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POPULAR MYTHOLOGY: THE FRAMERS' INTENT, THE CONSTITUTION, AND IDEOLOGICAL REVIEW OF SUPREME COURT NOMINEES†

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Hardly anyone has bothered to refer to the original understanding of the framers of the Constitution. This is a significant oversight, because . . . [b]oth the text of the Appointments Clause of the Constitution and the debates over its adoption strongly suggest that the Senate was expected to play an active and independent role in determining who should sit on the nation's judiciary.¹

I. INTRODUCTION

The Senate rejection of Judge Robert H. Bork represented the first time in the history of the United States that the Senate openly rejected a nominee exclusively because of disagreement with his view of constitutional interpretation.² Consequently, the issue of

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¹ Dellinger, *Choosing Judges, The Framers' Intent*, 132 CONG. REC. S12,380 (daily ed. Sept. 11, 1986) (statement of Sen. Biden).

² Several rejections in the past have been ideologically based, but never has the ideological opposition been both open and exclusive. See Dellinger, *The Coming Battle for the Supreme Court*, THE NEW REPUBLIC, Dec. 16, 1985, at 40 ("When voting to reject a nominee, senators have thought it necessary publicly to rationalize their vote on the grounds of lack of ethics or competence, rather than on the more honest basis of objections to the nominee's philosophy."). Of the five other Supreme Court rejections in this century, one, that of G. Harrold Carswell, was attributable mainly to lack of qualifications. See McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 8, 23 (1970). Another, that of Douglas Ginsburg, resulted from an ethical impropriety. The other three (John J. Parker, Abe Fortas

whether the Senate should consider a nominee's judicial philosophy or ideology³ in its "Advice and Consent"⁴ role came into sharp focus. Senators and legal commentators debated the issue on two fronts. The first concerned to what extent the Constitution and the framers' intent required or supported ideological review. The second concerned the prudence of the Senate assuming such a role.

Several commentators who believe that it is appropriate for the Senate to oppose nominees on ideological grounds argue that a proper reading of the framers' intent and/or fair inference from the Constitution's text lend strong support to their position.⁵ They

and Clement Haynsworth) were largely based upon opposition to the nominee's judicial philosophy. See Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 80-82 (1983). In each of these, however, the ideological opposition was not exclusive and was clothed in more neutral terms. See, e.g., Grossman & Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 577 (conflict of interest issue at Haynsworth hearings "provided a convenient justification for opposition generated in fact by ideological or political considerations").

³ "Judicial philosophy" or "ideology" will refer to a nominee's view of constitutional interpretation and how this view would affect the outcome of cases. As an initial matter, no one disagrees with the proposition that the Senate is properly exercising its advice and consent role when it rejects a nominee who does not possess the requisite ability, integrity and judicial temperament. It also is generally agreed that the Senate should reject a nominee who does not adhere to certain "broad principles that are 'crucial to our sense of what America is all about.'" Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1288 (1986) (reviewing and quoting L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985)). Because a President would rarely, if ever, name a nominee of this type, the battle revolves around whether the Senate should reject nominees who hold views of constitutional interpretation that reasonable people espouse.

⁴ The Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court." U.S. CONST. art. II, § 2, cl. 2.

⁵ See, e.g., Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 660 (1970) ("The Constitution certainly permits, if it does not compel, . . . the conclusion that a Senator both may and ought to consider . . . the lifeview and philosophy of a nominee . . ."); Dellinger, *Choosing Judges, The Framers' Intent*, 132 CONG. REC. at S12,380-81 (daily ed. Sept. 11, 1986) (motion that Senate should not consider judicial philosophy is "simply inconsistent with both the text and original intent of the appointments clause"); Dellinger, *The Coming Battle for the Supreme Court*, THE NEW REPUBLIC, Dec. 16, 1985, at 41 (debates over appointments clause lend "significant support" to notion that "Senators should make their own independent judgment . . . over whether to confirm a nominee"); Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 565 (1987) ("[I]deologically based opposition" is "[c]onsistent with constitutional tradition and commands concerning the Senate's proper role . . ."); Schwartz, *The Senate Can Play Too*, A.B.A. J. Aug. 1985, at 36, 38 ("A senator has a constitutional duty to exercise independent judgment over whether a nominee will further or impede what [he or she] believes are appropriate goals and ideals for the nation.").

The debate has been characterized by language unhelpful in determining what standard the Senate constitutionally should use. For instance, Professor Dellinger has stated that the

conclude that the Constitution should be read as strongly supporting the idea of ideological review, or more forcefully, that a constitutional duty exists for senators to reject a nominee under certain circumstances.⁶

framers meant for the Senate to take a much more "active" role than it has in recent years, and that this "may come as a surprise to the administration officials who are so concerned about original intent." *Kitchen Cabinet*, LEGAL TIMES, July 21, 1986, at 3. Because the commentators who use language such as "active," "broad," "equal," and "independent" are uniformly in favor of ideological review, these words should be understood as arguing that the Constitution by inference and/or the framers' intent supports Senate rejections on ideological grounds.

