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## McConnell's Gamble

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# McConnell’s Gamble

*Peter Nemerovski\**

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## INTRODUCTION

February 13, 2016 was an eventful day in American history. That afternoon, news outlets began reporting that Justice Antonin Scalia had been found dead earlier in the day at a resort in West Texas.<sup>1</sup> Justice

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1. Gary Martin & Guillermo Contreras, *U.S. Supreme Court Justice Antonin Scalia found dead at West Texas Ranch*, MY SAN ANTONIO (Feb. 16, 2016, 1:52 PM), <https://www.mysanantonio.com/news/us-world/article/Senior-Associate-Justice->

Scalia's death sent shockwaves through Washington, D.C.<sup>2</sup> There was much uncertainty: nobody knew whom President Barack Obama would nominate for the seat, how the Senate would react to the nomination, or who would be president in a year's time.

There was, however, one very powerful person in Washington who seemed to know exactly what would happen next: Senate Majority Leader Mitch McConnell (R-Ky.).<sup>3</sup> On the day of Scalia's death, McConnell released a statement praising Scalia and offering condolences to his family.<sup>4</sup> The statement continued: "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President."<sup>5</sup>

Later that day, in Greenville, South Carolina, the six top contenders for the Republican presidential nomination participated in a nationally televised debate, one week before the South Carolina primary.<sup>6</sup> Donald J. Trump entered the debate as the frontrunner for the Republican (GOP) nomination: he had won the New Hampshire primary the week before, and he held a commanding lead in the polls in South Carolina.<sup>7</sup> At the South Carolina debate, moderator John Dickerson of CBS News asked then-candidate Trump whether he was OK with President Obama nominating someone to fill the vacancy created by Scalia's death.<sup>8</sup> Trump responded:

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Antonin-Scalia-found-6828930.php?cmpid=twitter-mobile [https://perma.cc/3XD9-VR4R].

2. See, e.g., Charles W. Collier, *The Unwritten Rules of Liberal Democracy*, 15 U. MASS. L. REV. 197, 202–03 (2020) ("The political, legal, and institutional significance of Scalia's death could hardly be overstated. . . . The ground began to shift—and not in a good way—beneath conservative centers of power like Washington think tanks and the offices of Republican Senators and Congressmen all across Capitol Hill.").

3. See *id.*

4. Press Release, Mitch McConnell, Majority Leader, Senate, Justice Antonin Scalia (Feb. 13, 2016), <https://www.republicanleader.senate.gov/newsroom/press-releases/justice-antonin-scalia> [perma.cc/FZJ6-88D9] (Statement on the Passing of Justice Antonin Scalia).

5. *Id.*

6. MJ Lee, *The GOP's bitter South Carolina brawl*, CNN (Feb. 14, 2016, 7:28 AM EST), <https://www.cnn.com/2016/02/13/politics/republican-debate-highlights/index.html> [https://perma.cc/4D6P-HSU4].

7. Steve Holland, *Refusing to sit on lead, Trump gets bitter in Republican debate*, REUTERS (Feb. 13, 2016, 5:18 AM), <https://www.reuters.com/article/us-usa-election/refusing-to-sit-on-lead-trump-gets-bitter-in-republican-debate-idUSMTZSAPEC2DHGQ8ZL> [https://perma.cc/3VAU-KCTS].

8. *The CBS News Republican debate transcript, annotated*, WASH. POST (Feb. 13, 2016, 11:27 PM EST), <https://www.washingtonpost.com/news/the->

“I think he’s going to do it whether [] I’m OK with it or not. I think it’s up to Mitch McConnell, and everybody else to stop it. It’s called delay, delay, delay.”<sup>9</sup> Trump also mentioned two federal appellate judges—Diane Sykes of the Seventh Circuit and William Pryor Jr. of the Eleventh Circuit, whom Trump called “fantastic people”<sup>10</sup>—as potential candidates for the seat.

February 13, 2016 marked the beginning of a five-year period that would transform the United States Supreme Court and the process through which the Senate considers Supreme Court nominations. The major developments during those five years—which are discussed in detail in Part I.F of this Article—are generally well-known, even to casual observers of American politics.<sup>11</sup> What is not known, and what this Article will explore, is what these recent and very consequential developments mean for the future of the Supreme Court.

As the title of this Article suggests, Senator McConnell’s handling of the vacancies created by the deaths of Justice Scalia in 2016 and Justice Ruth Bader Ginsburg in 2020 amounted to a political gamble. McConnell bet that having the Senate play a greater role in determining who sits on the Supreme Court—up to and including an absolute veto during the final year of a president’s term—would benefit the GOP, both immediately and in the long run.

In the short term, McConnell’s strategy was successful: the Senate confirmed conservative justices to replace Scalia and Ginsburg.<sup>12</sup> The

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fix/wp/2016/02/13/the-cbs-republican-debate-transcript-annotated/ [https://perma.cc/PF3T-D9Y5].

9. *Id.*

10. *Id.*

11. For example, Scalia’s death and President Obama’s subsequent nomination of Judge Garland to the Court received such extensive media coverage that the Associate Press named the Supreme Court one of the Top 10 news stories of 2016. David Crary, *AP Poll: US election voted top news story of 2016*, ASSOCIATED PRESS (Dec. 21, 2016), <https://apnews.com/article/40c1f5ac84b74be2b8574705671c9087> [https://perma.cc/4HUQ-RWHN].

12. The Senate confirmed Neil M. Gorsuch to succeed Justice Scalia, and Amy Coney Barrett to succeed Justice Ginsburg. *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [https://perma.cc/XBJ8-6MML] (last visited Aug. 9, 2022) [hereinafter *Supreme Court Nominations*]. Whether Justices Gorsuch and Barrett are conservative is somewhat subjective; however, as noted in Part III.D of this Article, Justices Gorsuch and Barrett delivered a major conservative victory when they joined Justice Samuel Alito’s majority opinion in *Dobbs v. Jackson Women’s Health Organization*. See discussion *infra* notes 375–77 and accompanying text.

GOP has not paid any perceptible political price for refusing to consider Judge Merrick B. Garland, President Obama's nominee to replace Scalia.<sup>13</sup> But whether McConnell's actions—and inaction—will benefit his party in the long run remains to be seen.

This Article argues that McConnell's gamble will also pay off in the long run, at least from the perspective of having more Republican appointees than Democratic appointees on the Supreme Court. Part I of the Article discusses the recent history of Supreme Court nominations, beginning with President Ronald Reagan's unsuccessful nomination of Judge Robert Bork in 1987.<sup>14</sup> It attempts to explain how the Senate, in just a few decades, went from confirming three justices unanimously to confirming four consecutive justices with fewer than 55 votes, amidst increasing partisan rancor. Part II summarizes the new rules of the game in light of the actions taken by both parties, and their justifications for those actions, in the years since Scalia's death. Part III explores what the future of Supreme Court nominations will look like, with a particular focus on the Senate's rural and small-state biases. Finally, Part IV argues that the new rules and norms that have emerged since 2016 give Republicans a significant advantage that will likely endure for decades to come.

## I. RECENT HISTORY

This Part summarizes the winding path from the early- and mid-1980s, when Justices Scalia and O'Connor were unanimously confirmed by the Senate,<sup>15</sup> to the present, in which Supreme Court nominations are highly controversial and deeply partisan.<sup>16</sup> It begins with the U.S. Constitution, which unfortunately provides little guidance regarding the Senate's

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13. See Editorial Board, *The GOP's Gamble on Merrick Garland Pays Off*, WASH. POST (Nov. 10, 2016), [https://www.washingtonpost.com/opinions/the-gops-shameful-gamble-on-merrick-garland-pays-off/2016/11/10/05f79dd2-a780-11e6-8fc0-7be8f848c492\\_story.html](https://www.washingtonpost.com/opinions/the-gops-shameful-gamble-on-merrick-garland-pays-off/2016/11/10/05f79dd2-a780-11e6-8fc0-7be8f848c492_story.html) [https://perma.cc/Q2S9-DX9U] (“This was a gamble on a GOP victory in the fall; and there is no denying that, in political terms, it has paid off. Contrary to predictions that voters would punish GOP obstructionism, they appear to have rewarded it.”); Jeff Greenfield, *The Justice Who Built the Trump Court*, POLITICO MAG. (July 9, 2018), <https://www.politico.com/magazine/story/2018/07/09/david-souter-the-supreme-court-justice-who-built-the-trump-court-218953/> [https://perma.cc/MJK8-R3W7] (noting that, in the 2016 election, voters who cited the Supreme Court as their top issue voted for Donald Trump over Hillary Clinton by a margin of 56% to 41%).

14. See *Supreme Court Nominations*, *supra* note 12.

15. *Id.*

16. See *infra* Part I.F.

consideration of Supreme Court nominees. The next four subparts explain the modern Supreme Court wars, which most scholars agree began with President Reagan's ill-fated nomination of Judge Bork in 1987.<sup>17</sup> It is a story of increasing partisanship and frequent obstruction, albeit with occasional periods of calm and some uncontroversial nominations mixed in. Finally, Part I.F describes the momentous events of the years 2016–2020, focusing on how Senator McConnell deftly consolidated power over Supreme Court nominations in the Senate Majority Leader's hands.

#### *A. The Constitution's Unhelpfulness*

A big reason why Supreme Court nominations have become so contentious is the lack of clarity in the Constitution about the Senate's role in the process. Article II, § 2 of the United States 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 . . .”<sup>18</sup> The words “nominate” and “appoint” are clear enough, and, thus, the president's role in the process has not been controversial. However, the meaning of “Advice and Consent” is not clear.<sup>19</sup> Under what circumstances may the Senate withhold its consent? When and how should the Senate manifest its consent or lack thereof?

The Constitution does not answer these questions. Scholars have looked for guidance elsewhere. For example, Grant H. Frazier and John N. Thorpe studied the use of the phrase “Advice and Consent” in eighteenth-century English statutes and in the Constitutions of the 13 colonies; statements made by delegates to the Philadelphia Constitutional Convention of 1787, and by Alexander Hamilton and John Jay in *The Federalist Papers*; and early interactions between President George Washington and the Senate.<sup>20</sup> Their findings are inconclusive: different founding fathers had different ideas about what role the Senate should play on issues where the Constitution requires the Senate's advice and consent.<sup>21</sup>

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17. See discussion *infra* note 37 and accompanying text.

18. U.S. CONST. art. II, § 2, cl. 2.

19. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 20 (2005) (“‘Advice and consent’ is indisputably a vague term that could admit of a number of interpretations . . .”).

20. Grant H. Frazier & John N. Thorpe, *A Case for Circumscribed Judicial Evaluation in the Supreme Court Confirmation Process*, 33 *GEO. J. LEGAL ETHICS* 229, 236–46 (2020).

21. *Id.* at 243.

Even if the context surrounding the advice-and-consent clause provided absolute clarity regarding the role that the Framers intended the Senate to play, it probably would not matter. Faced with an opportunity to move the Supreme Court in one ideological direction or prevent a sitting president from doing so, neither Mitch McConnell nor any future Majority Leader from either party would likely feel constrained by such historical context.

Writing about President Obama's nomination of Merrick Garland in 2016, Professor Michael D. Ramsey argued that the Constitution "does not require the Senate to do anything in response to the nomination."<sup>22</sup> According to Ramsey, the Constitution "makes the Senate's consent a prerequisite to presidential appointments, but it does not place any duty on the Senate to act nor describe how it should proceed in its decision-making process."<sup>23</sup> Ramsey argues that the Framers of the Constitution intended the Senate's advice-and-consent role to be a check on the president, and the Senate may exercise its advice-and-consent power simply by not acting.<sup>24</sup>

As Ramsey points out, when the Framers wanted one branch of government to respond to another branch's action within a certain time or in a certain way, they wrote that into the Constitution: for example, "Article I, Section 7 says that when Congress passes a bill, the president ordinarily must veto the bill within 10 days—and give reasons for doing so—or the bill becomes law."<sup>25</sup> The Framers gave the Senate no such deadline to act on a president's Supreme Court nomination. Ramsey further notes that Article I, § 5 gives the Senate the power to "determine

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22. Michael D. Ramsey, *Why the Senate Doesn't Have to Act on Merrick Garland's Nomination*, ATLANTIC (May 15, 2016), <https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/> [<https://perma.cc/GZ2U-EZZ7>]. See also Eric T. Kasper, *The Possibility of Rejection: The Framers' Constitutional Design for Supreme Court Appointments*, 51 CREIGHTON L. REV. 539, 574 (2018) ("With no mandate in Article II that the Senate *must* vote on a nominee, the Senators can still comply with the Constitution without taking action."); Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 GEO. MASON L. REV. 15, 18 (2016) ("While there are strong *policy* and *prudential* arguments that the Senate should promptly consider any and all nominations to legislatively authorized seats on the federal bench, and on the Supreme Court in particular, the argument that the Senate has some sort of constitutional obligation to take specific actions in response to a judicial nomination is erroneous.").

23. Ramsey, *supra* note 22.

24. See *id.*

25. *Id.*

the Rules of its Proceedings.”<sup>26</sup> Over the years, the Senate has determined that it will manifest its consent to Supreme Court nominations by a majority vote and its lack of consent through a variety of means, including taking no action at all on the nomination. Indeed, it is not uncommon for the Senate to fail to act on other presidential nominees that require Senate confirmation.<sup>27</sup>

Not everyone agrees with Professor Ramsey. In the aftermath of the Garland blockade, several scholars argued that the Senate had failed to fulfill its constitutional obligation.<sup>28</sup> President Obama himself argued at the time he nominated Judge Garland that if the Senate did not give him “a fair hearing and then an up-or-down vote,” it would be “an abdication of the Senate’s constitutional duty” with respect to Supreme Court nominees.<sup>29</sup>

In the end, it does not really matter if some law professors think the Constitution required the Senate to act on Judge Garland’s nomination. The debate itself is rather silly: one side essentially says of the Senate refusing to consider a president’s nominee, “the Constitution doesn’t say you can do that,” while the other side says, “but it doesn’t say you cannot.” Both sides are correct. What matters is what actually happened, and

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26. *Id.* (quoting U.S. CONST. art. I, § 5).

27. *Id.* (“[T]he Senate’s longstanding practice, at least in modern times, is often not to act formally on nominees.”). *See also* Adler, *supra* note 22, at 20 (“It is indisputable that the Senate may withhold its consent, and there is nothing in the text of the Constitution that suggests the Senate’s failure to provide such consent must take any particular form.”).

28. *See, e.g.*, Carl Tobias, *Confirming Supreme Court Justices in a Presidential Election Year*, 94 WASH. U. L. REV. 1089, 1099 (2017) (“[T]he Senate should have promptly discharged its constitutional responsibility to furnish advice and consent, even when a Supreme Court vacancy arose in a presidential election year.”); Collier, *supra* note 2, at 207–08 (“[T]he Constitution does *not* say: ‘The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court—*unless* the Senate elects not to participate in the appointments process that year.’ In fact, the Constitution recognizes no way that the Senate could lawfully do this. ‘Not participating’ is not a constitutionally recognized option under either the written or unwritten law.”).

29. *Transcript: Obama announces nomination of Merrick Garland to Supreme Court*, WASH. POST (Mar. 16, 2016, 11:47 AM EDT), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/16/transcript-obama-announces-nomination-of-merrick-garland-to-supreme-court/> [<https://perma.cc/JXY8-QE3K>].



despite President Obama's appeals to the Constitution,<sup>30</sup> the Senate did not act.<sup>31</sup> Future majority leaders may follow McConnell's lead.

The lack of clear constitutional guidance helps explain why the Senate's role in Supreme Court nominations has shifted so much over the years.<sup>32</sup> At times the Senate has acted like a proverbial rubber stamp, overwhelmingly—or even unanimously—confirming whomever the president nominates.<sup>33</sup> When President Obama nominated Judge Garland in 2016, the Senate acted as a complete roadblock, refusing even to consider the nominee.<sup>34</sup> And of course there are various in-between roles the Senate can play, and it has played many of them over the years. As explained in the subparts that follow, there is a clear trend toward greater obstruction, but that trend has not been linear.

### *B. The Rejection of Judge Bork*

According to Professor Jonathan H. Adler, “[T]he judicial confirmation process has been in a downward spiral of increasing obstruction and dysfunction” since the mid-1980s.<sup>35</sup> The two parties have “engaged in an escalating game of tit-for-tat,” using whatever procedural tactics are available to prevent the confirmation of the other party's nominees.<sup>36</sup>

Many commentators agree that the modern Supreme Court wars began with President Reagan's failed nomination of Judge Robert Bork to the Supreme Court in 1987.<sup>37</sup> That is not because Judge Bork was the first

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30. Obama mentioned the Constitution nine times in his March 2016 speech announcing his nomination of Judge Garland. *Id.*

31. *See Supreme Court Nominations, supra* note 12.

32. *See Frazier & Thorpe, supra* note 20, at 249 (“Given the lack of specificity of the Appointments Clause and general dearth of constitutional instruction on a required procedure, it is not surprising that the appointment process has changed over time.”).

