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## The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women's Bureau at the Department of Labor?

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# The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can a Man Head the Women’s Bureau at the Department of Labor?

*Donald J. Kochan\**

## I. INTRODUCTION

Can a man be the Director of the Women’s Bureau at the Department of Labor? According to Congress, the answer is no.<sup>1</sup>

This article addresses the 1920 statute requiring that the President nominate a woman to head the Women’s Bureau at the Department of Labor (“Women’s Bureau”).<sup>2</sup> Although this may make sense as a policy matter,<sup>3</sup> the consequences of the statute are problematic and raise two key questions: (1) even if it makes sense on policy grounds to appoint a woman to head the Women’s Bureau, is it constitutional to mandate it? and (2) if we accept this statutory limitation on the President’s power, what are the potential precedential consequences for other appointment matters?

As a result, this Article considers whether Congress may constitutionally remove the President’s discretion to choose his nominees, regardless of their sex, race, class, or other characteristics. As the U.S. Supreme Court has stated:

[A]ll officers of the United States are to be appointed in accordance with the [Appointments] Clause. Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the

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1. 29 U.S.C. § 12 (2000).

2. *Id.*

3. There are undoubtedly many compelling policy reasons why a President would choose to appoint a woman to direct the Bureau, but whether a woman should be appointed to head the Women’s Bureau is outside the scope of this Article.

heads of departments, or by the Judiciary. *No class or type of officer is excluded because of its special functions.*<sup>4</sup>

Class-based policy preferences, however wise for the special functions of a position, simply cannot become class-based statutory restrictions under the Constitution. As legal scholars have posited, even minor and perhaps inconsequential intrusions may have significant precedential effects that present dangers to the separation of powers and the Republic itself:

The fact of the matter is that, given the protean nature of political power, members of one branch can accumulate dangerous powers over time without the other branches noticing it. Worse yet, when the other branches notice the danger, they may not be able to either remedy the harm already caused or effectively stop the now all-powerful branch from abusing its powers. To prevent one branch, particularly the dangerous legislature, from accumulating these powers over time, the court must articulate and enforce prophylactic rules against the first encroachment upon the powers of another branch, even if that encroachment seems small or especially useful under the circumstances.<sup>5</sup>

Although the Senate may refuse its advice and consent to anyone nominated by the President, the Constitution clearly prohibits Congress from placing restrictions on who the President may present to the Senate for appointment.<sup>6</sup>

In an era where presidential appointments have elicited heated debate,<sup>7</sup> perhaps these concerns have heightened significance. These

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4. *Buckley v. Valeo*, 424 U.S. 1, 132 (1978) (second emphasis added).

5. Andrew C. Spiropoulos, *Constitutional Law: The Garvee Bonds Case and Executive Power: Breakthrough or Blip?*, 56 OKLA. L. REV. 327, 346 (2003) (footnote omitted).

6. See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (stating Congress is subject to the “basic” restraint that “[i]t may not ‘invest itself or its Members with either executive power or judicial power’”).

7. See, e.g., Mike Madden, *Frist’s Leadership to be Tested*, TENNESSEAN, July 20, 2005, at 1 (discussing Senator Bill Frist’s role in the U.S. Supreme Court confirmation hearings for John G. Roberts); Matt Bai, *The Framing Wars*, N.Y. TIMES, July 17, 2005, § 6, at 38 (describing the Democrats’ defense of the filibuster to block nominations); David T. Canon, *Move Over, Buster There’s Nothing Sacred About the Rules Regarding Filibusters*, WIS. ST. J., July 3, 2005, at B1 (discussing alternatives to changing the Senate filibuster rule); Frank James & Mike Dorning, *Bracing for a Nomination Battle like No Other*, CHI. TRIB., June 30, 2005, at 12 (highlighting conservative efforts in the fight over Supreme Court nominee John G. Roberts); Editorial, *Battling Over Bolton*, ARIZ. REPUBLIC, June 23, 2005, at B6 (discussing the nomination of John Bolton as Ambassador to the United Nations); Mark Preston, *Comity in the Senate: The Divisions Are Worse Now. Or Are They?*, ROLL CALL, June 16, 2005 (discussing the Senate battles over President Bush’s judicial nominations); John Stanton, *Frist, Reid Prep For Supreme Court Clash*, CONG. DAILY, June 10, 2005 (discussing nomination of John G. Roberts); *Both Sides Prepare for War Over Top Court Nominations*, STAR-LEDGER, June 10, 2005, at 16 (discussing battles over court nominations).

concerns hold particular interest as there is a growing trend toward a clash between the Executive branch and Congress on judicial nominations. For example, as Senator John McCain recently stated, “I do believe this issue of [the appointment and confirmation of] judges is a *hot* issue.”<sup>8</sup> But the Appointments Clause touches on far more than judicial nominations, reaching all high-level federal positions. With that in mind, in the face of current controversies and attempts to find political means to create obstacles or conditions on appointments, this Article examines just how far Congress can go to limit the discretion of Executive authority. Much focus has been placed on senatorial power to block nominations or otherwise thwart presidential preferences through advice and consent functions.<sup>9</sup> This Article, however, examines the statutory ability to, *ex ante*, limit the President’s choice of nominees.

