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# Law, Politics, and the Appointments Process

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## Law, Politics, and the Appointments Process

*Advice and Consent: The Politics of Judicial Appointments* by Lee Epstein and Jeffrey A. Segal.  
New York, New York: Oxford University Press, 2005. Pp. 180.

Bradley W. Joondeph\*

*“Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.”* — John Roberts, in his opening statement to the Senate Judiciary Committee, September 12, 2005<sup>1</sup>

I

The notion that Supreme Court justices are neutral arbiters of constitutional disputes, objectively applying the law without reference to their personal values or policy preferences—not making the rules but merely applying them—has a strong hold on many Americans’ understanding of our constitutional democracy. After all, it is the Constitution that should decide whether a certain governmental action is permissible, not the justices themselves. The rule of law, at some level, demands that neutral principles of law must decide legal disputes, not a judge’s own view of what the law should be. And it is the elected branches of the federal government—Congress and the President—that possess the democratic legitimacy to make policy, not the unelected and life-tenured judiciary. Law and politics are distinct realms, and judges should know their place.

Indeed, the depth at which this law-as-separate-from-politics ideal resonates seems to explain why so many politicians still find it profitable to rail against “activist judges.” Consider President Bush’s most recent State of the Union address. Despite the long list of important issues facing his administration, the President found it worthwhile to describe how “many

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<sup>1</sup> U.S. Senate Judiciary Committee, Hearing on the Nomination of John Roberts to Be Chief Justice of the United States, Sept. 12, 2005, 2005 WL 2204109.

Americans” are “discouraged by activist courts,” pledging to “continue to nominate men and women who understand that judges must be servants of the law and not legislate from the bench.”<sup>2</sup> Of course, one person’s “judicial legislation” is another’s principled reading of the Constitution. But even if we ardently disagree about what amounts to “judicial activism,” no serious commentator, liberal or conservative, seems to be calling for more of it.

The law-as-separate-from-politics ideal is also foundational to the argument that the process for appointing federal judges should not be “too politicized.” For if Supreme Court justices are really like umpires, the debate over a nominee should focus on his objective qualifications—the credentials he has accumulated in the minor leagues, his ability to accurately call balls and strikes—rather than his personal ideology. Participants in the appointments process pay homage to the ideal, even when they are clearly pursuing political objectives. Presidents emphasize their nominees’ professional credentials; opposing Senators shy away from direct confrontations about case outcomes, instead invoking vague terms (such as “out of the mainstream”) or latching onto alleged personal failings; and nominees reiterate *ad nauseum* that their personal views will be irrelevant to their judicial behavior. In other words, no one is comfortable directly challenging the conception of law as separate from politics—of constitutional decisions being free from the justices’ personal experiences, values, and policy preferences.

The problem, of course, is reality. Law and politics are *not* separate, particularly at the Supreme Court. They are inextricably intertwined.

To be sure, judging is quite different from legislating or executing the law. Federal judges face a very different set of institutional constraints than those borne by Congress or the President, the most significant of which are probably legal doctrine and the norms that surround its application. Judges are not at liberty to pursue their own ideological ends in every instance. (Nor are members of Congress or the President, for that matter.) In fact, in the overwhelming majority of cases decided by the federal courts as a whole, the law probably dictates an outcome that every reasonable judge would reach, regardless of her ideological stripe.

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<sup>2</sup> *State of the Union: ‘We Strive to Be a Compassionate, Decent, Hopeful Society’*, N.Y. TIMES, Feb. 1, 2006, at A18.

But to say that judges play a different role in our system than members of Congress or the President is not to say that judging is neutral, objective, or apolitical. Judging is intensely political, especially at the Supreme Court, and especially with respect to the most controversial questions. (I use the term “political” in the broadest sense, to mean that decisions are shaped by the judges’ own values and not simply dictated by legal principles.) Almost every constitutional case to reach the Court could defensibly be decided either way. The objective sources of constitutional law—the text, history, tradition, and precedent—are too indeterminate to dictate objectively correct results. Justices are largely free to roam in an open expanse, unconstrained by authoritative instructions. And on those rare occasions that precedent supplies a clear answer—even when that precedent is relatively recent—the Court can disregard it. (Witness *Lawrence v. Texas*<sup>3</sup> and *Roper v. Simmons*.<sup>4</sup>) Thus, a justice’s own political values and policy preferences inevitably influence her behavior, even when she sincerely believes she is acting as “a servant of the law.” Human beings have no choice but to resort to their own predispositions when exercising such discretion. And the higher the political stakes of a case, the more likely a justice’s ideology will predict her vote. (Witness *Bush v. Gore*.<sup>5</sup>)

Lawyers, law professors, and judges tend to resist these insights because they threaten conventional understandings of the law and judging. But the evidence accumulated by social scientists is simply overwhelming. As one political scientist recently wrote, “[n]o serious scholar of the judiciary denies that the decisions of judges, especially at the Supreme Court level, are at least partially influenced by the judges’ ideology.”<sup>6</sup>

Because a nominee’s ideology is highly predictive of how he will vote as a justice, appointments to the Court are a powerful means to influencing public policy in the United States. Staffing the Court with justices of a certain ideological bent can largely determine the shape of constitutional law on such varied topics as abortion, affirmative action, the separation of church and state, and the President’s powers as Commander in Chief, just to name a few. Presidents

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<sup>3</sup> 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

<sup>4</sup> 543 U.S. 551 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

<sup>5</sup> 531 U.S. 98 (2000) (per curiam).

<sup>6</sup> Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 237 (Cornell W. Clayton & Howard Gillman eds., 1999).

and senators therefore have a strong incentive to vindicate their policy goals through the appointments process. Why *wouldn't* the President select judicial nominees based on his perception of their ideology? Why *wouldn't* the Senate perform its advice and consent function based on the same considerations? How could we possibly expect elected officials to behave otherwise? The idea itself seems incoherent.

These are the essential points of Lee Epstein and Jeffrey Segal in their recent book, *Advice and Consent: The Politics of Judicial Appointments*. Epstein and Segal are political scientists, not law professors, and thus have no normative stake in protecting constitutional law from politics, the preoccupation of many constitutional theorists. Instead, their aim is purely positive: to explain how the appointments process has actually functioned over the course of the nation's history. And their conclusions are relatively straightforward. Presidents pursue political objectives in making judicial nominations, especially nominations to the Supreme Court; Senators pursue political objectives in providing their "advice and consent," especially for nominations to the Supreme Court; and judges pursue political objectives in deciding cases, especially at the Supreme Court, thus giving Presidents and Senators good reason to focus on a nominee's ideology during the appointments process. And it has always been this way.

