



2003

Disarming the Confirmation Process

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Michael M. Gallagher, Disarming the Confirmation Process, 50 Clev. St. L. Rev. 513 (2002-2003)

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DISARMING THE CONFIRMATION PROCESS

MICHAEL M. GALLAGHER¹

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I. INTRODUCTION

In his second term of office, the President nominates a Circuit Court judge to fill a recent vacancy on the Supreme Court. The nominee, respected by practitioners and jurists alike, quickly receives a rating of “Well Qualified” from the American Bar Association. In announcing the nomination, the President praises the nominee’s qualifications, temperament, and character. Regrettably, the announcement of the nomination is the high point for the nominee. Almost immediately, interest groups mobilize against the nominee. The nominee’s previous decisions are scoured, scorned, and misrepresented. Charges are leveled that the nominee is an ideologue.

Heeding the call to battle, many Senators in the opposition party quickly criticize the nominee’s ideology, and announce their intentions to vote against the nominee. Interest groups quickly release reports charging that the nominee’s views are “outside the mainstream” of legal thought. The confirmation hearing turns bitter; the nominee’s stock continues to decline. Senators demand that the nominee comment on hypothetical questions of constitutional law, and they label the nominee’s judicial philosophy as politically driven. After much mudslinging and overturning of stones by Senators, the Senate rejects the nomination by a significant margin. The President immediately criticizes the Senate and laments the current state of the confirmation process. In response, Senators assert that the Senate should have an equal role in the confirmation process.

For some, the previous two paragraphs might conjure up images of the confirmation hearing of Judge Robert Bork.² Given the recent, pervasive use of ideology³ as a relevant factor in judicial confirmations, the previous two paragraphs would plainly describe the confirmation hearings of Justices Antonin Scalia⁴ or Ruth

²Nominated by President Ronald Reagan for Justice Lewis Powell’s seat on the Supreme Court, Judge Robert Bork experienced a very controversial and contentious hearing before the Senate Judiciary Committee. In the end, the Senate rejected his nomination by a vote of 58-42. Edward Walsh & Ruth Marcus, *Bork Rejected for High Court; Senate’s 58-42 Vote Sets Record for Margin of Defeat*, WASH. POST, Oct. 24, 1987, at A1.

³One can define ideology as “[t]he body of ideas reflecting the social needs and aspirations of an individual, group, class, or culture.” THE AMERICAN HERITAGE DICTIONARY 343 (2d ed. 1983). One commentator defines ideology as “a systemic body of concepts especially about human life or culture.” Stephen B. Presser, *Should Ideology of Judicial Nominees Matter? Is the Senate’s Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 246 & n.1 (2001) (quoting MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 575 (10th ed. 1996)). Whatever the wisdom of labeling judges as “liberal,” “conservative” or “moderate” may be, it is fair to say that “conservative” judges believe “that the Constitution should be interpreted in a textualist and originalist manner,” while “liberal” judges “accept a more open-ended, interpretive methodology.” John O. McGinnis, *The President, The Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 634 n.6 (1993) [hereinafter McGinnis, *A Reply*].

⁴See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY (1997) [hereinafter SCALIA, MATTER OF INTERPRETATION] (offering a detailed explanation of Justice Scalia’s judicial philosophy); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *Rule of Law*].

Bader Ginsburg⁵ were they nominated to the Supreme Court today.⁶ More importantly, each of the events described in the preceding paragraphs has happened over the past fifteen years to individuals nominated by Republican and Democratic Presidents.⁷

The only point of agreement concerning the confirmation process is that the process is deeply flawed.⁸ The pervasive, unjustified use of ideology as a factor in evaluating nominations has lowered the quality and tenor of the confirmation process.⁹ Past ideological scrutiny by Senators of both parties has embittered many

Confirmed unanimously by the Senate in 1986, Justice Scalia has been frequently mentioned as the paradigmatic example of a Justice who is “outside the mainstream” of American legal thought. See, e.g., Sean Wilentz, *From Justice Scalia, A Chilling Vision of Religion’s Authority in America*, N.Y. TIMES, July 8, 2002, at A19 (“Justice Scalia’s remarks show bitterness against democracy, strong dislike for the Constitution’s approach to religion and eager advocacy for the submission of the individual to the State. It is a chilling mixture for an American.”).

⁵The most recent litmus test is whether a judicial nominee supports *Roe v. Wade*, 410 U.S. 113 (1973). Opponents of many of President Bush’s nominees have focused their attacks on a nominee’s opposition to *Roe*. See, e.g., Editorial, *Judging Michael McConnell*, N.Y. TIMES, Sept. 29, 2002, at A36 [hereinafter Editorial, *Judging Michael McConnell*] (“Mr. McConnell has not merely expressed abstract reservations about the *Roe v. Wade* ruling, but has also actively crusaded against it.”). Over the past two years, any bad words spoken about *Roe* made a judicial nominee “outside the mainstream.” Justice Ginsburg, however, has criticized the reasoning of *Roe*. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382 (1985) [hereinafter Ginsburg, *Some Thoughts*] (“I believe the Court presented an incomplete justification for its action. Academic criticism of *Roe*, charging the Court with reading its own values into the due process clause, might have been less pointed had the Court placed the woman alone . . . at the center of its attention.”). So too have many law professors. See *infra* note 457. It strains the limits of reason to conclude that these commentators are “outside the mainstream.”

⁶The preceding scenario envisions the Presidency controlled by one political party (Republicans or Democrats), and the Senate controlled by the other political party (Republicans or Democrats). The unexpected gains by Republicans in the 2002 Midterm Elections and the takeover of the Senate by Republicans now make it likely (but not certain) that many of President George W. Bush’s nominees to the Circuit Courts of Appeal will be confirmed. Nonetheless, the changes to the confirmation process this paper proposes are not dependent on electoral returns. *But cf.* David A. Strauss & Cass R. Sunstein, *On Truisms and Constitutional Obligations: A Response*, 71 TEX. L. REV. 669, 669 n.4 (1993) [hereinafter Strauss & Sunstein, *A Response*] (“The election of a President and a Senate majority of the same political party in 1992 means that our arguments are now largely moot. . . . The distinctive circumstances that justified an active senatorial role no longer exist.”).

⁷See *infra* Part II.B.

⁸David A. Strauss & Cass R. Sunstein, *The Senate, The Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1491 (1992) [hereinafter Strauss & Sunstein, *Confirmation Process*]; see also Michael J. Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 395 (1994) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994)) [hereinafter Gerhardt, *Confirmation Mystery*] (“The confirmation process is like the weather: everyone complains, but no one seems able to do anything about it.”).

⁹See *infra* Part III.D.1.

nominees,¹⁰ threatened judicial independence,¹¹ discouraged individuals from enduring the confirmation process,¹² and contributed to the vacancy crisis in the federal judiciary.¹³ Along the way, the boundary between law and politics has eroded substantially.¹⁴ Political necessity, not principled evaluation, is the currency in the confirmation process.¹⁵

Little intellectual consistency exists in the confirmation process.¹⁶ When a Senator's party controls the White House, that Senator extols the virtues of presidential dominance in the confirmation process.¹⁷ Conversely, when a Senator's

¹⁰See *infra* Part III.D.5.

¹¹See *infra* note 315.

¹²See *infra* Part III.D.5.

¹³See *infra* note 19.

¹⁴See Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 663 n.162 (1993) [hereinafter Simson, *Supreme Unfitness*] (advocating a close link between the confirmation process and politics).

¹⁵Fierce opposition is sometimes the best a judicial nominee can expect. Following the announcement of the Bork nomination, Planned Parenthood took out an advertisement in the *Washington Post*, which claimed: "Bork upheld a local zoning board's power to prevent a grandmother from living with her grandchildren because she didn't belong to the 'nuclear family.'" WASH. POST, Sept. 14, 1987, at A9. The case Planned Parenthood cited is *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Whatever one thinks of *Moore*, that case was decided before Judge Bork became a Circuit Judge. This advertisement, then and now, puzzles Judge Bork. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 289 (1990) ("I was surprised to learn that I had ruled against the grandmother. . . . Not only didn't I decide the case, I have never written about it or even discussed it."). Nor was Judge Bork the only one dismayed by this blatant misinformation. Ruth Bader Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered By the Senate*, 1988 U. ILL. L. REV. 101, 115 [hereinafter Ginsburg, *Thoughts on the Second Opinion*] (calling the Planned Parenthood advertisement "an egregious example of the misinformation such campaigns breed").

¹⁶See Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1995 (1988) [hereinafter Carter, *Confirmation Mess*].

¹⁷See 143 CONG. REC. S2538 (1999) (statement of Senator Biden) ("This is about trying to keep the President of the United States of America from being able to appoint judges [on] the courts of appeals."); 143 CONG. REC. S2528 (1998) (statement of Sen. Leahy); 142 CONG. REC. S10,740 (1998) (statement of Sen. Dorgan) ("The confirmation process on judges has virtually ground to a halt. That is unfair. It is unfair to the judges that have been appointed and are awaiting confirmation. . . .").

And, of course, the reverse is true. See 148 CONG. REC. S9863 (2002) (statement of Sen. McConnell) ("It is beyond a doubt, with respect to circuit court nominees in particular, that President Bush is being treated far worse—dramatically worse—than any President in recent history in his first term."); 148 CONG. REC. S8253 (2002) (statement of Sen. Kyl) ("[T]his day is a very dark day in the history of the Senate. The Senate Judiciary Committee . . . has just rejected, on a purely partisan party line vote, the nomination of one of President Bush's finest nominees to the U.S. Circuit Court, Justice Priscilla Owen. . . ."); 148 CONG. REC. S4127 (2002) (statement of Sen. Santorum) ("I am here on the anniversary of the President's first nominations to the circuit court to, once again, focus the Senate on what really is a great

party does not control the White House, that Senator suddenly argues for increased ideological scrutiny of judicial nominees, and greater input in the process.¹⁸ Claims that a judicial vacancy crisis exists can appear and vanish, depending on statistical interpretation.¹⁹ Commentators have described the confirmation process in rhetorical flourishes that remind one more of *The Sopranos* than the Senate floor.²⁰ When a nomination is rejected, Senators of one party bemoan the state of judicial nominations, and insist: “There must be a better way.” Still, the game continues.²¹

obstruction of justice that is occurring as a result of the actions within the Judiciary Committee.”).

¹⁸Compare 148 CONG. REC. S9418 (1998) (statement of Sen. Lott) (“We should look not only at their education, background, and qualifications, but also . . . what is their philosophy with regard to the judiciary and how they may be ruling. We have a legitimate responsibility to ask those questions.”), with Senator Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19 (“Senate opposition to judicial nominees outside the mainstream is justified. . . . If the president uses ideology in deciding whom to nominate to the bench, the Senate, as part of its responsibility to advise and consent, should do the same in deciding whom to confirm.”). Senate Democrats and Republicans have also called for greater input in nominating judges. Compare Schumer, *supra* (“[T]he president was elected by the narrowest of margins, while the Senate is closely split. In such a time, the president and the Senate must collaborate in judicial appointments. . . .”), with Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 294 (1999) (noting that Senate Republicans during the Clinton Administration “wanted to require the White House to clear names of potential nominees with both Senators from a specific state, regardless of party affiliation, before the nomination could be forwarded to the Senate”).

¹⁹Compare 143 CONG. REC. S9163 (1999) (statement of Sen. Hatch) (“There are more sitting judges today than there were throughout virtually all of the Reagan and Bush administrations. . . . Let’s just be honest about it.”), with 148 CONG. REC. S2936 (2002) (statement of Sen. Hatch) (“The bottom line of all of this is that America is facing a real crisis facing its federal judiciary, especially the circuit courts of appeals, due to the nearly 100 vacancies that plague it.”). In fairness, Chief Justice Rehnquist repeatedly warned Senators during the Clinton Administration of a vacancy crisis in the federal judiciary. Compare WILLIAM REHNQUIST, 1996 YEAR-END REPORT ON THE JUDICIARY 8 (1996) [hereinafter REHNQUIST, 1996 YEAR-END REPORT] (“It is hoped that the Administration and Congress will continue to recognize that filling judicial vacancies is crucial to the fair and effective administration of justice.”), with WILLIAM REHNQUIST, 1997 YEAR-END REPORT ON THE JUDICIARY 4 (1997) [hereinafter REHNQUIST, 1997 YEAR-END REPORT] (calling the vacancy crisis the most immediate problem faced in the federal judiciary).

²⁰Compare Simson, *Supreme Unfitness*, *supra* note 14, at 626 (“[Y]ou should have made up your mind that *this guy had to go*.” (emphasis added)), and *id.* at 663 n.162 (“As some Thomas supporters already have learned *or will learn the hard way* . . . the elected officeholders who put [Supreme Court nominees] there definitely are not.” (emphasis added)), with *The Sopranos: The Knight in White Satin Armor* (HBO television broadcast Apr. 2, 2000) (“You and I both know, *he’s gotta go!* (emphasis added)), and *The Sopranos: Second Opinion* (HBO television broadcast Apr. 8, 2001) (“You ever go whining about [stuff] between me and you to the big man again, *we’ll have a problem, my friend.*” (emphasis added)).

²¹The confirmation process resembles a game in that both “teams”—Republicans and Democrats—often seek payback for perceived past wrongs. This particular game has a unique set of rules that Senators often claim have been violated. See, e.g., 148 CONG. REC. S8280 (2002) (statement of Sen. Sessions) (stating that “three liberal activist professors” met with the Democratic Conference shortly after President Bush was inaugurated “to discuss changing the

There is a better way. To improve the current process and eliminate the bitter nature of confirmation hearings, Senators should not consider a nominee's ideology in determining whether to vote for that nominee.²² Ideological scrutiny lacks historical and constitutional support; it has led to repeated, prolonged battles that threaten to draw the confirmation process into a dangerous stalemate.²³ Removing ideology from judicial nominations would return the confirmation process to its original understanding,²⁴ one in which the President enjoys the dominant role.²⁵ Those who argue that allowing the President, not the Senate, to consider a nominee's ideology would harm the federal judiciary and ignore the nature of the federal judiciary and the judicial process.²⁶

Part II analyzes the text of the appointments clause, the history of judicial nominations, and the use of ideology in evaluating past Supreme Court and Circuit Court nominations. Part III argues that the use of ideology as a criterion by the Senate lacks both historical and textual support. The President can—and should—consider a nominee's ideology when making judicial nominations. Moreover, the Senate's refusal to do so will benefit the federal judiciary. Terms such as “outside the mainstream”²⁷ or “burden of proof”²⁸ are wholly inapplicable to a judicial

ground rules on the nominations of Federal judges”). The question addressed in this paper is whether the Senate's consideration of a nominee's ideology makes this particular game worth the particular candle. I conclude that it does not.

²²See *infra* Part III.

²³See *infra* Part III.B.

²⁴See McGinnis, *A Reply*, *supra* note 3, at 635 (“As a dispassionate reading of the text and historical sources shows, the Appointments Clause assigns no prenomination role of a constitutional dimension to the Senate.”), for a detailed examination of the original understanding of “Advice and Consent.” See Strauss & Sunstein, *A Response*, *supra* note 6, at 673 (“Professor McGinnis suggests that we are mistaken in saying that a nominee bears the burden of proof. . . . No one has a right to serve on the Court. . . .”), for a response to Professor McGinnis. See John O. McGinnis, *A Further Word Against Consensus*, 71 TEX. L. REV. 675, 678 (1993) [hereinafter McGinnis, *A Further Word*] (“[W]hile I agree that the current confirmation process is flawed, I believe that their proposed reforms will make the process worse and that vigorous exercise of presidential power rather than an increased prenomination role for the Senate is the way to make it better.”), for a reply to Professors Strauss and Sunstein's response.

²⁵McGinnis, *A Reply*, *supra* note 3, at 636 (“Accordingly, undiluted presidential responsibility for selection is to be preferred. . . .”); see also Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 675 (1989) (“The Senate thus lacks any electoral mandate to justify rejecting Supreme Court nominees on the basis of judicial philosophy.”)

²⁶See *infra* Part III.B.

²⁷The claim that the judicial philosophy of a nominee is “outside the mainstream” is far easier to make than it is to prove. Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 565-66 (1988) [hereinafter Rotunda, *Supreme Court Justices in the Modern Era*] (“If even half of the charges [that Judge Bork was ‘outside the mainstream’] were true, one wonders why he had earlier been unanimously confirmed as a Circuit Judge for the District of Columbia Court of Appeals while winning an endorsement from the New York Times.” (footnote omitted)). The term “outside the mainstream” has been so repeatedly used and distorted that it no longer deserves any serious

nomination. The continued use of these terms, in any form or fashion, will allow Senators to easily reject qualified nominees for unjustified reasons.²⁹ Part IV analyzes the various justifications for considering a nominee's ideology and asserts that these justifications lack prudence and logic. This paper concludes that removing ideology from judicial nominations will prevent more "blood on the [Senate] floor."³⁰

II. BACKGROUND

A. *The Constitutional Meaning of "Advice and Consent"*

The Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law."³¹ Unfortunately, the Constitution says little about the precise contours of "advice and consent."³² Two things are clear. First, the President possesses the power to nominate an individual.³³ The structure and text of the clause plainly prove that conclusion.³⁴ Second, the Senate does not have to confirm any of

mention. Moreover, this term is one of convenience. *See infra* Part III.D (discussing the many logical flaws underlying recent use of the term "outside the mainstream"). Judicial philosophy, "especially as the term is used by proponents of quizzing judicial nominees about their own, is not easy to distinguish from the prediction of results in concrete cases." Carter, *Confirmation Mess*, *supra* note 16, at 1190. Unsurprisingly, various Senators use the term "outside the mainstream" to describe those nominees who disagree with Senators on a particular legal or political issue, regardless of the reasons for that disagreement.

²⁸Application of the term "burden of proof" to a judicial nomination suffers from many of the logical flaws that application of the term "outside the mainstream" does—both terms "import[] a concept from court proceedings into a political process." McGinnis, *A Reply*, *supra* note 3, at 636 (footnote omitted). Moreover, judicial nominees do not bear the burden of proof in a confirmation process. *See infra* Part III.A.5.

²⁹*See infra* Part II.B.

³⁰STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 187 (1994) [hereinafter CARTER, CLEANING UP].

³¹U.S. CONST. art. II, § 2, cl. 2.

³²*See, e.g.*, Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 66 (1989) ("We know from the language of the Constitution *what* the Senate is to do with a nomination: it is to advise and consent. Yet the language of the Constitution does not say *how* the Senate should do that. . . ."); Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 364 (1999) ("The text simply does not specify the grounds for Senate advice and consent any more than it specifies the grounds for presidential appointment.").

³³Strauss & Sunstein, *A Response*, *supra* note 6, at 670.

³⁴McGinnis, *A Reply*, *supra* note 3, at 635 ("[T]he Framers wanted to assure accountability in appointments by making the President alone constitutionally responsible for the act of a nomination.").

the President's nominees.³⁵ The constitutional collision of these two principles produces a thorny question of interpretation: To what extent is power shared between the President and the Senate? Some commentators assert that the President must take the Senate's advice into account before making a nomination.³⁶ Other commentators claim that the President can listen to Senators and heed their advice, but he need not do so.³⁷ As a matter of language and interpretation, advice is not mandatory; the person receiving that advice may follow or reject it at his or her peril.³⁸ Even when a Senator advises the President to nominate a particular individual for a judgeship, the President is entirely free to accept or reject that advice.³⁹ Thus, it is doubtful that the President must follow Senatorial prerogatives.

The appointments clause envisions two countervailing forces: the President nominating whomever he wants, and Senators voting for or against whomever they want.⁴⁰ Many commentators advocating increased Senate participation in the confirmation process note that the Constitution prescribes a power-sharing scheme between the President and the Senate.⁴¹ This observation is entirely true and quite irrelevant.⁴² The President and the Senate do share power, but the President and the Senate do not have equal amounts of power.⁴³ By the terms of the appointments clause, the Senate can reject a nominee for any reason.⁴⁴ The President, of course,

³⁵Fein, *supra* note 25, at 677 (“The assertion that the Senate is not obliged to confirm any nominee is unassailable.”).

³⁶Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1495 (averring that the Senate has two roles—“an advisory role before the nomination has occurred and a reviewing function after the fact”). *But see* Strauss & Sunstein, *A Response*, *supra* note 6, at 671 (“[W]e do not claim that consultation is formally necessary to make a nomination effective.”).

³⁷*See* McGinnis, *A Reply*, *supra* note 3, at 635 (noting that Senators may make recommendations to the President concerning potential nominees, but arguing that the President has a constitutional obligation to nominate individuals “who he believes will interpret the Constitution as it should be interpreted”).

³⁸*Id.*

³⁹*See id.*

⁴⁰*See* Michael J. Gerhardt, *Supreme Court Selection as War*, 50 *DRAKE L. REV.* 393, 394 (2002) [hereinafter Gerhardt, *Selection as War*] (“The structure of the Constitution pits Presidents and Senators against each other in the federal appointments process, and the framers fully expected (even hoped) conflict would ensue from this design.”).

⁴¹Lloyd N. Cutler, *The Limits of Advice and Consent*, 84 *NW. U. L. REV.* 876, 877 (1990) [hereinafter Cutler, *Limits of Advice and Consent*] (“[T]he President and the Senate share the power to select Justices.”).

⁴²*See* Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 *HARV. J.L. & PUB. POL’Y* 467, 479 (1998) [hereinafter Gerhardt, *Comprehensive Understanding*] (“The Constitution also establishes a presumption of confirmation that works to the advantage of the president and presidential nominees.”); *id.* at 481 (“Thus, a president holds the structural advantage for influencing the exercise of judicial power.”); *id.* at 480 (“The structure is set up to ensure a high presidential success rate.”).

⁴³*See id.* at 532 (“[T]he constitutional structure grants the president the balance of power in the federal appointments process. . . .” (footnote omitted)).

⁴⁴*See* Fein, *supra* note 25, at 677; Wolfe, *supra* note 32, at 364.

can nominate whomever he wants.⁴⁵ The best interpretation of the appointments clause made by those who advocate a strong Senate role is the following: the President must listen to the Senate's advice.⁴⁶ The President can, however, reject any advice as he sees fit.⁴⁷

The appointments clause does not delineate the grounds for Senate approval or rejection of a nominee; thus, one may argue that the appointments clause envisions strong ideological scrutiny by the Senate.⁴⁸ One could also argue that the appointments clause allows the President, not the Senate, to consider ideology when nominating individuals.⁴⁹ In the end, the debate continues.⁵⁰ One must consequently examine the history of the confirmation process, as well as policy arguments, to determine whether it is wise for Senators to consider a nominee's judicial philosophy.⁵¹

B. A [More Recent] History of the Confirmation Process⁵²

Many commentators argue that the history of the appointments clause proves that the Senate should not utilize ideology as a criterion in evaluating a nominee.⁵³ Significant historical evidence supports this conclusion.⁵⁴ The grounds for rejecting

⁴⁵Once the President does so, "a nominee . . . is clothed with an aura of respectability, credibility, and presumptive merit." Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 480.

⁴⁶See Strauss & Sunstein, *A Response*, *supra* note 6, at 671 ("[C]onsultation is a necessary means of establishing a workable and sensible appointments process.").

⁴⁷See *id.* ("[W]e do not claim that consultation is formally necessary to make a nomination effective.").

⁴⁸See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1514-15.

⁴⁹See *infra* note 55 and accompanying text.

⁵⁰See *infra* notes 53-60 and accompanying text.

⁵¹See Strauss & Sunstein, *A Response*, *supra* note 6, at 673 ("[T]he relevant provisions of the text are too ambiguous to be decisive on the question of the Senate's role.").

⁵²Commentators have analyzed the history of the appointments clause thoroughly. See *infra* notes 53-60 and accompanying text. This paper asserts that ideological scrutiny is a more recent phenomenon that began in 1987.

⁵³Dr. John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 640-46 (2003); Fein, *supra* note 25, at 672-74; McGinnis, *A Reply*, *supra* note 3, at 652-59; Presser, *supra* note 3, at 252-53; see David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900, 916 (1990) ("Senators . . . argued that historical precedents going back to the time of George Washington justified ideology as a ground for the rejection [of Judge Bork]. That argument, as the preceding examination of cases for Tribe's thesis has shown, is unpersuasive." (footnote omitted)); *id.* at 920 ("[T]he history of judicial nominations does not justify ideological rejection of Supreme Court nominees. . . ."); Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Justices*, 95 YALE L.J. 1283, 1283-1300 (1986) [hereinafter Friedman, *Tribal Myths*] (reviewing LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985)).

⁵⁴See Letter from Gouverneur Morris to Robert Walsh (Feb. 5, 1811), in 3 THE LIFE OF GOVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS

a nominee, such as political favoritism by the President, or ethical lapses by the nominee, are especially compelling.⁵⁵ Notably, the great majority of historical evidence does not mention ideology as a criterion.⁵⁶ Some commentators, however, have concluded otherwise.⁵⁷ The debate over the history of the appointments clause has been fruitful and voluminous.⁵⁸ For reasons to be explained, I cast my lot with the ideological minimalists. The Senate's consideration of a nominee's ideology finds its historical roots not in 1787, but in 1987, the year of the Bork nomination.⁵⁹ Regardless of one's historical interpretation, the tone and substance of Senate Judiciary Committee hearings have changed dramatically over the past two decades.⁶⁰ I now turn to that recent history.

PAPERS 260, 261 (Jared Sparks ed., Boston, Gray & Bowen 1832); *see also* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 134 (Jonathan Elliot ed., J.B. Lippincott Co. 2d photo reprint 1941 (1836)); *see* THE FEDERALIST NO. 76, at 425 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The Senate could not be tempted by the preference they might feel to another to reject the one proposed. . . ."); *see id.* ("To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a *powerful, though, in general, a silent operation.*" (emphasis added)); *see id.* ("It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." (emphasis added)); *see id.* ("[I]t is not likely that their sanction would often be refused, *where there were not special and strong reasons for the refusal.*" (emphasis added)); *see also* THE FEDERALIST NO. 77, *supra*, at 429 (Alexander Hamilton) ("The censure of rejecting a good [nomination] would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the executive."); McGinnis, *A Reply*, *supra* note 3, at 635-40 (analyzing these materials).

⁵⁵Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 475 (stating that the compromise "embodied in the Appointments Clause . . . seeks to protect against the appointments of presidential cronies and legislative flunkies").

⁵⁶*See supra* note 54.

⁵⁷*See, e.g.*, Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358, 1387 (1990) (book review) [hereinafter Gerhardt, *Interpreting Bork*] ("Bork also seems oblivious to the historical fact that his rejection was not the first time the Senate had evaluated someone's judicial philosophy in determining whether to confirm a nominee."); Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1514-20; TRIBE, *supra* note 53, at 92 ("[T]he simple truth [is] that the upper house of Congress has been scrutinizing Supreme Court nominees and rejecting them on the basis of their political, judicial, and economic philosophies ever since George Washington was President."); *see generally* Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMM. 283 (1990) [hereinafter Simson, *Proposed Approach*] (advocating ideological scrutiny of judicial nominees).

⁵⁸*See supra* notes 53-57 and accompanying text.

⁵⁹*Cf.* Fein, *supra* note 25, at 673 ("If continued, the Senate's departure from the Hamiltonian model in favor of this more intrusive form of scrutiny bodes ill for the quality of Supreme Court Justices.").

⁶⁰*See* Oona A. Hathaway, Book Note, *The Politics of the Confirmation Process*, 106 YALE L.J. 235, 238 (1996) (reviewing JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* (1995)) ("A close reading of his own historical accounts suggests that the highly

1. The Bork Nomination

In 1987, President Reagan nominated Judge Robert Bork for Justice Lewis Powell's seat on the Supreme Court. Prior to his nomination to the Supreme Court, Judge Bork was a law professor at Yale University, Solicitor-General of the United States, and a private practitioner. Minutes after President Reagan announced the nomination, Senator Kennedy sharply denounced Judge Bork's record.⁶¹ Interest groups followed Senator Kennedy's lead, and the Bork nomination quickly became controversial. "All at once the political passions of three decades seemed to converge on a single empty chair: the Supreme Court seat vacated by Lewis Powell."⁶² The focus soon shifted to Bork's chair in the Senate Judiciary Committee hearings.⁶³ For his part, Judge Bork did not fare well on television under sharp questioning from Senate Democrats.⁶⁴ Judge Bork's opponents alleged that he opposed women's rights, the right to privacy, and enforcement of civil rights laws.⁶⁵ Many law professors criticized Bork's judicial philosophy of originalism as "outside the mainstream" of legal thought.⁶⁶

Some Senators made more controversial claims, one being that Judge Bork's judicial philosophy resembled the *Dred Scott* decision.⁶⁷ Politically weakened by the

ideological tenor of recent nomination hearings is a relatively new phenomenon." (footnote omitted)).

⁶¹133 CONG. REC. S9188 (1987) (statement of Sen. Kennedy).

⁶²Richard Lacayo, *The Battle Begins; Bork's Nomination Is Likely to Stir a Fiercely Political Senate Fight*, TIME, July 13, 1987, at 10.

⁶³*See id.*

⁶⁴Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 521.

⁶⁵*See* MICHAEL PERTSCHUK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION 254 (1989).

⁶⁶ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 196-98 (1989).

⁶⁷*Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 314 (1987) (quoting Senator Paul Simon). Besides accusing him of authoring a 1977 Supreme Court decision with which they disagreed, *see supra* note 15, Judge Bork's opponents also claimed that he favored mandatory sterilization. *See* BRONNER, *supra* note 66, at 179. Planned Parenthood claimed that Judge Bork forced factory women to choose between mandatory sterilization and keeping their jobs. *Id.* The case referred to is *Oil, Chemical & Atomic Worker International Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984) (Bork, J.). In that case, Judge Bork, writing for a unanimous panel, concluded that the word "hazard" in the Occupational Safety and Health Act did not address an employer's policy requiring women of child-bearing age to be sterilized or else lose their jobs. *Id.* at 450. The case involved a relatively straightforward question of statutory interpretation. *Id.* at 445 ("Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy."). Ironically, Judge Bork noted what the case did not involve. *Id.* ("We may not, on the one hand, decide that the company is guilty because it chose to let women decide for themselves which course was less harmful to them. . . . These are issues of no small complexity, but they are not for us."). Commentators were disgusted by the misrepresentation of *American Cyanamid*. *See* BRONNER, *supra* note 66, at 178 (quoting

Iran-Contra scandal and nearing the end of his second term, President Reagan never acted quickly enough to defend Judge Bork.⁶⁸ Few expected the tide of public opinion to turn against Judge Bork.⁶⁹ But the tide did indeed turn, and the Senate rejected Judge Bork's nomination.⁷⁰ Judge Bork soon resigned from the bench and returned to the sanctuary of the legal academy.⁷¹

Whatever one thinks of Judge Bork's judicial philosophy, his confirmation hearing is not a model for future confirmation hearings.⁷² The political rhetoric

Professor Laurence Tribe). Many commentators have regretted the treatment Judge Bork received. *See infra* note 72.