This Article first discusses the background of the Women’s Bureau at the Department of Labor and highlights the Bureau’s mission.<sup>10</sup> This Article next examines the role of the Senate and Congress in establishing the pre-selection criteria for presidential nominees and cites to the Framers, namely James Madison and Alexander Hamilton, in discussing the proper roles of the President and Congress.<sup>11</sup> Can sex, race, sexual orientation, economic status, political party affiliation, ACLU membership, Federalist Society membership, NRA membership or other class distinctions—no matter how presumptively reasonable on policy grounds—be statutorily mandated (or prohibited) to limit the discretion of presidential nominations for any particular position for officers of the United States?<sup>12</sup> Such class-based preferences can be taken into account in considering whether the Senate will provide its advice and consent to any particular nomination,<sup>13</sup> but it is

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8. Craig Gordon, *Schiavo Case sets up Judicial Fight: Will Judges be Impeached? Will the Senate go to the ‘Nuclear Option’?*, GRAND RAPIDS PRESS, Apr. 3, 2005, at A11 (emphasis added). Discussing recent conflicts over judicial appointments, Eastman has stated: “The text of the [Appointments] clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one than is currently claimed.” John C. Eastman, *The Limited Nature of the Senate’s Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 640 (2003).

9. See generally Eastman, *supra* note 8 (citing recent articles on the Senate’s role in the nomination process).

10. See *infra* Part II (discussing background of Women’s Bureau and the appointment of its directors).

11. See *infra* Part III (examining the role of governmental bodies in forming pre-selection criteria for nominees).

12. “Assessing a candidate’s ‘qualifications for office’ did not give the Senate grounds for imposing an ideological litmus on the President’s nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office.” Eastman, *supra* note 8, at 647.

13. “[T]he Executive & Senate in the cases of appointments to Office . . . are to be considered as independent of and co-ordinate with each other. If they agree the appointments . . . are made. If

unconstitutional to place such class-based preferences in statutory, pre-nomination mandates and restrictions. Thus, this Article argues that class preferences belong in the decision whether to provide advice and consent and not in pre-nomination statutory restrictions.<sup>14</sup>

This Article next uses one example, the statutory pre-nomination limitation regarding the Women's Bureau, to demonstrate the illegitimacy of class-based statutory limitations on the President's nomination power.<sup>15</sup> The place for the invocation of preferences is in the post-nomination/advice and consent process—not in statutory mandates. This Article then posits that the prohibition of class restrictions presents little danger to meeting congressional or public preference.<sup>16</sup>

This Article concludes that the Constitution precludes Congress from placing limitations on the presidential nomination power and provides that Congress cannot require that a nominee meet specific criteria.<sup>17</sup> The Senate may exercise its advice and consent power to disapprove of any candidate based on the Senate's own class preferences, but mandatory, statutory pre-nomination limitations are simply beyond the Senate's advice and consent power.

## II. THE WOMEN'S BUREAU AND THE APPOINTMENT OF ITS DIRECTOR

In 1920, just as the States were ratifying the Nineteenth Amendment to guarantee nondiscriminatory suffrage, Congress created the Women's Bureau. Ironically, in establishing the position of its Director, Congress discriminated on the basis of sex—requiring that the Director be “*a woman . . . appointed by the President, by and with the advice and consent of the Senate.*”<sup>18</sup> Policy concerns regarding equal protection may themselves justify voiding this 85-year old quota. However, this

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the Senate disagree they fail.” 8 THE WRITINGS OF JAMES MADISON 250-51 (Gaillard Hunt ed., 1900–1910).

14. Eastman, *supra* note 8, at 640 (“As the text of the provision makes explicitly clear, the power to choose nominees—to ‘nominate’—is vested solely in the President.”). See *infra* Part III (discussing pre-nomination criteria); see also Eastman, *supra* note 8, at 644 (“In short, by assigning the sole power to nominate . . . to the President, the [Constitutional] Convention specifically rejected a more expansive Senate role. The delegates believed that providing the Senate with such a role would undermine the President’s responsibility . . .”).

15. See *infra* Part III (demonstrating the illegitimacy of statutory limitations on the President’s nomination power).

16. See *infra* Part IV (stating that prohibiting statutory class restrictions on nominations would not prevent the public interest being served).

17. See *infra* Part IV (discussing the constitutional limitations on Congress’s power).

18. 29 U.S.C. § 12 (2000) (emphasis added). The Director appointment provision was first passed in the statute establishing the Women’s Bureau, and it has never been amended. Act of June 5, 1920, Pub. L. No. 66-259, 41 Stat. 987.

Article raises a more fundamental issue regarding the constitutional separation of powers:<sup>19</sup> whether Congress may, by statute, limit the class of persons the President may nominate under his Appointments Clause power.<sup>20</sup>

According to its website, “the Women’s Bureau is the single unit at the [f]ederal government level exclusively concerned with serving and promoting the interests of working women.”<sup>21</sup> The provision for the appointment of the Director of the Women’s Bureau states that “[t]he Women’s Bureau shall be in charge of a director, a woman, to be appointed by the President, by and with the advice and consent of the Senate.”<sup>22</sup>

By its plain terms, this provision creates the Director position but precludes the President from appointing a male to run the Women’s Bureau.<sup>23</sup> It statutorily disqualifies all men from holding the position. There have been fifteen Directors, as one would expect from the text, all women, since the Bureau was created in 1920.<sup>24</sup>

### III. THE APPOINTMENTS CLAUSE AND UNCONSTITUTIONAL INTRUSIONS ON PRESIDENTIAL POWERS

“[W]ith admirable clarity,”<sup>25</sup> the text of the Appointments Clause bifurcates the roles of the President and Senate and vests the choice of a nominee for a position as an officer of the United States solely with the

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19. “The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.” *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). *See also id.* at 271 (White, J., concurring in part and dissenting in part) (describing the Appointments Clause as “a major building block” in the separation of powers).

