

## Note

# THE REAL DEBATE OVER THE SENATE'S ROLE IN THE CONFIRMATION PROCESS

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### ABSTRACT

*The five Supreme Court nominations between 2005 and 2010 brought renewed attention to the Senate's role in the confirmation process. This Note explores the debate over the Senate's proper role in that process. First, this Note summarizes and clarifies the two traditional views of the Senate's role, classifying them as the "assertive view" and the "deferential view," and offers a new framework for understanding these views. This Note then traces the traditional arguments made by proponents of these views. It first examines the historical arguments, both from original understanding and historical practice; it then turns to pragmatic arguments about which view better accomplishes the purposes of the Senate's participation in the confirmation process. Neither the historical arguments nor the pragmatic arguments resolve the issue of which approach to the confirmation process is better.*

*By recounting these arguments, however, this Note reveals the underlying—and unspoken—difference between adherents of the assertive view and adherents of the deferential view: their conceptions of the relationship between law and politics differ widely. Adherents of the assertive view can fall on either end of a spectrum in understanding the relationship between law and politics. For some adherents of the assertive view, law is completely distinct from politics, so they believe senators should carefully ensure that judicial nominees understand this distinction and should vote only for those nominees who do and will respect it. For other adherents of the*

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*assertive view, law and politics are two sides of the same coin, so they think senators should aggressively inquire into the views of judicial nominees and should vote only for those nominees whose views comport with their own. Either way, the assertive view results in the same role for the Senate in the confirmation process. Adherents of the deferential view, by contrast, fall somewhere in the middle of the spectrum, believing that law is underdetermined and is shaped, but not totally controlled, by politics. Adherents of this view make certain that nominees have reasonable legal views, but they are more willing to vote to confirm nominees whose views differ from their own. This Note brings this important difference to the forefront in hopes of promoting more meaningful discussions about the Senate's role in the confirmation process.*

### INTRODUCTION

On July 20, 2010, the Senate Judiciary Committee voted 13 to 6 to send President Obama's nomination of Elena Kagan to serve as an Associate Justice of the Supreme Court of the United States to the full Senate with its favorable recommendation.<sup>1</sup> During the committee's meeting before the vote, Senator Lindsey Graham stated, "I could give you a hundred reasons why I could vote no if I based . . . my vote on how she disagrees with me."<sup>2</sup> Senator Graham clarified, however, that he based his vote not on whether he agreed with Kagan's views but rather on whether he believed she was qualified for the federal bench and situated in the mainstream of American legal thought in her views.<sup>3</sup> He quoted Senator Phil Gramm's statement from the confirmation of Justice Breyer: "I am going to vote for this nominee, not because I agree with him philosophically but because I believe he is qualified. I believe he is credible. I believe his views, though they are different from mine, are within the mainstream of . . . thinking of his political party."<sup>4</sup> Believing that Kagan fit this description and would "serve this nation

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1. Sheryl Gay Stolberg, *Senate Panel Backs Kagan Nomination, with One Republican Vote*, N.Y. TIMES, July 21, 2010, at A11.

2. *Executive Business Meeting on Nominations, S. 2925, and S. 3397 of the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Sen. Graham, Member, S. Comm. on the Judiciary), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da1604cd7>.

3. *Id.*

4. *Id.* (omission in original) (quoting 140 CONG. REC. 18,672 (1994) (statement of Sen. Gramm)).

honorably,”<sup>5</sup> Senator Graham supported Kagan’s nomination. Every other Republican on the Senate Judiciary Committee, however, voted against recommending Kagan favorably to the full Senate because they disagreed with how they believed she would decide cases as a Justice.<sup>6</sup>

The flurry of Supreme Court nominations between 2005 and 2010 brought national attention to the Senate’s role in the confirmation process<sup>7</sup> and, as a result, to the meaning of the Constitution’s Advice and Consent Clause,<sup>8</sup> which requires the president to appoint federal judges “by and with the Advice and Consent of the Senate.”<sup>9</sup> Debates over the proper role of the Senate in the confirmation process are not new,<sup>10</sup> and this attention reflected only another incarnation of a long-running battle.<sup>11</sup> Traditional arguments over the Senate’s role in the confirmation process first focus on the history of the process.<sup>12</sup> Yet the original understanding of the Advice and Consent Clause and subsequent historical practice provide no clear instruction for how the Senate should evaluate the president’s judicial nominees. Thus, the debate typically turns to

5. *Id.*

6. See Stolberg, *supra* note 1 (discussing senators’ reactions to Kagan’s nomination).

7. See, e.g., *The Samuel Alito Nomination*, PBS NEWSHOUR, [http://www.pbs.org/newshour/bb/law/supreme\\_court/alito](http://www.pbs.org/newshour/bb/law/supreme_court/alito) (last visited Feb. 14, 2012) (providing a list of stories covering the Alito confirmation hearings); see also BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 3 (updated ed. 2009) (“Nominations to the high court today represent major political confrontations, grand mobilizations of the political bases of both parties, along with their affiliated interest groups and sympathetic academics.”). The media, interest groups, and the public all focus on the Senate confirmation process. See, e.g., JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 4–5 (1995) (discussing the increased involvement of interest groups in the confirmation process). As part of this attention, scholars debate whether the Court shapes society or society shapes the Court. Compare Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. 583, 588 (arguing that the Supreme Court has the power to “shape[] popular values to a nontrivial extent”), with BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 371 (2009) (arguing that the Supreme Court has generally tracked public opinion).

8. U.S. CONST. art. II, § 2, cl. 2.

9. *Id.*

10. See generally HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II (5th new & rev. ed. 2008) (tracing the history of Supreme Court nominations).

11. No agreed-upon standard exists for determining the Senate’s role in the confirmation process. See David M. O’Brien, *Background Paper*, in JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 13, 76 (1988) (noting the debate over the Senate’s proper role in the confirmation process).

12. See *infra* Part II.

pragmatic arguments about which approach best achieves the purposes of the Senate's involvement in the confirmation process.<sup>13</sup> But like the historical arguments, these purposive arguments shed little light on the proper role for the Senate.

This Note seeks to reframe the debate over the Senate's role in the confirmation process to focus on the real issue that divides commentators and senators: What is the relationship between law and politics,<sup>14</sup> and how does that relationship inform the Senate's role in the confirmation process? In Part I, this Note proffers a new conception of the two major approaches that senators take in evaluating judicial nominees. Part I.A describes what this Note terms the "assertive view." Adherents of this view focus explicitly and specifically on a nominee's ideology, voting to confirm only those nominees whose ideological views fall within a certain narrow range.<sup>15</sup> Then, Part I.B examines what this Note calls the "deferential view." Adherents of this view argue that the Senate should be more deferential to the president's nominee and should confirm any nominee who falls within a broadly defined "mainstream" of political and judicial thinking.<sup>16</sup>

Subsequent Parts evaluate the common arguments in favor of these opposing views. In Part II, this Note traces the traditional disputes between proponents of the assertive view and proponents of the deferential view concerning the Senate's historical role in the

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13. See *infra* Part III.

14. "Politics" can be an amorphous term. In this Note, "politics" is defined as the process of decisionmaking in a country, both within formal settings and throughout the nation as the public engages in collective decisionmaking. Cf. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, at 330–49 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (discussing the creation of political society).

15. See, e.g., *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 8 (2009) (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary) (stating that he would "inquire into how [Sotomayor's] philosophy . . . affects [her] decision-making"); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2006) (statement of Sen. Patrick J. Leahy, Member, S. Comm. on the Judiciary) (declaring his intention to question Alito on the independence of his views from those of President George W. Bush); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15–18 (2005) (statement of Sen. Joseph R. Biden, Jr., Member, S. Comm. on the Judiciary) (comparing his views of the adaptability of the Constitution to those of Roberts to suggest that Roberts's ideological views deserved especially careful scrutiny during the hearings).

16. See *supra* text accompanying notes 3–5.

confirmation process. Part II demonstrates that the original understanding of the Advice and Consent Clause and the history of the confirmation process do not resolve the debate over what the Senate's role should be. Next, Part III evaluates the pragmatic arguments about whether the assertive view or the deferential view better vindicates the values implicated in the confirmation process—including judicial independence, judicial accountability, respect for the rule of law, the need for qualified judges, and social cohesion. Part III concludes that these arguments likewise fail to resolve the question of which view is better.

With the shortcomings of these traditional arguments exposed, Part IV sets forth the underlying source of the disagreement between proponents of the assertive and deferential views: a dispute about the relationship between law and politics. This disagreement leads to dramatically different conclusions about the proper role of the Senate in the confirmation process. After all, if law and politics are totally distinct, then nominees—once they become judges—must decide cases using only traditional tools of judicial decisionmaking, not by reference to their ideological beliefs. Alternatively, if law and politics are the same thing by different names, then judicial decisions will be based solely on judges' ideological beliefs. But if the truth lies somewhere in between these extremes—if law and politics are to some degree intertwined—then judges' decisions will be influenced by both their ideological views and traditional tools of judicial decisionmaking. If this underlying disagreement is understood, senators and scholars can more productively debate the Senate's role rather than dwelling on issues that are merely incidental to their real difference of opinion.<sup>17</sup>

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17. Although the deferential view may hold the most promise for a respectful, successful confirmation process, this Note does not seek to resolve the matter. Rather, this Note exposes the shortcomings of the current literature on the confirmation process in the hopes of spurring meaningful discussion. Furthermore, this Note also recognizes that the participants in the confirmation process must consider more than just their views of the relationship between law and politics. Political considerations and the relationships between the participants in the process affect confirmations and shape the Senate's role. The real world is full of moving parts, but many debates over the Senate's role focus not on these realpolitik considerations but rather on what the Senate's role *should* be. This Note focuses on this latter discussion, clarifying the underlying disagreement in the debate. Although academic debates might lack the drama of horse-race politics, these academic dialogues shape the ideas of the next generation. Ultimately, this debate might not have a "right" answer that would require senators to adhere to one view over the other. This Note merely seeks to provide a framework for more useful debates about the Senate's role.

## I. TWO MODELS OF THE SENATE'S ROLE IN THE CONFIRMATION PROCESS

This Part proposes a new framework for defining and discussing the Senate's role in the confirmation process by casting the common approaches to the confirmation process into two models. The first model is the assertive view, under which senators take a very aggressive approach to questioning nominees and focus intensely on nominees' ideological views. Two very different views of law and politics can justify this view: the complete-distinction justification and the no-distinction justification. Although supporters of these variations start from radically different conceptions of the relationship between law and politics, they end up with a similar view of the Senate's role in the confirmation process. The second model is the deferential view, under which senators look only to see if the nominee's ideological views are within the mainstream. Senators who adhere to the assertive view and senators who adhere to the deferential view agree on two important requirements for all judicial nominees: top qualifications<sup>18</sup> and good character.<sup>19</sup> What they disagree on is the role that a nominee's ideological preferences should play in the confirmation process.

### A. *The Assertive View*

As noted, under the assertive view, senators focus intensely on a nominee's ideological views. This focus on ideological orientation can be rooted in either of two opposite views of the relationship between law and politics. This Section discusses these two justifications for the assertive view. The first justification is that law and politics are completely distinct; the second is that law is just another form of politics, so they are not distinct at all. The first justification is far more

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18. See, e.g., Lindsey Graham, *The Right Vote for Me and, I Believe, the Country*, LINDSEY GRAHAM (July 28, 2009), [http://lgraham.senate.gov/public/index.cfm?FuseAction=AboutSenatorGraham.Blog&ContentRecord\\_id=c2176c09-802a-23ad-4313-608b29022a59](http://lgraham.senate.gov/public/index.cfm?FuseAction=AboutSenatorGraham.Blog&ContentRecord_id=c2176c09-802a-23ad-4313-608b29022a59) (declaring support for Sotomayor because she, like prior nominees Roberts and Alito, had strong professional qualifications); ABRAHAM, *supra* note 10, at 246–47 (noting that Lewis Powell had little experience as a judge or academic prior to his nomination but received widespread support due to his success as a former president of the American Bar Association); *infra* note 29.

19. See, e.g., CODE OF CONDUCT FOR UNITED STATES JUDGES (2009), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf> (setting forth the ethical rules for federal judges). This requirement of good character can also be viewed as connected to the Constitution's requirement of good behavior for judges to remain on the bench. See U.S. CONST. art. III, § 1 (“The Judges . . . shall hold their Offices during good Behaviour . . .”).

common; the second is rarely invoked, at least by senators. Thus, this Note focuses more on the complete-distinction justification, though it also discusses the no-distinction justification to show how both justifications lead to a similar role for the Senate in the confirmation process.