Epstein and Segal's analysis is especially refreshing given the past year's events. In the span of seven months, we saw four distinct nominations to the Supreme Court, three nominees publicly scrutinized, and two new justices appointed to the Court.<sup>7</sup> Much of the public conversation was soaked in the law-as-separate-from-politics ideal: President Bush described Harriet Miers as "the one person [who] stood out as exceptionally well suited" to succeed Sandra Day O'Connor<sup>8</sup>; Democratic senators expressed deep concern over Samuel Alito's initial failure to recuse himself in a 2002 case involving Vanguard, the company that managed some of his investments<sup>9</sup>; John Roberts's personal views about abortion were supposedly irrelevant to how

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<sup>7</sup> In addition to the nominations of Harriet Miers and Samuel Alito, John Roberts was actually nominated twice—first for Associate Justice and then, after that nomination was withdrawn, for Chief Justice.

<sup>8</sup> Statement of President George W. Bush, October 3, 2005 (available at <http://www.whitehouse.gov/news/releases/2005/10/print/20051003.html>)

<sup>9</sup> See David D. Kirkpatrick, *At Hearings, Democrats Plan to Call Critics of Alito's Integrity*, N.Y. TIMES, Jan. 6, 2006, at A18.

he would vote as a justice.<sup>10</sup> It was enough to make most of us gag—on the naiveté, the disingenuousness, or both. *Advice and Consent* provides a clear view of what actually happens and why, demonstrating that the appointments process “is now and has always been a contentious process—one driven largely by partisan and ideological concerns.”<sup>11</sup>

What lessons can we draw from these insights? An obvious implication is that calls to “depoliticize” the appointments process are misguided. There is no way to extricate the judges’ personal values from judicial decisionmaking. And if judicial decisions are political, then so must be the process of selecting the judges. Indeed, it is unclear why reducing the political accountability of the process would be desirable, even if it were practicable.

Rather, precisely because judging is inherently political, it seems worthwhile to consider how the appointments process might better reflect the views of the national electorate, especially in the selection of Supreme Court justices. An important justification for the Court’s exercise of political power might be that the justices are appointed by officials who are themselves democratically accountable. In this way, the ideological direction of the Court is tied, if only indirectly, to the results of elections. But there is a significant problem with the present system: one presidential election (or set of senatorial elections) can count much more heavily than others. The connection between election results and the personnel of the Court is somewhat random, largely dependent on the timing of justices’ retirements or deaths in office. It might therefore be sensible to eliminate some of this serendipity, so that the Court’s ideology better reflected the electorate’s periodic judgments.

It is time we accept the Supreme Court’s status as a political organ. The more pertinent question is whether it should be more representative.

## II

Though quite succinct (containing only 145 pages of text), *Advice and Consent* presents a rich portrayal of the judicial appointments process, full of statistical evidence and illustrative

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<sup>10</sup> See David D. Kirkpatrick, *Skirmish Over a Query About Roberts’s Faith*, N.Y. TIMES, July 26, 2005, at A13.

<sup>11</sup> P. 2.

anecdotes. Its analysis begins, naturally enough, with the event that triggers every judicial appointment: the creation of a vacancy. Vacancies occur when a judge retires, a judge dies in office, or Congress authorizes a new seat. As Epstein and Segal show, the timing of such vacancies—at least those stemming from voluntary departures or new judgeships—is strongly influenced by politics.

First, federal judges tend to step down when they are ideologically close to the current president. And the more influential the judge, the more likely politics will play a role in her decision to retire. So, as Epstein and Segal note, the evidence concerning federal district judges is mixed; Albert Yoon, for example, has found that pension eligibility better explains the retirement decisions of district judges than politics.<sup>12</sup> But the evidence is quite clear with respect to circuit judges and Supreme Court justices. Judges on the courts of appeals “will remain on the bench, even if they are ill or eligible for retirement, to prevent a president from appointing a successor of a different political party.”<sup>13</sup> Specifically, “when the president and the judge share a partisan attachment, the probability of retirement doubles.”<sup>14</sup> With respect to Supreme Court justices, Epstein and Segal observe that “[n]early every single justice who has left the Court over the last three decades seems to have contemplated the politics surrounding his or her departure.”<sup>15</sup> For some, such as William O. Douglas, William Brennan, and Thurgood Marshall, ill health foiled their plans.<sup>16</sup> But for most, such as Sandra Day O’Connor, the timing of their retirements has allowed an ideologically compatible president to name their successor.

Second, politics has strongly influenced Congress’s decisions to create new judicial seats. In the original Judiciary Act, Congress authorized only nineteen federal judgeships: six positions on the Supreme Court and thirteen district court positions.<sup>17</sup> As the population of the United States has grown from less than 4 million in 1789 to nearly 300 million today, there clearly

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<sup>12</sup> Albert H. Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002*, 8 AM. L. & ECON. REV. 1, 28–32 (2006).

<sup>13</sup> P. 37 (citing David C. Nixon & David Haskin, *Judicial Retirement Strategies*, 28 AM. POL. Q. 458 (2000)).

<sup>14</sup> *Id.*

<sup>15</sup> P. 38.

<sup>16</sup> Pp. 39–40.

<sup>17</sup> An Act to Establish the Judicial Courts of the United States, §§1–3, 1 Stat. 73–74 (Sept. 24, 1789).

have been sound justifications for expanding the size of the judiciary. But as Epstein and Segal note, “it seems entirely implausible that the precise timing of these bench expansions was not motivated by the sheer desire of one political party to pack the courts.”<sup>18</sup> For example, Congress has increased the size of the Supreme Court on four occasions: in 1807 (from six to seven), in 1837 (from seven to nine), in 1863 (from nine to ten), and in 1869 (from 8 to 9, after the Republicans had previously reduced the number of seats from ten to eight to deny Andrew Johnson any appointments). In each instance, the same political party controlled both Congress and the White House, and “politics was a driving force behind the adjustment.”<sup>19</sup> With respect to the creation of new circuit court judgeships, Epstein and Segal note that “[a]n astonishingly high proportion of the authorizations—32 of the 37, or 86.5 percent—were enacted during political periods when the same party held a majority in Congress and controlled the White House.”<sup>20</sup> In fact, there have only been ten periods since 1869 that one party has controlled both Congress and the presidency, and Congress has created new courts of appeals judgeships in nine of those ten periods.<sup>21</sup>

How have presidents used the opportunities presented by these vacancies? A president’s basic incentives are to advance his own policy goals (which necessarily reflect the preferences of his various constituencies, especially if he plans to seek reelection) and to promote the electoral interests of his party. Epstein and Segal demonstrate that these are generally the goals that presidents have pursued in nominating federal judges. To be sure, presidents must care a bit about the quality of the judges they nominate. This seems to explain why President Herbert Hoover selected Benjamin Cardozo for the Court, for instance, despite the obvious ideological distance between the two.<sup>22</sup> But Cardozo stands out as an aberration.

