2012

The Federal Judicial Vacancy Crisis: Origins and Solutions

Ryan Shaffer
Claremont McKenna College

CLAREMONT McKENNA COLLEGE

THE FEDERAL JUDICIAL VACANCY CRISIS: ORIGINS AND SOLUTIONS

SUBMITTED TO

PROFESSOR JOHN J. PITNEY, JR.

AND

DEAN GREGORY HESS

BY

RYAN SHAFFER

FOR
SENIOR THESIS

SPRING 2012
APRIL 23, 2012

TABLE OF CONTENTS

INTRODUCTION: OBAMA'S VACANCY CRISIS

On January 20th, 2009, Barack Obama's first day in the White House, there were 55 vacancies in the federal judicial system. His first nomination, of David Hamilton for the Seventh Circuit, came only two months later; Hamilton did not win confirmation until November 19th, 59-39, with only one Republican supporter. By September, the number of vacancies had jumped to 93; the administration had made 16 nominations, with no confirmations. For all of 2010, the number of judicial vacancies would remain above 100, of 874 authorized judgeships, and for more than half of those seats, the administration had not even submitted nominees.[1]

While the number of vacancies has declined from that high mark, the courts are still understaffed. There are still 81 vacancies in the Federal Courts, with at least 17 more appearing in the near future. The Obama Administration has only nominated judges for 33 of those positions. Thirty-four of those vacancies qualify as "judicial emergencies," positions that have remained vacant for too long and for which the number of filings for that judgeship are severely large. The costs of these vacancies are apparent. The American judicial system has a reputation for sluggishness; while some of this is built into the system, it is also a function of a judge shortage. While the Constitution promises criminal defendants a speedy trial, it offers no such guarantees for civil litigants. The median duration of a civil case that proceeds to trial is now almost two years; from 2009 to 2010, the number of civil cases over three years old before the district courts increased by almost 10,000. As vacancies go unfilled, federal judges find it difficult to clear cases from their docket, and as more suits are filed, cases take longer to pass

[1] Alliance for Justice, "The State of the Judiciary: President Obama and the 111th Congress," 2011, Accessed from http://www.afj.org/judicial-selection/state_of_the_judiciary_111th_congress_report.pdf

through the system, making it harder for those wronged to get justice and increasing the cost of adjudication.[2]

Yet the Obama administration has had trouble filling these vacancies. This is a problem borne primarily out of fear of a judicial nomination process that has become increasingly combative. Since the "nuclear option" episode of 2005, where Republicans threatened to eliminate judicial filibusters to overcome Democratic opposition to several of George W. Bush's lower-court nominees, both parties have viewed judicial nominations as a battleground; many nominees find that their philosophies face tough scrutiny by the Senate Judiciary Committee, spend months in limbo waiting for a vote, and often receive no support from the opposing party. To save his nominees from this process, the Obama administration has instead opted to not submit some of its nominees at all, which only makes the problem worse. And as long as both parties continue to fight the other's nominees, it would seem the conflict will persist.

Many observers have tried to pinpoint the causes of the judicial nomination crisis. These theories often fall into one of two categories. The first, the "Big Bang" theory, postulates that one big event introduced partisanship to judicial nominations, and our modern fights are the lasting impact of that event. Most of this theory's proponents point to Ronald Reagan's failed nomination of Robert Bork to the Supreme Court in 1987 as that transformative event. However, this theory is inconsistent with data on confirmation rates and delays for the period; while delays and failures rose after 1987, they had been trending in that direction for years before Bork's nomination. Nor does each Big Bang theory account for the effect of other pivotal events, such

[2] "Future Judicial Vacancies." United States Courts. Accessed from www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/FutureJudicialVacancies.aspx (Apr. 20, 2012); "Current Judicial Vacancies." United States Courts. Accessed from www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx (Apr. 20, 2012); "Table C-5: Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition." *Federal Judicial Caseload Statistics 2011*. United States Courts. Accessed from http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx

as the Court's decision in *Brown v. Board of Education* in 1954 or Lyndon Johnson's failed nomination of Abe Fortas in 1968. The other theory, supported most notably by Lee Epstein and Jeffrey Segal, holds that nominations have always been political; in their view, this is because courts and judges themselves have always been political. Yet this theory does not explain why politics, and thus nominations, have become more contentious in recent decades.[3]

Instead, this article argues that the conflict over judicial nominations today is not the result of one major event, but rather a steady shift in the role of the courts in American politics and how the Senate and President have responded to that shift. The article proceeds as follows: Chapter I describes how the Founders designed judicial nominations to involve both the Executive and Legislature to ensure only the best individuals would be chosen. Chapter II explains how the Supreme Court's role in the political process would change through the 19th and 20th century. In the 19th century, the courts took direction from John Marshall's example; the courts saw a strict delineation between the powers of the different branches, and the federal and state governments, and sought to maintain those distinctions. Even with the ratification of the 14th Amendment, which expanded federal powers with the intention of increasing rights protection for newly-freed slaves, the Supreme Court maintained its minimalist position, striking down many of the resultant regulations and civil rights laws as unconstitutionally restrictive of the states. Starting in the late 19th century, however, the Court began to identify a fundamental right to due process in the 14th Amendment. Initially, in the cases of the *Lochner* era, the Court used substantive due process to strike down regulations aimed at improving conditions for workers. Starting with *West Coast Hotel Co. v. Parrish*, however, and continuing for the next

[3] Sarah Binder, "Advice and Consent in the 'Slow' Senate," *The U.S. Senate: From Deliberation to Dysfunction*, ed. Burdett A. Loomis, Washington, DC: CQ Press, 2012, 180-181; Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments*, Oxford: Oxford University Press, 2005;

three decades, the Court increasingly used substantive due process rights to extend federal police powers to protect workers, criminal defendants, and "discrete and insular minorities."[4]

Chapter III describes how the political parties, the Senate, and the President responded to this change in the Court's power. In 1968, Richard Nixon ran for President against the Court, arguing its decisions on the rights of the accused had contributed to the crime wave of the 1960s. Nixon and his Republican allies, with the support of southern Democrats, sought to place on the court "originalist" judges who would ratchet back the Court's progressive reforms and expansions of federal power. At the same time, Earl Warren decided to retire. Senate conservatives saw an opportunity to set the Court on a new course, so they blocked Lyndon Johnson's elevation of Abe Fortas to Chief Justice with allegations of financial impropriety. Angered by Fortas' treatment, Democrats responded by vigorously opposing Nixon's nominations of Clement Haynsworth and G. Harrold Carswell.

While Nixon ultimately succeeded in appointing key strict constructionist allies such as William Rehnquist, he also ensured future nominees to the Court would be undergo severely challenge. Chapter IV examines how future nomination battles would be affected by the Court's decision in *Roe v. Wade*. That decision spurred the development of grassroots organizations on both sides, which sought to promote their views through the Courts. This coincided with the rise of conservative legal movements, which sought to rectify what they saw as liberal domination of the legal profession and judiciary. These groups would play a key role in the battles over Ronald Reagan's elevation of William Rehnquist and nomination of Antonin Scalia and Robert Bork. The bitter defeat of the latter in particular set the tone for modern nomination battles – heavily centered on interest groups and nominees' positions on key political issues, and sharply divided along party lines. Chapters V and VI examine the effect the Bork nomination and subsequent

[4] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), 152n. 4.

battles would have over the next twenty-five years. In that time, Senators increasingly scrutinized nominees in committee hearings, seeking to identify partisan beliefs; in response, nominees increasingly avoided giving direct answers. Fear of partisan judges led in turn to increased scrutiny of the lower-court nominees of Bill Clinton and George W. Bush; the fights over these nominees would culminate in the battle over the "nuclear option," which Republicans sought to use to destroy the filibuster permanently. While that outcome was averted, as the parties attempt to avoid using the filibuster, the increasing use of holds to block nominees has led to our modern vacancy crisis.

Ultimately, it seems unlikely the two parties' beliefs about judicial nominations will change soon, as they remain polarized. Yet the size of the problem demands some greater response. While the parties are averse to changes in the rules of the Senate to expedite nominations, such as the restriction of the filibuster, it appears that both parties are willing to abuse that right for the purpose of obstruction. Chapter VII thus examines possible solutions to the vacancy crisis. It appears likely that unless the judicial nomination process is reformed, the vacancy problem will only grow, increasing delays in cases and making it harder for the courts to protect American rights.

I. THE FOUNDERS' JUDICIARY

Understanding the modern judiciary's problem depends on recognizing the origins of that problem and of the Supreme Court at its center. From the beginning, the Founders were familiar with the British parliamentary monarchy's problems. In the British system, the superiority of the monarch in appointment decisions (notwithstanding the monarch's relationship with Parliament) meant that judges, especially colonial judges, were beholden to the king. The colonists sought to reject British legal institutions – the Founders repudiated the British judiciary in the Declaration of Independence, and nine of the thirteen state constitutions and the Articles of Confederation placed the power to nominate judges solely in the legislature's hands.[5]

But the Founders also took inspiration from the British judiciary. In the colonial period, the Privy Council had final say over colonial legal problems, settled border conflicts between the states, and "could also invalidate a colonial statute in the course of deciding a case."[6] John Frank suggests that Jefferson took inspiration from the Privy Council when he envisioned in 1787 a Supreme Court with "a general veto over legislation."[7] By contrast, the court system under the Articles of Confederation, like the rest of that government, was minimalist; its powers largely extended to adjudicating piracy and admiralty matters. Yet even with those limitations, the court was ineffectual; Frank notes that state courts, unassociated with the confederate system, had no qualms with ruling to protect states' interests, and sometimes refused to subject their cases to federal review. Thus, the Founders confronted the problem of designing a judicial system that would be supreme to the states, yet would not overwhelm their legislative authority.[8]

---

[5] Mary L. Clark. "Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments." 71 *Louisiana Law Review* 452 (2011).
[6] John P. Frank. "Historical Basis of the Federal Judicial System." *Law and Contemporary Problems*, Vol. 13 No. 1 (Winter 1948) 4-5.
[7] *Ibid.*
[8] *Ibid* 8-9.

This is readily apparent in Madison's notes on the Federal Convention. The Founders wanted the Constitution to divide judicial nominations, but they disagreed about the proper distribution of those powers. The first plan put forward for the new government, the Virginia Plan, was more parliamentary in structure – it gave the proposed bicameral legislature the power to nominate not only judges, but also the "National Executive." The judiciary of the Virginia Plan, like that of the Articles of Confederation, was also limited in its jurisdiction to matters of war, piracy, international suits, and "questions which may involve the national peace." By contrast, the New Jersey Plan placed the power to appoint judges in the hands of the Executive (who was still appointed by the Congress). Yet a month later, when the delegates took up the issue of appointment powers, they were still leery of moving the power to appoint from the legislature to the executive. Nathaniel Gorham's motion on July 18th to have the Executive appoint judges failed, even after adding an advice and consent clause. It would be two more months before draft Constitutions gave the President sole power to appoint the judiciary with the Senate's advice and consent.[9]

The Federalist Papers reflect the Founders' fears of factionalism and the benefits of a divided appointment process. The most famous of the papers, Madison's no. 10, identifies the virtues of the Union as a check against faction from its very first sentence. Factions pose a unique challenge for a democracy because their ideological unity can allow them majoritarian power, which has the tendency to slide into tyranny. Madison's proposed republic would check the power of faction, because factions could not fare as well in a large territory. Outside the

[9] James Madison. "The Virginia Plan." *Notes on the Debates in the Federal Convention*. May 29, 1787. The Avalon Project, Yale Law School. Accessed from avalon.law.yale.edu/18th_century/debates_529.asp; William Patterson. "The New Jersey Plan." *Notes on the Debates in the Federal Convention*. June 15, 1787. The Avalon Project, Yale Law School. Accessed from http://avalon.law.yale.edu/18th_century/debates_615.asp; Max Farrand, ed. *The Records of the Federal Convention of 1787*. Rev. ed. 4 vols. New Haven and London: Yale University Press, 1937. As part of *The Founders' Constitution*. Vol. 4, Article 2, Section 2, Clauses 2 and 3, Document 1. Accessed from http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s1.html

incubator of the individual states, "the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source."[10] The diffusion of factions under the Constitution would require them to find an overlapping consensus in order to produce policy. This pluralism appears again in *The Federalist* no. 51, in which Madison lays out the balance of powers among the three branches of the new government. Because the three branches (and, in the first, the two houses of Congress) would be chosen in different manners and hold separate powers, one faction could not seize control of the entire government through one branch, as in a traditional republic. Thus, the Founders thought the Constitution would provide some insulation from the meddling of faction. [11]

This desire to curb factions informed Alexander Hamilton's articles on the presidential power of nomination and the Senatorial powers of advice and consent. Because they believed factions would be incapable of influencing national politics to a degree necessary to control the results, the Founders felt comfortable placing the nomination power solely in the president's hands. But Hamilton explains the benefit of having those decisions checked by another body, especially one such as in the Senate. Since "cabal and intrigue" would not tarnish such a body's membership, due to the means of appointment, the Senate could check improper presidential decisions. Hamilton saw the Senate's check as one "upon a spirit of favoritism in the President, [that] 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. Likewise, senators would have little incentive to reject all of the president's nominations, because they could only expect to receive another one in return. This weak veto power, in Hamilton's view,

[10] James Madison. "The Federalist no. 10." The Federalist Papers. November 23, 1787. Accessed from http://thomas.loc.gov/home/histdox/fed_10.html.
[11] James Madison. "The Federalist no. 51." The Federalist Papers. February 8, 1788. Accessed from http://thomas.loc.gov/home/histdox/fed_51.html.

allows each side to achieve a desirable outcome while mitigating the potential for abuse.[12]

This fear of faction and desire for balance also informed Hamilton's design for the judiciary. Hamilton acknowledges concerns that judicial review and life tenure would give the judiciary too much influence over the legislature. While the judges would interpret the law and the Constitution, Hamilton stresses that these would be the only two factors that his judges would use. Furthermore, having judges chosen by the president and confirmed by the Senate, yet separate from both would keep the judiciary from unfairly favoring one branch. Judges with lifetime tenure would also be free from the threat of "a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." These checks would ensure that judges would rely on legal judgment rather than personal will, clearly separating the legislative and judicial powers.[13]

[12] Alexander Hamilton. "The Federalist no. 76." The Federalist Papers. April 1, 1788. Accessed from http://thomas.loc.gov/home/histdox/fed_76.html.

[13] Alexander Hamilton. "The Federalist no. 78." *The Federalist Papers*. May 28, 1788. Accessed from http://thomas.loc.gov/home/histdox/fed_78.html.

II. JURISPRUDENCE FROM MARSHALL TO WARREN

Understanding the current battle over the courts requires understanding how the courts have changed from their beginnings to today. For much of the 19th century, the Supreme Court followed the constitutionalism of John Marshall, with clear delineations between federal and state power, and between the different branches. It was not until the 20th century that the Court began to accept the idea of important individual rights beyond those set out in the Constitution – first economic rights during the *Lochner* and New Deal eras, and then civil and criminal rights under the Warren Court. The decisions of these eras not only expanded rights protections, they also increased the role of the courts in protecting and defining rights; this in turn made the ideological makeup of the courts a key issue for the parties.

