).

292. *Id.* at \*\*9, 147.

293. *Id.*, 2010 WL 2600871, at \*\*15, 107 (June 30).

her prior political positions, she was ultimately confirmed in a sixty-three to thirty-seven vote.<sup>294</sup>

Other Justices who charted a similar course have also been confirmed over the last two decades. Judge Clarence Thomas' sixteen months as a judge on the District of Columbia Circuit Court of Appeals did not provide an indication of his legal philosophy, other than he was tough on crime.<sup>295</sup> His appellate court opinions, like those of Judge Sotomayor, frequently "read as if they had been stripped of controversy."<sup>296</sup> During his 1991 confirmation hearing, he repeatedly asserted that discussing his views on legal issues would improperly "prejudge" them and interfere with the judicial craft.<sup>297</sup> For example, while responding to more than seventy questions about abortion,<sup>298</sup> Justice Thomas consistently maintained he could not discuss *Roe v. Wade* without comprising his impartiality and he could not "remember or recall participating" in discussions about the case.<sup>299</sup> He positioned himself during his testimony as "an open-minded moderate" without extreme positions.<sup>300</sup> He discussed the "limited" role of judges in the American constitutional system and explained that he would refrain from approaching precedents "with any desire to change them."<sup>301</sup> He spoke of constitutional provisions evolving and moving "with our history and our tradition."<sup>302</sup> He pledged that, as a Justice, he would be "fair and impartial" without "preconceived notions" or "an agenda."<sup>303</sup>

Many Senators had their doubts, however, attacking the conservative articles and speeches he made during his tenure as a civil rights official in the Reagan and Bush administrations.<sup>304</sup> But he contended that these positions were a necessary part of his duties as an

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294. Ralph Lindeman, *Kagan Sworn in as Supreme Court Justice Two Days After Senate Confirmation*, 79 U.S.L.WK. 1178 (Aug. 10, 2010).

295. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 162 (1994).

296. *Id.*

297. *Confirmation Hearing on the Nomination of Clarence Thomas To Be Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 172-73 (1991) [hereinafter *Thomas Hearing*].

298. KATZMANN, *supra* note 125, at 31; MALTESE, *supra* note 69, at 110-11.

299. *Thomas Hearing*, *supra* note 297, at 222-23. Within a year after his confirmation, he joined opinions stating that *Roe* "was wrongly decided" and "outrageous." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part); *id.* at 981 (Scalia, J., concurring in part and dissenting in part). He has also described *Roe* as "grievously wrong," *Sternberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting), and joined an opinion stating that the Court's abortion jurisprudence is "in stark contradiction of the constitutional principles we apply in all other contexts." *Hill v. Colorado*, 530 U.S. 703, 742 (2000) (Scalia, J., dissenting).

300. Joyce A. Baugh & Christopher E. Smith, *Doubting Thomas: Confirmation Veracity Meets Performance Reality*, 19 SEATTLE U. L. REV. 455, 458 (1996).

301. *Thomas Hearing*, *supra* note 297, at 135.

302. *Id.* at 274.

303. *Id.* at 110.

304. *See, e.g., id.* at 451-52 (remarks of Senator Kennedy).

appointee in the executive branch, and distinct from his record as a judge.<sup>305</sup> A judge, he emphasized, should be committed to stare decisis, because overruling a case is “a very serious matter,” requiring a judge to meet the “burden” of showing not only that the case is wrong, but that it is necessary to overrule it.<sup>306</sup> He urged that the appropriate predictor of his tenure as a confirmed Justice was his modest and open-minded record on the federal appellate bench.<sup>307</sup> Although many Senators were not convinced, especially with the added controversy of Anita Hill’s sexual harassment charges against him, he was narrowly confirmed by the Senate in a fifty-two to forty-eight vote.<sup>308</sup>