⁶⁸BRONNER, *supra* note 66, at 202.

⁶⁹*See id.*

⁷⁰Walsh & Marcus, *supra* note 2.

⁷¹Judge Bork's first publication after his confirmation hearing consisted of an answer to his critics. *See* BORK, *supra* note 15, at 323-36. Reflecting the controversy surrounding his nomination, many commentators criticized the book. *See, e.g.*, Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1420 (1990) (book review) [hereinafter Ackerman, *Grand Inquisition*] ("And yet, judging from Bork's performance, the time isn't ripe for a Great Crusade. Bork has succumbed to his own temptation. Proclaiming his fidelity to history, his constitutional vision is radically ahistorical."); Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 660 (1990) (book review) ("Bork's caustic jurisprudence debases the quality of the debate. He coarsens the public argument by reducing it to a stock Western drama, heroes against horse thieves. He may find the real argument too complex for his polemical purposes. But he should not stoop to tactics he rightly deplores when they are aimed against him."); Gerhardt, *Interpreting Bork*, *supra* note 57, at 1359 ("This Book Review Essay argues that Bork's theory of original understanding cannot coherently and consistently overcome certain problems endemic to the interpretation of the written constitutional text, the search for objective historiography, and the reconsideration of precedents not based on original understanding."); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1407 (1990) (book review) ("It is surely a chilling commentary on the state of American public culture that Bork's incoherent originalism was accredited to the extent it was."); Suzanna Sherry, *Original Sin*, 84 NW. U. L. REV. 1215, 1215 (1990) (book review) ("[Bork's] positions on most issues are as extremist as his critics have portrayed them. His intellectual abilities are weaker than his opponents suspected. He is an abysmal historian, which . . . is a fatal flaw in a self-professed originalist."). Others, however, harbored a more charitable view of Judge Bork's book and judicial philosophy. *See, e.g.*, Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Social Justice*, 69 TEX. L. REV. 759, 788 (1991) [hereinafter Carter, *Bork Redux*] ("Bork's constitutional theory, while flawed, is sensible and well thought out. What it is not outside is the mainstream of constitutional thought, which was, to my way of thinking, the unfairest charge of all."); Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1049 (1992) ("The American people must be brought to see again what they seem to have forgotten: that self-government and federalism are their most important constitutional rights and the best protection of their freedom, security, and prosperity. Robert Bork's book has done more than any other to help the American people understand this.").

⁷²Carter, *Bork Redux*, *supra* note 71, at 762 (stating that the treatment Judge Bork received from his "most vociferous opponents was shameful"); *see also* Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988) [hereinafter Ackerman, *Transformative Appointments*] ("It is a tragedy that the republic should pay [Bork] for his decades of service by publicly humiliating him.").

spewed in the Bork confirmation hearing reached alarmingly inaccurate heights.⁷³ Some commentators lauded the Bork confirmation hearing as a perfect example of public participation in the confirmation process.⁷⁴ Considering the many distortions, omissions, and inaccuracies of Judge Bork's record made by his critics, this conclusion is somewhat strange.⁷⁵ Unsurprisingly, these distortions were only corrected long after Judge Bork's confirmation hearing.⁷⁶ No one ever disputed Judge Bork's qualifications, yet Judge Bork was "outside the mainstream." Judge Bork, however, was confirmed unanimously to the D.C. Circuit—and recommended by the *New York Times*.⁷⁷ Moreover, many law professors have argued that Judge Bork is not "outside the mainstream."⁷⁸ Embittered by the Bork nomination, Senate Republicans vowed to gain revenge.

2. President George H.W. Bush

Republicans fulfilled that vow after gaining control of the Senate in 1994. Their anger toward the confirmation process had only increased following the near-failure of the Clarence Thomas nomination in 1991.⁷⁹ In President George H.W. Bush's last year of office, many nominees never received hearings; the Bush Administration accused Democrats of waiting on the election returns.⁸⁰ After President Clinton's win in 1992, Republicans demanded greater input in nominating judges.⁸¹

3. President Bill Clinton

Nevertheless, President Clinton's election restored balance to the confirmation process.⁸² Until 1994, the confirmation process had regained some sense of normalcy. President Clinton's two Supreme Court nominees—Ruth Bader Ginsburg and Stephen Breyer—were easily confirmed with little Republican opposition.⁸³ Senate Judiciary Committee Chairman Orrin Hatch enjoyed strong relations with the

⁷³See *supra* note 15.

⁷⁴See, e.g., Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1228 (1988).

⁷⁵See *supra* note 72.

⁷⁶See *supra* note 15.

⁷⁷See Editorial, *Echoes of Watergate*, N.Y. TIMES, Dec. 10, 1981, at A30 [hereinafter Editorial, *Echoes of Watergate*].

⁷⁸See, e.g., Carter, *Bork Redux*, *supra* note 71, at 788.

⁷⁹See, e.g., JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 293-95 (1994); see also Kline, *supra* note 18, at 326.

⁸⁰*Cf.* Kline, *supra* note 18, at 264.

⁸¹See *id.* at 293-94.

⁸²See *id.* at 247.

⁸³See *id.* at 314 n.209.

White House, and both parties worked reasonably well together.⁸⁴ That working relationship changed, however, toward the end of President Clinton's first term.⁸⁵

To say that many Clinton nominees never received hearings during President Clinton's second term oversimplifies what occurred.⁸⁶ The results are far worse than that.⁸⁷ Many Clinton nominees were placed on hold informally; Senate Republicans never allowed those nominees to appear before the Senate Judiciary Committee.⁸⁸ Some nominees went years before they received a hearing; other nominees never even received hearings.⁸⁹ The number of confirmed judges declined steadily after 1996, leading many commentators to claim that a vacancy crisis existed in the federal judiciary.⁹⁰

Senate Democrats accused Senate Republicans of changing the "rules of the game" in the confirmation process.⁹¹ Senate Republicans, of course, claimed that they were merely exercising the powers of "advice and consent."⁹² Others noted that Senate Republicans were gaining political revenge for the Bork nomination.⁹³ Advice and consent became "abuse and dissent;"⁹⁴ few people were satisfied with the confirmation process.⁹⁵ The confirmation process stalled completely in President Clinton's last year in office, prompting President Clinton to utilize a recess appointment to nominate Roger Gregory for a seat on the Fourth Circuit.⁹⁶

During President Clinton's second term, it became far more procedurally difficult for his nominees to receive hearings.⁹⁷ Even when hearings took place, however, the obstacles placed before nominees were vast.⁹⁸ Many Clinton nominees were accused

⁸⁴*See id.* at 247.

⁸⁵*See* Kline, *supra* note 18, at 248 (detailing the decrease in judges confirmed by the Senate from 1994 to 1997).

⁸⁶*See id.* at 249-51.

⁸⁷For a thorough examination of Clinton nominees who did not receive hearings, *see id.* at 260-64.

⁸⁸*Id.* at 308-12 (discussing the use of informal "holds" by Senate Republicans).

⁸⁹*Id.* at 301.

⁹⁰*See* REHNQUIST, 1996 YEAR-END REPORT, *supra* note 19, at 4 (calling the vacancy crisis the most immediate problem faced by the federal judiciary).

⁹¹*See* Kline, *supra* note 18, at 268.

⁹²*Id.* at 324.

⁹³*Id.* at 327 n.256 (noting that many Republicans considered 1997 the tenth year of the Bork battle, not the tenth anniversary of the Bork battle).

⁹⁴Edward Kennedy, Alliance for Justice Luncheon Speech (April 30, 1997), *quoted in* Kline, *supra* note 18, at 333 n.275.

⁹⁵Certainly not Senate Democrats. *See id.* at 329-30.

⁹⁶President Bush renominated Judge Gregory, and the Senate confirmed Judge Gregory just two months after he was nominated.

⁹⁷*See id.* at 323-43.

⁹⁸*See id.* at 277-87.

of being “outside the mainstream” because they were “judicial activists.”⁹⁹ Many of the charges made against Clinton nominees were based on gross distortions of a nominee’s record.¹⁰⁰ If Senate Republicans could not find material in a nominee’s record to distort, they refused to grant that nominee a hearing.¹⁰¹ This was particularly true for nominees to the D.C. Circuit, the Fourth Circuit, the Fifth Circuit, and the Sixth Circuit.¹⁰²

President Clinton nominated Missouri Supreme Court Judge Ronnie White for a judgeship. Judge White subsequently appeared before the Senate Judiciary Committee, and suffered a Bork-style confirmation hearing at the hands of Senate Republicans.¹⁰³ Then Senator John Ashcroft claimed that Judge White unduly favored the rights of criminals and was “outside the mainstream.”¹⁰⁴ Judge White’s record on the Missouri Supreme Court proved otherwise.¹⁰⁵ Senator Ashcroft, however, opposed the White nomination with particular ferocity.¹⁰⁶ The Senate rejected Judge White’s nomination on a party-line vote for the same reason that it rejected Judge Bork’s nomination: by the time anyone fairly evaluated Judge White’s record, the nomination had been rejected.¹⁰⁷ Judge White became the rallying cry for

⁹⁹*Id.* at 250-55.

¹⁰⁰*See, e.g., id.* at 338-40.

¹⁰¹*See* Kline, *supra* note 18, at 308-09 (“The hold process was so secretive that sometimes it is difficult to tell exactly which nominees have had holds placed on them.” (footnote omitted)).

¹⁰²*See id.* at 265-69; *see* Carl Tobias, *Sixth Circuit Federal Judicial Selection*, 36 U.C. DAVIS L. REV. 721 (2003) [hereinafter Tobias, *Sixth Circuit*] (discussing the controversy surrounding nominations to the Sixth Circuit Court of Appeals during President Clinton’s two terms in office).

¹⁰³*See* Editorial, *A Sad Judicial Mugging*, N.Y. TIMES, Oct. 8, 1999, at A26 [hereinafter Editorial, *A Sad Judicial Mugging*].

¹⁰⁴*See* 145 CONG. REC. S11932 (1999) (statement of Sen. Ashcroft) (detailing his concerns regarding Judge White’s record).

¹⁰⁵*See, e.g.,* State v. Lyons, 951 S.W.2d 584, 587 (Mo. 1997) (White, J.); State v. Smith, 944 S.W.2d 901, 909 (Mo. 1997) (White, J.); State v. Taylor, 929 S.W.2d 209, 213 (Mo. 1996) (White, J.); State v. Copeland, 928 S.W.2d 828, 834 (Mo. 1996); State v. Kreutzer, 928 S.W.2d 854, 859 (Mo. 1996); State v. Smulls, 935 S.W.2d 9, 13 (Mo. 1996) (White, J.); *see also* 145 CONG. REC. S11867 (1999) (statement of Sen. Leahy) (“I just note that Justice Ronnie White is far more apt to affirm a death penalty decision than to vote as one of many members of the Supreme Court to reverse it. He has voted to affirm 41 times and voted to reverse only 17 times.”).

¹⁰⁶*See, e.g.,* 145 CONG. REC. S11867 (1999) (statement of Sen. Ashcroft) (“But I urge my fellow Senators to consider whether we should sanction the life appointment to the responsibility of a Federal district court judge for one who has earned a vote of no confidence from so many in the law enforcement community in the State in which he resides.”).

¹⁰⁷Judge White is anything but a “left-wing” jurist. *See supra* note 105 and accompanying text. Any claims to the contrary are the same sort of misrepresentations that Judge Bork suffered. Senator Ashcroft “Borked” Judge White. *See* RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 154 (2d ed. 1999) (stating that the verb “Bork” means “to attack (a candidate or public figure) systematically, especially in the media”).

Senate Democrats disgusted with the confirmation process.¹⁰⁸ He became their Bork, and they vowed that they would never forget his experience.¹⁰⁹

4. President George W. Bush

a. *Defining the Rules of the Game*

After the Supreme Court decided *Bush v. Gore*,¹¹⁰ Senate Democrats were disgusted with the Supreme Court and several law professors.¹¹¹ Senate Democrats claimed that the “Rehnquist Five” had irreparably harmed the Court’s integrity.¹¹² They announced that severe ideological scrutiny of President Bush’s nominees was forthcoming.¹¹³ Some commentators went further, arguing that none of President Bush’s nominees should even receive hearings.¹¹⁴ These announcements were noteworthy for their promptness; President Clinton enjoyed two years of relatively peaceful relations with Senate Republicans on judicial nominations.¹¹⁵ By contrast, Senate Democrats defined the rules of the game before President Bush took the oath of office.¹¹⁶ Senate Democrats fired the warning shot by almost unanimously voting

¹⁰⁸See, e.g., 145 CONG. REC. S11918 (1999) (statement of Sen. Daschle).

¹⁰⁹Senate Democrats, as one would expect, still invoke Judge White’s name. See, e.g., 148 CONG. REC. S8280 (2002) (statement of Sen. Leahy).

¹¹⁰531 U.S. 98 (2000).

¹¹¹See, e.g., Neal Kumar Katyal, *Politics over Principle*, WASH. POST, Dec. 14, 2000, at A35; Randall Kennedy, *Contempt of Court*, AM. PROSPECT, Jan. 1-15, 2001, at 15; Jeffrey Rosen, *Disgrace: The Supreme Court Commits Suicide*, NEW REPUBLIC, Dec. 25, 2000, at 18 [hereinafter Rosen, *Disgrace*].

¹¹²See, e.g., 147 CONG. REC. S1671 (2001) (statement of Sen. Leahy).

¹¹³See Schumer, *supra* note 18 (arguing that President Bush lacks a mandate to nominate conservative judges). For criticism of the argument that the President needs a political mandate to nominate judges of his ideological persuasion, see Part III.A.2 *infra*.

¹¹⁴Bruce Ackerman, *Foil Bush's Maneuvers for Packing the Court*, L.A. TIMES, April 26, 2001, at B11 [hereinafter Ackerman, *Foil Bush's Maneuvers*] (“This unprecedented situation requires the Senate to ask new questions and draw new lines. The first step should be a moratorium on Supreme Court appointments until the American people return to the polls in 2004.”). But see Matthew D. Marcotte, Note, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 519, 561 (2001) (“President George W. Bush is entitled to the same deference as any other President who takes office under controversial circumstances. This means that his nominees to the Supreme Court should neither be rejected out of hand, nor confirmed without careful examination of their philosophies and qualifications to serve on the Supreme Court.”).

¹¹⁵See Kline, *supra* note 18, at 247-48.

¹¹⁶See, e.g., Ackerman, *Foil Bush's Maneuvers*, *supra* note 114.

against Senator Ashcroft's nomination to be Attorney General.¹¹⁷ The rules of the game, Senate Democrats argued, would change.¹¹⁸

The rules changed drastically.¹¹⁹ Many of President Bush's nominees went almost two years without a hearing before the Senate Judiciary Committee.¹²⁰ Senator Leahy, Chairman of the Senate Judiciary Committee after the defection of Senator Jim Jeffords, stated that more controversial nominees would take more deliberation.¹²¹ Notably, the Senate has confirmed many district court judges.¹²² The percentage of Circuit Court nominees confirmed during Senator Leahy's tenure, however, was less than stellar.¹²³ Nominees who appeared before the Senate Judiciary Committee endured hearings of an almost entirely political character.¹²⁴ As promised, Senate Democrats frequently voted against nominees they considered "outside the mainstream."¹²⁵ Many of President Bush's Circuit Court nominees were deemed "outside the mainstream," including Professor Michael McConnell, who received the support of over 300 law professors, and Miguel Estrada, who served for five years in the Office of Solicitor General during the Clinton Administration.¹²⁶

¹¹⁷Helen Dewar, *A Serious Breach in Bipartisanship: Democrats Fire "Shot Across Bow,"* WASH. POST, Feb. 2, 2001, at A6 [hereinafter Dewar, *Serious Breach*] (noting that forty-two Democrats voted against Senator Ashcroft's nomination for Attorney General).

¹¹⁸*Cf. id.*

¹¹⁹*See infra* notes 120-34 and accompanying text.

¹²⁰*See* United States Senate Committee on the Judiciary, *U.S. Courts of Appeals*, at http://www.senate.gov/~judiciary/nominations_appeals.cfm (last visited Aug. 8, 2003).

¹²¹148 CONG. REC. S9975-02 (2002) (statement of Sen. Leahy) ("Most Senators understand that more controversial nominees require greater review. This process of careful review is part of our democratic system.").

¹²²Senator Leahy justly deserves credit for this. *See* Editorial, *Forgetting Anyone?*, WASH. POST, Oct. 11, 2002, at A36 [hereinafter Editorial, *Forgetting Anyone?*] ("Mr. Leahy deserves credit for having moved nominees at a faster clip than the Senate managed in recent years."). For a full list of confirmed district court nominees, see United States Senate Committee on the Judiciary, *U.S. District Courts*, at http://www.senate.gov/~judiciary/nominations_district.cfm (last visited Aug. 8, 2003). At last count, the Senate has confirmed eighty-six district court judges. *Id.*

¹²³*See Circuit and District Court Judicial Nominations*, at <http://www.usdoj.gov/olp/2yearcomparison.pdf> (last visited Aug. 8, 2003) (noting that 53% of President Bush's Circuit Court nominees were confirmed during the first two years).

¹²⁴Senators interrogated Mr. Estrada concerning allegations made by an anonymous source that he imposed litmus tests on Supreme Court clerkship candidates while conducting screening interviews for Justice Kennedy. *See infra* note 331 (discussing the nomination of Miguel Estrada).

¹²⁵*See, e.g.*, 148 CONG. REC. S11502-01 (2002) (statement of Sen. Kennedy) (detailing his concerns regarding the nomination of Dennis Shedd); *see also infra* Part II.B.4.c (discussing the Owen nomination).

¹²⁶As a result of attacks from Senate Democrats, Mr. Estrada withdrew his name from consideration on September 9, 2003. Mr. Estrada's opponents made quite an interesting argument against confirmation: No one knows Mr. Estrada's views on legal issues, and those views are "outside the mainstream." *Compare* Jack Newfield, *The Right's Judicial*

John G. Roberts, Jr., one of the best Supreme Court advocates in recent memory, did not receive a hearing during Senator Leahy's tenure.¹²⁷

When asked about his treatment of President Bush's judicial nominees, Senator Leahy frequently responded by criticizing the record of his predecessor, Senator Hatch.¹²⁸ Noting that many of President Clinton's nominees never received hearings, Senator Leahy has bluntly stated that President Bush would have been wise to nominate many of those individuals.¹²⁹ Senate Judiciary Committee hearings have often degenerated into shouting matches between Senators Leahy and Hatch.¹³⁰ President Bush refused to shy away from nominating individuals of a conservative bent; Senator Leahy refused to stop subjecting those individuals to close ideological scrutiny.¹³¹

Juggernaut, NATION, Oct. 7, 2002, at 11 (quoting Senator Schumer as saying: "Estrada is like a Stealth missile—with a nose cone—coming out of the right wing's deepest silo"), with Neil A. Lewis, *Bush Judicial Choice Imperiled By Refusal to Release Papers*, N.Y. TIMES, Sept. 27, 2002, at A28 [hereinafter Lewis, *Bush Judicial Choice Imperiled*] ("Senate Democrats . . . suggested that they would not vote on his nomination unless the administration relented and provided internal legal memorandums Mr. Estrada wrote when he was a government lawyer."); *id.* (quoting Senator Schumer as saying: "Everyone I've spoken with believes such memoranda will be useful in assessing how [Mr. Estrada] approach[es] the law. . . .").

Mr. Estrada worked in the Office of the Solicitor General for five years during the Clinton Administration. Senate Democrats refused to vote on the nomination until Mr. Estrada's memoranda and papers during his stint in the Office of the Solicitor General were released. Lewis, *Bush Judicial Choice Imperiled*, *supra*. One case they should have examined is *NOW v. Scheidler*, 510 U.S. 249 (1994). There, Mr. Estrada argued for the United States, as *amicus curiae*, that the RICO statute applied to anti-abortion protestors. *See id.* The Court, however, chose not to address that particular issue. *Id.* at 262 n.6 ("[T]he question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise or racketeering activity has an overriding economic motive. . . . We therefore decline to address the First Amendment question argued by respondents and the amici."). *Scheidler* represented Mr. Estrada's public involvement in the issue of abortion.

¹²⁷*See* United States Senate Committee on the Judiciary, *U.S. Courts of Appeals*, at http://www.senate.gov/~judiciary/nominations_appeals.cfm (last visited Aug. 8, 2003). Mr. Roberts was confirmed on May 8, 2003. *Id.*

¹²⁸148 CONG. REC. S9975-02 (2002) (statement of Sen. Leahy).

¹²⁹*See id.* (statement of Sen. Leahy).

¹³⁰*Compare* 148 CONG. REC. S8510-02 (2002) (statement of Sen. Leahy) ("We have also now confirmed more of President George W. Bush's judicial nominations since July, 2001—75—than were confirmed in all of 1989 and 1990, the first 2 years of the term of his father President George H.W. Bush—73."), with *id.* (statement of Sen. Hatch) ("[T]he Committee under my chairmanship permitted the nomination to go to the floor for a full Senate vote. My colleague from Vermont certainly cannot say the same. In the last fifteen months, the Democrat-controlled Judiciary Committee has already voted against two nominees in committee. . . .")

¹³¹The Republican takeover of the Senate in the 2002 Midterm Elections gives President Bush a unique opportunity to "begin repairing the broken judicial nomination system." Editorial, *Second Chance on Judges*, WASH. POST, Nov. 8, 2002, at A30 [hereinafter Editorial, *Second Chance on Judges*]. President Bush's proposal that the Senate hold hearings on a nomination within 90 days of receiving a nomination, and that the full Senate vote within 180

Just as Senate Republicans blocked many of President Clinton's nominations, Senate Democrats blocked many of President Bush's nominations.¹³² Senate Democrats have criticized Senate Republicans for past sins in the confirmation process, yet they have shown that they are equally adept at blocking a President's judicial nominees for less-than-compelling reasons.¹³³ The Senate Judiciary Committee rejected two of President Bush's nominees to the Fifth Circuit—District Judge Charles Pickering and Texas Supreme Court Justice Priscilla Owen—on party-line votes.¹³⁴ Both individuals received “Well Qualified” ratings from the ABA, so presumably each nominee's qualifications were not at issue. Ideology, however, was certainly at issue in both hearings.

b. The Pickering Nomination

When President Bush nominated Judge Charles Pickering for a seat on the Fifth Circuit, few observers expected Judge Pickering's confirmation hearing to be that contentious.¹³⁵ After all, Senator Trent Lott is a close friend of Judge Pickering,¹³⁶ and Judge Pickering received a “Well Qualified” recommendation from the ABA.¹³⁷ Yet, Judge Pickering's hearing quickly became quite a spectacle.¹³⁸ He was accused of having a poor record on civil rights, and supporting racial segregation in a *Law Review* article.¹³⁹ Many Senate Democrats argued that the Fifth Circuit has

days, “would improve the nominations process.” *Id.* More important than the timetable for consideration of nominations, however, are the criteria utilized to evaluate nominees.

¹³²See Robert Novak, *Dysfunctional Senate Stalled on Judicial Nominees*, CHICAGO SUN-TIMES, Oct. 10, 2002, at 33 (“Democratic treatment of Bush's early nominees is worse in degree but not different in kind than Republican treatment of President Bill Clinton's late nominees.”).

¹³³*See id.*

¹³⁴*See infra* Part II.B.4 (discussing both nominations).

¹³⁵*See House Member Drops Out of Running for U.S. Judge*, WASH. POST, May 26, 2001, at A13 (perfunctorily noting the nomination of Judge Pickering to the Fifth Circuit).

¹³⁶Considering Senator Lott's recent (and very likely racist) remarks on the subject of race at Senator Thurmond's retirement dinner, being a friend of Senator Lott is hardly a political asset these days.

¹³⁷*See id.*

¹³⁸*See Senate's Approval of Judicial Nominee Foretells Struggles*, WASH. POST, Aug. 1, 2002, at A25 (noting that women's rights groups, civil rights groups and liberal groups expressed strong concerns about the nomination of Judge Pickering).

¹³⁹*See* John Nichols, *Fighting Pickering: Civil Rights Record of Judicial Nominee Charles Pickering Questioned*, NATION, Mar. 18, 2002, at 5. Judge Pickering's casenote is not the piece of racist propaganda that many allege it to be. Judge Pickering wrote a casenote analyzing a recent Mississippi Supreme Court decision. *See* Charles W. Pickering, Note, *Recent Cases: Criminal Law—Miscegenation—Incest*, 30 MISS. L.J. 326, 326-27 (1959). The case, *Ratcliff v. State*, 107 So. 2d 728 (Miss. 1958), involved an appeal by an African-American woman who had been convicted of cohabitating with a white man. The Mississippi Legislature passed a law forbidding cohabitation between persons “whose marriage is prohibited by law by reason of race or blood and which marriage is declared to be incestuous and void.” Thus, Mississippi Code Section 2000 required two elements for conviction: a marriage prohibited by law, and a marriage declared to be incestuous. *Id.* The Mississippi

frequently reversed Judge Pickering's rulings.¹⁴⁰ Statistics supporting this charge, however, have been lacking.¹⁴¹ Yet by the time Judge Pickering's hearing ended,

Supreme Court reversed Ratcliff's conviction because she and the white man were engaged in a miscegenetic relationship, not an incestuous one. *Id.* at 730. The statute, however, required an incestuous relationship. *Id.* The State failed to prove one of the elements of unlawful cohabitation; thus, the Court reversed the defendant's conviction. *Id.*

Ratcliff is a straightforward case of statutory interpretation. The Mississippi Legislature required two elements for conviction of unlawful cohabitation, and the State only proved one of those elements. The decision—merely three pages in length—was unanimous. The Court noted that it had to construe the statute as written, not as the Legislature intended the statute to be written. *Id.* Had the Court adopted the latter view of statutory interpretation, it likely would have upheld the conviction. The Court, however, punished the Mississippi Legislature for poor legislative drafting. *See id.*

Judge Pickering's casenote recited the facts of *Ratcliff*, the legislative history surrounding Section 2000 of the Mississippi Code, and the mistake in drafting committed by the Mississippi Legislature. *See Pickering, supra*, at 326-27. Judge Pickering noted that, in criminal cases, most courts do not interpret a statute beyond its literal terms. *Id.* at 327. Judge Pickering then surveyed miscegenation statutes in other states, *id.*, noting that such statutes were frequently attacked as unconstitutional. *id.* at 327-28, yet upheld by the United States Supreme Court. *Id.* at 328 (citing *Pace v. Alabama*, 106 U.S. 583 (1883)). Judge Pickering then stated that Mississippi's miscegenation statute was "more comprehensive than the statutes in most of the other states." *Id.*

The final paragraph of Judge Pickering's casenote is the most controversial paragraph. It begins with this telling statement: "Certain recent decisions in the fields of education, transportation, and recreation, would cause one to wonder how long the Supreme Court will allow any statute to stand which uses the term 'race' to draw a distinction." *Id.* at 329.

Thus, Judge Pickering—at a minimum—doubted the constitutionality of miscegenation laws. *See id.* One may fairly wonder why, if Judge Pickering is a racist, he would have included that sentence in his casenote. In the next sentence, however, Judge Pickering predicted that the Supreme Court would not invalidate miscegenation statutes. *Id.* at 329 & n.15. Judge Pickering concluded his casenote with this sentence: "Therefore, if Section 2000 of the Code of 1942 is to serve the purpose that the legislature undoubtedly intended it to serve, the section should be amended." *Id.* at 329.

Judge Pickering's concluding sentence mirrored the sentiments of the Court in *Ratcliff*—if the Mississippi Legislature wanted to obtain convictions for illegal cohabitation, it should have drafted its miscegenation laws properly. Otherwise, any future convictions for illegal cohabitation would likely be overturned. Judge Pickering suggested ways to amend the statute only because the statute was poorly written. Considering that Judge Pickering doubted the constitutionality of the miscegenation statute, it's difficult to conclude that Judge Pickering wanted to "strengthen" the miscegenation statute. *Id.* at 329. The fact that the Mississippi Legislature amended the statute and removed the requirement of an incestuous relationship, does not make Judge Pickering responsible for the hateful sentiments that produced the Mississippi miscegenation statute.

¹⁴⁰*Id.*

¹⁴¹One can use statistics, however, to prove nearly anything. *Compare Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg & Breyer, JJ.) (concluding that a national consensus has developed against capital punishment for the mentally retarded because eighteen state legislatures have passed laws exempting the mentally retarded from capital punishment), *with id.* at 342 (Scalia, J., joined by Rehnquist, C.J., & Thomas, J., dissenting) (arguing that a national consensus against executing the mentally retarded does not exist because "less than half (47%) of the 38 States that permit

many people had accused him of being an outright racist.¹⁴² Judge Pickering's nomination was defeated on a party-line vote.¹⁴³

c. The Owen Nomination

President Bush nominated Justice Priscilla Owen to the Fifth Circuit on May 9, 2001.¹⁴⁴ Justice Owen received a "Well Qualified" rating from the ABA.¹⁴⁵ More than one year later, she appeared before the Senate Judiciary Committee and encountered significant opposition.¹⁴⁶ Justice Owen's opponents argued that she is beholden to big business and special interests, corrupted by Texas's system of judicial elections, and "outside the mainstream" of legal thought.¹⁴⁷ Detractors focused on her opinions regarding abortion, claiming that Justice Owen has refused to follow Supreme Court precedent.¹⁴⁸ In the end, the Senate Judiciary Committee rejected Justice Owen's nomination on a party-line vote.¹⁴⁹

capital punishment (for whom the issue exists) . . . have very recently enacted legislation barring execution of the mentally retarded").

¹⁴²See Neil A. Lewis, *Judicial Confirmation Hearing Evokes Civil Rights Struggle*, N.Y. TIMES, Feb. 8, 2002, at A16 [hereinafter Lewis, *Civil Rights Struggle*] (noting that Senator Durbin questioned Judge Pickering about his alleged contacts with the Mississippi Sovereignty Commission).

¹⁴³One commentator claims that the Pickering nomination is an example of how the confirmation process should work. See Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 719 (2003). Professor Sheldon does not offer any detailed analysis of Judge Pickering's record. See *id.* at 707-18. Instead, he claims, the Senate acted properly by rejecting a nomination that was viewed as too conservative. *Id.* at 719. Contrary to expectations, President Bush renominated Judge Pickering. It is quite likely that Senate Democrats will filibuster Judge Pickering's nomination if that nomination ever goes to the Senate floor.

¹⁴⁴Neil A. Lewis, *Bush to Nominate 11 to Judgeships Today*, N.Y. TIMES, May 9, 2001, at A24 [hereinafter Lewis, *Bush to Nominate*].