⁶ Senator Biden, the present Chairman of the Senate Judiciary Committee, argued the stronger position during the Bork hearings. The senator asserted that the "Framers intended . . . the broadest role for the Senate — in choosing the Court and checking the President in every way" and that "the Senate has performed a constitutional function in attempting to resist the President's efforts to remake the Court in his own image." 133 CONG. REC. S10,523 (daily ed. July 23, 1987). The Senate has exercised this constitutional function by "scrutiniz[ing] the political, legal, and constitutional views of nominees" and "reject[ing] professionally qualified nominees because of the perceived effect of their views on the Court and the country." *Id.* Senator Biden concluded that there are three circumstances in which the Senate has a "constitutional duty" to reject nominees on grounds of judicial philosophy: "[w]hen the President attempts to use the Court for political purposes; when the President and Congress are deeply divided; or when the Court is divided and a single nomination can bend it in the direction of the President's political purposes." *Id.* at S10,527-58

Whatever the merit or demerit of these standards as a prudential matter, for the reasons stated herein they are in no way required by the Constitution or implied by the debates over the appointments clause.

Not surprisingly, senators who believe it is proper to oppose nominees on ideological grounds are almost exclusively those opposing the judicial philosophy of the current nominee. When a nominee with a more compatible judicial philosophy is up for confirmation, however, consideration of ideology becomes taboo. For example, Senator Kennedy vehemently opposed the confirmation of Judge Bork on ideological grounds, see 133 CONG. REC. S9188 (daily ed. July 1, 1987), whereas Senator Thurmond thought judicial philosophy to be subordinate to neutral concerns such as integrity, judicial temperament and understanding of the law. See *Hearings Before the Committee on the Judiciary, United States Senate, on the Nomination of Robert H. Bork to be Associate Justice*. (Comm. Print) 100th Cong., 1st Sess., pt. 1, at 40 (1987). Yet compare these past statements:

I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be Associate Justice of the Supreme Court only if his views coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance. We are interested really in knowing whether the nominee has the background, experience, qualifications, temperament, and integrity to handle this most sensitive, important, responsible job.

133 CONG. REC. S10,883 (daily ed. July 30, 1987) (statement of Senator Hatch, quoting Senator Kennedy at Marshall hearings).

It is my contention . . . that the Supreme Court has assumed such a powerful role as a policymaker in the Government that the Senate must necessarily be concerned with the views of prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with these issues.

Critical examination of these arguments has been inadequate.⁷ If left unchallenged, the notion could become accepted dogma at future confirmation hearings, with the danger that the Constitution would be seen as supporting Senate rejections of nominees who hold views of constitutional interpretation that reasonable people espouse — even if prudential considerations suggest that the Senate should confirm the nominee. The purpose of this essay is to demonstrate that the idea that textual inference or framers' intent supports the position of ideological review is popular mythology, as is the notion that a Senate that does not consider judicial philosophy is behaving "inconsistent[ly] with both the text and the original intent of the Appointments Clause."⁸ The Constitution itself lends little support for this idea, and the framers' intent is at best indeterminate.⁹

This essay presents the arguments of ideological-review advocates concerning the framers' intent and constitutional implication. It then critiques the reasoning of these commentators. Finally, it

133 CONG. REC. S10,526 (daily ed. July 23, 1987) (statement of Senator Biden, quoting Senator Thurmond at Fortas hearings).

⁷ Senator Hatch has been the lone voice in opposition. In his review of Professor Tribe's book, the senator attacked the notion that constitutional inference supports ideological review, see Hatch, *Save the Court From What?*, 99 HARV. L. REV. 1347, 1353-56 (1986) (reviewing L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985)). In a speech responding to Senator Biden, Senator Hatch also attacked the idea that the framers intended ideological review and disputed the notion of a "constitutional duty" to reject a nominee. See 133 CONG. REC. S10,878-85 (daily ed. July 30, 1987). In further maintaining that constitutional inference and intent suggest that senators should *not* engage in ideological review, see *id.* at S10,881; however, Senator Hatch's position is more problematic, see also *infra* note 9.

⁸ See Dellinger, *Choosing Judges, The Framers' Intent*, 132 CONG. REC. S12,381 (daily ed. Sept. 11, 1986).

⁹ To the extent the framers' intent tells us anything on this issue, it works against the position of ideological-review advocates. See *infra* section III. Nonetheless, this essay does not claim that the constitutional intent mandates that ideological review *not* be practiced. Cf. Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1202, 1205 (1988) ("Constitution is silent on what criteria the Senate should use in giving 'Advice and Consent'" and there is "no constitutional duty on senators to vote for confirmation" even where nominee has "surpassing qualifications").

In defending his nomination of G. Harrold Carswell to the Supreme Court, President Nixon stated that the President is "the one person entrusted by the Constitution with the power of appointment" and that the question before the Senate was "whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment." See 116 CONG. REC. 10,158 (1970) (letter of President Nixon to Senator Saxbe). To the extent this letter implies that the Senate has a constitutional duty *not* to consider a nominee's judicial philosophy, it is as erroneous as Senator Biden's opinion that the Senate has a constitutional duty to consider judicial philosophy. See *supra* note 6.

concludes that the Constitution does not settle the matter; therefore, the issue of whether the Senate should engage in ideological review of Supreme Court nominees should be fought on prudential grounds.

II. THE CASE FOR A CONSTITUTIONAL INTENT

The notion of a constitutional intent for ideological review of Supreme Court nominees derives from four areas: first, the Constitutional Convention in the summer of 1787; second, Alexander Hamilton and *The Federalist*; third, the Senate rejection of John Rutledge as Chief Justice in 1795; and finally, direct inference from the text of article II.

