

Review Essay

NAVIGATING THE NEW POLITICS OF JUDICIAL APPOINTMENTS

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THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS by Christopher L. Eisgruber (Princeton University Press, Princeton 2007).

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INTRODUCTION

The 2008 presidential campaign is in full swing, and the future of the Supreme Court has become a top concern for candidates and voters. Five of the Court’s nine members will be over the age of seventy by January

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2009,¹ and there is widespread speculation that the next President will have the opportunity to replace one or more of them.² Candidates on both sides of the aisle recognize the stakes. Republican presidential candidate John McCain has promised to select judicial nominees who are “clones” of Chief Justice Roberts and Justice Alito.³ Democratic frontrunner Barack Obama says “[w]e need [a Supreme Court nominee] who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old.”⁴ Voters are paying attention. In an August 2007 poll, 52% of registered voters reported that “the appointment of Supreme Court Justices” would be “very important” to their vote for President in 2008, and 88% reported that Supreme Court appointments would be at least “some-what important.”⁵

With impeccable timing comes Christopher Eisgruber’s *The Next Justice: Repairing the Supreme Court Appointments Process*.⁶ Written by a law professor but aimed at a general audience,⁷ *The Next Justice* roughly fits the mold of Stephen Carter’s *The Confirmation Mess*⁸ and Laurence Tribe’s *God Save This Honorable Court*⁹ in critically evaluating the selection process for Supreme Court Justices and offering a program for reform.

Eisgruber’s book enters a crowded but important field. The essential elements of the appointments process, set out in Article II, Section 2 of the

¹ Steven G. Calabresi & John O. McGinnis, *McCain and the Supreme Court*, WALL ST. J., Feb. 4, 2008, at A14; see Supreme Court of the United States, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited July 25, 2008).

² See, e.g., Douglas W. Kmiec, *Justice Clinton?*, WALL ST. J., Dec. 15, 2007, at A13 (“[I]t is widely anticipated that there will be one or more vacancies on the Supreme Court during the next presidential term.”); Posting of Tom Goldstein to SCOTUSblog, <http://www.scotusblog.com/wp/uncategorized/the-next-supreme-court-justice/> (Dec. 21, 2007, 3:22 p.m.) (agreeing that “[t]he next president is likely to make several Supreme Court appointments” and speculating about which Justices may retire).

³ Jim Galloway, *Countdown 2008: Senators Back McCain, Open Rift*, ATLANTA J.-CONST., Feb. 3, 2008, at C1 (reporting on an Atlanta campaign rally where McCain promised, “I will try to find clones of [Justice Samuel] Alito and [Chief Justice John] Roberts”).

⁴ Posting of Carrie Dann to First Read, <http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx> (July 17, 2007, 4:21 p.m.).

⁵ Press Release, Quinnipiac Univ. Polling Inst., Voters Back Supreme Court Limit on School Deseg 3–1, at 5 (Aug. 16, 2007), available at <http://www.quinnipiac.edu/images/polling/us/us08162007.doc>. Just 11% of registered voters consider the appointment of Supreme Court Justices “not important at all” to their votes. *Id.*

⁶ CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2007).

⁷ *Id.* at x (lamenting the lack of understanding of judicial decisionmaking in “American public debate” and explaining that the goal of the book is to help the American public to “understand better how the Court operates”). Eisgruber was previously a law professor at New York University School of Law but now serves as the provost of Princeton University.

⁸ STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994).

⁹ LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985).

Constitution, are unchanged since the Founding: the President “by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”¹⁰ For a variety of structural, external, and judicial reasons, however, the politics of federal judicial appointments have fundamentally changed in the last eighty years, especially since the 1980s.¹¹ Today, for the Supreme Court and United States circuit courts of appeals, the appointments process is high-stakes, explosively partisan, and often nasty.¹² Commentators have called for the abandonment of Senate confirmation hearings,¹³ the direct election of Justices,¹⁴ a more assertive and independent role for the Senate in pre-approving and rejecting nominees,¹⁵ a two-thirds supermajority requirement for Senate confirmation,¹⁶ and a host of other changes.¹⁷ Eisgruber, like his predecessors, seeks a more honest and informed method of filling vacancies on the Supreme Court.¹⁸

His argument only partly succeeds. *The Next Justice* is a thought-provoking and original essay about Supreme Court judging trapped in an unconvincing book about Court reform. Eisgruber is at his best as he dissects and counters two popular narratives about the way Supreme Court Justices decide cases: one that treats Justices as neutral and nonpolitical “umpires,” and another that views Justices as pervasively ideological “politicians” in robes.¹⁹ Those insights make *The Next Justice* a worthy read in spite of the book’s weaknesses, including an unrealistic and likely ineffective package of reforms.

Eisgruber’s two-part reform package urges the Senate to confirm only “moderate” Justices. First, at the confirmation hearings, he proposes that

¹⁰ U.S. CONST. art. II, § 2.

¹¹ See David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1057–72 (2008).

¹² See *id.* at 1072–78.

¹³ BENJAMIN WITTES, CONFIRMATION WARS 13–14 (2006).

¹⁴ RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 170–78 (2005).

¹⁵ Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 992 (1992); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1512 (1992).

¹⁶ Gary J. Simson, *Thomas’s Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 649–51 (1993).

¹⁷ See, e.g., Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 960 (2007) (advocating statutory reform of the confirmation process); Tom Lininger, *On Dworkin and Borkin*, 105 MICH. L. REV. 1315, 1328–29 (2007) (proposing a package of reforms that includes revisions to the ABA’s code of judicial ethics); Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 OHIO ST. L.J. 1087, 1105 (1993) (proposing that the House of Representatives assume a role in the appointments process).

¹⁸ Eisgruber addresses only in passing the substantial developments in the appointments process for nominees to the federal circuit courts, where much of the delay, acrimony, and obstruction has taken place in recent years.

¹⁹ EISGRUBER, *supra* note 6, at 7.

senators ask questions designed to uncover extremism.²⁰ Second, if senators are not satisfied that a nominee is a moderate, they should reject the nomination.²¹ Put another way, Eisgruber wants the Senate to “get smart” and to “get tough,” asking more intelligent and probing questions about judicial philosophy at the hearings, and then boldly rejecting any nominee who is not demonstrably moderate.

Unfortunately, Eisgruber’s proposals are riddled with problems. His definition of a moderate is supposed to appeal to the political center, but its details are noticeably left-leaning. He also fails to properly diagnose the problems with the appointments process and to account for current political realities in his reform package. In particular, his proposals for reforming confirmation hearings are unlikely to succeed because they depend on senators’ willingness to overcome intense political pressure from interest groups and the media. In the past, senators have been unable to do so despite the high stakes of Supreme Court appointments.

But the most serious flaw in Eisgruber’s program for reform, and in similar proposals that rely on a “get tough” approach by the Senate, is a failure to account for the institutional strength of the President. As we demonstrate in Part II, drawing on a rich body of political science literature, Presidents have an impressive set of tools at their disposal to counter even the most aggressive action by the Senate. The most basic and powerful tool is the strategic selection of nominees, especially nominees with excellent qualifications, which can make it difficult for senators of the opposition party to block a nomination. Strategic selection is especially important in periods of divided government between the political parties. In addition, Presidents can improve the odds of confirmation by “going public” and touting the qualifications and attributes of their nominees. They can also counter Senate inaction or obstruction on nominees by making recess appointments and by employing ordinary legislative techniques like logrolling strategies, credible veto threats, and the offer of incentives to encourage recalcitrant senators to support a nominee. Strategic employment of these tools makes it difficult for senators, especially those of the President’s party, to obstruct Supreme Court nominees.

This Review Essay proceeds in two parts. Part I reviews *The Next Justice*, evaluating both its novel account of how Supreme Court Justices decide cases and its disappointing call for reform. Part II focuses on the role of the President in judicial appointments and describes the surprisingly strong and varied set of tools at the President’s disposal.

²⁰ *Id.* at 187.

²¹ *Id.* at 183.

I. AN IMMODERATE PROPOSAL

A. *The Job Description of a Supreme Court Justice*

The Next Justice advertises itself as a plan for “repairing the Supreme Court appointments process,”²² but it would be a mistake to classify *The Next Justice* in the policy reform genre. “The book’s heart,” Eisgruber explains, is an argument about how Supreme Court Justices decide cases, which has implications for the kind of Justices Americans should prefer.²³ Just as a good manager must understand the job description before hiring an employee, Americans “must have a clear understanding of what Supreme Court justices do”—specifically, how they decide politically controversial cases—to know what kind of individuals should be nominated and confirmed.²⁴

That starting point, Eisgruber recognizes, is “unusual.”²⁵ He notes that “[m]any books examine the appointment of Supreme Court justices, and many discuss how the Supreme Court should decide cases, but almost none connect the two subjects.”²⁶ To correct this “damaging mistake,”²⁷ Eisgruber dedicates almost all of his attention to an analytical model of Supreme Court decisionmaking, only briefly articulating and defending a package of reforms.²⁸ We turn to those reforms below, but we begin by discussing Eisgruber’s job description for a Supreme Court Justice.

1. *Judges as Umpires, Judges as Politicians.*—In interviews, Eisgruber has explained that he wrote *The Next Justice* because he was “disappointed with the quality of the Roberts and Alito hearings” and, in particular, with Chief Justice Roberts’s description of Justices as “umpires.”²⁹ The book begins with a description of that episode:

When John Roberts addressed the Senate at his confirmation hearings, he declared that judges, including Supreme Court justices, are like umpires. “Umpires don’t make the rules; they apply them,” Roberts testified. “I come before the committee with no agenda. I have no platform. Judges are not politicians[.]” . . .

Roberts has proven to be an odd sort of umpire. In contested cases during his first term as chief justice, Roberts consistently voted with the Court’s conservatives and against its liberals. In cases settled by a divided vote, Roberts

²² *Id.* at iii.

²³ *Id.* at xi.

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 164–92.

²⁹ Posting of Jason Harrow to SCOTUSblog, <http://www.scotusblog.com/wp/uncategorized/ask-the-author-christopher-eisgruber-and-the-next-justice-part-i/> (Nov. 14, 2007, 10:11 a.m.).

agreed with the Court's best-known conservative, Antonin Scalia, 77.5 percent of the time, and he voted with John Paul Stevens, commonly regarded as the Court's most liberal member, only 35 percent of the time. . . . [Roberts's] umpiring turned out to have a decidedly conservative slant.³⁰

Eisgruber makes the same point about Clarence Thomas, ridiculing Thomas's statement to the Senate "that justices ha[ve] to 'strip down [like] a runner,' casting aside their opinions and values, before deciding a case."³¹ That claim is "unbelievable" and Thomas's statements to the Senate are "patent[ly] inadequa[te]," Eisgruber says, because they are contradicted by Thomas's conservative views on social issues and consistently conservative voting record on the Court.³² Eisgruber also criticizes as "disingenuous[]" President Reagan's characterization of Judge Robert Bork, his failed nominee to the Court, "as an 'even-handed and open-minded' judge who was neither a conservative nor a liberal."³³ The Senate properly rejected Bork, Eisgruber says, because it recognized "that Bork's judicial philosophy was extremely conservative."³⁴

Although Eisgruber plainly faults Roberts, Thomas, and Reagan for engaging in deception, or perhaps self-delusion, he considers it unremarkable that Supreme Court Justices' votes fit an ideological pattern.³⁵ Indeed, his central argument is that Justices *have no choice* but to vote ideologically. He illustrates the point using the Equal Protection Clause, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."³⁶ To interpret that clause, "[p]resumably [Justices] must ask what it means for the laws to protect people equally."³⁷ That question takes the Court "straight to the nerve center of American

³⁰ EISGRUBER, *supra* note 6, at 17 (footnotes omitted).

³¹ *Id.* at 182 (second alteration in original); *see id.* at 145.

³² *Id.* at 145, 182. Eisgruber does not mention that Thomas borrowed the phrase from Learned Hand, who praised Justice Benjamin Cardozo as a "runner stripped for the race" in a memorial tribute written upon Cardozo's death in 1939. *See* Learned Hand, *Mr. Justice Cardozo*, 39 COLUM. L. REV. 9, 11 (1939) ("A wise man is one exempt from the handicap of such a past; he is a runner stripped for the race . . ."). As Mary Ann Glendon has observed, it is striking that Thomas's statement "was pounced upon and ridiculed in the national press and in law school corridors by people who appeared to have no idea that Thomas was quoting Hand on Cardozo!" Mary Ann Glendon, *A Nation Under Lawyers*, Address for the American Enterprise Institute Bradley Lecture Series, Nov. 17, 1994, *available at* http://www.aei.org/publications/pubID.17996,filter.all/pub_detail.asp. Notably, Justice Breyer made the same statement during his confirmation hearings several years later. *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 119 (1995) (describing the ideal judge as "a runner stripped for the race" and explaining to the Senate that a judge should "interpret the law that applies to everyone, not enunciate a subjective belief or preference").

³³ EISGRUBER, *supra* note 6, at 153.

³⁴ *Id.* at 154.

³⁵ *Id.* at 18.

³⁶ U.S. CONST. amend. XIV, § 1.

³⁷ EISGRUBER, *supra* note 6, at 20.

ideological controversy,” Eisgruber observes, because “[l]iberals and conservatives disagree passionately about what it means for the laws to protect groups equally, and about when it is appropriate for the laws to treat one group better than another.”³⁸ The public debates over affirmative action and same-sex marriage, for example, reflect competing views “about what equality means.”³⁹ Applying the Equal Protection Clause in these areas is not as simple as calling balls and strikes, Eisgruber argues, because Justices “cannot appeal to some uncontroversial standard of equality that exists outside and apart from competing theories about equality.”⁴⁰ The same difficulty arises in construing other provisions written “in spare and short text” using “abstract phrases,” including the First and Fourth Amendments.⁴¹ Eisgruber contends that, because these constitutional provisions are indeterminate, Justices necessarily must make politically controversial choices in interpreting them.⁴²

In a chapter entitled “The Incoherence of Judicial Restraint,” Eisgruber criticizes “strict construction,” “judicial restraint,” and similar “rhetorical trick[s]” as close cousins of the umpire analogy that “cannot save judges from the need to make politically controversial judgments.”⁴³ He focuses most intently, however, on originalism, which he describes as an interpretive strategy that “recommends that when the constitutional text is susceptible of multiple interpretations, judges and other readers should try to figure out what the framers (or the ratifiers) would have intended for us to do.”⁴⁴

³⁸ *Id.*

³⁹ *Id.* at 20–21.

⁴⁰ *Id.* at 21.

⁴¹ *Id.* at 23–25.

⁴² *Id.* at 21.

⁴³ *Id.* at 32–35.

⁴⁴ *Id.* at 35. Anyone familiar with the scholarly debate about originalism will find Eisgruber’s discussion deficient. He describes originalism as a search for “original intent,” ignoring the emergent (and now arguably dominant) form of originalism that looks to the “original public meaning” of the constitutional text rather than the subjective intentions of the Framers or ratifiers. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–29 (1999) (describing this method as “the new originalism”); Bradley P. Jacob, *Back to Basics: Constitutional Meaning and “Tradition”*, 39 TEX. TECH. L. REV. 261, 268 (2007) (describing “original public meaning textualism” as “[t]he cutting edge of originalist thinking today”); Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1139 (2003) (describing “original meaning textualism” as “[t]he latest word” in originalism and a new chapter “in the story of originalism working itself pure”). Even Keith Whittington, whom Eisgruber praises for offering “[b]y far the most sophisticated and thorough defense” of originalism, EISGRUBER, *supra* note 6, at 35 n.10, has acknowledged a significant shift in originalist methodology toward original public meaning. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609–12 (2004). Most glaringly, Eisgruber characterizes Akhil Amar and Justice Scalia as intentionalists, when both have expressly rejected that approach. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 37–47 (Amy Gutmann ed., 1997).