20. “The Appointments Clause has been held to provide the exclusive constitutional means for appointment of officers of the United States.” Gordon G. Young, *Federal Maritime Commission v. South Carolina State Ports Authority: Small Iceberg or Just the Tip?*, 47 ST. LOUIS U. L.J. 971, 1001 n.156 (2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 139–40 (1976)).

21. WOMEN’S BUREAU, U.S. DEP’T OF LABOR, THE WOMEN’S BUREAU: AN OVERVIEW 1970–2000, available at [http://www.dol.gov/wb/info\\_about\\_wb/interwb2.htm](http://www.dol.gov/wb/info_about_wb/interwb2.htm); *see also* 29 U.S.C. § 13 (2000) (setting out the statutory powers and duties of the Women’s Bureau).

22. 29 U.S.C. § 12 (2000).

23. Interestingly, Congress placed no gender restriction on the Assistant Director of the Women’s Bureau, an inferior position filled through appointment by the Secretary of Labor. *See* 29 U.S.C. § 14 (2000) (prescribing the manner of appointment of the Assistant Director).

24. WOMEN’S BUREAU, U.S. DEP’T OF LABOR, DIRECTORS GALLERY, available at <http://www.dol.gov/wb/edu/gallery.htm>.

25. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring) (“The President’s power to nominate principal officers falls within the line of cases in which a balancing approach is inapplicable . . . . The President has the sole responsibility for nominating these officials, and the Senate has the sole responsibility of consenting to the President’s choice.”).

President.<sup>26</sup> The Appointments Clause of the Constitution provides that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other [o]fficers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior [o]fficers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>27</sup>

The text clearly indicates that the Framers of the Constitution intended for the Senate and the President to have separate and distinct, yet interdependent roles in the appointment of officers.<sup>28</sup>

It was intended that the Constitution would govern appointments with divided but defined powers, each serving independent yet coordinate influences on the choice and presentation of nominees as well as their ultimate success in rising to a particular position.<sup>29</sup> In considering these principles, the United States Supreme Court has explained: “Neither Congress nor the Executive can agree to waive this structural protection . . . . The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.”<sup>30</sup> Such structural protections are key to the constitutional separation of powers.

26. “The core concern of the Appointments Clause is to ensure that executive power remains independent.” *Confederated Tribes of Siletz Indians v. United States*, 841 F. Supp. 1479, 1487 (D. Or. 1994); *see also* Brian P. McClatchey, Note, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the “Governor’s Veto” for Gaming on “After-Acquired Lands,”* 37 U. MICH. J.L. REFORM 1227, 1250-51 (2004) (“The federal system depends, in part, upon assurances that the legitimate exercise of power by each branch will be undisturbed by the others.”).

27. U.S. CONST. art. II, § 2, cl. 2.

28. *See* *Buckley v. Valeo*, 424 U.S. 1, 267–82 (1976) (White, J., concurring in part and dissenting in part). “[N]o case in this Court even remotely supports the power of Congress to appoint an officer of the United States aside from those officers each House is authorized by Art. I to appoint to assist in the legislative processes.” *Id.* at 275. *See generally* MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* (2000) (describing the selection and appointment of United States officials).

29. *Buckley*, 424 U.S. at 275 (White, J., concurring in part and dissenting in part) (citing *Myers v. United States*, 272 U.S. 52, 128–129 (1926)).

Congress clearly has the power to create federal offices and to define the powers and duties of those offices . . . but no case in this Court *even remotely* supports the power of Congress to appoint an officer of the United States aside from those officers each House is authorized by Art. I to appoint to assist in the legislative processes.

*Id.* (emphasis added).

30. *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991) (holding that a special trial judge must be appointed in accordance with the Appointments Clause).

Substantial history from the drafting of the Appointments Clause indicates that the President was not to be constrained in his choice of persons to nominate. Likewise, the Senate could, constitutionally, reject any nominee without constraint.<sup>31</sup> As Justice Byron White explained, “[t]he decision to give the President the *exclusive* power to initiate appointments was thoughtful and deliberate.”<sup>32</sup> James Madison further explained that “while there was some admixture, the Constitution was nonetheless true to Montesquieu’s well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct.”<sup>33</sup> The separation of the nomination power and prerogative from the advice and consent power is a quintessential example of that admixture.<sup>34</sup> There is not “hermetic sealing off”<sup>35</sup> of the powers of appointment between the President and the Senate but identifiable separations that should be recognized and respected.<sup>36</sup>

Alexander Hamilton explained in *Federalist* No. 66 that the Senate has no proper role in restricting the President’s choice of nominees for an officer position created by Congress:

It will be the office of the President to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the Senate. They may defeat one choice of the executive, and oblige him to make another; but they

31. See, e.g., M. Elizabeth Magill, *The Revolution That Wasn’t*, 99 NW. U. L. REV. 47 (2004) (discussing the static nature of separation of powers jurisprudence during the Rehnquist court); Spiropoulos, *supra* note 5, at 344 (discussing the holding in *Buckley* that the legislature cannot appoint officers of the United States); see also William J. Wagner, *Balancing as Art: Justice White and the Separation of Powers*, 52 CATH. U. L. REV. 957, 960 n.12 (2003).

