

“ADVICE AND CONSENT” IN HISTORICAL PERSPECTIVE

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ABSTRACT

In recent years, commentators have complained about what they regard as an increasingly dysfunctional confirmation process for judges and high-ranking executive officials, and the proper role for the Senate in the confirmation process has been much debated. This Article suggests that confirmations have been contentious throughout American history, and that the focus on ideological issues in today’s confirmation proceedings is not anomalous. Indeed, historically, both Republicans and Democrats have used the confirmation process to delay or oppose nominations when the President hails from a different political party, and, sometimes, even when the President comes from the same party but there are ideological objections to the nominee.

That the appointments process has, at times, been difficult and contentious should come as no great surprise. The Framers of the United States Constitution intentionally created a governmental structure that was more prone to obstructionism than other comparable systems. Relying on concepts like “separation of powers,” and “checks and balances,” the Framers sought to constrain the federal government in ways that would limit the possibilities for governmental abuse. The appointments power reflects this approach. Like many other constitutional powers, it is a shared power. Although the President has the power to nominate Article III judges, as well as ambassadors and “officers,” nominees can only be confirmed with the “advice and consent” of the Senate. By placing the power to appoint in two politically elected entities, the Constitution establishes a system whereby political influences will sometimes have a major impact on the confirmation process.

Although contentiousness can arise during any type of nomination, some Supreme Court nominations have been particularly bitter. Both the Senate and the American public have increasingly become aware

that the courts make law and that the political and judicial attitudes of nominees matter. Under such circumstances, the Senate's inquiry quite naturally goes beyond the simple question of whether a nominee is qualified or unqualified. However, the confirmation process is more difficult today, even for nonjudicial nominees, because of the bitter partisanship that has infected the U.S. political system.

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INTRODUCTION

Robert Bork's failed nomination to the Supreme Court in 1987 ignited a firestorm of controversy over the Senate's role in the judicial confirmation process.¹ Rather than focusing on Bork's qualifications, which were impressive given his background as a Yale law professor and a federal judge,² Bork's nomination was derailed because of his

1. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 281–84 (5th ed. 2008); see also generally David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900 (1990) (discussing competing visions of the role of the Senate in the confirmation process as it related to the Bork nomination); Orrin G. Hatch, *The Dangers of Political Law*, 75 CORNELL L. REV. 1338, 1338–39 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1989)) (“Judge Bork’s opponents did not want a judge who would religiously follow the words of the Constitution and federal laws—instead, they preferred a judge who would follow his own heart. Moreover, they hoped that the judge’s heart would beat to the rhythm of their own political drums. In legal matters, Judge Bork neither followed his heart nor strove to synchronize his political preferences to those of a majority of the Senate. Thus he lost.”).

2. See Terrance Sandalow, *The Supreme Court in Politics*, 88 MICH. L. REV. 1300, 1304 (1990) (reviewing ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989)) (“To be sure, Bork’s professional credentials and intellectual qualifications were outstanding, as impressive as those of any nominee in a good many years and more impressive than most.”).

ideological views.³ Some Senate observers feared that the Senate's repudiation of the Bork nomination would lead to a politically charged confirmation process, involving strident attacks on nominees that were designed to demonstrate their unfitness for Senate confirmation.⁴ Some have termed this process "Borking,"⁵ and others have lamented what they perceive as the politics of personal destruction.⁶

Although the Bork nomination was certainly contentious in 1987, the confirmation process may be even more dysfunctional today. The Senate has stalled President Barack Obama's nominations to the federal courts, as well as his nominations to executive-branch and ambassadorial positions.⁷ At one point, fifty-nine of Obama's nominees to executive-branch positions and seventeen of his nominees to the federal judiciary were awaiting confirmation votes.⁸

3. See Erwin Chemerinsky, *Ideology, Judicial Selection and Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 643, 646 (1989) ("Judge Bork was attacked for his writings criticizing Supreme Court cases protecting the right of privacy, applying the equal protection clause to gender discrimination, and using the First Amendment to protect speech not concerned with the political process."); Danelski, *supra* note 1, at 900 ("Opponents of Robert H. Bork's nomination did not question his personal integrity or his professional qualifications . . . [T]hey objected to his constitutional views and for that reason sought to prevent his confirmation. Their premise was that ideology is a permissible ground for rejecting a Supreme Court nominee.").

4. See Tom Lininger, *On Dworkin and Borkin*, 105 MICH. L. REV. 1315, 1323 (2007) (reviewing RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* (2005) and RONALD DWORKIN, *JUSTICE IN ROBES* (2006)) ("[Richard] Davis claims that '[i]n a sense, selecting Justices for the Supreme Court is an election without the voters.'" (second alteration in original) (quoting DAVIS, *supra*, at 9)); see also H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 673 (2004) ("The hearings on Bork's nomination . . . gave the entire nation a basic and easily understood lesson in Legal Realism 101."); *Senate Committee Hearings on the Judicial Nomination Process*, 50 DRAKE L. REV. 429, 504 (2002) ("Over the years, people from time to time have objected to judicial nominees on the ground that their legal views were extreme. But until now, they have saved 'Borking' for an unlucky few.").

5. See Lininger, *supra* note 4, at 1316; see also David Greenberg, Op-Ed., *'Borking' Before Bork*, N.Y. TIMES, Dec. 21, 2012, at A31 (describing opposition to Supreme Court nominees before Bork that was based on the nominees' beliefs or identities rather than their qualifications).

6. See, e.g., James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1140 (2004) ("The Senate confirmation process for Supreme Court nominees has become more contentious over the course of the last several decades."); Richard Lavco, *Washington Burning*, TIME, Jan. 4, 1999, at 66 ("Clinton's impeachment is the latest episode in the intensification of congressional partisanship that dates back at least to the Democrat-controlled Senate's 1987 rejection of Robert Bork for the Supreme Court.").

7. Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1.

8. *Id.*

Senate Democrats became so frustrated that they decided to alter the filibuster rules. Instead of requiring a supermajority of sixty senators to halt a filibuster,⁹ the Senate adopted rules requiring only a simple majority to cut off debate for all presidential appointments except Supreme Court nominees.¹⁰ This change angered Senate Republicans,¹¹ prompting them to use other tactics to slow the confirmation process.¹² Although the rules change has led to the confirmation of more nominees, even after the filibuster change, many positions remained unfilled. For example, at one point, there were still more than thirty ambassadorial posts that remained unfilled even though nominations for those slots had been pending in the U.S. Senate for some time.¹³

The proper role for the Senate in the confirmation process has been a subject of much debate. Should the Senate focus only on whether a nominee is qualified or unqualified, or should the Senate also consider a nominee's ideological perspectives (or, perhaps, other issues)? Historically, it has not been unusual for confirmation proceedings to focus on ideological issues.¹⁴ Indeed, both Republicans and Democrats have used the confirmation process to delay or oppose nominations when the President hails from a different political party, and sometimes, even when the President comes from the same party but there are ideological objections to the nominee.¹⁵ Although at times the Senate has played a more limited role in the confirmation process, there are other periods when the confirmation

9. *Id.*

10. *Id.*

11. *See id.* ("Republicans accused Democrats of irreparably damaging the character of an institution that in many ways still operates as it did in the 19th century, and of disregarding the constitutional prerogative of the Senate as a body of 'advice and consent' on presidential nominations.").

12. Kristina Peterson, *Senate Differences Stall Nominees: Partisan Disputes Create Backlog Among Would-Be Ambassadors as GOP Blocks Procedural Shortcuts*, WALL ST. J., June 28, 2014, at A5.

13. *Id.*

14. *See* HENRY B. HOGUE, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: SUPREME COURT NOMINATIONS NOT CONFIRMED, 1789-2007, at 7-12 (2008) (listing nominees that failed due to "[o]pposition to the [n]ominee's [v]iews"); *see also* RICHARD S. BETH & BETSY PALMER, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789-2011, at 1 (2011).

15. *See* HOGUE, *supra* note 14, at 7-12; *see also* William Safire, Op-Ed., *Battle of the Blue Slips*, N.Y. TIMES, May 10, 2001, at A33 (describing the Senate practice of "blue-slipping" nominees, which allows individual senators to block nominees for positions in their home states).

process has been extremely contentious.¹⁶ During the eighteenth and nineteenth centuries, for example, there were a number of battles regarding Supreme Court nominees, and those battles regularly focused on the nominee's views.¹⁷

The fact that the appointments process has, at times, been difficult and contentious should come as no great surprise. The Framers intentionally created a governmental system that was more prone to obstruction than comparable systems. Relying on concepts like separation of powers¹⁸ and checks and balances,¹⁹ the Framers sought to constrain governmental powers in ways that would limit the possibilities for governmental abuse.²⁰ The appointments power reflects this approach. Like many other constitutional powers, it is a shared power.²¹ Although the President has the power to nominate Article III judges, as well as ambassadors and “officers,” nominees can only be confirmed with the “advice and consent” of the Senate.²²

16. See HOGUE, *supra* note 14, at 7–12.

17. See BETH & PALMER, *supra* note 14, at 4–7.

18. See THE FEDERALIST NO. 47 (James Madison); THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT 6 (Ralph Ketcham ed., 1986) (“Also, mindful of colonial experience and following the arguments of Montesquieu, the idea that the legislative, executive, and judicial powers had to be ‘separated,’ made to ‘check and balance’ each other in order to prevent tyranny, gained wide acceptance.”); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490–91 (2010) (striking down a statute governing the removal of Board members as a violation of the “Constitution’s separation of powers”); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (“[T]his system of division and separation of powers produces conflicts at times . . . , but it was deliberately so structured to assure full, vigorous . . . debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.”).

19. See THE FEDERALIST NO. 47 (James Madison); see also *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (“[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances”); *Free Enter. Fund*, 561 U.S. at 500 (referring to the system of checks and balances); *Nixon v. United States*, 506 U.S. 224, 234–35 (1993) (referring to the “Framers’ insistence that our system be one of checks and balances”).

20. See THE FEDERALIST NO. 47 (James Madison); THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 18, at xv. Compare U.S. CONST. art. I, § 8 (articulating Congress’s enumerated legislative authority), with U.S. CONST. art. I, § 7 (providing for the President’s role in the legislative process which involves approval or disapproval of legislation passed by Congress, as well as for so-called “pocket vetoes”).

21. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, . . . [to] 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 Officers 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 Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

22. *Id.*

By placing the power to appoint in two politically elected entities, the Constitution establishes a system whereby political influences will sometimes have a major impact on the confirmation process. Although contentiousness can arise with regard to any type of nomination, confirmation fights have been particularly bitter regarding some nominations to the Supreme Court. Both the Senate and the American public have increasingly come to realize that judges make law, and that the political and judicial attitudes of nominees matter because they provide insight into how the nominees might exercise their law-creating powers as judges. Under such circumstances, the Senate naturally inquires beyond simple questions as to whether a nominee is qualified or unqualified. However, the confirmation process is more difficult today, even for nonjudicial nominees, because of the bitter partisanship that has infected the U.S. political system.

This Article explores the theoretical basis, history, and practices associated with the appointments process. Part I examines the philosophical underpinnings of the U.S. Constitution and the Appointments Clause. Part II focuses on the historical realities of the appointments process. Parts III and IV focus, respectively, on how the Senate's procedural rules have complicated the confirmation process, and how recent changes to these rules have affected the process. Finally, Part V comments on how the current political climate in Washington has resulted in unprecedented partisanship regarding appointments to nonjudicial offices.

I. THE PHILOSOPHICAL UNDERPINNINGS OF THE CONSTITUTION AND THE APPOINTMENTS CLAUSE

Even though varied and sometimes conflicting ideological principles played a role in the framing and development of the Constitution,²³ the founding generation was unquestionably influenced by the principles of the Enlightenment,²⁴ including such

23. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 16–18 (1967) (“Study of the sources of the colonists’ thoughts as expressed in the informal as well as the formal documents . . . reveals, at first glance, a massive, seemingly random eclecticism.”).

24. *Id.* at 26–27 (“Despite the efforts that have been made to discount the influence of the ‘glittering generalities’ of the European Enlightenment on eighteenth-century Americans, their influence remains The ideas and writings of the leading secular thinkers of the European Enlightenment . . . were quoted everywhere in the colonies . . .”).

writers as John Locke,²⁵ Thomas Paine,²⁶ and Baron de Montesquieu.²⁷ Enlightenment principles were debated, discussed, and relied on to map out an entirely new approach to government and governmental authority. For example, the drafters of the Declaration of Independence²⁸ implicitly rejected the concept of divine right: the idea that monarchs are placed on their thrones by God, are divinely inspired and guided, and carry out God's will through their actions.²⁹ In doing so, the drafters of the Declaration of Independence seemed to embrace attacks on the notions of divine right³⁰ and hereditary succession,³¹ and opted instead for a government premised on democratic principles: "Governments are instituted among Men,

25. See Donald L. Doernberg, "We the People": John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 57, 64–65 (1985) (concluding that it "would be difficult to overstate John Locke's influence on the American Revolution and the people who created the government that followed it"); David Thomas Konig, *Thomas Jefferson's Armed Citizenry and the Republican Militia*, 1 ALB. GOV'T. L. REV. 250, 262 (2008) (noting that "Jefferson followed Locke in justifying for the American colonies of 1776 the right of armed resistance").

26. See THOMAS PAINE, *COMMON SENSE* (Barnes & Noble 2005) (1776); see also Allen Edward Shoenberger, *Connecticut Yankee in Europe's Court: An Alternative Vision of Constitutional Defamation Law to New York Times Co. v. Sullivan?*, 28 QUINNIPIAC L. REV. 431, 432 (2010) ("Free speech, such as that exemplified by the speeches and pamphlets of the revolutionary firebrand Thomas Paine, has been at the center of American civil rights." (citing HARVEY J. KAYE, *THOMAS PAINE: FIREBRAND OF THE REVOLUTION* (2000))).

27. See THE FEDERALIST NO. 47 (James Madison).

28. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

29. See *Seminole Tribe v. Florida*, 517 U.S. 44, 96 (1996) (Stevens, J., dissenting) (noting that "centuries ago" there was a "belief that the monarch served by divine right"). Of course, part of the problem is that some major constituencies were omitted from the notion of the "consent of the governed." See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 18, at 9 (noting that slaves, women, and those who did not hold property were barred from voting).

30. See PAINE, *supra* note 26, at 6 ("There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment [*sic*] is required."). Paine, who was born in England, but was in the American colonies during the Revolutionary period, wrote extensively, and with serious reservations, regarding the British monarchy's claim to rule by divine right: "no man in his senses can say that [the British monarch's claim to the throne] under William the Conqueror is a very honorable one. A French bastard landing with an armed banditti, and establishing himself king of England against the consent of the natives, is in plain terms a very paltry rascally original. It certainly hath no divinity in it." *Id.* at 13–14.

31. Even had the British monarchy been legitimately established, Paine had grave reservations regarding the desirability of granting the monarch the right of hereditary succession: "Most wise men, in their private sentiments, have ever treated hereditary right with contempt; yet it is one of those evils, when once established is not easily removed . . ." *Id.* at 12–13.

deriving their just powers from the consent of the governed”³² In other words, power flows from the people to the government, rather than the other way around.

Significantly, in terms of understanding the Advice and Consent Clause, although the Framers embraced democracy and the principle that the power to govern is rooted in the “consent of the governed,” many in the founding generation were highly distrustful of governmental power.³³ As Thomas Paine argued, “Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one.”³⁴

Two separate and distinct reasons likely lead to this distrust of government. First, the newly independent Americans had recently revolted against the British Empire and claimed their independence because of alleged abuses by the English monarch.³⁵ Second, many Americans had immigrated to the American colonies to escape religious persecution in Europe.³⁶ In particular, they sought to escape “established” religions that required everyone to support those religions, and aggressively persecuted those who tried to practice other religions.³⁷

Even though the Declaration of Independence made clear that the power to govern flows from the “consent of the governed,” the early Americans did not unequivocally embrace government, even democratic government, and instead sought to limit and constrain governmental power. The Constitution was written at a time when Europe was governed primarily by monarchs, and many philosophical writers of the time were keenly aware of the risks that monarchies

32. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

33. See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 18, at 16 (“Uncertain that any government over so vast a domain as the United States could be controlled by the people, the anti-federalists saw in the enlarged powers of the central government only the familiar threats to the rights and liberties of the people.”).

34. See PAINE, *supra* note 26, at 3.

35. See, e.g., THE DECLARATION OF INDEPENDENCE ¶¶ 3–30 (U.S. 1776) (listing the grievances against the English King (although, in fact, some of the offenses had been committed by the British Parliament rather than the King)).

36. SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 490 (1902); see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947) (“A large proportion of the early settlers of this country came here from Europe to escape the bondage laws which compelled them to support and attend government-favored churches”).

37. COBB, *supra* note 36, at 490.

posed.³⁸ For example, Thomas Paine argued that monarchs become “poisoned by importance” and ultimately are “the most ignorant and unfit of any throughout the dominions.”³⁹ He goes on to note,

*How came the king by a power which the people are afraid to trust, and always obliged to check? Such a power could not be the gift of a wise people, neither can any power, which needs checking, be from God; yet the provision, which the [British] constitution makes, supposes such a power to exist.*⁴⁰

In an effort to limit and control the actions of governmental officials, the Framers embraced the ideas of Baron de Montesquieu, the French philosopher, who is credited with articulating the doctrine of separation of powers.⁴¹ In his landmark *The Spirit of the Laws*, he articulates the theory:

[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of every thing, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.⁴²

Citations to Montesquieu’s arguments regarding separation of powers appear in the Federalist Papers⁴³ and the debates at the Constitutional Convention,⁴⁴ as well as in other writings from the period.⁴⁵ More importantly, the Constitution embraces the doctrine of “separation of powers” throughout.⁴⁶ For example, although Congress has the power

38. See PAINE, *supra* note 26, at 14 (“As the exalting one man so greatly above the rest cannot be justified on the equal rights of nature, so neither can it be defended on the authority of scripture; for the will of the Almighty . . . expressly disapproves of government by kings.”).

39. *Id.* at 21.

40. *Id.* at 11.

41. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151–52 (Cosimo 2011) (1748).

42. *Id.* at 154.

43. See THE FEDERALIST No. 47 (James Madison).

44. See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 18, at 85, 237, 249, 253, 260, 288, 339, 360.

45. See *id.* at 159–60, 163, 166–67, 240, 247, 259–60, 357.

46. See *id.* at 6 (“Also, mindful of colonial experience and following the arguments of Montesquieu, the idea that the legislative, executive, and judicial powers had to be ‘separated,’ made to ‘check and balance’ each other in order to prevent tyranny, gained wide acceptance.”).

to enact legislation, the Constitution requires the President's signature as a prerequisite to enactment (unless Congress overrides the President's veto or the President allows the act to become law without his signature).⁴⁷ Likewise, although Congress and the President jointly enact legislation, the judiciary is frequently charged with interpreting that legislation, and sometimes in striking it down as unconstitutional.⁴⁸ Moreover, the President and Congress share many powers in the realm of foreign affairs. The Constitution gives the President the power to negotiate treaties, but the power to ratify rests with the Senate;⁴⁹ only Congress can declare war,⁵⁰ but the President is integrally involved in other foreign affairs issues.⁵¹ In addition, the Framers created different terms of office for different officials so that a single election could not dramatically shift the course and direction of government.⁵²

Interestingly, even though the Framers may have viewed the separation of powers principles as a sufficient check on governmental abuse, the founding generation did not agree. Reflecting the skepticism and distrust discussed earlier, they demanded additional protections. When the Framers decided not to include a bill of rights in the Constitution, believing they had created a government of limited and enumerated powers, the people of the new nation

47. U.S. CONST. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . .").

48. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803).

49. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

50. U.S. CONST. art. I, § 8, cls. 1, 11 ("The Congress shall have Power . . . To declare War.").

51. See *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

52. See U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States."); U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years."); U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years."); see also THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 18, at 8 ("Thus, for example, even though an upper and a lower house of the legislature might each *eventually* derive from the people, different districts, different terms of office, different modes of election, and different definitions of authority would create balances of power.").

disagreed.⁵³ It rapidly became clear that the Constitution might not have enough support to gain ratification without the addition of a formal bill of rights.⁵⁴ In an effort to salvage the process, proponents urged ratification of the Constitution as drafted, but promised that the first Congress would create what became the Bill of Rights.⁵⁵ Only then was ratification possible.⁵⁶ As a result, the Bill of Rights entered the Constitution as amendments rather than as a part of the Constitution itself.⁵⁷

The Appointments Clause is fully consistent with the doctrines of separation of powers and checks and balances. The President has the power to appoint “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States,” but only with the advice and consent of the Senate.⁵⁸ The Federalist Papers explicitly refer to the Advice and Consent Clause as

53. See *Murdock v. Pennsylvania*, 319 U.S. 105, 122 (1943) (Reed, J., dissenting) (mem.) (“In the Constitutional Convention the proposal for a Bill of Rights of any kind received scant attention. In the course of the ratification of the Constitution, however, the absence of a Bill of Rights was used vigorously by the opponents of the new government.” (footnote omitted)); *Ex parte Wilson*, 114 U.S. 417, 424 (1885); see also *Wallace v. Jaffree*, 472 U.S. 38, 92–93 (1985) (Rehnquist, J., dissenting) (“During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Government carried with it a potential for tyranny.”).

54. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636–37 (1943) (“Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification.”); see also *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010) (“But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution.”); *Wallace*, 472 U.S. at 92–93 (Rehnquist, J., dissenting) (noting that four states refused to ratify the Constitution without the addition of a bill of rights); *Jones v. City of Opelika*, 319 U.S. 105, 122 (1943); *Ex parte Wilson*, 114 U.S. at 424.

55. See *W. Va. State Bd. of Educ.*, 319 U.S. at 636–37.

56. See *McDonald*, 561 U.S. at 769; *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) (“The first 10 Amendments were not enacted because the Members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution.”); *City of Opelika*, 319 U.S. at 122; *Ex Parte Wilson*, 114 U.S. at 424.

57. See *McDonald*, 561 U.S. at 769 (discussing the Bill of Rights as a condition for ratification of the Constitution, thus implying that the Bill of Rights is separate from the Constitution).

58. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power . . . [to] 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 officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”).

a check on the President's appointment authority. The Federalist Papers contend that the consent requirement

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.⁵⁹

The Papers go on to note that

a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing.⁶⁰

By requiring the Senate's advice and consent, the Framers made it comparatively more difficult to appoint officials in the United States than in most other Western-style democracies. In England, by contrast, the party in power exercises broad discretion to appoint ministers and other officials.⁶¹ The British Prime Minister assumes that post either because his party holds a majority in the House of Commons or because his party has formed a coalition with other parties to produce a majority.⁶² As a result, if the Prime Minister strongly desires to make an appointment, he simply makes the appointment.⁶³ If a Prime Minister's appointments power is constrained, it is limited only by the rules or conventions of his party, as well as by other traditions and rules of British law.⁶⁴

59. THE FEDERALIST NO. 76, at 385 (Alexander Hamilton) (Ian Shapiro ed., 2009).

60. *Id.*

61. See Mark Eisen, Note, *Who's Running the Place? A Comparative Look at the Appointment System in the United States and Britain, and What the United States Can Learn*, 30 B.U. INT'L L. J. 295, 299 (2012).

62. See *id.* at 299 ("The PM, since 1867, has almost always been the [*sic*] both the 'head of government and . . . leader of the majority party' in the House of Commons, while the President is head of one branch of government and frequently at party-odds with one or both houses of Congress. The PM's appointment power has been aggregating in him over time, to the point where he now enjoys a complete, though politically restricted, power to appoint." (alteration in original) (footnotes omitted) (quoting GRAHAM P. THOMAS, PRIME MINISTER AND CABINET TODAY 51 (Bill Jones ed., 1998)) (citing THOMAS, *supra*, at 97).

63. See *id.* at 304 ("The PM appoints cabinet Ministers and appoints, or delegates to Ministers to appoint, various other, lower level political positions.").

64. See *id.* at 304-08.

In the United States, by contrast, because the President and one or more houses of Congress have often been held by different political parties, the President's preferred appointments are not always rubber-stamped, or necessarily even accepted. Although President Obama was relatively fortunate to have a Senate controlled by his own party for the first six years of his presidency, he now faces working with a Senate that is controlled by the opposing political party.⁶⁵ Other recent presidents have faced a similar situation. For example, during parts of their presidencies, both President George W. Bush and President William Jefferson Clinton confronted a Senate controlled by the other party.⁶⁶

During periods of divided government, it is not at all surprising that Presidents have encountered difficulties confirming their nominees. Indeed, during both the Clinton and Bush presidencies, there were numerous confirmation battles, with the Republicans objecting to Clinton nominations⁶⁷ and Democrats objecting to Bush nominations.⁶⁸ However, opposition to nominees has hardly been limited to situations in which the presidency and the Senate are controlled by different political parties—there have been instances

65. See HOGUE, *supra* note 14, at 7–12.

66. See *id.*; see also Robin Toner, *Bush Agenda Now Faces Tough Sledding in Senate*, N.Y. TIMES, May 25, 2001, at A19 (“The shift of the Senate to Democratic control means that strong critics of some of Mr. Bush’s core policy proposals will now be in charge of the committees, the legislative calendar and much of the policy debate.”); Sean Wilentz, Letter to the Editor, *The Battle over the Filibuster*, N.Y. TIMES, Apr. 29, 2005, at A24 (noting that the Republicans took control of the Senate in 1995).

67. See HOGUE, *supra* note 14, at 7–12; Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 225 (2006); see also Editorial, *Blocking Judicial Ideologues*, N.Y. TIMES, Apr. 27, 2001, at A24 (stating that following George W. Bush’s election, “Senate Republicans who spent the better part of the past eight years stalling confirmation proceedings to block approval of President Clinton’s centrist judicial choices are now maneuvering to fill as many of the existing 94 judicial vacancies as possible while their party still controls the evenly divided chamber”); Wilentz, *supra* note 66 (noting that “the Republican majority blocked 35 percent of President Bill Clinton’s nominees to the federal appeals bench without giving them an up-or-down vote”).

68. See Slotnick, *supra* note 67, at 240 (“The most recent period corresponds to the six years of divided government in the Clinton Administration and Bush II’s first term, which saw two years of divided government and two years with a slight Republican majority and strong unified Democratic opposition.”); see also Neil A. Lewis, *G.O.P. Seeks to Ease Rules on Filibusters of Judgeships*, N.Y. TIMES, May 10, 2003, at A15 (discussing Republican efforts to “overcome the filibusters that the Democrats have mounted to block votes on two nominees to the federal appellate courts”); Wilentz, *supra* note 66 (“By contrast, President Bush has, since 2001, nominated 34 candidates to the federal circuit courts, 10 of whom the Democrats have blocked with filibusters—or just under 30 percent.”).

when the President's own party has stymied presidential nominations.⁶⁹

Interestingly, it is not clear that the Framers were in complete agreement regarding the need to “check” and “balance” the President's appointments power. At the Constitutional Convention, various proposals regarding that power were offered.⁷⁰ Some proposals would vest the appointments power solely in the President for all appointments, solely in the Senate (for the appointment of judges), or solely in lawyers (for judges).⁷¹ Ultimately, the Framers settled on the advice-and-consent formulation,⁷² which set the stage for the confirmation battles that inevitably followed.

II. THE HISTORICAL REALITIES OF THE CONFIRMATION PROCESS

In the course of U.S. history, the advice-and-consent formulation has served as a check and a balance against the President's appointments power. As a general rule, the Senate is relatively deferential to the President's choices regarding cabinet-level nominations.⁷³ Of the hundreds of cabinet-position nominations between the Founding and 2011, the Senate rejected only fifteen.⁷⁴ By contrast, the Senate has been much less deferential regarding the President's nominees to the federal judiciary. During that same period, 36 of the 160 nominations to the Supreme Court did not make it through the confirmation process.⁷⁵ Twelve of those nominees never made it out of committee to a vote on the Senate floor, and thirteen of those who did make it out of committee never received an up or down vote in the Senate.⁷⁶

This “checking” function of the advice-and-consent formulation is reflected in the fact that, when the President and the Senate hold similar ideological beliefs, Presidents have been more likely to

69. See BETH & PALMER, *supra* note 14, at 6 (noting that President Tyler's own party rejected most of his Supreme Court nominations); *id.* at 9 (referring to President Grant's nomination of Ebenezer Rockwood Hoar); *id.* at 10–11 (referring to President Hoover's failed attempt to nominate John J. Parker to the Supreme Court); HOGUE, *supra* note 14, at 10.

70. See Adam J. White, *Toward the Framers' Understanding of “Advice and Consent”*: A Historical and Textual Inquiry, 29 HARV. J.L. & PUB. POL'Y 103, 110–22 (2005).

71. *Id.*

72. *Id.* at 110.

73. See BETH & PALMER, *supra* note 14, at 1.

74. *Id.*

75. *Id.*

76. *Id.*

nominate judicial candidates who shared those beliefs.⁷⁷ By contrast, when the President's ideology has differed significantly from that of the Senate, the President has tended to moderate his selections in the direction of the Senate's views in an effort to obtain confirmation for his choices.⁷⁸ In other words, the Senate's advice-and-consent authority has served as a direct check on the President's nomination authority.

While there is a tendency to assume that the Bork nomination sparked a new era in which the ideological views of nominees were subjected to greater scrutiny, that is hardly the case.⁷⁹ Of the thirty-six nominees to the Supreme Court that were rejected between 1789 and 2007,⁸⁰ only a few were rejected as "unqualified,"⁸¹ and a number were rejected for ideological reasons.⁸² Moreover, in the eighteenth and nineteenth centuries, well before Bork was even born, the Senate failed to confirm some twenty-six Supreme Court nominees, some for ideological reasons (as detailed more fully below).⁸³

In the early years of the nation, the Senate acted on most presidential nominations fairly quickly, sometimes within a day after the President transmitted the nomination to the Senate.⁸⁴ For example, President Washington's initial nominations to the Court were sent to the Senate in 1789 and all six were confirmed within two days.⁸⁵ Even in later years, some nominees were quickly confirmed.

77. See Christine Kexel Chabot, *A Long View of the Senate's Influence over Supreme Court Appointments*, 64 HASTINGS L.J. 1229, 1232–33 (2013) ("Byron Moraski and Charles Shipan's leading study considers twenty-eight persons nominated to the Supreme Court from 1949 to 1994. They find that presidents nominate ideologically compatible Justices when they are 'unconstrained by the Senate.'" (footnote omitted) (citing Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1077 fig.3 (1999))).

78. See *id.* at 1233 ("Constrained presidents, however, nominate Justices closer to the Senate's ideology than the president would otherwise prefer." (citing Moraski & Shipan, *supra* note 77, at 1077 fig.3)).