That approach “cannot work,” Eisgruber concludes, because of insurmountable methodological problems in determining the original subjective intent of the Founders.⁴⁵ Eisgruber also criticizes originalism’s “ideological slant,” noting that “the most vocal proponents of originalism are conservatives” and charging that originalists reach conclusions at odds with their own political convictions “between very rarely and never.”⁴⁶

Just as he rejects the description of Justices as neutral and nonpolitical “umpires,” Eisgruber rejects a competing narrative of Justices as ideologues—“ordinary politicians”—who systematically translate their political preferences into judicial decisions.⁴⁷ Some differences between Justices and legislators are institutional, according to Eisgruber. He sees a sharp contrast between the method of decisionmaking on the Court and that of Congress, noting that although both bodies must make political choices, “adjudication does not involve lobbying, jawboning, or bargaining in the way legislation does.”⁴⁸ Drawing on his experience as a clerk for Justice Stevens, Eisgruber reports that “[t]he work done on the Court is more solitary, more scholarly, and more analytic than what is done in the nearby Senate and House office buildings.”⁴⁹ Another institutional difference between legislators and Justices is the expectation of impartiality. Justices, unlike members of Congress, may not participate in cases in which they have a personal or financial stake.⁵⁰ Life tenure reinforces the Court’s independence by allowing Justices to make decisions without “worry[ing] about pleasing voters, patrons, or political parties.”⁵¹

As the strongest proof that Justices are not simply politicians in robes, Eisgruber points to cases in which members of the Court unanimously agree, even when politicians are divided or would even reach the opposite result. For example, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*,⁵² the Court unanimously rejected a First Amendment challenge to the Solomon Amendment despite staunch political opposition

⁴⁵ EISGRUBER, *supra* note 6, at 35. Eisgruber’s inattention to methods other than “original intent” originalism is unfortunate because “original public meaning” originalism emerged largely in response to the methodological difficulties that Eisgruber identifies. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 552 n.35, 553 (1994); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988).

⁴⁶ EISGRUBER, *supra* note 6, at 40–41.

⁴⁷ *Id.* at 53.

⁴⁸ *Id.* at 52.

⁴⁹ *Id.*

⁵⁰ *Id.* at 89–90.

⁵¹ *Id.* at 63. See generally David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute”*, 83 WASH. U. L.Q. 1397 (2005) (defending life tenure for Supreme Court Justices and proposing a package of retirement incentives to discourage Justices from remaining on the Court too long).

⁵² 547 U.S. 47 (2006).

to the military's refusal to hire gay and lesbian attorneys.⁵³ Similarly, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁵⁴ the Court unanimously struck down an ordinance prohibiting the "ritual" killing of animals,⁵⁵ even though almost no one in Congress was willing to join an amicus brief supporting that result, fearing that "electoral opponents could paint them as sympathetic to animal sacrifice or strange religions."⁵⁶ For Eisgruber, unanimous decisions in politically controversial cases demonstrate that judges are not pervasively ideological in their decisionmaking.⁵⁷

To explain why Supreme Court Justices do not vote ideologically in every case, Eisgruber argues that in addition to their political values, Justices hold "procedural" values.⁵⁸ By procedural values, Eisgruber means both "small-scale principles," such as "the right of individuals to receive advance notice before the government holds a hearing that affects their interests," and "larger-scale norms," such as deference to legislatures, fidelity to precedent, and respect for the findings of administrative agencies.⁵⁹ He intends this "conceptual umbrella" to cover a wide range of principles, but he views the crucial characteristic of a procedural commitment to be its capacity to "generate votes that cross ideological lines."⁶⁰ Eisgruber argues, for example, that the decision in *FAIR* rested in part on the procedural principle that the Court should defer to Congress when setting policy for the purpose of raising and supporting armies—a principle that "[t]he liberal justices could support . . . even if they wished Congress had pursued a different policy."⁶¹

Eisgruber has no illusions that Justices always abide by their procedural values. Instead, "process and substance intertwine" and "interact with one another," such that a Justice might set aside a procedural value in a particular case for political reasons.⁶² Justices who have a procedural commitment to stare decisis, for example, may disregard that commitment to overrule a previous decision they dislike. His point is that procedural values sometimes point in the opposite direction of political values and that

⁵³ *Id.* at 70. For an overview of the political and legal controversy, see Anita J. Fitch, *The Solomon Amendment: A War on Campus*, ARMY LAW., May 2006, at 12–19.

⁵⁴ 508 U.S. 520 (1993).

⁵⁵ *Id.* at 541–42.

⁵⁶ EISGRUBER, *supra* note 6, at 76.

⁵⁷ *Id.* at 74. Justice Breyer has reached a similar conclusion based on the Court's unanimous cases. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 110 (2005); see also Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2390 (2006).

⁵⁸ EISGRUBER, *supra* note 6, at 79–80.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 82.

⁶² *Id.* at 96.

“[o]n occasion, procedural convictions may generate alliances that transcend ideological lines.”⁶³

In Eisgruber’s view, the relationship between political and procedural values lies at the heart of judicial philosophy. Eisgruber defines a “judicial philosophy” as “a pattern of selective deference” that “identif[ies] one set of issues about which judges should defer to other government officials, and another set about which judges should apply and enforce their own, independent view of what the Constitution means.”⁶⁴ As an example, Eisgruber describes Justice Brennan’s judicial philosophy, grounded in footnote 4 of *United States v. Carolene Products Co.*,⁶⁵ as a pattern of selective deference in which the courts defer to legislators on issues of “economic regulation” but intervene to guard “participatory rights” in the democratic system and “protect vulnerable minorities from hostile majorities.”⁶⁶ If Justices inevitably make political choices, but also inevitably subordinate their political choices to procedural commitments in some circumstances, a judicial philosophy describes the types of cases in which a Justice is willing to defer—whether to Congress, to administrative agencies, or to precedent.

Building on this understanding of how Supreme Court Justices make decisions, Eisgruber argues that we should prefer a particular kind of judicial philosophy, which he describes as “moderate.”⁶⁷ In Eisgruber’s view, there are “two features that characterize a moderate judicial philosophy.”⁶⁸ The first is “an open-mindedness toward novel claims of constitutional justice brought by disadvantaged groups or persons.”⁶⁹ A moderate Justice, he explains, sees judicial review as “a way to make the country more inclusive and more responsive to the claims of disadvantaged groups who have suffered through prejudice, misunderstanding, malice, or neglect.”⁷⁰ Although he provides few specifics, Eisgruber notes that this “open-minded, flexible approach to constitutional problems” has had “evident” application with respect to “such topics as marital privacy, abortion, and gay rights.”⁷¹ According to Eisgruber, a moderate Justice must be willing to intervene to protect the disadvantaged even in the absence of a clear warrant in the constitutional text.⁷²

⁶³ *Id.*

⁶⁴ *Id.* at 99.

⁶⁵ 304 U.S. 144, 152 n.4 (1938).

⁶⁶ EISGRUBER, *supra* note 6, at 101–02.

⁶⁷ *Id.* at 180.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 121. As a descriptive matter, we find this prong of Eisgruber’s definition closer to “liberal” than “moderate.” See *infra* notes 97–114 and accompanying text.

⁷¹ EISGRUBER, *supra* note 6, at 121.

⁷² *Id.* at 122 (“[M]oderation . . . also emphasizes that courts must sometimes be prepared to craft novel, controversial legal remedies in response to claims of constitutional injustice.”).

The second feature of a moderate judicial philosophy, according to Eisgruber, is “a lively and thoughtful understanding of the limits of the judicial role.”⁷³ Thus, a moderate Justice “proceed[s] cautiously when enforcing the Constitution” because “the effective pursuit of constitutional goals . . . requires a kind of active partnership between judges and the elected branches in which judges will usually play the subsidiary role.”⁷⁴ In other words, moderate Justices are *more likely* than extremists to subordinate their ideological values to their procedural values.⁷⁵ Moderates, in Eisgruber’s view, also prefer flexible standards over bright-line rules, to give the other branches maximum room to maneuver.⁷⁶

2. *Two Partial Objections.*—Eisgruber begins on firm ground in thoroughly dismantling the umpire analogy. Although that account of the Court’s work is so oversimplified that it would be dismissed as a straw man in academic circles,⁷⁷ Eisgruber demonstrates that the umpire analogy has real currency in the public debate.⁷⁸ His model of Supreme Court decisionmaking, and in particular his conception of a judicial philosophy as a relationship between political and procedural values, is thought-provoking and innovative. Nonetheless, Eisgruber’s account of how Supreme Court Justices decide politically controversial cases prompts two partial objections.

First, Eisgruber blurs the distinction between political and procedural values, making it unclear why some values qualify as procedural while others do not. The term “procedural” is a misnomer, as Eisgruber seems to recognize,⁷⁹ because many of the values he describes have nothing to do with rules of procedure, even if in some sense they inform the “process” by

⁷³ *Id.* at 120.

⁷⁴ *Id.* at 121. Oddly, Eisgruber does not describe these attributes—deliberate caution and a self-consciously subsidiary role for the Court—as forms of “judicial restraint.” Other scholars have described judicial restraint as encompassing those characteristics, *see, e.g.*, Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 27 (2007); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 10 (1983), so it is curious that Eisgruber dismisses judicial restraint as incoherent, EISGRUBER, *supra* note 6, at 31.

⁷⁵ EISGRUBER, *supra* note 6, at 180–81.

⁷⁶ *Id.* at 121; *see also* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 100–01 (1992).

⁷⁷ For more than a century, scholars have roundly criticized similar conceptions of judging as a purely technical task, such as Thomas Jefferson’s description of judges as “mere machine[s],” *see* Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 505 (Julian P. Boyd ed., 1950), and Christopher Langdell’s “mechanical jurisprudence,” *see* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). *See also* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 175–88 (3d ed. 2004) (describing American legal realist critiques of strong formalism in judicial decisionmaking and recounting the “legal-academic cliché” that “we are all realists now”).

⁷⁸ EISGRUBER, *supra* note 6, at 6–7.

⁷⁹ *See id.* at 80 (alluding to the possibility of other labels and insisting that there is nothing “magic” about the term “procedural”).

which a Justice thinks about a legal question. Nor does Eisgruber argue that these values should be called “procedural” because they are neutral and noncontroversial. To the contrary, he “insists” that these values are politically contested in at least two ways.⁸⁰ One is that the initial choice of procedural values may be controversial because some procedural values skew in favor of particular political results. For example, Eisgruber acknowledges that “the proposition that ‘accused terrorists must receive all the rights afforded to other criminal defendants’ describes a value that is both procedural and recognizably liberal.”⁸¹ Another, as noted above, is that procedural values are often malleable or conflicting, and they may yield to political values in particular cases. The Court in *FAIR*, Eisgruber explains, could have curtailed its deference to Congress in military matters “when important values such as academic freedom or the rights of minorities are at stake.”⁸²

Eisgruber’s swift rejection of originalism illustrates the blurred line that he draws between political and procedural values. Given Eisgruber’s acknowledgements about the politically contestable and abstract nature of procedural values, he readily could have endorsed originalism as a “procedural” principle, valuable in moderating Justices’ political principles and illustrative of how adjudication differs from lawmaking. Even if he is right that originalism often leads to conservative results in practice, it is no more malleable than many of his other procedural values. More importantly, originalism has led scholars and judges to results that conflict with their ideological commitments or political values. Originalist arguments have persuaded liberal scholars like Laurence Tribe and Akhil Amar to conclude that the Second Amendment protects an individual right to bear arms that is not dependent on service in a militia.⁸³ Originalism also has led conservative scholars to conclude that some laws they support are unconstitutional and some policies they oppose are constitutionally permitted.⁸⁴ On the Su-

⁸⁰ *Id.* at 95.

⁸¹ *Id.* at 9; *see also id.* at 94–95 (characterizing John Hart Ely’s “representation-reinforcing” theory of judicial review as a procedural value, but also the product of “interpretive choices that were politically and philosophically controversial”).

⁸² *Id.* at 96.

⁸³ *See* Laurence H. Tribe, *Sanity and the Second Amendment*, WALL ST. J., Mar. 4, 2008, at A16 (“[S]ome liberal scholars like me, having studied the text and history closely, have concluded, against our political instincts, that the Second Amendment protects more than a collective right to own and use guns in the service of state militias and national guard units.”); *see also* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 216–23 (1998); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 47–70 (1999).

⁸⁴ *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 859–63 (2006) (proposing to abolish life tenure for Supreme Court Justices but concluding that a statute to accomplish that goal would be unconstitutional); Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 75, 75–76 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (not-

preme Court, it has prompted some Justices to cast ideologically unexpected votes, such as when Justices Scalia and Thomas have sided with criminal defendants in Confrontation Clause⁸⁵ and sentencing cases⁸⁶ and against businesses in punitive damages cases.⁸⁷ Because the hallmark of a procedural value is that “[o]n occasion” it “may generate alliances that transcend ideological lines,”⁸⁸ originalism would appear to qualify.

Surprisingly, however, Eisgruber criticizes originalism for its “ideological slant.”⁸⁹ He not only notes that most originalists are conservatives, but he also suggests that many conservatives subscribe to originalism precisely because they find the socially conservative views of earlier generations appealing.⁹⁰ In addition, Eisgruber argues that disagreements among originalists about the proper inferences from historical sources serve as evidence that originalism is a malleable approach that can be bent to serve ideological purposes. Noting the debate between Justice Scalia and Judge Michael McConnell about the original meaning of the Free Exercise Clause, for example, Eisgruber finds it “difficult to take originalist analysis seriously.”⁹¹ “It would be one thing if there were a school of originalist judges whose historical research regularly led them to reach constitutional interpretations at odds with their own political convictions,” he writes, but in reality most originalists reach results driven by political preferences.⁹² These are the same defects, however, that Eisgruber readily forgives—indeed, “insists” upon—in his procedural values.⁹³

Eisgruber’s central argument about originalism is that it cannot spare Justices from the necessity of making politically controversial judgments.⁹⁴ That is a sound objection. Many originalists concede that the original meaning of the constitutional text does not supply a clear answer to every

ing that under Article I, Section 3, the Vice President has a sound argument for presiding at his own impeachment trial and noting the resulting potential for abuse by an “evil, diabolical” Vice President).

⁸⁵ See *Crawford v. Washington*, 541 U.S. 36 (2004).

⁸⁶ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁸⁷ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting). Eisgruber acknowledges that Justice Scalia’s adherence to textualism and originalism drove his vote in the punitive damages cases, and even concedes that “Scalia’s methodological commitments do matter at the margins.” EISGRUBER, *supra* note 6, at 115. Yet he does not classify textualism or originalism as “procedural” values and specifically concludes that originalism is “incoherent.” *Id.* at 31–39.

⁸⁸ EISGRUBER, *supra* note 6, at 96.

⁸⁹ *Id.* at 39–40.

⁹⁰ See *id.* at 40–41.

⁹¹ *Id.* at 40. Compare *Employment Div. v. Smith*, 494 U.S. 872 (1990) (Scalia, J.), and *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Scalia, J., concurring in part), with Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990), and Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

⁹² EISGRUBER, *supra* note 6, at 40.

⁹³ *Id.* at 95.

⁹⁴ *Id.* at 35.

interpretive question, leaving some core of hard cases involving abstract or vague constitutional provisions that require construction using other methods.⁹⁵ But for some Justices and scholars, originalism serves to narrow the range of permissible choices in the interpretation of constitutional text, and at least in some cases originalists have reached results that run contrary to their political preferences.⁹⁶ Eisgruber's rejection of originalism as incoherent—even as he praises other contestable values that in his view skew in favor of particular ideological results—creates confusion about what values qualify as “procedural” and why.

Second, Eisgruber's definition of a moderate is supposed to appeal to the political center, but its first prong is noticeably left-leaning. Special solicitude for the claims of the disadvantaged may be an admirable quality in a Justice, but surely Eisgruber knows that it is a *liberal* quality. Indeed, that requirement could have been lifted straight from the judicial philosophy of Justice Brennan, whom Eisgruber describes as one of the Court's “most famous and effective liberals.”⁹⁷ As “the quintessential *Carolene Products* justice,” Justice Brennan surely showed the requisite open-mindedness to the claims of the disadvantaged through his “functional consideration[] [of] the judiciary's role as a defender of vulnerable minorities and individuals.”⁹⁸ As a matter of partisan politics, moreover, the Democratic Party for years has advertised itself as the party of the disadvantaged—the poor, the elderly, consumers, organized labor, women, and racial minorities.⁹⁹ One

⁹⁵ See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–19 (1999); Barnett, *supra* note 44, at 645–46 (“Due to either ambiguity or generality, the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy. . . . When this happens, interpretation must be supplemented by constitutional construction—within the bounds established by original meaning.”); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2057 (2006); Lawrence B. Solum & Robert W. Bennett, *A Dialogue on Originalism Occasioned by Bennett's Electoral College Reform Ain't Easy*, 101 NW. U. L. REV. COLLOQUY 31, 38 (2006), <http://www.law.northwestern.edu/lawreview/colloquy/2006/4/>.

⁹⁶ See *supra* notes 83–87 and accompanying text.

⁹⁷ EISGRUBER, *supra* note 6, at 184.

⁹⁸ *Id.* at 103. Eisgruber presumably does not consider Justice Brennan a moderate based on the second prong of his definition, which requires caution and partnership with the legislature. See *id.* at 183 (describing Justices Brennan and Scalia as “bold justices who author grand jurisprudential gestures and radical changes in the law”).