A president’s political objectives in making judicial nominations can fall into two basic categories, though they usually overlap. The first involves partisan or electoral goals. For example, FDR frequently used judicial appointments as bargaining chips to shore up support

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<sup>18</sup> P. 41.  
<sup>19</sup> P. 43.  
<sup>20</sup> P. 43.  
<sup>21</sup> P. 43.  
<sup>22</sup> P. 121.

among senate Democrats for policies unrelated to the judiciary, such as his controversial foreign policy initiatives in advance of World War II.<sup>23</sup> Eisenhower nominated Earl Warren to be chief justice to repay Warren for having steered critical support to Eisenhower in the 1952 contest for the Republican nomination. Nixon appointed Lewis Powell of Virginia as part of the GOP's "southern strategy" for expanding the party's electoral base, while Reagan fulfilled a critical campaign pledge when he nominated Sandra Day O'Connor to become the first female justice. And George W. Bush has appointed an unprecedented number of Hispanic judges, consistent with some of the GOP's long-term electoral goals.

The second and more common political objective for presidents has been to populate the judiciary with judges who share similar ideological commitments. As illustration, Epstein and Segal compared the ideology of presidents (as measured by scores developed by the political scientist Keith Poole) with the ideology of Supreme Court justices (as measured by scores developed by Segal and Albert Cover that are based on newspaper editorials written at the time of a justice's nomination).<sup>24</sup> Epstein and Segal found that a "rather strong association emerges between the presidents' and their justices' political ideology," such that, "as presidents become more liberal, their nominees become more liberal as well."<sup>25</sup> Though political party is not a perfect proxy for ideology, it is nonetheless telling that 133 of the 150 nominees to the Supreme Court in U.S. history have been members of the same political party as the nominating president.<sup>26</sup> Indeed, the last cross-party appointment—Lewis Powell in 1972—was actually quite close to President Nixon ideologically.<sup>27</sup> The same pattern holds for circuit court nominees. Over the past 136 years, 92.5 percent of nominations to the court of appeals have gone to members of the same party as the nominating president.<sup>28</sup> The presidency of George W. Bush is no

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<sup>23</sup> P. 57.

<sup>24</sup> P. 112 Figure 5.1. An updated version of the Segal and Cover scores is available on Segal's website: <http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf> (last visited April 10, 2006).

<sup>25</sup> P.121.

<sup>26</sup> Pp. 26-27.

<sup>27</sup> P. 60.

<sup>28</sup> P. 26.

exception: only two of the thirty-four circuit court judges confirmed during his first term were Democrats.<sup>29</sup>

Of course, the president is not the only player in the judicial appointments game. The Appointments Clause of Article II requires that all federal judges be confirmed by the Senate. What determines how senators discharge this “advice and consent” function? As political scientists have long documented, senators generally behave as “single-minded seekers of reelection.”<sup>30</sup> Sure, senators care something about creating sound public policy, but this is clearly subordinate to improving their chances of winning the next election. Thus, throughout the confirmation process, senators are quite responsive to the preferences of those who will affect their prospects for reelection—namely, interest groups, constituents, and party leaders.<sup>31</sup> As Epstein and Segal observe, a senator’s objectives are “largely political: to seat judges who will advance their ideological or partisan causes.”<sup>32</sup>

This is evidenced by the significance of party affiliation in predicting a senator’s confirmation vote on a given nominee. With respect to Supreme Court nominees, 94 percent of the votes cast by senators who are members of the same party as the nominating president have been in favor of confirmation.<sup>33</sup> By comparison, only 76 percent of the votes cast by senators of the opposing party have been to confirm.<sup>34</sup> More broadly, when the Senate and the White House have been controlled by the same party, 90 percent of Supreme Court nominees (97 of 108) have been confirmed.<sup>35</sup> Under divided government, only 59 percent of Supreme Court nominees (23 of 39) have been confirmed.<sup>36</sup>

To gain a finer grained measure of the role of ideology in senate confirmation voting, Epstein and Segal compared the ideology of Supreme Court nominees since 1953 (again using the Segal and Cover scores) to the ideology of the senators who voted on their confirmation

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<sup>29</sup> P. 124 (citing Sheldon Goldman et al., *W. Bush’s Judiciary: The First Term Record*, 88 JUDICATURE 244 (2005)).

<sup>30</sup> P. 86 (citing DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2005)).

<sup>31</sup> P. 87.

<sup>32</sup> P. 87.

<sup>33</sup> P. 107.

<sup>34</sup> P. 107.

<sup>35</sup> P. 107.

<sup>36</sup> P. 107.

(using scores assigned to each senator by the interest group Americans for Democratic Action).<sup>37</sup> They found that “nominees who are ideologically distant from senators receive only 57 percent of their votes, but that figure jumps to 98 percent when they share political outlook.”<sup>38</sup> In other words, “senators are most likely to vote for nominees who are ideologically close to them” and “least likely to vote for nominees who are ideologically distant from them.”<sup>39</sup>

This is not to say that a nominee’s objective qualifications are irrelevant, either to presidents or senators. Indeed, one of Epstein and Segal’s more intriguing points is that, despite the strong hand of politics in the appointments process, professional merit matters a great deal. As Epstein and Segal note, “qualifications are of at least some concern to presidents, and have been since the George Washington administration.”<sup>40</sup> While presidents might be chiefly concerned with a nominee’s ideology, they tend to select highly qualified individuals from the pool of ideological allies. One reason could simply be an extension of the president’s political objectives: highly capable judges are apt to be more effective than less qualified ones in shaping the law.