¹⁴⁵Helen Dewar, *Senate Panel Rejects Bush Court Nominee*, WASH. POST, Sept. 6, 2002, at A1 [hereinafter Dewar, *Senate Panel Rejects*] (discussing the Senate Judiciary Committee's rejection of the Owen nomination).

¹⁴⁶Charles Lane, *Judicial Nominee Challenged on Abortion Views*, WASH. POST, July 24, 2002, at A4 [hereinafter Lane, *Judicial Nominee Challenged*].

¹⁴⁷Dewar, *Senate Panel Rejects*, *supra* note 145.

¹⁴⁸Neil A. Lewis, *Debate on Court Nominee Centers on Abortion*, N.Y. TIMES, July 22, 2002, at A10 [hereinafter Lewis, *Debate Centers on Abortion*]. Opinion regarding Justice Owen differed even among newspapers of a similar political bent. Compare Editorial, *The Wrong Judge*, N.Y. TIMES, Sept. 4, 2002, at A20 ("Justice Owen's nomination should be rejected."), with Editorial, *The Owen Nomination*, WASH. POST, July 24, 2002, at A18 [hereinafter Editorial, *The Owen Nomination*] ("[Justice Owen] is still a conservative. And that is still not a good reason to reject her.").

¹⁴⁹Dewar, *Senate Panel Rejects*, *supra* note 145. Then-Senate Majority Leader Tom Daschle stated that the message sent by the Senate to President Bush by the rejection of the Owen nomination is the following: "Don't send us unqualified people." *Id.* This statement is surprising, considering that the American Bar Association—the much-touted "gold standard"

Opponents of Justice Owen claimed that she is a “judicial activist” who would overturn *Roe v. Wade*.¹⁵⁰ They claimed that White House Counsel (then-Texas Supreme Court Justice) Alberto Gonzales, in his concurring opinion in *In re Doe I*,¹⁵¹ lambasted Justice Owen’s interpretation of the Texas Parental Notification Act as “an unconscionable act of judicial activism.”¹⁵² Interest groups and Senate Democrats repeated this charge with particular ferocity.¹⁵³ Senator Leahy cited *In re Doe I* to prove that Justice Owen is a “conservative judicial activist.”¹⁵⁴ Many commentators accepted this charge as gospel.¹⁵⁵ Unfortunately, this charge is wholly false.¹⁵⁶

for rating judicial nominees, 148 CONG. REC. S8253 (2002) (statement of Sen. Kyl)—gave Justice Owen its highest rating of “Well Qualified.” *Id.*

¹⁵⁰410 U.S. 113 (1973).

¹⁵¹19 S.W.3d 346, 365-66 (Tex. 2000) (Gonzales, J., joined by Enoch, J., concurring).

¹⁵²*Id.* at 366 (Gonzales, J., joined by Enoch, J., concurring). The full sentence reads: “Thus, to construe the Parental Notification Act so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the words of the statute, would be an unconscionable act of judicial activism.” *Id.* (Gonzales, J., joined by Enoch, J., concurring).

¹⁵³*See, e.g.,* Lane, *Judicial Nominee Challenged*, *supra* note 146 (quoting Senator Richard Durbin as saying: “You tend to expand and embellish on the text of the law”).

¹⁵⁴*See, e.g.,* 148 CONG. REC. S8447 (2002) (statement of Sen. Leahy) (analyzing *In re Jane Doe I*, and other cases, to prove that Justice Owen is a “conservative judicial activist”).

¹⁵⁵Jonathan Groner, *Activist Label Defeats Owen’s 5th Circuit Nomination*, TEX. LAW., Sept. 9, 2002, at 1 (quoting attorney David Keltner as stating: “[The Democrats] have a concurring opinion from the president’s own lawyer that accuses her of being activist”); Lane, *Judicial Nominee Challenged*, *supra* note 146; Neil A. Lewis, *Democrats Reject Bush Pick in Battle Over Court Balance*, N.Y. TIMES, Sept. 6, 2002, at A1 [hereinafter Lewis, *Democrats Reject Bush Pick*] (“To the discomfort of Republicans, Democrats repeatedly cited the words of Alberto R. Gonzales, Mr. Bush’s White House counsel who served with Justice Owen on the Texas court.”); Newfield, *supra* note 126 (“Gonzales wrote that Owen’s dissent was ‘an unconscionable act of judicial activism.’”); Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES, Aug. 11, 2002, § 6, at 38 [hereinafter Rosen, *Obstruction of Judges*] (“In the case of Priscilla Owen, . . . the Democrats’ concerns are arguably justified: even President Bush’s White House counsel, Alberto Gonzales, called Owen’s attempt to narrow a Texas law allowing minors to have abortions without their parents’ consent ‘an unconscionable act of judicial activism’ . . .”). One can only wonder how Justice Owen attempted to narrow a law she did not interpret. *See infra* text accompanying notes 157-71.

¹⁵⁶Very few commentators or political observers, it seems, read *In re Jane Doe I* and reached this conclusion. *See, e.g.,* Editorial, *The Willful Majority*, WEEKLY STANDARD, Aug. 5, 2002, at 45 (“Owen has more narrowly construed the statute than have some of her colleagues, including then Justice Alberto Gonzales (now White House counsel). But her interpretation of the law—the subject that dominated her hearing—is well within the bounds of reason.”); Steve Chapman, *A Conservative Judge’s “Judicial Activism,”* CHICAGO TRIB., Aug. 22, 2002, at 19 (“There is no ‘judicial activism’ in respecting the findings of a trial court judge, as Owen did.”); Charles Lane, *Judge’s Abortion Votes Likely to Dominate Senate Hearing; Opposition to Nominee Presages Larger Battle*, WASH. POST, July 23, 2002, at A15 [hereinafter Lane, *Judge’s Abortion Votes Likely*] (“Justice Nathan L. Hecht accused the justices in the majority of imposing their ‘personal views’ and ignoring the rights of parents. Gonzales’s concurring opinion was written largely as a response to Hecht’s dissent.”).

In Re Doe I considered whether a minor could obtain a judicial bypass from the Texas Parental Notification Act¹⁵⁷ and obtain an abortion.¹⁵⁸ Justice Gonzales concurred in the majority opinion, stating: “[T]o construe the Parental Notification Act so narrowly as to preclude bypass would be *an unconscionable act of judicial activism*.”¹⁵⁹ Justice Gonzales did not mention Justice Owen by name in that sentence.¹⁶⁰ Nor did he cite her dissenting opinion at all.¹⁶¹ Considering Justice Gonzales’s concerns about judicial activism, one would expect that Justice Gonzales would have mentioned Justice Owen by name if her dissent constituted an act of judicial activism.¹⁶² Instead, Justice Gonzales cited Justice Nathan Hecht,¹⁶³ who dissented and disagreed with the majority’s interpretation of the Texas Parental

Strangely, Justice Gonzales agreed that he criticized Justice Owen. Lewis, *Debate Centers on Abortion*, *supra* note 148 (“In a recent interview, Mr. Gonzales sought to minimize the impact of his remarks. He acknowledged that calling someone a ‘judicial activist’ was a serious accusation. . .”).

¹⁵⁷TEX. FAM. CODE ANN. § 33.003 (Vernon Supp. 2002).

¹⁵⁸*In re Doe I*, 19 S.W.3d 346, 346 (Tex. 2000).

¹⁵⁹*Id.* at 366 (Gonzales, J., joined by Enoch, J., concurring) (emphasis added).

¹⁶⁰*Id.* (Gonzales, J., joined by Enoch, J., concurring).

¹⁶¹*Id.* (Gonzales, J., joined by Enoch, J., concurring). Similarly, the majority opinion does not criticize Justice Owen’s interpretation of the Texas Parental Notification Act. *Id.* This absence of criticism entirely makes sense, considering that Justice Owen did not offer her own interpretation of the Texas Parental Notification Act. The opening sentence of Justice Owen’s dissent makes this point obvious. *See id.* at 376 (Owen, J., dissenting) (“Rather than conduct an appellate review to determine if there was evidence to support the lower courts’ determination, this Court has usurped the role of the trial court, reweighed the evidence, and drawn its own conclusions.”). One could argue that Justice Owen gave deference to the trial court’s findings because of her views on abortion and parental choice. Justice Owen’s opponents, however, certainly did not make that argument.

¹⁶²Particularly considering Justice Gonzales’s repeated exhortations for members of the Texas Supreme Court to follow legislative intent in construing a statute. *Id.* at 365 (Gonzales, J., joined by Enoch, J., concurring) (“Legislative intent is the polestar of statutory construction.” (citation omitted)); *id.* at 366 (Gonzales, J., joined by Enoch, J., concurring) (“[I]t is my obligation as a judge to impartially apply the laws of this state without imposing my moral view on the decisions of the Legislature.”). Justice Gonzales’s failure to cite Justice Owen’s dissent—either by name or by implication—means one of two things: either that the sentence has no meaning, or that the sentence refers to another Justice’s opinion. The latter statement is true.

¹⁶³*Id.* at 366 (Gonzales, J., joined by Enoch, J., concurring) (“Justice Hecht charges that our decision demonstrates the Court’s determination to construe the Parental Notification Act as the Court believes the Act should be construed and not as the Legislature intended.” (citation omitted)).

Notification Act.¹⁶⁴ Justice Hecht, not Justice Owen, was Justice Gonzales's nemesis in *In re Doe I*.¹⁶⁵

Justice Owen, however, didn't even offer her own interpretation of the Texas Parental Notification Act.¹⁶⁶ She focused her dissent on principles of appellate review, such as giving deference to the rulings of trial courts.¹⁶⁷ Reasonable minds can disagree with the trial court's conclusion that Jane Doe was not entitled to a judicial bypass; Justice Owen acknowledged this.¹⁶⁸ The claim that Justice Owen sought a more restrictive interpretation of the Texas Parental Notification Act is baseless because Justice Owen didn't advance any interpretation of the statute.¹⁶⁹ Justice Owen criticized the majority for giving no deference to the trial court's ruling.¹⁷⁰ Ironically, Justice Owen pointedly asked which Justice the majority opinion referred to as a "judicial activist."¹⁷¹

¹⁶⁴19 S.W.3d at 367 (Hecht, J., dissenting) ("The Court's utter disregard for the legislative history cited by fifty-six legislators in support of their view of the Parental Notification Act is an insult to those legislators personally, to the office they hold, and to the separation of powers between the two branches of the government.").

¹⁶⁵*Id.* at 366 (Gonzales, J., joined by Enoch, J., concurring). Justice Hecht's sharp criticism of the majority opinion drew significant criticism from Justice Enoch for its lack of collegiality and decorum. *Id.* at 364 (Enoch, J., joined by Baker, J., concurring) ("[Justice Hecht's] writings in these cases have been inappropriate. Deep convictions do not excuse a judge from respecting his colleagues, the litigants, or the law.").

¹⁶⁶*See id.* at 376-82 (Owen, J., dissenting).

¹⁶⁷*Id.* at 382 (Owen, J., dissenting) ("The issue is whether there was some evidence to support the trial court's failure to find by a preponderance of the evidence that Doe was mature and sufficiently well informed to make a decision to have an abortion without notifying one of her parents."). Justice Owen was also displeased with the majority's methods in *In re Doe*:

But I dissent from far more than the judgment rendered in this particular appeal. I strongly dissent from the methods employed by the Court in rendering that judgment. The Court summarily reversed the lower courts, without an opinion and without the opportunity for considered, substantive deliberations. Now that the Court has, after the fact, issued an opinion, it has obliterated, with the stroke of a pen, more than fifty years of precedent regarding appellate review of a trial court's findings. The Court's actions raise disturbing questions about its commitment to the rule of law and to the process that is fundamental to the public's trust in the judiciary.

Id. at 377 (Owen, J., dissenting).

¹⁶⁸*Cf. id.* at 381 (Owen, J., dissenting) ("The trial court could reasonably find that Doe was not mature enough to make the abortion decision without telling one of her parents.").

¹⁶⁹*Compare id.* at 382 (Owen, J., dissenting) ("It is the Court who has acted irresponsibly in this case by summarily rendering judgment without careful consideration of the record, by manufacturing reasons to support its actions, and by ignoring the evidence that supports the trial court's judgment."), *and id.* at 376 (Owen, J., dissenting) ("The Court has forsaken any semblance of abiding by principles of appellate review."), *with id.* at 367 (Hecht, J., dissenting) ("The Court is well aware of the near-universal criticism of its construction of the Parental Notification Act, and the defensiveness of the majority and concurring opinions is striking.").

¹⁷⁰*Id.* at 381 (Owen, J., dissenting) ("The Court's analysis of whether Doe was sufficiently well informed is also incorrect. If the Court were to follow well-established law, it would

Justice Owen's opponents claimed that her views on abortion are "outside the mainstream."¹⁷² As a matter of politics, that charge is dubious—parental notification statutes enjoy strong public support.¹⁷³ As a matter of law, that charge is equally dubious. To claim that a Justice or Judge opposes abortion because that Judge or Justice ruled against someone seeking an abortion confuses reasoning with results.¹⁷⁴ Justice Owen has never criticized *Roe* and its progeny. Even if she did, as a Fifth Circuit judge, her role would be to follow—not make—Supreme Court precedent.

Forced to find something to use against Justice Owen, her opponents misread and misrepresented her dissent in *In re Doe 1*.¹⁷⁵ In doing so, Justice Owen's opponents committed the same sin that she was accused of committing—substituting one's personal views for precedent. Justice Owen's nomination demonstrates the many dangers inherent in ideological scrutiny. It is certainly not the first time that Senators have misrepresented a nominee's judicial opinion. Should the Senate continue to evaluate a nominee's ideology, it certainly will not be the last time either.

The recent history of the confirmation process is entirely at odds with the history surrounding the appointments clause.¹⁷⁶ It is difficult to conclude that the Framers would have advocated rejecting a nominee because, in part, a nominee is "not Hispanic enough,"¹⁷⁷ a nominee participated in anti-war demonstrations,¹⁷⁸ or a

consider evidence in the record that supports the trial court's judgment rather than disregard that evidence.").

¹⁷¹*Id.* at 383 (Owen, J., dissenting) ("I challenge the Court to state plainly how any judge's personal convictions have entered into analyzing what is strictly a legal issue in this case.").

¹⁷²See Lane, *Judge's Abortion Votes Likely*, *supra* note 156.

¹⁷³See Chapman, *supra* note 156.

¹⁷⁴See *infra* note 389 (noting that it is quite possible for a judge to follow and apply *Roe* despite that judge's reservations).

¹⁷⁵See *supra* text accompanying notes 157-71 (discussing *In re Doe 1*).

¹⁷⁶*Cf.* Fein, *supra* note 25, at 672.

¹⁷⁷See Edward Walsh, *Hispanic Caucus to Oppose Estrada*, WASH. POST, Sept. 25, 2002, at A4 [hereinafter Walsh, *Hispanic Caucus*] ("The Congressional Hispanic Caucus, composed entirely of House Democrats, plans to announce today that it opposes the nomination of Miguel Estrada. . . . In a statement they will release today and in interviews, the caucus's 18 members portrayed Estrada as aloof from the everyday concerns of Latinos." (emphasis added)). Senate Democrats have noted that Miguel Estrada grew up in an upper middle-class family. See Lewis, *Bush Judicial Choice Imperiled*, *supra* note 126 ("In a colloquy with the nominee, Mr. Leahy put on the record that Mr. Estrada did not grow up poor, his father was a banker and lawyer and that he attended a private school."). The claim that Mr. Estrada is "not Hispanic enough" surely cannot succeed as a matter of genetics. Additionally, considering the political biases of the various parties who claim or deny legitimate racial lineage, these claims are neither objective nor relevant.

¹⁷⁸See Mark Shields, *Commando Phil Gramm*, WASH. POST, Nov. 23, 1997, at A22 (quoting Senator Gramm, speaking out in opposition to Texas trial judge Michael Schattman, as saying: "The Dallas-Fort Worth area has a lot of defense contractors, and so how is a guy who is opposed to all war going to make a fair shake to people whose job it is to make the weapons of war?")

nominee dared criticize a Supreme Court decision.¹⁷⁹ Many prudential reasons would lead a Senator of even modest caution to conclude that ideological scrutiny must end.

d. The 2002 Midterm Elections

After the 2002 Midterm Elections, and toward the end of Senator Leahy's tenure as Chairman, some progress was made in the confirmation process. In its last hearing under Senator Leahy's leadership, the Senate Judiciary Committee approved the nominations of Judge Dennis Shedd and Professor Michael McConnell.¹⁸⁰ The full Senate confirmed both men shortly thereafter.¹⁸¹ It appears that Senator Leahy brought both nominations to the floor as a sign of goodwill.¹⁸² Nevertheless, Senate Democrats have used the filibuster to prevent consideration of the "most controversial" nominees.¹⁸³ While the Senate is now under Republican control, it is doubtful that this change in leadership will end the rampant controversy surrounding the confirmation process.¹⁸⁴

e. The Estrada Nomination

President Bush's nomination of Miguel Estrada to the D.C. Circuit Court of Appeals ignited a firestorm of controversy. This controversy, however, did not focus on qualifications—Mr. Estrada received a unanimous "Well Qualified" rating from the American Bar Association.¹⁸⁵ Many Senate Democrats would likely agree that

¹⁷⁹See, e.g., Editorial, *Judging Michael McConnell*, *supra* note 5 ("Mr. McConnell has not merely expressed abstract reservations about the *Roe v. Wade* ruling, but has also actively crusaded against it.").

¹⁸⁰Neil A. Lewis, *Democrats Vote No, But Allow Judicial Nominee to Advance*, N.Y. TIMES, Nov. 15, 2002, at A28 [hereinafter Lewis, *Democrats Vote No*].

¹⁸¹See *Thurmond's Wish Granted by Senate; Protege Promoted to Federal Court Despite Accusations*, HOUSTON CHRON., Nov. 21, 2002, at A4; *Washington in Brief*, WASH. POST, Nov. 19, 2002, at A10.

¹⁸²See Lewis, *Democrats Vote No*, *supra* note 180 ("The Shedd nomination was, still, a tribute of sorts to Mr. Thurmond.").

¹⁸³Amy Goldstein & Charles Lane, *GOP Eyes Quick Approvals; Judicial Nominees Focus of Plans*, WASH. POST, Nov. 7, 2002, at A27 ("Warning that the ideological balance of the judiciary was at stake, [Senate Democrats] predicted that the GOP's intentions could lead to a new form of judicial battle, gravitating from debates in the Judiciary Committee to filibusters and other tactics on the Senate floor."). Senate Democrats have begun to fulfill this promise by filibustering the Estrada nomination.

¹⁸⁴See *id.*

¹⁸⁵Some Senate Democrats, however, claimed that Mr. Estrada lacked judicial experience. This claim was somewhat debatable, considering that Mr. Estrada served as a law clerk on the Second Circuit and on the United States Supreme Court, worked in the Appellate Division of the U.S. Attorney's Office for the Southern District of New York, and served for five years in the Office of Solicitor-General. Surely these experiences are at least related to the judicial process. Additionally, the American Bar Association deemed Mr. Estrada "Well Qualified" by a unanimous margin. Even assuming this claim to be true, more than a few Circuit Judges and Justices were confirmed without having previously served in the judiciary, including,

Mr. Estrada possesses quite impressive credentials. However, some argued that insufficient information exists to determine Mr. Estrada's views on contested legal issues.¹⁸⁶ Specifically, they claim that Mr. Estrada refused to answer questions regarding his judicial philosophy.¹⁸⁷ Because of this alleged lack of information, Senate Democrats filibustered the Estrada nomination, refusing to bring the nomination up for a vote until they received more information concerning Mr. Estrada's views.¹⁸⁸

Senate Democrats made rather odd arguments against confirming Mr. Estrada.¹⁸⁹ First, they argued that no one can determine Mr. Estrada's views on contested legal issues or his judicial philosophy.¹⁹⁰ Second, they argued that these views are outside the mainstream.¹⁹¹ Put simply, Senate Democrats simultaneously knew too much yet not enough about Mr. Estrada.¹⁹² The lack of logic in these arguments is quite apparent.¹⁹³ Worse yet, Mr. Estrada's opponents claimed, rather offensively, that Mr. Estrada "is not a real Hispanic, . . . [but] was nominated only because he is Hispanic."¹⁹⁴

Even if one ignores the rather desperate arguments advanced against confirmation,¹⁹⁵ the precedent set is quite troubling.¹⁹⁶ Senate Democrats have

among others, Judges David Tatel, Harry Edwards, and Justices Earl Warren, Byron White, Lewis Powell, and William Rehnquist.

¹⁸⁶See Lewis, *Bush Judicial Choice Imperiled*, *supra* note 126. Specifically, Senate Democrats demanded that the Bush Administration release memoranda written by Mr. Estrada during his tenure in the Office of Solicitor-General. That demand, however, has been opposed by every living Solicitor-General, in a letter written to Senator Leahy. The letter can be found at <http://www.usdoj.gov/olp/solicitorsletters.pdf> (last visited Aug. 8, 2003). If all seven living Solicitor-Generals can agree on a contested topic, that opinion is certainly worth listening to.

¹⁸⁷See Lewis, *Bush Judicial Choice Imperiled*, *supra* note 126.

¹⁸⁸See *id.*

¹⁸⁹See *supra* note 126.

¹⁹⁰See Lewis, *Bush Judicial Choice Imperiled*, *supra* note 126.

¹⁹¹See Newfield, *supra* note 126.

¹⁹²See *supra* notes 126, 190-91.

¹⁹³See Editorial, *Filibustering Judges*, WASH. POST, Feb. 5, 2003, at A22 (arguing that Senate Democrats should not filibuster the Estrada nomination); see also *supra* note 125.

¹⁹⁴Editorial, *Just Vote*, WASH. POST, Feb. 18, 2003, at A24.

¹⁹⁵Ignoring the logical flaws in the arguments against confirming Mr. Estrada is quite a daunting task. See *id.* ("The arguments against Mr. Estrada's confirmation range from the unpersuasive to the offensive."). Another argument against confirmation is that Mr. Estrada has represented clients who have unfairly sought to implement anti-loitering ordinances. Charles Lane, *Nominee for Court Faces Two Battles; Senate Panel to Focus on Ideology, Immigrant Past*, WASH. POST, Sept. 24, 2002, at A1 [hereinafter Lane, *Nominee*]. Representation of a client, however, does not imply endorsement of that client's position by a lawyer. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (1983).

¹⁹⁶See Gerhardt, *Confirmation Mystery*, *supra* note 8, at 421-22 ("[T]he Senate has never rejected anyone for saying too little in a confirmation hearing and, thus, the most serious part

already stated that they will vote against any nominee holding a judicial philosophy with which they disagree.¹⁹⁷ In the event that no incriminating information exists (or the nominee hasn't provided his or her own noose), Senate Democrats will refuse to vote on that nomination.¹⁹⁸ Consequently, the principle established by the Estrada nomination is this: the failure by Senate Democrats to assemble a legitimate case against a nominee is itself grounds to vote against that nominee.¹⁹⁹ The actions taken by Senate Democrats are troubling on a scale far larger than the immediate consequences for Mr. Estrada and the D.C. Circuit.²⁰⁰ These actions represent a wholesale escalation of the confirmation process.²⁰¹

Neither political party has clean hands in the confirmation process.²⁰² Senators of both parties have used any means necessary to defeat nominees when it suited their respective purposes.²⁰³ Along the way, Senators from both parties have grasped at any legal principle or fact—whatever its relationship to reality may be—to defeat a nomination.²⁰⁴ Undoubtedly, Senate Democrats filibustered Mr. Estrada's nomination as payback for the sins committed by Senate Republicans during President Clinton's two terms in office.²⁰⁵ This sort of "They Started It" argument²⁰⁶

of the threat to judicial independence—the coercion of a vote—has never been realized." (footnote omitted).

¹⁹⁷See, e.g., Schumer, *supra* note 18.

¹⁹⁸It is highly doubtful that Senate Democrats would have given Mr. Estrada any credit for revealing his views on contested legal issues or his judicial philosophy. For example, assuming that Mr. Estrada would have said that *Roe* was wrongly decided, Senate Democrats more than likely would have used this information to characterize Mr. Estrada as "outside the mainstream." Additionally, Senate Democrats would likely have argued that a view on a disputed issue such as *Roe* created a conflict of interest that would have prevented Mr. Estrada from hearing cases involving abortion. See *infra* note 598 and accompanying text. One can only wonder why, as Senate Democrats claimed, there was no information regarding Mr. Estrada, considering that a year and a half transpired before Mr. Estrada even received a hearing. Simply put, Senate Democrats succeeded in getting Mr. Estrada to defeat his own nomination. See *supra* note 126. This approach was not different, in principle, from the actions of Senate Republicans during the Clinton years. When Senate Republicans found no information that would defeat a nomination, some Senators simply refused to hold hearings on Clinton nominees.

¹⁹⁹Editorial, *Filibustering Judges*, *supra* note 193.

²⁰⁰*Id.* ("[A] world in which filibusters serve as an active instrument of nomination politics is not one either party should want.").

²⁰¹*Id.* (noting that the confirmation process is "a war that long ago got out of hand").

²⁰²See *supra* Part II.B.

²⁰³See *supra* Part II.B.

²⁰⁴See *supra* Part II.B.

²⁰⁵E.J. Dionne, Jr., *They Started It*, WASH. POST, Feb. 21, 2003, at A27 [hereinafter Dionne, *They Started It*].

²⁰⁶For some, that argument seems to be the only argument that justifies rejecting Mr. Estrada's nomination. See *id.* This argument can only lead to a continued escalation of the confirmation process.

only leads to further bloodshed and conflict, whatever the facts may be. By seeking to defeat the Estrada nomination, Senate Democrats all but waived any right to object to future, obstructionist tactics by Senate Republicans.²⁰⁷ In effect, the confirmation process has achieved a full transformation to a system where Democrats vote against Republicans, and Republicans vote against Democrats.

III. WHY IDEOLOGICAL SCRUTINY MUST END

A. Ideological Scrutiny Violates Principles of Separation of Powers

1. A Concentration of Constitutional Powers in the Presidency

One commentator thoughtfully argues that Senators must counteract the President's ambition with their own ambitions.²⁰⁸ If the President takes ideology into account in selecting nominees, so too should Senators.²⁰⁹ An overly strong Presidential role undermines the "ambition-countering-ambition" principle.²¹⁰ Because "[t]he modern history is one of unprecedented presidential domination of the appointment process,"²¹¹ the Senate must counteract Presidential ambition.²¹²

²⁰⁷Senate Democrats have also blatantly contradicted earlier statements, made during the Clinton years, that all nominees should receive a vote by the full Senate. *See, e.g.*, 145 CONG. REC. S11103 (1999) (statement of Sen. Kennedy) ("These nominees and their families deserve a decision by the Senate."); 145 CONG. REC. S11098 (1999) (statement of Sen. Kohl) ("These nominees, who have put their lives on hold waiting for us to act, deserve an up or down vote."); 144 CONG. REC. S11031 (1998) (statement of Sen. Durbin) ("Vote the person up or down."); 144 CONG. REC. S6522 (1998) (statement of Sen. Leahy) ("If we don't like somebody the President nominates, vote him or her down. But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators."); 143 CONG. REC. S10926 (1997) (statement of Sen. Leahy) ("[I]t is the responsibility of the U.S. Senate to at least bring [nominations] to a vote."); 143 CONG. REC. S9166 (1997) (statement of Sen. Feinstein) ("Let's bring their nominations up, debate them if necessary, and vote them up or down.").

²⁰⁸Tushnet, *supra* note 32, at 50; *see also* Gerhardt, *Selection as War*, *supra* note 40, at 394.

²⁰⁹Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 556-58, 563 (1986); *see also* Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620 (2003) [hereinafter Chemerinsky, *Selection of Federal Judges*] ("Every President in American history, to a greater or lesser extent, has chosen federal judges, in part, based on their ideology. Likewise, since the earliest days of the nation, the United States Senate also has looked to ideology in the confirmation process. This is exactly how it should be.").

²¹⁰Tushnet, *supra* note 32, at 79.

²¹¹Simson, *Supreme Unfitness*, *supra* note 14, at 647-48.

²¹²*Id.*; *see also* Tushnet, *supra* note 32, at 66 n.61. Were the President to nominate someone for a judgeship solely because of ideology, the Senate should subject that nominee to an "ideologically-based confirmation." Lively, *supra* note 209, at 565-67. This concept of procedural justice will, in theory, prevent Court-packing. *See id.* at 567.

While certainly well reasoned, this view of the confirmation process ignores the fact that the confirmation process assigns more power to the President.²¹³ Power may be separated in the confirmation process, but it is not an even separation by any means.²¹⁴ Once the President receives 270 electoral votes and is sworn in, the President alone has the constitutional power to nominate.²¹⁵ Evaluation of a nominee's judicial philosophy must end because the Senate's power is reactive, not proactive.²¹⁶ The Senate cannot put forth a nomination; it can only reject a nomination.²¹⁷ If the Senate rejects a nomination, the President can nominate an individual sharing the ideology of the rejected nominee.²¹⁸ The President, not the Senate, has the lion's share of the power.²¹⁹ The final act of a judicial nomination, as *Marbury v. Madison*²²⁰ tells us, is a Presidential signature of the nominee's commission. While a separation of powers exists, so too does a concentration of powers—in the Presidency.²²¹

The President has the power to nominate; thus, it is hardly unreasonable to argue that the President is the actor who can act with ambition.²²² This ambition is born of and justified by an electoral and constitutional victory.²²³ Presidential candidates are

²¹³See Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 532.

²¹⁴See *id.*

²¹⁵See U.S. CONST. art. II, § 2, cl. 2.

²¹⁶William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 647-48 (1987). Though Professor Ross does believe that ideology should be part of the Senate's consideration, *id.* at 660-61, he does note that initial deference to the President's nominee is "a practical necessity as well as a constitutional command." *Id.* at 681. In short, the Senate may not substitute its own nominee for the President's judgment. *Id.*

²¹⁷*Id.*; see also Lively, *supra* note 209, at 551; THE FEDERALIST NO. 76, *supra* note 54, at 425 (Alexander Hamilton) ("But his nomination may be overruled; this it certainly may, yet it only can be made place for another nomination by himself.").

²¹⁸See THE FEDERALIST NO. 76, *supra* note 54, at 425 (Alexander Hamilton) ("The Senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination." (emphasis added)).

²¹⁹See Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 532.

²²⁰5 U.S. 137, 155 (1803).

²²¹Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 532 ("[T]he constitutional structure grants the president the balance of power in the federal appointments process. . .").

²²²See, e.g., THE FEDERALIST NO. 76, *supra* note 54, at 423 (Alexander Hamilton) ("He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.").