33. For example, all nine of President Franklin D. Roosevelt's Supreme Court nominees were confirmed by the Senate. *See Supreme Court Nominations, supra* note 12. The closest roll-call vote during that period was 63–16, and seven of those nine nominees were confirmed via a voice vote. *Id.* In the 1970s and 1980s, five nominees were confirmed unanimously, and a sixth was confirmed by a vote of 89–1. *Id.*

34. *See* discussion *infra* notes 120–44 and accompanying text.

35. Adler, *supra* note 22, at 32.

36. *Id.*

37. Carl Tobias, *Fixing the Federal Judicial Selection Process*, 65 EMORY L.J. ONLINE 2051, 2054 (2016) (“observers ascribe the modern ‘confirmation wars’ to Judge Robert Bork's 1987 attempted Supreme Court appointment”);

Supreme Court nominee to be rejected by the Senate; that distinction belongs to John Rutledge, whose nomination by President George Washington to be Chief Justice of the United States the Senate rejected in 1795.<sup>38</sup> Even in more modern times, it is not unheard of for the Senate to reject a Supreme Court nominee: President Richard Nixon's first two nominees to replace Justice Abe Fortas—Clement Haynsworth, Jr. and G. Harrold Carswell—were voted down in 1969 and 1970, respectively.<sup>39</sup>

Nevertheless, the rejection of Judge Bork by the Senate, and the events leading up to that rejection, broke new ground in several ways. First, there was an unprecedented campaign to rally the public in opposition to Bork's confirmation.<sup>40</sup> Second, the hearings on Bork's nomination received widespread media coverage.<sup>41</sup> Radio and television stations broadcasted the hearings live, and various types of media from around the country traveled to Washington to cover the proceedings.<sup>42</sup> Third, whereas previous Supreme Court nominees tended to be evaluated on their

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Brendan Williams, *Judicial Politics: The Devolution of the Third Branch of Government*, 20 LOY. J. PUB. INT. L. 241, 244 (2019); Michael J. Gerhardt, *The New Religion*, 40 CREIGHTON L. REV. 399, 399 (2007) (“Many people worry that the confirmation process for Supreme Court nominations is broken and cite the Senate’s rejection of Robert Bork’s nomination to the Court as the watershed event signaling the demise of the confirmation process.”).

38. Senate Hist. Off., *Chief Justice Nomination Rejected*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/nominations/a-chief-justice-rejected.htm> [<https://perma.cc/6C3C-6YT4>] (last visited Aug. 9, 2022) (“When the Senate convened in December [1795], it promptly voted down his nomination. Rutledge thus became the first rejected Supreme Court nominee . . .”).

39. *Supreme Court Nominations*, *supra* note 12; *see also* discussion *infra* note 64.

40. *See* Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 567 (1988) (describing a “widely aired television commercial” in which the actor Gregory Peck asked viewers to “[p]lease urge your Senators to vote against the Bork nomination”); Ellen Knight, *Reformation of the Supreme Court: Keeping Politics Out*, 52 NEW ENG. L. REV. 345, 350 (2018) (quoting JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 5 (1998)) (“It was not until 1987—during the nomination of Robert Bork—that the current structure of heavy involvement of outside forces on the nomination process permeated. Over 300 groups publicly opposed Bork’s appointment in various forms, while about 100 supported it.”).

41. *See* Frank Guliuzza et al., *Character, Competency, and Constitutionalism: Did the Bork Nomination Represent a Fundamental Shift in Confirmation Criteria?*, 75 MARQ. L. REV. 409, 417 (1992).

42. *Id.*

character and competence, the opposition to Bork focused on his judicial philosophy.<sup>43</sup>

On the same day that President Reagan nominated Judge Bork—July 1, 1987—Senator Edward M. Kennedy (D-Mass.) gave a speech on the Senate floor that set the tone for the opposition:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.<sup>44</sup>

At the time of his nomination, Bork was a judge on the D.C. Circuit.<sup>45</sup> Before that appointment, he had worked as a law professor, and, thus, he had a long paper trail of speeches and publications.<sup>46</sup> During Bork's confirmation hearings, senators questioned him about his stated views of the Constitution, which many senators considered extreme.<sup>47</sup>

Bork did himself no favors during those hearings. He came across as "dour and humorless."<sup>48</sup> When asked why he wanted to serve on the Supreme Court, he replied that "it would be an intellectual feast."<sup>49</sup> He agreed with the statement that giving freedom to slaves takes away the

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43. *Id.* at 411 ("Since the 1950s, of those nominees whose confirmations have been rejected, Bork stands alone as a casualty of his constitutional theory."); *see also* discussion *infra* note 64 (discussing the questions of character that contributed to the Senate's rejection of two of President Nixon's Supreme Court nominees).

44. Daniel Kishi, *Robert Bork's America*, AM. CONSERVATIVE (Mar. 1, 2018, 12:43 PM), <https://www.theamericanconservative.com/articles/robert-borks-america/> [https://perma.cc/9A9T-32QU].

45. Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICK. L. REV. 585, 626 (2018).

46. *Id.*

47. *Id.*

48. Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, NPR (Dec. 19, 2012, 4:33 PM), <https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever> [https://perma.cc/T2D7-YYB7].

49. *Id.*

freedom of slave owners.<sup>50</sup> He said courts should not recognize a constitutional right to marital privacy.<sup>51</sup> Professor Michael J. Gerhardt summarized Bork's performance as follows: "No nominee has ever been rejected for saying too little to the Committee; Bork was a dramatic example of the problems a nominee could cause for himself by talking too much."<sup>52</sup> On October 23, 1987, the Senate rejected Bork's nomination by a vote of 58 to 42.<sup>53</sup> Six Republicans voted against confirmation.<sup>54</sup>

There is room for disagreement over whether the Bork nomination forever changed the Senate's approach to Supreme Court nominations. One could argue that the episode was simply an aberration that was quickly followed by a return to normalcy. But it is important to place the events of the past few years in their proper historical context, and the Bork nomination is as good a starting point as any.

### *C. The 1990s: Return to Normalcy—With One Exception*

The Bork rejection did not immediately transform the way Supreme Court justices are nominated and confirmed. To the contrary, after the Senate rejected Judge Bork, things basically went back to normal—for a while. President Reagan eventually nominated Judge Anthony M. Kennedy to the Court, and he was confirmed by a vote of 97–0 on February 3, 1988.<sup>55</sup> In 1990, Justice William J. Brennan retired, and President George H.W. Bush nominated Judge David Souter to the Court.<sup>56</sup> On October 2, 1990, the Senate confirmed Souter by a vote of 90–9.<sup>57</sup>

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50. C. Shapiro, *supra* note 45, at 626.

51. *Id.*

52. Gerhardt, *supra* note 37, at 403.

53. *Supreme Court Nominations*, *supra* note 12.

54. *Senate's Roll-Call On the Bork Vote*, N.Y. TIMES, Oct. 24, 1987, at 10.

55. *Supreme Court Nominations*, *supra* note 12. In between the nominations of Bork and Kennedy, President Reagan announced his intention to nominate Judge Douglas H. Ginsburg of the D.C. Circuit to the Supreme Court. Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES, Nov. 8, 1987, at 1. After "disclosures about his personal and ethical conduct stirred a storm of criticism," Ginsburg withdrew from consideration on November 7, 1987, just nine days after being announced as Reagan's choice. *Id.* Ginsburg was never formally nominated to the Court. Sarah Pruitt, *How Robert Bork's Failed Nomination Led to a Changed Supreme Court*, HIST. (Oct. 28, 2018), <https://www.history.com/news/robert-bork-ronald-reagan-supreme-court-nominations> [<https://perma.cc/85SX-K6GF>].

56. *Supreme Court Nominations*, *supra* note 12.

57. *Id.*

In 1991, controversy erupted again when President Bush nominated Judge Clarence Thomas to replace the retiring Justice Thurgood Marshall.<sup>58</sup> This was almost certainly the most controversial U.S. Supreme Court nomination ever. As anyone with even a passing familiarity with American history knows, Thomas was accused of sexual harassment by Anita Hill, who worked for Thomas at the Department of Education and the Equal Employment Opportunity Commission.<sup>59</sup>

The Senate Judiciary Committee's hearings on Thomas's nomination captured the attention of the nation. When Hill testified before the committee in October 1991, Nielsen reported that more than 20 million households watched the hearing on television, and "the total audience . . . was likely much higher."<sup>60</sup> Numerous books were written,<sup>61</sup> and an HBO movie<sup>62</sup> was made about the scandal.

On October 15, 1991, the Senate confirmed Thomas by a vote of 52 to 48.<sup>63</sup> Thomas was not the first Supreme Court nominee to have his confirmation jeopardized by a scandal, nor would he be the last.<sup>64</sup> Between the confirmation of Justice Thomas in 1991 and the turn of the century,

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58. *Id.*

59. Joan Biskupic, *6 Supreme Court nominees who faced controversy*, CNN (Oct. 4, 2018, 11:48 AM EDT), <https://www.cnn.com/2018/10/03/politics/supreme-court-controversial-nominations-justice/index.html> [<https://perma.cc/6KZK-W4LJ>]; Barbara Maranzani, *6 Supreme Court Nomination Battles*, HIST. (Oct. 28, 2018), <https://www.history.com/news/a-brief-history-of-supreme-court-battles> [<https://perma.cc/2DHC-TLE2>].

60. Mikey O'Connell, *20 Million Watch Full Ford-Kavanaugh Hearing on Cable and Broadcast*, HOLLYWOOD REP. (Sept. 28, 2018 11:13 AM), <https://www.hollywoodreporter.com/tv/tv-news/ford-kavanaugh-ratings-hearing-brings-20-million-viewers-cable-broadcast-1147785/> [<https://perma.cc/ZL7V-537S>].

61. *See, e.g.*, JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994); HELEN WINTERNITZ & TIMOTHY M. PHELPS, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION* (1992).

62. *CONFIRMATION* (HBO Films 2016).

63. *Supreme Court Nominations*, *supra* note 12.

64. For example, the Senate rejected Judge G. Harrold Carswell, nominated by President Richard Nixon in 1969, by a vote of 51–45, in part because Carswell had spoken favorably about white supremacy. *See A History of Conflict in High Court Appointments*, NPR (July 6, 2005, 12:00 AM ET), <https://www.npr.org/2005/07/06/4732341/a-history-of-conflict-in-high-court-appointments> [<https://perma.cc/X4LD-HR2C>]. The Senate rejected another Nixon nominee, Judge Clement Haynsworth, by a vote of 55–45, amidst allegations of financial conflicts of interest. *Id.*

things were relatively calm. Two vacancies arose during Bill Clinton's presidency, and in each case President Clinton's first choice for the seat was overwhelmingly confirmed.<sup>65</sup> The confirmations of Justices Ruth Bader Ginsburg and Stephen Breyer were likely made easier by the Democrats' control of the Senate in the early years of Clinton's presidency.<sup>66</sup> However, there was so little opposition to Clinton's nominees—just three votes against Ginsburg and nine against Breyer<sup>67</sup>—that both likely would have been confirmed by a Republican-controlled Senate.

*D. Escalation: The George W. Bush Years*

In some ways, the Bush administration, like the Clinton administration before it, was a calm period for Supreme Court nominations. Like Clinton, Bush only got to fill two Supreme Court vacancies despite being president for eight years.<sup>68</sup> There were no blockades, no nominees voted down by the Senate, and no major scandals that jeopardized the confirmations of Bush's nominees.<sup>69</sup> As discussed in Part III.D, White House Counsel Harriett Miers, nominated by Bush to replace the retiring Justice Sandra Day O'Connor, withdrew from consideration amidst opposition from conservatives.<sup>70</sup> Bush's other nominees—Judge John Roberts to replace Chief Justice William Rehnquist and Judge Samuel Alito to replace O'Connor—were confirmed by the Senate.<sup>71</sup> The confirmation process for

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65. *Supreme Court Nominations*, *supra* note 12. Justice Ruth Bader Ginsburg was confirmed by a 98–3 vote, and Justice Stephen G. Breyer by a vote of 87–9. *Id.*

66. *Complete List of Majority and Minority Leaders*, U.S. SENATE, <https://www.senate.gov/senators/majority-minority-leaders.htm> [<https://perma.cc/668X-HWTQ>] (last visited Aug. 9, 2022).

67. *See Supreme Court Nominations*, *supra* note 12.

68. *See id.*

69. Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 402 (2006) (“2005 did not recreate 1987. The confirmation process for both John Roberts and Samuel Alito was tamer than many expected or hoped.”).

70. *See discussion infra* notes 278–84 and accompanying text.

71. *Supreme Court Nominations*, *supra* note 12. Bush initially nominated Roberts to replace O'Connor on July 29, 2005. *Id.* Then, on September 3, 2005, while the Roberts nomination was pending, Chief Justice Rehnquist died of thyroid cancer. Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, at 1. On September 5, Bush withdrew his nomination of Roberts to the seat being vacated by O'Connor and instead nominated him to succeed Rehnquist as Chief Justice. Peter Baker, *Bush Nominates Roberts as*

Roberts was relatively uneventful, and the Senate ultimately confirmed him by a vote of 78 to 22.<sup>72</sup> As Professor Gerhardt notes, “[m]ore than a few senators (and commentators) were dazzled by his eloquence, confidence, and endurance” when Roberts testified before the Judiciary Committee.<sup>73</sup>

Alito’s confirmation played out differently.<sup>74</sup> Immediately upon Alito’s nomination, Senate Democrats criticized him as extreme and divisive.<sup>75</sup> At Alito’s confirmation hearings, Democrats seized on Alito’s membership in a group called Concerned Alumni of Princeton, which advocated limiting the admission of women and minorities to Princeton.<sup>76</sup> At one point during the hearings, Alito’s wife broke down in tears, and she later left the hearing while it was still in progress.<sup>77</sup> Some Senate Democrats, led by Senators Edward M. Kennedy and John Kerry of Massachusetts, attempted to block Alito’s confirmation by mounting a filibuster, but the Senate defeated the filibuster effort by a vote of 72 to 25.<sup>78</sup>

Democrats gave varying reasons for opposing Alito’s confirmation. Senator Russ Feingold (D-Wis.) believed Alito would be too deferential to the executive branch.<sup>79</sup> Senator Diane Feinstein (D-Cal.) opposed Alito because of his views on congressional power and on *Roe v. Wade*, which

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*Chief Justice*, WASH. POST (Sept. 6, 2005), <https://www.washingtonpost.com/archive/politics/2005/09/06/bush-nominates-roberts-as-chief-justice/ddd7565e-5022-4347-8438-9d03b6f2a077/> [<https://perma.cc/VLV5-UY6N>].

72. *Supreme Court Nominations*, *supra* note 12.

73. Gerhardt, *supra* note 37, at 400.

74. See Sheldon Goldman et al., *Picking Judges in a Time of Turmoil: W. Bush’s Judiciary During the 109th Congress*, 90 JUDICATURE 252, 271–72 (2007) (discussing differences between Roberts’s confirmation and Alito’s).

75. *Reactions to the Alito Nomination*, NPR (Oct. 31, 2005, 12:00 AM ET), <https://www.npr.org/2005/10/31/4982460/reactions-to-the-alito-nomination> [<https://perma.cc/529J-WBLY>].

76. *Emotions run high in Alito hearing’s 3rd Day*, NBC NEWS (Jan. 11, 2006, 7:29 AM CST), <https://www.nbcnews.com/id/wbna10802815> [<https://perma.cc/74N4-T5RX>].

77. *Id.*

78. Jeff Zeleny, *Filibuster attempt against Alito fails*, BALT. SUN (Jan. 30, 2006, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-2006-01-31-0601310250-story.html> [<https://perma.cc/WUN9-EURM>].

79. Gail Russell Chaddock, *Why Democrats are united against Alito*, CHRISTIAN SCI. MONITOR (Jan. 25, 2006), <https://www.csmonitor.com/2006/0125/p03s03-uspo.html> [<https://perma.cc/6K87-YALL>].

Alito had criticized as “wrongly decided” while working in the Reagan Justice Department in the mid-1980s.<sup>80</sup>

Professor Stephen B. Presser argues that the differences in the Senate’s treatment of Roberts and Alito had less to do with the nominees themselves and more to do with the justices they were nominated to replace: unlike Rehnquist, whom Roberts replaced, O’Connor had sided with the Court’s liberals on cases involving abortion rights, affirmative action, and religion.<sup>81</sup> Thus, replacing O’Connor with Alito threatened to move the Court to the right in a way that replacing Rehnquist with Roberts did not. Senator Patrick Leahy (D-Vt.) voiced precisely this concern in announcing his opposition to Alito’s confirmation: “I will not lend my support to an effort by this president to move the Supreme Court and law radically to the right.”<sup>82</sup> The Senate ultimately confirmed Alito by a vote of 58 to 42, with just four Democrats voting in favor of confirmation.<sup>83</sup>

The number of votes against the confirmations of Chief Justice Roberts and Justice Alito—22 and 42, respectively—reflected senators’ increasing willingness to vote against a nominee based on his or her judicial ideology.<sup>84</sup> The George W. Bush years were something of a midpoint between the Reagan years, when three justices were confirmed unanimously, and the modern Trump-Biden era—2017 to the present—in

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80. Maura Reynolds, *Democrats Poised Against Alito*, L.A. TIMES (Jan. 19, 2006, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-2006-jan-19-na-alito19-story.html> [<https://perma.cc/G447-S6VM>]; Charlie Savage, *Decades Ago, Alito Laid Out Methodical Strategy to Eventually Overrule Roe*, N.Y. TIMES (June 25, 2022), <https://www.nytimes.com/2022/06/25/us/politics/samuel-alito-abortion.html> [<https://perma.cc/83ED-VZW2>].