⁹⁹ See 2004 DEMOCRATIC NAT'L CONVENTION COMM., STRONG AT HOME, RESPECTED IN THE WORLD: THE 2004 DEMOCRATIC NATIONAL PLATFORM FOR AMERICA 22, 25, 31, 38 (2004), available at <http://www.democrats.org/pdfs/2004platform.pdf>; Mario Cuomo, Keynote Address at the 1984 Democratic National Convention (July 16, 1984), available at <http://www.americanrhetoric.com/speeches/PDFFiles/Mario%20Cuomo%20-%201984%20DNC%20Keynote.pdf> (asserting that Democrats seek to protect “the whole family”); Morris K. Udall, Keynote Address at the 1980 Democratic National Convention (Aug. 11, 1980), available at http://www.library.arizona.edu/exhibits/udall/dnc_80.pdf (“[W]e have been the party of the disadvantaged in our society. This is the party that cares about the widow in the nursing home, with the kids grown up and gone away. Sick people, poor people, the small businessman and the young American trying to find a decent job.”).

would have expected a “moderate” judicial philosophy to feature only demonstrably centrist political values. Instead, Eisgruber’s definition of moderation begins on the left, rather than in the middle.

Consider, for example, that Eisgruber describes exactly five of the Court’s current members as moderates: Stevens,¹⁰⁰ Ginsburg,¹⁰¹ Breyer,¹⁰² Souter,¹⁰³ and Kennedy.¹⁰⁴ It is true that on some issues, such as regulatory policy, the Roberts Court has moved to the right of its predecessors.¹⁰⁵ Still, it is difficult to argue, as Eisgruber does, that there is not a single identifiable liberal Justice on the Court today. To use but a few possible measures, William Landes and Richard Posner have shown that in cases through the 2006 Term, Justices Stevens and Ginsburg cast liberal votes in approximately two-thirds of cases, placing both of them at the cusp of the most liberal quartile of Justices since 1937.¹⁰⁶ Similarly, the measure of judicial ideology developed in a 2002 article by Andrew Martin and Kevin Quinn (Martin-Quinn scores), which is used widely by political scientists, ranks Justices Stevens and Ginsburg at the cusp of the most liberal quartile of Justices since 1953.¹⁰⁷ Eisgruber’s assessment is at least out of step with the

¹⁰⁰ EISGRUBER, *supra* note 6, at 29 (describing Justice Stevens as neither too liberal nor conservative); *id.* at 121 (describing Justice Stevens as a “paradigmatic moderate[]”).

¹⁰¹ *Id.* at 119, 156.

¹⁰² *Id.* at 120–21.

¹⁰³ *Id.* at 121.

¹⁰⁴ *Id.*

¹⁰⁵ See Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38 (describing an “ideological sea change on the Supreme Court” that has left “no economic populists on the court, even on the liberal wing”); see also Posting of Eric Posner to Convictions: Slate’s Blog on Legal Issues, <http://www.slate.com/blogs/blogs/convictions/archive/2008/03/17/is-the-supreme-court-biased-in-favor-of-business.aspx> (Mar. 17, 2008, 3:16 p.m.) (“[T]he Supreme Court is not increasingly pro-business, but maybe it is increasingly pro-market . . .”).

¹⁰⁶ William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 47 (Univ. of Chi. Law & Econ., Olin Working Paper No. 404), available at <http://ssrn.com/abstract=1126403>. In determining whether votes were liberal or conservative, Landes and Posner used a modified version of the method originally developed by Harold J. Spaeth for his comprehensive database of Supreme Court decisions beginning with the Warren Court. See HAROLD J. SPAETH, *THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE: 1953–2006 TERMS: DOCUMENTATION* 53–55 (2006), http://www.cas.sc.edu/poli/juri/allcourt_codebook.pdf. The Spaeth database generally codes pro-defendant, pro-civil liberties, anti-business, pro-union, and pro-judicial power votes as liberal, and votes in the opposite direction as conservative. *Id.* Landes and Posner modified those classifications for certain free speech cases (including commercial speech and campaign finance cases), labor cases, and federal power cases. Landes & Posner, *supra*, at 42. By Landes and Posner’s measure, Justice Stevens cast conservative votes in 34.1% of cases and Justice Ginsburg cast conservative votes in 31.2% of cases, placing them at positions thirty-two and thirty-five, respectively, in an ideological ranking of forty-three Justices since 1937. *Id.* at 47. Justices Kennedy and O’Connor, by contrast, cast conservative votes in 64.7% of cases and 68.0% of cases, respectively, placing both in the most conservative quartile of Justices. *Id.*

¹⁰⁷ Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145–46 (2002). Martin-Quinn scores are a partly dynamic measure of a Justice’s “ideal point” ideologically, based on patterns

“conventional wisdom,” which “routinely describ[es] some justices as liberal and others as conservative.”¹⁰⁸ Even Eisgruber mentions “the Court’s liberals” when discussing the *FAIR* case—an odd reference, if the Court in fact consists entirely of moderates and extreme conservatives.¹⁰⁹

In particular, a willingness to vindicate constitutional claims concerning “such topics as marital privacy, abortion, and gay rights,”¹¹⁰ regardless of their support in the constitutional text, would seem to place a Justice to the left of the fault line in constitutional adjudication that is *Roe v. Wade*.¹¹¹ Eisgruber insists that his definition of a “moderate” Justice does not require a firm commitment on *Roe* because it “tells us very little about how he or she would weigh the state’s interest in protecting fetal life.”¹¹² The implication, however, is that his definition *does* tell us something about how to weigh the opposing interests. Although we do not doubt that Eisgruber is sincere in his attempt to craft a definition that avoids locking a nominee into a position on abortion, it does not appear that he has succeeded. The roster of Justices he identifies as moderates under his two-part definition—Breyer, Ginsburg, Harlan, Kennedy, O’Connor, Powell, Souter, and Stevens¹¹³—all have supported broad privacy rights under the Fourteenth Amendment, and those that have expressly considered *Roe* and its successors have held un-animously that the Constitution protects a right to abortion.¹¹⁴

of agreement between Justices, and have been used for assessing ideological “drift” over time. See Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, with Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. COLLOQUY 143, 144–46 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/11/>. The Martin-Quinn scores for Justices Stevens (-0.555) and Ginsburg (-0.179) placed them at positions twenty-two and twenty-one, respectively, among twenty-nine Justices between 1953 and 1999. See Martin & Quinn, *supra*, at 146. Justices Kennedy (1.345) and O’Connor (1.325), by contrast, ranked among the Court’s most conservative Justices at positions five and six, respectively. See *id.*

¹⁰⁸ EISGRUBER, *supra* note 6, at 18.

¹⁰⁹ *Id.* at 82.

¹¹⁰ *Id.* at 121.

¹¹¹ 410 U.S. 113 (1973).

¹¹² EISGRUBER, *supra* note 6, at 190.

¹¹³ *The Next Justice* contains several lists of Justices who qualify as moderates under Eisgruber’s definition. See *id.* at 44, 119, 121, 156. Several of those lists are referenced in the index as characterizing these Justices “as moderate.” *Id.* at 226, 230, 233–34, 237–38.

¹¹⁴ See *Roe*, 410 U.S. at 113 (opinion of the Court joined by Powell, J.); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843–44 (1992) (joint opinion of O’Connor, Kennedy, & Souter, JJ.); *id.* at 912–14 (Stevens, J., concurring in part and dissenting in part); *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) (Breyer, J., joined by Stevens, O’Connor, Souter, & Ginsburg, JJ.). Justice Harlan left the Court shortly before *Roe* was decided, so we cannot be certain how he would have voted in cases like *Roe*, *Casey*, and *Stenberg*. His concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring), did conclude that a state-law prohibition against contraception “violates basic values ‘implicit in the concept of ordered liberty,’” and therefore violates the Fourteenth Amendment. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

In our correspondence with Eisgruber about an earlier draft of this Review Essay, Eisgruber indicated that Justice White might also be classified as a moderate, noting that he refers to Justice White as a “moderate liberal” at one point in the book. Email from Christopher L. Eisgruber to authors (Mar. 5,

Eisgruber offers two justifications for his definition of a moderate. The first is circular. After analyzing the judicial philosophies of Justices Breyer and O'Connor, whom he considers to be moderates, Eisgruber concludes that both have been especially protective of the disadvantaged.¹¹⁵ The second is unpersuasive. Eisgruber contends that special solicitude for the disadvantaged is an extension of impartiality. Just as a judge must “ensure that defendants get fair trials,” a judge has “a similar duty to give fair and impartial hearing to claims of justice that depend upon unclear or unsettled constitutional principles”—particularly, it seems, where the rights of the disadvantaged are at stake.¹¹⁶ On its face, that inference is dubious, and Eisgruber scarcely defends it. A hallmark of judicial impartiality, in Eisgruber’s view, is that Justices “ought to be neutral among parties”—for example, by declining to participate in cases where they have a personal interest.¹¹⁷ Yet Eisgruber’s definition of a moderate appears to be expressly *non-neutral* among parties, placing a thumb on the scale in favor of any party that is disadvantaged.¹¹⁸ There are serious arguments that the Judiciary has a special obligation to protect the disadvantaged, especially with re-

2008, 12:26 CST) (on file with authors) (citing EISGRUBER, *supra* note 6, at 78). That reference to Justice White, however, did not relate to Eisgruber’s definition of a moderate, but rather to the unusual political alignment of the Court in the flag-burning cases. See EISGRUBER, *supra* note 6, at 78. Indeed, that same sentence classifies Justice Kennedy as one of the Court’s “most conservative” Justices, not as a moderate, even though Eisgruber later explicitly identifies Kennedy as a moderate under his two-part definition. See *id.* at 78, 119, 121. In our view, any credible definition of a moderate must include Justice White, whose Martin-Quinn score places him exactly in the center ideologically among Justices since 1953. See Martin & Quinn, *supra* note 107, at 146 (placing Justice White at position fifteen among twenty-nine Justices with a score of 0.420); see also Landes & Posner, *supra* note 106, at 46 (calculating that Justice White cast conservative votes in 60.5% of civil liberties cases but liberal votes in 61.6% of economic, union, and tax cases). If Eisgruber agrees with that assessment, the book would have benefited from an explicit discussion of how Justice White’s judicial philosophy fits within Eisgruber’s two-part definition of “moderate.”

¹¹⁵ EISGRUBER, *supra* note 6, at 120.

¹¹⁶ *Id.* at 182.

¹¹⁷ *Id.* at 63.

¹¹⁸ Eisgruber also defends his definition of a moderate on the ground that he “suspect[s] that many Americans will be attracted to the idea that courts should . . . [be] receptive to new claims of injustice from powerless or neglected persons or groups.” *Id.* at 183. He offers no support for this “suspect[ed]” democratic mandate, however, and we suspect that liberals, not moderates, would be the group of Americans most likely to find that value attractive. Indeed, during the 2008 presidential campaign, Democrat Barack Obama has embraced criteria for selecting Supreme Court Justices that are strikingly similar to Eisgruber’s. Obama intends to nominate judges “who [are] sympathetic enough to those who are on the outside, those who are vulnerable, those who are powerless, those who can’t have access to political power and as a consequence can’t protect themselves . . . from being dealt with sometimes unfairly.” *CNN Late Edition with Wolf Blitzer: Interview with Barack Obama* (CNN television broadcast May 11, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/080511/le.01.html>. Contrary to Eisgruber’s prediction, these attributes have not drawn bipartisan praise as a moderate approach broadly acceptable to most Americans. Instead, conservatives have criticized the approach outlined by Obama, while liberals have praised it. See David G. Savage, *Two Visions of the Supreme Court*, L.A. TIMES, May 19, 2008, at A8.

spect to rights of democratic participation. John Hart Ely,¹¹⁹ Cass Sunstein,¹²⁰ Robert Cover,¹²¹ and many others have articulated principles broadly similar to Eisgruber's. Yet Eisgruber draws on none of this literature, instead relying on a questionable inference from impartiality.

By placing a preference for "moderate" Justices at the core of his recommendations for the Supreme Court appointments process, Eisgruber has assigned himself the challenge of defining a moderate judicial philosophy with widespread appeal. Despite his best efforts, the definition articulated in *The Next Justice* will strike most observers as conspicuously left-leaning. That is an important shortcoming of the book, because without agreement on what it means to be a moderate, Eisgruber will have difficulty convincing the public, and senators in particular, to demand the appointment of moderates to the Court.

Notwithstanding these objections, Eisgruber has developed an insightful and thought-provoking account of how Supreme Court Justices make decisions. His model of a judicial philosophy as a relationship between political and procedural values is particularly innovative. His arguments lose steam, however, in the book's closing chapters, which discuss how to reform the Supreme Court appointments process.

B. *Repairing the Supreme Court Appointments Process*

Despite the subtitle *Repairing the Supreme Court Appointments Process*, Eisgruber's *The Next Justice* allocates relatively little attention to how the appointments process became broken or how to fix it. Eisgruber's model of Supreme Court decisionmaking is intriguing, but it dominates the book, leaving the policy reform discussion underdeveloped. We now turn to the book's assessment of the problem and its program for reform.

1. *An Incomplete Diagnosis.*—In a terse chapter offering a diagnosis of the ills of the judicial appointments process, Eisgruber points to Presidents who have "raised the stakes" by nominating extremists rather than moderates.¹²² As examples, he points to President Nixon's nominations of Warren Burger, Clement Haynsworth, and Harold Carswell, and President Reagan's nominations of Antonin Scalia and Robert Bork.¹²³ It used to be different, Eisgruber says. President Eisenhower made nominations to the Supreme Court with almost no consideration of judicial philosophy: he tapped Earl Warren as Chief Justice as payback for delivering California in

¹¹⁹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73–179 (1980).

¹²⁰ See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 187, 192–93 (1990) (proposing a substantive canon of interpretation requiring broad interpretation of statutes protecting disadvantaged groups).

¹²¹ See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *YALE L.J.* 1287 (1982).

¹²² EISGRUBER, *supra* note 6, at 124–43.

¹²³ *Id.* at 125–29.

the presidential election, and he named William Brennan because he wanted to appoint a Catholic Democrat.¹²⁴ For Eisgruber, the ideal state of affairs would be “a revival of the Eisenhower Administration’s moderate approach to judicial appointments.”¹²⁵

But Eisgruber has no illusions of a return to a halcyon nonpolitical age. “Ironically enough,” he explains, it was Eisenhower’s appointments to the Warren Court, which rendered controversial decisions on hot-button issues like race and abortion, “that [have] precluded subsequent presidents from following Eisenhower’s examples.”¹²⁶ Today it is “unimaginable” that a President would pay so little attention to a nominee’s political ideology.¹²⁷ Expecting Presidents voluntarily to depoliticize the appointments process is unrealistic, he acknowledges, because “[t]he Supreme Court’s political prominence on any number of issues gives liberal and conservative presidents alike the incentive to look for ideologically pure nominees.”¹²⁸

Rather than focus directly on the Presidency,¹²⁹ Eisgruber indirectly addresses the problem of ideological selection by suggesting two reform measures for the Senate. First, at the confirmation hearings, “the Senate’s aim, and the public’s, should be to understand what a nominee thinks judicial review is good for, and to evaluate whether that judicial philosophy is an acceptable one.”¹³⁰ Consonant with his preference for judicial moderates, Eisgruber recommends questions aimed at uncovering extremism.¹³¹ Second, the Senate must “vigorously” exercise its “constitutional prerogative to insist on the appointment of judicial moderates.”¹³² The Senate “ought not to regard the confirmation hearings either as the principal means for exploring a nominee’s judicial philosophy or as a test that, if passed, entitles the nominee to confirmation.”¹³³ Instead, senators should consult pub-

¹²⁴ *Id.* at 128–29. Similarly, Warren Harding appointed Pierce Butler to the Supreme Court because he was looking for a Catholic Democrat to replace the retiring Joseph Day. See David R. Stras, *Pierce Butler: A Supreme Technician*, 62 VAND. L. REV. (forthcoming 2009).

¹²⁵ EISGRUBER, *supra* note 6, at 142. This abbreviated timeline is a bit misleading, as it leaves out the highly political appointments to the Court by President Franklin Roosevelt during the New Deal. If any President “raised the stakes” by selecting Justices with an eye toward specific results, it was Roosevelt, whose self-conscious effort to “wrest control of the judiciary from the conservative forces of his day” included an infamous court-packing plan. WITTES, *supra* note 13, at 33.

¹²⁶ EISGRUBER, *supra* note 6, at 142.

¹²⁷ *Id.*

¹²⁸ *Id.* at 187.

¹²⁹ To be fair, Eisgruber laments that many scholars have unsuccessfully proposed reforms to the judicial appointments process because such reforms have failed to take into account the strength of the Presidency. See *id.* at 124–25. Eisgruber’s proposed reforms, however, focus almost exclusively on the Senate. Indeed, he concedes the President’s incentives to make ideologically driven appointments, instead looking to the Senate to prevent the President from placing extremists on the Court. *Id.* at 186–91.

