

NOTE

DO YOUR DUTY (!)(?)

THE DISTRIBUTION OF POWER IN THE APPOINTMENTS CLAUSE

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Judge Merrick Garland's thwarted Supreme Court nomination has divided legal scholars over the meaning of the Appointments Clause. While some believe that the Senate and the President share the power to appoint principal officers, others contend that the President alone has the power to nominate and appoint them. To the former scholars, Article II, Section 2, enables the President to nominate whomever he or she wishes, but it also empowers the Senate to confirm or reject whomever it wishes. Accordingly, the appointment power is divided between the two, meaning it is only exercised when both branches utilize their respective and discretionary powers. To the latter scholars, the same text gives the President the sole power to nominate and to appoint, with appointment subject to the Senate's mandatory duty to advise and decide on whether to consent. Therefore, advice and consent is a check by which the Senate prevents the President from abusing his or her appointment power, triggered by the President's decision to nominate. This Note argues that the latter scholars are correct because the Founders' intent, the Constitution's text, the doctrines of separation of powers and checks and balances, and long-standing Senate practice indicate that the appointment power is solely a presidential power. For Judge Garland, this conclusion means the Senate violated its duty to hold hearings and to provide an opportunity for a vote on his nomination. More importantly for the nation, it means that

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the Appointments Clause requires the Senate to apply to every nominee the process that it has designed for securing its consent. Thus, the precedent established by the 114th Senate of blocking all Supreme Court nominations during presidential election years, which will likely be followed and perhaps extended to mid-term election years, contravenes the nation's fundamental constitutional structure. By failing to perform its duty, moreover, the 114th Senate also deprived the nation of the benefits that the advice and consent process provides, such as greater accountability for the Senate's confirmation or rejection of nominations and a more functional government. In doing so, the Senate has placed political expediency ahead of the public interest.

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INTRODUCTION

“The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president.”

-Senate Majority Leader Mitch McConnell (R-KY).¹

ON February 13, 2016, Justice Antonin Scalia passed away.² Minutes after the public learned of his death, two Republican Senators announced that the Senate may categorically refuse to act upon Supreme Court nominees in a presidential election year.³ Undeterred, President Barack Obama nominated Judge Merrick Garland to replace the late Justice on March 16.⁴ The Republican-controlled Ju-

¹ Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, Politico (Feb. 13, 2016, 9:56 PM), <http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248> [https://perma.cc/5RV5-YXKR].

² Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. Times (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0.

³ Everett & Thrush, *supra* note 1; see also Ted Cruz (@tedcruz), Twitter (Feb. 13, 2016, 2:27 PM), <https://twitter.com/tedcruz/status/698634625246195712?lang=en> [https://perma.cc/PEM7-SEW3] (“Justice Scalia was an American hero. We owe it to him, & the Nation, for the Senate to ensure that the next President names his replacement.”).

⁴ Juliet Eilperin & Mike DeBonis, *President Obama Nominates Merrick Garland to the Supreme Court*, Wash. Post (Mar. 16, 2016), <https://www.washingtonpost.com/world/national-security/president-obama-to-nominate-merrick-garland-to-the-supreme-court->

diciary Committee, however, refused to act upon the nomination.⁵ This political standoff ended, for all intents and purposes, on November 8, when the Republican Party maintained control of the Senate and won the presidency.⁶ President Donald Trump nominated Judge Neil Gorsuch to the Court in January 2017.⁷ He was confirmed by the Senate upon hearings and a full floor vote.⁸ The flurry of debate among politicians, constitutional law scholars, and the public that the Garland episode has sparked, however, has not ended. This Note attempts to resolve the fundamental question raised by this constitutional conflict: What, if anything, does the Appointments Clause require of the Senate?

The 114th Senate's actions are unprecedented. Unsurprisingly, in the months leading up to the 2016 presidential election, several scholars published articles and participated in public debates about the Senate's authority and obligation under the Appointments Clause. Many scholars defended the Senate's inaction, arguing, for example, that the Constitution gives the Senate discretion to decide whether to act on a nomination.⁹ Others, however, strongly opposed the Senate's blockade, asserting that its inaction violated the Constitution.¹⁰

sources-say/2016/03/16/3bc90bc8-eb7c-11e5-a6f3-21ccdbc5f74e_story.html?utm_term=.4a44f5ee14c9 [https://perma.cc/995V-WF6J].

⁵ Elaine Godfrey, *What Does Chuck Grassley Fear?*, Atlantic (Apr. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/04/chuck-grassley-scotus-garland/478038/> [https://perma.cc/U2PZ-PP2H].

⁶ 2016 Senate Election Results, Politico (Dec. 13, 2016, 1:57 PM), <http://www.politico.com/2016-election/results/map/senate> [https://perma.cc/V2EP-4DPV].

⁷ Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. Times (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html?_r=0 [https://perma.cc/92BY-26ZK].

⁸ Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. Times (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html?_r=0.

⁹ These scholars include Jay Sekulow, Ed Whelan, and Professors Jonathan H. Adler, Vikram David Amar, Noah Feldman, Michael Ramsey, and Ilya Somin. See, e.g., Jonathan H. Adler, *The Erroneous Argument that the Senate Has a 'Constitutional Duty' to Consider a Supreme Court Nominee*, Wash. Post: Volokh Conspiracy (Mar. 15, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/15/the-erroneous-argument-the-senate-has-a-constitutional-duty-to-consider-a-supreme-court-nominee/?tid=ainl>; Vikram David Amar, *The Grave Risks of the Senate Republicans' Stated Refusal to Process Any Supreme Court Nominee President Obama Sends Them*, Justia: Verdict (Feb. 26, 2016), <https://verdict.justia.com/2016/02/26/the-grave-risks-of-the-senate-republicans-stated-refusal-to-process-any-supreme-court-nominee-president-obama-sends-them> [https://perma.

cc/Z989-RUB2]; Noah Feldman, *Obama and Republicans Are Both Wrong About Constitution*, Bloomberg View (Feb. 17, 2016, 12:21 PM), <https://www.bloomberg.com/view/articles/2016-02-17/obama-and-senate-are-both-wrong-about-the-constitution>; Erwin Chemerinsky & Michael Ramsey, *Podcast: Does the Senate Have a Duty to Hold Hearings for Supreme Court Nominees?*, Nat'l Const. Ctr.: Const. Daily (Apr. 7, 2016), <http://blog.constitutioncenter.org/2016/04/podcast-does-the-senate-have-a-duty-to-hold-hearings-for-supreme-court-nominees/> [https://perma.cc/47V4-8JTV] (expressing Ramsey's view that there is no Senate duty to act on presidential nominations); Michael Ramsey, *I Debate Erwin Chemerinsky on the Senate and Judge Garland*, Originalism Blog (Apr. 8, 2016, 6:04 AM) [hereinafter Ramsey, Debate], <http://originalismblog.typepad.com/the-originalism-blog/2016/04/i-debate-erwin-chemerinsky-on-the-senate-and-judge-garland-michael-ramsey.html> [https://perma.cc/E6KA-EHEL]; Michael Ramsey, *Law Professors' Letter on Supreme Court Appointments*, Originalism Blog (Mar. 15, 2016, 6:55 AM) [hereinafter Ramsey, Letter], <http://originalismblog.typepad.com/the-originalism-blog/2016/03/law-professors-letter-on-supreme-court-appointments-michael-ramsey.html> [https://perma.cc/2JDN-9KJS]; Jay Sekulow, *The Constitution Is Clear: The Senate's "Advice and Consent" Is Not a Rubber Stamp of the President*, Am. Ctr. for L. & Just. (Feb. 19, 2016), <http://aclj.org/supreme-court/the-constitution-is-clear-the-senates-advice-and-consent-is-not-a-rubber-stamp-of-the-president> [https://perma.cc/MR9B-835L]; Ilya Somin, *Can President Obama Appoint Merrick Garland to the Supreme Court Without the Consent of the Senate?*, Wash. Post: Volokh Conspiracy (Apr. 11, 2016) [hereinafter Somin, President Obama], https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/11/can-president-obama-appoint-merrick-garland-to-the-supreme-court-without-the-consent-of-the-senate/?utm_term=.489fea27a2f9 [https://perma.cc/38BG-UMAQ]; Ilya Somin, *The Constitution Does Not Require the Senate to Give Judicial Nominees an Up or Down Vote*, Wash. Post: Volokh Conspiracy (Feb. 17, 2016) [hereinafter Somin, The Constitution], https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/the-constitution-does-not-require-the-senate-to-give-judicial-nominees-an-up-or-down-vote/?utm_term=.1cbfe328f669; Ed Whelan, *More Law Professors Behaving Badly*, Nat'l Rev.: Bench Memos (Mar. 9, 2016, 9:44 AM), <http://www.nationalreview.com/bench-memos/432525/law-professor-letter-senate-power> [https://perma.cc/7YXQ-EPCN].

¹⁰ These scholars include Professors Erwin Chemerinsky, Thomas P. Crocker, Jamal Greene, Robin Bradley Kar, Jason Mazzone, Neil Kinkopf, Martha Minow, and Deanell Tacha. See, e.g., Chemerinsky & Ramsey, *supra* note 9 (expressing Chemerinsky's view that the Senate has a duty to act on presidential nominations); Thomas P. Crocker, *What Would Scalia Do?*, Atlantic (Mar. 22, 2016), <http://www.theatlantic.com/politics/archive/2016/03/what-would-scalia-do/474771/> [https://perma.cc/N8W9-2NG4]; Jamal Greene, *'Advice and Consent' a Subjective Standard, Not a Rule*, Bulletin (Apr. 2, 2016, 8:49 PM), <http://www.norwichbulletin.com/article/20160402/OPINION/160409995> [https://perma.cc/8MXN-A3CJ]; Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. Rev. Online 53, 58–60 (2016); Neil Kinkopf, *The Senate's Duty of Advice and Consent*, Telegraph (Mar. 31, 2016, 9:08 PM), <http://www.macon.com/opinion/readers-opinion/article69346272.html> [https://perma.cc/3YQ5-Q2FN]; Martha Minow & Deanell Tacha, *US Needs a Government of Laws, Not People*, Bos. Globe (Mar. 22, 2016), <https://www.bostonglobe.com/opinion/2016/03/21/needs-government-laws-not-people/34oNmHmUH3TYEibTxcQyIM/story.html>.

This recent dispute is not the beginning of the debate over the Appointments Clause. Indeed, many of the arguments presented reflect years of argument over the Clause's meaning, especially with respect to the proper interpretation of its text¹¹ and the Founders' intent.¹² Far from being a time-bound political issue, the obstruction of Garland's appointment is the most recent manifestation of a longstanding question over an important constitutional provision.¹³

While numerous scholars have brought several important arguments regarding the Appointments Clause to the public's attention, they have not provided a comprehensive discussion and analysis of the Garland appointment issue. This Note builds upon and contributes to the current

¹¹ See John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 *Tex. L. Rev.* 633, 638–39, 655–58 (1993) (arguing that the structure of the Appointments Clause and the placement of the advice and consent provision make the appointment power primarily a presidential power); Laura T. Gorjanc, *Comment, The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 *Case W. Res. L. Rev.* 1435, 1459 (2004) (arguing that the structure of the Appointments Clause divides the appointment power between the President and the Senate to ensure checks and balances).

¹² See Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 *Harv. J.L. & Pub. Pol'y* 103, 140–41 (2005) (arguing that the Founders adopted the advice and consent provision with the understanding that it would, like its model—the Massachusetts Constitution—allow the Senate to reject nominees through inaction). But see John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 *U.C. Davis L. Rev.* 633, 635–36, 640–45 (2003) (arguing that the Founders' statements about the advice and consent provision during the Constitutional Convention indicate their intent for the appointment power to be, primarily, a presidential power).

¹³ Various scholars have addressed related questions. See Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 *Harv. L. Rev.* 1202, 1203–07 (1988) (discussing the role of the Senate in the confirmation process, whether it can reject nominees, and whether it has a duty to confirm nominees); Nicole Schwartzberg, *What is a "Recess"?: Recess Appointments and the Framers' Understanding of Advice and Consent*, 28 *J.L. & Pol.* 231, 233–41 (2013) (discussing the purpose of the Recess Appointments Clause in light of the advice and consent provision and modern practice); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *Yale L.J.* 1491, 1493–96 (1992) (discussing the Senate's discretion to reject individual nominees and to advise the President about his nominations in light of the Founders' intent); Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 *Marq. L. Rev.* 355, 365–76 (1999) (discussing the Senate's authority to establish criteria by which it confirms nominees and the evolution of those criteria for Supreme Court nominees); Jeff Yates & William Gillespie, *Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process*, 58 *Wash. & Lee L. Rev.* 1053, 1057–60 (2001) (discussing the Senate's scope of discretion to reject nominees in light of the Founders' intent for the advice and consent provision).

scholarship in three ways. First, it presents a detailed compilation and analysis of the opposing arguments in the debate over the Senate's discretion to affirmatively exercise its advice and consent authority, grouping the literature into two integrated theories. One theory, which this Note terms the "Joint Power Theory," argues that a nominee for a principal officer position cannot be confirmed unless the President and the Senate exercise their distinct and discretionary powers endowed by the Appointments Clause.¹⁴ Accordingly, the Senate may refuse to act on any nomination for any principal officer position. The other theory, which this Note labels the "Constrained Power Theory," argues that the provision for Senate confirmation is (merely) a check on the President's power, and the Senate has a duty to consider and then accept or reject each of his or her principal officer nominees.¹⁵ Second, this Note presents a comprehensive defense of the Constrained Power Theory and a critique of the Joint Power Theory. Third, this Note argues that Senate action on nominations improves functioning of the federal government.

This Note's primary argument is that the Constrained Power Theory is the best interpretation of the Appointments Clause, from both a legal and practical perspective. Regarding the former, it argues that the Founders gave the appointment power to the President because he is better suited than the Senate to select qualified principal officers. To prevent the President from abusing his power by appointing unqualified friends and patrons, the Founders gave the Senate the authority to advise on and consent to each individual nominee. This interpretation is reflected in the text of the Appointments Clause, which states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint."¹⁶ The President "shall nominate" and "shall appoint," not the Senate. Accordingly, advice and consent is the mechanism by which the Senate can check a President's abuse of the appointment power. As a check on the President's power, the Senate must exercise its advice and consent authority for every nomination.

Regarding the theory's practical benefits, this Note argues that mandatory advice and consent preserves separation of powers by pre-

¹⁴ See sources cited *supra* note 9.

¹⁵ See sources cited *supra* note 10.

¹⁶ U.S. Const. art. II, § 2, cl. 2.

venting the Senate from nullifying the President's authority to nominate and appoint principal officers. Moreover, it promotes better governance by encouraging the Senate to advance the public's interest in a meritocratic government rather than individual Senators' political preferences, ensuring that the government is well staffed and not obstructed by unnecessary gridlock, and improving accountability and public confidence in Senate decision making.

To develop this argument, this Note proceeds as follows. Part I explains the Joint Power and Constrained Power theories in more detail and summarizes their main arguments based on the Founders' intent, the meaning of the Constitution's text, and the Senate's discretion and long-standing practice. Part II defends the Constrained Power Theory and critiques the Joint Power Theory by elaborating on Part I and by submitting original contentions. Specifically, it argues that the Constrained Power Theory is more consistent with the Founders' purpose for empowering the Senate to advise on and consent to nominations, the text of the Appointments Clause and the Constitution more generally, principles of checks and balances and separation of powers, and the Senate's discretion to fashion its rules of conduct and its long-standing advice and consent practice for Supreme Court nominees. Part III of this Note asserts the practical benefits of requiring the Senate to execute its confirmation process, even when the outcome appears inevitable. Part IV concludes the Note.

Far from an academic exercise, scholarship on this topic is critical because Garland's thwarted nomination is a watershed moment for the law and politics of Supreme Court nominations. Moving forward, at a minimum, the Senate has established that it is willing to categorically refuse to act on a President's Supreme Court nominations during a presidential election year. Given the Republican Party's success in the 2016 senatorial and presidential elections, the American electorate has incentivized this practice, demonstrating that such conduct will not harm, and may even help, a party's political prospects. This precedent could be extended to midterm election years and even to any year given the Senate's current underlying theory of its advice and consent authority (the Joint Power Theory). A comprehensive understanding of the division of power within the Appointments Clause is thus essential to counter future abuse.

I. PRIMARY INTERPRETATIONS

The scholarship analyzing the Appointments Clause is dominated by two opposing perspectives, both of which are derived from their proponents' interpretations of the Founders' understanding of the Clause, the Clause's text, principles of constitutional law, and the Senate's discretion and long-standing practice. The first theory, which this Note terms the Joint Power Theory, contends that the President and the Senate share the power to appoint principal officers. By "share," these scholars mean that the President and the Senate have distinct and, critically, discretionary authority in the appointment process: The President nominates and the Senate advises and consents. Unless both entities exercise their authority, a nominee is not appointed. The other theory, which this Note terms the Constrained Power Theory, argues that the President alone has the power to appoint principal officers, but he or she may only do so with the Senate's advice and consent. Rather than a discretionary component of the appointment process, this theory contends that advice and consent is a reactionary check on the President to prevent abuse of power. As such, it must be exercised whenever the President makes a nomination; otherwise his or her power to appoint is compromised. These theories are a synthesis of numerous law review articles and public opinion pieces regarding Supreme Court appointments and the Appointments Clause.¹⁷ This Part will explain both theories in more depth by describing the various proponents' arguments and distilling them into three main categories: the Founders' intent, the text of the Appointments Clause, and the Senate's discretion to make its own rules and its long-standing practice of advice and consent for Supreme Court nominees.

