

# POLITICIZING THE SUPREME COURT

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## I. INTRODUCTION

On February 13, 2016, the unexpected passing of United States Supreme Court Justice Antonin Scalia left a vacancy on the Supreme Court in the midst of a presidential election year.<sup>1</sup> Because this particular election was fought with greater vitriol than any other recent election, the appointment process did not proceed in the same fashion as previous appointments.

Within days of Justice Scalia's death,<sup>2</sup> the Senate leadership, in efforts to prevent a shift to a more liberal Court, announced the Senate would not consider any replacement nominated by President Barack Obama.<sup>3</sup> Soon thereafter, President Obama nominated Judge Merrick Garland<sup>4</sup> to fill the

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1. Adam Liptak et al., *How a Vacancy on the Supreme Court Affected Cases in the 2015–16 Term*, N.Y. TIMES (June 27, 2016), [http://www.nytimes.com/interactive/2016/02/14/us/politics/how-scalias-death-could-affect-major-supreme-court-cases-in-the-2016-term.html?\\_r=0](http://www.nytimes.com/interactive/2016/02/14/us/politics/how-scalias-death-could-affect-major-supreme-court-cases-in-the-2016-term.html?_r=0).
2. Amy Brittain & Sari Horwitz, *Texas Sherriff's Report Reveals More Details on Supreme Court Justice Scalia's Death*, WASH. POST (Feb. 23, 2016), [https://www.washingtonpost.com/world/national-security/texas-sheriff-releases-report-on-supreme-court-justice-scalias-death/2016/02/23/8c0bdb0c-da82-11e5-891a4ed04f4213e8\\_story.html](https://www.washingtonpost.com/world/national-security/texas-sheriff-releases-report-on-supreme-court-justice-scalias-death/2016/02/23/8c0bdb0c-da82-11e5-891a4ed04f4213e8_story.html). President Obama nominated Judge Merrick Garland to succeed Justice Scalia on March 16, 2016. Juliet Eilperin & Mike DeBonis, *President Obama Nominates Merrick Garland to the Supreme Court*, WASH. POST (Mar. 16, 2016), [https://www.washingtonpost.com/world/national-security/President-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-eb7c-11e5-a6f3-21ccdbc5f74e\\_story.html](https://www.washingtonpost.com/world/national-security/President-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-eb7c-11e5-a6f3-21ccdbc5f74e_story.html). Although few presidents have filled Supreme Court vacancies in their final year, the Senate has never taken more than 125 days to confirm a successor; the average has been 25 days before either consent is afforded or the nominee is withdrawn. *How Long Does It Take Before to Confirm a Supreme Court Nominee?*, N.Y. TIMES (Feb. 13, 2016), [http://www.nytimes.com/interactive/2016/02/13/us/how-long-does-it-take-to-confirm-a-supreme-court-nominee.html?\\_r=0](http://www.nytimes.com/interactive/2016/02/13/us/how-long-does-it-take-to-confirm-a-supreme-court-nominee.html?_r=0). The delay in this appointment caused over two-thirds of the Court's 2016–17 term to be carried out with only eight justices.
3. See Manu Raju et al., *Senate GOP: No Hearings for Supreme Court Nominee*, CNN (Feb. 23, 2016, 9:39 PM), <http://www.cnn.com/2016/02/23/politics/joe-biden-supreme-court-senate-republicans/index.html> (discussing the Senate's refusal to hold confirmation proceedings until President Obama's successor takes office).
4. Judge Merrick Garland serves as the chief judge of the United States Court of Appeals for the District of Columbia Circuit. Del Quentin Wilber & David G. Savage, *Oklahoma City Bombing*

vacancy.<sup>5</sup> The Senate, however, remained steadfast in its refusal to hold confirmation hearings.<sup>6</sup>

The conflict between the Republican controlled Senate and the outgoing Democratic President—presented with his third opportunity to nominate a justice—sparked an intense constitutional debate over the appointment process itself.<sup>7</sup> While Article II of the Constitution<sup>8</sup> provides that the president, with the “Advice and Consent” of the Senate, “shall appoint” a replacement,<sup>9</sup> there is much disagreement over whether the Senate has a constitutional obligation to advise and consent on the president’s nominee in a timely manner. If so, another issue arises regarding how to enforce this obligation. If not, is the Senate’s refusal only permitted during an election year,<sup>10</sup> or can the Senate refuse indefinitely?<sup>11</sup> The problem arises because, as discussed *infra*, the Constitution expressly gives the Senate the power to advise and consent, but it does not specify how the Senate must exercise this power.<sup>12</sup>

This Article argues the Senate has a constitutional duty to advise and consent in a timely manner. More importantly, it argues the Senate’s responsibility to fulfill its constitutional duty is a paramount political—as opposed to legal—obligation that the Constitution imposes directly on senators to preserve the integrity of the Court and to maintain the political morality of democracy in the process. Under the United States’ system of government, senators are occasionally summoned to fulfill “higher law”

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*Deeply Affected Supreme Court Nominee Merrick Garland*, L.A. TIMES (Mar. 16, 2016, 1:51 PM), <http://www.latimes.com/nation/la-na-court-obama-garland-20160316-story.html>. Chief Judge Garland is also a former federal prosecutor well-known for his prosecutorial work in the Oklahoma City bombing that killed 168 people, including 19 children. *Id.*

5. *Id.*

6. Martha Minow & Deanell Tacha, *US Needs a Government of Laws, Not People*, BOSTON GLOBE (Mar. 22, 2016), [http://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYEibtXCQyIM/story.html?s\\_campaign=8315](http://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYEibtXCQyIM/story.html?s_campaign=8315) (noting that the Senate’s refusal is unwarranted, considering the fact that Chief Judge Garland has “18 years of federal judicial service . . . [a] reputation as one of the most outstanding judges in the country, . . . [and] a lifetime devotion to public service as a prosecutor, justice official, judge, and lawyer.”).

7. Andy Schmookler, *How Obama Can Break the Impasse on the Supreme Court Vacancy*, HUFFINGTON POST (May 14, 2016), [http://www.huffingtonpost.com/andy-schmookler/how-obama-can-break-the-i\\_b\\_9971588.html](http://www.huffingtonpost.com/andy-schmookler/how-obama-can-break-the-i_b_9971588.html).

8. All references to the Constitution not otherwise specified are to the U.S. Constitution.

9. U.S. CONST. art. II, § 2, cl. 2.

10. See Michael Bowman, *US Supreme Court Vacancy Sparks Constitutional Debate*, VOA (Apr. 26, 2016, 3:18 PM), <http://www.voanews.com/a/us-supreme-court-vacancy-sparks-constitutional-debate/3303706.html> (describing the “partisan tug-of-war” over the Supreme Court nomination process).

11. *McCain Suggests GOP Would Oppose Clinton Supreme Court Picks*, SALON (Oct. 17, 2016, 2:15 PM), <http://www.salon.com/2016/10/17/mccain-suggests-gop-would-oppose-clinton-supreme-court-picks/>.

12. See *infra* Part III.

responsibilities—meaning specific constitutional obligations—which includes advising and consenting on judicial nominees. Determining the specific actions required, and the temporal limitations on performance of these actions, necessitates an examination of the Constitution’s text, the Framers’ intent in devising our nation’s political institutions, and, normatively, what the Constitution sought to achieve through creating a representative government.

Part II explains the Senate’s concerns about the ideological direction the Court may follow without a conservative replacement for Justice Scalia. Part III sets forth relevant constitutional provisions along with evidence of the Framers’ intent, showing the Supreme Court was established and designed to function outside of normal politics as an independent branch of government. Part IV discusses the justiciability limitations that may prevent courts from resolving the issue. Part V offers guidelines for maintaining the integrity of the confirmation process in light of the Constitution’s higher law by limiting the Senate’s evaluation to the nominee’s integrity, legal expertise, judicial philosophy, temperament, and concern for the rights people currently possess. Part VI presents a political philosophy for peaceful operation of a pluralistic democratic society, which comports with the guidelines in Part V. Finally, Part VII concludes that the survival of the constitutional order is dependent on the dedication of the political branches to fulfilling their higher law responsibilities as a matter of political morality, especially amidst serious political disagreements.