Judge Ruth Bader Ginsburg also pointed to her experience on the District of Columbia Circuit Court of Appeals as evidence of her qualifications during her confirmation hearing in 1993.<sup>309</sup> Her rulings during her thirteen years of service on the federal bench had been “relatively restrained,”<sup>310</sup> following precedent without providing much insight as to her own views on many issues likely to be resolved by the Supreme Court.<sup>311</sup> Her testimony during her confirmation hearing regarding the judicial role struck a familiar chord—“each case is based on particular facts and [the court’s] decision should turn on those facts and the governing law.”<sup>312</sup> She described her approach to judging as “neither liberal nor conservative,” but instead “rooted in the place of the judiciary” in the American scheme to impartially administer the law in

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305. *Id.* at 264-67. With respect to a couple of the more extreme positions he had apparently advocated, Justice Thomas testified that he had not fully read a report he signed that recommended, among many other suggestions, that the President appoint Supreme Court Justices to overrule *Roe*, and that he did not intend to indicate in a speech a position on abortion by praising an article “on the Declaration of Independence and the meaning of the right to life [as] a splendid example of applying” natural law. *Id.* at 127-31, 146.

306. *Id.* at 134-35, 246, 420. This has not been the case in practice, however, as even Justice Scalia has (probably unintentionally) implied that Justice Thomas is a “nut” for his willingness to overrule precedent that does not accord with his view of the original meaning of the Constitution. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 103 (2007). Empirical studies confirm that Justice Thomas has a relatively low commitment to precedent. See, e.g., Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 139-40 (2007).

307. *Thomas Hearing*, *supra* note 297, at 264-67.

308. Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 970 n.6, 985-91 (1992).

309. *Nomination of Ruth Bader Ginsburg To Be Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 103d Cong. 55 (1993) [hereinafter *Ginsburg Hearing*]. In addition to her thirteen years on the federal appellate bench, she also highlighted her past articles on procedure as a law professor and her advocacy for gender equality. See *id.* At least by the time of her nomination, there was nothing controversial about her pioneering role in litigating gender equality claims or her procedural articles that could be used against her.

310. ABRAHAM, *supra* note 1, at 306.

311. See, e.g., *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 752 (D.C. Cir. 1990) (holding judiciary powerless to create a cause of action permitting civil rights groups to sue federal officials for rights enforcement in the absence of congressional authorization).

312. *Ginsburg Hearing*, *supra* note 309, at 55.

“the cases before [the court] without reaching out to cover cases not yet seen.”<sup>313</sup> She refused to subscribe to any role for personal values in judicial decisionmaking, instead articulating that the proper analysis depended on the Constitution’s text, structure, and history, as well as the history and traditions of the American people.<sup>314</sup> With respect to the expected results of her jurisprudential philosophy in specified legal areas, she maintained she could not commit as she would be “open” to considering arguments and ideas.<sup>315</sup> She accordingly reflected in most respects the public vision of a fair, impartial, and experienced jurist, and her confirmation was nearly unanimous.<sup>316</sup>

A similar approach was followed by the next nominee, Judge Stephen G. Breyer, the following year. His fourteen years on the First Circuit Court of Appeals also evinced mostly restrained judicial decisionmaking.<sup>317</sup> His testimony during his confirmation hearing then reinforced the recurring themes from prior hearings. He emphasized the importance of precedent to the stability and legitimacy of the American legal system.<sup>318</sup> He pledged to “consider with an open mind” the cases he would face because “there is nothing more important to a judge than to have an open mind and to listen carefully to the arguments.”<sup>319</sup> A few Senators were nevertheless concerned that he had demonstrated favoritism to business interests in his prior appellate opinions and that he had failed to recuse himself from considering certain cases that might have indirect ramifications for his investments in Lloyd’s of London.<sup>320</sup> Despite these concerns, the Senate Judiciary Committee viewed him as “a principled moderate pragmatist.”<sup>321</sup> He accordingly was overwhelmingly confirmed, with nine dissenting votes.<sup>322</sup>

The next confirmation hearing did not occur for more than a decade, when Judge Roberts was nominated to be Chief Justice of the United States in 2005.<sup>323</sup> Although he had served for only two years as a federal

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313. *Id.* at 6.

314. *Id.* at 127 (“No judge is appointed to apply his or her personal values, but a judge will apply the values that come from the Constitution, its history, its structure, the history of our country, the traditions of our people.”).