Proponents of ideological review maintain that throughout their deliberations over the appointments clause the framers expected the Senate to "play a very substantial role in the selection of federal judges"¹⁰ and that the clause, as finally adopted, did not change this intention.¹¹ The leading advocate of this position, Professor Walter Dellinger, recounts the progression of the appointments clause at the Constitutional Convention held in Philadelphia in the summer of 1787.¹²

The original plan for the Constitution provided that "a National Judiciary be established . . . to be chosen by the National Legislature." When the proposal was presented to the Convention, it was thought that the entire legislature was too large. Nonetheless,

¹⁰ Dellinger, *Choosing Judges, The Framers' Intent*, 130 CONG. REC. S12,380 (daily ed. Sept. 11, 1986); see also 133 CONG. REC. S10,523 (daily ed. July 23, 1987) (statement of Sen. Biden).

¹¹ See sources cited *supra* note 10; see also Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 937-38 (1983) ("[E]arly drafts of article II provided for appointment by the Senate alone, and nothing in the records of the Federal Constitutional Convention suggests that the change into the nomination by the President and confirmation by the Senate was intended to produce a change in the factors that the Senate should consider.").

Professor, now Judge, Rees is an exception to the general rule that those opposed to the judicial philosophy of a given nominee and/or administration laud ideological review, whereas those in favor condemn it. Rees was one of those in charge of choosing judges for the Reagan administration before he was named Chief Judge of American Samoa. In this lengthy article he presents his case for ideological review. Generally, Rees feels that Senate consideration of judicial philosophy offsets the President's consideration of the same.

¹² The following is an account of the history of the appointments clause. See Dellinger, *Choosing Judges, The Framers' Intent*, 132 CONG. REC. S12,380 (daily ed. Sept. 11, 1986) and 133 CONG. REC. S10,523 (daily ed. July 23, 1987) (statement of Sen. Biden). The source for the depiction is J. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* (1966) [hereinafter *NOTES OF DEBATES*]. As explained below, however, there is more to the story. See *infra* notes 31-45 and accompanying text.

Pennsylvania delegate James Wilson's alternative suggestion that the President be given the power found almost no support. James Madison agreed that the legislature was too large a body, but said that he was not prepared to give the appointment to the Executive; rather, he was "inclined to give it to the Senatorial branch," which he considered "sufficiently stable and independent" to provide "deliberate judgments."

On June 13, 1787, Madison moved that the power of appointing judges be given exclusively to the Senate, and the motion was adopted without objection. On June 19, the Convention incorporated Madison's "Virginia Plan" in its working draft. The plan proposed that a "national Judiciary" be created, the "Judges of which to be appointed by the second Branch of the National Legislature."

In July, the Convention reviewed every provision of the draft. On the 18th of that month, James Wilson again moved "that the Judges be appointed by the Executive." The motion lost six states to two. James Bedford of Delaware saw "solid reasons against leaving the appointment to the Executive." Maryland's Luther Martin argued that, "being taken from all the states," the Senate "would be the best informed and most capable of making a fit choice." Massachusetts delegate Nathaniel Ghorum offered a compromise proposal that provided for appointment by the Executive "by and with the advice and consent of the Senate." The proposal failed on a tie vote — four states to four.

On July 21, the Convention again rejected Executive appointment and affirmed exclusive Senate appointment on a vote of six states to three. George Mason of Virginia decried the notion of Executive appointment as "dangerous precedent. It might even give him influence over the Judiciary department itself." The Committee on Detail reported the draft of the Constitution as "The Senate of the U.S. shall have the power to . . . appoint . . . Judges of the Supreme Court." And the phrasing remained the same until the final days of the Convention.

The controversy would not die, however, and on September 4, the Committee on Postponed Matters reported back with a draft reading that "[t]he President shall nominate and by and with the advice and consent of the Senate shall appoint judges of the Supreme Court." Three days later the Convention adopted the provision without dissent. This was the first time the Convention had given the President any role at all in the selection of judges.

From this account Professor Dellinger and Senator Biden find a mandate for ideological review of Supreme Court nominees. Professor Dellinger concludes that “[t]he Convention having repeatedly and decisively rejected the idea that the President should have the exclusive power to select judges could not possibly have intended to reduce the Senate to a ministerial role,” and indeed intended the “selection of judges [to be] a joint decision of the President and the Senate.”¹³ Senator Biden asserts that “it is difficult to imagine that, after four attempts to exclude the President from the selection process, the Framers intended anything less than the broadest role for the Senate — in choosing the Court and checking the President in every way.”¹⁴

Alexander Hamilton's *Federalist* Nos. 76 and 77 have also been cited as support for ideological review. Senator Biden relies on these two *Federalist* papers in arguing that “[Alexander] Hamilton stressed that even the Federalists intended an active and independent role for the Senate.”¹⁵ The senator points to Hamilton's statement in *Federalist* No. 76 that the Senate would prevent the President from appointing Justices who were “obsequious instruments of his pleasure.” He refers also to Hamilton's statement in *Federalist* No. 77, made in response to worries that the Senate's power to reject might give it an improper influence over the Executive: “If by influencing the President, be meant restraining him, this is precisely what must have been intended. And it has been shown that the restraint would be salutary.”¹⁶

Senator Biden interprets the debates over the adoption of the appointments clause and the perspective of Alexander Hamilton as settling “beyond dispute from an historical perspective” that the framers intended Senate rejections on ideological grounds.¹⁷

The third basis for the argument that the framers intended the Senate to engage in ideological review is the Senate's rejection, in 1795, of former Justice Rutledge of South Carolina. Two commentators have suggested that ideological review is warranted because “many of the framers of the Constitution, as Senators, conducted

¹³ Dellinger, *Choosing Judges, The Framers' Intent*, 132 CONG. REC. S12,380-81 (daily ed. Sept. 11, 1986).