Another reason is the Senate. If a nominee’s qualifications are important to how senators will vote on confirmation, presidents must anticipate this preference, lest they run the risk that the nominee will be rejected. And the Senate has clearly cared about professional merit, especially in nominees to the Supreme Court. Using assessments of professional qualifications developed by Segal and Cover<sup>41</sup> (again derived from newspaper editorials written at the time of the nominations), Epstein and Segal divided the universe of Supreme Court nominees since 1953 into three categories: very qualified, moderately qualified, and very unqualified. In studying the 2,451 confirmation votes by senators on these nominees, they discovered that “[s]enators almost always vote for candidates perceived as highly qualified but are far more suspect of those with lower merit.”<sup>42</sup> More specifically, “[i]f all one hundred senators cast a vote, a highly qualified

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<sup>37</sup> Pp. 111-112 Figure 4.7.

<sup>38</sup> P. 113.

<sup>39</sup> P.109.

<sup>40</sup> P. 68.

<sup>41</sup> These scores are also available on Segal’s web site:

<http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf> (last visited April 10, 2006).

<sup>42</sup> P. 103.

nominee would receive about forty-five more votes (on average) than one universally deemed unqualified.”<sup>43</sup>

Of course, this emphasis on merit is likely itself the product of political considerations: it is politically more difficult for senators to oppose highly qualified nominees than unqualified ones. Moreover, the importance of merit should not be overstated. Presidents tend to select nominees who are *both* ideologically compatible and objectively qualified, and Senators tend to vote to confirm nominees who are *both* highly qualified and similar ideologically. Indeed, it is the relationship between merit and ideology that seems to have the greatest explanatory power. As Epstein and Segal explain,

Senators will most certainly vote for candidates who are ideologically close and well qualified, and they also will almost certainly vote against candidates who are distant and not qualified. Moreover, the odds are high that they will vote for an undeserving candidate who is ideologically proximate (think of southern Democrats and Clement Haynsworth), thus underscoring the role of politics. But it is also the case that they will, under certain conditions, support a politically remote candidate if they perceive that candidate to be highly meritorious (consider the example of Republicans and Ruth Bader Ginsburg), thus underscoring the role of qualifications.<sup>44</sup>

In other words, a nominee’s qualifications are important, but within a larger context that is thoroughly political.

Many observers seem to assume that this emphasis on ideology in the appointments process is a relatively recent phenomenon. But Epstein and Segal explain that this is just a myth. There was never any “golden age” in which federal judges were selected based solely on their professional credentials. For instance, Grover Cleveland and Woodrow Wilson “virtually never nominated a person outside of their own political party” for a lower court judgeship.<sup>45</sup> Indeed, between 1869 and 2004, 92.5 percent of all lower court judgeships went to nominees who were members of the same party as the president.<sup>46</sup> Or consider the first president: all fourteen of

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<sup>43</sup> *Id.*

<sup>44</sup> Pp. 114–115.

<sup>45</sup> P. 26.

<sup>46</sup> P. 26.

George Washington's nominations to the Supreme Court were Federalists who shared Washington's vision of robust federal authority.<sup>47</sup> Over the nation's history, 89 percent of the nominations to the Supreme Court have gone to members of the president's political party.<sup>48</sup> It is likely that the balance between ideological and partisan goals has varied over time, and it is possible that ideology has been especially important to presidents and senators in recent years. But Epstein and Segal are surely correct to conclude that "the simple reality is that both the Senate and the president take into account nominees' partisanship and ideology, in addition to their professional qualifications, when they make their decisions, *and they always have*."<sup>49</sup>

Why have presidents and senators always acted politically in the selection of federal judges? Because—as social scientists have conclusively demonstrated—the ideological predispositions of the judges substantially influence their decisions. If judges decided cases purely based on the "neutral principles" of law, then the personal views of a judge would be irrelevant to the outcomes of cases. The law would dictate objectively correct results, and we would only be concerned with the appointment of capable, impartial jurists. Presidents and senators would have little reason to care much about judicial appointments.

But presidents and senators obviously *do* care, especially about appointments to the Supreme Court. And the reason is that a nominee's ideology is highly predictive of how he will behave as a judge. As Epstein and Segal explain, "with scattered exceptions here and there, the decisions of judges, and especially the decisions of Supreme Court justices, tend to reflect their own political values."<sup>50</sup> To demonstrate this, Epstein and Segal compared the ideology of justices (once again using the Segal and Cover scores) to their voting records once on the Court, with the outcome of each case being coded as either liberal or conservative. Rather unsurprisingly, they found that the justices identified as ideologically liberal (e.g., William Brennan and Thurgood Marshall) voted much more frequently for liberal outcomes, while those identified as ideologically conservative (e.g., William Rehnquist and Antonin Scalia) voted much more frequently for

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<sup>47</sup> P. 26.

<sup>48</sup> Pp. 26–27.

<sup>49</sup> P. 26.

<sup>50</sup> P. 3.

conservative outcomes.<sup>51</sup> To take two current justices, Justice Ginsburg has voted for liberal results roughly 60 percent of the time, and Justice Scalia has voted for conservative results roughly 66 percent of the time. By no means is this to say that ideology is the exclusive explanation for a justice's decisionmaking; indeed, Ginsburg and Scalia agree in roughly half of the cases the Court decides on the merits. But ideology does explain a great deal of the variance in justices' voting patterns. "[W]ith only scattered exceptions (e.g., the unexpectedly liberal voting of Harry Blackmun), the justices' ideology provides a remarkably good predictor of how they will vote on the Court."<sup>52</sup>

The same is true, though less starkly so, for circuit court judges. As Epstein and Segal explain, court of appeals judges face more constraints than Supreme Court justices. First, their review is mandatory, such that many of their cases are easily resolved by the application of clear precedent, something that is rare at the Supreme Court. Second, circuit court decisions are subject to reversal by the Supreme Court, a result judges generally seek to avoid. Finally, unlike the justices, circuit judges often have aspirations for higher office—namely, a seat on the Court—which likely tempers their ideological leanings. Still, circuit judges do enjoy a fair degree of discretion, and their political values clearly influence their decisions, particularly in politically salient cases. For example, Democrats (70 percent) are significantly more likely than Republicans (49 percent) to cast votes that are protective of the right to obtain an abortion.<sup>53</sup> Democrats (42 percent) are also significantly more likely than Republicans (20 percent) to vote in favor of defendants in cases involving the death penalty.<sup>54</sup> And Democrats (74 percent) vote to uphold affirmative action programs much more frequently than Republicans (48 percent).<sup>55</sup> In short, judges' decisions "tend to reflect their own political views."<sup>56</sup>

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<sup>51</sup> Pp. 125–127 and Figure 5.2.

