In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process

Lori A. Ringhand
IN DEFENSE OF IDEOLOGY: A PRINCIPLED APPROACH TO THE SUPREME COURT CONFIRMATION PROCESS

Lori A. Ringhand*

ABSTRACT

In this paper, Professor Ringhand offers a principled defense of an ideological approach to the Supreme Court Justice confirmation process. In constructing her argument, she does three things. First, she explores how the insights provided by recent empirical legal scholarship have created a need to rethink the role of the Supreme Court and, consequently, the process by which we select Supreme Court Justices. In doing so, Professor Ringhand explains how these insights have called into question much of our conventional constitutional narrative, and how this failure of the conventional narrative has in turn undermined traditional objections to an ideologically-based confirmation process. Second, Professor Ringhand explains how an ideologically-based approach to the confirmation process is not just unobjectionable, but can in fact play a normatively desirable role in ongoing efforts to construct alternative constitutional narratives, narratives that attempt to guide or justify the use of judicial review while also incorporating a realistic understanding of the capacities of the Supreme Court. She concludes by reviewing the historic use of ideology in the confirmation process, and discussing several additional benefits that could result from the more open acknowledgement of the role ideology has—and does—play in that process.

INTRODUCTION

There is an ongoing debate in both academic and political realms about the appropriate role of senators charged with evaluating prospective Supreme Court Justices. Should they limit themselves to consideration of a nominee’s professional competence, or should they also consider a nominee’s constitutional or political ideology? Proponents of an ideologically-based confirmation process argue that

* Associate Professor of Law, University of Georgia School of Law. I would like to thank Barry Friedman, Mark Graber, Nichole Huberfeld, Dan Lorentz, Joseph Miller, Terri Peretti, Eric Segall, Neil Siegel, Lawrence Solum, Mark Tushnet, Rebecca Zietlow and the participants at the 2008 West Coast Public Law Schmooze for comments on earlier drafts of this piece. Thanks also are owed to James McPhillips and Lori Elizabeth Morris for their research assistance and to Melissa Connelly for her editorial help. Errors are of course my own. This article was written before the August 6, 2009 confirmation of Justice Sonia Sotomayor, and any references to the Justices of the Court reflect its makeup before that date.

1 "Ideology" in this context includes considerations that go beyond a nominee’s abstract constitutional or interpretive philosophies to questions intended to predict how a nominee will
a vigorous examination of the nominee's ideological preferences is necessary to ensure judicial accountability. Opponents argue that such an examination threatens judicial independence.

This paper takes a fresh look at the question by considering the confirmation process in the larger context of recent developments in constitutional theory. It proceeds in three parts. Part I tells the story of the Supreme Court. In doing so, it unpacks the conventional narrative of the Court and explains the strain put on that narrative by empirical legal scholarship exploring the way the Court actually functions. It then explains how the failure of the conventional narrative in turn undermines traditional objections to the use of ideology in Supreme Court confirmation hearings. Part I concludes by discussing two evolving constitutional narratives and positing that an ideological approach to the confirmation process could further the goals asserted by advocates of each of these approaches. The failure of the conventional narrative, in vote on certain issues, such as questions about the nominee's position on previously decided cases, including controversial or unsettled cases. An ideologically-based confirmation process, in other words, is one in which the Senate (and the President) base their actions at least in part on their agreement or disagreement with the nominee's perceived ideological positions. See Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments 109-11 (2005) (measuring the "ideology" of Supreme Court nominees by determining whether they held moderate, conservative, or liberal views on particular issues such as support for criminal defendants, privacy, racial equality, and the First Amendment).

2 See Laurence H. Tribe, God Save This Honorable Court 131-37 (1985); Steven Goldberg, Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No, 17 Geo. J. Legal Ethics 175, 192 (2004); Martin H. Redish, Legal Realism and the Confirmation Process, 84 NW. U. L. Rev. 886, 887-88 (1990).


4 The use in this paper of the terms "narrative" and "story" is intentional. As Jack Balkin has noted, the value of theories of constitutional interpretation is that they give us as a nation a shared language through which to argue about constitutional meaning and legitimacy. See Jack M. Balkin, Original Meaning and Constitutional Redemption, 24 Const. Comment. 427, 517-19 (2007); see also Lief H. Carter & Thomas F. Burke, Reason in Law 111-16 (7th ed. 2005) (discussing various methods of constitutional interpretation). Robert Post and Reva Siegel have made a similar point, eloquently observing in their examination of originalism as a political practice that theories about the Constitution succeed when they provide a compelling language—a story—connecting constitutional law to a living political culture. Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545, 549 (2006); see also Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 9 (1983) (arguing that constitutional interpretation serves as a "connective between states of affairs, both of which can be represented in their normative significance only through the devices of narrative").
other words, allows us to see that the use of ideology in the confirmation process is not just unobjectionable but is instead both normatively desirable and theoretically useful to evolving constitutional approaches.

Having laid this foundation, Part II of the paper explains in depth how an ideological approach to confirmations can play this role. In doing so, it reconceptualizes the confirmation process as a mechanism through which the public can legitimize constitutional change over time while still preserving the distinction between constitutional and ordinary law. Part II also explains how the evolving constitutional narratives discussed in Part I can benefit from this reconceptualization.

Part III of the paper explains how the approach developed here is neither new nor radical. This part explores how ideology has, despite our current unwillingness to acknowledge it, played a role in the confirmation process throughout our history. The contribution of this paper, therefore, is not to propose radical change but rather to offer a principled defense of what is—and long has been—our actual practice. The paper concludes with a brief discussion of several additional benefits that could result from embracing the vision of the confirmation process articulated here.

I. THE STORY OF THE SUPREME COURT

A. The Conventional Narrative

The conventional story of the Supreme Court is familiar to all Americans. The Constitution embodies the commitment we as a nation have made to remove certain policy choices from the realm of ordinary politics and elevate them to the level of constitutionally protected rules. The role of the Supreme Court is to use its legal expertise to ascertain and protect those entrenched rules against the contrary passions of transient majorities. In this story, the Justices are the guardians of the rules we have embodied in our Constitution and their duty is to bind us to those constitutional commitments, even—or perhaps especially—when confronted with other governmental actors who want to transgress them. Their job is to be countermajoritarian.

To do this job properly, however, the Justices must be protected from the political pressures and preferences that influence elected officials; they must be independent. We give them this independence by appointing them rather than electing them, and by giving them life tenure. But that independence comes at a cost. Because the Justices are unaccountable to the public, and because the Court has the power to override democratically made choices, there is always a danger of the Court becoming

---

6 See id.
7 See U. S. Const. art II, §2.
8 See U.S. Const. art. III, §1.
tyrannical—of it subjugating self-government to "government by judiciary."9 Thus, while its countermajoritarian duties require the Court to be independent, that very independence raises the risk that the Justices will use their power to impose their own personal preferences in lieu of constitutional law.10

Under the conventional narrative, therefore, judicial discretion must be carefully constrained. Much constitutional scholarship arising under the conventional narrative thus has focused on fixing constitutional meaning by developing methods of constitutional interpretation capable of generating determinate answers to constitutional questions.11 Originalists attempt to find that meaning in the original public meaning of the written Constitution.12 Others look for it in the deductive logic of legal reasoning,13 or in moral or ethical truths.14 These approaches to constitutional interpretation are very different, but each sees the reduction of judicial discretion and the search for "true" constitutional meaning as essential to the legitimate exercise of judicial power.

Under this conventional narrative, objections to the use of ideology in the Supreme Court confirmation process make a certain amount of sense. If the Court is to fulfill its duty to use objective interpretive methods to find and impose fixed constitutional restrictions on popular government, then the Court must be independent from political influence.15 To condition confirmation on a Supreme Court nominee's agreement with either the President's or the Senate's constitutional preferences would interfere with that duty by inappropriately imposing majoritarian preferences on a countermajoritarian body.16 It would hinder the ability of the Court to interpret the

---


11 See Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1789, 1810 (2005); see also PERETI, supra note 10, at 35.


13 See, e.g., Brian Z. Tamanaha, Understanding Legal Realism, 87 Tex. L. Rev. 731 (2009) (discussing the impact legal realism has had on the judiciary).


15 See Stephen L. Carter, The Confirmation Mess: Cleaning Up the Federal Appointments Process xi (1994); Stephen Carter, The Confirmation Mess, 101 Harv. L. Rev. 1185, 1189–92 (1988) [hereinafter Carter, The Confirmation Mess]. Carter argues that encouraging the Senate to use "litmus tests" when considering Supreme Court confirmations would "enshrin[e] the politically expedient judgments of a given era as fundamental constitutional law." Carter, supra note 3, at 965. He calls such a result a "despotic horror." Id; see also Nagel, supra note 3, at 863 (arguing for a more vigorous senatorial rule but agreeing with critics of such a rule that such questioning poses a real risk to the Court's independence).

16 See Carter, The Confirmation Mess, supra note 15, at 1190; Carter, supra note 3, at 963. Grover Rees has made the interesting point that requiring nominees to answer more specific questions about their constitutional understandings is consistent with both legal realism and
Concerns about judicial independence have, consequently, moored opposition to the use of ideology in the judicial confirmation process ever since the legal academy began obsessing about the "countermajoritarian difficulty" more than forty years ago. The problem with this argument, of course, is that it rests on a vision of the Supreme Court—the conventional narrative—that is fundamentally inconsistent with much of what empirical and positive legal scholarship has taught us about how the Court actually functions. That scholarship, which has been exhaustively explored elsewhere, has taught us that Supreme Court decisions are rarely countermajoritarian, that those that are rarely last, and that even our most rigorous methods legal formalism: to legal realists, it matters because the Constitution is under-determinate; to legal formalists it matters because there are correct constitutional answers and we therefore should reject a Justice who gets the Constitution wrong. See Rees, supra note 3, at 947. See Carter, The Confirmation Mess, supra note 15, at 1193–94. See Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 YALE L. J. 153, 155–56 (2002). See Stephen M. Griffin, American Constitutionalism: From Theory to Politics 89 (1996); Friedman, supra note 18, at 210–15 (noting that most of the Warren Court's controversial decisions were not truly countermajoritarian, but rather were made in the face of legislative inaction while supported by national majorities, and discussing the Warren and Burger Courts' quick reversals of the unpopular criminal rights cases); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 647–48 & n.365 (1993) [hereinafter Friedman, Dialogue]; Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596, 2607 (2003) [hereinafter Friedman, Mediated Popular Constitutionalism] ("[T]ime—and not too long a time—usually serves to ensure that the Court bows to public opinion, or confirms that public opinion was moving in the same direction as the Court's decisions."); Thomas R. Marshall, Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?, 42 W. Pol. Q. 493, 493–504 (1989) (discussing the Court's success in setting public policy); Keith E. Whittington & Tom S. Clark, Judicial Review of Acts of Congress 1789–2006 2 (Oct. 14, 2006) (unpublished manuscript) available at http://ssm.com/abstract_908986. While some Supreme Court decisions almost certainly are genuinely countermajoritarian (the flag burning decisions and much of the Court's current school prayer jurisprudence probably fall into this group), such cases appear to be rare. Moreover, the finality of these decisions may itself be a fiction in that some unpopular decisions, such as the school desegregation decisions, were simply not obeyed in large swaths of the country. See Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 15–16, 84–85 (2d ed. 2008).

More than fifty years ago, Robert Dahl questioned whether the Supreme Court in fact plays the countermajoritarian role our legitimizing narrative assigns to it. Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, J. Pub. L. 279 (1957), reprinted in 50 EMORY L.J. 563, 579–81 (2001). Specifically, Dahl compared the preferences of national "lawmaking majorities" (determined by looking at the preferences of the President and the majority members of the House of Representatives and the U.S. Senate). See id. at 569–77. When comparing these preferences to decisions in which the Supreme Court invalidated federal laws, he found that the Court's decisions rarely deviated from the preference of the elected officials. See id. at 577. When they did, he noted that the laws being invalidated usually were the work of what he called "dead" majorities, meaning
of constitutional interpretation routinely fail in practice to eliminate judicial discretion.\textsuperscript{21} It thus appears that the Court simply does not do what the conventional

that the statutes being struck down were more than four years old. \textit{Id.} at 571–72. In invalidating such statutes, Dahl speculated, the Court may well have been playing a \textit{majoritarian} role in keeping laws in alignment with current preferences. \textit{Id.} at 571–73. Thus, Dahl concluded, the Supreme Court, rather than protecting powerless minorities against majority tyranny, serves mainly to strengthen the preferences of the ruling coalition by lending its legitimacy to that coalition’s agenda. \textit{Id.} at 580–81. For sources updating, confirming, and discussing the essential findings of Dahl’s work, see Neal Devins, \textit{Is Judicial Policymaking Countermajoritarian}, in \textit{Making Policy, Making Law: An Interbranch Perspective} 189 (Mark C. Miller & Jeb Barnes eds., 2004) (discussing the theory that when the Court overturns legislation they are often acting according to majoritarian forces); Thomas R. Marshall, \textit{Public Opinion and the Supreme Court} 79–80 (1989); Robert G. McCloskey, \textit{The American Supreme Court} 132 (Samuel Levinson ed., 4th ed. 2005); Jonathan D. Casper, \textit{The Supreme Court and National Policy Making}, 70 \textit{Am. Pol. Sci. Rev.} 50 (1976) (claiming Dahl’s theory ignores relevant evidence and that the Court takes on a larger policy-making role than Dahl suggests); Friedman, \textit{supra} note 18, at 188–89; Mark Tushnet, \textit{Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law}, 1 U. Pa. J. Const. L. 325, 331–33 (1999); Whittington & Clark, \textit{supra} note 19. It is worth noting that we have not always obsessed over the allegedly countermajoritarian nature of Supreme Court decisions. See Friedman, \textit{supra} note 18, at 157; see also Larry D. Kramer, \textit{The People Themselves: Popular Constitutionalism and Judicial Review} 221–23 (2004). Barry Friedman has exhaustively documented this dialogical nature of most Supreme Court decision-making. See Friedman, \textit{Dialogue, supra} note 19; see also Kramer, \textit{supra}, at 234 (noting that there is no such thing as perfect finality in law and that uncertainty and change will exist even in a system of judicial supremacy).