A. The Joint Power Theory

The Joint Power Theory of the Appointments Clause asserts that the power to appoint principal officers of the United States, including Supreme Court Justices, is shared by the President and the Senate.¹⁸ Ac-

¹⁷ These theories are also shaped by commentary on related questions, such as the proper procedure for Supreme Court appointments, the Senate's discretion to reject Supreme Court nominees, and the significance of the Treaty Clause. These sources' arguments, however, fundamentally align with one camp or the other.

¹⁸ See White, *supra* note 12, at 140–46; Gorjanc, *supra* note 11, at 1447–48; sources cited *supra* note 9; see also Monaghan, *supra* note 13, at 1206–07 (arguing that the President and

ording to the Joint Power Theory, the Senate and the President share the power to appoint principal officers because Article II, Section 2, of the Constitution empowers the President to nominate whomever he or she wishes and the Senate to confirm or reject any and all nominees it wishes.¹⁹ Both are empowered to act but neither is compelled.²⁰ Since the appointment power is only exercised when both branches utilize their discretionary powers,²¹ the Senate may choose whether to confirm, reject, or even to act upon a nomination.²² To some advocates, this theory is the only reasonable interpretation in light of the Founders' intent.²³ To others, the Clause's text, the Senate's discretion to make its own rules, and the Senate's advice and consent practices compel this view.²⁴

the Senate share the common responsibility of appointing appropriate officers); Schwartzberg, *supra* note 13, at 238–41 (arguing that the Senate has the discretion not to act on nominations but styling this discretion as a check on the President's power to make appointments, although the argument is functionally consistent with the aforementioned scholars' views given the discretionary authority the Senate is accorded); Strauss & Sunstein, *supra* note 13, at 1493–94 (arguing that the Founders intended the Senate to play a significant role in the appointment process and that the Constitution does not suggest it should be deferential to the President); Wolfe, *supra* note 13, at 364 (arguing that there is no constitutional limit on the Senate's advice and consent power, only reasonable limits that the Senate itself must enforce); Yates & Gillespie, *supra* note 13, at 1059–60 (arguing that the Founders intended the Senate to be actively involved in the confirmation process and that the Founders empowered the Senate to reject any nominee for any reason); Akhil Reed Amar, Opinion, Games Over Center Court, *Wash. Post* (July 5, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/04/AR2005070400864.html> [<https://perma.cc/HB82-CU8X>] (arguing that the Constitution's text does not give nominees a right to an up-or-down floor vote, though norms may make it difficult to deny Supreme Court nominees a vote).

¹⁹ Feldman, *supra* note 9; Whelan, *supra* note 9.

²⁰ See Adler, *supra* note 9; Amar, *supra* note 9; Feldman, *supra* note 9; Somin, *The Constitution*, *supra* note 9; Whelan, *supra* note 9.

²¹ See Somin, *The Constitution*, *supra* note 9; see also Amar, *supra* note 9 (arguing implicitly that the appointment power is only exercised when both branches utilize their discretionary powers by explaining that it is generally permissible for inaction by one political entity to block the action of another).

²² See Feldman, *supra* note 9.

²³ See Strauss & Sunstein, *supra* note 13, at 1493; White, *supra* note 12, at 147; Yates & Gillespie, *supra* note 13, at 1057–63; Sekulow, *supra* note 9; Whelan, *supra* note 9.

²⁴ See Monaghan, *supra* note 13, at 1202–08; Gorjanc, *supra* note 11, at 1452–57; Adler, *supra* note 9; Amar, *supra* note 9; Chemerinsky & Ramsey, *supra* note 9 (Ramsey); Somin, *The Constitution*, *supra* note 9; see also Wolfe, *supra* note 13, at 364–65 (arguing that the Constitution does not specifically limit the ability of the Senate to reject whomever it wants and that the Senate has, over time, changed its criteria for confirmation, but that the Senate's discretion does not justify capricious action).

1. The Founders' Intent

Although the Founders decided to give the President the power to make *nominations*, some Joint Power Theory advocates contend that the Founders did not envision the Senate as playing a subordinate role to the President in *appointments*.²⁵ Rather, they envisioned the Senate as freely exercising or withholding its advice and consent power, thus creating a system of checks and balances based on institutional competency to ensure the appointment of qualified candidates, not presidential benefactors.²⁶

The Constitutional Convention considered the proper locus of the appointment power at great length before adopting the current Appointments Clause. On June 1, 1787, the Convention gave the power to appoint principal officers, including judges, to the President.²⁷ Proponents of executive appointment authority, such as James Wilson, argued that the Congress could not be trusted with the appointment power because its “intrigue” and “partiality” would lead to “impropriety of such appointments [sic].”²⁸ James Madison agreed with Wilson’s mistrust of Congress, but he disagreed with his solution.²⁹ Rather, he argued that the Senate alone would be the most responsible holder of the appointment power because the Senate was “numerous eno’ to be confided in—as not so numerous as to be governed by the motives of [the other branch]; and as being sufficiently stable and independent to follow their deliberative judgments.”³⁰ In light of this argument, the Convention removed the power to appoint judges from the President on June 5.³¹ Fourteen days later, after Madison and other influential delegates lobbied for Senate authority to appoint judges, the Convention vested that power in the Senate.³²

²⁵ See Schwartzberg, *supra* note 13, at 240; Strauss & Sunstein, *supra* note 13, at 1497–500; White, *supra* note 12, at 140–41; Yates & Gillespie, *supra* note 13, at 1059; Sekulow, *supra* note 9; Whelan, *supra* note 9.

²⁶ See Monaghan, *supra* note 13, at 1206–07; White, *supra* note 12, at 143.

²⁷ Yates & Gillespie, *supra* note 13, at 1058.

²⁸ White, *supra* note 12, at 111 (quoting 1 *The Records of the Federal Convention of 1787*, at 119 (Max Farrand ed., rev. ed. 1937)).

²⁹ *Id.* at 112 (quoting 1 *The Records of the Federal Convention of 1787*, *supra* note 28, at 120).

³⁰ *Id.* (quoting 1 *The Records of the Federal Convention of 1787*, *supra* note 28, at 120).

³¹ *Id.* at 111–12.

³² *Id.* at 112–14.

The debate about judicial appointments was settled until July 18 when Nathaniel Gorham proposed the advice and consent provision of the Appointments Clause, which he based on the constitution of his native Massachusetts.³³ He did so for three reasons. First, he believed the Senate would be “too numerous, and too little personally responsible, to ensure a good choice.”³⁴ Second, he argued that the President would be more capable of making meritocratic appointments than the Senate because he would “be careful to look through all the states for proper characters.”³⁵ Third, he believed the system worked well in Massachusetts, where it prevented abuse by the governor.³⁶ In Massachusetts, the governor was empowered to nominate officers but could not appoint nominees without the Privy Council’s discretionary advice and consent. In fact, the Privy Council could reject nominees by refusing to act on the governor’s nominations (albeit an infrequent event),³⁷ even though its power to do so was not explicitly stated in the Massachusetts Constitution and appeared to contradict the constitution’s text.³⁸ Since Gorham modeled his amendment on Massachusetts’s division of powers, his proposal delegated the same discretion to the Senate.³⁹

Madison presented a (similar) alternative in response: presidential appointment of judges subject to concurrence by one-third of the Senate.⁴⁰ The Convention first considered Gorham’s amendment after Gouverneur Morris seconded it for a vote.⁴¹ The amendment was rejected due to a tie vote. On July 18, Madison changed his amendment to presidential appointment subject to a two-thirds Senate veto within a specified time frame.⁴² The Convention rejected it on July 21.⁴³

On July 26, the Convention referred the issue to the Committee of Detail, which preserved the status quo of Senate appointment of judges,

³³ *Id.* at 114.

³⁴ *Id.* (quoting 2 *The Records of the Federal Convention of 1787*, *supra* note 28, at 41).

³⁵ *Id.* (quoting 2 *The Records of the Federal Convention of 1787*, *supra* note 28, at 42).

³⁶ *Id.* at 114.

³⁷ Approximately 900 nominations were made in 1780–81 and 1786–87. Of those nominations, 57 were rejected in this manner. *Id.* at 135–37.

³⁸ *Id.* at 136–37, 140–41.

³⁹ Schwartzberg, *supra* note 13, at 240–41, 243.

⁴⁰ White, *supra* note 12, at 115.

⁴¹ *Id.* at 116.

⁴² *Id.*

⁴³ *Id.* at 116, 119.

and Executive appointment of “officers in all cases not otherwise provided for by this Constitution.”⁴⁴ On September 4, the Committee on Compromise presented a report advising the Convention to adopt Gorham’s amendment.⁴⁵ Morris made the only public statement on the issue and, in doing so, “seemed to speak for the entire, now unanimous assembly.”⁴⁶ He told the Convention, “[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”⁴⁷ His words affirmed the Founders’ understanding that the Appointments Clause, as Gorham believed, was a compromise that joined the power between the President and the Senate, rather than delegating it to just one.⁴⁸ Indeed, Hamilton later wrote in *Federalist 67* that “[t]he ordinary power of appointment is confided to the President and Senate jointly.”⁴⁹ Two weeks later (September 17), the Convention adopted Gorham’s proposal.⁵⁰

To proponents of the Joint Power Theory, this timeline demonstrates the Founders’ intent to divide the appointment power between the President and the Senate and make the exercise of that power discretionary.⁵¹ Rather than give the appointment power solely to the President or the Senate, they opted for the Massachusetts model of joint power, which ensures the appointment of meritocratic nominees by giving the Presi-

⁴⁴ *Id.* at 119 (quoting 2 The Records of the Federal Convention of 1787, *supra* note 28, at 185).

⁴⁵ *Id.* at 120.

⁴⁶ Strauss & Sunstein, *supra* note 13, at 1498.

⁴⁷ *Id.* (quoting 1 The Records of the Federal Convention of 1787, at 539 (Max Farrand ed., 1966)).

⁴⁸ White, *supra* note 12, at 120–21.

⁴⁹ Schwartzberg, *supra* note 13, at 237 n.35 (emphasis omitted) (quoting The Federalist No. 67, at 409–10 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Adam White argues that, despite Hamilton’s statement, the whole of Hamilton’s writings and actions indicate that he held a different view from the rest of the Framers on how the Appointments Clause would function. See White, *supra* note 12, at 129.

⁵⁰ White, *supra* note 12, at 121.

⁵¹ See Schwartzberg, *supra* note 13, at 239–40, 243–44; White, *supra* note 12, at 108–09, 140–41, 143–46. Whelan and Sekulow agree, citing White’s scholarship. Sekulow, *supra* note 12 (citing White, *supra* note 12); Whelan, *supra* note 9 (citing White, *supra* note 12); see also Strauss & Sunstein, *supra* note 13, at 1494–500 (making a different but related argument that the actions and statements taken during the Constitutional Convention demonstrate that the Founders intended for the Senate to play an active, not deferential, role in the appointment process, including the power to reject nominees on the basis of ideology); Yates & Gillespie, *supra* note 13, at 1057–60 (same).

dent the power to nominate and the Senate discretion over whether to act upon any and all nominations.

2. *The Constitution's Text*

Most Joint Power Theory advocates primarily contend that the Constitution's text justifies their interpretation of the Appointments Clause. According to some of these scholars, a plain meaning interpretation of the Appointments Clause indicates that it creates two distinct powers: the power to nominate and the power to appoint.⁵² The Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint."⁵³ The power to nominate is vested in the President since the Clause states he or she "shall nominate" and the phrase is not modified.⁵⁴ The power to appoint, however, is shared by the President and the Senate because the Clause states that the President "shall appoint" "by and with the Advice and Consent of the Senate."⁵⁵ These scholars therefore contend that although the President can unilaterally nominate principal officers, he or she cannot unilaterally appoint them. Instead, the President and the Senate can only appoint them together by jointly exercising their separate powers of nomination and advice and consent.⁵⁶

Nor, according to the Joint Power Theory, does the text of Article II, Section 2, state or imply that the Senate must exercise its power to give advice and consent.⁵⁷ While the Appointments Clause states, "shall appoint," that phrase applies to the President, not the Senate, because it

⁵² See Monaghan, *supra* note 13, at 1206; Adler, *supra* note 9 (citing Ramsey, Letter, *supra* note 9); see also Amar, *supra* note 9 ("If we look at other constitutional settings in which one entity must consent to the proposal of another actor before the proposal can take legal effect, we have as a general matter not inferred any duty on the part of the second actor to do anything.").

⁵³ U.S. Const. art. II, § 2, cl. 2.

⁵⁴ Adler, *supra* note 9; Somin, President Obama, *supra* note 9.

⁵⁵ See Gorjanc, *supra* note 11, at 1447–50. This is the common argument underlying several scholars' view that the Senate has the discretion to act on nominees and to decide how to do so, and that appointment requires nomination and confirmation. See Adler, *supra* note 9 (citing Ramsey, Letter, *supra* note 9); Feldman, *supra* note 9; Ramsey, Letter, *supra* note 9; Somin, *The Constitution*, *supra* note 9; Whelan, *supra* note 9.

⁵⁶ See Somin, *The Constitution*, *supra* note 9; Whelan, *supra* note 9.

⁵⁷ See Adler, *supra* note 9 (citing Amar, *supra* note 9); Chemerinsky & Ramsey, *supra* note 9 (Ramsey).

does not refer to the Senate's advice and consent.⁵⁸ Therefore, even if the President had a duty to nominate and appoint principal officers due to the word "shall," the Senate does not share such an obligation given the absence of any similar modifying clauses on advice and consent.

Some Joint Power Theory advocates also point to the context of the Appointments Clause to support their argument. Laura Gorjanc, for example, has asserted that the absence of the phrase "shall have Power" or the use of the word "power" in relation to appointments indicates that the Senate has a discretionary role in the process.⁵⁹ Article II, Section 2, Clause 2, is comprised of the Treaty Clause and the Appointments Clause.⁶⁰ The Treaty Clause states, "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."⁶¹ By including the word "power," the Founders delegated the authority to make treaties to the President alone.⁶² The Appointments Clause, on the other hand, does not include the word "power."⁶³ It simply states, "*he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . .*"⁶⁴ While the Founders could have written the Appointments Clause in the same manner, they did not. "Instead, the . . . structure of the text is such that the President and the Senate each act and these acts together are the exercise of the appointment power."⁶⁵

Nicole Schwartzberg agrees that the Treaty Clause demonstrates that the Founders understood the appointment power to be a joint power but for different reasons. According to her, the Founders intended the treaty

⁵⁸ See Chemerinsky & Ramsey, *supra* note 9 (Ramsey).

⁵⁹ Gorjanc, *supra* note 11, at 1447–48.

⁶⁰ U.S. Const. art. II, § 2, cl. 2.

⁶¹ *Id.*

⁶² Gorjanc, *supra* note 11, at 1448.

⁶³ *Id.*

⁶⁴ *Id.* at 1447–48 (quoting U.S. Const. art. II, § 2, cl. 2).

⁶⁵ *Id.* at 1448. It is worth noting that other clauses and provisions of the Constitution that delegate authority to the executive or legislative branch also incorporate the phrase "shall have power" or use the word "power." See U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. Const. art I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); U.S. Const. art I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes . . ."); U.S. Const. art II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate . . .").

power to be a joint power between the President and the Senate.⁶⁶ Discussing the treaty power, Hamilton stated “there is no comparison” between the King of England’s ability to make treaties and that of the President because “[t]he one can perform alone what the other can only do with the concurrence of a branch of the legislature.”⁶⁷ The advice and consent language within the Treaty Clause, accordingly, is the mechanism that ensures the Senate’s power to be involved in the treaty process.⁶⁸ Therefore, Schwartzberg argues that the Founders understood such language generally to be a tool for ensuring that a given power is shared between branches.⁶⁹ By incorporating advice and consent language into the Appointments Clause, then, the Founders understood the appointment power to be shared.

Gorjanc also notes that the context of the Appointments Clause within Article II does *not* indicate that it is a presidential power. The Constitution, she argues, describes the structure of the federal government and, within that structure, divides the power among the branches.⁷⁰ While most of these powers are listed in the constitutional article related to the branch that exercises them, some are placed in other articles based on the process employed for using them.⁷¹ The veto, for example, is listed in Article I—even though it is a presidential power—because it can only be exercised after the House and the Senate pass a bill.⁷² It would be inefficient if the veto were included in Article II, given its contingent relationship to Congress’s legislative power.⁷³ Similarly, the advice and consent power is listed in Article II because it can only be exercised once the President exercises his or her nomination power.⁷⁴ Therefore, the appointment power is not an exclusively presidential power simply because it is in Article II.⁷⁵ Rather, like the veto, the Senate’s equal share of the power to appoint appears in Article II to avoid redundancy and to clarify the appointment process.

⁶⁶ Schwartzberg, *supra* note 13, at 259–62.

⁶⁷ *Id.* at 261 (quoting *The Federalist* No. 69, *supra* note 49, at 420 (Alexander Hamilton)).

