

Restoring the Balance of Power: The Struggle for Control of the Supreme Court

By TERRI JENNINGS PERETTI*

I. Introduction

Recent years have been exciting for scholars studying the Supreme Court and the judicial selection process. In 1987, the Senate decisively rejected President Reagan's nomination of Robert Bork after a particularly intense and divisive confirmation battle. Douglas Ginsburg, Bork's replacement, withdrew his nomination after revelations of marijuana use. Anthony Kennedy and David Souter then sailed through the confirmation process despite (and probably because of) a near total absence of knowledge regarding their political and judicial philosophies. The nomination and near rejection of Clarence Thomas defies such simplistic characterization, though perhaps "bizarre" says it best.

These events are rich in intellectual opportunities for students of the judicial selection process. They may, for example, be used as vehicles for examining the criteria which the Senate may properly use in appraising a Supreme Court nominee,¹ evaluating presidential strategy in selecting a nominee and securing confirmation,² or analyzing the degree to which

* Assistant Professor of Political Science, Santa Clara University. Ph.D., University of California, Berkeley, 1990; M.A., University of California, Berkeley, 1981; B.G.S., University of Kansas, 1979. For his helpful comments on an earlier draft of this Article, the author wishes to thank Robert Kagan of the University of California, Berkeley.

1. See, e.g., Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989); Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS (1990); Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMMENTARY 283 (1990); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992); Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988); "What's the Alternative?": *A Roundtable on the Confirmation Process*, 78 A.B.A. J. 41 (Jan. 1992).

2. See JOHN MASSARO, SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS (1990); Charles Cameron, et al., *Supreme Court Nominations and the Rational Presidency*, Paper presented at the American Political Science Association meeting, Sept. 1, 1990 (on file with the author).

the selection process is undergoing significant change.³

The purpose of this particular effort is to reassess the selection process as a satisfactory vehicle of constitutional change, regarding the proper balance of power between the President and Congress. As an empirical matter, constitutional change has occurred more frequently through appointments to the Court than through the amendment process.⁴ Recently, we have seen a marked effort by several presidents to transform constitutional law doctrines through a succession of conservative appointments. Thus, the adequacy of the judicial selection process as a mechanism for debating and approving constitutional change is an especially critical and timely issue.

The starting point for this analysis is a 1988 *Harvard Law Review* article by Professor Bruce Ackerman regarding the failed Bork nomination.⁵ Ackerman argued that there are significant risks involved in relying on "transformative appointments" to the Supreme Court as the primary way to effect constitutional change. As a result, he called for reform of the constitutional amendment process. While Professor Ackerman accurately assessed the potential risks of transformative appointments, his reform proposal was misdirected, ineffective, and impractical.

The primary danger of transformative appointments is that presidents may succeed in enacting significant change in constitutional law through their appointments to the Supreme Court without the broad and deep political support which should be required for such change in a democracy. Reform efforts, then, should focus not on the constitutional amendment process, but rather on strengthening the political checks on presidential power to control the Court's composition and ideological make-up. Before examining how this might be accomplished, it will be useful to examine Ackerman's alternate approach to the problem.

II. The Virtues and Vices of Transformative Appointments

In Professor Ackerman's view, the defeat, indeed humiliation, of Judge Bork at the hands of the Senate was "tragic."⁶ Robert Bork surpassed most Supreme Court nominees in terms of his intellect, professional accomplishments, as well as his serious and extended examination

3. See Mark Silverstein & William Haltom, Can There Be a Theory of Supreme Court Confirmations?, Paper presented at the Western Political Science Association meeting, Mar. 21-23, 1991, at 6-14 (on file with author).

4. The Court reversed prior rulings only 32 times in the nineteenth century, compared to 174 times in the twentieth century. Furthermore, of those 174 doctrinal reversals, 157 have occurred since 1937. See DAVID M. O'BRIEN, SUPREME COURT WATCH - 1992, 11 (1992).

5. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

6. *Id.* at 1164-65.

of fundamental constitutional law issues. Ackerman argued that, like a tragic hero, it was precisely Bork's virtues that proved his undoing.⁷

Bork not only possessed a "transformative vision,"⁸ a desire for significant if not wholesale doctrinal change, but also the legal ability and intellectual dynamism to implement it. He therefore served as an unusually "compelling symbol of the Reagan effort to catalyze a judicial transformation of Rooseveltian magnitude,"⁹ and uniquely presented the Senate with the question of whether "President Reagan, like President Roosevelt, [should] be granted the constitutional authority to make transformative appointments."¹⁰

The Senate's rejection of the Bork nomination can thus be seen as a rejection of both Bork's constitutional philosophy and Reagan's authority, particularly as a lame-duck president, to achieve further constitutional change through his appointments. The general question, however, remains: Under what conditions *should* a president be given the authority to "rewrite" the Constitution through appointments to the Court?

The Framers' answer to that question was that the president does not and should not have any such authority. In fact, they gave the president no role at all in the constitutional amendment process. Under Article V, only the Congress and state legislatures may alter the Constitution.¹¹ Additionally, two-thirds of each House of Congress must approve a proposed amendment, and three-fourths of the states must ratify it. Formal constitutional change thus requires the consent of nearly all state and national representatives. Consistent with many other features of the Constitution, a small minority may veto the desires of even a substantial majority.

In contrast, constitutional change through transformative appointments requires only the approval of the president and a bare majority of Senators. State legislatures and the House of Representatives are excluded from the process. Additionally, approval of such appointments, and the constitutional change they represent, does not require the broad and enduring political support of the "super-majority" that Article V mandates.

7. *Id.*

8. *Id.* at 1168.

9. *Id.* at 1167.

10. *Id.* at 1169. For a discussion of Roosevelt's court packing plan, see *infra* note 53.

11. Under Article V, amendments may also be proposed by a national convention upon the petition of two-thirds of the states and ratified by special state ratification conventions. All existing amendments, however, have been proposed by Congress, and all but one have been ratified by state legislatures. (The Twenty-first Amendment, which repealed Prohibition, was ratified by state conventions.)

According to Ackerman's assessment, the transformative appointment method of constitutional change is preferable to Article V in one significant way—it is more appropriate to twentieth century American politics.¹² We have become, since the Civil War, more a nation than a collection of states. And, more than the Framers anticipated or desired, presidential elections have taken on considerable significance as “a principal way in which we democratically decide our fate as a People”¹³ Thus, constitutional change led by the president and debated at the national level through transformative appointments better reflects “the present American understanding” than Article V's “federalistic, assembly-led” approach.¹⁴

This single virtue, however, is outweighed, according to Ackerman, by three defects of transformative appointments as a method of democratic political change. Debate over constitutional change that occurs in the context of evaluating a particular nominee is “almost inevitably poorly focused,” too often centering on “the personal style, charisma, [and] frailties of the individual.”¹⁵ This is certainly true when compared to a national debate over the desirability of an explicitly worded constitutional amendment. Transformative appointments may also give too weighty a role to a president whose claim to a broad popular mandate may be weak or faulty.¹⁶ Presidential support of constitutional change alone is “too institutionally flimsy to give credible evidence of the existence of the deep and broad popular support classically required for a sharp break with the constitutional past.”¹⁷ Finally, the transformative appointment method is elitist. It does not require our national representatives to take their constitutional reform agenda to the people for their consideration and approval.

To solve the three problems of “legal focus[,] institutional weight [and] popular responsiveness,”¹⁸ Ackerman proposed reforming the constitutional amendment process. He suggested that

[d]uring his or her second term in office, a President may propose constitutional amendments to the Congress of the United States; if two-thirds of both Houses approve a proposal, it shall be listed on the ballot at the next two succeeding presidential elections in each of the several states; if three-fifths of the voters participating in each of these elections should approve a proposed amendment, it

12. Ackerman, *supra* note 5, at 1180.

13. *Id.*

14. *Id.*

15. *Id.* at 1180-81.

16. *Id.* at 1181.

17. *Id.* at 1182.

18. *Id.*

shall be ratified in the name of the People of the United States.¹⁹

As Ackerman himself noted, his proposal is not without problems. The first and most obvious is that his reform proposal itself would require passing a constitutional amendment through the existing and exceptionally cumbersome Article V process.

Even assuming that the Article V hurdle could be surmounted, it is not clear that Ackerman's proposal would be effective. It may indeed be true that transformative appointments are a risky way to enact constitutional change in a democracy. But his proposal, like Article V, may be too much of a good thing. Ackerman would require that only a second-term president may propose such an amendment, that two-thirds of each House must approve it, and that sixty percent of the voters must ratify the amendment in two successive presidential elections. Such significant hurdles are certain to insure that no such amendments are proposed or passed and that presidents will continue to be tempted to choose the path of least resistance—transformative appointments.²⁰

Ackerman's reform proposal is unlikely to be passed or to produce the desired results. It provides no disincentive for presidents to seek constitutional change through their appointments, either explicitly, as with Bork, or surreptitiously, as with Souter. Nor does it alter the confirmation process to insure a more sharply focused national debate or a broadening of the popular and institutional support required for approval of transformative appointments. Ackerman's proposal simply does not effectively address the problem. In part, this is a product of his failure to assess more precisely the seriousness of the problem and to identify its source.

A. The Dangers of Transformative Appointments: Real or Imagined?

Ackerman identified *potential* dangers of allowing presidents to revise constitutional law through their appointments without the clearly focused national debate and broad political support desirable for such

19. *Id.* Ackerman presented the same argument in his book *WE THE PEOPLE: FOUNDATIONS* 52-55 (1991).

20. Ackerman responded that "Presidents would be quite reluctant to provoke the principled opposition likely to arise under the changed constitutional structure." Ackerman, *supra* note 5, at 1182-83. This naively underestimates the willingness of presidents to try nonetheless. Ackerman also erroneously assumed that presidents and their supporters would be willing to defend nominees as either lacking transformative intentions or as possessing only legitimate intentions of returning to a true and faithful reading of the Constitution; in either case presidents could claim that a formal constitutional amendment was not required. Finally, Ackerman overestimated the ability of opponents to overcome the general inertia of the political system, especially in Congress, and to mount an effective campaign against the president.

revisions in a democracy. He failed to demonstrate, however, that those dangers are real rather than potential and ongoing rather than episodic.