¹⁴ 133 CONG. REC. S10,523 (daily ed. July 23, 1987) (statement of Sen. Biden).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

precisely such an inquiry" in refusing to confirm John Rutledge.¹⁸ Rutledge was nominated for the position of Chief Justice by President Washington on July 1, 1795. He was one of Washington's first appointments, but subsequently resigned to become Chief Justice in his home state of South Carolina. Prior to Senate consideration of his nomination, it was disclosed that Rutledge had given a speech shortly before his appointment violently attacking the recently ratified and highly controversial Jay treaty with England. Support for the treaty was of utmost importance for the Federalists, who viewed Rutledge's public opposition with astonishment. Consequently, the Federalist-dominated Senate rejected the nomination, in large part because of Rutledge's public opposition to the treaty.¹⁹

Professor Lively sees the Rutledge rejection as evidence that the framers would not agree that "Senate attempts to substitute its judgment" in the confirmation process would upset "traditional constitutional balances."²⁰ This position, according to Professor Lively, "disregards the fact that the framers of the Constitution themselves participated, as Senators, in policy-based battles with the president over Supreme Court appointments."²¹

Finally, commentators have inferred a mandate for ideological review from the language in article II of the Constitution, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court"²² It is argued that this language gives the Senate and the President equivalent roles in the confirmation process. The more similar the roles, the greater the likelihood that the Senate was intended to consider the same factors as the President, *i.e.*, the ideology of the nominee, and in the same manner.

Thus Professor Dellinger and Senator Biden point out that at the Constitutional Convention, Gouverneur Morris of Pennsylvania paraphrased the provision as giving the Senate the power "to appoint Judges nominated to them by the President."²³ Professor Dellinger paraphrased the provision as "giving the President the power,

¹⁸ Lively, *supra* note 5, at 552-53 (citing McKay, *Selection of United States Supreme Court Justices*, 9 U. KAN. L. REV. 105, 129 (1960)).

¹⁹ See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 124-39 (1922).

²⁰ Lively, *supra* note 5, at 557 n.36.

²¹ *Id.*; see also *id.* at 552-53.

²² U.S. CONST. art. II, § 2, cl. 2.

²³ Dellinger, *Choosing Judges, The Framers' Intent*, 130 CONG. REC. S12,380 (daily ed. Sept. 11, 1986); 133 CONG. REC. S10,523 (daily ed. July 23, 1987) (statement of Sen. Biden).

with the advice of the Senate, to nominate judges, and the power, with the consent of the Senate, to appoint."²⁴

Moreover, in discussing constitutional intent, ideological-review advocates speak of nomination as "a joint decision of the President and the Senate,"²⁵ where the Senate has "equal responsibility" and a "half interest in the appointment process."²⁶ The selection of nominees was intended to be a "joint enterprise,"²⁷ in which the Senate was to have the "broadest role" in "choosing the Court and checking the President in every way."²⁸ Representative of this thinking is the notion that "[a] Senate role that is equal, rather than subordinate, to the president's is consistent with the compromise, effected by James Madison, between drafters who favored exclusive selection by the executive and those who preferred exclusive power in the Senate."²⁹ In the least, these commentators maintain that "[t]he Constitution certainly permits, if it does not compel, . . . the conclusion that a Senator both may and ought to consider . . . the life view and philosophy of a nominee"³⁰

III. EXPOSING THE MYTH

The notion that a constitutional intent for ideological review exists is popular mythology. Support claimed to exist in the debates at the Constitutional Convention in 1787, the views of Alexander Hamilton as expressed in *Federalist* Nos. 76 and 77, the Senate rejection of John Rutledge as Chief Justice, and fair inference from article II of the Constitution does not survive careful scrutiny.

The debates at the Constitutional Convention do not show that the Senate was intended to have a "broad" role, including ideological review. Aside from the problem that the framers did not pass on the question of ideological review,³¹ there exists the difficulty in translating evidence for a "broad" Senate role into a constitutional

²⁴ Dellinger, *Choosing Judges, The Framers' Intent*, 132 CONG. REC. S12,380, 381 (daily ed. Sept. 11, 1986).

²⁵ *Id.*

²⁶ Lively, *supra* note 5, at 563.

²⁷ *Id.* at 573.

²⁸ 133 CONG. REC. S10,523 (daily ed. July 23, 1987) (statement of Sen. Biden).

²⁹ Lively, *supra* note 5, at 554 n.24.

³⁰ Black, *supra* note 5, at 660.

³¹ The framers did not consider whether a senator should reject a nominee who he or she feels is bad for the country but nonetheless holds views of constitutional interpretation that reasonable people espouse.

mandate for ideological review.³² Moreover, the finally adopted appointments clause was seen as counseling against a broad role for the Senate.

Although the history of the constitutional debates presented by ideological-review advocates is accurate, it is incomplete. The history gives only one side of the debate — the *losing* side. The account also fails to consider what the framers were attempting to accomplish with the appointments clause.

Early in the Convention, James Madison supported Senate appointment over appointment by the entire legislature. He was looking for a selection procedure that would ensure competent “judges of the requisite qualifications.”³³ Madison was also concerned with the “danger of intrigue and partiality” that would accompany selection “by the Legislature or any numerous body.”³⁴ Although the delegates originally saw problems with Executive appointment, nowhere did the framers consider the effect of the policy views of judges; rather, they were concerned with who would be able to choose the best qualified judges, without becoming embroiled in “intrigue and partiality.”³⁵

In the summer of 1787 the Convention considered six different methods of appointment before finally settling on one.³⁶ The delegates, including James Madison, would move from appointment by the Senate alone to the finally adopted presidential appointment with Senate concurrence.³⁷ Selective quoting from one side of the debate obscures the fact that the Convention as a whole was very much undecided on the proper method of appointment until its unanimous decision in September to place it in the hands of the

³² Similar difficulty arises in translating evidence for a “narrow” Senate role into a constitutional mandate against ideological review. See *supra* note 9.