81. See Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 453 (2008); see also Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 401 (2010) (“Although Roberts and Alito were both regarded as quite conservative, the significant difference in the votes was likely due to the fact that Alito’s confirmation threatened significantly to alter the ideological balance on the Court, whereas Roberts’s nomination did not.”).

82. *Top US Senate Democrats oppose Alito nomination*, IRISH TIMES (Jan. 19, 2006, 12:00 AM), <https://www.irishtimes.com/news/top-us-senate-democrats-oppose-alito-nomination-1.768823> [<https://perma.cc/QS4H-N5NQ>].

83. *Roll Call Vote 109th Congress - 2nd Session*, U.S. SENATE (Jan. 31, 2006, 11:01 AM), [https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1092/vote\\_109\\_2\\_00002.htm](https://www.senate.gov/legislative/LIS/roll_call_votes/vote1092/vote_109_2_00002.htm) [<https://perma.cc/D5U6-PUGW>].

84. See discussion *supra* notes 74–80 and accompanying text.



which none of the four justices confirmed to the Court received more than 54 votes.<sup>85</sup>

Other events in the Bush years reflected a ratcheting up of the judicial wars. As Nathan A. Williams explains, in 2001, Senate Majority Leader Tom Daschle (D-S.D.) urged Democratic senators to withhold support for President Bush's judicial nominees as a means of "leveraging a more robust role in the 'advice' portion of the nominating process."<sup>86</sup> When Bush sent 11 judicial nominations to the Senate in 2001, Democrats were slow to consider them.<sup>87</sup> But Daschle's strategy fell apart when Republicans regained control of the Senate in the 2002 midterm elections.<sup>88</sup> Once in the minority, Democrats used the filibuster to block several of Bush's more controversial nominees, including Miguel Estrada, whom Bush nominated to the D.C. Circuit.<sup>89</sup>

Several years later, in a July 27, 2007 speech to the American Constitution Society, Senator Charles Schumer (D-N.Y.) called upon his fellow Democrats, who had just regained control of the Senate the year before, to "reverse the presumption of confirmation" of Supreme Court nominees.<sup>90</sup> Schumer continued: "Given the track record of this President and the experience of obfuscation at the hearings, with respect to the Supreme Court, at least: I will recommend to my colleagues that we should not confirm a Supreme Court nominee except in extraordinary circumstances."<sup>91</sup> Thus, in the absence of extraordinary circumstances—a term Schumer did not define—the future Democratic leader appeared to endorse a blockade against any Supreme Court nominations for the remaining year-and-a-half of President Bush's term. Nobody knows whether Democrats would have gone along with Schumer's plan because

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85. *Supreme Court Nominations*, *supra* note 12.

86. Nathan A. Williams, *Rejecting the Confirmation Process: Modern Standards for Investigating Nominees to the Supreme Court*, 19 GEO. J.L. & PUB. POL'Y 317, 320 (2021).

87. *Id.*

88. *Id.*

89. *Id.* Senate Democrats complained that they did not have enough information to determine Estrada's fitness for the position and that he was ideologically outside the mainstream. MITCHEL A. SOLLENBERGER, JUDICIAL APPOINTMENTS AND DEMOCRATIC CONTROLS 141 (2011).

90. Press Release, Charles Schumer, Senator, United States Senate, Schumer Declares Democrats Hoodwinked Into Confirming Chief Justice Roberts, Urges Higher Burden Of Proof For Any Future Bush Nominees (July 31, 2007), <https://www.schumer.senate.gov/newsroom/press-releases/schumer-declares-democrats-hoodwinked-into-confirming-chief-justice-roberts-urges-higher-burden-of-proof-for-any-future-bush-nominees> [<https://perma.cc/HC92-8LGU>].

91. *Id.*

there were no vacancies on the Supreme Court during the remainder of Bush's presidency.<sup>92</sup>

The Bush years featured plenty of controversy over lower-court nominees. Between 2003 and 2005, with Republicans controlling the Senate, Democrats used the filibuster to prevent the confirmation of ten Bush nominees to the federal courts of appeals.<sup>93</sup> In November 2004, President Bush was reelected, and Republicans expanded their Senate majority from 51 seats to 55.<sup>94</sup> There was tremendous pressure on Senate Republicans, and in particular on Majority Leader Bill Frist (R-Tenn.), to do something about Democrats' continued obstruction of Bush's nominees.<sup>95</sup>

In May 2005, Frist scheduled a vote to change Senate rules to ban filibusters of judicial nominees.<sup>96</sup> However, shortly before that vote, a bipartisan group of 14 senators—7 Democrats and 7 Republicans—announced that they had reached an agreement that preserved the filibuster option while limiting it to “extraordinary circumstances.”<sup>97</sup> Under the agreement, Democrats agreed not to further filibuster three of the appeals court nominees they had previously blocked.<sup>98</sup> In return, the Republicans in the “Gang of 14” agreed not to vote to ban filibusters of judicial

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92. *Supreme Court Nominations*, *supra* note 12.

93. Byron York, *Eye-for-an-eye filibuster stops Democratic nominee*, WASH. EXAMINER (May 19, 2011, 12:00 AM), <https://www.washingtonexaminer.com/eye-for-an-eye-filibuster-stops-democratic-nominee> [<https://perma.cc/6CJT-L6PV>].

94. Senate Hist. Off., *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/8R6N-9RRH>] (last visited Aug. 9, 2022) [hereinafter Senate Hist. Off., *Party Division*].

95. Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST (May 24, 2005), <https://www.washingtonpost.com/archive/politics/2005/05/24/a-last-minute-deal-on-judicial-nominees/8a3d5ee6-f5a9-4c11-a21e-d8fdd8fe75ed/> [<https://perma.cc/35BP-5M98>].

96. *Id.*

97. *Id.* The agreement did not define “extraordinary circumstances” and instead stated that “each signatory must use his or her own discretion and judgment” in determining whether extraordinary circumstances were present. MEMORANDUM OF UNDERSTANDING ON JUDICIAL NOMINATIONS--GANG OF FOURTEEN AGREEMENT, S. REP. NO. 109-369, at 108 (2006).

98. Babington & Murray, *supra* note 95. Only the seven Democrats in the group agreed to this, but without those seven senators, Democrats lacked the votes to mount a successful filibuster. See Goldman et al., *supra* note 74, at 265 (“With seven Democratic senators thus committed to vote for cloture to stop filibusters in the normal course of events, the Democrats could no longer muster the 41 votes necessary to sustain a filibuster.”).

nominees, thus denying Leader Frist the votes needed to enact that change.<sup>99</sup>

The Gang of 14's agreement was generally successful. It resolved the existing controversies over several pending nominees, assuring that three of them would be confirmed, while two others would have to be withdrawn or face a likely successful filibuster.<sup>100</sup> For the remainder of the 109th Congress, none of President Bush's nominees to the federal courts was successfully filibustered.<sup>101</sup>

The biggest test came when Bush nominated Judge Alito to the Supreme Court. All 14 members of the "Gang" opposed the effort by some Democrats to filibuster the nomination, and as noted above, the filibuster attempt was resoundingly rejected.<sup>102</sup> This led some commentators to conclude that the biggest beneficiaries of the Gang of 14's agreement were two future justices, Roberts and Alito, neither of whom had been nominated to the Court at the time of the agreement.<sup>103</sup> Roberts and Alito had the backgrounds and credentials that are typical of Supreme Court nominees—Ivy League degrees, experience working in the Department of Justice, and service on federal appellate courts—and no major scandals or ethical concerns, making it difficult for Democrats to argue that their nominations amounted to extraordinary circumstances.<sup>104</sup>

The Gang of 14's agreement essentially expired at the end of the 109th Congress.<sup>105</sup> Two of the group's Republican members, Lincoln Chafee of Rhode Island and Mike DeWine of Ohio, were voted out of office in the 2006 midterm elections.<sup>106</sup> Democrats seized control of the Senate, and the issue of filibustering judicial nominees simply went away for the time being.<sup>107</sup> There was no longer any need for Democrats to utilize the

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99. Babington & Murray, *supra* note 95.

100. *Id.*

101. Michael Gerhardt & Richard Painter, "Extraordinary Circumstances": *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969, 970 (2012).

102. *See* Goldman et al., *supra* note 74, at 265.

103. *See id.* at 266.

104. *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/2REY-D94J>] (last visited Aug. 9, 2022).

105. *See* Goldman et al., *supra* note 74, at 266 (referring to "the expiration of the Gang of 14's agreement at the end of the 109th Congress").

106. FEDERAL ELECTION COMMISSION, FEDERAL ELECTIONS 2006: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 28 (2007).

107. Senate Hist. Off., *Party Division*, *supra* note 94.

filibuster: as the majority party, if Democrats wanted to block one of Bush's nominees, they could simply vote against him or her.<sup>108</sup>

Thus, the Gang of 14 succeeded for the time being. It prevented additional filibusters of judicial nominees, while avoiding the “nuclear option”—a Senate rules change to eliminate the filibuster option. However, both of those victories would be reversed in just a few years.

### *E. Going Nuclear: The Obama Years*

Even as recently as President Barack Obama's first term, the process for filling Supreme Court vacancies was fairly uneventful and uncontroversial. There were two vacancies during that time.<sup>109</sup> Obama's nominees to fill those vacancies, Judges Sonia Sotomayor and Elena Kagan, were both confirmed with substantial bipartisan support and within a few months of their nominations.<sup>110</sup>

As Professor Geoffrey R. Stone explains, both Sotomayor and Kagan had several things going for them: “[N]either was appointed in the last year of a president's term; neither had any ethical problems; both were qualified . . . both were ideologically moderate . . . and neither nomination threatened any significant change in the ideological balance on the Court . . . .”<sup>111</sup> In addition, Democrats controlled the Senate by a wide margin,<sup>112</sup> so Republicans who opposed Sotomayor and Kagan had little to gain from any kind of organized campaign against them. Moreover, as Professor Stone suggests, Sotomayor and Kagan were very much within the mainstream of liberal legal thought.<sup>113</sup> Had Obama nominated a left-wing bomb-thrower—the Democratic equivalent of Robert Bork, perhaps—the process might have played out differently.

While there was little controversy over Supreme Court nominations in the early Obama years, a major change took place with respect to lower-court nominees. In November 2013, Senate Democrats, led by Majority Leader Harry Reid (D-Nev.), eliminated the filibuster option for district

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108. There are, of course, several other ways in which the Senate can prevent the confirmation of a judicial nominee if the party in the majority is so inclined. See Gerhardt & Painter, *supra* note 101, at 972–73.

109. *Supreme Court Nominations*, *supra* note 12.

110. *Id.* Justice Sotomayor was confirmed by a 68–31 vote and Justice Kagan by a vote of 63–37. *Id.*

111. Stone, *supra* note 81, at 453.

112. Senate Hist. Off., *Party Division*, *supra* note 94.

113. See Stone, *supra* note 81, at 453.

and circuit court nominees.<sup>114</sup> This “nuclear option” meant that federal judicial nominees—notably *excluding* Supreme Court nominees—could advance to confirmation votes with the support of a simple majority of senators, instead of the 60-vote supermajority that had been required for nearly 40 years.<sup>115</sup> At the time, Democrats said the rule change was necessary because Republicans had used the filibuster threat to block three of President Obama’s nominees to the D.C. Circuit.<sup>116</sup>

Republicans were outraged. Senator McConnell, then the Minority Leader, decried the Democrats’ “power grab” and called it “a sad day in the history of the Senate.”<sup>117</sup> Senator Lamar Alexander (R-Tenn.) called the move “another raw exercise of political power to permit the majority to do anything it wants whenever it wants to do it.”<sup>118</sup> Senator Richard Shelby (R-Ala.) said the elimination of the filibuster option for lower-court nominees “changes the Senate tremendously in a bad way” and called it a “mistake” by the Democrats.<sup>119</sup>

#### *F. An Audience of One: 2016–2020*

As discussed in the Introduction, the five-year period that began with the death of Justice Scalia in February 2016 brought major changes to the Senate’s role in Supreme Court nominations. One theme connecting those changes was the consolidation of power in the hands of one person: the Senate Majority Leader. On February 18, 2016, five days after Justice Scalia’s death, McConnell and Senator Chuck Grassley (R-Iowa), the chairman of the Senate Judiciary Committee, published an editorial in the *Washington Post*.<sup>120</sup> The two senators reiterated the position McConnell had taken the day Scalia died: “[T]he American people have a particular opportunity now to make their voice heard in the selection of Scalia’s

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114. Paul Kane, *Reid, Democrats trigger ‘nuclear’ option; eliminate most filibusters on nominees*, WASH. POST (Nov. 21, 2013), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html) [<https://perma.cc/93QB-4Q7J>].

115. *Id.*

116. *See id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Mitch McConnell & Chuck Grassley, *McConnell and Grassley: Democrats shouldn’t rob voters of chance to replace Scalia*, WASH. POST (Feb. 18, 2016), [https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bd-c-d68a-11e5-be55-2cc3c1e4b76b\\_story.html](https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bd-c-d68a-11e5-be55-2cc3c1e4b76b_story.html) [<https://perma.cc/3CW2-9WHJ>].

successor as they participate in the process to select their next president — as they decide who they trust to both lead the country and nominate the next Supreme Court justice.”<sup>121</sup>

Other Senate Republicans quickly endorsed McConnell’s plan. On February 23, 2016, all 11 Republicans on the Senate Judiciary Committee signed a letter to McConnell that stated:

[W]e wish to inform you of our intention to exercise our constitutional authority to withhold consent on any nominee to the Supreme Court submitted by this President to fill Justice Scalia’s vacancy. Because our decision is based on constitutional principle and born of a necessity to protect the will of the American people, this Committee will not hold hearings on any Supreme Court nominee until after our next President is sworn in on January 20, 2017.<sup>122</sup>

On March 16, 2016, President Obama nominated Merrick Garland to the Supreme Court.<sup>123</sup> Throughout February and March of 2016, McConnell reiterated his position that because a presidential campaign was underway, the winner of that election should appoint Scalia’s successor so as to “give the people a voice”:

- February 23, 2016: “The Senate will appropriately revisit the matter after the American people finish making in November the decision they’ve already started making today.”<sup>124</sup>
- March 16, 2016: “The American people may well elect a president who decides to nominate Judge Garland for Senate consideration. The next president may also nominate someone very different.

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121. *Id.*

122. Letter from the U.S. Senate Committee on the Judiciary to Honorable Mitch McConnell, Senate Majority Leader (Feb. 23, 2016), <https://assets.documentcloud.org/documents/2719115/Senate-SCOTUS-Letter.pdf> [https://perma.cc/HB5C-SG5Z].

123. Juliet Eilperin & Mike DeBonis, *President Obama nominates Merrick Garland to the Supreme Court*, WASH. POST (Mar. 16, 2016), [https://www.washingtonpost.com/world/national-security/president-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-eb7c-11e5-a6f3-21ccdbc5f74e\\_story.html](https://www.washingtonpost.com/world/national-security/president-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-eb7c-11e5-a6f3-21ccdbc5f74e_story.html) [https://perma.cc/ZZN9-K6B3].

124. Katie Wadington, *Then and now: What McConnell, others said about Merrick Garland in 2016 vs. after Ginsburg’s death*, USA TODAY (Sept. 19, 2020, 9:59 AM ET), <https://www.usatoday.com/story/news/politics/2020/09/19/what-mcconnell-said-merrick-garland-vs-after-ginsburgs-death/5837543002/> [https://perma.cc/J846-F36L].

Either way, our view is this: Give the people a voice in the filling of this vacancy.”<sup>125</sup>

- March 20, 2016: “We think the important principle in the middle of this presidential year is that the American people need to weigh in and decide who's going to make this decision.”<sup>126</sup>
- March 20, 2016: “The American people are about to weigh in on who is going to be the president. And that's the person, whoever that may be, who ought to be making this appointment.”<sup>127</sup>

In justifying his refusal to act on Garland’s nomination, McConnell relied on arguments that then-Senator Joseph R. Biden had made back in 1992. Speaking on the Senate floor on March 16, 2016, McConnell said: “The Senate will continue to observe the Biden Rule so that the American people have a voice in this momentous decision . . . .”<sup>128</sup> McConnell was referring to a 1992 speech that Biden, then a senator from Delaware and the chairman of the Senate Judiciary Committee, made in the Senate.<sup>129</sup> In June 1992, President George H.W. Bush was running for reelection against Arkansas Governor Bill Clinton.<sup>130</sup> There were no vacancies on the Supreme Court at the time, but there were rumors that Justice Harry Blackmun, who was 83, would retire that summer.<sup>131</sup> On June 25, Senator Biden said the following:

Should a justice resign this summer and the president move to name a successor, actions that will occur just days before the Democratic Presidential Convention and weeks before the Republican Convention meets, a process that is already in doubt

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125. *McConnell on Supreme Court Nomination*, MITCH MCCONNELL REPUBLICAN LEADER (Mar. 16, 2016), <https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-on-supreme-court-nomination> [https://perma.cc/EUX4-SKQE].