Ackerman in fact seemed rather ambivalent regarding the seriousness of the dangers of transformative appointments. For example, he noted at the article's end, that we need not be so cynical as to assume that *all* presidents will be "hell-bent on transformation" or that all nominees will engage in "corrupt bargains" with their presidential benefactors.²¹ He further argued that, in any case, most Justices have properly recognized their duty to apply the Constitution "on the basis of their conscientious interpretation of two centuries of constitutional development, and not merely [to] serve as well-paid servants of the President who put them into office."²² If the corrupt and partisan appointee is so rare, however, why is such significant reform of the amending process necessary to protect us from the dangers of transformative appointments?

Ackerman implicitly (and belatedly) acknowledged that there are limits on a president's ability to achieve constitutional change. The president must first be given the opportunity to appoint several Justices, a matter of both luck and reelection.²³ Replacing a majority on the Court may also require that successive presidents share the same constitutional reform agenda. Those presidents must also receive the support of a majority of the Senate, whose composition and party control is subject to at least some change.

Moreover, appointees must live up to presidential expectations, faithfully and consistently implementing the president's constitutional reform agenda. This is by no means a certainty.²⁴ New appointees must

21. *Id.* at 1183.

22. *Id.*

23. As Jimmy Carter's presidency demonstrated, some presidents are unusually unlucky. In addition to losing his reelection bid in rather spectacular fashion, Carter was the only president to serve a full term without a single vacancy occurring on the Court. (He did, however, appoint more than 250 federal judges to the lower courts.) Franklin Roosevelt's success in obtaining a Court more sympathetic to his New Deal policies was a function of winning four successive elections. Roosevelt did not have the opportunity to appoint a single member to the Court until his second term, and his last four appointments (out of a total of nine) did not occur until his third term. On the average, a vacancy on the Court occurs every 1.82 years, giving a single-term president 2.2 appointments and a two-term president 4.4 appointments. John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different Than Legislatures*, 77 VA. L. REV. 833, 877 (1991).

24. While not certain, it is likely. Contrary to what Laurence Tribe called "the myth of the surprised president," most appointees do in fact live up to presidential expectations. My own analysis shows that approximately 20% of all Supreme Court nominees have disappointed the President who appointed them. Many of these, however, should more properly be labelled presidential mistakes. Only a very small number of appointees executed what could be termed a judicial metamorphosis. See TERRI PERETTI, IN DEFENSE OF A POLITICAL COURT (forth-

also secure majority support within the Court for the desired changes—including both the general constitutional principles and their specific doctrinal formulations—and may have to persuade other Justices to abandon longstanding precedent.²⁵

Even a new Court majority fully and firmly united in its commitment to the president's constitutional reform agenda is not sufficient to guarantee success. The Court cannot simply announce a new set of constitutional principles and dictate, by its words alone, the new social, economic or political reality it desires. As judicial impact research consistently reveals, compliance with the Court's decisions is neither automatic nor uniform. Successful implementation of new constitutional doctrines requires the willingness of parties to obey the Court's decisions, faithful application of new doctrine by lower court judges (state and federal), as well as budgetary and enforcement support by the other branches, perhaps at all levels of government.²⁶ This is no mean task.

This certainly does not imply that presidents have *no* power to alter the Constitution through their appointments. Despite the litany of "ifs" listed above, the fact remains that many presidents have indeed reshaped

coming 1993). See also LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT* 50 (1985) ("For the most part, and especially in areas of particular and known concern to a President, Justices have been loyal to the ideals and perspectives of the men who have nominated them."); DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* 107-10 (1976) (fewer than one-fourth of the nominees generally voted contrary to the views of their appointing president); ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 147 (1971) ("about one [J]justice in four whose performance could be evaluated did not conform to the expectations of his appointer in important matters that came before the Supreme Court"); John B. Gates & Jeffrey E. Cohen, *Presidents, Supreme Court Justices, and Racial Equality Cases: 1954-1984*, 10 *POL. BEHAV.* 22, 33 (1988) (finding even greater presidential success; "Presidential appointment appears to guarantee long-term representation of the unique policy perspectives of presidents"); Edward V. Heck & Steven A. Shull, *Policy Preferences of Justices and Presidents: The Case of Civil Rights*, 4 *L. & POL'Y Q.* 327, 333-35 (1982) ("recent presidents have been only moderately successful in appointing [J]ustices who would later take positions consistent with the appointing president's public statements on civil rights . . . 9 of the 14 [J]ustices (64%) voted as expected." However, presidential "success," ranging from 50% to 92%, depended largely on a president's *attentiveness* to civil rights, thus echoing Tribe's conclusion.).

25. For the classic analysis of the challenges facing the policy-motivated Justice, see WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

26. *THE IMPACT OF SUPREME COURT DECISIONS* (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973); CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (1984); WILLIAM K. MUIR, JR., *PRAYER IN THE PUBLIC SCHOOLS* (1968); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* (1970); Bradley C. Canon, *Courts and Policy: Compliance, Implementation, and Impact*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 435 (John B. Gates & Charles A. Johnson eds., 1991).

the Court's doctrinal framework, and virtually all have tried.²⁷ Furthermore, Presidents Reagan and Bush have enjoyed considerable success in steering the Court (indeed the entire federal judiciary) in a conservative direction.²⁸

The problem with Ackerman's indictment is its reliance on an exaggerated and overly generalized view of a president's power to alter the Constitution single-handedly. Most importantly, Ackerman failed to note that the danger of the president's success in enacting constitutional change through appointments without popular support is far greater in the twentieth century than it was in the nineteenth. Furthermore, it is far greater today than ten years ago. Rather than making the generalized claim that transformative appointments are dangerous, it might be more appropriate to argue that a balance of power between the president and Congress in controlling the Court's composition and ideological make-up is desirable but increasingly less likely. Examining that shift and identifying its sources will lead to reform solutions which are more effective than amending Article V.

III. The Growth of Presidential Power in Control of the Court

Three pieces of evidence demonstrate that the balance of power in influencing the Supreme Court has shifted decidedly in the president's favor. First, the rate of Senate rejections of presidential nominees to the Court declined dramatically in the twentieth century. In a related trend, Congress reduced its use of constitutionally provided Court-curbing and Court-influencing tools. Senate acquiescence in the Reagan-Bush con-

27. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (3d ed. 1992).

28. For a journalistic account, see DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992). Savage surveyed the Court's decisions from Rehnquist's ascension to the Chief Justiceship in 1986 through Souter's participation in his first term ending 1991. He concluded that the new winners in the Rehnquist Court include government officials and prosecutors. The new losers are individuals and their constitutional rights, except those asserting free speech and free press rights and white males challenging affirmative action programs. Savage characterized the Rehnquist Court as a "pro-government conservative Court," which upholds government authority in virtually all areas, from abortion to economic regulation to treatment of prisoners and the criminally accused. It is not, he argued, a "Chamber of Commerce Conservative Court," willing to challenge the government's power to regulate private economic activity. *Id.* at 455-56. See also Sheldon Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 *JUDICATURE* 313 (1985); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 *JUDICATURE* 48 (1986); Walter F. Murphy, *The Legacy of Reagan's Judicial Strategy*, in *THE REAGAN IMPRINT* (Larry Berman ed., 1989); C. K. Rowland, et al., *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 *L. SOC'Y REV.* 191 (1988).

servative transformation of the Court, despite its opposition to that development, demonstrates the excessive presidential power in controlling of the Court.

A. The "Spineless Senate"

In his 1985 book advocating more rigorous, ideology-based review of Supreme Court nominees by the Senate, Laurence Tribe addressed the "myth of the spineless Senate."²⁹ He refuted the empirical view of the Senate as a rubber-stamp for presidential nominations by noting that nearly one in five Supreme Court nominations have failed to win confirmation.³⁰ Tribe's brief historical review of Senate rejections led him to conclude 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."³¹

Tribe's account and conclusion are misleading. Including the Senate's refusal to vote on the Fortas promotion to Chief Justice, only five Supreme Court nominations have failed to win Senate confirmation in the twentieth century.³² This includes a seventy-five year span, from 1894 to 1968, in which only one nomination was rejected. Additionally, only six of the twenty-six Supreme Court nominations since the end of World War II produced more than twenty-five negative votes.³³ The one in five rejection ratio cited by Tribe is distorted by the nearly one in three rejection record set by the Senate in the nineteenth century.³⁴ In contrast, only one in ten nominations have failed to receive confirmation in the twentieth century.³⁵ Put another way, presidents in the twentieth

29. TRIBE, *supra* note 24, at 77-92.

30. *Id.* at 78.

31. *Id.* at 92.

32. The Senate rejected President Hoover's nomination of John Parker in 1930, Nixon's nominations of Clement Haynsworth in 1969 and G. Harrold Carswell in 1970, and Reagan's nomination of Robert Bork in 1987. President Johnson's nomination of Justice Abe Fortas to fill the Chief Justice seat was withdrawn in 1968 after the Senate failed to defeat a motion to end floor debate and bring the nomination to a vote.

33. Silverstein & Haltom, *supra* note 3, at 5. Clarence Thomas' confirmation vote increases their stated "5 of 25 nominations" to 6 of 26.

34. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 39 (2d ed. 1985). *See also* Simson, *supra* note 1, at 324; Strauss & Sunstein, *supra* note 1, at 1501 (noting that "roughly one in four" nominees were rejected). Of the 65 nominations submitted to the Senate in the nineteenth century, 29.2% (or 1 for every 3.44 nominations) failed to win confirmation. (Calculations based on ABRAHAM, *supra* note 34, and TRIBE, *supra* note 24, at 142-151.)