## II. WHY JUSTICE SCALIA’S REPLACEMENT MATTERS

Justice Scalia was the leading conservative voice on the Court during his tenure. Justice Scalia often invoked the judicial philosophies of “originalism” and “textualism.”<sup>13</sup> Textualism involves interpreting statutes to accord with the plain language of the text, while originalism involves interpreting the meaning of the Constitution by discerning the Framers’ expectations at the time it was drafted.<sup>14</sup> In general, Justice Scalia was a fairly predictable proponent of conservative outcomes; he was, by way of the rhetoric in his often vehement and sometimes sarcastic dissents, a supporter of conservative values.<sup>15</sup> These values are what conservatives

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13. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 23-25, 37-41 (Amy Gutmann ed., Princeton Univ. Press 1997).

14. See *id.* at 40. The legal philosopher, Ronald Dworkin, has argued that Justice Scalia’s two forms of interpretation are not the same. See *id.* at 119-27 (Comment by Ronald Dworkin).

15. See David G. Savage, *Supreme Court Justice Antonin Scalia Dies at 79: Ardent Conservative Fought Liberalism’s Tide*, L.A. TIMES (Feb. 13, 2016), <http://www.latimes.com/local/lanow/la-me-antonin-scalia-20160213-story.html>.

believe will be lost—and what liberals hope to limit—if a liberal president appoints Justice Scalia’s replacement.<sup>16</sup>

Some of the most contentious cultural and political issues of our time—including the recognition of same-sex marriage,<sup>17</sup> the right to bear arms,<sup>18</sup> and a woman’s right to have an abortion<sup>19</sup>—were resolved by very close votes on the Supreme Court. Justice Scalia, for example, sided with the five-to-four majority in the landmark Second Amendment cases *District of Columbia v. Heller*<sup>20</sup> and *McDonald v. City of Chicago*.<sup>21</sup> In other monumental decisions that split the Court five-to-four, such as *Obergefell v. Hodges*,<sup>22</sup> legalizing same-sex marriage, and *Planned Parenthood v. Casey*,<sup>23</sup> reaffirming a woman’s right to an abortion prior to viability, Justice Scalia vigorously dissented. Justice Scalia’s death leaves these close decisions vulnerable to various legal challenges from parties who object to the Court’s previous determinations and the rights these decisions confer.

Moreover, equally contentious issues will inevitably wind through the lower courts to the Supreme Court.<sup>24</sup> The determination of these cases, if decided in the next term, will be influenced by the judicial philosophy<sup>25</sup> of the nominee ultimately appointed. For these reasons, both parties are concerned about the future nominee, as the fate of many current and future rights may be held in the balance. The Republican Leadership, however, took its concern to the next level by halting the confirmation process under President Obama altogether.

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16. SCALIA, *supra* note 13, at 23–28, 119–27.

17. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding by a five-to-four majority establishing a right to same-sex marriage).

18. *See generally* *District of Columbia v. Heller*, 554 U.S. 570 (2008) (resulting in a five-to-four majority holding that the Second Amendment protects an individual’s right to bear arms unconnected with forming a militia).

19. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (ruling in favor of a woman’s right to have an abortion with two dissenting justices); *Planned Parenthood v. Casey*, 505 U.S. 833 (1972) (reaffirming the central holding in *Roe*, but with only five justices joining the majority).

20. *See generally* 554 U.S. 570 (2008) (holding the Second Amendment protects an individual’s right to bear arms unconnected with forming a militia).

21. *See generally* 561 U.S. 742 (2010) (holding the Second Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment).

22. *See generally* *Obergefell*, 135 S. Ct. 2584 (extending the fundamental right to marry to same-sex couples and requiring states to provide marriage licenses to same-sex couples).

23. *See generally* *Planned Parenthood*, 505 U.S. 833 (reaffirming the central holding in *Roe* that a woman has a constitutional right to obtain an abortion prior to viability).

24. *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (involving a prison policy that prevented a Muslim prisoner from growing a short beard; the Court found this policy violated the Religious Land Use and Institutionalized Persons Act). Depending on how a future Supreme Court interprets precedent like *Holt*, these decisions have potential to effect broader issues concerning religious liberty that will likely implicate equality concerns.

25. Specifically, how the future justice interprets the Constitution.

Senate Majority Leader, Mitch McConnell, defended the Senate's inaction, stating that postponing the nomination process allows the American people to decide who should be on the Court through the next elected president.<sup>26</sup> While the legitimacy of this reasoning was questionable and likely a pretext for underlying political motivations, the troubling aspect of the Senate's obstructionism is the dangerous precedent it sets for future Supreme Court nominees whenever the presidency and the Senate are controlled by different political parties.<sup>27</sup> Part III discusses the constitutional provisions supporting the contention that the Senate has a constitutional duty and explains how the Senate's inaction thwarts the purpose of the nomination process.

### III. CONSTITUTIONAL REQUIREMENTS

Article III provides: "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."<sup>28</sup> The Framers made the judicial branch separate and distinct to ensure the judiciary served as an independent check on the legislative and executive branches.<sup>29</sup> Alexander Hamilton articulated the Framers' opposition to making the Supreme Court part of Congress in *Federalist No. 81*, stating:

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes, in the whole or in a part of the legislative body . . . . To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them . . . that it is not violated by vesting the

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26. David M. Herszenhorn, *Mitch McConnell Tells Garland the Senate Will Not Act*, N.Y. TIMES (Mar. 16, 2016), <http://www.nytimes.com/live/obama-supreme-court-nomination/mcconnell-tells-garland/>.

27. Adam Liptak, *Study Calls Snub of Obama's Supreme Court Pick Unprecedented*, N.Y. TIMES (Jun. 13, 2016), <http://www.nytimes.com/2016/06/14/us/politics/obama-supreme-court-merrick-garland.html?smprod=nytcare-ipad&smid=nytcare-ipad-share>.

28. U.S. CONST. art. III, § 1.

29. THE FEDERALIST NO. 81, at 2 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them, would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges.<sup>30</sup>

These concerns are further supported by constitutional provisions illustrating the Framers' intent to keep the Court separate from the politics of the political branches.<sup>31</sup> Article III, for example, provides that the justices of the Supreme Court, along with all federal judges, are to hold "their Offices during good Behaviour . . ."<sup>32</sup> This provision grants federal judges life tenure,<sup>33</sup> subject only to impeachment for high crimes or misdemeanors by the House of Representatives,<sup>34</sup> followed by a trial in the Senate,<sup>35</sup> moreover, this precludes Congress from manipulating the composition of the Court by arbitrarily replacing justices for making a decision unfavorable to the controlling political party. Hamilton's belief, that this provision requires a different kind of evaluation for members of the judiciary from that of the political branches, is exposed when he writes:

There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party division, there will be no less reason to

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30. *Id.*

31. *See* U.S. CONST. art. III, § 1; *id.* art. II, § 4; *id.* art. I, § 3, cl. 6.

32. *Id.* art. III, § 1.

33. *Id.*

34. *Id.* art. II, § 4.

35. *Id.* art. I, § 3, cl. 6.

fear that the pestilential breath of faction may poison the fountains of justice.<sup>36</sup>

As further proof that partisan divides should not hamper the operation of the judiciary, Article III expressly prohibits Congress from diminishing the compensation judges receive during “their Continuance in Office.”<sup>37</sup> This limitation shows the Framers’ intent to prevent Congress from politicizing the judiciary, for example, by threatening to reduce judges’ salaries for opinions unfavorable to the political party that dominates Congress. Article III does, however, grant Congress authority to alter the Court’s appellate jurisdiction<sup>38</sup> and to set the number of seats on the Court.<sup>39</sup> Although Article III does not specify when it is appropriate to change the number of justices, it presumably includes circumstances where the Court is unable to do its job effectively; such circumstances would not include delaying an appointment in hopes that the next president nominates a candidate more favorable to the party controlling Congress.