1. *The Complete-Distinction Justification.* Adherents of this justification of the assertive view believe that the law develops totally independently of politics.<sup>20</sup> Many senators adhere to this justification of the assertive view, claiming that the distinction between law and politics requires them to investigate fully whether a nominee will be capable of respecting that distinction as a judge.<sup>21</sup> Yet judicial nominees, like all people, have personal views about the world and about what the law should be. Those personal views can influence judicial decisionmaking.<sup>22</sup> Thus, senators who adhere to the assertive view want to confirm only those nominees whose views of the law align with the senators' objective views of what the law is—the idea being that, as judges, those nominees will decide cases in accordance with the law and will not decide cases based on their ideological beliefs.<sup>23</sup> Adherents of the assertive view, including Senators Patrick

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20. See, e.g., *Meet the Press* (NBC television broadcast May 31, 2009) (transcript available at [http://www.msnbc.msn.com/id/31015497/ns/meet\\_the\\_press](http://www.msnbc.msn.com/id/31015497/ns/meet_the_press)) (providing a record of Senator Sessions's comments that the law is distinct from politics).

21. See DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 31–33, 36 (2005) (discussing the role of ideology in the confirmation process); John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 652 (2003) (“[T]he Senate today appears bent on using its limited confirmation power to impose ideological litmus tests on presidential nominees.”). Although scholars debate how much the confirmation process has changed, many seem to agree with the “unobjectionable premise that the judicial appointments process has become increasingly political and less genteel.” David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1047 (2008) (book review); see also Diarmuid F. O’Sconnlain, *Today’s Senate Confirmation Battles and the Role of the Federal Judiciary*, 27 HARV. J.L. & PUB. POL’Y 169, 173–74 (2003) (“Whatever one’s political orientation, all sides agree on one point: it is the other side that is ‘playing politics’ with judicial nominations in an effort to exert control over the federal courts.”). Although slight differences may exist between how certain senators approach the confirmation process, this Section seeks to provide a broad sketch of how *most* senators think about the process.

22. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (discussing how a judge’s personal views can influence that judge’s decisions).

23. Cf. ABRAHAM, *supra* note 10, at 53 (arguing that politics is the paramount concern of presidents in selecting a judicial nominee and that, because many people recognize the impact of ideology on judicial decisions, senators will share this concern about a nominee’s ideological

Leahy and Jeff Sessions—both members of the Senate Judiciary Committee<sup>24</sup>—and well-respected academics such as Professor Cass Sunstein, maintain that the Senate has a strong and independent role in the confirmation process.<sup>25</sup> This role permits senators to question nominees' ideological views very closely to ensure that, as judges, the nominees will base their decisions on the law rather than on their own ideological views.<sup>26</sup>

Regardless of which party controls the White House and the Senate, the post-World War II confirmation process has been remarkably consistent in its use of ideology, reflecting the prevalence of this justification of the assertive view.<sup>27</sup> When the president sends his nomination to the Senate, the prevailing presumption is that the president has selected a nominee with whom the president feels an ideological compatibility.<sup>28</sup> Members of the president's party in the Senate then typically hail the nominee as an excellent choice, whose temperament and experience easily qualify the nominee to sit on the federal bench. At the same time, senators of the opposing party express grave fears that the nominee is a fierce partisan and unfit for the bench.<sup>29</sup> For example, Republicans praised President George W. Bush's judicial nominations, particularly Supreme Court nominees John Roberts and Samuel Alito, whereas Democrats immediately

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views). A nominee's ideological views include the nominee's political views and philosophy, as well as any personal beliefs that shape the nominee's worldview.

24. *Committee Members*, U.S. SENATE COMM. ON THE JUDICIARY, <http://judiciary.senate.gov/about/members.cfm> (last visited Feb. 14, 2012).

25. *See, e.g.*, David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1501 (1992) (“[There exists] an independent role for the Senate in the confirmation . . . process.”); *supra* note 15 and accompanying text.

26. What makes this form of the assertive view challenging in practice is the fact that Republicans and Democrats often take conflicting views of what the law is or is constitutionally required to be, thereby casting doubt on the clear distinction between law and politics that this view claims exists. *Cf.* Amy Goldstein & Charles Babington, *Roberts Avoids Specifics on Abortion Issue*, WASH. POST, Sept. 14, 2005, at A1 (noting the different views of abortion law reflected by questions from Republicans and Democrats during Roberts's confirmation hearing).

27. ABRAHAM, *supra* note 10, at 188–324 (tracing the development of the confirmation process since World War II).

28. *See id.* at 52–53 (noting that the president focuses on a nominee's “real politics” in the nomination process); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1203 (1988) (“We take for granted that the President will nominate a person whose general constitutional philosophy the President endorses.”).

29. *Cf.* Elisabeth Bumiller & Carl Hulse, *Bush's Court Choice Ends Bid After Attack by Conservatives*, N.Y. TIMES, Oct. 28, 2005, at A1 (demonstrating that the president's party is unlikely to back a nominee who appears unqualified both because of issues with the nominee's qualifications and uncertainty about how the nominee would decide cases).

conveyed their concerns that these nominees held extreme views and could not be trusted.<sup>30</sup> Several years later, when President Obama announced his Supreme Court nominations of Sonia Sotomayor and Elena Kagan, as well as his circuit court nominations of Goodwin Liu and Robert Chatigny, the roles were reversed, with Democratic senators lauding the nominations and Republicans fervently proclaiming their disagreement with the president's selections.<sup>31</sup> These reactions naturally follow from senators' beliefs that their view of the law is correct and from concerns that a nominee who has a different view of the law based on different ideological beliefs will follow his own legal views.<sup>32</sup>

Members of the president's party feel comfortable stressing the nominee's qualifications and the wisdom of the president's choice

30. See, e.g., *Bush Nominates Alito to Supreme Court*, CNN (Oct. 31, 2005), [http://articles.cnn.com/2005-10-31/politics/scotus.bush\\_1\\_confirmation-bush-nominates-alito-hearings](http://articles.cnn.com/2005-10-31/politics/scotus.bush_1_confirmation-bush-nominates-alito-hearings) ("Conservatives lauded President Bush . . . for his choice of Judge Samuel Alito for the Supreme Court, while liberals signaled a contentious confirmation hearing is ahead for the nominee."); *Bush Picks Roberts for Supreme Court*, FOXNEWS.COM (July 20, 2005), <http://www.foxnews.com/story/0,2933,163025,00.html> (describing the positive reactions from Republican senators to the Roberts nomination and the criticism expressed by Democrats).

31. See, e.g., *Nominations Hearing of U.S. Circuit and U.S. District Judges: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 496–97 (2010) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) ("Republican members seem to be applying a standard to President Obama's nominees that they did not demand of President Bush's . . . Senate Republicans . . . declar[ed] themselves 'disappointed' by the President's nomination of Professor Liu and claim[ed] that Professor Liu was 'far outside the mainstream of American jurisprudence.'"); Press Release, Senator Patrick Leahy, Comments on the President's Nomination of Sonia Sotomayor to the U.S. Supreme Court (May 26, 2009), available at [http://leahy.senate.gov/press/press\\_releases/release/?id=c351dc4a-5d99-4f20-aa07-4d991cc5a349](http://leahy.senate.gov/press/press_releases/release/?id=c351dc4a-5d99-4f20-aa07-4d991cc5a349) ("Judge Sotomayor has a long and distinguished career on the federal bench. . . . Her record is exemplary."); *Good Morning America* (ABC television broadcast June 28, 2010), available at <http://abcnews.go.com/GMA/video/elena-kagan-faces-confirmation-hearing-today-11031290> (recording Senator Sessions's statement that "[activism is] what [Kagan's] philosophy is").

32. For Senator Sessions's comments indicating that he was "troubled" by Sotomayor's views, see *Meet the Press*, *supra* note 20. If a senator believes that the law has a fixed meaning that judges must apply and the senator is faced with a nominee who holds different views that may limit the nominee's ability to apply the law fairly, then the senator must believe that his own interpretation of the law is the correct one and that the interpretation held by the nominee is incorrect. Alternatively, these reactions could potentially be driven by political animus. Such a conclusion, however, is generally based on speculation, rather than outright statements to that effect. Compare Dan Balz, *More Democrats Say They Will Oppose Alito*, WASH. POST, Jan. 20, 2006, at A4 (noting Democratic senators' stated reasons for opposing Alito's nomination, including fears about Alito's legal views), with *Democrats Continue To Embarrass Themselves Regarding Judge Alito*, ROSSPUTIN.COM (Jan. 30, 2006, 6:23 AM), [http://rossputin.com/blog/index.php/democrats\\_continue\\_to\\_embarrass\\_themselv](http://rossputin.com/blog/index.php/democrats_continue_to_embarrass_themselv) (arguing that Democratic senators opposed Alito's nomination because of "political pandering" to liberal voters). This Note takes senators at their word regarding their reasons for opposing judicial nominees.

because they trust that the president has chosen a nominee who generally agrees with the president and his party as to the meaning of the law.<sup>33</sup> These senators also discuss the nominee's ideology, painting the nominee as fitting well within the mainstream of American political opinion.<sup>34</sup> Senators who oppose the nominee similarly focus their attacks on the nominee's ideological views. These opponents, however, try to paint the nominee as extreme and likely to base his decisions on political rather than judicial considerations, a prospect that in turn means that some of those decisions could be contrary to established law.<sup>35</sup> For example, Democrats alleged that Supreme Court nominee Samuel Alito and Eleventh Circuit nominee William Pryor would undermine civil rights for minorities and women.<sup>36</sup> Likewise, Republicans claimed that Sotomayor's "wise Latina" comment showed that she harbored racial and gender prejudices and

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33. See ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 146 (1971) (concluding that, as of 1971, presidents had succeeded in finding an ideologically compatible nominee about three-fourths of the time). This fraction will most likely increase, given the greater importance put on the screening of judicial nominees since the Reagan administration. See O'BRIEN, *supra* note 27, at 69 (noting that the Reagan administration established "the most rigorous process for judicial selection ever").

34. See, e.g., *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor*, *supra* note 15, at 4 (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) ("My review of [Judge Sotomayor's] judicial record leads me to conclude that she is a careful and restrained judge with a deep respect for judicial precedent and for the powers of the other branches of the Government, including the law-making role of Congress."); *Confirmation Hearing on the Nomination of John G. Roberts, Jr.*, *supra* note 15, at 1028 (statement of Sen. Richard G. Lugar) ("I have every confidence that Judge Roberts, in addition to the extraordinary intellectual, professional and personal qualities he will bring to the task of leading our Nation's highest court, will also bring a profound understanding of and commitment to the transcendent principles . . . about the proper role of the judiciary in our constitutional system.").

35. Often, members of the president's party appear to be favoring the deferential view, whereas senators of the opposing party appear to follow the assertive view. See *supra* notes 29–32 and accompanying text. In reality, a senator who adheres to the assertive view at any time is likely to be a consistent adherent of the assertive view. The senator simply sees the need to be more assertive when the nominee holds different views than the senator does, and the senator has less need to be so assertive when the nomination is made by a president of that senator's party because the president would presumably have already screened the nominee. See ABRAHAM, *supra* note 10, at 52 ("Among the points a president is almost certain to consider [includes] . . . whether the nominee has been a loyal member of the president's party . . .").

36. See, e.g., Press Release, Senator Barbara Boxer, Democratic Women Senators United in Opposition to the Nomination of Judge Alito to the U.S. Supreme Court (Jan. 31, 2006), available at <http://boxer.senate.gov/en/press/releases/013106.cfm> (providing statements from female Democratic senators describing Alito as biased against the rights of women); James Rowley, *William Pryor Confirmed by U.S. Senate to Appeals-Court Seat*, BLOOMBERG (June 9, 2005, 4:30 PM EDT), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awAIXBHXqL1M> (noting the objections from Democrats that Pryor had opposed civil rights earlier in his career and lacked the appropriate temperament for the federal bench).

that Kagan's restrictions on military recruiters at Harvard Law School demonstrated her bias against the military.<sup>37</sup>

Ultimately, hearings and confirmation votes for the most high-profile nominations generally fall along partisan lines.<sup>38</sup> These votes capture the assertive view of advice and consent: a senator votes for a nominee only if the senator believes the nominee holds ideological views that align with the senator's views about what the law is.

2. *The No-Distinction Justification.* The second justification, grounded in legal realism,<sup>39</sup> is based on the view that law is merely another form of politics. Under this approach, because the law is the means for achieving political results, a senator votes in favor of only those nominees whose ideological views align with his own, believing that those nominees' rulings as judges will develop the law in a way that the senator favors.

Although this justification has some support among academics,<sup>40</sup> senators typically do not invoke it. Senators may rely on the

37. *E.g.*, David M. Herszenhorn & Carl Hulse, *Parties Plot Strategy as Sotomayor Visits Capitol*, N.Y. TIMES, June 3, 2009, at A20 (noting that Republican senators sought to use Sotomayor's comments about a "wise Latina" being a better judge as evidence of her prejudicial views); Bernie Becker, *Alexander a No on Kagan*, N.Y. TIMES THE CAUCUS BLOG (July 23, 2010, 1:39 PM), <http://thecaucus.blogs.nytimes.com/2010/07/23/alexander-a-no-on-kagan> (stating that Senator Lamar Alexander planned to vote against Kagan's nomination because of "his concern over her decision to ban military recruiters from parts of the campus while she was dean of Harvard Law School").