35. Simson, *supra* note 1, at 323. This figure does not include the nomination of Homer Thornberry by President Lyndon Johnson. The Senate did not act on the nomination because Abe Fortas's withdrawal from consideration for Chief Justice rendered the issue moot.

century have enjoyed a ninety percent success rate in their nominal battle with the Senate over control of the Court's membership. Thus, ample empirical evidence supports the assertion of Professor Sulfridge that since 1894 there has existed "a Senate presumption in favor of confirmation."³⁶

According to Richard Friedman, the primary cause of this dramatic change in the Senate's response to Supreme Court nominations was the elevation in the Court's status and apolitical reputation. In the first half of the nineteenth century, and especially during Reconstruction, "the Supreme Court was at a low point in prestige and was regarded much like a political institution, the membership of which, senators believed, should be geographically dispersed and politically reliable."³⁷ As a result, Senate opposition to nominations based on partisan and patronage grounds was "politically reputable."³⁸

By the end of the nineteenth century, however, momentous changes had occurred. Sectional and partisan rivalries had dissipated, and the workload and reputation of judges in general, and the Supreme Court in particular, had vastly improved. As a result, "political interference in the selection process was generally scorned," and "[c]onfirmation of qualified [J]ustices was perceived as a welcome expression of nationalism and nonpartisanship."³⁹

The twentieth century norm of judicial independence has worked to the distinct advantage of the president, due to the Executive's dominant role as the initiator of the appointment process. Court-packing attempts by presidents are easy to mask. They need only employ the proper terminology, paying tribute to normative expectations regarding the judicial role. Thus, the nominee is inevitably intelligent and open-minded, would interpret the Constitution rather than legislate from the bench, and possesses the requisite integrity and judicial temperament.⁴⁰

Of course, the Senate's refusal to confirm five nominees in the twentieth century demonstrates that the president does not have complete

36. Wayne Sulfridge, *Ideology as a Factor in Senate Consideration of Supreme Court Nominations*, 42 J. POL. 560, 562-63 (1980).

37. Richard D. Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 4 (1983).

38. *Id.*

39. *Id.* at 5.

40. The White House "script" in the Reagan-Bush years, according to Strauss and Sunstein was to assert that "the nominee is open-minded, has 'no agenda,' enthusiastically accepts both *Brown v. Board of Education* and *Griswold v. Connecticut*, is humbled by the difficulty of being a Justice, and admires Justice Harlan." Stauss & Sunstein, *supra* note 1, at 1492.

freedom to “build the Court of his dreams.”⁴¹ Nevertheless, Senate-imposed constraints or boundaries within which presidents must operate in selecting their nominees have broadened considerably. Unless the president mistakenly nominates an individual who is obviously unqualified and ill-suited for the Court like G. Harrold Carswell⁴² or greatly out of the political and judicial mainstream like Robert Bork,⁴³ it is highly unlikely that the Senate will challenge or reject the president’s nominees. While Court-packing attempts by the president are both expected and tolerated, politically motivated rejection by the Senate is regarded as improper interference with the independence of the Court.

B. The Weakening of Congressional Checks on the Court

The president and Congress have frequently struggled over control of the Court. However, in keeping with the substantial decline in the rate at which the Senate rejects Supreme Court nominees, the number and variety of tools Congress uses to compete with the president in influencing the Court have diminished since the latter part of the nineteenth century.

No doubt the most rancorous battle between the president and Congress over the Court occurred between the Federalists and Jeffersonian Republicans after the 1800 election.⁴⁴ Lame-duck President John Adams and the outgoing Federalists in Congress passed the Judiciary Act in 1801, which reduced the number of justices from six to five (effective with the next vacancy) and created new judgeships which were promptly

41. The phrase belongs to Laurence Tribe, *supra* note 24, at 76.

42. In addition to his poor civil rights record, Carswell was widely regarded, in Henry Abraham’s words, as a “patently inferior [candidate], simply on the basis of fundamental juridical and legal qualifications.” ABRAHAM, *supra* note 34, at 16. Louis Pollak, then Dean of the Yale Law School, asserted that Carswell possessed “more slender credentials than any Supreme Court nominee put forth in this century.” *Id.* Even the President’s floor manager of the nomination in the Senate, Senator Roman Hruska of Nebraska, had a difficult time defending Carswell; he argued to his Senate colleagues that “[e]ven if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance? We can’t have all Brandeises, Cardozos and Frankfurters, and stuff like that there.” *Id.* at 16-17. In addition, Carswell held the dubious record of having been reversed by appellate courts more than any of the other then-sitting federal jurists except seven.” *Id.* at 17.

43. While some have challenged the validity of this claim, Bork was certainly widely *perceived* as a judicial radical. See Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 685-86 (1988), discussing the Justice Department’s statistical study of Bork’s judicial record (provided in *A Response to the Critics of Judge Robert H. Bork*, 9 CARDOZO L. REV. 373 (1987) (reprint from U.S. Department of Justice, Office of Public Affairs)).

44. Even before this momentous episode, the Senate rejected George Washington’s nomination of John Rutledge for Chief Justice because of the nominee’s opposition to the Jay Treaty. TRIBE, *supra* note 24, at 79-80.

filled with loyal Federalists. The new Congress quickly responded by repealing the 1801 Act and even postponed the Court's next term to insure that it could not hear an upcoming challenge to the repealing legislation. The House also impeached Justice Samuel Chase, a Federalist, on grounds of "high crimes and misdemeanors."⁴⁵ The Senate refused to confirm subsequent appointees to the federal bench who were not Republicans.⁴⁶

Congress has altered the size of the Court to secure a particular membership and ideological bent at other times as well. The number of Associate Justices was increased from six to eight in the final days of Andrew Jackson's Administration. After a close five-to-four decision upholding the blockade of the Confederacy,⁴⁷ the size of the Court was increased to ten, thereby affording Lincoln a more secure pro-Union majority on the Court. To prevent President Andrew Johnson from appointing Justices who might fail to uphold its Reconstruction program, the powerful Republican Congress reduced the Court's size, as each vacancy occurred, from ten to seven Justices. The embattled Johnson was never permitted an appointment to the Court, and the existing majority of Lincoln appointees remained secure. After Ulysses Grant's election, Congress again expanded the size of the Court, this time to nine, where it remains to this day. President Grant promptly used the new vacancies to engineer a reversal of the *Hepburn* decision, which had denied Congress the power to authorize the use of paper currency.⁴⁸

This selective account is certainly not intended to provide an exhaustive or representative list of such inter-branch conflicts.⁴⁹ It only illustrates the wider variety of Congressional tools previously used to in-

45. ABRAHAM, *supra* note 34, at 76.

46. DAVID M. O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY* 171 (1991).

47. *The Prize Case*, 67 U.S. (2 Black) 635 (1862).

48. Due to the new appointees, *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869), was overruled in *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870). One commentator has argued, however, that the legal tender issue was not the sole reason for the nominees' selection. See 4 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1888*, 713-38 (Paul Freund ed., 1971). See also Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343 (1935).

49. For a fuller account, see ADAM C. BRECKENRIDGE, *CONGRESS AGAINST THE COURT* (1970); WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* (1962); C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT, 1957-1960* (1961); JOHN R. SCHMIDHAUSER & LARRY L. BERG, *THE SUPREME COURT AND CONGRESS* (1972); Roger Handberg & Harold F. Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress*, 14 L. & SOC'Y REV. 309 (1980); Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965).

fluence the Court and its decisions, either directly or by affecting the president's capacity to do so. Not only was the Senate willing to reject presidential nominees at a very high rate (including a record five of six for President John Tyler), Congress felt free to tinker with the size of the Court for blatantly political purposes. It also postponed judicial consideration of a sensitive issue by abolishing an upcoming term of the Court in 1802, nearly succeeded in removing a "political undesirable" from the Court in 1804, and withdrew the sensitive issue of the constitutionality of Reconstruction legislation from the Court's jurisdiction in 1868.⁵⁰ The twentieth century record of Congressional interference with the Court pales in comparison.⁵¹

As Friedman has explained, the perceived propriety of such Congressional interference with the judiciary underwent significant change by the turn of the century.⁵² There is no more clear and certain evidence of this than Franklin Roosevelt's failed attempt to secure Congressional permission to expand the Court, in essence, by six members.⁵³ Fresh from their decisive electoral victory, both Roosevelt and his Democratic Congress were eager to proceed with their New Deal agenda and were united in their antagonism toward the obstructionist majority on the Court. But Congress would not consent to a proposal that was seen as too direct and radical an assault on the judiciary, and one that had been foisted upon them by the impatient Roosevelt.⁵⁴

50. In its fear over the outcome of legal challenges to the constitutionality of major Reconstruction legislation, Congress in 1868 repealed the Court's jurisdiction over writs of habeas corpus for cases involving military offenses. The Court upheld the constitutionality of the 1868 repeal act in *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

51. Congress has attempted to restrict the Court's jurisdiction on numerous occasions, but no such proposals have succeeded. The two most notable efforts were the Jenner bill to forbid review of Congress's investigatory power during the McCarthy era and the 1968 proposal to restrict the Court's review of *Miranda*-based challenges to state criminal convictions. More typically, Congress reacts to Court decisions it views unfavorably by limiting their impact through implementation and funding decisions. The Hyde Amendment, restricting the use of Medicaid funds for abortion, is an excellent example of Congress limiting the impact of *Roe v. Wade*, 410 U.S. 113 (1973).

52. Friedman, *supra* note 37, at 4.

53. Roosevelt did not directly propose expanding the Court by six members. Rather, his transparently political proposal was to enhance the Court's capacity to handle its workload by creating a new position for every Justice over the age of 70 years and 6 months. Thus, for each of the then six sitting Justices over that age refusing to resign, Roosevelt would get an appointment.

54. See JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* (1941). Congress did, however, pass legislation allowing full rather than half pay for Justices at age seventy retiring after ten years of service, which may have helped persuade the recalcitrant older Justices to retire. O'BRIEN, *supra* note 46, at 172.

The relevant lesson from this episode is that, by 1937, an extraordinarily popular president who enjoyed great support in the Congress still could not convince his close allies to employ a constitutionally legitimate and, in the nineteenth century, not infrequently-used tool to achieve a political goal of utmost importance to both. That is quite a remarkable change.

C. Senate Acquiescence in the Reagan-Bush Transformation of the Court

As a general rule, presidents in the twentieth century have come to enjoy a significant competitive advantage over the Senate in shaping the Court's composition. If recent events are any indication, this competitive advantage has become a virtual monopoly of power. The Senate has acquiesced in the recent conservative transformation of the Court to a far greater degree than one would expect, given the factors leading to Senate rejections of past presidential nominees.