Article III’s provisions, along with Article II and the *Federalist Papers*, show that the Framers intended to maintain the balance of powers by ensuring the judiciary remained isolated from the politics affecting the executive and legislative branches. Nevertheless, is the confirmation process for Supreme Court appointees an instance where partisan control can invade an otherwise non-political branch of government? The answer to this question requires an examination of the components of the relevant constitutional provisions.

#### A. The Senate’s Role and Temporal Limits

When there is a vacancy, the Constitution provides that the president “shall nominate, and by and with the Advice and Consent of the Senate,

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36. THE FEDERALIST NO. 81, *supra* note 29, at 485.

37. U.S. CONST. art. III, § 1.

38. *Id.* art. III, § 2, cl.2.

39. *See id.* art. I, § 3, cl. 6 (indicating that there will be one Chief Justice but leaving the number of justices unaddressed). The Judiciary Act of 1789 set the number of justices at six; since 1869, however, the number of justices has been nine. Elizabeth Nix, *7 Things You Might Not Know About the U.S. Supreme Court*, HISTORY (Oct. 8, 2013), <http://www.history.com/news/history-lists/7-things-you-might-not-know-about-the-u-s-supreme-court>. During the Administration of President Franklin Delano Roosevelt, there was some discussion to expand the size of the Court after several pieces of President Roosevelt’s New Deal legislation were struck down as unconstitutional; however, this never passed. *Id.* Some have suggested this was due to Justice Roberts’s switch to upholding New Deal legislation beginning with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *See, e.g.*, Brian T. Goldman, *The Switch in Time that Saved Nine: A Study of Justice Owen Roberts’s Vote in West Coast Hotel Co. v. Parish*, U. PA. SCHOLARLYCOMMONS (2012), [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1181&context=cur\\_ej](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1181&context=cur_ej).

shall appoint . . . Judges of the supreme Court . . . .”<sup>40</sup> Here, the Constitution’s direction to both the president and the Senate is not conditional, thus ensuring the obligation takes effect immediately upon a vacancy. Moreover, Article II, Section 2, further details the president’s initial role in the appointment process by granting the president the “power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>41</sup> In conjunction, these provisions acknowledge it is the president’s sole power to make nominations—both temporary and permanent—subject only to his or her judgment concerning the nominee’s qualifications.<sup>42</sup>

However, the fact that recess appointments automatically expire “at the End of [the Senate’s] next session”<sup>43</sup> shows the Framers intended for the Senate to check the president’s powers with regard to permanent nominations, by requiring the Senate’s advice and consent.<sup>44</sup> This ensures the nominee holds the proper qualifications, temperament, and overall suitability for the Court. These limitations on the president’s power show that the Senate is intended to be a coordinate political partner in the process of filling Supreme Court vacancies.

The Senate’s role is further discussed in Article I, Section 5, which provides that the Senate has the power to “determine the Rules of its Proceedings.”<sup>45</sup> This power allows the Senate to decide, among other matters, how to advise and consent on Supreme Court nominees and gives the Senate the ability to control how the confirmation process proceeds.<sup>46</sup> This ordinarily occurs after a formal hearing where the nominee testifies before the Senate Judiciary Committee regarding his or her background, judicial temperament, concern for *stare decisis* and existing rights, and

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40. U.S. CONST. art. II, § 2, cl. 2.

41. *Id.* art II, § 2, cl. 3.

42. See Lyle Denniston, *Is a Recess Appointment to the Court an Option?* SCOTUSBLOG (Feb. 14, 2016, 12:24 AM), <http://www.scotusblog.com/2016/02/is-a-recess-appointment-to-the-court-an-option/> (discussing the president’s power for both permanent and temporary recess appointments).

43. U.S. CONST. art. 2, § 2, cl. 3.

44. In at least two instances, recess appointments were made permanent upon the Senate’s confirmation after returning into session. See Dave Boyer, *Obama Could Use Recess Appointment to Bypass Congress, Install Justice*, WASH. TIMES (Feb. 15, 2016), <http://www.washingtontimes.com/news/2016/feb/15/obama-could-fill-supreme-court-vacancy-with-recess/> (discussing the appointments of Chief Justice Earl Warren and Justice Brennan). In *National Labor Relations Board v. Noel Canning*, the Supreme Court set out criteria concerning how long the Senate must be out of session to determine if a recess appointment is constitutionally appropriate. See generally 134 S. Ct. 2550 (2014) (holding, among other things, that the Recess Appointments Clause extends to vacancies arising before recesses).

45. U.S. CONST. art. I, § 5, cl. 2.

46. See *id.* art. II, § 2, cl. 2.



overall judicial philosophy; other witnesses—supporting or opposing the nominee—may also speak at the hearing.<sup>47</sup> After the hearing, the Senate Judiciary Committee reports its confirmation recommendation to the full Senate.<sup>48</sup> These provisions show the Senate has an important role in the process that is to be performed promptly.

## B. Duties and Principles of Constitutional Interpretation

The Constitution's plain language, prescribing the Senate's role in the confirmation process, shows this duty is mandatory. Article II uses the word "shall" in its declaration that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . ." <sup>49</sup> In this context, "shall" is defined as a "command, promise, or determination" to act.<sup>50</sup> While the semantics of the first "shall" are initially placed on the president, the Senate is also commanded to advise and consent to fulfill the purpose of the second "shall" before "appoint," which cannot occur absent the Senate doing its job. Otherwise, the Constitution's creation of the judicial branch would be entirely at the Senate's discretion, which contradicts Hamilton's concerns expressed in *Federalist No. 81*.<sup>51</sup>

In other words, the Constitution's mandate that the president "*shall* nominate, and by and with the Advice and Consent of the Senate, *shall* appoint . . . Judges of the supreme Court"<sup>52</sup> is futile if the Senate is permitted to delay the proceedings for political purposes. The president's duty and the Senate's duty go together as indicated by "shall appoint . . . Judges of the supreme Court." The word "shall" is placed before "appoint" to emphasize the Senate's separate duty to determine the nominee's suitability. Therefore, the Senate's duty is not optional; appointment can only occur after both the president's and the Senate's duties are performed.

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47. See *The Supreme Court of the United States*, U.S. SENATE COMM. ON JUDICIARY, <https://www.judiciary.senate.gov/nominations/supreme-court>.

When a vacancy occurs on the Supreme Court, the President of the United States is given the authority, under Article II of the United States Constitution, to nominate a person to fill the vacancy. The nomination is referred to the United States Senate, where the Senate Judiciary Committee holds a hearing where the nominee provides testimony and responds to questions from members of the panel. Traditionally, the Committee refers the nomination to the full Senate for consideration.

*Id.*

48. *Id.*

49. U.S. CONST. art II, § 2, cl 2.

50. See *Shall*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/shall> (last visited Oct. 30, 2016) ("[U]sed in laws, regulations, or directives to express what is mandatory.").

51. See THE FEDERALIST NO. 81 (Alexander Hamilton).

52. U.S. CONST. art II, § 2, cl. 2 (emphasis added).

Thus, interpreting the president's duty to be mandatory while the Senate's to be optional is not logical because such an interpretation undermines the whole appointment process the Constitution sets forth.

The second "shall," and the Constitution's establishment of an independent judiciary, show that the Senate has a duty-bound role to advise and consent, meaning the Senate has a duty to make a determination either approving or disapproving the president's nominations. Any other interpretation undercuts the Framers' intention to separate powers among the branches. For example, interpreting the Senate's duty as optional, but the president's duty as mandatory, fails to afford respect to the president's role and contradicts how the provision was meant to operate in the Constitution, since "shall appoint" *requires* the agreement of both the president and the Senate, and without this requirement, the use of "shall" becomes effectively impotent.

Moreover, even going beyond the plain meaning of the words to considering additional principles of constitutional construction proves that "shall," in this context, means "[h]as a duty to . . . [or] required to."<sup>53</sup> For example, functional or structural methods of constitutional interpretation focus on the structure of the Constitution and how the document is intended to function as a whole.<sup>54</sup> These methods adhere to the maxim that "no one can properly understand a part until he has read the whole."<sup>55</sup> In other words, the Constitution must be read as a whole and in such a way as to make each of its provisions consistent with every other provision, unless amended or interpreted differently by the Supreme Court.<sup>56</sup>

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53. *Shall*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("This is the mandatory sense that drafters typically intend and that courts typically uphold.").