A. THE BALANCE OF THE 19TH CENTURY

At the beginning of John Marshall's term as Chief Justice, the Supreme Court was precariously positioned. Despite the Constitution's federal hierarchy, the United States in practice more resembled a confederation than a true union. States still viewed federal authority as advisory, rather than directive. These differences were reflected in the Supreme Court's decision in *Chisolm v. Georgia*. The Court ruled that Georgia lacked sovereign immunity and indeed could be sued. In response, Congress quickly passed the 11th Amendment, reinstituting that immunity. Unhappy states also sought to reduce the powers of the federal government through legislation. In 1798, Republicans felt threatened by the Federalist Alien and Sedition Acts, which seemingly made political opposition itself a crime. In response, the Republican state legislatures in Virginia and Kentucky passed resolutions declaring the act to have no power within their territory; while those acts had no power, they represented the tenuous ties between the federal and state governments. Marshall's role as Chief Justice was thus not only to interpret the law, but also to avoid unsettling this delicate political balance.[14]

Marshall's Court was arguably the most successful in history; conventional wisdom holds that he was instrumental in expanding the role of the federal government, and particularly the Court. Yet Marshall's judgments were also comparatively restrained. He saw his role, and that of the Court, as adapting the Constitution to the country's problems, yet also sought to maintain the limits of those powers. The resultant practice of restrained constitutionalism would influence jurisprudence for the rest of the 19th century; while the federal government would be an equal partner to the states, rather than a mere confederation, its powers would not exceed those identified under Marshall.[15]

The case for which the Marshall Court is best known is *Marbury v. Madison*, which is generally believed to be the case that gave the Court its most critical power: judicial review. Yet despite its modern reputation, *Marbury* primarily served to restrain the powers of the Supreme Court, rather than expand them. Judicial review was already a familiar concept prior to *Marbury*; indeed, Hamilton argued for such a power in *Federalist* 78, emphasizing that "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[16] William Treanor also notes that judicial review was in use at every judicial level prior to 1803; even if it was not strictly codified in case law or universally accepted, judicial review was widely understood and practiced before *Marbury*. The most significant part of *Marbury*, rather, was the way in which it exercised that judicial review. While often forgotten in modern times, the Court

[14] *Chisholm v. Georgia*, 2 U.S. 419 (1793); Lucas A. Powe, Jr, *The Supreme Court and the American Elite*, Cambridge, MA: Harvard University Press, 2009, 34-37.
[15] Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 5th ed., Lanham, MD: Rowman & Littlefield Publishers, Inc., 2008, 67
[16] Alexander Hamilton. "The Federalist no. 78." *The Federalist Papers*. May 28, 1788. Accessed from http://thomas.loc.gov/home/histdox/fed_78.html.

ruled that, while the Judicial Act of 1789 granted the Court the power of *mandamus*, that clause of the Act unconstitutionally expanded the Court's powers beyond those in Article III. *Marbury* thus represents how the Marshall Court sought to maintain the balance between the federal and state governments, and the different branches, under the Constitution, rather than dramatically expand federal and judicial authority beyond those limits.[17]

The next significant change on the court would come with Andrew Jackson's nomination of Roger Taney as Chief Justice. The Taney Court's jurisprudence combined the constitutionalism of the Marshall Court with a Jacksonian emphasis on limiting the powers of states and the federal government. In no case are these two perspectives better exemplified than in *Charles River Bridge v. Warren Bridge*, which concerned whether state charters imparted monopolistic rights over a particular area of business. Taney's opinion reflected the expansionist interests of the time. In finding that state charters do not equate to monopolies, Taney argues that, "while the rights of private property are sacredly guarded, we must not forget that the community also have rights; and that the happiness and well-being of every citizen depends on their faithful preservation."[18]

Yet the Taney Court is best known for its infamous decision in *Dred Scott v. Sanford*. Dred Scott sued for his freedom in federal court, claiming that because he had been brought as a slave into Missouri, where slavery was illegal under the Missouri Compromise of 1820. Taney first ruled that, while Article III does allow for diversity jurisdiction in cases between citizens of different states, Dred Scott was not a citizen and thus the courts had no jurisdiction. Taney argued that at the time of the Constitution's creation, blacks were not considered equal (as human beings) with whites; in addition, the Framers believed in, and demonstrated through their

---

[17] William M. Treanor, "Judicial Review Before *Marbury*," *Stanford Law Review*, vol. 58 no. 2 (Nov. 2005), 455-562; *Marbury v. Madison*, 5 U.S. 137 (1803), 173-174.
[18] Powe, *American Elite*, 87-89; *Charles River Bridge v. Warren Bridge*. 36 U.S. 420 (1837), 548.

own slave ownership, a firm divide between whites and blacks. Likewise, Taney argued that citizenship in the United States is the purview of the federal government, and thus "no State can, by any act or law of its own… introduce a new member into the political community created by the Constitution." Hence, Taney held, Dred Scott was not a citizen and the federal court could not hear his petition.[19]

Yet Taney chose in his ruling to go beyond the matter of diversity jurisdiction to consider slavery in the territories itself. The Missouri Compromise, regulating slavery in the territories, was rooted in Article IV of the Constitution, which allows Congress to create law for the territories. Taney argued that this only applied to the United States' territory at the time, the land north of the Mississippi and Ohio Rivers. In Taney's view, the Constitution addressed territories only to manage the Northwest Territory until such time as the land could be divided into states; much as states were not subject to the whims of Congress with respect to slavery, neither should the territories, but instead each should be allowed to decide its status for itself. While this decision was unpopular, the case also illustrates how Taney's Court maintained separation between the federal and state governments under the Constitution.[20]

The end of the Civil War brought new challenges to American law. Newly freed slaves faced severe discrimination in the South. The victorious North responded by introducing the 14th Amendment, which primarily sought to ensure African-Americans equal protection under the law and a safeguard against having their rights infringed by the states. Yet while the 14th Amendment was primarily aimed to address the 13th Amendment's procedural challenges, its Privileges and Immunities and Due Process Clauses implied that the federal government could secure rights despite the states' wishes – an unsavory conclusion in Reconstruction. The

[19] *Dred Scott v. Sanford*, 60 U.S. 393 (1856), 406-410.
[20] *Ibid.*, 410-454, 572-573, 582-583; Powe, *American Elite*, 107.

Amendment's scope of protections also represented a break from the minimal constitutionalism of the antebellum. The fate of the Reconstruction reform effort thus hinged on how the Court would view this expansion of the federal government's role.

In the *Slaughter-House Cases*, Justice Samuel Miller rejected claims by New Orleans butchers that laws restricting their practice violated the 14th Amendment's Privileges and Immunities Clause. Miller argued instead that the 14th Amendment's first section centered on its first part. That section overturned the finding in *Dred Scott* in holding that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside* [emphasis added]."[21] To Miller, the distinction was critical. One was not merely a citizen of the United States – he was a citizen of the Union and his own state. It was commonly seen in American law, particularly before the Civil War, that the states protected the most critical rights, such as the right to one's property and person. The Constitution's protections were merely procedural rights against the federal government's intrusion; there was no need for additional protection, because the states already protected the most essential rights. As Miller wrote,

> When the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.[22]

It is ultimately uncertain whether or not Congress intended that the 14th Amendment incorporate the Bill of Rights. Nonetheless, the *Slaughter-House* decision demonstrated that the Supreme

[21] U.S. Constitution, Amend. 14, sec. 1.
[22] *Slaughter-House Cases*, 83 U.S. 36 (1872), 78.

Court still viewed the government's role in protecting those rights as marginal compared with the states.

United States v. Cruikshank confirmed this notion. The case concerned the indictment of three members of a white mob that massacred blacks defending a courthouse for conspiring to violate their constitutional rights. The Court overturned the convictions, finding that the First and Second Amendments did not apply to the states. Subsequently, in the *Civil Rights Cases*, the Court struck down the Civil Rights Act of 1875, which codified the 14th Amendment's protections of rights for freed slaves. The Court, working from *Cruikshank*, held that this only allowed Congress to enforce the Amendment's prohibitions, nor promote positive rights.[23]

Unlike the cases upon which it was built, however, the *Civil Rights Cases* targeted the very purpose of the postbellum amendments – the protection of freed slaves. With this decision, the Court had struck down eleven federal statutes since the Civil War – in contrast to the two for all years prior. The federal power to address racism remained essentially where it had been before the 14th Amendment; in its absence, segregation would fester. Yet these decisions reflected how, throughout the 19th century, the prevailing view of constitutional powers was one based in restraint – of both the states and the federal government – with tremendous consequences for freed slaves.[24]

B. ECONOMIC DUE PROCESS: *LOCHNER* AND THE NEW DEAL

While the Court in Reconstruction still clung to the jurisprudence of the Marshall and Taney eras, the Court at the turn of the century increasingly began to recognize rights under the 14th Amendment's Due Process Clause. In *Lochner v. New York*, the Court ruled that a law restricting

[23] *United States v. Cruikshank*, 92 U.S. 542 (1875); *Civil Rights Cases*, 109 U.S. 3 (1883), 11-12.
[24] Powe, *American Elite*, 144-147.

the number of hours bakers could work was an unconstitutional violation of the bakers' right to free contract under the 14th Amendment. The Court had decided based on the correct law, but had used the protection of individual rights to push back, rather than sustain, governmental regulation. *Lochner* indicates that the Court felt the 14th Amendment was intended mainly to limit government police powers – a notion akin to the one held in *Cruikshank* – and that the only threat to laborers could come from the states, rather than employers exploiting unequal bargaining power. In the decades following *Lochner*, the Court struck down numerous state and federal regulations as violating the rights of workers and employers in cases such as *Adkins v. Children's Hospital*, which held a federal minimum wage law for women unconstitutional. Progressives such as Woodrow Wilson sought to undo the damage through judicial nominations, but the political climate made those nominations risky – when Wilson nominated Louis Brandeis, business interests branded the latter a radical (in attacks tinged with anti-Semitism).[25]

Yet one Court decision of the *Lochner* era would have greater ramifications than the titular case. In *Pierce v. Society of Sisters*, the Court considered an Oregon law requiring all students attend public school and forbid private school education. A unanimous Court struck down the law; in his decision, James McReynolds[26] argued that while the private schools were not due 14th Amendment rights, their owners had a vested interest in their continued existence, and the law deprived them of those due process rights. For McReynolds, what mattered was not that the law deprived of the plaintiffs of their rights, but that the deprivation was "arbitrary,

[25] *Lochner v. New York*, 194 U.S. 45 (1905), 53, 75; *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 5th ed, Lanham, MD: Rowman & Littlefield Publishers, Inc., 2008, 142-143.

[26] It is ironic that McReynolds was the author of the Court's decision in *Pierce* – while he was nominated by Wilson under the mistaken belief that McReynolds was a progressive, he would prove to be quite the opposite – he would be one of the "Four Horsemen" conservatives who fought Roosevelt's New Deal, and notoriously once turned his back on Charles Houston, the NAACP's chief litigator, when the latter was arguing before the Court. While McReynolds would not be the last judge nominated to the Court under a mistaken presumption of political beliefs, as George H. W. Bush could attest, Wilson's mistake was particularly significant. See also Powe, *American Elite*, 179, and Abraham, *Justices, Presidents, and Senators*, 140-141.

unreasonable, and unlawful." But the Court went further still, ruling that the law also violated parents' right to send their children where they wish – identifying a new right requiring protection under the 14th Amendment. *Pierce* would in the following decades be cited as an early example of the Court broadening the scope of substantive due process; it would become an important precedent in the Court's decision in *Griswold v. Connecticut*, which would in turn prove influential on its decision in *Roe v. Wade*.[27]

The *Lochner* Court proved difficult for Franklin D. Roosevelt's New Deal programs. The Court struck down a series of important acts adding new regulatory safeguards for industry and workers. In *Schechter Poultry Corp. v. United States*, the Court struck down the National Industrial Recovery Act, which authorized the president to create price regulations, as an unconstitutional delegation of Congress' legislative power; furthermore, it held that federal control over interstate commerce ceased once products enter the state if it is not clear they continue from there. By 1936, Roosevelt was so stymied as to propose a bill to "pack" the Court. The Judicial Procedures Reform Bill of 1937 would have given Roosevelt the authority to appoint an additional justice for every sitting member of the Court over 70 – six new judges.[28]

Yet before the bill came to fruition, the Court (in particular Owen Roberts, who had sided with the conservative *Lochner*-era judges in rejecting the New Deal) reversed course. In the landmark case of *West Coast Hotel Co. v. Parrish*, the Court overturned *Adkins v. Children's Hospital* and upheld the constitutionality of Washington's minimum wage. Charles Hughes wrote in his decision for the Court that the Constitution made no provision for the liberty of contract cited by the Court in *Adkins* and *Lochner*; while due process protections were important for ensuring liberty, they were also important to restrain liberty to preserve it for all. Likewise, in

[27] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), 534-536.
[28] *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); Powe, *American Elite*, 206.

National Labor Relations Board v. Jones & Laughlin Steel Corp., the Court held that Congress' powers under the Commerce Clause extended to labor relations. And in *Wickard v. Filburn*, the Court held that even the production of wheat for one's personal consumption constituted an economic activity with an interstate effect, since it limited the amount one acquired in the market, and thus was also subject to regulation. With these decisions, the *Lochner* era concluded – the Court recognized that economic freedom was in some way contingent upon Congress' participation and regulation.[29]

Yet the decision most indicative of the Court's future direction came in *United States v. Carolene Products*. Like many of the cases in the wake of *West Coast Hotel*, the decision in *Carolene Products* identified another legitimate exercise of Congressional regulatory powers under the Commerce Clause – in this case, regulating the interstate transport of milk. As Harlan Stone noted in the famous "footnote four," the Court in upholding the law followed a "rational basis" test, which merely required that the Court identify Congress's rational purpose for the law under its powers. But Stone also argued that not all laws ought to have this presumption of constitutionality. There are very clear cases, such as when a law comes into direct conflict with part of the Bill of Rights, where the Court's presumption should be against the law, and it ought instead to apply more strict scrutiny. Stone argued that this level of scrutiny ought to also be applied in cases where a law restricts certain "discrete and insular minorities" who may be unable to affect the political process to the extent where Congressional actions might reflect the political will of the people.[30]

Stone thus positioned the Court between Congress and these minorities. This case, along with *Pierce*, introduces a new use for substantive due process – as a means of protecting

[29] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[30] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), 152n4.

threatened groups from having their rights violated by stronger majorities. These decisions would prove to be instrumental to the expansion of protections under the 14th Amendment under Earl Warren; yet in placing the courts next to Congress in creating rights for individuals, these decisions continued the courts' shift in role from arbiter to determiner of rights.

C. DUE PROCESS IN THE WARREN COURT

While the Court under Charles Hughes, Harlan Stone, and Fred Vinson expanded federal regulatory powers under the 14th Amendment, it made less progress in expanding due process protections in the social realm. This process would begin under Earl Warren, whose Court would significantly expand substantive due process protections for underrepresented groups. His success in this role is best represented by his opinion in *Brown v. Board of Education*, which overturned *Plessy v. Ferguson* and held that segregation, even when it is supposed to be "separate but equal," always violates the 14th Amendment Equal Protection and Due Process Clauses.[31]

Yet *Brown*'s companion case, *Bolling v. Sharpe*, would better reflect how far the Warren Court was willing to go to protect due process rights. Decided the same day as *Brown*, *Bolling* held that segregation in the District of Columbia, which as a federal enclave and not a state was thus exempt from the 14th Amendment, was nonetheless prohibited by the Fifth Amendment's Due Process Clause. Arguing for a form of "reverse incorporation," Warren argued that it makes little sense that the federal government should be exempt from some restriction on the states, such as the responsibility to maintain equal protection. This argument was tenuous at best; as Peter Rubin notes, if the due process rights protected by the Fifth Amendment are broadly defined, the rights protected by the first eight Amendments are redundant. Furthermore, this

[31] *Brown v. Board of Education*, 347 U.S. 483 (1954).

implies that slavery was always unconstitutional in the District of Columbia and just never recognized as such – and even if one buys David Souter's subsequent reasoning that the Court merely intended to retroactively equate due process with equal protection, this still suggests a fundamental reinterpretation of the Founders' intentions. Accordingly, *Bolling* is a favorite target for originalists. But *Bolling* also reflects how the Warren Court emphasized expanding rights protections to threatened groups over following narrow traditional conceptions of federal powers.[32]

The Court's decision *Griswold v. Connecticut* enhanced due process protections. The Court ruled that a Connecticut law prohibiting the use of contraceptives by married people to be a violation of the public's right to privacy. William Douglas ruled that this right, though not codified in the Constitution, existed among the "penumbras" of other rights codified in the Bill of Rights. For example, in *NAACP v. Alabama*, the Court found that the First Amendment protections of free expression also protected the membership lists of an organization engaged in such expression. Without the right to privacy, members of groups such as the NAACP could have their right to expression threatened through intimidation. Douglas' intentions in ruling this way are clear – he believed creating a new right to privacy was a better solution to *Griswold* than citing substantive due process, due to the implications of such a doctrine.[33]