315. *See id.*

316. ABRAHAM, *supra* note 1, at 306.

317. *Id.* at 311.

318. *Confirmation Hearing on the Nomination of Stephen G. Breyer To Be Associate Justice of the Supreme Court of the United States, Hearing before the S. Comm. on the Judiciary*, 103d Cong. 82-83 (1994).

319. *Id.* at 113-14.

320. ABRAHAM, *supra* note 1, at 311.

321. *Exec. Rep. 103-31, Nomination of Stephen G. Breyer To Be an Associate Justice of the Supreme Court of the United States*, 103 Cong. 2 (1994).

322. RUTKUS & BEARDEN, *supra* note 66, at 39 (table 1) (eighty-seven to nine vote in favor of confirmation).

323. *See id.* Judge Roberts was originally nominated to replace Justice Sandra Day O’Connor as an Associate Justice, but that nomination was withdrawn and he was renominated for the position of Chief Justice after the death of Chief Justice Rehnquist. *See id.*



appellate judge on the District of Columbia Circuit, he urged that his decisions during that time should be the focus of the confirmation proceedings, and they were “not the opinions of an ideologue.”<sup>324</sup> His testimony, as with prior nominees, focused on the judicial role generally, not his own views on disputed legal issues.<sup>325</sup> He compared the judicial role to umpires, contending “umpires don’t make the rules; they apply them.”<sup>326</sup> He had “no agenda” and “no platform” because “[j]udges are not politicians.”<sup>327</sup> Instead, he wanted to be a “modest judge,” deciding only what was necessary to resolve cases in accordance with the law and “and the precedents of other judges that become part of the rule of law.”<sup>328</sup> He pledged fidelity to precedent,<sup>329</sup> promising to “confront every case with an open mind” and decide it according to the law.<sup>330</sup> He was questioned regarding his ability to be open-minded in light of positions he had advocated during his service in the executive branch, but he distanced himself from his Justice Department positions, stating that was the work of a paid advocate, much different from his current role as a judge. As a judge, he maintained he had no “overarching judicial philosophy” and understood the necessity of deference to the legislative branch of government.<sup>331</sup> Although some Senators were still concerned his past conservative record would manifest itself in his Supreme Court decisions on abortion, affirmative action, and other issues, he was easily confirmed in a seventy-eight to twenty-two vote.<sup>332</sup>

After the unsuccessful nomination of Harriet Miers, the next nominee was another sitting federal appellate court judge, Samuel A. Alito. Judge Alito had more than fifteen years of service on the Third Circuit, which opponents claimed indicated a too conservative jurisprudence on issues such as abortion, religious establishment, and affirmative action.<sup>333</sup> During his testimony, however, he disavowed any conservative creed, iterating that his only obligation as a judge was to

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324. *Roberts Hearing*, *supra* note 31, at 55.

325. *See id.* He probably understood the “rules” of confirmation better than most other nominees, as he had outlined a strategy for Sandra Day O’Connor to respond to the questioning of the Judiciary Committee when he was working in the Department of Justice in 1981. ABRAHAM, *supra* note 1, at 318. Under this strategy, O’Connor refused to state how she “might vote on a particular issue which may come up before the Court” or to “endorse or criticize specific Supreme Court decisions which may well come before the Court again.” *Hearing on the Nomination of Sandra Day O’Connor To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 97th Cong. 57 (1981).

326. *Roberts Hearing*, *supra* note 31, at 55-56.

327. *Id.*

328. *Id.* at 158-59, 177.

329. *See id.* at 142 (explaining that overruling precedents should be reserved for exceptional circumstances where a decision has proven clearly unworkable over time).

330. *Id.* at 56.

331. *Id.* at 281.