21 The classic critique of originalism as an effective constraint on judicial discretion is Paul Brest’s \textit{The Misconceived Quest for the Original Understanding}, 60 B.U. L. Rev. 204 (1980) (identifying numerous problems with original intent as a theory of interpretation, including the difficulty of conceptualizing a single intent within a collective group); see also Fallon, \textit{supra} note 12, at 13–25 (discussing the limitations of originalist theories in constitutional interpretation); Daniel A. Farber & Suzanna Sherry, \textit{Seeking Certainty: The Misguided Quest for Constitutional Foundations} 1–9 (2002) (demonstrating how originalism, constitutional libertarianism (as advocated primarily by Richard Epstein and Randy Barnett), constitutional dualism (as advocated by Bruce Ackerman) and moral philosophy (as advocated by Ronald Dworkin) each strive toward, but fail to attain, constitutional determinacy); Peretti, \textit{supra} note 10, at 42; Mark Tushnet, \textit{Red, White, and Blue: A Critical Analysis of Constitutional Law} 148 (1988); Balkin, \textit{supra} note 4, at 514–15; Richard H. Fallon, Jr., \textit{A Constructivist Coherence Theory of Constitutional Interpretation}, 100 Harv. L. Rev. 1189, 1214–15 (1987); Robert M. Howard & Jeffrey A. Segal, \textit{An Original Look at Originalism}, 36 Law & Soc’y Rev. 113, 133 (2002); H. Jefferson Powell, \textit{The Original Understanding of Original Intent}, 98 Harv. L. Rev. 885, 948 (1985) (arguing that the framers’ theory of interpretation rejected originalism); Louis J. Sirico, Jr., \textit{Original Intent in the First Congress}, 71 Mo. L. Rev. 687, 691 (2006) (finding that most discussion of the original intent in the first Congress involved the general policies embodied in the Constitution, not the specific words or meanings thereof); Lawrence B. Solum, \textit{Originalism as Transformative Politics}, 63 Tul. L. Rev. 1599 (1989) (arguing that both originalists and nonoriginalists are seeking the same
narrative says it does: it does not use methods of interpretation to identify fixed constitutional rules and impose those rules against otherwise-inclined majorities.

The main case against an ideologically-based confirmation process thus turns out to be dependent on a largely discredited vision of the Supreme Court. After all, if Supreme Court Justices are not using objective interpretive methods to find and impose fixed constitutional constraints, but rather are (at best) exercising reasoned discretion in under-determinate areas of law and (at worst) imposing their own preferred policy choices in the name of the Constitution, then surely the people and their representatives can claim some right to guide that process by ascertaining the ideological preferences of nominees before confirming them to a lifetime position on the high court. Independence-based objections to ideological confirmation hearings, dependent as they are on the asserted need to isolate the judicial selection process from all such influence, cannot survive the failure of the conventional narrative.

The failure of the conventional narrative does more than remove this objection however. It also opens up the opportunity to reconceptualize the confirmation process in a way in which the use of ideology is not just unobjectionable, but is normatively and theoretically desirable. It presents, in other words, an opportunity to build a positive case for an ideologically-based confirmation process. This positive case builds on evolving alternative narratives of constitutional law—narratives that are taking seriously the insights of empirical legal scholarship and attempting to reconstruct a story of judicial power that rests on a realistic understanding of how the Supreme Court actually functions. It is to these narratives that we will now turn.

B. Evolving Narratives

The failure of the conventional narrative has, as noted above, led contemporary legal scholars to grope for new ways of understanding the process of constitutional lawmaking, ways that better accommodate the realities of how the Supreme Court actually functions.22 Some of these efforts have focused on encouraging political scientists to develop their models more carefully to account for the possibility that law, political institutions, and judicial acculturation impose restraints on the policy result when interpreting the Constitution); Michael C. Dorf, An Institutional Approach to Legal Indeterminacy (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 02-44, 2002), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=326780 (demonstrating the indeterminacy of process theories (advocated by John Hart Ely) and judicial minimalism (advocated by Cass Sunstein)).

22 Charles Black was one of the first to recognize the clash between the conventional understanding of judicial review and the insights of legal realism, asking whether it is "prudent notwithstanding our new insights into the nature of law, to continue to refer questions of constitutional power and permissibility . . . to a body so manned and placed as is the Court?" He concluded that it was. CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 169 (1960).
choices made by judicial actors that successfully differentiate those actors from elected officials. Others have focused on various instrumentalist rationales explaining why other political actors tolerate judicial review.

This work has been valuable, but the language of law requires more than a descriptive or instrumentalist story of how judicial review functions or why it is tolerated; it requires a normatively desirable legal story as well. Taking law seriously requires a principled way to talk about judicial power as a legal, not just a political, concept. Some constitutional theorists, consequently, have been working to develop alternative approaches to constitutional lawmaking that explain the exercise of judicial power, particularly the power of judicial review, without depending on the problematic assumptions embedded in the conventional narrative.

This scholarship varies tremendously, but it can be usefully divided into two broadly defined groups: “New Originalist” approaches and “developmentalist” approaches. The delineation of these two groups, and the decision to focus on them in the following discussion, is not unproblematic. The first difficulty is that the two groups sometimes overlap. Jack Balkin’s work, discussed below, reflects elements

---


25 William Marshall captured this thought in his argument against allowing the insights of legal realism to legitimize the use of ideology in the confirmation process. Marshall argued that the purely descriptive story of legal realism cannot provide Justices with a normatively desirable vision of the unique role of the Court in our governing system, and that endorsing ideological confirmations would thus discourage Justices from even aspiring to do anything other than impose their political viewpoints on the rest of us. See William P. Marshall, Constitutional Law as Political Spoils, 26 Cardozo L. Rev. 525 (2005).

26 See Barry Friedman, Taking Law Seriously, 4 Persp. on Pol. 261 (2006).

27 These classifications were drawn by Stephen M. Griffin, Rebooting Originalism, 2008 U. Ill. L. Rev. 1185, 1210. While I share Professor Griffin’s expressed reluctance to add new labels to constitutional theory, I also share his conclusion that the approaches he deems “developmental” are sufficiently like each other to warrant their recognition as a group, and also are, as a group, sufficiently unlike their predecessor (living constitutionalism) to justify a new term.

28 As Griffin has pointed out, there is a significant amount of imprecision in a dichotomous framing between “originalists” and “developmentalists.” See id. In regard to issues of interpretation, therefore, the distinction between originalists and others may be more one of linguistics and emphasis than of kind. In regard to issues of legitimacy, however, the dichotomy is more appropriate. Both the old and the new originalists link the legitimacy of judicial review to the ability of Supreme Court Justices to ground their decisions in the original meaning of the Constitution. See id. at 1219. Developmentalists source the legitimacy of judicial review elsewhere. See id. Even here, however, there is overlap. Some of Bruce Ackerman’s critics see traces of originalism in his approach, in that he continues to link judicial review to distinct moments of constitutional creation even though his work reflects a developmentalist
of both New Originalism (the group in which he places himself) and developmentalism. Likewise, Bruce Ackerman, whose work is presented here as exemplary of the developmentalist approach, has been assailed by some of his critics for being essentially originalist. The second difficulty is that there is much contemporary constitutional scholarship that is not encompassed by either of these categories. My focus on these two areas to the exclusion of other work is thus admittedly underinclusive.

Despite these problems, the focus on New Originalism and developmentalism is justifiable here for two reasons. First, these approaches are the contemporary heirs to the two paradigmatic constitutional movements of the recent past—originalism and living constitutionalism. Second, scholars working within these two frameworks are the most directly engaged in the project at issue here—the explication of normatively desirable alternative approaches to constitutional lawmaking in light of the failure of the conventional narrative.

1. The New Originalists

The New Originalists are the more cohesive of the two groups. Led by Keith Whittington and Lawrence Solum, New Originalists argue that the Constitution must be interpreted in accordance with the likely understandings of the general public at the time of the ratification of the relevant textual provision. Unlike earlier originalists, however, New Originalists have accepted that this approach will not always approach. See id. at 1210. For a more detailed discussion of these overlaps and differences, see generally id. See also Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 GEO. L.J. 1765, 1766 (1997).


New Originalism—as evidenced by its name—embraces its heritage explicitly. Developmentalism’s link to living constitutionalism is less direct, but equally present. See Griffin, supra note 27, at 1209–10 (recognizing the connection and articulating differences between the two); see also Bruce Ackerman, The Living Constitution, 120 HARV. L. REV. 1737 (2007); Stephen M. Griffin, The Bush Presidency and Theories of Constitutional Change 15, 27 (Tulane Pub. Law Research Paper, Paper No. 09-01, 2009), available at http://ssrn.com/abstract=1341983 (citing Ernest Young, The Constitution Outside the Constitution, 117 YALE L.J. 408, 449 (2007)) (linking Karl Llewellyn’s notion of a “working constitution” as a “living institution” to later work attempting to explain constitutional change outside of the Article V amendment process).

generate determinate outcomes to constitutional questions; they accept, in other words, the practical limitations of their preferred interpretive method.33

Rather than decrying as "illegitimate" the under-determinacy in judicial decision-making resulting from this (which was more or less the response of the original originalists34), New Originalists instead resort to the following distinction: when the original public meaning of a constitutional provision does not yield a relatively determinative answer to a constitutional question, or when it does so at such a high level of abstraction that the provision is nonetheless rendered under-determinate in relation to the question presented, the resolution of the question must be referred to as an act of constitutional "construction," not constitutional "interpretation."35

This distinction—the refusal to label as "interpretation" any constitutional reasoning not traceable to original public meaning—is key to the New Originalist approach. It is how, in light of the failure of the conventional narrative, New Originalists reconcile constitutional under-determinacy with the viability of originalism as an interpretive method.36 It also is the method they use to meet the practical need to accept as legitimate volumes of existing constitutional law which, while not obviously contrary to any ascertainable original public meaning, is nonetheless not directly tied to it.37

---

33 See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 171-72 (1999); Lawrence B. Solum, A Reader's Guide to Semantic Originalism and a Reply to Professor Griffin 2 (III. Pub. Law Working Paper Series, 2008), available at http://ssm.com/abstract=1130665. This limitation can stem from different things. Sometimes the original public meaning of a constitutional provision will be contested or otherwise unknowable. See id. at 40. Other times it will be pitched at such a high level of generalization that it is not particularly useful in actual cases. See id. Solum acknowledges that "much of the important work of constitutional practice must be done by construction, the crafting of specific rules or practices that allow for the application of constitutional provisions which are vague." Id. Originalists argue about which constitutional provisions raise these problems. See, e.g., Mark Tushnet, Heller and the New Originalism, 69 OHIO ST. L.J. 609 (2008). However, originalists do agree that when they are present, constitutional fidelity requires that the relevant provision be understood as either incapable of an originalist interpretation or as encompassing the full breadth of the principle it was originally understood to embody. See Solum, supra, at 2.

34 Herbert Wechsler and Robert Bork are among those who have taken this approach. See Mark A. Graber, Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship, 27 LAW & SOC. INQUIRY 309, 325 (2002) (reviewing LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS (2000)) (noting that Wechsler advocated a theory of judicial power that he admitted courts had never followed, and noting that Bork has described "the history of judicial review as a 200-year reign of error").

35 See WHITTINGTON, supra note 33, at 5-7; see also BARNETT, supra note 32, at 118-30; Solum, supra note 32, at 67-69.

36 Solum, supra note 33, at 40. ("[M]uch of the important work of constitutional practice must be done by construction, the crafting of specific rules or practices that allow for the application of constitutional provisions which are vague.").