¹³⁰ *Id.* at 187.

¹³¹ *Id.* at 169–77.

¹³² *Id.* at 183.

¹³³ *Id.* at 187.

licly available materials about a nominee and, “[i]f the nominee’s record suggests to senators that his or her views about the purpose of judicial review are rigid or extreme rather than moderate,” they should reject the nomination.¹³⁴

To simplify, Eisgruber wants the Senate to “get smart” and to “get tough.” Senators must ask smarter questions that are designed to assess whether a nominee is a moderate. Senators must also stand tough against a President who nominates an extremist, even if they find the nominee’s political views attractive. Before delving into the specifics of Eisgruber’s reforms, there are two notable flaws in Eisgruber’s assessment of how the appointments process became broken.

One is that Eisgruber’s proposed reforms for the Senate are not tailored to the problems that he identifies in the appointments process. He is correct that Presidents have chosen more ideological nominees in response to the Supreme Court’s increasingly prominent role in deciding hot-button political, social, and cultural issues.¹³⁵ That account, however, suggests that the Judiciary has raised the stakes by issuing politically controversial opinions, and Presidents have acted largely in response to the expansion of judicial power. For that reason, Eisgruber’s solution—a smarter, tougher Senate as a check on an out-of-control President—does not match his account of the source of the problem, which is rooted in political pressures generated by the Court. Senators face similar pressure, and Eisgruber offers no reason to believe that they can “get smart” and “get tough” where Presidents have fallen short.

Another flaw is that, like many other commentators, Eisgruber makes little attempt to identify the full range of factors that have contributed to the politicization of the appointments process.¹³⁶ He zeroes in on one: the choices of Presidents in response to the controversial role of the Supreme Court. That account, however, is incomplete.

As one of us has argued elsewhere, structural and external factors, in addition to judicial factors, have driven a fundamental transformation of the judicial appointments process over the last eighty years.¹³⁷ Structurally, the Seventeenth Amendment and the advent of roll-call votes and public hearings on judicial nominations have made senators directly accountable to their constituents for every vote on Supreme Court nominees.¹³⁸ In addi-

¹³⁴ *Id.*

¹³⁵ *Id.* at 142 (conceding that ideological appointments to the Court began in response to the controversial decisions of the Warren Court); *see also* Stras, *supra* note 11, at 1068–69 (noting that the Judiciary has contributed to the high stakes and politicization of the confirmation process “as the federal courts are increasingly injected into matters of social, religious, and political importance”).

¹³⁶ Stras, *supra* note 11, at 1056–57 (discussing previous literature that has offered a partial, but not comprehensive, explanation for changes in the Supreme Court appointments process).

¹³⁷ *Id.* at 1057.

¹³⁸ *Id.* at 1057–62 (describing the unanticipated effects of the Seventeenth Amendment on the Supreme Court appointments process); *see also* JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME*

tion, external pressure from interest groups and the media has increased the visibility and the political consequences of those votes.¹³⁹ Senators are under considerable pressure to cast a vote consistent with their own “policy brand” because interest groups and constituents pay close attention to votes on judicial nominations.¹⁴⁰ The combined effect of these changes has been intense political pressure on senators to deliver, or to block, Justices with particular ideological views. Moreover, these structural and external factors operate directly on the Senate, undermining Eisgruber’s assumption that senators will be able to withstand the same political pressures that have prompted Presidents to raise the stakes. As we explain below, by beginning from an incomplete diagnosis, Eisgruber has arrived at an ineffective prescription.

2. *Get Smart.*—The first plank of Eisgruber’s proposal focuses on the Senate confirmation hearings. His complaint is that nominees to the Court “[i]n the post-Bork era” have “played it safe, refusing to say anything meaningful about their view of the Constitution and the Court’s role.”¹⁴¹ To overcome nominees’ evasiveness, Eisgruber proposes that senators should try “to understand what a nominee thinks judicial review is good for” by asking questions about procedural values and the circumstances in which the nominee believes judicial review is appropriate.¹⁴² He also suggests some specific questions, like, “Could you tell us something about the values and purposes that will guide you when you interpret provisions like the equal protection clause?” and “[W]hen and why is it a good thing to have judges intervening in the political process of a democratic country?”¹⁴³

Answers to these questions would indeed be illuminating. In fact, a host of other scholars have preceded Eisgruber in proposing equally penetrating questions for Supreme Court nominees.¹⁴⁴ For three reasons, how-

COURT NOMINEES 52–53 (1995) (describing the adoption of a requirement for a roll-call vote on judicial nominations); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL’Y 467, 490–92 (1998) (discussing the effects of public hearings on nominees).

¹³⁹ Stras, *supra* note 11, at 1062–68.

¹⁴⁰ On politicians’ conscious efforts to shape their “policy brand,” see Helmut Schneider, *Branding in Politics—Manifestations, Relevance and Identity-Oriented Management*, 3 J. POL. MARKETING 41, 49–50 (2004).

¹⁴¹ EISGRUBER, *supra* note 6, at 4.

¹⁴² *Id.* at 187.

¹⁴³ *Id.* at 169–70, 173.

¹⁴⁴ See, e.g., CARTER, *supra* note 8, at 151 (arguing that the Senate should eschew ideological questioning in favor of evaluating the moral character of nominees); DAVIS, *supra* note 14, at 161–63 (criticizing senators’ “softball” questions and their requests for commitments from nominees, and urging the Senate Judiciary Committee to “restore their legitimate role and be willing to hold interest groups at bay”); TRIBE, *supra* note 9, at 94 (proposing that senators’ questions be directed at whether nominees adhere to “constitutional landmarks [that] are . . . crucial to our sense of what America is all about”); Lininger, *supra* note 17, at 1328–29 (proposing revisions to the ABA’s code of judicial ethics that would allow nominees to answer more questions about particular cases); Michael Stokes Paulsen, *Straighten-*

ever, it is difficult to imagine Eisgruber's change in emphasis at the confirmation hearings succeeding.

First, senators have been unwilling or unable to ask comparable questions in the past. Senate confirmation hearings today are designed principally to satisfy the demands of external players, especially the media and interest groups.¹⁴⁵ Many senators therefore use the hearings to make political statements, not to ask questions.¹⁴⁶ Eisgruber encourages senators to use the national spotlight to ask subtle and sophisticated questions in service of the "bland virtue" of moderation,¹⁴⁷ even though his proposal would not please interest groups that care "above all else" about results on particular political issues, especially abortion.¹⁴⁸ That expectation is unrealistic because interest groups now play a central role in the Senate hearings¹⁴⁹ and they care almost entirely about results, not philosophy.¹⁵⁰ As one senator put it, "If an interest group says 'this is a key vote, we're watching this vote,' then the easy thing to do is to vote the way the group wants."¹⁵¹ Senators therefore have strong political incentives to use the hearings to

ing Out The Confirmation Mess, 105 YALE L.J. 549, 562–70 (1995) (book review) (supporting a robustly ideological confirmation process, including "litmus test" questions); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmations*, 115 YALE L.J. POCKET PART 38, 38 (2006), http://www.thepocketpart.org/2006/01/post_and_siegel.html (proposing that senators "ask Supreme Court nominees about how they would have voted in cases that the Supreme Court has already decided").

¹⁴⁵ Stras, *supra* note 11, at 1066.

¹⁴⁶ DAVIS, *supra* note 14, at 160–61 ("[Many senators] use their time as a pulpit preacher rather than as a questioner."); *see also* Gerhardt, *supra* note 138, at 531 (noting that Senate confirmation hearings emerged because the practice "provided senators with the opportunity, especially in high-profile cases, to get free publicity for their activities").

¹⁴⁷ EISGRUBER, *supra* note 6, at 183.

¹⁴⁸ *Id.* at 190.

¹⁴⁹ WITTES, *supra* note 13, at 32 (noting that interest groups "to a great extent, now drive the process"); Stras, *supra* note 11, at 1062 ("[T]he number and influence of organized interest groups participating in judicial nominations has skyrocketed over the past sixty years."); *see* MALTESE, *supra* note 138, at 91; Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499, 519 (1998); Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 291, 302 (Roger C. Cramton & Paul D. Carrington eds., 2006) ("[T]he 'judicial confirmation wars,' with their extreme rhetoric and unwillingness to compromise, are driven in very large part by the agendas of advocacy groups for whom the nominees are trophies—trophies of power and influence.").

¹⁵⁰ We know of no interest group, for example, that pressures both parties to appoint moderates to the Supreme Court. Certainly such pressure has not come from the groups most explicitly interested in judicial philosophy: the Federalist Society and the American Constitution Society.

¹⁵¹ Lauren C. Bell, *Senate Confirmations in an Interest Group Age*, EXTENSIONS, Spring 2004, available at <http://www.ou.edu/special/albertctr/extensions/spring2004/Bell.html> (quoting an anonymous senator).

score points with interest groups, to bolster their liberal or conservative bona fides, and to draw attention to their pet issues.¹⁵²

Second, nominees have proven adept at avoiding questions. Eisgruber deplores the fact that nominees since Robert Bork have answered questions with platitudes and evasion,¹⁵³ but he recognizes that no questions posed by senators can operate as “magic bullets” to “pierce the defensive armor of nominees.”¹⁵⁴ Indeed, it is likely that his proposed questions will be easy to dodge. Most “procedural” values, like deference to other decisionmakers, sound neutral and noncontroversial, giving a nominee an easy way out: endorsing the principle in the abstract but declining to speculate about how it might apply in particular cases. Both Chief Justice Roberts and Justice Alito used this strategy in responding to questions about *stare decisis* at their confirmation hearings.¹⁵⁵ It would require heroic persistence by a senator to extract answers from a recalcitrant nominee that would yield enough information to uncover a complete, moderate judicial philosophy conforming to Eisgruber’s model.¹⁵⁶

Instead, Eisgruber’s goal is to craft questions that “permit a *cooperative* nominee to share his or her judicial philosophy without taking specific positions on hot-button cases.”¹⁵⁷ The real challenge, then, is to convince nominees to “cooperate,” and as Eisgruber concedes, they have done precisely the opposite since the Senate’s rejection of Robert Bork. Eisgruber’s proposal for senators to “get smart” therefore depends on the success of his plan for them to “get tough.” Only by shifting the burden to a nominee to “prov[e] that he or she is [a moderate]” and backing up that shift with a threat to reject nominees who do not cooperate at the hearings can the Senate expect Eisgruber’s line of questioning to be effective.¹⁵⁸

¹⁵² See DAVIS, *supra* note 14, at 161–62; Stras, *supra* note 11, at 1066 (“[I]t is not unfair to characterize the seemingly futile questioning of a nominee by senators as a stage on which they can posture to and please constituents and interest groups.”). In some cases, senators have literally read questions from a script provided by an interest group. DAVIS, *supra* note 14, at 163. Although interest groups are not “all-powerful,” they present a serious obstacle to proposals for reform because they wield enormous influence and their “truces are likely to be temporary.” Hellman, *supra* note 149, at 302.

¹⁵³ EISGRUBER, *supra* note 6, at 4 (agreeing with Senator Arlen Specter’s characterization of modern confirmation hearings as “a subtle minuet” between senators and nominees).

¹⁵⁴ *Id.* at 169.

¹⁵⁵ See Robin Toner, *In Complex Dance, Roberts Pays Tribute to Years of Precedent Behind Roe v. Wade*, N.Y. TIMES, Sept. 14, 2005, at A24 (noting Roberts’s comment that *Roe* is “entitled to respect under principles of *stare decisis*”); Amy Goldstein & Charles Babington, *Alito Leaves Door Open to Reversing ‘Roe’*, WASH. POST, Jan. 12, 2006, at A1 (noting Alito’s comment that *Roe* is “a precedent that is protected, entitled to respect under the doctrine of *stare decisis*”).

¹⁵⁶ Eisgruber acknowledges this problem but maintains that the Senate can force recalcitrant nominees to answer by “getting tough” and threatening to reject nominees who are not more forthcoming. See *infra* Part I.B.3.

¹⁵⁷ EISGRUBER, *supra* note 6, at 173 (emphasis added).

¹⁵⁸ *Id.* at 177.

Third, even if senators were to ask and nominees were to fully answer Eisgruber's questions, there is reason to doubt that the answers would be meaningful. A recent study of the Rehnquist Court by Jason Czarnezki, William Ford, and Lori Ringhand compared the statements of Justices at confirmation hearings with their pattern of voting on the Court on four subjects: stare decisis, originalism, the rights of criminal defendants, and the use of legislative history.¹⁵⁹ They concluded that "the confirmation hearings are providing very little substantive information as to future judicial behavior,"¹⁶⁰ finding a particularly weak correlation between Justices' statements about stare decisis and the frequency with which they voted to overturn precedent.¹⁶¹ That conclusion is particularly discouraging for Eisgruber's reforms because the study involved answers about some of his "procedural values." Yet the study's conclusion should come as no surprise. Nominees have every incentive to disclose selectively or obscure aspects of their judicial philosophy to make themselves as appealing as possible to the Senate. If senators adopted Eisgruber's "solicitude for the disadvantaged" as a litmus test, for example, even the most conservative nominees would have a strong incentive to characterize their judicial philosophy as consistent with that principle, rendering their answers at the confirmation hearings unhelpful.

Ultimately, Eisgruber's proposal for the Senate to "get smart" is not a "repair" so much as a change in mindset. What we need, he says, is "a better way to talk about Supreme Court appointments,"¹⁶² and the thrust of his plan is to improve "public understanding[]" of how Supreme Court Justices decide cases.¹⁶³ Eisgruber is plainly echoing Stephen Carter, who likewise has argued that we can clean up the confirmation mess only by changing "our attitudes toward the Court as an institution" and our understanding of "the judicial role."¹⁶⁴ As a charter for reform, however, Eisgruber's plan is unrealistic. Senators are under tremendous pressure to deliver ideological results and will not lightly surrender their political goals for the sake of abstractions. Much as we would like to believe in the transformative power of "attitudes" and "understandings" prescribed by law professors, Eisgruber's suggestions are not viable in light of the political realities of the confirmation process.¹⁶⁵

¹⁵⁹ Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 136–37, 150 (2007).

¹⁶⁰ *Id.* at 158.

¹⁶¹ *Id.* at 140–41.

¹⁶² EISGRUBER, *supra* note 6, at 4.

¹⁶³ *Id.* at 16.

¹⁶⁴ CARTER, *supra* note 8, at 188–89.

¹⁶⁵ See WITTES, *supra* note 13, at 35 (commenting, on Carter's proposals, that "the forces that drive political polarization and partisanship—whatever one believes them to be—[are not] likely to yield before plaintive pleading from one law professor").

3. *Get Tough.*—The second plank of Eisgruber’s plan calls for the Senate to “get tough.” If a nominee appears to be too extreme or is too recalcitrant in answering questions, the Senate can and should reject the nomination.¹⁶⁶ Eisgruber does not mean merely that senators should insist upon moderate nominees for tactical reasons, hoping to minimize the damage when the White House is controlled by the opposing party.¹⁶⁷ Instead, because he believes there are “[g]enuine reasons for preferring moderate Justices,” he expects senators to demand moderation even when they believe an ideologically like-minded extremist could be nominated and confirmed.¹⁶⁸

At first glance, this aspect of Eisgruber’s proposal seems more promising. Scholars like Michael Gerhardt and Cass Sunstein have been advancing similar “get tough” recommendations since the early 1990s, urging the Senate to stop giving nominees the “benefit of the doubt,”¹⁶⁹ to develop “some consensus on the credentials it would like for judicial nominees to possess . . . [and] adhere to that consensus in spite of presidential opposition,”¹⁷⁰ and to assert its “independent role.”¹⁷¹ In fact, the Senate has grown tougher with respect to nominations to the federal circuit courts. The confirmation rate for those nominees has fallen significantly in the last thirty years, from 92% under President Carter to 71% under President Clinton and 74.6% under President George W. Bush.¹⁷²

The increasingly acrimonious battles over nominations to the federal courts of appeals, however, do not offer an encouraging model for the potential impact of a “get tough” plan in the Senate for Supreme Court nominees. As the Senate has confirmed circuit court nominees at a lower rate, the pace of the process has also slowed considerably. Between 1945 and 1986, new court of appeals judges were confirmed in an average of one to two months; between 2000 and 2006, the average time until confirmation stretched to more than a year.¹⁷³ Among Article III judgeships, 49 of 871 authorized positions on the federal courts are currently vacant, including sixteen vacancies on circuit courts.¹⁷⁴ The result is a process as “ugly and divisive” as it has ever been, with many highly qualified candidates unwilling to endure the long struggle to confirmation.¹⁷⁵ Surprisingly, Eisgruber

¹⁶⁶ EISGRUBER, *supra* note 6, at 142–43.