³³ NOTES OF DEBATES, *supra* note 12, at 68.

³⁴ *Id.*

³⁵ See *infra* notes 40–43, 46–52, 57–58 and accompanying text for a discussion of Hamilton and Ghorum.

³⁶ The Convention also considered having the legislature nominate, the Senate nominate, the President nominate, the President nominate with the concurrence of one-third of the Senate, and the Senate nominate subject to the approval of the President. See NOTES OF DEBATES, *supra* note 12, at 345 (remarks of O. Ellsworth).

³⁷ Strangely, the conversion of James Madison is omitted from the history of both Professor Dellinger and Senator Biden. In fact, Madison would have gone *further* than the rest of the Convention in proposing Executive appointment subject to the concurrence of only *one-third* of the Senate. See NOTES OF DEBATES, *supra* note 12, at 316, 343 (remarks of J. Madison). Madison, however, was quite happy with the final result. See *id.* at 346 (remarks of J. Madison approving of one-half Senate concurrence); *cf. id.* at 112–13 (remarks of J. Madison proposing appointment by the Senate).

President. This meaningful deliberation resulted in the final draft, giving the President the power to nominate.³⁸

All of this concerns the early intent of the framers. Yet the full intentions of the framers can be ascertained only by looking at the clause finally adopted, and contrasting it with what was rejected. The consensus the Convention arrived at was complete: The delegates rejected all other formulations and adopted the current language of the appointments clause, as rewritten by the Special Committee on Postponed Matters, without one dissent. The most significant fact is not that some earlier proposals would have excluded the President from the appointment process, but that those proposals were *rejected*: The delegates consciously gave the President, and not the Senate, the power to nominate judges.³⁹ As finally proposed to and ratified by the states, the Constitution granted to the President the principal role of selecting and proposing candidates, and the Senate the more restricted role of approving or disapproving the nominations.

At the Convention, Alexander Hamilton was the first delegate to propose that the President's nomination be submitted to the Senate for approval by a simple majority.⁴⁰ Therefore, his views of advice and consent assume particular significance. In both *The Federalist* and the Rutledge rejection, Hamilton unequivocally shunned a broad Senate role.⁴¹

Delegate Ghorum's views are also particularly instructive. He was the father of the "advice and consent" clause, borrowing the wording from the Constitution of his home state of Massachusetts. Ghorum worried that the Senate would be "too numerous, and too little personally responsible, to ensure a good choice."⁴² And the

³⁸ The appointments clause was not simply a last minute compromise, as Senator Biden has suggested. See Biden, 133 CONG. REC. S10,523 (daily ed. July 23, 1987) (article II was an "11th hour compromise"). The clause was nearly passed on July 18, a full six weeks before the end of the Convention, failing on a four-states-to-four tie vote. NOTES OF DEBATES, *supra* note 12, at 317.

³⁹ U.S. CONST. art. II, § 2, cl. 2. One might also note that the framers could not have intended to give the Senate the "broadest role" in the process: If they had desired to do so, they would have left the appointment power exclusively with the Senate.

⁴⁰ See NOTES OF DEBATES, *supra* note 12, at 138; J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 21 (1953).

⁴¹ See *infra* notes 46-52, 57-58 and accompanying text.

⁴² NOTES OF DEBATES, *supra* note 12, at 314. Expanding on his belief that the President is best situated to choose Justices, Ghorum also argued that "the Executive . . . will be careful to look through all of the States for proper characters . . ." He referred to one state as a "full illustration of the insensibility to character, produced by a participation of numbers, in dishonorable measures, and of the length to which a public body may carry wickedness & cabal." *Id.* at 315.

concurrence of the Senate, James Madison argued, would guard against "any incautious or corrupt nomination by the Executive." Moreover, the President would "equally sympathi[ze] with every part of the U[nited] States," whereas if the Senate chose judges they might be chosen "by a minority of the people."⁴³

Those framers who foresaw the development of political parties in America believed that the constitutional role given to the Senate would prevent partisan rejections.⁴⁴ Others hoped, but were not so optimistic. John Adams "vigorously criticiz[ed] the appointment provisions of the Constitution and predict[ed] that political parties would quickly arise and that partisan considerations would dominate the actions of the Senate in passing upon nominations of the President."⁴⁵ In sum, fairly evaluated, the debates over the adoption of article II steadfastly refute the notion that a broad Senate role, including ideological review was necessarily the framers' design.

Senator Biden has attempted to employ one delegate's views — Alexander Hamilton and *The Federalist* — for support. Senator Biden quotes from *Federalist* No. 77, which advocates a "restraining" role for the Senate. Unfortunately, the Senator ignores language in the preceding *Federalist* No. 76, which explains how, and the purpose for which, the restraint would be exercised:

To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful though . . . excellent check upon the spirit of favouritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.⁴⁶

This passage lends no support for a broad Senate role, and it certainly does not seem to support Senator Biden's position.⁴⁷ Ham-

⁴³ NOTES OF DEBATES, *supra* note 12 at 316, 344.

⁴⁴ See J. HARRIS, *supra* note 40, at 20 (Those who feared the political machinations of legislative bodies believed they had won with the final draft of the appointments clause.)

⁴⁵ *Id.* at 29.

⁴⁶ THE FEDERALIST No. 76, at 513 (A. Hamilton) (J. Cooke ed. 1961).