⁶⁸ *Id.* at 259–62.

⁶⁹ *Id.*

⁷⁰ Gorjanc, *supra* note 11, at 1449.

⁷¹ *Id.*

⁷² *Id.* at 1449, 1449 n.84.

⁷³ *Id.* at 1449.

⁷⁴ *See id.*

⁷⁵ *Id.*

3. The Senate's Discretion and Long-Standing Practice

The advice and consent provision does not define the words “advice” and or “consent,” nor does it state or imply that the Senate must take any particular actions to exercise its power.⁷⁶ According to some Joint Power Theory advocates, the absence of apparent definitions of “advice” and “consent” empowers the Senate itself to define these terms in determining the rules of its proceedings since Article I, Section 5, allows the Senate to craft its own rules.⁷⁷ These scholars contend that this discretion permits the Senate to determine how, when, and whether to organize hearings about, vote on, and confirm individual nominees; consequently, it can categorically refuse to act on all nominees.⁷⁸ Implicit in this argument is the claim that there is no functional difference between the Senate categorically refusing to act on nominations and rejecting all nominees individually.⁷⁹ Pursuant to its discretion, therefore, the 114th Senate Judiciary Committee refused to conduct hearings or schedule an up-or-down vote on Garland’s nomination. Likewise, and pursuant to his discretion, the Majority Leader refused to bring Garland’s nomination to the floor for a vote.

Critics assert, or at least imply, that the Senate’s discretion is limited by its long-standing practices, which are unique to each type of nominee.⁸⁰ They suggest, therefore, that the Senate may only apply the long-standing procedure it has used for Supreme Court nominees when considering such nominees.⁸¹ Joint Power Theory advocates reject this counterargument, responding there is only one advice and consent provision, such that the provision applies to all nominees. Accordingly, the Senate’s discretion to devise its own practices under that provision allows the Senate to apply its practices for one type of nominee to any

⁷⁶ Feldman, *supra* note 9; Somin, *The Constitution*, *supra* note 9.

⁷⁷ Adler, *supra* note 9; Feldman, *supra* note 9; Somin, *President Obama*, *supra* note 9; Whelan, *supra* note 9; see also Gorjanc, *supra* note 11, at 1443 (describing the Senate’s constitutional discretion to make its own rules).

⁷⁸ See sources cited *supra* note 77.

⁷⁹ In fact, Professor Michael Ramsey has made this point explicitly. See Chemerinsky & Ramsey, *supra* note 9.

⁸⁰ *Id.*; see also Greene, *supra* note 10 (focusing solely on the history of Supreme Court nominations in arguing that the Senate’s past practice is to vote).

⁸¹ See Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky); Greene, *supra* note 10.

type of nominee.⁸² Therefore, even if the Senate may only apply long-standing practices, the 114th Senate did so for Garland because it has a long-standing practice of refusing to act on judicial nominations.⁸³ Senate Democrats, for example, refused to give Miguel Estrada, who was President George W. Bush's nominee to the Court of Appeals for the D.C. Circuit, a hearing or a vote for two years, ultimately forcing President Bush to withdraw the nomination.⁸⁴ Both parties have done the same to many federal district court judges.⁸⁵ Therefore, contrary to critics, the Senate is not violating its long-standing practice. Rather, it is using its constitutionally endowed discretion to apply a long-standing practice to Supreme Court nominees.⁸⁶

B. The Constrained Power Theory

Scholars who oppose the Joint Power Theory, instead following the Constrained Power Theory, believe that the Appointments Clause's advice and consent provision is a compulsory check on the President's appointment power, not a discretionary Senate power.⁸⁷ According to this perspective, Article II, Section 2, empowers the President to nominate *and to appoint* principal officers.⁸⁸ The President's power to nomi-

⁸² See Chemerinsky & Ramsey, *supra* note 9 (Ramsey); Somin, *The Constitution*, *supra* note 9; Whelan, *supra* note 9.

⁸³ See Somin, *The Constitution*, *supra* note 9; Somin, *President Obama*, *supra* note 9.

⁸⁴ Somin, *The Constitution*, *supra* note 9.

⁸⁵ *Id.*

⁸⁶ *Id.*; see also Richard S. Beth, Cong. Research Serv., RL32878, *Cloture Attempts on Nominations: Data and Historical Development* 5 (2013) ("There also seems reason to suppose that often, when any Senators strongly objected to a nomination, the Senate might decline to bring the matter to the floor in the first place. The custom of 'Senatorial courtesy,' under which the Senate would decline to consider a nomination to a position in the home state of a Senator who declared the nomination 'personally obnoxious' to him, represented an instance of such practices.").

⁸⁷ Scholars who hold this view, either explicitly or implicitly, include Professors Robin Bradley Kar, Jason Mazzone, John C. Eastman, John O. McGinnis, William Andreen (and the 360 other law professors who signed a letter to Senate Majority Leader Mitch McConnell), Erwin Chemerinsky, Thomas P. Crocker, Neil Kinkopf, Martha Minow, and Deanell Tacha, among others. See Eastman, *supra* note 12, at 635–37; McGinnis, *supra* note 11, at 639, 653; Letter from Professor William Andreen, Univ. of Ala. Sch. of Law, et al. to Senate Majority Leader Mitch McConnell, U.S. Senate Majority Leader, et al. [hereinafter *Lawyers Letter*] <http://www.afj.org/wp-content/uploads/2016/03/Law-professor-SCOTUS-vacancy-letter.pdf> [<https://perma.cc/7AWS-NS6E>]; Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky); sources cited *supra* note 10.

⁸⁸ See Eastman, *supra* note 12, at 635–37, 640.

nate is unconstrained by Congress, but his or her appointment power is limited by the Senate's advice and consent; advice and consent is thus a procedural check by which the Senate prevents the President from abusing his or her appointment power.⁸⁹ While the Senate is not required to consent, it is required to act.⁹⁰

1. The Founders' Intent

Some Constrained Power Theory advocates, like their Joint Power Theory counterparts, appeal to the Founders' statements and to the history of the Constitutional Convention to justify their interpretation.⁹¹ They too note that the purpose of the Appointments Clause is to ensure that principal officers are qualified and to protect the federal government from cronyism.⁹² Constrained Power Theory advocates, however, claim that the Founders relied on these concerns to create a senatorial *check* on what was fundamentally a *presidential* power.⁹³

The scholars point to, among others, the statements of Nathaniel Gorham.⁹⁴ Opposing Senate control of the appointment power, Gorham argued that the Senate was "too numerous, and too little personally responsible, to ensure a good choice."⁹⁵ Fearing that the Senate's capacity for "intrigue and cabal" would compromise the nomination and appointment of principal officers, he, along with Wilson and Morris, argued for executive control of the appointment power.⁹⁶ Gorham believed that executive control of the nomination and appointment powers would be superior because the President would "be responsible, in point of character at least," and he would "be careful to look through all the

⁸⁹ *Id.*

⁹⁰ Crocker, *supra* note 10.

⁹¹ Eastman, *supra* note 12, at 642–43; McGinnis, *supra* note 11, at 646; Crocker, *supra* note 10; Kinkopf, *supra* note 10.

⁹² Eastman, *supra* note 12, at 642; Senator 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, 202 (1987); Wm. Grayson Lambert, Note, The Real Debate over the Senate's Role in the Confirmation Process, 61 Duke L.J. 1283, 1303–04 (2012).

⁹³ See Eastman, *supra* note 12, at 635–36, 642–43.

⁹⁴ See *id.* at 640–41.

⁹⁵ *Id.* at 641 (quoting 2 The Records of the Federal Convention of 1787, at 41 (Max Farrand ed., 1911)) (quotation marks omitted).

⁹⁶ *Id.* (quoting 2 The Records of the Federal Convention of 1787, *supra* note 95, at 42).

States for proper characters.”⁹⁷ Furthermore, he contended that “[t]he Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone.”⁹⁸

Critics made Gorham and his supporters aware of the risk that the President, like the Senate, “would insensibly form local [and] personal attachments . . . that would deprive equal merit elsewhere, of an equal chance of promotion.”⁹⁹ Gorham, however, believed that presidential appointment power with advice and consent of the Senate would be sufficient in light of that arrangement’s success in Massachusetts.¹⁰⁰ Morris agreed, stating that Gorham’s advice and consent formulation would combine “responsibility” from presidential control with the “security” of a check by the Senate.¹⁰¹

Alexander Hamilton, these scholars note, agreed that the advice and consent provision was designed to address these concerns in this manner.¹⁰² In *Federalist 76*, Hamilton declares that the purpose of the advice and consent provision is to prevent the President from appointing principal officers out of partisan allegiance or as patronage; he believed it “would be an excellent check upon a spirit of favoritism in the president” because the President would be afraid to bring forward unmeritorious candidates for fear of public disapproval.¹⁰³ Moreover, Hamilton seems to have made clear that the powers to nominate and to appoint are both presidential:

In the act of nomination, [the President’s] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsi-

⁹⁷ Id. (quoting 2 The Records of the Federal Convention of 1787, supra note 95, at 42) (first quotation mark omitted).

⁹⁸ Id. at 641–42 (alteration in original) (quoting 2 The Records of the Federal Convention of 1787, supra note 95, at 43).

⁹⁹ Id. at 641 (quoting 2 The Records of the Federal Convention of 1787, supra note 95, at 42).

¹⁰⁰ Id. at 641–43.

¹⁰¹ Id. at 643 (quoting 2 The Records of the Federal Convention of 1787, supra note 95, at 539).

¹⁰² See id. at 644–45 (“Note the very limited role that the Senate serves in Hamilton’s view—which, of course, echoes the views expressed at the Constitutional Convention by both those who defended and those who opposed giving the appointment power to the President. In the founders’ view, the Senate acts as a check on the President’s ability to fill offices with his own friends and family members rather than qualified nominees.”).

¹⁰³ The Federalist No. 76, supra note 49, at 457 (Alexander Hamilton).

bility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing.¹⁰⁴

Madison agreed that the provision delegates the appointment power to the President and entrusts the Senate to *mitigate* any potential abuse of that power. Madison initially advocated for exclusive Senate control, and, in part due to his support, the Convention vested the appointment power in the Senate alone on June 19, 1787.¹⁰⁵ Madison subsequently changed his position, however, and actively sought to restore the appointment power to the President.¹⁰⁶ On July 18, he proposed an amendment giving the power to appoint to the President, but subject to a two-thirds Senate veto within a specified time frame, which was rejected by the Convention.¹⁰⁷ Ultimately, Madison supported Gorham's amendment because he believed the provision and the "'responsibility-security' language" that Morris used to explain it comported exactly with Madison's desire, as reflected in his proposals, for a presidential appointment power subject to a senatorial check to prevent cronyism.¹⁰⁸

Other delegates agreed with Hamilton, Gorham, and Madison's views, which supports the notion that their views were representative of

¹⁰⁴ Eastman, *supra* note 12, at 644 (alterations in original) (quoting *The Federalist* No. 76, at 482 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)); see also McGinnis, *supra* note 11, at 642 (describing Hamilton's defense of "presidential nomination and public confirmation" in contrast to an "appointments process by a multimember council").

¹⁰⁵ Lambert, *supra* note 92, at 1300.

¹⁰⁶ See McGinnis, *supra* note 11, at 640–41, 641 n.34 (suggesting that Madison's support for Senate control of the appointment power prior to debate over Gorham's proposal indicates that he truly wanted some executive authority over appointments all along).

¹⁰⁷ Lambert, *supra* note 92, at 1300–01.

¹⁰⁸ McGinnis, *supra* note 11, at 639 ("Gouverneur Morris described the advantages of this multistage process: '[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.'" (quoting 2 *The Records of the Federal Convention of 1787*, *supra* note 47, at 539)); see also *id.* at 641 ("Madison claimed that it would 'unite the advantage of responsibility in the Executive with the security afforded in the [Senate] against any incautious or corrupt nomination by the Executive.' . . . Thus, this history shows that the 'responsibility-security' language did not originate as a slogan of those advocating a larger role for the Senate in the appointments process. Nor did it evolve as a particular description of the advice and consent requirement. Quite to the contrary, this idea was offered by those who wanted to vest the appointment in the Executive with the Senate serving as a mere check against 'incautious or corrupt nomination.'" (emphasis omitted) (quoting 2 *The Records of the Federal Convention of 1787*, *supra* note 47, at 42–43)).

the Convention. George Mason, for example, stated, “Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive [and] Senate, the appointment was substantially vested in the former alone.”¹⁰⁹ Mason’s comments are especially illuminating because he was an advocate of congressional control over appointments.¹¹⁰ James Iredell similarly noted, “As to offices, the Senate has no other influence but a restraint on improper appointments This, in effect, is but a restriction on the President.”¹¹¹ Iredell also believed that the Senate has a duty to act upon nominations, stating: “The President proposes such a man for such an office. The Senate has to consider upon it. If they think him improper, the President must nominate another”¹¹²

Constrained Power Theory advocates, therefore, claim that because the advice and consent provision was designed primarily to prevent presidential cronyism, the Founders only needed (and intended) to give the Senate the authority to consider and confirm or reject all individual nominees, not a discretionary *power* to refuse to act on all nominations.¹¹³ Moreover, they contend, based on statements by the Founders, the provision creates a procedure to prevent the President from abusing his or her appointment power that is automatically triggered whenever the President exercises power to nominate. At a minimum, these statements indicate that the delegates believed the Senate is obligated to act upon all nominations.

¹⁰⁹ McGinnis, *supra* note 11, at 657 (quoting 2 The Records of the Federal Convention of 1787, *supra* note 47, at 83).

¹¹⁰ Eastman, *supra* note 12, at 641; McGinnis, *supra* note 11, at 643–44.

¹¹¹ Eastman, *supra* note 12, at 646 (quoting James Iredell, Debate in the North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 The Founders’ Constitution 102 (Philip B. Kurland & Ralph Lerner eds., 1987)).

¹¹² McGinnis, *supra* note 11, at 642–43 (quoting 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 134 (Jonathan Elliot ed., 1941)); Kinkopf, *supra* note 10.

¹¹³ Eastman, *supra* note 12, at 643–44.

2. *The Constitution's Text*

Other Constrained Power Theory advocates contend that the text of Article II, Section 2, compels the same interpretation.¹¹⁴ First, these scholars note that the powers to nominate and appoint are given to the President because Article II, Section 2, states, “[he] shall nominate, and . . . [he] shall appoint.”¹¹⁵ Thus, both powers are granted to the President as a matter of grammar, and his or her appointment power is merely constrained by the Senate’s reactionary advice and consent check.¹¹⁶

Second, Constrained Power Theory advocates assert that the text of Article II, Section 2, provides the President a structural advantage in the appointment process by indicating that the appointment power is a presidential power and that the advice and consent provision is just a constraint on that power.¹¹⁷ The Senate has no authority over whom the President nominates.¹¹⁸ If the Senate and the President share the appointment power, it is odd that the Senate has no role in nominating principal officers while the President is involved in both nominating and appointing them. Moreover, the President’s ability to make nominations is unlimited because he or she can continue to nominate candidates until one of them is confirmed.¹¹⁹ Thus, the President is the proactive force behind each and every appointment, and the Senate is merely the reactive force.¹²⁰ As such, the better interpretation is that the Senate’s role is to confirm or reject whomever the President nominates, not to block the President’s unquestionable right to make nominations through indiscriminate inaction.¹²¹

¹¹⁴ See *id.* at 640; McGinnis, *supra* note 11, at 638–46, 652–53; Lawyers Letter, *supra* note 87; Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky); Crocker, *supra* note 10; Minow & Tacha, *supra* note 10.

¹¹⁵ See Eastman, *supra* note 12, at 640.

¹¹⁶ *Id.*

¹¹⁷ See McGinnis, *supra* note 11, at 655–57.

¹¹⁸ *Id.* at 656–57.

¹¹⁹ *Id.* at 656.

¹²⁰ *Id.* at 657 (“[T]he President has the initiative of choice in the appointment of Supreme Court Justices . . .”).

¹²¹ Cf. *id.* at 653–55 (arguing that advice and consent is a check on presidential abuse of the nomination power and the Senate has no role in the nomination power; that the Senate was only given the power of rejection, which was only to be exercised for “special and strong reasons”; and that rejection is conceived as an affirmative action, as evidenced by the

Third, some proponents of the Constrained Power Theory argue that Article II, Section 2, requires the Senate to act because it obliges the President to nominate and appoint principal officers.¹²² Article II, Section 2, states that “he *shall* nominate, and by and with the Advice and Consent of the Senate, *shall* appoint.”¹²³ The word “shall,” they contend, creates an obligation because “shall” implies a command.¹²⁴ If the Senate could refuse to act on a nominee, however, then the Senate would not have an obligation to consent, ever.¹²⁵ How, then, they argue, could the President fulfill his or her duty?¹²⁶ Such an interpretation would be incompatible with the textual obligations imposed on the President. By necessity, therefore, the President’s duty to appoint creates an obligation on the Senate to consent to or reject his or her nominees.¹²⁷

3. *The Senate’s Long-Standing Practice*

Some of these scholars also note that long-standing Senate practice supports their position. They claim that such practice is relevant because long-standing government practice informs the interpretation of the Constitution.¹²⁸ They indicate that separation of powers is implicated because the Senate’s refusal to act upon a Supreme Court nomination profoundly hinders the ability of the President to appoint Supreme Court nominees and the Supreme Court’s ability to function.¹²⁹ Accordingly, what the Constitution allows the Senate to do in response to a Supreme Court nomination is, in part, shaped by the long-standing practice between the Senate and the President in applying the Appointments Clause to Supreme Court nominees.¹³⁰

example of the Senate’s vote to reject John Rutledge’s nomination (quoting *The Federalist* No. 76, *supra* note 49, at 457 (Alexander Hamilton)).