38. *See, e.g.*, 152 CONG. REC. 361 (2006) (recording the Senate's roll-call vote on Alito's Supreme Court nomination, in which fifty-four of fifty-five Republican senators voted in favor of confirmation and forty-one of the forty-five senators who caucused with the Democrats voted against confirmation). Of course, vote counts might reflect a genuine disagreement among senators even if all senators adhered to the deferential view, so vote counts are not necessarily accurate indicia of the assertive view in action. Nominations that receive less attention often do not generate bitter partisan fights, presumably because fighting over such nominees is not worth the political capital of senators who might potentially oppose those nominees. *Cf.* LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 92 (2005) ("No more than one out of every five nominations to the lower courts over the last five decades has generated objections of any type . . ."). Nevertheless, when votes regularly fall along party lines, those votes suggest that senators are supporting only nominees with whom they agree ideologically.

39. For a foundational text of what became the legal-realist school of thought, see Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

40. *See, e.g.*, EPSTEIN & SEGAL, *supra* note 38, at 3 (arguing that senators should care about a nominee's ideological views because judges are political and their personal views shape the law). Other academics, of course, strongly disagree. *See, e.g.*, John O. McGinnis, Essay, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 665 (1993) (noting with disfavor the idea that judges

complete-distinction justification instead either because they genuinely believe that the justification is correct or because they believe that doing so is a political necessity.<sup>41</sup> This Note takes senators at their word about why they adhere to the assertive view. Nevertheless, this Note includes the no-distinction justification because doing so gives a more complete description of the debate over the Senate's role in the confirmation process.

### B. *The Deferential View*

Under the deferential view, senators look only to whether a nominee's views fall within a broad mainstream. In the late twentieth and early twenty-first centuries, the deferential view has not been as prominent as the assertive view, but it retains some influence.<sup>42</sup> During the confirmation hearings for Kagan and Sotomayor, Senator Graham was the deferential view's most ardent proponent and drew widespread attention for his approach to the Senate's role in the confirmation process.<sup>43</sup> During the Senate Judiciary Committee's debate over whether to send Kagan's nomination to the full Senate,

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"mak[e] policy on a set of discrete issues rather than applying a coherent body of legal theory to all cases").

41. Given the "increasingly partisan" atmosphere of the confirmation process, WITTES, *supra* note 7, at 5, and how "the [informal] rules have fundamentally changed" so that that most members of the opposing party automatically object to a nominee, *id.* at x, reason may exist to doubt these statements from senators. Regardless, the two justifications of the assertive view lead to similar roles for the Senate in the confirmation process, and the underlying debate over the Senate's role can be clarified without knowing senators' true motivations.

42. *See, e.g.*, 140 CONG. REC. 18,667–69 (1994) (statement of Sen. Arlen Specter) (describing his deference to President Clinton's nomination of Stephen Breyer because Breyer was qualified to sit on the Supreme Court and was within the mainstream in his thinking); *see also*, *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. 135–36 (1994) (statement of Sen. Strom Thurmond, Member, S. Comm. on the Judiciary) (noting that, although he did "not agree with Judge Breyer on every issue," Senator Thurmond would still support Breyer's nomination because Breyer had a strong resume and had the "proper judicial temperament"). This view was also influential among the "Gang of 14" in 2005. *See Senators Compromise on Filibusters*, CNN (May 24, 2005, 12:20 AM EDT), <http://www.cnn.com/2005/POLITICS/05/23/filibuster.fight> (describing the compromise reached by the Gang of 14).

43. *See, e.g.*, Dana Milbank, Op-Ed., *Standing Tall Against the Purity Police*, WASH. POST, Mar. 14, 2010, at A17 (noting that Senator Graham broke with his party on judicial nominations as well as on other issues); Jay Newton-Small, *Lindsey Graham: New GOP Maverick in the Senate*, TIME (Dec. 23, 2009), <http://www.time.com/time/politics/article/0,8599,1949766,00.html> (discussing Senator Graham's "reputation as an independent dealmaker" and his vote for Sotomayor). *See generally* Robert Draper, *This Year's Maverick*, N.Y. TIMES MAG., July 4, 2010, at 22 (describing Senator Graham as willing to work with both Republicans and Democrats to build consensus on various issues).

Senator Graham described his view of advice and consent.<sup>44</sup> His similar statements about voting in favor of Sotomayor's confirmation<sup>45</sup> reflected earlier articulations of the approach.

In calling for the Senate to return to the "Qualification Standard" that Senator Graham said the Senate had used for most of its history,<sup>46</sup> Senator Graham's statement set out three considerations for analyzing judicial nominees: qualifications, character, and ideological views.<sup>47</sup> These factors featured in earlier articulations of the deferential view, such as the views of Senators John Warner<sup>48</sup> and Charles Mathias.<sup>49</sup> When analyzing these considerations, adherents of the deferential view argue that senators should give the president's choice a presumption of confirmability because "the Constitution . . . puts a requirement on [senators] to not replace [their] judgment for [the president's]."<sup>50</sup> This deference means that votes against a nominee should presumably be "the exception, not the rule"<sup>51</sup> and that a senator should vote against a nominee only in "an extraordinary circumstance."<sup>52</sup> Under this approach, a senator votes for or against a nominee based not on whether the senator would

44. *Executive Business Meeting*, *supra* note 2 (statement of Sen. Graham, Member, S. Comm. on the Judiciary).

45. Graham, *supra* note 18.

46. *Id.* (calling for the Senate to "go back to the judicial standard for Supreme Court nominees which served our country well for over 200 years—the 'Qualification Standard'").

47. *Executive Business Meeting*, *supra* note 2; *see also* Graham on Senate Confirmation of Judge Tim Cain, SC BUSINESS BLOG, <http://scbusinessblog.com/?p=538> (last visited Feb. 14, 2012) (quoting Senator Graham as noting that a judicial nominee who "possesse[d] a great combination of intellect, integrity, common sense, and judicial demeanor" ought to be confirmed).

48. *See* 147 CONG. REC. 14,024–25 (2001) (statement of Sen. Warner) (providing reasons why the Senate should confirm a circuit court nominee).

49. *See* Charles McC. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 204 (1987) (citing a nominee's intellect, temperament, and experience as factors to consider in evaluating a nominee).

50. *Executive Business Meeting*, *supra* note 2 (statement of Sen. Lindsey O. Graham, Member, S. Comm. on the Judiciary); *see also* 139 CONG. REC. 18,141 (1993) (statement of Sen. Strom Thurmond) (stating that he would give Ruth Bader Ginsburg "the benefit of any doubts").

51. *Executive Business Meeting*, *supra* note 2 (statement of Sen. Lindsey O. Graham Member, S. Comm. on the Judiciary).

52. Graham, *supra* note 18. Such "extraordinary circumstance[s]" might occur if the nominee were to be related to the president or were to attempt to bribe someone to obtain the appointment. *Id.*

have nominated that particular person but rather based on whether the nominee is a reasonable choice to sit on the federal bench.<sup>53</sup>

Like the assertive view, the deferential view is shaped by its conception of the relationship between law and politics. Proponents of this view acknowledge the underdeterminacy of law.<sup>54</sup> They accept the idea that, in a diverse society, people can hold different yet equally reasonable views. In elections, such differences lead people to cast ballots for different candidates,<sup>55</sup> and the winner of the presidential election gets the power to nominate judges. The party that loses an election is willing to accept the nominees of the winning party because the losing party knows that it can win the next election and put its nominees on the bench, thus helping to develop the law in a way that the losing party prefers.

Based on this view of the relationship between law and politics, Senator Graham's analysis of a nominee's ideological perspective differs from an analysis under the assertive view because Senator Graham is willing to confirm nominees who fit within a broad range of ideological views.<sup>56</sup> The deferential view seeks to determine only if

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53. See 151 CONG. REC. 26,071 (2005) (statement of Sen. Orrin G. Hatch) (stressing that senators must look at how a judge decides a case, not just the outcomes of decisions).

54. The underdeterminacy of law is the idea that the development of the law is partially controlled by existing legal doctrines and partially influenced by political events. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987). The indeterminacy of law is the idea that the development of the law is completely controlled by political events. *Id.*; cf. H.L.A. HART, *THE CONCEPT OF LAW* 124–25 (1961) (discussing the “open texture” of the law in its development). The determinacy of law is the idea that the development of the law is unchangeably dictated by existing legal doctrines. Solum, *supra*, at 473, as if the law were handed down from on high in the same way God gave Moses the Ten Commandments on Mount Sinai, see *Exodus* 19:1–20:21. Thus, the underdeterminacy of law is a middle ground between these extreme positions: adherents of the deferential view do not believe that law and politics are synonymous, see *Executive Business Meeting*, *supra* note 2 (statement of Sen. Lindsey O. Graham, Member, S. Comm. on the Judiciary) (noting “a difference between politics and the law”), nor do they believe that law and politics are totally unrelated, see *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor*, *supra* note 15, at 425 (statement of Sen. Lindsay O. Graham, Member, S. Comm. on the Judiciary) (“[Y]ou are not going to find a law book that tells you whether a fundamental right exists vis-à-vis the Second Amendment . . . [.] you are going to have to rely upon your view of America, who we are, how far we have come and where we are going to go, and our relationship to gun ownership.”). Rather, they believe that judges, although influenced by their beliefs, still base their decisions on traditional methods of legal decisionmaking.

55. See generally *THE PARTY'S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA'S FUTURE* (Larry J. Sabato & Bruce Larson eds., 2d ed. 2009) (discussing how voters choose political parties and candidates based on the views and positions of those candidates and parties).

56. Compare *supra* notes 30–31, with *supra* note 4.

a nominee's thinking fits within a broad range of reasonable beliefs, unlike the assertive view, which focuses on whether a nominee's views are likely to align with a senator's own views of the law.

Defining what views are reasonable can be difficult. For Senator Graham, a nominee's thinking falls outside this broad range of acceptable views when the nominee holds views that are outside of the mainstream of American politics.<sup>57</sup> According to Senator Graham, a nominee with extreme ideological commitments is more likely to decide cases in a way that causes the law to develop outside of generally accepted American ideological views; such a nominee is likely to decide cases without any reliance on traditional tools of judicial decisionmaking.<sup>58</sup> Likewise, Senator Gramm described acceptable views as those "within the mainstream of the thinking of [the nominee's] political party."<sup>59</sup> Senator Jim Talent expressed a variety of this view as well, noting that no one narrow mainstream exists but rather that a judicial nominee can hold a wide range of reasonable positions.<sup>60</sup>

Several nominations illustrate Senator Graham's conception of the mainstream. For instance, although Senator Graham acknowledged that Sotomayor was "far more liberal than [he] would prefer," he thought that she was "within the mainstream," a fact that was demonstrated by her writings and opinions.<sup>61</sup> Likewise, Senator Graham stated that, despite his disagreements with Kagan, she was also within the mainstream, even though most Senate Republicans disagreed.<sup>62</sup> Senator Graham similarly believed that Alito was within the mainstream, even though many Democrats disagreed with Senator Graham's assessment of Alito's views.<sup>63</sup> Ultimately, Senator Graham showed how broad the acceptable range could be when he opined that Kagan was confirmable even though she had named Israeli jurist Aharon Barak as her hero. Senator Graham noted his

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57. *See supra* text accompanying note 4.

58. *See Executive Business Meeting, supra* note 2 (statement of Sen. Graham, Member, S. Comm. on the Judiciary) (recognizing that a judge's views influence decisions); *see also* 132 CONG. REC. 23,813 (1986) (statement of Sen. Pete V. Domenici) (stating that a nominee's personal philosophy is only relevant if it "undermines the fundamental principles of our constitutional system" or threatens the nominee's ability to judge impartially).

59. 140 CONG. REC. 18,672 (1994) (statement of Sen. Gramm).

60. 151 CONG. REC. 7875-76 (2005) (statement of Sen. Talent).

61. Graham, *supra* note 18.

62. *See supra* note 37.

63. *See supra* note 36.

hope that a conservative whose hero was former judge and Professor Robert Bork could also be confirmed.<sup>64</sup>

Some nominees, however, fall outside the mainstream as defined by Senator Graham. On the left, Senator Graham opposed Goodwin Liu's nomination to the Ninth Circuit,<sup>65</sup> and on the right, he opposed the nomination of William Haynes to the Fourth Circuit.<sup>66</sup> In Senator Graham's eyes, both Liu and Haynes held extreme views—Liu about welfare rights and Haynes about limits on executive power—that were not generally accepted by either political party.<sup>67</sup> Thus, these nominees fell outside the mainstream, and Senator Graham did not support their nominations.<sup>68</sup>

The contrast between the assertive view of the Senate's advice-and-consent role and the deferential view is striking. Although both views consider the nominee's ideology, they do so in meaningfully different ways. Given these differences, each interpretation of the Senate's role has very different implications for the confirmation process.