The language of the Appointments Clause was not mere inadvertence. The Framers repeatedly debated the matter of the appointment of officers of the new Federal Government. They reached the final formulation of the Clause only after the most careful debate and consideration of its place in the overall design of government.

*Id.* (quoting Justice White in *Buckley*, 421 U.S. at 271).

32. *Buckley*, 424 U.S. at 272 (White, J., concurring in part and dissenting in part) (emphasis added); see also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 81 (Max Farrand ed., 1911) (statements of Edmund Randolph) (“Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications.”).

33. *Buckley*, 424 U.S. at 120 (Majority Opinion).

34. According to Madison, the Senate was “joined with the President in appointing to office . . . merely for the sake of advising.” JAMES MADISON, *Speech in Congress on the Removal Power*, in JAMES MADISON: WRITINGS 434, 436 (Jack N. Rakove ed., 1999). He continued that “no person can be forced upon [the President] as an assistant by any other branch of government.” *Id.*

35. *Buckley*, 424 U.S. at 121.

36. *Id.* at 281 (White, J., concurring in part and dissenting in part) (“[I]t has not been insisted that the commands of the Appointments Clause must also yield to permit congressional appointments of members of a major agency.”).



cannot themselves *choose*—they can only ratify or reject the choice, of the President.<sup>37</sup>

Justice David Souter has stated, “Hamilton’s Federalist Papers writings contain the most thorough contemporary justification for the method of appointing principal officers that the Framers adopted.”<sup>38</sup> Justice Souter continued that “Hamilton was clear that the President ought initially to select principal officers and that the President was therefore rightly given the *sole* power to nominate[.]”<sup>39</sup> Hamilton explained that there was indeed a purpose and desire behind separating nominating power and advice and consent.<sup>40</sup>

As Hamilton further explained, allowing a President full and sole authority in the nomination was not dangerous because reputational factors (and the risk of not receiving advice and consent) would be an adequate incentive to make prudent choices for his nominees:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.<sup>41</sup>

37. THE FEDERALIST No. 66, at 449 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). As one author noted the use of The Federalists by modern politicians to limit the Senate’s role in nominations:

Hamilton believed that the President, acting alone, would be the better choice for making nominations, as he would be less vulnerable to personal considerations and political negotiations than the Senate and more inclined, as the sole decision maker, to select nominees who would reflect well on the presidency. The Senate’s role, by comparison, would be to act as a powerful check on ‘unfit’ nominees by the President.

Emery G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate’s Role in the Judicial Confirmation Process*, 30 OHIO N.U. L. REV. 235, 242 (2004) (quoting Senator Orrin Hatch); see also Orrin G. Hatch, *At Last a Look at the Facts: The Truth About the Judicial Selection Process: Each Is Entitled to His Own Opinion, But Not to His Own Facts*, 11 GEO. MASON L. REV. 467, 472–73 (2003) (agreeing with Hamilton that the Constitution grants the power of appointments solely to the president).

38. *Weiss v. United States*, 510 U.S. 163, 185 n.1 (1994) (Souter, J., concurring).

39. *Id.* (emphasis added).

40. For instance, as Eastman has written:

Note the very limited role that the Senate serves in Hamilton’s view . . . the element of choice—the essence of the power to fill the office—belongs to the President alone. The Senate has the power to refuse nominees, but in the Constitutional scheme it has no proper authority in *picking* the nominees—either through direct choice or through rollcalling and deal-making.

Eastman, *supra* note 8, at 644–45.

41. THE FEDERALIST No. 76, at 510–11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Based on these principles, the Senate could defeat every man that the President might nominate as an officer, including every man nominated to become director of the Women's Bureau, but they cannot invade the province of the Executive by statutorily prohibiting the nomination of a man.<sup>42</sup>

Finally, the Framers knew how to limit the President's nomination power when deemed necessary.<sup>43</sup> An additional basis for concluding that the President alone has discretion in choosing a nominee for an officer derives from a time-honored principle of statutory construction, *expression unius est exclusio alterius*—the expression of one is the exclusion of others. Based on this maxim, the designation of sole presidential power in the act of nomination means that no others have been granted any constitutional power to be involved in the “choice” aspect of nominations. This maxim underscores the idea of both a limited government—no person has more power than they are granted, and the separation of powers—no branch has more than they are granted. So, by expressing that the President shall nominate excludes the others from choice in that process, and in this example makes a congressional statutory choice of a woman for the Women's Bureau violates that maxim.

The Constitution itself creates one limit on the President's power to choose a nominee in the Emoluments and Incompatibility Clauses.<sup>44</sup> These clauses state:

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42. See Eastman, *supra* note 8, at 640 (“As the text of the [Appointments Clause] makes explicitly clear, the power to choose nominees—to ‘nominate’—is vested solely in the President. The President also has the primary role to ‘appoint,’ albeit with the advice and consent of the Senate.”) (footnote omitted); see also Spiropoulos, *supra* note 5, at 345 (“It is clear, then, that the Court has constructed a set of high, formal barriers around the exercise of purely executive powers. The Court has decided that under no circumstances will legislators be allowed to: (1) appoint officers who exercise executive functions; (2) remove these officers; or (3) exercise executive functions themselves.”).