⁴⁷ Compare Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 672 (1989) (Legitimate bases for Senate rejection under "Hamiltonian model" exist only where the nominee (1) has pledged to vote a "certain way on specific issues"; (2) was selected because of "cronyism or financial association" with the President or his party; or (3) was chosen "solely to appease a narrow partisan constituency.") and Monaghan, *supra* note 9 at 1205 (THE FEDERALIST envisioned narrow Senate role) with *supra* notes 15–17 and accompanying text (interpreting THE FEDERALIST Nos. 76 and 77 as conceiving of broad Senate role).

ilton further explained that the Senate would be rather circumspect in rejecting the President's nominees:

But might not [the President's] nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. . . . The Senatè could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves that the person they might wish would be [subsequently nominated]. . . . [I]t is not likely that their sanction would often be refused where there were not special and strong reasons for the refusal.⁴⁸

Senator Biden also notes that Hamilton thought Senate review would prevent confirmation of Executive appointments who were "obsequious instruments of his pleasure."⁴⁹ Yet it is clear that Hamilton's concern was not with the congruence of the nominee's judicial philosophy with the President's, but rather with the nominee's competence and integrity. Hamilton explained that, because of the requirement of advice and consent, the President "would be both ashamed and afraid to bring forward . . . candidates who had no other merit than that of . . . possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."⁵⁰ Consequently, a fair reading of *The Federalist* does not aid the case for constitutional intent.

⁴⁸ THE FEDERALIST No. 76, at 512 (A. Hamilton) (J. Cooke ed. 1961). Professor Black rhetorically asks whether a "special and strong" reason for a negative vote would exist when a "nominee holds skewed and purblind views of social justice." Black, *supra* note 5, at 662. One might first question whether such a nominee, so far out of the mainstream, has been or ever will be nominated. Assuming the answer is yes, and that the nominee's views are truly radical, e.g., a belief that "separate but equal" should again be the law of the land, there may exist a *prudential* bar to confirmation. But so long as a Senator is convinced that the nominee is serious about upholding the Constitution, there might not be a *constitutional* bar to confirmation. In any case, one can grant that this situation would present a "special and strong" reason for rejection. This would still support Hamilton's point that rarely would this reason ever be present, and thus rejection warranted.

Yet Professor Black is in all probability not talking about such an unlikely case; rather, he most likely had in mind disagreement in areas of constitutional interpretation where reasonable people disagree — *i.e.*, whether the fourteenth amendment forbids race conscious hiring practices. Does THE FEDERALIST suggest a constitutional intent that a senator reject nominees with whom he or she disagrees on these kind of issues? Hamilton's answer, in all likelihood, would be "no." As explained *infra* notes 57–58 and accompanying text, Hamilton strongly opposed the first rejection of a Supreme Court nominee on policy grounds — even though he disagreed with the nominee.

⁴⁹ THE FEDERALIST No. 76, at 513 (A. Hamilton) (J. Cooke ed. 1961).

⁵⁰ *Id.* George Mason's concern that Executive appointment might give the President "influence" over the Judiciary was also over the competence and integrity of the nominee, not judicial philosophy.

The Senate rejection of John Rutledge as Chief Justice in 1795 is also wholly unpersuasive as support for ideological review of Supreme Court nominations. It is true that many senators did oppose Rutledge's confirmation as Chief Justice in 1795 because of his earlier opposition to the Jay Treaty.⁵¹ Yet it is also true that many were equally concerned over the nominee's allegedly deteriorating mental competence.⁵²

Professor Lively asserts that "many of the framers, as Senators" opposed Rutledge.⁵³ Nowhere, however, is it stated *how many* of the fifty-five delegates to the Constitutional Convention engaged in the ideological opposition to Justice Rutledge. In fact, though Rutledge lost by a 14-10 vote,⁵⁴ only *six* of the senators who voted attended the Constitutional Convention,⁵⁵ and only *three* of these six voted against Rutledge.⁵⁶

Moreover, Alexander Hamilton, a leading member of the Federalist Party, which strongly supported the Jay Treaty, advised senators to reject Rutledge *only* if they felt he was mentally incompetent, and not simply because of his speech against the Jay Treaty.⁵⁷ Thus, the originator of the appointments clause clearly opposed rejection of Justice Rutledge on policy grounds. In light of these facts, it can hardly be said that the Rutledge rejection supports the argument that the framers intended the Senate to engage in ideological review.⁵⁸

⁵¹ See *supra* note 19 and accompanying text.

⁵² THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 48 (L. Friedman & F. Israel ed. 1969) (arguing that insanity charge was supported by "many contemporaneous references to specific incidents of derangement," including a suicide attempt after hearing of rejection by the Senate).

⁵³ Lively, *supra* note 5, at 552-53.

⁵⁴ I THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 99 (M. Marcus & J. Perry ed. 1985) [hereinafter DOCUMENTARY HISTORY] (listing senators supporting and opposing Rutledge).

⁵⁵ See C. BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787, at xvii-xix (1986) (listing delegates who attended the Convention). The six senators who attended the Convention and passed upon the Rutledge confirmation were Pierce Butler (South Carolina), Alexander Martin (North Carolina), John Langdon (New Hampshire), Oliver Ellsworth (Connecticut), Rufus King (Massachusetts senator, New York delegate) and Caleb Strong (Massachusetts). *Id.*; DOCUMENTARY HISTORY, *supra* note 54, at 99.

⁵⁶ The three were Ellsworth, King and Strong. DOCUMENTARY HISTORY, *supra* note 54, at 99.