¹⁶⁷ *Id.* at 179 (“[I]t is easy to explain these practices on strategic grounds.”).

¹⁶⁸ *Id.*

¹⁶⁹ Simson, *supra* note 16, at 653.

¹⁷⁰ See Gerhardt, *supra* note 15, at 992 (1992).

¹⁷¹ Strauss & Sunstein, *supra* note 15, at 1512.

¹⁷² WITTES, *supra* note 13, at 39–41; Stras, *supra* note 11, at 1073. For the Bush Administration, the rate of confirmation is current through October 2007. *Id.*

¹⁷³ WITTES, *supra* note 13, at 38–39; Stras, *supra* note 11, at 1073.

¹⁷⁴ OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, JUDICIAL NOMINATIONS, available at <http://www.usdoj.gov/olp/judicialnominations.htm> (last visited Oct. 23, 2007).

¹⁷⁵ See Stras, *supra* note 11, at 1074.

almost entirely ignores the transformation of the appellate court appointments process, and thus he overlooks the potentially serious costs—including indefinite vacancies and a serious drain on the pool of willing candidates—of encouraging the Senate and President to wage an escalating war over Supreme Court nominations.

More fundamentally, there are good reasons why a “get tough” strategy has become difficult for the Senate to execute when evaluating Supreme Court nominees. As we explain in brief here, and develop more fully in Part II, proposals for greater resilience on the part of the Senate fail to appreciate the institutional strength and tactical options of the President. A “get tough” plan underestimates the President in several ways.

First, a “get tough” plan ignores the political realities facing the Senate. Even in cases of divided government, senators face enormous political pressures. As we explain in Part II, the strategic selection of nominees by a President can make it politically difficult for senators of either party to block a nomination. One component of this strategy, as Eisgruber recognizes, is the selection of ideologically moderate nominees.¹⁷⁶ A rich empirical literature also demonstrates, however, that choosing nominees strategically based on other characteristics, especially qualifications, increases the odds of confirmation.¹⁷⁷ Selecting a highly qualified individual helps to weaken Senate resistance, even if the nominee is ideologically distant from most senators.

The challenges of a “get tough” plan are particularly clear in proposals like Eisgruber’s, which direct senators to repudiate nominations made by same-party Presidents for being too extreme or for a nominee’s recalcitrance in answering questions. It is simply unrealistic to expect that senators will unilaterally disarm in such a politicized process, rejecting an ideologically attractive nominee and insisting on a moderate even in the absence of a tactical need and with no assurance that the other party will return the favor when the circumstances are reversed.¹⁷⁸ The failed nomination of Harriet Miers by President George W. Bush dramatically illustrates the point. The Miers nomination was undermined to some degree by fellow Republicans who controlled the Senate and wanted Bush to nominate someone more conservative—or at least a more prominent and reliable conservative.¹⁷⁹ It is difficult to imagine those senators, under similar

¹⁷⁶ See *infra* Part II.A.

¹⁷⁷ See *infra* notes 198–202 and accompanying text.

¹⁷⁸ CARTER, *supra* note 8, at 189 (noting that “the nature of modern partisan politics” makes such a move unlikely because “members of the President’s party will not want to oppose him without very strong reasons”).

¹⁷⁹ JAN CRAWFORD GREENBURG, *SUPREME CONFLICT* 272–73, 276 (2007). Although concerns about Miers’s qualifications and charges of cronyism also played a role in the unraveling of the nomination, it was clear that many Republican senators would not settle for a moderate—or a “stealth” candidate with the potential to be moderate—and were willing to break ranks with a President of their own party to avoid ending up with one. *Id.* at 278–83.

circumstances, accepting Eisgruber's advice to *insist* upon someone less conservative.

Second, and more importantly, plans for the Senate to "get tough" fail to appreciate the reality that Presidents, too, can "get tough." When Presidents decide to fight for an imperiled nominee, they have a number of potent weapons at their disposal. We discuss three of the President's options in Part II: the use of the bully pulpit, the power to make recess appointments to the Supreme Court, and the strategic use of logrolling techniques and threats to veto legislation.¹⁸⁰ Empirical research by political scientists suggests that some of these tools have been particularly effective for Supreme Court nominations, even when they have been less effective for circuit court nominations. Although some of these tactics are controversial and have been used sparingly in the past, they demonstrate how a plan for the Senate to toughen up might provoke a strong response from the President and only escalate the conflict over judicial appointments. These options help to explain why, to date, the Senate has disappointed Eisgruber and others who have called for greater resolve in challenging the President's nominations to the Supreme Court.

II. NAVIGATING THE NEW POLITICS OF JUDICIAL APPOINTMENTS

When commentators recommend that the Senate assert itself more vigorously at the confirmation stage to block unacceptable nominees, they often view the process only from the perspective of senators. They fail to take into account the institutional strength of the Presidency or the myriad tools at a President's disposal in navigating the judicial appointments process. The Senate's assertion of its will in rejecting qualified nominees is likely only to raise the stakes in future nominations and force Presidents to get tough in response.

In this Part, drawing on empirical findings by political scientists, we demonstrate that the conflict over Supreme Court nominations is multifaceted and dynamic. Presidents have powerful tools at their disposal to counteract resistance by the Senate, including increasing the pressure on senators both by exercising the power of the Presidency and by marshalling external groups to assist an imperiled nominee. The most commonly deployed and historically successful tactic is the strategic selection of nominees. Other tools include: (1) the use of the bully pulpit by the President, (2) the employment or threat of recess appointments to the federal courts, and (3) logrolling techniques or credible threats to veto legislation. We demonstrate that a President can use these tools to fight back against a "get tough" strategy in the Senate and secure confirmation for many Supreme Court nomi-

¹⁸⁰ See *infra* Parts II.B–D.

needs, even those that are ideologically divergent from the pivot point of the Senate.¹⁸¹

A. Strategic Selection

The most basic and powerful tool a President can use to improve confirmation odds is the strategic selection of Supreme Court nominees. Selecting a nominee is a delicate process, and a President's margin for error depends on a host of tactical considerations. Nonetheless, the available research suggests some guidelines for Presidents determined to make it difficult for the Senate to reject Supreme Court nominees.

1. *Constraints on Strategic Selection.*—Most academic research focuses on the confirmation stage of the judicial appointments process—the factors that influence the Senate's consideration of judicial nominees.¹⁸² The dearth of research on the selection side is due in no small part to the tiny group of close advisors that are privy to the selection methodologies employed by Presidents. The institutionalization of the Presidency and the expansion of the staff of the White House, particularly the Counsel's office, have centralized much of the decisionmaking about judicial nominations in the White House.¹⁸³ In contrast, the Senate provides a comparatively easy object of study as the deliberations over judicial nominees are open, heavily covered by the media, and the fodder of interest group activity.

The available research identifies several constraints on a President's selection of a Supreme Court nominee. According to Christine Nemacheck, who has engaged in the most probing study of presidential selection to date, perhaps the most important external factor is whether the President faces a Senate controlled by the opposite party.¹⁸⁴ A number of scholars have found that divided government reduces the likelihood that the Senate will confirm a judicial nominee and, in recent years, that it also increases the amount of time required for confirmation.¹⁸⁵ Indeed, Sarah Binder and For-

¹⁸¹ For the confirmation of a Supreme Court nominee, the pivotal senator is likely to be, but is not always, the fifty-first senator that is willing to vote in favor of confirmation because filibusters of Supreme Court nominees are rare. See CHRISTINE L. NEMACHECK, STRATEGIC SELECTION 28–29 (2007); Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1093 (1999).

¹⁸² See NEMACHECK, *supra* note 181, at 15; Moraski & Shipan, *supra* note 181, at 1070.

¹⁸³ See NEMACHECK, *supra* note 181, at 85–86, 93, 106.

¹⁸⁴ See *id.* at 66; see also LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 107 (2005).

¹⁸⁵ See NEMACHECK, *supra* note 181, at 66 (citing multiple studies on both phenomena); Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190, 195 (2002); Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1136–38 (1999). But see Glen S. Krutz et al., *From Abe Fortas to Zoe Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871, 878 (1998) (finding that divided government does not make it more likely that Supreme Court nominations will fail).

rest Maltzman found that the hazard rate (or likelihood) of a decision by the Senate on a judicial nominee “decreases during divided government by nearly fifty percent compared to periods of unified control.”¹⁸⁶ In other words, a “president would like to appoint his preferred nominee without regard to his opposition’s preferences, but he recognizes that he is constrained by the Senate, especially when it is controlled by the opposition party.”¹⁸⁷ In recent years, the ability of the opposition party to mount a filibuster, especially against lower court nominees, also has influenced presidential selection of judicial nominees.¹⁸⁸

In addition, decreased political capital, either because of low approval ratings or the approach of the end of a term in office, constrains the selection decisions of Presidents.¹⁸⁹ As in the case of ordinary legislative initiatives, scholars have found that it becomes more difficult for Presidents to gain confirmation for a judicial nominee as their remaining time in office decreases because “the incentive for members of Congress to bargain with the president declines,” especially if the President is viewed as a “lame duck.”¹⁹⁰ Political scientists have also found that a President’s approval ratings affect nominee selection. Although the impact of approval ratings is not clear as an empirical matter, some studies have found that high approval ratings give Presidents greater freedom to nominate a candidate who is closer to the President’s own ideology.¹⁹¹

The criticality of the particular nomination at issue also constrains the President’s choice of nominee. “Critical” nominations, those that will influence the ideological balance of a court, receive greater scrutiny than nominations that replace an outgoing judge with a like-minded successor.¹⁹²

¹⁸⁶ See Binder & Maltzman, *supra* note 185, at 196.

¹⁸⁷ NEMACHECK, *supra* note 181, at 66.

¹⁸⁸ See *id.* at 67.

¹⁸⁹ See Binder & Maltzman, *supra* note 185, at 197 (focusing on the diminished political capital toward the end of presidential terms); Charles M. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525, 528 (1990) (discussing constraints on Presidents toward the ends of their terms); Krutz et al., *supra* note 185, at 878 (finding that presidential approval ratings often influence the success of judicial nominations); McCarty & Razaghian, *supra* note 185, at 1139–41 (noting that Presidents are more likely to succeed in judicial appointments toward the beginning of their terms in office).

¹⁹⁰ NEMACHECK, *supra* note 181, at 70–71.

¹⁹¹ See EPSTEIN & SEGAL, *supra* note 184, at 108; NEMACHECK, *supra* note 181, at 80; Timothy R. Johnson & Jason M. Roberts, *Pivotal Politics, Presidential Capital, and Supreme Court Nominations*, 32 CONGRESS & PRESIDENCY 31, 38 (2005); Moraski & Shipan, *supra* note 181, at 1088–90. *But cf.* Binder & Maltzman, *supra* note 185, at 197 (“[P]opular presidents are no more able to get their nominees approved quickly than less popular ones . . .”).

¹⁹² See EPSTEIN & SEGAL, *supra* note 184, at 108–09 (“Simply stated, when an appointee is likely to tip the ideological balance of a circuit, senators are more likely to drag their feet over the confirmation.”); P.S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. POL. 793, 797–98 (1993). One prominent example of a noncritical appointment was the replacement of Chief Justice William Rehnquist with his former law clerk, John G. Roberts, both of whom were appointed by Republican Presidents.

Such scrutiny occurs most often when a President replaces judges appointed by a different party. As P.S. Ruckman has noted, nearly 60% of all unsuccessful nominations to the Supreme Court have involved attempted opposite-party replacements.¹⁹³ An opposite-party replacement to the Supreme Court is defined as critical when it would result in a one-member partisan split (i.e., a 5-4 continuing majority with a high possibility of swing voting), create a partisan deadlock, or establish a new partisan majority on the Court.¹⁹⁴ In other words, opposite-party replacements are critical when “they involve the added possibility of having a substantial impact on the partisan balance” of a court,¹⁹⁵ such as when President Nixon nominated Harry Blackmun to fill the seat vacated by Democratic-appointee Abe Fortas.¹⁹⁶ Indeed, not only is it more difficult for a President to successfully confirm a nominee when a critical nomination arises, but according to Charles Shipan and Megan Shannon, such a nomination also results in greater delay than with noncritical nominations.¹⁹⁷

2. *The Power of Strategic Selection.*—Despite those constraints, a substantial body of empirical research demonstrates that strategic selection of nominees by the President can dramatically improve the chances of confirmation, even when the opposing party controls the Senate. We discuss three aspects of this strategy: (1) the selection of highly qualified nominees, (2) the selection of ideologically moderate nominees, and (3) pre-nomination consultation with the Senate. Strikingly, the selection of highly qualified nominees has been the President’s single most effective tactic, even in cases where such nominees are ideologically distant from the pivot point in the Senate.

First, empirical work by Lee Epstein, among others, demonstrates that the qualifications of Supreme Court nominees can have a dramatic impact on the likelihood of confirmation.¹⁹⁸ In studying the votes of every senator

¹⁹³ See Ruckman, *supra* note 192, at 797.

¹⁹⁴ See Charles R. Shipan & Megan L. Shannon, *Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations*, 47 AM. J. POL. SCI. 654, 661 (2003).

¹⁹⁵ Ruckman, *supra* note 192, at 798.

¹⁹⁶ See *id.* at 797. It bears noting that, consistent with the hypothesis that critical nominations tend to lead to greater conflict between the President and the Senate, President Nixon’s first two nominees to fill the Fortas vacancy—Clement Haynsworth, Jr. and G. Harrold Carswell—were both rejected by the Senate. See *id.*

¹⁹⁷ See Shipan & Shannon, *supra* note 194, at 665. *But cf.* Binder & Maltzman, *supra* note 185, at 197 (finding that critical nominations at the lower court level only lead to greater delay when there is divided government).

¹⁹⁸ See EPSTEIN & SEGAL, *supra* note 184, at 69; Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U.L. REV. 1145, 1148 (2005); see also Cameron et al., *supra* note 189, at 530 (finding that the qualifications of a nominee are “equally important” to the “ideological distance between senators and nominees”); Jeffrey Rosen, *Supreme Court Confirmations Are As Messy As They Should Be*, CHRON. HIGHER EDUC., Nov. 11, 2005, at B6, B7 (reviewing the available research and concluding that “[q]ualifications matter—as much today as they have in the past”).

on every Supreme Court nominee since the middle of the twentieth century—2451 votes in all—Epstein and Segal found that “a highly qualified nominee would receive about forty-five more votes (on average) than one universally deemed unqualified.”¹⁹⁹ In an earlier study, Charles Cameron, Albert Cover, and Jeffrey Segal analyzed 2054 confirmation votes from Earl Warren to Anthony Kennedy and similarly discovered that it is “overwhelmingly” the interaction of qualifications and the ideology of nominees that “determines the votes of senators.”²⁰⁰ Recent experience tends to corroborate those findings. For example, it is not a stretch to say that Harriet Miers may have been confirmed to the Supreme Court had she been seen both by the public and the Senate as highly qualified, rather than just a close confidante and crony of President George W. Bush.²⁰¹ Likewise, due to the criticality of the nomination to replace departing Justice Sandra Day O’Connor, it is fair to speculate that Samuel Alito may have faced a filibuster or an unfavorable Senate vote had he not served previously with distinction as a Third Circuit judge, United States Attorney, and Supreme Court advocate in the Solicitor General’s office.²⁰²

Second, senators are more likely to vote for a nominee who shares or approximates their own political ideology than for a nominee who is ideologically distant.²⁰³ According to Epstein and Segal, a Supreme Court nominee receives only about 57% of the votes of ideologically distant senators, while an ideologically congruent nominee receives 98% of the possible

¹⁹⁹ EPSTEIN & SEGAL, *supra* note 184, at 103. To measure a nominee’s qualifications, the study used a technique that examines the content of newspaper editorials about Supreme Court nominees that were written between the time of their nomination and their confirmation vote in the Senate. *See id.* Although the newspapers examined in the study reflected rough ideological balance, one wonders the extent to which a nominee’s ideological views may have influenced a newspaper’s assessment of that nominee’s qualifications. For example, we wonder whether Robert Bork received a less favorable evaluation of his credentials because many senators, including Edward Kennedy, had already characterized his jurisprudence as outside of the mainstream of legal thought. Indeed, according to the study, Bork was the tenth least qualified nominee, whereas Lewis Powell, who had never been a judge before his nomination to the Supreme Court, tied for the most qualified nominee since 1953. *See id.* at 105. Although any further discussion of this issue is beyond the scope of this paper, we would hypothesize that Epstein and Segal’s methodology overstates the influence of qualifications on a nominee’s prospects for confirmation, though we have no doubt that a nominee’s qualifications play a highly influential role in the votes of senators.