37 See WHITTINGTON, supra note 33, at 171-72; see also Mitchell N. Berman, Originalism is Bunk, 84 N.Y.U. L. REV. 1 (2009) (criticizing New Originalism for this move); Griffin, supra note 27, at 1216-17.
New Originalism thus successfully responds to much of the criticism leveled at its predecessor. It acknowledges the under-determinacy of its preferred method of constitutional interpretation, and it accommodates changes in constitutional law through the use of non-interpretative constitutional constructions.

The value of New Originalism as an alternate constitutional narrative, however, is limited by the uncertainty with which New Originalists approach what Lawrence Solum has called the “construction zone”—the area in which issues not resolvable through interpretation (as defined within the theory) are addressed. Many New Originalists do not provide a normative theory of constitutional construction. Moreover, those New Originalists who do address the process of constitutional construction differ significantly on what factors should guide it. Consequently, as a group, the New Originalists give little guidance to judges regarding how questions requiring constitutional construction are to be approached. Depending on the size of a given New Originalist’s “construction zone,” this theoretic blank spot leaves potentially large swaths of the actual work done by courts in constitutional cases beyond the normative scope of the theory.

38 Solum, supra note 33, at 6, 40.
39 See id. at 27 (noting that his version of New Originalism, semantic originalism, does not include a normative theory of construction). Whittington has exhaustively detailed constitutional construction outside the courts, but disavows, and therefore does not discuss, legitimate acts of judicial construction. See Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999).
40 See Solum, supra note 33, at 27 (“Different New Originalists have different normative views about constitutional construction. Barnett emphasizes constitutional legitimacy; Whittington emphasizes deference to politics; Balkin emphasizes the role of constitutional principles.”).
41 See id., at 40. Solum acknowledges that “much of the important work of constitutional practice must be done by construction, the crafting of specific rules or practices that allow for the application of constitutional provisions which are vague.” Id. See also Whittington, supra note 39. As Stephen Griffin has said, “One could read Whittington’s entire book ... without gaining an understanding of how a lawyer is supposed to analyze a given constitutional case or a judge is supposed to render a decision. The practice of constitutional law is not addressed.” Griffin, supra note 26, at 1191.
42 See Griffin, supra note 27, at 1198–99. Solum acknowledges this. While maintaining that New Originalism, like old originalism, is committed to constitutional fixity, he acknowledges that the knowable core of fixed constitutional meaning will not generate determinate answers to many constitutional questions. Solum, supra note 33, at 32 (noting that “semantic originalism underdetermines outcomes, so there will be a variety of cases in which a range of outcomes is consistent with the semantic content of the Constitution”). To give one pointed example of this, consider the divergence of opinion among prominent New Originalists about the constitutionality of abortion rights. Jack Balkin and Randy Barnett agree with the outcome in Roe and find that the original public meaning of the Constitution protects judicially enforceable abortion rights. See Barnett, supra note 32, at 232–34; Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291, 299 (2007). Solum posits that a New Originalist Justice could disagree with Roe as inconsistent with original meaning, thus allowing the Justices to
Some New Originalists, such as Solum, are not particularly troubled by this. Solum’s mission is not to develop a normative theory of constitutional decision making, but rather to provide a theoretical account of the linguistic meaning of the constitution and to thereby clarify how we talk about what courts do.\textsuperscript{43}

Others take different tacks. Whittington avoids the \textit{judicial} construction problem by limiting the role of courts in enforcing provisions requiring construction.\textsuperscript{44} Randy Barnett argues that a better understanding of what he sees as the rights-protective original public meaning of the Constitution overall (and the Ninth Amendment in particular\textsuperscript{45}) would in fact enable most constitutional disputes to be answered through acts of interpretation, thus reducing the need to engage in problematic constructions.\textsuperscript{46} Still others, most notably Jack Balkin, agree with Barnett that the meaning of many—or perhaps most—constitutional provisions can be derived through interpretation not construction, but then interpret those provisions at such a high level of generality that they become as under-determinate in actual cases as are the questions their peers relegate to the construction zone.\textsuperscript{47}


\textsuperscript{44} Whittington is not entirely clear on this point, but this appears to be his approach. \textit{WHITTINGTON, supra} note 33, at 160–68; \textit{see also} Barnett, \textit{supra} note 32, at 121–23 (discussing Whittington’s work).


\textsuperscript{46} \textit{See} Barnett, \textit{supra} note 32, at 54. In making this argument, Barnett emphasizes his understanding that the original meaning of the Constitution, specifically the Ninth Amendment, included an expansive understanding of the constitutionalization of natural rights. \textit{Id.} at 54.

\textsuperscript{47} \textit{See} Balkin, \textit{supra} note 4, at 453. Balkin’s goal is to reconcile originalism with living constitutionalism. He does this by arguing that fidelity to the original meaning of the Constitution requires adherence to constitutional principles at whatever level of generality they were
The difficulty with all of this, in terms of New Originalism's success in creating an alternative narrative of judicial power, is that each of these approaches (with the exception of Whittington's) reintroduces many of the same problems of historical uncertainty and constitutional under-determinacy that rendered originalism problematic as an interpretive method in the first place. Whittington's approach avoids that particular problem, but in doing so renders much of our existing judge-made constitutional law presumptively illegitimate. New Originalism would thus benefit by a mechanism through which the discretionary acts of courts engaged in constitutional constructions could be guided and legitimated—a mechanism a reconceptualized approach to the confirmation process can provide.

originally understood. *Id.* at 449, 493–98. Consequently, to Balkin, being an originalist necessarily encompasses respecting the indeterminacy inherent in constitutional principles which were themselves originally understood in a vague or highly abstract way. *Id.* at 491–98. To refuse to enforce such provisions because of the uncertainty inherent in doing so is to disrespect original meaning. *Id.* at 491; see also Randy E. Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7, 11 (2006). Thus, Balkin's New Originalism works to reconcile originalism and living constitutionalism. Balkin, *supra* note 4, at 428. In doing so, however, he openly rejects the search for strong constraints on judicial discretion that so motivated the original originalists, turning instead to citizen and social movements as the first sources of constitutional interpretation. See *id.* at 503–16; see also *id.* at 458 (noting that constitutions are designed to "channel and discipline future political judgment, not forestall it").


49 This is so for two reasons. First, like original originalism, Whittington's approach appears to require the disavowal of much of our existing constitutional law. Second, it is unclear in Whittington's work how a court is to engage with constitutional constructions after they have been adopted by political actors outside of the courts. See Whittington, *supra* note 39, at 167–73 (an example of his discussion of precedent); *id.* at 173–79 (discussion of prior constitutional "settlements"); *id.* at 213 (noting that political constructions do matter to constitutional outcomes but not elaborating on how, if at all, courts are to approach even well-settled political constructions of our Constitution). This leaves open the question of whether there ever comes a time when courts should enforce constitutional constructions that have developed and been embraced outside of the courts. For example, should courts today enforce well-accepted decisions that were almost certainly inconsistent with original public meaning, such as *Bolling v. Sharpe*, 347 U.S. 497 (1954) (the companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954)), that invalidated racial discrimination in the District of Columbia? Whittington's failure to address this issue leaves his approach open to the same problems of ad hoc acceptance of imperfect prior decisions that plague original originalism. Stephen Griffin also has made this point. See Griffin, *supra* note 27, at 1191.
2. The Developmentalists

Developmentalism is a very big tent, and developmentalist scholars differ from each other in more ways than do the New Originalists. But each of these theorists shares a common trait that distinguishes them from the New Originalists—they acknowledge and accept as legitimate constitutional change outside of the Article V amendment process. This sets developmentalists apart from New Originalists in two important ways. First, developmentalists source changes in constitutional understanding in a wide array of social and political actions, with no particular priority necessarily given to the originally understood public meaning of the constitutional text. Second, and relatedly, developmentalists therefore are not as concerned as New Originalists with drawing crisp distinctions between acts of “construction” and acts of “interpretation.”

Bruce Ackerman’s work perhaps best exemplifies the developmentalist approach. Ackerman rejects the conventional story of the Supreme Court as a false narrative of constitutional continuity that treats significant constitutional changes not as changes at all, but rather as judicial rediscoveries of fixed constitutional truths. This story of constitutional continuity is, as Ackerman notes, appealing precisely because of its insistence on the fixity of constitutional meaning. As Ackerman recognizes,

50 Developmentalists include scholars who support judicial supremacy and those who do not. For examples of the former, see Leib, supra note 29, at 360; Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373 (2007) (discussing the cyclical reinforcement of constitutional enforcement and the Court’s role); Suzanna Sherry, Democracy Uncaged (Vanderbilt Law Sch. Pub., Law & Legal Theory Research Paper Series, Paper No. 09-04, 2009), available at http://ssrn.com/abstract=1338130 (book review). For examples of the latter, consider the “popular constitutionalism” approaches developed by Mark Tushnet, Larry Kramer, and as noted in Post & Siegel, supra at 373 & n.3, as well as Bruce Ackerman (discussed infra notes 54–67 and accompanying text), and others.

51 See Griffin, supra note 27, at 1209, 1219.

52 See id. at 1220; see also Dorf, supra note 28, at 1770, 1788–94 (describing developmentalist theory through an examination of Philip Bobbit’s theories).

53 See Griffin, supra note 27, at 1218–20.

54 As noted above, there also are strands of originalism in Ackerman’s approach, and some of his critics have considered him an originalist. See Sherry, supra note 30, at 928. That critique is correct, in that Ackerman, like the originalists, does look for foundational moments to ground constitutional meaning and ties his constitutional interpretation to those moments rather than to concepts of common law or moral philosophy. His approach is distinctly developmentalist, however, in that it finds such foundational moments outside of the formal Article V amendment process. For a discussion of Ackerman’s work in this regard, see Griffin, supra note 27, at 1209. See also Stephen M. Griffin, Constitutional Theory Transformed, 108 Yale L.J. 2115, 2142–47 & n.131 (1999).


56 See id. at 457–67 (noting the popularity of this interpretational story in the context of the New Deal).
however, a narrative of continuity is deeply inconsistent with the reality of our constitutional experience—the one in which constitutional law changes. The façade of continuity is thus at best a reassuring fiction.

Armed with this assessment of the situation, Ackerman set out to bridge the gap between the conventional narrative and constitutional law as it actually operates. His goal was to develop a theory that could accommodate the fact of constitutional change while preserving the constitutionalist distinction between ordinary and constitutional law. He did so by arguing that certain moments in history are so significant that they constitute moments of “higher lawmaking”—times when “We the People” are sufficiently engaged and committed to a governing project that our actions effectuate a constitutional change.

Preserving constitutionalism, however, required Ackerman to find a way to distinguish these moments from ordinary fluctuations in the political preferences of the public. Ackerman did this by identifying five stages that a political movement must go through before it can be deemed a moment of higher lawmaking: signaling, proposing, triggering, ratifying, and consolidating. These stages serve to ensure that the People are sufficiently aware, mobilized, and approving of a constitutional change before it is acknowledged as such. Once a political movement successfully navigates all five stages, however, it is fully incorporated as part of the Constitution.

As with judicial decision-making within the New Originalists’ “construction zone,” there is an unfortunate imprecision to this. Ackerman’s five stages are both vague and, at least as originally articulated, stringent. As such, the theory has

---

57 See id. at 471.
58 See id. (describing how what is perceived as continuity is really a deliberative process that serves to re-entrench fundamental rights of Americans).
59 See id. at 456–57; see also Griffin, supra note 54, at 2117–19 (calling Ackerman’s thesis the “restoration thesis, or restorationism”).
60 See Ackerman, supra note 55, at 456–57; see also Griffin, supra note 54, at 2117–19.
61 See Ackerman, supra note 55, at 461.
62 See Ackerman, supra note 31, at 1762. Ackerman originally articulated this as a four-stage process: signaling, proposing, deliberating, and codifying. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 266–69 (1998); see also Sherry, supra note 30, at 929.
63 See ACKERMAN, supra note 62, at 4–5 (explaining how his theory of higher lawmaking culminates in acceptance by We the People).
64 See id. at 268–69 (describing the ultimate incorporation of the New Deal through key Supreme Court decisions).
65 For a more detailed discussion of this point, see Todd E. Pettys, Popular Constitutionalism and Relaxing the Dead Hand: Can the People be Trusted?, 86 WASH. U. L. REV. 313 (2008) (discussing and attempting to clarify popular constitutionalism). See also Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 VA. L. REV. 1045, 1079–83 (2001) (describing the difficulties in using Ackerman’s theory); Griffin, supra note 54, at 2146–47 (describing the gaps in Ackerman’s theory); supra note 42 and accompanying text (discussing the imprecision in New Originalist theory).
66 See Sherry, supra note 30, at 929–30. It appears that Ackerman may be reducing the rigor of the five-stage test. His early writings emphasized the relative rarity of moments of higher
limited ability to legitimate the decisions of Justices struggling to answer constitutional questions presented in actual cases, particularly those doing so without the benefit of historical perspective. Other developmentalists have had similar difficulty articulating a mechanism through which the social and political movements their theories rely on are legitimately translated into constitutional law. This imprecision weakens the link, so essential to Ackerman and other developmentalists, between the will of the people and the fact of constitutional change: if the Court cannot easily identify moments of higher lawmaking, then judge-made constitutional change can look more like change by judicial fiat than by the engaged action of We the People.