Yet Justice Harlan's short concurrence would prove to be the most influential aspect of *Griswold*. Harlan's argument stemmed from his dissent in *Poe v. Ullman* four years earlier, in which he argued the liberty protected by the Due Process Clauses is "a rational continuum

---

[32] *Bolling v. Sharpe*, 347 U.S. 497 (1954), 499-500; Richard A. Primus, "*Bolling* Alone," *Columbia Law Review*, vol. 104 no. 4 (May 2004), 982-989; Peter J. Rubin, "Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process," *Virginia Law Review*, vol. 92, no. 8 (Dec. 2006), 1885-1888; Stephen L. Carter, "Originalism and the Bill of Rights," *Faculty Scholarship Series*, Paper 2252, Yale University, 1992, accessed from http://digitalcommons.law.yale.edu/fss_papers/2252/, 146-147.
[33] *Griswold v. Connecticut*, 381 U.S. 479 (1965), 486-488; *NAACP v. Alabama*, 377 U.S. 288 (1964); Powe, *American Elite*, 274.

which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[34] For Harlan, due process is not merely the procedural aspects necessary for legal protections, but rather a broad protection against all unnecessary restrictions on individuals' rights – what is better known as substantive due process. The decision in *Griswold* was popular when it was first released, but has become a strong target for claims of "judicial activism." These claims stem in part from the famous case built upon *Griswold*'s expansion of privacy rights years later – *Roe v. Wade*.[35]

Yet while *Brown* is likely the Warren Court's most famous case, arguably the Court's most significant decisions were in criminal rights. In a series of decisions, the Court expanded rights protections for defendants and suspects, incorporating many clauses of the 4th, 5th, 6th, and 8th Amendments against the states. In *Katz v. United States*, the Court ruled that the right to privacy under the 4th Amendment includes protection in places where one has a reasonable expectation of privacy, such as a phone booth. *Gideon v. Wainwright* incorporated the 6th Amendment right to counsel against the states through the Due Process Clause. *Escobedo v. Illinois* extended this right to counsel to include police interrogations. And in *Miranda v. Arizona*, the Court held that not only were police required to inform defendants of their right against self-incrimination, but also that defendants must also waive those rights before statements could be taken admissibly.[36]

The Warren Court represented the sum of six decades of due process jurisprudence. The Court had fully moved away from the narrow constitutionalism of the 19th century. But in the process, its political role had expanded greatly. Both political parties were now more aware that

[34] *Poe v. Ullman*, 367 U.S. 497 (1961), 516-522.
[35] *Griswold v. Connecticut*, 381 U.S. 479 (1965),
[36] *Katz v. United States*, 389 U.S. 347 (1967); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

the Court could easily strike down or uphold their laws, depending on its ideological balance. Thus, while the Warren Court greatly expanded the role of the courts, it also cast itself in the center of future struggles for political control – one that would come into sharper relief with the battle over Abe Fortas.

III. FORTAS AND NIXON

While Abe Fortas' time on the Supreme Court was brief, his experiences and his fate reflect the ways in which nominations to the Court changed during the 1960s. In his first nomination in 1965, Fortas was the last justice the Senate confirmed by voice vote, but his nomination for Chief Justice in 1968 was particularly divisive. Johnson nominated his old friend shortly after announcing he would not run again for the presidency amid deep unpopularity, casting a pall over that nomination. The Senate saw the nomination as an opportunity to express its displeasure with the Warren Court's jurisprudence. And Republicans, including presidential candidate Richard Nixon, saw a chance to remake the Court in their image. These factors all contributed to the nomination's bitter defeat; that defeat, and the Nixon Administration's subsequent challenges in rebuilding the Court, would set the tone for future nomination battles, and made the balance of the Court a central issue for presidents going forward. While many historians cite the equally-divisive battle over Robert Bork's nomination as the event horizon for partisan battles over the Court, thus, it is clear that after Fortas and Bork, the Court could never again be seen as anything but a political body.

A. THE BATTLE OVER FORTAS

On March 31, 1968, with his public standing in ruins after the failure of the war in Vietnam, Johnson announced he would not seek a second term. In response, Earl Warren chose to resign at the end of the Court's spring term. While his immediate reasons were of age, Warren also was aware, with Johnson's withdrawal and the political environment, that the Republicans were favored to take the White House in November, and that they would seek with their nominees to undo some of the work of his Court. Warren worried that Richard Nixon, his old California political rival and the leading candidate for the Republican nomination, might have the opportunity to name his replacement. Instead, Warren hoped by resigning in June that Johnson and the Senate could fill his seat by the Court's return in October – presumably, with another liberal. Johnson gravitated toward his old friend, Associate Justice Abe Fortas, a liberal with Warren's approval.[37]

Yet while Johnson believed he had the support of Senate Minority Leader Everett Dirksen, many Republicans opposed Fortas' nomination, in large part because they believed with Nixon's likely election in November they could fill the position themselves. Nixon's campaign emphasized the issue of law and order, since during the 1960s, crime rates were soaring. This change coincided with the Supreme Court's decisions increasing protections for criminals and defendants, which Nixon criticized, promising instead to nominate judges who would better respect their Constitutional role. Nixon also sought to draw southern Democrats into the Republican fold. As Johnson and the Warren Court supported civil rights reforms, Nixon aimed to capture these votes by attacking the Court on issues such as busing-based desegregation. Nixon's pursuit of the Court, and Republican desires to reshape the Court and undo Warren's work, weighed heavily on Fortas' nomination.[38]

Nixon would prove more influential than Dirksen, and Republicans cemented their opposition to Fortas. Yet that alone would not guarantee Fortas' defeat. Johnson made further tactical blunder, such as antagonizing Sen. Richard Russell, a powerful Democrat from Georgia, by not moving fast enough on a judicial nomination for one of his allies. Nor were matters helped by Johnson's projected replacement for Fortas' original seat, Homer Thornberry. While

[37] Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 5th ed., Lanham, MD: Rowman & Littlefield Publishers, Inc., 2008, 227
[38] *Ibid.*; Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court*, New York: Simon and Schuster, 1979, 10.

not unqualified, Thornberry was another of Johnson's Texas cronies, which further cast Fortas in an unsavory light. But had Republicans not been intent on capturing the seat by any means, it seems unlikely they would have managed to defeat Fortas.

Yet Republicans kept digging, looking for something to bury Fortas. Strom Thurmond, the influential southern Republican, made Fortas' nomination a referendum on the Warren Court's decisions, criticizing its decisions in matters of civil and criminal policy. Republicans criticized Fortas for consulting Johnson on several of the latter's policy decisions, which blurred the line of his judicial role. Thurmond's thorough investigation of Fortas also uncovered that the justice had taken a $15,000 fee for participating in a series of lectures at American University that summer – representing more than 35% of a Supreme Court associate justice's annual salary. While the payment was not becoming of a Supreme Court justice, nor was it exactly unethical – but Thurmond and Republicans sold it as on par with taking bribes, particularly when it came to light that the funding for the seminar had come from a series of prominent businessmen, rather than American University itself. While the Judiciary Committee reported Fortas' nomination, his support among Democrats and Republicans had eroded. Republicans filibustered the nomination, and Fortas and his allies could only get 45 of the 59 votes required for cloture. Fortas soon withdrew.[39]

The defeat of Abe Fortas was by no means the first or last time the Senate and President would use the Court as a political pawn, yet it represented how each saw the Court in the new legislative process. He was the first judicial nominee ever filibustered; indeed, Democrats would later cite him as a precedent to justify their own filibuster of George W. Bush's judicial

[39] Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice*, New York: William Morrow and Company, Inc., 1988, 167, 310, 499-507, 525; Abraham, *Justices, Presidents, and Senators*, 227.

nominees.[40] Fortas's defeat was not merely the result of circumstances, but also of direct action taken by Republicans to defeat his nomination. The attack on Fortas also represented a direct action taken against the Warren Court and its progressive reforms; in blocking Fortas' nomination, Republicans gave Nixon an opportunity to send the Court in a new direction. Fortas's fall thus reflected the new judicial politics in action. Nixon's quest to fill the seat would prove just how vicious that political environment could become.

B. NIXON'S NOMINEES

While Republicans had defeated Fortas, they were not done with him. Warren returned to his seat after the Senate failed to confirm Fortas for that job, though it was expected he would retire after the following term. Nixon and the Republicans found themselves with immediate Court vacancies. But Nixon and John Mitchell, his Attorney General, got their chance when on May 4, 1969, *Life* magazine revealed that Fortas had made an arrangement in 1966 with a financier named Louis Wolfson, who three years later was imprisoned on federal fraud charges, by which Fortas would advise Wolfson in return for $20,000 a year for the duration of Fortas's life and that of his wife. Mitchell and Nixon subtly fueled the resultant scandal to nudge Fortas out the door, and it worked – Fortas resigned eleven days after the story broke, after Warren requested he do so. And Warren's own resignation in late May gave Nixon two vacancies, including the chief justice's seat, with which to reshape the Court.[41]

In his nominations, Nixon looked for justices who not only represented the positions on which he had run such as criminal rights, but would also practice "strict constructionism." To the Nixonians, the Warren Court had read into the Constitution innumerable rights that did not exist

[40] Tim Curry, "Filibuster Foes Argue Over '68 Fortas Precedent," MSNBC, May 19, 2005, Accessed from http://www.msnbc.msn.com/id/7747167/ns/politics-tom_curry/page/2/#.T4jILJpWo40
[41] Murphy, *Fortas*, 556-577; Abraham, *Justices, Presidents, and Senators*, 9, 228.

in the text; they sought to place justices who would not only scale back the Warren Court's precedents, but also return Constitutional interpretation itself to its state before the rise of substantive due process. As noted in a 1969 memo to Nixon from White House aide Tom Huston, the Nixonians were aware that the Court's decisions depended "as much on the type of men who become judges as it does on the constitutional rules" which they use in reaching those decisions.[42] Remaking the Court was for Nixon a key step to undoing the work of the Warren Court in progressive policymaking. Nixon's first nominee, Warren Burger, seemed to be a good example of the type of conservative justice Republicans wanted; the Senate quickly confirmed him, which Nixon saw as an affirmation of his nomination in the wake of Fortas' failure to attain the same seat. His second nomination would prove more difficult. Nixon wished to place a conservative southern justice on the Court, in part to repay the support of influential southerners during the primary and to guarantee southern support in future elections.[43]

With that in mind, Nixon nominated Clement Haynsworth, a South Carolinian judge on the Fourth Circuit Court of Appeals; the nominee soon won broad approval from Republicans and southerners. But Haynsworth's strict constructionism fell under the scrutiny of Democrats, who suspected he might oppose the desegregation decisions of the Warren Court. While Haynsworth affirmed his support for *Brown* in hearings before the committee, the NAACP and other major civil rights organizations opposed his nomination. In their view, Haynsworth was not sufficiently supportive of civil rights matters; were he to serve on the Court, he would work to maintain the status quo. They cited his decision, in *Griffin*, to hold the case back at the circuit court level on a minor procedural matter, before the Supreme Court chose to take the case itself.

[42] John A. Maltese, "Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush," *The Journal of Appellate Practice and Process*, vol. 5 no. 1 (Spring 2005), 3-4.
[43] Abraham, *Justices, Presidents, and Senators*, 9-10

While Haynsworth was not a segregationist, in their view he nonetheless was a threat to equality for African-Americans.[44]

Yet it would be a smaller mistake that would doom Haynsworth's nomination. Before joining the Fourth Circuit, Haynsworth been a partner in a firm named Carolina Vend-a-Matic. While he resigned as vice president of the company in 1957 upon accepting the judgeship, he was still a director in the company until 1963. Shortly after giving up that position, he heard a case concerning union rights at a mill owned by a company that did business with Vend-a-Matic; Haynsworth ruled in favor of the company. There was no direct evidence that Haynsworth profited from his decision, but critics still assailed him; George Meany, the AFL-CIO's president, argued that the Vend-a-Matic decision demonstrated Haynsworth's clear ethical issues, and labor organizations campaigned against Haynsworth in the weeks leading up to his nomination. Criticism of Haynsworth only grew when it came to light that Haynsworth had decided on another case involving a company, the Brunswick Corp., in which he owned stock – another ethically-dubious, if not exactly illegal choice.[45]

In different circumstances, it seems unlikely Haynsworth would have been rejected for these indiscretions alone. But the Senate recognized the problem with confirming Haynsworth after he had been nominated to replace Fortas, whose nomination had also gone down on charges of financial impropriety. While Haynsworth's nomination made it out of committee, he soon lost support from several major southern strict constructionist Senators; seventeen Republicans voted against Haynsworth in defeating his nomination. The Haynsworth defeat not only demonstrated the political ramifications of the bitter fight over Fortas, it also proved to be an early example of the influence interest groups – in this case, groups in labor and civil rights interests – could have

---

[44] John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court*, Charlottesville, VA: University Press of Virginia, 1991, 26, 30, 48-61

[45] *Ibid.*, 21-22, 29-31, 43

over the nomination process by identifying candidates' weaknesses. This influence would only expand over the next few decades as the stakes of Supreme Court decisions and the contentiousness of nominations continued to grow.[46]

The defeat struck Nixon, who saw it as a repudiation of southerners and strict constructionism, and called it such in public. He responded by nominating another judge in that mold – G. Harold Carswell of the Fifth Circuit. Unlike Haynsworth, who was qualified, Carswell was an awful nominee. Nixon and Mitchell had insufficiently vetted Carswell before nominating him to the Court, and soon it came to light that Carswell, in his 1948 campaign for a seat on the Georgia legislature, had made a speech championing white supremacy at an American Legion meeting. He had also helped with the effort to transform a public golf course built with federal funds into a private club to avoid desegregation. Carswell claimed his involvement in the golf club matter was small, but in doing so only drew further attention to his shoddy record. In an infamously pathetic attempt to save the nominee, Sen. Roman Hruska, one of the President's allies, argued that this latter quality should not disqualify Carswell, because "there are lots of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?"[47] Unsurprisingly, Hruska's argument only managed to make Carswell look more pathetic, and the Senate soundly rejected the nominee.

Nixon lashed out at the Senate following this defeat, claiming they rejected Haynsworth and Carswell due to implicit bias against southerners and strict constructionists. This statement was largely false – the nominees, particularly Carswell, had been rejected for their personal characteristics, and while Democrats had a motivation to fight Haynsworth's nomination after

---

[46] *Ibid.*, 88-89; Abraham, *Justices, Presidents, and Senators*, 10-11; Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments*, Oxford: Oxford University Press, 2005, 95

[47] *Congressional Record*, 91st Congress, 2nd session, vol. 116, 1970, p. 7498; Abraham, *Justices, Presidents, and Senators*, 11-12; John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court*, Charlottesville, VA: University Press of Virginia, 1991, 100-116.

Fortas' fate, it appears a qualified nominee, even a southern strict constructionist, would have been happily accepted by the Senate. But instead, Nixon nominated Harry Blackmun, an uncontroversial Eighth Circuit judge; after the fierce fighting over Haynsworth and Carswell, the Senate was happy to unanimously confirm Blackmun. At the time, most observers, including Nixon, expected the justice would follow his fellow Minnesotan Burger in promoting strict constructionism, but the nomination backfired when Blackmun instead moved toward the liberal wing of the Court; most notably, Blackmun would author the controversial opinion in *Roe v. Wade* just three years after his nomination – extending, rather than reversing, the expansive view of privacy rights promoted by the Warren Court.[48]

In 1971, Hugo Black and John Harlan both retired. In their place, Nixon nominated Lewis Powell, former president of the ABA, and Assistant US Attorney General William Rehnquist.[49] Powell, of Virginia, represented another attempt by Nixon to finally place a strict constructionist southerner. In spite of the battles over Haynsworth and Carswell, the Senate easily confirmed Powell; he would be consistently, if moderately, conservative in his time on the bench, but failed to meet Nixon's expectations. By contrast, Rehnquist was far more ideological than Powell; he hewed far closer to Nixon's strict constructionist ideal. It would be those positions that drew the sharp criticism of the Senate. In a move indicative of the influence interest groups would have over future nominations, Rehnquist was the first Court nominee the ACLU chose to oppose, criticizing his positions on civil liberties – as clerk to Justice Robert Jackson in 1952, as the Court considered *Brown*, Rehnquist had written a memo defending the decision in *Plessy v. Ferguson*.[50]

[48] Frank, *Clement Haynsworth*, 119-124.
[49] *Ibid*. pp. 44, 67-68, 104; Abraham, *Justices, Presidents, and Senators*, 14-15
[50] Abraham, *Justices, Presidents, and Senators*, 252-253; "Nixon's Final Advice to Rehnquist," Miller Center Presidential Recordings Program, University of Virginia, Accessed from http://whitehousetapes.net/clip/richard-

Rehnquist would ultimately claim he wrote the memo to represent Justice Jackson's opinion, rather than his own. On other issues, however, Rehnquist aggressively defended his positions, following Nixon's advice. The floor debate on Rehnquist's nomination was even more acrimonious, with Rehnquist at one point being deemed worse than Carswell, despite his pristine credentials, and Democratic Sen. Evan Bayh successfully filibustered the candidate. Eventually, however, the Senate chose to vote on the nomination before leaving for the holidays. It voted to confirm Rehnquist by a comfortable margin – a remarkable outcome, since the Democrats controlled the Senate.[51]

Yet while Rehnquist's case reflects how nominations of the time could still be bipartisan and generally were passed by a wide margin, his experience and those of Fortas, Haynsworth, and Carswell reflect how the two parties saw the Court as less an arbitrative body and more a political powerhouse. The Warren Court demonstrated the extent of the Court's reach under substantive due process, but those decisions also made the Court's subsequent composition a critical issue for Republicans. These nomination battles in turn foreshadowed the far more acrimonious fights to come.