²⁰⁰ *See* Cameron et al., *supra* note 189, at 530–31. The Cameron, Cover, and Segal study also used newspaper editorials to measure both the ideology and qualifications of Supreme Court nominees. *Id.* at 529. It measured senators’ ideology using the ratings assigned by a liberal interest group, Americans for Democratic Action. *Id.*

²⁰¹ *See, e.g.,* Linda Feldmann, *Religious Right’s Hard Call*, CHRISTIAN SCI. MONITOR, Oct. 22, 2007, at 1 (noting the concerns about Harriet Miers’s qualifications to sit on the Supreme Court).

²⁰² *See, e.g.,* Ferrell Bount, Op-Ed., *The Real Samuel Alito: Judge Is Most Qualified Supreme Court Nominee in Seven Decades*, CHARLOTTE OBSERVER, Jan. 20, 2006, at 10A (noting that the ABA gave Samuel Alito “the highest rating possible” with respect to his qualifications).

²⁰³ *See* EPSTEIN & SEGAL, *supra* note 184, at 109.

votes.²⁰⁴ Cameron, Cover, and Segal similarly observed that the votes of senators are “decisively affected” by the ideological distance between a senator and a Supreme Court nominee.²⁰⁵ Although operationalizing the political views of nominees and senators can be difficult, and there is vigorous scholarly debate over the role that political considerations ought to play in the Senate’s evaluation of Supreme Court nominees,²⁰⁶ there is no doubt that a President can improve the odds of confirmation by selecting nominees with ideological appeal to senators of the opposition party.

Eisgruber makes a similar point in defense of his proposal to select moderates for the Supreme Court, noting that Presidents have had more difficulty winning confirmation for their nominees when they have chosen extremists.²⁰⁷ As an initial matter, most empirical work in this area employs a conventional definition of moderation that situates Justices along an ideological continuum with other members of the Court. It is therefore unclear the extent to which the existing empirical evidence on judicial ideology supports Eisgruber’s claim that moderates, as he defines them, would enjoy greater rates of confirmation.²⁰⁸ Even so, Eisgruber goes further, making clear that he would not be satisfied with the selection of moderates for merely tactical reasons.²⁰⁹ His proposal calls for senators to block extremists from reaching the Court even in cases of unified government where concessions to opposition senators are unnecessary, which is unrealistic given the dynamics of confirmation politics.²¹⁰

²⁰⁴ See *id.* at 113. Like Cameron, Cover, and Segal, the Epstein and Segal book also used the scores assigned by Americans for Democratic Action to measure the ideology of senators. *Id.* at 111; see *supra* note 200.

²⁰⁵ See Cameron et al., *supra* note 189, at 530.

²⁰⁶ Compare TRIBE, *supra* note 9, at 132–33 (arguing that the Senate and the President should be “equal partner[s]” and that it is perfectly permissible for senators to consider the ideology of judicial nominees), and Paulsen, *supra* note 144, at 552 (“Far from forbidding inquiries into judicial ideology, we should give free rein to ideology in the battle over judicial appointments.”), with, John C. Eastman, *The Limited Nature of the Senate’s Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 646–47 (2003) (stating that, in the Founders’ views, the role of the Senate in the appointments process was quite limited), and Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 687 (1989) (asserting that, in Bork’s confirmation, “[t]he Senate should have confined its investigation to determining whether the nominee was intellectually competent and whether his nomination was tainted by cronyism, corruption, or crass political partisanship”).

²⁰⁷ EISGRUBER, *supra* note 6, at 156.

²⁰⁸ As stated above, Eisgruber employs an idiosyncratic definition of “moderate” that has two principle features: special solicitude toward claims of the disadvantaged and a thoughtful understanding of the limits of the judicial role. See EISGRUBER, *supra* note 6, at 121; *supra* notes 68–76 and accompanying text.

²⁰⁹ EISGRUBER, *supra* note 6, at 179.

²¹⁰ See Moraski & Shipan, *supra* note 181, at 1075–76. According to a leading game-theoretic model developed by Moraski and Shipan, the President is generally unconstrained in making appointments to the Supreme Court during periods of unified government and when the Court’s median is to the right or the left of both the Senate and the President. Under such circumstances, the Senate will accept any nominee that moves the ideological median of the Court in the direction that it prefers. See *id.* (de-

Moreover, several studies suggest that highly qualified nominees are difficult for the Senate to reject, even when they are ideologically distant from the median pivot of the Senate. Highly qualified nominees to the Supreme Court between 1953 and 2005 received a staggering 99.3% of a possible 602 votes from ideologically compatible senators.²¹¹ For nominees deemed “not qualified,” that number drops to 91.8%.²¹² For those nominees who are ideologically distant from senators, the difference could not be more stark: well-qualified nominees received 94.8% of the possible 231 votes, while those nominees deemed not qualified received only 1.7% of a possible 115 votes.²¹³ It is for these reasons that Timothy Johnson and Jason Roberts conclude that “presidents have a greater deal of power over the nomination process—even when they face ideological constraints in the Senate—and that they use this power to gain confirmation for their preferred choices.”²¹⁴ Although there is evidence that ideological compatibility has become a stronger predictor of confirmation since the 1950s, qualifications have remained consistently influential for more than a century.²¹⁵ The numbers speak for themselves: despite recent difficulty in gaining confirmation for some lower court nominees, only four Supreme Court nominees have been rejected by the Senate since 1900, while fifty-five have been approved.²¹⁶

Third, pre-nomination consultation with senators when forming the short list of candidates to fill a Supreme Court vacancy can reduce the degree of opposition that Presidents face.²¹⁷ According to Nemacheck, “[b]y

scribing the President as “unconstrained” under those circumstances). The failed nomination of Harriet Miers appears to be inconsistent with that prediction, perhaps because of Moraski and Shipan’s assumption of a single-period game. *See id.* at 1072; *supra* note 179 and accompanying text (describing the Miers nomination). Neither the political science literature nor the Miers nomination, however, offers any support for the scenario envisioned by Eisgruber, in which the Senate rejects ideologically attractive nominees on the ground that they are not moderate enough.

²¹¹ *See* EPSTEIN & SEGAL, *supra* note 184, at 114.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Johnson & Roberts, *supra* note 191, at 44.

²¹⁵ Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 302 (2006) (noting that while the influence of qualifications on confirmation have remained fairly steady, ideology has become a more important aspect of the Senate’s consideration of nominees since the 1950s).

²¹⁶ *See* Moraski & Shipan, *supra* note 181, at 1069. One possible partial explanation for these results is that the President enjoys the exclusive power to make the *next* nomination. Because the President alone chooses nominees to the Supreme Court, U.S. CONST. art. II, § 2, senators must always consider whether expending significant resources to defeat a nominee will prompt the President to choose someone equally objectionable, or even worse. *See* Johnson & Roberts, *supra* note 191, at 45 n.11 (discussing “the iterative nature of the nomination game” and suggesting that the fact that the game “potentially has many rounds” helps to explain why even when the President’s party lacks a filibuster-proof majority in the Senate, Presidents have greater success in securing nomination than spatial models of ideological distance would otherwise predict).

²¹⁷ *See* WITTES, *supra* note 13, at 115, 119.

listening to members of Congress in developing his short list, the president might be seen as being conciliatory in terms of his deliberations, which in turn could help establish a more favorable nomination environment.²¹⁸ Even if the President does not ultimately select a senator's suggested nominee, senators appreciate consultation because it "can bolster their image both within the chamber and with their constituents."²¹⁹ Such consultation can be especially effective when the President faces divided government,²²⁰ there is enough opposition to filibuster a nominee,²²¹ or presidential capital is especially low.²²² For example, President Clinton's two Supreme Court nominees, Ruth Bader Ginsburg and Stephen Breyer, enjoyed relatively smooth confirmations in part because President Clinton consulted informally with the ranking Republican on the Senate Judiciary Committee, Orrin Hatch, prior to nominating them.²²³

The available research thus demonstrates that the strategic selection of nominees can weaken resistance from senators. Choosing a highly qualified individual, paying attention to a nominee's political views, and pre-nomination consultation with key senators can put pressure on the opposing party and increase the odds of confirmation, even during periods of divided government.²²⁴ Proponents of a "get tough" plan for the Senate should not underestimate the President's power to frame the confirmation debate by strategically selecting nominees that are difficult for the Senate to reject.

B. "Going Public" and the Use of the Bully Pulpit

Even after selecting nominees, the President has considerable institutional strength in influencing the confirmation of nominees. One powerful tool the President can use to smooth the path to confirmation is "going public" or using the bully pulpit to tout the qualifications and attributes of nominees. Empirical research suggests that Presidents have deployed this

²¹⁸ NEMACHECK, *supra* note 181, at 40.

²¹⁹ *Id.* at 40–41.

²²⁰ *See id.* at 65–66.

²²¹ *See id.* at 67.

²²² *See id.* at 70–71.

²²³ *See* ORRIN HATCH, *SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR* 180 (2002); NEMACHECK, *supra* note 181, at 41; Richard J. Durbin, *No Constitutional Right to a Rubber Stamp*, 39 U. RICH. L. REV. 989, 998–99 (2005); Timothy R. Johnson & Jason M. Roberts, *Presidential Capital and the Supreme Court Confirmation Process*, 66 J. POL. 663, 664 n.3 (2004).

²²⁴ Of course, the research demonstrates only that these techniques have been successful in the past, not that they will be in the future. An important part of Eisgruber's project is to explain to senators and the public that, although "[l]egal acumen and experience are obviously important," presidential claims about the qualifications of their nominees are often unreliable, and in any event, a focus on qualifications is inappropriate because "judging is not like umpiring." EISGRUBER, *supra* note 6, at 16. We suspect, however, that the Senate's strong tendency to confirm highly qualified nominees has not resulted from a naïve and mistaken belief among senators that Supreme Court decisionmaking is entirely technical and nonpolitical. Instead, for instance, concerns about the legitimacy of the Court and respect for the rule of law might lead senators to prefer highly respected and accomplished nominees.

strategy most frequently when their nominees are imperiled, but it can also be influential to further entrench support for nominees who would otherwise be confirmed.

The benefits and risks of the using the bully pulpit are apparent in the legislative arena, where the President plays an active role in setting “both the public agenda and the congressional agenda.”²²⁵ Ronald Reagan, for instance, won important budget battles “early in his first term by imploring” that citizens “contact [their] senators and congressmen.”²²⁶ Unlike most senators and members of Congress, Presidents have the attention of the entire country and thus can influence the legislative agenda by “go[ing] over the heads” of other political figures and making their appeals to the general public.²²⁷ With respect to ordinary legislation, one risk of using the bully pulpit too often is that it can eliminate bargaining options for both the President and Congress.²²⁸ As Johnson and Roberts have observed, once Presidents have “draw[n] a line in the sand” on some policy or budgetary initiative, it is often difficult for them to continue to bargain without appearing as if they have capitulated to congressional demands.²²⁹ Johnson and Roberts further explain that “going public” can be a risky strategy because it uses precious political capital and is not always successful.²³⁰ For instance, President George H.W. Bush used the bully pulpit to try to influence congressional consideration of his budget proposals, but that approach failed miserably with the Democratic Congress.²³¹

The use of the bully pulpit in contested confirmation battles can be a powerful weapon for the President. Before the twentieth century, Presidents were reluctant to speak out publicly about their policies or judicial nominees out of fear that they would be perceived as demagogues.²³² Once the Seventeenth Amendment was passed in 1913 and senators became more accountable to the general public,²³³ Presidents increasingly used the power of public persuasion to “mold mandates for policy initiatives.”²³⁴ Even after the use of the bully pulpit became more common for legislation, however, Presidents still hesitated to use public appeals for judicial nominees.²³⁵ Presidents eagerly wanted to avoid being perceived as “stooping to ‘poli-

²²⁵ Johnson & Roberts, *supra* note 223, at 665.

²²⁶ *Id.*

²²⁷ *See id.*

²²⁸ *See id.* at 666.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *See id.*

²³² *See* John Anthony Maltese, *The Presidency and the Judiciary*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 499, 513–14 (Michael Nelson ed., 6th ed. 2000); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 95 (1987).

²³³ *See* Stras, *supra* note 11, at 1058–61.

²³⁴ *See* Maltese, *supra* note 232, at 513.

²³⁵ *See id.* at 514.

tics” in order to have their judicial nominees confirmed.²³⁶ In one prominent example, Herbert Hoover desperately desired to publicly support his doomed Supreme Court nominee, John J. Parker, in 1930 but ultimately decided against it.²³⁷ Although Presidents such as Harry Truman and Dwight Eisenhower spoke publicly about some of their Supreme Court nominees,²³⁸ Ronald Reagan was the first President to make widespread use of the bully pulpit in the judicial appointments context. Indeed, President Reagan made a whopping seventy public statements in favor of Robert H. Bork, greater than the total number of public statements made in favor of Supreme Court nominees by all of the Presidents that preceded Reagan.²³⁹

In a recent study, Timothy Johnson and Jason Roberts examined the conditions under which Presidents are most likely to “go public” in support of their Supreme Court nominees. According to the study, Presidents are most likely to make public statements when a nominee is ideologically distant from the Senate’s filibuster pivot, the Supreme Court’s median Justice is ideologically distant from the pivotal senator, and the President and Senate fall on opposite ends of the ideological spectrum.²⁴⁰ In fact, Presidents are “almost five times more likely to go public to fight for their chosen nominee” to the Supreme Court when their nominees are ideologically distant from the Senate.²⁴¹ Presidents will also release “almost three times as many public statements when their nominee will not move the Court median ideologically closer to the pivotal Senator.”²⁴² Therefore, Presidents tend to use the bully pulpit most often when they are “ideologically constrained by the Senate.”²⁴³ Most importantly, the Johnson and Roberts study demonstrates that the strategy works with respect to Supreme Court nominees: Presidents who publicly support their nominees are likely to reduce the number of “nay” votes actually cast as compared to the number of such votes estimated by predictive models that are based on ideological dis-

²³⁶ *See id.* Instead, Presidents often used surrogates to make a public case for their judicial nominees. *See id.* at 516. For instance, Woodrow Wilson used Norman Hapgood, the editor of *Harper’s Weekly*, to publicly tout Supreme Court nominee Louis Brandeis in 1916. *See id.* Richard Nixon also made aggressive use of his new Office of Communications to publicly support the unsuccessful nomination of Clement Haynsworth in 1969. *See id.*

²³⁷ *See id.* at 514.

²³⁸ *See* Johnson & Roberts, *supra* note 223, at 672.

²³⁹ *See id.*

²⁴⁰ *Id.* at 669–70, 675–78. Johnson and Roberts used Segal/Cover scores, derived from newspaper editorials, to measure the ideology of Supreme Court nominees. *Id.* at 673. It used DW-NOMINATE scores, based on nearly all roll-call Senate votes, to measure the filibuster pivot of the Senate. *Id.* at 673 & nn.19–20; *see* KEITH POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997) (discussing DW-NOMINATE scores).

²⁴¹ Johnson & Roberts, *supra* note 223, at 676.

²⁴² *Id.*

²⁴³ *Id.* at 674.

tance.²⁴⁴ For example, Johnson and Roberts surmise that absent President George H.W. Bush's twenty-nine public statements of support, Justice Clarence Thomas would not have been confirmed by the Senate.²⁴⁵

There are, of course, exceptions. Robert Bork's nomination was soundly defeated despite numerous public statements by President Ronald Reagan,²⁴⁶ and Harriet Miers's nomination failed despite immediate public statements of support by President George W. Bush.²⁴⁷ Therefore, supportive statements by the President certainly do not guarantee confirmation for a Supreme Court nominee.²⁴⁸ Nonetheless, the empirical evidence demonstrates that robust use of the bully pulpit can lead to more favorable out-

²⁴⁴ *Id.* at 679. Although Presidents have enjoyed remarkable success in going public in support of Supreme Court nominees, they have not been nearly as successful in using the bully pulpit in support of nominees to the lower federal courts. See Lisa M. Holmes, *Presidential Strategy in the Judicial Appointment Process: "Going Public" in Support of Nominees to the U.S. Court of Appeals*, 35 AM. POL. RES. 567, 586 (2007). Lisa Holmes hypothesizes that this distinction may exist because there is a "'reservoir of goodwill' that stymies effective mobilization against Supreme Court nominees," while going public in support of lower court nominees can in some instances entrench ideological opposition against them. *Id.* at 588 (quoting James L. Gibson & Gregory A. Caldeira, *Politicized Confirmation Processes and the Legitimacy of the U.S. Supreme Court* (Apr. 17, 2006) (paper presented at the 64th Annual National Conference of the Midwest Political Science Association), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/3/9/3/5/pages139352/p139352-1.php).