126. Wadington, *supra* note 124.

127. *Id.*

128. C. Eugene Emery Jr., *In Context: The ‘Biden Rule’ on Supreme Court nominations in an election year*, POLITIFACT (Mar. 17, 2016), <https://www.politifact.com/article/2016/mar/17/context-biden-rule-supreme-court-nominations/> [https://perma.cc/WVK5-RKFX].

129. *Id.*

130. Amy Sherman, *In Context: Is there a ‘Biden Rule’ On Supreme Court nominations in a presidential election year?*, POLITIFACT (Sept. 21, 2020), <https://www.politifact.com/article/2020/sep/21/context-there-biden-rule-supreme-court-nominations/> [https://perma.cc/HZ9B-HLNB].

131. *Id.* (These rumors were unfounded, and Justice Blackmun would remain on the court until 1994. *Supreme Court Nominations*, *supra* note 12.).

in the minds of many will become distrusted by all. Senate consideration of a nominee under these circumstances is not fair to the president, to the nominee, or to the Senate itself. Mr. President, where the nation should be treated to a consideration of constitutional philosophy, all it will get in such circumstances is partisan bickering and political posturing from both parties and from both ends of Pennsylvania Avenue. As a result, it is my view that if a Supreme Court Justice resigns tomorrow, or within the next several weeks, or resigns at the end of the summer, President Bush should consider following the practice of a majority of his predecessors and not . . . name a nominee until after the November election is completed.<sup>132</sup>

Biden's 1992 statement suggests that he may have been amenable to President Bush sending a nominee to the Senate during the lame-duck period between the November election and the inauguration of President Clinton on January 20, 1993.<sup>133</sup> Nevertheless, Biden's statement clearly suggests that the Senate could, and in fact should, delay consideration of a Supreme Court nomination made during a presidential election year until after the election. And that was good enough for McConnell to run with in 2016.

During the Garland blockade, there were small pockets of dissent within the GOP. Senator Mark Kirk (R-Ill.), facing an uphill reelection battle in solidly Democratic Illinois, held a meeting with Judge Garland on March 29, 2016.<sup>134</sup> Senator Susan Collins (R-Me.), noting that Obama, "whether Republicans like him or not, is our president until next January," said there was "no basis" for refusing to consider the president's nominee.<sup>135</sup> But Kirk's and Collins's were lonely voices, and McConnell held all the cards.

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132. *Id.*

133. *Id.*

134. Emmarie Huetteman, *Republican Senator Meets With Garland, and Urges Colleagues to Follow*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/us/politics/republican-senator-meets-with-garland-and-urges-colleagues-to-follow.html> [<https://perma.cc/5LTZ-2VPS>].

135. *Id.*



McConnell's blockade of Judge Garland was successful.<sup>136</sup> Donald Trump won the 2016 presidential election.<sup>137</sup> The Garland nomination officially expired on January 3, 2017, when the 114th Congress ended.<sup>138</sup> On February 1, 2017, President Trump nominated Judge Neil M. Gorsuch for the seat previously held by Justice Scalia.<sup>139</sup> At the time of Gorsuch's nomination, Republicans held a narrow 52–48 Senate majority.<sup>140</sup> Still seething from McConnell's refusal to consider Judge Garland's nomination the year before,<sup>141</sup> Democrats mounted a filibuster, denying Republicans the 60 votes required by Senate rules to allow a vote on Gorsuch's confirmation.<sup>142</sup> McConnell, with the unanimous support of his Republican colleagues, responded by changing the Senate's rules to lower the threshold to end debate on Supreme Court nominations from 60 votes to 51.<sup>143</sup> On April 7, 2017, the Senate confirmed Gorsuch by a vote of 54–45, with just two Democrats voting in favor of confirmation.<sup>144</sup>

Four years after the Garland blockade, that episode—and in particular McConnell's "give the people a voice" justification—took on a new relevance. On September 18, 2020, Justice Ruth Bader Ginsburg died at

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136. J. Stephen Clark, *President-Shopping for a New Scalia: The Illegitimacy of "McConnell Majorities"* In *Supreme Court Decision-Making*, 80 ALB. L. REV. 743, 799 (2017) [hereinafter Clark, *President-Shopping for a New Scalia*] ("McConnell and Senate Republicans achieved their goal. By sticking to their posture of determined inaction, they succeeded in President-shopping in a quest for a more ideologically desirable nominee than Garland.")

137. *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM ET), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/E9TJ-JCU2>].

138. Amy Howe, *Garland nomination officially expires*, SCOTUSBLOG (Jan. 3, 2017, 6:47 PM), <https://www.scotusblog.com/2017/01/garland-nomination-officially-expires/> [<https://perma.cc/9FQF-8WE8>].

139. *Supreme Court Nominations*, *supra* note 12.

140. Senate Hist. Off., *Party Division*, *supra* note 94.

141. Susan Davis, *Senate Pulls 'Nuclear' Trigger To Ease Gorsuch Confirmation*, NPR (Apr. 6, 2017, 12:33 PM ET), <https://www.npr.org/2017/04/06/522847700/senate-pulls-nuclear-trigger-to-ease-gorsuch-confirmation> [<https://perma.cc/8NYD-934U>] (noting Democrats' "simmering resentment towards McConnell's decision to block any consideration of President Obama's nominee Merrick Garland last year").

142. *Id.*

143. *Id.*

144. *Roll Call Vote 115th Congress, 1st Session*, U.S. SENATE (Apr. 7, 2017, 11:31 AM), [https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1151/vote\\_115\\_1\\_00111.htm](https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00111.htm) [<https://perma.cc/6V8T-NVG9>].

her home in Washington, D.C.<sup>145</sup> Even before Ginsburg's death, McConnell apparently anticipated the charges of hypocrisy he would face if he allowed the Senate to consider a Supreme Court nomination in the final year of President Trump's term.<sup>146</sup> On September 3, 2019, McConnell told radio host Hugh Hewitt, "You have to go back to 1880 to find the last time, back to [the] 1880s to find the last time a Senate of a different party from the president filled a Supreme Court vacancy created in the middle of a presidential election."<sup>147</sup> In other words, when a Supreme Court vacancy arises in an election year, the Senate should only give the people a voice in filling that vacancy if the president's party does not control the Senate.

When Ginsburg died, McConnell released a statement in which he pledged to hold a vote on President Trump's nominee for the vacant seat, even though the vacancy arose just 46 days before the 2020 presidential election:

Americans re-elected our majority in 2016 and expanded it in 2018 because we pledged to work with President Trump and support his agenda, particularly his outstanding appointments to the federal judiciary. Once again, we will keep our promise. President Trump's nominee will receive a vote on the floor of the United States Senate.<sup>148</sup>

McConnell's September 18, 2020 statement also repeated the historical point he had made a year earlier: since the 1880s, no Senate has confirmed an opposite-party president's Supreme Court nominee in a presidential election year.<sup>149</sup>

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145. Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html?action=click&module=Spotlight&pgty=Homepage> [https://perma.cc/VT2B-QRT5].

146. See Jordain Carney, *McConnell: GOP would 'absolutely' fill Supreme Court seat next year*, THE HILL (Sept. 3, 2019, 11:01 AM ET), <https://thehill.com/homenews/senate/459715-mcconnell-gop-would-absolutely-fill-supreme-court-seat-next-year/> [https://perma.cc/784N-8C7X].

147. *Id.*

148. *McConnell Statement on the Passing of Justice Ruth Bader Ginsburg*, MITCH MCCONNELL REPUBLICAN LEADER (Sept. 18, 2020), <https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-statement-on-the-passing-of-justice-ruth-bader-ginsburg> [https://perma.cc/XC5R-23QD] (statement on the Passing of Justice Ruth Bader Ginsburg).

149. *Id.* This particular formulation was not technically accurate. A Democrat-controlled Senate confirmed Anthony M. Kennedy to the Court on February 3,

On September 29, 2020, President Trump nominated Seventh Circuit Judge Amy Coney Barrett to replace Justice Ginsburg.<sup>150</sup> The Senate confirmed Judge Barrett on October 26, 2020.<sup>151</sup> It was the fastest confirmation of a Supreme Court nominee since 1975.<sup>152</sup>

In between Justices Gorsuch and Barrett, President Trump nominated Judge Brett Kavanaugh of the D.C. Circuit to replace the retiring Justice Anthony Kennedy.<sup>153</sup> Senate Democrats resolved to defeat the nomination.<sup>154</sup> Their opposition initially focused on Kavanaugh's judicial philosophy and the likelihood that he would vote to overturn *Roe v. Wade*.<sup>155</sup> Then, in September 2018, Dr. Christine Blasey Ford, a psychology professor in California, publicly accused Kavanaugh and a high school classmate of sexually assaulting her in the early 1980s, when all three were teenagers.<sup>156</sup> Dr. Ford's allegation led to what *The New York Times* called the most brutal Supreme Court nomination fight since the Clarence Thomas nomination in 1991.<sup>157</sup> On October 6, 2018, the Senate voted 50 to 48 to confirm Kavanaugh to the Court.<sup>158</sup>

The end result of these events was the consolidation of power over Supreme Court nominations in the hands of the Senate Majority Leader, at the expense of individual senators and the minority party. By refusing to hold a vote on Merrick Garland's nomination, Mitch McConnell—who was Majority Leader for the entire five-year period in question—took away the power of individual senators to vote yea or nay. By changing the

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1988. *Supreme Court Nominations*, *supra* note 12. However, Kennedy was President Reagan's third choice—and second official nominee—for a vacancy that arose in the summer of 1987. *See* discussion *supra* note 55.

150. *Supreme Court Nominations*, *supra* note 12.

151. *Id.*

152. *Id.*

153. *Id.*

154. Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote In Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/5UFA-BW2Q>].

155. *Id.*

156. Emma Brown, *California professor, writer of confidential Brett Kavanaugh letter, speaks out about her allegation of sexual assault*, WASH. POST (Sept. 16, 2018, 10:28 PM EDT), [https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b\\_story.html](https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html) [<https://perma.cc/9JNH-JBKN>].

157. Stolberg, *supra* note 154.

158. *Id.*

Senate rules to eliminate the filibuster option, McConnell took away the only mechanism available to the minority to block a nomination.

Consistent with this consolidation of power, in October 2017, McConnell announced that the Senate would no longer honor the tradition of “blue slips” for nominees to federal appeals courts.<sup>159</sup> As Professor Brandon P. Denning explains, “When a judicial nomination is made, the chair of the Judiciary Committee sends ‘blue slips’ (so called because of the color of paper used) to the senators of the nominee’s home state.”<sup>160</sup> Under the Judiciary Committee’s longstanding practice, a senator’s failure to return a blue slip effectively defeated the nomination.<sup>161</sup>

Frustrated with Democrats’ use of blue slips to block or delay some of President Trump’s nominees, McConnell decided in 2017 that going

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159. Joseph P. Williams, *McConnell To End Senate’s ‘Blue Slip’ Tradition*, U.S. NEWS (Oct. 11, 2017), <https://www.usnews.com/news/politics/articles/2017-10-11/mcconnell-to-end-senates-blue-slip-tradition> [<https://perma.cc/N7F2-MGTS>]. The blue slips are sent by the Judiciary Committee Chair to the nominee’s home-state senators, and the Chair decides how to handle negative or unreturned blue slips. Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL’Y REV. INTER ALIA 1, 1 (2018). Shortly after McConnell called for eliminating the blue-slip tradition for circuit court nominees, Senator Grassley, the Judiciary Chair, acquiesced, announcing that he would not treat a negative blue slip as a bar to further consideration of a nominee. Alex Swoyer, *Grassley says blue slips won’t veto Trump’s judicial picks*, WASH. TIMES (Nov. 14, 2017), <https://www.washingtontimes.com/news/2017/nov/14/grassley-blue-slips-wont-veto-trump-judicial-picks/> [<https://perma.cc/PWD7-ZWF7>]; Tobias, *supra* note 159, at 16 (“Grassley experienced mounting pressure to change the blue slip procedure as 2017 progressed. . . . Particularly important were statements by Senator Mitch McConnell (R-KY), the Majority Leader, who criticized Democrats for obstructing President Trump’s judicial nominees.”).

160. Brandon P. Denning, *The “Blue Slip”*: *Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL OF RTS. J. 75, 76 (2002). The blue-slip tradition has a complicated history that is generally beyond the scope of this article. For an excellent summary of that history, see Tuan Samahon, *Federal Judicial Selection and the Senate’s Blue Slip “Tradition”*, 20 NEV. LAW. 11 (2012). As Professor Samahon explains, the tradition dates back to 1917. Samahon, *supra* note 160, at 12. However, different Judiciary Committee chairs have assigned different weights to negative and unreturned blue slips. *Id.* at 11. Under the weightiest approach, a judicial nomination is defeated if even one home-state senator declines to return a positive blue slip. *Id.* at 12. This approach “has prevailed during less than a third of the blue slip tradition’s existence.” *Id.* More commonly, the blue slips have been used merely to promote “pre-nomination presidential consultation with home state senators.” *Id.*

161. Michael J. Gerhardt, *Dissent in the Senate*, 127 YALE L.J. F. 728, 757 (2018).

forward, blue slips would merely be treated as a “notification of how you’re going to vote, not as an opportunity to blackball” a nominee.<sup>162</sup> Predictably, Minority Leader Schumer criticized the move, calling it “a shame.”<sup>163</sup> Just as predictably, Schumer and the Democrats declined to reinstate the blue-slip tradition when they retook the Senate in January 2021.<sup>164</sup>

The 2017 abandonment of the blue-slip veto applied to federal appellate court nominees only: there are no blue slips for Supreme Court nominees,<sup>165</sup> and the Senate has continued to respect the blue-slip tradition for federal district court nominees.<sup>166</sup> Nevertheless, the Senate’s reversal on blue slips for circuit court nominees affects Supreme Court nominations in several ways. First, eight of the nine current Supreme Court justices previously served on federal appellate courts.<sup>167</sup> The elimination of the blue-slip veto makes it easier for the party that controls the Senate to confirm future Supreme Court justices to these lower courts.

Second, consistent with the theme described above, the elimination of the blue-slip veto takes power over judicial nominations away from individual senators and increases the Majority Leader’s power. As long as a Majority Leader from the same party as the President has at least 50 votes for the nominee, the leader is now virtually guaranteed to get that nominee confirmed. This is true even if one or both of the nominee’s home-state senators oppose the nomination.

Third, this is yet another example of how the judicial wars escalate: the party that controls the Senate does something to increase its power over judicial nominations at the expense of the minority. The minority party kicks and screams, and then, a few years later, it becomes the majority party and decides it’s actually OK with the new policy. The policy change that was so revolutionary just a few years ago—in this case, 2017 versus 2021—becomes the status quo, accepted by both parties.

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162. Joseph P. Williams, *supra* note 159.

163. *Id.*

164. Tierney Sneed, *Democrats embrace hardball judicial nomination tactics GOP adopted under Trump*, CNN (Jan. 13, 2022, 11:31 AM EST), <https://www.cnn.com/2022/01/13/politics/senate-judicial-nominations-blue-slips-democrats/index.html> [<https://perma.cc/428L-GDNX>].

165. SOLLENBERGER, *supra* note 89, at 99.

166. *Id.*

167. See *Current Members*, *supra* note 104. The lone exception is Justice Kagan. *Id.*

## II. CURRENT RULES AND NORMS

Clearly a lot has changed. Whatever rules and norms prevailed in the mid-1980s, when the Senate confirmed Justice Scalia to the Supreme Court by a vote of 98–0, are long gone.<sup>168</sup> Much has changed even since the early Obama years, when his two nominees were confirmed by large margins and with significant bipartisan support.<sup>169</sup>

It is difficult to say for sure what the new rules of the game are. What is clear is that going forward, the Senate will play a much more prominent role in the process than it did during most of American history. As Senator McConnell himself put it in April 2022, “No matter who is in the majority in the Senate, for the foreseeable future, the confirmation process is going to be viewed by senators as a co-responsibility. . . . In other words, the president gets to initiate, but we are full partners in the process.”<sup>170</sup>

By electing a Republican president and a Republican-controlled Senate in 2016, the American people essentially gave future Senates an incentive—or at least no disincentive—to block a president’s Supreme Court nominations in an election year.<sup>171</sup> The Garland blockade did not harm, and may have improved, the GOP’s electoral prospects in 2016.<sup>172</sup>

Refusing to act on a Supreme Court nomination during a presidential election year is now an option available to either political party. It worked once and can work again. But why stop there? There is nothing preventing the Senate from refusing to act on a Supreme Court nomination that is not made during a presidential election year. Writing about the Garland blockade, Professor J. Stephen Clark warned of “the metastasizing of the McConnell moratorium into a routine practice of simply refusing to

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168. U.S. Senate, *Cong. Rec.—Sen. No. 23813* (Sept. 17, 1986), [https://www.senate.gov/reference/resources/pdf/267\\_1986.pdf](https://www.senate.gov/reference/resources/pdf/267_1986.pdf) [<https://perma.cc/ZL8H-7K7U>].