Although Senate rejections have been rare in this century, they do occur. According to a number of studies, when a nominee is perceived as altering the critical ideological balance on the Court, when the Senate is controlled by the opposition party, and when the president is lame-duck or otherwise politically-weakened, Senate rejections are far more likely to occur.⁵⁵

Thus, the ease with which Antonin Scalia was confirmed is explained by Republican control of the Senate and the fact that he would be replacing another conservative, William Rehnquist, who was being elevated to replace the retiring conservative Chief Justice Warren Burger. In contrast, the Bork nomination was clearly doomed according to this formula. The Democrats had regained control of the Senate, Reagan was a lame-duck president, and he was politically-weakened due to the Iran-Contra scandal. Furthermore, the very conservative and controversial Bork would be replacing the moderately conservative Lewis Powell, who

55. See Charles Cameron, et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990); John D. Felice & Herbert F. Weisberg, *The Changing Importance of Ideology, Party, and Region in Confirmation of Supreme Court Nominees, 1953-1988*, 77 KY. L.J. 509 (1988-89). Thomas Halper, *Senate Rejection of Supreme Court Nominees*, 22 DRAKE L. REV. 102 (1972); Jan Palmer, *Senate Confirmation of Appointments to the U.S. Supreme Court*, 41 REV. SOC. ECON. 152 (1983); Jeffrey Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998 (1987); Donald R. Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 L. & SOC'Y REV. 927 (1979); Sulfridge, *supra* note 36; William F. Swindler, *The Politics of "Advice and Consent"*, 56 A.B.A. J. 533 (1971); George Watson & John Stookey, *Supreme Court Confirmation Hearings: A View from the Senate*, JUDICATURE 186 (1988).

held the swing vote in many close and politically contentious decisions, especially those regarding civil rights and abortion.

According to the same conventional wisdom, however, one would have expected far more Senate opposition to Reagan's nomination of Anthony Kennedy and Bush's nomination of David Souter than actually occurred. The Democrats retained their majority status in both the House and Senate, and party polarization and party-line voting in Congress increased during the Reagan-Bush years. At the time of the Kennedy nomination, Reagan remained lame-duck and politically weakened. Tensions between Congress and the Court continued to escalate, spurred on by several Court decisions regarding civil rights, executive power, and abortion. Additionally, Anthony Kennedy was to replace the less conservative Powell and, more of a watershed, David Souter would be taking the seat vacated by William Brennan, no doubt the strongest and most effective voice for the Court's liberal wing. Given these many factors predisposing the Senate to reject, why did it not respond more vigorously to or even reject the Kennedy and Souter nominations?

The Senate's failure to reject Clarence Thomas is similarly puzzling. Thomas possessed limited experience, had been severely criticized for his performance as Chairman of the Equal Employment Opportunity Commission,⁵⁶ received a lower American Bar Association rating than any previously confirmed nominee,⁵⁷ and was vigorously opposed by civil rights and women's rights groups, particularly as an inappropriate replacement for the liberal civil rights crusader, Justice Thurgood Marshall.⁵⁸ Thomas also attempted to distance himself from numerous

56. Every article on the subject in the major papers the day after President Bush's announcement of the Thomas nomination seized on these two issues. In fact, the first question asked at the press conference announcing Thomas's nomination focused on charges that the nominee was "insensitive to the concerns of the elderly and civil rights advocates," and that while he was the Chairman of the Equal Employment Opportunity Commission, the EEOC did not aggressively pursue their claims. *The Supreme Court: Excerpts from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14. For an account of the Thomas nomination and confirmation, see SAVAGE, *supra* note 28, at 423-50.

57. A twelve-person majority on the ABA's Standing Committee on Federal Judiciary rated Thomas as "qualified," a minimum passing grade. A minority of two members found Thomas "not qualified" and one abstained. (In contrast, Souter was unanimously rated "well qualified.") Neil A. Lewis, *Bar Association Splits on Fitness of Thomas for the Supreme Court*, N.Y. TIMES, Aug. 28, 1991, at A1.

58. Thomas was opposed by the AFL-CIO and, after some initial uncertainty, by the NAACP. Roberto Suro, *N.A.A.C.P. Defers Stance on Court Pick*, N.Y. TIMES, July 9, 1991, at A12; Steven A. Holmes, *N.A.A.C.P. and Top Labor Unite to Oppose Thomas*, N.Y. TIMES, Aug. 1, 1991, at A1. He was also opposed by the NAACP Legal Defense and Education Fund, Inc., the Congressional Black Caucus, the Women's Legal Defense Fund, People for the American Way, National Abortion Rights Action League, National Organization for Women, Alliance for Justice, and the Leadership Conference on Civil Rights. The National Urban

controversial statements regarding the uses of natural law for conservative purposes, and incredibly asserted that he had never expressed nor formulated an opinion, not even in private, regarding the Court's *Roe v. Wade* abortion decision.⁵⁹ Even serious charges of sexual harassment made by a highly credible witness, Professor Anita Hill, were insufficient to produce majority opposition in the Senate.⁶⁰

Two factors account for this heightened spinelessness on the part of the Senate in recent years. First, Presidents Reagan and Bush used their built-in advantage in Court-packing with exceptional skill. They raised (or lowered, depending on one's view) the art of screening judicial candidates and waging an effective confirmation campaign on their behalf to a new level.⁶¹

A conservative Republican president can choose one of two strategies to win support from a Democratic Senate for conservative judicial nominees. The first is to fight—to employ all the tools of persuasion and power available to the president and try to bludgeon the Senate into ac-

League voted to take no position and the American Civil Liberties Union decided (by one vote) not to oppose the Thomas nomination. The day the Senate Judiciary Committee hearings began, however, two-thirds of Americans had not yet made up their mind. Adam Clymer, *Most Americans Are Undecided on Court Nomination, Poll Finds*, N.Y. TIMES, Sept. 10, 1991, at A1.

59. In a 1987 speech, Thomas had praised Lewis Lehrman's article comparing fetuses to slaves and abortions to the Holocaust as a "splendid example of applying natural law." Neil A. Lewis, *Court Nominee Is Linked to Anti-Abortion Stand*, N.Y. TIMES, July 3, 1991, at A1, D18. At the Judiciary Committee hearings, however, Thomas asserted that his praise of Lehrman was merely a tool to persuade a conservative audience to embrace natural law generally, which in turn might encourage them to accept the use of natural law on behalf of civil rights. The next day, he told the Committee that he may have only skimmed Lehrman's article and had not reread it since. He also stated that his earlier remarks supporting the use of natural law to provide for greater judicial protection of economic rights were the musings of a part-time political theorist and had no bearing on his views regarding how a judge should approach such issues. Thomas stated that he accepted a general constitutional right of privacy but refused to give his opinion regarding its extension to abortion. He asserted that to do so would impair his impartiality, that he had "no private agenda" regarding the abortion issue, Neil A. Lewis, *Thomas Declines Requests by Panel for Abortion View*, N. Y. Times, Sept. 11, 1991, at A1, and that he had never expressed an opinion on *Roe v. Wade*. *Thomas Undergoes Tough Questions on Past Remarks*, N.Y. TIMES, Sept. 12, 1991, at A1, A21. In the recent decision upholding most of Pennsylvania's abortion regulations, Justice Thomas joined both the Rehnquist and Scalia opinions, which provided a scathing attack of *Roe* and argued for its reversal. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992).

60. Thomas was hurt by Hill's charges of sexual harassment, although there is some question of how much. "Both sides estimate that Thomas lost about 10 votes that he might have had before the Hill allegations emerged—narrowing an outcome that still would have been one of the closest in history. But only three senators publicly shifted positions." Joan Biskupic, *Thomas' Victory Puts Icing on Reagan-Bush Court*, CONG. Q. 3026, 3030 (Oct. 19, 1991).

61. According to Ethan Bronner, the White House campaign on behalf of Bork was an exception. ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 348 (1989). Bruce Fein would agree. Fein, *supra* note 1, at 685-87.

ceptance. As the Bork nomination proved, that is a risky strategy. Alternatively, the president can resort to subterfuge by employing the strategy, now proven successful, of nominating individuals whose primary virtue is anonymity.⁶² Kennedy, Thomas, and particularly the enigmatic Souter possessed the slimmest of credentials and minimal experience to qualify for a seat on the Court. But more importantly, they had spoken or written little on the burning constitutional issues of the day, thus making the Senate's search for a "legitimate" basis for rejection more difficult. Unfortunately for the Senate, it no longer possessed the nineteenth century luxury of rejecting the president's nominees to the Court virtually at will.

In addition, the Senate could hardly expect Presidents Reagan or Bush to respond by replacing a rejected Kennedy or Souter with a liberal nominee more to the liking of Democratic Senators. Consequently, the Senate could quite legitimately reason that it made little sense to spend considerable time and energy rejecting a nominee when the replacement would likely be similar or "worse." In the end, the Senate has been reduced to acquiescing to the president's choice.

The Senate increasingly has lacked the will and the power to defeat Supreme Court nominees it would prefer to reject. Had the views and subsequent decisions of Kennedy and Souter been presented to the Congress in the form of statutory initiatives or constitutional amendment proposals, they would no doubt have been rejected.⁶³ When such "proposals," however, are hidden or disguised in the form of a Supreme

62. Robert Bork correctly predicted this to be one of the undesirable results of his defeat in the Senate. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 347-48 (1990); Robert H. Bork, *The Full Court Press: The Drive for Control of the Courts*, *THE AMERICAN ENTERPRISE* 58 (1990).

63. For example, Souter and Kennedy provided the fourth and fifth votes in upholding the Reagan Administration's "gag rule," forbidding abortion counseling and referral in federally-funded family planning clinics. *Rust v. Sullivan*, 111 S.Ct. 1759 (1991). Congress's attempt to reverse the *Rust* decision met with a Bush veto, which it failed to override. Justice Kennedy provided the critical fifth vote in several employment discrimination decisions in 1989 which met with Congressional disapproval. See especially, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that employees challenging employment practices having racially discriminatory impact bear the burden of proving such practices are motivated by discriminatory intent rather than business needs, thus overruling *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)); *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989) (holding that § 1981 of the 1866 Civil Rights Act forbids racial discrimination in hiring but not on-the-job racial harassment); and *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing white employees to challenge court-approved consent decrees embodying affirmative action plans). Congress subsequently passed the 1990 Civil Rights Act which would have reversed these decisions. President Bush, however, vetoed the Act, and the Senate failed to override by one vote. The Civil Rights Act of 1991, signed by Bush, overturned twelve Supreme Court rulings, including *Wards Cove*, *Patterson*, and *Martin v. Wilks*. See O'BRIEN, *supra* note 4, at 26-27.

Court nominee (especially a “stealth” nominee like Souter), and when they are put forward by an unusually popular and skillful President, the Senate is far more constrained.