---

nixon-william-rehnquist-nixons-final-advice-rehnquist

[51] Abraham, *Justices, Presidents, and Senators*, 252-253; "Nixon's Final Advice"

IV. DRAWING THE BATTLE LINES

Nixon's appointment of Burger was intended to be the first step in a strict constructionist revolution. With the appointment, conservatives could begin scaling back the liberal reforms of the Warren Court. Yet Burger was a weak leader, and a sizable number of liberal judges still remained on the bench. These factors were pivotal in producing the decision in *Roe v. Wade*. Far from drawing back Warren Court precedents, *Roe* built on the constitutional right of privacy identified in *Griswold* to legalize abortion under the Due Process Clause.

Yet while *Roe* was a significant defeat for conservatives, it energized them. In the wake of *Roe*, grassroots organizations on both sides rose up to continue the abortion fight, and conservative legal movements arose to combat liberal dominance of the law. Ronald Reagan drew from these groups for his administration, and sought to not only restrict *Roe*, but to continue to place strict constructionist and orignalist judges on the Court. Reagan's nomination of Antonin Scalia and elevation of William Rehnquist empowered the conservative wing of the Court. But it was Reagan's nomination of Robert Bork that would prove most pivotal to the future of judicial nominations. As with Nixon's nomination of Haynsworth, liberals vigorously attacked Bork for perceived conservative biases, but unlike Haynsworth, *Roe* and the interest groups it helped create magnified the conflicts over Bork's nomination. The bitterness of Bork's defeat has reverberated through successive judicial nominations, as each party is increasingly willing to attack the other's nominees.

A. *ROE V. WADE,* INTEREST GROUPS, AND THE COURT

There are arguably few Supreme Court decisions more divisive or consequential than *Roe v. Wade*. By intervening in the controversial question of abortion rights, the Court would drastically alter its position in the political order. While Nixon's campaign against the Warren Court was a significant early case of the Court becoming the focus of modern political battles, starting with Reagan, Republican presidents made changing the balance of power on the Court – with the intention of overturning *Roe* – a key issue in their campaigns, fueling future fights over nominees.

Roe was significant in large part because it extended Warren Court due process protections. The district court had y ruled in favor of the plaintiff, adopting a version of the argument in Arthur Goldberg's concurrence in *Griswold v. Connecticut*. Goldberg had argued that the 9th Amendment implied that the rights preserved by the first eight amendments were not comprehensive, and that the federal government may still have a vested interest in declaring other rights equally important and worthy of protection. But the Court disposed of this argument; as noted by William Douglas in companion case *Doe v. Bolton*, the Ninth Amendment's acknowledgment of unknown rights did not create those rights. Instead, the Court held in *Roe* that some concept of "liberty" was protected within the Due Process Clause; building off a multitude of precedents, including *Pierce* and *Griswold*, the justices held that liberty included the rights of privacy and free choice. Thus, abortion was a right protected under the 14th Amendment.[52]

The ruling came as a blow to conservatives, who had sought to scale back the Warren Court's decisions, rather than extend them. Not only did three of Nixon's four nominees vote in the majority on that case – with Blackmun penning the Court's opinion – but it reflected how in whole Burger failed to live up to the Republicans' hopes for a Court that would overturn the Warren Court's progressive precedents. This remake would only come thirteen years later, with Burger's retirement and the twin confirmations of Rehnquist and Scalia.

[52] *Roe v. Wade*, 410 U.S. 113 (1973), 129.

Yet *Roe* was not a complete defeat for conservatives, as it and its successor cases served to bring interest groups to the forefront of the American legal process. Before *Roe*, interest groups played a small but significant role in the judicial process. Labor unions pushed for progressive causes. The NAACP was a significant force for desegregation through the courts; Thurgood Marshall, the organization's chief counsel, represented the plaintiffs in *Brown v. Board of Education*. As the Warren Court expanded its focus into a broad range of social issues, interest groups appeared on both sides of those issues to influence judicial nominations. And with the advent of television, interest groups could broadcast their message to a wide audience, attracting greater attention to their causes. But abortion was an influential issue, and *Roe* came at a time when women's rights were expanding. The Court's decision fueled numerous pro-life and -choice interest groups, which subsequently unified, coordinated, and continued the fight outside the Court.[53]

The period also saw a rise in conservative legal movements throughout the country. In the 1970s and early 1980s, conservative law students perceived that legal institutions – schools, firms, and the courts – were pervaded by a bias toward liberal ideology. To express their beliefs, these conservatives began creating their own organizations. The most notable of these was the Federalist Society, which began as an offshoot of a 1982 legal conference at Yale University School of Law. The movement quickly spread, opening chapters in law schools across the country. These chapters not only served to centralize and focus their members' efforts, but also to connect Federalists to members in other chapters. In this way, the Federalist Society served not only to promote conservative legal theory, but also to help conservative lawyers and students network, further strengthening the movement's ties. This was particularly important to its

[53] Barbra Hinkson Craig and Daniel M. O'Brien, *Abortion and American Politics*. Chatham, NJ: Chatham House Publishers, 1993, pp. 36-43.

members as a means of countering similar liberal networks that enabled liberal litigation and political advocacy groups to thrive in the 1970s.[54]

Yet its network of conservatives would nonetheless be an important tool of the Republican Party. Shortly after the Federalist Society's founding, the Reagan administration hired all of the organization's founders to work for the White House. This move helped the administration in several key ways. First, it sent a strong message to conservative activists – that the administration placed great value on ideological consistency. Hiring the Federalists also connected the Reagan administration directly to their network of conservative advocates. This funneled more Federalists into the administration, including Stephen Markman, who would ultimately play a crucial role in Reagan's court nominations as assistant attorney general. Furthermore, the network provided an easy method for confirming a nominee's ideology – not only would members be more likely to staunchly support conservative principles, but the connections formed through the network would help the administration to thoroughly vet a candidate. Unlike Nixon, who repeatedly nominated moderates thinking they were conservatives, the Reagan administration could easily "litmus test" its conservatives and ensure support for them upon nomination.[55]

But to the Federalists, what mattered most was not the connection to the Republican Party. Indeed, the Federalist Society's goals were primarily ideological, and the organization shied away from outright partisanship. Instead, the Society sought to promote change through litigation. The Society recognized that the greatest obstacles to promoting its policies were the limitations on a court's agenda (since unlike Congress, the courts can only consider matters before them) and the balance of the judiciary. The effects of the former were apparent; the

---

[54] Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*, Princeton, NJ: Princeton University Press, 2008, 12, 137-140.
[55] *Ibid.*, 141-142, 158-159.

Society's members could see the effect pro-life, feminist, and civil rights groups had had during the Warren Court and the early years of Burger. Through the use of the conservative legal network, the Society began organizing effective litigation campaigns to reshape the courts' agenda. But it would be the latter obstacle – the makeup of the courts – that would put conservatives in the path of a growing political storm.[56]

B. BORK

The Burger Court's failure in *Roe* and other cases only hardened Republican determination to remake the Court in a truly originalist image. Yet for Reagan, like Nixon, this commitment to originalism was reflected primarily in a focus on whether nominees would promote conservative goals. Chief among the issues the administration considered in weighing a candidate was his or her opinion on *Roe v. Wade*; David Stras notes that, for judicial nominees, his or her opinion on *Roe* has become the predominant indicator of their political ideology. For that reason, nominees are increasingly grilled in hearings on what they might decide in abortion cases, and Senators will base their opinions of a nominee on that testimony; presidents disguise their opinions of abortion behind vague terms like "strict contstructionism."[57]

Reagan's nominations prior to Robert Bork had not generated quite that level of public outrage. His first nomination, of Sandra Day O'Connor, was meant to fulfill a campaign promise to nominate a woman to the Court. More controversial was his nomination of Rehnquist to replace a retiring Burger as chief justice, with Antonin Scalia chosen to fill Rehnquist's old seat.

[56] *Ibid*., 54, 152-157

[57] David R. Stras, "Understanding the New Politics of Judicial Appointments," Legal Studies Research Paper Series Research Paper No. 07-46, University of Minnesota Law School, 2007, 5; Sarah A. Binder & Forrest Maltzman, *Advice & Dissent: The Struggle to Shape the Federal Judiciary*, Washington, DC: Brookings Institute Press, 2009, 156; Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments*, Oxford: Oxford University Press, 2005, 60-61; John A. Maltese, "Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush," *The Journal of Appellate Practice and Process*, vol. 5 no. 1 (Spring 2005), 9.

By this time, Rehnquist had over fourteen years of decisions on the Court; he indicated in his hearings that his judicial philosophy would not change. Democrats responded by charging that Rehnquist's conservative views on social issues placed him "out of the mainstream." Democrats on the Judiciary Committee assailed Rehnquist, citing his strong conservative positions. More tellingly, organizations such as the National Abortion Rights Action League publicly opposed his nomination; Rehnquist's dissent in *Roe v. Wade* led these organizations to believe he might try to overturn the case decision (as he ultimately would). But in the minority, they could not stop the nomination from going through. Scalia's simultaneous nomination, meanwhile, was meant to appear normal placed next to Rehnquist's; the administration reasoned that had they put forth Rehnquist and Bork at the same time, the resultant political firestorm would have consumed them both. Instead, as Democrats focused their attention on Rehnquist, Scalia was handily confirmed. With these two judges and the more moderate O'Connor, who would later become the main tiebreaking vote in the polarized Rehnquist Court, Reagan and the originalist conservatives had a foothold on the Court.[58]

Yet when Louis Powell retired one year later and Reagan moved to nominate Robert Bork, Scalia's former colleague on the DC Circuit Court of Appeals, who had long been a presumptive nominee, the political climate had changed. Many Republican Senators who had been elected alongside Reagan subsequently lost their seats, and Democrats reclaimed the Senate. In July 1987, when Reagan announced Bork's nomination, his approval ratings had fallen more than fifteen points since 1986, in large part due to the shadow of the Iran-Contra

[58] Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 5th ed, Lanham, MD: Rowman & Littlefield Publishers, Inc., 2008, 265, 276-281; Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America*, New York: Union Square Press, 1989, 16-17; Karen Shields, "Testimony for National Abortion Rights Action League on Nomination of William Rehnquist to Chief Justice of U.S. Supreme Court," Testimony before the Senate Judiciary Committee, July 31, 1986. Accessed from http://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-38-2.pdf

scandal. Furthermore, Powell had been the previous Court's deciding vote; Democrats recognized that whomever Reagan placed in that seat would greatly shift the balance of power on the Court, and if Bork were that nominee, American jurisprudence would change. Yet while Reagan saw Bork's nomination as an opportunity to solidify the originalist presence on the Court, he described him in announcing the nomination as "neither a conservative nor a liberal" – a distortion immediately recognized by most observers, since Bork had a well-established conservative record.[59]

Indeed, Bork faced severe opposition from liberals. Most famously, Sen. Edward Kennedy remarked that Bork's decisions reflected a worldview, which he characterized as "Robert Bork's America," in which "women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids," and the many key rights the Supreme Court created under substantive due process would cease to exist. While the portrayal was exaggerated, Kennedy still made his point – that the Supreme Court was now a political entity, and thus the candidate's political opinions would be essential to understanding how he would affect the body. By setting the stakes for the nomination high, Kennedy guaranteed the fight would be viewed, and treated, as pivotal – and, that it would be vicious.[60]

Interest groups and legal advocacy organizations played a major role in the Bork nomination. One of their key weapons was the media. Not only were the hearings televised (although they had to compete with Oliver North's hearings on Iran-Contra for the American attention span), interest groups used them to launch ads on the nominee – most of which y

---

[59] Abraham, *Justices, Presidents, and Senators*, 281-282; "Job Performance Ratings for President Reagan," Roper Center Public Opinion Archives, Accessed from http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Reagan#.T4oln5pWo40

[60] Bronner, *Battle for Justice*, 84-85

opposed Bork. Organizations such as People for the American Way, AFSCME, and the National Abortion Rights Action League ran spots on television and radio and in newspapers condemning Bork. Dozens more organizations participated in building grassroots, legal advocacy, research, and continuing the fight over Bork outside the hearing room. Indeed, the pressure applied by lobbyists was too much for Joseph Biden, then the Chairman of the Judiciary Committee; on July 8th, Biden met with six interest groups' representatives to ask them to back off to give him room to maneuver. Lobbying interests were organized, and coordinated to avoid conflicting messages in their attacks on Bork. Many of these organizations were concerned that Bork would threaten key progressive precedents like *Griswold* and *Roe*, and sought to vigorously attack the nominee for those positions.[61]

Over the course of the hearings on Bork, the committee worked to identify specific policy beliefs he held that might be used to defeat his nomination. Unlike Haynsworth and Carswell before him, while Bork's politics were very conservative, he did not suffer from any significant lapses of judgment or character that might easily disqualify him from joining the Court. His opponents acknowledged that his judicial credentials were excellent. If they were to defeat his nomination, the Democrats would have to oppose him for his political beliefs. To that end, over five days of hearings, Democrats assailed Bork on his positions that they thought reflected an overly-conservative viewpoint. Of interest were matters of privacy rights – Bork had criticized the Court's decision in *Griswold* in 1971 – as his views on privacy would undoubtedly play a role were he to join the bench and reassess *Roe*.[62]

Yet in the hearings, Bork failed to understand how his answers might come across to the Committee. His explanations for decisions were legalistic, with little regard for how the public

---

[61] Bronner, *Battle for Justice*, 127-133

[62] *Ibid.*, 178-196; Maltese, "Confirmation Gridlock," 8-10.

may view such an austere approach to matters of their rights. Bork also tried to sidestep questions during his hearing; this tactic was particularly apparent in his attempts to defend his criticism of the Constitutional basis of decisions like *Bolling*. Bork had to admit he would have not supported the Court's interpretation of substantive due process in that case, but then claimed he would not overrule *Bolling*. His opponents nonetheless used these statements to indicate that Bork would likely not support issues of substantive due process in the future, which endangered many key progressive decisions. Similar statements on key issues such as women's rights further gave his opponents and even some of his allies the impression that Bork's opinions were too extreme for the Court – doubts that continued even after Bork disavowed many of his most controversial writings and decisions. Steady campaigning by interest groups and grassroots organizations took its toll, and the Bork nomination collapsed; the Judiciary Committee did not recommend him, Six Republicans abandoned him, the Reagan administration distanced itself from the nomination, and he fell nine votes short of confirmation.[63]

Reagan and Republicans decried Bork's defeat as the result of political calculations, rather than any problems with the man himself. Much like Nixon before him, Reagan nominated a candidate very similar to the one the Senate had rejected. Douglas Ginsburg, yet another judge from the DC Circuit, was at least as conservative as Bork, but liberals feared that his lack of a paper trail would make it harder to identify the specific threat he posed. Only the revelation that he had regularly used marijuana in the past saved the Senate from another violent struggle over his nomination. Again like Nixon before him, Reagan relented on the third attempt, nominating the comparatively-moderate Anthony Kennedy, who was confirmed unanimously.[64]

Bork's appointment would have likely changed the balance of power on the Courts and

---

[63] Bronner, *Battle for Justice*, 197-210, 278-297; Peter Wallison, Interview, Ronald Reagan Oral History Project, October 28-29, 2003, Charlottesville, VA, 60.
[64] *Ibid*; Bronner, *Battle for Justice*, 300; Maltese, "Confirmation Gridlock," 10

accelerated the conservative trend; yet his defeat was arguably more influential. The viciousness of the attacks on both sides, and the perceived stakes of the nomination, would influence each party in future nomination battles. Conservatives in particular were outraged by their nominee's defeat; Bork had formed close personal ties within the Federalist Society, and its members sought in the wake of his defeat to get revenge on the "liberal elites" who had unmade him.[65] In addition, Bork's defeat set a new precedent; the Senate demonstrated a willingness to defeat a nomination based solely on the nominee's beliefs, which became known as "Borking".[66] While no battle would ever quite be as severe as that over Bork – though the Thomas affair four years later would be comparable – every battle would be akin to that one, with each party distrusting the other and seeking to identify how the other's nominee seeks to destroy America as Bork supposedly would.