79. See HOGUE, *supra* note 14, at 13–14; see also Greenberg, *supra* note 5 ("Although Mr. Bork's confirmation certainly represented a major battle of the Reagan years, the campaign to defeat him was neither unprecedented nor illegitimate.").

80. See HOGUE, *supra* note 14, at 1.

81. *Id.* at 13–14.

82. *Id.* at 1 ("The Supreme Court nominations discussed here were not confirmed for a variety of reasons, including Senate opposition to the nominating President, nominee's views, or incumbent Court.").

83. See *id.* at 22–30 tbl.4.

84. See BETH & PALMER, *supra* note 14, at Summary (listing nominations and the length of time required to confirm them).

85. *Id.* at 4.

For example, the nomination of President William Howard Taft was received, debated, and voted on within a day.⁸⁶

Despite the quickness of the process in the eighteenth and nineteenth centuries, some Supreme Court nominees were withdrawn or rejected on ideological grounds.⁸⁷ Even President Washington's nominee for the position of Chief Justice was rejected in 1795 because of a speech that the nominee made opposing the Jay Treaty—a treaty supported by the Federalists, who dominated the Senate, and who provided thirteen of the fourteen “no” votes on the nomination. Another of Washington's nominees, William Paterson, was withdrawn without debate.⁸⁸ During the early and middle parts of the nineteenth century, other nominees were rejected on ideological grounds.⁸⁹ For example, President John Quincy Adams nominated John Crittenden to the Supreme Court in 1828 after Andrew Jackson had been elected to the presidency.⁹⁰ Not only did President Jackson's supporters successfully oppose the nomination,⁹¹ but the Senate also decided that it was not even required to consider and vote on the nomination.⁹² In addition, Alexander Wolcott's nomination to the Court in 1811 was rejected by the Senate.⁹³

From 1835 to 1867, the nomination process became more formal, with judicial nominations being initially referred to the Senate Committee on the Judiciary.⁹⁴ Once a nomination was reported out of the Committee to the full Senate, the nomination generally received an up-or-down vote by the full Senate within a day.⁹⁵ However, during President John Tyler's presidency in the middle of the nineteenth century, the Senate rejected eight of his nine nominations to the Supreme Court (the only nominee who was confirmed was Samuel Nelson in 1845).⁹⁶ Although President Tyler was a Whig, he had

86. *Id.* at 3.

87. *See* HOGUE, *supra* note 14, at 8–12.

88. *Id.* at 8; *see also id.* at 22 tbl.4 (“Supreme Court Nominations Not Confirmed, 1789–2007.”).

89. *Id.* at 9–10.

90. *See* BETH & PALMER, *supra* note 14, at 4.

91. *Id.*

92. *Id.* at 4–5.

93. *Id.* at 4.

94. *See id.* at 5.

95. *Id.*

96. *Id.* at 6.

strained relations with his own party.⁹⁷ Tyler had been elected to the Vice-Presidency, and became President when President William Henry Harrison died only thirty-one days into his term.⁹⁸ Following Harrison's death, all but one of Harrison's cabinet members resigned, and Tyler was eventually expelled from the Whig party.⁹⁹ Accordingly, it came as no great surprise that Tyler had difficulty obtaining confirmation for his appointees following the expulsion.¹⁰⁰ Four of his nominees were tabled with no further action, and one was outright rejected.¹⁰¹

Other Presidents' Supreme Court nominations encountered similar difficulties. For example, President Millard Fillmore's nomination of George E. Badger in 1853 was stalled for a considerable period of time and ultimately failed.¹⁰² Fillmore, a Whig, was a lame-duck president who was going to be succeeded by a Democrat, Franklin Pierce.¹⁰³ The Senate, which was controlled by Democrats, decided not to vote on Badger's nomination during the four months remaining in Fillmore's term, thereby allowing his successor, Pierce, to make the appointment.¹⁰⁴

By 1868, the confirmation process had become significantly more complex. By that time, the Senate had adopted a detailed rule requiring that nominations first be referred to the Senate Committee on the Judiciary.¹⁰⁵ In the following decades (1868-1922), the Senate confirmed most nominees within a day or two after they were reported out of committee to the full Senate, but there were some exceptions.¹⁰⁶ For example, the Senate rejected the nomination of Ebenezer Rockwood Hoar in 1869.¹⁰⁷ Hoar, who was the sitting U.S. Attorney General at the time of his nomination, had angered senators with his recommendations for federal circuit-court judges.¹⁰⁸ Although

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.*

101. *Id.*

102. *Id.* at 7.

103. *Id.*

104. *Id.*

105. *Id.* at 7-8 ("When nominations shall be made by the President of the United States to the Senate, they shall . . . be referred to appropriate committees; and the final question on every nomination shall be 'Will the Senate advise and consent to this nomination?'").

106. *Id.* at 8.

107. *Id.* at 9.

108. *Id.*

most senators had preferred nominees for those judgeships, Hoar ignored their preferences, instead making his own recommendations, and President Grant routinely chose Hoar's recommendations over those of the senators.¹⁰⁹ Moreover, Hoar's demeanor was not engaging.¹¹⁰ Hoar's confirmation vote was delayed for two months, and he was eventually voted down by a 24–33 vote.¹¹¹

During the beginning of the twentieth century, no Supreme Court nominees were rejected on ideological grounds.¹¹² By this time, the confirmation process was becoming much more formalized.¹¹³ The Senate had instituted the so-called "Calendar Call" under which nominations that had been reported out of committee would be placed on the Senate's calendar of business and would be called up in the order in which they appeared on the calendar.¹¹⁴ A nomination could be considered "early" (ahead of its place in the calendar) by unanimous consent, or a controversial nomination could be passed over when it's time for consideration arrived.¹¹⁵ Further, although many Senate debates regarding Supreme Court nominations had previously been held in secret, they were now held in public.¹¹⁶ Even before this time, some nominations had been publicly debated in the Senate. For example, the 1916 nomination of Louis D. Brandeis to the Supreme Court encountered significant opposition,¹¹⁷ in part because of anti-Semitism and in part because of his left-leaning inclinations,¹¹⁸ and a decision was made to make the proceedings public.¹¹⁹ Nevertheless, he was confirmed by a 47–22 vote.¹²⁰

By the 1930s, the Supreme Court nomination process was becoming much more contentious. For example, President Herbert Hoover nominated John J. Parker to the Supreme Court in 1930.¹²¹

109. *Id.*

110. *Id.*

111. *Id.*

112. See HOGUE, *supra* note 14, at 8–12. Although William B. Hornblower and Wheeler H. Peckham were rejected during this time period, both were rejected on "senatorial-courtesy" grounds. See ABRAHAM, *supra* note 1, at 114–15.

113. See BETH & PALMER, *supra* note 14, at 3.

114. *Id.* at 10.

115. *Id.*

116. *Id.*

117. *Id.* at 36.

118. See ABRAHAM, *supra* note 1, at 142–43.

119. See BETH & PALMER, *supra* note 14, at 10.

120. *Id.* at 36.

121. *Id.* at 10–11.

Even though Hoover was a Republican, and even though Republicans held a sizeable majority in the Senate, there was significant opposition to the nomination.¹²² The opposition focused on Parker's judicial ruling on so-called "yellow dog" labor contracts (under which an employer could require an employee to sign a statement indicating that he would not join a union), and on his racist comments when running for the position of Governor of North Carolina. Parker had stated that African-Americans do not wish to participate in politics, and that the Republican party did not wish for them to do so.¹²³ The nomination was stalled for nearly two months, and was ultimately rejected by a 39–41 vote.¹²⁴

President Franklin D. Roosevelt's nomination of William O. Douglas to the Supreme Court in 1939 was also contentious.¹²⁵ Douglas's nomination did not encounter any resistance in committee, but between the committee session and the floor debate, opposition developed surrounding Douglas's perceived relationship with members of the New York Stock Exchange.¹²⁶ Senator Lynn Frazier of North Dakota argued Douglas had an improper relationship with the leaders of the New York Stock Exchange. The nomination was passed over twice on the Call of the Calendar, in order to facilitate fuller debate.¹²⁷ Nevertheless, the Senate ultimately confirmed Douglas's nomination by a comfortable margin.¹²⁸

In the last six decades, the confirmation process has usually proceeded under rules that limit debate, preclude certain procedural actions, and do not require adherence to the Calendar Call.¹²⁹ In the modern era, several weeks can elapse between the time that a nomination is made and a vote on confirmation, and the process can sometimes require months to complete.¹³⁰ Consistent with the idea that the Senate takes its advice-and-consent responsibilities seriously, the length and scope of the review process has varied depending on

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 12.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

the nominee.¹³¹ As a Congressional Research Service report notes, “the Senate has reserved to itself the right to take the course of action that it believes best suits consideration of a particular nomination.”¹³² For some nominees, the process can take place in a relatively quick and uncomplicated manner.¹³³ For more controversial nominees, the process can be more searching and intense.¹³⁴

In a number of instances during the twentieth century, the Senate’s review process focused on ideological considerations. Indeed, a number of Supreme Court nominees were either rejected or not confirmed on ideological grounds, including President Johnson’s nomination of Abraham Fortas as Chief Justice,¹³⁵ President Eisenhower’s nomination of John Harlan II (although he was later confirmed),¹³⁶ and President Nixon’s nomination of Clement Haynsworth, Jr.¹³⁷ In addition, some nominees were never reported

131. *Id.* As a Congressional Research Service report noted, a review of all Supreme Court nominations since 1789 yields two general conclusions about the procedures used. First, the Senate has not felt bound to consider each nomination in exactly the same way that the others before it were considered. Although some Supreme Court nominations, for example, never reached the Senate floor (and hence, did not receive a vote), the Senate spent numerous days debating other nominations. Neither of those practices has been routine, but their use shows how the Senate has reserved to itself the right to take the course of action that it believes best suits consideration of a particular nomination. *Id.* at 2.

132. *Id.*

133. *Id.*

134. *Id.*

135. HOGUE, *supra* note 14, at 11. Although there are suggestions that other factors may have played a role in the rejection of Fortas as Chief Justice, some senators clearly opposed him because of his judicial philosophy:

One Senator wrote that Fortas’s “judicial philosophy disqualifies him for this high office.” Another criticized Fortas as part of the majority on the Supreme Court led by Chief Justice Earl Warren (the Warren Court) making an “extremist effort . . . to set itself up as a super-legislature.” A third Senator also found Fortas lacking on the “broader question of the nominee’s judicial philosophy which includes his willingness to subject himself to the restraint inherent in the judicial process.” Yet another Senator objected to “positions taken by Justice Fortas since he went on the Supreme Court as Associate Justice [which had] reflected a view to the Constitution insufficiently rooted to the Constitution as it is written.”