332. ABRAHAM, *supra* note 1, at 318-19.

333. *Id.* at 321.

the “rule of law” and doing “what the law requires.”<sup>334</sup> He paid homage to precedent, describing it as “a fundamental part of our legal system” to “respect the judgments and the wisdom that are embodied in prior judicial decisions.”<sup>335</sup> He pledged to approach questions not resolved by precedent with an “open mind.”<sup>336</sup> He also distanced himself from his prior political work during the 1980s at the Justice Department, relying on differences between the executive and judicial roles. In the face of attacks on both his judicial and executive record, he was assisted by the testimony of seven current and former colleagues from the Third Circuit, who opined that he approached judicial decisionmaking impartially and with an open mind, rather than as an inflexible ideologue.<sup>337</sup> The Senate eventually confirmed him in a relatively close fifty-eight to forty-two vote.<sup>338</sup>

An evident pattern emerges from these successful recent nominees. All have had the requisite decisionmaking experience, with elite backgrounds. The ones that have had the least difficulty being confirmed are those whose judicial records are perceived as relatively moderate, who have avoided overly partisan activities, and who have not expressed definitive opinions on the controversial issues of the day. The more the nominee’s past strays from this ideal, the more difficult the confirmation process becomes. This helps explain, for example, why Solicitor General Kagan did not receive the same level of public support as past successful nominees—although the quasi-judicial obligations of the Solicitor General may be understood by Senators on the Judiciary Committee, the lack of judicial experience complaint raised by some of her opponents resonated with a number of the public.<sup>339</sup> It also helps explain why Judge Alito’s confirmation vote was so much closer than the vote for Judge Roberts—Roberts’ opinions in his short tenure on the federal appellate bench had been more nondescript, while there was more evidence of Alito’s conservative bent.<sup>340</sup> Yet Justice Alito was still

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334. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be Associate Justice of the Supreme Court of the United States, Hearing before the S. Comm. on the Judiciary*, 109th Cong. 56 (2006).

335. *Id.* at 318-19.

336. *Id.* at 322.

337. *Id.* at 654-82. Professor Clark has noted that ten Senators voting in favor of confirmation cited the testimony of his colleagues as a factor in their decision. *See, e.g.*, Mary L. Clark, *My Brethren’s (Gate) Keeper? Testimony by U.S. Judges at Others’ Supreme Court Confirmation Hearings: Its Implications for Judicial Independence and Judicial Ethics*, 40 ARIZ. ST. L.J. 1181, 1192 (2008).

338. RUTKUS & BEARDEN, *supra* note 66, at 39 (table 1).

339. *Cf. Jones, supra* note 23.

340. Another important factor was the judicial philosophy of the Justice being replaced. The replacement of Chief Justice Rehnquist by Chief Justice Roberts did not appreciably change the balance of the Court, while the replacement of Justice O’Connor with Justice Alito has presumably altered the result in a number of cases. *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Garcetti v.*

narrowly confirmed, probably owing in part to the testimony and support of his judicial colleagues, who reinforced the ideal—that his judicial decisionmaking record evidenced an open mind, impartiality, and the fair and even-handed application of the law.

The final piece of the confirmation puzzle is that the nominee's testimony before the Committee must repeatedly reinforce his or her commitment to these desired judicial traits. The nominee should avoid personal commentary on any disputed legal issues during the confirmation hearings, because such testimony will be seized upon by opponents as evidence of a predisposition on the controversial issues that will come before the Court. That is not what the public—now a critical actor in the confirmation process—desires or expects in a Supreme Court Justice.

#### IV. FROM PAST LESSONS TO THE FUTURE PATHS OF THE CONFIRMATION PROCESS

Overlapping descriptive and normative tales are at the heart of this Article. The descriptive portion illustrated the burgeoning opportunities for public involvement in the Supreme Court appointments process and the resulting impact on confirmation outcomes. After the Seventeenth Amendment made Senators accountable to citizens, the Senate, through a slow process of evolution, opened its confirmation practices to public scrutiny and debate. The public often did not avail itself of these opportunities at first. But as the Court's opinions impacted daily American life more frequently, the public's involvement expanded. The testimony of nominees became standard practice in 1955, immediately after *Brown*; public interest group participation and more intensive Committee questioning became the norm after 1967, as political opposition to the Warren Court intensified; and public interest group input and media attention reached new heights when the proceedings were televised and the Court's decisions ignited volleys in the culture wars. At each stage of progression, the likelihood that a nominee was a sitting appellate court judge or had analogous experience escalated, until such experience became an expectation.