New Originalism and developmentalism thus in some ways share the same benefits and the same flaw. Both work to incorporate within their approaches a realistic understanding of the actual operation of the Supreme Court. Both accept the under-determinacy of interpretive methods and acknowledge that Supreme Court Justices necessarily make choices when deciding at least some constitutional cases. Finally, both accept the fact of changes in constitutional law outside of the Article V amendment process, although New Originalists label such changes acts of constitutional construction rather than constitutional interpretation.

But both approaches also have a similar flaw: they lack a satisfying device through which constitutional changes are considered and accepted as legal changes. Most New Originalists do not even attempt to make this connection, either pushing such changes into the under-developed construction zone or legitimizing them only when undertaken in the political realm. Developmentalists take the problem more seriously, but their work as of yet has not provided a mechanism that is both sufficiently concrete and theoretically satisfying.

It is the premise of this paper that an lawmaking. Id. His later work, however, uses the same multistage test to extend constitutional status to landmark statutes (notably the Civil Rights Act of 1964) and so-called “mandates from the People.” Ackerman, supra note 31, at 1775.

Ackerman has emphasized that periods of higher lawmaking stretch over decades. See Ackerman, supra note 31, at 1763. For a discussion of the interpretive difficulties this creates, see Dorf, supra note 28, at 1768 (noting that Ackerman’s approach does not generate interpretive principles and is more a theory of legitimacy than of interpretation). Ackerman appears to be aware of this, but he addresses this critique only by invoking the shallow democratic credentials of much legislation. See Ackerman, supra note 31, at 1805. Most ordinary legislation, he argues, does not reflect the considered judgment of the People. Consequently, it is not antidemocratic for the Court to strike down such legislation as inconsistent with the more thoughtful commitments made by the People in moments of higher lawmaking. See also Balkin & Levinson, supra note 65, at 1079–82.

See Pettys, supra note 65, at 332–34 (noting the continuing lack of precision in the way various developmentalists link social movements to constitutional change).

Compare id. at 316–17 (developmentalist), with Solum, supra note 21, at 1621–22 (originalist).

Compare Pettys, supra note 65, at 320, with Solum, supra note 21, at 1622.

Compare Pettys, supra note 65, at 332–33, with Griffin, supra note 27, at 1211.

See Griffin, supra note 27, at 1217.

Jack Balkin, Sanford Levinson, Reva Siegel and Robert Post have all discussed, as
ideological confirmation process can provide one such mechanism. It is to that issue that we will now turn.

II. A Principled Defense of an Ideological Confirmation Process

This section builds on Jack Balkin and Sanford Levinson’s theory of “partisan entrenchment.”

Balkin and Levinson examined how political parties who hold power for extended periods of time use Supreme Court appointments to entrench their constitutional preferences. My goal in this Part is to demonstrate how a more completely theorized understanding of an ideological confirmation process can extend that insight beyond the descriptive and provide a normative defense of such a process. In doing so, I also will argue that both New Originalist and developmentalist theories would benefit by embracing the reconceptualization of the confirmation process offered here.

The idea developed here does not purport to be a theory of constitutional interpretation, nor is it primarily a mechanism by which to control the discretion of individual Justices. Rather, it offers a normatively appealing explanation of how an ideological confirmation process can fill gaps in our evolving constitutional narratives by accommodating constitutional change while preserving the notions, essential to our understanding of our legal system, of both constitutionalism and self-governance.

A confirmation-based narrative, broadly speaking, operates as follows. Major constitutional changes made by the Court since the last Supreme Court vacancy will be the subject of attention at subsequent confirmation hearings. If the nation approves of the Court’s changes, adherence to them will become a prerequisite to future confirmations. If such approval is sufficiently long-lasting, the changes will become entrenched on the Court and will become the country’s new constitutional consensus. If, on the other hand, the public disapproves of them, or if its approval is not sufficiently deep or broad to survive changing political regimes, the change will not be absorbed and the Court’s constitutional change will be rejected.

When viewed through this framework, constitutional decisions can be seen as something akin to “constitutional proposals” made by the Justices to the country. Over time, the country will either accept those constitutional proposals and incorporate adherence to them into the confirmation process, or it will reject them by refusing to

---

71 See Balkin & Levinson, supra note 65, at 1066–70; Post & Siegel, supra note 50, at 375–76.
72 See Balkin & Levinson, supra note 65, at 1066.
73 Jack Balkin and Sanford Levinson’s work on partisan entrenchment posits that, as a descriptive matter, this is precisely how constitutional law changes over time. See id. at 1066–68; see also Jack M. Balkin & Sanford Levinson, The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State, 75 FORDHAM L. REV. 489 (2006) (offering an updated analysis of their theory of partisan entrenchment).
74 See Balkin & Levinson, supra note 65, at 1067–68.
confirm nominees who advocate them. Judicial power, in this narrative, is different than legislative or executive power, but is legitimized by the same basic mechanism: the regular and effective opportunity for a democratically-controlled check over how it is exercised. Confirmation hearings under this approach will become what Justice Scalia once bemoaned they were turning into: mini constitutional conventions during which We the People decide what we want the open-ended phrases of the Constitution to mean.

In this narrative, the under-determinacy inherent in much of our constitutional text, acknowledged by both New Originalists and developmentalists, is not particularly troubling. The discretion necessarily exercised by the Justices is channeled on a cycling basis through the democratically-credentialed confirmation process. This ensures that the public will have regular and ongoing opportunities to evaluate how that discretion is exercised and, if desired, to incorporate acceptance or rejection of the Court’s constitutional changes into future confirmation decisions.

Like New Originalism and developmentalism, this narrative also takes seriously the need to preserve the distinction between constitutional and ordinary law. It does so by ensuring that only those constitutional changes that enjoy deep public support for an extended period of time become entrenched in our constitutional consensus—only a political movement holding power across two branches of government for a significant period of time will be able to effectuate a constitutional change by “stacking” the Court. Unlike those approaches, however, an ideologically-based approach to the confirmation process accomplishes this in a way that tangibly connects constitutional change to a specific moment (the confirmation process) at which the public and its elected officials are uniquely focused on public policy choices as constitutional choices.

If an ideological confirmation process can accomplish this—if it can help evolving constitutional narratives cope with the failure of the conventional story by providing a mechanism through which deeply held yet changing public values can be legitimately

---

77 As noted above, Jack Balkin and Sanford Levinson have argued that this is in fact how constitutional law changes over time. See id., at 1067-68; see also Friedman, Mediated Popular Constitutionalism, supra note 19, at 2609 (noting that the appointment process ensures a connection between popular opinion and judicial opinions).

78 MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 27 (2004) (“[W]e are . . . having a plebiscite on the meaning of the Constitution every time a justice is nominated and that’s crazy.”). Then-Senator Joseph Biden, chair of the Senate Judiciary Committee from 1987 to 1995, has embraced this view, calling Supreme Court confirmation hearings “town meeting[s]” on the meaning of the Constitution. Stephen J. Wermiel, Confirming the Constitution: The Role of the Senate Judiciary Committee, 56 LAW & CONTEMP. PROBS., Autumn 1993, at 121, 122 & n.8.

79 Public awareness of the Court and constitutional controversies is high during contested confirmation hearings. See James L. Gibson & Gregory A. Caldeira, Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court, Feb. 9, 2008, available at http://www.polisci.wustl.edu/media/download.php?page=faculty&amp;paper=123(collecting research finding the same).
transformed into constitutional law—then such a process would be normatively defensible and theoretically useful to both New Originalists and developmentalists. It would help developmentalists by providing a tangible point at which “the People” can concretely contribute to constitutional change. It would help New Originalists by providing a principled way to guide and legitimize changes in constitutional constructions.

Can an ideological confirmation process accomplish these things? The remainder of this paper argues that such a process not only can do so, but that it frequently—indeed throughout much of our history—has played precisely this role.

A. Confirmation Questions

If the confirmation process is to successfully provide a mechanism through which the public’s evolving constitutional preferences are translated over time into constitutional law, then it is important that the public have some opportunity to evaluate the ideological preferences of the nominee being confirmed. This opportunity is most readily provided through the confirmation hearings conducted by the Senate Judiciary Committee. The senators engaged in questioning the nominees at these hearings are well-versed in constitutional issues, they are keenly aware that they are speaking both to and for their constituents, and they frequently determine whether a nominee will or will not be allowed to take a place on the Supreme Court.

The constitutional questions posed by senators at these hearings tend to take two forms: questions about areas of law that were initially controversial but are now well-settled, and questions involving currently controversial constitutional issues. Each of these types of questions contributes—albeit quite differently—to the ability of the confirmation process to play the role set out for it here.

1. Settled Issues

Questions in this category require the nominee to either accept or reject the existing constitutional resolution of a previously controversial issue. Some of the

---

80 Presidents and senators have multiple sources of information about the views of Supreme Court nominees, and it is questionable whether those actors acquire much additional information during the confirmation hearings. The hearings do, however, give the public a more direct way to evaluate the nominee’s positions, and, as discussed below, to hold senators electorally accountable for their confirmation votes. Thus, while an open confirmation hearing is not essential to the narrative developed here—the public could hold senators accountable for their conduct even without a direct window into a nominee’s views—an open process seems likely to enhance the ability of the public to do so. It also is more able to contribute to the evolution of constitutional dialogue, as discussed infra Part II.A.1.

81 See Nagel, supra note 3, at 862–65 (discussing the Senate’s qualifications to inquire about the judicial philosophy of nominees, and its role in judging a nominee’s ability to change the Court for better or worse).

issues or cases addressed in these questions will have been controversial when made (Brown), others will have come over time to stand for subsequently repudiated principles (Plessy and Lochner). But in either scenario, the key point is that the public has now reached a broad and deep consensus on what the constitutionally correct resolution of the issue is.

These questions represent the most straightforward illustration of the confirmation-based narrative at work. The prior judicial decisions being accepted or repudiated in these scenarios represent the quintessential "constitutional propositions" posited above: the Court, faced with the need to generate a constitutional rule in an underdeterminate area of law, has exercised its discretion and issued its decision. Public debate—often quite vigorous debate—about the propriety of that decision then ensued. Over time, public opinion stabilized and a consensus on the issue was reached. From that point forward (or for at least as long as the consensus holds) a nominee expecting to be confirmed must signal in response to this type of question that he or she concurs with the hard-won public consensus and will behave accordingly if confirmed. The failure of a nominee to make such an affirmation will almost certainly—and appropriately—doom the nomination.

The fifty-year saga of Brown v. Board of Education illustrates this point. Consider the way Brown has been used at the confirmation hearings in the more than half-century since that case was decided. Potter Stewart, confirmed shortly after Brown, was questioned extensively by Southern senators about his opinion of the case. He avoided a direct response for some time, but ultimately informed the senators that he was disinclined to overturn the case, and that those wanting such a result should not vote for him. Despite a difficult confirmation hearing, only seventeen senators—all from former Confederate states—ultimately voted against his appointment. Thus, while the country at the time of the Stewart confirmation was still debating Brown and the future of civil rights, Southern opposition to Brown was not strong enough to make its rejection a condition of Justice Stewart's confirmation. The case was one on which no constitutional consensus had been reached.

By 1985, however, support for Brown had solidified and affirmation of the case had become a de facto prerequisite to confirmation. Justice Rehnquist, appearing before the Senate that year as a nominee for Chief Justice, was required to repeatedly

84 Plessy v. Ferguson, 163 U.S. 537 (1896).
86 See Brown, 347 U.S. 483.
87 See Tribe, supra note 2, at 89.
88 See id.; Ringhand, supra note 82, at 355 n.91.
89 Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth & Thomas G. Walker, The Supreme Court Compendium: Data, Decisions, and Developments 289 (1994); Ringhand, supra note 82, at 355 n.91.
disavow previous writings expressing skepticism of the case. Robert Bork, testifying two years later, felt compelled to explain in great detail how his narrow version of originalism could be made consistent with the outcome in Brown. Even Justice Scalia, who answered very few specific questions at his 1986 confirmation hearing, felt it necessary to speak positively about Brown.

Today, glowing endorsements of Brown have become standard fare at confirmation hearings, regardless of the political inclinations and purported interpretive preferences of the nominee. The country has embraced the constitutional proposition made by the Court in Brown, and adherence to that proposition, while previously controversial, is now expected and demanded of Supreme Court nominees. More to the point, any nominee who refused to affirm Brown today would not be confirmed, and any senator who voted for such a nominee would do so at their immediate electoral peril. Brown is now part of our constitutional consensus, and its use as a litmus test for confirmation is both expected and accepted.