¹²² See Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky); Crocker, *supra* note 10.

¹²³ U.S. Const. art. II, § 2, cl. 2 (emphasis added).

¹²⁴ See Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky); Crocker, *supra* note 10.

¹²⁵ Chemerinsky & Ramsey, *supra* note 9.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*; see also Greene, *supra* note 10 (arguing that courts must interpret constitutional standards, such as the advice and consent provision, in light of past practice).

¹²⁹ See Eastman, *supra* note 12, at 639; Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky).

¹³⁰ Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky).

To date, the Senate has confirmed twenty-one of the twenty-four Supreme Court candidates nominated in the final year of a President's term.¹³¹ Moreover, the Senate has considered every Supreme Court nominee since the end of the nineteenth century, and it "has never refused to consider the Supreme Court nominee of a popularly elected president."¹³² Long-standing Senate practice, therefore, is to vote on Supreme Court nominees, regardless of the year in which they are nominated.¹³³ Thus, Constrained Power Theory advocates assert that the Appointments Clause should be interpreted in accordance with this practice and in a manner that requires the Senate to act.¹³⁴

In conclusion, as applied to Garland, the Constrained Power Theory argues that the Senate was required to exercise its advice and consent check. The Senate did not need to confirm him, but it was required to act on his nomination in a constitutionally sufficient manner. Thus, according to decades of Senate practice, Garland was entitled to public hearings and a floor vote, or, at the very least, the opportunity for a floor vote.

II. IN DEFENSE OF THE CONSTRAINED POWER THEORY

While both theories offer compelling arguments, the Constrained Power Theory is the superior interpretation of the Appointments Clause. The Constrained Power Theory more consistently comports with the Founders' purpose for and underlying premises of the Appointments Clause, the Constitution's text, principles of checks and balances and of separation of powers, and the Senate's discretion to make its own rules and its long-standing practice than does the Joint Power Theory. It also avoids the troubling consequences that the Joint Power Theory would justify, namely, the ability of the Senate to refuse to act on all nominations throughout the President's term.¹³⁵ This Part will elaborate on these arguments, and, since the Constrained Power Theory is underdeveloped in some areas, it will present a few additional ones.

¹³¹ *Id.*

¹³² Greene, *supra* note 10.

¹³³ *Id.*

¹³⁴ Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky); Greene, *supra* note 10.

¹³⁵ Chemerinsky has raised this point. See Chemerinsky & Ramsey, *supra* note 9.

A. Consistent with the Founders' Purpose for the Advice and Consent Provision

The Constrained Power Theory explains “advice” and “consent” in a manner more consistent with the Founders’ understanding than does the Joint Power Theory. The latter theory purports to explain both advice and consent but, in reality, only addresses consent. This is problematic because “the constitutional text and its historical origins indicate that ‘Advice’ was intended to be more than a redundant synonym for ‘Consent.’”¹³⁶ Indeed, advice is the first of two checks upon the President’s power to appoint, a fact the Constrained Power Theory captures more fully.

The purpose and function of “consent” in the advice and consent provision are relatively clear: Whether a presidential or joint power, the Senate must “consent” to a nominee for an appointment to succeed. The role of “advice,” however, is much less apparent because it too applies to appointments, not nominations.¹³⁷ Although advice would have clear relevance in the context of nominations, what advice is needed once the President has already chosen a nominee?

The answer to this question lies in the Founders’ two fundamental premises about the appointment process as interpreted by the Constrained Power Theory.¹³⁸ First, the President is more capable than the Senate of choosing meritocratic candidates because the Senate is more likely to succumb to favoritism.¹³⁹ Second, the President is also (but to a much lesser extent than the Senate) susceptible to favoritism, so his or her power to appoint must be constrained.¹⁴⁰ Thus, if the Senate were to advise the President about nominations, it would corrupt the process by providing self-serving counsel, a fate it could not escape given its penchant for “cabal and intrigue.”¹⁴¹ Once a nominee is picked, however, the Senate’s incentive and ability to pursue its own agenda is significant-

¹³⁶ Monaghan, *supra* note 13, at 1205.

¹³⁷ McGinnis, *supra* note 11, at 635.

¹³⁸ See *supra* Subsection I.B.1.

¹³⁹ McGinnis, *supra* note 11, at 636, 648.

¹⁴⁰ See Monaghan, *supra* note 13, at 1205 & n.15.

¹⁴¹ McGinnis, *supra* note 11, at 642 (quoting *The Federalist* No. 77, *supra* note 49, at 462 (Alexander Hamilton)).

ly impaired.¹⁴² Its capacity to check any ignoble intentions the President may harbor, however, remains intact. Accordingly, the Senate's advice is attached to the act of appointing, so that the Senate can inform the President of the propriety of his or her nomination before it is given the opportunity to publicly reject an inappropriate candidate.

This is the function the Founders considered "advice" to have. Mason, who was the only Founder to explicitly discuss the role of the Senate's advice, stated, "The Word 'Advice' here clearly relates in the Judgment of the Senate on the Expediency or Inexpediency of the . . . Appointment; . . . otherwise the word *Advice* has no Meaning at all"¹⁴³ George Washington put this understanding into practice, beginning with his first nominee, William Short.¹⁴⁴ After nominating Short, "President Washington sent the Senate this message: 'I nominate William Short, Esquire, and request your advice on the propriety of appointing him.'"¹⁴⁵

Although Hamilton did not discuss the meaning of advice in the *Federalist Papers*, his articulation of the advice and consent provision is consistent with Mason and Washington's understanding of it. In *Federalist 76*, he wrote:

The danger to [the President's] own reputation, and . . . to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity *to the observation of a body whose opinion would have great weight in forming that of the public* could not fail to operate as a barrier to the one and to the other.¹⁴⁶

Here, Hamilton argues that the Senate's capability to determine that the President has made an inappropriate choice and shape public opinion of the propriety of his choice will discourage the President from making improper nominations. By advising the President about his or her nomi-

¹⁴² The Federalist No. 76, supra note 49, at 457 (Alexander Hamilton) ("The Senate could not be tempted by the preference they might feel to another to reject the one proposed . . .").

¹⁴³ Gorjanc, supra note 11, at 1459 (quoting Letter from George Mason to James Monroe, in 3 The Papers of George Mason 1255 (Robert A. Rutland ed., 1970)).

¹⁴⁴ McGinnis, supra note 11, at 645; Monaghan, supra note 13, at 1205.

¹⁴⁵ McGinnis, supra note 11, at 645 (quoting 1 Journal of the Executive Proceedings of the Senate of the United States of America 6 (1828), reprinted in 2 Documentary History of the First Federal Congress of the United States of America, 1789–1791, at 8 (Linda Grant De Pauw ed., 1974)) (emphasis omitted).

¹⁴⁶ The Federalist No. 76, supra note 49, at 458 (Alexander Hamilton) (emphasis added).

nation *before* it chooses to publicly confirm or reject the nominee, the Senate can leverage this capability and the President's corresponding fear to persuade him or her to retract an inexpedient choice. If the President heeds the Senate's advice, he or she can re-nominate a qualified individual with the expectation of confirmation. If he or she is defiant in his or her poor choice, however, the Senate will reject the nominee, publicly shaming the President for this abuse of power.¹⁴⁷ The Senate can thus fulfill its function of preventing abuse. This conception of consent is also consistent with Mason's understanding: "[T]he Word '*Consent*' [applies] to [the Senate's] Approbation or Disapprobation of the Person nominated"¹⁴⁸ Far from a redundancy or turn of phrase, the Senate's advice works in tandem with its consent to prevent the President from abusing his or her appointment power.

In contrast to this understanding of the Appointments Clause, advice plays no meaningful role in the appointment process under the Joint Power Theory because, according to that theory, the appointment power consists entirely of a combination of the *President's power to nominate* and the *Senate's power to consent*. That view renders the Senate's advice superfluous, which violates well-known rules of construction¹⁴⁹ and runs counter to the Founders' explicit concerns and descriptions of the Clause.

A few Joint Power Theory advocates recognize that advice is, or at least may be, independent from consent and have endeavored to explain its function. Professor Michael Ramsey, for example, believes it is "plausible" that the Senate has an "implied duty" to advise the President on appointments.¹⁵⁰ Such advice could be specific to an individual nominee or an opinion about the propriety of making nominations in general for certain positions in the current political climate.¹⁵¹ Any such "duty," however, is informal. So informal, in fact, that the Majority Leader—or presumably, the chair of the relevant committee—may complete it by

¹⁴⁷ Cf. Kinkopf, *supra* note 11 (explaining that nomination and consideration by the Senate would be public affairs with political consequences for poor decisions).

¹⁴⁸ Letter from George Mason to James Monroe, *in* 3 *The Papers of George Mason* 1254, 1255 (Robert A. Rutland ed., 1970).

¹⁴⁹ Caleb Nelson, *Statutory Interpretation* 88 (2011) (describing the presumption against superfluity used in statutory construction).

¹⁵⁰ Ramsey, Letter, *supra* note 9.

¹⁵¹ *Id.*

publicly announcing the Senate's advice.¹⁵² Accordingly, he contends that the 114th Senate met its duty because the Majority Leader and the Judiciary Committee Chair publicly announced that President Obama should not attempt to appoint a Supreme Court Justice because of the 2016 presidential election.¹⁵³

Ramsey's interpretation, however, is unconvincing for two reasons. First, his interpretation still makes advice indistinguishable from consent, like the Joint Power Theory generally. If the Senate's advice can be a public statement that the President should not make a nomination and if the Senate is free to ignore any nomination the President makes (as he contends it can), then the Senate's advice is indistinguishable from its refusal to act on nominations and its effective rejection of nominees. Under Ramsey's view, advice could only be distinct from consent if the Senate had to act on a nomination because the Senate could advise the President not to make a nomination and then reject his or her nominee, when forced to consider that nominee, after the President ignores its advice. Yet, Ramsey and other Joint Power Theory advocates contend that consent is discretionary. Moreover, his conception gives advice an overlapping function with consent: public shaming. In his view, the Senate's advice can serve to publicly shame the President for making an improper nomination or a nomination at an inappropriate time. Part of the purpose of consent, however, is to publicly shame the President for making an inappropriate nomination. Only if advice is private can it serve a distinct function from consent.

Second, Professor Ramsey argues that advice need not be individualized. Rather, the Senate can give general advice to the President about the propriety of exercising his or her authority to make nominations in the current political climate. This unlimited scope, however, runs contrary to the text of the Appointments Clause, which attaches the duty of advice and consent to individual appointments (as will be discussed in Section II.B). The Senate, therefore, cannot simply lecture the President about the political inconvenience caused by his or her decision to make a nomination and call it "advice."

Professor Cass Sunstein, Professor David Strauss, and Laura Gorjanc have also argued that advice is a Senate power distinct from consent.

¹⁵² *Id.*

¹⁵³ *See id.*

They contend that the Senate exercises its authority to give advice by informing the President of the qualities it wants to see in nominees and even by recommending specific individuals it would confirm prior to the President's nomination.¹⁵⁴ "The advantage" of this system, they argue, "is that . . . the President . . . can gauge ahead of time whether his nominee will survive the Senate's consent process."¹⁵⁵ Thus, advice and consent can be discretionary Senate powers with separate and distinct purposes.

Their interpretation, however, like Ramsey's, is flawed for two reasons. First, as Professor John McGinnis has pointed out, the advice and consent provision modifies the *appointment* power, not the *nomination* power.¹⁵⁶ As a matter of grammar, the Senate's power (and duty) to provide advice does not arise prior to the nomination.¹⁵⁷ Second, their concept of advice would defeat the Founders' stated purpose for giving the President the authority to nominate and appoint, whether shared or not: avoiding cabal and intrigue. As previously discussed, the Founders did not delegate to the Senate the sole authority to nominate or appoint principal officers because they were afraid that Senators would negotiate compromises to engineer the appointment of their allies. If the Senate advises the President on nominations before he makes them, informing him of whom it will and will not confirm, the President and the Senate will engage in the very intrigue and compromise the Founders attempted to avoid. Only by advising the President on the suitability of his choice *after* he has made it can the Senate chastise impropriety without resorting to public condemnation through a formal rejection.

B. Consistent with the Constitution's Text

The Constrained Power Theory is more consistent with the Constitution's text than the Joint Power Theory. The Constrained Power Theory identifies the advice and consent provision as a check on the President's appointment power, meaning that the Senate has a duty to act on a nomination. Part of this theory's implicit justification for this conclusion is

¹⁵⁴ Strauss & Sunstein, *supra* note 13, at 1495; Gorjanc, *supra* note 11, at 1460.

¹⁵⁵ Gorjanc, *supra* note 11, at 1460; see also Strauss & Sunstein, *supra* note 13, at 1495 (explaining that "the advisory function makes consent more likely").

¹⁵⁶ McGinnis, *supra* note 11, at 638–39.

¹⁵⁷ *Id.*

that the advice and consent provision refers to *the act of appointing a particular nominee* rather than to the power to appoint itself. This interpretation is the best reading of the provision because it recognizes that the provision's purpose is to prevent the President from abusing his or her power by appointing a specific individual who is unqualified. Blocking the President's ability to nominate and appoint principal officers does not serve this purpose; it simply undermines his or her constitutionally endowed authority.¹⁵⁸ This point becomes clearer when the advice and consent provision is compared with similar clauses, such as the Treaty Clause and the Recess Appointments Clause.

The Treaty Clause states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."¹⁵⁹ In this Clause, the Senate's "advice and consent" role is attached to *the President's power to make treaties* rather than to the specific treaties themselves. The two-thirds concurrence requirement, however, refers to *making individual treaties*. Any interpretation that considers consent and concurrence both to refer to individual treaties would render the Clause confusing and unnecessarily repetitive. Thus, rather than serving as merely superfluous language, consent is properly considered distinct from concurrence; the former applies to the President's power to make treaties, and the latter refers to the binding authority of individual treaties themselves.

The Appointments Clause, however, does not have a similarly bifurcated structure separating the appointment power in general from the appointment of a nominee in particular, applying "advice and consent" only to the former. Unlike the Treaty Clause, there is no distinct mention of the President's general power to appoint. The Clause solely states that the President appoints principal officers, and must do so with the advice and consent of the Senate. This syntax suggests that the Senate advises on and consents to an individual nominee's appointment, not to the President's power to appoint, just as the concurrence requirement is exercised with respect to a specific treaty.

¹⁵⁸ Admittedly, the Senate could reject every individual nominee if the President only nominated inappropriate nominees. If that were the case, the Senate's justified and individualized rejections would not be tantamount to a categorical rejection of nominees for a specific position.

¹⁵⁹ U.S. Const. art. II, § 2, cl. 2.

When the Recess Appointments Clause is also considered, the Senate's obligation to act upon each nomination becomes even clearer. Pursuant to this Clause, the President may unilaterally appoint principal officers when the Senate is not in session.¹⁶⁰ While the Senate must advise and consent once it is back in session for the appointees to become permanent officers, *the President* has still appointed the officers. These appointees exercise the powers of and are responsible for the duties of the roles to which they have been appointed; they are just eventually subject to the Senate's confirmation or rejection. Therefore, the Recess Appointments Clause demonstrates that the Constitution considers the power to *appoint* to be vested in the President, with the Senate able to check this power by eventually rejecting the President's choice.

The Senate, moreover, does not need to have a share of the appointment power to check the President and prevent abuse—a fact also demonstrated by the Recess Appointments Clause. As discussed above, the Recess Appointments Clause anticipates presidential authority to appoint officers, at least during a recess. The purpose of the Clause is to enable the President to maintain a well-staffed federal government since the Senate is unable to confirm nominees while it is in recess.¹⁶¹ However, to prevent a presidential run-around of the advice and consent provision, the President's unilateral power to appoint is temporary.¹⁶² Additionally, any recess appointment is temporary, subject to the Senate's advice and consent process or expiration.¹⁶³ These limits on the recess appointment power demonstrate that, even in situations where the President has affirmatively appointed an officer who is presently fulfilling the duties of the office, the Constitution considers *eventual* advice and consent by the Senate to be a constitutionally adequate limit on the President's appointment authority. In the Appointments Clause setting, where the President has not yet appointed an officer, it would seem that the Constitution would similarly consider a mandatory advice and consent "check" to be sufficient.

Lastly, the argument that the appointment power is a joint power because it is not directly modified by the phrase "shall have power" is un-

¹⁶⁰ *Id.* cl. 3.

¹⁶¹ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559, 2575 (2014).

¹⁶² See *id.* at 2558–59.

¹⁶³ U.S. Const. art. II, § 2, cl. 3.

availing because other solely executive or legislative powers do not contain that specific language.¹⁶⁴ Article II, Section 2, for example, states, “[t]he President shall be Commander in Chief.”¹⁶⁵ Article I, Section 5, states that “[e]ach House may . . . with the Concurrence of two thirds, expel a Member.”¹⁶⁶ Similarly, Article V empowers Congress and the states to amend the Constitution.¹⁶⁷ All three of these powers are delegated to the President, Congress, or one of Congress’s chambers, but none of them include the phrase “shall have power.”