169. See *Supreme Court Nominations*, *supra* note 12.

170. Sahil Kapur and Frank Thorp V, *Is the Supreme Court confirmation process irreparably broken? Some senators say yes.*, NBC NEWS (Apr. 2, 2022, 3:30 AM CDT), [www.nbcnews.com/politics/supreme-court/supreme-court-confirmation-process-irreparably-broken-senators-say-yes-rcna22608](http://www.nbcnews.com/politics/supreme-court/supreme-court-confirmation-process-irreparably-broken-senators-say-yes-rcna22608) [<https://perma.cc/3JYJ-BELE>]; see also EPSTEIN & SEGAL, *supra* note 19, at 26 (noting that senators have “a crucial role in the process of judicial appointments,” and “it is quite unlikely that they will demote themselves anytime soon”).

171. Daniel S. Cohen, *DO YOUR DUTY (!)(?) The Distribution of Power in the Appointments Clause*, 103 VA. L. REV. 673, 680 (2017).

172. *Id.*

entertain any Supreme Court nomination” from a president whose party does not control the Senate.<sup>173</sup>

As noted in Part I.A, the Constitution allows the Senate to exercise its “advice and consent” power how it sees fit.<sup>174</sup> One lesson from the Garland blockade is that voters are unlikely to punish the party that controls the Senate for failing to consider a Supreme Court nominee.<sup>175</sup> And as President Obama learned in 2016, there is no way for a president to force the Senate to act on a Supreme Court nominee.

During the 2016 presidential campaign, several Republican senators suggested that if Hillary Clinton were to win, a Republican-controlled Senate would refuse to confirm anyone to the Supreme Court during her entire four-year term. Senator Richard Burr (R-N.C.) said: “If Hillary becomes president, I’m going to do everything I can do to make sure that four years from now, we’re still going to have an opening on the Supreme Court.”<sup>176</sup> Senator John McCain (R-Ariz.) agreed: “I promise you that we will be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up.”<sup>177</sup> Senator Ted Cruz (R-Tex.) did not commit to a four-year blockade but did signal that he was comfortable with a Supreme Court consisting of just eight justices: “There is certainly a long historical precedent for a Supreme Court with fewer justices,” he said in October 2016.<sup>178</sup>

More recently, Senator McConnell himself refused to commit to allowing future Democratic Supreme Court nominees to be considered by the Senate if he becomes majority leader again. On June 14, 2021, Senator McConnell had the following exchange with radio host Hugh Hewitt:

HEWITT: Now let me ask you about the key thing, Leader, about the 2023 term. Again, if you were back as the Senate Republican Leader, and I hope you are, and a Democrat retires at the end of

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173. J. Stephen Clark, *Senators Can’t Be Choosers: Moratoriums on Supreme Court Nominations and the Separation of Powers*, 106 KY. L.J. 337, 408 (2018) [hereinafter Clark, *Senators Can’t Be Choosers*].

174. See discussion *supra* notes 18–34 and accompanying text.

175. See discussion *supra* note 13 and accompanying text.

176. Steve Benen, *A third GOP senator backs an indefinite Supreme Court blockade*, MSNBC (Nov. 1, 2016, 11:45 AM CDT), <https://www.msnbc.com/rachel-maddow-show/third-gop-senator-backs-indefinite-supreme-court-blockad-e-msna920676> [<https://perma.cc/XN2J-4B8C>].

177. *Id.*

178. Eugene Scott and Ted Barrett, *Cruz cites ‘long historical precedent’ of SCOTUS vacancies, lays ground for potential fight*, CNN (Oct. 27, 2016, 9:15 PM EDT), <https://www.cnn.com/2016/10/27/politics/ted-cruz-supreme-court/index.html> [<https://perma.cc/U55Q-EPRT>].

2023, and there are 18 months, that would be the Anthony Kennedy precedent. Would they get a fair shot at a hearing, not a radical, but a normal mainstream liberal?

MCCONNELL: Well, we'd have to wait and see what happens.<sup>179</sup>

On the Democratic side, recall that the current Senate Majority Leader, Chuck Schumer, endorsed refusing to fill a Supreme Court vacancy during the last year and a half of President George W. Bush's second term.<sup>180</sup> Thus, it appears that the Garland blockade has established a new norm: the Senate will not consider a Supreme Court nominee in a presidential election year if the President and Senate Majority Leader belong to different parties. Furthermore, senators from both parties are open to extending that norm beyond presidential election years, but just how far remains to be seen.

It is at least clear by now that there will not be two sets of rules. When the party controlling the Senate does something—even something unprecedented—to escalate the judicial wars, the other party will respond in kind when the shoe is on the other foot. As explained in Part I.E, when Democrats exercised the “nuclear option” in November 2013 to eliminate the filibuster option for lower-court nominees, Republicans were outraged.<sup>181</sup> However, when Republicans regained control of the Senate in the 2014 midterm elections, they did not reverse the Democrats' “power grab” by reinstating the filibuster.<sup>182</sup> To the contrary, Republicans eventually *expanded* the nuclear option by eliminating the filibuster option for Supreme Court nominees in 2017.<sup>183</sup>

When Republicans changed the Senate rules in 2017 to eliminate the filibuster option for Supreme Court nominees, thus allowing Justice Gorsuch to be confirmed with just 54 senators in support, Democrats were

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179. Hugh Hewitt, *Senate GOP Leader Mitch McConnell On President Biden Judicial Nominees, A New “JCPOA”*, THE HUGH HEWITT SHOW (June 14, 2021), [hughhewitt.com/senate-gop-leader-mitch-mcconnell-on-president-biden-judicial-nominees-a-new-jcpoa/](https://www.hughhewitt.com/senate-gop-leader-mitch-mcconnell-on-president-biden-judicial-nominees-a-new-jcpoa/) [<https://perma.cc/28VT-S82W>].

180. See discussion *supra* notes 90–92 and accompanying text.

181. See discussion *supra* notes 117–19 and accompanying text.

182. Camille Caldera, *Fact check: Republicans, not Democrats, eliminated the Senate filibuster on Supreme Court nominees*, USA TODAY (Oct. 1, 2020, 6:58 PM ET), <https://www.usatoday.com/story/news/factcheck/2020/10/01/fact-check-gop-ended-senate-filibuster-supreme-court-nominees/3573369001/> [<https://perma.cc/PJ4P-ALWX>] (noting that Democratic Majority Leader Harry Reid eliminated the filibuster for lower-court nominees in 2013, and Leader McConnell extended the no-filibuster rule to Supreme Court nominees in 2017).

183. See Davis, *supra* note 141.



predictably apoplectic. Senator Jeff Merkley (D-Or.) called the move a “crime against the Constitution”<sup>184</sup> When Democrats retook the Senate in 2021, they of course did not reinstate the filibuster option.<sup>185</sup> When President Biden nominated Ketanji Brown Jackson to the Supreme Court, Democrats were likely relieved that a filibuster was not an option for Republicans, as Justice Jackson was eventually confirmed with just 53 votes.<sup>186</sup>

In the mid-2000s, Republicans argued that filibustering judicial nominations violates the advice-and-consent requirement, even though some of those same Republicans supported filibusters of Clinton nominees in the 1990s.<sup>187</sup> During Clinton’s presidency, Democrats, including Senator Leahy, argued that every nominee deserved an up-or-down vote.<sup>188</sup> A few years later, with a Republican in the White House, Leahy and other Democrats filibustered several of President Bush’s nominees.<sup>189</sup> The hypocrisy, at least, is bipartisan.

Moreover, the tendency to say and do whatever helps one’s own party in that particular moment extends beyond the legislative branch. Consider the following quote from a twenty-first-century president: “The Senate has a constitutional obligation to vote up or down on a president’s judicial

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184. Seung Min Kim et al., *Senate GOP goes ‘nuclear’ on Supreme Court filibuster*, POLITICO (Apr. 6, 2017, 3:01 PM EDT), <https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937> [<https://perma.cc/H8B5-QKCH>]. Senator Schumer also criticized the rules change: “It doesn’t have to be this way. When a nominee doesn’t get enough votes for confirmation, the answer is *not* to change the rules, it is to change the nominee.” *Id.*

185. See Steve Benen, *Why Ketanji Brown Jackson is very likely to be confirmed*, MSNBC (Feb. 25, 2022, 9:35 AM CST), <https://www.msnbc.com/rachel-maddow-show/maddowblog/ketanji-brown-jackson-likely-confirmed-rcn-a17694> [<https://perma.cc/8YBB-CVCZ>] (noting that Ketanji Brown Jackson probably would not need any votes from the Senate Republican minority because “[f]ilibusters for judicial nominees are a thing of the past”).

186. Maureen Chowdhury et al., *Ketanji Brown Jackson becomes first Black woman confirmed to Supreme Court*, CNN (Apr. 8, 2022, 2:09 PM ET), <https://www.cnn.com/politics/live-news/ketanji-brown-jackson-senate-confirmation-vote/index.html> [<https://perma.cc/8FXH-S2ZH>] This is not to say that Republicans would have filibustered Justice Jackson’s nomination had that been an option. Just because there were 47 votes against her confirmation does not necessarily mean that there would have been enough senators—41—to successfully filibuster her nomination.

187. EPSTEIN & SEGAL, *supra* note 19, at 25.

188. *Id.*

189. *Id.*

nominees.”<sup>190</sup> While that sounds nearly identical to statements made by President Obama during the Garland blockade, the statement actually came from President George W. Bush in 2004 in response to inaction by a Democratic Senate on his lower-court nominees.<sup>191</sup>

### III. LOOKING AHEAD

As the heading suggests, this Part focuses on the future. Part III.A explains why Republicans will most likely control the Senate more often than Democrats in the decades to come. Therefore, having the Senate act as full partners in the Supreme Court confirmation process, to use Senator McConnell's description, and having the Senate Majority Leader in particular exercise great control in this area are likely to benefit Republicans more than Democrats.<sup>192</sup> Part III.B focuses on the presidency, which is important here because the Senate has not confirmed a Supreme Court justice with the Senate and White House controlled by different parties since 1991.<sup>193</sup> Parts III.C and III.D explain how the confirmation process and the nominees themselves will likely be different going forward as compared to in the decades before Justice Scalia's death. Finally, Part III.E explores various proposals to reform the Supreme Court and the possibility of a negotiated truce that would reverse the trend of increased partisanship surrounding nominations to the Court.

#### *A. The Democrats' Senate Problem*

As explained in Part II above, the Senate is likely to play a much more prominent role in deciding who ends up on the Supreme Court going forward than it did before 2016. In his book, *Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court*, Ilya Shapiro of the Manhattan Institute argues that control of the Senate is “by far the most

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190. The White House, President George W. Bush, *Statement on Judicial Nominations* (Dec. 23, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041223-1.html> [https://perma.cc/XH7U-TP8M].

191. *Id.*

192. See ILYA SHAPIRO, *SUPREME DISORDER: JUDICIAL NOMINATIONS AND THE POLITICS OF AMERICA'S HIGHEST COURT 2* (2020) (arguing that control of the Senate is by far the most important aspect of the Supreme Court appointments process).

193. Louis Jacobson, *Supreme Court nominees confirmed by opposite party in Senate are rare*, POLITIFACT (Jan. 31, 2022), <https://www.politifact.com/fact-checks/2022/jan/31/chuck-todd/supreme-court-nominees-confirmed-opposite-party-se/> [https://perma.cc/L7JQ-K7LR].

important aspect” of the Supreme Court appointments process.<sup>194</sup> If Republicans wish to maintain, or even expand, their 6–3 Supreme Court majority going forward, they will need to control the Senate as often as possible when Supreme Court vacancies arise. Similarly, if Democrats are to gain a majority on the Court, controlling the Senate when vacancies arise will be critical. All of this is, generally speaking, good news for Republicans and bad news for Democrats. That is because the Democrats have a Senate Problem.

As political scientist Simon Bazelon explains, “[T]he growing polarization of the electorate around educational attainment and the urban-rural divide has generated a Senate that is incredibly biased against the Democratic party.”<sup>195</sup> Journalist G. Elliott Morris describes the problem as follows:

The median state leans roughly 3 percentage points to the right on margin, giving Republicans an extra two Senators per state which falls between a 0 and 3 percentage point Democratic margin. Assuming no split-ticket voters—which is the trend in which American politics is moving—that is an extra 6 states and 12 Senators.<sup>196</sup>

There are some obvious objections to the argument that the Democrats are doomed in the Senate. First, Democrats have actually performed just fine in recent Senate elections. Out of the 12 Congresses that have convened since the 2000 election—the 107th Congress through the current 118th—Democrats have controlled the Senate in seven.<sup>197</sup>

However, the composition of the Senate during recent periods of Democratic control shows that even recent successes will be difficult for Democrats to sustain going forward. Consider the 111th Congress (2009–2011), during which Democrats briefly held an incredible 60 Senate seats—counting that of Independent Senator Bernie Sanders of Vermont,

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194. I. SHAPIRO, *supra* note 192, at 2.

195. Simon Bazelon, *Democrats are sleepwalking into a Senate disaster*, SLOW BORING (Apr. 11, 2022), <https://www.slowboring.com/p/democrats-are-sleepwalking-into-a?s=r> [<https://perma.cc/FXJ9-YDA2>].

196. G. Elliott Morris, *Can Democrats avoid a looming electoral disaster?*, POLITICS BY THE NUMBERS (Apr. 17, 2022), <https://gelliottmorris.substack.com/p/can-democrats-avoid-looming-electoral?s=r> [<https://perma.cc/8RVA-S423>].

197. Senate Hist. Off., *Party Division*, *supra* note 94 (Sometimes control of the Senate changes hands during a particular Congress, such as when a senator dies or switches parties. In those cases, the Congress is labeled Republican or Democrat based on which party was in control for a majority of the two years.).

who caucuses with the Democrats—to the Republicans' 40. Those 60 Democrats included the following senators:

- Max Baucus of Montana, first elected in 1978;
- Evan Bayh of Indiana, first elected in 1998;
- Sherrod Brown of Ohio, first elected in 2006;
- Robert Byrd of West Virginia, first elected in 1958;
- Kent Conrad of North Dakota, first elected in 1992;
- Byron Dorgan of North Dakota, first elected in 1992;
- Tom Harkin of Iowa, first elected in 1984;
- Tim Johnson of South Dakota, first elected in 1996;
- Mary Landrieu of Louisiana, first elected in 1996;
- Blanche Lincoln of Arkansas, first elected in 1998;
- Claire McCaskill of Missouri, first elected in 2006;
- Ben Nelson of Nebraska, first elected in 2000;
- Mark Pryor of Arkansas, first elected in 2002;
- Jay Rockefeller of West Virginia, first elected in 1984; and
- Jon Tester of Montana, first elected in 2006.<sup>198</sup>

Those 15 senators represented—and in the cases of Senators Brown and Tester, the only 2 of the 15 still in the Senate, represent—states that are now solidly Republican. In 2020, Donald Trump defeated Joe Biden in those states by margins of 8.1 percentage points (Ohio), 8.2 (Iowa), 15.4 (Missouri), 16 (Indiana), 16.4 (Montana), 18.6 (Louisiana), 19 (Nebraska), 26.2 (South Dakota), 27.6 (Arkansas), 33.3 (North Dakota), and 38.9 (West Virginia)—even as Joe Biden was winning the presidential election.<sup>199</sup> Many of the senators listed above were holdovers from a bygone era when Democrats were competitive in states like Arkansas, Nebraska, and the Dakotas.<sup>200</sup>

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198. *Roll Call Vote 111<sup>th</sup> Congress - 1<sup>st</sup> Session*, U.S. SENATE (Dec. 24, 2009, 7:05 AM), [https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1111/vote\\_111\\_1\\_00396.htm](https://www.senate.gov/legislative/LIS/roll_call_votes/vote1111/vote_111_1_00396.htm) [<https://perma.cc/3D2M-R284>].

199. *U.S. Presidential Election Results 2020: Biden Wins*, NBC, <https://www.nbcnews.com/politics/2020-elections/president-results> [<https://perma.cc/MSY7-P6T9>] (last visited Aug. 9, 2022) [hereinafter *U.S. Presidential Election Results 2020*].

200. See, e.g., Eric Ostermeier, *The Decline of South Dakota Democrats*, SMART POLITICS (Dec. 20, 2015), <https://smartpolitics.lib.umn.edu/2015/12/20/the-decline-of-south-dakota-democrats/> [<https://perma.cc/G8C7-3F3S>]; Ross Benes, *How Democrats Lost the Great Plains*, HIST. NEWS NETWORK, <https://historynewsnetwork.org/article/179062> [<https://perma.cc/GKU5-3CKJ>] (last visited Jan. 26, 2023).