²²³See McGinnis, *A Reply*, *supra* note 3, at 646-47 ("Thus, the President appears to be under a constitutional obligation to nominate an individual who he believes will interpret the Constitution in a manner that generally accords with his view of lawful construction." (footnote omitted)).

fully entitled to set goals for those whom they would appoint to the federal bench.²²⁴ Whether these goals are achieved depends on whether or not the public votes for that candidate.²²⁵ Once elected, a President has a constitutional duty to nominate Judges or Justices of his or her ideological persuasion.²²⁶ A failure to do so would abrogate the President's constitutional responsibilities.²²⁷

2. Mandating a Political Mandate

Some commentators claim that a President must have a political mandate to nominate judges sharing his judicial philosophy.²²⁸ Thus, they argue that President Bush lacks a mandate to nominate conservative judges.²²⁹ Federal judges, however, have never been selected based on electoral returns.²³⁰ No Senate Republicans told

²²⁴*See id.* at 647-48. Debates regarding judicial philosophies have occurred in every Presidential election since 1980. *See infra* notes 236-41 and accompanying text.

²²⁵*See* McGinnis, *A Reply, supra* note 3, at 648 (noting that presidential candidates make "a pact with the people concerning the exercise of one of their fundamental presidential responsibilities" when they pledge to nominate judges of a particular judicial philosophy).

²²⁶*See id.* at 647 n.59 ("The early Presidents all nominated candidates who the Presidents believed reflected their views of proper constitutional construction.").

²²⁷*Id.* at 647 ("A President who . . . agreed with the Senate in advance to nominate a jurist whose constitutional views differed substantially from his would abrogate this most solemn oath.").

²²⁸*See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1107 (2001) [hereinafter Balkin & Levinson, *Constitutional Revolution*] ("As we have argued, a party's authority to stock the federal courts with its ideological allies stems from its repeated victories at the polls.").

²²⁹Professors Balkin and Levinson have this to say concerning President Bush's mandate and legitimacy:

He may occupy the White House by the grace of his brother the Governor of Florida, Florida Secretary of State Katherine Harris, and five Justices of the Supreme Court. But he should not have the right to appoint life-tenured judges who further the constitutional revolution unless he won a mandate from We the People. He won no such mandate. Indeed, more people opposed his candidacy than favored it, and his victory in the electoral college is equally dubious given the disenfranchisement of thousands of African-American voters and the Supreme Court's hijacking of the national political process. That is why *Bush v. Gore* matters. George W. Bush is assuming a legitimate power to reshape the Constitution through judicial appointments that he simply does not possess. It is the obligation of the Democratic opposition in the Senate to resist his attempts.

Id. at 1106-07.

²³⁰*See* Statement by C. Boyden Gray, in *Senate Committee Hearings on the Judicial Nomination Process*, 50 DRAKE L. REV. 429, 438 (2002) ("After all, it's not uncommon for the White House and the Senate to be in the hands of different political parties, and we've never apportioned judicial seats on the breakdown of the vote in the last election."). One could argue that President Reagan possessed a strong political mandate when he won re-election and forty-nine states in the Electoral College in 1984. Professors Balkin and Levinson acknowledge President Reagan's "triumphant reelection." Balkin & Levinson, *Constitutional Revolution, supra* note 228, at 1069. However, they argue that President Reagan's mandate ended following the Democratic takeover of the Senate in 1986. *See id.* at 1070. In the end,

President Truman that he lacked a mandate to nominate judges of a particular ideological bent because he barely beat Dewey in 1948.²³¹ Similarly, no Washington insiders informed President Kennedy that he lacked a mandate to nominate judges after he narrowly beat President Nixon in 1960.²³² The only mandate required to nominate an individual is 270 electoral votes.²³³ As recent history has demonstrated, these 270 electoral votes can come from a majority, a minority, or a plurality of the popular vote.²³⁴

Many Presidential candidates have made their views well known concerning those whom they would nominate to the federal judiciary.²³⁵ This was true in 1980,²³⁶ 1984,²³⁷ 1988,²³⁸ 1992,²³⁹ 1996,²⁴⁰ and 2000.²⁴¹ Once that particular,

political mandates begin or end when members of the opposing political party want them to begin or end. One could either argue that President Clinton's "semi-triumphant" re-election over Senator Robert Dole gave President Clinton greater authority to nominate judges. Or, on the other hand, one could argue that President Clinton's failure to garner a majority of the popular vote proved that he lacked a mandate to nominate judges.

²³¹*Cf.* Statement by C. Boyden Gray, in *Senate Committee Hearings on the Judicial Nomination Process*, *supra* note 230, at 438.

²³²*Cf. id.*

²³³*See* U.S. CONST. art. II, § 2, cl. 2.

²³⁴John O. McGinnis, *The Law of Presidential Elections: Issues in the Wake of Florida 2000: Popular Sovereignty and the Electoral College*, 29 FLA. ST. U. L. REV. 995, 996 (2001) [hereinafter McGinnis, *Law of Presidential Elections*] ("Paying attention to the popular vote in this context is like suggesting we should pay attention to the total number of runs a team got in the World Series rather than the number of games won." (footnote omitted)).

²³⁵*See, e.g.*, Fred Barbash, *Election Could Also Determine Future Course of Supreme Court*, WASH. POST, July 15, 1984, at A3 ("One close Mondale aide said that in making [Supreme Court] appointments he would be conscious of bringing the current court back toward 'the center' and would look for 'centrists' as justices.").

²³⁶*See Reagan: Look at "Philosophy" for High Court*, WASH. POST, Oct. 2, 1980, at A3 ("Republican presidential nominee Ronald Reagan says he would choose Supreme Court justices on the basis of 'the whole broad philosophy' they would bring to the bench—and would not rule out jurists who support abortion.").

²³⁷*See* Editorial, *Court Bashing*, WASH. POST, Aug. 13, 1984, at A14 ("The wide differences between Mr. Mondale and Mr. Reagan on how justices should settle these and other issues provide the basis for a legitimate political debate.").

²³⁸*Cf.* George Will, *A Case for George Bush*, WASH. POST, Nov. 6, 1988, at C7 [hereinafter Will, *A Case*] ("A Bush-directed change in the court's composition might result in reversal of the 1973 abortion ruling, but that might not result in much change in abortion policy. It would ignite 50 arguments by restoring to states the right to regulate abortion.").

²³⁹*See* Editorial, *Gov. Clinton's Litmus Test*, WASH. POST, July 9, 1992, at A22 ("Now Gov. Bill Clinton has said that he will apply an abortion litmus test (the term is one he accepts) in nominating Supreme Court justices. . . . [H]is appointments to the Supreme Court 'will be strong supporters of *Roe v. Wade*.'").

²⁴⁰*See* Nat Hentoff, *An 'F' For Both of Them*, WASH. POST, Sept. 28, 1996, at A17 ("Moreover, Bob Dole has pledged that if he is elected, 'only conservative judges need apply.' But Bill Clinton . . . has said that he would appoint only Supreme Court judges who are pro-choice, and he has kept his word.").

constitutional mandate is received, a President has the power to nominate judges.²⁴² The power to nominate rests inherently in the President's constitutional powers; it is affected neither by polls nor by disputes over a political mandate.²⁴³

Judicial nominations have rarely, if ever, been an issue in Senate campaigns.²⁴⁴ Each Senator wins elections based predominately on local or regional issues.²⁴⁵ Can one seriously claim that one Senator has a national mandate to thwart or reject the President's nominees? Probably not. Arguments in favor of an assertive Senate role fail of their own accord. Additionally, the President can easily determine which individuals to nominate.²⁴⁶ A President "institutionally is better suited than the Senate to picking one candidate out of a list of many."²⁴⁷

3. Institutionalized Presidential Discretion

Those who advocate ideological scrutiny have expressed profound shock and surprise at past Supreme Court nominees.²⁴⁸ The best example of this, as one might imagine, is the Bork nomination.²⁴⁹ Some commentators have proposed that the President and the Senate be equal partners in the confirmation process so the

²⁴¹See, e.g., E.J. Dionne, Jr., *Bush Falls Short*, WASH. POST, Oct. 5, 2000, at A35 [hereinafter Dionne, *Bush Falls Short*] ("Gore said he would favor Supreme Court justices who support abortion rights. Bush said he'd appoint 'strict constructionists,' which every right-to-lifer knows means someone like conservative Antonin Scalia.")

²⁴²See U.S. CONST. art. II, § 2, cl. 2.

²⁴³This term "mandate" traces its lineage to the political process. Thus, its application to the confirmation process is quite questionable. Whether a President receives 270 or 400 electoral votes, that President retains the powers vested in him or her according to the Constitution of the United States. President Clinton received less than 50% of the popular vote in 1992 and 1996. President Kennedy barely won the popular vote in 1960; President Truman narrowly beat Thomas Dewey in 1948. No claims that a mandate was lacking were made when these Presidents nominated Justices. This is entirely unsurprising—arguments in favor of ideological scrutiny lack historical support.

²⁴⁴But see *U.S. Senate; Cornyn v. Kirk: More than U.S. Senate Seat at Stake Here*, HOUSTON CHRON., Oct. 27, 2002, at 2 ("Cornyn has repeatedly urged Senate confirmation of all of Bush's nominations to federal judgeships. Kirk has been more selective. Notably, Kirk opposed confirmation of Texas Supreme Court Justice Priscilla Owen's appointment to the 5th U.S. Circuit Court of Appeals.")

²⁴⁵See THE FEDERALIST NO. 76, *supra* note 54, at 424 (Alexander Hamilton) (noting that the President is institutionally better suited than the Senate to nominate individuals).

²⁴⁶Senator Charles McC. Mathias, Jr. *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 204-05 (1987).

²⁴⁷Yvette M. Barksdale, *Advise and Consent*, 47 CASE W. RES. L. REV. 1399, 1418 (1997).

²⁴⁸Gary J. Simson, *Mired in the Confirmation Mess*, 143 U. PA. L. REV. 1035, 1051-52 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994)) [hereinafter Simson, *Mired in the Confirmation Mess*].

²⁴⁹*Id.* at 1051 ("By any measure, *President Reagan's nomination of Bork was a solid right to the jaw of liberals and even centrists in the Senate.*" (emphasis added)).

President won't nominate someone as "provocative" as Judge Bork.²⁵⁰ A President, however, can nominate as "provocative" a nominee as he or she wants.²⁵¹ A President has a constitutional duty to consider ideology when selecting nominees.²⁵² Moreover, "[a] President is entitled to reflect his judicial and political philosophy in his [or her] judicial nominations."²⁵³ Since time immemorial, Presidential nominees and Presidents have promised to achieve various goals on the federal judiciary.²⁵⁴

Even if a Senator disagrees with the President's choice for a judgeship, mere disagreement with a nominee's ideology should not invalidate the President's choice.²⁵⁵ Admittedly, the Constitution does not delineate the criteria that Senators should utilize to examine judicial nominees.²⁵⁶ History and logic, however, caution against ideological scrutiny.²⁵⁷

4. Pre-appointment Senate Prerogatives

The Constitution assigns no mandatory preappointment role to the Senate.²⁵⁸ Three Supreme Court Justices agree with this argument.²⁵⁹ Additionally, one of the

²⁵⁰*Id.* at 1052. Judge Bork (once) received a glowing recommendation from the *New York Times*. See Editorial, *Echoes of Watergate*, *supra* note 77 ("Mr. Bork, moreover, is a legal scholar of distinction and principle."). Interestingly, that editorial supported Judge Bork's nomination to the D.C. Circuit in spite of disagreement with his views. See *id.* ("One may differ heatedly with him on specific issues like abortion, but those are differences of philosophy, not principle. Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.").

²⁵¹See, e.g., Fein, *supra* note 25, at 672.

²⁵²*Cf.* Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 934-36 (1983).

²⁵³Mathias, *supra* note 246, at 204-05.

²⁵⁴See *supra* notes 236-41 and accompanying text.

²⁵⁵Mathias, *supra* note 246, at 204-05.

²⁵⁶Wolfe, *supra* note 32, at 364-65.

²⁵⁷As one commentator has noted, the mere claim that "advice and consent" means whatever a majority of the House of Representatives considers it to be at a given moment in history allows unending political shenanigans. Kline, *supra* note 18, at 278 n.97. Senators who have not cared about a nominee's judicial philosophy in years (because their party controlled the White House) will suddenly parse every sentence of a district court opinion soon after the White House switches parties. Likewise, Senators who have insisted on thorough, belabored interrogations of judicial nominees will quickly argue the benefits of Presidential discretion.

²⁵⁸McGinnis, *A Reply*, *supra* note 3, at 635. The President could, of course, consult with Senators as he wishes. See *id.*

²⁵⁹*Id.* at 639 n.23 (citing *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., joined by Rehnquist, C.J., & O'Connor, J., concurring) (arguing that the text gives "[n]o role whatsoever . . . to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment")); see also Presser, *supra* note 3, at 261 n.65.

Court's first cases states the same principle.²⁶⁰ Even those who favor an assertive Senate role admit this.²⁶¹ Any role the Senate might have is conditioned on the President's discretion.²⁶² Put another way, a President might find it politically advisable to float "trial balloons" concerning potential Justices.²⁶³ On the other hand the President might informally invite Senators to the Oval Office to discuss their recommendations for judges.²⁶⁴ These two techniques would likely be politically prudent, but neither technique is constitutionally required.²⁶⁵ Historical evidence bears this out.²⁶⁶ Advice may be heeded, ignored, valued, or downplayed.²⁶⁷ Determining whether to "advise and consent" to a nomination is, however, mandatory in the confirmation process.²⁶⁸ The absence of a pre-nomination role for the Senate does not preclude an aggressive, post-nomination Senate role.²⁶⁹ An active pre-nomination role for the Senate, however, is not constitutionally prudent.

5. Burdening a Judicial Nominee with the Burden of Proof

Some commentators argue that a Supreme Court or Circuit Court nominee bears the burden of proof in a confirmation hearing.²⁷⁰ One commentator even advocates

²⁶⁰McGinnis, *A Reply*, *supra* note 3, at 639 ("[The nomination] is the sole act of the President. . . ." (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803))).

²⁶¹Simson, *Supreme Unfitness*, *supra* note 14, at 662. *But see* Roger J. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075, 1078 (1992) ("It seems clear to me that the Senate cannot fulfill the advice requirement unless it has input in the nomination itself.").

²⁶²*See* McGinnis, *A Reply*, *supra* note 3, at 646 ("To be sure, some Presidents have consulted with key Senators and a few with the Senate leadership, *but they have done so out of comity or political prudence and never with a declaration of constitutional obligation.*" (emphasis added)).

²⁶³President Clinton used this technique skillfully in nominating Justices Ruth Bader Ginsburg and Stephen Breyer to the Supreme Court. Kline, *supra* note 18, at 247-48.

²⁶⁴*See* McGinnis, *A Reply*, *supra* note 3, at 646.

²⁶⁵Presser, *supra* note 3, at 261 n.65. *But see* Miner, *supra* note 261, at 1078.

²⁶⁶Moreover, as one commentator has noted, arguments to the contrary are based on errors and omissions in the historical record. *See* McGinnis, *A Reply*, *supra* note 3, at 634-38. Some errors are arguably harmless ones. *See* Friedman, *Tribal Myths*, *supra* note 53, at 1285 (noting that Chief Justice John Marshall was nominated only after Oliver Ellsworth resigned from the Supreme Court, not immediately after the Senate rejected John Rutledge's nomination, as Professor Tribe claimed). Other errors, however, are more serious. *See id.* at 1291-1312.

²⁶⁷*Cf.* McGinnis, *A Reply*, *supra* note 3, at 646 ("Not one subsequent President has recognized a constitutional role for senatorial advice prior to nomination."); *see also supra* Part II.A (discussing the structure of the Appointments Clause).

²⁶⁸James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 339-40 (1989).

²⁶⁹*Id.* at 340; *see also* Mathias, *supra* note 246, at 202.

²⁷⁰Simson, *Mired in the Confirmation Mess*, *supra* note 248, at 1038. Other commentators advocating ideological scrutiny argue that a nominee should have the burden of proof in a confirmation hearing. Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1519.

increasing the votes needed for approval to 2/3 in both the Senate Judiciary Committee and the Senate floor.²⁷¹ Other commentators have proposed all manner of interrogations concerning a nominee's commitment to various causes or issues.²⁷² As a matter of textual interpretation, this argument is permissible.²⁷³ History and practice, however, defeat this argument.²⁷⁴

The Framers believed that the Senate should reject a nomination only for compelling reasons.²⁷⁵ To the extent that any burden existed, the burden rested with the President to select individuals of great character, intellect, and temperament.²⁷⁶ Few individuals, the Framers thought, would have the capacity to be judges.²⁷⁷ Thus, an individual nominated to be a judge enjoys a presumption in favor of confirmation.²⁷⁸ Nowhere in any historical source does any indication exist that a nominee's judicial philosophy is a relevant factor.²⁷⁹

Recent history cautions against having a judicial nominee bear the burden of proof.²⁸⁰ Imposing a burden of proof on the nominee guarantees that the Senate will reject meritorious nominees. The confirmation process, however, is designed to "screen out unfit characters."²⁸¹ Additionally, the concept of "burden of proof" is far too easy for a Senator not in the President's party to manipulate for his or her political purposes.²⁸²

The argument that a nominee has the burden of proof begs the question of what the nominee must prove. What form or variety of "innocence" has a

²⁷¹Simson, *Mired in the Confirmation Mess*, *supra* note 248, at 1045.

²⁷²*See, e.g.,* Joseph L. Rauh, Jr., *Nomination and Confirmation of Supreme Court Justices: Some Personal Observations*, 45 ME. L. REV. 7, 11 (1993) [hereinafter Rauh, Jr., *Some Personal Observations*] (proposing that Senators refuse to confirm anyone to the Supreme Court whom they believe "has failed during his (or her) lifetime to show by word or deed substantial dedication to the Bill of Rights" (quoting Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 248 (1990))).

²⁷³Ross, *supra* note 216, at 635 ("The Constitution says nothing about the criteria upon which the Senate may base its decision. Technically, therefore, the Senate may reject a nominee for any reason.").

²⁷⁴McGinnis, *A Reply*, *supra* note 3, at 636. As one commentator notes, the Framers thought that nominees would have to pass a stringent test *just to be nominated*. *Id.* at 636 n.13.

²⁷⁵Presser, *supra* note 3, at 264.

²⁷⁶McGinnis, *A Reply*, *supra* note 3, at 653-54.

²⁷⁷Presser, *supra* note 3, at 262.

²⁷⁸Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 477 nn.20-21, 479.

²⁷⁹Were that the case, one would expect that the confirmation process has a low success rate for nominations. The structure governing judicial confirmations, however, "is set up to ensure a high presidential success rate." Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 480.

²⁸⁰*See supra* Part II.B.

²⁸¹Fein, *supra* note 25, at 687.

²⁸²*Cf.* McGinnis, *A Reply*, *supra* note 3, at 636.

nominee/defendant been required to prove over the past two years? Allegiance to a particular judicial philosophy?²⁸³ Support of one particular Supreme Court case?²⁸⁴ Criticism of another Supreme Court case?²⁸⁵ A pledge to never criticize *Roe v. Wade*?²⁸⁶ All (or at least some) of the above?²⁸⁷ The increased politicalization of the confirmation process over the past fifteen years should make anyone think twice before requiring that a nominee carry the burden of proof.²⁸⁸ When one political party imposes a particularly strict burden of proof, the other political party can easily up the ante. Any reforms placing the burden of proof on a nominee would stall the confirmation process completely.

B. Ideological Scrutiny Lacks Historical Support

1. The Past

Significant historical evidence proves that the Framers did not intend Senators to examine a nominee's judicial philosophy as a criterion for confirmation.²⁸⁹ Only compelling reasons justify rejection of a nomination, and a nominee's ideology is not one of those reasons.²⁹⁰ Thus, a nominee enjoys a presumption in favor of confirmation.²⁹¹ Further, the Framers contemplated that the Senate would bear a political burden to reject a nomination.²⁹² Many commentators have argued that claims of an active Senate consideration of ideology since the founding of the Republic are somewhat spurious.²⁹³ Moreover, claims that history supports a thorough Senate review of ideology are marred by quite a few misrepresentations, omissions, and errors.²⁹⁴

²⁸³Unless that judicial philosophy is originalism. See *infra* notes 460-68 and accompanying text.

²⁸⁴Only if that case is *Roe*. See *infra* notes 428-34 and accompanying text.

²⁸⁵Unless that case is *Roe*. See *supra* note 5.

²⁸⁶Senate Democrats all but formalized this requirement over the past two years. See *supra* Part II.B.4.c (discussing the Owen nomination).

²⁸⁷Some of the above. See *supra* notes 283-86 and accompanying text.

²⁸⁸See *supra* Part II.B.

²⁸⁹See THE FEDERALIST NO. 76, *supra* note 54, at 425 (Alexander Hamilton) ("It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." (emphasis added)).

²⁹⁰See *id.* (Alexander Hamilton) ("[I]t is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal." (emphasis added)).

²⁹¹See McGinnis, *A Reply*, *supra* note 3, at 653 (noting that the Appointments Clause "makes it difficult for the Senate to reject a nominee unless it has compelling reasons").

²⁹²See *id.*

²⁹³See *supra* notes 53-54 and accompanying text.

²⁹⁴See McGinnis, *A Reply*, *supra* note 3, at 636-38.

2. The Recent Past

Those who argue for ideological scrutiny tacitly admit this lack of historical support by claiming that recent history justifies assertive ideological scrutiny.²⁹⁵ Forced to search for modern precedent, these commentators argue that recent political history mandates that the Senate independently examine each nominee's judicial philosophy.²⁹⁶ Because Republican Presidents placed eleven consecutive nominees on the Supreme Court, the argument goes, ideological scrutiny is necessary to achieve ideological balance on the Court.²⁹⁷ Additionally, in an era of sharply divided government, the country has not made up its mind; thus, this profound division necessitates compromise between the President and the Senate.²⁹⁸

3. The Future

Applying the "divided government" theory will prove quite difficult.²⁹⁹ The "divided government" theory rests entirely upon electoral returns.³⁰⁰ When President Clinton won in 1992, Professors Strauss and Sunstein argued that the entire basis for ideological scrutiny had disappeared.³⁰¹ The reason: A Democrat occupied the Oval Office.³⁰² This theory does not ensure consistent application, and Professors Strauss and Sunstein admit as much.³⁰³ When one considers the relationship between the popular vote and the Electoral College, applying this newfound theory becomes even more interesting. Determining the scope of a political mandate is, rightfully, a subject of great debate. Federal judges, however, are not elected, and in theory are not subject to the winds of political change. The "divided government" theory lacks historical support; it simply cannot stand.

²⁹⁵The timing of proposals put forth by proponents of ideological scrutiny is quite interesting. Frequently, these proposals correspond with the date of Presidential elections. See Friedman, *Tribal Myths*, *supra* note 53, at 1284 ("Given what Tribe calls the 'greying' of the present Court, and the consequent possibility that President Reagan will appoint several new justices, this is a most timely thesis." (footnote omitted)).

²⁹⁶Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1504-05.

²⁹⁷*Id.*

²⁹⁸*Id.* at 1505.

²⁹⁹One could argue that the unprecedented Republican takeover of the Senate in the 2002 Midterm Elections proves, or at least indicates, that the country is less divided than it was in 2000. It would seem that Professors Strauss and Sunstein would agree that this provides greater leeway for President Bush to nominate judges. See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1503 n.57. Yet Professors Strauss and Sunstein ensure uncertainty in applying their own theory, stating: "Any relevant mandate is therefore quite muddled." *Id.* at 1505.

³⁰⁰See *id.* ("But in the last twenty-five years the nation has not made up its mind. It has elected mostly Republican Presidents, but mostly Democratic Senates.").

³⁰¹Strauss & Sunstein, *A Response*, *supra* note 6, at 669 n.4.

³⁰²*Id.*

³⁰³See McGinnis, *A Reply*, *supra* note 3, at 651 ("It is unclear how seriously Professors Strauss and Sunstein take their own arguments.").

Application of the “divided government” theory fails because control of the Senate could change every two years.³⁰⁴ It’s doubtful that Senator Kennedy would want Democratic nominees subjected to the kind of intense ideological scrutiny that many of President Bush’s nominees endured. Indeed, Senator Kennedy has protested against past abuses in the confirmation process.³⁰⁵ Yet if the current system continues and a Democrat wins the Presidency in 2004, Senator Kennedy would bemoan the state of the confirmation process when Senate Republicans target Democratic nominees with judicial philosophies they disagree.³⁰⁶ Senate Republicans, of course, would have less to say.³⁰⁷

C. Continued Ideological Scrutiny Will Ensure an Endless Cycle of Political Retribution

The third reason why ideological scrutiny must end is that any continuation of this practice will ensure endless political retribution. The confirmation process is overly politicized.³⁰⁸ As previously stated, the Bork nomination quickly became a rallying cry for Senate Republicans.³⁰⁹ Senate Republicans then increased the ideological scrutiny on President Clinton’s nominees, publicly lambasting Senate Democrats for their treatment of Judge Bork.³¹⁰ Senate Democrats then increased the ideological scrutiny on President Bush’s judicial nominees, noting that many of President Clinton’s nominees never received hearings.³¹¹

It may be fair for a Senator whose party controls the Senate (but not the White House) to ask why he or she should forego ideological scrutiny. In today’s political environment, it is uncertain whether Senators on the other side of the aisle would recognize those good deeds. Mutual restraint by both political parties, however, will benefit both political parties. Any slight—imaginary, real or perceived—committed against a President’s nominee by the other political party will be remembered when that President’s party controls the Senate. Both Republicans and Democrats have responded in kind, and in varying degrees, to poor treatment of nominees by the other party.³¹² By doing so, Senate Republicans and Democrats have increased the degree of strife and bitterness in American politics.

³⁰⁴See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1503 n.57 (noting that many factors could change application of their theory).

³⁰⁵See, e.g., 144 CONG. REC. S9186 (1987) (statement of Sen. Kennedy).

³⁰⁶This was Senator Kennedy’s stance during the Clinton years. See *supra* note 94.

³⁰⁷Instead, Senate Republicans would insist on increased ideological scrutiny. See *supra* Part II.B.3 (discussing judicial nominations during the Clinton years).

³⁰⁸See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1494 (“The current process is too ideological and partisan.”).

³⁰⁹See *supra* Part II.B.3 and accompanying text (discussing judicial nominations during the Clinton years).

³¹⁰See Kline, *supra* note 18, at 323-43.

³¹¹See 148 CONG. REC. S8510-02 (2002) (statement of Sen. Leahy).

³¹²See Novak, *supra* note 132.

Ideology is far too easy a subterfuge for Senators of either political party to utilize to defeat disfavored judicial nominees.³¹³ Most commentators who have advocated ideological scrutiny have argued that “[t]he potential for abuse . . . does not support a conclusion that the Senate must refrain from a comprehensive assessment of a nominee’s qualifications or limit its inquiry to policy-neutral factors.”³¹⁴ The potential for abuse, however, has been realized. This development has threatened judicial independence.³¹⁵ As Republicans and Democrats add names to the list of vanquished nominees, neither political party has recognized that each party has committed the same sins.³¹⁶

In its current form, the confirmation process benefits neither Democrats nor Republicans.³¹⁷ The proposals introduced to improve the confirmation process—evaluating a nominee’s ideology,³¹⁸ placing the burden of proof on a nominee,³¹⁹ and interrogating the nominee concerning hypothetical questions of constitutional law³²⁰—have been introduced based on political frustrations. Put more bluntly, the party that loses the Presidency often seeks to resume that particular battle in Congress.³²¹ When President Clinton won the White House, but won only a plurality

³¹³See Lee Renzin, Note, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1739 n.4, 1746 (1998).

³¹⁴Lively, *supra* note 209, at 576.

³¹⁵See Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEO. J. LEGAL ETHICS 127, 131 (2001) [hereinafter Rotunda, *Role of Ideology*].

³¹⁶See Novak, *supra* note 132.

³¹⁷Many commentators advocating ideological scrutiny do so mainly out of anger about past sins committed during the confirmation process. See Chemerinsky, *Selection of Federal Judges*, *supra* note 209, at 631 (“But now I feel outrage when I hear Republicans say that it is wrong for a Democratic-controlled Senate to look at ideology when that is exactly what Republicans did for the last six years of the Clinton presidency. If I was too liberal for a Republican Senate, then nominees such as Miguel Estrada, Carolyn Kuhl, Michael McConnell, and Jeffrey Sutton should be regarded as too conservative by a Democratic Senate.”). This sort of “They Started It” argument is equally simple and imprudent. Cf. Elliot E. Slotnick, *Federal Judicial Selection in the New Millenium*, 36 U.C. DAVIS L. REV. 587, 593 (2003) (“I believe there are two alternative paths that could define the road ahead. One is premised on the lessons we learned in our earliest Political Science classes—‘What goes around, comes around.’ The other, we learned from our mothers—‘Two wrongs don’t make a right.’”). Professor Chemerinsky is a first-rate scholar who has contributed vast, profound insights to the study of constitutional law. That his nomination was aborted in the face of Republican opposition is unfortunate and wrong. Seeking retribution for past sins, however, only leads to further retribution—and, of course, cries for revenge. Put more simply, the names of the victims change, but the song remains the same.

³¹⁸See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1510-14.

³¹⁹See Simson, *Mired in the Confirmation Mess*, *supra* note 248, at 1038.

³²⁰See Schumer, *supra* note 18.

³²¹The most logical alternative would be for one to seek the election of a particular President. See McGinnis, *A Reply*, *supra* note 3, at 667; cf. Balkin & Levinson, *Constitutional Revolution*, *supra* note 228, at 1075-76 (“In short, there is nothing surprising about the transformation of constitutional law viewed in hindsight. . . . Put another way, if you don’t

of the popular vote, Senate Republicans insisted upon greater power in selecting nominees. When President Bush won the White House but lost the popular vote,³²² Democrats insisted upon increased ideological scrutiny.³²³ Political power grabs are nothing new in our nation's capitol.³²⁴ The use of the Senate Judiciary Committee as a political battleground is a far more recent invention.³²⁵

Not long ago, there existed a system that both Republicans and Democrats deplored when one party controlled the White House and the other party controlled Congress. The Independent Counsel system, designed with the best of intentions, led to rather hellish results, including the impeachment of a President. Senate Republicans found the law useful when a Democrat occupied the Oval Office; Senate Democrats, in turn, discovered a renewed zeal for investigations when a Republican occupied the Oval Office. Over time, Presidents and administration officials of both parties suffered the consequences. Eventually, Republicans and Democrats recognized the flaws in that particular law, and chose not to renew it. The reason: the political costs and the structural inequities of that law outweighed any benefits. Developed after Watergate and the resignation of President Nixon, the Independent Counsel Statute³²⁶ died a natural death after the impeachment of President Clinton.³²⁷

Ideological scrutiny has a similarly recent origin—the confirmation hearing of Robert Bork.³²⁸ Since then, the political and constitutional costs of ideological scrutiny have increased tremendously. These costs far outweigh the “benefits” of utilizing ideology as a criterion. Senator Charles Schumer stated that evaluating a

like what the Court is doing now, you (or your parents) shouldn't have voted for Ronald Reagan.”); cf. Editorial, *Echoes of Watergate*, *supra* note 77 (“One may differ heatedly with him on specific issues like abortion, but those are differences of philosophy, not principle. Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.”).