My normative narrative attempts to explain the interconnecting pieces of the descriptive tale. Public acceptance of the Supreme Court as an institution is required for its controversial decisions impacting identity politics to be respected. Although the public has minimal understanding of the judicial process, there is a shared conception of the background experiences and qualifications a Supreme Court Justice needs to ensure that the judicial craft is distinct from the ugly game of politics. The Supreme Court, in the public's view, demands prior

experience in fair, impartial, and nonpartisan decisionmaking to achieve the ideal—justice blindly balancing the merits of opposing positions championed by advocates.

But there is an undoubted tension between this public ideal and the competing objectives of Presidents, Senators, and various interest groups in the appointments process. In an attempt to comport (at least superficially) with the public's vision, Presidents have for the last four decades turned to nominees who possessed the publicly accepted background experience, avoided any extreme legal positions, and then testified to the need to decide cases with an open mind and without either a liberal or conservative bent. Yet Presidents still usually desire to influence the Supreme Court, and therefore seek to fill vacancies with Justices that at some level share their jurisprudential philosophy.<sup>341</sup> No serious person really believes, for instance, that the “balls and strikes” called by Justice Sotomayor will correspond in controversial cases with the calls of Chief Justice Roberts and Justice Alito, despite the similarities in their confirmation testimony.<sup>342</sup>

So we find ourselves at an uneasy crossroad, with ever increasing tension between the public ideal and the frequently unstated (but nonetheless commonly recognized) objectives of the institutional actors in the appointments process. Although I will not offer a prescriptive recommendation here, two divergent paths for the confirmation process might alleviate this current tension.

One would be to modify the public's conception of the ideal Supreme Court nominee and the process of judging, at least to the extent that candidly discussing the impact of various jurisprudential philosophies on judicial outcomes would not disqualify nominees from confirmation. If the public came to expect that nominees would be forthcoming in their discussion of their constitutional understanding and how that understanding might impact the resolution of constitutional issues, the code words and hidden motivations in the appointments process would no longer serve their current purpose. But it is no easy task to change public expectations. President Obama made an attempt to modify the prevailing ideal with several iterations of the need for “empathy” in constitutional interpretation,<sup>343</sup> but even his nominees found the

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341. See, e.g., ABRAHAM, *supra* note 1, at 3-5.

342. The evidence so far confirms that these Justices have different understandings of constitutional meaning. See, e.g., *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876 (2010).

343. See, e.g., *The President's Remarks on Justice Souter* (May 1, 2009, 4:23 PM), <http://whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter/> (“I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving as [sic] just decisions and outcomes.”); 151 CONG. REC.

necessity (presumably with his blessing) of distancing themselves from that approach.<sup>344</sup>

Another alternative would be for the Senate to enforce the public's current expectations by rejecting any candidate—by filibuster, if necessary—whose past indicated any partisan predispositions that might influence judicial outcomes. In essence, the presumption would be against the nominee, who could rebut the presumption only by establishing a prior record of—and future commitment to—nonpartisan, open-minded decisionmaking comporting with the public ideal. The hope would be to constrain Presidents, requiring them to nominate for the Supreme Court only those with cross-party appeal. This, however, would also not be an easy task. It would require long-term commitments by Senators to refrain from seeking partisan advantage in Supreme Court appointments, and would inevitably lead to a showdown with the President, with the public at large presumably deciding the ultimate victor.

As a result, the immediate future probably will proceed along the same path we are on today. Although the public apparently prefers a judge above politics, there is an awareness that, to some extent, politics nevertheless matters immensely in the appointments process, despite frequent platitudes about choosing the “best qualified” candidate without imposing any litmus tests. But until a competing vision of the judicial role is embraced by the public, which either allows the candid consideration of judicial philosophy or compels strict adherence to a rule of law divorced from politics, the supreme appointment will continue to favor sitting appellate court judges (or those with analogous experience) who have not accumulated a paper trail on the controversial issues of the day.

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S10365-66 (2005) (statement of Senator Obama regarding the nomination of Chief Justice Roberts) (“The tough cases can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspective on how the world works and the depth and breadth of one’s empathy”).

344. *See supra* Part I.