⁵⁷ See 1 C. WARREN, *supra* note 19, at 136.

⁵⁸ Perhaps a better argument, yet one not made by Professor Lively, is that the Rutledge rejection illustrated the understanding of a Senate, only six years removed from the passage of the Constitution, that ideologically-based rejections were appropriate. This argument, however, would ignore the fact that much of the Rutledge opposition was motivated by fear

Finally, ideological-review advocates make much of the language of article II itself. Yet the debates at the Constitutional Convention and the text of the Constitution they yielded make clear that the Senate and the President were to have different roles in the appointment process. Moreover, contrary to Senator Biden's view,⁵⁹ only the President was given the responsibility to *choose* nominees.⁶⁰ In not giving the Senate the responsibility of choosing the Supreme Court nominee, the framers did not wholly endorse Senate rejections of nominees whose judicial philosophy is held by reasonable people. Yet, the more the Senate engages in ideological review — and rejects nominees with a judicial philosophy similar to the President's — the more it limits the President's choice. Even-

of mental instability, and that the framers themselves split three-to-three on the confirmation vote. More importantly, a Senate rejection eight years after the Constitutional Convention does not imply that the framers *originally* intended ideological rejection to occur, especially because those framers who did envision the existence of political parties feared rather than welcomed the thought of such rejections. See *supra* notes 44–45 and accompanying text.

⁵⁹ See *supra* note 6 and accompanying text. Professor Dellinger is likewise incorrect in his paraphrase of article II. See *supra* note 24 and accompanying text. The President alone was given the power to nominate. See Rees, *supra* note 11, at 937 (“[I]f the text of article II, section 2 implies anything about the scrutiny the Senate should apply, the implication would seem to reside in the distinction between the president's unilateral power to ‘nominate’ and his power to ‘appoint’ only with the approval of the Senate.”).

⁶⁰ Alexander Hamilton stated that:

There will, of course, be no exertion of *choice* on the part of the senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose* — they can only ratify or reject the choice he may have made.

THE FEDERALIST No. 66, at 449 (A. Hamilton) (J. Cooke ed. 1961); see also Friedman, *supra* note 3, at 1287–88 n.24 (“[T]he Constitution gives the President a selective function, and the Congress a reactive one, and the two are significantly different.”).

One might object that this reasoning implies that the President constitutionally should not exercise his veto power over congressional legislation on political grounds because only Congress was given the power to make the law. The rejoinder would be that this article is concerned only with making the more limited point that constitutional intent does not suggest or imply that a senator consider each factor the President does, and not with the proposition that a senator constitutionally should *not* consider each factor. The thesis of this article therefore has little relevance on the question of whether the president constitutionally should or should not consider politics in his or her veto decision.

Parenthetically, one might note that the two cases are fundamentally different. The framers gave the Senate an even broader role in legislating than they gave the President in nominating. When the President vetoes a piece of legislation, the Congress can, and often does, override his or her veto and reenact the very same piece of legislation. On the other hand, when the Senate “vetoes” the President's nominee, he or she has no such opportunity to override the Senate. Other differences between considering legislation and Supreme Court nominees are also apparent. Cf. Friedman, *supra* note 2, at 88 n.560 (arguing that deadlock over legislation between Senate and President may be preferable to hasty adoption of legislation, but that it would be “difficult to make any corresponding argument in favor of a deadlock that left the Supreme Court understaffed for an extended period”).

tually, by repeated rejections or a threat thereof, the Senate could force the President to nominate a candidate more to its liking than the President's — and thereby effectively "choose" a nominee.⁶¹

Even Professor Tribe, one of the leading proponents of ideological review, acknowledges that the Constitution gives the President and the Senate different roles. It would not be acceptable for the Senate to:

refus[e] to confirm a nominee to whom the Senators' only objection is that the candidate would not have been *their* first or even second choice. In Supreme Court appointments the Constitution allows only the President his "druthers." Allowing each Senator to confirm only from the Senator's own "short list" would prescribe paralysis in the Supreme Court appointment process.⁶²

Despite the Convention's refusal to give the Senate the power to choose the Supreme Court, several commentators speak of the Senate's role as the *same* as the President's and consequently believe that the Senate constitutionally should consider ideology as a factor when the President does.⁶³ As already noted, these commentators would agree that "[a] Senate role that is equal, rather than subordinate, to the president's is consistent with the compromise, effected by James Madison, between drafters who favored exclusive selection by the executive and those who preferred exclusive power in the Senate."⁶⁴ There are several objections to this reasoning.

⁶¹ It may be argued that all forms of review could have the consequence of turning into "choice." This consequence is unlikely, however, if the review merely screens for more neutral factors such as ability, integrity and judicial temperament, because a second nominee is likely to be accepted if the first one is rejected. It is only when the review promotes a particular Senate agenda that a President may be forced into effectively allowing the Senate to "choose."

⁶² L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 107 (1985). In light of Tribe's recognition of a basic role differentiation, his later characterization of the Senate as "equal partner," *id.* at 132, has little purpose, especially because Tribe accepts that "[t]he appointment process requires the Senate only to react, not to create." *Id.* at 131; see also Friedman, *supra* note 3, at 1287.

⁶³ See *supra* notes 5-6 and accompanying text.