43. See Laura T. Gorjanc, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435, 1452 (2004) (“[T]he Framers intended their compromise to divide the appointment power between the President and the Senate, with neither taking a greater slice of the appointment power pie.”).

44. Justice White explained:

From the very outset, provision was made to prohibit members of Congress from holding office in another branch of the Government while also serving in Congress. There was little if any dispute about this incompatibility provision which survived in Art. I, § 6, of the Constitution as finally ratified. Today, no person may serve in Congress and at the same time be Attorney General, Secretary of State, a member of the judiciary, a United States attorney, or a member of the Federal Trade Commission or the National Labor Relations Board.

Buckley v. Valeo, 424 U.S. 1, 272 (White, J., concurring in part and dissenting in part) (footnote omitted).

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.<sup>45</sup>

This enumeration of one limitation on the class of eligible nominees as officers of the United States excludes the presumption that any other limitations exist on the President's choice in making nominations.<sup>46</sup>

### A. *Unconstitutional Intrusions by the Senate*

As Professor John Yoo has stated, “[w]hile the Senate may reject nominees . . . it is quite clear that the Senate cannot *choose* them, contrary to suggestions made by some scholars.”<sup>47</sup> Similarly, Senators could informally express their view that a woman should be appointed for a position, but they cannot statutorily require it. As Senator Orrin Hatch has explained:

Hamilton . . . further pointed out that the Senate does not have the power to choose officeholders, but only to advise and consent. He felt that Senators might have political reasons for confirming or rejecting a nominee, but observed the fact that because the President alone makes the nominations, Senators would be somewhat constrained in their voting decisions and that self-interested decisions would be offset by other Senators. Voting decisions on the merits would become much more the norm. Elsewhere, Hamilton asserted that the appointments powers have been wisely vested in the hands of two parties, the President and the Senate.<sup>48</sup>

By placing class restrictions in a statute authorizing an officer position, the Senate is unconstitutionally exerting the type of choice that Hamilton explained was prohibited.<sup>49</sup> In *Federalist* No. 76, Hamilton articulated this concept:

45. U.S. CONST. art. I, § 6, cl. 2.

46. See *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring) (making a similar argument).

47. John C. Yoo, *Criticizing Judges*, 1 GREEN BAG 2D 277, 284 (1998) (emphasis added); see also, Eastman, *supra* note 8, at 645 (“Placing the nomination power in the President *alone* would, [Hamilton] argued, cut down on the degree to which political bargains in the Senate influenced the choice of candidates because . . . all would understand that the power of appointment belonged to the President *alone*.”) (emphasis added).

48. Hatch, *supra* note 37, at 470–71 (footnote omitted). “The president is to nominate, and thereby has the *sole* power to select for office[.]” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1525 at 376 (1833) (emphasis added).

49. Senator Hatch explained Hamilton's argument as follows:

As [Hamilton] put it, “[t]he necessity of [the Senate's] concurrence would have a

In the act of nomination [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment . . . . [E]very man who might be appointed would be in fact his choice.

But might not [the President's] nomination be overruled? I grant it might, yet this could only be to make place for another nomination by [the President]. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree.<sup>50</sup>

The President must have full control of, and accountability for, his exercise of the nomination power granted to him in the Constitution.<sup>51</sup> Statutes such as the one creating the Director of the Women's Bureau unconstitutionally trespass upon the President's exercise of that power.<sup>52</sup>

These intrusions may seem inconsequential, limited, and perhaps of little significance. But, "short of an overt coup, such accretion [of power] need not be—indeed, is unlikely to be—of a dramatic form.

powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." In addition, he believed that the President's reputation would be on the line when the Senate considered the nomination, and thus better nominations would be the natural response from the President.

Hatch, *supra* note 37, at 471 (footnote omitted).

50. THE FEDERALIST No. 76, at 512 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

51. As Justice White stated in explaining the history of the Appointments Clause:

The language of the Appointments Clause was not mere inadvertence. The matter of the appointment of officers of the new Federal Government was repeatedly debated by the Framers, and the final formulation of the Clause arrived at only after the most careful debate and consideration of its place in the overall design of government . . . . The separation-of-powers principle was implemented by a series of provisions, among which was the knowing decision that Congress was to have no power whatsoever to appoint federal officers, except for the power of each House to appoint its own officers serving in the strictly legislative processes and for the confirming power of the Senate alone.

Buckley v. Valeo, 424 U.S. 1, 271–72 (1978) (White, J., concurring in part and dissenting in part).

52. It is worthwhile to note that another set of commentators reached a similar conclusion in relation to statutory limitations on nominees in the Anti-Nepotism Statute, 5 U.S.C. § 3110 (2000) (precluding the nomination of a relative), the Solicitor General Statute, 28 U.S.C. § 505 (2000) (requiring that the Solicitor General be "learned in the law"), and the Federal Communications Commission authorizing statute, 47 U.S.C. § 154 (2000 & West Supp. 2005) (restricting the number of commissioners who may be of the same political party). See Richard P. Wolwick & Frank J. Macchiarola, *Congressional Interference with the President's Power to Appoint*, 24 STETSON L. REV. 625, 643–45 (1995) (arguing that restrictions on appointments violate the Constitution).