Many things, of course, contributed to society's acceptance of Brown and the concept of racial equality it represents. What a confirmation-based narrative adds to

---

90 See Ringhand, supra note 82, at 347 (discussing the practice of the Rehnquist Court nominees of willingly affirming their adherence to Brown and Lochner).


94 See Carter, The Confirmation Mess, supra note 15, at 1193. In fact, the worm has turned so far on Brown that it is jarring to remember that the "colorblind" reading of the Fourteenth Amendment advocated by today's constitutional Formalists was rejected by the constitutional formalists of 1954 as an insufficiently "neutral principle" on which to rest constitutional lawmaking. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 22–23 (1959). Thus, the decision and the principle underlying it—that separate is inherently unequal—has in fifty years gone from a deeply contested constitutional proposition to such a mainstay of our constitutional understanding that it now forms the starting rather than the ending point of our Fourteenth Amendment dialogue. See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 716–20 (2007).
these explanations is a mechanism through which those societal changes were specifically contemplated as constitutional changes, and were accepted as such through a democratically-controlled process operating over an extended period of time.

It is true that the cases addressed in this type of questioning frequently are being accepted or rejected more for the symbolic principles they have come to stand for than the precise legal point initially at issue in the case. This is particularly true the farther in time a given confirmation is from the actual case being discussed. This hardly, however, renders their affirmation (or rejection) meaningless. The affirmation of Brown tells us that our constitutional consensus now requires that we accept people of color as full and equal citizens under law, and that state-sanctioned race-based subordination is consequently prohibited. It is important to recall that that principle, which today seems too abstract to be of much practical use, was not part of our constitutional consensus prior to, and immediately after, Brown. Acceptance of it as such thus had real constitutional bite. Our distance from the original controversy should not mask that fact.

2. Unsettled Issues

Many—maybe most—questions asked of nominees at their confirmation hearings are very different, however. These questions involve issues on which no constitutional consensus has been reached. They involve constitutional issues that are currently and often bitterly contested, issues such as abortion, executive power, and the death penalty today; or desegregation and subversive speech fifty years ago. A nominee occasionally will respond directly to this type of question, but is more likely to avoid speaking to the issue either by reciting existing law without opining on it, or by stating that the need for impartiality in future cases prevents him or her from being more responsive.

These questions—or more accurately, the answers they provoke—obviously cannot play the same role in the confirmation process as do questions requiring the affirmation or rejection of prior cases or doctrines. These colloquies nonetheless

95 Consider the recent fight in Parents Involved about the legacy of Brown. Each of the Justices currently sitting on the Court would claim—did claim—fidelity with Brown. The Justices nonetheless vehemently disagreed with each other about what the fidelity required in the case presented. See Parents Involved, 551 U.S. at 740–47 (Roberts, C.J.), 747–50 (Thomas, J., concurring), 797–802 (Stevens, J., dissenting), 802–04 (Breyer, J., dissenting).
96 See, e.g., Alito Transcript, supra note 93, at 379 (unequivocally denouncing Plessy v. Ferguson, 163 U.S. 537 (1896)).
97 See, e.g., Ringhand, supra note 82, at 338–46.
98 See id. at 343. More frequently (but still rarely) a nominee will not answer such questions directly but will strongly indicate his or her preferences. Id. at 353 (discussing Justice Ginsburg's relatively frank answer regarding her support of abortion rights).
99 I have argued elsewhere that this latter justification is not convincing. See id. at 354–56.
contribute to the process. They do so by presenting two distinct and important opportunities. First, they provide an opportunity for the senators to refuse to confirm nominees who will not answer their questions. Second, they provide an opportunity for a highly visible public discussion of contested constitutional proposals. The first opportunity ensures public control over which branch of government makes decisions in constitutionally contested areas; the second enables voters to "keep tabs" on the constitutional issues they care about. Each of these opportunities is explored further below.

a. Opportunity for Rejection

Senators confronted with a nominee who refuses to answer questions regarding currently contested constitutional issues have a valuable, if infrequently used, weapon at their disposal: they can vote against confirmation. Senators, of course, rarely use this weapon; ideological disagreement is much more likely to generate a "no" vote than is a refusal to answer questions. The relevant point for the confirmation-based narrative, however, is that the senators have the opportunity to reject a nominee on this basis. Thus, while a senatorial norm of pushing nominees to answer questions about contested areas of constitutional law might improve the confirmation process, it is not necessary to the narrative developed here.

The opportunity to reject a nominee who refuses to answer questions is significant because it displays to voters what scholars of the Senate frequently assert—senators, like other elected officials, are often quite happy to delegate the resolution of deeply divisive issues to the Supreme Court. Thus, when the Senate votes to confirm a nominee who has refused to answer questions about a contested area of constitutional law, the message being sent is simple: a majority of our senators have temporarily delegated resolution of the contested constitutional question at issue to the Supreme Court.

As Stephen Wermiel has pointed out, senators have "learned to shape the constitutional dialogue in confirmation hearings to make clear to nominees that a willingness to profess belief in some threshold constitutional values is a prerequisite for the job." Wermiel, supra note 78, at 121-22. Neal Devins has attributed the pro-choice votes of Justices O'Connor and Kennedy in Planned Parenthood v. Casey, 505 U.S. 833 (1992), at least in part to the impression left on these Justices during their confirmation hearings that a willingness to accept privacy rights (often a code word for abortion in the confirmation context) was necessary for their confirmations. See Devins, supra note 20, at 195.

There are several reasons senators may be reluctant to do this. For a full examination of these reasons, see Devins, supra note 20, at 195-99.

See Stephenson, supra note 24; see also Devins, supra note 20.
Such a delegation would be troubling, from a self-governance perspective, if it was irreversible and permanent, or if the fact of delegation itself was contrary to public wishes. But neither of these things seems likely to be the case. As we have seen, one of the insights of recent empirical work examining the Court is that constitutional law changes: it is neither irreversible nor permanent. Consequently, if at some point a public consensus is reached on the contested issue, adherence to that consensus will become a condition of confirmation and the consensus will thereby be incorporated into our deeper constitutional understanding. That this cannot occur until the constitutional agreement is broad and deep—until the consensus is firm enough that a majority of senators voting on enough nominees are willing to treat it as a condition of confirmation—is precisely how the confirmation process helps preserve the essential distinction between constitutional and ordinary law.

As noted above, this delegation of decision-making authority away from elected officials and to the Court could nonetheless be troubling if those being governed objected to the fact of the delegation itself. This also, however, does not appear to be the case. Senators are presumed to act in their own electoral self-interest. If a senator believed that her constituents objected to this delegation of policy-making authority, she could vote against a nonresponsive nominee on precisely those grounds. Moreover, if voters become annoyed at their senator’s refusal to do so—at the repeated delegation of contested constitutional issues to the discretion of the Court without an adequate understanding of how that discretion will be exercised—they can signal their displeasure to their senator. If enough do so, the Senate presumably will respond by more vigorously questioning nominees.

The point, in short, is that the public remains in charge: if a previously contested (or unanticipated) issue becomes one that enough people come to view as implicating core constitutional values, the issue will become a litmus test in future hearings. If not, we can assume that the public is content to allow the Justices to continue to exercise their discretion on the issue. More precisely, we can assume that the public’s

104 See supra notes 19–20 and accompanying text.
105 See supra notes 86–94 and accompanying text.
106 David Stras and Ryan Scott have calculated that it takes on average 16.2 years for the Supreme Court to completely turn over its membership. David R. Stras & Ryan W. Scott, An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren, 30 HARV. J.L. & PUB. POL’Y 791, 802 (2007).
107 Although it seems more likely that the public, like its elected officials, prefers to leave difficult issues to judicial resolution. See William E. Forbath, Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule, 81 CHI.-KENT L. REV. 967 (2006) (arguing that judicial review has always been supported by popular majorities because of its association with gradual and principled change); see also Stephenson, supra note 24 (discussing why elected officials tolerate systems allowing for the exercise of strong judicial review).
level of contentment with the exercise of such discretion is no more troubling, from a self-governance perspective, than other delegation decisions made by the legislative or executive branches.108

b. Opportunity for Discussion

The other value that questions about currently contested constitutional issues contribute to the process is the opportunity such questions provide for a high profile, public discussion of controversial issues as constitutional issues. Barry Friedman has extensively documented how constitutional law is advanced and changed through an ongoing conversation between the courts, elected officials, and the public.109 Confirmation hearings offer an ideal forum for this type of dialogue. By discussing competing policy preferences in the language of precedent, principle, and institutional competencies, confirmation hearings can encourage the public to think about how their policy preferences intersect with and shape arguments about the meaning of the Constitution itself.

Senators have long understood that confirmation hearings present an opportunity for this type of discussion. Vice President (then Senator) Joseph Biden has favorably compared confirmation hearings to “town meeting[s] on the meaning and importance of the Constitution.”110 Numerous scholars have documented the ways in which senators involved in confirmation hearings use the high-profile process to make “constitutional comments” expounding on their understanding of what the Constitution means to them and the constituents they represent.111 Senators also are forthright about their use of the hearings to talk directly to the Court: senators posing questions to the nominee appearing before them frequently stress their hope not just that the nominee is listening, but that the sitting Justices are as well.112

This discussion of policy disputes as constitutional conflicts, even when it leaves the issues themselves unresolved, can help enable the public and its elected officials to better evaluate which constitutional changes to accept or reject in the future. It can, for example, put questions about flag burning in the context of a larger tradition of tolerating disagreeable speech, or put concerns about Ten Commandments displays

108 Senators, who have to vote up or down on nominees who encompass a range of beliefs, also at times have to compromise some constitutional issues in favor of others. This flaw, however, is shared by the elected branches, much of whose work goes undetected or uncorrected by the electorate. Neither is considered fatal to the democratic credentials of those actors.

109 See Friedman, Dialogue, supra note 19, at 580–81.

110 Wermiel, supra note 78, at 122.

111 For an example and summary, see Frank Guliuzza III, Daniel J. Reagan & David M. Barrett, The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria, 56 J. Pol. 773, 782 (1994).

112 See Nagel, supra note 3, at 873 (noting that senators often use the confirmation process to “give advice” to sitting Justices).
in a historical perspective. Putting policy disputes of this type into the language of constitutional law is thus an additional benefit of this type of questioning.

The fact that existing questioning practices are adequate for the purposes set forth here does not mean, of course, that the confirmation process could not be improved. Senators armed with a principled defense of an ideological approach to confirmations could, with confidence, push nominees to expound more precisely on their understanding of the meaning and scope of specific constitutional provisions, to answer questions about how they would have voted in previously decided Supreme Court cases and why, and to discuss the types of facts and arguments they believe are useful in constitutional decision-making. They also could ask nominees to demonstrate how their preferred methods of interpretation would play out in actual cases, and press nominees who disavow their earlier statements or writings on why (and when) they changed their mind.

While this more rigorous questioning would be useful, it is important to note that it is not essential to the idea advocated here. The confirmation process as conceived of here does not envision using the confirmation process as a device by which to radically restrain judicial discretion by extracting commitments from nominees to adjudicate cases in exact accordance with statements made at their confirmation hearings. That type of precommitment is neither necessary nor appropriate. Rather, the point of an ideological confirmation process is to provide a democratically-credentialed mechanism through which the Court's prior constitutional changes can be accepted or rejected by the people acting through their representatives. While better questioning could further that goal, it is not essential to it.

B. Potentially Problematic Underlying Assumptions

The above section illustrated how an ideological confirmation process can be seen as both a normatively desirable and a theoretically useful response to the failure of the conventional narrative. It argued that Supreme Court decisions implementing under-determinate constitutional provisions can be thought of as akin to constitutional propositions made by the Court to the country. Propositions that enjoy long-lasting,


114 Judging, even in the policy-laden world of the Supreme Court, requires attention to details and arguments not presented in abstract or hypothetical scenarios. See, e.g., Post & Siegel, supra note 113, at 47–48. Facts and circumstances change, and new arguments arise even in old contexts. Id. A Justice therefore should not be asked to commit to future votes without knowing what these changed facts, circumstances, and arguments will be. See also TRIBE, supra note 2, at 97–101 (arguing for vigorous senatorial questioning but noting that factual differences in cases as actually presented to the Court make it inappropriate for nominees to commit in advance to specific outcomes); Nagel, supra note 3, at 867.
broad and deep support will become confirmation litmus tests, and nominees failing
to adhere to the public consensus on such issues will not be confirmed. Resolution of
constitutional questions raising issues on which there is not yet a stable political con-
sensus will be left to the discretion of the Court, subject to the right of the public to
reclaim the issue when such a consensus is reached, or when enough people are no
longer satisfied with judicial, rather than political, resolution of the issue. Over time,
this process will empower the public to control the evolution of constitutional law. Be-
cause this can only occur over the course of multiple confirmations, however, it also
ensures that the distinction between constitutional and ordinary law is maintained.