³²²This fact is historically interesting and constitutionally irrelevant. McGinnis, *Law of Presidential Elections*, *supra* note 234, at 996.

³²³See Schumer, *supra* note 18 (“No one needs to be reminded that the president was elected by the narrowest of margins, while the Senate is closely split. In such a time, the president and the Senate must collaborate in judicial appointments. . . .”).

³²⁴See Kline, *supra* note 18, at 294 (“Senator Phil Gramm (R-Texas) drafted a proposal in 1997 that would have allowed Republican Senators to veto nominees from their circuit.”).

³²⁵So too is the practice of questioning judicial nominees at confirmation hearings. Rotunda, *Role of Ideology*, *supra* note 315, at 129 (“Senators have not normally asked such questions of judicial nominees. In fact, as discussed below, until 1955 traditionally judicial nominees did not appear at the confirmation hearing to answer any questions.”). Even after nominees began appearing before the Senate, the scope of the questions remained quite limited. See *id.* at 129-30.

³²⁶28 U.S.C. §§ 591-94 (1994).

³²⁷One commentator has a provocative proposal to reform the Independent Counsel system. See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2135-36 (1998) (proposing that the President nominate and the Senate confirm special counsels to investigate wrongdoing in the Executive Branch).

³²⁸See *supra* note 59 and accompanying text.

nominee's judicial philosophy would avoid the "gotcha politics" of past confirmation battles.³²⁹ If anything, recent ideological scrutiny has only led to "gotcha politics,"³³⁰ as well as allegations against judicial nominees that lack merit.³³¹

The time has come for both Republicans and Democrats to acknowledge the inherent flaws in the current confirmation process, just as they did with the Independent Counsel statute, and reform the confirmation process. Former White House Counsel Lloyd Cutler recognized the inherent dangers in continually having a Bork-style confirmation hearing.³³² The reason: neither political party would want more "blood on the floor" after each confirmation hearing.³³³ President Clinton was

³²⁹See Schumer, *supra* note 18.

³³⁰*Id.*

³³¹One charge that deserves special mention is the one made by Senate Democrats that Mr. Estrada accused a Supreme Court clerkship candidate of being "too liberal," and subjected candidates to thorough ideological scrutiny. See Newfield, *supra* note 126 ("Perhaps the most damaging evidence against Estrada comes from two lawyers he interviewed for Supreme Court clerkships."). For this evidence to be admissible, however, it would have to avoid application of the Federal Rules of Evidence. Both alleged conversations that Mr. Estrada had with these clerkship applicants qualify as hearsay. See FED. R. EVID. 801(c) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); FED. R. EVID. 802. It has been said many times that a confirmation hearing is a political process, not a legal process. Even evaluated in the political realm, however, neither statement is especially damning. One should be wary of the veracity of charges made by individuals who found Mr. Estrada's conduct to be so offensive that they chose not to identify themselves.

Additionally, it is difficult to argue that both clerkship candidates acted out of pure motives. Justice Kennedy hired neither candidate; accordingly, both candidates are mad at Mr. Estrada. See Newfield, *supra* note 126 ("Estrada was being obnoxious."). The main complaint of both clerkship candidates is that Mr. Estrada subjected them to thorough ideological scrutiny. *Id.* ("[Mr. Estrada] asked me a lot of unfair, ideological questions, a lot about the death penalty, which I told him I thought was immoral. I felt I was being subjected to an ideological litmus test."). Even if one assumes, *arguendo*, that both encounters with Mr. Estrada did occur, these charges simply are not that remarkable. Judges often (but not always) look for law clerks that share their judicial philosophies. Once a law clerk starts working for a judge, that law clerk often prepares draft opinions consistent with his or her judge's judicial philosophy. These practices are not extraordinary. See Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 868 (1999) (reviewing EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998)) [hereinafter Kozinski, *Conduct Unbecoming*] ("[S]ince when is it improper for a clerk to give advice that conforms to his Justice's judicial philosophy and to prepare a draft 'that might appeal to his boss?' *Most people think that is what law clerks are paid to do.*" (emphasis added) (footnotes omitted)).

³³²Cutler, *Limits of Advice and Consent*, *supra* note 41, at 876. Mr. Cutler also supported Judge Bork, which makes it difficult to claim that Judge Bork is "outside the mainstream." See Lloyd N. Cutler, *Judge Bork: Well Within the Mainstream*, WASH. POST, Sept. 16, 1987, at A21 [hereinafter Cutler, *Judge Bork*].

³³³See Helen Dewar, *Judge Kennedy Off to Smooth Start; Key Conservative Praises Nominee; Biden Calls Chances "Very Good,"* WASH. POST, Nov. 13, 1987, at A11 [hereinafter Dewar, *Off to Smooth Start*] (quoting Senator John McCain).

spared that fate when he nominated Justices Ginsburg and Breyer.³³⁴ If President Bush gets the chance to fill a Supreme Court vacancy, he probably will not have that luxury.³³⁵ If President Bush's nominee endures a repeat of the Bork confirmation, the political rhetoric and invective will increase yet again.³³⁶ Ideological scrutiny benefits neither political party. Ideological abstention, however, benefits both political parties.

One may, of course, respond to this argument by asking, "So What?"³³⁷ With some exceptions, Americans have lived under a government with one political party in control of the Presidency and the other political party in control of Congress.³³⁸ Accordingly, one can argue that ideological scrutiny is healthy because it prevents the President from exerting undue power and influence.³³⁹ Thus, one Senator's vote against a nominee for purely political reasons is entirely permissible.³⁴⁰ One can aver that the Senate's rejection of Robert Bork demonstrated the Senate's refusal to allow President Reagan to pack the Court through "transformative appointments."³⁴¹

The current maxim in American politics seems to be, if one dislikes the result of an election, one should "stay and fight" the results of that election. Americans have seen the Supreme Court decide the outcome of one Presidential election, and there has been election litigation in New Jersey and elsewhere.³⁴² This politicalization has infected the confirmation process.³⁴³ The confirmation process, however, has simply never served as a test of whether a President has a greater or lesser political mandate.³⁴⁴

Nor is the confirmation process a proper venue on which to engage in political combat. Continued ideological scrutiny will encourage members of each political

³³⁴Justices Ginsburg and Breyer were both confirmed quite easily. Kline, *supra* note 18, at 314 n.209.

³³⁵See Gerhardt, *Selection as War*, *supra* note 40, at 393.

³³⁶See *id.*

³³⁷See Tushnet, *supra* note 32, at 50 ("[T]here is nothing . . . cynical in the view that . . . the constitutional scheme authorizes a member of Congress to act solely with reference to his or her concerns for reelection—that is, to be partisan in the narrowest possible sense in taking positions on matters of constitutional import.").

³³⁸See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1505 ("But in the last twenty-five years the nation has not made up its mind. It has elected mostly Republican Presidents, but mostly Democratic Senates.").

³³⁹See Tushnet, *supra* note 32, at 79 ("[A] system that made it normatively impermissible for a senator to consider such predictions would tilt the balance of authority rather strongly in favor of the President. . .").

³⁴⁰See *id.* at 81 ("[A]ll the Constitution really requires is that politics be given its ordinary range of operation, that ambition be set to counteract ambition.").

³⁴¹Ackerman, *Transformative Appointments*, *supra* note 72, at 1164-67.

³⁴²See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1025 (N.J. 2002).

³⁴³See *supra* Part II.B.4.

³⁴⁴*Cf. supra* note 208.

party, if they dispute a President's mandate, to take the political fight to the Senate Judiciary Committee hearing room. This newfound development threatens the quality of the federal judiciary and the system of checks and balances.³⁴⁵ By treating control of the judiciary as the latest political war, Senators of both parties have ensured nothing except political casualties, the most prominent one being judicial independence.³⁴⁶

Checks and balances already exist in the nomination process.³⁴⁷ There are good reasons for the Senate to reject a nomination.³⁴⁸ For example, ethical scandals have forced Presidents to withdraw quite a few nominations.³⁴⁹ Adding a nominee's ideology to the criteria for Senate consideration, however, worsens the situation. The federal judiciary constitutes a separate, dynamic branch of government that is not fully dependent on the most recent political whims.³⁵⁰ If that were the case, constitutional law would be neither principled nor stable.³⁵¹

D. Continued Ideological Scrutiny Will Worsen the Confirmation Process Even Further

1. Failed "National Referenda"

In principle, Senate confirmation hearings have a normative function.³⁵² The nominee appears before twenty Senators elected by the people, addresses concerns about his or her nomination, and discusses his or her views.³⁵³ Aided by research into the nominee's background, Senators can engage in an open conversation with the nominee.³⁵⁴ In practice, however, Senate confirmation hearings have become far more political and contentious than originally envisioned.³⁵⁵ The original purpose behind confirmation hearings was to screen out unfit characters, not to hold a "national referendum" on constitutional law.³⁵⁶ Even those Senators who have sought "national referenda" have engineered show trials instead of legitimate

³⁴⁵See *supra* Part III.A.1.

³⁴⁶See Rotunda, *Role of Ideology*, *supra* note 315, at 131-32.

³⁴⁷See *infra* Part V.A.1.

³⁴⁸See *infra* Part V.A.1.

³⁴⁹HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 14-15* (2d ed. 1985) (discussing President Nixon's nomination of Judge Clement Haynsworth to the Supreme Court).

³⁵⁰See *infra* notes 356-57 and accompanying text.

³⁵¹See *infra* notes 356-57 and accompanying text.

³⁵²Ross, *supra* note 216, at 674.

³⁵³See *id.*

³⁵⁴See *id.*

³⁵⁵Fein, *supra* note 25, at 690.

³⁵⁶*Id.* at 687.

confirmation hearings.³⁵⁷ Most hearings are particularly pointless exercises, particularly when the nominee's views are well known.³⁵⁸

Instead of serving as evaluations of a nominee's character and qualifications, Senate confirmation hearings focus only on "a few distinct, political issues."³⁵⁹ While Senator Hatch was Senate Judiciary Committee Chairman during President Clinton's second term, Senator Hatch unfairly accused many Clinton nominees of being "left-wing" judicial activists hell-bent on legislating from the bench.³⁶⁰ While Senator Leahy was Senate Judiciary Committee Chairman during the past two years, Senator Leahy unfairly accused many Bush nominees of being "right-wing" judicial activists hell-bent on overturning *Roe*.³⁶¹ Even assuming, *arguendo*, that Senators should evaluate a nominee's judicial philosophy, one would expect Senators to examine a nominee's views on a broad range of topics.³⁶² By being organized to discuss only one issue, Senate confirmation hearings have lacked meaning and focus.

2. A Regrettable Fusion of Law and Politics

By imposing single-issue litmus tests on nominees, Senators have reduced the boundary between law and politics.³⁶³ This boundary is not a "wall of separation;" it is far more flexible.³⁶⁴ I do not contend that law is wholly independent of politics.³⁶⁵ Presidents have judged and will continue to judge the political consequences of judicial nominations.³⁶⁶ Presidents have nominated an individual to appease a party's base.³⁶⁷ Other times, Presidents have utilized the press to leak the names of potential nominees, then picked a nominee who has widespread support.³⁶⁸ Politics is certainly present in the confirmation process.³⁶⁹

³⁵⁷*Id.* at 688-90.

³⁵⁸Ross, *supra* note 216, at 670 n. 181, 673.

³⁵⁹McGinnis, *A Reply*, *supra* note 3, at 665.

³⁶⁰*See supra* Part II.B.3.

³⁶¹*See supra* Part II.B.4.

³⁶²McGinnis, *A Reply*, *supra* note 3, at 665.

³⁶³*Id.* at 642.

³⁶⁴Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1458 (2001) [hereinafter Balkin, *Law and Politics*].

³⁶⁵*See* Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935, 959 (1998) [hereinafter Tobias, *Fostering Balance*].

³⁶⁶*See* Balkin & Levinson, *Constitutional Revolution*, *supra* note 228, at 1068-73.

³⁶⁷*See id.* Professors Balkin and Levinson note that President Bush might "take a lesson from his father and nominate a conservative Hispanic to fill the first Supreme Court vacancy, daring the Democrats to oppose the first Hispanic appointment to the United States Supreme Court." *Id.* at 1070 n.113.

³⁶⁸*See infra* note 651.

³⁶⁹*See, e.g.,* Lively, *supra* note 209, at 575.

There is, however, a distinction between nomination of a judge that shares the President's judicial philosophy—"high politics"—and the "low politics" of ideological scrutiny in a Senate confirmation hearing.³⁷⁰ The former act has legitimate motives; the latter act often does not.³⁷¹ Ending ideological scrutiny will enable "high politics"—a recognition that legitimate differences in constitutional interpretation exist.³⁷² Along the way, much of the bitterness of recent years will likely disappear.

3. Senators as Law Professors

Senators, the central actors in Senate confirmation hearings, are poorly suited to engage in meaningful constitutional discourse.³⁷³ Senators over the past twenty years have hardly proved their merit as cross-examiners or law professors in confirmation hearings.³⁷⁴ This makes perfect sense; with some exceptions, most Senators are neither lawyers nor law professors.³⁷⁵ Additionally, "[t]he Senate is designed to be a deliberative body, but not necessarily a deeply intellectual one."³⁷⁶

Regardless of a Senator's qualifications, Senators have interest groups and constituencies about which to worry when a controversial confirmation hearing occurs.³⁷⁷ Arlen Specter during Judge Bork's confirmation hearing and the Arlen Specter during Justice Thomas's confirmation hearing were two different Senators.³⁷⁸

³⁷⁰*Cf.* Balkin & Levinson, *Constitutional Revolution*, *supra* note 228, at 1063 (arguing that, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 360 (2001), which held that plaintiffs may not sue states to recover money damages for violations of Title I of the Americans with Disabilities Act, the Court engaged in "high politics"—"the promotion of certain core political principles in constitutional doctrine").

³⁷¹*Compare id.* at 1063 (noting that "constitutional revolutions always concern 'high politics'—the promotion of larger political principles and ideological goals"), *with* Neil A. Lewis, *Democrats Ready for Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19 [hereinafter Lewis, *Democrats Ready*] (noting that Senate Democrats met in early 2001 to discuss how to "change the ground rules" in the confirmation process).

³⁷²*See* Balkin & Levinson, *Constitutional Revolution*, *supra* note 228, at 1063 ("Thus, *one might criticize Garrett because one disagrees with the political principles of the five conservatives*, which, one believes, are false to the best understandings of the Constitution." (emphasis added)).

³⁷³*See* Carter, *Confirmation Mess*, *supra* note 16, at 1195; *cf.* Richard D. Freer, *Advice? Consent? Senatorial Immaturity and the Judicial Selection Process*, 101 W. VA. L. REV. 495, 511 (1999) ("But, ultimately, I cannot imagine, however, that someone of the intellectual and academic caliber of Stephen Breyer considers himself enlightened by hearing some politician's theory of the Constitution.").

³⁷⁴Simson, *Supreme Unfitness*, *supra* note 14, at 656-58; *see also* Fein, *supra* note 25, at 673.

³⁷⁵McGinnis, *A Reply*, *supra* note 3, at 637 n.18.

³⁷⁶Carter, *Confirmation Mess*, *supra* note 16, at 1195.

³⁷⁷Henry Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1207 (1988).

³⁷⁸Simson, *Supreme Unfitness*, *supra* note 14, at 646-47.

One likely reason: Senator Specter was up for reelection in 1992, but not in 1988.³⁷⁹ Similarly, Senator Kennedy now frequently criticizes Justice Scalia; sixteen years ago, however, Senator Kennedy had nary a word to say against Justice Scalia.³⁸⁰ One likely reason: Senator Kennedy chose not to attack a nominee of Italian descent, considering that Italian-Americans are an influential constituency in Massachusetts.³⁸¹ Due to political concerns, Senators are hardly the right individuals to evaluate a nominee's judicial philosophy consistently.³⁸²

4. Result-Oriented Confirmation Hearings

a. Results Instead of Rational Analysis

One of the most serious charges leveled by one judge against another is that the judge in question decided the case as he or she saw fit, then found the reasoning to justify that result.³⁸³ The charge is called "result-oriented" jurisprudence; it is not a term of endearment, and it appears often in the volumes of the Federal Reporter.³⁸⁴ Senate confirmation hearings are oriented toward exclusive consideration of the results of cases instead of the reasoning a judge utilized to resolve those cases.³⁸⁵ When a nominee rules against factory women, that nominee must favor forced

³⁷⁹*See id.*

³⁸⁰*See* Howard Kurtz & Al Kamen, *First Day of Questioning Leaves Scalia Unscathed; Nominee Praised as Brilliant Legal Scholar*, WASH. POST, Aug. 6, 1986, at A6.

³⁸¹*See* LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 723-24 (1991) (speculating that both Justice Scalia and Judge Bork would have been confirmed to the Supreme Court if President Reagan had nominated Judge Bork first).

³⁸²*See* Simson, *Supreme Unfitness*, *supra* note 14, at 646-48; *see also* Freer, *supra* note 373, at 512 ("[S]enators ask only about those narrow, hotbutton issues important to their primary constituencies—interest groups. We are not getting judicial philosophy. We are not getting contemplative reflection. . . . We are getting soundbites to appease interest groups.").

³⁸³This charge is easy to make and much harder to prove. *See* Carter, *Confirmation Mess*, *supra* note 16, at 1191 n.13 (noting that the accusation that a judge is "results-oriented" "can easily be made of virtually all the important work of the current Court"). Additionally, this charge is quite subjective. *Id.* ("In public debate, of course, the charge that a judge is result-oriented has greater or lesser force depending on the popularity of the results in question.").

³⁸⁴Frequently, the dissenting judge or Justice accuses the majority of being "result-oriented." *See, e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 783 (1987) (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting) ("The Court's analysis in this area strikes me as result oriented, to say the least."); *Bezanson v. Metro. Ins. & Annuity Co.*, 952 F.2d 1, 8 (1st Cir. 1991) (Seyla, J., dissenting) ("[B]ecause because the court's result-oriented response to this pleasureless predicament makes a bad situation worse, I dissent."); *Cahill v. Rushen*, 678 F.2d 791, 805 (9th Cir. 1982) (Wallace, J., dissenting) ("And when the extension occurs, as it does here, without anything more than naked statements unsupported by rational analysis, one wonders whether this extension can be considered anything less than result-oriented decisionmaking.").

³⁸⁵*Cf.*, *e.g.*, 148 CONG. REC. S11512 (2002) (statement of Sen. Edwards) ("Judge Shedd could not point to one instance in his eleven years on the bench in which an individual alleging discrimination—based on race, sex, age or disability—has ever won a case in his court.").

sterilization.³⁸⁶ When a nominee rules for a criminal defendant instead of the state, he or she must be “too soft on crime.”³⁸⁷ Discussions at confirmation hearings avoid consideration of the arguments made and the issues raised in cases.³⁸⁸

It is entirely possible for a Judge to follow *Roe* while expressing concerns about *Roe*.³⁸⁹ It is also entirely possible for a judge to uphold the constitutionality of the death penalty while acknowledging concerns about the death penalty.³⁹⁰ Knowledge of the result of a case tells one little besides its procedural disposition. Knowledge of how that case was adjudged, however, is far more important.³⁹¹ Constitutional subtleties of any variety, however, are rarely noticed in Senate confirmation hearings.³⁹² By the time anyone has actually examined the reasoning or logic of a judicial opinion, the nominee has been rejected, and the point is moot.³⁹³

³⁸⁶See *supra* note 67; see also *infra* note 454 (discussing Judge Bork’s opinion in *American Cyanamid*).

³⁸⁷See, e.g., John Biskupic, *Nominee Tests Clinton’s Judicial Balance Amid Crime Debate*, WASH. POST, Feb. 3, 1994, at A10 (discussing the confirmation hearing of Judge Rosemary Barkett, a Clinton nominee accused of being “soft on crime” and “outside the mainstream on important issues”).

³⁸⁸It is far more useful to know why a Judge reached a particular result in a case than merely to know the procedural result of that case. Carter, *Confirmation Mess*, *supra* note 16, at 1193 (“For a constitutional theorist . . . , a decision is only as legitimate as the judicial process that it reflects. . . . To the theorist, what matters is the legitimacy of the reasoning offered by the Justices to connect the Constitution to the end result.”).

³⁸⁹See *Sojourner T. v. Edwards*, 974 F.2d 27, 32 (5th Cir. 1992) (Garza, J., concurring specially) (“Because the decision to permit or proscribe abortion is a political choice, I would allow the people of the State of Louisiana to decide this issue for themselves. Nonetheless, I acknowledge that *Casey* controls, and therefore, I concur.”).

³⁹⁰See *United States v. Quinones*, 313 F.3d 49, 70 (2d Cir. 2002) (concluding that appellant’s arguments against the constitutionality of the Federal Death Penalty Act are foreclosed by the Court’s decision in *Gregg v. Georgia*, 428 U.S. 153 (1976)).

³⁹¹See Carter, *Confirmation Mess*, *supra* note 16, at 1193; cf. 147 CONG. REC. S593 (1999) (statement of Sen. Leahy) (“Focusing on the egregious facts of (rather than the legal analysis underlying) a death penalty case is a disingenuous and inappropriate way of evaluating the qualifications of sitting judges.” (emphasis added)).

³⁹²See Carter, *Bork Redux*, *supra* note 71, at 762.

³⁹³*Cf. id.* “Result-oriented” charges have been filed against some of President Bush’s judges. See E.J. Dionne, Jr., *Payback in Judges*, WASH. POST, Jan. 10, 2003, at A21 [hereinafter Dionne, *Payback*] (“[C]onsider the ruling of Judge John D. Bates in December declaring that Congress’s General Accounting Office—and thus the public—had no right to learn the specifics about meetings between Vice President Cheney’s famous energy task force and various energy executives and lobbyists.”). But see *Walker v. Cheney*, 230 F. Supp. 2d 51, 74-75 (D.D.C. 2002) (Bates, J.) (concluding that the General Accounting Office lacked standing to sue Vice-President Cheney); Michael M. Gallagher, Letter to the Editor, *Mind Your Mudslinging*, WASH. POST, Jan. 18, 2003, at A21 (noting that Judge Bates instead held that the General Accounting Office lacked standing to sue Vice-President Cheney).

b. An Illustration

It is all too easy for a nominee's opponents to misrepresent his or her judicial opinions.³⁹⁴ A simple illustration of a "result-oriented" charge against a nominee proves this point. Suppose that the President nominates a Circuit Judge for a vacancy on the Supreme Court. Though the nominee is a well-respected Judge, one of the nominee's opinions is quite troubling. In that case, an African-American man was convicted of rape and sentenced to death.³⁹⁵ On appeal, the defendant, on appeal, argued that the imposition of the death penalty was racist and unfair.³⁹⁶ Rather than recognize the racial disparities inherent in the death penalty, as well as the discrimination that African-Americans endure in the American justice system, the nominee wrote an opinion affirming the conviction.³⁹⁷ The nominee's opinion demonstrates insensitivity toward civil rights; additionally, the nominee refused to enforce basic constitutional rights.³⁹⁸ Fortunately, the Supreme Court, in a *per curiam* opinion joined by seven Justices, reversed the nominee's opinion.³⁹⁹ This case plainly illustrates that the nominee cannot serve as an impartial arbiter of constitutional rights for millions of minorities.⁴⁰⁰

The preceding illustration is a rather inaccurate depiction of a past Circuit Court decision. Neither Judge Bork nor Judge Pickering, however, wrote the opinion in question. Instead, Justice Harry Blackmun wrote the opinion while he was a Circuit Judge on the Eighth Circuit. The case—*Maxwell v. Bishop*⁴⁰¹—did involve an appeal by an African-American defendant of a rape conviction.⁴⁰² The defendant in *Maxwell* did argue that the imposition of the death penalty was racist and unfair.⁴⁰³ Justice Blackmun rejected this argument; however, he did so by faithfully following and applying Supreme Court precedent.⁴⁰⁴ True to his nature as a thoughtful, caring jurist,⁴⁰⁵ Justice Blackmun agonized over the decision.⁴⁰⁶ He expressed his doubts

³⁹⁴*Cf.* Carter, *Confirmation Mess*, *supra* note 16, at 1191 n.13 (noting that the accusation that a judge is 'results-oriented' "can easily be made of virtually all the important work of the current Court").

³⁹⁵Jonathan L. Entin, *The Confirmation Process and the Quality of Political Debate*, 11 YALE L. & POL'Y REV. 407, 417 (1993) (discussing the case).

³⁹⁶*Id.* at 417 n.56 (discussing the defendant's constitutional challenge to the death penalty).

³⁹⁷*See id.* at 417.

³⁹⁸*See id.* (noting that the nominee "rejected an important civil rights claim").

³⁹⁹*Id.* at 418.

⁴⁰⁰*See id.* at 417 (noting that the nominee "held a less-than-ideal civil rights record").

⁴⁰¹398 F.2d 138 (8th Cir. 1968) (Blackmun, J.), *vacated and remanded*, 398 U.S. 262 (1970).

⁴⁰²*Id.* at 139.

⁴⁰³*Id.* at 141-44.

⁴⁰⁴*Id.* at 146-48.

⁴⁰⁵Sherry F. Colb, *Breakfast with Justice Blackmun*, 71 N. DAK. L. REV. 13, 14 (1995) ("His humility was and is as genuine as it is extraordinary. Though he knew that part of

about the validity of capital punishment.⁴⁰⁷ Nevertheless, Justice Blackmun wrote a well-reasoned opinion.⁴⁰⁸ The Supreme Court did reverse Justice Blackmun, but the Court did so based on grounds unrelated to the defendant's constitutional challenge to the death penalty.⁴⁰⁹ A fair reading of Justice Blackmun's opinion in *Maxwell* easily demonstrates the factual flaws of the above illustration.⁴¹⁰

Fortunately, Justice Blackmun did not have to endure misrepresentations of his opinions at his confirmation hearing.⁴¹¹ Nominated after the Senate rejected the nominations of Judge Haynsworth and Judge Carswell, the Senate confirmed Justice Blackmun unanimously.⁴¹² No one testified against Justice Blackmun, and Justice Blackmun's nomination was quite uncontroversial.⁴¹³ Were Justice Blackmun nominated to the Court today, his opponents could easily—and unfairly—misrepresent his judicial opinions.⁴¹⁴ Considering the bitter, contentious nature of the confirmation process, it is quite likely that Justice Blackmun's record would be mischaracterized and misrepresented.⁴¹⁵

5. Return of the “Stealth Nominee”

One of the sad truths of the confirmation process is that many well qualified nominees have endured defeat either on the Senate floor or in the Senate Judiciary Committee.⁴¹⁶ As the process currently stands, most sensible nominees—rather than endure false character attacks and misrepresentations at the hands of opposition Senators—will likely stand on the sidelines.⁴¹⁷ Continued ideological scrutiny will

judging was making decisions, choosing among difficult alternatives, he never stopped agonizing over those choices and coming to every new case with an open and critical mind.”).

⁴⁰⁶See *Maxwell*, 398 F.2d at 153-54 (stating that the case was “particularly excruciating for the author of this opinion, who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent” (footnote omitted)).

⁴⁰⁷*Id.* at 154.

⁴⁰⁸See *id.* at 146-48.

⁴⁰⁹*Maxwell v. Bishop*, 398 U.S. 262, 264-67 (1970), *rev'g* 398 F.2d 138 (8th Cir. 1968) (Blackmun, J.).

⁴¹⁰See *Maxwell*, 398 F.2d at 139-54.

⁴¹¹Entin, *supra* note 395, at 418 n.58 (citing JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 122, 124 (1991)).

⁴¹²*Id.* at 418.

⁴¹³*Id.*

⁴¹⁴Ironically, as Professor Entin notes, Justice Blackmun authored a dissent on the Supreme Court showing far more sympathy to statistical claims of racial discrimination in the administration of the death penalty. *Id.* at 417 n.56 (citing *McCleskey v. Kemp*, 481 U.S. 279, 354 n.7 (1987) (Blackmun, J., dissenting)).

⁴¹⁵Considering Justice Blackmun's record as a champion of civil rights and civil liberties, this misrepresentation of his record would be particularly unfair and shameful.

⁴¹⁶See *supra* Part II.B.

⁴¹⁷See McGinnis, *A Reply*, *supra* note 3, at 667 (“[A] greater role for the Senate is likely to make nomination and confirmation of distinguished nominees more difficult. . .”).

likely force future Presidents to nominate true “stealth nominees.”⁴¹⁸ Anyone aspiring to the federal bench will have to write nothing controversial, nothing except the most bland, general statements of law.⁴¹⁹ “Stealth nominees” will resort to the only means necessary to gain approval at a confirmation hearing—saying nothing yet agreeing with everything.⁴²⁰

The preponderance of “stealth nominees” will not be a positive development.⁴²¹ As former White House Counsel Lloyd Cutler has noted, Senators of both parties should want bold judges with pronounced views on the great legal issues of the day.⁴²² Some have said, however, that the federal judiciary needs “mainstream” judges who will take middle-of-the-road approaches to legal issues.⁴²³ It is hardly obvious that these individuals would improve the quality of the federal judiciary.⁴²⁴ Nor is it necessarily true that reasonable, middle-of-the-road judges would be easily found.

E. Continued Ideological Scrutiny Will Harm the Federal Judiciary

In its current form, the confirmation process will not help maintain the quality of the federal judiciary. Three pervasive myths explain the deficiencies in the confirmation process.

1. The Myth of the “Mainstream”

Like the phrase “judicial activism,” the phrase “outside the mainstream” is meaningless.⁴²⁵ Opponents of President Bush’s nominees have repeatedly argued that judicial nominees must be within the “mainstream.”⁴²⁶ The term “mainstream” exhibits inherent ambiguity.⁴²⁷ Does opposition to one Supreme Court case (such as *Roe*) place a nominee “outside the mainstream?”⁴²⁸ If recent history is any indication, the answer to that question is yes.⁴²⁹ Having one particular Supreme

⁴¹⁸Fein, *supra* note 25, at 684.

⁴¹⁹Cutler, *Limits of Advice and Consent*, *supra* note 41, at 878.

⁴²⁰Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 521.

⁴²¹Rees, *supra* note 252, at 951 nn.131-32.