Id. (alteration in original) (quoting *Nomination of Abe Fortas: Hearing Before the Sen. Comm. On the Judiciary*, 90th Cong. 15–44 (1968)).

136. *Id.* at 10–11. However, in his initial nomination, the Senate failed to act before its special session ended. See ABRAHAM, *supra* note 1, at 205 (providing background for the chronology of events). When he was finally considered, although he was comfortably confirmed, there was significant opposition. HOGUE, *supra* note 14, at 10–11 (“Among the objections to his nomination was the perception by some Senators that Harlan was ‘ultra-liberal,’ hostile to the South, [and] dedicated to reforming the Constitution by ‘judicial fiat.’” (quoting ABRAHAM, *supra* note 1, at 263)).

137. HOGUE, *supra* note 14, at 11 (“[O]ne Senator opposed the nomination on the basis of the judge’s record on civil rights issues. Furthermore, Haynsworth drew criticism from labor and

out of the Judiciary Committee to the floor of the Senate.¹³⁸ Some of these nominees were resubmitted and ultimately confirmed.¹³⁹

In the last six decades, a number of confirmation proceedings have been contentious. For example, when President Nixon nominated William H. Rehnquist to be an Associate Justice in 1971,¹⁴⁰ questions were raised regarding his commitment to civil rights.¹⁴¹ Although the Committee on the Judiciary held five days of hearings and opponents were able to delay a final vote for another week,¹⁴² Rehnquist was ultimately confirmed by a sizeable majority of the Senate (68–26).¹⁴³ The 1991 Clarence Thomas hearings were particularly contentious, given the allegations that he had sexually harassed a female colleague.¹⁴⁴

When a nominee's ideological attitude might alter the ideological balance on the Court, the nomination sometimes assumes increased importance and opposition. For example, when Robert Bork was nominated, he would have replaced Justice Lewis F. Powell, Jr., who was regarded as the swing vote on an ideologically divided Court.¹⁴⁵ Much of the opposition focused on Bork's views on such hot-button issues as abortion and privacy.¹⁴⁶ By contrast, although Justice Samuel

minority groups on the basis of his record.” (citing REPORT TO ACCOMPANY THE NOMINATION OF CLEMENT F. HAYNSWORTH, JR., SENATE COMM. OF THE JUDICIARY, 91st Cong., S. EXEC. REP. 91-12 at 24, 48)).

138. *Id.* at 17. However, the reasons vary. In the case of John Roberts, Chief Justice Rehnquist died while his nomination was pending, and his nomination as an associate Justice was withdrawn so that he could be nominated as Chief Justice. *Id.* In the case of some who were not initially reported out of committee, they were reported out during a subsequent session of Congress. *Id.*

139. *Id.* at 11.

140. *Id.* at 13.

141. *Id.*

142. *Id.*

143. *Id.* at 7–8.

144. Kevin T. McGuire, Book Review, 11 CONST. COMMENT. 622, 623 (1995) (reviewing CHRISTOPHER E. SMITH, CRITICAL JUDICIAL NOMINATIONS AND POLITICAL CHANGE: THE IMPACT OF CLARENCE THOMAS (1993)).

145. ABRAHAM, *supra* note 1, at 281; see also Linda Greenhouse, *The Bork Nomination: In No Time at All, Both Proponents and Opponents Are Ready for Battle: Foes on the Left Strive for Unity*, N.Y. TIMES, July 9, 1987, at A24 (lending additional support for this proposition).

146. ABRAHAM, *supra* note 1, at 282–83; see also Philip Shenon, *Poll Finds Public Opposition to Bork is Growing*, N.Y. TIMES, Sept. 24, 1987, at A20 (“A growing number of Americans are expressing an unfavorable opinion of Judge Robert H. Bork after his weeklong testimony at Senate hearings on his nomination to the Supreme Court, a New York Times/CBS News Poll shows. . . . [The unfavorable response to Judge Bork] was [due to] . . . his opposition to Supreme Court decisions upholding abortion rights and personal privacy.”).

Alito replaced Justice Sandra Day O'Connor, who was the swing vote on the Supreme Court at the time, Alito's perceived views did not thwart his nomination.¹⁴⁷

In summary, the history of the confirmation process reveals that the Bork nomination should not be regarded as aberrational. Over the last two-hundred-plus years of confirmation history, a number of nominees have been challenged (and some defeated) on ideological grounds.

III. THE SENATE'S PROCEDURAL RULES AS A ROADBLOCK TO CONFIRMATION

Separation of powers does not completely explain the current slow down in the confirmation process. Senate procedural rules create additional hurdles. Indeed, for the first six years of his presidency, President Obama was blessed with a Senate that was controlled by his own political party.¹⁴⁸ So, even though the Senate had the power to check Obama's appointments, one would have expected the Democratically controlled Senate to largely rubber-stamp Obama's wishes. Of course, that did not happen.

A variety of Senate rules can slow or obstruct the presidential confirmation process. One such rule is the cloture rule that requires a supermajority to end a filibuster.¹⁴⁹ The supermajority requirement was originally imposed by Senate Democrats who feared that President George W. Bush would stack the federal bench with

147. See 152 CONG. REC. 35, 41 (statement of Sen. Specter); 152 CONG. REC. 35, 52 (statement of Sen. Durbin); 152 CONG. REC. 35, 70–72 (statement of Sen. Clinton); 152 CONG. REC. 35, 70–72 (statement of Sen. Specter and Sen. Leahy); 152 CONG. REC. 35, 74–75 (statement of Sen. Kerry); see also David D. Kirkpatrick, *Alito Hearings Unsettle Some Prevailing Wisdom About the Politics of Abortion*, N.Y. TIMES, Jan. 16, 2006, at A10 (“Judge Alito, in particular, aroused the ire of abortion rights supporters because of two memorandums he had written . . . [about his] disagreement with the abortion rights decisions. Abortion rights groups called the memorandums the most extensive written record of a Supreme Court nominee's opposition to the abortion rights precedents since 1987, when the Senate rejected Judge Robert H. Bork.”).

148. See Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1106; see also Michael D. Shear & Carl Hulse, *G.O.P. To Act Swiftly in Promoting Its Agenda*, INT'L N.Y. TIMES, Nov. 6, 2014, at A1 (“The voting on Tuesday gave Republicans control of the Senate and added substantially to their majority in the House. Republicans won many of the most closely contested governors' races.” (emphasis added)).

149. STANDING RULES OF THE SENATE, R. XXII, in COMM. ON RULES & ADMIN., SENATE MANUAL, S. DOC. NO. 113-1, at 20 (2014); see Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 982 (2013) (emphasizing the ways in which the rule can be utilized to achieve certain political goals).

conservative appointees.¹⁵⁰ Naturally, when President Obama took office, Republicans used the rule to stop his nominees.¹⁵¹ Because of the recent changes to the filibuster rule, the Senate can confirm presidential appointees (except for Supreme Court nominees) by a simple majority vote.¹⁵² With the rules change, the process has been returned (by and large) to the rules that applied prior to the election of Bush II.¹⁵³ However, even after Senate Democrats altered the filibuster rule, fifty-nine nominations languished, including nominations for key ambassadorial appointments (such as Russia and Turkey), and a number of senior State Department officials.¹⁵⁴ This delay is likely due to the fact that following the amendment of the filibuster rules, Senate Republicans refused to fast-track presidential appointees.¹⁵⁵

An additional obstacle is the notion of senatorial courtesy.¹⁵⁶ In the nineteenth century, seven Supreme Court nominees were thwarted by the objections of senators from their home states.¹⁵⁷ For nominations to the lower federal courts, senators can now invoke the so-called “blue-slip” policy that allows senators to effectively veto nominees from their states.¹⁵⁸ The policy allows a senator to achieve that objective by failing to return the blue slip.¹⁵⁹ The return signals

150. Charlie Savage, *Despite Filibuster Limits, a Door Remains Open to Block Judge Nominees*, N.Y. TIMES, Nov. 29, 2013, at A18.

151. *Id.* (“After Mr. Obama was elected, Senate Republicans escalated the practice, routinely delaying the confirmation of executive branch and judicial nominees and blocking up-or-down votes on four District of Columbia Circuit nominees.”).

152. *Id.*; see generally Akhil Reed Amar, *Lex Majoris Partis: How the Senate Can End the Filibuster on Any Day by Simple Majority Rule*, 63 DUKE L.J. 1483 (2014) (predicting, in lecture given before the filibuster reform, how changes to the filibuster rules would impact the operation of the Senate).

153. STANDING RULES OF THE SENATE, R. XXII, *supra* note 149, at 20.

154. Carol Giacomo, *Why Doesn't the United States Have an Ambassador in Russia?*, TAKING NOTE (July 17, 2014, 11:25 AM), <http://takingnote.blogs.nytimes.com/2014/07/17/why-doesnt-the-united-states-have-an-ambassador-in-russia/?gwh=C7745F61EB6BEA957DEA2832D313E1C3&gwt=pay&assetType=opinion>.

155. *Id.*

156. See HOGUE, *supra* note 14, at 13.

157. *Id.*

158. Rachel Brand, *Judicial Appointments: Checks and Balances in Practice*, 33 HARV. J.L. & PUB. POL'Y 47, 50 (2010); Savage, *supra* note 150; Wilentz, *supra* note 66.

159. See Ryan J. Owens, Daniel E. Walters, Ryan C. Black & Anthony Madonna, *Ideology, Qualifications and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 352 (“[N]ominee ideology and qualifications both independently influence whether Senators *blue slip* lower federal court nominees, with ideology playing a stronger role. [A]

approval of a nominee to the Chairman of the Judiciary Committee, and a failure to return signals potential disapproval.¹⁶⁰ However, the blue-slip policy only applies when both of the senators from a state fail to return the required blue slip.¹⁶¹ At one point in Senate history, the failure to return the blue slip meant that a nomination effectively died.¹⁶² Today, when neither senator returns the blue slip, the nominee may be accorded a Senate hearing, but the nomination will not advance beyond that stage.¹⁶³

Since the blue-slip policy discourages Presidents from nominating judges unless both home state senators agree to the nomination,¹⁶⁴ the policy can force more liberal Presidents to nominate more conservative judges, or vice versa, in an effort to avoid a blue-slip veto.¹⁶⁵ For example, in 2014 there was considerable controversy regarding the nomination of Michael P. Boggs, a sitting state judge, to a seat on a federal district court.¹⁶⁶ In an effort to fill judicial vacancies in Georgia, President Obama agreed with Republican senators from that state to nominate various individuals to federal judgeships, including Boggs.¹⁶⁷ However, Boggs ran into substantial opposition from Democratic interests and liberal activists.¹⁶⁸ Effectively, the blue-slip policy functions as a veto.¹⁶⁹ And so, in the final analysis, Senate rules have had a significant impact on a President's ability to confirm his nomination choices.