⁶⁴ Lively, *supra* note 5, at 554 n.24. The notion of "equality" is an undefined one. "Equal and not subordinate" might imply that the Senate constitutionally should consider ideology in the same *manner* as the President. Yet this cannot be the case. As Professor Tribe recognizes, the Constitution gives only the President the power to consider ideology in choosing nominees. The alternative notion of equality is that the Constitution implies that both the President and the Senate should consider the same *factors*. Yet as discussed below, in other article II appointments, the President and Senate consider different factors. Thus, there is no *constitutional* requirement that each consider the same factors. Of course, this does not preclude — but rather necessitates — *prudential* arguments about whether each should consider the

First, although Madison supported the compromise that eventually became the appointments clause, he did not believe that the Senate's role should be "equal" to the President's. To the contrary, Madison favored a confirmation process in which the President's nomination needed only a one-third Senate concurrence and was quite wary of Senate "intrigue and partiality" in the confirmation process.⁶⁵

Second, the appointments clause requires the President to choose and the Senate to approve or reject the President's choice. These two different constitutional responsibilities rebut the suggestion that the appointments clause suggests no difference in the factors the President and the Senate are each to consider. In fact, the same appointments clause has allowed for broad Senate deference to the President's ideological choice in some areas — *i.e.*, cabinet members.⁶⁶ One can also compare the Constitution's less deferential advice and consent role concerning treaties — whose

same factors. *Cf.* Monaghan, *supra* note 9, at 1027 (entire appointment process is best understood as . . . involv[ing] mainly questions of prudence, judgment and politics).

⁶⁵ See *supra* notes 34, 37 and accompanying text.

⁶⁶ The extent of such deference is exemplified by the fact that the Senate rejection of John Tower for the cabinet position of Secretary of Defense was the first rejection of a President's initial choice for a cabinet post in the history of the country. Of course, different considerations apply to the Senate's review of cabinet and Supreme Court nominations. The cabinet consists of the "President's men" whereas the Supreme Court demands detachment from the Executive. See Black, *supra* note 5, at 659–60.

An objection may be made that this view fails to consider the strong institution of "senatorial courtesy" in the selection of lower court judges. Here, in essence, home state senators choose the nominee; if the President tries to nominate other than the home state senator's choice, the senator can veto the choice and the nominee will be rejected. By implication this supports a broad senate "advice and consent" role, including ideological review.

Yet the operation of senatorial courtesy has little bearing on the Senate's "advice and consent" role concerning Supreme Court nominees. First, in lower court appointments local constituencies rather than a national one are being represented, with the opportunity for individual senators to play a much larger role. Second, the nominee is not the Senate's choice in any real sense because the nominee must receive the President's imprimatur. Especially in the Reagan administration, which carefully screened the judicial philosophy of potential nominees, the President placed his mark on a nominee. Third, the framers certainly did not envision senatorial courtesy. The Convention did not even establish lower courts but rather simply gave Congress the power to "institute inferior tribunals," see NOTE OF DEBATES, *supra* note 12, at 72–73 (motion of J. Wilson & J. Madison). Thus, as a matter of constitutional intent, senatorial courtesy in no way supports the notion that the framers intended a broad Senate role, including ideological review.

These considerations aside, no one has suggested that senatorial courtesy be extended to Supreme Court nominees. How would it work? The framers recognized the institutional incapacity of the Senate to choose Supreme Court Justices. In any event, the institution of senatorial courtesy actually supports the point made in the text: Article II allows different levels of deference and does not define the standard for Supreme Court nominees.

passage requires two-thirds Senate concurrence.⁶⁷ Regardless of what model of advice and consent one believes the Senate *should* utilize in considering Supreme Court nominees, the Constitution clearly allows for different levels of Senate deference to the President under article II. Therefore, to imply that the Constitution suggests that the Senate should consider the same factors as the President, including the ideology of the nominee, is unfounded.⁶⁸ The Constitution simply does not reflect the Senate's role as "equal and not subordinate" in the sense that "equal" implies "same."

IV. CONCLUSION

The notion of a constitutional intent that a senator vote to reject a Supreme Court nominee who holds a different view of constitutional interpretation is popular mythology. In ascertaining constitutional intent, what was not said is just as important as what was said. Nothing in the debates at the Constitutional Convention over the adoption of the appointments clause, in the text of *The Federalist*, or in the Senate's later rejection of John Rutledge supports such a broad Senate role, including ideological review. Nor does a fair reading of article II support ideological review by the Senate.⁶⁹

In light of this indeterminacy, a Senate that carries out its advice and consent duty by largely deferring to the President's philosophical choice and ascertaining only whether a nominee is "qualified by character and competence" is not acting "inconsistent[ly] with both the text and the original intent of the Appointments Clause."⁷⁰ Because the Constitution does not settle the matter, the question then becomes whether it is *prudent* for a senator to consider a nominee's ideology in his vote. It is on this ground that the battle over the proper "advice and consent" role for the Senate should be fought.

⁶⁷ U.S. CONST. art. II, § 2, cl. 2. Professor Dellinger has argued that the Senate's advice and consent role should be the same for Supreme Court nominations as for treaties. Dellinger, *supra* note 3, at 43. The text of the Constitution, however, does not support the analogy: The two-thirds concurrence required for ratification of treaties suggests that the framers intended a greater Senate role, and consequently less deference, in consideration of treaties than in the confirmation of Supreme Court nominees.

⁶⁸ See Friedman, *supra* note 3, at 1287 n.24 (argument that Senate is "equal" is erroneous to extent it implies that, under article II Senate must consider same factors as President).

⁶⁹ Likewise, it cannot be said that original intent reveals a mandate against ideological review. See Monaghan, *supra* note 9, at 1202, 1207.

⁷⁰ See Dellinger, *Choosing Judges, The Framers' Intent*, 132 CONG. REC. S12,381 (daily ed. Sept. 11, 1986).