<sup>52</sup> P. 127. For additional studies demonstrating the ideological nature of the justices' voting patterns, see note \_\_\_\_ *infra*.

<sup>53</sup> P. 128.

<sup>54</sup> Pp. 128–29.

<sup>55</sup> P. 129.

<sup>56</sup> P. 3. See also Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175 (1998) (finding that court of appeals "panels controlled by Republicans were more likely to defer to conservative agency decisions . . . than were the panels controlled by Democrats" and that "Democrat-controlled panels were more likely to defer to liberal agency decisions than were those

The final question that Epstein and Segal address is whether presidents have achieved their ideological goals with their appointments. That is, have presidents actually obtained what they have sought in their nominees? The answer is yes, but with some qualifications. “[B]y and large, presidents are successful with their appointees” to the Supreme Court,<sup>57</sup> though there have been several exceptions. Earl Warren and William Brennan had voting records that were much more liberal than the views of Dwight Eisenhower. Byron White was substantially more conservative than John F. Kennedy. Harry Blackmun grew more liberal than Richard Nixon, and David Souter’s voting record has likely surprised George H.W. Bush. Nonetheless, “[m]ost justices appointed by conservative presidents cast a high percentage of conservative votes,” while “most justices appointed by liberal presidents cast a higher percentage of left-of-center votes than their colleagues seated by more conservative presidents.”<sup>58</sup> That is, “[m]ore often than not” justices “vote in ways that would very much please the men who appointed them.”<sup>59</sup>

Again, the same is true for circuit judges, but again less dramatically (as presidents tend to focus less on ideology in the selection of circuit judges, and ideology is less significant in circuit court decisionmaking). Examining the extent to which the typical (or mean) court of appeals judge has taken positions consistent with the appointing president in cases involving civil rights, civil liberties, and criminal justice, “a stunningly close relationship emerges.”<sup>60</sup> As Epstein and Segal explain, the “more liberal (or conservative) the president, the more liberal (or conservative) the votes of their appointees.”<sup>61</sup> Of course, focusing on the mean appointee ignores the variation within the group, variation that means that some judges were significant surprises to their

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controlled by Republicans”); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1766 (1997) (study of environmental cases decided by D.C. Circuit finding that “judges employ a strategically ideological approach to judging”); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (study of circuit court decisions on several politically charged issues, finding that ideology plays a significant role in judicial decisions, and that the ideological composition of the panel tends to dampen or amplify these effects).

<sup>57</sup> P. 132.

<sup>58</sup> P. 132.

<sup>59</sup> P. 132.

<sup>60</sup> P. 133.

<sup>61</sup> P. 133.

appointing presidents. But this data nonetheless reveals the degree to which presidents have pushed the overall direction of the law in the courts of appeals.

An important caveat is in order, however. As time passes, the ideological affinity between the voting pattern of a judge and the views of the appointing president seem to dissipate. In other words, judges are susceptible to “drift,” either because their views evolve over time or because the relevant issues change, presenting questions that the appointing president could not have considered in evaluating the nominee’s views. Epstein and Segal nicely summarize the evidence concerning Supreme Court justices in the following terms:

During the first four years of justices’ tenure, their voting behavior correlates at a rather high level (.64) with their appointing president’s ideology, but for justices with ten or more years of service, the relationship drops to .49. In other words, liberal presidents appoint liberal justices who continue to take liberal positions *for a while*. Ditto for conservatives. But as new issues come to the Court, or as the justice for whatever reason makes adjustments in his or her political outlook, the president’s influence wanes.<sup>62</sup>

Moreover, the effect that a given president can have on the direction of the Supreme Court turns critically on the number of vacancies that occur during his presidency, as well as which justices he has the opportunity to replace. Both Bill Clinton and George W. Bush (to date) have appointed two justices to the Court. But Bush may ultimately have a much greater impact on constitutional law because he was afforded the opportunity to nominate the successor to Justice O’Connor, a crucial swing vote on the Rehnquist Court.

In the end, a president’s impact on the judiciary is often shaped by circumstances beyond his control. But some presidents have plainly left a lasting ideological imprint on the federal courts. And this is precisely why the process for selecting judges and justices is, and has always been, so political.

### III

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<sup>62</sup> P. 136.

Many in the legal profession continue to resist the essential premise of Epstein and Segal's analysis: that judges, and especially justices of the Supreme Court, act politically. Perhaps more commonly, lawyers acknowledge that a judge's ideology influences some of her decisions, but they condemn the practice as illegitimate. Again, the notion that law and politics are separate realms seems to have a strong grip on America's legal conscience. To some, the idea that constitutional adjudication essentially amounts to the imposition of the judges' own political views, dressed up in the garb of legal reasoning, borders on heresy. Allowing a judge's personal ideology to influence her decisions, they say, threatens the basic commitments of our constitutional democracy—perhaps even the rule of law—and it arguably demeans the role of judges. Judge Harry Edwards, for example, has written that the idea that the members of his court are “influenced more by personal ideology than legal principles” is “absurd and would be understood as such by anyone familiar with the judges and operation of the D.C. Circuit.”<sup>63</sup>

But the evidence amassed by social scientists is now beyond serious question: a judge's ideology is significantly predictive of how she will decide cases, and this is especially true for justices of the Supreme Court.<sup>64</sup> As Epstein explained in an earlier article with co-author Jack

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<sup>63</sup> Harry Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1337 (1998).