²⁴⁵ See Johnson & Roberts, *supra* note 223, at 679.

²⁴⁶ Despite making seventy statements in favor of Robert Bork—so many that "it seemed that the president would use virtually any public forum to push his nominee, whether signing a proclamation for National Hispanic Heritage Week or German American Day"—the nomination ultimately failed by a 58-42 margin. See Maltese, *supra* note 232, at 514. Bork's nomination failed due, at least in part, to the ideological distance between Bork and the Democratic Senate, the criticality of the nomination to replace swing vote Lewis Powell, Bork's remarkably candid answers to questions by members of the Senate Judiciary Committee, and the late date at which the vacancy arose during Reagan's second term. See NEMACHECK, *supra* note 181, at 70; Cameron et al., *supra* note 189, at 528; Fein, *supra* note 206, at 676-77, 683.

²⁴⁷ President Bush went public to support Miers the day after the nomination "to quell a revolt within his own party . . . in the face of Republican complaints that he ha[d] drifted from his ideological moorings." Peter Baker & Shailagh Murray, *Bush Defends Supreme Court Pick*, WASH. POST, Oct. 5, 2005, at A1. He made additional statements of support on at least four subsequent occasions over the next three weeks, before the nomination was eventually withdrawn. See Charles Babington, *After the Home Run, a White House Balk?; Handling of Miers Nomination Cannot Stand Up to Ease of Roberts Approval*, WASH. POST, Oct. 21, 2005, at A4; Peter Baker & Dan Balz, *Bush Rejects Calls to Withdraw Miers*, WASH. POST, Oct. 8, 2005, at A8; Peter Baker & Charles Babington, *Role of Religion Emerges as Issue*, WASH. POST, Oct. 13, 2005, at A8; Michael A. Fletcher & Charles Babington, *Conservatives Escalate Opposition to Miers*, WASH. POST, Oct. 25, 2005, at A2.

²⁴⁸ Timothy R. Johnson & Jason M. Roberts, *Supplemental Materials: Presidential Capital and the Supreme Court Confirmation Process* 8 (Aug. 2004), <http://sitemason.vanderbilt.edu/files/ks7ZPa/johnson%20supplements.pdf> (supplementing Johnson & Roberts, *supra* note 223, and acknowledging that the authors' theory "cannot explain" the Senate's rejection of Bork, but maintaining that "no theory is perfect, and the fact that we are able to say, with confidence, that 25 of the last 26 Supreme Court nominees have been helped by presidents willing to go public on their behalf is a very important finding both theoretically and substantively").

comes for Supreme Court nominees, especially in cases where a nomination faces stiff resistance from the Senate.²⁴⁹

C. Recess Appointments

Presidents also possess other tools to persuade the Senate to confirm an embattled nominee. One of the most important is the power to temporarily circumvent the process altogether by exercising their constitutional 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.”²⁵⁰ Although there is a robust debate in the scholarly literature about the meaning of the Recess Appointments Clause,²⁵¹ every circuit that has considered the question has held that Presidents possess the power to recess appoint federal judges to Article III courts, including during intrasession recesses of the Congress.²⁵² As the Eleventh Circuit held in considering President George W. Bush’s recess appointment of William Pryor, Jr. to that court, while there is some tension between the Article III requirement of life tenure and the recess appointment power, “the temporary judges appointed under the Recess Appointments Clause are an exception to the general rule of Article III.”²⁵³ Recess appointees, the court held, are “afforded the full extent of the authority commensurate with” the office during the

²⁴⁹ Eisgruber argues that “it would be a mistake to ignore the power of ideas” because “[p]ublic understandings of the appointments process will affect how that process is conducted.” EISGRUBER, *supra* note 6, at 16. Eisgruber may be correct that over the long term, books like *The Next Justice* might blunt the effectiveness of the bully pulpit by directing the public’s attention to a sophisticated understanding of judicial philosophy rather than a nominee’s qualifications and public support—the subjects of public statements by the President that have proven effective. See Johnson & Roberts, *supra* note 223, at 671. It is difficult to imagine, however, given the institutional advantages of the Presidency in defining the public debate surrounding Supreme Court nominations, that abstract notions of judicial philosophy and moderation will come to dominate discussions about judicial nominees.

²⁵⁰ U.S. CONST. art. II, § 2, cl. 3.

²⁵¹ In interpreting the text of the Clause, scholars have focused on two major questions: first, whether the vacancy to be filled must actually arise or merely exist during the recess of the Senate; second, whether the power may be exercised only during intersession recesses of Congress or whether it also applies to intrasession recesses. Although the courts are unanimous that the President’s power is extremely broad with respect to both questions, *see infra* note 252 and accompanying text, scholars are still debating the scope of the power. See, e.g., Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515 (2004); Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61 (2006); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005); Note, *Recess Appointments to the Supreme Court: Constitutional but Unwise?*, 10 STAN. L. REV. 124 (1957). Due to the unanimity of the federal courts on the constitutionality of recess appointments for federal judges and the rich scholarship on the subject, any further discussion of the constitutionality of the Recess Appointments Clause is beyond the scope of this Review Essay.

²⁵² See *Evans v. Stephens*, 387 F.3d 1220, 1226–27 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 712 (2d Cir. 1962).

²⁵³ *Evans*, 387 F.3d at 1223.

pendency of the recess appointment.²⁵⁴ The text of the Clause makes clear, however, that recess appointees may only serve for a limited time. For example, an individual that is appointed by the President during a recess occurring in the middle of the first session of Congress will be eligible to serve until the end of the second session, which is likely to be late in the following year.²⁵⁵

Although Presidents have been less willing to appoint judges using recess appointments over the past forty years,²⁵⁶ there is a rich history of aggressive use of the power to reshape the federal Judiciary. Over the course of American history, Presidents have made 248 recess appointments to federal district courts, 43 to the federal circuit courts, and 12 to the Supreme Court of the United States.²⁵⁷ Few remember that President Dwight Eisenhower employed the power liberally, recess appointing Chief Justice Earl Warren and Justices William Brennan and Potter Stewart prior to confirmation by the Senate.²⁵⁸ Eisenhower used the recess appointment power strategically to appoint each right before a national election.²⁵⁹ Other Presidents

²⁵⁴ *Id.*

²⁵⁵ T.J. HALSTEAD, CONG. RESEARCH SERV., ORDER CODE RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW (2005), available at http://openers.cdt.org/rpts/RL33009_20050726.pdf. The records of the Founding era provide little information about the scope or operation of the Clause. Alexander Hamilton in *The Federalist No. 67* implies that the purpose of the power was primarily pragmatic:

The ordinary power of appointment is confided to the President and Senate jointly, and can therefore only be exercised during the session of the Senate; but, as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the president, singly, to make temporary appointments "during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

THE FEDERALIST NO. 67, at 346 (Alexander Hamilton) (Max Beloff ed., 1948).

Hamilton's statement was meant to respond to the critique that the exception of unilateral appointment would swallow the prevailing rule of joint appointment by the Senate and the President, and other statements from the Founding debates are in accord with Hamilton's view. See Statement of Archibald Maclaine at the North Carolina Ratifying Convention (July 29, 1788), in 4 THE FOUNDERS' CONSTITUTION 102–03 (Philip B. Kurland & Ralph Lerner eds., 1987); Proceedings of the Pennsylvania Convention, Dec. 10, 1787 (statement of Thomas McKean), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 537 (Merrill Jensen ed., 1976). Indeed, prior to the Civil War, the Recess Appointments Clause was necessary for continuity of government because Congress typically sat in session for only three to six months per year and then often went into recess for between six and nine months at a time. See Rappaport, *supra* note 251, at 1500–01.

²⁵⁶ Only four judges have been given recess appointments to an Article III court since 1964: Walter Heen (Ninth Circuit), Roger Gregory (Fourth Circuit), Charles Pickering (Fifth Circuit), and William Pryor (Eleventh Circuit). See LOUIS FISHER, CONG. RESEARCH SERV., ORDER CODE RL31112, RECESS APPOINTMENT OF FEDERAL JUDGES 19 (2001), available at <http://www.senate.gov/reference/resources/pdf/RL31112.pdf>; Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 659 (2004).

²⁵⁷ See Hogue, *supra* note 256, at 659–61.

²⁵⁸ See *id.* at 660.

²⁵⁹ Michael Brus, *What Is a Recess Appointment?*, SLATE, June 14, 1999, <http://www.slate.com/id/1002994>.

have also used the power “for political purposes,” including George Washington, who recess appointed John Rutledge to the post of Chief Justice of the United States in 1795, though Washington’s use of the power “generated significant controversy” and ultimately played a role in the Senate’s rejection of Rutledge’s nomination.²⁶⁰ Indeed, the first five Presidents used the power a total of thirty-one times to appoint judges, including the appointment of five Supreme Court Justices.²⁶¹

Not surprisingly, the primary institutional opponent to robust use of the recess appointment power has been the Senate, which has often viewed the power as circumventing the Senate’s advice and consent role in the appointments process. For instance, in response to President Eisenhower’s aggressive use of the power to appoint three Justices to the Supreme Court,²⁶² the Senate passed a resolution in 1960 stating that recess appointments to the Court “may not be wholly consistent with the best interests of the Supreme Court . . . and that such appointments, therefore, should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court’s business.”²⁶³ Later, in 1985 and 1986, Senate Minority Leader Robert Byrd objected to President Reagan’s recess appointments to executive agencies during brief, intrasession recesses of the Senate.²⁶⁴ Byrd threatened to suspend Senate action on nearly every pending nomination, including 5700 military promotions, but the White House averted the conflict by agreeing to provide notice to the Senate in advance of future recess appointments.²⁶⁵ Senator James Inhofe likewise threatened to place a hold on President Clinton’s judicial nominations in 1999 in response to several of Clinton’s recess appointments,²⁶⁶ but a showdown was again prevented when Trent Lott, the Senate Majority Leader at the time, failed to support Inhofe’s proposed moratorium.²⁶⁷

Recently, the Senate has moved aggressively to block the President from making recess appointments. In 2007, Senate Majority Leader Harry Reid scheduled pro forma sessions of Congress during periods of traditional Senate recess in order to prevent President George W. Bush from making

²⁶⁰ See HALSTEAD, *supra* note 255, at 2. Rutledge was also rejected by the Senate as a result of his publicly expressed opposition to the Jay Treaty with Great Britain. See MALTESE, *supra* note 138, at 27–29.

²⁶¹ See HALSTEAD, *supra* note 255, at 2.

²⁶² See *supra* notes 257–258 and accompanying text.

²⁶³ S. Res. 334, 86th Cong., 106 CONG. REC. 18145 (1960).

²⁶⁴ See Hogue, *supra* note 256, at 667.

²⁶⁵ See *id.* at 668–69.

²⁶⁶ See Carrie Johnson, *Judges 2000: Many Chosen, Few Named*, LEGAL TIMES, Jan. 24, 2000, at 10.

²⁶⁷ See Neil A. Lewis, *Two Clinton Judicial Choices Are Named After Lott Forces Vote*, N.Y. TIMES, Feb. 11, 2000, at A25.

recess appointments to the executive and judicial branches.²⁶⁸ While it remains to be seen whether Senator Reid's strategy can be sustained, or even become routine over the long term, it goes without saying that robust exercise of the recess appointment power by Presidents is risky because it can generate powerful, negative responses from Congress.

Surprisingly, presidential use of the recess appointment power, even on executive branch appointments, is one of the most understudied and lightly theorized issues in the literature about the Presidency.²⁶⁹ In light of historic Senate opposition to robust use of the recess appointment power, Presidents must be careful, particularly with respect to the timing of the appointment.²⁷⁰ As Henry Hogue has observed, recess appointments during intrasession recesses have been more controversial than those during intersession recesses, and it is therefore unsurprising that of the more than three hundred recess appointments to Article III courts, only fourteen have been made during an intrasession recess.²⁷¹

Recess appointments during brief recesses, whether intra- or intersession, have also led to greater interbranch conflict.²⁷² Perhaps the most aggressive use of recess appointments was by President Theodore Roosevelt, who appointed more than 160 individuals to various nonjudicial posts during what he called a "constructive recess" between two sessions of Congress, even though "there was no break in time between the two sessions."²⁷³ President Roosevelt's appointments stirred quite a bit of controversy and the Senate Judiciary Committee emphatically rejected the notion of a "constructive recess" in a report it published approximately fourteen months later.²⁷⁴ Similarly, President Bush's appointment of Judge Pryor during a ten-day recess in 2004 angered many Democratic senators, though the Senate eventually confirmed Pryor because of the agreement reached by the Gang of Fourteen.²⁷⁵

²⁶⁸ See Sean Lengell, *Senate Democrats Play Recess Hardball*, WASH. TIMES, Nov. 21, 2007, at A01.

²⁶⁹ See Pamela C. Corley, *Avoiding Advice and Consent: Recess Appointments and Presidential Power*, 36 PRESIDENTIAL STUD. Q. 670, 672 (2006).

²⁷⁰ In a related study of the use of recess appointments to independent agencies, Pamela Corley found that Presidents are more likely to use recess appointments when they lack partisan support in the Senate, when they have high public approval ratings, and when they are in the last year of their terms in office. See *id.* at 677–678.

²⁷¹ See Hogue, *supra* note 256, at 669–70.

²⁷² See *id.* at 667.

²⁷³ See *id.* at 671.

²⁷⁴ See HALSTEAD, *supra* note 255, at 10.

²⁷⁵ See Gail Russell Chaddock, *As Politics Flare, Judicial Appointments Take a Recess*, CHRISTIAN SCI. MONITOR, Apr. 6, 2004, at 3; Greg Land, *53-45 Vote Gives Pryor Lifetime Bench Seat*, FULTON COUNTY DAILY REP., June 10, 2005, at 1. The Gang of Fourteen was a bipartisan group of senators in the 109th Congress that reached an agreement to prevent the employment of the so-called "nuclear option" by Senate Republicans, which could have ended the use of the filibuster on judicial nominees. The agreement also resulted in the confirmation of several stalled judicial nominees, including Judge Pryor.

Nonetheless, recess appointments are a powerful tool that may enable Presidents to overcome resistance in the Senate in two ways. First, recess appointments can help to overcome a Senate filibuster by temporarily circumventing the process and placing the nominee directly on the bench. Presidents can also threaten a recess appointment in response to senatorial obstruction, reducing delays and forcing a vote on stalled nominations. Second, the performance of a nominee during a recess appointment might improve the prospects for confirmation. A recess appointee who serves with distinction and avoids controversy during a brief stint on the bench can make a powerful case for her own confirmation.²⁷⁶ The Senate might shift from a searching review of a nominee's qualifications and ideology to her actual performance over the course of a short judicial career.²⁷⁷ To be sure, the strategy is risky. Recess appointing an ideologically objectionable judge risks angering opposition party senators and, as a result, may actually solidify opposition and make the prospects for confirmation more difficult.²⁷⁸ History has shown, however, that in some circumstances recess appointments can be a powerful option for Presidents.

None of these observations should be understood as an endorsement, implicit or otherwise, of the practice of recess appointing Supreme Court Justices. As a descriptive matter, however, the ability to make strategic recess appointments remains a powerful tool for Presidents who wish to influence confirmation politics or encourage Senate action on judicial nominees. That Presidents have the constitutional power to unilaterally (though temporarily) appoint Supreme Court Justices illustrates the difficulty that senators may encounter when attempting to “get tough” with respect to Supreme Court nominations.

D. Legislative Tactics

Finally, Presidents can use legislative tactics to influence the judicial appointments process. Specifically, Presidents have the power to veto, or to threaten to veto, ordinary legislation if the Senate fails to confirm a nominee to the Supreme Court. They can also resort to the distinctively legislative practice of trading political favors, also known as “logrolling.”²⁷⁹ These strategies would be controversial, but as Eisgruber recognizes, the

²⁷⁶ The possibility that recess appointees will view their brief service on the Court as a kind of “audition” is, of course, the reason that scholars and courts have questioned whether they pose a threat to judicial independence. See *supra* note 251.

²⁷⁷ See Pyser, *supra* note 251, at 113.

²⁷⁸ See E-mail from Rachel Brand, former Assistant Attorney General for the Office of Legal Policy, to David Stras, Associate Professor of Law, University of Minnesota Law School (Dec. 12, 2007, 08:38 CST) (on file with author) (stating that many officials in the George W. Bush Administration believed that “getting recess appointed . . . kills your prospects of getting confirmed except in very unusual circumstances”); *supra* notes 262–268 and accompanying text.

²⁷⁹ See Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1338–39 (2000).

stakes of Supreme Court nominations are enormous.²⁸⁰ If the Senate were to “get tough,” as he suggests, we would expect the President to consider all available options in response.