Rather, it may be almost microscopic, so that the naked eye will be unable to perceive its occurrence.”<sup>53</sup>

### *B. Unconstitutional Intrusions by the House of Representatives*

Another troubling separation-of-powers concern that arises from congressional limitations on the pool of officer nominees results from the intrusion of the House of Representatives into the purely senatorial function of “Advice and Consent.”<sup>54</sup> Establishing an office “by Law”<sup>55</sup> requires a bicameral act and presentment to the President. Therefore, the Appointments Clause clearly contemplates the act of bicameralism and presentment in the creation of an office. In contrast, the Advice and Consent Clause is clearly limited to only one entity—the Senate.

By allowing Congress, as a whole, to place limitations on the President’s choice of a nominee for an office, the House of Representatives intrudes upon senatorial and presidential prerogative by itself engaging in pre-nomination advice. Therefore, in the case of the Women’s Bureau Director, the House has intermixed itself in the matter of “choice.” The statute limiting the Director to “a woman” involved the bicameral action of the House and Senate.

Even if the Senate could be said to have some role in offering pre-nomination advice,<sup>56</sup> certainly the House does not. Duties committed solely to one house of Congress cannot be exercised by the other. For example, the Origination Clause,<sup>57</sup> which requires that all bills for

53. Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 464 (1991).

54. U.S. CONST. art. II, § 2, cl. 2.

55. *Id.*

56. For an excellent discussion of why the Senate has no constitutional pre-nomination role in advice on judicial candidates, see generally John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633 (1993). *But see, e.g., Bush Gets Democrats’ Pick for Supreme Court Slot*, INT’L HERALD TRIB., July 14, 2005, at 2 (describing the idea of “co-nomination” in presidential appointees).

57. U.S. CONST. art I, §7, cl. 1. For a general discussion, see William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992) (discussing bicameralism and presentment in statute-making); J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 TULSA L.J. 165 (1987) (providing a comparative study of the origination clause); Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U. L. REV. 735 (1993) (arguing that the constitution does not allow a presidential selective veto); Adrian Vermuele, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004) (suggesting reforms for internal legislative rules); Robert F. Williams, *Comparative Subnational Constitutional Law: South Africa’s Provincial Constitutional Experiments*, 40 S. TEX. L. REV. 625 (1999) (providing a discussion of comparative subnational constitutional law). *See also* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) (supporting Congress’s ability to perform constitutional analysis); Catherine Fisk &

raising revenue must originate in the House of Representatives, makes invalid any bills for raising revenue that originate in the Senate.<sup>58</sup> The Appointments Clause similarly limits the advice and consent function to the Senate and provides no room for formal House involvement. When a statute is passed with a class limitation, however, the House has necessarily been injected into the process of choice.

### C. *Unconstitutional Intrusions by Former Presidents*

The same is true of the President who signs the legislation creating an office with a restricted pool of eligible nominees and binds, therefore, future Presidents to that nomination restriction. The President alone actually makes the appointment to choose his nominee, and a prior President can have no role in limiting that future President's class of potential nominees. However, when presented with a bill and signing it—like the Women's Bureau statute with a class limitation—the

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Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997) (arguing that modern filibuster rules can and should be changed); Philip P. Frickey, *Constitutional Law and Economics: Constitutional Structure, Public Choice, and Public Law*, 12 INT'L REV. L. & ECON. 163 (1992) (exploring the use of the public choice perspective in approaching constitutional structure); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001) (proposing reform in Congressional constitutional interpretation); James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645 (1992) (discussing the potential value of American constitutional conventions).

58. See generally *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) (noting the requirement of the Origination Clause that revenue bills originate in the House); *United States v. Munoz-Flores*, 863 F.2d 654 (9th Cir. 1988) (invalidating law as a violation of the Origination Clause). For a number of other cases discussing the Origination Clause, see generally the following: *Walthall v. United States*, 131 F.3d 1289 (9th Cir. 1997) (holding that the Tax Equity and Fiscal Responsibility Act does not violate the Origination Clause); *United States v. Dugan*, 912 F.2d 942 (8th Cir. 1990) (holding that a special assessment statute is not a revenue raising measure under the Origination Clause); *United States v. Wilson*, 901 F.2d 1000 (11th Cir. 1990) (holding that the special assessment statute was not designed for revenue, but rather was a part of a comprehensive scheme to assist victims); *United States v. Michael*, 894 F.2d 1457 (5th Cir. 1990) (holding that a statute that charges a criminal defendant who pleads guilty to a special assessment does not violate the Origination Clause); *United States v. Tholl*, 895 F.2d 1178 (7th Cir. 1990) (upholding the special assessment statute as not a violation of the Origination Clause); *United States v. King*, 891 F.2d 780 (10th Cir. 1989) (holding that the special assessment statute is not subject to constitutional challenge under the Origination Clause because the statute's purpose is not to raise revenue); *United States v. Newman*, 889 F.2d 88 (6th Cir. 1989) (determining that a statute may be challenged under the Origination Clause if it is designed to raise revenue); *United States v. Simpson*, 885 F.2d 36 (3d Cir. 1989) (holding that the Victims of Crime Act was not intended to raise revenue and is not subject to challenge under the Origination Clause); *United States v. Griffin*, 884 F.2d 655 (2d Cir. 1989) (upholding the special assessment statute because it is not intended to raise revenue); *State v. Block*, 717 F.2d 874 (4th Cir. 1983) (holding that the amendment to the Agricultural Act of 1949 is a regulation, not a tax, and does not violate the Origination Clause); *Bertelsen v. White*, 65 F.2d 719 (1st Cir. 1933) (holding that the Merchant Marine Act is not a revenue act and does not violate the Origination Clause).

signatory President has acquiesced in an unconstitutional statutory limitation on future presidential appointments' powers.