54. *Principles of Constitutional Interpretation*, FEDERALIST PAPERS PROJECT, <http://thefederalistpapers.org/principles-of-constitutional-interpretation> (last visited Oct. 29, 2016).

55. *Principles of Constitutional Construction*, CONSTITUTION SOCIETY, [http://www.constitution.org/cons/prin\\_cons.htm](http://www.constitution.org/cons/prin_cons.htm) (last visited Sept. 25, 2016).

56. *See id.* In this regard, the Constitution Society has stated:

Constitutional *interpretation*, or constitutional *construction*, the term more often used by the Founders, is the process by which meanings are assigned to words in a constitution, to enable legal decisions to be made that are justified by it. Some scholars distinguish between "interpretation"—assigning meanings based on the meanings in other usages of the terms by those the writers and their readers had probably read, and "construction"—inferring the meaning from a broader set of evidence, such as the structure of the complete document from which one can discern the function of various parts, discussion by the drafters or ratifiers during debate leading to adoption ("legislative history"), the background of controversies in which the terms were used that indicate the concerns and expectations of the drafters and ratifiers, alternative wordings and their meanings accepted or rejected at different points in development, and indications of meanings that can be inferred from what is *not* said, among other methods of analysis.

*Id.*

Article II, Section 2, for example, begins with “[the president] *shall have the Power*, by and with the Advice and Consent of the Senate, to make Treaties . . . .”<sup>57</sup> Here, “shall have the Power,” unlike the language “shall appoint” used to describe the dual roles of the president and the Senate in making Supreme Court appointments, implies that the treaty power is at the discretion of the president. This shows that the Framers chose to make a power optional in various places in the Constitution, but chose not to do so in regards to the Senate’s duty to advise and consent on Supreme Court nominees.

Similarly, interpreting the Constitution as a whole casts light on the governmental structure of the document, which devises the power among the three branches. The Framers’ decision to create three separate branches only to have the Senate effectively nullify the third would render this formation meaningless. The Senate’s role is to ensure the nominee is qualified, and it is in fulfilling that role where the Senate’s duty lies. The combination of the president’s duty with the Senate’s duty is how the appointment process is required to proceed—without both, appointment cannot occur.

### C. Separation of Powers

Interpreting the Senate’s duty as optional undermines the Supreme Court’s ability to function as a non-political institution by inhibiting its ability to provide an independent check over the other two political branches. While the Senate is supposed to play *a part* in the process, the Senate usurped the power of all the branches’ functions by delaying the process and disregarding the needs, obligations, recommendations, and concerns of the other branches based solely on political motivations.

The Senate’s overstep, allowing it to make the ultimate decision, creates an imbalance of power among the branches. Indeed, the language contained in Article I and Article II, in conjunction with Article III’s creation of the Judiciary as the third branch of government, imposes a constitutional duty on the Senate to advise and consent on the president’s nominee whenever a vacancy occurs. This role is essential to ensure that the Judicial Branch remains viable and non-political. Abandoning this duty for political reasons allows the Senate to usurp the powers of the other branches and affords the Senate a purely partisan veto, rather than a veto based on the nominee’s suitability as intended.<sup>58</sup>

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57. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

58. See Raju et al., *supra* note 3.

Inserting politics into the confirmation process contradicts the Framers' vision of a non-political branch of government. Therefore, to fulfill its constitutional duty and to preserve its integrity, the Senate must always make a decision on the president's nominee based on the nominee's fitness for the position.<sup>59</sup> The Senate should never, however, refuse to participate in the appointment process that the Constitution obligates it to take part in. Although this analysis of the relevant constitutional provisions suggests the Senate has a duty to act timely, who is responsible for ensuring the Senate performs this duty?

#### IV. JUSTICIABILITY CONCERNS

Unfortunately, it is unlikely courts will consider the Senate's obligation because of the long-standing "political question doctrine."<sup>60</sup> Since *Marbury v. Madison*,<sup>61</sup> the Supreme Court has generally held that so-called political questions are not justiciable, meaning that unlike legal questions involving the interpretation of federal law, the courts are not the appropriate arena for resolving political disputes.<sup>62</sup>

In *Marbury*, the Supreme Court first recognized the Court should maintain its independent judicial role by not interfering with political questions.<sup>63</sup> There the U.S. Secretary of State was issued a mandamus to

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59. See discussion *infra* Part V.

60. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 129–30 (3rd ed. 2006) (footnotes omitted), for a discussion of the political question doctrine.

61. See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.

*Id.* at 166.

62. See generally *Baker v. Carr*, 369 U.S. 186 (1962) (providing the classic statement of the political question doctrine). In *Baker*, the Court readily upheld redistricting challenges to avoid population malapportionment resulting from the way the Tennessee legislature drew the legislative districts.

*Id.* While in effect limiting the political question doctrine, the Court nevertheless stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

63. See generally *Marbury*, 5 U.S. 137.

deliver commissions signed by President John Adams.<sup>64</sup> The issue arose after the Federalist Administration of President Adams was not reelected, and President Thomas Jefferson, a Democratic-Republican, chose to disregard last minute appointments made by the Adams Administration.<sup>65</sup>

In reaching his decision, Chief Justice Marshall articulated the responsibilities of the office of the Secretary of State as follows:

As the agent of the President, [the Secretary of State] is not liable to a mandamus; but as a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws. It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty, and if he refuses, is liable to indictment.<sup>66</sup>

Chief Justice Marshall noted that purely ministerial responsibilities were reviewable by the courts, while discretionary functions, including those arguably “political,” as when the Secretary of State advises the president on matters of foreign policy—are not justiciable.<sup>67</sup> This distinction is relevant to judicial confirmation proceedings because while setting a hearing for a Supreme Court nominee appears purely ministerial, there are many underlying political considerations. Such considerations, for example, may include: the controlling party’s desire to obtain a nominee favorable to its ideology, the research the senators deem necessary to make a determination of suitability, and even determinations about the questions posed to the nominee at the hearing. These political considerations are deeply entangled with what seems like a purely ministerial act, and accordingly, the confirmation hearings are certainly political. As a result, courts will hesitate, except perhaps in the most egregious of situations, to get involved for fear of the Court appearing partisan in resolving the dispute.<sup>68</sup>

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64. *Id.*

65. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 11 (15th ed., 2004).

66. *Marbury*, 5 U.S. at 149–50.

67. See *id.* at 166.

68. The Court could construe the political question doctrine less constrictively and enable a lower court to issue a mandamus to the Senate if it refuses to fulfill its duty in the confirmation process. However, since the Senate only indicated delaying the confirmation process until after the

In *Marbury*, because the commissions were completed before the prior administration left office and all that was left was their delivery, Chief Justice Marshall determined “[t]hese duties are not of a confidential nature, but are of a public kind, and [the President’s] clerks can have no exclusive privileges.”<sup>69</sup> This is notable because courts have interfered with what seems to be a political question, but the interference was justified to ensure a law had not been broken; it was not directed toward affecting the political outcome of the determination.<sup>70</sup>

In contrast, courts’ interference is not justified where the issue merely concerns the logistics of confirmation proceedings for a Supreme Court nominee because no law is broken by this exercise of discretion. It is the political concerns of the Senate, however, that are at stake. The Constitution is silent as to how the process should go forward, in effect leaving those matters solely to the Senate’s own rules of procedure and the Constitution’s expectations for political leaders. Thus, in regards to judicial enforcement of the constitutional requirements for filling Supreme Court vacancies, it is unlikely the courts will step in to ensure the Senate fulfills its duties.

If not the courts, where does enforcement for filling vacancies lie once the president has submitted a nomination? Does it lie with the people as a political matter? As a political branch, the Senate is ultimately subject to the will of the people; thus, if the people disagree with the way their senators behave, they can express their discontent at the polls during the next Senate election. Ultimately, the people have the enforcement power to ensure the Senate performs its duties.<sup>71</sup> Since the courts will not resolve the

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presidential election, the temporal window was likely too narrow for any court to find the issue justiciable.