C. Consistent with Checks and Balances

The Constrained Power Theory is also superior to the Joint Power Theory because it is more consistent with the spirit of checks and balances. In *Federalist 10*, Madison explains that one of the purposes of checks and balances is to counteract the “mortal disease” of political factions, that is, partisan politics.¹⁶⁸ Hamilton agreed, and he applied this principle to the Appointments Clause directly.¹⁶⁹ In *Federalist 76*, he stated that the Senate should only reject a nominee for “special and strong reasons.”¹⁷⁰ Partisanship was not among the reasons he considered “special and strong.”¹⁷¹

The categorical rejection of the President’s ability to appoint Supreme Court Justices in an election year is likely a purely partisan act. A Senate majority would have a significant incentive to refuse to act on a nomination in order to hold out for a more preferable nominee chosen by the majority’s favored presidential candidate, or at a minimum, for a larger majority that would allow it to pressure the President to make more favorable nominations. The Constrained Power Theory is thus more consistent with checks and balances, as understood by the Founders, because it recognizes that advice and consent are meant to prevent the President from making improper appointments, not from making ap-

¹⁶⁴ See *supra* Subsection I.A.2.

¹⁶⁵ U.S. Const. art. II, § 2, cl. 1.

¹⁶⁶ *Id.* art. I, § 5, cl. 2.

¹⁶⁷ *Id.* art. V.

¹⁶⁸ Crocker, *supra* note 10 (quoting *The Federalist No. 10*, *supra* note 49, at 77 (James Madison)).

¹⁶⁹ McGinnis, *supra* note 11, at 653–54.

¹⁷⁰ *Id.* at 653 (quoting *The Federalist No. 76*, *supra* note 49, at 457 (Alexander Hamilton)).

¹⁷¹ *Id.*

pointments when it is politically inexpedient for a majority of Senators. It only permits the Senate to reject nominees individually, making it much more difficult for the Senate to use its advice and consent authority for partisan purposes. The Joint Power Theory, on the other hand, empowers the Senate to block all nominees, thus elevating politics over accountability.

Assuming that this problem with the Joint Power Theory could be overcome, Professor Vikram David Amar suggests that it is actually the Constrained Power Theory that contradicts the nature of checks and balances.¹⁷² He implies that it does so by mandating that the Senate affirmatively reject nominees individually rather than allowing it to reject nominees by categorically ignoring them.¹⁷³ According to Amar, the Constitution, in various circumstances, allows one branch to block the action of another through inaction.¹⁷⁴ Congress, for example, has the power to legislate but can only exercise that power if both chambers affirmatively consent to the same legislation.¹⁷⁵ Accordingly, the Senate and the House of Representatives can block each other's ability to legislate simply by refusing to vote on the other chamber's bills.¹⁷⁶ Similarly, if Congress wants to amend the Constitution, both chambers must affirmatively consent, as must three-fourths of the states. If either chamber or more than one-fourth of the states refuses to act, the proposed amendment fails.¹⁷⁷ Amar also points to the Treaty Clause,¹⁷⁸ which empowers the President to make treaties but only with the advice and consent of two-thirds of the Senate.¹⁷⁹ He argues the Clause does not require the Senate to give advice and consent or to vote on a particular treaty.¹⁸⁰

¹⁷² See Amar, *supra* note 9.

¹⁷³ See *id.* Ramsey also argues that Senate inaction reflects the Senate's consideration and rejection of the President's nomination. Chemerinsky & Ramsey, *supra* note 9.

¹⁷⁴ See Amar, *supra* note 9 (citing the bicameral process, the ratification process for constitutional amendments, and the process for senatorial advice and consent to treaties as examples).

¹⁷⁵ See *id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ U.S. Const. art. II, § 2, cl. 2.

¹⁸⁰ Amar, *supra* note 9.

Inaction, therefore, can check the President's ability to make treaties.¹⁸¹ Requiring these entities to act, in Amar's view, would restrict their constitutional right to block other entities' actions through inaction and, accordingly, violate checks and balances.

The problem with Amar's argument is that his examples are not checks; rather, they are most properly considered joint powers. Joint powers serve a different function than checks; thus, they must be treated differently for purposes of checks and balances. As suggested throughout this Note, a "power" is an action that a branch (or political entity such as a state or a chamber of Congress) is allowed to exercise pursuant to its discretion, whereas a "check" is an action by one branch (or entity) of government that is solely designed to limit the exercise of power by another. For example, the President's authority to "require the Opinion, in writing, of the principal Officer[s]" or to "grant Reprieves and Pardons" are powers, not checks, because they are discretionary acts of authority, and they are not solely designed to limit another entity's authority.¹⁸² Similarly, Congress has the power to declare war and to coin money, which are not checks either.¹⁸³ The President's veto, on the other hand, is a check because it is solely designed to prevent Congress from exercising its discretion to enact legislation. A joint power, therefore, is a power that can only be exercised by two branches (or other entities) in concert.

In light of these distinctions, Amar's examples are not checks; they are joint powers. Congress has the *power* to legislate, because it has the discretion to do so and legislation is not designed for the sole purpose of checking the authority of another entity. Since Congress is a bicameral institution, its power to legislate is shared by its constituent chambers: the House of Representatives and the Senate. Only by exercising the power together can the chambers of Congress legislate, since neither entity possesses the power to legislate on its own. Similarly, the authority to amend the Constitution is a power, not a check, because it is not designed solely to limit the authority of another entity. That power is a joint one because neither Congress nor the states have the authority to

¹⁸¹ *Id.* This argument, implicitly, raises another argument: Since treaties and appointments are both conditioned on the Senate's advice and consent, the latter should not be treated differently than the former.

¹⁸² See U.S. Const. art. II, § 2, cl. 1.

¹⁸³ *Id.* art. I, § 8, cls. 5, 11.

unilaterally enact amendments, absent a constitutional convention.¹⁸⁴ Moreover, the authority to make treaties is a power, not a check, because it is also not designed solely to limit another entity's authority. As discussed in Section II.B, the Senate's "advice and consent" role is attached to the President's power to make treaties (rather than to the specific treaties themselves). Consequently, the President and the Senate share the power.

Unlike the above examples, advice and consent authority in the appointment context is best interpreted as a check, as the Constrained Power Theory recognizes, because it is designed solely to limit the *President's independent power* to appoint officers. Its purpose and function is to prevent the threat of cronyism made possible by the *President's* exercise of power. In Amar's examples, the relevant branches do not possess their powers independently; rather, they must act in concert to exercise them. Accordingly, inaction in these settings is permissible. In the case of constitutional checks like the Appointments Clause, however, action should be required. Forcing the checking branch to act enables it to prevent the checked branch from *abusing* its power without preventing it from *using* that power at all. If the checking branch can categorically refuse to act, it can obstruct the checked branch even if that branch has not acted improperly, thus broadening the check beyond its purpose. Accordingly, mandatory action in the Appointments Clause context is necessary because it prevents the President from abusing his or her power, not from using it at all.

Amar counters this point by contrasting his examples with the veto to prove that inaction is the default method to check the power of other entities. The Veto Clause, he points out, explicitly requires the President to affirmatively act to check Congress's legislative power.¹⁸⁵ If the President does not act, a bill becomes law.¹⁸⁶ Therefore, Amar concludes, the Founders knew how to specify when action is required to check the power of another entity, and they did not so specify in the Appointments Clause.¹⁸⁷

¹⁸⁴ Id. art. V. It is worth noting that the states can also exercise this power independently from Congress. Article V allows states to call a constitutional convention and ratify proposed amendments arising from that convention. Id.

¹⁸⁵ Amar, *supra* note 9.

¹⁸⁶ Id.

¹⁸⁷ Id.

Amar's reliance on the veto is misplaced, however, because the veto is a discretionary check by necessity. If the President could passively veto bills, no bill passed by Congress could become law unless the President signed it. Such an arrangement would be profoundly unworkable because it would limit Congress's power to legislate to too great an extent, and would disrupt the balance of power between branches far more than do other constitutional checks. Thus, while the Founders designed the veto to limit Congress's power to legislate, they had to make the veto a discretionary check to ensure a proper balance of powers between the President and Congress in the legislative context. Accordingly, the fact that the veto is written as a discretionary check that must be affirmatively exercised does not suggest that all checks, including the Senate's advice and consent on nominations, are discretionary.

D. Consistent with Separation of Powers

As noted above, Joint Power Theory proponents often point to Senate practice as an authority on the meaning of advice and consent.¹⁸⁸ The Constitution, they argue, empowers the Senate to determine its rules of procedure.¹⁸⁹ Absent any explicit requirements for specific powers, all that is required, they claim, is what the Senate prescribes.¹⁹⁰ Since Article II, Section 2, does not state how advice and consent must be given, the Senate may freely devise the rules regarding how they exercise them.¹⁹¹ This understanding of the intersection of government practice and separation of powers is fundamentally flawed, however, for two reasons. First, government practice does not solely determine and cannot define violations of separation of powers, even though it helps inform it. Second, only long-standing government practice informs separation of powers.

¹⁸⁸ Chemerinsky & Ramsey, *supra* note 9 (Ramsey); Somin, *The Constitution*, *supra* note 9; Whelan, *supra* note 9.

¹⁸⁹ Chemerinsky & Ramsey, *supra* note 9 (citing U.S. Const. art. I, § 5) (Ramsey).

¹⁹⁰ *Id.*

¹⁹¹ See, e.g., *id.*

1. Government Practice Informs but Does Not Determine Separation of Powers

The Joint Power Theory implies, correctly, that Senate practice can inform separation of powers in any given case. In *McCulloch v. Maryland*, the Court declared that “the practice of the government, ought to receive a considerable impression” when the balance of the “respective powers of those who are equally the representatives of the people” is challenged.¹⁹² The Court reiterated this position in *The Pocket Veto Case* and *NLRB v. Noel Canning*, stating that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions’ regulating the relationship between Congress and the President.”¹⁹³

Such practice, however, is not dispositive for separation of powers purposes. In *Noel Canning*, for example, the Court explained that “this Court has treated practice as an important interpretive factor” but not as the singular determinate of what separation of powers allows since it is the courts’ duty “in a separation-of-powers case as in any other—‘to say what the law is.’”¹⁹⁴ Moreover, government practice is only accorded “great regard” if the practice is mutually recognized by the branches whose powers are implicated.¹⁹⁵ In *Noel Canning*, the Court stated that in interpreting the Recess Appointments Clause for the first time, “we must hesitate to upset the compromises and working arrangements *that the elected branches of Government themselves have reached.*”¹⁹⁶ Simi-

¹⁹² 17 U.S. (4 Wheat.) 316, 401 (1819).

¹⁹³ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”); cf. *Mistretta v. United States*, 488 U.S. 361, 398–401 (1989) (utilizing long-standing practice in interpreting the Constitution in the separation of powers context).

¹⁹⁴ *Noel Canning*, 134 S. Ct. at 2560 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁹⁵ *The Pocket Veto Case*, 279 U.S. at 689–90; see *Mistretta*, 488 U.S. at 399; *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

¹⁹⁶ *Noel Canning*, 134 S. Ct. at 2560 (emphasis added).

larly, in *Dames & Moore v. Regan*, the Court held that “*congressional acquiescence . . . supports the President’s power to act here.*”¹⁹⁷

This qualification unravels the foundations of the Joint Power Theory advocates’ argument. Unlike recess appointments, whose “frequency suggests that the Senate and President have recognized that [such] appointments can be both necessary and appropriate in certain circumstances,”¹⁹⁸ President Obama did not “acquiesce” to this new arrangement. To the contrary, he repeatedly and publicly called upon the Senate to vote on Garland’s nomination.¹⁹⁹ Far from settling the separation of powers debate, the Senate’s new, unilaterally enacted practice does not satisfy the Court’s test for informing it.

Additionally, and perhaps most importantly, these scholars miss a critical point: Government practice is circumscribed by “fundamental principle[s] of our representative democracy,” such as separation of powers, not the other way around.²⁰⁰ When fundamental constitutional principles are at risk of being undermined by a branch of the government, the Court narrowly construes the scope of that branch’s power and practice.²⁰¹ In *Powell v. McCormack*, for example, the Supreme Court was “compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress’ power to exclude members-elect” because that power conflicted with the “fundamental principle of our representative democracy . . . ‘that the people should choose whom they please to govern them.’”²⁰² Likewise, in the separation of powers context, a particular branch’s general discretion to exercise its powers does not empower it to do so at the expense of the other branches’ authority.²⁰³ If it

¹⁹⁷ 453 U.S. 654, 684 (1981) (emphasis added).

¹⁹⁸ *Noel Canning*, 134 S. Ct. at 2560.

¹⁹⁹ See, e.g., Reena Flores & Emily Schultheis, Obama to GOP Senate on Supreme Court Vacancy: Do Your Job, CBS News (Feb. 24, 2016, 9:29 AM), <http://www.cbsnews.com/news/what-is-obama-looking-for-in-a-supreme-court-nominee/> [https://perma.cc/7ZKR-7FYN]; Obama to Senate: Do Your Duty on Supreme Court Nominee, Reuters (Mar. 19, 2016), <http://www.reuters.com/video/2016/03/19/obama-to-senate-do-your-duty-on-supreme?videoId=367793563> [https://perma.cc/7R52-HGZR].

²⁰⁰ *Powell v. McCormack*, 395 U.S. 486, 547 (1969).

²⁰¹ See *id.*

²⁰² *Id.* (quoting 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathon Elliot ed., 1836)).

²⁰³ See *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (“[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as ‘a self-executing safeguard against the encroachment or aggrandizement of one branch at the

did, separation of powers would be meaningless.²⁰⁴ Indeed, since separation of powers is also a fundamental principle of American government, the Senate's authority to determine its advice and consent power must too be narrowly construed.

The Joint Power Theory is not a narrow interpretation of the advice and consent provision. In fact, it flips Supreme Court precedent by making Senate practice superior to constitutional separation of powers. Under the Joint Power Theory, the Senate can refuse to act on any Supreme Court nomination at any time.²⁰⁵ If, however, as some Constrained Power Theory advocates argue, the President is obligated to nominate and appoint officers, such discretion obstructs his constitutional duty.²⁰⁶ Even if the President is not obligated but is simply empowered to nominate and appoint, then such discretion would render his powers meaningless; the Senate could prevent him from exercising that power in general rather than check his abuse of that power in a specific instance.²⁰⁷ As a result, the Joint Power Theory allows the Senate to create a practice that vitiates both the President's powers to nominate and appoint principal officers and separation of powers more generally.²⁰⁸

The Joint Power Theory also fails to serve as a narrow interpretation of the Appointments Clause, according to some Constrained Power The-

expense of the other.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)); see also *Myers v. United States*, 272 U.S. 52, 161 (1926) (“But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to *infringe the constitutional principle of the separation of governmental powers.*” (emphasis added)), abrogated in part on other grounds by *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–27, 631–32 (1935), as recognized in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 516, 518 (2010) (Breyer, J., dissenting) (“But soon thereafter the Court expressly disapproved most of *Myers'* broad reasoning. See *Humphrey's Executor*, [295 U.S.] at 626–627, overruling in part *Myers*, [272 U.S.]”).

²⁰⁴ See *Morrison*, 487 U.S. at 693.

²⁰⁵ Ramsey concedes this point in his debate with Professor Chemerinsky. Chemerinsky & Ramsey, *supra* note 9.

²⁰⁶ See Minow & Tacha, *supra* note 10; *supra* notes 122–127 and accompanying text.

²⁰⁷ See McGinnis, *supra* note 11, at 635; Kinkopf, *supra* note 10.

²⁰⁸ See Kinkopf, *supra* note 10; cf. Eastman, *supra* note 12, at 643. (“No one argued that the Senate's participation in the process should include second guessing the judicial philosophy of the President's nominees Indeed, such a suggestion was rejected as presenting a dangerous violation of the separation of powers, by allowing the Senate to control the President's choices”).

ory advocates, by allowing the Senate to hinder the ability of the Supreme Court to operate effectively.²⁰⁹ Without a full bench on a permanent basis, these scholars argue, the Court cannot attend to its docket as efficiently, and it will “leav[e] critical matters unresolved.”²¹⁰ While this argument is tenuous when one or two seats are vacant,²¹¹ the Joint Power Theory does empower the Senate to eviscerate the Supreme Court if taken to its logical conclusion. Hypothetically, if the nine Justices died in a plane crash, under the Joint Power Theory, the Senate would not be obliged to act on any of the President’s nominees to replace them. Admittedly, this hypothetical is unlikely, but the underlying separation of powers problem it reveals is important. In fact, some Joint Power Theory proponents acknowledge this flaw and concede that the Senate may not prevent the Supreme Court’s existence.²¹²

The Constrained Power Theory, on the other hand, narrowly interprets the advice and consent provision. It recognizes the President’s power to nominate and appoint as well as the Senate’s authority to check that power by confirming or rejecting any particular nominee. By requiring the Senate to affirmatively confirm or reject each nominee, the Constrained Power Theory ensures that the President may exercise his or her powers and that the Senate may prevent the President from abusing those powers. Furthermore, it makes it profoundly difficult to hinder the functioning of the judicial branch for an extended period of time because consistent publicized rejections of qualified individual nominees would likely eventually turn the tide of public opinion. Accordingly, this narrow construction brings the Senate’s advice and consent practice into alignment with the fundamental constitutional principle of separation of powers, not vice versa.