## II. THE HISTORY OF ADVICE AND CONSENT

The assertive view and the deferential view described in Part I have been present throughout the history of judicial confirmations. In arguing about which view is better, proponents of each view often focus on the original understanding of the Advice and Consent Clause and on the historical practice of the confirmation process rather than on the underlying disagreement about the relationship

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64. *Executive Business Meeting*, *supra* note 2 (statement of Sen. Graham, Member, S. Comm. on the Judiciary). Barak is the former president of the Supreme Court of Israel who was noted for his very liberal views. See Sheryl Gay Stolberg, *Praise for an Israeli Judge Drives Criticism of Kagan*, N.Y. TIMES (June 24, 2010), <http://www.nytimes.com/2010/06/25/us/politics/25kagan.html> (describing Kagan's admiration of Barak).

65. See Press Release, Senator Lindsey Graham, Graham Votes Against Liu Nomination (May 13, 2010), available at [http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=933C8744-802A-23AD-401E-1F426661C02A](http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=933C8744-802A-23AD-401E-1F426661C02A) (providing Senator Graham's reasons for opposing Liu's nomination).

66. See Kate Zernike, *G.O.P. Senator Resisting Bush over Detainees*, N.Y. TIMES, July 18, 2006, at A1 (“[Senator Graham] raised questions about the judicial nomination of William J. Haynes II, the Pentagon general counsel who helped write a memorandum that narrowly defined torture only as treatment that causes pain similar to death or major organ failure.”).

67. See sources cited *supra* notes 65–66.

68. Of course, other senators disagreed with Senator Graham about these nominees, and the lack of clear standards for determining what views fall outside the mainstream makes the deferential view difficult in practice.

between law and politics. These debates over the original understanding and history of the Advice and Consent Clause have been well chronicled in many places and have been debated by countless scholars and senators.<sup>69</sup> Thus, this Part does not seek to recount these historical arguments in their entirety. Instead, it sets out enough of these debates to demonstrate that compelling arguments exist in favor of both the assertive view and the deferential view. The ability of both views to find support in the historical record suggests that history alone cannot determine which view of advice and consent the Senate should adopt.<sup>70</sup> These historical arguments do not reveal the underlying disagreement between the assertive view and the deferential view, but understanding these arguments is important for putting the most fundamental difference between these views in context and for providing enough background to appreciate that difference.

#### A. *The Original Understanding of the Advice and Consent Clause*

1. *The Constitutional Convention.* The Constitutional Convention, for all its laborious efforts, actually left little insight into the Framers' thinking about the Advice and Consent Clause. This short sketch of the Convention's discussion of judicial appointments provides the framework for analyzing the original understanding of the Advice and Consent Clause.

On May 29, 1787, Edmund Randolph introduced his fifteen-point Virginia Plan, which called for "a National Judiciary . . . to be chosen by the National Legislature."<sup>71</sup> The Committee of the Whole discussed this proposal on June 5, with James Wilson noting that

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69. See, e.g., ABRAHAM, *supra* note 10; MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 15–77 (2000); Mathias, *supra* note 49. This Note provides anecdotes from the history of the confirmation process to demonstrate that both the assertive view and the deferential view can find support in historical practice. For a brief history of how the practices and procedures of judicial nominations have changed, see generally RICHARD S. BETH & BETSY PALMER, CONG. RESEARCH SERV., RL33247, SUPREME COURT NOMINATIONS: SENATE FLOOR PROCEDURE AND PRACTICE, 1789–2011 (2011).

70. Furthermore, some commentators and judges may not accept a historical argument as binding, even if that argument conclusively proves the original understanding of the debated text. See, e.g., STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5–6 (2005) (arguing that history should not necessarily be the lynchpin of legal argument).

71. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 32 (Adrienne Koch ed., Ohio Univ. Press 1966) (1840).

appointment by the executive was favorable because such a system would charge “a single, responsible person” with the selection of judges.<sup>72</sup> During that same debate, James Madison argued that the full legislature might not know what made good judges but that giving the power to one person was unwise. Thus, Madison proposed that the Virginia Plan’s language of “appointment by the Legislature” be struck and the power be given to the Senate.<sup>73</sup> This motion was adopted.<sup>74</sup> Madison defended this position on June 13,<sup>75</sup> eventually convincing Roger Sherman and Charles Pinckney to withdraw their motion to institute appointment by the entire legislature rather than just the Senate.<sup>76</sup> Soon thereafter, William Paterson presented the New Jersey Plan, which called for judges “to be appointed by the Executive.”<sup>77</sup> A few days later, on June 18, Alexander Hamilton, in response to the New Jersey Plan, proposed his own plan. His proposal called for presidential appointment, “subject to the approbation or rejection of the Senate.”<sup>78</sup> On June 19, however, the Convention rejected the approaches of both Hamilton’s plan and the New Jersey Plan, leaving the appointment power with the Senate.<sup>79</sup>

When the Convention next discussed judicial appointments on July 18, Nathaniel Gorham proposed that judges be appointed by the president with the “advice [and] consent” of the Senate.<sup>80</sup> Gorham claimed that the president would “be careful to look through all the States for proper characters” to appoint as judges.<sup>81</sup> This proposal sparked further debate on the topic; some delegates, such as Luther Martin and Roger Sherman, still believed that the appointment power should belong to the Senate, whereas others, including Wilson, supported Gorham’s proposal.<sup>82</sup> The Convention, however, did not

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72. *Id.* at 67.

73. *Id.* at 68 (emphasis omitted).

74. *Id.* at 68–69.

75. *Id.* at 112–13 (“The [judicial] candidate who was present, who had displayed a talent for business in the legislative field, who had perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means, would without any of the essential qualifications for an expositor of the laws prevail over a competitor not having these recommendations, but possessed of every necessary accomplishment.”).

76. *Id.* at 113.

77. *Id.* at 120.

78. *Id.* at 138.

79. *Id.* at 150.

80. *Id.* at 314.

81. *Id.* at 315.

82. *Id.* at 315–17.

adopt Gorham's proposal.<sup>83</sup> The same day, the Convention also rejected Madison's alternative plan, which would have given the president the power to appoint judges and the Senate the power to veto the appointment with a two-thirds vote.<sup>84</sup> A few days later, the Convention referred the matter to the Committee of Detail.<sup>85</sup> When the committee returned its report on August 6, the Senate still had the power to appoint judges.<sup>86</sup> Then, on September 4, with virtually no discussion, the Convention changed course, adopting an "advice and consent" scheme much like the one Gorham had proposed.<sup>87</sup> Thus the Constitution's scheme of judicial appointments was born, reflecting a compromise between those delegates who believed the executive should have the sole appointment power and those delegates who wanted the legislature to appoint judges.

2. *Ratification Debates and the First Congresses.* As ratified in the Constitution, the "vaguely worded textual grant of power" to the Senate to advise and consent to judicial nominees gives little guidance as to how the Framers intended the power to be used.<sup>88</sup> Proponents of both the assertive view and the deferential view can find support from the Constitutional Convention and the Founding era to support their interpretation of the proper understanding of the Advice and Consent Clause.

For the assertive view, Madison's *Notes*<sup>89</sup> clearly suggest that many delegates were wary of giving too much power to the executive and consistently rejected plans to give the executive an unchecked power to appoint judges.<sup>90</sup> The inclusion of the Senate in the process at all meant, in the words of James Gauch, that the Framers "tacitly

83. *Id.* at 317.

84. *Id.* at 344.

85. *Id.* at 383.

86. *Id.* at 391.

87. *Id.* at 575.

88. WITTES, *supra* note 7, at 104; *see also* Derek P. Langhauser, Essay, *Nominations to the Supreme Court of the United States: Historical Lessons for Today's Debate*, 205 EDUC. L. REP. 553, 556 ("[T]he Constitution provides little clear guidance on how the Framers intended the Senate to use its advice and consent powers when reviewing Supreme Court nominees."); Monaghan, *supra* note 28, at 1205 ("The Constitution is silent on what criteria the Senate should use in giving 'Advice and Consent' . . ."); Strauss & Sunstein, *supra* note 25, at 1498 ("This picture [of the Constitutional Convention] leaves something of a puzzle.").

89. MADISON, *supra* note 71.

90. *See id.* at 67, 317 (declining to adopt James Wilson's proposals to entrust the appointment power solely to the executive).

endorsed ideological considerations.” Gauch explains that “Equal state representation meant that any inclusion of the Senate [in the confirmation process] would necessarily involve accommodating different views on states’ rights, and different views on states’ rights represented political differences.”<sup>91</sup> Additionally, proponents of the assertive view point to the fact that nothing in the Constitution prohibits the Senate from taking an aggressive posture in the process.<sup>92</sup>

Proponents of the assertive view can also find support in the ratification debates: Madison seemingly acknowledged a role for the Senate in *Federalist No. 38*.<sup>93</sup> Comments made during state ratification debates about the Senate’s ability to be actively involved in confirming judges, such as Randolph’s statements in Virginia and James McHenry’s comments in Maryland, also support the assertive view.<sup>94</sup>

Proponents of the assertive view can further rely on actions taken by early Congresses as evidence supporting their view of advice and consent. The Senate, for example, rejected John Rutledge’s nomination to be Chief Justice largely because of Rutledge’s opposition to the Jay Treaty.<sup>95</sup> Likewise, senators challenged nominees of Presidents Madison and John Quincy Adams, taking an aggressive role in evaluating whether the nominees should sit on the bench.<sup>96</sup> These examples lead proponents of the assertive view to claim that the original understanding of the Advice and Consent Clause supports a robust role for the Senate in evaluating judicial

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91. James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 357 (1989).

92. E.g., WITTES, *supra* note 7, at 128 (“Nothing in the Constitution forbids such an aggressive posture, which the Senate remains free to assume at any time.”).

93. THE FEDERALIST NO. 38 (James Madison); e.g., Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 519, 533–35 (2002). In *Federalist No. 38*, Madison responds to the objection that allowing the Senate to have a role in the confirmation of judges is a “vicious part” of the Constitution. THE FEDERALIST NO. 38, at 232 (James Madison) (Clinton Rossiter ed., 1961).

94. E.g., Marcotte, *supra* note 93, at 533–35.

95. See Gauch, *supra* note 91, at 358–62 (discussing Rutledge’s nomination); Strauss & Sunstein, *supra* note 25, at 1500 (“The Senate ultimately rejected Rutledge for political reasons . . .”).

96. Strauss & Sunstein, *supra* note 25, at 1501 (noting the Senate’s assertiveness in the nominations of Alexander Wolcott and Robert Trimble). Wolcott was rejected, and Trimble was confirmed after a bitter battle in the Senate. ABRAHAM, *supra* note 10, at 71–72, 75.

nominees.<sup>97</sup> Thus, these proponents claim, senators should be able to consider a nominee's ideological views when voting on the nominee, just as the president can consider those views in choosing a nominee, to determine if the nominee holds views that align with the senators'.<sup>98</sup>

At the same time, the historical record also provides strong support for the deferential view of advice and consent. The Constitutional Convention explicitly rejected a prominent role for Congress when it refused to give both legislative houses the power to appoint judges,<sup>99</sup> and the Convention likewise rejected such a role for the Senate when it gave the president, rather than the Senate, the power to nominate federal judges.<sup>100</sup> The preeminence of the president's role, proponents argue, is clear from the text of the Advice and Consent Clause, which gives the president the exclusive power to nominate judges and permits the Senate to give its consent only after the nominee has been sent to the Senate.<sup>101</sup>

The ratification debates also lend support to the deferential view. According to Hamilton in *Federalist No. 76*,<sup>102</sup> the Constitution vests the power to nominate judges in one person because the Framers believed that that structure would produce better judges,<sup>103</sup> and the Constitution provides for the Senate to be a check on those nominations only "to prevent the appointment of unfit characters

97. See, e.g., Strauss & Sunstein, *supra* note 25, at 1501 (claiming that "history support[s] an independent role for the Senate in the confirmation process").

98. Cf. Jeff Yates & William Gillespie, Essay, *Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process*, 58 WASH. & LEE L. REV. 1053, 1070 (2001) (claiming that a "vigorous institutional role for the Senate" is preferable because it keeps the president from having too much power in selecting a nominee).

99. See MADISON, *supra* note 71, at 68 (changing the nomination power from one vested in the entire Congress to one vested solely in the Senate); *supra* notes 71–87 and accompanying text.

100. See MADISON, *supra* note 71, at 575 (recording the adoption of the Advice and Consent Clause, which vests the power to nominate judges in the executive); *supra* notes 72–87 and accompanying text.

101. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 194–95 (2005) (noting the far greater power that the Constitution gives the president in the nomination process compared to the Senate); Eastman, *supra* note 21, at 640 (arguing that the president's sole power to nominate suggests that the Senate's role in the confirmation process is subordinate to the president's role); McGinnis, *supra* note 40, at 642–43 (noting that the text of the Advice and Consent Clause gives much greater authority to the president than to the Senate).