This story rests, however, on two potentially problematic assumptions. The first
assumption is that a nominee’s ideological preferences are sufficiently constant to
make an examination of them at the time of confirmation meaningful. The second
is that Supreme Court vacancies are spaced in such a way that the preferences of the
elected officials charged with filling the vacancies accurately reflect the ongoing pref-
erences of the public—that vacancies are not, in other words, randomly skewed in a
way that favors one ideological perspective over the other. Each of these assumptions
is examined below.

1. Ideological Constancy

The concern here is that the use of ideology in the confirmation process cannot
successfully translate the constitutional preferences of the public into constitutional
law because the ideological preferences of Supreme Court Justices change over time,
thus undermining the usefulness of a democratic check imposed at the time of con-
firmation. The concern rests on work demonstrating that some Justices fail to vote in
accordance with the ideological preferences of the presidents who nominated them,
and that the ideological direction of most Justices’ jurisprudence changes (or “drifts”)
over time.  

This concern is unwarranted. Most of the empirical work in this area has focused
on the relationship between presidents and nominees. This focus ignores the role
played by the Senate in the appointments process. The Senate’s role is key, however,
precisely because the preferences of the nominating President and the confirming
Senate will not always align. Not accounting for the ideological preferences of the
confirming Senate thus fails to fully capture the broader base of public sentiment
underlying the appointment. This in turn fails to fully appreciate the need for con-
stitutional changes to occur via the confirmation process only when support for them
is sufficiently long-lasting and deep.

Many of the examples of “disappointed” presidents cited in this literature can
be traced directly to a president’s need to compromise with an ideologically hostile

115 See, e.g., KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY
220 (2007).
116 See, e.g., id.
The first President Bush’s nomination of David Souter and President Reagan’s nomination of Anthony Kennedy are familiar examples of this. Both of these Justices were nominated by Republican presidents and confirmed by Democratic senates. Their nominating presidents therefore needed to take senatorial preferences into account when making these nominations. This is particularly obvious in regard to Justice Kennedy, who was selected by President Reagan only after the failed nomination of Robert Bork and the withdrawn nomination of Douglas Ginsburg.

Even the most infamous example of presidential disappointment, President Eisenhower’s nomination of Chief Justice Earl Warren and Justice William Brennan, does not really support the premise asserted. Constrained by a Senate firmly in the hands of the Democrats, Eisenhower, a Republican, elected to negotiate his nomination choices with the liberal northern wing of the Democratic party rather than its more conservative southern wing. He therefore could not really have been surprised by the subsequent liberal jurisprudence of his nominees, particularly on race-related issues. Indeed, far from casting doubt on the power of an ideological confirmation process, stories like these are surprising only when we ignore the role of the Senate.

This need for compromise between a nominating President and a confirming Senate does not harm the confirmations-based narrative developed here, but is essential to it. Preserving the distinction between constitutionalism and ordinary politics requires that an interest group or political party be unable to stack the Court—and thus unable to change constitutional law—unless the group or party enjoys broad public support for an extended period of time. The need for a nominee to win approval from both the President and the Senate facilitates this.

The concern about ideological constancy also, and relatedly, oversimplifies the preferences it attributes to the nominating President and (by implication) the confirming Senate. Presidents have on numerous occasions made Supreme Court nominations for reasons other than concerns about constitutional development. President Reagan’s nomination of Sandra Day O’Connor, whose support for abortion
rights disappointed many conservatives, was such an appointment. Justice O’Connor’s ambivalence about the constitutionality of restrictions on abortion was known both to President Reagan and the Republican-controlled Senate that confirmed her. The issue simply was not as important to the coalition supporting her as was the political benefit of fulfilling President Reagan’s promise to put the first woman on the high court. While the confirmations approach advanced here would discourage this, past confirmations fitting that pattern can hardly be characterized as failures of the approach itself.

Concerns based on the phenomena of “ideological drift” are similarly oversimplified, at least in relation to their relevance to the ability of an ideological confirmation process to shape constitutional law. Ideological drift occurs when the ideological direction of a Justice’s jurisprudence shifts over the course of his or her tenure on the Court. Recent work has illustrated that almost all of the Justices sitting on the last Rehnquist Court underwent some ideological drift during the course of their careers.

At Justice O’Connor’s confirmation hearing she was asked to explain her position on abortion. She responded by saying that “[t]he subject of abortion is a valid one, in my view, for legislative action subject to any constitutional restraints or limitations.” The Nomination of Sandra Day O’Connor to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 87th Cong. 61 (1981) [hereinafter O’Connor Transcript] (statement of J. O’Connor). She went on to discuss in detail several votes involving abortion which she cast while in the Arizona State Senate. These votes included a bill repealing Arizona’s anti-abortion statutes, a vote in favor of a bill which appeared to allow family planning services to provide abortions to minors without parental consent, a vote against a message urging Congress to amend the Constitution to provide that the word “person” in the Fifth and Fourteenth Amendments included unborn children, and a vote against adding a rider to a stadium construction bill that would have prohibited abortions in any facility under the jurisdiction of the Arizona Board of Regents. See id. at 61–63.

See LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 733 (2000) (discussing Reagan’s promise); Wermiel, supra note 78, at 129. Justice Souter’s support for abortion rights, which even more bitterly disappointed conservatives, was almost equally predictable. As several scholars have noted, Justice Souter’s vote in Planned Parenthood v. Casey, 505 U.S. 833 (1992) the abortion case many conservatives believed the newly comprised court would use to overturn Roe v. Wade, 410 U.S. 113 (1973), should not have been a surprise to anyone who actually paid attention to Souter’s testimony at his confirmation hearing. See Wermiel, supra note 78, at 121, 135. Justice Souter’s sparse record on the issue helped President H.W. Bush avoid directly confronting an issue that was at the time controversial within his own party. It also appears that President Bush was concerned about Republicans being held responsible if the Court became too conservative and the country swung back to the ideological center. See id.; see also Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, Ideological Values and the Votes of U.S. Supreme Court Justices Revisited, 57 J. POL. 812, 813–18 (1995) (finding that Justice Souter’s votes in civil rights cases were highly correlated with predicted votes on those issues derived from an ideological score based on news accounts from the time of his confirmation).


See id. at 1502–19.
This work does not, however, show the issues on which the drift occurred, nor does it show the impact, if any, that the drift of any individual Justice had on the decisions of the Court as a whole.\(^\text{128}\) Both of those facts are key to ascertaining whether the ideological drift of individual Justices hinders the effectiveness of an ideological approach to the confirmation process. The ability of the confirmation process to play the role assigned to it here does not depend on individual Justices being labeled at the time of their confirmation as either “liberal” or “conservative” and then voting consistently with the ongoing substantive preferences of those ideological blocs.\(^\text{129}\) Nominees may well behave consistently with the expectations created at their confirmations (it would in fact be somewhat surprising if they did not) and still drift ideologically. This could happen because the issue areas in which the “drift” occurs were unanticipated or not prioritized during the Justice’s confirmation process, or because shifting political coalitions realigned the preferred policy package associated with a particular political party.\(^\text{130}\)

Neither of these types of drift is incompatible with the role assigned here to the confirmation process. If new issues arise or new political alignments change the ideological expectations associated with a particular political party, then those changed issues and expectations will themselves become litmus tests in future confirmation hearings, ensuring that the Court as a whole—rather than any individual Justice—remains attuned over time to the constitutional commitments of the people.\(^\text{131}\) The fidelity of a given Justice to the changing political goals of the coalition that confirmed him or her is not essential to that story.\(^\text{132}\)

Research teasing out these more finely-tuned questions about presidential preferences and judicial performance supports this conclusion. This work, while not comprehensive, shows that presidents tend to get what they want on the issues they care about, even if their nominees surprise them (or their reconfigured political coalition)


\(^{129}\) See Balkin & Levinson, supra note 65, at 1071–73.

\(^{130}\) The most obvious example of such a shift would be the realignment on racial issues that occurred between the Republican and Democratic Parties in the early and mid 1900s. The gradual polarization of the two parties’ positions on abortion is another example. See id. at 1071 (noting that “parties are not ideological monoliths” and that “the ideological centers of the major parties shift over time”).

\(^{131}\) Laurence Tribe, addressing several of the frequently recited examples of presidents allegedly not getting what they want, makes exactly this point, arguing that in areas of particular concern to a given president, the president has usually gotten what he has wanted from Justices he appointed. Tribe, supra note 2, at 50. But see Richard D. Friedman, Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations, 95 YALE L.J. 1283 (1986) (reviewing LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT (1985)) (rejecting Tribe’s conclusion).

\(^{132}\) There is nonetheless significant evidence indicating that judges do remain “faithful” to those who appointment them. Peretti, supra note 10, at 111–30.
on other issues. As David Strauss has pointed out, Justices Hugo Black and Felix Frankfurter, both of whom were appointed by President Roosevelt, were and remained solid New Deal supporters (the issue President Roosevelt was primarily concerned about) despite their later split in civil rights cases (an issue that became important only later to a realigned Democratic Party). President Nixon’s “tough on crime” appointments remained tough even though they eventually disappointed conservatives by voting in favor of abortion rights—an issue that had little political salience to Nixon at the time of their nominations. The nominees of President Reagan, and those of the first President Bush, have likewise shown stoutness on the state power and federalism issues that formed the heart of the “Reagan Revolution.”

2. Timing of Vacancies

A more vexing problem is presented by the inconsistent timing of Supreme Court vacancies. If the confirmation process is to function as a mechanism through which the public can imprint its changing constitutional preferences onto the Court, then the constitutional preferences of the elected officials controlling that process (the appointing President and confirming senators) must coincide with those of the public. The votes of these elected officials, in other words, must reflect the preferences of the public on whose behalf they are acting.

Our representative system of government assumes for purposes of ordinary lawmaking that this is true, or at least true enough to justify treating duly enacted

---

133 See id. at 84–88, 228 (advocating for greater use of the confirmation process to impose a politically controlled check on the Court and arguing that subsequent “value-voting” by Justices creates a valuable form of political representation). Peretti also collects numerous studies attempting to ascertain whether the confirmation process is an effective check. Peretti, while expressing “strong reservations” about the ability of any of the studies to decisively answer the question, concludes nonetheless that the Justices have more often performed in accordance with expectations than not. However, Peretti’s focus was on presidential, not senatorial, preferences. See id. at 114–30; see also Balkin & Levinson, supra note 75, at 495–97. 134 See Strauss, supra note 128, at 50–52; see also Balkin & Levinson, supra note 65, at 1073. But see KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE (2004) (arguing that Roosevelt cared more about the racial politics of his judicial nominees than is generally recognized). A different study done by Segal, Epstein, Cameron, and Spaeth may also support the conclusion that presidents get what they want on the issues they care about. In that study, the authors found that ideological scores of Supreme Court Justices (derived from news coverage at the time of the Justice’s confirmation) correlate with votes cast in economic and civil liberties, but that the correlation is less robust for Roosevelt and Truman nominees. See Segal, et al., supra note 125. This may indicate that when a nomination is focused predominately on one issue—the New Deal for President Roosevelt, for example—the Justice’s future votes on lower profile or unanticipated issues may be less predictable. 135 See WHITTINGTON, supra note 115, at 226; see also Balkin & Levinson, supra note 75, at 496–97. 136 WHITTINGTON, supra note 115, at 275–81; Balkin & Levinson, supra note 65, at 1070.
legislation as legitimately binding law. The confirmation process, however, presents a more complicated question. This is because Supreme Court vacancies occur only infrequently, and at irregular intervals. It is therefore possible that the spacing of vacancies could give one side of a constitutional conflict appointment power disproportionate to the public support enjoyed by that side. If this was to happen repeatedly—either because of luck or because of strategic retirement decisions made by the Justices—then the Court would not, even over time, reflect the constitutional preferences of the public.

Historically, there is little evidence that this has been a significant problem. Supreme Court vacancies typically have occurred every two to three years. President Jimmy Carter was the first president to serve a full term and not get to make a nomination. (Other presidents have had their nominees rejected and have been unable to fill a seat while in office, but that is less worrisome from a confirmations-based perspective). While a single vacancy usually will not—and should not—allow a President to reverse the Court, regularly spaced vacancies will ensure that the Court over time is responsive to long-lasting shifts in our constitutional understandings.