²⁰⁹ See Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky); Minow & Tacha, *supra* note 10.

²¹⁰ See Minow & Tacha, *supra* note 10.

²¹¹ See Chemerinsky & Ramsey, *supra* note 9 (Ramsey); Feldman, *supra* note 9.

²¹² Professor Henry Monaghan recognizes this danger of the Joint Power Theory: “To be sure, a prolonged impasse over confirmation eventually could threaten the constitutional requirement that there be a Supreme Court.” Monaghan, *supra* note 13, at 1207 n.21. He, like other Joint Power Theory advocates, however, merely dismisses the concern on the grounds of its low probability. *Id.* Ramsey also recognizes and disregards this possibility. Chemerinsky & Ramsey, *supra* note 9.

2. Only Long-Standing Practice Informs Separation of Powers

Even if the Joint Power Theory were a narrow construction of the Senate's authority, the chamber's decision to ignore Supreme Court nominations in presidential election years is irrelevant for constitutional interpretation purposes because government practice must be long standing to inform separation of powers.²¹³ While the Court has not specified the duration that constitutes "long standing," it contemplates years, not months. In *Noel Canning*, for example, the Court cited the following language from *The Pocket Veto Case*: "[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'"²¹⁴ Likewise, in *Dames & Moore*, the Court explained, "[E]ven if the pre-1952 cases [involving the practice of settling claims through executive agreements] should be disregarded, congressional acquiescence in settlement agreements since that time supports the President's power to act here."²¹⁵ The fact that the 114th Senate's current practice has been in operation for a mere year and a half means that it falls quite short of the judicial standard for "long standing."

Indeed, by refusing to act on Garland's nomination, the 114th Senate acted unilaterally and chartered a course that is inconsistent with six decades of established practice.²¹⁶ Given the novelty of the 114th Senate's actions and the sharp disagreement between the President and the Senate over the practice, the Court's deference to government practice cannot justify the Senate's inaction.

E. Consistent with the Senate's Long-Standing Practice

Only practice that is long-standing is relevant in determining the Senate's authority and obligation under the Appointments Clause. The Senate's long-standing practice to conduct hearings and to vote on Supreme

²¹³ See *Noel Canning*, 134 S. Ct. at 2560; *Dames & Moore*, 453 U.S. at 686; *The Pocket Veto Case*, 279 U.S. at 688–90.

²¹⁴ *Noel Canning*, 134 S. Ct. at 2559 (quoting *The Pocket Veto Case*, 279 U.S. at 690).

²¹⁵ *Dames & Moore*, 453 U.S. at 684.

²¹⁶ See *supra* Subsection I.B.3 as well as *infra* Section II.E for further detail regarding the inconsistencies between the 114th Senate's inaction and the Senate's long-standing practice.

Court nominees supports the Constrained Power Theory rather than the Joint Power Theory.

1. Long-Standing Practice of Hearings and a Floor Vote

The modern Supreme Court nomination process began in 1949 when President Harry Truman nominated Tom C. Clark.²¹⁷ Clark's nomination was referred to the Senate Judiciary Committee, which held a confirmation hearing, voted on his nomination, and referred it to the full Senate for a floor vote.²¹⁸ The Senate then voted to confirm him.²¹⁹ Since Clark, eleven Presidents have made thirty-six Supreme Court nominations; the Senate has initiated this process for all but one of them (Harriet Miers).²²⁰ Thirty-two of them were brought to the Senate floor for a vote after the Judiciary Committee completed its process,²²¹ and the Senate has conducted this entire process for thirty-one of them.²²² This consistent history illustrates the Senate's long-standing practice of conducting hearings and voting on Supreme Court nominees.

All five of the nominations that were not voted on by the full Senate are outliers. Justice John Marshall Harlan II's first nomination was not considered because President Eisenhower made the nomination less than one month prior to Congress's adjournment.²²³ Upon re-nominating him in the next session, the Senate conducted the entire process.²²⁴ Chief Justice John Roberts's nomination for an Associate Justice position was not considered,²²⁵ nor was Harriet Miers's nomination, because they were withdrawn before the Senate could proceed with hearings and votes.²²⁶

²¹⁷ See Denis Steven Rutkus & Maureen Bearden, Cong. Research Serv., RL33225, Supreme Court Nominations, 1789 to the Present: Actions by the Senate, the Judiciary Committee, and the President 7 (2012).

²¹⁸ *Id.* at 34.

²¹⁹ *Id.*

²²⁰ *Id.* at 7, 34–40.

²²¹ *Id.*

²²² *Id.*

²²³ See *id.* at 10 n.32.

²²⁴ *Id.*

²²⁵ Peter Baker, Bush Nominates Roberts as Chief Justice, Wash. Post (Sept. 6, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090500173.html> [https://perma.cc/6URT-SFTU].

²²⁶ Bush Picks White House Counsel for Supreme Court, CNN (Oct. 4, 2005, 8:07 AM), <http://www.cnn.com/2005/POLITICS/10/03/scotus.miers/> [https://perma.cc/REN9-RMUM]; see also Elisabeth Bumiller & Carl Hulse, Bush's Court Choice Ends Bid; Conservatives At-

Upon being re-nominated for the Chief Justice position, the Senate conducted its entire confirmation process for John Roberts.²²⁷ Miers, ultimately, did not proceed through the entire process, but not because the Senate refused to act.²²⁸

The other two nominations that did not receive votes from the full Senate—Justice Abe Fortas and Judge Homer Thornberry—were intertwined in the same unique event. In 1968, President Johnson nominated Associate Justice Fortas to be Chief Justice and Homer Thornberry to take the seat that Fortas would vacate.²²⁹ The Judiciary Committee held hearings for Justice Fortas's nomination and reported him favorably to the full Senate after conducting public hearings and eliciting his testimony.²³⁰ It became public that Justice Fortas had been advising President Johnson on political matters while serving as an Associate Justice and that he had accepted \$15,000 for speaking engagements at American University.²³¹ Outraged, forty-three Senators voted against a cloture vote on the nomination, which persuaded President Johnson to withdraw the nomination.²³² Prior to the scandal, the Judiciary Committee held public

tacked Miers, N.Y. Times (Oct. 28, 2005), http://www.nytimes.com/2005/10/28/politics/politicsspecial1/bushs-court-choice-ends-bid-conservatives-attacked-miers.html?_r=0 [<https://perma.cc/8BBJ-NHWU>] (noting that Miers's nomination was withdrawn after less than two months).

²²⁷ Charles Babington & Peter Baker, Roberts Confirmed as 17th Chief Justice, Wash. Post (Sept. 30, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html> [<https://perma.cc/7VB3-CFU4>]; see also Kenneth Jost, Privacy, Precedents Dominate Roberts Session, NPR (Sept. 13, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4845368> (discussing Roberts's confirmation hearings).

²²⁸ Bumiller & Hulse, *supra* note 226.

²²⁹ Martin Weil, Homer Thornberry Dies at 86, Wash. Post (Dec. 13, 1995), https://www.washingtonpost.com/archive/local/1995/12/13/homer-thornberry-dies-at-86/50eed866-fa86-4039-b6c0-a4d2425de02c/?utm_term=.48df63d76ea3 [<https://perma.cc/36JH-MDHG>].

²³⁰ Rutkus & Bearden, *supra* note 217, at 35.

²³¹ David A. Kaplan, Opinion, The Reagan Court - The Child of Lyndon Johnson?, N.Y. Times (Sept. 4, 1989), <http://www.nytimes.com/1989/09/04/opinion/the-reagan-court-child-of-lyndon-johnson.html>.

²³² See Eric Black, Will Trump's Choice for the Supreme Court be Subjected to a Filibuster?, MinnPost (Jan. 31, 2017), <https://www.minnpost.com/eric-black-ink/2017/01/will-trumps-choice-supreme-court-be-subjected-filibuster> [<https://perma.cc/EGK5-E8YW>] (discussing the Senate's anger over the Fortas scandal); see also Charles Babington, Filibuster Precedent? Democrats Point to '68 and Fortas, Wash. Post (Mar. 18, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A45149-2005Mar17.html> [<https://perma.cc/BZ9D-MUC3>] (stating that forty-three Senators voted against cloture).

hearings for Thornberry and elicited his testimony,²³³ but it did not vote on his nomination; President Johnson withdrew the nomination, given that Fortas would not be confirmed as Chief Justice and therefore his Associate Justice seat would not be vacated.²³⁴ None of these few unusual events is analogous to the Senate's inaction on Garland's nomination.

At a minimum, the Senate's long-standing practice is to bring a Supreme Court nomination to the floor for a vote, regardless of the Judiciary Committee's actions. Since 1949, the Judiciary Committee has reported all but three nominees to the full Senate with a favorable recommendation: Homer Thornberry, Robert Bork, and Clarence Thomas.²³⁵ The Senate gave Bork and Thomas an up-or-down vote despite the fact that the Judiciary Committee gave Bork a negative recommendation and refused to provide a recommendation for Thomas.²³⁶ Over that same period, of nominees who were not withdrawn, only Fortas and Thornberry did not receive a full floor vote. In stark contrast to the more than thirty nominees before him, Garland is the first Supreme Court nominee (whose nomination was not withdrawn) to receive neither a Judiciary Committee vote nor a Senate vote since Justice Harlan II.²³⁷ Accordingly, long-standing Senate practice, which is the only practice that informs separation of powers in this context, supports the Constrained Power Theory since the Senate has, for decades, acted on each Supreme Court nominee.

2. One Advice and Consent Process (?)

Professor Ilya Somin counters this argument by broadening the scope of the Senate's practice to include all federal judicial nominees.²³⁸ Somin has pointed out that the Senate refused to bring the nomination of Miguel Estrada to the D.C. Circuit Court of Appeals, and various other lower federal court nominations, to the floor for a vote during the

²³³ See Nominations of Abe Fortas and Homer Thornberry, Hearings Before the S. Comm. on the Judiciary, 90th Cong. (1968), <https://www.loc.gov/law/find/nominations/thornberry/hearing-pt1a.pdf> [<https://perma.cc/BW8D-27ZK>].

²³⁴ Rutkus & Bearden, *supra* note 217, at 36.

²³⁵ *Id.* at 34–40.

²³⁶ *Id.* at 38.

²³⁷ *Id.* at 34–40.

²³⁸ Somin, *The Constitution*, *supra* note 9; see also Whelan, *supra* note 9 (“It’s also a safe bet that many of [the Constrained Power Theory advocates] cheered on the obstruction and filibuster of Bush 43 [sic] judicial nominees . . .”).

George W. Bush administration.²³⁹ He reasons that this practice can be applied to Supreme Court nominees as well because they are also federal judicial nominees, and nothing in the Constitution indicates that separate rules of advice and consent apply to the former than apply to the latter.²⁴⁰

Ramsey makes a similar but broader claim. He argues that the Constitution applies the same advice and consent provision to all principal officers, whether Supreme Court nominees or ambassadors.²⁴¹ Consequently, he believes that any practice, including rejection through inaction, the Senate has applied to any type of nominee can be applied to Supreme Court nominees and vice versa.²⁴²

Ramsey is correct that the advice and consent provision refers to all nominees. Nothing in its text suggests otherwise and the Founders did not think that the Senate could devise different methods by which it gives advice and consent to different types of nominees: “Federalist No. 78 assumes that the mode of appointing Supreme Court judges raises no issue distinct from that of ‘appointing officers of the union in general.’”²⁴³ This argument does not support his or Somin’s conclusions, however. Since advice and consent applies to all types of principal officers and does not distinguish its treatment of them, the Senate must apply the same rules and procedures to each of them. The Senate has not, as Ramsey has pointed out,²⁴⁴ done so. Per this line of argument, the Senate must choose one, and only one, advice and consent practice to apply to every nominee. Any such practice, however, must comport with constitutional principles, which leads this argument back to the Joint Power Theory’s key deficiencies: separation of powers, checks and balances, and the intent and text of the Appointments Clause. To follow the Constitution, the Senate must act on every nomination, regardless of the type of nominee. The Constrained Power Theory comports with this requirement because it requires the Senate to act on each nominee, regardless of type.

²³⁹ See Somin, *The Constitution*, supra note 9.

²⁴⁰ *Id.*

²⁴¹ See Chemerinsky & Ramsey, supra note 9.

²⁴² See *id.*

²⁴³ See Monaghan, supra note 13, at 1205 (quoting *The Federalist No. 78*, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)) (Monaghan himself disagrees with this premise, see *id.* at 1205 n.17, but Alexander Hamilton believed it was true.).

²⁴⁴ See Chemerinsky & Ramsey, supra note 9; see also Somin, *The Constitution*, supra note 9.

3. The Filibuster

What about the filibuster? If the Constrained Power Theory allows the filibuster, then it cannot distinguish between a successful filibuster and the Senate's categorical refusal to act upon a nominee. In either event, no vote is cast, contrary to alleged long-standing Senate practice. If the theory does not allow the filibuster, then it contradicts its own assertion that the Senate may implement its long-standing practice. Either way, it could be argued that the theory is fundamentally flawed.²⁴⁵

The Constrained Power Theory likely prohibits a filibuster of a Supreme Court nomination given the text of Article II, Section 2. If the Appointments Clause allowed the Senate to require nominees to receive a supermajority of votes to be confirmed (the requirement for overcoming a filibuster), the Clause's text would have said so.²⁴⁶ The Treaty Clause, for example, specifically requires a two-thirds majority vote to approve treaties, whereas the Appointments Clause does not. By specifying a supermajority requirement for treaties but simply requiring consent for appointments, Constrained Power Theory advocates argue that the Founders knew they were creating a more rigorous standard for the former and intended to do so.²⁴⁷ This conclusion is further confirmed by the fact that the Constitution explicitly requires the House of Representatives and the Senate to each gain two-thirds approval of a bill to overcome a veto.²⁴⁸ Since the Founders knew how to create a supermajority standard, but chose not to do so, the filibuster contradicts the language of the Appointments Clause.

Furthermore, the filibuster is not a part of long-standing Senate practice, so it does not inform the separation of powers analysis. The Senate has only filibustered five Supreme Court nominations since 1949, and only one filibuster was successful (Fortas in 1968).²⁴⁹ In that one case,

²⁴⁵ At least one critic has pointed out the problem the filibuster raises for the theory. See, e.g., Whelan, *supra* note 9 (“Do [Constrained Power Theory advocates] believe that the filibuster of nominees is unconstitutional? If the answer . . . is yes, how is it that they have never publicly stated such a position before? (It’s also a safe bet that many of them cheered on the obstruction and filibuster of Bush 43 [sic] judicial nominees; I certainly don’t recall hearing objections from Tribe and Chemerinsky.)”).

²⁴⁶ See Crocker, *supra* note 10.

²⁴⁷ See McGinnis, *supra* note 11, at 657 & n.106; Crocker, *supra* note 10.

²⁴⁸ U.S. Const. art. I, § 7, cl. 2.

²⁴⁹ Abe Fortas (1968), William Rehnquist (1971 and 1986), Samuel Alito (2006), and Neil Gorsuch (2017). See Matt Flegenheimer, Senate Republicans Deploy ‘Nuclear Option’ to

however, several of the Senators who participated in the prolonged debate asserted that they were not filibustering the nomination and that they did not oppose an eventual full floor vote.²⁵⁰ Arguably then, the Senate has only initiated four true filibusters against Supreme Court nominees, two of which applied to the same nominee.²⁵¹ Such sparse use indicates that the filibuster is not a long-standing practice.

The Senate Democrats of the 115th Congress initiated the fifth (and, for now, final) filibuster of a Supreme Court nominee, arguably in retaliation for the 114th Senate's treatment of Judge Garland as well as for political and ideological purposes.²⁵² Forty-four Democrats blocked Judge Gorsuch's confirmation vote through the filibuster; in response, Majority Leader Mitch McConnell submitted a motion to the floor to prohibit the use of the filibuster against Supreme Court nominees.²⁵³ The motion passed, enabling the Senate to confirm Judge Gorsuch by a simple majority vote, which it did (54-45).²⁵⁴ Majority Leader McConnell's motion, which is popularly termed "the nuclear option," prohibits the use of the filibuster against any Supreme Court nominee unless and until the motion is changed.²⁵⁵

The Gorsuch confirmation raises two key points. First, the filibuster, moving forward, is not part of the Senate's long-standing practice. Arguments over its consistency with the Appointments Clause, therefore, are moot, for now. Second, the 115th Senate reverted to its long-standing practice of subcommittee hearings and a floor vote Gorsuch. In doing so, it reinforced the Constrained Power Theory's contention about

Clear Path for Gorsuch, *N.Y. Times* (Apr. 6, 2017), <https://mobile.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/572N-HG5J>]; Darren Patrick Guerra, No, There is No Tradition of Filibustering Supreme Court Nominees, *Weekly Standard* (Feb. 14, 2017, 6:00 AM), <http://www.weeklystandard.com/no-there-is-no-tradition-of-filibustering-supreme-court-nominees/article/2006811> [<https://perma.cc/2GLA-4FXW>].