69. *Marbury*, 5 U.S. at 141.

70. See, e.g., *Royal Props. v. The City of Knoxville*, 490 S.W.3d 1, 8 (Tenn. Ct. App. 2015) (ordering a city council to take a vote when the court thought a definite ruling would help determine whether a law was violated). Petitioner appealed ruling that the Knoxville City Council acted lawfully when it failed to exercise its review authority by voting on whether the denial by the Metropolitan Planning Commission of a surface parking lot was a permitted use. *Id.* The Tennessee Court of Appeals remanded the case “to the Knoxville City Council for a definitive ruling on whether the requested surface parking lot is permissible as a use permitted on review,” noting that “a crucial test distinguishing legislative acts from administrative acts is whether the action taken (resolution or ordinance) makes new law or executes one already in existence.” *Id.* at 7-8. The appellate court noted that, in reviewing the City Council’s decision, the trial court “may not (1) inquire into the intrinsic correctness of the decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the board or agency.” *Id.* at 7. The trial court may, however, “review the record solely to determine whether it contains any material evidence to support the decision because a decision without evidentiary support is an arbitrary one” in violation of law. *Id.*

71. See Part VI *infra*.

issue, Part V proposes political guidelines for the Senate to follow to avoid future holdouts.

## V. POLITICAL GUIDELINES TO AVOID FUTURE HOLDOUTS

This Part suggests a set of political guidelines that are not justiciable, but which inconspicuously operate to guarantee a properly functioning system. Some of the suggested guidelines are already practiced as a matter of good politics and common sense. Nevertheless, it is important to understand how these guidelines both derive from the constitutional system of government the Founders sought to provide and respect the difference in roles between the political and judicial branches. Perceiving these guidelines as supporting the constitutional framework will decrease the risk of the guidelines being altered by changing political agendas.

While the proposed guidelines may not be justiciable, they should be afforded great deference in the court of public opinion, as they fit well within the democratic order that the Constitution instantiates, as shown *infra*. As the philosopher H. L. A. Hart argues, the Constitution along with its various interpretations by the Supreme Court provides the “Rule of Recognition” that affords final public legitimacy to everything else Congress or the president does.<sup>72</sup> The Constitution achieves this legitimacy by limiting the authority of the political branches from just gratuitously advancing their own political agendas and by affording rights to minorities who can rely on the courts to remain free.

In order to guarantee long-term democratic success, the Constitution must remain above conventional partisan politics. This, however, raises the issue of separating the politics discussed in Part III, that are inherent in the president’s nominations and the Senate’s confirmations, from the politics

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72. See H. L. A. HART, *THE CONCEPT OF LAW* 145 (Penelope A. Bulloch & Joseph Raz eds., Clarendon Press 2nd ed. 1994). While laws are deemed valid if adopted in accordance with the requisite constitutional procedures, the Constitution itself may not be valid since the Articles of Confederation required amendments to be unanimously adopted by Congress and all thirteen state’s legislatures—not by special state conventions. See *ARTICLES OF CONFEDERATION* 1781, art. XIII, para. 2; see also HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION* 13 (Univ. of Chicago Press, 1981). But see FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 279 (Univ. Press of Kansas, 1985).

[T]he convention recommended that Congress forward the [Constitution] to the states and that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification. Congress unanimously resolved to follow that recommendation, and the legislatures of all thirteen states voted to abide by it.

*Id.* At this time, “the People” was limited to men who owned a certain amount of property, and Article VII of the Constitution required ratification by only nine states. See *id.* at 25.

that result in a mishandling of the procedures. Affording recognition to the following guidelines provides legitimacy to the Supreme Court nomination process by ensuring that process is carried out as intended by the Framers in devising the Constitution.

*1. No Unnecessary Delays*

The Constitution's guidance for filling a vacancy does not suggest that this process can be artificially postponed.<sup>73</sup> In fact, it suggests the contrary. As mentioned above, Article II, Section 2, allows the president to make a recess appointment, which expires at the end of the Senate's next session.<sup>74</sup> This suggests the Framers intended for the Senate to act promptly on recess nominations, *a fortiori* it intended the Senate act at least as promptly upon permanent nominees.<sup>75</sup> Indeed, the language of Article II, Section 2, supports this conclusion as it uses "shall"—not "may"—in directly prescribing the president's duties and indirectly prescribing the Senate's duties.<sup>76</sup> Thus, the first guideline forbids unnecessary delays in the nomination process; any delay in the process must be necessary for the Senate to function. That is, to perform its job by way of deliberating and voting on the nominee.<sup>77</sup>

To fulfill this guideline, the Senate may not delegate an appointment to a future president or Senate. Allowing the Senate to delay appointments undermines both branches' dual responsibility to facilitate the constitutionally mandated process that keeps the Court outside normal politics. By the same token, postponing the confirmation process is detrimental to the resolution of important issues that are ripe for decision because, with only eight justices, the Court will not be able to resolve close cases and provide guidance to the lower courts if it is evenly divided. The absence of a ninth judge leaves "matters unresolved, keeping individuals, businesses, and communities in limbo and uncertainty."<sup>78</sup>

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

74. *Id.* art II, § 2, cl. 3.

75. *Id.*

76. See *id.* art II, § 2, cl. 2.

77. For example, at the time of the Constitution's ratification, delays may have occurred because it took longer to send messages over land by horse and stagecoach. See The United States Postal Service: An American History 1775–2006, GOV'T REL., U.S. POSTAL SERV. (Nov. 2012), <https://about.usps.com/publications/pub100.pdf>.

78. Minow & Tacha, *supra* note 6; see also John Bisognano, *What They are Saying in Massachusetts About the Supreme Court Nomination*, WHITE HOUSE (May 5, 2016, 3:08 PM), <https://www.whitehouse.gov/blog/2016/05/05/what-theyre-saying-massachusetts-about-supreme-court-nomination> ("Two-thirds of Americans want the senators to do their job: Meet Garland, hold a fair hearing, and vote to approve or disapprove.").



The Supreme Court accepts very few cases annually,<sup>79</sup> and many of the cases the Court hears involve circuits splits or important federal question issues.<sup>80</sup> Accordingly, many of the issues the Court resolves are divisive, and it is not unusual for the justices to disagree on the correct outcome.<sup>81</sup> In these situations, which may involve conflicts over culture, religion, or fundamentally different interpretations of the relevant law, the failure to have nine justices to decide the matter will often lead to the denial of important rights. Here, the role of the ninth justice serves to break a tie when the justices disagree on a divisive issue. The longer the Court operates with an even number of justices, the longer it will struggle to adequately provide guidance on the issues it decides.

For these reasons, the president should always nominate in a timely fashion, and the Senate should promptly offer advice and consent on the nominee if the nominee is overall qualified for the position. The Senate's failure to complete the confirmation process after President Obama nominated Judge Garland created a dangerous precedent for future political disruptions of the Supreme Court and other federal court nominations.

## 2. *Respect the Representative Form of Government*

The second guideline is implicit from the Constitution's text insofar as it establishes a representative democracy.<sup>82</sup> In a representative democracy, the people's *current* representatives—not the people themselves—appoint justices to the Supreme Court.<sup>83</sup> Americans indirectly make the decision by voting in presidential and congressional elections.<sup>84</sup> Indeed, in regards to

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79. See *Supreme Court Procedure*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/> (last visited Sept. 25, 2016) (“Of the 7,000 to 8,000 cert. petitions filed each Term, the Court grants cert. and hears oral argument in only about 80.”).

80. See *Rules of the Supreme Court of the United States, Pt. III, Jurisdiction on Writ of Certiorari*, LEGAL INFO. INST., [https://www.law.cornell.edu/rules/supct/rule\\_10](https://www.law.cornell.edu/rules/supct/rule_10) (last visited Nov. 18, 2016); see also H. W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 251 (Harvard Univ. Press 1991) (discussing the interworking of how the Supreme Court decides which cases to grant certiorari).