With respect to nominations to the lower courts, the Senate has already begun to employ parliamentary tactics like the filibuster and legislative practices like vote logrolling. As Senator Orrin Hatch has noted, logrolling has become

[the] norm. Today, votes on nominees are often traded like commodities—ten judges in exchange for a vote on this, two commissioners for a vote on that. This objectionable practice is so common and accepted that it has become as important in keeping the Senate functioning as unanimous consent and other key parliamentary rules.²⁸¹

Justice Breyer, for instance, reportedly received his nomination to the First Circuit in exchange for Senator Edward Kennedy’s support of President Jimmy Carter’s efforts to secure a second presidential term.²⁸² Although there is little evidence that logrolling exists in the appointment of Supreme Court Justices, such behavior would not be surprising in light of Senator Hatch’s recognition that it has become an important, even common, aspect of the judicial appointments process.

The President’s most powerful source of leverage in the legislative process, however, is the presidential veto.²⁸³ From 1789 to 1992, Congress has overridden just 7% of the 1448 presidential vetoes, meaning that Presidents are highly effective when they elect to use the veto pen.²⁸⁴

Two dominant, game-theoretic models describe presidential use of veto threats.²⁸⁵ The first is the coordination model, in which Congress possesses

²⁸⁰ EISGRUBER, *supra* note 6, at 187 (noting that the Court’s prominence on issues of political importance gives the President a strong incentive to choose an “ideologically pure” nominee).

²⁸¹ See NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 152 (2005) (quoting HATCH, *supra* note 223, at 123).

²⁸² SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 261 (1997).

²⁸³ The Presentment Clause provides that “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return to it, with his Objections to that House in which it shall have originated” U.S. CONST. art. I, § 7, cl. 2. Congress must then pass the legislation by a supermajority two-thirds vote of both chambers in order to override the veto and for it to become law. See *id.* Interestingly, the Advice and Consent Clause and the Presentment Clause share structural oddities, and in some ways each is the mirror image of the other. The veto, though a power wielded by Presidents, is found in the Presentment Clause of Article I, which predominantly discusses legislative power. Likewise, the advice and consent power of the Senate, which is obviously a legislative power, is found in Article II, which almost exclusively describes executive power.

²⁸⁴ See Nolan M. McCarty & Keith T. Poole, *Veto Power and Legislation: An Empirical Analysis of Executive and Legislative Bargaining from 1961 to 1986*, 11 J.L. ECON. & ORG. 282, 283 (1995).

²⁸⁵ A third, the commitment model, posits that the effectiveness of veto threats turns on the public rhetoric of Presidents. See Daniel E. Ingberman & Dennis A. Yao, *Presidential Commitment and the Veto*, 35 AM. J. POL. SCI. 357 (1991). Under the model, when Presidents commit publicly to veto legis-

uncertainty about the President's ideal policy point.²⁸⁶ In this model, if Congress views a President's public veto threat as credible and is uncertain about the President's ideal policy point, "the majority will meet the president's demands as far as possible to circumvent a veto."²⁸⁷ Under this scenario, "the president may choose to object publicly to many more legislative provisions than he actually opposes in order to maximize potential concessions."²⁸⁸ Without delving into the minutiae of the coordination model, it is sufficient to say here that the model successfully explains executive-legislative bargaining as an empirical matter, primarily because it provides a rationale for why "presidents are typically not compelled to actually apply vetoes to threatened legislation" on every occasion.²⁸⁹

An example from the presidency of George H.W. Bush nicely illustrates the coordination model. In 1989, President Bush proposed legislation providing federal support for child care through tax credits for families with children under the age of four.²⁹⁰ At the time, Democrats held an eighty-five seat advantage in the House of Representatives and a ten seat advantage in the Senate.²⁹¹ Democrats, not surprisingly, championed a different proposal, the Act for Better Child Care (ABC), which would have funded child care through block grants to states, creating a new federal entitlement and strict guidelines for child care providers.²⁹² As the ABC bill was being debated in the Senate, President Bush launched a veto threat through Senate Majority Leader Bob Dole, who stated that "the president's advisors would recommend a veto unless the contested provisions, including the grants to parents, [were] dropped."²⁹³ After a great deal of negotiation between Congress and the White House, President Bush finally signed a version of the

lation it "can be seen as a commitment designed to shore up the president's informal powers of persuasion." Rebecca E. Deen & Laura W. Arnold, *Veto Threats as a Policy Tool: When to Threaten?*, 32 PRESIDENTIAL STUD. Q. 30, 33 (2002). For a President, however, "renegeing on a veto threat might entail electoral retaliation or cost the president in the court of public opinion." Richard S. Conley, *George Bush and the 102d Congress: The Impact of Public and "Private" Veto Threats on Policy Outcomes*, 33 PRESIDENTIAL STUD. Q. 730, 732 (2003). The costs to the President of renegeing on a veto threat also enhance the credibility of the threat in the view of Congress, meaning that it may not attempt to pass the legislation if the President has made a credible veto threat. *See id.* A more thorough discussion of the commitment model is omitted because, to date, the available empirical data on veto bargaining is not supportive of its explanatory power.

²⁸⁶ *See* Conley, *supra* note 285, at 732.

²⁸⁷ *See id.* at 732.

²⁸⁸ *See* Richard S. Conley, *President Clinton and the Republican Congress, 1995–2000: Political and Policy Dimensions of Veto Politics in Divided Government*, 31 CONGRESS & PRESIDENCY 133, 137 (2004).

²⁸⁹ *Id.* at 138.

²⁹⁰ *See* Rebecca E. Deen & Laura W. Arnold, *Assessing Effectiveness of Veto Threats in the Bush Administration (1989–1993): Preliminary Evidence from Case Studies*, 29 CONGRESS & PRESIDENCY 47, 56–57 (2002).

²⁹¹ *See id.* at 55–56.

²⁹² *See id.* at 57–58.

²⁹³ *Id.* at 58.

bill in November of 1991 that funded the program primarily through tax credits, but also required states to create licensing standards for child care providers and provided a \$2.5 billion block grant to states to be used for poor families.²⁹⁴ The strategic use of a veto threat enabled the Bush Administration to eliminate portions of the bill that it opposed while still fulfilling one of Bush's chief campaign promises—all without ever actually using the veto pen.²⁹⁵

A second model, the blame-game model, provides an explanation for when the coordination model fails. This model explains interbranch relations when Congress seeks to intentionally provoke a veto in order to lessen the public approval ratings of the President.²⁹⁶ The model has particular explanatory power in election years or when the majority in Congress attempts to pass legislation that is particularly popular with the public.²⁹⁷ Congress engages in this game because preliminary evidence does in fact demonstrate that presidential approval ratings drop following a veto.²⁹⁸ An interesting, recent example of blame-game politics is the Democratic rhetoric regarding President George W. Bush's recent veto of the popular State Children's Health Insurance Program (SCHIP) legislation, which is popular even among Republican voters and has generated widespread negative press for the Administration.²⁹⁹

Both models demonstrate, to varying degrees, that Presidents wield the veto power in order to influence the legislative process and set the congressional agenda. The scholarly literature, however, is devoid of any discussion of using veto threats to influence the judicial appointments process. That absence might be explained by the binary nature of senators' votes on a judicial nominee. Unlike ordinary legislation, a confirmation vote is not subject to a presidential veto, and the Senate either votes yea or nay on the nominee. As with recess appointments, however, the President can use veto threats as an antifilibuster strategy. Senators may be inclined to oppose a Supreme Court nominee but might also fear that the President's veto could delay or permanently shelve legislation they consider crucial to their chances for re-election. As Richard Conley noted with respect to President George H.W. Bush's Administration, veto threats were "quite successful in

²⁹⁴ See *id.* at 59.

²⁹⁵ See *id.* As Richard Conley's study of George H.W. Bush's papers also reveal, public veto threats are only part of the story. See Conley, *supra* note 285, at 733. Presidents also routinely threaten to veto primarily lower-priority legislation through private veto threats sent to selected members of Congress. See *id.* According to Conley, "not a single bill on which Bush issued a private veto threat passed or was vetoed." See *id.* at 737.

²⁹⁶ See Conley, *supra* note 285, at 732–33.

²⁹⁷ See C. Lawrence Evans & Stephen Ng, The Institutional Context of Veto Bargaining 4–5 (unpublished manuscript), available at http://clevan.people.wm.edu/The_Institutional_Context.pdf.

²⁹⁸ See *id.* at 5.

²⁹⁹ See Sean Lengell, *House Approves Revised SCHIP Bill; Democrats Lack Veto-Proof Votes*, WASH. TIMES, Oct. 26, 2007, at A04.

exacting concessions from the congressional majority.”³⁰⁰ A President with a larger strategic view can use public or private veto threats to encourage senators to support judicial nominees in exchange for a promise not to veto a piece of favored legislation. Of course, as the coordination and commitment models require, a President must make a credible threat to veto legislation or the threat will be ignored by the Congress. For instance, a veto threat by President George W. Bush on a bill to generously increase spending on the Iraq War would not be seen as particularly credible by Congress, but a veto threat on a piece of entitlement legislation might well be.

For Presidents, this strategy is not without risks. Historically, Presidents typically have used veto threats to extract concessions related to the legislation that is subject to the threat, not to influence senators on unrelated matters, such as other bills or judicial appointments.³⁰¹ Presidents who publicly threaten to veto popular legislation to win confirmation of a Supreme Court nominee therefore may appear unprincipled, risk a public backlash, or even prompt counterattacks by senators and House members who could stall the President’s legislative agenda or block other nominees. Furthermore, as Rebecca Deen and Laura Arnold have observed, vetoes and veto threats can make Presidents look weak because of their “inability to lead Congress.”³⁰² Moreover, frequent use of veto threats without actually vetoing legislation can undermine the effectiveness of veto threats as a credible tool to “move the congressional majority toward the president’s preferred position.”³⁰³ For those reasons, Presidents are unlikely to use veto threats except as a last resort to get their most important (and embattled) nominees confirmed.³⁰⁴

Yet commentators such as Eisgruber who hope that a resurgent Senate can rein in Presidents who engage in ideologically driven selection should not underestimate the impact of presidential veto threats in moving the Senate majority toward confirmation. A targeted veto-threat strategy might be particularly effective in the judicial appointments context. Such a strategy would focus on minor legislation that is of special importance to key members of the Senate but that is unlikely to actually “result in vetoes and inter-

³⁰⁰ See Conley, *supra* note 285, at 738.

³⁰¹ There are instances, however, where Presidents have used judicial appointments to garner support for other legislative initiatives, which means that appointments and legislation are not necessarily strictly separable. See, e.g., GOLDMAN, *supra* note 282, at 173 (reporting that Lyndon Johnson was willing to give an opposition-party senator influence over the selection of judges in order to get his “help on [a] tax bill”).

³⁰² See Deen & Arnold, *supra* note 285, at 31.

³⁰³ *Id.*

³⁰⁴ See *id.*

branch confrontation,³⁰⁵ such as a spending provision that benefits the state of a key senator but has no wider public saliency.³⁰⁶

Further, as Richard Conley has suggested, Presidents can help to insulate themselves from public and congressional repercussions by issuing private rather than public veto threats, because such threats often avoid “blame game politics” and a showdown between the branches.³⁰⁷ Recent political science research suggests that Presidents use private veto threats far more often than previously thought. Indeed, Deen and Arnold estimated that 25% of the vetoes threatened during the presidency of Gerald Ford were privately communicated to senators and not reported in the popular press.³⁰⁸ For George H.W. Bush, just under 20% of his veto threats were “purely private,” while approximately 20% more fell into the “private-to-public” category, which means that they were originally communicated privately to senators but were later reported in the *Congressional Quarterly Weekly Report* or on the AP wire.³⁰⁹ In his study, Conley found that private and private-to-public veto threats were “quite effective in winning concessions from Congress” with respect to ordinary legislative measures, but the record was mixed with regard to highly salient legislation.³¹⁰ Meanwhile, only sixteen of the 205 veto threats during the George H.W. Bush Administration failed to win the “policy concessions” sought by the White House,³¹¹ which means that the use of veto threats can be a highly effective strategy in moving the congressional majority toward a President’s preferred policy positions.³¹²

The use of logrolling and veto threats to win support for a Supreme Court nominee is underexplored in the empirical literature. Research in the context of ordinary legislation strongly suggests, however, that these tactics could be effective in persuading recalcitrant senators to vote in favor of judicial nominees that they might otherwise oppose. Through logrolling and

³⁰⁵ See Conley, *supra* note 285, at 731. A targeted strategy also minimizes the risk of both angering and provoking a counterattack by members of the House of Representatives, who are not involved in consenting to judicial appointments.

³⁰⁶ For example, Senator Ted Stevens of Alaska felt so strongly about funding for a bridge to Gravina Island in Alaska, dubbed the “bridge to nowhere” by critics, that he threatened to quit the Senate if his earmark was not approved. Editorial, *A Bridge Too Far*, WALL ST. J., Nov. 21, 2005, at A16. Presidents willing to get tough in the fight for a Supreme Court nominee could exploit such parochial interests through veto threats or logrolling strategies.

³⁰⁷ See Conley, *supra* note 285, at 731.

³⁰⁸ See *id.* at 733 (citing Deen & Arnold, *supra* note 285).

³⁰⁹ See *id.* at 735.

³¹⁰ *Id.* at 739; see also *id.* at 741 (“Bush won more clear-cut compromises and concessions on much ordinary legislation, including appropriation measures that were the focus of many of the private-to-public threats in the 102d Congress.”).

³¹¹ See *id.* at 743.

³¹² See CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER 193 (2000) (“Veto threats usually bring concessions.”); *id.* at 198 (“Presidential scholars have long suspected that veto threats are a powerful tool for presidents.”).

the judicious use of targeted and private veto threats, a President can forcefully push back against a Senate that attempts to “get tough” against Supreme Court nominees.

* * *

Our aim in describing these techniques—strategic selection, the bully pulpit, recess appointments, and legislative tactics like logrolling and veto threats—is not to claim that they will always be successful. Nor do we mean to suggest that they will be used, or should be used, in particular circumstances. Rather, the availability of these techniques helps to explain why the Senate has not followed the advice of scholars like Eisgruber to block ideological or recalcitrant Supreme Court nominees, even though it has begun to “get tough” with respect to nominations to the lower courts. Senators cognizant of the President’s institutional strength and strategic options likely will think twice before escalating the conflict over a nominee in all but the most compelling cases.

The President’s available arsenal also serves as an indication of how ugly the Supreme Court appointments process could become if the Senate chooses to “get tough.” The confirmation process for nominees to the circuit courts of appeals now involves extraordinary delays and acrimony, with the President turning to recess appointments and the Senate using filibusters and other legislative tactics to stall judicial nominees.³¹³ Importing those features into the Supreme Court appointments process would have serious costs, and proponents of a “get tough” strategy by the Senate should carefully consider the consequences.

CONCLUSION

In response to the new politics of judicial appointments, many commentators have proposed Senate-specific reforms, appealing to senators to stand up to the President and block unacceptable nominees. In *The Next Justice*, Christopher Eisgruber joins their ranks. He calls for the Senate to “get smart” by asking penetrating questions about the judicial philosophy of Supreme Court nominees in an effort to ensure that future Justices are moderates rather than extremists. He also proposes that the Senate “get tough” by rejecting any nominees who do not prove to be moderate or who fail to give satisfactory answers at their confirmation hearings. We have serious reservations about the specifics of Eisgruber’s reforms, which are predicated on a questionable definition of a “moderate” and an incomplete diagnosis of the reasons behind the increasing politicization of the appointments process. In particular, Eisgruber underestimates the influence of interest

³¹³ See Stras, *supra* note 11, at 1075–76; *supra* notes 173–175 and accompanying text.

groups and the media, which create powerful pressure for senators to deliver ideological results.

All proposals that depend on effective resistance by the Senate must also overcome the substantial institutional strength of the Presidency. A rich political science literature demonstrates that a “get tough” strategy by the Senate is likely to provoke a strong response from the President, who has a number of tools available to deal with Senate resistance. The most basic and powerful is the strategic selection of Supreme Court nominees, especially those with excellent qualifications, which can make it difficult for senators to delay or reject those nominees. In the face of an obstructionist Senate, Presidents can also draw upon their substantial institutional strength by “going public” and touting the qualifications and attributes of the nominee, by making or threatening a recess appointment, and by employing ordinary legislative techniques like logrolling strategies and credible veto threats. Strategic employment of these tactics makes it more difficult for senators of either party to obstruct Supreme Court nominees and, as a result, undermines the effectiveness of Senate-specific reforms to the appointments process.