Senator is more likely to *blue slip* a lower federal court nominee who is ideologically distant from her than an ideologically close nominee." (emphasis added)).

160. See Brand, *supra* note 158, at 50; see also Safire, *supra* note 15 (further describing this process).

161. See Safire, *supra* note 15.

162. *Id.*

163. *Id.*

164. See Savage, *supra* note 150.

165. See Carl Hulse, *Post-Filibuster, Obama Faces New Anger Over Judicial Choices*, N.Y. TIMES, Feb. 28, 2014, at A14 (discussing two judicial nominees from the State of Georgia who were being opposed by progressive groups).

166. See Carl Hulse, *Obama Judicial Choice Is Urged to Withdraw*, N.Y. TIMES, Sept. 23, 2014, at A19 (discussing Boggs's nomination).

167. *Id.*

168. *Id.*

169. Hulse, *supra* note 165 (quoting Kathryn Ruemmler, White House counsel).

IV. MODERN CONFIRMATION BATTLES: RECOGNITION THAT THE APPOINTMENTS PROCESS MATTERS FOR JUDICIAL APPOINTMENTS

One of the reasons that the confirmation process for judicial appointments has become so politicized is that the ideology of judicial nominees matters a great deal. Over time, Congress and the general public have come to realize that law is not simply a deductive process, that the Supreme Court “makes law,” and that the ideological views of those appointed to the Court affect the laws they make. The confirmation process simply reflects this reality, and the process has necessarily become more contentious.

At one point in U.S. history, there were those who regarded law as a science and who believed that law should be studied by scientific methods.¹⁷⁰ Christopher Columbus Langdell, an early dean of the Harvard Law School, was a proponent of this view.¹⁷¹ He believed that just as a physicist or biologist might search for immutable scientific truths, law professors and their students should search for the fundamental (and scientific) principles of law.¹⁷² Langdell argued that law could be simplified into “comparatively few absolute rules,”¹⁷³ and that the scientific method should be used to search for those rules.¹⁷⁴ For Langdell, the scientific method involved an examination of

170. See, e.g., Charles William Eliot, President, Harvard Law Sch., Speech at the Harvard Law School Association (Nov. 5, 1886), in 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL 361 (1908); see also ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 56 (1953) (discussing the policy in greater detail); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 262 (1950) (same); Samuel F. Batchelder, *Christopher C. Langdell*, 18 GREEN BAG 437, 438 (1906) (same); Louis D. Brandeis, *The Harvard Law School*, 1 GREEN BAG 10, 19 (1889) (same); Edward J. Phelps, *Methods of Legal Education*, 1 YALE L.J. 139, 148 (1892) (same).

171. See Christopher Columbus Langdell, Professor, Harvard Law Sch., Speech at the Harvard Law School Association (Nov. 5, 1886), in WARREN, *supra* note 170, at 374 (illustrating this viewpoint).

172. Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 502 (1920) (describing this sentiment); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 581 (1987).

173. See Fessenden, *supra* note 172, at 506; Spiegel, *supra* note 172, at 581.

174. Spiegel, *supra* note 172, at 581–82.

“original sources”¹⁷⁵—the printed reports of cases¹⁷⁶—that students should study to uncover fundamental rules and principles.¹⁷⁷

One might assume that the appointments process would have been less political while Langdellian formalism was in vogue. After all, if law really is a science focused on unearthing the “fundamental rules and principles of law,” the ideology of the nominee should be less important. The confirmation process need only focus on whether the nominee is a good scientist, and therefore is capable of discovering and applying the “fundamental rules and principles.” If so, the nominee should be confirmed and should be capable of scientifically interpreting constitutional language and applying it to the facts of specific cases.

One can debate whether Langdell really believed that law is a science. At the time, law schools were struggling to survive, and many viewed law as a craft that was best taught through the apprentice method.¹⁷⁸ Within universities, there were many who questioned whether law was an academic discipline that was worthy of study in a university environment.¹⁷⁹ By arguing that law was a “science,” in the same sense as the physical sciences, Langdell was able to shift the debate and justify the presence of law schools in a university environment.¹⁸⁰

175. James Barr Ames, *Professor Langdell—A View of His Career*, 20 HARV. L. REV. 1, 2 (1906); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1304 (1947); Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 449 (1981); Batchelder, *supra* note 170, at 439.

176. HURST, *supra* note 170, at 262.

177. See C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* viii (Lawbook Exchange 1999) (1871):

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases.

See also HARNO, *supra* note 170, at 57 (providing further explanation of this viewpoint); Batchelder, *supra* note 170, at 438–39 (same); Brandeis, *supra* note 170, at 19 (same); Rosamond Parma, *The Origin, History and Compilation of the Case-book*, 14 LAW LIBR. J. 14, 15 (1921) (same).

178. See, e.g., THORSTEIN VEBLÉN, *THE HIGHER LEARNING IN AMERICA* 211 (1993). As a result, many early law schools struggled to survive. As such, Langdell’s “law as a science” argument might have been used simply to justify teaching law in university settings. *Id.*

179. *Id.*

180. See Russell L. Weaver, *Langdell’s Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 531 (1991).

By the early twentieth century, attitudes regarding the nature of law and judging had moved in a radically different direction.¹⁸¹ By that time, Langdell's formalistic and scientific approach to law had fallen under attack first by the Realists¹⁸² and then by the Critical Legal Studies movement.¹⁸³ As time passed, it became clear that the Supreme Court was not simply declaring the law, or unearthing the "fundamental principles of law" through some sort of scientific method, but was engaged in law creation.¹⁸⁴

Even though the Court may be interpreting constitutional text, the difficulty is that most constitutional provisions are so vague and ambiguous that the Justices have great leeway in construing those provisions. The leeway is evident when one examines the language of specific constitutional provisions (such as due process, equal protection, freedom of speech), as well as the evidence of the Framers' intent regarding those provisions. For example, does the Due Process Clause, which is phrased in procedural terms, have a substantive component?¹⁸⁵ Likewise, does the right to equal

181. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 43 (1977) ("The jurisprudential premise of Langdell and his followers was that there is such a thing as the one true rule of law which, being discovered, will endure, without change, forever. This strange idea colored, explicitly or implicitly, all the vast literature which the Langdellians produced."); Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 225 (1974); Weaver, *supra* note 180, at 545.

182. John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 86 (1995); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2078 (1995) ("As Grant Gilmore put it, 'if Langdell had not existed, we would have had to invent him. . . . However absurd, however mischievous, however deeply rooted in error it may have been, Langdell's idea [that law is a science] shaped our legal thinking for fifty years.'" (alterations in original) (quoting GILMORE, *supra* note 181, at 42)); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1456 (1990).

183. See Hasnas, *supra* note 182, at 85.

184. See Lininger, *supra* note 4, at 1316 ("Dworkin argues that judges' subjective, value-laden conceptions of justice are central to their adjudication, even when the judges aspire to absolute textual fidelity."); see generally ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* 1 (2012) (suggesting that the Supreme Court functions more like "a political veto council" than a court).

185. The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The language appears to be "procedural" because it seems to suggest that individuals may be deprived of "life, liberty, or property" only if they are provided with the procedural protection of due process of law. However, the phrase has been broadly defined to have a substantive component that includes, for example, the right to have an abortion. See, e.g., *Roe v. Wade*, 410 U.S. 113, 160 (1973) ("A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without

protection prohibit discrimination against same-sex marriages?¹⁸⁶ Does the Free Speech Clause prohibit hate speech,¹⁸⁷ defamatory speech,¹⁸⁸ or seditious libel?¹⁸⁹ One can search the language and accompanying evidence of the Framers' intent without finding clear or definitive answers to these questions.

Part of the difficulty is that the Justices do not agree regarding the methodology that should be used in interpreting the Constitution. While some Justices are proponents of interpreting the Constitution according to historical analysis,¹⁹⁰ or by reference to some touchstone like "original intent" or "original meaning,"¹⁹¹ other Justices subscribe to the notion of a "living Constitution."¹⁹² With such differing approaches, it is no surprise that the Justices disagree regarding the meaning of specific constitutional provisions. As a result, the Justices have produced thousands of pages of opinions on a variety of issues, and a single phrase in a constitutional amendment can produce hundreds of pages of text in modern casebooks.¹⁹³ In other words, the ideology of the judge assigned to a case can have an important impact on the outcome of that case.¹⁹⁴

If the public believes that judges are applying "neutral principles of law," in the way that a Langdellian scientist might have done, the

regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.").

186. See *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

187. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

188. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

189. See *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964).

190. See *McDonald v. City of Chicago*, 561 U.S. 742, 788 (2010) (plurality opinion) ("To begin, while there is certainly room for disagreement about *Heller's* analysis of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen the question there decided. Few other questions of original meaning have been as thoroughly explored.").

191. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1835 (2014) (Thomas, J., dissenting).

192. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 899 (2005) (Scalia, J., dissenting); see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 290 (1988) (Brennan, J., dissenting); *Rummel v. Estelle*, 445 U.S. 263, 307 (1980) (Powell, J., dissenting) ("We are construing a living Constitution.").