Democrats controlled the Senate for four consecutive congresses from 2007 through 2015.<sup>201</sup> However, given the compositions of those Democratic majorities, the Democrats' success during that time is not helpful in determining who is likely to control the Senate in the future.

The second counterargument is based on the results of the 2020 presidential election, in which Joe Biden and Donald Trump each carried 25 states.<sup>202</sup> One could argue that, based on those results, there are 25 "red" states and 25 "blue" states. Until that changes, the argument goes, each party will have an equal chance of controlling the Senate. In an average Senate, we should expect to see 50 Democrats and 50 Republicans—and indeed, that was the exact composition of the Senate in the 117th Congress (2021–2023).<sup>203</sup>

However, when one digs deeper into the numbers, the Democrats' Senate problem becomes more apparent. Figure 1 below lists the 25 states that Biden carried in 2020, and the 25 states that Trump carried, in ascending order of margin of victory.<sup>204</sup>

**Figure 1**

<b><u>Biden States</u></b>	<b><u>Trump States</u></b>
Arizona: 49.4% to 49.1% (0.3)	North Carolina: 49.9% to 48.6% (1.2)
Georgia: 49.5% to 49.2% (0.3)	Florida: 51.2% to 47.9% (3.3)
Wisconsin: 49.5% to 48.8% (0.7)	Texas: 52.1% to 46.5% (5.6)
Pennsylvania: 50.0% to 48.8% (1.2)	Ohio: 53.3% to 45.2% (8.1)
Nevada: 50.1% to 47.7% (2.4)	Iowa: 53.1% to 44.9% (8.2)
Michigan: 50.6% to 47.8% (2.8)	Alaska: 52.8% to 42.8% (10.0)
Minnesota: 52.4% to 45.3% (7.1)	South Carolina: 55.1% to 43.4% (11.7)

201. *Complete List of Majority and Minority Leaders*, *supra* note 66.

202. *Id.*

203. Senate Hist. Off., *Party Division*, *supra* note 94.

204. *U.S. Presidential Election Results 2020*, *supra* note 199.

New Hampshire: 52.7% to 45.4% (7.3)	Kansas: 56.1% to 41.5% (14.6)
Maine: 53.1% to 44.0% (9.1)	Missouri: 56.8% to 41.4% (15.4)
Virginia: 54.1% to 44.0% (10.1)	Indiana: 57.0% to 41.0% (16.0)
New Mexico: 54.3% to 43.5% (10.8)	Montana: 56.9% to 40.5% (16.4)
Colorado: 55.4% to 41.9% (13.5)	Mississippi: 57.5% to 41.0% (16.5)
New Jersey: 57.1% to 41.3% (15.8)	Louisiana: 58.5% to 39.9% (18.6)
Oregon: 56.5% to 40.4% (16.1)	Nebraska: 58.2% to 39.2% (19.0)
Illinois: 57.5% to 40.6% (16.9)	Utah: 58.1% to 37.6% (20.5)
Delaware: 58.7% to 39.8% (18.5)	Tennessee: 60.7% to 37.5% (23.2)
Washington: 58.0% to 38.8% (19.2)	Alabama: 62.0% to 36.6% (25.4)
Connecticut: 59.2% to 39.2% (20.0)	Kentucky: 62.1% to 36.2% (25.9)
Rhode Island: 59.4% to 38.6% (20.8)	South Dakota: 61.8% to 35.6% (26.2)
New York: 60.9% to 37.7% (23.2)	Arkansas: 62.4% to 34.8% (27.6)
California: 63.5% to 34.3% (29.2)	Idaho: 63.8% to 33.1% (30.7)
Hawaii: 63.7% to 34.3% (29.4)	Oklahoma: 65.4% to 32.3% (33.1)
Maryland: 65.4% to 32.2% (33.2)	North Dakota: 65.1% to 31.8% (33.3)

Massachusetts: 65.6% to 32.1% (33.5)	West Virginia: 68.6% to 29.7% (38.9)
Vermont: 66.1% to 30.7% (35.4)	Wyoming: 69.9% to 26.6% (43.3)

The first thing to understand about Figure 1 is that the bottom half of it is basically irrelevant. For example, there is virtually no chance of California electing a Republican senator any time soon, nor will Idaho send a Democrat to Washington. There will always be the occasional anomalous senator who manages to win elections despite the senator's party being unpopular in that state. Susan Collins, a Republican, represents Maine, a blue state that last voted for a Republican presidential candidate in 1988.<sup>205</sup> Joe Manchin, a Democrat, represents West Virginia, a red state that President Trump carried by margins of 68% to 26.4% in 2016 and 68.6% to 29.7% in 2020.<sup>206</sup>

But senators like Collins and Manchin are increasingly rare exceptions, and their seats are likely to be won by the dominant parties in their respective states—Democrats in Maine and Republicans in West Virginia—once they retire.<sup>207</sup> In Manchin's case, the seat will likely be won by a Republican even if he seeks reelection in 2024. Political scientist Simon Bazelon believes "Manchin's odds of holding his seat [in 2024] are definitely less than 20%, and probably less than 10%."<sup>208</sup> Bazelon notes that Manchin won his last election by just three percentage points in a national political environment that favored Democrats.<sup>209</sup>

When one looks toward the top of the table above, the Democrats' Senate problem becomes clearer. There are more toss-up states—states that are close in presidential elections and where both parties can expect to be competitive in Senate elections—in Biden's column than in Trump's. For example, Biden won six states by fewer than three percentage points,

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205. *Maine*, 270 TO WIN, <https://www.270towin.com/states/Maine> [<https://perma.cc/72FK-GCFT>] (last visited Aug. 9, 2022).

206. *West Virginia*, 270 TO WIN, [https://www.270towin.com/states/West\\_Virginia](https://www.270towin.com/states/West_Virginia) [<https://perma.cc/2CL9-52VV>] (last visited Jan. 11, 2023).

207. This is a prediction by the author based on recent election results in those states.

208. Simon Bazelon, *Why Joe Manchin Is Screwed*, MEDIUM (Mar. 19, 2021), <https://simonbazelon.medium.com/why-joe-manchin-is-screwed-5b26c138dead> [<https://perma.cc/NNB3-63X7>].

209. *Id.*

whereas Trump only won one state—North Carolina—by such a narrow margin.<sup>210</sup>

Focusing just on the Trump column, it is difficult to see where future Democratic senators will come from. In North Carolina, there have been eight Senate elections this century, and the Republican candidate has won seven of them.<sup>211</sup> The situation is somewhat better for Democrats in Florida, the second-closest state won by President Trump.<sup>212</sup> Democrats have won three out of eight Senate elections this century.<sup>213</sup> However, all three of those victories belong to Bill Nelson, who lost his re-election bid to Republican Rick Scott in 2018.<sup>214</sup> Since Nelson is 80 years old,<sup>215</sup> Florida Democrats will have to find someone else who can win Senate elections, and it will not be easy.

The news is even worse for Democrats in Texas, the third-closest state carried by President Trump.<sup>216</sup> No Democrat has won a Senate election in Texas since Lloyd Bentsen in 1988.<sup>217</sup> That is 11 consecutive victories for the GOP, beginning in 1990.

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210. *U.S. Presidential Election Results 2020*, *supra* note 199.

211. *List of United States Senators from North Carolina*, BALLOTPEDIA, [https://ballotpedia.org/List\\_of\\_United\\_States\\_Senators\\_from\\_North\\_Carolina](https://ballotpedia.org/List_of_United_States_Senators_from_North_Carolina) [https://perma.cc/WVL5-FF2Y] (last visited Jan. 14, 2023).

212. *U.S. Presidential Election Results 2020*, *supra* note 199.

213. *List of United States Senators from Florida*, BALLOTPEDIA, [https://ballotpedia.org/List\\_of\\_United\\_States\\_Senators\\_from\\_Florida](https://ballotpedia.org/List_of_United_States_Senators_from_Florida) [https://perma.cc/45U5-JBWS] (last visited Jan. 14, 2023).

214. *Id.*

215. The Editors of Encyclopedia Britannica, *Bill Nelson*, BRITANNICA (Feb. 10, 2023), <https://www.britannica.com/biography/Bill-Nelson> [https://perma.cc/5HUC-ECW8] (last visited Aug. 9, 2022).

216. *U.S. Presidential Election Results 2020*, *supra* note 199.

217. Chris Essig, *Here's how Texas voted in every U.S. Senate election since 1961*, TEX. TRIBUNE (Nov. 5, 2018, 12:00 AM CT), <https://www.texastribune.org/2018/11/05/heres-how-texas-voted-every-us-senate-election-1961/> [https://perma.cc/RA97-DTUM].



The next two states on the list, Ohio<sup>218</sup> and Iowa,<sup>219</sup> are former swing states that have turned solidly red in recent years. In the November 2022 midterm election, Republican J.D. Vance defeated Democrat Tim Ryan in the race to replace retiring Senator Rob Portman, 53.3% to 46.7%.<sup>220</sup> Governor Mike DeWine, a Republican, defeated his Democratic challenger, 62.8% to 37.2%.<sup>221</sup> Republicans hold ten of Ohio's fifteen seats in the House of Representatives.<sup>222</sup> In Iowa, voters re-elected a Republican governor, Kim Reynolds, and one of their two Republican Senators, Chuck Grassley, both by double-digit margins.<sup>223</sup> In Iowa's third Congressional district, Republican Zach Nunn defeated incumbent Democrat Cindy Axne, giving the GOP a clean sweep of Iowa's four U.S. House districts.<sup>224</sup>

Clearly, even the closest states carried by President Trump in 2020 are currently quite hostile toward Democrats. This is not to say that Democrats will *never* win Senate elections in the states carried by President Trump in 2020—only that such victories will be few and far between, and less common than Republican wins in Biden states. As noted above, the Democratic candidate did win one of the eight Senate elections in North

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218. See, e.g., Kevin Fahney, *What Happened?: The 2020 election confirmed that Ohio is no longer a swing state*, LSE (Sept. 2, 2021), <https://blogs.lse.ac.uk/usappblog/2021/09/02/what-happened-the-2020-election-confirmed-that-ohio-is-no-longer-a-swing-state/> [https://perma.cc/T4WY-VLKX]; Deon J. Hampton, 'Ohio has taken a different turn': Ohio no longer appears to be a swing state, NBC NEWS (Nov. 12, 2020, 11:07 AM CST), <https://www.nbcnews.com/politics/2020-election/ohio-has-taken-different-turn-ohio-no-longer-appears-be-n1247507> [https://perma.cc/UB6W-F2XM]; Ohio, 270 TO WIN, <https://www.270towin.com/states/Ohio> [https://perma.cc/X4MW-PJ7X] (last visited Aug. 9, 2022).

219. Trip Gabriel, *Why Iowa Has Become Such a Heartbreaker for Democrats*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/2021/04/27/us/politics/iowa-democrats-republicans.html> [https://perma.cc/VZ7S-ZXUB]; Iowa, 270 TO WIN, <https://www.270towin.com/states/Iowa> [https://perma.cc/4HAS-SWV3] (last visited Aug. 9, 2022).

220. *Election Results 2022: Ohio Election Results*, POLITICO (Dec. 6, 2022, 9:34 PM CST), <https://www.politico.com/2022-election/results/ohio/> [https://perma.cc/HLC4-NF9D].

221. *Id.*

222. *Id.*

223. *Election Results 2022: Iowa Election Results*, POLITICO (Dec. 6, 2022, 9:34 PM CST), <https://www.politico.com/2022-election/results/iowa/> [https://perma.cc/K74H-5ZQP].

224. *Republicans swept all four of Iowa's U.S. House races*, POLITICO (Dec. 6, 2022, 9:34 PM CST), <https://www.politico.com/2022-election/results/iowa/house/> [https://perma.cc/6W3D-CE5E].

Carolina so far this century: Kay Hagan defeated incumbent Senator Elizabeth Dole in 2008.<sup>225</sup> Democrats will probably win at least one of the next eight Senate elections in North Carolina, and perhaps two or three if they can recruit good candidates and catch a little luck. And Democrats will eventually end their remarkable losing streak in Texas. Representative Beto O'Rourke (D-Tex.) came within 2.6 percentage points of defeating incumbent Senator Ted Cruz in 2018,<sup>226</sup> and Republican margins of victory in presidential elections have gotten smaller in recent years.<sup>227</sup>

Republicans have their own problems. The two closest states carried by President Biden, Arizona and Georgia, each have two Democratic senators. But if Republicans can just find a way to win half, or almost half, of the Senate elections in "purple," toss-up states like Arizona, Georgia, Wisconsin, Pennsylvania, and Nevada, they will control the Senate more often than not.

The 2020 presidential election, in which each candidate carried 25 states, was something of a mirage for Democrats. Going forward, it will be difficult for Democrats to win more than the occasional Senate seat in a state carried by President Trump. Meanwhile, Republicans will have plenty of good opportunities to win Senate races in the many states that President Biden carried narrowly.<sup>228</sup>

It is nevertheless important to acknowledge the *potential* implications of the 2020 presidential election for the future of the Senate. It is certainly possible that President Biden's victory pointed the way toward a future in which there are at least as many blue states as red states and possibly more. If the Democrats can keep the northern "rust belt" states that Biden won—Michigan, Minnesota, Pennsylvania, and Wisconsin—in their column and develop a consistent advantage in some previously red "sun belt" states—Arizona and Georgia, which Biden won in 2020; North Carolina, which is

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225. *List of United States Senators from North Carolina*, *supra* note 211.

226. Abby Livingston & Patrick Svitek, *Ted Cruz defeats Beto O'Rourke in difficult re-election fight*, TEX. TRIBUNE (Nov. 6, 2018, 10:00 PM CT), <https://www.texastribune.org/2018/11/06/ted-cruz-beto-orourke-texas-midterm-election-results/> [<https://perma.cc/J5QU-FPKT>].

227. *Texas, 270 TO WIN*, <https://www.270towin.com/states/Texas> [<https://perma.cc/H9PU-EELC>] (last visited Aug. 9, 2022).

228. Whether Republicans will capitalize on those opportunities remains to be seen. In November 2022, Republicans could have flipped Senate seats in Arizona, Georgia, and Nevada. However, they lost all three races to the Democratic incumbents. *See Democrats secure majority in the Senate*, CNN, <https://www.cnn.com/election/2022/results/senate?election-data-id=2022-SG&election-painting-mode=projection&filter-key-races=false&filter-flipped=false> [<https://perma.cc/JAZ2-J77J>] (last visited Jan. 14, 2023).

demographically similar to Georgia;<sup>229</sup> and perhaps someday Texas<sup>230</sup>—then Democrats will have the upper hand in the Senate.<sup>231</sup>

Democrats gaining a long-term advantage in the Senate remains unlikely. Looking beyond the most recent presidential election yields even more evidence of the Democrats' Senate problem. Figure 2 below shows the number of states won by each party's nominee in the other five presidential elections this century:<sup>232</sup>

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229. Ella Nilsen, *Georgia went blue. Can Democrats make it happen elsewhere?*, VOX.COM (Jan. 15, 2021, 8:00 AM EST), <https://www.vox.com/22224701/how-democrats-flipped-georgia-blue> [<https://perma.cc/7PF6-R984>].

230. Tal Axelrod, *Democrats eager for another shot at turning Texas blue*, THE HILL (Oct. 7, 2021, 6:00 AM ET), <https://thehill.com/homenews/campaign/575666-democrats-eager-for-another-shot-at-turning-texas-blue/> [<https://perma.cc/PL6R-T2LS>].

231. Ronald Brownstein, *Democrats' Future Is Moving Beyond the Rust Belt*, THE ATLANTIC (Jan. 9, 2020), <https://www.theatlantic.com/politics/archive/2020/01/rust-belt-trump-democrats-sun-belt/604678/> [<https://perma.cc/L9Q8-V6PU>]; Gabriel T. Rubin, *Democrats Ditch Rust Belt for Sun Belt in Bid for Future Growth*, WALL ST. J. (Jan. 3, 2020, 5:30 AM ET), <https://www.wsj.com/articles/democrats-ditch-rust-belt-for-sun-belt-in-bid-for-future-growth-11578047400> [<https://perma.cc/GS3D-4ZRS>]; Bill Barrow, *Georgia Democrats offer blueprint for other Sun Belt states*, AP NEWS (May 26, 2021), <https://apnews.com/article/politics-donald-trump-georgia-government-and-politics-020c29e9670d140d9ef5e3d4ba568474> [<https://perma.cc/Z6GT-BJDF>].

232. *Historical Presidential Elections*, 270 TO WIN, <https://www.270towin.com/historical-presidential-elections/> [<https://perma.cc/S8GR-8AJC>] (last visited Aug. 9, 2022). Maine and Nebraska allocate some of their electoral votes by congressional district. *Split Electoral Votes in Maine and Nebraska*, 270 TO WIN, <https://www.270towin.com/content/split-electoral-votes-maine-and-nebraska/> [<https://perma.cc/7V7G-9X36>] (last visited Aug. 9, 2022). In Figure 2, Maine and Nebraska are classified as having been won by the candidate who earned the most electoral votes from those states in that election.