102. THE FEDERALIST NO. 76 (Alexander Hamilton).

103. See THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 93, at 455 ("The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.").

from State prejudice, from family connection, from personal attachment, or from a view to popularity.”<sup>104</sup> Proponents of the deferential view also point to comments from other prominent national leaders, such as James Wilson, who expressed deferential views during the ratification debates.<sup>105</sup> Similarly, James Iredell, the future Supreme Court Justice, stated during the ratification debate in North Carolina that “the Senate has no other influence but a restraint on improper appointments.”<sup>106</sup>

The early history of the Senate’s advice-and-consent role also provides support for the deferential view. For instance, the rejection of Rutledge’s nomination was based not only on his opposition to the Jay Treaty but also on questions about his mental health.<sup>107</sup> Thus, although Rutledge’s ideological views appear to have played a role, other factors were also involved,<sup>108</sup> a fact that weakens the support the failed Rutledge nomination gives to the assertive view. Furthermore, other examples cited in support of the assertive view do not necessarily show that disagreement with a nominee’s ideological views is a sufficient ground for rejecting a nominee. Supreme Court nominee Alexander Wolcott, for instance, was overwhelmingly rejected because of “his extreme partisanship.”<sup>109</sup> Even more powerful support for this view comes from the relatively easy confirmations of judicial nominees who had clear ideological views but who were nonetheless overwhelmingly approved.<sup>110</sup>

The history of the Founding era is thus ambiguous. It reveals no clear original understanding of the Senate’s advice-and-consent role

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104. *Id.* at 457.

105. *See, e.g.*, Eastman, *supra* note 21, at 646–47 (explaining Wilson’s position on the Senate’s narrow role in the confirmation process); Adam J. White, *Toward the Framers’ Understanding of “Advice and Consent”: A Historical and Textual Inquiry*, 29 HARV. J.L. & PUB. POL’Y 103, 129–30 (2005) (discussing Wilson’s comments during the Pennsylvania ratification debates).

106. Eastman, *supra* note 21, at 646 (quoting James Iredell, Debate in North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 THE FOUNDERS’ CONSTITUTION 102, 102 (Philip B. Kurland & Ralph Lerner eds., 1987)).

107. TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 20 (2001); Eastman, *supra* note 21, at 649.

108. *See* Eastman, *supra* note 21, at 649 (noting that “the Senate’s refusal to confirm Rutledge might in part be due to questions about his mental stability”); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1000 (2000) (noting Rutledge’s declining mental health).

109. ABRAHAM, *supra* note 10, at 71–72.

110. *Id.* at 58–64 (noting the relative ease with which the majority of President Washington’s Supreme Court nominees were confirmed, despite them having strong Federalist views).

in the confirmation process, but instead provides proponents of both the assertive view and the deferential view with arguments to support their respective positions.<sup>111</sup> Thus, given that proponents of each view can make colorable arguments based on the historical record, resolving the question of which view is more supported by original understanding alone is difficult, if not impossible.

*B. The Senate's Approach to the Confirmation Process Throughout American History*

The history of judicial confirmations shows the use of both the assertive and deferential views, and arguments based on historical practice reflect the fact that history supports both views. On some occasions, the Senate has opposed a nominee for overtly political reasons. At other times, it has shown much more deference to the president's nominee. Moreover, the "process has changed much over the last two centuries,"<sup>112</sup> giving both sides opportunities to make historical arguments. As with the debate over original understanding, neither the deferential view nor the assertive view has a winning case based solely on historical practice.

1. *Nineteenth-Century Confirmations.* The Senate has taken an aggressive posture in many confirmation battles, even early in American history, and proponents of the assertive view cite these battles as support for their position. For instance, in the 1840s, the Senate rejected five nominees of President Tyler.<sup>113</sup> President Cleveland's Supreme Court nomination of William Hornblower in 1893 had the same result.<sup>114</sup> Such results were not uncommon in the nineteenth century, when "the Senate rejected one out of every four nominees for the Supreme Court."<sup>115</sup> These partisan rejections, however, focused more on the political relationship between the president and the Senate than on the ideology of the nominee. President Tyler was essentially a president without a party, and many

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111. Compare Strauss & Sunstein, *supra* note 25 (arguing for what this Note defines as the assertive view), with McGinnis, *supra* note 40 (arguing for what this Note defines as the deferential view). Both articles furnish ample historical evidence for their positions.

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

113. ABRAHAM, *supra* note 10, at 85–86.

114. *Id.* at 114–15.

115. Gauch, *supra* note 91, at 337.

senators, both Democrats and Whigs, were his political enemies.<sup>116</sup> And the rejection of President Cleveland's nominee was spearheaded by a New York senator who wanted President Cleveland to nominate a different New Yorker to the Court.<sup>117</sup>

Alternatively, proponents of the deferential view can point to the easy confirmation of the majority of nominees with clear ideological preferences.<sup>118</sup> Furthermore, these proponents can distinguish the Senate's rejection of the nominees of Presidents Tyler and Cleveland by noting that the political disputes at issue involved not the nominee's ideology, but rather battles between presidents and senators over other political issues.<sup>119</sup> Still, these examples undercut Senator Graham's historical arguments because senators during this time period were basing their decisions on more than just a combination of the nominees' qualifications and the general acceptability of the nominee's views.<sup>120</sup>

2. *Early-Twentieth-Century Confirmations.* The judicial nominations of the twentieth century also provide support for both the deferential view and the assertive view. Proponents of the assertive view can point to the Senate's rejection of John Parker in 1930. Nominated for the Supreme Court by President Hoover, Parker was a judge on the Fourth Circuit who faced bitter opposition from the American Federation of Labor and the NAACP.<sup>121</sup> Progressives attacked Judge Parker's record, claiming that he was racist and hostile to organized labor; Parker was narrowly rejected by a 41 to 39 vote.<sup>122</sup> Proponents of the assertive view claim that the Parker nomination process was exactly like Robert Bork's nomination process in 1986, in which Bork's views were evaluated and eventually rejected by senators who disagreed with those views.<sup>123</sup> Supporters of

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116. See ABRAHAM, *supra* note 10, at 85–86 (describing the opposition that President Tyler's nominees faced in the Senate because of the Senate's hostility toward President Tyler).

117. See, e.g., *id.* at 114–15 (describing the animosity between President Cleveland and Senator David B. Hill of New York).

118. See *id.* at 102–04 (noting that the Senate approved all of President Grant's Supreme Court nominees by large majorities).

119. See Eastman, *supra* note 21, at 649–51 (discussing the political nature of the Jeffersonian Republicans' efforts to impeach Justice Chase).

120. See *supra* note 46.

121. ABRAHAM, *supra* note 10, at 32–33.

122. WITTES, *supra* note 7, at 50–53.

123. See *id.* at 51 (noting that the Parker confirmation fight “display[ed] almost all of the elements of the later Bork fight”).

the assertive view also point to Thurgood Marshall's confirmation hearings as an example of senators' opposing a nominee based on ideology.<sup>124</sup> During the Marshall confirmation, Southern senators treated Marshall very harshly and voted against him because of his race and liberal views.<sup>125</sup>

Meanwhile, other nominations during the twentieth century support the deferential view. Proponents of this view can point to the easy confirmations enjoyed by President Franklin D. Roosevelt's record-setting nine Supreme Court nominees, all of whom were widely regarded as liberal.<sup>126</sup> G. Harold Carswell's nomination by President Nixon in 1970 also provides support for the deferential view. Senators worried about the conservative Southerner's extreme views on civil rights.<sup>127</sup> Even Carswell's supporters admitted his mediocre ability, which, when combined with his extreme views, led the Senate to reject his nomination.<sup>128</sup> The Bork nomination can also support the deferential view. Although some senators undoubtedly opposed Bork's nomination because they disagreed with his views, his nomination also drew opposition from well-respected Republican senators, such as Senator Warner of Virginia, who considered Bork's views on constitutional law too extreme.<sup>129</sup> According to this view of the Bork nomination, the rejection was at least partly the result of some senators' adhering to the deferential view and refusing to confirm a nominee with views that were widely considered far more conservative than the mainstream of the nominee's party.

124. *See id.* at 73 (discussing the opposition of Southern senators to Marshall's nomination).

125. *See* ABRAHAM, *supra* note 10, at 230 (noting that all but one of the votes against Marshall's nomination came from senators from the Deep South).

126. *See id.* at 163–87 (discussing President Roosevelt's Supreme Court nominations).

127. *See id.* at 11 (noting Carswell's stated commitment to "White Supremacy"). Of course, attributing a rejection solely to the deferential view is difficult because senators can vote against a nominee under either justification of the assertive view, whereas other senators may vote against a nominee based on the deferential view. Nevertheless, at least some senators who voted against Carswell, such as Senator Mathias, were adherents of the deferential view. *See* Mathias, *supra* note 49, at 204 (describing Senator Mathias's standard for evaluating judicial nominees).

128. *See* Warren Weaver Jr., *Carswell Attacked and Defended as Senate Opens Debate on Nomination*, N.Y. TIMES, Mar. 17, 1970, at 21 (noting that Senator Roman Hruska stated, in support of Carswell's nomination, that "mediocre judges and people and lawyers . . . are entitled to a little representation").

129. *See* ABRAHAM, *supra* note 10, at 281–83 (discussing the nomination of Robert Bork). Although the rejection of the Bork nomination is often thought of as the quintessential example of the assertive view in action, the opposition from Republican senators is perhaps more illustrative of the deferential view. Senator Warner was an adherent of the deferential view. *See supra* note 48.

3. *Confirmations in the Rehnquist and Roberts Eras.* Since the 1980s, senators have trended toward the assertive view.<sup>130</sup> The Clarence Thomas nomination is the iconic example of the assertive view's dominating the debate, as Thomas's confirmation was a major battle between conservatives and liberals.<sup>131</sup> Alito, Sotomayor, and Kagan all also faced partisan battles during their confirmations.<sup>132</sup> These confirmation battles have also affected circuit court and district court nominations. The confirmation rates of nominees for lower federal benches have dropped dramatically since 1980.<sup>133</sup>

Still, the years of the Rehnquist and Roberts Courts are not lacking in examples of confirmations in which the Senate has appeared to adhere to the deferential view. The nominations of Antonin Scalia, Ruth Bader Ginsburg, and Stephen Breyer, for example, lend support to the deferential view. Each nominee had clear ideological views, yet the Senate confirmed all three nominees by overwhelming margins.<sup>134</sup> Thus, although partisan confirmation battles have grown more common since the 1980s, the deferential view has not been totally abandoned.

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The historical record provides support for both the assertive view and the deferential view. Although proponents of each view can make a strong case based on this record, neither side can make a persuasive case because of the counterarguments on the other side.<sup>135</sup>

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130. See Rotunda, *supra* note 112, at 130–31 (claiming that by the 1990s the process had changed and the Senate had become more assertive in the confirmation process).

131. See, e.g., LEWIS L. GOULD, *THE MOST EXCLUSIVE CLUB: A HISTORY OF THE MODERN UNITED STATES SENATE* 296–98 (2005) (discussing the partisanship of the Thomas hearings). Although the Thomas nomination could be representative of the deferential view, the circus-like atmosphere of the hearings made this nomination more of an example of an assertive Senate trying to examine a nominee aggressively.

132. See *supra* notes 34–38 and accompanying text.

133. See SARAH A. BINDER & FORREST MALTZMAN, *ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY* 3 fig.1-1 (2009) (providing a graph with the confirmation rates for circuit court and district court judges between 1947 and 2008).

134. See ABRAHAM, *supra* note 10, at 278–79, 305–06, 311–12 (discussing the relatively easy confirmations of Justices Scalia, Ginsburg, and Breyer). Although Chief Justice Roberts faced some opposition, his confirmation was still relatively easy. See Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A1 (discussing Chief Justice Roberts's confirmation).

135. The Senate's varied approach to the confirmation of judges demonstrates the influence of political cycles on the confirmation process. See Monaghan, *supra* note 28, at 1208 ("The Senate's actual role in the confirmation process depended upon the shifting balance of political

Therefore, the debate over the Senate's role in the confirmation process remains unresolved. Given history's failure to end the discussion, scholars often turn to another ground for deciding what the Senate's role in the confirmation process should be.

### III. THE VALUES INVOLVED IN THE CONFIRMATION PROCESS

The arguments focusing on the original understanding of the Advice and Consent Clause and historical practice fail to resolve the debate over the Senate's proper role in the confirmation process. Thus, the debate often shifts to the question of which view better achieves the purposes of Senate confirmation of judicial nominees. Scholars have identified certain values that define the battlefield on which these debates are held. Among these values are judicial independence, judicial accountability, respect for the rule of law, the need for talented legal minds to want to become federal judges, and social cohesion.<sup>136</sup> This Part sets out these values and considers the extent to which each view serves them.<sup>137</sup> Like the debates over the

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power between Congress and the President.”). See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1997) (describing the cyclical pattern of the strength of presidential leadership). Senators are more willing to challenge the president when the president is politically weak at the time of a nomination, and senators are forced by political reality to defer to a president who is enjoying great popularity at the time of a nomination. Still, some senators have stuck to a particular approach despite the political climate. For example, despite President Obama's relatively high popularity during the Sotomayor nomination, see *Daily Presidential Tracking Poll*, RASMUSSEN REP. (Feb. 14, 2012), [http://www.rasmussenreports.com/public\\_content/politics/obama\\_administration/daily\\_presidential\\_tracking\\_poll](http://www.rasmussenreports.com/public_content/politics/obama_administration/daily_presidential_tracking_poll), some Republican senators were still eager to challenge the president's nominee, see *Meet the Press*, *supra* note 20. Even if political cycles explain some of how the Senate has changed over time, these cycles do not truly explain *why* senators adhere to one view rather than the other.