81. See *Supreme Court Procedure*, *supra* note 79.

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

83. Representative democracy is defined as “[a] government by representatives elected by the people.” *Representative democracy*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969). By contrast, in a direct democracy, as was practiced in ancient Athens, the people decide all questions in assemblies. See Mark Cartwright, *Athenian Democracy*, ANCIENT HIST. ENCYCLOPEDIA (Oct. 13, 2014), [http://www.ancient.eu/Athenian\\_Democracy/](http://www.ancient.eu/Athenian_Democracy/).

84. See U.S. CONST. art I, § 3, cl. 2 (providing for scattered Senate elections based on an initial division of the members of the first Senate into three parts). The Seventeenth Amendment did not alter this division when it provided for popular election of the senators, thereby maintaining the scattered election of senators set out in Article I. See *id.* amend. XVII (“This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.”).

federal level appointments, the first representative of the people is the incumbent president, who has the duty to nominate by virtue of being elected to office.<sup>85</sup> Then, the members of the Senate who, by way of tradition and rules of procedure, are duly entrusted to ensure the nominee is fit for the position.<sup>86</sup> Beyond these duties, there will often be compromises between the president and the Senate over who to appoint, especially when the Senate is controlled by the opposite political party. It is unclear, however, where the line of compromise should be drawn, as the Constitution leaves the matter to the political branches to resolve.

Still, wherever the line is drawn, it should at least affirm the Founders' original plan to create a republican form of government, which assures continuity by having the president elected every four years,<sup>87</sup> members of the House of Representatives every two years, senators every six years,<sup>88</sup> and an independent federal judiciary with life tenure<sup>89</sup> to be appointed expeditiously as vacancies occur. This particular republican form is best exemplified by the structure the federal government takes under the Constitution, in which the people act through elected representatives, except when voting on constitutional amendments, as described in Article V.<sup>90</sup> It is also different from other republican forms of government insofar as it divides federal and state authority; a republican form of government could exist with merely a central authority.

Moreover, the Constitution itself alludes to the federal form of government in Article IV, Section 4, where it mandates: "The United States shall guarantee to every state in this Union a Republican Form of Government . . ." <sup>91</sup> Of course, it does not place the same requirement on the federal government because the Constitution provides that form to the federal government, with its own separation of powers, as made clear by James Madison in *Federalist* 39.<sup>92</sup> Thus, protecting this form of

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85. *Id.* art. II, § 2, cl. 2 ("[The President] shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . ."); see also *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2577 (2016) (acknowledging the president's authority by ruling that the recess appointment power authorizes the president to fill any vacancy existing during a recess).

86. See generally DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 22-43 (2010) (providing a general review of the history of Supreme Court appointments).

87. U.S. CONST. art. II, § 1.

88. *Id.* art. I, §§ 2-3.

89. *Id.* art. III, § 1.

90. *Id.* art. V.

91. *Id.* art. IV, § 4.

92. See generally THE FEDERALIST No. 39 (James Madison) (arguing the plan of the Constitution is to create a republican form of government for the American people).

government and the rights it secures, along with considering international law,<sup>93</sup> is the proper politics of the situation for the president and senators to contemplate because it respects the Founders' plan of government, and it does not unnecessarily politicize the federal judiciary, especially the Supreme Court.

### 3. *Adhering to a Confirmation Process*

The next guideline prescribes how the confirmation process should proceed. This involves two traditionally recognized events. First, the Senate should hold hearings after a proper investigation into the candidate, as might be relevant to the fitness of a Supreme Court justice.<sup>94</sup> This follows the Judiciary Committee's long-standing tradition of holding open hearings.<sup>95</sup> Second, after the Judiciary Committee concludes its hearings, the Senate should vote on whether to confirm the nominee, unless the nominee withdraws from further consideration. Although, the Judiciary Committee could terminate the nominee's chances prior to the Senate's vote by deciding not to report a nomination, the Committee's practice is to report all nominees to the full Senate, including those that it opposes.<sup>96</sup>

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93. The Constitution provides international law should be acknowledged. *See* U.S. CONST. art. I, § 8, cl. 10; *id.* art. II, § 8, cl. 2; *id.* art. VI, § 2; *see also* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of [U.S.] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).

94. *See* Warren Fiske & Sean Gorman, *Herring Says All Supreme Court Nominees Back to 1875 Got a Confirmation Hearing*, POLITIFACT (Mar. 20, 2016), <http://www.politifact.com/virginia/statements/2016/mar/20/mark-herring/herring-says-all-supreme-court-nominees-back-1875-/> (discussing the Judiciary Committee's historical practice of voting on nominees without hearing testimony from anyone).

95. *See id.* In the nineteenth century, hearings held before the Judiciary Committee were closed to the public. *Id.* In fact, it was not until the 1930s, with two exceptions—in 1916, the Judiciary Committee held an open session for nominee Luis D. Brandeis, and in 1925, an open session was held for Harlan S. Stone, who became the first nominee to appear and testify—that open hearings became the regular practice. *See* RUTKUS, *supra* note 86, at 18.

96. Barry J. McMillion, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee* 17 (Oct. 19, 2015), <https://www.fas.org/sgp/crs/misc/R44236.pdf>.

Usually within a week of the end of hearings, the Judiciary Committee meets in open session to determine what recommendation to report to the full Senate. The committee may (1) report the nomination favorably, (2) report it negatively, or (3) make no recommendation at all on the nomination. A report with a negative recommendation or no recommendation permits a nomination to go forward, while alerting the Senate that a substantial number of committee members have reservations about the nomination.

*Id.* at 15.

Thus, the Senate makes the final determination of the nominee's confirmation.<sup>97</sup>

At first glance, this process may appear merely ministerial; a deeper look, however, reveals the underlying political considerations, including timing (especially in a presidential election year), background research, and related matters. Nevertheless, the president and the Senate have constitutional obligations: the president to nominate and the Senate to advise and consent on the nomination.<sup>98</sup> This means the senators have a duty, regardless of whether the duty might be enforced by a court, not to be merely perfunctory in approving or disapproving of a nominee, but to be mindful of their constitutional obligation to confirm only a qualified candidate for the position.

Article II's appointment procedures must be followed in order to prevent political obstructionism. The Constitution's process for appointment—requiring the president to nominate and the Senate to advise and consent—is mandatory. The Senate can make constitutionally legitimate arguments that require compromise with the president, including arguments about judicial philosophy and the nominee's respect for rights previously recognized. Moreover, the Senate can reject nominees who are unqualified because of education, training, or past illegal behavior. This is why the Constitution vests the power of appointments in both branches of government—so neither branch has the sole power to decide and politicize the process.

#### 4. *The Nominee's Qualifications*

The fourth guideline concerns the ability of the nominee to adequately handle the matters that come before the Supreme Court. The permitted politics should not encompass unscrupulous tactics by the Senate or the president, such as causing delay in hopes of obtaining a more politically favorable nominee in the future. Rather, these politics must embrace the higher law of the Constitution that seeks consensus around a candidate based on his or her overall qualifications. These qualifications include the candidate's legal expertise, temperament, sensitivity to the concerns of the political branches and relations among the institutions of government, respect for international law and for the rights people currently possess

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97. *Id.* at 18; *see also* RUTKUS, *supra* note 86, at 17–18 (discussing the early history of the Judiciary Committee and affording deference for fellow senators), 21–22 (discussing the present pre-hearing stage of a confirmation).

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

(unless seriously in error).<sup>99</sup> Other considerations, including a nominee's promise to decide a particular case in the future a certain way, should not be considered. Although such promises would not be judicially enforceable, the mere transaction deludes the public's perception of the Court's legitimacy by making the Court appear less impartial.<sup>100</sup>

##### 5. *Limited Inquiry into the Candidate's Political Views*

Questions will arise from various constituencies regarding the nominee's propensity to protect their valued rights. Accordingly, the fifth guideline requires the president and the Senate to be circumspect in determining if the nominee exhibits the sensitivity to the concerns of various constituencies. The nominee's testimony, published work, or prior judicial opinions, are all relevant to help make that determination. It is particularly helpful to hold hearings where the nominee can offer testimony about his or her judicial philosophy and respond to senators' questions that might be derived from, among other sources, past scholarly presentations or judicial opinions. To this extent, politics may enter, but only in this limited way, to ensure the candidate is appropriate for the position. This limited exception is important to determining that the nominee, as a justice, will be able to articulate a decision that, even if others disagree with, will nevertheless be respected as a fair and reasonable interpretation of the law.<sup>101</sup>

It is important to remember why the Framers set up the judiciary separate from the political branches: the political branches, unlike the courts, are often motivated by an array of crass concerns, including how

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99. There may be times that substantial legal grounds warrant the questioning of certain rights or previous decisions. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (discussing evidence that a matter warrants reconsideration may include social science data about the effects of separate educational systems on minority children).