<sup>64</sup> The classic works discussing this research are JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993), and JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). See also L. BAUM, *THE SUPREME COURT* 147, 155 (7th ed. 2001); Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277 (1988); Cross & Tiller, *supra* note \_\_\_\_, at 2175; K. O'Connor & B. Palmer, *The Clinton Clones: Ginsberg, Breyer, and the Clinton Legacy*, 84 JUDICATURE 262–273 (2001); Terri Jennings Peretti, *Does Judicial Independence Exist?: The Lessons of Social Science Research*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 103, 109–116 (Burbank & Friedman eds., 2002); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999); Gregor J. Rathjen & Harold J. Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969–1976*, in *STUDIES IN U.S. SUPREME COURT BEHAVIOR* 24, 29–32, 40 (Harold J. Spaeth & Saul Brenner eds., 1990); Revesz, *supra* note \_\_\_\_, at 1766–69; Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557–565 (1989); Jeffrey A. Segal, Lee Epstein, C.M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812–23 (1995); James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1093–94 (2001); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 655–57 (2004); Sunstein, Schkade & Ellman, *supra* note \_\_\_\_,; C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355

Knight, “[j]ustices may have goals other than policy, but no serious scholar of the Court would claim that policy is not prime among them. Indeed, this is perhaps one of the few things over which most social scientists agree.”<sup>65</sup> And this revelation is hardly new, at least to political scientists. As early as 1941, C. Herman Pritchett wrote that judges “are influenced by their own biases and philosophies, which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law.”<sup>66</sup> True enough, the precise degree to which ideology affects judicial decision making remains contested. Some scholars argue that judges vote exclusively to maximize their policy preferences, while others take a more complex view. But the basic point is undisputed: judges’ personal values, experiences, and policy preferences substantially influence their decisions.

This is not to say that judges consciously set out to impose their policy views through their opinions, manipulating legal doctrine to suit their ideological ends. Most judges probably believe quite sincerely that they are performing the task described by John Roberts at his confirmation hearing: acting as an umpire, faithfully interpreting the relevant sources of law and applying them to the facts presented. But the nature of human decisionmaking is such that the “true” reasons for a decision are often opaque, especially to the decisionmaker herself. As social psychologists have long known, “we humans tend to hold beliefs and reach judgments and conclusions that we desire, and we vastly underappreciate that tendency—particularly in ourselves.”<sup>67</sup> Moreover, there is ample reason to think that judges suffer from some cognitive dissonance on this score. Surely, judges would rather believe that the impersonal compulsion of the law, and not their own ideology, is responsible for certain outcomes. For instance, who actually wants to believe that *his* discretionary judgment permitted the execution of another human being? It’s much easier to attribute that result to the decisions of previous justices and those who ratified the Bill of Rights or the Fourteenth Amendment.

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(1981); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88*, 35 AM. J. POL. SCI. 460 (1991).

<sup>65</sup> Lee Epstein & Jack Knight, *The New Institutionalism, Part II*, 7 L. & CTS. 4, 5 (1997).

<sup>66</sup> C. Herman Pritchett, *Divisions of Opinion among Justice of the Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890, 890 (1941).

<sup>67</sup> Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 138 (2003).

The problem, though, is that the law rarely compels a particular result, at least in cases that reach the Supreme Court. The supposedly “neutral principles” of constitutional law—the text of the Constitution, its structure, our nation’s history and traditions, and the Court’s own precedent—are too indeterminate to answer the difficult questions.<sup>68</sup> The legal arguments on both sides are typically quite compelling; indeed, the reason most cases reach the Court is that lower courts have disagreed as to the proper result.<sup>69</sup> Thus, as Richard Posner has explained, these cases “occupy a broad open area where the conventional legal materials of decision run out and the Justices, deprived of those crutches, have to make a discretionary call.”<sup>70</sup> And human beings are simply incapable of making such discretionary calls without being affected by their own predispositions, whether they realize it or not. There is nothing else to fill the void. Judges’ decisions *must* be political in this sense, no matter their efforts to the contrary.<sup>71</sup>

This does not mean that judges have a completely free hand to impose their policy views willy-nilly, even at the Supreme Court. Indeed, the justices face a range of constraints.<sup>72</sup> First, Congress can punish the Court in a number of ways: it can strip the Court of jurisdiction, adjust the size of the Court, reduce the Court’s appropriations, or even propose constitutional amendments to overrule the Court’s decisions. Second, the President can disregard or decline to enforce the Court’s decisions. Third, lower courts can effectively disobey the Court, stretching and squeezing precedent in ways that suit their own ends.<sup>73</sup> And fourth, public opinion can stymie the Court, at least when the issue is highly salient; as history shows, when the Court has strayed too far from society’s prevailing views, the public has knocked the Court back into line, and at great cost to the Court’s institutional prestige.<sup>74</sup> Granted, these retributive controls have

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<sup>68</sup> See, e.g., Richard Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 39–54 (2005).

<sup>69</sup> See Supreme Court Rule 10.

<sup>70</sup> Posner, *supra* note \_\_\_\_, at 40.

<sup>71</sup> See Posner, *supra* note \_\_\_\_, at 40.

<sup>72</sup> For an extensive discussion of these constraints, see Barry Friedman, *The Politics of Judicial Review*, 84 TEXAS L. REV. 257, 270–329 (2005). See also Keith E. Whittington, *Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 618 (2000) (book review).

<sup>73</sup> See generally Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L. J. 819 (2003).

<sup>74</sup> For a thorough account of how the Court has never been significantly counter-majoritarian, see MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

been invoked quite sparingly in American history. But they nonetheless have all been invoked, and the justices know this history.

Moreover, despite the law's indeterminacy, legal doctrine *does* constrain judges' choices, as do the norms that surround what it means to be a judge in our constitutional system. In the lower federal courts, where review is mandatory and precedent is far more binding, the law likely dictates a particular result in the vast majority of cases.<sup>75</sup> For example, a 1986 study of circuit court decisions found that Reagan and Carter appointees concurred in 74 percent of the cases in which they were on the same panel.<sup>76</sup> A more recent examination of court of appeals decisions handed down between 1928 and 1992 concluded that "[t]he traditional legal model clearly explains a significant part of this decisionmaking, even after controlling for ideology and other variables."<sup>77</sup>

Even at the Supreme Court, where review is discretionary and precedent can be disregarded, legal doctrine almost certainly exerts some independent bite.<sup>78</sup> Though most lawyers are sophisticated enough to understand that the justices' ideology can affect how the Court decides cases, all graduates of American law schools share certain understandings of acceptable judicial behavior. Moreover, as lawyers themselves (usually several years into their careers), the justices likely have fairly well-developed conceptions of what it means to be a judge, conceptions that have incorporated these shared understandings of the profession. These collective expectations are manifested in norms that are tethered, in various ways, to legal

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<sup>75</sup> See Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 770–74 (2005) (finding that the effect of ideology on lower federal court decisions is rather modest).