²⁵⁰ See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 *Harv. J.L. & Pub. Pol'y* 181, 222 (2003).

²⁵¹ See Guerra, *supra* note 249.

²⁵² Russell Berman, *Republicans Abandon the Filibuster to Save Neil Gorsuch*, *Atlantic* (Apr. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/04/republicans-nuke-the-filibuster-to-save-neil-gorsuch/522156/>.

²⁵³ *Id.*

²⁵⁴ Audrey Carlsen & Wilson Andrews, *How Senators Voted to Confirm Gorsuch*, *N.Y. Times* (Apr. 7, 2017), <https://www.nytimes.com/interactive/2017/04/07/us/politics/gorsuch-confirmation-vote.html>.

²⁵⁵ Berman, *supra* note 252.

long-standing practice. At a minimum, long-standing Senate practice requires a Supreme Court nominee to be given an opportunity for a full vote by the Senate, as the Constrained Power Theory points out. Therefore, at most, only the Senate floor vote to confirm a Supreme Court nominee could be filibustered.²⁵⁶

F. Consistent with the Senate's Power to Design Its Practices

Admittedly, the Senate has significant flexibility in deciding how to conduct its affairs given its constitutional authority to “determine the Rules of its Proceedings.”²⁵⁷ Both the Constrained Power Theory and Joint Power Theory recognize this authority. Notably, the Senate’s relevant rules contemplate a vote on all nominees. In doing so, the Senate’s own formal confirmation process, which the Constitution contemplates the Senate will follow (as the point of making the rules is to follow them) indicates that the Senate views itself as being obligated to vote on nominees. These rules comport with the Constrained Power Theory, since they are a constitutionally sound exercise of the Senate’s discretion to devise its own proceedings. In fact, they are more consistent with the Constrained Power Theory than the Joint Power Theory since they contemplate a Senate vote on nominations.

Senate Rule XXXI is the official, step-by-step rule governing the Senate’s procedure for advising on and consenting to nominations.²⁵⁸ In its current version, Senate Rule XXXI operates on the presumption that the Senate will act upon on a nomination. Clause One states: “When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees”²⁵⁹ Clause One indicates that when Garland was nominated, Senate Majority Leader McConnell should have referred his nomination to the Judiciary Committee or referred his nomination to the Senate in a different manner: hence the phrase “unless otherwise or-

²⁵⁶ Chemerinsky has argued that the Senate must act on all nominations but has also defended the Senate’s authority to filibuster nominations. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181, 185 (1997); Chemerinsky & Ramsey, *supra* note 9.

²⁵⁷ U.S. Const. art. I, § 5, cl. 2.

²⁵⁸ Senate Manual, S. Doc. No. 113-1 (2014) (S. Rule XXXI).

²⁵⁹ *Id.* cl. 1.

dered.”²⁶⁰ Clause One also states that “the final question on every nomination shall be, ‘Will the Senate advise and consent to this nomination?’”²⁶¹ According to Clause Two, this final question (and “all business”) “shall be transacted in open session, unless the Senate as provided in rule XXI by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session.”²⁶² Therefore, Senator McConnell’s decision not to act on Garland’s nomination ignored the chamber’s obligation to consider this “final question” and to do so in open or closed session.

Clauses Three and Five also contemplate a vote on nominees to determine this final question. Clause Three states, “When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration.”²⁶³ Here, the act of voting clearly refers to confirmation or rejection and the rule enables, as a normal course of events, Senators in the majority to reconsider the vote. If there were no vote, how could a vote be reconsidered? Clause Five, moreover, states that motions to reconsider nominees fail if they have not been accepted by the time the Senate adjourns or recesses for more than thirty days.²⁶⁴ Nominations for which these failed motions were made shall be returned to the President “as confirmed or rejected by the Senate, as the case may be.”²⁶⁵ “Confirmed or rejected,” particularly in light of Clauses One and Three, suggests that a vote to confirm the nominees was actually executed.

Only Clause Six may address Senate inaction. It states:

Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all

²⁶⁰ “Unless otherwise ordered” could be interpreted to allow the Majority Leader to pocket consideration of the nominee, just as he can pocket the consideration of a bill. However, this seems to be an expansive interpretation and one inconsistent with the rest of the rule’s text. Even if the rule allows the Majority Leader to preclude any action upon a nominee, the Senate’s constitutional requirement to act on a nomination would negate this discretion. See *supra* Section II.D.

²⁶¹ Senate Manual, S. Doc. No. 113-1 (2014) (S. Rule XXXI, cl. 1).

²⁶² *Id.* cl. 2.

²⁶³ *Id.* cl. 3.

²⁶⁴ *Id.* cl. 5.

²⁶⁵ *Id.*

nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.²⁶⁶

Given the phrase “any succeeding session,” the first part of this compound sentence most reasonably refers to nominations that the Senate neither confirmed nor denied prior to the end of its session or adjournment. As previously discussed, inaction or incomplete action due to time limitations is a far cry from a categorical refusal to act on nominees.

The second part of the Clause (“and if the Senate . . . by the President”) could plausibly be interpreted to mean that the Senate may refuse to act because nominations not “pending or not finally acted upon” before the Senate takes an intrasession recess of thirty days or longer are returned to the President. The word “pending,” under this reading, could include those nominations upon which the Senate has not acted. A more plausible reading, however, is that this Clause, like the preceding Clause, takes the realities of the Senate’s physical limitations into account. The phrase “not *finally* acted upon” is key. “Not finally acted upon” does not suggest that the Senate has refused to act. Rather, it implies that the Senate has simply not *finished* the action it was taking upon the nominee. In this context, then, “pending” does not likely refer to nominations simply ignored but to nominations on the Senate’s backlog. Accordingly, this Clause creates parity between nominations rendered incomplete or pending due to an intersession recess and those so rendered due to a similarly lengthy intrasession recess.²⁶⁷ If the latter half of the Clause *does* allow the Senate to functionally reject nominations through inaction by calling a thirty-day recess, such a rule would be unconstitutional. It would violate separation of powers, checks and balances, and the Appointments Clause itself for all of the reasons previously discussed.

In sum, the Constrained Power Theory best reflects the Senate’s power to devise its own rules of procedure, subject to constitutional con-

²⁶⁶ Id. cl. 6.

²⁶⁷ Like many intrasession recesses, several intersession recesses have been twenty to thirty days. See Dates of Sessions of the Congress, Present–1789, United States Senate, <http://www.senate.gov/reference/Sessions/sessionDates.htm#1> [<https://perma.cc/XEU2-DUVW>] (last visited Feb. 6, 2017).

straints. Since Senate Rule XXXI clearly anticipates Senate action on a nomination, save for expiration due to adjournment or lengthy intrasession recesses, the Constrained Power Theory recognizes the validity of the rule and the Senate's discretion to have enacted and to follow it. Moreover, Rule XXXI aligns more consistently with the Constrained Power Theory than the Joint Power Theory, since it implies that the Senate votes to confirm or reject a nominee individually (which is somewhat ironic given Joint Power Theory advocates' reliance on the Senate's discretion to devise its own rules). Thus, the Constrained Power Theory is the better interpretation of the Senate's obligations, and it comports more fully with its current formal procedures.

III. THE VALUE OF MANDATING AN ADVICE AND CONSENT PROCESS

But what does it matter? If the Senate can reject any individual nominee, it can reject all nominees. What is the value of forcing the Senate to conduct a process if it can predetermine the outcome? What about the human costs of such a charade? The simplest (and most jurisprudentially sound) answer is that the question of benefit is irrelevant because it is the Senate's duty to conduct some process. There are, however, more satisfying justifications for enforcing the Senate's constitutional obligation, which underscore the importance of its duty.

A. Preserves Separation of Powers

Requiring the Senate to conduct its advice and consent process for every nominee helps preserve separation of powers from the onslaught of politics. While the Senate's ability to reject individual nominees is necessary for it to be able to check the President's appointment power, the erasure of a process requirement would not serve that purpose. Rather, it would significantly expand the Senate's power (a problematic outcome in itself)²⁶⁸ and weaken the President by nullifying his or her appointment power and making his or her nomination power largely meaningless. The fact that the necessity of the Senate's ability to reject individual nominees creates the potential for abuse does not justify the

²⁶⁸ *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 274 (1991) (explaining that where the effect of legislation is to vest Congress itself or its members with "either executive power or judicial power," the statute is unconstitutional (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928))).

institutionalization of that abuse. Compelling the Senate to provide process to each Supreme Court nominee would preserve the Senate's and the President's constitutional roles, instead of sacrificing one for the other.

B. Promotes Better Governance

Requiring the Senate to act on every nominee individually would also pressure the Senate to put the public's need for a meritocratic government ahead of political expediency, which in turn would help make the federal government more functional. Moreover, mandatory action would make the Senate more accountable to the people for its confirmation decisions and would instill more confidence in the public about those decisions.

1. Increases Pressure to Respond to the Public Interest over Political Expediency

Requiring the Senate to act on all nominations would pressure it to respond to the public's interest in a meritocratic government rather than advance its members' own agendas. By blockading judicial nominations, the Senate can leave judgeships vacant until the election of a President who will choose nominees more aligned with its preferences. As demonstrated by Garland and the other fifty-eight pending federal judiciary nominees (as of December 2016),²⁶⁹ the Senate will ignore vacant judgeships and the potentially qualified individuals nominated to fill them for this reason. If the Senate were required to act on all nominations, however, it would be forced to make individual determinations. Those determinations would be subject to public scrutiny. Public scrutiny, in turn, would pressure the Senate to consider the nominees' merits and the nation's need for federal judgeships to be filled, rather than just the Senate's own self-interest, since individual Senators would have to explain their decisions to their constituents.

The Supreme Court has, for decades, extolled the benefits of such "action-forcing procedures" in the related field of administrative law (particularly administrative law governing environmental policy) for this

²⁶⁹ Vacancy Summary for December 2016, U.S. Courts, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/12/summary> [https://perma.cc/DFJ9-K7Q3] (last updated Dec. 21, 2016).

reason.²⁷⁰ In *Robertson v. Methow Valley Citizens Council*, the Court recognized that requiring agencies to take action “inevitably bring[s] pressure to bear on agencies ‘to respond to the needs’” within their domain.²⁷¹ Given public scrutiny, a similar outcome would result from a requirement that the Senate affirmatively consider all nominees. Admittedly, formal consideration of individual nominees would not guarantee that the Senate would only confirm qualified nominees and only reject unqualified nominees. At a minimum, however, it would prevent the Senate from ignoring judicial vacancies en masse to promote its political interests; indeed, as history indicates, the Senate is much more likely to confirm when forced to consider the merits of individual qualified candidates. Since 1945, sixteen Supreme Court nominees have been submitted to the Senate by a President from the opposing party.²⁷² Thirteen of those sixteen nominees (81%) were confirmed.²⁷³ Moreover, the Senate has confirmed six of eight (75%) Supreme Court nominees considered during an election year since 1900.²⁷⁴

2. Promotes a More Functional Federal Government

Mandatory action upon a nomination would also improve the functioning of the federal government by increasing confirmations and eliminating unnecessary gridlock between the President and the Senate.

²⁷⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (recognizing that NEPA’s requirement for an agency to prepare an environmental impact statement facilitates the law’s action-forcing purpose).

²⁷¹ *Id.* at 349 (quoting 115 Cong. Rec. 40425 (daily ed. Dec. 20, 1969) (statement of Sen. Muskie)).

²⁷² Scott Bomboy, Presidents vs. Opposing Senates in Supreme Court Nominations, Nat’l Const. Ctr.: Const. Daily (Feb. 16, 2016), <http://blog.constitutioncenter.org/2016/02/presidents-vs-opposing-senates-in-supreme-court-nominations/> [<https://perma.cc/K3PP-4FT9>].

²⁷³ *Id.*

²⁷⁴ Gregor Aisch et al., Supreme Court Nominees Considered in Election Years Are Usually Confirmed, N.Y. Times (Mar. 16, 2016), http://www.nytimes.com/interactive/2016/02/15/us/supreme-court-nominations-election-year-scalia.html?_r=0. The two unconfirmed nominees, Abe Fortas and Homer Thornberry, were withdrawn, not rejected, due to a unique circumstance. See *supra* Subsection II.E.1.

a. Increases Confirmations

Fully staffing the Supreme Court and the federal judiciary, in general, is preferable to not doing so because the courts will be more capable of executing their responsibilities. With one fewer Justice than statutorily prescribed, the remaining Supreme Court Justices are more strained than they would be otherwise, resulting in fewer cases heard.²⁷⁵ The deleterious effect of ignoring nominees is even more glaring among federal district court judges. The Federal Bar Association, the State of Arizona, and even Chief Justice John Roberts have spoken to the severity of the problems caused by the large number of currently vacant federal judgeships.²⁷⁶ In 2011, 101 judgeships were vacant, resulting in judicial emergencies in 46 (5%) of the nation's 857 district and circuit judgeships.²⁷⁷ This crisis continued during the last year of President Obama's term.²⁷⁸ From 2014 to June 2016, the Republican-controlled Senate confirmed only 16 of President Obama's nominees.²⁷⁹ As a result, in June 2016, 10% of federal district court judgeships were vacant, and the number of judicial emergencies was twice as high as it was in 2008.²⁸⁰ Failure to act on nominations has, consequently, increased the federal judiciary's backlog and overextended the capacity of current judges to hear cases "in an adequate and timely manner."²⁸¹

²⁷⁵ See Chemerinsky & Ramsey, *supra* note 9 (Chemerinsky); Kenneth W. Moffett et al., *The Supreme Court is Taking Far Fewer Cases than Usual. Here's Why.*, Wash. Post: Monkey Cage (June 2, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/02/the-supreme-court-is-taking-far-fewer-cases-than-usual-heres-why/?utm_term=.273d0c6a21d5 [https://perma.cc/7ZHC-HYLW].

²⁷⁶ Fed. Bar Ass'n, *Judicial Vacancies Fact Sheet*, http://www.fedbar.org/vacancies-fact_sheet [https://perma.cc/BK8Y-2VC3] (last visited Jan. 21, 2017); Spencer S. Hsu, *Waiting for Next President, Confirmations of Federal Trial Judges Stall*, Wash. Post (June 5, 2016), https://www.washingtonpost.com/local/public-safety/waiting-for-next-president-confirmations-of-federal-trial-judges-stall/2016/06/05/9b626aa4-222f-11e6-9e7f-57890b612299_story.html?utm_term=.2060ae537b06 [https://perma.cc/U8KA-HYXR]; Jerry Markon & Shailagh Murray, *Federal Judicial Vacancies Reaching Crisis Point*, Wash. Post (Feb. 8, 2011, 12:07 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706032.html?sid=ST2011020800441> [https://perma.cc/DN6X-CSS8].

²⁷⁷ Markon & Murray, *supra* note 276.

²⁷⁸ Hsu, *supra* note 276.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Fed. Bar Ass'n, *supra* note 276; see also Hsu, *supra* note 276 ("Heavy caseloads in some places slow resolution of everything from commercial disputes to workplace discrimination claims to federal regulatory challenges, in which district court rulings are often the

Since the Appointments Clause applies to all principal officers, not just judges, it is also worth noting that permitting Senate inaction could harm the administration of the federal government more generally. Principal officers are responsible for the administration of the legal system, developing economic policy, and promoting national security, among other public interests. Without them, the organizations such officers lead cannot function at full capacity, which can hinder their ability to fulfill their duties.²⁸²

If the Senate had to act on each nomination, more nominees would be confirmed. Senators who would prefer to reject a qualified nominee but fear political reprisal from their constituents would not be able to shield themselves with the Majority Leader's decision not to schedule a vote and their party's talking points.²⁸³ Nor would such Senators, particularly ones representing politically divided states, or states traditionally held by the opposing party, be able to publicly "oppose" the Majority Leader's tactics without having to actually do anything.²⁸⁴ Without such defenses and in the face of public scrutiny, such Senators would likely bend to political pressure to confirm a qualified nominee, as the previously discussed trend of Supreme Court confirmations attests.²⁸⁵ The confirmation of Justice Thomas is a particularly striking example.

last word because most are not appealed."); Markon & Murray, *supra* note 276 ("The effect is most visible in civil cases, with delays of up to three years in resolving discrimination claims, corporate disputes and other lawsuits.").

²⁸² See Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 920–21 (2009).

²⁸³ Vulnerable Senators Rob Portman (R-OH), Ron Johnson (R-WI), and Pat Toomey (R-PA) appear to have taken this approach. See Sabrina Eaton, *Sen. Rob Portman Unmoved After Meeting with Supreme Court Nominee Merrick Garland*, Cleveland.com (Apr. 14, 2016, 11:23 AM), http://www.cleveland.com/open/index.ssf/2016/04/sen_rob_portman_unmoved_after.html [https://perma.cc/HM8U-VKFM]; Bill Glauber, *Ron Johnson Meets with Garland, Stands Firm Against Nominee*, Milwaukee J. Sentinel (May 10, 2016), <http://archive.jsonline.com/news/statepolitics/ron-johnson-meets-with-garland-stands-firm-against-nominee-b99723130z1-378873071.html> [https://perma.cc/LN3A-PDCF]; Emmarie Huetteman, *Republican Pennsylvania Senator to Meet with Merrick Garland*, N.Y. Times (Mar. 23, 2016), https://www.nytimes.com/2016/03/24/us/politics/patrick-toomey-pennsylvania-senator-meet-merrick-garland.html?_r=0.