137 There is a tremendous amount of literature discussing the ways in which our system fails to accurately represent public opinion. See, e.g., Michael R. Dimino, Sr., The Worst Way of Selecting Judges—Except All the Others That Have Been Tried, 32 N. KY. L. REV. 267 (2005); Bradley A. Smith, Vanity of Vanities: National Popular Vote and the Electoral College, 7 ELECTION L.J. 196 (2008). Interest group capture, gerrymandering, the electoral college, and the inability to easily rid ourselves of unpopular political actors are among the problems discussed in these works. Few of these scholars, however, argue that legislation enacted through that imperfect system should be considered illegitimate or void because of these failings. The democratic failures of our electoral system are thus treated as less significant than the democratic failures invoked by the “countermajoritarian difficulty” confronted by the Supreme Court in the conventional narrative of judicial review.

138 See Balkin & Levinson, supra note 65, at 1061–66 (discussing how the Court’s involvement in election law issues, including its decision in Bush v. Gore, 531 U.S. 98 (2000), can pervert the ideological consequences of political confirmation hearings); see also Timothy M. Hagle, Strategic Retirements: A Political Model of Turnover on the United States Supreme Court, 15 POL. BEHAV. 25 (1993) (discussing political and personal factors that influence a Justice’s decision to retire); Stras & Scott, supra note 106 (discussing the duration of the Justices’ tenure on the Court and the desirability of imposing judicial term limits).

139 There is an extensive debate in the literature regarding the extent to which strategic retirements (Justices timing their retirement to best ensure that they are replaced by a like-minded Justice) have increased and/or are successful. See, e.g., Epstein & Segal, supra note 1, at 29–46; Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 HARV. J.L. & PUB. POL’Y 769, 812 (2006); Hagle, supra note 138, at 25–28; Gary King, Presidential Appointments to the Supreme Court: Adding Systematic Explanation to Probabilistic Description, 15 AM. POL. Q. 373, 373–86 (1987); see also supra note 138.

140 See Calabresi & Lindgren, supra note 139, at 787–88.

Recent history is potentially more troubling, however. Not a single vacancy arose in the eleven years between Justice Blackmun’s retirement in 1994 and Justice O’Connor’s in 2005.\footnote{See Calabresi & Lindgren, supra note 139, at 770–71.} Moreover, of the nine Justices sitting on the Court today, all but two (Justices Ginsburg and Breyer) were nominated by Republican presidents.\footnote{See ABRAHAM, supra note 118, at 387.} This occurred despite the fact that Democrats occupied the White House for twelve of the thirty years during which the vacancies filled by the current Justices arose.\footnote{See id.} In other words, despite controlling the White House for approximately forty percent of the relevant time period, Democratic presidents filled less than twenty-five percent of Supreme Court vacancies arising within that time period.

Like the concerns about presidential surprise and ideological drift, however, this concern about the timing of vacancies is weakened by reintroducing the Senate into the story. Of the seven currently sitting Justices appointed by Republican presidents, four faced confirmation by a Democratically-controlled Senate.\footnote{See SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, www.supremecourtus.gov/about/members.pdf [hereinafter MEMBERS OF THE SUPREME COURT]; U.S. Senate: Art & History Homepage, Party Division in the Senate, 1789–Present, www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm.} The constraint this imposed on the nominating presidents is evident by the selections these presidents made: the four currently sitting Justices confirmed in this situation were Justices Stevens, Kennedy, Souter, and Thomas.\footnote{See id.}

Even a brief examination of the confirmations of each of these Justices illustrates that it is no coincidence that two of them are reliable members of the Court’s more liberal bloc and that a third sits at its fulcrum point.\footnote{See Members of the Supreme Court, supra note 145.} Justice Stevens was appointed by President Ford in 1975.\footnote{Justice Thomas’s confirmation is perhaps somewhat of an anomaly in that the racial politics underlying it may have led the Senate to accept a much more conservative candidate than it otherwise would have. See COMISKEY, supra note 78, at 125–27; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUdINAL MODEL REVISITED 216 (2002).} President Ford, obtaining office as he did through the impeachment and resignation of Richard Nixon (and only one year away from his own failed reelection bid) was in no position to force an ideologically conservative nominee through the Senate, nor did he appear to have any desire to do so.\footnote{See Members of the Supreme Court, supra note 145.}

The constraining influence of the Senate is even more self-evident in Justice Kennedy’s nomination. Justice Kennedy, as noted above, was nominated by President

\footnote{See ABRAHAM, supra note 118, at 330. Justice Stevens apparently was selected from a list of nominees that included Ruth Bader Ginsburg and Sandra Day O’Connor, along with Robert Bork, who apparently was rejected because of fears that the Senate, presented with such a candidate, would simply refuse to confirm any nominee until after the 1976 election. See id. at 328–30.}
Reagan only *after* the Democratic Senate made it perfectly clear, through its rejection of Robert Bork, that it would not confirm a candidate perceived as ideologically extreme. Kennedy’s relative liberalism, far from being a surprise, was thus the very reason he was confirmable at all. His comments at his hearing illustrate this. Among other things, he affirmed his belief in a constitutionally protected right to privacy, he endorsed a broad reading of the Fourteenth Amendment, and he disavowed Judge Bork’s narrow originalism as a viable method of constitutional interpretation. The constraint imposed by the Senate in filling the Kennedy seat, far from being irrelevant to the ideological direction of the Court, has made the difference between a Court on which Justice Kennedy is the median Justice and one on which Justice Roberts or Alito would likely be filling that role.

Justice Souter, likewise, was neither a failed “stealth” nominee nor much of a surprise. He was selected by President George H.W. Bush in part because his views on abortion—then a contentious issue within the Republican Party—were unclear. Moreover, like Justice Kennedy, Justice Souter’s liberalism on several issues was evident during his confirmation hearings. In response to senatorial questioning, Justice Souter affirmed his support for *Griswold v. Connecticut*, stated his belief that the Due Process Clause of the Fourteenth Amendment includes an unenumerated right of privacy, agreed that the Equal Protection Clause covers more issue areas than those intended by its authors, indicated his support for affirmative action, and stated that constitutional protections should not be confined to the specific intent of the framers but rather should change as the needs of society change.

Plainly, while the opportunity to nominate Justices may be distributed in ways that do not reliably reflect the changing constitutional preferences of the public, it is far from clear that this disparity actually leads to ideologically skewed confirmations over time. At least during the past thirty years, the Senate has exercised its confirmation

---

150 See *id.* at 360–61.
151 *See Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 164–65 (1987) [hereinafter *Kennedy Transcript*] (statement of J. Kennedy). Stephen Wermiel has noted that no one paying attention at the confirmation hearings of Justices Souter and Kennedy should have been surprised by the pro-choice votes cast by those Justices in *Planned Parenthood v. Casey*. See Wermiel, supra note 78, at 121.
152 *See Kennedy Transcript*, supra note 151, at 151.
153 *See id.* at 140.
155 381 U.S. 479 (1965). *See Nomination of David Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 101st Cong. 54 (1990) [hereinafter *Souter Transcript*] (statements of J. Souter).
156 *See id.*
157 *See id.* at 129.
158 *See id.* at 182–83.
159 *See id.* at 303.
power in ways that have successfully managed to counter the lack of proportionality in presidential nominating opportunities.\textsuperscript{160} While it is possible that the Senate’s ability to do this was merely fortuitous, it seems more likely that the split party rule enabling it was itself a reflection of the deeply divided partisan affiliations of the public during this same time period.\textsuperscript{161}

Concerns about the lack of partisan proportionality in presidential nomination opportunities also suffer from an additional flaw. Such concerns define each president solely by his party ideology and then treat all presidents serving an equal length of time as equally entitled to influence the direction of the Court. But as Keith Whittington has observed in his work on regime politics, not all presidents are created equal, and the differences between them have confirmation consequences.\textsuperscript{162}

Whittington has described presidents as either “reconstructive,” “affiliated,” or “oppositional.”\textsuperscript{163} Reconstructive presidents, such as Presidents Jefferson, Roosevelt and perhaps Reagan, come into office with a mandate to “reconstruct” government in the face of a collapsing regime.\textsuperscript{164} Affiliated or oppositional presidents, presidents like the first President Bush and President Clinton, have no such mandate. Rather, they were elected to continue the agenda of the existing regime (H.W. Bush) or they were elected despite the continuing popularity of an opposing regime (Clinton).\textsuperscript{165} These presidents, particularly oppositional presidents, consequently must find ways to accommodate and work within the dominant regime rather than claim a mandate to reconstruct it.\textsuperscript{166}

Reconstructive presidents, not surprisingly, have more power to implement their agendas (including their constitutional agendas) than do affiliated or oppositional presidents.\textsuperscript{167} Affiliated and oppositional presidents enjoy less impassioned public support for their agendas and thus have less power to pursue them.\textsuperscript{168} Under this more nuanced view of the relationship between public opinion and the presidency, then, it is neither surprising nor troubling if two-term President Reagan (assuming he was

\textsuperscript{160} See supra notes 145 & 146 and accompanying text.
\textsuperscript{161} For a discussion of political polarization during this era, see Morris P. Fiorina & Samuel J. Abrams, \textit{Political Polarization in the American Public}, 11 ANN. REV. POL. SCI. 563 (2008).
\textsuperscript{162} See WHITTINGTON, supra note 115, at 22–25, 87–89.
\textsuperscript{163} Id. at 23–24.
\textsuperscript{164} See id. at 23.
\textsuperscript{165} See generally id. (discussing the attitudes of each administration toward the Supreme Court).
\textsuperscript{166} See id. at 161.
\textsuperscript{167} See id. at 22–23.
\textsuperscript{168} See id. at 226–27 (describing President Clinton as an oppositional president). Watson and Stookey made a similar point, arguing that a careful President in a non-vulnerable situation should rarely be surprised by the subsequent jurisprudence of his nominees. GEORGE WATSON & JOHN A. STOOKEY, \textit{SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS} 66–68 (1995). Their observation seems well taken, given that most presidential disappointments seem to have occurred when the President was constrained.
a reconstructive president) had more ability to impose a conservative ideology on the Court than did two-term President Clinton (an oppositional president) to impose a liberal one. Rather than reflect an inappropriate lack of partisan proportionality, this difference reflects a real difference in public support for the agendas pursued by each president. Moreover, the likely result of these differences would be a Court comprised of both liberal and conservative Justices, but one on which the conservative Justices are more conservative than the liberal Justices are liberal—a Court, in other words, much like the one we have today.

None of this is to claim that the unreliable distribution of Supreme Court vacancies could not limit the ability of the confirmation process to play the role ascribed to it here. Indeed, disruptions in the distribution of vacancies may well explain the few eras in which the Court has gotten uncomfortably far out of alignment with public opinion. Professors Calabresi and Lindgren, for example, attribute the “nine old men” of the Lochner era to the fact that Presidents Taft and Harding made six and four nominations, respectively, while President Wilson, who served longer than Taft and Harding combined, made only three.

Repeated occurrences of this sort may ultimately lend support to suggestions that we end the unreliable distribution of vacancies by imposing term limits on Supreme Court Justices. My point here is simply to argue that there does not yet appear to be convincing evidence that variances in the opportunity to fill vacancies is inappropriately skewing the makeup of the Court today.

III. THE ROLE OF IDEOLOGY IN PAST CONFIRMATIONS

This paper has set forth a principled defense of an ideological approach to Supreme Court confirmation hearings. It has not, however, called for radical change in how those hearings are conducted. This is because ideology has long played a role in our nomination and confirmation process, even when we have refused to acknowledge it. Issue-based disputes over Supreme Court nominations are neither new

169 Balkin and Levinson have made a similar point. See Balkin & Levinson, supra note 75, at 490.

170 Public opinion polls support this conclusion: when asked in a 1992 survey if the Court was too liberal, too conservative, or “about right,” 58 percent of those polled chose “about right.” Gregory A. Caldeira & James L. Gibson, The Etiology of Public Support for the Supreme Court, 36 AM. J. POL. SCI. 635, 642 (1992).


172 For a discussion of these proposals, see generally Calabresi & Lindgren, supra note 139; Stras & Scott, supra note 106.