[65] Teles, *Conservative Legal Movement*, 169.
[66] Linda Greenhouse, "Why Bork is Still a Verb in Politics, 10 Years Later," *The New York Times*, October 5, 1997, Accessed from http://www.pulitzer.org/archives/6092

V. ESCALATION AND OBSTRUCTION

While the Bork nomination fight was rough, it did not guarantee that judicial nominations would forever be partisan battlefields. But both parties began to expect the other to nominate partisan judges. In turn, starting with the fight over Clarence Thomas, each party, and their grassroots interest groups, increasingly sought to shape the judiciary, and thus judicial decision-making, through nominations and confirmations. This interest extended to lower-court nominees, slowing the rate of their confirmations. Nominees responded by following Ruth Bader Ginsburg's strategy of providing oblique answers to "litmus test" questions, which only served to increase suspicions that each party sought to slip "judicial activists" past the Senate's scrutiny. The Court's decision in *Bush v. Gore* demonstrated to both parties the apparent stakes of judicial nominations. Each of these battles only served to escalate the conflict over the composition of the courts – a battle that culminated with the very public "nuclear option" fight in 2005, with Republicans threatening to eliminate the judicial filibuster to save a few nominees.

A. SOUTER, THOMAS, AND GINSBURG

Following the bitter battle over Robert Bork, George H. W. Bush's first Supreme Court nominee, the moderate David Souter, indicated a way to escape the downward spiral of combative nominations. But the historical record indicates this was not the administration's intention; it instead is likely Souter was meant to be a "stealth nominee" – or, more specifically, a "stealth conservative." After Bork, the administration sought to avoid another nasty battle; yet the intention was to place a judge with similar beliefs. Souter fit one of these qualities, as though he had been appointed to the Fourth Circuit Court of Appeals three months earlier, he had never taken his seat. Furthermore, in his practice had had written only one law review article, which merely praised his hero, Justice Brennan. Souter thus had no public opinions, particularly on abortion, by which the still-Democratic-controlled Judiciary Committee might judge him. But Bush's Chief of Staff John Sununu knew Souter and believed he was very conservative. The administration had Souter review tapes of Bork's hearings to prepare him for the expected gauntlet. Yet, as the administration discovered, Souter was not quite as conservative as they imagined; while he did not give a forthcoming answer to the committee's many questions about *Roe v. Wade*, he acknowledged a constitutional right to privacy, and his praise of Brennan, for whom he was nominated to replace, indicated he would be similarly moderate and restrained in his judgments. While Souter managed to split the Democrats, he also worried some Republicans, who feared he might not follow the line on the wedge issues. Nonetheless, the committee and the Senate approved him almost unanimously.[67]

Yet while Souter's confirmation was a partial victory for the Senate in the wake of the fight over Bork, it was ultimately a failure for the Bush administration. While Souter's opinions were moderate, he was undoubtedly to the left of Scalia and Rehnquist; the Bush administration's expectations that he might follow those two were undoubtedly unfounded. In 1992, Republican fears about Souter were realized with *Planned Parenthood v. Casey*, which reassessed the findings of *Roe v. Wade*. At stake was a Pennsylvania law applying a set of restrictions on a woman's right to an abortion. Souter, O'Connor, and Kennedy's plurality opinion, which was joined in every part by at least two other justices (though not the same two every time), held constitutional several of the law's restrictions, but upheld the "essential holding" of *Roe*.[68]

---

[67] Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*, 5th ed, Lanham, MD: Rowman & Littlefield Publishers, Inc., 2008, 289-293; John H. Sununu, Interview, George H. W. Bush Oral History Project, June 8-9, 2000, Charlottesville, VA, 110

[68] *Casey v. Planned Parenthood*, 505 U.S. 833 (1992).

In this decision, the plurality drew a comparison between the questions in *Casey* and those in *Brown* and *West Coast Hotel*, two other cases that overturned longstanding precedents. In each of those cases, the justices argued, the predecessors, *Plessy v. Ferguson* and *Adkins v. Children's Hospital*, was based on facts that, while unintelligible today, were nonetheless sound reasoning at the time, and since the logic could be understood, the decisions "were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principles to facts as they had not been seen by the Court before. In constitutional adjudication, as elsewhere in life, changed circumstances may impose new obligations." The Court's obligation, the plurality argued, was to represent the Constitution as it was presently understood; by contrast, no aspect of Constitutional interpretation or the nature of abortion had changed in the nineteen years since *Roe*, and thus its fundamental finding and constitutional status were also unchanged.[69] Naturally, the originalists on the Court reacted critically to this interpretation of *stare*, but Blackmun and Stevens joined, preserving *Roe* with a slim majority. If the Bush administration had chosen Souter as a "secret weapon" against abortion, then, it miserably failed in that goal. Yet this failure only further indicated the importance of nominating steadfast conservatives to protect Republican policies on the bench.

In 1991, after witnessing the failure with Souter, Bush nominated Clarence Thomas to replace Thurgood Marshall. Immediately, liberals criticized the nomination, because while Thomas would maintain the racial composition of the Court, he would sharply shift its ideological balance. In particular, interest groups and Democratic Senators believed Thomas would be another vote against *Roe v. Wade*, along with Rehnquist, Scalia, and Byron White. These fears were due also in part to Thomas' lack of a solid record, having only served on the

[69] *Ibid*, pp. 863-864.

Circuit Court for the District of Columbia for six months prior to his nomination. In a move reminiscent of the fight over Bork, both parties mobilized their grassroots organizations and prepared for a fierce fight in committee. Democrats subjected Thomas to strict scrutiny over his views on *Roe*, which he insisted he had not considered, and his other conservative opinions on matters such as affirmative action. When Thomas' nomination made it to the floor after splitting the vote in committee, he confronted allegations by Anita Hill of sexual harassment, which further threatened his nomination. But ultimately, Thomas's evasions worked. Without any admissions on abortion issues or a clear record like Bork's, interest groups formed a less united front. Pro-choice and feminist groups strongly opposed Thomas, but civil rights groups split over his nomination, and other interest groups did not act against his nomination as strongly as against Bork. Without that united coalition, and with no clear result from the Hill drama, the Senate narrowly confirmed the battered justice.[70]

Thomas' hearings demonstrated how judicial nominations had changed since Bork's defeat. While interest groups during Bork's nomination played a large role in influencing the hearing process and Senators' subsequent votes, since then their influence had magnified. Gregory Caldeira and John Wright measure the influence of lobbying interests on the nomination hearings for Bork and Thomas and find that, while fewer groups lobbied for and against Thomas, they had a significantly greater impact over the proceedings. They find that, had the amount of lobbying done against Bork decreased by 25%, he would have only won five more votes – not enough to win his nomination. By contrast, had lobbying for Thomas increased by 25%, he would have received 33 more votes over experimental predictions; they also note that a 2% decrease in lobbying for Thomas would have been enough to defeat his nomination. Thus, while

[70] Abraham, *Justices, Presidents, and Senators*, 295-301; Gregory A. Caldeira and John R. Wright, "Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate," *American Journal of Political Science*, Vol. 42 No. 2 (Apr. 1998), 509

lobbying interests greatly influenced Bork's nomination, within a few years their influence had magnified, and small shifts in support for a candidate could be all he or she needs to secure a nomination.[71]

Despite the tough road he faced getting to the Court, Thomas was more successful in promoting Bush's judicial agenda; where Souter was more liberal than the administration had judged, Thomas has proven himself to be very conservative, and reliably voted with Rehnquist and Scalia. While for Souter was key in the administration's loss in the *Casey* decision, likewise, Thomas was instrumental in the Court's ruling in *United States v. Lopez*, which reduced the reach of the federal government's powers under the Commerce Clause. The defendant challenged a law that prohibited the possession of a firearm in a school zone; Congress asserted that the regulation of activities in schools fell within the scope of its powers, because maintaining safe schools is important to the future of interstate commerce.[72]

Rehnquist's opinion for the Court's 5-4 majority argued otherwise. He held that Congress's justification for the bill was based on a series of flimsy inferences connecting gun possession with unrelated economic activities. Such an extension would allow anything to fall under Congress' unenumerated powers, removing any reason for their original enumeration. *Lopez* was a tremendous victory for the Court's originalists – it was the first time since before *West Coast Hotel* almost six decades earlier that the Court had ruled that Congress had exceeded its authority under the Commerce Clause. The Rehnquist Court would further retract the federal government's Commerce Clause powers in *United States v. Morrison*, in which it also declared unconstitutional part of a law – in this case, the Violence Against Women Act – for exceeding Congress' authority, again by a narrow margin. These two cases demonstrated the influence of

[71] Caldeira and Wright, "Lobbying for Justice," 504, 509.
[72] *United States v. Lopez*, 514 U.S. 549 (1995)

originalist ideology on the Court; by scaling back federal powers, the conservative wing of the Court under Rehnquist began to fulfill its decades-old mission.[73]

Bill Clinton was more successful than Bush in choosing justices. The most notable of his nominations was that of Ruth Bader Ginsburg, though not for any obstacles in confirmation, receiving almost no votes in opposition. The Ginsburg nomination is notable instead for how the justice fared in hearings. Her record was acceptable to both parties – at once reassuring to Democrats and nonthreatening to Republicans – but in describing her judicial philosophy, Ginsburg refused to answer questions related to major judicial issues such as abortion and gay marriage, instead falling back on defenses of *stare decisis* and well-known and agreeable precedents and former justices. While this strategy did not hinder Ginsburg's nomination, it would set a precedent for future nominees to avoid answering questions; while this protects candidates from the fierce inquiries which ended up derailing Bork's nomination, it also has the unintended consequence of making Senators fearful that a candidate who is not forthcoming with their opinions is concealing some dangerous activist tendency. Democrats criticized John Roberts and Samuel Alito during their nominations because both were withdrawn about their opinions. The Ginsburg precedent has thus only further exacerbated recent conflicts over judicial nominations.[74]

B. LOWER COURT BATTLES

---

[73] *Ibid.*; *United States v. Morrison*, 529 U.S. 598 (2000); Lucas A. Powe, Jr. *The Supreme Court and the American Elite*. Cambridge, MA: Harvard University Press, 2009, 317

[74] Abraham, *Justices, Presidents, and Senators*, 306; Senate Committee on the Judiciary, *Report on the Nomination of Ruth Bader Ginsburg to be an Associate Justice of the United States Supreme Court*, 103rd Cong., 1st sess., 1993, Accessed from http://www.loc.gov/law/find/nominations/ginsburg/report.pdf; Todd L. Wheeler, "I Can't: Ethical Responses and the Roberts Confirmation Hearings," *Georgetown Journal of Legal Ethics*, Vol. 19 No. 1 (Winter, 2006), 1077.

Yet the battles over Supreme Court nominees would have an additional consequence; as those battles became more antagonistic and each party came to see the role of a judge as larger, the two parties began delaying and blocking the other's lower court nominees. In 1992, in a move reminiscent of Fortas' fate, Biden used his powers as chairman of the Senate Judiciary Committee to delay consideration of some of George H. W. Bush's nominees. He gave Democrats an opportunity to fill those nominations themselves should a Democrat take the White House.[75]

Two years later, when Republicans recaptured the Senate, they began using similar tactics against Clinton's nominees. They did so in much more systematic manner with several tools at their disposal. First, since they controlled the Senate, Republicans also held the chair of the Senate Judiciary Committee. In that position, they blocked Clinton nominations by delaying votes and, in some cases, by preventing the nominee from receiving a hearing. Second, Republicans applied holds. Because the Senate rules require that all Senators consent to proceed on a matter, if a Republican disagreed with a nominee, he or she could place a hold on the nominee. Finally, Republicans emphasized the use of the "blue slip" for lower-court nominees. By Senate tradition, a state's Senators may object to any nominees submitted for positions in that state, and the President is supposed to follow their wishes. Republicans took this convention a step further; in 1997, the chairman of the Senate Judiciary Committee, Orrin Hatch, requested that the White House in choosing lower-court nominees give serious consideration to the home-state Senators' preferences – beyond just giving them a veto. In states with Republican delegations, this would force Clinton to submit nominees the Republicans would prefer, making

[75] Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments*, Oxford: Oxford University Press, 2005

it difficult for him to pick a liberal. These factors combined to delay Clinton's appointment of preferred judicial nominees.[76]

The divisiveness of these nomination battles reflected in part greater divisions in American politics. John Maltese notes that in recent history different parties have often controlled the White House and Senate. With more obstacles to legislation, and greater partisan polarization, all legislative goals have suffered, including judicial nominations. For example, in 1994, Republicans captured the House and Senate on a fierce campaign against Clinton's first two years in the White House. Although that campaign was primarily in response to political issues unrelated to the courts, the fierce political divisions it represented also affected nomination battles for the next six years of Republican majority. Maltese also emphasizes that judges are particularly important – not only can they reshaping federal law, they also serve for life; with the frequent turnover in Congress and the White House, Democrats and Republicans recognized that court nominees would fill their roles for far longer than each party would control government, and have a much greater effect on policy.[77]

Antagonism between Clinton and Republicans further complicated the process. In 1998 and 1999, in the months leading up to Clinton's impeachment trial, Hatch placed a blanket hold on all of the president's nominees; while the hold was ultimately lifted, the result was that many of Clinton's later nominees were never heard by the Judiciary Committee. Republicans also blocked Clinton's nominees in later years of his term because at the time, the partisan balance of the courts was very even, and they feared his nominations might unsettle that balance.

---

[76] Brannon P. Denning, "Reforming the New Confirmation Process: Replacing 'Despite and Resent' with 'Advice and Consent'," *Administrative Law Review*, Vol. 53 (2001), 20-22; Sarah Wilson, "Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective," *The Journal of Appellate Practice and Process*, Vol. 5 No. 1 (Spring 2003), 31-32; Sarah A. Binder & Forrest Maltzman, *Advice & Dissent: The Struggle to Shape the Federal Judiciary*, Washington, DC: Brookings Institute Press, 2009, 99

[77] John A. Maltese, "Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush," *The Journal of Appellate Practice and Process*, vol. 5 no. 1 (Spring 2005), 3.

Notwithstanding the legitimacy of such a tactic or its ends, this move had the effect of frustrating Democrats, introducing more antagonism to the nomination process. Clinton attempted to circumvent Republican opposition through recess judicial appointments, but Senator James Inhofe responded by blocking all of the President's nominees in protest.[78]

Even if these tactics did not work to defeat all nominees, they had the effect of increasing the time it took for confirmation. In the 106th Congress, with the Republican blanket hold during the Clinton impeachment, the average wait time from nomination to confirmation for a circuit court nominee jumped to well over 250 days, and confirmation rates fell below fifty percent. The number of vacancies on the federal courts began to grow; in 1998, Chief Justice Rehnquist criticized the Senate in his annual report for allowing the number of vacancies to grow, endangering the judicial process.[79]

Yet Republicans maintained that Clinton's nominees were radical. In 1997, a Republican fundraising effort (signed, ironically, by Robert Bork) argued that Clinton's nominees were liberal elite activists.[80] This sentiment reflected the growing stratification in American politics; while Republicans had impeached Clinton, their failure to see him convicted had left both parties frustrated. Yet the election of 2000 would not only demonstrate how much more fractious politics could be, it would provide the fuel for the next, even harsher battle over judicial nominees.