136. For a few examples of sources that base their arguments on these values, whether explicitly or implicitly, see Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 937 (2007); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 974 (2007); Mathias, *supra* note 49, at 205; Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 433–36 (2008); Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 791–94 (2010); Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 935 (2005); and Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 939–40 (1995) (book review).

137. This Part and Part IV focus more on the complete-distinction justification of the assertive view because that is the view that is most often invoked by senators. Nevertheless, as noted in Part I.A.2, senators also discuss the no-distinction justification to illustrate the differences between these justifications.

original understanding of advice and consent and historical practice, the debates over these values fail to focus on the underlying disagreement between proponents of the assertive and deferential views. These debates help reveal this underlying disagreement, but they focus only on a result of that disagreement.

### A. *Judicial Independence*

The independence of the federal judiciary is a feature of American constitutionalism that has drawn praise and respect from across the political spectrum.<sup>138</sup> An independent judiciary is one in which judges are free from outside influences, including influence by the other branches of government, so that they can make decisions based solely on the facts and law in each case.<sup>139</sup> The need for judicial independence is now widely accepted,<sup>140</sup> and it is considered “one of this Nation’s outstanding characteristics.”<sup>141</sup> Hamilton’s defense of an independent judiciary in *Federalist No. 78*<sup>142</sup> remains a leading argument on the subject. Hamilton’s two primary reasons for favoring an independent judiciary were to ensure the ability of the courts to enforce constitutional limitations on the powers of the political branches<sup>143</sup> and to protect the rights of minorities against tyrannical majorities.<sup>144</sup> Judicial independence is fostered by the constitutional

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138. See, e.g., 151 CONG. REC. 7879–86 (2005) (statement of Sen. Joseph R. Biden, Jr.) (stressing the need for judicial independence); 149 CONG. REC. 28,857 (2003) (statement of Sen. Bill Frist) (“[T]he Senate stewardship of the independent judiciary is perhaps the Senate’s most important task.”); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 93, at 466 (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”).

139. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 320 (1999).

140. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion) (“The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.”); *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84 (1970) (“There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.”); Burbank, *supra* note 139, at 341 (“It was also [the Framers’] view that judicial independence was instrumental to the resolution of ordinary cases according to law.”); Strauss & Sunstein, *supra* note 25, at 1504 (“To be sure, the Supreme Court is supposed to be independent . . .”).

141. *Chandler*, 398 U.S. at 136 (Douglas, J., dissenting).

142. THE FEDERALIST NO. 78 (Alexander Hamilton).

143. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 93, at 465–66.

144. *Id.* at 470 (noting that only independent courts can protect “particular classes of citizens [from] . . . unjust and partial laws”).

provisions providing for tenure during good behavior<sup>145</sup> and prohibiting the reduction of judges' salaries.<sup>146</sup> Additionally, the Supreme Court has garnered a strong and enduring respect among the public, which has come to accept the federal courts' need for independence from the political branches.<sup>147</sup>

Judicial independence can exist in two ways: actual independence and perceived independence.<sup>148</sup> Actual judicial independence involves the postconfirmation relationship between the courts and the other branches.<sup>149</sup> Thus, a judge can be independent once confirmed if the Senate does not try to influence the outcomes of his cases, regardless of whether confirming senators have aggressively inquired into his ideology or deferred to a broad range of generally accepted views during his confirmation.<sup>150</sup> Perceived judicial independence is the public's perception of whether judges are able to make decisions free from the influence of the political branches.<sup>151</sup> The confirmation process can have the most pronounced effect on perceived independence.

145. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . . .”); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 93, at 470–71 (“That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.”).

146. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 93, at 471 (arguing that the constitutional prohibition on reducing judges' salaries “is the most eligible provision that could have been devised” to protect judicial independence).

147. See WITTES, *supra* note 7, at 103–04 (describing how the Court has helped promote its independence through means beyond the explicit protections of the judiciary in the Constitution). Compare *Topics at a Glance: The Supreme Court*, ROPER CTR., [http://www.ropercenter.uconn.edu/data\\_access/tag/the\\_supreme\\_court.html](http://www.ropercenter.uconn.edu/data_access/tag/the_supreme_court.html) (last visited Feb. 14, 2012) (providing polling data on the public's opinion of the Supreme Court), with *RealClearPolitics Poll Averages*, REALCLEARPOLITICS, <http://www.realclearpolitics.com/polls> (last visited Feb. 14, 2012) (averaging the results of multiple polls on the approval ratings of both President Obama and Congress).

148. See, e.g., David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 279 (2008) (recognizing the difference between actual and perceived judicial independence).

149. See Burbank, *supra* note 139, at 336 (discussing the role of judicial independence in the American constitutional system).

150. See Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1990 (1988) (noting that judges should be “insulated” from politics once they are on the bench).

151. See O'BRIEN, *supra* note 27, at 330 (“The Court's prestige rests on preserving the public's view that justices base their decisions on interpretations of the law, rather than on their personal policy preferences.”).

For proponents of the complete-distinction justification of the assertive view, the clear line between law and politics requires that senators inquire into a nominee's views to ensure that those views align with the senators' own views of the law. Thus, for example, Senator Sessions noted that he would inquire into Sotomayor's ideological views to ensure that her views aligned with Senator Sessions's understanding of the law.<sup>152</sup> By inquiring into a nominee's views, senators can ensure that judges do not have views that will impermissibly influence their decisions and lead to decisions contrary to established precedent.<sup>153</sup> Although the depth and pointedness of senators' questions associated with this inquiry may cause judges to appear less independent,<sup>154</sup> the inquiry is necessary to protect the clear line between politics and law.<sup>155</sup> By having senators inquire into nominees' views, the public can trust that only those nominees who will uphold the law will sit on the bench.

Meanwhile, according to the no-distinction justification of the assertive view, senators should intensely scrutinize nominees' views in an attempt to influence the development of the law by voting to confirm only nominees who share their ideological views.<sup>156</sup> Under this justification, the appearance of independence is far less important because the law is shaped by the views of those judges who sit on the bench and because knowing what nominees believe is essential to knowing how they will decide cases. Judges can still have actual independence to decide particular cases, but they need not appear independent or isolated from the political process because, according to this view, the law is not independent or isolated from politics.

Proponents of the deferential view can argue that their view provides a much greater appearance of independence. Although the president may choose a nominee based on ideology,<sup>157</sup> the president's use of ideology is not as obvious as the Senate's use of ideology because the president does not have to discuss any political

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152. See *supra* note 15.

153. For a discussion of the assertive view's focus on preventing judges from basing decisions on their ideological beliefs rather than the law, see *supra* notes 20, 23 and accompanying text.

154. See O'Scannlain, *supra* note 21, at 174 (claiming that aggressive questioning of judicial nominees "threatens to erode" judicial independence).

155. See *supra* notes 20, 32 and accompanying text.

156. See generally SEGAL & SPAETH, *supra* note 22 (arguing that people are generally aware that judges' decisions are influenced by their personal views).

157. See *supra* note 28 and accompanying text.

motivations behind the selection.<sup>158</sup> Whereas the assertive view's use of ideology puts the ideological positions of nominees squarely in the public eye, the deferential view does not usually emphasize a nominee's specific positions on controversial issues.<sup>159</sup> The deferential view accepts that some degree of judicial discretion exists due to the underdeterminacy of law. It seeks to give judges room to exercise that discretion without forcing them to disclose their views on extremely controversial issues that would divide the public during the confirmation process and will be likely to become the focus of high-profile cases.<sup>160</sup>

### B. *Judicial Accountability*

Another value reflected in the confirmation process is judicial accountability. Because democracy is rooted in the idea that the people have the ultimate authority, affording judges lifetime tenure can pose serious threats to democratic legitimacy.<sup>161</sup> Judicial accountability sits in tension with judicial independence because a judiciary that must constantly answer to public opinion cannot be sufficiently free to make decisions based on law rather than on popular opinion.<sup>162</sup> At the same time, the public is unlikely to support independence for a judiciary that seems completely detached from the real world.

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158. For instance, presidents do not have to make the type of statements that senators who adhere to the assertive view make during hearings. *See, e.g., supra* note 15.

159. The practical distinction between these views was evident in the different approaches to questioning Kagan. *See* Stuart Taylor Jr., *Graham, the Gentleman, at Kagan Hearings*, THE DAILY BEAST (June 29, 2010, 2:30 PM EDT), <http://www.thedailybeast.com/newsweek/2010/06/29/graham-the-gentleman-at-kagan-hearings.html> (contrasting Senator Graham, who maintained a “good-natured dialogue” with Kagan, with the “other senators of both parties who doggedly pressed Kagan to agree with their views”).

160. *See* Bruce Fein, Commentary, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 687 (1989) (arguing that an assertive Senate will weaken the judiciary); Jackson, *supra* note 136, at 982–83 (asserting that some limits constrain the questions that senators are willing to ask during confirmation hearings).

161. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962) (discussing the countermajoritarian nature of the judiciary).

162. *See* Jonathan Remy Nash, Essay, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2171 (2006) (“While independence frees judges to make unpopular decisions, lack of accountability may at the same time free them to make erroneous decisions. However, the more we hold judges accountable, whether to the political branches, the public, or both, the less independence judges will enjoy.”).

The realization that the judiciary is not as weak or as unimportant as it was originally imagined to be<sup>163</sup> has given rise to serious concerns about how federal judges can be held accountable to the public.<sup>164</sup> In *Federalist No. 79*,<sup>165</sup> Hamilton argued that impeachment would be a sufficient check on judges and would provide all the accountability that would be necessary.<sup>166</sup> Impeachment of federal judges, however, has been an infrequent occurrence, and now it is invoked only for criminal behavior.<sup>167</sup> Realistically, the best way for the political branches to hold the judiciary accountable is through the confirmation process.<sup>168</sup>

Both national accountability and local accountability inhere in the confirmation process. First, national accountability exists through the president.<sup>169</sup> As the only nationally elected official, the president

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163. Compare THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 93, at 465–66 (claiming that the judiciary “ha[s] neither FORCE nor WILL but merely judgment” and “is beyond comparison the weakest of the three departments”), with O’Scannlain, *supra* note 21, at 171–72 (arguing that the judiciary is far more powerful than the Founders believed it would be).

164. See BICKEL, *supra* note 161, at 16–23 (discussing the inherent tension in a democracy between the will of the majority and the ability of the unelected judiciary to overrule the majority).

165. THE FEDERALIST NO. 79 (Alexander Hamilton).

166. THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 93, at 474 (“[The Impeachment Clause, U.S. CONST. art. II, § 4.] is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.”).

167. See Burbank, *supra* note 139, at 340 (“[T]he impeachment article has become a virtual dead letter for [holding judges accountable for their decisions] . . .”); *History of the Federal Judiciary: Impeachments of Federal Judges*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/judges\\_impeachments.html](http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html) (last visited Feb. 14, 2012) (providing a list of the fifteen impeached federal judges).

168. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–88 (2001) (describing the theory of partisan entrenchment and noting that “[federal] judges—and particularly Supreme Court Justices—tend to reflect the vector sum of political forces at the time of their confirmation”); O’Scannlain, *supra* note 21, at 171 (“[T]he primary means by which the political branches exert control over an otherwise insulated federal judiciary—especially during the last decade and a half—has been the confirmation process.”); Strauss & Sunstein, *supra* note 25, at 1504 (describing how nomination by the president and confirmation by the Senate provide a political check on the federal judiciary). Since George Washington’s presidency, presidents have recognized the importance of the power to nominate federal judges. See generally ABRAHAM, *supra* note 10 (tracing the history of Supreme Court nominations). The nomination process has generally provided meaningful accountability by permitting public opinion to influence who sits on the federal bench. See WILLIAM H. REHNQUIST, THE SUPREME COURT 210 (new ed. 2001) (arguing that the confirmation process allows “the public will” to shape the federal judiciary).

169. Scholars and senators generally agree that the president nominates people for the federal bench who substantially share his ideological commitments. Therefore, when voters choose one presidential candidate over another, they are by implication favoring one type of

selects a nominee whom the president, and presumably many of the president's supporters, believe to be qualified and to possess the desired ideological views.<sup>170</sup> Thus, presidential nomination provides some judicial accountability at the national level. Second, the senators who must confirm or reject the nominee each represent the views of one of the fifty states, so when senators vote on a nominee, they hold the judiciary accountable on a more local level.