Each President should be entitled to his own prerogative in making appointments to his administration. If a prior President can tie the hands of a future President he intrudes upon that discretion and exercises inappropriate and extra-constitutional control. Thus, by signing a statute that binds the nominational discretion normally afforded a future President, a President oversteps the temporal power afforded in his term.

#### IV. PROHIBITING STATUTORY CLASS RESTRICTIONS ON NOMINEES PRESENTS LITTLE DANGER IN FULFILLING CONGRESSIONAL OR PUBLIC PREFERENCES

Even absent the statutory restriction, one should not be surprised that the position of Director of the Women's Bureau has been filled by a woman and expect it likely always will be so filled.<sup>59</sup> It is anticipated that the structure of the appointments process compels the President to make proper choices in his nominees.<sup>60</sup> Nonetheless, far from being "harmless error," the Women's Bureau appointment provision reflects a fundamental encroachment on presidential prerogatives established in the Constitution, sets poor precedent, and should be amended by Congress.<sup>61</sup>

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59. See, e.g., Gorjanc, *supra* note 43, at 1451-52. Gorjanc notes:

Hamilton argued that the Appointments Clause limits the Senate insofar as the President always has the power to choose a nominee. According to Hamilton, even though the Senate may reject that nominee, the President always has the power to choose another nominee. Thus, the fact that the Senate has the advice and consent power does not diminish the President's power to nominate. Yet, as Hamilton observed, the possibility of the Senate rejecting a nominee should affect the President's choice.

*Id.* (footnotes omitted).

60. See, e.g., Eastman, *supra* note 8, at 646 ("To Adams, the President should be solely responsible for his choices, and should alone pay the price for choosing unfit nominees."). "His own office, his own character, his own fortune should be responsible." James Wilson, *Lectures on Law* (1791), reprinted in 4 THE FOUNDERS' CONSTITUTION 110, 110 (Philip B. Kurland & Ralph Lerner eds., 1987).

61. One might argue that the position itself, as currently constituted, is unconstitutional. Of course, the courts might very well find that the unconstitutional component, the words "a woman," are severable from the remainder of the position. On severability law, see e.g., *Champlin Refining Co. v. Corp. Comm. Of Okla.*, 286 U.S. 210, 234 (1932) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."). Especially because it is unlikely anyone would ever have standing to challenge the statute, it is Congress's responsibility to correct its error.

As Spiropoulos has noted, strong protections of the role of the Executive in the appointments power, even against seemingly small or useful intrusions on the Executive's power to choose freely his nominees, is essential to the functioning of the constitutional system:

[A]rticulating strong formal rules against the usurpation of the powers of another branch has a great value, aside from facilitating the judicial invalidation of legislative overreaching. The fact of the matter is that, given the protean nature of political power, members of one branch can accumulate dangerous powers over time without the other branches noticing it.<sup>62</sup>

He continues that even small or seemingly harmless encroachments must be guarded against lest the structure of power lean away from its intended separation:

Worse yet, when the other branches notice the danger, they may not be able to either remedy the harm already caused or effectively stop the now all-powerful branch from abusing its powers. To prevent one branch, particularly the dangerous legislature, from accumulating these powers over time, the court must articulate and enforce prophylactic rules against the first encroachment upon the powers of another branch, *even if that encroachment seems small or especially useful under the circumstances*.<sup>63</sup>

Thus, even if the encroachment in the Women's Bureau statute seems small, it is significant.

As the concurring Justices of the Supreme Court concluded in *Public Citizen*, "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch."<sup>64</sup> It should not be tolerated for the appointment of the Director of the Women's Bureau.

The invalidity of the Women's Bureau statute has implications beyond just the Department of Labor. Just imagine the havoc Congress might wreak if it believed it had the power to broadly restrict presidential nominations to certain sexes or other classes of persons. Admittedly, this is not the only instance where Congress has tried to limit the pool of prospective nominees by statute or placed "qualification" requirements in appointment statutes.<sup>65</sup> Because

62. Spiropoulos, *supra* note 5, at 346.

63. *Id.* (footnote omitted) (emphasis added).

64. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring); *see also id.* at 487 (noting that the three branches need not be "entirely separate and distinct . . . [b]ut as to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them").

65. *See* Wulwick & Macchiarola, *supra* note 52, at 626 & n.5 (listing statutes that attempt to



political pressures and policy reasons will likely compel future Presidents to nominate a woman to head the Women's Bureau,<sup>66</sup> the probable policy preferences supporting the Sixty-Sixth Congress's decision to create the unconstitutional mandate—ensuring that a female runs the Bureau—is likely to go undisturbed by a statutory amendment removing the gender restriction from the appointments provision.<sup>67</sup> Presidents generally can be held accountable for their unwise decisions.<sup>68</sup>

As Hamilton wisely observed, placing the sole power of nomination in the hands of the President will also constrain him, for “[t]he possibility of rejection would be a strong motive to care in proposing.”<sup>69</sup>

place restrictions on the President's Appointments Clause power, including those that identify particular professional qualifications, experience, or skills). This author is not, however, aware of any other appointments statutes that create sex or class limitations.