---

[78] Epstein & Segal, *Advice and Consent*, 20-25
[79] Binder and Maltzman, *Advice & Dissent*, 3, 5; John H. Cushman, Jr. "Senate Imperils Judicial System, Rehnquist Says," *New York Times*, January 1, 1998, Accessed from http://www.nytimes.com/1998/01/01/us/senate-imperils-judicial-system-rehnquist-says.html?pagewanted=all&src=pm
[80] Maltese, "Confirmation Gridlock," 15

VI. THE CONFLICT GOES NUCLEAR: BUSH AND OBAMA

A. *BUSH V. GORE*

If the conflicts between Clinton and Congress did not suggest greater partisan schisms in American politics, the decision in *Bush v. Gore* not only made those divisions very apparent, but also indicated the role the courts would play in the next decade of partisan conflict. The case demonstrated the power of courts, and in turn made both parties increasingly sensitive to their political balance. In the close 2000 presidential election, the Court agreed with Bush, halting the Florida recount. The five conservative justices subsequently ruled that no recount consistent with the Equal Protection Clause could be completed in time for the electoral votes to count, effectively giving Florida, and the election, to Bush. Democrats perceived the decision as conservative judicial activism – five Republican appointees defending a Republican presidential nominee. Forty percent of respondents in one survey thought the decision was "partisan" or "political."[81]

In a certain sense, the popular belief that *Bush v. Gore* was both partisan and unconventional is contradictory; if we believe that presidents nominate judges to push their agendas, including the success of their party, then partisan decisions are conventional. It may be instead that Americans still generally believed at the time of *Bush v. Gore* that partisanship on the courts was unusual. Whatever the reason, the Court could not escape the public's negative reaction to the decision.[82] It appears that by voting *per curiam* about the Equal Protection issues,

---

[81] *Bush v. Gore,* 531 U.S. 98 (2000); Jeffrey Toobin, "Precedent and Prologue," *The New Yorker*, December 6, 2010, accessed from http://www.newyorker.com/talk/comment/2010/12/06/101206taco_talk_toobin; James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, "The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?" *British Journal of Political Science*, Vol. 33 No. 4 (Oct. 2003); Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments*, Oxford: Oxford University Press, 2005, 125

[82] The one way the Court could have avoided making a conclusive decision, as Charles Zelden argues, would have been for the majority to merely use the *per curiam* judgment's majority, with Breyer and Souter, to remand the case to the Florida Supreme Court with instructions to correct their errors. The Court's intentions in the more conclusive

the Court sought to avoid partisan perceptions. Yet had the Court attempted to provide a *per curiam* decision on the "safe harbor" deadline, which was ruled on a 5-4 margin, the nakedness of the political calculus, if not earning the Court additional scrutiny, would not improved the situation. The decision guaranteed to be controversial, because the decision was guaranteed to look like the Supreme Court choosing the president. As Stevens predicted in his scathing dissent,

> The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land… Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[83]

Bush v. Gore did not have an immediate impact on the overall public standing of the Court. Nonetheless, it had an important effect on how the courts and judicial nominations would be subsequently perceived. Before *Bush v. Gore*, the stakes of court decisions were comparably small, outside of a handful of major social issues such as abortion. But *Bush v. Gore* demonstrated the scope of Court decisions, and made the political makeup of the Court a far more important issue to Americans. Democrats in particular experienced a strong increase in disapproval of the Court after the decision. This anger with the Supreme Court, coupled with the opportunity for Democrats to get payback for the divisiveness of the Clinton years, would greatly contribute to the nuclear option crisis.[84]

B. THE NUCLEAR OPTION

---

ruling are more inscrutable, though it is possible the Court was not sure what Florida would do on remand and sought to avoid playing an unnecessary game of judicial ping-pong. See Charles Zelden, Bush v. Gore*: Exposing the Hidden Crisis in American Democracy*, Lawrence, KS: University Press of Kansas, 2008, pp. 221-222.

[83] *Bush v. Gore,* 531 U.S. 98 (2000), 128-129

[84] Herbert M. Kritzer, "The Impact of *Bush v. Gore* on Public Perceptiosn and Knowledge of the Supreme Court," *Judicature*, vol. 85, no. 1 (Jul.-Aug. 2001), 35.

By the beginning of the Bush administration, the costs of the delaying tactics of the Republican Senate under Clinton were becoming apparent. The confirmation rate for circuit court judges in the 1980s was 90 percent; in the 1990s, that rate was 64 percent. Yet even after Republicans took the presidency, delays only grew. After Sen. Jim Jeffords defected from the Republicans, the Democrats claimed control of the Senate. Having witnessed the low confirmation rates of the 1990s, they repaid Republicans with holds, delays, and filibusters, blocking ever more judges – the confirmation rate for 2000-2008, despite a Republican majority in the Senate for six of those eight years, was a paltry 48 percent.[85]

The decision in *Bush v. Gore* made this choice easier for Democrats; they feared allowing more judges like Scalia, Thomas, or Rehnquist, whom they perceived as partisan judicial activists. Yet as obstruction in the name of blocking activist judges increased severely in the 1990s and 2000s, judges – and judicial nominees – became no more partisan or activist. While Samuel Alito and John Roberts, nominated by the second President Bush and confirmed by a bitterly divided Senate, are significantly more conservative than average (voting conservatively in 74% and 75.3% of cases, respectively), they are significantly less conservative than William Rehnquist, nominated decades before our current crisis, and Clarence Thomas. And this trend applies to lower courts as well. Cass Sunstein, David Schkade, and Lisa Ellman, surveying federal circuit court judges, found Republicans voted for liberal positions 38% of the time, and Democrats voted for conservative positions almost half the time. As the authors argue, despite the overblown fears of judicial activism, these results indicate judges primarily rule based on the facts of a case, *stare decisis*, and the rule of law, rather than their personal biases. [86]

---

[85] Sarah A. Binder & Forrest Maltzman, *Advice & Dissent: The Struggle to Shape the Federal Judiciary*, Washington, DC: Brookings Institute Press, 2009, 80
[86] William M. Landes and Richard A. Posner. "Rational Judicial Behavior: A Statistical Study." Unpublished manuscript. October 26, 2007. Accessed from http://economics.uchicagoedu/pdf/Landes_PosnerOct07. 46; Cass R.

What has increased in recent decades is the extent to which each party *perceives* the other party to be trying to slip judicial activists through – and that perception is symptomatic primarily of increased partisan stratification. With increased stratification, the two parties think increasingly worse of each other, which in turn leads them to expect the worst from the other – and thus from whom they nominate. The Ginsburg precedent has only worsened this situation, as judicial nominees' reticence in an attempt to avoid badly answering an unanswerable question comes across to concerned Senators as the nominee concealing their dangerous opinions.[87]

These trends in the treatment of lower-court judicial nominees under Bush are important to understanding the roots of the "nuclear option" episode. When Bush took the presidency, there were still several dozen vacancies on the bench – which existed in part because Senate Republicans had blocked Clinton's nominations in his lame duck session by refusing to hold hearings. Bush made an effort to fill the bench with solidly conservative justices. This mission in part reflects the participation of the Federalist Society in his nominations – Epstein and Segal note that twenty of his first seventy nominees were directly recommended by the organization. But Democrats were angry with Republicans – not only because Bush had triumphed in *Bush v. Gore*, but also because Republicans, like Nixon with Fortas, now sought to fill vacancies they had maintained. Democrats responded by preparing to fight Bush's nominations; prominent liberal legal scholars argued that Bush intended to fill the bench with extreme conservatives, and that direct action was necessary to prevent that outcome.[88]

Sunstein, David Schkade, and Lisa M. Ellman. "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation." 90 Virginia Law Review 301 (March 2004).

[87] Todd L. Wheeler, "I Can't: Ethical Responses and the Roberts Confirmation Hearings," *Georgetown Journal of Legal Ethics*, Vol. 19 No. 1 (Winter, 2006), 1077.

[88] Neil A. Lewis, "Washington Talk; Democrats Readying for Judicial Fight," *New York Times*, May 1, 2001, Accessed from http://www.nytimes.com/2001/05/01/us/washington-talk-democrats-readying-for-judicial-fight.html; Epstein and Segal, *Advice and Consent*, 52-55;

The two sides would first come into direct conflict over the nomination of Miguel Estrada, Bush's first nominee to the Circuit Court for the District of Columbia. Estrada worried Democrats because he had no judicial experience or published academic work, and while he was predictably reticent about his opinions in hearings, he was a member of the Federalist Society and associated with many well-known Republicans. Estrada had also been part of the legal team representing the president in the loathed *Bush v. Gore* decision. Democrats also perceived that if Estrada joined the DC Circuit Court, he would be positioned for a future nomination to the Supreme Court, since not only has no Supreme Court justice since Rehnquist joined the court without judicial experience, but also the DC Circuit Court would put him in prime position for a subsequent nomination to the Court – four of the current nine justices had served there; Bill Clinton originally appointed Elena Kagan to that court as well, but her nomination was blocked by Republicans. Democrats were particularly afraid of this outcome because they themselves wanted the opportunity to nominate the first Hispanic justice. To get more information about Estrada, Democrats requested confidential Justice Department memos about his nomination, which the White House refused to release. Without knowing the contents but observing the White House's resistance, Democrats believed there was something to fear about the nominee which the administration sought to hide (despite no evidence to that effect) and vowed to maintain the filibuster until they learned more about the nominee; subsequent Republican efforts to break the filibuster proved unsuccessful, and Estrada chose to withdraw his nomination.[89]

[89] David G. Savage, "Little Light Shed on Bush Judicial Pick," *Los Angeles Times*, March 27, 2002, Accessed from http://articles.latimes.com/2002/sep/27/nation/na-estrada27; Byron York, "When Democrats Derailed a GOP Latino Nominee," *Washington Examiner*, May 27, 2009, Accessed from http://washingtonexaminer.com/politics/2009/05/when-democrats-derailed-gop-latino-nominee/98900; Tim O'Brien, "Democrats Begin Filibuster Against Estrada," CNN, February 13, 2003, Accessed from http://articles.cnn.com/2003-02-13/politics/senate.estrada_1_miguel-estrada-senate-democrats-bush-judicial-nominee?_s=PM:ALLPOLITICS; "Supreme Court Justices Without Prior Judicial Experience Before Becoming Justices," Findlaw, Accessed from http://supreme.lp.findlaw.com/supreme_court/justices/nopriorexp.html

Not only was Estrada the first circuit court nominee ever successfully filibustered, that filibuster was also the first time a nominee was defeated despite having the support of a majority of the Senate. Where Democrats had criticized Republicans for their delaying tactics under Clinton, now it was Republicans criticizing Democrats. The latter claimed Fortas' defeat as precedent, but the scandals surrounding Fortas made his nomination untenable, and indeed he lacked the support of a majority of the Senate at the time of his defeat. Furthermore, while Reagan, the first Bush, and Clinton had had nominations blocked by the Senate, those cases usually occurred because the President's party did not control the Senate. By contrast, Estrada was defeated solely because Republicans could not get enough votes for cloture.[90] With Estrada's defeat, Democrats escalated the battle over judicial nominations – not only by making the filibuster the crux of the battle, but also by extending it to lower court nominations.

In the 108th Congress, Democrats filibustered ten nominees to federal appeals courts, of forty-six total nominees. Of those, seven were resubmitted, and blocked again, in 2005. The nominees were to Democrats too extreme to even deserve a vote, which would undoubtedly end in confirmation. While Republicans protested the move, Democrats argued it was no different from the filibuster of Abe Fortas' nomination in 1968, or Republicans' obstructive methods under Clinton from 1995-2000. In the former case, however, Fortas fell despite an overwhelming Democratic majority in the Senate. Fortas' ethical issues, not his positions, provided his foes with the ammunition they needed. By contrast, the candidates the Democrats filibustered were not tainted by scandal. In the latter case, Republicans controlled the Senate and could merely keep distasteful nominees from getting a hearing; this was a reflection of their ability to stop a nominee from being confirmed if he or she went to a vote. By contrast, Democrats were in the

[90] Tim Curry, "Filibuster Foes Argue Over '68 Fortas Precedent," MSNBC, May 19, 2005, Accessed from http://www.msnbc.msn.com/id/7747167/ns/politics-tom_curry/page/2/#.T4jILJpWo40

minority in the Senate from 2005-2008. By filibustering nominees, they exercised power but, unlike the Republicans, lacked greater power to back it up; their powers were limited to the rules they used in obstructing nominees. Notwithstanding the legitimacy of the filibuster, it did represent the first systematic use of a filibuster by an opposing party minority to block circuit court nominations. At the same time, the Democrats' citation of these cases in defense of their filibuster indicates how the history of judicial nomination battles is linked to present conflicts; each party views this history and through it expects the other party to nominate partisans and obstruct the nomination process.[91]

To overcome the filibusters, Majority Leader Bill Frist threatened the so-called "constitutional option," or the "nuclear option," a procedural method to defeat the filibuster. The nuclear option would require that a Republican Senator appeal to the president of the Senate to ask for a ruling on the appropriate number of votes needed to close debate. Since Vice President Dick Cheney served as President of the Senate, he would rule that advice and consent merely requires a simple majority. Democrats would move to appeal the ruling, and Republicans would respond by tabling that motion. Since a motion to table passes by simple majority and cannot be debated or filibustered, and since Republicans could likely obtain 51 votes, Cheney's ruling would be upheld and filibustering a judicial nomination would be prohibited. Yet the risks of employing the nuclear option were also very real; since no majority party would have reason to reinstitute the rule in the future, the change would likely be permanent – which would expose each party to risk whenever they found themselves out of the White House and in the minority in

[91] Binder and Maltzman, *Advice & Dissent*, 98-99; "Failed Cloture Votes on President Bush's Nominees," American Bar Association. July 26, 2004, Accessed from http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/judicial_vacancies/fillibuster108th_72604.authcheckdam.pdf

the Senate. In addition, Democrats threatened that, were Republicans to use the nuclear option, they would use any remaining procedural tools to shut down Senate business.[92]

On May 24, 2005, Frist planned to call for cloture on the nomination of Janice Rogers Brown, one of the "extremist" filibustered judges. He threatened that should the vote fail, he would employ the nuclear option. But because before the conflict could escalate further, on May 23, a group of senators known as the Gang of 14, representing seven members of each party, intervened. The Democratic members agreed to vote on cloture for Bush's nominations except in extreme circumstances, and the Republicans agreed not to vote for the nuclear option. The compromise ensured that the filibuster would remain, and some of the filibustered nominees were confirmed. While the political climate to that point had escalated to where conflict seemed inevitable, the Senate backed from the brink, preserving the equality of the nomination process.[93]

C. THE CRISIS' AFTERMATH

Yet the Gang of 14's compromise did not address the sluggishness of the judicial nomination process, nor did it alleviate the partisan divide. When Democrats reclaimed the Senate in 2006, they resumed the process of denying hearings to district and circuit court nominees they found objectionable; when Republicans criticized the decision, Senate Judiciary Committee Chairman Patrick Leahy defended the decision by pointing to Republicans' similar treatment of Clinton's

[92] Richard S. Beth, "'Entrenchment' of Senate Procedure and 'Nuclear Option' for Change: Possible Proceedings and Their Implications," Congressional Research Service, March 28, 2005, Accessed from https://www.fas.org/sgp/crs/misc/RL32843.pdf; Edwin Chen, "Senate Democrats Erect Shield to Obstruct 'Nuclear Option'," *Los Angeles Times*, March 16, 2005, Accessed from http://articles.latimes.com/2005/mar/16/nation/na-reid16

[93] Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, "Picking Judges in a Time of Turmoil: W. Bush's Judiciary During the 109th Congress," *Judicature*, Vol. 90 No. 6 (May-June 2007), 264-267.