⁴²²Cutler, *Limits of Advice and Consent*, *supra* note 41, at 878.

⁴²³Statement by Senator Charles E. Schumer, in *Senate Committee Hearings on the Judicial Nomination Process*, *supra* note 230, at 509-10.

⁴²⁴Statement by C. Boyden Gray, in *id.*, *supra* note 230, at 438 (“Well, I don’t know if we want to appoint profoundly ambivalent judges.”).

⁴²⁵Presser, *supra* note 3, at 265 (“The term ‘activism,’ then, is ambiguous at best, and misleading, if not pernicious at the worst.”).

⁴²⁶Statement by Senator Charles E. Schumer, in *Senate Committee Hearings on the Judicial Nomination Process*, *supra* note 230, at 509.

⁴²⁷*Cf.* Friedman, *Tribal Myths*, *supra* note 53, at 1289 (“‘Balance’ and ‘equilibrium’ are, of course, squishy terms.”).

⁴²⁸It shouldn’t. See *infra* note 432 and accompanying text.

⁴²⁹See *supra* Part II.B.4.

Court decision determine residence in the “mainstream” seems odd.⁴³⁰ Even Senator Kennedy once agreed with this argument.⁴³¹ Professor Sunstein has stated that opposition to *Roe* should not disqualify one from becoming a federal judge.⁴³² Many law professors have criticized *Roe*.⁴³³ Even if a lower court nominee dislikes *Roe*, those personal views are irrelevant if that nominee states that he or she will follow *Roe* because of *stare decisis*.⁴³⁴

A confirmation process where one case determines residence in the “mainstream” invites political mischief. Though *Roe* has served as the most recent litmus test, one can easily imagine Senate Republicans asking individuals nominated by a Democratic President about their views on *United States v. Lopez*,⁴³⁵ *Printz v. United States*,⁴³⁶ and *United States v. Morrison*.⁴³⁷ All three cases demonstrate a philosophy of the federal-state balance with which Senator Hatch agrees.⁴³⁸ If Senate Republicans administered such a litmus test in the future, Senate Democrats would be livid.⁴³⁹ Senate Republicans, however, have frequently objected to litmus tests over the past two years.⁴⁴⁰

⁴³⁰For purposes of fairness, this would hold true for cases such as *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act of 1990 as beyond Congress’s powers under the Commerce Clause).

⁴³¹See Rees, *supra* note 252, at 918 (citation omitted).

⁴³²See Cass R. Sunstein, *A Conservative Liberals Should Love*, WALL ST. J., Sept. 17, 2002, at A20 [hereinafter Sunstein, *A Conservative Liberals Should Love*] (“But standing all by itself, disagreement with *Roe* should not be a disqualification for the federal bench. Many people, of all political stripes, are uncomfortable with *Roe* as a matter of constitutional law.”).

⁴³³Justice Ginsburg disagreed with the reasoning of *Roe*, yet has consistently spoken out in favor of a woman’s right to choose. Ginsburg, *Some Thoughts*, *supra* note 5, at 382-84. Additionally, Professor John Hart Ely has denounced *Roe*. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947-49 (1973). One hopes that this criticism does not place Professor Ely “outside the mainstream.” Cf. Rotunda, *Supreme Court Justices in the Modern Era*, *supra* note 27, at 579 n.101 (“[I]s John Hart Ely beyond the pale?”).

⁴³⁴Cf. Sunstein, *A Conservative Liberals Should Love*, *supra* note 432 (“In any case Mr. McConnell is firmly committed to the law, and he would be a judge on a lower court, bound by Supreme Court decisions recognizing women’s right to choose.”).

⁴³⁵514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act of 1990 as beyond Congress’s powers under the Commerce Clause).

⁴³⁶521 U.S. 898, 935 (1997) (“We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly.”).

⁴³⁷529 U.S. 598, 601 (2000) (invalidating parts of the Violence Against Women Act as beyond Congress’s powers under the Commerce Clause and section 5 of the Fourteenth Amendment).

⁴³⁸This has already occurred. See Kline, *supra* note 18, at 258-60.

⁴³⁹See *id.* at 263.

⁴⁴⁰See *id.* at 268.

If one defines “outside the mainstream” as refusing to follow all Supreme Court precedent, then a nominee fits this definition if he or she routinely thumbs his or her nose at the Supreme Court.⁴⁴¹ This definition would regrettably fail for lack of political viability. Republicans would not accept it because of *Roe*; Democrats would not accept it because of the Rehnquist Court’s federalism and Eleventh Amendment jurisprudence.⁴⁴² One could possibly determine whether a Circuit Court judge nominated for the Supreme Court is “in the mainstream” by examining how many dissents that judge has issued.⁴⁴³ This would likely indicate whether a nominee is within the “mainstream.” Senators, however, have found little use for this test, even when a nominee has passed this test.⁴⁴⁴

One could also determine whether a nominee is “outside the mainstream” based on how many times that nominee has been reversed by a higher court.⁴⁴⁵ Senate Republicans and Democrats have unfortunately misinterpreted or ignored statistics when it suited their political needs. Any one of the previous three tests to determine whether one resides “in the mainstream” would be far more reliable than the recent, single-case litmus test. Unfortunately, for reasons both personal and political, Senate Republicans and Democrats would rather continue administering single-case litmus tests.

There are many problems with what Democrats or Republicans have defined as “the mainstream.” The fundamental problem, however, is who defines the “mainstream.”⁴⁴⁶ Senators of both parties have used the terms “harmful to the

⁴⁴¹This would likely disqualify many judges on the Ninth Circuit, which recently gained notoriety by being reversed unanimously by the Supreme Court three times on the same day. See *Early v. Packer*, 123 S. Ct. 362, 362 (2002) (per curiam) (“Because this decision exceeds the limits imposed on federal habeas review by 28 U.S.C. § 2254(d), we grant the petition for certiorari and reverse.”), *rev’g sub. nom. Packer v. Hill*, 291 F.3d 569 (9th Cir. 2002); *Woodford v. Visciotti*, 123 S. Ct. 357, 357 (2002) (per curiam) (“Because this decision exceeds the limits imposed on federal habeas review by 28 U.S.C. § 2254(d), we reverse.”), *rev’g Visciotti v. Woodford*, 288 F.3d 1097 (9th Cir. 2002); *INS v. Ventura*, 123 S. Ct. 353, 354 (2002) (per curiam) (“We agree with the Government that the Court of Appeals should have remanded the case to the BIA. And we summarily reverse its decision not to do so.”), *rev’g Ventura v. INS*, 264 F.3d 1150 (9th Cir. 2001).

⁴⁴²For a defense of Rehnquist Court’s federalism jurisprudence, see Presser, *supra* note 3, at 265-73; see also Stephen Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 784-88, 826-30 (1995).

⁴⁴³This concern was particularly relevant regarding the nomination of Justice Owen, because Senator Leahy accused her of being “outside the mainstream” of the “ultra-conservative” Texas Supreme Court. See, e.g., 148 CONG. REC. S8447 (2002) (statement of Sen. Leahy) (detailing his concerns regarding the Owen nomination).

⁴⁴⁴Fein, *supra* note 25, at 685-86 (discussing Judge Bork’s voting record on the D.C. Circuit).

⁴⁴⁵Perhaps then, one could evaluate a nominee based in part on how many rulings from that nominee’s Circuit have been reversed. In that regard, the Ninth Circuit easily wins the prize for “Most Reversed Circuit.” See, e.g., *The Supreme Court, 2001 Term: The Statistics*, 116 HARV. L. REV. 461 (2002) (noting that the Supreme Court reversed or vacated fifteen decisions of the Ninth Circuit during the October 2001 term).

⁴⁴⁶More often than not, the person defining the mainstream is the commentator or Senator opposing the nominee. See Friedman, *Tribal Myths*, *supra* note 53, at 1290 (arguing that

country” or “lunatic fringe” to describe the constitutional views of judicial nominees.⁴⁴⁷ One commentator avers that Senators should not confirm anyone whom they believe has not demonstrated a substantial commitment to the Bill of Rights in his or her lifetime.⁴⁴⁸ In proposing these various tests, Senators ignore the wholly subjective nature of their claims.⁴⁴⁹ “[F]ew senators . . . should oppose a nominee merely because the nominee occupies a place on the political spectrum a bit to the left or right of his or her own.”⁴⁵⁰ Senators often fail to account for legitimate differences in constitutional interpretation.⁴⁵¹ Objections to a nominee’s judicial philosophy frequently mask the political objectives of Senators, who are motivated as much by concerns about re-election as they are by concerns about constitutional interpretation.⁴⁵²

Single-case litmus tests are theoretically permissible. If a judicial nominee disavowed *Brown v. Board of Education*,⁴⁵³ advocated forced sterilization of women,⁴⁵⁴ and stated that *Korematsu v. United States*⁴⁵⁵ was one of the greatest Supreme Court decisions ever, then Senators would certainly be justified in voting to reject that nomination.⁴⁵⁶ Constitutional interpretation, however, admits of a wide

Professor Tribe’s main goal is “to ensure that, to the extent possible, the Court is composed of Justices who think the way he does”).

⁴⁴⁷See, e.g., Charles Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 663-64 (1970) (“If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his . . . as a satisfactory basis in itself for a negative vote.”).

⁴⁴⁸Rauh, Jr., *Some Personal Observations*, *supra* note 272, at 11 n.8.

⁴⁴⁹See Ross, *supra* note 216, at 681.

⁴⁵⁰Rauh, Jr., *Some Personal Observations*, *supra* note 272, at 11 & n.8.

⁴⁵¹See Ross, *supra* note 216, at 681.

⁴⁵²See Simson, *Supreme Unfitness*, *supra* note 14, at 658.

⁴⁵³347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896).

⁴⁵⁴Judge Bork did not advocate forced sterilization of women. *Oil, Chem. & Atomic Workers Int’l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 445 (D.C. Cir. 1984) (“[W]e think the language of the Act cannot be stretched so far as to hold that the sterilization option of the fetus protection policy is a ‘hazard’ of ‘employment’ under the general duty clause. Consequently, we affirm.” (emphasis added)); *see also id.* (“Nor may we decide that the company is guilty because it offered an option of sterilization. . . . These . . . issues . . . are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy.”).

⁴⁵⁵323 U.S. 214, 219 (1944) (Black, J.) (upholding internment of Japanese-Americans during World War II). *Korematsu* easily ranks as the worst decision of Justice Black’s otherwise illustrious career on the Supreme Court. See Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1248 (2002) [hereinafter Amar, *Hugo Black*] (“Over the run of his extraordinary tenure on the Court, spanning five (!) decades, Black had many bad days, of course.”) (citing *Korematsu*)).

⁴⁵⁶The above example illustrates a situation involving a nominee whose views are wholly antithetical to the Constitution. In nearly all cases involving confirmation hearings, however,

range of reasonable disagreement.⁴⁵⁷ The debate over the jurisprudence of the Rehnquist Court has raged over the past sixteen years, as well it should.⁴⁵⁸ The issue is not whether the Rehnquist Court should be beyond criticism; it is not. The issue is not whether all nine Justices should possess identical judicial philosophies; they should not.

The term “mainstream,” however, refuses to recognize legitimate differences in judicial philosophy.⁴⁵⁹ In searching for the “mainstream,” Senators have embarked

such individuals are highly unlikely to appear. See Carter, *Confirmation Mess*, *supra* note 16, at 1199 (“There is, in other words, no reason for the Senate to set itself the task of keeping off the Court nominees whose views stray too far beyond the discourse of the mainstream, *for the Senators are then policing for criminals unlikely to appear.*” (emphasis added)). Judge Bork does not qualify as one of those criminals. See *id.* Nor does Judge White. See *supra* note 105.

⁴⁵⁷Despite claims to the contrary, see *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992) (“It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown and Roe.*”), *Roe* is at best a distant cousin of *Brown* when one considers *Roe*’s constitutional legitimacy and doctrinal foundation. *Brown* overruled the invidious doctrine of “separate but equal” established in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The national crisis that precipitated *Brown* divided this nation for two centuries and still divides this nation. The constitutional basis for *Brown* is fairly evident; the constitutional basis for *Roe*—*by Justice Blackmun’s own admission!*—is entirely muddled. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, *whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people,* is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” (emphasis added)).

Few commentators have criticized the rationale of *Brown*. But see *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (Jack M. Balkin ed., 2001) (rewriting *Brown*). Many members of the academy, however, have disagreed with the Court’s reasoning in *Roe*, or have denounced *Roe* entirely. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 93-102 (1987) (offering an alternative justification for *Roe*); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, at 1353-59 (2d ed. 1988) [hereinafter *TRIBE, AMERICAN CONSTITUTIONAL LAW*] (offering an alternative justification for *Roe*); see also Ely, *supra* note 433, at 947-49 (concluding that *Roe* is bad constitutional law); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 *HARV. L. REV.* 989, 992 (1991) (stating his belief that *Roe* was wrongly decided). It is fair to say that *Roe* has been one of the most lambasted Supreme Court decisions of the past two centuries. It is true that *Roe*, like *Brown*, is “settled law” because of *stare decisis*. Legitimate opposition exists to both the reasoning and result of *Roe*. *Brown*, however, does not command the same degree of disapproval. Consequently, claiming that a judicial nominee is “outside the mainstream” based solely on opposition to *Roe* is misguided. See Sunstein, *A Conservative Liberals Should Love*, *supra* note 432.

⁴⁵⁸For articles criticizing the Rehnquist Court, see *infra* note 509.

⁴⁵⁹See McGinnis, *A Reply*, *supra* note 3, at 665; see also Friedman, *Tribal Myths*, *supra* note 53, at 1290 (“No, Tribe’s concern is not with so elusive a concept as ‘balance.’ Rather, his goal is to ensure that, to the extent possible, the Court is composed of Justices who think the way he does.”).

upon a foolish, unending voyage across the murky waters of legal interpretation. Rather than continue this ill-fated voyage, Senators should eschew use of the term “mainstream.” They should recognize what many law professors and judges already have: that there exists reasonable disagreement over what the proper judicial philosophy is. Senators should finally cast aside vastly overstated political rhetoric and conclude, at a minimum, that originalists do not support forced sterilization, and that non-originalists do not support weekend furloughs for convicted murderers.

Many prominent law professors attacked Judge Bork’s judicial philosophy as outdated and unwieldy.⁴⁶⁰ Similarly, when some of President Clinton’s nominees faced the Senate Judiciary Committee, their views on cases were carefully scrutinized for any hint of “liberal judicial activism.”⁴⁶¹ Both incidents illustrate the ongoing scholarly debate about the merits of originalism. Democratic Senators and various law professors have recently criticized originalism.⁴⁶² In doing so, they have proved that the debate concerning originalism’s validity is an ongoing one.⁴⁶³ They have also proved that this debate is unsettled.⁴⁶⁴

Claiming that originalism lacks any merit, however, is questionable.⁴⁶⁵ Like all judicial philosophies, originalism has its detractors and its defenders.⁴⁶⁶ Many Supreme Court Justices have utilized originalism over the past thirty years, and have

⁴⁶⁰See *supra* notes 65-67 and accompanying text.

⁴⁶¹Kline, *supra* note 18, at 258.

⁴⁶²See, e.g., Statement by Professor Cass R. Sunstein, in *Senate Committee Hearings on the Judicial Nomination Process*, *supra* note 230, at 468-72; Statement by Professor Laurence R. Tribe, in *id.*, *supra* note 230, at 442-44.

⁴⁶³Carter, *Confirmation Mess*, *supra* note 16, at 1192 (“Whatever the degree of controversy among legal scholars on originalism as a method, however, *it is just that—a controversy.*” (emphasis added)).

⁴⁶⁴This debate intensified after the Bork nomination. See *id.* (“Judge Bork was pilloried, for example, for his dogged reliance on the original understanding as a tool for interpretation.” (emphasis added)).

⁴⁶⁵See *id.* at 1191 (“One of the gravest weaknesses of the liberal constitutional theory that currently dominates the academy is *its inability to point to much in the Constitution’s text or history to explain the supposed wrongheadedness of the conservative assault on the work of the modern Court.*” (emphasis added)). It is difficult to argue that the history of the appointments clause is irrelevant. Scholars on both sides of the debate have researched the issue and reached different conclusions. Compare McGinnis, *A Reply*, *supra* note 3, at 636 (“The Framers thought the Senate should only reject nominees for weighty and publicly compelling reasons.” (footnote omitted)), with Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1495 (“The clause thus envisions a genuinely consultative relationship between the Senate and the President. . . . History supports this view of the text.”). Even those who have criticized originalism have examined the original understanding of the nominations clause thoroughly. Cf. McGinnis, *A Reply*, *supra* note 3, at 655 n.102 (“One hopes that Professors Strauss and Sunstein have not suddenly converted to a view that specific intentions of individual Framers are controlling over the words of the Constitution.”).

⁴⁶⁶See Carter, *Confirmation Mess*, *supra* note 16, at 1191-92. For a thorough critique of originalism, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213-17 (1980).

examined the original understanding of the Constitution.⁴⁶⁷ This debate will not end anytime soon.⁴⁶⁸

Ideological scrutiny, however, disallows legitimate constitutional debate.⁴⁶⁹ If Republicans continue to control the Senate Judiciary Committee, any individuals nominated by a future Democratic President would be wise to avoid criticizing the Rehnquist Court's federalism jurisprudence.⁴⁷⁰ Any one of President Bush's nominees over the past two years would have taken leave of his or her senses had that nominee said anything about *Roe* beyond: 1) It is "settled law;"⁴⁷¹ 2) It remains the law of the land;⁴⁷² 3) It should be upheld because of *stare decisis*.⁴⁷³ Continued ideological scrutiny will marginalize the opportunity for legitimate constitutional debate on contested issues. In the end, ideological scrutiny prevents constitutional progress.

⁴⁶⁷Carter, *Confirmation Mess*, *supra* note 16, at 1192 n.14. As Professor Carter states, "[e]very Justice who has sat on the Court in recent years has written or joined opinions invoking the original understanding to decide questions involving the separation of powers." *Id.* (citing *Bowshar v. Synar*, 478 U.S. 714, 722-24 (1986) (Burger, C.J., joined by Brennan, Powell, Rehnquist, and O'Connor, JJ.) (appealing to original understanding on legislative action); *INS v. Chadha*, 462 U.S. 919, 946-51 (1983) (Burger, C.J., joined by Brennan, Marshall, Blackmun, Stevens, and O'Connor, JJ.) (same); *Nixon v. Fitzgerald*, 457 U.S. 731, 771-78 (1982) (White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (appealing to original understanding on punishment of the President); *City of Memphis v. Greene*, 451 U.S. 100, 154-44 n.18 (1981) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (invoking original understanding of thirteenth amendment); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396-98 (1978) (Marshall, J., concurring in judgment in part and dissenting in part) (invoking original understanding of fourteenth amendment)).

⁴⁶⁸*Id.* at 1192 (noting that the controversy over originalism during the Bork nomination represented a "tendency in contemporary political rhetoric to say 'philosophy' but mean 'rights we like'").

⁴⁶⁹*See* McGinnis, *A Reply*, *supra* note 3, at 665.

⁴⁷⁰Otherwise, if the current practice of ideological scrutiny continues, those nominees would very likely be rejected. *See* Kline, *supra* note 18, at 277-87 (noting that Senate Republicans asked many intrusive questions of President Clinton's nominees, ranging from their views on partial-birth abortions to their views on the constitutionality of capital punishment).

⁴⁷¹*See* Neil A. Lewis, *Judicial Nominee Says His Views Will Not Sway Him on The Bench*, N.Y. TIMES, Sept. 19, 2002, at A30 [hereinafter Lewis, *Judicial Nominee*] (noting that Judge Michael McConnell stated at his confirmation hearing that *Roe* was "settled law").

⁴⁷²*See id.* (noting that Judge McConnell stated that "he would comply with Supreme Court opinions with which he disagreed").

⁴⁷³*See id.* (quoting Judge McConnell).

The term “outside the mainstream” is one made out of whole political cloth.⁴⁷⁴ Application of this term to the confirmation process is a recent, unsettling phenomenon.⁴⁷⁵ The continued determination of whether a judicial nominee is “outside the mainstream” will politicize the confirmation process further and deter qualified, distinguished individuals from willing to be nominated.⁴⁷⁶ Instead of engaging in prolonged political retribution, Senate Democrats and Republicans should return the phrase “outside the mainstream” to the political process.⁴⁷⁷

2. The Myth of Predicting a Judge’s Votes

Senators should not consider a nominee’s ideology because one frequently cannot predict how a nominee will decide future cases.⁴⁷⁸ Even when a nominee plainly possesses a certain judicial philosophy, surprises still occur.⁴⁷⁹ Despite claims to the contrary,⁴⁸⁰ it would take a soothsayer reminiscent of Nostradamus to

⁴⁷⁴See, e.g., David S. Broder, *Dukakis Keeps His Hopes Alive; Democrat Fends Off Bush Effort to Place Him Far to Left*, WASH. POST, Sept. 26, 1988, at A1 (“Michael S. Dukakis kept the presidential race alive and in doubt tonight by showing a huge televised audience that he could deflect George Bush’s efforts to place him *outside the mainstream of American politics*.” (emphasis added)); Editorial, *Vote Chuck Robb*, WASH. POST, Nov. 6, 1994, at C6 (arguing that the views of Senate candidate Oliver North “are harsh and outside the mainstream”); Editorial, *What Kind of Moderate?*, WASH. POST, June 7, 1993, at A18 (noting that some pundits have claimed that “Mr. Clinton is in trouble because he has been ‘too liberal’ or ‘too far outside the mainstream’ or in some other unacceptable place”).

⁴⁷⁵See Schumer, *supra* note 18.

⁴⁷⁶See Editorial, *Injuring the Judiciary*, WASH. POST, Sept. 13, 2002, at A38 (“Do senators really want a confirmation process in which conservatives vote against liberals because they are liberals and liberals oppose conservatives because they are conservatives?”).

⁴⁷⁷That’s where it came from. See *supra* note 474.

⁴⁷⁸Ronald D. Rotunda, *Innovations Disguised as Traditions: A Historical Review of the Supreme Court Nominations Process*, 1995 U. ILL. L. REV. 123, 131 [hereinafter Rotunda, *A Historical Review*]

⁴⁷⁹See *infra* notes 483-98 and accompanying text.

⁴⁸⁰See, e.g., Simson, *Supreme Unfitness*, *supra* note 14, at 655 (“There is a lot to be said for having a reasonably good idea of what you are getting, and you can make a reasonable prediction as to how candidates with substantial paper trails are generally apt to vote.”); Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1514-15; Jeff Yates & William Gillespie, *Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process*, 58 WASH. & LEE L. REV. 1053, 1063-64 (2001) (“Another argument advanced in favor of a constrained Senate role is the proposition that executive nominations based on a candidate’s ideological views are innocuous because the President is unable to predict a Justice’s long-term voting trends. This premise, however, is not supported by history. . . .” (footnotes omitted)).

accurately predict how a nominee will vote on future cases.⁴⁸¹ Judicial nominees are not Senators with voting records or baseball players with batting averages.⁴⁸²

Judges and Justices have often frustrated the wishes of the Presidents who nominated them.⁴⁸³ President Eisenhower referred to Chief Justice Warren and Justice Brennan as the two greatest mistakes of his Presidency.⁴⁸⁴ President Nixon nominated Justice Blackmun and expected him to follow Chief Justice Burger.⁴⁸⁵ Justice Blackmun, however, authored *Roe v. Wade*,⁴⁸⁶ and dissented in many death penalty cases.⁴⁸⁷ He quickly dashed President Nixon's hope that he would become a "law-and-order" Justice.⁴⁸⁸ Similarly, Justice Powell argued that diversity could constitute a compelling governmental interest in higher education,⁴⁸⁹ and anchored the centrist wing of the Burger Court.⁴⁹⁰

Anyone who predicted in 1975 that Justice Stevens would anchor the "liberal" wing of the Rehnquist Court would have encountered sharp disagreement, yet Justice Stevens has done just that.⁴⁹¹ Barely two years after she was confirmed, Justice

⁴⁸¹Presser, *supra* note 3, at 259 ("[P]redictions of what people will do when they ascend the bench are notoriously inaccurate.").

⁴⁸²*See, e.g.,* Rotunda, *A Historical Review*, *supra* note 478, at 131 ("To the extent that the confirmation process tries to determine how the nominee will vote in particular cases, it is focusing on an issue that cannot really be answered.").

⁴⁸³*Id.* at 135.

⁴⁸⁴RICHARD HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT* 30 (1980); *see also* BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 5 (1979) ("Later Eisenhower remarked that the appointment [of Chief Justice Warren] was 'the biggest damned-fool mistake [he] ever made.'" (footnote omitted)).

⁴⁸⁵WOODWARD & ARMSTRONG, *supra* note 484, at 97 ("Nixon found Blackmun's moderate conservatism perfect. . . . [Blackmun] had a . . . predictable, solid body of opinions that demonstrated a levelheaded, strict-constructionist philosophy. . . . Blackmun was a decent man, consistent, wedded to routine, unlikely to venture far."); *see also* Rotunda, *Role of Ideology*, *supra* note 315, at 136.

⁴⁸⁶410 U.S. 113 (1973).

⁴⁸⁷*See, e.g.,* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled— . . . to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty. . . ." (footnote omitted)).

⁴⁸⁸*See* Rotunda, *Role of Ideology*, *supra* note 315, at 136.

⁴⁸⁹Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978) (opinion of Powell, J.) ("The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.").

⁴⁹⁰*See* John C. Jeffries, Jr., *Lewis F. Powell, Jr. and the Art of Judicial Selection*, 112 HARV. L. REV. 597, 597 (1999) ("Lewis F. Powell, Jr. served on the Supreme Court from 1972 through 1987. On the crucial issues of that time, his was the decisive voice.").

⁴⁹¹*See* Atkins v. Virginia, 536 U.S. 304, 346-47 (2002) (Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg & Breyer, JJ.) (finding that a national consensus has developed against capital punishment for the mentally retarded); *cf., e.g.,* Robert A. Schapiro, *Balancing*,

O'Connor criticized the trimester framework established in *Roe*.⁴⁹² Nine years later, however, Justice O'Connor voted to reaffirm *Roe*'s central holding.⁴⁹³ Additionally, Justice O'Connor has frequently eschewed broad rulings, and has favored fact-intensive tests.⁴⁹⁴ Justice Kennedy likely wins the prize for "Most Disappointing Justice" in the eyes of Republicans, because he has become a centrist on Establishment Clause issues.⁴⁹⁵ Many observers expected Justice Souter to be a reliable conservative.⁴⁹⁶ Instead, Justice Souter has defended *Roe*,⁴⁹⁷ and has sharply criticized the Rehnquist Court's federalism jurisprudence.⁴⁹⁸

Justice, and the Eleventh Amendment: Justice Stevens' Theory of State Sovereign Immunity, 27 RUTGERS L.J. 563, 563 (1996) ("Though it was Justice William Brennan who initially led a four-Justice faction consistently hostile to sovereign immunity, Justice Stevens has become the Court's leading opponent of sovereign immunity and leading proponent of holding the government judicially accountable for its actions." (footnote omitted)).

⁴⁹²*City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 453-54 (1983) (O'Connor, J., joined by White & Rehnquist, JJ., dissenting) ("The trimester or 'three-stage' approach adopted by the Court in *Roe*, and, in a modified form, employed by the Court to analyze the regulations in these cases, cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests." (emphasis added)).

⁴⁹³*Planned Parenthood v. Casey*, 505 U.S. 833, 845-46 (1992) ("[W]e are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

⁴⁹⁴*See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires *careful examination and weighing of all the relevant circumstances in this context*." (emphasis added)).

⁴⁹⁵*See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg & Breyer, JJ.) (holding that student-led, student-initiated prayer at football games violates the Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (Kennedy, J., joined by Blackmun, Stevens, O'Connor & Souter, JJ.) (holding that school-sponsored prayer at a middle school graduation violates the Establishment Clause). *But see Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2473 (2002) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy & Thomas, JJ.) (holding that a pilot program enabling parents to choose between public and private schools does not violate the Establishment Clause). Justice Kennedy has also developed a reputation as a particularly contemplative, soul-searching jurist. *See Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("[T]his case, like others before us from time to time, exacts its personal toll."); *id.* at 420-21 (Kennedy, J., concurring) ("The hard fact is that *sometimes we must make decisions we do not like*. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." (emphasis added)).

⁴⁹⁶*See, e.g., Rauh, Jr., Some Personal Observations, supra note 272*, at 10.

⁴⁹⁷*See Casey*, 505 U.S. at 845-46 ("[W]e are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

⁴⁹⁸*See, e.g., United States v. Lopez*, 514 U.S. 549, 612 n.2 (1995) (Souter, J., dissenting) (stating that he would have given greater deference to Congress's finding that the Gun-Free School Zones Act of 1990 addressed a subject substantially affecting interstate commerce).

There are Justices whose judicial philosophies have remained consistent.⁴⁹⁹ Justices Scalia and Thomas have sought to reduce the “wall of separation” between church and state,⁵⁰⁰ have voted to limit the powers of the federal government,⁵⁰¹ and have voted to uphold capital punishment.⁵⁰² Justice Breyer has become a voice of moderation on the Rehnquist Court, occasionally joining ranks with Justices Scalia, Rehnquist and Thomas,⁵⁰³ but mostly opposing them.⁵⁰⁴ Chief Justice Rehnquist has consistently voted to increase government aid to religion,⁵⁰⁵ limit Congressional

⁴⁹⁹This paper does not claim that a nominee’s judicial philosophy will never indicate how he or she will decide cases once on the bench. Cf. Balkin & Levinson, *Constitutional Revolution*, *supra* note 228, at 1070 (“To be sure, judges and Justices grow and develop over time, though, we strongly suspect, there is less ‘growth’ and ‘development’ than is suggested by the ideologically-freighted reassurance that one often hears that Justices are ruggedly independent and have thoroughly unpredictable views.”).

⁵⁰⁰*See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 631-32 (1992) (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting) (“[T]he Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”).

⁵⁰¹*See* *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (“Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.”); *Printz v. United States*, 521 U.S. 898, 935 (1997) (Scalia, J., joined by Rehnquist, C.J., O’Connor, Kennedy & Thomas, JJ.) (“We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly.”); *Lopez*, 514 U.S. at 602 (Thomas, J., concurring) (“At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.”).

⁵⁰²*See* *Atkins v. Virginia*, 536 U.S. 304, 363 (2002) (Scalia, J., joined by Rehnquist, C.J., Thomas, J., dissenting) (“Today’s decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. . . . Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.”).

⁵⁰³*See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 837 (2000) (O’Connor, J., joined by Breyer, J., concurring in the judgment).