173 Watson and Stookey have said that the “conventional view” that Justices are selected on the basis of their legal and judicial qualifications rather than their ideology is “one of the splendid myths of American politics.” Watson & Stookey, supra note 168, at 39.
nor rare: presidents and senators have always known that who sits on the high court matters, and they have always calibrated their behavior accordingly.\textsuperscript{174}

Our earliest and most revered presidents worked hard to ensure that the Court was populated with Justices sympathetic to their political agendas. Presidents Washington, Jefferson, Jackson, and Lincoln all attempted to “stack” the Court with political and ideological allies.\textsuperscript{175} Lincoln refused to consider any appointee whose views on the Union and slavery were not crystal clear (and in agreement with his).\textsuperscript{176} President Grant packed the Court with Republican loyalists in order to ensure that an earlier case invalidating the Legal Tender Act was overturned (which it promptly was).\textsuperscript{177} President Adams nominated John Marshall as a bulwark against the anti-Federalist agenda of President-elect Thomas Jefferson,\textsuperscript{178} while Jefferson in turn refused to appoint any nominee who had not demonstrated sufficient loyalty to his Democrat-Republican agenda.\textsuperscript{179} Theodore Roosevelt, much like his cousin Franklin decades later, vowed to use his appointments to change a hostile and conservative Court into one more aligned with his pro-government and anti-corporate agenda.\textsuperscript{180}

The Senate has been equally aggressive in putting its institutional stamp on the Court. The failed Bork nomination, far from being the seismic shift in senatorial behavior that it has at times been portrayed as, was preceded by a long history of vigorous senate opposition to judicial nominees.\textsuperscript{181} Almost twenty percent of the

\textsuperscript{174} For a classic study of the role of politics in the Supreme Court confirmation process, see ABRAHAM, supra note 118. See also WHITTINGTON, supra note 115, at 210–28 (describing the appointments process as “brutal” until the late nineteenth century and detailing early fights between presidents and the Senate). This almost certainly reflects what Brian Tamanaha has recently argued: that there was no golden age of legal formalism in our historic experience. See Brian Z. Tamanaha, The Bogus Tale About the Legal Formalists (St. John’s Legal Studies Research Paper, Working Paper No. 08-0130, 2008), available at http://ssrn.com/abstract=1123498.

\textsuperscript{175} See ABRAHAM, supra note 118, at 67–70; PERETTI, supra note 10, at 121; see also Paul A. Freund, Appointment of Justices: Some Historical Perspectives, 101 HARV. L. REV. 1146, 1148 (1988).

\textsuperscript{176} See ABRAHAM, supra note 118, at 116–18.

\textsuperscript{177} Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871). See ABRAHAM, supra note 118, at 123–26 (discussing Grant’s appointments to the Court).

\textsuperscript{178} See ABRAHAM, supra note 118, at 82.

\textsuperscript{179} Id. at 85.

\textsuperscript{180} Id. at 157. Theodore Roosevelt wrote, “I should hold myself as guilty of an irreparable wrong to the nation if I should put [on the Court] any man who was not absolutely sane and sound on the great national policies for which we stand . . . .” Id.

\textsuperscript{181} Empirical work indicates that the Bork hearing was not even much of an anomaly within the context of the confirmation contests immediately bracketing it. See Guliuzza et al., supra note 111, at 773–77 (finding that Bork was not asked a higher percentage of substantive constitutional questions than were other Justices appearing before the Senate Judiciary Committee between 1955 and 1991).
first 142 Supreme Court nominees named by presidents were not confirmed by the Senate. In the nineteenth century that number was one in three.

The Senate rejected President Washington’s elevation of Justice John Rutledge to Chief Justice because of Rutledge’s vocal objection to the then-recently negotiated and politically controversial Jay Treaty. Justice Stanley Matthews suffered through months of senatorial resistance, stemming from his connections to finance and railroad interests, before winning confirmation by a single vote. Pierce Butler’s appointment was blocked by Senator “Fighting Bob” La Follette and the Progressives for several bitter weeks. Justice Charles Evan Hughes’s nomination to Chief Justice by President Hoover was fought viciously by the Senate because of Justice Hughes’s economic conservatism and connections to big business. John J. Parker, another

182 See ABRAHAM, supra note 118, at 39; see also Freund, supra note 175, at 1147; Strauss & Sunstein, supra note 141, at 1501.

183 ABRAHAM, supra note 118, at 38. Most of these rejections were for ideological or political reasons, including partisan disagreements, concerns that the nominee was insufficiently loyal to the agenda of his party, opposition by interest groups, or worries that the nominee would too dramatically alter the jurisprudential makeup of the Court. See id. There is a dispute among scholars regarding whether some of these rejections should be considered “ideological” or “political.” See John P. Frank, Are the Justices Quasi-Legislators Now?, 84 NW. U. L. REV. 921, 922–23 (1990); see also Keith E. Whittington, Presidents, Senates, and Failed Supreme Court Nominations, 2006 SUP. CT. REV. 401, 404–05 (2006). Since partisan disagreements frequently reflect competing constitutional visions, it is not clear what the ultimate significance of this distinction is. See Balkin & Levinson, supra note 65, at 1062–66. Further complicating matters, the Senate has frequently cloaked its ideological objections in the language of ethics or character concerns, making it difficult in hindsight to determine if a nominee was rejected for ideological or ethical reasons. See WATSON & STOOKEY, supra note 168, at 27–32 (discussing the impeachment of Chief Justice Chase and the Senate’s filibuster of President Johnson’s failed elevation of Associate Justice Abe Fortas to Chief Justice); see also ABRAHAM, supra note 118, at 39–48 (1992) (discussing the Senate’s rejection of early Supreme Court nominees, usually for ideological reasons); PERETTI, supra note 10, at 89–90 (collecting research demonstrating the role of ideology and policy preferences in the confirmation process, and rejecting non-ideological partisanship as a significant factor in explaining senatorial votes); Dennis J. Hutchinson, A Comment on Danelski, 84 NW. U. L. REV. 925, 927 (1990) (reviewing scholarship on ideology and partisanship in the confirmation process); Donald R. Songer, The Relevance of Policy Values for the Confirmation of Supreme Court Nominees, 13 LAW & SOC’Y REV. 927, 946 (1979); Strauss & Sunstein, supra note 141, at 1500.

184 See ABRAHAM, supra note 118, at 73; Whittington, supra note 183, at 428. President Washington apparently did not dispute the propriety of the Senate’s actions. See WATSON & STOOKEY, supra note 168, at 13 (quoting President Washington as saying, “As the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs.”).

185 See ABRAHAM, supra note 118, at 136–37.

186 See id. at 191–92.

187 See id. at 200–01, 205–06. President Hoover ultimately decided to accept the Senate’s own preferred nominee, Justice Benjamin Cardozo. See id.
Hoover nominee, was rejected for similar reasons, and also because of concerns raised by the NAACP. The apogee of Senate resistance, however, may have been its refusal to confirm five of President John Tyler's nominees.

These often epic confirmation battles have been comprehensively recounted elsewhere. My recitation of some of them here is merely to illustrate that difficult, political, and bitterly contested confirmation hearings are not a new development in our country. In fact, the conditions under which they occur are highly predictable. Empirical work has shown that Supreme Court nominations are most likely to be contested when weak presidents (including presidents near the end of their terms) nominate candidates perceived as ideologically hostile to the confirming Senate.

Confrontation under such circumstances is particularly likely when the nominee is seen as underqualified or when the seat being filled is considered a particularly important or "swing" seat. None of this is surprising, and none of it is likely to change if the ideological underpinnings of the process are more openly acknowledged.

Indeed, if the confirmation process has changed in the last century it is not because politics have suddenly intruded into a pristine and apolitical process, but because democracy itself has changed it. The Seventeenth Amendment, adopted in 1913, for the first time made senators directly accountable to their constituents. Suddenly,

188 See id. at 42–43. Parker went on to be a distinguished defender of civil rights as a judge on the Fourth Circuit. See id. at 43. Parker’s replacement was Justice Owen Roberts, the Justice who “switched in time” and thus ended the Supreme Court’s battles with President Roosevelt over New Deal legislation. Id. at 202–04. This raises the provocative question of whether replacement Justices such as Owen Roberts and Justice Kennedy, see supra note 119 and accompanying text, are particularly sensitive to the conditions under which they are confirmed.

189 WHITTINGTON, supra note 115, at 211.

190 See, e.g., ABRAHAM, supra note 118.

191 See Ringhand, supra note 82, at 349–51 (discussing this empirical work).

192 See EPSTEIN & SEGAL, supra note 1, at 92–115; Charles M. Cameron, Albert D. Cover & Jeffrey A. Segal, Senate Voting on Supreme Court Nominees: A Neoinstitutional Model, 84 AM. POL. SCI. REV. 525 (1990) (modeling the number of senatorial “no” votes a Supreme Court nominee is likely to receive based on the perceived qualifications of the nominee, the strength of the nominating President, and the ideological distance between the nominee and the confirming Senate); P. S. Ruckman, Jr., The Supreme Court, Critical Nominations, and the Senate Confirmation Process, 55 J. POL. 793 (1993) (discussing the relatively high failure rate of “critical” or swing nominees who are perceived as likely to change the ideological balance on the reconfigured Court); see also JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 4–5 (1995) (noting the high failure rate of Supreme Court appointments made by unelected Presidents); WATSON & STOOKEY, supra note 168, at 51–56 (discussing the effect of presidential strength and interbranch conflict on Supreme Court nominations).

193 See Freund, supra note 175, at 1146; see also Griffin, supra note 54, at 2158–59.

194 U.S. CONST. amend. XVII (providing for the popular election of senators, rather than election by state legislatures). For a discussion of the effect of the Seventeenth Amendment on the confirmation process, see TRIBE, supra note 2, at 132–33. See also Gerhardt, supra
what "We the People" want from our Constitution became highly relevant to senators evaluating Supreme Court nominees. Backroom deals gave way to public examinations of nominees, a transformation itself triggered in large part by the democratic backlash created by the perception that an elitist, out of touch Senate confirmed their former colleague Hugo Black without publically airing his Ku Klux Klan affiliation.195

Consequently, what used to go on behind closed Senate doors now occurs in the bright glare of daylight, accompanied by ubiquitous media coverage.196 If this is a bad thing—and I do not think it is—then the blame for it surely rests squarely on the increasingly public nature of government decision-making, not on the loss of an apolitical utopia in which senators set aside politics and their competing constitutional visions and solemnly entered the Forum of Principle.

The idea that the public should play an active role in shaping constitutional meaning is far from a radical concept in our history. As Larry Kramer has argued, the people have long used both political and legal means to shape and change the meaning of vague constitutional language.197 A confirmations-based narrative both recognizes this and provides a concrete and specific mechanism through which the public can channel their efforts to affect it.

The approach envisioned here also offers additional benefits. First, an openly ideological approach to the confirmation process will better inform the public about the actual role of the Court in our governing scheme. In doing so, it may help move our dialogue out of the “umpires” versus “activists” rut in which it is stuck. Embracing the use of ideology also would eliminate the charade of senators packaging their policy considerations as concerns about the “personal integrity” or character of the nominees who appear before them.198 It instead would encourage senators and

note 171, at 488–90 (1998); Whittington, supra note 183, at 434 (“It was only when the election of senators was thrown open to regular citizens, rather than state legislatures, that the Senate suddenly discovered the need to conduct its business in public.”).

195 WATSON & STOOKEY, supra note 168, at 142–45; Freund, supra note 175, at 1160. The Senate Judiciary Committee reviewing Justice Thomas’s nomination initially made a similar decision (to vet Anita Hill’s sexual harassment allegations in a closed session) and suffered a similar backlash. See COMISKEY, supra note 78, at 114; SEGAL & SPAETH, supra note 147, at 198–99; see also Lee Epstein, Jeffrey A. Segal, Nancy Staudt & Rene Lindstadt, The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court, 32 Fla. St. U. L. Rev. 1145, 1151 (2005) (examining how control over confirmations has broadened from a “‘cozy triangle’” of senators, the President, and the bar to include participation by interest groups and the public (quoting Gregory A. Caldeira & John R. Wright, Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships, in CONTEMPLATING COURTS 44–45 (Lee Epstein ed., 1995))).

196 Among other things, televised hearings have increased constituency pressures on senators facing confirmation votes. See WATSON & STOOKEY, supra note 168, at 21.


nominees to focus on what is at stake—the ratification of constitutional development and change. Senate confirmation hearings could be openly and frankly about exactly what they should be about: a battle between competing visions of the best meaning of the Constitution. Finally, an openly ideological confirmation process holds at least the potential to increase judicial humility. A better understanding of the Justices' roles as unique policy makers exercising discretion and judgment, rather than mechanically applying preordained constitutional meaning, could reduce the hubris of Justices who hide exercises of discretion and choice behind assertions that "the Constitution made me do it." 

CONCLUSION

This paper has offered a principled defense of the use of ideology in the Supreme Court confirmation process. The approach developed here is grounded in a realistic understanding of the Supreme Court's role in our governing process, and is theoretically useful to evolving constitutional narratives. It is useful to New Originalists in that it offers a mechanism that can guide and legitimate constitutional construction. It is useful to developmentalists in that it provides a specific and concrete device through which the changing constitutional preferences of the public can be validated as legal changes. Moreover, the reconceptualization offered here accomplishes these things without necessitating radical or disruptive changes in our existing practice. Consequently, this paper should advance the ongoing discussion of constitutional law and the role of the Supreme Court in our governing process.

While this paper was written before the confirmation hearing of now Justice Sonia Sotomayor, it is worth noting that the hearing was, by this metric, a step backward. Both the senators and the nominee at the Sotomayor hearing repeatedly recited the formulaic notion that the job of a Justice is simply to "follow the law." The questioning rarely raised the complex issues presented by legal under-determinacy, nor did the nominee or the senators spend much time discussing how Justices should decide cases when confronted with such under-determinacy.