100. Although approval ratings often fluctuate between contiguous years, Gallup polls have been fairly consistent over the past sixteen years in showing public approval for the Supreme Court. *See Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited Sept. 25, 2016). This is likely because the Court is basically an anti-majoritarian institution perceived to operate outside normal politics. *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 235–43 (Bobbs-Merrill 1962). Another reason for the Court's high approval, considering its lack of power to ensure its decisions are followed, is because it leads by persuasion, never being too far ahead or behind the society in which it operates. *See id.* "The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed." *Id.* at 239.

101. *See* JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 353 (2009) ("[W]hen reflecting on constitutional interpretation, we should start not from the fact that certain methods of interpretation are used, and not others, but from the question: Why is interpretation so central to constitutional adjudication?").

adopting one position over another might benefit one's reelection. Judges, however, must decide cases based on what the law requires, not on personal beliefs or alternative political agendas.<sup>102</sup> Hence, judges are granted life tenure.

However, in deciding what the Constitution requires, legal philosopher Joseph Raz denies there can be any clear way to separate what the law is from how it should develop, even though constitutional interpretation is not just applied moral reasoning.<sup>103</sup> This problem arises because in discerning the Constitution's mandates, the words relied upon, along with the provision's purported purpose, need to be interpreted. In situations where the meaning is clear, however, a judge should decide the case accordingly or resign if he or she believes doing so would be grossly immoral.<sup>104</sup>

Moreover, the notion that delaying the nomination provides greater certainty to predict how a nominee might decide certain future cases, as opposed to gathering a general idea of the nominee's overall approach, is likely to be unsuccessful. Unpredictable factual situations will arise. This occurs because new factual situations often produce complexities that may only be appropriately resolved by new understandings of morality and human psychology. Additionally, as a matter of constitutional interpretation, Professor Ronald Dworkin has noted:

Any case that arises under the 'vague' constitutional guarantees can be seen as posing two questions: (1) Which decision is required by strict, that is to say faithful, adherence to the text of the Constitution or to the intention of those who adopted that text? (2) Which decision is required by a political philosophy that takes a strict, that is to say narrow, view of the moral rights that individuals have against society? Once these questions are distinguished, it is plain that they have different answers. The text of the First Amendment, for example, says that Congress shall make no law abridging the freedom of speech, but a narrow view of

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102. See, e.g., *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting) (arguing the Majority's decision to strike down Colorado's Amendment 2 was "an act not of judicial judgment, but of political will"); see also SCALIA, *supra* note 13, at 22.

103. See RAZ, *supra* note 101, at 353-57, 361. "There is no general theory of constitutional interpretation, if that is meant to be a general recipe for the way such interpretation should be conducted that is set out in some detail in order to guide the interpreter every step of the way with practical advice." *Id.* at 357.

104. Judges are bound by *stare decisis* to provide certainty in the law, unless the principles of this doctrine warrant reconsideration of the matter. See *id.* at 353.

individual rights would permit many such laws, ranging from libel and obscenity laws to the Smith Act.<sup>105</sup>

Of course, it is appropriate to question the nominee's view of the various guarantees to gain perspective on his or her understanding of the issues. Still, attempts to predict a nominee's view based solely on the political affiliation of the president who nominates the candidate or even the nominee's putative judicial philosophy will be largely unsuccessful. At most, this will only provide a shallow understanding of the way the nominee will begin his or her work on the Court.

Inevitably, questions will arise over the course of a justice's tenure that will cause a shift in ideological views.<sup>106</sup> President Eisenhower's nominee, Earl Warren, for example, was considered a judicial conservative when appointed but veered from just protecting legislative prerogatives toward protecting background rights by ordering school desegregation and recognizing rights of the accused that place specific duties on law enforcement.<sup>107</sup> On the other hand, a judge considered a judicial activist, such as President Kennedy's nominee, Byron White, turned out to be far more conservative than anticipated. For example, Justice White wrote the majority opinion in *Bowers v. Hardwick*, which allowed states to criminally prosecute same-sex couples engaged in private sexual acts in the home.<sup>108</sup> Moreover, he joined the dissent in *Roe*, recognizing a woman's right to have an abortion, and *Miranda*, affording defendants the right to remain silent and have an attorney present before an interrogation.<sup>109</sup> This shows

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105. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 133 (Harvard Univ. Press, 1978). The Alien Registration Act of 1940 ("Smith Act") imposed criminal sanctions for advocating overthrowing the U.S. government and required any alien living in the United States to register with the government. See 18 U.S.C. § 2385 (1940).

106. See generally VINCENT J. SAMAR, *JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY* 68 (Univ. Press of Kansas 1998) (providing a metatheory for judges to depart from their typical legal philosophy when necessary to preserve background rights or institutional rights and prerogatives).

107. See e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding racial segregation in the schools to be unconstitutional); *Miranda v. Arizona*, 384 U.S. 436 (1966) (protecting the rights of the accused); *Engel v. Vitale*, 370 U.S. 421 (1962) (ending public school sponsored prayers); *Reynolds v. Sims*, 377 U.S. 533 (1964) (establishing one man, one vote as a constitutional requirement for apportionment of legislative districts).

108. See e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding states can criminally prohibit adult from engaging in consensual same-sex behavior in the home) *overruled in* *Lawrence v. Texas*, 539 U.S. 558 (2003).

109. *Roe v. Wade*, 410 U.S. 113 (1973) (White, J., dissenting) (recognizing a woman's constitutional right to an abortion); *Miranda*, 384 U.S. 436 (1966) (White, J., dissenting) (requiring police to inform a defendant of his right to counsel and to avoid self-incrimination before proceeding with an interrogation).

the process of judging cannot easily be predicted<sup>110</sup> because unanticipated factual situations along with varying understandings of human behavior will present new challenges for courts to resolve.<sup>111</sup>

Thus, the nominee should be questioned on more enlightening topics concerning views the nominee articulated in lower court rulings or scholarly writings, as these subjects may afford a better understanding of where the candidate's sensitivities lie. This information can be obtained from an examination during the hearings of the nominee's record and by probing questions concerning the nominee's commitment to following *stare decisis*. Such a forthright examination should always be released to the public to ensure legitimacy of the process. In no event, however, should a nominee be required to promise a particular outcome for any case yet to come before the Court or even to express a preferred outcome. For that would undercut the Court's ability to fulfill its duty of affording a fair and impartial hearing to all those who come before it.

Understandably, this uncertainty may be uncomfortable to those who prefer to know in advance exactly how the Court will decide a future case, but perhaps this is the price for having a truly independent judiciary. In the final analysis, if the Court is perceived to venture too far outside what the country believes the law provides, there are political checks by way of Congress increasing the number of justices appointed to the bench<sup>112</sup> or, in a worst case scenario, impeachment.<sup>113</sup>

## VI. POLITICAL PHILOSOPHY

This Part provides a philosophical account for the legitimacy of the Constitution, which the above guidelines further, by showing how it supports a conception of political morality particularly suited to provide stability and protection of fundamental rights in a modern pluralistic democracy.

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110. See SAMAR, *supra* note 106, at 76–77, for a discussion laying out specific metacriteria to ensure departures from precedent are just, rationally unified, and not a product of idiosyncratic whims or personal biases.

111. A modern example was presented in *Obergefell v. Hodges*, where the Court determined same-sex marriage is protected by the Due Process Clause of the Fourteenth Amendment. *See generally* *Obergefell*, 134 S. Ct. 2751 (2015).