⁵⁰⁴*See, e.g.*, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2506-07 (2002) (Breyer, J., joined by Stevens & Souter, JJ., dissenting) (conceding that “the Establishment Clause currently permits States to channel various forms of assistance to religious schools . . . [such as] transportation costs for students, computers, and secular texts,” yet arguing that school vouchers violate the Establishment Clause); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 382-85 (2001) (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (arguing that the Court owes Congress greater deference in evaluating legislation).

⁵⁰⁵*See, e.g.*, *Zelman*, 122 S. Ct. at 2473 (Rehnquist, C.J., joined by O’Connor, Scalia, Kennedy & Thomas, JJ.) (holding that a pilot program permitting parents to choose between public and private schools “does not offend the Establishment Clause”). Chief Justice Rehnquist’s battle to increase government aid to religion began thirty years ago. *See* *Comm. on Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 805-13 (1973) (Rehnquist, J., joined by Burger, C.J., & White, J., dissenting).

power,⁵⁰⁶ reduce Fourth Amendment protection,⁵⁰⁷ and overrule *Roe*.⁵⁰⁸ Chief Justice Rehnquist's judicial philosophy has remained consistent; in applying it to cases, he has received persistent criticism from commentators.⁵⁰⁹

Chief Justice Rehnquist, however, authored *Dickerson v. United States*,⁵¹⁰ which reaffirmed *Miranda*.⁵¹¹ In *Kyllo v. United States*,⁵¹² Justice Scalia authored an opinion striking down the use of thermal imaging as a surveillance tool.⁵¹³ The preceding case defies political stereotypes.⁵¹⁴ Justice Scalia wrote an opinion

⁵⁰⁶See *Morrison*, 529 U.S. at 601-27 (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy & Thomas, JJ.) (striking down parts of the Violence Against Women Act as beyond Congress's powers under the Commerce Clause and section 5 of the Fourteenth Amendment).

⁵⁰⁷See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 91 (1998) (Rehnquist, C.J., joined by O'Connor, Kennedy, Scalia & Thomas, JJ.) (holding that respondents, who had stayed in an apartment for two and a half hours to package cocaine, lacked standing because they had no legitimate expectation of privacy in the apartment).

⁵⁰⁸See *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992) (Rehnquist, C.J., joined by White, JJ., concurring in the judgment in part and dissenting in part).

⁵⁰⁹See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 168 (2001) ("The members of . . . the Rehnquist Court are constitutional fundamentalists, acting to restore the Constitution to what they believe is its true form. Like most forms of fundamentalism, their belief rests on an imagined past that never existed. *How long must we let them continue fantasizing at our expense?*" (emphasis added)); see also Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 47 (1989) [hereinafter Chemerinsky, *Vanishing Constitution*] ("Moreover, I believe that the [Rehnquist] Court's approach to judicial review will have disastrous consequences for constitutional law and for the nation. . . . Fewer clauses of the Constitution, whether dealing with the structure of government or with individual liberties, are being enforced.").

⁵¹⁰530 U.S. 428 (2000) (Rehnquist, C.J., joined by Stevens, O'Connor, Kennedy, Souter, Ginsburg & Breyer, JJ.).

⁵¹¹*Id.* at 443. One possible explanation for the Court's holding in *Dickerson* might have been displeasure at Congress's attempt to overrule *Miranda* through section 3501. See Michael C. Dorf & Barry Freedman, *Shared Constitutional Interpretation*, 2001 SUP. CT. REV. 61, 72 ("[Section 3501] was a slap at the Court, and if any Court was likely to slap back it was this one.").

⁵¹²533 U.S. 27 (2001).

⁵¹³*Id.* at 40 (Scalia, J., joined by Souter, Thomas, Ginsburg & Breyer, JJ.) ("[W]e hold the Thermovision imaging to have been an unlawful search. . . ."). Justice Stevens, however, dissented, claiming that the use of Thermovision imaging was not a Fourth Amendment search, much less an unreasonable one. *Id.* at 42-46 (Stevens, J., joined by Rehnquist, C.J., O'Connor & Kennedy, JJ., dissenting).

⁵¹⁴As one commentator has thoroughly demonstrated, the Rehnquist Court defies political stereotypes. See Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1210 (2002) ("The talk emanating from liberal academics holds that the current Court is on a programmatic mission to advance right-wing political goals. That talk—not to put too fine a point on it—is dishonest."). As Professor Young states, even "right-wing" professors and judges are dissatisfied with the Rehnquist Court, because these individuals feel that the Court is not conservative enough. *Id.* at 1215 nn. 329-30.

invalidating the police's search, while Justice Stevens argued that the use of thermal imaging was constitutional.⁵¹⁵ Justice Scalia found that burning the American flag is free speech;⁵¹⁶ Justice Stevens, however, concluded otherwise.⁵¹⁷ Ironically, Justice Scalia advocated increased First Amendment protection, while Justice Stevens did not.⁵¹⁸ Supreme Court cases often avoid quick application of political stereotypes.⁵¹⁹

The Rehnquist Court has undeniably charted a well-defined course on many constitutional issues.⁵²⁰ The political rhetoric regarding the Rehnquist Court, however, is misleading.⁵²¹ The Rehnquist Court has easily been the most pro-First Amendment Court in history, striking down numerous statutes and upholding various practices.⁵²² As one commentator notes, the statistics of how the Justices voted on free speech cases from 1994 to 2000 disprove the common perceptions concerning the Rehnquist Court.⁵²³ The "right-wingers" have voted to uphold First Amendment

⁵¹⁵Compare *Kyllo*, 533 U.S. at 40 (Scalia, J., joined by Souter, Thomas, Ginsburg & Breyer, JJ.) ("[W]e hold the Thermovision imaging to have been an unlawful search. . ."), with *id.* at 43 (Stevens, J., joined by Rehnquist, C.J., O'Connor & Kennedy, JJ.) (dissenting) ("[T]he notion that heat emissions from the outside of a dwelling is a private matter implicating the protections of the Fourth Amendment . . . is not only unprecedented but also quite difficult to take seriously.").

⁵¹⁶See *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (Brennan, J., joined by Marshall, Blackmun, Scalia & Kennedy, JJ.) ("After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.").

⁵¹⁷*Id.* at 439 (Stevens, J., dissenting) ("If [the ideas of liberty and equality] are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.").

⁵¹⁸See Rotunda, *Role of Ideology*, *supra* note 315, at 140.

⁵¹⁹See Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 195 (2002) ("Supreme Court seers are inclined to speak of liberal and conservative blocs and the effect of changes in personnel on their voting strength. . . . [I]t is difficult to align the dispositions of these blocs with any coherent set of doctrinal or jurisprudential principles."); see also Paula Alexander Becker & Richard J. Hunter, Jr., *A Review of the Supreme Court's 2000 Term: Is There a Consistent Theme?*, 38 HOUS. L. REV. 1463, 1474 (2002) ("It is extremely difficult to provide an overall determinative characterization of the philosophy of the current United States Supreme Court.").

⁵²⁰See *supra* notes 499-509 and accompanying text.

⁵²¹For a thorough, well-reasoned response to the charge that the Rehnquist Court is an "activist" Court, see J. Harvie Wilkinson, III, *Is There a Distinctive Conservative Jurisprudence?*, 73 U. COLO. L. REV. 1383, 1385-89 (2002).

⁵²²See Kramer, *supra* note 509, at 130 ("*The Rehnquist Court has probably been most active in the area of First Amendment freedoms.* With respect to speech, the Court has demonstrated a strong libertarian bent. . . ." (emphasis added)); see also *id.* at 130 nn. 546-550 (collecting cases).

⁵²³Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV. 1191, 1198 (2001) ("[T]he vote tallies are not speculation: They reveal that we can no longer assume that the Left generally sides with speakers and the Right with the

values, yet the “left-wingers” have sided with the government.⁵²⁴ Commentators rarely mention this commitment to civil liberties.⁵²⁵

Instead, some commentators warn that the Rehnquist Court might strike down civil rights laws in the name of federalism and overturn *Roe*.⁵²⁶ The Rehnquist Court, however, has not hinted in any way that it will overturn civil rights laws.⁵²⁷ Additionally, the Rehnquist Court has reaffirmed *Roe*'s central holding,⁵²⁸ declined many invitations to overrule *Roe*,⁵²⁹ and struck down a statute banning partial-birth abortions.⁵³⁰ The Rehnquist Court has damned *Roe* by faint praise, but it has gone no farther.⁵³¹ Might the Rehnquist Court overturn *Roe*?⁵³² This outcome is possible but

government.”); *see also* Young, *supra* note 514, at 1211 (“It is hard to imagine how the Court could be more aggressive in extending the limits of the Free Speech Clause.”).

⁵²⁴Volokh, *supra* note 523, at 1198.

⁵²⁵*But see* Kramer, *supra* note 509, at 131 (“Overall, it was a year to cheer the normally heavy hearts of civil libertarians. . . . In the area of free speech, the Court struck down statutory restrictions on the arguments a government-funded legal services lawyer can make, and it prohibited states from including candidates’ positions on selected issues on the ballot. . . .” (footnotes omitted)).

⁵²⁶*See, e.g.,* Balkin, *Law and Politics*, *supra* note 364, at 1457 & n.155 (“The Court, however, has embarked on a strong states’ rights path (*pace* *Bush v. Gore* itself) and one suspects that this is not the last civil rights statute it will strike down in the name of the inherent dignity and sovereignty of the states.” (footnote omitted)).

⁵²⁷*United States v. Morrison*, 529 U.S. 598, 609-10 (2000) (noting that the Rehnquist Court has “upheld a wide variety of congressional Acts regulating intrastate economic activity *where [the Court has] concluded that the activity substantially affected interstate commerce*” (emphasis added) (citing *United States v. Lopez*, 514 U.S. 549, 559 (1995)). Of particular importance, the Court in *Morrison* approvingly cited *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), which upheld the Civil Rights Act of 1964 as a valid exercise of Congress’s power under the Commerce Clause. *Id.* at 361 (“We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years.”). Thus, it is quite doubtful that the Rehnquist Court’s Commerce Clause jurisprudence will return the nation “to the days of segregated lunch counters, segregated hotels, or segregated motels.” Presser, *supra* note 3, at 270.

⁵²⁸*See* *Planned Parenthood v. Casey*, 505 U.S. 833, 845-46 (1992) (“[W]e are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

⁵²⁹*See* *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989) (“This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause. . . .”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (“Again today, we reaffirm the general principles laid down in *Roe*. . . .”).

⁵³⁰*Stenberg v. Carhart*, 530 U.S. 914, 922 (2000).

⁵³¹As one commentator notes, the Rehnquist Court’s abortion jurisprudence is hardly based on impregnable logic. *See* Akhil Reed Amar, *The Supreme Court, 1999 Term: Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 110 (2000) [hereinafter Amar, *Document and Doctrine*] (“If all sides are being invited to come together in good faith,

hardly certain.⁵³³ It is foolish to quickly characterize the jurisprudence of the entire Court or make rash predictions concerning the fate of disputed cases.⁵³⁴

it is hard to ask them to cohere around *Roe* simply because ‘this Court’ keeps incanting it without justifying it constitutionally.”).

⁵³²*Roe*’s demise will not occur anytime soon. See Presser, *supra* note 3, at 260 (“The empirical case that Republican appointees are a danger to the legality of abortion simply has not been made.”). This outcome is entirely possible, but would require the confirmation of two “right wing” Justices nominated by President Bush. See *infra* note 533.

⁵³³Assuming, *arguendo*, that one can predict how the Justices will vote based on paper trails (which all current Justices have), one need only examine the views of the Justices to conclude that *Roe* is not in imminent danger of being overturned.

Justice Stevens has consistently voted to uphold *Roe*. See, e.g., *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 419-20 (1983) (Powell, J., joined by Burger, C.J., Brennan, Marshall, Blackmun & Stevens, JJ.) (“[T]he doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*.” (footnote omitted)). Justice Souter and Justice Kennedy have voted to reaffirm *Roe*’s central holding. *Casey*, 505 U.S. at 845-46 (“After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”). Justice O’Connor joined Justices Souter and Kennedy in reaffirming *Roe*’s central holding, *id.*, and has plainly rejected attempts by earlier Republican administrations to overturn *Roe*. *Id.*; see also *Webster*, 492 U.S. at 526 (O’Connor, J., concurring in part and concurring in the judgment) (“When the constitutional invalidity of a State’s abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.”). Justice O’Connor’s “undue burden” test is now the law of the land. *Casey*, 505 U.S. at 879 (“An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”).

Justices Ginsburg and Breyer came to the Court after *Akron*, *Webster*, and *Casey*, yet they both voted to invalidate a statute prohibiting partial-birth abortions. *Stenberg*, 530 U.S. at 922 (Breyer, J., joined by Stevens, O’Connor, Souter & Ginsburg, JJ.) (“We hold that this statute violates the Constitution.”). Thus, both Justices would likely vote to reaffirm *Roe*. This is particularly true in Justice Ginsburg’s case, as she has defended the result of *Roe*, while offering alternative justifications for *Roe*. Ginsburg, *Some Thoughts*, *supra* note 5, at 382.

On the other hand, Chief Justice Rehnquist dissented in *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (“[T]he Court’s sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify . . . , and the conscious weighing of competing factors that the Court’s opinion apparently substitutes . . . is far more appropriate to a legislative judgment than to a judicial one.”). Justices Scalia and Thomas oppose *Roe* vehemently. See, e.g., *Stenberg*, 530 U.S. at 980 (Thomas, J., joined by Rehnquist, C.J. & Scalia, J., dissenting) (“As some of my colleagues on the Court, past and present, ably demonstrated, [*Roe v. Wade*] was grievously wrong.” (citations omitted)); *Casey*, 505 U.S. at 1002 (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., concurring in the judgment in part and dissenting in part) (“We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”); *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment) (“The outcome of today’s case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court’s self-awarded sovereignty over a field where it has little proper business. . . .”).

Thus, six Justices would likely vote to reaffirm *Roe*, while three Justices would vote to overturn *Roe*. Of those six Justices who would vote to reaffirm *Roe*, four were nominated by

The gap between prediction and reality regarding Supreme Court justices is enormous.⁵³⁵ Very often, the “conventional wisdom” concerning a judicial nominee has turned out to be rather common and unwise. Two years after Justice Souter was confirmed, one noted commentator labeled Justice Souter “a stealth right-winger.”⁵³⁶ By that time, however, Justice Souter had written many opinions as a judge.⁵³⁷ Additionally, anyone residing in the “right wing” of the Supreme Court would not claim Justice Souter as a member.⁵³⁸ Senators lauded Justice Kennedy’s open mind

Republican presidents. Even the addition of a George W. Bush-nominated Justice would not, in all likelihood, result in *Roe*’s demise. Assuming, *arguendo*, that President Bush places two “right-wingers” on the Court, concerns of *stare decisis* caution against overturning *Roe*. Cf. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (Rehnquist, C.J., joined by Stevens, O’Connor, Kennedy, Souter, Ginsburg & Breyer, JJ.) (“We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.” (citation omitted)). When one analyzes the previous opinions written by the Justices, not the various political stereotypes regarding the Justices, a surprising conclusion is reached. Cf. Volokh, *supra* note 523, at 1191 (“Which Supreme Court Justices are free speech maximalists and which are free speech minimalists? Counting their votes in recent cases yields surprising results.”). Will this prediction come true? Probably, but then, one never knows. It’s a prediction.

⁵³⁴See Balkin, *Law and Politics*, *supra* note 364, at 1446 (“As a teacher of constitutional law, I have been predicting the outcome of Supreme Court decisions for most of my professional career. . . . During the last five years or so, I have been consistently wrong about what the Court was willing to do to promote its conservative agenda.”); Kramer, *supra* note 509, at 129 (“The Court under Chief Justice Rehnquist has, by and large, favored conservative outcomes, though its full record is a complex mix that defies easy characterization.”).

Some commentators argue that *Roe* is just one vote from being overturned. See Elizabeth A. Cavendish, *The Legitimacy of Considering Judicial Philosophy in the Nominations Process*, 7 NEXUS J. OP. 27, 30 (2002) (“*Roe v. Wade* was decided by a 7-2 majority, but on the eve of its thirtieth anniversary, it is in peril. Just one new anti-choice justice, replacing a supporter of a woman’s right to choose, could undo *Roe*’s protections.”). One can easily understand why die-hard supporters of *Roe* would propagate such a myth—it serves their interests in opposing President Bush’s nominees. Proclaiming repeatedly that President Bush’s nominees will tear down the entire fabric of the Constitution, though false, will attract attention.

⁵³⁵Fein, *supra* note 25, at 682 n.68, 683; see also Cutler, *Limits of Advice and Consent*, *supra* note 41, at 878.

⁵³⁶Rauh, Jr., *Some Personal Observations*, *supra* note 272, at 10 (“President Bush added two new wrinkles to the game in his nominations. The first such addition was a stealth right-winger, Justice David Souter, about whom so little was known that it was politically difficult to justify voting against him.”).

⁵³⁷Justice Souter was hardly a stealth nominee; he had written quite a few opinions before being nominated to the Court. See McGinnis, *A Reply*, *supra* note 3, at 661 n.120 (collecting cases). As Professor McGinnis notes, “Justice Souter’s New Hampshire opinions disclose . . . a view that the rule of law is best promoted by generally treating law as a body of enumerated rules.” *Id.* at 660-61 (footnote omitted).

⁵³⁸Justice Souter certainly lost his membership in the Court’s “right wing”—barely a year after being confirmed—by joining Justices O’Connor and Kennedy in *Casey*.

after he was nominated to the Court.⁵³⁹ Now, many commentators criticize Justice Kennedy's support of the Rehnquist Court's federalism jurisprudence.⁵⁴⁰ The statement that wins the prize for "Least Accurate Prediction" is the one made shortly after Justice Scalia was confirmed that he was becoming a "stealth liberal."⁵⁴¹ Considering Justice Scalia's well-known views as a Professor, Circuit Judge, and Justice,⁵⁴² that prediction would surely surprise him.⁵⁴³

Even if one favors ideological scrutiny, Senate confirmation hearings will not help Senators determine how a nominee will vote on future cases.⁵⁴⁴ Given the current political climate, any remotely intelligent nominee facing a Senate controlled by the opposition party will profess a genuinely open mind concerning all issues, sing the praises of *stare decisis*, and claim that John Marshall is his or her favorite Supreme Court Justice. A particular irony exists. Not only does ideological scrutiny mischaracterize what federal judges have done, ideological scrutiny also fails to

⁵³⁹See Cynthia Gorney, *A Cautious Conservatism; Justice Kennedy Lives By the Rules*, WASH. POST, Dec. 14, 1987, at A1 ("Over the next 12 years, Kennedy wrote nearly 400 opinions and established among most of his colleagues a reputation as a cordial and thorough jurist who could be relied on to give serious attention to all sides in a case before him."). At the time of his nomination, Justice Kennedy had written opinions that "were marked by deference to the political branches unless their actions violate[d] principles directly inferable from the text or structure of the Constitution." McGinnis, *A Reply*, *supra* note 3, at 661 (footnote omitted); *id.* at 661 n.119 (collecting cases). Yet Justice Kennedy had ruled on controversial constitutional issues, such as "Gays in the Military." See *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980) (Kennedy, J.) ("We conclude, in these cases, that the importance of the government interests furthered . . . outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct.").

⁵⁴⁰See Balkin, *Law and Politics*, *supra* note 364, at 1456-57.

⁵⁴¹Al Kamen, *Scalia Making Conservatives Nervous; New Justice Sides with Liberals in Number of Early Decisions*, WASH. POST, Mar. 8, 1987, at A1 ("The picture emerging, though preliminary, is not a shift to the right, but, if anywhere, to the left.").

⁵⁴²See Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 1979 WASH. U. L.Q. 147, 152 [hereinafter Scalia, *The Disease as Cure*] (criticizing justifications for affirmative action); see also *United States v. Richardson*, 702 F.2d 1079, 1093 (D.C. Cir. 1983) (Scalia, J., dissenting) ("[D]enying not only a constitutional double jeopardy claim but even a statutory right to appeal insufficiency of the evidence at an earlier trial—does not threaten to produce an inequitable criminal justice system in the future any more than it has in the several hundred years past."), *rev'd*, *Richardson v. United States*, 468 U.S. 317 (1984); see also *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., joined by Rehnquist, C.J., White & Thomas, JJ., dissenting) ("Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.").

⁵⁴³This prediction would certainly surprise Justice Scalia's critics. See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 HAWAII L. REV. 385, 385 (2000) [hereinafter Chemerinsky, *A Critical Appraisal*] ("I argue below that [originalism] is an undesirable method of constitutional interpretation and one that Justice Scalia uses selectively when it leads to the conservative results he wants. . . .").

⁵⁴⁴See Simson, *Supreme Unfitness*, *supra* note 14, at 654.

predict what federal judges will do.⁵⁴⁵ No matter how many times Senators gaze into Aladdin's lamp to glimpse the future of a Circuit or Court, constitutional interpretation defies political predictions.⁵⁴⁶

3. The Myth of Judicial Omnipotence

Doctrinal shifts and modifications do not occur merely because of the confirmation of one Justice or Judge. With some exceptions, the Supreme Court changes or modifies precedent gradually.⁵⁴⁷ Sometimes the Justices reach broadly; sometimes they choose a more limited course. As a whole, however, complete doctrinal modifications are rare.⁵⁴⁸ For example, in 1976, the Court upheld the constitutionality of the federal death penalty statute;⁵⁴⁹ twenty-six years later, the Court carved out an exception for the mentally retarded.⁵⁵⁰

Any individual not familiar with the legal system who saw a Senate confirmation hearing would probably make the following conclusions: 1) Every case decided in the federal courts is as controversial and important as *Roe*;⁵⁵¹ 2) The addition of one judge or Justice will fundamentally change a Circuit or the Court;⁵⁵² 3) Circuit Court

⁵⁴⁵See Rotunda, *Role of Ideology*, *supra* note 315, at 138 (“Business school studies typically conclude that it is very difficult—if not impossible—to consistently time and beat the market over the long term. Similarly, it is extremely difficult—if not impossible—to predict with any consistency how Court nominees will turn out.”).

⁵⁴⁶See *supra* notes 535-43 and accompanying text.

⁵⁴⁷See Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 190-91 (1997) [hereinafter Kozinski, *Moot Court*] (“[M]uch of the Court’s work consists of fine-tuning its jurisprudence.”); see also *id.* at 190 n.33 (citing Supreme Court cases that represented a modest change in precedent). It is perhaps this popular misconception of the Supreme Court that leads to the misguided nature of many Moot Court competitions, *id.* at 192, and Senate Confirmation hearings. Cf. Editorial, *Well Qualified for the Bench*, WASH. POST, Sept. 20, 2002, at A28 (“[T]he fate of abortion rights will not be decided by the 10th Circuit. . . . Mr. McConnell says he would faithfully apply Supreme Court precedent protecting abortion, and in the absence of . . . evidence suggesting otherwise, he should be taken at his word.”).

⁵⁴⁸Kozinski, *Moot Court*, *supra* note 547, at 190. More common are gradual buildups toward a change in doctrine. An example of this is the Court’s Establishment Clause jurisprudence. See Fried, *supra* note 519, at 173-74 (discussing the Court’s cases over the past thirty years).

⁵⁴⁹*Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵⁵⁰*Atkins v. Virginia*, 536 U.S. 304, 346-47 (2002).

⁵⁵¹Cf. 148 CONG. REC. S11306 (2002) (statement of Sen. Leahy) (hoping that Judge McConnell “will not seek to undermine women’s reproductive rights derived from the Constitution and articulated in *Roe v. Wade*”); cf. Statement by Marcia D. Greenberger, in *Senate Committee Hearings on the Judicial Process*, *supra* note 207, at 483.

⁵⁵²Cf. Statement by Marcia D. Greenberger, in *Senate Committee Hearings on the Judicial Process*, *supra* note 230, at 483 (arguing that the Senate must subject President Bush’s judicial nominees to assertive ideological scrutiny because “the very ability of Congress to protect the American people is on the line” (emphasis added)).

judges have limitless power to decide cases.⁵⁵³ All of these conclusions are misleading and wrong. First, many Circuit cases involve factual situations that judges resolve by logically applying precedent.⁵⁵⁴ Second, even if a nominee is confirmed to a federal appellate court, that nominee must convince at least one other judge on a three-judge panel to join his or her proposed opinion. A Supreme Court Justice, however, can prevail only by convincing four other Justices to join his or her opinion.⁵⁵⁵ Third, Supreme Court precedent binds Circuit judges.⁵⁵⁶ A three-judge panel of a Circuit Court cannot overrule a prior Circuit decision.⁵⁵⁷ Only the full Circuit, sitting *en banc*, may escape or overrule Circuit precedent.⁵⁵⁸

⁵⁵³See 148 CONG. REC. S11512 (2002) (statement of Sen. Murray) (“These are lifetime appointments. Furthermore, because the U.S. Supreme Court hears only a few cases, the Circuit Courts of Appeals are often the courts of last resort for citizens seeking justice from the federal bench.”).

⁵⁵⁴See, e.g., Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335 (1998) [hereinafter Edwards, *Collegiality*] (“I will show that, even when one looks carefully at the so-called ‘empirical studies’ that purport to analyze the work of my Circuit, it is clear that, in most cases, judicial decision making is a principled enterprise that is greatly facilitated by collegiality among judges.”); Harry T. Edwards, *Public Misconceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 621 (1985) [hereinafter Edwards, *Public Misconceptions*] (disagreeing with the “growing perception that federal judges decide cases on political grounds”).

⁵⁵⁵One may fairly wonder how Judge Bork, had he been confirmed, would have convinced four other Justices of the United States Supreme Court to issue opinions re-instituting segregation, censoring artists and writers, invalidating the rights of women, and supporting lawless police raids at the stroke of midnight. Many opponents alleged that Judge Bork posed that very danger. See, e.g., 133 CONG. REC. S9188 (1987) (statement of Sen. Kennedy). Three explanations for this theory are possible. The first one is that Judge Bork’s powers of persuasion and reason are greater than those of Socrates. The second one is that nearly half of the Court’s Justices would be willing to mindlessly follow him on those revolutionary crusades. The third, and most likely, explanation is that Judge Bork’s detractors misrepresented his positions significantly.

⁵⁵⁶This is true even regarding the much-maligned Ninth Circuit. See *United States v. Orso*, 266 F.3d 1030, 1040 (9th Cir. 2001) (en banc) (Paez, J., concurring) (“With some reluctance, I also concur in the conclusion that, under [*Oregon v. Elstad*, 470 U.S. 298 (1985)], the district court need not suppress the confession Orso made after she was read, and then waived, her Miranda rights.”), *reh’g denied*, 275 F.3d 1190 (9th Cir. 2001), *cert. denied*, 123 S. Ct. 125 (2002). In defending the denial of full court en banc rehearing in *Orso*, Judge O’Scannlain stated:

Judge Trott’s impassioned dissent from our denial of full court en banc rehearing in this case makes clear that he disapproves of the methods that the police employed which produced Jody Orso’s Mirandized confession in this case. His views are perfectly reasonable. And who knows—if this court were free to rewrite Fifth Amendment law I might well agree with him. But we are not free to rewrite the law.

And that is where I part company with Judge Trott and his merry band of dissenters. *Orso*, 175 F.3d at 1190 (O’Scannlain, J., concurring in the denial of full court en banc rehearing) (footnote omitted).

⁵⁵⁷See FED. R. APP. P. 35.

⁵⁵⁸See *id.*

Senators propound the myth of judicial omnipotence without bothering to explain the limitations on the judicial role. One Senator and many interest groups once argued that the confirmation of Judge Bork would lead to back-alley abortions, legalized slavery, institutionalized racism, and police searches on demand.⁵⁵⁹ Similarly, when one of President Clinton's nominees was in Republican crosshairs, it was alleged that confirmation of some nominees would result in activist rulings in favor of criminals.⁵⁶⁰ Senators should recognize that one Justice, much less a Circuit Judge, does not a sea change in law make. This recognition would reduce much of the tension in the confirmation process.

IV. WHY IDEOLOGICAL SCRUTINY MUST CONTINUE—AND A REPLY

A. *The Senate is Better Suited than the President to Represent the People's Interests in the Confirmation Process*

Defenders of ideological scrutiny argue that the Senate is a diverse body that best represents America.⁵⁶¹ After all, “[t]he Senate, no less than the President, is elected by the people.”⁵⁶² The President, however, is elected based on the votes of all fifty states.⁵⁶³ Senators are elected based on local and regional issues—judicial nominations are rarely, if ever, an issue in Senate campaigns.⁵⁶⁴ Additionally, the Senate is composed of one hundred different individuals with one hundred different personalities, egos, and agendas.⁵⁶⁵ Thus, the Senate is at a disadvantage in the confirmation process. Once a President is sworn in, that President has the power to

⁵⁵⁹Upon learning that Judge Bork had been nominated for Justice Powell's seat on the Court, Senator Edward Kennedy had this to say:

Robert Bork's America is a land 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, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim or government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.

133 CONG. REC. S9188 (1987) (statement of Sen. Kennedy).

⁵⁶⁰See, e.g., Biskupic, *supra* note 387 (discussing the confirmation hearing of Judge Rosemary Barkett, a Clinton nominee accused of being “soft on crime” and “outside the mainstream on important issues”).

⁵⁶¹Lively, *supra* note 209, at 576.

⁵⁶²Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1493.

⁵⁶³See U.S. CONST. art. II, § 3, cl. 3; U.S. CONST. amend. XII.

⁵⁶⁴Fein, *supra* note 25, at 674-75.

⁵⁶⁵See McGinnis, *A Reply*, *supra* note 3, at 636. *But cf.* Richard D. Manoloff, *The Advice and Consent of Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1104-07 (1993) (advocating participation by the House of Representatives in the confirmation process to ensure additional public participation).

nominate.⁵⁶⁶ Implicit in the power to nominate is the discretion to choose which individuals to nominate.⁵⁶⁷

Proponents of ideological scrutiny argue that Senators should vote to reject a nominee if Senators feel that the nominee will be harmful to the Supreme Court.⁵⁶⁸ This proposal ignores the political basis for such a judgment.⁵⁶⁹ This proposal also elevates political preferences over either qualifications or character.⁵⁷⁰ Application of this standard to the confirmation process invites another wholesale public shaming like the Bork nomination.⁵⁷¹ In fairness to those commentators who have advocated such an approach, one must note that many of these proposals were put forth before the Bork confirmation hearing.