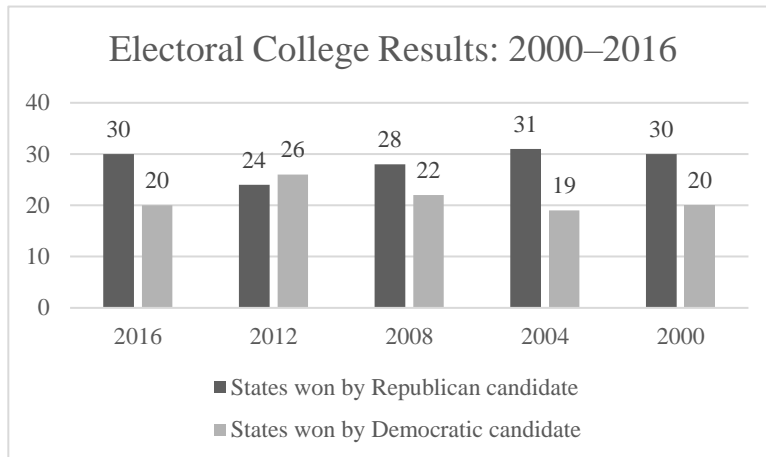
**Figure 2**

Figure 2 shows that in the five presidential elections held between 2000 and 2016, the Republican nominees carried, on average, 28.6 states, while the Democratic nominees carried 21.4—further evidence that there are more red states than blue states.

The Cook Political Report's Partisan Voter Index (PVI) provides another way of looking at the partisan leans of the various states and another illustration of the Democrats' Senate problem.<sup>233</sup> As Cook's website explains:

A Cook PVI score of D+2, for example, means that in the 2016 and 2020 presidential elections, the state or district performed about two points more Democratic in terms of two-party vote share than the nation did as a whole, while a score of R+4 means the state or district performed about four points more Republican.<sup>234</sup>

233. 2022 *Cook PVI: State Map and List*, THE COOK POL. REP. (July 12, 2022), <https://www.cookpolitical.com/cook-pvi/2022-partisan-voting-index/state-map-and-list> [<https://perma.cc/F762-HHA7>].

234. *Id.*

Currently, just 19 states have PVI scores that favor Democrats,<sup>235</sup> while the other 31 states have PVI scores that favor Republicans.<sup>236</sup>

It is important to understand what these ratings do and do not mean. A rating such as Georgia's R+3 does not mean that Republicans outperform Democrats in Georgia by three points. Rather, it means that Republicans do about three points better in Georgia than they do nationally.<sup>237</sup> The 2022 ratings are based on the 2016 and 2020 presidential elections, in which the Democratic candidates won the national popular vote: Hillary Clinton won the popular vote by 2.1 percentage points in 2016,<sup>238</sup> and Joe Biden won it by 4.45 points in 2020.<sup>239</sup>

What the Cook PVI ratings do mean is that wherever the Democrats are nationally—and they really need to be at least a couple points ahead of Republicans nationally to be competitive state-by-state—they are worse off than that in a substantial majority of the states. This does not bode well for Democrats in Senate elections.

Of course, things can always change. Democrats could figure out a solution to their Senate problem. After all, Republicans succeeded in transforming the Southern United States from predominantly Democratic

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235. The 19 states with Democratic PVIs are: Vermont (Cook PVI score of D+16), Massachusetts (D+15), Maryland (D+14), Hawaii (D+14), California (D+13), New York (D+10), Rhode Island (D+8), Washington (D+8), Connecticut (D+7), Illinois (D+7), Delaware (D+7), New Jersey (D+6), Oregon (D+6), Colorado (D+4), New Mexico (D+3), Virginia (D+3), Maine (D+2), Minnesota (D+1), and New Hampshire (D+1). *Id.*

236. The 31 states with Republican PVIs are: Wyoming (R+25), West Virginia (R+22), North Dakota (R+20), Oklahoma (R+20), Idaho (R+18), Arkansas (R+16), South Dakota (R+16), Kentucky (R+16), Alabama (R+15), Tennessee (R+14), Utah (R+13), Nebraska (R+13), Louisiana (R+12), Montana (R+11), Indiana (R+11), Mississippi (R+11), Kansas (R+10), Missouri (R+10), South Carolina (R+8), Alaska (R+8), Iowa (R+6), Ohio (R+6), Texas (R+5), Florida (R+3), North Carolina (R+3), Georgia (R+3), Arizona (R+2), Wisconsin (R+2), Pennsylvania (R+2), Michigan (R+1), and Nevada (R+1). *Id.*

237. *Id.*

238. *Federal Elections 2016: Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, FED. ELECTION COMM'N, <https://www.fec.gov/resources/cms-content/documents/federaelections2016.pdf> [https://perma.cc/U7QW-JUKD] (last visited Aug. 9, 2022).

239. *Official 2020 Presidential General Election Results*, FED. ELECTION COMM'N, <https://www.fec.gov/resources/cms-content/documents/2020presgeregresults.pdf> [https://perma.cc/VT3G-DMKK] (last visited Aug. 9, 2022).

to reliably Republican.<sup>240</sup> But that change took roughly half a century to accomplish.<sup>241</sup> “A large realignment of demographic voting patterns, with rural and working-class voters returning to the Democratic party,” is “improbable given the party’s current trajectory,” according to Bazelon.<sup>242</sup>

For the foreseeable future, Republicans have the advantage. As it turns out, predicting the results of individual Senate elections is not terribly difficult. Currently, 95 of the 100 senators represent states that their party’s nominee carried in the 2020 presidential election.<sup>243</sup> In the November 2022 midterm election, there were 35 Senate races, including two special elections.<sup>244</sup> Thirty-four of those elections were won by the party whose nominee carried the state in the 2020 Presidential election.<sup>245</sup> The lone exception was Wisconsin: President Biden carried the state in 2020, while incumbent Republican Senator Ron Johnson defeated his Democratic challenger, Mandela Barnes, in 2022.<sup>246</sup> In Senate elections, party is destiny: the partisan orientation of a state will predict the winner of the vast majority of these elections.

### *B. The Presidency*

While the focus of this Article is on the role of the Senate in Supreme Court nominations, no discussion of the future of the Supreme Court is complete without some consideration of the presidency. Recent developments portend a more prominent role for the Senate in determining who sits on the high court, but it is still the president who initiates the process by selecting a nominee. When it comes to the presidency, there is reason for Democrats to be optimistic: the Democratic candidate has prevailed in five of the last eight presidential elections. Two of the Democrats’ three losses during that time—the 2000 and 2016 elections—

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240. Becky Little, *How the ‘Party of Lincoln’ Won Over the Once Democratic South*, HIST. (Apr. 10, 2019), <https://www.history.com/news/how-the-party-of-lincoln-won-over-the-once-democratic-south> [https://perma.cc/J9P5-XN94].

241. *Id.*

242. Bazelon, *supra* note 208.

243. The exceptions are Sherrod Brown (D-Ohio), Susan Collins (R-Me.), Ron Johnson (R-Wis.), Joe Manchin (D-W. Va.), and Jon Tester (D-Mont.).

244. *2022 Election Results: The Senate is staying under Democratic control*, POLITICO (Dec. 6, 2022, 9:41 PM CST), <https://www.politico.com/2022-election/results/senate/> [https://perma.cc/H8RU-NKLP].

245. *Id.*

246. *Id.*

were extremely close, “coin flip” elections that could have gone either way.<sup>247</sup>

As things currently stand, Republicans benefit from the fact that the Electoral College, and not the national popular vote, determines the winners of presidential elections.<sup>248</sup> Analyzing the 2020 presidential election results, the website FiveThirtyEight found that Joe Biden needed to win the national popular vote by more than 3.8 percentage points to win the Electoral College.<sup>249</sup> Biden won the popular vote by 4.45 points.<sup>250</sup>

That Democrats need to win the popular vote by nearly four points—literally millions of votes—just to eke out a narrow Electoral College victory would seem to be a major problem, but recent history suggests that Democrats are up to the task. The popular vote margins from the past eight presidential elections were as follows:

- 2020: Democrat won by 4.45 percentage points
- 2016: Democrat won by 2.0 percentage points
- 2012: Democrat won by 3.9 percentage points
- 2008: Democrat won by 7.2 percentage points
- 2004: Republican won by 2.4 percentage points
- 2000: Democrat won by 0.5 percentage points
- 1996: Democrat won by 8.5 percentage points
- 1992: Democrat won by 5.6 percentage points<sup>251</sup>

The results listed above show that, on average, the Democratic presidential candidate has run 3.72 percentage points ahead of the Republican candidate over the past eight elections. This is nearly identical to the 3.8-point margin that Biden needed to clear—and did clear—to win the 2020 election.<sup>252</sup> It appears that modern presidential elections are a 50–

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247. The Editors of Encyclopaedia Britannica, *United States Presidential Election Results*, BRITANNICA, <https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863> [<https://perma.cc/LFZ5-5S8R>] (last visited Aug. 9, 2022).

248. Laura Bronner & Nathaniel Rakich, *Advantage, GOP*, FIVETHIRTYEIGHT (Apr. 29, 2021), <https://fivethirtyeight.com/features/advantage-gop/> [<https://perma.cc/ATY7-SUZ5>].

249. *Id.*

250. *Official 2020 Presidential General Election Results*, *supra* note 239.

251. *The American Presidency Project*, UC SANTA BARBARA, <https://www.presidency.ucsb.edu/statistics/elections/2020> [<https://perma.cc/K65X-8D8Q>] (last visited May 24, 2022).

252. *Id.*

50 proposition: Democrats can expect to win the popular vote by a margin that is right around the break-even point in the Electoral College.<sup>253</sup>

In the end, trying to predict something like which party will win the 2040 presidential election is a fool's errand. Candidates matter a lot. So does the electorate's view of the incumbent president: if he or she is a popular Republican or an unpopular Democrat, then the Republican candidate would almost certainly be favored to win in 2040. Predicting the results of future presidential elections is extremely difficult.

### *C. The Process*

The events of the past few years raise several important questions about the process by which Supreme Court vacancies are filled. As discussed in Part II, one question is how far the principle advanced by Senate Republicans in 2016—that when a vacancy arises in an election year, the Senate may delay action on the president's nominee to “give the people a voice”<sup>254</sup>—should extend. Professor Daniel Cohen believes the precedent could easily be extended to midterm election years.<sup>255</sup>

But what if a vacancy arises in the fall before a midterm or presidential election year? It is not uncommon for the Senate to spend several months considering a Supreme Court nomination.<sup>256</sup> If the process were to drag into the next year, could the Senate Majority Leader then announce that because an election year had arrived, there would be no further consideration of the president's nominee, or any other nominee, so as to “give the people a voice?” That would leave a president whose party does not control the Senate just a few months at the beginning of each odd-numbered year in which to make Supreme Court nominations.

Even then, there is no guarantee that the Senate will consider the nomination. If the next election is too far away for the Senate to give the people a voice, the Senate Majority Leader can always just refer back to the previous election. He or she can say: “The voters gave our party a majority in the Senate as a check on the president, and we will carry out the voters' will by refusing to consider the president's nominee.”

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253. There are some important caveats to add here. First, the choice of the past eight elections is somewhat random: the average margin would be different if it reflected the past six elections, or the past ten. Second, going back as far as 1992 arguably sweeps in misleading data. The electoral map looked very different 30 years ago than it does today.

254. *McConnell on Supreme Court Nomination*, *supra* note 125.

255. Cohen, *supra* note 171, at 680.

256. *See generally Supreme Court Nominations*, *supra* note 12.



There may be limits to this approach. If a nomination is made in the first few months of a president's term, the Senate Majority Leader would have to keep the seat open for nearly 4 years and potentially 8 or 12 if voters keep electing a president from one party and a Senate majority from the other. That would be a substantial extension of the Garland blockade, which lasted less than a year.<sup>257</sup> At some point, there might be a backlash from voters against a party that holds a Supreme Court seat open for several years. There is also the possibility that multiple vacancies will threaten the Court's ability to achieve a quorum, or six justices.<sup>258</sup>

Surely there will come another day when a Senate controlled by one party confirms a Supreme Court nominee chosen by a president from the other party. But that will not happen often. Given the success of the Garland blockade, there will be little incentive for future majority leaders to consider such nominees, especially if the vacancy arises less than two years before the next presidential election.

Writing in 2017, Professors Michael Gerhardt and Richard Painter predicted that in some cases, "newly emboldened majorities will use their power to ram through nominees, as they did with Judge Gorsuch."<sup>259</sup> In other situations, the majority party will refuse to give the nominee a hearing and a vote, as was the case with Judge Garland.<sup>260</sup> The atmosphere surrounding Supreme Court nominations "will likely be yet more partisan and bitter."<sup>261</sup>

#### *D. The Nominees*

Going forward, there will probably be more openly liberal nominees when Democrats control the Senate and White House and more openly conservative nominees when Republicans are in power. In March 2022, after President Biden nominated Judge Ketanji Brown Jackson, a former federal public defender, to the Supreme Court, Professor Orin Kerr tweeted about why so few public defenders are appointed to federal judgeships:

My sense is that, back when 60 votes were needed, ambitious

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257. President Obama nominated Garland to the Supreme Court on March 16, 2016. *Supreme Court Nominations*, *supra* note 12. The nomination expired on January 3, 2017. Howe, *supra* note 138.

258. 28 U.S.C. § 1.

259. Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 267 (2017).

260. *Id.*

261. *Id.*

lawyers seeking a federal judgeship usually aimed for centrist credentials, taking establishment jobs . . . that centrists would be expected to take to show the other side you were centrist.

But if the threshold is 50 votes, and Senators mostly vote on party lines, the incentives change. You'd expect the credentials of nominees of both sides to shift away from the center.<sup>262</sup>

When the President's party controls the Senate, "the best strategy to get the necessary majority, just fifty-one votes, is to find a nominee that fits squarely within one's own party."<sup>263</sup> With the filibuster option now unavailable to the party in the minority, the President has little incentive to nominate someone with bipartisan appeal. When the President's party is in the minority in the Senate, the situation will be very different. There is a very real possibility that no nominee will be confirmed no matter what. Clarence Thomas was the last justice to be nominated by a president from one party and confirmed by a Senate controlled by the other party,<sup>264</sup> although that is partly because the situation—a vacancy on the Court, with a president and Senate Majority Leader from different parties—has not arisen very often.

Going forward, there probably will not be many more justices like David Souter, who served on the Supreme Court from 1990 to 2009.<sup>265</sup> Almost immediately after being nominated to the Court by President George H.W. Bush, whose chief of staff predicted that he would be "a home run for conservatives," Souter began voting with the Court's liberals in politically charged cases.<sup>266</sup> In 1992, he was part of the majority that reaffirmed the right to abortion in *Planned Parenthood v. Casey*.<sup>267</sup> "No more Souters" became a conservative rallying cry.<sup>268</sup>

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262. Orin Kerr (@OrinKerr), TWITTER (Mar. 6, 2022, 1:57 PM), <https://twitter.com/OrinKerr/status/1500561233996484611> [<https://perma.cc/WNX9-UENL>]; Orin Kerr (@OrinKerr), TWITTER (Mar. 6, 2022, 2:01 PM), <https://twitter.com/OrinKerr/status/1500562235273277441> [<https://perma.cc/ZQP4-Y4N4>].

263. Gregory Dickinson, *One Justice, Two Justice, Red Justice, Blue Justice: Dissecting the Role of Political Ideology in Supreme Court Nominations*, 2017 U. ILL. L. REV. 345, 370 (2017).

264. Jacobson, *supra* note 193.

265. *Supreme Court Nominations*, *supra* note 12.

266. Greenfield, *supra* note 13.

267. *Id.*

268. Tucker Higgins, *George HW Bush was president for only 4 years, but he shaped the Supreme Court for decades*, CNBC (Dec. 5, 2018, 9:54 PM EST), <https://www.cnbc.com/2018/12/04/george-hw-bush-shaped-the-supreme-court-for-decades.html> [<https://perma.cc/YV7Z-JTNX>].

As it turns out, it is quite easy to avoid nominating a Souter—or the Democratic-appointed equivalent—when the president’s party controls the Senate and the minority party does not have the option to filibuster a nominee. Neither of those things was true in 1990 when Bush nominated Souter. Democrats had a 55–45 Senate majority,<sup>269</sup> and the filibuster would not be abolished for Supreme Court nominations until 2017.<sup>270</sup>

The three justices appointed by President Trump and confirmed under the new simple-majority system—Gorsuch, Kavanaugh, and Barrett—are all in their fifties.<sup>271</sup> There is certainly time for them to drift leftward, and perhaps one or more of them will. But all three passed their first major test when they joined Justice Alito’s majority opinion in *Dobbs v. Jackson Women’s Health Organization*.<sup>272</sup> It would be foolish to predict that there will *never* be another David Souter on the Court, but under the current system, it is unlikely that a Republican president would nominate a justice who turns out to be liberal, or that a Democratic president would nominate one who turns out to be conservative. When future vacancies arise, moderates, centrists, and potential candidates without clear judicial ideologies probably need not apply.