66. Gorjanc, *supra* note 43, at 1453 (“The President is not bound by the Senate's advice, but at maximum, the Appointments Clause allows the Senate to give the President advice on whom to nominate.”). It is difficult to contemplate public acceptance of naming a man to head the Women's Bureau, and in recognition of that fact, most politicians would be unlikely to be willing to face claims of chauvinism or others by naming a man to head the post.

67. *Id.* at 1452. “[A]s Hamilton observed, the possibility of the Senate rejecting a nominee should affect the President's choice[,]” meaning that a President would use prudence in his choice due to the qualities necessary and the consequences of his decision politically.

68. See, e.g., Eastman, *supra* note 8, at 641–42 (recounting National Ghorum's argument that “while if the appointment power were given to the President alone, ‘the Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone.’”) (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 32, at 41).

69. THE FEDERALIST No. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

*Id.* Justice Souter has provided further analysis that policy objectives and the check on inappropriate nominations underscore the Framers' purpose for requiring Senate approval and that unfettered authority of the President to nominate did not mean that he would make unwise choices because the Senate could hold him accountable:

The same notes were struck in the Constitutional Convention, where Hamilton was actually the first to suggest that both the President and the Senate be involved in the appointments process. See 1 Farrand 128; J. Harris, *The Advice and Consent of the Senate* 21 (1953). For example, Gouverneur Morris, who was among those initially favoring vesting exclusive appointment power in the President, see 2 Farrand 82, 389, ultimately defended the assignment of shared authority for appointment on the ground that “as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.” *Id.*, at 539. See also 4 J. Elliot, *Debates on the Federal Constitution* 134 (1891) (James Iredell in North Carolina ratifying convention) (“[T]he Senate has no other influence but a restraint on improper appointments . . . [The Appointments Clause provides] a double security”). See generally Harris, *supra*,

As with the Women's Bureau, other posts should receive the same reflection in order for a political President to avoid unnecessary entanglements with the Senate or his voting public.

## V. CONCLUSION

Congress should take action to remove this restriction from the Women's Bureau statute and any similar laws that run afoul of the Constitution's limitation on the congressional role in the appointments process. "[B]oth Congress and the courts have a parallel responsibility to interpret the Constitution in the performance of their institutional duties and in upholding the text as supreme law."<sup>70</sup> Not only is it Congress's constitutional obligation, but it would also provide an opportunity to underscore an important principle regarding the separation of powers.

The policy objective can be achieved while cleansing the statute of its constitutional infirmities, for any strong preference is likely to affect the President's choice of a nominee and any defection from such preferences will lead to negative political consequences.<sup>71</sup> Political appointments are transparent and subject to public scrutiny.<sup>72</sup> Providence and prudence<sup>73</sup> will undoubtedly ensure that the policy goal of having a female run the Women's Bureau will almost without question continue to be fulfilled if "a woman" is removed from

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at 17-26 (summarizing debates in the Constitutional Convention and in the ratifying conventions).

Weiss v. United States, 510 U.S. 163, 185 n.1 (1994) (Souter, J., concurring) (alterations in original).

70. Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry Into Legislative Attitudes, 1959-2001*, 29 L. & SOC. INQUIRY 127, 134 (2004).

71. "As to offices, the Senate has no other influence but a restraint on improper appointments . . . . This, in effect, is but a restriction on the President." James Iredell, *Debate in North Carolina Ratifying Convention, 28 July 1788*, in 4 THE FOUNDERS' CONSTITUTION 102, 102 (Philip B. Kurland & Ralph Lerner eds., 1987).

72. "If [the President] should . . . surrender the public patronage into the hands of profligate men, or low adventurers, it [would] be impossible for him long to retain public favour . . . . At all events, he would be less likely to disregard [public disapprobation] . . . ." STORY, *supra* note 48, § 1523, at 375-76 (1833).

73. As the Supreme Court majority in *Buckley* explained, quoting Madison:

We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

*Buckley v. Valeo*, 424 U.S. 1, 122-23 (1976) (quoting THE FEDERALIST No. 51, at 323-24 (James Madison) (G.P. Putnam's Sons ed., 1908)).

Women's Bureau appointment statute<sup>74</sup> without leaving a constitutionally infirm provision or possible precedent for future mischief in the United States Code.

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74. Justice Souter explained this political "check" on presidential nominations:

In the Framers' thinking, the process on which they settled for selecting principal officers would ensure "judicious" appointments not only by empowering the President and the Senate to check each other, but also by allowing the public to hold the President and Senators accountable for injudicious appointments.

*Weiss*, 510 U.S. at 186 (Souter, J., concurring). Souter continued to explain that the Framers believed that transparency of presidential decisions should quell imprudent ones:

"[T]he circumstances attending an appointment [of a principal officer], from the mode of conducting it, would naturally become matters of notoriety," Hamilton wrote; "and the public would be at no loss to determine what part had been performed by the different actors." *The Federalist* No. 77, at 517. As a result,

"[t]he blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate; aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made the executive for nominating and the senate for approving would participate though in different degrees in the opprobrium and disgrace." *Ibid.*

The strategy by which the Framers sought to ensure judicious appointments of principal officers is, then, familiar enough: the Appointments Clause separates the Government's power but also provides for a degree of intermingling, all to ensure accountability and "preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

*Weiss*, 510 U.S. at 186 (Souter, J., concurring) (alteration in original).