The assertive view and the deferential view provide accountability to different degrees and in different ways. The assertive view provides a type of double accountability. By considering a nominee's ideological views to the same extent as the president, senators provide a second check in the confirmation process.<sup>171</sup> This check is necessary under both justifications for the assertive view. For the complete-distinction justification, exercising this second form of accountability is important because it provides senators with a chance to ensure that judges base their decisions on the law rather than on their own views. For example, senators adhering to the assertive view regularly ask nominees about abortion because those senators have clear beliefs about what the Constitution requires the law on abortion to be.<sup>172</sup> This inquiry can help a senator know whether a nominee will base decisions on what the law is—or on what the senator believes the Constitution requires the law to be—rather than on what the nominee wants the law to be.<sup>173</sup> For the no-

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judge over another. For detailed explanations of these ideas, see generally ABRAHAM, *supra* note 10, which traces the history of judicial nominations and the criteria used by presidents in making those nominations; SEGAL & SPAETH, *supra* note 22, which uses decisions by judges to demonstrate a shared ideology with the presidents who nominated them; and Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957), which discusses how the Supreme Court reflects popular opinion.

170. See *supra* note 23.

171. A potential problem is that, due to the Senate's structure of equal representation for all states, a bloc of senators from small states who object to a nominee's ideological views could thwart the will of the majority of the country. See LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY* 25 (2007) (explaining that the Senate's structure permits a small portion of the nation's population to block the majority's will).

172. See, e.g., Editorial, *Judge Alito on Abortion*, WASH. POST, Nov. 7, 2005, at A20 (noting the importance to senators of Alito's views on abortion); *Sotomayor Deflects Questions on Abortion*, MSNBC.COM (July 15, 2009, 7:17 PM ET), [http://www.msnbc.msn.com/id/31917681/ns/politics-supreme\\_court/t/sotomayor-deflects-questions-abortion](http://www.msnbc.msn.com/id/31917681/ns/politics-supreme_court/t/sotomayor-deflects-questions-abortion) (describing Republican senators' questions to Sotomayor on abortion).

173. See Emery G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate's Role in the Judicial Confirmations Process*, 30 OHIO N.U. L. REV. 235, 238–39 (2004) (summarizing common arguments in support of the position that the assertive view

distinction justification, a focus on the nominee's ideological views provides an opportunity to influence the development of the law. Because judges are essentially unaccountable once they are confirmed, the confirmation process provides a chance for senators to try to keep off the bench those nominees who have views with which they strongly disagree.<sup>174</sup>

According to proponents of the deferential view, presidential nomination of judges provides sufficient accountability in the confirmation process because the president represents the entire nation.<sup>175</sup> Although this form of accountability is not as strong as the accountability that the assertive view would provide, adherents of the deferential view find their position sufficient because it provides a degree of accountability while still allowing enough independence for judges to make decisions without appearing to bend to the political views of the people who nominated and confirmed them.<sup>176</sup> This careful balance between accountability and independence is desirable to give judges the necessary room to decide cases. The political process exerts some influence, but judicial reasoning also plays a role in the development of the law. Proponents of this view argue that it seeks to maintain a balance between judicial accountability and independence that is appropriate in a democracy while simultaneously appreciating the underdeterminacy of law.<sup>177</sup>

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provides greater accountability for federal judges because nominees' ideological commitments are tested and can be rejected by the Senate).

174. Cf. Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 337 (2005) (defending the filibuster as a means of checking judicial power).

175. See, e.g., Eastman, *supra* note 21, at 645 (discussing the president's power to nominate federal judges); see also *Clinton v. Jones*, 520 U.S. 681, 711 (1997) (Breyer, J., concurring) ("[The president] (along with his constitutionally subordinate Vice President) is the only official for whom the entire Nation votes, and is the only elected officer to represent the entire Nation both domestically and abroad."); *Burroughs v. United States*, 290 U.S. 534, 545 (1934) ("The importance of [the president's] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.")

176. See *Executive Business Meeting*, *supra* note 2 (statement of Sen. Lindsey O. Graham, Member, S. Comm. on the Judiciary) (providing Senator Graham's evaluation of judicial accountability and independence).

177. See *supra* notes 54–55 and accompanying text.

### C. *Respect for the Rule of Law*

Society's respect for the rule of law is essential for a nation to sustain its democratic structure.<sup>178</sup> The rule of law exists when a nation is governed by “fixed and publicly known [laws] . . . , so that those applying the law, as much as those to whom it is applied, can be bound by it.”<sup>179</sup> The rule of law embodies values such as consistency, stability, predictability, and transparency.<sup>180</sup>

As with judicial independence, the fact and the appearance of the rule of law are not identical. Although the two often coexist, one can exist without the other. Because society's respect for the rule of law can be based only on collective perceptions, the appearance of the rule of law is the more important aspect. Society will maintain respect for the rule of law if people believe that judges make decisions based on promulgated rules and free from political considerations, interpreting the law based on an honest legal judgment and applying that judgment to the facts of each case. Without this understanding, the values embodied in the rule of law begin to fade, and their benefits are lost.<sup>181</sup>

“[T]he rule of law is not self-sustaining,”<sup>182</sup> so political leaders, including senators in the process of confirming judges, must be careful to ensure that their actions do not undermine the appearance of the rule of law. The Constitution provides the process for

178. See, e.g., LARRY DIAMOND, *THE SPIRIT OF DEMOCRACY: THE STRUGGLE TO BUILD FREE SOCIETIES THROUGHOUT THE WORLD* 21 (2008) (“A country cannot be a democracy if there is . . . no rule of law.”); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001) (“The rule of law is a cornerstone of contemporary constitutional democracy . . . .”); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 966 (2008) (arguing that the rule of law can only be sustained by a culture that values it); cf. ROBERT D. PUTNAM WITH ROBERT LEONARDI & RAFFAELLA Y. NANETTI, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 181–85 (1993) (studying the differences between northern and southern Italy to demonstrate that a certain culture is necessary for a democratic society to exist).

179. Robert H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 3 (1997).

180. Siegel, *supra* note 178, at 966–67. For early and influential works describing the need for the rule of law, see generally LOCKE, *supra* note 14; and SAMUEL RUTHERFORD, *LEX, REX* (1644).

181. See Siegel, *supra* note 178, at 967 (“If members of a political community experienced the law as deeply alienating over an extended period of time, they would inevitably feel a diminished sense of obligation to obey the law.”).

182. *Id.* at 966.

appointing federal judges,<sup>183</sup> but the actions and statements of the participants in the process shape public perceptions of the rule of law and of the federal courts more broadly. Although the growth of legal realism shattered any notion that the law is “a brooding omnipresence in the sky,”<sup>184</sup> cases should, at the very least, appear to be decided based on accepted methods of legal reasoning instead of the personal preferences of judges.<sup>185</sup> Because the judges who apply the law and decide cases claim their seats on the bench through the confirmation process, the process must promote the legitimacy of these judges as fair, impartial adjudicators.

For the complete-distinction justification of the assertive view, respect for the rule of law is maintained when judges make decisions based on clearly established rules and without considering their personal views. Advocates of this justification are likely to believe that the aggressive questioning of nominees during the confirmation process will ensure that no judge holds views contrary to the law that will influence the judge’s decisions.<sup>186</sup> As a result, society will be able to respect the rule of law knowing that it is based on established legal rules, not on judicial biases. Alternatively, the no-distinction justification provides respect for the rule of law by ensuring that judges who sit on the bench reflect popular opinion. Presumably, judges whose views reflect popular opinion will decide cases reflecting that opinion. When decisions reflect popular opinion, the public is more likely to respect those decisions and abide by them.

By contrast, the belief that the law is underdetermined leads proponents of the deferential view to argue that respect for the rule of law is preserved when judges make decisions based on accepted forms of legal reasoning, even if the judges’ own views color their analyses to some extent.<sup>187</sup> Recognizing that the law is molded by

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183. See U.S. CONST. art. II, § 2, cl. 2 (“[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . .”).

184. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

185. See Rosenfeld, *supra* note 178, at 1340 (“[T]he rule of law in the narrow sense appears to insure a significant amount of legality and the promotion of legal norms that do not stray too far from the well of commonly accepted values.”).

186. If judges’ views were to influence their decisions, then judges with views contrary to the law would be likely to issue decisions that were not based on the established law. See *supra* note 23 and accompanying text.

187. See *supra* note 185 and accompanying text; cf. Janet Adamy, *Court Strikes at Health Law*, WALL ST. J., Dec. 14, 2010, at A1 (emphasizing that a Republican president nominated the judge who struck down part of the Patient Protection and Affordable Care Act, Pub. L. No. 111-

society's experiences and by who sits on the bench, adherents of the deferential view seek to promote respect for the rule of law by confirming judges with reasonable views. Although the individuals confirmed as federal judges are likely to affect the outcomes of cases, adherents of the deferential view accept the reality that elections have consequences.<sup>188</sup> These adherents seek to preserve the distinction between law and politics while still accommodating the ways that politics influences the law's development.<sup>189</sup> The requirement that nominees hold reasonable views ensures that the law will not venture outside the mainstream, so that the public will be able to accept and respect the law.<sup>190</sup>

#### D. *The Need for Qualified Jurists*

Society needs and should want smart, capable judges sitting on the federal bench.<sup>191</sup> Federal courts handle thousands of cases every year,<sup>192</sup> deciding important questions that affect the rights of individuals and providing answers that set forth many of the rules that govern society.<sup>193</sup> The power held by federal judges necessitates intelligent, fair judges who can discern the law and equities in every case and apply the law impartially.<sup>194</sup>

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148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.), and that a Democratic president had nominated the judges who upheld the Act's constitutionality).

188. See *Executive Business Meeting*, *supra* note 2 (statement of Sen. Lindsey O. Graham, Member, S. Comm. on the Judiciary) (noting the Senate's "obligation to honor . . . [and] respect elections" in the confirmation process).

189. See *supra* note 54 and accompanying text.

190. No bright line exists between the belief that the law is underdetermined and the belief that it is indeterminate; rather, the distinction is a matter of degree. Wherever the distinction between these positions falls, the deferential view's requirement of mainstream nominees distinguishes its conception of law and politics from the conception of law and politics underlying the no-distinction justification of the assertive view.

191. See Siegel, *supra* note 178, at 980 (noting that federal judges "must not only be good citizens and men of education and integrity . . . but must also be statesmen" (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 150 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835))).

192. See generally ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR* (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf> (summarizing the caseload of federal courts).

193. See generally Wallace Mendelson, *The Judge's Art*, 109 U. PA. L. REV. 524 (1961) (discussing the nature of a judge's work).

194. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J., dissenting) ("All judges take an oath to uphold the Constitution and apply the law impartially . . ."); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 93, at 471

This need for good judges leads to several conclusions. First, America's best legal minds should be encouraged to sit on the federal bench. Lifetime tenure makes the federal bench an appealing job.<sup>195</sup> A federal judgeship should not be made less appealing because of an acrimonious confirmation process.<sup>196</sup> Instead, nominees should be able to expect a confirmation process that is professional, informative, and probative of the nominee in a way that meaningfully determines whether the nominee would make a good judge.

Second, the confirmation process must focus on putting qualified individuals on the bench. The Senate should block any judge who would fail to meet the expectations for federal judges<sup>197</sup> because those judges have a lifetime appointment<sup>198</sup> and few methods exist to bind judges once they are on the bench.<sup>199</sup> Thus, the Senate's examination of a nominee's substantive views should be done in a meaningful and informative way. Senators should ask serious questions to learn about

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("[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.").

195. See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . ."). Judicial salaries, although protected, are much lower than what most judges would make in private practice, so the protection of salaries is not a great enticement for lawyers to become judges. See, e.g., JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2007), available at <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf> ("Our judiciary will not properly serve its constitutional role if it is restricted to (1) persons so wealthy that they can afford to be indifferent to the level of judicial compensation, or (2) people for whom the judicial salary represents a pay increase.").

196. See, e.g., WITTES, *supra* note 7, at 88 (describing how Miguel Estrada refused to be considered for the Supreme Court vacancy created by Justice O'Connor's retirement because of his negative experience as a failed nominee for the U.S. Court of Appeals for the District of Columbia Circuit).

197. Admittedly, these expectations are difficult to articulate. Perhaps more helpful for understanding what makes a good judge is studying what makes a bad judge. See Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004) (describing bad judges as those jurists "who are incompetent, self-indulgent, abusive, or corrupt").

198. For a discussion of the impeachment of federal judges, see *supra* notes 167, 195 and accompanying text.

199. One such approach could be limiting the jurisdiction of federal courts. See U.S. CONST. art. III, § 2 (permitting Congress to make certain exceptions to the Supreme Court's appellate jurisdiction); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("[H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies."). This approach, however, has its limits. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008) (invalidating the provision of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.), which suspended habeas corpus). See generally Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975) (describing the challenges of trying to limit the discretion of judges).

how a nominee would approach the job of judging and the duty of deciding cases.<sup>200</sup> Ultimately, the confirmation process can ensure that qualified judges are installed if it is fair and not so acrimonious as to discourage good nominees from being willing to go through the process.

Under either the complete-distinction justification or the no-distinction justification, the assertive view is more likely to create an acrimonious process. Nevertheless, proponents of both justifications are likely to view this cost as necessary. Under the complete-distinction justification, judges' views must conform to the law, so senators must inquire into a nominee's views. Under the no-distinction justification, a senator must inquire into the nominee's views to determine whether the nominee shares the senator's views. The process is likely to be far more hostile when senators aggressively question a nominee about the nominee's views on controversial issues, a phenomenon occurs when senators follow either justification of the assertive view and focus intensely on the nominee's ideological views.<sup>201</sup> A burdensome confirmation process, particularly one that is personally wearisome, is likely to drive away some potential nominees,<sup>202</sup> but for proponents of either justification of the assertive view, this cost is necessary.