112. U.S. CONST. art. II, § 1.

113. *Id.* art. II, § 4.



### A. The Constitution's Inherent Conception of Political Morality

A society marked by reasonable, but different comprehensive moral views, can operate as a whole, so long as it is able to agree on a political conception of justice “latent in the public political culture of a democratic society.”<sup>114</sup> The Philosopher John Rawls posed the question: “[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”<sup>115</sup> Rawls believed that society must be well ordered and united not in its moral beliefs, but in its political conception of justice, where justice becomes the focus of an overlapping consensus of reasonable comprehensive doctrines.<sup>116</sup> Regardless of whether Rawls’ statement applies to the current American political climate, his idea of a well-ordered society is not out-of-place. Indeed, his idea is advanced when citizens from various backgrounds and beliefs acknowledge they are equal before the law and trust the judiciary will ensure that equality.

Many of the most pernicious disagreements that most profoundly divide people occur over religion, metaphysics, and ethics because these issues are likely to make people feel unequal for who they are or what they believe. This is further provoked by political attempts to force a single view to govern a wide range of situations making “citizens with opposing views and interests highly suspicious of one another’s arguments.”<sup>117</sup> This is where rule of law comes apart and is replaced by crass partisan politics. Still, once this is understood as the potential danger to the democratic order, the possibility of real consensus materializes even among those who might otherwise seriously disagree. That consensus will arise, however, only if the laws are seen to be founded not on some metaphysical idea of justice, which might alienate those who hold a different view, but on the basis of social cooperation to discover common interests. At this point, the judiciary plays a pivotal role separate from the legislature, provided it has

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114. JOHN RAWLS, *POLITICAL LIBERALISM* 175 (Columbia Univ. Press 1993); *see also* THE FEDERALIST NO. 51 (James Madison) (arguing that the proposed republican form of government, with its separation of powers and multiplicity of parties’ interests, disallows collations to “take place on any other principles than those of justice and the general good”).

115. RAWLS, *supra* note 114, at 4. *But see* ALAN GEWIRTH, *SELF-FULFILLMENT*, 77–87, 151–58 (Princeton Univ. Press 1998) (distinguishing universal morality, in which reason and human purpose are foundational and apply to everyone, from more particularistic moralities, as particular groups may adopt to provide members a unique kind of self-fulfillment, provided respect is shown for the universal rights of nonmembers).

116. RAWLS, *supra* note 114, at 35.

117. *Id.* at 160–62.

not become so politicized by the confirmation process that it is no longer able to function or be viewed as truly independent.

This is especially true when fundamental constitutional questions are at stake, where the resolution can operate as a *modus vivendi*,<sup>118</sup> like toleration, to allow different political conceptions of society to peacefully coexist knowing everyone's constitutional rights are being secured.<sup>119</sup> Such constitutional consensus initially "establishes democratic electoral procedures for moderating political rivalry within society" and includes "agreement on certain basic political rights and liberties," such as "the right to vote and freedom of political speech and association, and whatever else is necessary for electoral and legislative procedures of democracy," including equality before the law.<sup>120</sup>

Political instability arises in the move from the constitutional consensus to what Rawls calls, "overlapping consensus" where legislation may become dominant and group interests take greater hold.<sup>121</sup> The potential instability can be reduced only by removing from the political agenda specific rights and liberties that preserve the democratic process to go forward.<sup>122</sup> This is why the Supreme Court does not operate from a specific political platform like political parties or elected representatives. Rather, the Supreme Court operates, or should operate, as an "exemplar of public reason" derived from a principled ideal of the basic rights and liberties that constitute higher law and avoid the frailties of ever-changing political agendas.<sup>123</sup> Even when people disagree about particular Supreme Court decisions, their disagreement should be checked by how well the process serves the democratic ideal of living in a free society that protects basic rights of minorities. When the Constitution accomplishes this, it speaks with moral authority, notwithstanding that not everyone will morally agree with every decision the Court makes. But, if this is the view, why do questions like whether the Senate should do its job and hold confirmation hearings for a judicial nominee even arise?

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118. Defined as "[a] temporary, provisional arrangement concluded between subjects of international law and giving rise to binding obligations on the parties." *Modus vivendi*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[Modus vivendi] is an instrument of toleration looking towards a settlement, by preparing for or laying down the basis of a method of living together with a problem or by bridging over some difficulty pending a permanent settlement.").

119. RAWLS, *supra* note 114, at 158.

120. *Id.* at 158–59.

121. *Id.* at 161.

122. *See id.*

123. *Id.* at 231.

## B. Maintaining the Constitution's Political Morality in a Nearsighted System

These questions arise because American politics exhibit a primarily short-term view of the public interest, which often makes it appear closely aligned to private or specific group interests.<sup>124</sup> Two factors may account for this: the age of the country and the election cycle. First, the country is relatively young by European and Asian standards, so there is not a lot of history to support the development of longer-term public interests that might alter the framework of governmental institutions.<sup>125</sup> Second, the American election cycle for electing a president, senators, and members of the House of Representatives accounts for it.<sup>126</sup> Indeed, much of the political disruption that appears to permeate higher law is a result of these relatively short-term bouts for political office that focus on short-term interests of specific groups.

For this reason, it is imperative that every candidate for public office, upon swearing an oath to uphold the Constitution, understands the longer-term obligations that come with the position, especially regarding matters like the appointment of federal judges who will possess life tenure.<sup>127</sup> The Constitution requires that these longer-term positions should not suffer at the polls and that they be capable of rendering higher law constitutional decisions. By the same token, it ensures that nominees be properly vetted by having the Senate provide a separate role of advising and consenting upon the president's nomination. For the Constitution does not allow for only short-term politics to dominate, but in fact requires, political officials and federal judges to follow the higher law of the Constitution. For this reason, the Founders were adamant in ensuring the judiciary be non-political. Similarly, the Senate must at times be less political, like when

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124. See generally Anthony Salvanto et. al., *CBS/NYT Poll: Donald Trump Leads, Strong on Terrorism, Economy*, CBS NEWS (Dec. 10, 2015, 6:32 PM), <http://www.cbsnews.com/news/cbsnyt-poll-donald-trump-leads-strong-on-terrorism-economy/> (explaining that voters tend to align with particular candidates based on their immediate concerns, like the economy or terrorism, rather than long-term concerns like global warming or the constitutional rights and duties that may be affected by the candidate's presidency).

125. See RAWLS, *supra* note 114, at 217 (“[The] exercise of political power is proper and hence justifiable only when its exercise is in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of the principles and ideals acceptable to them as reasonable and rational.”); see also BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 1: FOUNDATIONS* 6 (Harvard Univ. Press, 1991) (describing how a “dualist Constitution” distinguishes between “[d]ecisions by the people [which] occur rarely, and under special constitutional conditions” and “[d]ecisions made by the government [which] occur daily, and also under special conditions”).

126. See *supra* Part V, § 2.

127. U.S. CONST. art III, § 1.

confirming federal judges, if the Constitution is to continue to have a meaningful, lasting effect on America's representative democracy.

## VII. CONCLUSION

This Article provides direction for future confirmations occurring during a presidential election year when the president and Senate majority are from different parties. In doing so, it has sought to remind the political branches of their respective duties to higher law and to avoid the temptation to collapse to mere partisan considerations. This Article has also displayed why the issue of holding hearings and voting on Supreme Court nominees should not be reduced to the same politics that accompany normal lawmaking. Rather, at least with Supreme Court nominations, where the integrity of the Constitution is itself at stake, something more circumspect is required. In particular, this requires a long-term vision of how the constitutional plan fits within democratic pluralism, and how the basic institutions of society would collapse if Americans no longer felt that their rights are protected by an independent judiciary. Absent adherence to the obligations of the Constitution, the Senate risks deterioration of the social contract that binds all Americans and potentially the end of the constitutional form of government Americans have cherished for over two centuries. Certainly, short-term politics alone cannot be what the Founders intended for America when they began their effort to create a new nation with those now famous words: "We the People . . ." <sup>128</sup>

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128. U.S. CONST. pmb1.