IV. The Value of Balance in Political Control of the Court

The recent shift toward presidential dominance in the selection of Supreme Court Justices is troubling. Such dominance undermines the Framers’ conception of balanced government as a protection against tyranny. In their view, the threat of tyranny was reduced and liberty better secured by dividing governmental power and supplying each institution with the motive and sufficient power to check the others.⁶⁴ Thus, before the government can use its coercive power, it must achieve agreement among numerous and diverse institutions (and, by implication, broad popular consent). In other words, neither the president, the Congress, nor the Court was to possess unilateral power to achieve significant political change. Furthermore, the Framers added far more significant hurdles with regard to constitutional change. The Framers simply did not trust single elections to reveal accurately the true wishes of the people or the common good for purposes of ordinary legislation, let alone constitutional change.⁶⁵ In their view, the president possesses a claim, but only a partial claim, to understanding the popular will or the national good. The same may be said of the House and Senate. Bargaining between these differently composed institutions, however, should produce a broader and more inclusive political consensus.

This plan for institutional competition, balance, and if need be, stalemate, in the interest of preventing tyranny applies not only to policy concerns but to judicial selection and constitutional law concerns as well. In other words, permitting momentous constitutional changes to turn on the outcome of a single presidential election (even a landslide) is an egregious violation of the Framers’ desire for balanced and nontyrannical government.

The Framers, in any case, specifically provided for shared and balanced control of the judiciary. The President may nominate members to

64. THE FEDERALIST NO. 51, at 320 (James Madison) (New American Library ed., 1961).

65. Representative government, in the Framers’ view, was not intended solely to reveal the popular will or to compensate for the practical difficulties of direct democracy. It was instead intended to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” THE FEDERALIST NO. 10, at 82 (James Madison) (New American Library ed., 1961).

the federal bench, but the Senate must approve the President's choices.⁶⁶ Congress possesses the power to remove federal judges through the impeachment process,⁶⁷ create inferior courts,⁶⁸ regulate the appellate jurisdiction of the federal courts,⁶⁹ fix the budget⁷⁰ and terms of the Court, and alter its size.⁷¹ Additional checks are provided by the discretionary power of Congress and the Executive Branch to fund and enforce the Court's decisions. Because each institution is composed differently and competition is encouraged among them, political control of the judiciary—its membership, size, jurisdiction, and implementation of its decisions—is shared and balanced, rather than arbitrary and tyrannical.

Using the term "political control" in this context no doubt strikes fear in the hearts of many scholars for whom the independence and apolitical nature of the judiciary is an ideal of paramount importance. While the Court's decisions should certainly not be dictated or programmed in advance by politicians, it is commonly accepted that the Supreme Court exercises significant discretionary power in interpreting the Constitution and that a Justice's personal views play a significant role in that interpretive process. It follows that a nominee's political beliefs and judicial philosophy are of profound importance to our Constitution's future and thus to political leaders who are constitutionally empowered to shape that future.

The legitimacy of vigorous ideology-based Senate review of Supreme Court nominees is by no means a settled issue. While few scholars would

66. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court." U.S. CONST. art. II, § 2, cl. 2.

67. "[T]he House of Representatives . . . shall have the sole Power of Impeachment . . ." U.S. CONST. art. I, § 2, cl. 5. "The Senate shall have the sole Power to try all Impeachments . . ." U.S. CONST. art. I, § 3, cl. 6.

68. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . ." U.S. CONST. art. III, § 1. "The Congress shall have Power . . . to constitute Tribunals inferior to the supreme Court . . ." U.S. CONST. art. I, § 8.

69. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2.

70. This is a function of Congress's general budgetary authority. Congress cannot reduce the salaries of any federal judge. ("The Judges, both of the supreme and inferior Courts, shall . . . receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.) Congress can, however, choose not to increase the Court's budget or its members' salaries. For example, in 1964, to communicate its displeasure with the Warren Court (especially its rights of the accused and school prayer decisions), Congress increased the annual salary of federal judges by \$7500, while providing the Justices with only a \$4500 increase.

71. See U.S. CONST. art. III, § 1.

endorse Richard Nixon's grandiose assertion that the president is "the one person entrusted by the Constitution with the power of appointment,"⁷² many would find troubling the more aggressive and political Senate role advanced here.

Bruce Fein, for example, argued that such a role would violate the Framers' intent. According to his reading of *Federalist No. 76*, Fein asserted that the Framers intended the Senate only to examine "whether the nominee [is] intellectually competent and whether [the] nomination [is] tainted by cronyism, corruption, or crass political partisanship."⁷³ Many commentators, however, dispute that interpretation.⁷⁴

Insistence that the Senate examine only professional fitness or a nominee's judicial, as opposed to political, philosophy simply ignores our knowledge regarding constitutional interpretation and judicial decision-making. Judicial behavior research consistently reveals the importance of political attitudes in influencing judicial decisionmaking.⁷⁵ Additionally, it is not difficult to demonstrate, as do Critical Legal Studies schol-

72. Nixon made this assertion during the Senate debate over the Carswell nomination. 116 CONG. REC. 10158 (1970) (letter from Richard M. Nixon to William Saxbe, Apr. 2, 1970).

73. Fein, *supra* note 1, at 687. In applying that standard, Fein gave the Bork nomination an unusually nonpolitical cast, noting that it was plausible that Reagan merely "wanted to leave as part of his legacy an exceptionally talented jurist who shared his view of the proper judicial role." *Id.* at 672. In fact, Fein played a major role in shaping Reagan's highly centralized and ideologically-focused judicial recruitment and selection process. He has remarked that "[t]he judiciary is a primary player in the formulation of public policy" and therefore, "it would be silly for an administration not to try to affect the direction of legal policy" through its judicial appointments. David M. O'Brien, *The Reagan Judges: His Most Enduring Legacy?*, in THE REAGAN LEGACY 60, 65 (Charles O. Jones ed., 1988). While perhaps not tainted by corruption or pure patronage concerns, the Bork nomination was a clear effort at Court-packing which legitimated a like response from the Senate. For a similar argument that the Framers intended a quite limited Senate role, see Hickok, Jr., *supra* note 1; A. Mitchell McConnell, Jr., *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7, 32 (1970).

74. Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L. J. 657, 658-62 (1970); James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989); Simson, *supra* note 1, at 306-12; Strauss & Sunstein, *supra* note 1, at 1494-1502.

75. That is especially the case where the law is unclear and precedent is absent or conflicting. Of course, it is precisely those type of "hard" cases that are likely to find their way onto the Supreme Court's docket. See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* (1948); ROHDE & SPAETH, *supra* note 24, at 118-31; HAROLD J. SPAETH, *SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION* (1979); JOHN D. SPRAGUE, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM, 1889-1959* (1968); Saul Brenner & Theodore S. Arrington, *Unanimous Decision Making on the U.S. Supreme Court: Case Stimuli and Judicial Attitudes*, 9 POL. BEHAV. 75 (1987); Jeffrey A. Segal & Albert Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices*, 75 AM. POL. SCI. REV. 355 (1981). Judicial behavior research regarding the lower courts is also quite voluminous.

ars, that no interpretive approach has yet been found that successfully constrains judicial discretion and limits the intrusion of the judge's personal views.⁷⁶ In any case, even a "correct" approach to constitutional interpretation (assuming one exists) would produce a distinct set of political consequences, as would Bork's theory of original understanding.⁷⁷ In a democracy, Senators bear a responsibility to their constituents, and the nation as a whole, to examine those consequences, ascertain their desirability, and vote accordingly.

Another significant defect in Fein's argument is that the preference for a more limited Senate role was expressed at a time when the Supreme Court was not expected to play such a significant role in national policymaking.⁷⁸ The Framers' overwhelming preference for balanced, and even stalemated government, regarding both policy and constitutional change, should take precedence over specific views expressed at a time when the Court was not expected to be so powerful.

Another set of objections to an active and political confirmation role focuses on Senate capacity. Fein argued that the Senate is "ill-suited intellectually, morally, and politically to pass on anything more substantive than a nominee's professional fitness . . ." Senators, he asserted, tend to be "intellectually shallow and result-oriented."⁷⁹ To complete the argument, Fein must defend presidents in terms of their unusual fitness and their possession of more noble (i.e. non-result-oriented) intentions in their nominations to the Court. Most presidents, however, rank ideology

76. For a sampling of this extensive literature, see MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L. J.* 1063 (1981); *Critical Legal Studies Symposium*, 36 *STAN L. REV.* 1 (1984); *Interpretation Symposium*, 58 *S. CAL. L. REV.* 1 (1985).

77. Bork responded that his philosophy may have had political consequences, but it lacked "political content or intention." Judges faithfully applying the Constitution's original meaning do not *intend* either liberal or conservative results. It is only because recent liberal Courts have illegitimately written their preferences into the Constitution that his original understanding approach would appear to produce conservative results. BORK, *supra* note 62, at 177-78.

78. Another commentator made a similar point. Henry P. Monaghan, *The Confirmation Process: Law or Politics*, 101 *HARV. L. REV.* 1202, 1205-06 n.17 (1988).

79. Fein, *supra* note 1, at 673. Stephen Carter agreed that Senators are too result-oriented in their appraisal of a nominee's judicial philosophy. Carter, however, would assign them the role of evaluating whether a nominee possesses the "right moral instincts." Fein found the Senate *especially* unfit in this regard. See Stephen Carter, *The Confirmation Mess*, 101 *HARV. L. REV.* 1185, 1199 (1988). Friedman agreed that the Senate is "less able to consider the nominee's record reflectively." Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 *YALE L.J.* 1283, 1313 (1986).

above merit-based criteria in selecting their nominees.⁸⁰

Further, Fein's argument that the Senate is too parochial in outlook misunderstands the Framers' purpose in composing and structuring political institutions differently. The Senate's representation of state interests only *enhances* its capacity to serve as a check on the president. The president's reading of the popular will or national good regarding desirable constitutional change may be erroneous. Presidential preferences are to be subjected to a test in other institutions, whose "reading" is likely to be (and is expected to be) different, but no less legitimate.