<sup>76</sup> Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48–54 (1986).

<sup>77</sup> Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1514 (2003). See also Cross & Tiller, *supra* note \_\_\_\_, at 2175 (finding that, in D.C. Circuit decisions reviewing agency action, "legal doctrine appears to play an important role in the partisan struggle over policy" because "[m]inority judges can use doctrine to corral the partisan ambitions of a court majority whose policy preferences would best be accomplished by neglecting the dictates of doctrine).

<sup>78</sup> See, e.g., LEE EPSTEIN & JOSEPH KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* (1992); Howard Gillman, "What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making, 26 L. & SOC. INQUIRY 465 (2001); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002); Rogers M. Smith, *Comments on The Supreme Court and the Attitudinal Model*, 4 L. & CTS. 8 (1994).

doctrine and legal practices. And because the justices care about their reputations in the legal community—and generally seek to act in ways that are consistent with their own conceptions of the proper judicial role—these norms meaningfully shape the justices' conduct.<sup>79</sup>

To be sure, these norms are quite general, but they discipline the Court in important ways. For instance, regardless of the actual reasons for their votes, the justices must justify their decisions with plausible legal arguments that are articulated in written opinions. And they can only decide cases over which the Court has jurisdiction and questions that have been pressed and decided in the lower courts. For example, the Court's more liberal justices could not have held in *Grutter v. Bollinger*<sup>80</sup> that, because of the imperative to compensate for years of institutional racism, state universities are constitutionally *required* to practice affirmative action in admitting prospective students. Such a position is certainly an intellectually defensible understanding of the Equal Protection Clause, and it might have even been the sincere belief of some of the justices. But it would have been legally "out of bounds" in *Grutter*, as it had not been advanced by any party, nor was it a plausible reading of the Court's precedent. Thus, the law, at least in this broader sense, limits the justices. Indeed, despite the Court's ideological diversity, the justices are typically unanimous in 30 to 40 percent of their decisions every term. Or, viewing the data discussed above from a different angle, Justice Ginsburg still votes for conservative outcomes 40 percent of the time, and Justice Scalia still votes for liberal results 34 percent of the time.<sup>81</sup>

Judges are therefore constrained in a variety of ways. But these constraints still leave a vast field of discretion, especially for justices of the Supreme Court, and the exercise of that discretion is necessarily influenced by the judges' own political values. As Epstein and Segal make clear, this means that the process for selecting judges *must* be—has always been, will always be—political. So long as judges exercise political power—a fact that the indeterminacy of

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<sup>79</sup> See Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 L. & SOC'Y REV. 135, 137–38 (2006).

<sup>80</sup> 539 U.S. 306 (2003) (holding that, under certain circumstances, state institutions of higher education are permitted to consider race in their admissions programs in the interest of pursuing a diverse student body).

<sup>81</sup> See text accompanying note \_\_\_\_ *supra*.

constitutional law makes inevitable—their selection will offer an important opportunity for presidents and senators to influence policy outcomes. As one scholar recently explained, politicians who are “interested in reelection and policy success cannot reasonably be expected to ignore such splendid opportunities to please their constituents, help their party, and realize their policy goals.”<sup>82</sup>

This is why the frequent calls to “depoliticize” the appointments process are fundamentally misguided. One cannot simultaneously (a) invest political power in an institution, (b) grant elected officials the authority to select the personnel of that institution, and then (c) expect the elected officials to ignore political considerations in selecting that personnel. Given the political stakes in judicial decisions, presidents and senators have every incentive to pursue ideological goals in deciding who becomes a federal judge, and particularly a justice of the Supreme Court. How could we coherently ask them not to?

Setting aside the futility of the idea, a more fundamental question is *why* we would want to reduce the influence of politics on the selection of judges. It is particularly unclear why we would want this for the selection of Supreme Court justices. A central question concerning the role of the Court in our constitutional system—indeed, *the* central question for constitutional theorists over the last fifty years—is how to square the practice of judicial review with representative democracy.<sup>83</sup> This is the well known “countermajoritarian difficulty,” as famously termed by Alexander Bickel.<sup>84</sup> How can a polity supposedly committed to democratic self-government entrust many of its most significant policy decisions to nine unelected, life-tenured justices? What legitimates privileging the judgments of the Court—judgments that are inherently political—over those of our duly elected representatives?

I am hardly qualified to offer a comprehensive answer to that question. But part of the response might be that, though the justices are unelected, they are nonetheless politically

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<sup>82</sup> Peretti, *supra* note \_\_\_\_, at 109.

<sup>83</sup> See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

<sup>84</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

representative.<sup>85</sup> Justices are nominated by the president and confirmed by the Senate based in large part on the ideology they will bring to the bench. Each justice therefore reflects, at least to some degree, the political values of the country as a whole at the time of his appointment. Of course, as Epstein and Segal document, justices can drift from their ideological starting points, weakening the link between the voters' views and those represented on the Court.<sup>86</sup> Moreover, the average tenure of justices who have retired since 1971 is twenty-six years, meaning that the ideology of a justice can reflect election results that have long become stale.<sup>87</sup> And then there is the larger problem that, given the Electoral College and the equal representation of each state in the Senate, the results of presidential and senatorial elections do not necessarily reflect the views of the national electorate.

Still, the ideological composition of the Court reflects, albeit imperfectly, the choices made by voters in various prior elections.<sup>88</sup> And it does so in large measure *because* politics plays such an important role in the selection of justices—*because* presidents and senators have focused on ideology in making their decisions to nominate and confirm the justices.

“Depoliticizing” the appointments process would only weaken this link, further attenuating the connection between the views of the voters and the political values of the justices. The Court’s political power would not decrease, but the exercise of that power would become less democratically accountable.

Instead of reducing the role of politics, a better aim might be to rationalize its influence. That is, if one accepts the idea that the Court is politically representative, and that this representativeness is important to the Court’s democratic legitimacy, there is a serious flaw in the present system: elections do not count equally. Some elections have had an enormous impact

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<sup>85</sup> This theory is eloquently elaborated in TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999).

<sup>86</sup> See Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes the Justices More Liberal*, *Boston Review*, Nov./Dec. 2005, available at <http://www.bostonreview.net/BR31.1/hansonbenforado.html> (last visited April 9, 2006).

<sup>87</sup> See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 15, 23 (Roger C. Cramton & Paul D. Carrington eds., 2005).