Under the deferential view, senators are still free to examine the nominee's ideological views, but doing so is necessary only to ensure that the nominee holds reasonable positions and to understand the nominee's views on a judge's role.<sup>203</sup> Still, these questions are likely to

200. If senators have serious questions about a nominee's personal conduct or concerns about ethics charges against a nominee, they should ask those questions. Senators should not, however, trump up charges against a nominee because of ideological opposition, as Senator Kennedy was accused of doing against Alito. See Byron York, *Alito and the Ted Kennedy "Study,"* NAT'L REV. ONLINE (Jan. 9, 2006, 1:54 PM), <http://old.nationalreview.com/york/york/200601091354.asp> (decrying as spurious Senator Kennedy's claims that Alito's dissents on the Third Circuit were hostile to individual rights).

201. See, e.g., *Senate GOP Questions Sotomayor's Stances*, MSNBC.COM (June 24, 2009, 7:38 AM ET), [http://www.msnbc.msn.com/id/31508311/ns/politics-capitol\\_hill](http://www.msnbc.msn.com/id/31508311/ns/politics-capitol_hill) (discussing Republican attacks on Sotomayor). This process can, unsurprisingly, be difficult for a nominee and a nominee's family to bear. See, e.g., CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* 266 (2007) ("I had only one last doubt in my mind [about the confirmation process]: I didn't know how much more of a beating [my wife] and I could take."); Rotunda, *supra* note 112, at 131 ("[S]ome first-class nominees may refuse to be considered because they do not wish to endure the gauntlet of being subjected to unfair flyspecking of one's career.").

202. See *supra* note 196.

203. The proper role of a judge is hard to define. Kagan gave an apt description of the judge's role during her confirmation hearings, explaining that judges should respect the political

be far less hostile because a senator need only determine that the nominee does not hold extreme views and need not push the nominee to agree or disagree with a specific position.<sup>204</sup> The process may not be easy for nominees under the deferential view, but the it not as personally burdensome as proponents of the assertive view might make it.

### *E. Social Cohesion*

A cohesive society is one in which citizens coexist peaceably despite any disagreements they might have on various issues. America is a nation of people who hold widely divergent views on many issues. In a pluralistic society, citizens must adhere to some overarching values that bind them together, no matter their other disagreements.<sup>205</sup> In the United States, social cohesion is premised on a shared reverence for life, liberty, the pursuit of happiness, and the equality of all people under the law.<sup>206</sup> Although these values are broad and somewhat amorphous, they underlie senators' conversations about judicial nominations.<sup>207</sup> These values can be interpreted in many different ways, but, ultimately, a good confirmation process will promote social cohesion by reinforcing society's common bonds rather than sharpening its cleavages.

By focusing on a nominee's ideological views, the assertive view often highlights the issues that matter most to the public. Senators raise the controversial issues that dominate public attention and that

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branches, adhere to precedent, and decide cases narrowly. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 266 (2010) (statement of Elena Kagan).

204. Cf. Fein, *supra* note 160, at 687 (arguing that an assertive Senate will drive away otherwise-qualified nominees). For an explanation of the difference in the tenor of senators' questioning under each view, see *supra* note 159.

205. See Rosenfeld, *supra* note 178, at 1310 (“[I]n heterogeneous societies with various competing conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable to achieving political cohesion with minimum oppression.”).

206. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”). See generally THOMAS PAINE, COMMON SENSE 46 (Belknap Press 2010) (1776) (encouraging Americans to rally behind a common cause). Of course, scholars can vehemently disagree about how these values should shape society. Still, these values provide a foundation for people with different ideologies to live amongst each other with a common understanding.

207. See, e.g., *Executive Business Meeting*, *supra* note 2 (statement of Sen. Lindsey O. Graham, Member, S. Comm. on the Judiciary) (implicating many of these values in discussing Senator Graham's support for Kagan's nomination).

lead to the most divisive cases.<sup>208</sup> Under the complete-distinction justification, senators ask nominees about their views on these issues to determine whether the nominees would decide cases contrary to what the senators believe the law is. Thus, this justification promotes social cohesion by allowing senators to protect the law from politics through a focus on substantive issues. Under the no-distinction justification, however, senators ask questions about controversial issues because they want to confirm only the nominees with whom they agree. Although these issues generate controversy,<sup>209</sup> proponents of this justification of the assertive view treat the law as another means of achieving a certain result, so they have no reason to emphasize an empty hope of social cohesion ahead of their policy goals.<sup>210</sup>

Meanwhile, the deferential view promotes social cohesion by deemphasizing society's sharpest disagreements. By taking a broader view of a nominee's ideology, the deferential view allows the confirmation process to underscore the common bonds of Americans and the respected role of the federal courts in America's constitutional system. By acknowledging the legitimacy of different ideological views during the confirmation process, the deferential view promotes unity and a sense of respect.<sup>211</sup> It also helps keep the confirmation process from becoming a major political battle. In a time of great partisanship,<sup>212</sup> the deferential view provides an opportunity for the Senate to focus on points of agreement and

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208. One such controversial issue is abortion. Senators regularly prod nominees about their views on abortion and *Roe v. Wade*, 410 U.S. 113 (1973). See *supra* notes 26, 172.

209. See, e.g., Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1 (discussing the controversy surrounding the Obama administration's decision not to defend the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)), in court); Jennifer Steinhauer, *Under Banner of Fiscal Restraint, Republicans Plan New Abortion Bills*, N.Y. TIMES, Feb. 9, 2011, at A18 (describing the controversy over proposed abortion restrictions).

210. See Gauch, *supra* note 91, at 364 ("If political dealing is inevitable, we should recognize it as such or we will only further obscure the real issues.").

211. Cf. 151 CONG. REC. 7875-76 (2005) (statement of Sen. James M. Talent) (describing the "divisive" results when senators attack nominees solely because of ideological disagreements).

212. See, e.g., Dan Balz, *Bayh's Criticism of Congress: Overstated or Spot-On?*, WASH. POST, Feb. 17, 2010, at A1 (discussing the partisanship in Congress).

provides a refreshing break from its normal political fighting.<sup>213</sup> The deferential view also seeks to protect democracy, which can become fragile if the tensions within a country are too strained.

#### IV. CLARIFYING THE UNDERLYING DEBATE BETWEEN THE COMPETING VIEWS OF ADVICE AND CONSENT

Although the values in Part III often provide the battlefield for proponents of the assertive view and the deferential view in the debate over the Senate's role in the confirmation process, discussion of these values ultimately does not resolve the question of which approach is better. Instead, they only reveal a deeper disagreement between proponents of these views. Fundamentally, the assertive view and the deferential view face a stark divide in their conceptions of the relationship between law and politics. This Part discusses this more fundamental disagreement about the confirmation process. This disagreement manifests in two ways: in senators' comments about and during judicial confirmations and in commentators' and scholars' arguments about which approach is better.

First, senators' own comments reveal their underlying assumptions about the relationship between law and politics. On the one hand, Senators Sessions and Leahy and then-Senator Joseph Biden have all noted that they would inquire carefully into nominees' ideological views.<sup>214</sup> Each senator's statement suggested that a nominee whose political views did not align with accepted law would not be fit for the bench because the senators feared that such a nominee would decide cases contrary to the law.<sup>215</sup> Implicitly, these senators were saying that law and politics are separate and that judges should never let their political views influence their legal decisions.

Senator Graham, on the other hand, openly stated his view of the relationship between law and politics during the Sotomayor and Kagan confirmation hearings.<sup>216</sup> Although he recognized that a "difference between politics and the law" exists,<sup>217</sup> he nevertheless

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213. Cf. Dana Milbank, *One of These Senators Is Not Like the Other*, WASH. POST, July 21, 2010, at A2 (claiming that Senator Graham "believe[s] there are bigger things than politics" and that he "towers above his Senate Republican colleagues").

214. See *supra* note 15.

215. See *supra* note 15.

216. E.g., *Executive Business Meeting*, *supra* note 2 (statement of Sen. Graham, Member, S. Comm. on the Judiciary); Graham, *supra* note 18.

217. *Executive Business Meeting*, *supra* note 2 (statement of Sen. Graham, Member, S. Comm. on the Judiciary).

admitted that “elections have consequences” for the judiciary and the law.<sup>218</sup> In these statements, Senator Graham recognized that although law and politics are not synonymous, they have an intertwined relationship in which political events have repercussions for the law. Although senators rarely explicitly challenge each other’s views of the relationship between law and politics, these statements from Senators Sessions, Leahy, Biden, and Graham reveal deep differences.

Second, the arguments that proponents of each view put forth as to why their view best vindicates the values implicated by the confirmation process also reveal these differing views on the relationship between law and politics. The emphasis that adherents put on certain values instead of other values reflects their views with respect to the relationship between law and politics, even if unspoken or subconscious.

For the assertive view, law and politics can be either completely distinct or not distinct at all. Either way, senators focus intensely on a nominee’s ideological views. Although the justifications of the assertive view are at opposite ends of the spectrum in describing the relationship between law and politics, they lead to the same conclusion as to how the Senate should approach its role in the confirmation process.<sup>219</sup> This view does not mask differences; it brings them to the forefront to expose the consequences of those differences. For example, under the assertive view, senators emphasize the importance of judicial accountability and the Senate’s role as a check on nominees, suggesting that the appearance of judicial independence is not as important as holding judges accountable.<sup>220</sup> Likewise, senators are not as concerned about making the process easy for nominees; instead, senators are concerned with learning a nominee’s ideological beliefs to ensure those beliefs conform to the law.<sup>221</sup> And finally, proponents of the complete-distinction justification claim that the rule of law is best upheld when the law is kept separate from politics.<sup>222</sup>

By contrast, proponents of the deferential view emphasize the need for judicial independence and social cohesion. Because this view rests on the underdeterminacy of law, it recognizes the influence of

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218. Graham, *supra* note 18.

219. *See supra* Part I.A.1.

220. *See supra* notes 24–26 and accompanying text.

221. *See supra* note 21 and accompanying text.

222. *See supra* notes 20–21 and accompanying text.

both politics and traditional methods of judicial decisionmaking on the development of law.<sup>223</sup> Adherents of the deferential view emphasize these values because giving judges, who tangentially reflect public opinion, the freedom to make decisions ensures that the law reflects society's values while still separating the law enough from politics to ensure that it will garner respect and be followed.<sup>224</sup> Like proponents of the assertive view, proponents of the deferential view also argue that their approach best protects the rule of law because it appreciates the impact of politics on the law without forcing the law to fit within a particular political ideology.<sup>225</sup> Thus, their arguments are premised on the idea that the law and politics are related but not inseparable.

The debate highlighted in Part III could theoretically provide a basis for resolving which view is better if senators and scholars could agree about the relative importance of each value. In some instances, the assertive view better vindicates certain values, whereas in other instances, the deferential view does. Even if using these values to decide which senatorial role is better were possible, making the decision on these terms would be misguided because it would ignore the deeper disagreement between the two views. The underlying disagreement about the relationship between law and politics leads proponents to talk past each other when their debate is based on values that they weigh differently. Although they argue over the same values implicated in the confirmation process, those values are not the only subject of dispute. A more robust—and more useful—debate can be had by considering the way each side views the relationship between law and politics.

Of course, even conclusively resolving the debate over the relationship between law and politics might not clearly identify the Senate's proper role in the confirmation process. Realistically, however, a resolution to the law-and-politics question is not possible—or at least it is not probable anytime soon<sup>226</sup>—so debates over the Senate's role may still turn back to historical practice or pragmatic arguments about the values involved in the process. But

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223. See *supra* note 54.

224. See *supra* notes 57–60, 181, 205 and accompanying text.

225. See *supra* notes 188–89 and accompanying text.

226. For an article offering a new theory of the relationship between law and politics and describing older theories, see generally Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319 (2010).

with the model developed in this Note, those debates can now include and incorporate the role that the disparate views of the relationship between law and politics plays in this disagreement.

#### CONCLUSION

After more than a decade with no Supreme Court nominations, five nominations to the Supreme Court were made between 2005 and 2010, as were many contentious lower court nominations. These nominations brought renewed attention to the issue of the Senate's role in judicial confirmations. With no clear original understanding or historical practice illuminating the meaning of the Advice and Consent Clause, the values implicated in the confirmation process often provide the foundation for the debate over which view better achieves the purposes of having the Senate involved in the confirmation process. These debates, however, only mask an underlying, fundamental area of disagreement: the proper relationship between law and politics. The arguments made in support of each view based on these values reveal divergent underlying premises. This Note identifies this underlying disagreement so that future discussions of the Senate's role in the confirmation process can focus on this important issue. With a better understanding of the underlying debate over the Senate's role in the confirmation process, scholars and senators can now debate the Senate's proper role within a more useful framework.