An argument that the Senate possesses certain defects does not, in any case, call for granting the president virtually complete control over the Court's membership. Unlike executive branch appointees, Supreme Court Justices are not subordinate to the president. Extreme Senate deference to presidential nominations to the Court violates the principle of separation of powers and defeats the purpose of the judiciary as an equal and coordinate branch of government.⁸¹

The final argument against an aggressive, political role for the Senate focuses on the practical consequences for the Court's prestige and independence. According to some critics, subjecting prospective Justices to an intensive political or ideological review will reinforce a political perception of the Court's role.⁸² No longer will judging and constitutional interpretation be perceived as nonpolitical functions. The resulting loss in the Court's prestige and apolitical reputation will limit its ability to make politically unpopular decisions, thus destroying its special

80. "[P]olitical and ideological compatibility has arguably been *the* controlling factor" in presidential choice of Supreme Court nominees. ABRAHAM, *supra* note 34, at 6.

81. As Strauss and Sunstein also note, this is especially problematic with regard to separation of powers issues. As one of the parties in the conflict, the President "should not have the dominant role in choosing the mediator." Strauss & Sunstein *supra* note 1, at 1493. See also Biskupic, *supra* note 60, at 3026, describing the "two against one" situation that has resulted from recent presidential dominance in the judicial selection process: the Court provides a conservative interpretation of a Congressional statute (or defers to the executive branch's conservative interpretation), Congress reverses that interpretation by rewriting the statute, only to face a presidential veto, which it narrowly fails to override. Two recent examples include Congress's efforts to override the Court's *Rust v. Sullivan* decision, 111 S.Ct. 1759 (1991), and several of its employment discrimination decisions (most notably *Wards Cove Packing v. Atonio*, 490 U.S. 642 (1989)). In the later case, at least, Congress was ultimately successful when a politically weakened President George Bush decided to sign the Civil Rights Act of 1991.

82. Strauss & Sunstein argued that the process is already political, "but only at one end. . . . [P]art of what has politicized the process is the approach of recent Presidents." They further assert that the solution is not a less deferential Senate, but a more aggressive one, in that the president would be induced to take the Senate's role seriously, to deliberate, and to compromise. The confirmation process would then become *less* political. Strauss & Sunstein, *supra* note 1, at 1512-15.

value in our constitutionally limited democracy.⁸³

The weakness in this often-advanced argument is that it is not supported by empirical evidence. Survey research consistently reveals that the public does not hold the Court in particularly high regard and does not view it in exalted terms. Additionally, “[c]itizens know surprisingly little about . . . most decisions, and offer support contingent upon agreement with specific public policies.”⁸⁴ In short, “the dynamics of aggregate support for the Court bear a remarkable resemblance to those for Congress and the presidency.”⁸⁵

Additionally, empirical research fails to support the assertion that the Court indeed plays a countermajoritarian role. For example, Thomas Marshall’s analysis of public opinion and the Court’s decisions from the mid-1930s to 1986 led him to conclude that “[m]ost modern Supreme Court rulings *reflect* public opinion, and overall, the modern Court has been roughly as majoritarian as other American policy makers.”⁸⁶ In short, the Court’s role of issuing unpopular decisions can hardly be destroyed if it rarely performs such a role.

The notion that the president may pack the Court free of any signifi-

83. Richard D. Friedman, *Balance Favoring Restraint*, 9 CARDOZO L. REV. 15, 18-19 (1987); BORK, *THE TEMPTING OF AMERICA*, *supra* note 62, at 2, 345-49; Friedman, *supra* note 37, at 84-87.

84. Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1210 (1986). See also David Adamany, *Legitimacy, Realignment Elections, and the Supreme Court*, 1973 WIS. L. REV. 790; David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 L. & POL’Y Q. 405 (1983); Gregory Casey, *Popular Perceptions of Supreme Court Rulings*, 4 AMER. POL. Q. 3 (1976); Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 L. & SOC’Y REV. 385 (1974); Kenneth M. Dolbeare, *The Public Views the Supreme Court*, in *LAW, POLITICS, AND THE FEDERAL COURTS* 194 (Herbert Jacob, ed. 1967); Kenneth M. Dolbeare & Phillip E. Hammond, *The Political Party Basis of Attitudes Toward the Supreme Court*, 37 PUB. OPINION Q. 16 (1968); John H. Kessel, *Public Perceptions of the Supreme Court*, 10 MIDWEST J. OF POL. SCI. 167 (1966); Walter F. Murphy and Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 L. & SOC’Y REV. 357 (1968); Joseph Tanenhaus & Walter F. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24 (1981).

85. Caldeira, *supra* note 84, at 1223-24.

86. THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* ix (1989) (emphasis added). David Barnum’s empirical analysis similarly shows that the countermajoritarian reputation of the Court is greatly exaggerated. David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision-Making in the Post-New Deal Period*, 47 J. POL. 652 (1985). The classic statement of this thesis comes from Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

cant Senate check is patently undemocratic.⁸⁷ Furthermore, it is flatly at odds with the Framers' plan for balanced government and their preference for stalemate over constitutional change that may be only weakly supported and hurriedly or surreptitiously enacted.

Simply put, presidents do not possess the exclusive power or legitimacy to reshape our constitutional law as a by-product of their authority to nominate Supreme Court Justices. Through Article V, the Framers intended state and national legislators to share the power to enact constitutional change. Given the modern day reliance on transformative appointments to achieve constitutional change, the power to make such appointments must also be shared, requiring at a minimum, the deliberate approval of a majority of Senators.

It might be argued that formal amendments and transformative appointments are two very different vehicles of constitutional change, each perhaps necessitating different safeguards. For example, textual amendments produce concrete, immediate, and long-term change, thereby justifying Article V's demand for broad and enduring political support at both the national and state level. Constitutional change implemented through transformative appointments, on the other hand, occurs in a slower and more subtle manner, especially due to the ability of precedent to constrain the transformative ambitions of new appointees. Thus, there are built-in safeguards, lessening the need for additional checks in the form of Article V-type political support.

The problem with this argument is that it overstates the differences between the two forms of constitutional change. Textual amendments may not produce immediate and long-term change; they may not be faithfully interpreted or they may simply be ignored. Both of these occurred with regard to the Fourteenth Amendment.⁸⁸ Additionally, precedent is not as powerful a constraint on judicial decisionmaking as is

87. The claim for such presidential authority is further weakened by low and unrepresentative voter turnout and the difficulties in translating voter support into a popular mandate for the president's appointment preferences.

88. The Court limited the scope of the Fourteenth Amendment, generally in the Slaughterhouse Cases U.S. (16 Wall.) 36 (1873), and more particularly in eliminating racial discrimination. *Strauder v. West Virginia*, 100 U.S. 303 (1880). In the Civil Rights Cases, 109 U.S. 3 (1883), it ruled that Congress had overstepped its authority in attempting to ban private discrimination under the Civil Rights Act of 1875. In the late nineteenth century, the Court permitted the states to enact Jim Crow laws mandating segregation, most notably in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court only occasionally struck down racially discriminatory laws in the early part of the twentieth century. See, e.g., *Guinn v. United States*, 238 U.S. 347 (1915) and *Lau v. Wilson*, 307 U.S. 268 (1939), both regarding voting rights. It was not until the Warren Court of the 1950's and 1960's that the Fourteenth Amendment's equal protection clause was vigorously enforced.

often assumed, particularly at the Supreme Court level. Certainly the Warren and Rehnquist Courts are proof of that.⁸⁹ Furthermore, the Rehnquist Court has stated its belief that *stare decisis* is not an “inexorable command,” and that precedent is more important regarding property and contract rights than individual rights.⁹⁰ Five of the six Justices supporting this position are Reagan and Bush appointees.⁹¹ Finally, no Supreme Court Justice has been removed from office through the impeachment process,⁹² and only four of the Court’s constitutional decisions have been overruled by formal amendment.⁹³ Considering the relative youth of recent appointees, it is difficult to argue that constitutional change through transformative appointments is less significant and long lasting, and therefore less deserving of powerful political checks on its development.

89. In the twentieth century, the Court has reversed prior rulings less than twice per year (1.74 a year). During Earl Warren’s tenure from 1953 to 1969, however, the Court overturned 45 precedents; most of these (34) were from the period from 1962 to 1969, in which the Court struck down nearly five per year. O’BRIEN, *supra* note 4, at 11-12. The most significant reversals occurred in the areas of race discrimination, *Brown v. Board of Education*, 347 U.S. 483 (1954), reapportionment, *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964), school prayer, *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963), and rights of the accused, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

The Rehnquist Court has also been only weakly devoted to precedent. It has reversed 21 precedents from 1986 through the 1991-92 term. The pace of reversals has increased in the last few years. For example, in Kennedy’s first two terms, eight precedents were reversed. In 1990, when Souter joined the Court, seven reversals occurred. And in Thomas’s first year, five precedents were overturned. See O’BRIEN, *supra* note 46 at 12. Rehnquist Court reversals have primarily occurred in the areas of school desegregation, *Board of Education of Oklahoma City v. Dowell*, 111 S. Ct. 630 (1991), employment discrimination, *Wards Cove v. Atonio*, 490 U.S. 642 (1989), and abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). Respect for precedent has been especially weak in cases involving the rights of the accused, particularly habeas corpus, *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Coleman v. Thompson*, 111 S.Ct. 2546 (1991), search and seizure, *Florida v. Bostick*, 111 S. Ct. 2382 (1991), and the admissibility of coerced confessions, *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).

90. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-10 (1991) (reversing the precedent that a crime victim’s family may not testify at trial).

91. Rehnquist wrote the opinion in *Payne*, joined by White, O’Connor, Scalia, Kennedy, and Souter.

92. Only one Supreme Court Justice, Samuel Chase, was impeached by the House of Representatives. The Senate failed, however, to convict Chase by the required two-thirds vote, and he served out his term.

93. *Chisholm v. Georgia*, 2 U.S. 419 (1793) (overruled by the Eleventh Amendment); *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (reversed by the Civil War Amendments (U.S. CONST. AMEND. XIII-XV)); *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895) (overruled by the Sixteenth Amendment); and *Oregon v. Mitchell*, 400 U.S. 112 (1970) (overruled by the Twenty-sixth Amendment).