²⁸⁴ Senator Mark Kirk (R-IL) took this approach. See Ted Barrett et al., *Kirk Blasts GOP Leaders for Inaction on Supreme Court Nominee*, CNN (Mar. 29, 2016, 4:40 PM), <http://www.cnn.com/2016/03/29/politics/merrick-garland-supreme-court-republican-meeting/> [https://perma.cc/6Y56-LCWB].

²⁸⁵ A higher percentage of Republicans supported confirmation of Garland (33%) than supported confirmation of Elena Kagan (26%) or Sonia Sotomayor (24%). Jeffrey M. Jones,

Justice Thomas was nominated by President George H. W. Bush, a Republican, in a year when Democrats controlled the Senate by a six-seat majority. Despite being mired in controversy, the Senate narrowly confirmed Thomas by a vote of 52-48 with eleven Democrats voting in favor.²⁸⁶ While some of these Senators, such as Richard Shelby (D-AL) (who became a Republican three years later) or J. Bennett Johnston (D-LA) (a conservative), may have wanted to confirm Justice Thomas even if Senate Majority Leader George Mitchell offered to prevent a vote, the more moderate Senators and those facing re-election in that year in states where confirmation for Justice Thomas was popularly supported, such as John Breaux (D-LA) and Wyche Fowler (D-GA), may have preferred to have been shielded from having to vote.²⁸⁷ If Senator Mitchell had acted as Senator McConnell acted, Justice Thomas would not be on the Court; because there was a vote, he is.

U.S. Support for Garland Average for Supreme Court Nominees, Gallup (Mar. 21, 2016), <http://www.gallup.com/poll/190091/support-garland-average-supreme-court-nominees.aspx>. The same percentage of Republicans that opposed Kagan's confirmation (51%) opposed Garland's nomination, and a greater percentage opposed Sotomayor's confirmation (57%). Id. Given these comparisons, Garland likely would have received at least a few Republican votes since Kagan received five Republican votes and Sotomayor received nine. See Carl Hulse, Senate Confirms Kagan in Partisan Vote, N.Y. Times (Aug. 5, 2010), <http://www.nytimes.com/2010/08/06/us/politics/06kagan.html>; How Republicans Voted for Sotomayor, N.Y. Times (Aug. 6, 2009, 3:20 PM), http://www.nytimes.com/interactive/2009/07/31/us/politics/0731-sotomayor-vote.html?_r=0.

²⁸⁶ 137 Cong. Rec. 26,354 (1991). These eleven Senators represented Alabama, Arizona, Georgia, Illinois, Louisiana, Nebraska, Oklahoma, Virginia, and South Carolina. Public support for Thomas's confirmation exceeded 70% in Georgia, Louisiana, Nebraska, and South Carolina. In fact, Thomas's approval rating was the highest in the nation in Louisiana (73%) and South Carolina (73%), and the sixth highest in Georgia (71%). See Jonathan P. Kastellec et al., Public Opinion and Senate Confirmation of Supreme Court Nominees, 72 J. Pol. 767, 774-75, 781 (2010) (arguing that state-by-state popular opinion of Thomas was crucial to his confirmation); see also Richard L. Berke, Support for Thomas Inches Toward Approval in the Senate, N.Y. Times (Oct. 14, 1991), <http://www.nytimes.com/1991/10/04/us/support-for-thomas-inches-toward-approval-in-senate.html> (suggesting that Senators Wyche Fowler (D-GA), Richard Shelby (D-AL), and John Breaux (D-LA) voted for Thomas because they were freshman Senators who faced re-election in 1992 and needed support from African-American constituents, among whom Thomas had significant support).

²⁸⁷ See Elaine S. Povich, Thomas Issue Touchy for South's Democrats, Chi. Trib. (Oct. 4, 1991), http://articles.chicagotribune.com/1991-10-04/news/9103300751_1_clarence-thomas-judge-thomas-black-constituents [<https://perma.cc/AX5E-D2PN>] ("My vote is not cast without some doubt," said Sen. Wyche Fowler (D-Ga.), whose face reflected the difficulty of his decision as he spoke on the Senate floor.").

If the Senate's aggrandized power is unchecked, however, the Senate will continue to ignore nominations in general and will, most likely, continue this trend for future Supreme Court and other judicial nominations. While the Senate could logically apply this practice to any year in the President's term, the Senate will most likely exercise it during midterm election years (in addition to presidential election years). In cases of divided government, the Senate majority has an incentive to block the President's nominations until after the midterm elections because the Senate will have more political leverage over the President if it can increase its majority. With more leverage, the Senate majority may be able to pressure the President into making more favorable nominations than he or she would have otherwise made. The Senate majority also has incentive to delay an appointment vote in a midterm election year to shield its vulnerable members from a choice that may bear political repercussions.

At a minimum, future Supreme Court nominations made during presidential election years will be in jeopardy because voters did not repudiate the Republican Party for the Senate refusing to act on Garland's nomination.²⁸⁸ Since the party was not hurt, and may even have been helped by this strategy,²⁸⁹ rational self-interest suggests that the party would employ this tactic again. The Democratic Party, moreover, is perhaps even more incentivized to blockade a Republican President's Supreme Court nominees the next time it controls the Senate given the po-

²⁸⁸ The Republican Party was not repudiated because it maintained its majority control of the Senate in the 2016 election and won the presidency. Republican Senators Toomey, Johnson, and Portman won re-election despite popular support for hearings and a vote for Merrick Garland in their states. See Benton Strong, Release: New Poll Shows Americans Overwhelmingly Support a Hearing and Vote on Merrick Garland's Nomination, Ctr. for Am. Progress (May 9, 2016), <https://www.americanprogress.org/press/release/2016/05/09/137152/release-new-poll-shows-americans-overwhelmingly-support-a-hearing-and-vote-on-merrick-garlands-nomination> [<https://perma.cc/YM8M-EPDP>] (showing popular support for a vote on Garland). See Senate Election Results: G.O.P. Keeps Control, N.Y. Times (Feb. 10, 2017, 4:38 PM), <http://www.nytimes.com/elections/results/senate> (showing the results of the 2016 Senate elections). Professors Amar and Greene share this concern. See Amar, *supra* note 9; Greene, *supra* note 10.

²⁸⁹ See David S. Cohen, Grand Theft Judiciary: How Republicans Stole the Supreme Court, *Rolling Stone* (Nov. 14, 2016), <http://www.rollingstone.com/politics/features/how-trump-and-the-republicans-stole-the-supreme-court-w450269> [<https://perma.cc/56YS-C66J>] (“[O]f the 21 percent of Americans who said the Supreme Court was the most important factor in their vote, 57 percent of them voted for Trump and only 40 percent voted for Clinton.”).

litical benefits the Republican Party reaped and the sense of outrage Republicans' inaction engendered among Democratic politicians and voters.²⁹⁰ The two parties have a history of responding in kind when one party is perceived to have changed the rules of the game.²⁹¹

b. Eliminates Unnecessary Gridlock Between the President and the Senate

Requiring the Senate to act on all nominees would also eliminate unnecessary gridlock between the President and the Senate. As previously discussed, the Senate's ability to ignore nominations is not necessary for it to check the President's abuse of the appointment power. In fact, the Senate's role as a check is only exercised when a specific nominee is rejected since it is the specific nominee, not nominations in general, which may constitute an abuse of the appointment power. Thus, the only potentially *necessary* gridlock between the President and the Senate is when the Senate determines that a nominee does not meet the criteria for confirmation, thus forcing the President to name a new nominee. A Senate blockade of all of the President's nominees, accordingly, is an extrane-

²⁹⁰ Sherrod Brown (D-OH) has stated that the Republican Party has "been rewarded for stealing a Supreme Court justice." Burgess Everett & Elana Schor, *Democrats to Give Trump Cabinet Picks the Garland Treatment*, Politico (Dec. 5, 2016, 5:06 AM), <http://www.politico.com/story/2016/12/trump-cabinet-democrats-senate-232136> [<https://perma.cc/H3MP-F9NE>].

²⁹¹ See Kar & Mazzone, *supra* note 10, at 87 (citing Amar, *supra* note 9) ("As Vikram Amar has observed, 'moves in this appointments game can generate countermoves,' such that '[g]ood players . . . need to calibrate their countermoves carefully to avoid putting themselves in more vulnerable situations later.'"); Amar, *supra* note 9; see also Lauren Carroll, *Harry Reid Says Unlike the GOP, Senate Democrats Never Held up a Supreme Court Nomination*, PolitiFact (Mar. 20, 2016, 5:42 PM), <http://www.politifact.com/truth-o-meter/statements/2016/mar/20/harry-reid/harry-reid-says-unlike-gop-senate-democrats-never/> [<https://perma.cc/8NXC-KWKX>] (discussing back-and-forth nature of Republican and Democratic Senators making it difficult for the President of the opposing party to appoint judges while blaming the other party for initiating such tactics); Everett & Schor, *supra* note 290 (quoting Senator Dianne Feinstein on the Senate's treatment of Garland: "Past is present, and what goes around comes around. Now, those are pretty hackneyed sayings, but those are really true around here[.]"); Jay Michaelson, *It's Not Just Merrick Garland: Republicans Are Blocking So Many Nominees It's Caused a Judicial Emergency*, Daily Beast (May 16, 2016, 1:00 AM), <http://www.thedailybeast.com/articles/2016/05/16/it-s-not-just-merrick-garland-republicans-are-blocking-so-many-nominees-it-s-caused-a-judicial-emergency.html> [<https://perma.cc/4L53-XERU>] (noting that Republican Senators have prevented President Obama from appointing more judges than Democratic Senators prevented President George W. Bush from appointing).

ous tactic that creates *unnecessary* gridlock between the President and the Senate, based on the values protected and promoted by the advice and consent provision.

Garland is a case in point. President Obama battled Senator McConnell and the Senate Republicans for most of his final year in office over the Garland nomination. If the Senate were required to act, it likely would have confirmed Judge Garland.²⁹² Even if it had not, it would have affirmatively rejected Judge Garland, and President Obama would have chosen another nominee. Eventually, a nominee would likely have been confirmed due to the structural imbalance of the Appointments Clause²⁹³ and public pressure to confirm a nominee, as history demonstrates.²⁹⁴ In either event, the protracted battle between the President and the Senate would likely have concluded with a confirmed nominee, as the process was meant to be resolved.

There is one obvious criticism of this argument: Few Supreme Court seats are vacant in an election year, so the practical impact of an action requirement would be small. Since the Founding, however, the Senate has voted on twenty-five Supreme Court nominees in a presidential election year, eight of those after 1900.²⁹⁵ If midterm election years are included, those numbers rise to forty-seven and twenty, respectively.²⁹⁶

²⁹² Only four Republican Senators needed to vote for Garland for him to be confirmed since Vice President Joe Biden would have cast the deciding vote. Jennifer E. Manning, Cong. Res. Serv., R43869, Membership of the 114th Congress: A Profile 1 (2016) (indicating that fifty-four Republicans were represented in the Senate). In 1997, Judge Garland was confirmed for the D.C. Circuit on a vote of 76-23 by a Republican-controlled Senate. See U.S. Senate Roll Call Votes 105th Congress - 1st Session, Senate, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=105&session=1&vote=00034 [<https://perma.cc/PSJ7-YRB2>]. Sitting Republican Senators John McCain (R-AZ), Orrin Hatch (R-UT), and Susan Collins (R-ME) voted for him then. See *id.* A couple of Republican Senators indicated they would have voted for him if Hillary Clinton had won the election, or that their colleagues would have. Amanda Terkel, GOP Senator Predicts Merrick Garland will be Confirmed This Year if Hillary Clinton Wins, *Huffington Post* (Nov. 6, 2016, 3:04 PM), http://www.huffingtonpost.com/entry/johnny-isakson-merrick-garland_us_581f7de3e4b0e80b02cab1a9. Garland was also well regarded and considered a consensus candidate even among Republicans. Alex Shephard, Orrin Hatch Once Said There Was “No Question” Merrick Garland Could be Confirmed to the Supreme Court, *New Republic*: Minutes, <https://newrepublic.com/minutes/131676/orrin-hatch-said-no-question-merrick-garland-confirmed-supreme-court> [<https://perma.cc/5FHE-HSKS>].

²⁹³ See McGinnis, *supra* note 11, at 655–58.

²⁹⁴ See discussion *supra* Subsection III.B.2.a.

²⁹⁵ Aisch et al., *supra* note 274.

²⁹⁶ *Id.*

These are nontrivial numbers. If the Senate is permitted to categorically refuse to consider nominations, the number of delayed nominations will only continue to grow and will likely do so at a greater rate than previously.

3. Makes the Senate More Accountable for Confirmation Decisions

Requiring the Senate to exercise its advice and consent process for each nominee would also make each Senator's vote subject to public scrutiny. When the Senate refuses to act upon a nomination, very few individual Senators are to blame. The Majority Leader bears the brunt of the blame because only he or she can bring the nomination to the floor for consideration. As the delay continues, constituents turn their attention to new issues, allowing the unconsidered nominee and the unfilled government post to slip from their memories. As a result, the Senators in the majority party are spared from having to decide whether to support or oppose confirmation and to explain their decision to their constituents. If the Senate were forced to act, however, they would have to make a decision and to defend it to their constituents, just as they must defend the stances they take on legislation. At the very least, the Senate would be held accountable because the public would, most likely, have a better understanding of why some individual nominees were confirmed and others rejected.

4. Instills More Confidence in the Senate's Advice and Consent Determinations

If the Senate acted on every nomination, public confidence in the Senate's determinations would improve. As suggested above, in the agency context mandatory action can be used to "ensure[] that the agency will inform the public that it has indeed considered [relevant] concerns in its decisionmaking process."²⁹⁷ Moreover, mandatory action can help "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information"²⁹⁸ These conclusions apply similarly in the advice and consent context. Mandatory affirmative consideration of each nominee instills public confidence in

²⁹⁷ *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983).

²⁹⁸ *Robertson*, 490 U.S. at 349.

the Senate's exercise of its advice and consent authority because it helps make the Senate's decision to confirm or reject nominees more thoughtful (by evaluating specific qualifications and circumstances) and less opaque and political (as it would be if the Senate could categorically refuse to consider all nominees).

CONCLUSION

The thwarted nomination of Garland has ignited a serious debate about the division of power in the Appointments Clause. This debate has divided legal scholars into two factions: those following the Joint Power Theory and those following the Constrained Power Theory. To the former, the Senate may categorically reject nominees through inaction because the power to appoint principal officers is equally divided between the President and the Senate, and, according to the Founders and the Constitution's text, the Senate may determine how it advises and consents to such nominations, and whether it does so at all. To the latter scholars, the President has the power to nominate and to appoint principal officers in light of the Founders' intent and the text of Article II, Section 2. Accordingly, advice and consent is a check by the Senate upon the President's appointment power—a check that is meant to prevent the President from appointing unqualified individuals. Only by acting on each nomination can the Senate check the President's authority; inaction rejects his authority.

Based on the totality of the Founders' intent, the Constitution's text, separation of powers, and Senate discretion and long-standing practice, the Constrained Power Theory is the better interpretation. The Founders believed the President was more capable of selecting meritocratic candidates than the Senate and more likely to do so. Wary of abuse, however, they charged the Senate with the responsibility of preventing the President from appointing friends and patrons through advice and consent. Thus, the advice and consent provision was designed to limit presidential discretion, not to allow the Senate to block all appointments. The Constitution's text embodies this understanding. Article II, Section 2, says the President shall nominate and appoint, not that the President and the Senate shall appoint. Therefore, the plain meaning of the Appointments Clause indicates that the President alone has the powers to nominate and to appoint. Advice and consent is simply a check on that presidential power.

The Joint Power Theory, on the other hand, is inconsistent with separation of powers. Under the Joint Power Theory, the Senate could render the President's nomination power functionally meaningless by refusing to act on any nominees. Doing so would impermissibly infringe upon the Executive's authority. The Constrained Power Theory, however, preserves separation of powers by permitting the President to nominate and appoint principal officers, and the Senate to prevent the President from abusing the latter in specific instances by rejecting individual nominees. This distinction is critical because both theories recognize that the Senate has discretion to formulate its advice and consent procedure, yet only the Joint Power Theory allows the Senate to violate a fundamental constitutional principle.

Irrespective of any constitutional obligation, a mandatory advice and consent process for all nominees is desirable. It preserves separation of powers, and it helps ensure a well-staffed federal government while adequately balancing that need against the Senate's interest in a qualified government. Discretion to act on nominees, in contrast, would allow the Senate categorically to undercut the federal government's ability to function by leaving jobs unfilled. It would also reduce accountability and public confidence in the Senate; it would permit the Senate majority to elevate its political interests over the public interest in a well-staffed government.

A judicial or public determination of this issue is vital because Judge Garland's nomination is a watershed moment for the law and politics of Supreme Court nominations. If the public and the courts accept the Joint Power Theory, "[w]e are hurtling toward a future in which the president no longer gets to appoint Supreme Court justices when the opposition controls the Senate."²⁹⁹ This nation needs to decide if that is the future it wants.

²⁹⁹ Greene, *supra* note 10.