<sup>88</sup> Cf. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1064–80 (2001) (arguing that constitutional law changes through the process of presidential appointments to the Court, calling this process “partisan entrenchment”).

on the Court. For example, the presidential election of 1936 gave FDR the opportunity to appoint five new justices—justices who, in turn, substantially transformed constitutional law.<sup>89</sup> Other elections have been largely irrelevant; Jimmy Carter did not appoint a single justice. Thus, the connection between any particular expression of voter preferences and the ideological composition of the Court is largely serendipitous. It depends entirely on the timing of justices' retirements or their deaths in office. If we care about the representativeness of the Court, this randomness is problematic, for it privileges the views of some voters over others, and often by a wide margin.

One way to mitigate this problem would be to limit the justices to staggered, nonrenewable eighteen-year terms. Several scholars have endorsed such a proposal,<sup>90</sup> including Paul Carrington and Roger Cramton in their Supreme Court Renewal Act.<sup>91</sup> This would ensure that each president would have two appointments to the Court per term, and thus that every presidential election would count equally. Though attractive in several respects, imposing fixed terms on the justices faces an important practical obstacle: it likely would violate Article III, and thus require a constitutional amendment. More modestly, Terri Peretti has proposed legislation that would guarantee every president at least one appointment per four-year term, with the nomination occurring in January of the term's second year.<sup>92</sup> In addition, Peretti would prohibit any president from making more than two appointments in a single term.<sup>93</sup> As a result, the size of the Court would fluctuate, becoming larger and smaller than nine justices depending on the timing

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<sup>89</sup> Those justices were, in chronological order, Hugo Black (sworn in August 19, 1937), Stanley Reed (January 31, 1938), Felix Frankfurter (January 30, 1939), William O. Douglas (April 17, 1939), and Frank Murphy (February 5, 1940).

<sup>90</sup> See Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799 (1986); L. A. Powe, Jr., *Old People and Good Behavior*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 77, 79 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004).

<sup>91</sup> Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2005).

<sup>92</sup> Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 435, 449 (Roger C. Cramton & Paul D. Carrington eds., 2005).

<sup>93</sup> *Id.*

of vacancies. Some presidential elections would still count more than others, but the variation would be substantially reduced.

These are just two possible solutions, though Peretti's seems particularly promising, as it would not require a constitutional amendment. The broader point is that we presently allocate opportunities to influence the policy direction of the Court serendipitously, and this irregularity seriously undermines the Court's legitimacy. Frankly, it is an embarrassment to our constitutional design that elections can have such a haphazard and unequal influence on such an immensely powerful political institution.

#### IV

At a general level, the nominations of John Roberts, Harriet Miers, and Samuel Alito unfolded largely as Epstein and Segal would have predicted. All three were political conservatives, and they each had demonstrated their partisan *bona fides* through extensive service in Republican administrations. Thus, they all reflected President Bush's desire to push the Court in a conservative direction. Roberts and Alito were generally regarded as very well qualified—Roberts exceptionally so—while Miers's qualifications were seriously challenged.<sup>94</sup> Alito had a lengthy public record as a consistently conservative judge on the Third Circuit. (Indeed, some referred to him as “Scalito” for the affinity between his views and those of Justice Scalia.<sup>95</sup>) Roberts was also perceived as conservative, but his ideology was less apparent, as he had spent most of his career as a practicing lawyer. Miers's constitutional views were largely unknown.<sup>96</sup>

Epstein and Segal's analysis suggests that Roberts should have been the easiest to confirm; his impeccable credentials made him the most difficult for Democrats to oppose, and he

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<sup>94</sup> The Segal and Cover qualifications scores rank nominees from 0 to 1, with 1 being the most qualified. Roberts had a score of .970, Alito a score of .810, and Miers a score of .360. See *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2005*, available at <http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf> (last visited April 10, 2006).

<sup>95</sup> Damien Cave, *Scalito*, N.Y. TIMES, Dec. 25, 2005, §4, p. 3.

<sup>96</sup> The Segal and Cover ideology scores also rank nominees from 0 to 1, with 0 being the most conservative. Roberts had a score of .100, Roberts a score of .120, and Miers a score of .270. See *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2005*, available at <http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf> (last visited April 10, 2006).

lacked much of a public record as a strident conservative. Miers and Alito should have been more difficult—Miers because of her undistinguished record, and Alito because he was so obviously conservative. And this is essentially how events unfolded. The Senate confirmed Roberts by a vote of 78 to 22, with all of the no votes being the more liberal Democrats.<sup>97</sup> The president withdrew the Miers nomination following a conservative revolt within the GOP, triggered by the great uncertainty surrounding her ideology and aggravated by her perceived lack of qualifications.<sup>98</sup> And the vote to confirm Alito was reasonably close—58 to 42—with only four Democrats voting yes and one Republican voting no.<sup>99</sup>

Many would agree with the gist of Epstein and Segal's analysis—that judges are nominated and confirmed based on ideology, and that this is because judges' political values influence their decisions. But they deeply lament it. According to Justice Scalia, for instance, we are seeing a “new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution.”<sup>100</sup> To Scalia, this means nothing less than “the end of the Bill of Rights.”<sup>101</sup> The apocalypse is now.

What Scalia fails to appreciate is that the appointments process has focused on the ideology of judicial nominees since the founding of the Republic. And the reason is that the neutral sources of constitutional law provide no clear answers to any difficult questions, leaving the justices' personal values, experiences, and policy preferences to fill the gaps. As a result, the resolution of some of society's most contested political issues—from abortion to affirmative action to gay rights to the death penalty—turns on the ideology of the Court's personnel. We should therefore celebrate the role of politics in the appointments process, not condemn it, for it ensures that the Court will at least be indirectly representative of the voters' choices. If there is a problem in the selection of justices, it is not the influence of politics, but how imperfectly those political forces shape the Court's composition.

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<sup>97</sup> *The Senate's Vote on Roberts*, N.Y. TIMES, Sept. 30, 2005, at A24.

<sup>98</sup> See, e.g., Robin Toner, David D. Kirkpatrick & Anne E. Kornblut, *Steady Erosion in Support Undercut Nomination*, N.Y. TIMES, Oct. 28, 2005, at A16.

<sup>99</sup> See David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21.

<sup>100</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 47 (1997).

<sup>101</sup> *Id.*