nominees from 1994 to 2000. This practice only further diminished Bush's rate of successful nominations.[94]

In 2008, Barack Obama was elected president, and the Democrats expanded their control over the Senate. Republicans, now in the minority, began using similar tactics to Democrats' from the Bush administration to block Obama's nominations. Both parties are still sensitive to returning to the nuclear crisis, which has led Republicans to avoid abusing the filibuster, but instead Republicans under Obama have opted to use the secret hold to block nominations. The secret hold differs from a normal hold in that it allows a Senator to place such a hold without being revealed, which not only makes it harder to identify that Senator and any demands he or she may have for lifting the hold, but also minimizes any political consequences for holding the bill. Proceeding with a bill around a secret hold exposes a bill to the possibility of a filibuster. While Republicans lacked the votes to block a cloture vote before Scott Brown's election to the Senate in January 2010, they could still threaten a filibuster with the secret hold, confident that Democrats would back down first; even if a confrontation occurred, because the Democrats are a less cohesive bloc than Republicans, their majority did not guarantee unanimity. Unlike during the Clinton administration, when Republicans used the hold to block Clinton nominations from a majority position, the extent to which Republicans have used the hold to combat judicial nominations without a majority is unusual.[95]

To address the problems with the secret hold, the Senate in 2008 added a rule requiring that Senators secretly holding a bill be revealed six days after placing the hold; in 2011, that deadline was shortened to two days. But despite popular perceptions to the contrary, that does

---

[94] Patrick Leahy to George W. Bush, March 20, 2008. Senate Judiciary Committee Documents: 110th Congress, 2008. Accessed from http://www.judiciary.senate.gov/resources/documents/upload/110thCongress-2008Documents.pdf ; Binder and Maltzman, *Advice & Dissent*, 101

[95]

not constitute a "ban" on the secret hold, since Senators can instead opt to place a hold, then withdraw the hold and have a fellow Senator place a new hold before the two days expires, allowing them to pass it off indefinitely while still maintaining their anonymity. While often Senators are very aware of who is placing the secret hold, it is difficult for Democrats to break the hold without a filibuster-proof majority or greater efforts at compromise – which, in this increasingly fractious political climate, is particularly difficult. As a result, the number of judicial nominees waiting to proceed is still high, and nominees wait increasingly long to be heard by the Senate – allowing the number of vacancies on the courts to grow to dangerous levels.[96]

Due in large part to Republicans' use of the secret hold, only one of Barack Obama's judicial nominees, Goodwin Liu, has been successfully filibustered, but twelve other nominations have gone down through the use of holds and other obstructions.[97] Yet the secret hold's power largely stems from the continued application of the filibuster. As long as that power to check the majority's nominations still exists (and as long as agreements such as the one created by the Gang of 14 can be ignored if one deems a nominee "too extreme"), vacancies will still plague the federal court.

[96] Ted Barrett, "Senate Bans Secret Holds, Makes Other Rule Changes," CNN, January 27, 2011, Accessed from http://politicalticker.blogs.cnn.com/2011/01/27/senate-bans-secret-holds-makes-other-rule-changes/; Tom Devine, "Who Killed the Whistle-Blower Bill?" *Los Angeles Times*, January 10, 2011, Accessed from http://articles.latimes.com/2011/jan/10/opinion/la-oe-devine-whistleblower-20110110 ; Helene Cooper, "Legislative Limbo Strands Many of Obama's Nominees," *New York Times*, December 27, 2009, accessed from http://www.nytimes.com/2009/12/28/us/politics/28nominees.html; David Welna, "Senators Fed Up With Secret Blocks on Nominees," National Public Radio, June 3, 2010, Accessed from https://www.npr.org/templates/story/story.php?storyId=127368817

[97] The circuit court nominees blocked are Robert Chatigny, Edward DuMont, Victoria Nourse, Stephen Six, Caitlin Halligan, and Patty Schwartz; the district court nominees blocked are Michael Green, Charles Day, Arvo Mikkanen, Louis Butler, Natasha Silas, and Linda Walker.

VII. FIXING ADVICE AND CONSENT

It appears unlikely judicial nominations will cease to be partisan in the near future. As each party seeks to promote and maintain its policy goals through the courts and to mitigate the other party's similar goals, neither party has any incentive to select more neutral judges. Any efforts to address the resultant polarization of the judicial nomination system must come from changes to the Senate's rules. As demonstrated by the nuclear option episode, the primary obstacle to judicial nominations is the threat of filibuster (implied in the secret hold). While it is important to allow the minority some power in the nomination process, an unlimited obstructive power leads to stagnation. Some compromise must be reached.

A. ASSESSING PROPOSALS TO FIX ADVICE AND CONSENT

There have been dozens of proposals on how to fix the judicial nomination process. To better understand what solutions might best address the problems with advice and consent, it is important to consider the problems with some of these proposals.

Michael Gerhardt and Richard Painter propose removing most checks on the nomination process, and instead instituting an agreement by which the steps to confirmation proceed in a structured manner. Confirmation hearings would be required to take place within ninety days of the original nomination, the secret hold would continue to be barred by popular agreement, and once a nomination reaches the floor it should soon receive an up-or-down vote. A minority that disagrees with a nominee may pass a resolution to delay the vote on a nominee until the next Congress, at which point it must get a vote.[98] Gerhardt and Painter believe that the political

[98] Michael Gerhardt & Richard Painter, "'Extraordinary Circumstances:' The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform," American Constitution Society for Law and Policy Issue Brief, November 2011, Accessed from https://www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf

process is the best check on extreme nominations, as those candidates will cost the President down the line.

However, they overlook several key flaws with their plan. First, while they believe this plan could be implemented through agreement between the majority and minority party leaders, it simply removes too many powers from the minority for the latter to ever agree to the plan. The option to delay a nomination "in extraordinary circumstances" is too small a response for the minority to consider giving up the filibuster. In addition, the delaying option only worsens judicial vacancies. If it works as Gerhardt and Painter propose, in that delayed nominees are forced to wait until the next Congress to receive a vote, then nominees may find themselves waiting up to two years before they can receive a hearing. But the President will be leery of nominating a different candidate in his or her place, because not only would it look bad politically, he would also have to take the chance that the new nominee would also be delayed. Instead, the President would be committed to his nominee, which would prevent any judges from being appointed to that position until the vote occurs – and during that time, the judicial caseload continues to grow, extending the length of civil actions in federal court. And since the definition of "extraordinary circumstances" is vague and the threshold to delay (45 votes) is not particularly high, there is nothing to stop a minority party from delaying every nominee in a session in the hopes of reclaiming the majority in the next Congress – further worsening the vacancy crisis.

Senators from both parties have at different times proposed that the Senate implement a "fast-track" system for uncontroversial judicial nominees. Nominees placed on the fast-track would be treated like treaties; debate on their nominations would be restricted, and after a certain time has elapsed, they would immediately be subject to an up-or-down vote, shielding their nomination from a filibuster. A fast track solution would ensure that nominees who will ultimately be confirmed unanimously or near-unanimously can quickly pass through the nomination process to take their seat. This would also protect uncontroversial nominees from delaying tactics such as the "blanket hold," when Sen. Richard Shelby placed a hold on every nominee pending to get the attention of the Obama administration on a pair of issues that affected his constituents. Holds like Shelby's only further extent the vacancy crisis, which makes a system to protect lower-court nominees more useful. However, such a system would only further isolate more difficult nominees. Senators could concentrate their energies on blocking nominees they find particularly dangerous; with greater focus placed on those nominees, the fights to see them passed would likely be as vicious as the battle that produced the nuclear option. Addressing delays requires not merely expediting nominations, but also defusing fights before they can begin by removing Senators' ability to start and continue those fights.[99]

Karl Schweitzer suggests instead that the Senate litigate the problem. He notes that the parties in the Senate are unlikely to cooperate to solve the problem. Were they instead to submit the question of the constitutionality to the judiciary, they could resolve the issue much more effectively. For example, if the judiciary declared the filibuster unconstitutional, the Senate could then create new (and presumably more lax) rules for adjudicating nominations. However, there are several problems with this method as well. First, it depends upon getting the judiciary to choose to hear the case, which is not guaranteed. It depends upon the court agreeing that the plaintiff in the case has standing to pursue the action (and also that such a plaintiff, likely a major political figure, is willing to expose him or herself to the scrutiny of the court and public); it also requires that the court overlook that, since the filibuster is a political tool, ruling on its legitimacy

[99] Gregory Kroger. "The Filibuster Then and Now: Civil Rights in the 1960s and Financial Regulation, 2009-2010." *The U.S. Senate: From Deliberation to Dysfunction*. Ed. Burdett A. Loomis. Washington, DC: CQ Press, 2012, 165-166; Sarah A. Binder & Forrest Maltzman. *Advice & Dissent: The Struggle to Shape the Federal Judiciary*. Washington, DC: Brookings Institute Press, 2009

would require the court to overlook the political question doctrine. Schweitzer attempts to avoid this by pointing to the constitutional significance of the filibuster question. The filibuster affects the balance of power between the legislative and executive branches. In addition, the plaintiff could argue that the legislature is failing in its responsibility to provide true advice and consent to the president. But this uncertainty undermines the effectiveness of Schweitzer's solution; it can't be truly effective if it sometimes doesn't work.[100]

Second, and more importantly, Schweitzer insufficiently addresses the political considerations at work in such litigation. The case requires a particular plaintiff with standing, which would be the President, a senator, or a judicial nominee affected by the filibuster. Since the filibuster is most often employed in cases where the President's party commands a majority below sixty votes in the Senate, we can assume each of these individuals would be of the same party. If a filibuster is being employed with no likelihood of being broken, meanwhile, we can assume political conditions would have degraded to the point where bipartisanship would not be possible in the litigation; it would instead be would be one party looking to the court to reprimand the other. Furthermore, since such a suit would undoubtedly make its way to the Supreme Court, the ultimate outcome of the litigation may be akin to that in *Bush v. Gore* – the justices' partisan preferences influencing their decisions. It is thus possible that a party in control of the Senate, the presidency, and the Supreme Court could thus get a ruling in its favor, but as Schweitzer notes, this would increase the visibility of the issue. The losing party could thus spin the defeat as the victors "railroading" legal reform through the "partisan, activist" Supreme Court; such a statement would undermine the victory attained. The danger of such aftershocks would likely dissuade parties from attempting to take the case to the courts.

[100] Karl Schweitzer, "Litigating the Appointments Clause: The Most Effective Solution for Senate Obstruction of the Judicial Confirmation Process," *Journal of Constitutional Law*, Vol. 12 No. 3 (Mar. 2003), 910-911, 922-934.

It appears then that the best solution to the judicial vacancy crisis would be one that replaces the filibuster with some limited, but still absolute, veto power. If the parties could each be guaranteed some control over the nomination process, it would be easier for the parties to accept such a compromise; at the same time, the limitations built into such a system would ensure that judicial vacancies are still filled.

B. THE "JURY SELECTION" MODEL

To that end, the author proposes replacing the filibuster with a system modeled after how juries are chosen for common criminal cases. After *voir dire*, attorneys have the opportunity to "strike" jurors from the pool. Attorneys can use two different types of challenges against potential jurors – challenges "for cause" and peremptory challenges. Challenges for cause are unlimited, and attorneys may use them when they believe a juror is biased or will not do their job effectively; by contrast, they may use one of a limited number of peremptory challenges to reject a juror, whom they perceive as being unfavorable to their cause, without giving a reason

Likewise, this model for judicial confirmations would replace the secret hold and filibuster with two types of challenges. Any senator could use a challenge for cause against a nominee whose views he or she believes are demonstrably far outside the mainstream law, or who has a bias that would undermine his or her ability to rule fairly in cases. Unlike anonymous secret holds, senators filing a challenge for cause would be required to state their reasons for challenging a nominee on the floor of the Senate; this would provide greater public scrutiny and reduce the incentives to challenge the average nominee. A motion to challenge a nominee for cause would then go to a voice vote of the chamber. Since one would expect extreme candidates to face bipartisan opposition, this would allow the Senate to quickly reject candidates who are clearly unsuited to becoming judges, and allows individual senators some say in the treatment of nominees.

The Senate may also block nominations with peremptory challenges. These challenges would function like holds, but with two important distinctions. First, only the party leader and ranking member of each party would be allowed to use peremptory challenges. Second, each party would have only a limited number of peremptory challenges for the two years of each Congress, which would be equal to a predetermined percentage of the total number of vacancies in the federal judiciary. Like normal holds, a challenge may be overturned by a cloture vote of sixty senators, but a nominee challenged cannot otherwise be resubmitted until the next Congress.

The peremptory challenge model has many important advantages over the current system of holds and filibusters. Since only two members of each party may use the challenges, they essentially cannot be secret, which increases visibility; this makes it harder for a party to block a nominee without risking political repercussions. Since the party leadership holds the challenges, they can take the input of party members, but will not feel constricted by them; they can weigh party members' requests and decide which ones are worth the use of a peremptory challenge. Their limited use also reduces the influence of interest groups on the judicial nomination process. In the current process, each senator can place a hold on a nominee; thus interest groups have an incentive to lobby certain senators to block candidates they deem threatening to their interests. If only the party leadership can place holds, interest groups will have no incentive to lobby to other senators, reducing the influence of such groups; even if they try to redirect their influence to the leadership, those senators will be so bombarded by interests, any individual group will necessarily find its influence diminished.

The limit on how many challenges each party may use would also expedite the nomination process. Since lower court nominees are usually approved unanimously or by unanimous consent agreement, the greatest obstacle to a nomination is the use of a hold. Putting a limit on the number of holds makes each hold more costly, since that makes it harder for the party to block future (and potentially more controversial) nominations; this would reduce the bar for confirmation for most judges, expediting the process and ensuring more vacancies are filled. Finally, since challenges are more permanent than holds, candidates are not kept in "limbo" while the Senate negotiates over a hold. This also reduces the incentive for the president to hold his best nominees back for fear they will be held or filibustered; due to the smaller number of challenges, if a candidate is blocked in this way, it was unlikely he or she would have ever passed anyway. By contrast, a hold leaves open the possibility the nominee will be confirmed, and thus force him or her to wait, and presidents are increasingly unwilling to force their best candidates to endure that experience, which leads them to never nominate those candidates at all.

This model undoubtedly has limitations. It would be very difficult to apply it to Supreme Court nominations, since usually only one or two vacancies appear on the Court at any one time. But Supreme Court nominations are more public, as the consequences of nominations are greater. Thus, presidents should be less likely to submit dangerous candidates with visible flaws, which makes it less likely the minority party will be able to obtain the necessary votes for a filibuster. This fact was demonstrated in recent nominations to the Supreme Court. In those cases, the President nominated a candidate who represented his or her positions but was nonetheless comparatively moderate; likewise, both parties understood the candidate would tend toward favoring their president's political philosophy in making decisions, but were largely harmless. As a result, each of the four judges was approved by healthy margins. In addition, since the process is more public, it becomes harder for the opposition to filibuster a nominee, because that action will be heavily scrutinized; since presidents have less of an incentive to nominate extreme candidates for the Court due to the greater scrutiny, it is unlikely a nominee will be extreme enough to justify a filibuster, further reducing its likelihood.

Some may also argue that, under this system, presidents whose nominees are blocked could keep submitting similarly-controversial nominees until the opposition party's challenges are exhausted. Yet this model would make such a tactic unlikely. First, the Senate would likely give each party a large number of peremptory challenges, since reducing the number of challenges would cost a party when they become the minority in the future. Second, particularly outrageous nominees would still be vulnerable to challenges for cause, and would be more likely to draw bipartisan criticism. Third, because this model would be more open than the current system of anonymous holds, stubbornness by the president or opposition parties would likely cost that party in future elections. Finally, such persistence is a necessary consequence of removing unlimited tools like the filibuster; what is important is providing a disincentive for extreme nominations and ensuring the party in opposition has a say in nominations.