Significant constitutional change achieved through transformative appointments is not without precedent. Franklin Roosevelt used his nine appointments to the Court to reverse longstanding precedent and, in effect, to eliminate from the Constitution its protection of both economic “substantive due process” rights and state powers in relation to national power. Thus, supporters of the recent efforts to transform the Court might respond, looking to Franklin Roosevelt, “what’s good for the goose is good for the gander.” Roosevelt, however, possessed far greater legitimacy to lead a constitutional revolution through his appointments than Reagan or Bush. Not only did President Roosevelt win reelection decisively, he also led his party to overwhelming victories in Congress. Furthermore, as Bruce Ackerman noted, Roosevelt and his Democratic Congress proceeded to enact “pathbreaking statutory initiatives” which were in turn subject to a “rich constitutional critique” by the Court. Thus, by 1936,

a decisive majority of Americans had voted for the New Deal with their eyes open to the practical and constitutional implications of their collective decision. If ever there was a time that the People could be said to have endorsed a sharp break with their constitutional past, it was when Roosevelt and the Senate self-consciously began to make transformative Supreme Court appointments.⁹⁴

Support for Reagan and Bush’s constitutional reform agenda was much weaker than the broad popular endorsement of Roosevelt’s New Deal. Although Republicans did gain control of the Senate in 1980, their numerical advantage was slim, and it vanished in 1986. Additionally, the Congress balked at many of their legislative and constitutional proposals. There simply has not been the sort of decisive popular and Congressional approval for the Reagan-Bush agenda that could justify giving these Presidents the type of transformative authority which Roosevelt so clearly earned.⁹⁵

94. Ackerman, *supra* note 5, at 1174-75.

95. Strauss and Sunstein argued that it is current conditions “unique in our history” which require a more active Senate role. Those conditions include “a large number of consecutive appointments by Presidents of one party during a period of divided government; the danger of intellectual homogeneity on the current Court; overt ideological attacks by the President on the Court and the self-conscious screening of nominees to the Court by the executive branch; the effective exclusion of the Senate from the selection of lower federal court judges; and the increased importance of separation of powers questions.” Strauss & Sunstein, *supra* note 1, at 1502-03. I would argue that the need for a more aggressive Senate role is a general and ongoing one. This will produce little conflict and great unity regarding Supreme Court appointments when the President and Congress share a political consensus on the major issues of the day, as in the case of Roosevelt. This should result in conflict and disunity with regard to judicial appointments when there is not a consensus between the President and Congress, as in the case of Presidents Reagan and Bush. (As the political commentator Russell Baker argued, “a politically divided Government is entitled to a politically divided Court.” *Supreme*

V. Restoring the Balance of Power

Presidential efforts to place on the Court individuals who share their constitutional reform agendas are not in themselves problematic. In fact, it is the motive for political dominance on the part of each branch which is at the heart of, and indeed activates and makes effective, the system of checks and balances. What makes such legitimate Court-packing efforts troubling is the absence of an effective Congressional counterweight.⁹⁶ How then might we strengthen the political checks on the president's power to control the Court's membership and restore a proper balance of power to the shaping of our constitutional future?

A. Strengthening the Senate's Will and Power to Reject

The appointment of a new Justice represents a momentous occasion in our constitutional development. Recent appointments have been especially significant, given the dramatic conservative shift currently underway in the Court. The Senate need not sit idly by while the president attempts to pack the Court with ideological allies. It can enforce its independent assessment regarding our nation's proper constitutional course by revitalizing its critical role in the confirmation process. The Senate faces two obstacles in attempting to do so, however: first, the twentieth century norm against political interference in the judiciary, and second, the effectiveness of recent Court-packing tactics, exemplified by the growing reliance on the "stealth" nominee to secure Senate confirmation.

The judicial independence norm is enormously powerful and is vigorously protected by the bench, the bar, the legal academy, and selectively, by politicians. Nevertheless, a principled case for ideologically motivated rejection of Supreme Court nominees by the Senate can be and must be made. Needless to say, the task of giving this principle the legitimate status and permanence it deserves will prove enormously difficult. A significant obstacle to Senate acceptance lies in the tendency of partisan supporters of individual nominees to themselves undermine the principle of aggressive and politically-motivated Senate review. The judicial

and P.C. Court, N.Y. TIMES, Aug. 3, 1991, at A19.) Thus, there is no need to make the sort of distinction which Strauss and Sunstein make; the Senate possesses the *general* authority to evaluate Supreme Court nominees independently and aggressively, not only when special conditions are present. To carve out an exception to a general rule of deference may weaken the Senate's ability to respond aggressively when it desires to do so, and thus when the need to do so arises.

96. See Strauss & Sunstein, *supra* note 1, at 1494 ("Partisanship in Supreme Court nominations is indeed problematic. But one-sided partisanship—in which only the President, and not the Senate, is allowed to be partisan—is much worse.").

independence norm is far too handy a tool for Senators to employ to secure confirmation of their politically-preferred candidate.

More particularly, how might the Senate seek to reassert its authority to check the president's excessive Court-packing power? The Senate may legitimately choose to enforce its authority not only to *consent* to presidential nominees to the Court, but to *advise* the president, as the Constitution permits.⁹⁷ The Senate might legitimately warn the president in advance of the requirements that subsequent nominees must meet. Those requirements could be partisan or ideological in nature. For example, it might promise rejection if the president fails to nominate a Democrat or political moderate to fill subsequent vacancies.⁹⁸ (Needless to say, the Senate must be prepared to follow through on such a threat.)

In fact, the Senate has, on several occasions, chosen to exercise its power to advise presidents in advance with regard to their Supreme Court nominations. In 1869, Congress submitted a petition to President Grant, signed by a majority of members in both the House and Senate, urging him to nominate Edwin Stanton. Having seen his first nominee rejected, Grant acceded to Congressional wishes.⁹⁹ Upon the retirement of Oliver Wendell Holmes, President Hoover abandoned his desire to nominate a "non-controversial western Republican" in response to the Senate Judiciary Committee's stated preference for another progressive and Senate Foreign Relations Committee Chairman Borah's insistence on Benjamin Cardozo.¹⁰⁰

As Strauss and Sunstein have persuasively argued, greater use of the Senate's advisory function would rid the confirmation process of several defects.¹⁰¹ To the degree that it is overly deferential and limits its evaluation to mere "acceptability" ("whether the nominee has good character and is not an extremist"¹⁰²), the president has little incentive to compro-

97. Walter Dellinger suggested that the Senate put forward its own list of potential nominees. If it is an especially distinguished list, and the president chooses to ignore it, the burden would shift to the president to defend his or her alternative, particularly in comparison to the Senate's preferred candidate(s). "*What's the Alternative?*", *supra* note 1, at 42.

98. Strauss and Sunstein agree. Strauss & Sunstein, *supra* note 1, at 1512.

99. ABRAHAM, *supra* note 34, at 126.

100. According to Abraham, "[t]wenty-four hours before Hoover had indicated he would announce his candidate publicly, he called for Borah. In an often-told, dramatic confrontation between two proud men, the President, after discussing the vacancy generally, suddenly handed Borah a list on which he had ranked those individuals he was considering for the nomination in descending order of preference. The name at the bottom was that of Benjamin N. Cardozo. Borah glanced at it and replied: 'Your list is all right, but you handed it to me upside down.'" *Id.* at 202-03.

101. Strauss & Sunstein, *supra* note 1, at 1513-15.

102. *Id.* at 1514.

mise or take Senate preferences into account. If the Senate were more aggressive in both communicating its desires prior to the president's decision and evaluating the nominee after that decision, the president would be induced to take the Senate's role and preferences more seriously and to compromise. The result would be a more collaborative process, resulting in a consensus nominee.¹⁰³

The confirmation hearings would then become less important, less political, and less contentious. The nominee would no longer be extensively "coached" by the Justice Department, the most frequent litigant before the Court.¹⁰⁴ The Senate would no longer need to resort to discovering and then exaggerating isolated statements in order to characterize the nominee as "out of the mainstream."¹⁰⁵ And nominees would no longer be pressured to execute a "confirmation conversion," betraying prior views or softening them in light of the Senate Judiciary Committee's alternate views.

In addition to advising and bargaining in advance with the president, the Senate should more vigorously examine the nominee's pre-nomination record. Previous remarks, writings, and official acts are "a far more reliable indicator of the nominee's views," certainly as compared to that which emerges from "public questioning of a well-coached nominee."¹⁰⁶ This examination may also reduce the importance and orchestrated nature of the confirmation hearings.¹⁰⁷

Should the president choose to ignore Senate advisories and continue to present the Senate with nominees whose primary virtue is anonymity, the Senate could quite simply refuse to confirm. It is certainly within their authority to demand from nominees an explanation and defense of their general views on current constitutional issues. In the absence of a public record to that effect, Senators can demand answers in the hearing or even in advance via a formal questionnaire.

The Senate might also consider other, more "neutral" requirements for a Supreme Court nominee. For example, it might impose an age requirement, perhaps 55 years of age. This would limit presidents in their search for a young nominee whose most attractive virtue is the absence of any meaningful statements or actions with regard to the important issues

103. See Walter Dellinger's comments in "What's the Alternative?", *supra* note 1, at 42.

104. See Michael McConnell remarks in "What's the Alternative?", *supra* note 1, at 41.

105. Strauss & Sunstein, *supra* note 1, at 1514.

106. *Id.* at 1518, 1517.

107. See Dellinger remarks in "What's the Alternative?", *supra* note 1, at 41.

of the day.¹⁰⁸

Similarly, the Senate might consider requiring that future nominees possess a modicum of federal judicial experience, perhaps five years. This too would go far toward reducing the likelihood of stealth nominees, who can legitimately, if unhelpfully, assert their open mindedness and lack of firm views on current constitutional issues. The problem, of course, is that such a requirement might excessively narrow the field of candidates and exclude many who would prove to be exceptional Justices. As Henry Abraham pointed out,

[M]any of the most illustrious members of the Court were judicially inexperienced. Among them were 8 of the 15 Chief Justices: John Marshall, Roger B. Taney, Salmon P. Chase, Morrison R. Waite, Melville W. Fuller, Charles Evans Hughes, Harlan F. Stone, and Earl Warren; and such outstanding Associate Justices as Joseph Story, Samuel F. Miller, Joseph P. Bradley, Louis D. Brandeis, Felix Frankfurter, Robert H. Jackson, and Lewis F. Powell, Jr.¹⁰⁹

Furthermore, the twelve Justices rated "great" in a 1970 survey of scholars by Albert Blaustein and Roy Mersky together possessed 40.5 years of judicial experience prior to their appointments, with Holmes and Cardozo accounting for over half of those years (at twenty-eight). The fourteen Justices rated as "failures," on the other hand had served a total of 64.5 years.¹¹⁰ The reason, as Felix Frankfurter aptly pointed out, is that

the correlation between prior judicial experience and fitness for the Supreme Court is zero. The significance of the greatest among the Justices who had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo. They were thinkers, and more particularly, legal philosophers.¹¹¹

A requirement for prior judicial experience is, in any case, not likely to be passed. All previous congressional proposals for such a prerequisite have failed. However, a requirement of a minimum of ten years of some significant form of legislative, executive, or judicial experience would ac-

108. This would also address the concerns of those who worry about the lengthy terms and increased impact on constitutional law that young Justices would have. It might also increase the Court's turnover and its representativeness.