193. Because of the realities of judicial decisionmaking, Professor Eric Segall has argued that "the Justices employ the fancy but misleading jargon of constitutional law (text, history, and prior cases) to hide the personal value judgments that actually support their decisions." SEGALL, *supra* note 184, at 3. Professor Segall goes on to argue that the Supreme Court Justices "do not treat prior law in a way that generates their constitutional decisions nor do they consistently offer the true justifications for the results they reach." *Id.*

194. See generally CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (analyzing the influence of ideology on judicial voting).

identity and, more particularly, the ideology of judicial nominees might be less controversial and less contentious. Understandably, there has been a conscious effort to conceal judicial realities from the public. As Judge Harry T. Edwards stated, if the public really understood that judicial decisionmaking is ideologically driven, there would be a risk that the public would lose trust in the judicial system.¹⁹⁵

Over time, however, the press and the public have come to realize and publicize the fact that the identity of judges is important to the outcome of decisions. Newspapers decry a Supreme Court that they regard as having a corporate bent,¹⁹⁶ as insensitive on racial or minority issues,¹⁹⁷ and as overly protective of First Amendment rights in the campaign-finance area.¹⁹⁸ They also complain about what they regard as an activist Supreme Court,¹⁹⁹ on which Justices are inclined to impose their own views of the world as they decide “legal” cases.²⁰⁰ Likewise, the press sometimes cries foul when a case is assigned to a judge who might be seen as unsympathetic. For example, the *Louisville Courier-Journal* expressed concern recently when a same-sex-marriage case was assigned to what it referred to as a “GOP-leaning panel.”²⁰¹ Of course, the clear implication of the article was that a same-sex-marriage case would receive a more hostile reception from a Republican-appointed panel than it would from a Democratic-leaning panel.

195. See Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1336–37 (1998).

196. See Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1 (“[A] liberal group . . . found that the positions supported by the [C]hamber [of Commerce] prevailed 68 percent of the time in the Roberts court, compared with 56 percent in the last 11 years of the Rehnquist court, a period without changes in the court’s membership.”).

197. See Linda Greenhouse, Op-Ed., *The Next Nine Years*, N.Y. TIMES (Oct. 1, 2014), <http://www.nytimes.com/2014/10/02/opinion/the-next-nine-years.html> (“It has been an eventful nine terms for the court and its chief. Samuel A. Alito Jr . . . has provided Chief Justice Roberts with a reliable if narrow majority for the court’s steady regression on race and its deregulatory hijacking of the First Amendment.”).

198. See *id.*

199. Adam Liptak, *How Activist Is the Supreme Court?*, N.Y. TIMES, Oct. 13, 2013 (Sunday Review), at 4.

200. See Jeff Shesol, *Rightward Bound*, N.Y. TIMES, July 6, 2014, at BR10 (“It is not a coincidence that the labels that many detractors apply to the court under Chief Justice John G. Roberts Jr. are the same ones they attach to Scalia: ‘stuck in the past,’ ‘pro-business,’ ‘disconnected from the real world.’”).

201. See Andrew Wolfson, *Gay Marriage Appeals Get GOP-Leaning Panel*, COURIER-JOURNAL (July 23, 2014, 10:14 PM), <http://www.courier-journal.com/story/news/2014/07/23/kentucky-gay-marriage-appeal-heard-panel-conservative-judges/13016615>.

Public awareness of the nature of judicial decisionmaking is further enhanced by media outlets emphasizing the fact that the ideology of Supreme Court Justices can affect the outcome of cases. Media emphasis on the Justices' ideologies further enhances public awareness of the potential politics behind judicial decisionmaking. For example, a recent National Public Radio (NPR) program on the Supreme Court focused extensively on the ideological leanings of the current Justices,²⁰² and the future composition of the Court.²⁰³ One commentator asked whether one of the more liberal Justices might choose to retire "while there is still a Democratic president in office."²⁰⁴ Of course, the clear implication of such speculation is that a liberal president would be more likely to nominate a liberal Justice, and thereby preserve liberal seats on the Court. If that implication were not clear enough, the commentator then asked NPR legal correspondent Nina Totenberg whether Justice Ruth Bader Ginsburg would opt to retire before President Obama left office.²⁰⁵ Totenberg doubted that Justice Ginsburg would choose to retire,²⁰⁶ noting that Justice Ginsburg sees no reason to retire "when there is little if any likelihood that President Obama could get through the Senate somebody who she would like to have replace her."²⁰⁷

As the press has emphasized the political nature of judicial decisionmaking, the public has begun to take the nomination process seriously and to view the confirmation process as political. The defeat of the Bork nomination reflected the fact that the public understands the importance of ideology. Today, there are a number of hot-button issues that have made their way to the federal courts, and in particular to the Supreme Court, including cases involving abortion,²⁰⁸ campaign finance,²⁰⁹ immigration,²¹⁰ affirmative action,²¹¹ same-sex

202. See Ari Shapiro, *For Now, Court Stays Mum on Gay Marriage Cases*, NAT'L PUB. RADIO (Oct. 5, 2014, 7:57 AM), <http://www.npr.org/2014/10/05/353849497/for-now-court-stays-mum-on-gay-marriage-cases> (interviewing Nina Totenberg, NPR legal correspondent).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* ("Justice Ginsburg most recently said that she's not about to retire. That she'll keep doing this job as long as she can do it well.")

207. *Id.*

208. See *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

209. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014); *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

210. See *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

marriage,²¹² religious exemptions to federal laws,²¹³ electoral redistricting,²¹⁴ and the Voting Rights Act.²¹⁵ Moreover, the Court's Affordable Care Act decision in *National Federation of Independent Business v. Sebelius*²¹⁶ presented important issues regarding whether the federal government could impose a health-insurance mandate, as well as issues relating to the federal government's taxing and spending power, and the scope of the Necessary and Proper Clause and the Commerce Clause.²¹⁷ Same-sex marriage, voter identification, and early-voting laws are among other hot-button issues working their way toward the Supreme Court.²¹⁸

Under such circumstances, it is hardly surprising that the judicial-appointments process has become an intensely political process.²¹⁹ If law is regarded as indeterminate and judges are viewed as policymakers, the public is likely to be intensely interested in the appointment and confirmation process. Senators, being electorally accountable, can be expected to respond to the concerns of constituents regarding judicial nominees. As a result, one could have expected Democratic senators to balk when President George W. Bush nominated federal judges they regarded as conservative ideologues.²²⁰ Likewise, one should expect Republicans to balk if

211. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

212. See *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

213. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

214. See *Perry v. Perez*, 132 S. Ct. 934, 944 (2012).

215. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

216. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

217. See generally *id.*

218. See *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 529 (6th Cir. 2014) (affirming a district court's preliminary injunction against an Ohio early-voting law); *True the Vote v. Hosemann*, No. 3:14-CV-532-NFA, 2014 WL 4273332, at *1 (S.D. Miss. Aug. 29, 2014) (interpreting the National Voter Registration Act regarding the mandatory disclosure of certain voting records).

219. See Jeremy W. Peters, *White House Steps Up Effort to Confirm Federal Judges*, N.Y. TIMES, Apr. 29, 2014, at A13 (“‘Conservatives accepted decades ago that the selection of federal judges is a 100 percent political process,’ said Robert Raben, a political consultant who works with the White House and Democrats on nominees. ‘Progressives have been very slow to accept that fact.’” (quoting Robert Raben)).

220. See Savage, *supra* note 150 (“The use of the filibuster to require a 60-vote supermajority to confirm an appeals court nominee arose out of the bitter aftermath of the disputed 2000 presidential election, when Senate Democrats used the tactic to deny lifetime appointments for several of President George W. Bush's nominees.”).

President Obama nominates judges they regard as too liberal,²²¹ and it should not be surprising that senators sometimes move to block nominees who are unwilling to reveal their political or judicial biases.²²²

Public understanding of the nature of the confirmation process has led interest groups to treat the confirmation process politically. When an individual who is politically objectionable is nominated to the judiciary, interest groups mobilize to influence the Senate and thwart the nomination.²²³ Interest groups employ a range of tactics, including researching nominees' positions, lobbying senators, providing information to the media, arranging television advertising campaigns, sending opposition mailings, and organizing constituent letters and phone calls.²²⁴ In the case of the Bork nomination, interest groups were concerned about Bork's positions on civil rights²²⁵ and on abortion,²²⁶ and immediately galvanized and actively opposed his nomination.²²⁷ Similarly, as previously discussed, Clarence Thomas was criticized during his nomination because of his political beliefs and because of sexual harassment allegations against him.²²⁸ Not only have these constituent efforts increased in quantity, they have also increased in effectiveness.²²⁹ For example, anticipating a possible Bork

221. *See id.*

222. *See Withdrawal of the Estrada Nomination*, 149 CONG. REC. 21,977 (statement of Sen. Leahy); *see also* Neil A. Lewis, *A Filibuster Resembling Those of Decades Past*, N.Y. TIMES, Feb. 13, 2003, at A29 ("Democrats have contended that Mr. Estrada... is a stealth nominee... [someone] who has not revealed his philosophical leanings in any writings and has been named... as part of [a] White House plan to shift the courts to the right.").

223. *See* Neil A. Lewis, *Gay Rights Groups Join Opposition to Ashcroft for Justice Dept.*, N.Y. TIMES, Jan. 9, 2001, at A15 (stating that gay-rights organizations, such as the Human Rights Campaign, planned to express opposition to the nomination of John Ashcroft for Attorney General).

224. *See id.* (describing efforts of gay-rights groups to influence Democratic senators' decisions over whether to oppose Ashcroft's nomination).

225. *Id.*

226. *See* Andrew Rosenthal, *Bork Fight Gives Abortion Rights Convention Something to Shout About*, N.Y. TIMES, July 13, 1987, at A12 (stating that Bork's nomination caused an abortion-rights convention to radically shift into a session "charged with activist fervor").

227. *See* Greenhouse, *supra* note 145 (describing the public's reaction to the Supreme Court vacancy, and liberal groups' anticipation that a Reagan nominee would hold interests contrary to their own).

228. *See* ABRAHAM, *supra* note 1, at 310-11 (describing Justice Thomas's techniques for avoiding Bork's mistakes).

229. *See* HOGUE, *supra* note 14, at 14 ("Observers of the Supreme Court confirmation process have suggested that interest group opposition has not only grown, but has also been effective in preventing confirmations. The impact of interest group opposition relative to other factors is a matter of continuing study.").

nomination by President Ronald Reagan, civil-rights groups started researching Bork's record for some time prior to his nomination.²³⁰

V. THE CONFIRMATION PROCESS AND NONJUDICIAL NOMINEES

The indeterminacy of law helps explain why President Obama has encountered difficulties in gaining confirmation of his judicial nominees, but it does not explain his difficulties in obtaining the Senate's confirmation of ambassador and other executive-branch appointees. As noted, throughout U.S. history, even though Presidents have sometimes encountered difficulties obtaining confirmation for their judicial appointments, particularly for Supreme Court nominees, they have had comparatively little difficulty gaining confirmation for their executive-branch appointments.