Finally, some may question whether this model is realistic. The nuclear option was particularly unpopular in 2005 – one poll showed 28% of respondents supported and 59% opposed the Republicans' plan. This opposition was particularly large among Democrats. This demonstrates that efforts to replace the filibuster will likely not be immediately popular. However, both parties must recognize that blocking the other's nominees will only lead that party to return the favor when the balance of power shifts back. Furthermore, polls have shown that the public disapproves of Congressional conflict, but the public still supports their own Senator if he or she claims a reason for obstructing the nomination. Thus, a better system for judicial nominations would be one that expedites the nomination process while allowing the party in opposition some way to challenge difficult nominees and save face. This proposed system does both of these things; peremptory challenges would allow the minority party to claim victory over the President and his "activist judges," while ensuring the much larger number of acceptable candidates can get through without the obstacle of holds. Passing this plan would require cooperation between the two parties – which is far from certain – but if both parties recognize that each is sacrificing some of its powers to preserve the rest, it should be possible to accomplish this task without threatening the parties' political standing.[101]

This proposed system will not fix the partisan rift, or even indicate whether such a rift can be fixed. Nor will it address partisan ideology from corrupting the courts, if such a phenomenon exists. But this proposal is concerned less with the ultimate cause of judicial nomination battles – modern partisanship – and more with addressing the effects of judicial vacancies. The plan is designed to ensure that judicial vacancies can be filled with qualified judges. In the end, the costs of judicial vacancies are too great to allow the parties' perhaps-irreconcilable differences to corrupt the nomination process.

[101] "TIME Poll: Bush Approval Rating at 46%," Time Magazine, May 15, 2005, Accessed from http://www.time.com/time/press_releases/article/0,8599,1061441,00.html; David W. Rohde & Kenneth A. Shepsle, "Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court," *The Journal of Politics*, Vol. 69 No. 3 (Aug. 2007), 674.

CONCLUSION

Conventional wisdom suggests that the judicial nomination crisis we face today is the product of one major event that changed how we view the courts and each other – the Bork nomination, or *Bush v. Gore*, or the battle over the nuclear option. But our political system and its flaws are not the product of one seismic event; rather, it represents a gradual shift in perspectives about the role of government and the courts. As the courts have grown in prominence in the American political process, their composition has in the eyes of the two parties become increasingly pivotal – controlling the courts is a necessary component of controlling the political agenda. And as each party perceives the other's nominees to be partisan activists, and seeks to block those nominations, escalation becomes inevitable. While the nuclear option crisis was only the latest in a long series of battles over the courts, the outsized stakes – the elimination of a filibuster on judicial nominations – compared to the small gain Republicans sought to attain from that destruction indicate how much weight the parties place on controlling the process, and how far they will undoubtedly go in the future to achieve that end.

Any solution to address the vacancy crisis will undoubtedly be limited both in the fundamental inability to address our divisive political climate, and in the need ultimately to provide some check for the minority that could be abused. But it is clear some balance must be reached between the absolute check of a filibuster and majoritarian dominance to ensure that, if there will be victims of our modern partisan conflict, justice under the law will not be one of them.

BIBLIOGRAPHY

Abraham, Henry J. *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II*. 5th ed. Lanham, MD: Rowman & Littlefield Publishers, Inc., 2008.

Adkins v. Children's Hospital, 261 U.S. 525 (1923)

Alliance for Justice. "The State of the Judiciary: President Obama and the 111th Congress." 2011. Accessed from http://www.afj.org/judicial-selection/state_of_the_judiciary_111th_congress_report.pdf

Barrett, Ted. "Senate Bans Secret Holds, Makes Other Rule Changes." CNN, January 27, 2011. Accessed from http://politicalticker.blogs.cnn.com/2011/01/27/senate-bans-secret-holds-makes-other-rule-changes/

Beth, Richard S. "'Entrenchment' of Senate Procedure and 'Nuclear Option' for Change: Possible Proceedings and Their Implications." Congressional Research Service, March 28, 2005. Accessed from https://www.fas.org/sgp/crs/misc/RL32843.pdf

Binder, Sarah A & Forrest Maltzman. *Advice & Dissent: The Struggle to Shape the Federal Judiciary*. Washington, DC: Brookings Institute Press, 2009

Bolling v. Sharpe, 347 U.S. 497 (1954).

Bronner, Ethan. *Battle for Justice: How the Bork Nomination Shook America*. New York: Union Square Press, 1989.

Brown v. Board of Education, 347 U.S. 483 (1954).

Bush v. Gore, 531 U.S. 98 (2000)

Caldeira, Gregory A. and John R. Wright. "Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate." *American Journal of Political Science*, Vol. 42 No. 2 (Apr. 1998), 509

Carter, Stephen L. "Originalism and the Bill of Rights." *Faculty Scholarship Series*, Paper 2252. Yale University. 1992. Accessed from http://digitalcommons.law.yale.edu/fss_papers/2252/.

Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).

Chen, Edwin. "Senate Democrats Erect Shield to Obstruct 'Nuclear Option'." *Los Angeles Times*, March 16, 2005. Accessed from http://articles.latimes.com/2005/mar/16/nation/na-reid16

Chisholm v. Georgia, 2 U.S. 419 (1793).

Civil Rights Cases, 109 U.S. 3 (1883).

Clark, Mary L. "Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments." 71 Louisiana Law Review 452 (2011).

Cooper, Helene. "Legislative Limbo Strands Many of Obama's Nominees." *New York Times*, December 27, 2009. Accessed from http://www.nytimes.com/2009/12/28/us/politics/28nominees.html.

Craig, Barbra Hinkson and Daniel M. O'Brien, *Abortion and American Politics*. Chatham, NJ: Chatham House Publishers, 1993

"Current Judicial Vacancies." United States Courts. Accessed from www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx (Apr. 20, 2012).

Curry, Tim. “Filibuster Foes Argue Over ’68 Fortas Precedent.” MSNBC, May 19, 2005. Accessed from http://www.msnbc.msn.com/id/7747167/ns/politics-tom_curry/page/2/#.T4jILJpWo40

Cushman, John H., Jr. “Senate Imperils Judicial System, Rehnquist Says.” *New York Times*, January 1, 1998. Accessed from http://www.nytimes.com/1998/01/01/us/senate-imperils-judicial-system-rehnquist-says.html?pagewanted=all&src=pm

Denning, Brannon P. “Reforming the New Confirmation Process: Replacing ‘Despite and Resent’ with ‘Advice and Consent’.” *Administrative Law Review*, Vol. 53 (2001)

Devine, Tom. “Who Killed the Whistle-Blower Bill?” *Los Angeles Times*, January 10, 2011. Accessed from http://articles.latimes.com/2011/jan/10/opinion/la-oe-devine-whistleblower-20110110

Dred Scott v. Sanford, 60 U.S. 393 (1856).

Epstein, Lee & Jeffrey A. Segal. *Advice and Consent: The Politics of Judicial Appointments*, Oxford: Oxford University Press, 2005

Escobedo v. Illinois, 378 U.S. 478 (1964)

“Failed Cloture Votes on President Bush’s Nominees,” American Bar Association. July 26, 2004, Accessed from http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/judicial_vacancies/fillibuster108th_72604.authcheckdam.pdf

Farrand, Max, ed. *The Records of the Federal Convention of 1787*. Rev. ed. 4 vols. New Haven and London: Yale University Press, 1937. As part of *The Founders’ Constitution*. Vol. 4, Article 2, Section 2, Clauses 2 and 3, Document 1. Accessed from http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s1.html

Frank, John P. *Clement Haynsworth, the Senate, and the Supreme Court*. Charlottesville, VA: University Press of Virginia, 1991.

_____. “Historical Basis of the Federal Judicial System.” *Law and Contemporary Problems*, Vol. 13 No. 1 (Winter 1948), pp. 4-5.

“Future Judicial Vacancies.” United States Courts. Accessed from www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/FutureJudicialVacancies.aspx (Apr. 20, 2012)

Gerhardt, Michael & Richard Painter. “‘Extraordinary Circumstances:’ The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform.” American Constitution Society for Law and Policy Issue Brief. November 2011. Accessed from https://www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf

Gibson, James L., Gregory A. Caldeira, and Lester Kenyatta Spence. “The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?” *British Journal of Political Science*, Vol. 33 No. 4 (Oct. 2003)

Gideon v. Wainwright, 372 U.S. 335 (1963).

Goldman, Sheldon, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni. “Picking Judges in a Time of Turmoil: W. Bush’s Judiciary During the 109th Congress.” *Judicature*, Vol. 90 No. 6 (May-June 2007)

Greenhouse, Linda. “Why Bork is Still a Verb in Politics, 10 Years Later.” *The New York Times*. October 5, 1997. Accessed from http://www.pulitzer.org/archives/6092

Griswold v. Connecticut, 381 U.S. 479 (1965).

Hamilton, Alexander. “The Federalist no. 76.” The Federalist Papers. April 1, 1788. Accessed from http://thomas.loc.gov/home/histdox/fed_76.html.

_____. “The Federalist no. 78.” *The Federalist Papers*. May 28, 1788. Accessed from http://thomas.loc.gov/home/histdox/fed_78.html.

“Job Performance Ratings for President Reagan.” Roper Center Public Opinion Archives. Accessed from http://webapps.ropercenter.uconn.edu/CFIDE/roper/presidential/webroot/presidential_rating_detail.cfm?allRate=True&presidentName=Reagan#.T4oln5pWo40

Katz v. United States, 389 U.S. 347 (1967).

Kritzer, Herbert M. “The Impact of *Bush v. Gore* on Public Perceptions and Knowledge of the Supreme Court.” *Judicature*, vol. 85, no. 1 (Jul.-Aug. 2001).

Landes, William M. and Richard A. Posner. “Rational Judicial Behavior: A Statistical Study.” Unpublished manuscript. October 26, 2007. Accessed from http://economics.uchicagoedu/pdf/Landes_PosnerOct07

Leahy, Patrick. Letter to George W. Bush, March 20, 2008. Senate Judiciary Committee Documents: 110th Congress, 2008. Accessed from http://www.judiciary.senate.gov/resources/documents/upload/110thCongress-2008Documents.pdf

Lewis, Neil A. “Washington Talk; Democrats Readying for Judicial Fight.” *New York Times*, May 1, 2001. Accessed from http://www.nytimes.com/2001/05/01/us/washington-talk-democrats-readying-for-judicial-fight.html

Lochner v. New York, 194 U.S. 45 (1905).

Loomis, Burdett A., ed. *The U.S. Senate: From Deliberation to Dysfunction*. Washington, DC: CQ Press, 2012

Madison, James. “The Federalist no. 10.” The Federalist Papers. November 23, 1787. Accessed from http://thomas.loc.gov/home/histdox/fed_10.html.

_____. “The Federalist no. 51.” The Federalist Papers. February 8, 1788. Accessed from http://thomas.loc.gov/home/histdox/fed_51.html.

_____. “The Virginia Plan.” Notes on the Debates in the Federal Convention. May 29, 1787. The Avalon Project, Yale Law School. Accessed from avalon.law.yale.edu/18th_century/debates_529.asp

Maltese, John A. “Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush.” *The Journal of Appellate Practice and Process*, vol. 5 no. 1 (Spring 2005).

Marbury v. Madison, 5 U.S. 137 (1803).

Miranda v. Arizona, 384 U.S. 436 (1966).

Murphy, Bruce Allen. *Fortas: The Rise and Ruin of a Supreme Court Justice*. New York: William Morrow and Company, Inc., 1988

NAACP v. Alabama, 377 U.S. 288 (1964), 377 U.S. 307 (1964).

“Nixon’s Final Advice to Rehnquist,” Miller Center Presidential Recordings Program, University of Virginia, Accessed from http://whitehousetapes.net/clip/richard-nixon-william-rehnquist-nixons-final-advice-rehnquist

O’Brien, Tim. “Democrats Begin Filibuster Against Estrada.” CNN, February 13, 2003. Accessed from http://articles.cnn.com/2003-02-13/politics/senate.estrada_1_miguel-estrada-senate-democrats-bush-judicial-nominee?_s=PM:ALLPOLITICS

Patterson, William. "The New Jersey Plan." Notes on the Debates in the Federal Convention. June 15, 1787. The Avalon Project, Yale Law School. Accessed from http://avalon.law.yale.edu/18th_century/debates_615.asp

Pierce v. Society of Sisters, 268 U.S. 510 (1925)

Primus, Richard A. "*Bolling* Alone." *Columbia Law Review*, vol. 104 no. 4 (May 2004).

Poe v. Ullman, 367 U.S. 497 (1961).

Powe, Lucas A., Jr. *The Supreme Court and the American Elite*. Cambridge, MA: Harvard University Press, 2009.

Rohde, David W. & Kenneth A. Shepsle. "Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court." *The Journal of Politics*, Vol. 69 No. 3 (Aug. 2007).

Rubin, Peter J. "Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process." *Virginia Law Review*, vol. 92, no. 8 (Dec. 2006).

Savage, David G. "Little Light Shed on Bush Judicial Pick." *Los Angeles Times*, March 27, 2002. Accessed from http://articles.latimes.com/2002/sep/27/nation/na-estrada27

Schweitzer, Karl. "Litigating the Appointments Clause: The Most Effective Solution for Senate Obstruction of the Judicial Confirmation Process." *Journal of Constitutional Law*, Vol. 12 No. 3 (Mar. 2003).

Shields, Karen. "Testimony for National Abortion Rights Action League on Nomination of William Rehnquist to Chief Justice of U.S. Supreme Court." Testimony before the Senate Judiciary Committee, July 31, 1986. Accessed from http://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST-4-38-2.pdf

Slaughter-House Cases, 83 U.S. 36 (1872).

Stras, David R. "Understanding the New Politics of Judicial Appointments." Legal Studies Research Paper Series Research Paper No. 07-46, University of Minnesota Law School. 2007.

Sununu, John H. Interview, George H. W. Bush Oral History Project. June 8-9, 2000, Charlottesville, VA.

Sunstein, Cass R., David Schkade, and Lisa M. Ellman. "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation." 90 Virginia Law Review 301 (March 2004)

"Supreme Court Justices Without Prior Judicial Experience Before Becoming Justices." Findlaw. Accessed from http://supreme.lp.findlaw.com/supreme_court/justices/nopriorexp.html

"Table C-5: Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition." *Federal Judicial Caseload Statistics 2011*. United States Courts. Accessed from http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx

Teles, Steven M. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton, NJ: Princeton University Press, 2008.

"TIME Poll: Bush Approval Rating at 46%," Time Magazine, May 15, 2005, Accessed from http://www.time.com/time/press_releases/article/0,8599,1061441,00.html

Toobin, Jeffrey. "Precedent and Prologue." *The New Yorker*, December 6, 2010, accessed from http://www.newyorker.com/talk/comment/2010/12/06/101206taco_talk_toobin

Treanor, William M. "Judicial Review Before *Marbury*." *Stanford Law Review*, vol. 58 no. 2 (Nov. 2005), pp. 455-562.

United States v. Carolene Products Co., 304 U.S. 144 (1938), 152n.
United States v. Cruikshank, 92 U.S. 542 (1875)
United States v. Lopez, 514 U.S. 549 (1995)
United States v. Morrison, 529 U.S. 598 (2000)
U.S. Congress. Senate. *Report on the Nomination of Ruth Bader Ginsburg to be an Associate Justice of the United States Supreme Court*, 103rd Cong., 1st sess., 1993, Accessed from http://www.loc.gov/law/find/nominations/ginsburg/report.pdf
Wallison, Peter. Interview, Ronald Reagan Oral History Project. October 28-29, 2003, Charlottesville, VA.
Welna, David. "Senators Fed Up With Secret Blocks on Nominees." National Public Radio, June 3, 2010. Accessed from https://www.npr.org/templates/story/story.php?storyId=127368817
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
Wheeler, Todd L. "I Can't: Ethical Responses and the Roberts Confirmation Hearings." *Georgetown Journal of Legal Ethics*, Vol. 19 No. 1 (Winter, 2006).
Woodward, Bob & Scott Armstrong, *The Brethren: Inside the Supreme Court*, New York: Simon and Schuster, 1979.
York, Byron. "When Democrats Derailed a GOP Latino Nominee." *Washington Examiner*, May 27, 2009. Accessed from http://washingtonexaminer.com/politics/2009/05/when-democrats-derailed-gop-latino-nominee/98900
Zelden, Charles. Bush v. Gore*: Exposing the Hidden Crisis in American Democracy*. Lawrence, KS: University Press of Kansas, 2008