109. ABRAHAM, *supra* note 34, at 52 (footnote omitted). Similarly, Robert Kagan found that of all U.S. Supreme Court Justices since 1930, only 24% had five years of judicial experience on any court. Robert A. Kagan, et al., *American State Supreme Court Justices, 1900-1970*, AM. B. FOUND. RES. J. 371, 375 (1984).

110. ABRAHAM, *supra* note 34, at 348 n.5.

111. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 795 (1975).

comply with the goal of preventing the stealth nominee without excessively narrowing the field of potential candidates.

Given that transformative appointments recently have been employed as the exclusive way in which constitutional change is achieved, another option might be to alter the confirmation process to resemble the constitutional amendment process, for example, by requiring that future nominees to the Court be approved by two-thirds of the Senate, rather than a majority. Thus, as under Article V, significant constitutional change would be approved by more than a simple majority of states, and even a minority of states could prevent confirmation if their representatives possessed serious doubts as to a nominee's desirability.

Professor Calvin Massey similarly argued for a two-thirds rule for Senate confirmation. He believes such a change would dampen "excessive partisan zeal" and "require the President to select a nominee with broad public support."¹¹² And although it might enhance the ability of an interest group to block any nominee it opposed, a salutary effect might result: "A premium would be placed on nominating a person whose accomplishments, constitutional philosophy, and professional stature is so beyond cavil that even groups politically opposed to the nominee would fail to arouse senatorial opposition."¹¹³

Had such a rule been in effect, the 52 to 48 Senate vote in favor of Clarence Thomas would have resulted in his rejection. Rehnquist too would have failed to receive Senate approval for his elevation to the Chief Justice seat in 1986 because he received only 65 confirmation votes.¹¹⁴ Due to changes in the dynamics of Senate confirmation voting, Rehnquist might also have been initially denied an associate justiceship in 1971, when he received only sixty-eight affirmative votes.¹¹⁵ This proposal would be effective only with regard to nominees whose statements or actions have aroused controversy. It would not likely affect the confirmation of "stealth" nominees like Kennedy (who received no negative votes) or Souter (who received only nine).¹¹⁶

112. Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 14-15 (1991).

113. *Id.* at 15.

114. As Massey noted, six other nominations would have failed as well (at no great loss to the nation, he argued): Mahlon Pitney, Lucius Lamar, Stanley Matthews, Nathan Clifford, John Catron, and Roger Taney (for Chief Justice). *Id.*

115. Other "close calls" were Charles Evans Hughes (for Chief Justice), Louis Brandeis, and Melville Fuller (for Chief Justice). *Id.* at 15-16.

116. Thus, vigorous examination of the pre-nomination record or, in its absence, of the nominee's views during the confirmation hearing remains critical.

Also consistent with the intent of Article V, the institutional support needed to approve constitutional change in the form of transformative appointments could be broadened. Confirmation by the House or even a delegation of state and party representatives could be added to insure that Presidents who seek momentous constitutional change must earn broad political support for that agenda.

The primary difficulty with such proposals is not their illegitimacy, but their impracticality, given that they would require a constitutional amendment.¹¹⁷ Extending the confirmation process in this manner would lengthen the process and increase the resources necessary to evaluate the nominee. That cost is outweighed, however, by the value of invigorating public debate and expanding the political support needed to approve the President's transformative nominations.

B. Strengthening Congressional Checks

In addition to the Senate more aggressively asserting its constitutional preferences in the confirmation process, Congress may also legitimately enter the inter-branch competition for control of the Court. While it possesses many tools to do so, altering the size of the Court is the most effective and legitimate.

Restricting the appellate jurisdiction of the Court is too selective and problematic a tool for the Congress to use. The conservative shift in the Court's decisionmaking is simply too broad, covering too many different constitutional issues, for the Congress to withdraw each and every issue on which it finds the Court's decisions troubling. Moreover, resolution of those constitutional issues would then be shifted to lower courts, which are also subject to transformative appointments. There are legitimate concerns regarding the resulting problems of uncertainty and instability in the law if important constitutional questions are left to potentially diverse resolutions in the lower courts, or if they temporarily remain static.¹¹⁸

117. Requiring two-thirds approval by the Senate would probably require a constitutional amendment. See Massey, *supra* note 112, at 14. The Senate could, however, as part of its advisory role, agree not to confirm a nominee if he or she failed to win an advisory approval vote from the House of Representatives or a delegation of national and state representatives.

118. For a discussion of such problems, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNDAMENTAL RECONSIDERATION OF THE RULE OF THE SUPREME COURT* 52-55 (1980); EDWARD KEYNES, with RANDALL K. MILLER, *THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION* (1989); Symposium, *Congressional Limits on Federal Court Jurisdiction*, 27 *VILL. L. REV.* 893 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *STAN. L. REV.* 895 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *HARV. L. REV.* 1362 (1953).

Simply cancelling the Court's term (or terms) similarly does nothing to alter the Court's composition or decisions. Such an action would only slightly delay undesirable decisions and temporarily leave current constitutional issues to the vicissitudes of lower courts.

Both the constitutional amendment and the impeachment processes are cumbersome, crude, and ineffective tools for checking the Supreme Court. They are, moreover, intended as direct checks on the Court and its decisions, rather than as checks on presidential control of the Court, the central concern here.

Congress can, of course, continue to limit the impact of the Court's decisions through its discretionary legislative and funding power. It may also attempt to overturn the Court's statutory interpretations with which it disagrees, as it has with regard to employment discrimination.¹¹⁹ That, however, is not the only legitimate course that Congress may follow. In fact, President Bush's veto strangle hold over the Congress¹²⁰ only strengthened the case for employing supplementary means to challenge the president's control of the Court.

As in the nineteenth century, Congress may legitimately choose to alter the size of the Court for political purposes. It may choose to limit the size of the Court as vacancies occur, waiting until the election of a president more to the liking of the Congressional majority. At that time, it may expand the size of the Court if desired. This tool is effectively directed to the goal of checking presidential dominance in packing the Court. It also does not possess the disadvantages of other approaches, like jurisdictional control, which freezes constitutional law doctrines or places them in a temporary state of uncertainty.¹²¹

There might be some concern that Congress may entirely usurp the president's role in selecting new Justices. These concerns, however, are unfounded. The president would retain the power to veto any attempt to reduce the Court's size; thus, it would, in effect, require a two-thirds congressional majority to limit a sitting president's power to continue making appointments as vacancies occur. Furthermore, presidents would also retain their initiating or nominating role in the selection process, a significant source of power in modern times. Finally, Congress is un-

119. In the Civil Rights Act of 1991, Congress overturned twelve Supreme Court rulings. Congress had failed to override Bush's veto of its earlier attempt at passing a Civil Rights Law in 1990. *See supra* note 63.

120. President Bush had successfully vetoed 35 bills without being overridden by Congress. On October 5, 1992, however, Congress overrode Bush's veto of a cable bill. *Bush's Veto on Cable TV is Overridden*, S.F. CHRON., Oct. 6, 1992 at A2.

121. One possible but relatively insignificant problem would be tie votes, should the Court's size remain at an even number.

likely to overuse, and thus abuse, its power of altering the Court's size. The need to do so would, in any case, be reduced if the Senate were to adopt the more aggressive "advise and consent" role advocated here.

VI. Conclusion

More vigorous Senate review, expanding the political support needed for confirmation, and particularly, congressional alteration of the Court's size, will no doubt be seen as overly political and thus a dangerous assault on the independence of the Supreme Court. These proposals, however, are not directed to subjecting *existing* members of the Court to additional or more vigorous political checks. They are distinct from proposals to make impeachment easier, to permit Congress to override the Court's constitutional decisions by a two-thirds vote, or to subject Justices to term limits or a public or congressional retention vote.¹²² Such reforms would indeed strike a significant blow to the ability of the Court to evaluate statutory and constitutional challenges independently and without fear of immediate political reprisal. What is being advocated here, in contrast, is a stronger political check on the power of the president to steer the Court in a particular ideological direction.

These proposals may indeed produce a significant inter-branch battle for control of the Court. This may even result in periods of political stalemate over judicial appointments and the Court's future direction. Should we as a nation arrive at a more certain consensus about the Court's desired constitutional course, however, the temporary costs of political acrimony and stalemate would be worthwhile.¹²³

The Framers intended the Supreme Court to be a coordinate, rather than a presidentially-subordinate, branch of government; it is not, nor should it be, a mere agent of the president. Control over the selection of its membership was intended to be shared between the president and Senate. In addition, the Framers quite rightly believed that constitutional

122. Progressives in Congress unsuccessfully sought to impose new constraints on the conservative Court at the turn of the twentieth century. They proposed that the Court could strike down federal statutes only by a two-thirds majority rather than a simple majority. They would have also permitted Congress to overrule the Court's decisions by a two-thirds majority. O'BRIEN, *supra* note 46, at 172. Monaghan proposed eliminating life tenure and instead providing that "no one be permitted to serve for more than some fixed and unrenovable term such as fifteen or twenty years." Monaghan, *supra* note 78, at 1212. See also Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799. For a conservative view, see A BLUEPRINT FOR JUDICIAL REFORM (Patrick B. McGuigan & Randall R. Rader eds., 1981).

123. Simson came to the same conclusion. Simson, *supra* note 1, at 315-17. Friedman, however, did not. Friedman, *supra* note 79, at 1316.

change should be unusually difficult to achieve, requiring the support of a super-majority consisting of both national and state representatives. However, two developments—the rise of the judicial independence norm and the recent increase in presidential power—have severely undermined both principles.

The near monopoly of power the president has come to enjoy with regard to Supreme Court appointments is troubling. It requires that we seriously entertain measures to regain an appropriate balance of power between the president and Congress in controlling the ideological direction of the Court. Such measures should increase the political support needed for transformative appointments while leaving intact the capacity of the Court to act as a co-equal branch.