So, what has changed? One answer might be an increased polarization between the primary political parties. In fact, Congress has become noticeably more politically partisan in recent years due to a shifting political landscape.²³¹ In the aftermath of the Great Depression, the Watergate scandal, and the Vietnam War, the Democratic party held a solid and seemingly unshakeable grip on Congress.²³² However, it was bolstered by Southern Democrats who tended to be more conservative than the party as a whole.²³³ As a result, Democratic losses in the confirmation process occurred when more conservative Southern Democrats rebelled against the party position.²³⁴ Over time, the dynamics of the electorate began to change

230. See Greenhouse, *supra* note 145.

231. See Robin Toner, *Southern Democrats' Decline Is Eroding the Political Center*, N.Y. TIMES, Nov. 15, 2004, at A1 (discussing the possibility that the loss of Southern Democrats might polarize the party and Congress).

232. See Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 294 (1997) (discussing the relationship between black enfranchisement and the loss of the Democratic party's hold over the South); see also Carl Hulse & David M. Herszenhorn, *Democrats See Risk and Reward If Party Sweeps*, N.Y. TIMES, Oct. 26, 2008, at A1 (describing the double-edged sword of accountability that arises when a political party assumes power during a crisis).

233. See Karlan, *supra* note 232, at 321; see also Nate Cohn, *Why a Democratic Majority Has Yet to Materialize*, N.Y. TIMES, Apr. 24, 2014, at A3 ("The collapse of Democratic support among Southern whites threatens the party's ability to control government and enact its agenda. Democrats will find it extremely hard to retake the House without reclaiming the majority white, Southern districts once held by . . . the Blue Dog[Democrats].").

234. See HOGUE, *supra* note 14, at 8–12.

as more conservative Democrats either retired or were defeated by Republicans, who ultimately took most Southern seats.²³⁵

In recent years, there have been fewer and fewer seats that are “in play” for both parties, so-called “swing seats,” in the House of Representatives.²³⁶ Many districts are now considered “safe” because either the Republican party or the Democratic party is virtually assured victory in that district from election to election, and because the districts do not generate competitive races between members of different political parties.²³⁷ The net effect is that the battle for such districts is primarily fought in primary races in which the contest is between a more-moderate Democrat (or Republican) and a more-radical one,²³⁸ and many politicians are more fearful about a challenge from the left (for Democrats) or from the right (for Republicans) than they are about a challenge from the opposing party.²³⁹ As the number of congressional swing seats has diminished, those who prevail (on both the left and the right) tend to be more radical in their views.²⁴⁰

There are a number of possible explanations for these decidedly partisan districts. Some blame the gerrymandering of congressional districts to make them more lopsided in favor of one party, hence the reduction of “swing districts.”²⁴¹ Another possible explanation is that

235. See generally EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002) (covering the sweeping changes that occurred to the Southern political environment over the twentieth century); WALLACE HETTLE, *THE PECULIAR DEMOCRACY: SOUTHERN DEMOCRATS IN PEACE AND CIVIL WAR* (2001) (discussing the politics of antebellum Southern Democrats).

236. See Nate Cohn, *Why Democrats Can't Win*, N.Y. TIMES, Sept. 7, 2014 (Sunday Review), at 1, available at <http://www.nytimes.com/2014/09/07/upshot/why-democrats-cant-win.html> (“Today there are fewer competitive counties in presidential elections. . . . The same is true for House districts, too.”).

237. See Norman Ornstein & Barry McMillion, Op-Ed., *One Nation, Divisible*, N.Y. TIMES, June 24, 2005, at A23; Cohn, *supra* note 236.

238. See Jonathan Weisman, *House Hopefuls in G.O.P. Seek Rightward Shift*, N.Y. TIMES, Sept. 29, 2014, at A1.

239. See Ornstein & McMillion, *supra* note 237.

240. See Karlan, *supra* note 232, at 295 (asserting that otherwise powerless minority interests may be able to exert substantial political power and influence within such districts).

241. See *Gerrymandering*, 154 CONG. REC. H7284 (daily ed. July 29, 2008) (statement of Rep. Tanner); Nicholas M. Goedert, *Redistricting, Risk, and Representation: How Five State Gerrymanders Weathered the Tides of the 2000s*, 13 ELECTION L.J. 406, 406–08 (2014); see also David Firestone, *Hillary Clinton Returns to Political Life*, TAKING NOTE (Aug. 13, 2013, 1:39 PM), http://takingnote.blogs.nytimes.com/2013/08/13/hillary-clinton-returns-to-political-life/?_r=0 (“Underlying all the gridlock holding back progress on the economy, on education, on the

there has been an effort in recent years to create more “minority” districts to ensure that more minority representatives are elected to the House of Representatives.²⁴² The creation of new minority districts requires siphoning minority voters from neighboring areas into highly concentrated congressional districts. While newly created minority districts may lean heavily Democratic, surrounding districts may lean heavily Republican. As a result, in minority districts the primary battle is fought among a decidedly Democratic constituency, with a Republican candidate having little chance of prevailing, and the surrounding districts involve battles between Republican candidates.²⁴³ The net effect is that the Democratic minority districts elect more liberal Democratic representatives and the surrounding districts elect more conservative Republican representatives. As a result, there is very little communication between the increasingly liberal and increasingly conservative representatives, and little middle ground.²⁴⁴

Of course, the Senate is charged with confirming presidential nominees, not the House of Representatives. However, as the House becomes more divided along ideological lines, the Senate has increasingly been drawn into the fray.²⁴⁵ As Congress’s, or either House’s, political-party support has shifted back and forth in recent decades, the political parties have positioned themselves for political advantage.²⁴⁶ The result has been unbridled partisanship. During the Clinton administration, for example, President Clinton was impeached by the House of Representatives and forced to stand trial in the Senate.²⁴⁷ Arguably, the impeachment proceedings were politically motivated. President Bush encountered very substantial

environment and so many other matters are abuses of the electoral system: The gerrymandering of districts to create safe seats for incumbents . . .”).

242. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1079–80 (1991); see also *Black District Is Rejected*, N.Y. TIMES, Feb. 8, 1997, at L7 (reporting on a federal court’s holding that a Virginia district, which had elected Virginia’s first black member of Congress, was unconstitutionally created).

243. Weisman, *supra* note 238.

244. See *id.* (referring to “an already polarized Congress”).

245. See Carl Hulse, *U.S. Senate Is Hobbled by Hostilities*, N.Y. TIMES (July 20, 2007), <http://www.nytimes.com/2007/07/20/world/americas/20iht-senate.1.6755028.html>.

246. See Evan Bayh, *Why I’m Leaving the Senate*, N.Y. TIMES, Feb. 21, 2010 (Week in Review), at 9.

247. See Alison Mitchell, *Plan to Curtail Trial of Clinton Hits New Snags*, N.Y. TIMES, Jan. 5, 1999, at A1.

opposition and hostility from the Democrats.²⁴⁸ During the first six years of the Obama administration, political partisanship has reached new highs with gridlock over a variety of issues, including taxing and spending.²⁴⁹ At one point, then-Senate Minority Leader Mitch McConnell even vowed that his goal was to ensure that President Obama would be a one-term president.²⁵⁰

In such a bitterly divided political environment, it should come as no great surprise that the Senate confirmation process, including nominations of ambassadors and executive-branch officials, has become contentious. Indeed, it would have been surprising if senators had chosen not to do battle with each other. In addition, some believe that a tit-for-tat mentality has developed between the Senate and the President.²⁵¹ Republicans managed to best President Obama in budget negotiations, so President Obama retaliated by trying to best the Republicans in subsequent negotiations.²⁵² Inevitably, this tit-for-tat scenario creeps into the Senate's confirmation processes. As one commentator noted, "When I asked a former Republican Senate staff member to explain why so many qualified Obama administration nominees were being denied confirmation hearings, he told me, 'We are tattling.'"²⁵³ Whether this dynamic will remain in the new Congress with Republicans in control, remains to be seen.

CONCLUSION

It wasn't supposed to be easy. Though it might be desirable to have an appointments process that is smooth and effective, it is not clear that the Framers desired such a system. Although the founding generation accepted the concept of democracy, as reflected in the Declaration of Independence's reference to the idea that legitimate governmental power is grounded in the "consent of the governed,"

248. See *Bush Administration Deceptions About Iraq Threaten Constitutional Democracy*, 149 CONG. REC. E1207 (statement of Rep. Conyers); see also Robin Toner, *Anger at Bush Smolders on Democratic Turf*, N.Y. TIMES, Aug. 4, 2003, at A8 ("There is a powerful disdain for the Bush administration, stoked by the aftermath of the war in Iraq and the continuing lag in the economy. There is also a conviction that President Bush is eminently beatable . . .").

249. See Richard H. Thaler, *The Art of Bargaining, So Lost upon Washington*, N.Y. TIMES, Jan. 8, 2012 (Business), at 4 ("Perhaps the refusal to confirm Mr. Cordray was simply follow-through on the publicly stated goal of Senator Mitch McConnell, the Republican minority leader, to assure that President Obama is a one-term president.").

250. *Id.*

251. See Cohn, *supra* note 233.

252. *Id.*

253. Thaler, *supra* note 249.

they were simultaneously distrustful of governmental power. The Framers exhibited this distrust when they created a governmental structure that was more cumbersome and less efficient than competing governmental systems. By incorporating Montesquieu's notions of separation of powers and checks and balances, the Framers embedded a level of inefficiency into the system that did not exist in other competing governmental systems such as England's.

Both in theory and practice, the advice-and-consent formulation for presidential appointments reflects the citizenry's distrust of government. The President was not given the unfettered power to make appointments, but was forced to seek the advice and consent of the Senate. Although the Senate's approach to confirmation issues has sometimes been deferential, the process has at other times been contentious and ideologically driven. For over two-hundred years of the nation's existence, it has not been at all uncommon for presidential nominees, especially nominees to the Supreme Court, to be challenged because of their ideological perspectives, and at times denied Senate confirmation. Therefore, to the extent that the appointments process is difficult, it is an intentionally imposed difficulty.

Thus, although some may view Robert Bork's Senate repudiation as exceptional, and as having led to a more contentious Senate-confirmation process, the Bork nomination can hardly be regarded as aberrational. Over the last two-hundred-plus years, there have been numerous instances in which a nominee was denied confirmation because of his ideological views, including as far back as the eighteenth century. The confirmation process might be particularly difficult or problematic currently because of the high level of partisanship on Capitol Hill, which has made it difficult for President Obama to obtain confirmation for even his executive-branch and ambassadorial appointments during his final two years in office. However, the current situation is a matter of degree rather than a reflection of a fundamental shift in the nature of the confirmation process.