The claim that a Senator should reject a nominee because he or she feels that nominee will be bad for the Court allows Senators to continually deny that the President even possesses the power to nominate judges. This trend occurred after the Republicans took control of the House and Senate in 1994.⁵⁷² This trend also occurred while Senator Leahy controlled the Senate Judiciary Committee.⁵⁷³ Senators in the confirmation process, however, should place principles before politics.⁵⁷⁴ History proves this assertion.⁵⁷⁵

On the other hand, an entirely non-deferential role for the Senate in the confirmation process usurps the President's power to nominate.⁵⁷⁶ Many Senators have forgotten (or have chosen to forget) that a confirmation hearing should not serve as a means to second-guess of a nomination.⁵⁷⁷ The implementation of a rational standard for evaluating nominees would return the confirmation process to its constitutional foundations. Political discretion by Senators would prove to be the better part of valor.

⁵⁶⁶See McGinnis, *A Reply*, *supra* note 3, at 646-48.

⁵⁶⁷*See id.*

⁵⁶⁸Barksdale, *supra* note 247, at 1418; Black, *supra* note 447, at 663-64; Ross, *supra* note 216, at 682.

⁵⁶⁹See Carter, *Confirmation Mess*, *supra* note 16, at 1192-93.

⁵⁷⁰See Barksdale, *supra* note 247, at 1414 (“[D]eference at least requires evaluation on the basis of arguable ‘qualifications’ rather than mere political preferences.”).

⁵⁷¹See Ackerman, *Transformative Appointments*, *supra* note 72, at 1164.

⁵⁷²See *supra* Part II.B.3.

⁵⁷³See *supra* Part II.B.4.

⁵⁷⁴See THE FEDERALIST NO. 76, *supra* note 54, at 423 (Alexander Hamilton); See also THE FEDERALIST NO. 77, *supra* note 54, at 429 (Alexander Hamilton).

⁵⁷⁵Mathias, *supra* note 246, at 206.

⁵⁷⁶Barksdale, *supra* note 247, at 1402 n.14.

⁵⁷⁷Mathias, *supra* note 246, at 206.

B. Continued Ideological Scrutiny Will Lead to Ideological Balance in the Federal Judiciary

Defenders of ideological scrutiny also argue that evaluation of a nominee's ideology will eventually produce ideological balance in the federal judiciary.⁵⁷⁸ By forcing the President to nominate moderates, Senators will ensure that confirmed nominees represent the "mainstream" of American legal thought.⁵⁷⁹ This argument assumes that Senators can achieve and should pursue the goal of ideological balance. Neither assumption is correct.

First, Senators historically have not used their powers of "advise and consent" to seek any sort of balance.⁵⁸⁰ Moreover, the worst that the Senate can do is reject a nomination.⁵⁸¹ If the Senate rejects a nomination of an individual who has a well-defined constitutional philosophy, one may argue that this rejection will dissuade the President from making further "provocative" nominations.⁵⁸² As recent history demonstrates, Presidents are rarely dissuaded from nominating individuals sharing their constitutional philosophy because some of those nominees are rejected.⁵⁸³ Senate rejection of a President's nomination will make the President more obstinate, not more deferential.⁵⁸⁴ The President can nominate another individual with the same judicial philosophy.⁵⁸⁵

Generally, elections determine whether a Republican or a Democrat occupies the White House and gets to nominate judges.⁵⁸⁶ Balance is impossible to achieve because either a Democrat or a Republican will have the power to nominate for four years. If one political party controls both the White House and the Senate, then the President will likely nominate individuals whom he believes share his judicial philosophy.

⁵⁷⁸Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1510-14.

⁵⁷⁹Barksdale, *supra* note 247, at 1409 n.36.

⁵⁸⁰Professors Strauss and Sunstein argue for prospective ideological scrutiny to ensure diversity on the Court. See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1510-14.

⁵⁸¹Ross, *supra* note 216, at 647-48.

⁵⁸²*Cf.* Simson, *Mired in the Confirmation Mess*, *supra* note 248, at 1051-53.

⁵⁸³President Bush has continued to nominate "conservative" judges, and there are no indications that he will reverse course.

⁵⁸⁴It will also increase public scrutiny on the Senate. See THE FEDERALIST NO. 77, *supra* note 54, at 429 (Alexander Hamilton).

⁵⁸⁵See THE FEDERALIST NO. 76, *supra* note 54, at 425 (Alexander Hamilton) ("The Senate could not be tempted by the preference they might feel to another to reject the one proposed; because *they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination.*" (emphasis added)).

⁵⁸⁶*But see* Balkin & Levinson, *Constitutional Revolution*, *supra* note 228, at 1050 ("Simply put, a constitutional coup occurred [in 2000]. The Florida Republican Party and its operatives were central players in that coup. So too were the five conservatives on the nation's highest Court." (footnotes omitted)).

Second, it is also doubtful that Senators should seek ideological balance.⁵⁸⁷ Even apart from the observation that Republicans and Democrats want balance only when the opposing party controls the White House,⁵⁸⁸ the concept of a perfectly balanced, “reasonable person” judge is disconcerting.⁵⁸⁹ Instead of searching for “balanced” judges, Senate Democrats and Republicans should welcome a clash of ideological absolutes.⁵⁹⁰ The great legal debates in American history have occurred because of vast philosophical differences between Justices.⁵⁹¹ The collective judgment of the Court is best served when each Justice possesses strong, developed views on disputed legal issues.⁵⁹² A Court that decides cases based on “balance”—or frequently utilizes the “reasonable person test”—achieves nothing except doctrinal incoherence.⁵⁹³

C. Continued Ideological Scrutiny Will Depoliticize the Confirmation Process

Finally, proponents of ideological scrutiny claim that ideological scrutiny will rid the confirmation process of the “gotcha politics” of the past.⁵⁹⁴ Because Senators will now focus on ideology instead of character accusations, more honest evaluations of judicial nominees will occur.⁵⁹⁵ Regrettably, the current focus on a nominee’s judicial philosophy has substituted one form of “gotcha politics” for another.⁵⁹⁶ Instead of making false accusations about character—a criterion far more susceptible to fair measurement than ideology—Senators now make dubious claims about a nominee’s possible votes in future cases.⁵⁹⁷

⁵⁸⁷See Cutler, *Limits of Advice and Consent*, *supra* note 41, at 878.

⁵⁸⁸*Cf.* Friedman, *Tribal Myths*, *supra* note 53, at 1284-85 (“Two of the principal defects in Tribe’s argument are his misleading use of history and his failure to recognize the double-edged cut of his test.” (emphasis added)).

⁵⁸⁹*Cf.* Republican Party of Minn. v. White, 122 S. Ct. 2528, 2536 (2002) (“Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.”).

⁵⁹⁰See Cutler, *Limits of Advice and Consent*, *supra* note 41, at 878.

⁵⁹¹*Cf. id.* (“[I]f we were to go through a Bork hearing every time, is that we would end up with a ‘plain vanilla’ Court. . . . We would lose the Justices who formulate broader and more creative statements than the particular case requires—statements that project twenty years ahead . . .”).

⁵⁹²*Id.* (“We want the kind of variety and stimuli that different Justices can provoke in one another. What we should want in the Court is not balance in every single Justice, but balance in their collective collegial judgment.” (emphasis added)).

⁵⁹³See Scalia, *Rule of Law*, *supra* note 4, at 1180 (“But it is no more possible to demonstrate the inconsistency of two opinions based upon a ‘totality of the circumstances’ test than it is to demonstrate the inconsistency of two jury verdicts. Only by announcing rules do we hedge ourselves in.” (emphasis added)).

⁵⁹⁴See Schumer, *supra* note 18.

⁵⁹⁵See *id.*

⁵⁹⁶See *supra* Part III.D.1.

⁵⁹⁷Or they misread and misrepresent one of a nominee’s judicial opinions completely. See *supra* Part II.B.4.c (discussing Justice Owen’s dissenting opinion in *In re Doe 1*).

This development is hardly a positive one. Indeed, some of the charges leveled against recent nominees based on ideological scrutiny have been quite unpersuasive.⁵⁹⁸ One interest group argued that Professor (now Judge) Michael McConnell should recuse himself from any cases involving abortion.⁵⁹⁹ The reason: Professor McConnell's impartiality might be "reasonably called into question" because he has criticized *Roe*.⁶⁰⁰ The grounds for judicial recusal do not include—and have never included—possession of pronounced views on a legal issue.⁶⁰¹ Many federal judges would have to recuse themselves if they applied this new standard for recusal.⁶⁰²

On the other side of the aisle, Senator Phil Gramm placed a hold on a Clinton district court nominee because that nominee had been an anti-war protestor.⁶⁰³ By

⁵⁹⁸See *supra* notes 126, 331 and accompanying text (discussing the Estrada nomination).

⁵⁹⁹See Susanne Martinez, Letter to the Editor, *Appeals Court Nominee*, N.Y. TIMES, Sept. 20, 2002, at A26 ("Federal law requires that judges disqualify themselves from any proceeding in which their impartiality might reasonably be questioned. Given Mr. McConnell's track record on reproductive rights alone, no reasonable person could judge him to be impartial."). Ms. Martinez accurately cites the standard regarding recusal in 28 U.S.C. § 455(a) (1994) ("Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (brackets in original)).

⁶⁰⁰*Id.* Ms. Martinez is Vice-President for Public Policy of Planned Parenthood Federation of America. *Id.*

⁶⁰¹It is also an argument neither found in nor supported by 28 U.S.C. § 455(b), which delineates the circumstances that mandate recusal, such as when the judge or his spouse is related to a party to or lawyer in the relevant civil action. *See id.* § 455(b)(5). Notably, having previously expressed views on a particular constitutional topic is not listed as a basis for mandatory recusal. *See id.* § 455(b)(1)-(5).

⁶⁰²See *Laird v. Tatum*, 409 U.S. 824, 831 (1972) (memorandum of Rehnquist, J.) ("My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law *with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.*" (emphasis added)). Had Ms. Martinez's standard for recusal existed in 1900, Justices Black, Frankfurter, Jackson and Hughes would have recused themselves from various cases. *See id.* at 831-34 (memorandum of Rehnquist, J.). In short, such a standard for recusal contradicts both the law and two centuries worth of Supreme Court history. *See, e.g., id.* at 837 (memorandum of Rehnquist, J.) (noting that Justice Oliver Wendell Holmes sat in several cases appealed from the Massachusetts Supreme Judicial Court, where he previously served as Chief Justice). Given Judge McConnell's views on *Roe*, it is unsurprising that Ms. Martinez would want Judge McConnell to disqualify himself from any cases involving abortion. As then Justice Rehnquist put it:

I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Kristensen would have preferred not to argue before Mr. Justice Jackson; that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Mr. Chief Justice Hughes.

Id. at 834 (memorandum of Rehnquist, J.) (footnote omitted). Dissatisfaction with a Judge's or Justice's views does not mandate recusal. *See id.* (memorandum of Rehnquist, J.).

⁶⁰³See Shields, *supra* note 178.

that same logic, attendance at Woodstock mandates recusal in cases involving drug seizures. After all, the nominee might have consorted with individuals who smoked marijuana. One hopes that these examples are not what proponents of ideological scrutiny consider rarefied discussions of constitutional law.

Professors Strauss and Sunstein argued that, “[i]f the Senate insists on its ‘advice’ function, there will be a greater likelihood of bipartisan agreement before the nomination is made.”⁶⁰⁴ Both Professors believed that “there is good reason to think that the approach we suggest would result in a less politicized appointment process.”⁶⁰⁵ Those recommendations were made in 1992.⁶⁰⁶ Two years later, Senate Republicans began to follow the methods suggested by Professors Strauss and Sunstein.⁶⁰⁷ Few members of the legal academy defended the actions of Senate Republicans.

Once President Bush was sworn in, however, Professor Sunstein and other professors returned to the fray, urging close examination of—and even wholesale opposition toward—President Bush’s nominees.⁶⁰⁸ Implementation of the methods advocated by Professors Strauss and Sunstein has overly politicized the confirmation process.⁶⁰⁹ Considering that President Clinton nominated many moderates instead of “left-wingers,” he cannot be blamed for the political misdeeds that marred the confirmation process during his two terms.⁶¹⁰ In the end, ideological scrutiny has only led to regrettable results for both political parties.⁶¹¹

V. DISARMING THE CONFIRMATION PROCESS

A. Reforming Senate Judiciary Committee Hearings

1. Ideological Abstention

The first reform is the simplest one: Senators should refrain from asking the nominee his or her views on legal issues, and should refrain from asking the nominee

⁶⁰⁴Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1514.

⁶⁰⁵*Id.* at 1513.

⁶⁰⁶*Id.*

⁶⁰⁷See Kline, *supra* note 18, at 277-87 (noting that Senate Republicans subjected many of President Clinton's nominees to intensive ideological scrutiny).

⁶⁰⁸See, e.g., Ackerman, *Foil Bush's Maneuvers*, *supra* note 114.

⁶⁰⁹In fairness, Professors Strauss & Sunstein argued that the election of a Democratic President and Senate in 1992 meant that their arguments were basically rendered moot. See Strauss & Sunstein, *A Response*, *supra* note 6, at 669 n.4. Thus, in their opinion, the methods advocated to achieve ideological diversity were no longer necessary. *Id.*

⁶¹⁰See Kline, *supra* note 18, at 317; see also Neil Lewis, *In Selecting Federal Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES, Aug. 1, 1996, at A20 [hereinafter Lewis, *In Selecting Federal Judges*].

⁶¹¹See Editorial, *Injuring the Judiciary*, *supra* note 476 (discussing the Owen nomination); Editorial, *A Sad Judicial Mugging*, *supra* note 102 (discussing the Senate's rejection of Judge Ronnie White in 1999).

hypothetical questions of constitutional law.⁶¹² Senators should instead focus on three historically accepted criteria: character, temperament, and qualifications.⁶¹³ This approach begs the question of whether Senators will use one criterion as a pretext for disapproval of a nominee's ideology.⁶¹⁴ Regrettably, this has happened before.⁶¹⁵ Nevertheless, Senators who blatantly use one of the three previously mentioned criteria as a "fig leaf" for opposition to a nominee's ideology will be plainly exposed.⁶¹⁶ Moreover, these three criteria are far more objective than the criterion of judicial philosophy.⁶¹⁷ As before, witnesses may be called and written statements and testimonials may be submitted. With ideological scrutiny removed from the hearings, the hearings will improve greatly.

2. Moral Evaluation of Judicial Nominees

Professor Stephen Carter proposes a slightly different approach to the confirmation process.⁶¹⁸ In his article, *The Confirmation Mess*,⁶¹⁹ Professor Carter disagrees with the argument that Senators should quiz the nominee concerning hypothetical Supreme Court cases and ask the nominee about his or her judicial philosophy.⁶²⁰ Professor Carter instead argues that Senators should examine the nominee's moral capacity.⁶²¹ A nominee's "moral vision and the capacity for moral reflection are perhaps the most important aspects of the judicial personality."⁶²² Thus,

⁶¹²See Rotunda, *Role of Ideology*, *supra* note 315, at 131 ("The Senators *should* ask nominees if they have made any promises to the President or his aides, other than the faithful performance of their judicial duties." (emphasis added)).

⁶¹³Rees, *supra* note 252, at 919 n.23. Of course, it's worth stating that almost all Supreme Court nominees—and Justices—during this century have had outstanding qualifications. Ross, *supra* note 216, at 645 n.66. Some commentators will argue that merit really never has mattered. Miner, *supra* note 261, at 1078. Nevertheless, examination of a nominee's qualifications is a necessary, and historically accepted, task. Ross, *supra* note 216, at 645.

⁶¹⁴Tushnet, *supra* note 32, at 62.

⁶¹⁵*Id.* at 49-50, 56 n.22; *see also* Ross, *supra* note 216, at 648-50.

⁶¹⁶See Tushnet, *supra* note 32, at 70.

⁶¹⁷Wolfe, *supra* note 32, at 374.

⁶¹⁸See Carter, *Confirmation Mess*, *supra* note 16, at 1185 (disagreeing with traditional approaches to the confirmation process).

⁶¹⁹101 HARV. L. REV. 1185 (1988).

⁶²⁰*Id.* at 1195 ("The Senate may lack the institutional capacity to evaluate judicial philosophy in any non-trivial theoretical sense, but that should not limit the senators to assessing the so-called 'professional qualifications of the nominee.'"); *id.* at 1194 ("A nominee is not independent when she is quizzed, openly or not, on the degree of her reverence for particular precedents."). Professor Carter additionally argues that the Senate should reject a Presidential nomination when Senators know that the President has illegitimately taken a nominee's judicial philosophy into account, and when the Senators "cannot comfortably countenance what the President has done." *Id.* at 1197 n.19.

⁶²¹*Id.* at 1199.

⁶²²*Id.*

Senators should examine the nominee's actions and refusals to take action.⁶²³ The goal of the confirmation process is confirmation of "good, trusted, upstanding individual[s]."⁶²⁴

In many ways, Professor Carter's approach to the confirmation process focuses on the symbolic, religious aspects of the judicial role.⁶²⁵ The Bible contains numerous references to the challenging role that judges play.⁶²⁶ Judges must possess a strong moral sense and the temperament to evaluate the merits of competing arguments.⁶²⁷ Judges must be individuals of impeccable character, "whose personal moral decisions seem generally sound."⁶²⁸ Judges must seemingly exercise will and restraint simultaneously.⁶²⁹ Under Professor Carter's approach to the confirmation process, a nominee's judicial philosophy is far less important than a nominee's individual choices.⁶³⁰ Heightened scrutiny of a nominee's character is necessary.⁶³¹

Professor Carter's approach to the confirmation process focuses on character and temperament instead of ideology.⁶³² This proposal, as he admits, is perhaps "too idealized a notion of the relationship between the American people and the Supreme Court."⁶³³ By focusing on the actions of nominees, however, Senators can

⁶²³*Id.* ("[A] lifetime habit of associating by choice with those who prefer not to associate with people of the wrong color tells something vitally important about the character and instincts of a would-be constitutional interpreter. . . .").

⁶²⁴*Id.* at 1200.

⁶²⁵Carter, *Confirmation Mess*, *supra* note 16, at 1197-1201.

⁶²⁶*See, e.g., John 7:24* (New International Version) ("Stop judging by mere appearances, and make a right judgment.").

⁶²⁷*Deuteronomy 1:17* (New International Version) ("Do not show partiality in judging; hear both small and great alike. Do not be afraid of any man, for judgment belongs to God. Bring me any case too hard for you, and I will hear it."); *Proverbs 24:23* (New International Version) ("These also are sayings of the wise: To show partiality in judging is not good. . . .").

⁶²⁸Carter, *Confirmation Mess*, *supra* note 16, at 1199.

⁶²⁹*Deuteronomy 16:18* (New International Version) ("Appoint judges and officials for each of your tribes in every town the LORD your God is giving you, and *they shall judge the people fairly.*" (emphasis added); *Deuteronomy 19:18* (New International Version) ("The judges must make a thorough investigation. . . ."); *Deuteronomy 25:1* (New International Version) ("When men have a dispute, they are to take it to court and the judges will decide the case, acquitting the innocent and condemning the guilty.").

⁶³⁰Carter, *Confirmation Mess*, *supra* note 16, at 1199 ("[I]t is far less useful to know that a nominee has ruled that private clubs violate no constitutional provisions when they discriminate against nonwhites than to know whether the nominee herself has belonged to a club with such policies, and for how long.").

⁶³¹*Id.*

⁶³²*See id.* at 1198 (arguing that Senators should "try to get a sense of the whole person, an impression partaking not only of the nominee's public legal arguments, but of her entire moral universe"). *But see id.* at 1197 n.19 (averring that Senators should vote to reject a nomination when "they know full well that the President has (illegitimately) taken that very factor into account").

⁶³³*Id.* at 1201.

legitimately discern whether, by training and experience, that nominee possesses the character and temperament required to be a federal judge.⁶³⁴

An increased focus on character is entirely consistent with the original understanding of “Advice and Consent.”⁶³⁵ It is more useful to know that a nominee blocked access to an abortion clinic or harassed doctors who perform abortions, than to know how that nominee would have drafted *Griswold v. Connecticut*.⁶³⁶ As previously stated, Senators have entirely reasonable criteria on which to evaluate a nominee if Senators abandon ideological scrutiny.⁶³⁷

3. Senators Instead of Law Professors

Many commentators have advocated having law professors or lawyers—not Senators—question nominees.⁶³⁸ This proposal is unnecessary.⁶³⁹ With ideological scrutiny removed from confirmation hearings, Senators need not exercise previously hidden desires to emulate law professors.⁶⁴⁰ Even if Senators do continue to examine a nominee’s judicial philosophy, Senators have staffs of individuals who can conduct detailed research on various legal issues.⁶⁴¹ If alleged ethical violations or issues concerning a nominee’s qualifications arise, Senators on the Judiciary Committee are fully capable of investigating those allegations.⁶⁴²

B. Sending Each Nomination to the Senate Floor

Senators of both parties have averred that each judicial nomination should go to the Senate floor whether or not the Senate Judiciary Committee approves that nomination.⁶⁴³ As one former Senator notes, “*the full Senate* should have the

⁶³⁴ See *id.* at 1199.

⁶³⁵ Compare Carter, *Confirmation Mess*, *supra* note 16, at 1199 (“First, the nominee ought to be a person for whom moral choices occasion deep and sustained reflection. Second, the nominee ought, in the judgment of the Senate, to be an individual whose personal moral decisions seem generally sound.”), with THE FEDERALIST NO. 76, *supra* note 54, at 425 (Alexander Hamilton) (noting that Senate scrutiny of a President’s nominees “would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters” (emphasis added)).

⁶³⁶ 381 U.S. 479 (1965); Cf. Carter, *Confirmation Mess*, *supra* note 15, at 1199 (“[W]hat matters most is not what sort of legal philosophers sit on the Court, but what sort of moral philosophers sit there.”).

⁶³⁷ See *supra* notes 612-17 and accompanying text.

⁶³⁸ See Carter, *Confirmation Mess*, *supra* note 16, at 1195; Fein, *supra* note 25, at 673; Simson, *Supreme Unfitness*, *supra* note 14, at 657; Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1519; see also Carter, *Bork Redux*, *supra* note 71, at 774.

⁶³⁹ See McGinnis, *A Reply*, *supra* note 3, at 637 (stating that such a proposal, if adopted, would “further distance Senators from their essential constitutional responsibilities”).

⁶⁴⁰ See *id.* at 653.

⁶⁴¹ See *id.* at 637 & nn.17-18.

⁶⁴² See *id.*

⁶⁴³ Compare 148 CONG. REC. S7856 (2002) (statement of Sen. Nickels) (“But to hold up these individuals who have argued 30, and 15, and 9, and 10 cases before the Supreme Court

opportunity to consider each nomination on a complete record.”⁶⁴⁴ In practice, this principle has been sporadically applied. Some nominations have been defeated based on party-line votes in the Senate Judiciary Committee; other nominations went to the Senate floor despite negative recommendations from the Senate Judiciary Committee.⁶⁴⁵ If a nominee’s judicial philosophy is as harmful as some Senators suggest, then the full Senate will recognize the nominee’s faults and vote to reject that nomination.⁶⁴⁶ Sending every nomination to the Senate floor is necessary and proper.

C. Presidential Consultation with the Senate

Political prudence arguably mandates Presidential consultation with the Senate before announcing a Supreme Court or Circuit Court nomination.⁶⁴⁷ This consultation may well reduce Senate opposition to a President’s nominee.⁶⁴⁸ A President who faces a Senate controlled by the opposition party would do well to either seek advice before the nomination, or inform Senators of whom he will nominate in advance.⁶⁴⁹ If a President listens to the advice of Senators before nominating an individual, then Senators will be more likely to listen to the President’s reasons for nominating a particular individual. Even if Senators disagree with the President’s choice, Senators might give the President credit for courtesy if nothing else.

and we do not even give them a hearing in committee, that is not fair. That is an injustice. That is an abuse of power.”), with 145 CONG. REC. S11867 (1999) (statement of Sen. Leahy) (“Let us vote up or down. If Members do not want either one of them, vote against them; if Members want them, vote for them. But allow them to come to a vote. Do not hide behind anonymous holds.”).

⁶⁴⁴Mathias, *supra* note 246, at 206.

⁶⁴⁵Judge Pickering and Justice Owen, however, were defeated on party-line votes in the Senate Judiciary Committee. See *supra* Part II.B (discussing both nominations).

⁶⁴⁶On the other hand, one can argue that Senate Democrats voted to reject Justice Owen in committee because the full Senate would have voted to confirm her. See Lewis, *Democrats Reject Bush Pick*, *supra* note 155 (“Republicans distributed a statement by Senator Zell Miller, a conservative Georgia Democrat, who said that if the nomination came to the floor he would [have] vote[d] to confirm Justice Owen. . .”).

⁶⁴⁷See Glenn Harlan Reynolds, *Takings Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577, 1579 (1992) (“What we have to do is find a way to involve the Senate, in an advisory way, in the selection of judicial nominees without destroying the President’s role in the process.”); Carl Tobias, *Rethinking Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1285 [hereinafter Tobias, *Rethinking*] (“Consultation honors the Constitution’s phrasing, which states that the President appoints with the advice and consent of the Senate.”).

⁶⁴⁸See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1518.

⁶⁴⁹Reynolds, *supra* note 647, at 1579 (“[T]he President should be held under no constitutional duty to follow that advise—though there is perhaps a duty to listen to the advice before nominating anyone.”).

In the current political climate, consultation is rare; neither political party is willing to yield an inch.⁶⁵⁰ Yet strategically placed leaks and “trial balloons” regarding potential nominees might well clear the air.⁶⁵¹ The President can gauge the level of opposition to potential nominees without having those nominees endure a confirmation hearing.⁶⁵² A President could claim that he will nominate a controversial individual, but instead nominate a more moderate individual. Expecting to confront the more controversial nominee, Senators would likely realize that the latter nominee is the best they would ever expect. Political courtesy would help reduce the tension in the confirmation process. To be sure, Senators might still reassert their own prerogatives.⁶⁵³ They might additionally refuse to return their “blue slips” to the Senate Judiciary Committee.⁶⁵⁴ No amount of reform, however, will prevent Senators from exercising discretion.

VI. CONCLUSION

Both Republicans and Democrats have lost the right to “start bleating about who is righteous about judges.”⁶⁵⁵ Ideological scrutiny has hurt both political parties. Ideological abstention, however, will best serve the interests of the American legal system. The Senate’s refusal to impose litmus tests or ideological scrutiny can only benefit constitutional interpretation.

The benefits of ideological abstention are simplicity and lack of cost. All Senators have to do is not ask nominees about their judicial philosophies.⁶⁵⁶ Senators will also ensure a healthy relationship between law and politics and prevent the spillage of further blood on the Senate floor.⁶⁵⁷ These reforms would take about one

⁶⁵⁰*Cf.* Gerhardt, *Selection as War*, *supra* note 40, at 393 (noting that Senate Democrats have warned that there could be a “war” if President Bush has the opportunity to fill a Supreme Court vacancy).

⁶⁵¹Even with the Senate now under Republican control, the Bush Administration continues to “float” the names of possible Circuit Court nominees. Neil A. Lewis, *The Nation: Here Come the Judges; First the Senate, Now the Courts of Appeals*, N.Y. TIMES, Dec. 1, 2002, § 4, at 3 [hereinafter Lewis, *First the Senate*] (“The White House has also thought about nominating another conservative Washington lawyer, Peter D. Keisler, a Maryland resident who is a former president of the Federalist Society. . . .”); *id.* (“The White House may also revive the notion of nominating Brett Kavanaugh, a White House lawyer.”).

⁶⁵²*See* McGinnis, *A Reply*, *supra* note 3, at 648 (noting that the President may consult Senators in determining the political ramifications of a nomination).

⁶⁵³*See* Gerhardt, *Comprehensive Understanding*, *supra* note 42, at 529-30.

⁶⁵⁴This paper doesn’t address “blue slips.” For a thorough examination of “blue slips,” see Brandon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Confirmation Process*, 10 WM. & MARY BILL OF RTS J. 75, 101 (2001). Senator Hatch recently stated that “blue slips” will carry little weight in the confirmation process. *See* Lewis, *First the Senate*.

⁶⁵⁵Kline, *supra* note 18, at 326 n.255 (citation omitted).

⁶⁵⁶This course of action will preserve judicial independence. *See* Carter, *Confirmation Mess*, *supra* note 16, at 1194 (“A nominee is not independent when she is quizzed, openly or not, on the degree of reverence for particular precedents.”).

⁶⁵⁷*But cf.* Simson, *Supreme Unfitness*, *supra* note 14, at 663 & n.162.

afternoon to implement. At a confirmation hearing, Senators can instead evaluate nominees on the traditional criteria: character, temperament, and qualifications.⁶⁵⁸

Unlike other proposals to reform the confirmation process, such as continued ideological scrutiny,⁶⁵⁹ lawsuits brought by defeated nominees,⁶⁶⁰ or a declaratory injunction,⁶⁶¹ ridding the confirmation process of ideological scrutiny and returning the confirmation process to its original understanding would be very simple and painless. Perhaps the reforms advocated here exhibit the same kind of idealism regarding the Senate that Professor Carter has regarding the relationship between the American people and the Supreme Court.⁶⁶² It is unclear whether Senators will prefer long-term stability to short-term partisan warfare.⁶⁶³ This question, as judges are wont to say, is an open one.⁶⁶⁴

⁶⁵⁸See *supra* Part V.A.1.

⁶⁵⁹See Strauss & Sunstein, *Confirmation Process*, *supra* note 8, at 1514-16.

⁶⁶⁰See Tushnet, *supra* note 32, at 78 n.98 (“For example, one can imagine a lawsuit by the disappointed nominee for wrongfully withheld salary (at least if the jurisdictional statutes covered such a claim).”); *cf.* Fein, *supra* note 25, at 678 (“A President cannot obtain an injunction from a court requiring an affirmative confirmation vote.”).

⁶⁶¹Renzin, *supra* note 313, at 1748-49 (discussing possible judicial remedies to solve the vacancy crisis in existence during President Clinton’s second term).

⁶⁶²*Cf.* Carter, *Confirmation Mess*, *supra* note 16, at 1201 (“That perhaps is too idealized a notion of the relationship between the American people and the Supreme Court. Perhaps results really are all that matter.”). There are many reasons why ideological scrutiny should end. There are far fewer reasons, however, why Senators will abstain from ideological scrutiny.

⁶⁶³Considering the rapid deterioration of reason and civility in the confirmation process, this possibility is not entirely likely. *Cf.* Entin, *supra* note 395, at 432 (“Too often the participants have seemed more interested in winning a short-term political battle than in facilitating deliberative politics or effective government. Unfortunately, the same can be said about many other aspects of contemporary political discourse.” (footnote omitted)).

⁶⁶⁴*Cf.* *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 385 n.16, (2002) (“[W]e need not decide today whether § 1133(2) carries the same preemptive force of § 1132(a) such that it overrides even the express saving clause for insurance regulation, because we see no conflict.”); *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 490 (2001) (“As an initial matter, we note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute.”).