Along these lines, Professors Gerhardt and Painter warn that “[a]llowing a president to get judges confirmed by eking out only a bare majority vote encourages presidents to nominate judges who are outside the mainstream.”<sup>273</sup> That has not really happened yet—Justices Gorsuch, Kavanaugh, Barrett, and Jackson are generally regarded as mainstream in their judicial ideologies<sup>274</sup>—in part because neither party has held more than 54 Senate seats in recent years.<sup>275</sup> The likelihood of an extremist nominee will increase as soon as one party controls the White House *and* 55–60 Senate seats. Only six Republican senators voted against Robert

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269. Senate Hist. Off., *Party Division*, *supra* note 94.

270. See discussion *supra* notes 137–44 and accompanying text.

271. D. Hunter Schwarz, *Two-thirds of Americans support term limits for Supreme Court Justices*, DESERET NEWS (Jul. 26, 2022, 12:01 PM CST), <https://www.deseret.com/2022/7/26/23278925/two-thirds-of-americans-support-term-limits-for-supreme-court-justices-court-packing-age> [<https://perma.cc/H69U-C9MD>].

272. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

273. Gerhardt & Painter, *supra* note 259, at 278.

274. See, e.g., Matthew Cooper, *With Gorsuch, Trump Leans Right, But Stays Mainstream*, NEWSWEEK (Jan. 31, 2017, 9:18 PM EST), <https://www.newsweek.com/542amuel542-trump-supreme-court-scotus-scalia-garland-obama-55097> 6 [<https://perma.cc/L7Q6-QEE3>]; I. SHAPIRO, *supra* note 192, at 2 (describing Justice Kavanaugh as “firmly part of the legal establishment, specifically its conservative mainstream”).

275. See Senate Hist. Off., *Party Division*, *supra* note 94.

Bork, who is probably the best modern example of a nominee outside the mainstream. If Republicans had held at least 56 Senate seats and Democrats had not had the option to filibuster, Bork might well have been confirmed.

Future Supreme Court nominees are also likely to have significant paper trails that show a clear judicial ideology. This represents a major change—and perhaps even a complete reversal—from just a few decades ago. As noted in Part I.B, Robert Bork was a prolific speaker and writer.<sup>276</sup> His lengthy paper trail hurt his chances of being confirmed because it revealed what many considered to be extreme views about the Constitution.<sup>277</sup>

Two decades later, Harriet Miers's lack of a paper trail helped doom her nomination.<sup>278</sup> President George W. Bush nominated Miers, his White House Counsel, to the Supreme Court on October 7, 2005.<sup>279</sup> On October 27, Miers announced that she was withdrawing from consideration.<sup>280</sup> The White House had refused to give the Senate documents from Miers' time as White House Counsel, citing executive privilege.<sup>281</sup> Senators argued that they needed to see the documents to compensate for Miers' lack of a paper trail.<sup>282</sup> Most of the backlash against Miers came from the right:<sup>283</sup> Senator Sam Brownback (R-Kan.) summed up the conservative opposition to Miers when he said, "There's precious little to go on and a deep concern that this would be a Souter-type candidate."<sup>284</sup>

Future Republican nominees are likely to have paper trails sufficient to assure conservatives that they are getting a judicial conservative and not

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276. See discussion *supra* notes 46–47 and accompanying text.

277. See *id.*

278. Jill Zuckman & Washington Bureau, *Lack of paper trail prompts caution*, CHI. TRIB. (Oct. 4, 2005, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2005-10-04-0510040188-story.html> [<https://perma.cc/9WAT-HEUL>].

279. *Supreme Court Nominations*, *supra* note 12.

280. Mark Oliver, *Harriet Miers withdraws supreme court candidacy*, THE GUARDIAN (Oct. 27, 2005, 11:40 AM EDT), <https://www.theguardian.com/world/2005/oct/27/usa.markoliver> [<https://perma.cc/L2LB-44YL>].

281. *Id.*

282. *Id.*

283. See Goldman et al., *supra* note 74, at 273 (“[W]hile there were some concerns raised from the Democratic Left about the nominee’s close ties to the President and the potential for cronyism, the primary opposition to Miers came from the Republican Right.”).

284. *GOP Senator Concerned About Miers’ Abortion Views*, ABC NEWS (Oct. 5, 2005), <https://abcnews.go.com/GMA/SupremeCourt/story?id=1184984> [<https://perma.cc/Y7CD-KD7S>].

another Souter. And future Democratic nominees will have paper trails that assure Democratic senators that the nominee is a judicial liberal.<sup>285</sup>

In addition, presidents from both parties may seek out candidates who are likely to time their retirements strategically so that a president from the same party can choose their successors. Historically, justices have timed their retirements strategically to some extent. In 2019, Professor Christine Kexel Chabot analyzed the 25 departures from the Supreme Court since 1954.<sup>286</sup> While Professor Chabot focused on ideology rather than party affiliation,<sup>287</sup> her findings are nevertheless instructive. According to Chabot, justices who left the Court voluntarily retired under ideologically similar presidents nearly two-thirds of the time.<sup>288</sup>

That figure will likely be higher going forward. The events surrounding the last four vacancies have made it abundantly clear that partisan politics plays a huge role in determining who sits on the Court. Everyone involved in this process—presidents, senators, and potential nominees—should, and probably will, act accordingly.

For Democrats to regain a majority on the Court, they will almost certainly need justices appointed by Democratic presidents to time their retirements strategically so that ideologically similar successors can be appointed. In March 2014, Dean Erwin Chemerinsky published an op-ed in the *Los Angeles Times*, the first sentence of which stated: “Justice Ruth Bader Ginsburg should retire from the Supreme Court after the completion of the current term in June.”<sup>289</sup> Chemerinsky argued that “only by resigning this summer can [Ginsburg] ensure that a Democratic president will be able to choose a successor who shares her views and values.”<sup>290</sup> Chemerinsky warned that if a Republican president were to select Ginsburg’s successor, that justice could be the fifth vote needed to

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285. Of course, the composition of the Senate matters. If the Senate is split 50–50, and Republicans are unanimously opposed to a Democratic president’s nominee, then there is a risk that something in the nominee’s background will alienate a moderate or conservative Democratic Senator and thus doom the nomination. With a closely divided Senate, a nominee should have an extensive paper trail, but that paper trail must not show the nominee to be controversial or extreme in their views.

286. Christine Kexel Chabot, *Do Justices Time Their Retirements Politically? An Empirical Analysis of the Timing and Outcomes of Supreme Court Retirements in the Modern Era*, 2019 UTAH L. REV. 527, 542 (2019).

287. *Id.*

288. *Id.* at 563.

289. Erwin Chemerinsky, *Much depends on Ginsburg*, L.A. TIMES (Mar. 15, 2014, 1:44 PM PT), <https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-ginsburg-should-resign-20140316-story.html> [<https://perma.cc/CM58-VHAE>].

290. *Id.*

overturn *Roe v. Wade*.<sup>291</sup> At the time of Chemerinsky's editorial, President Obama was not even halfway through his second term.<sup>292</sup> However, Chemerinsky noted the "distinct possibility that Democrats will not keep the Senate in the November 2014 elections," making it more difficult for an Obama nominee to be confirmed.<sup>293</sup>

Nearly everything Chemerinsky predicted in March 2014 came to pass. Republicans regained control of the Senate in the November 2014 midterm elections.<sup>294</sup> Republicans used that majority to prevent Obama from appointing any additional Supreme Court justices.<sup>295</sup> A Republican appointee eventually replaced Justice Ginsburg.<sup>296</sup> That appointee, Amy Coney Barrett, joined the five-justice majority opinion in *Dobbs*, which overturned *Roe v. Wade*.<sup>297</sup>

Going forward, there will be pressure on everyone involved in the Supreme Court appointments process to ensure not only that any nominee shares the ideology of the president nominating him or her, but also that the nominee, once confirmed to the Court, will time their departure from the Court strategically. It will not always work: Ginsburg faced quite a bit of pressure to step down during Obama's presidency,<sup>298</sup> but she did not do so. And there is always the chance that a justice will pass away before he or she can retire strategically, as Justice Scalia did.<sup>299</sup>

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291. *Id.*

292. The editorial was published in March 2014, and President Obama's second term began in January 2013. *See* Chemerinsky, *supra* note 289.

293. *Id.*

294. Jonathan Weisman & Ashley Parker, *Riding Wave of Discontent, G.O.P. Takes Senate*, N.Y. TIMES (Nov. 4, 2014), <https://www.nytimes.com/2014/11/05/us/politics/midterm-elections.html> [<https://perma.cc/AXX7-SELW>].

295. *See* discussion *supra* Part I.F.

296. *See id.*

297. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

298. Jonathan Topaz, *Ginsburg: Why I can't resign now*, POLITICO (Sept. 24, 2014, 6:37 AM EDT), <https://www.politico.com/story/2014/09/ruth-bader-ginsburg-elle-interview-111281> [<https://perma.cc/74FC-GHE4>]; Tucker Higgins, *Ruth Bader Ginsburg fires back against critics who say she should have retired under Obama: 'Who would you prefer on the court?'*, CNBC (Sept. 19, 2019, 10:00 AM EDT), <https://www.cnn.com/2019/09/18/rbg-fires-back-against-critics-who-say-she-should-have-retired-under-obama.html> [<https://perma.cc/3YK5-MLDD>]; Joan Biskupic, *U.S. Justice Ginsburg hits back at liberals who want her to retire*, REUTERS (July 31, 2014, 7:29 PM), <https://www.reuters.com/article/us-usa-court-ginsburg-idUSKBN0G12V020140801> [<https://perma.cc/BV54-JL6Y>].

299. Scalia could have chosen to retire during the George W. Bush administration. However, by the end of Bush's second term, Scalia was in his

Of course, it is difficult for a president to know at the time of the nomination when or how a Supreme Court appointee's tenure will end. But there are things that presidents can do, and that past Democratic presidents probably should have done, to avoid the Democrats' current predicament. The first is simply to ask the candidate. If the candidate responds that he or she plans to serve "as long as I can do the job," as Justice Ginsburg often did,<sup>300</sup> or that politics should not figure into a justice's decision about when to retire, as Justice Breyer said in 2021,<sup>301</sup> then the president should probably move on to the next candidate. If anyone in President Clinton's administration asked this question of Ginsburg or Breyer, it has remained a secret for over 25 years.

The second way to increase the likelihood that a justice will time their retirement strategically is to nominate someone with a demonstrated commitment to the president's political party. Shortly after Chief Justice Roberts and Justice Alito were confirmed to the Court, Professor Gerhardt observed that, like Scalia and Thomas before them, "Roberts and Alito were political appointees in Republican administrations."<sup>302</sup> They were "involved in making a number of politically charged decisions at the Justice Department."<sup>303</sup> It is likely that Roberts's and Alito's perceived loyalty to the Republican Party played a role in their selections.

There are several recent examples of justices who were active in party politics before serving on the Court and who retired—or in Justice Douglas's case, strongly wished to retire—under a president from their own party:

- *Sandra Day O'Connor*. Before she became a judge, and eventually a Supreme Court justice, O'Connor had a long history with the Republican Party. In 1964, she worked as a

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early seventies. *Antonin Scalia*, LEGAL INFO. INST., <https://www.law.cornell.edu/supct/justices/scalia.bio.html> [<https://perma.cc/88R3-5ZV7>] (last visited Aug. 9, 2022). Modern Supreme Court Justices routinely remain on the Court well into their eighties. David Ingold, *Eighty Is the New 70 as Supreme Court Justices Serve Longer and Longer*, BLOOMBERG (Apr. 7, 2017), <https://www.bloomberg.com/graphics/2017-supreme-court-justice-tenure/> [<https://perma.cc/Z5LS-4SY2>].

300. *Ruth Bader Ginsburg says she will serve as long as she has 'steam'*, THE JERUSALEM POST (Feb. 2, 2018, 9:15), <https://www.jpost.com/546amuel546g-politics/ruth-bader-ginsburg-says-she-will-serve-as-long-as-she-has-steam-540515> [<https://perma.cc/2A4L-5R48>].

301. Adam Liptak, *Why Justice Breyer May Resist Calls for His Retirement*, N.Y. TIMES (Aug. 27, 2021), <https://www.nytimes.com/2021/05/17/us/justice-breyer-retirement.html> [<https://perma.cc/XM8S-FY5G>].

302. Gerhardt, *supra* note 37, at 416.

303. *Id.*

precinct committeewoman.<sup>304</sup> She served in the Arizona Senate from 1969 to 1975.<sup>305</sup> In 1973, she became majority leader.<sup>306</sup> According to *The Wall Street Journal*, Justice O'Connor's husband, John O'Connor, told friends in 2000 that his wife wished to retire but would be reluctant to do so during a Democratic administration.<sup>307</sup> On the night of the 2000 presidential election, after CBS News projected that Democrat Al Gore would win Florida, Justice O'Connor herself reportedly called the result "terrible."<sup>308</sup> Justice O'Connor ultimately announced her retirement from the Supreme Court in July 2005, early in President George W. Bush's second term, even though she was 75 years old and in good health.<sup>309</sup>

- *Warren E. Burger*. Burger played a major role in Republican Harold Stassen's 1938, 1940, and 1942 campaigns for Governor of Minnesota, all of which Stassen won.<sup>310</sup> At the 1948 and 1952 Republican National Conventions, Burger was the floor manager for Governor Stassen's unsuccessful bids for the Republican presidential nomination.<sup>311</sup> In 1952, after Stassen's presidential campaign ended, Burger supported

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304. Marjorie Williams, *How Sandra Day O'Connor became the most powerful woman in 1980s America*, WASH. POST (Mar. 29, 2016, 10:30 AM EDT), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/03/29/how-sandra-day-oconnor-became-the-most-powerful-woman-in-1980s-america/> [<https://perma.cc/37Z7-K4VY>].

305. *Id.*

306. *Id.*

307. Jess Bravin et al., *Supreme Interests: For Some Justices, The Bush-Gore Case Has a Personal Angle*, WALL ST. J., Dec. 12, 2000, at A1.

308. EPSTEIN & SEGAL, *supra* note 19, at 38.

309. Richard Wolf, *Former Supreme Court Justice Sandra Day O'Connor announces dementia diagnosis*, USA TODAY (Oct. 23, 2018, 5:34 PM ET), <https://www.usatoday.com/story/news/politics/2018/10/23/547amuel-day-oconnor-supreme-court-dementia/1737674002/> [<https://perma.cc/6WPU-4YHX>] ("Her retirement while still in good health at age 75 was rare for Supreme Court justices, but she did it to care for her husband, John, who had advanced Alzheimer's disease at the time.")

310. John Fox, *Biographies of the Robes: Warren Earl Burger*, THIRTEEN, [https://www.thirteen.org/wnet/supremecourt/rights/robes\\_burger.html](https://www.thirteen.org/wnet/supremecourt/rights/robes_burger.html) [<https://perma.cc/DRL8-Z9JL>] (last visited Aug. 19, 2022).

311. *Id.*



eventual nominee Dwight D. Eisenhower.<sup>312</sup> Burger was instrumental in convincing the Minnesota delegation to support Eisenhower.<sup>313</sup> Republican Richard Nixon appointed Burger to the Supreme Court, and Burger's retirement in 1986 enabled another Republican president, Ronald Reagan, to appoint his successor.<sup>314</sup>

- *Arthur Goldberg*. Goldberg's political background was much more limited than Burger's: He was President Kennedy's Secretary of Labor from January 1961 to September 1962.<sup>315</sup> Nevertheless, he was liberal Democrat who, later in life and after his time on the Supreme Court, was the Democratic nominee for governor of New York.<sup>316</sup> In 1965, President Lyndon Johnson convinced Goldberg to leave the Court, despite having only been appointed three years earlier, to become ambassador to the United Nations.<sup>317</sup>
- *Byron White*. During the 1960 presidential campaign, White led the Colorado Committee for Kennedy.<sup>318</sup> White then served as Deputy Attorney General in Kennedy's Justice Department before Kennedy appointed him to the Supreme Court in 1962.<sup>319</sup> While on the Court, White said he wished to retire during a Democratic administration.<sup>320</sup> Shortly after Bill Clinton won the 1992 election, White did just that.<sup>321</sup>
- *William O. Douglas*. President Franklin D. Roosevelt appointed Douglas to the Securities and Exchange

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312. *Warren E. Burger*, OYEZ, [https://www.oyez.org/justices/warren\\_e\\_burger](https://www.oyez.org/justices/warren_e_burger) [<https://perma.cc/H8WX-N6MK>] (last visited Aug. 19, 2022).

313. *Id.*

314. *Supreme Court Nominations*, *supra* note 12.

315. *Hall of Secretaries: Arthur J. Goldberg*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/548amuel548g> [<https://perma.cc/472F-GP9J>] (last visited Aug. 22, 2022).

316. The Editors of Encyclopaedia Britannica, *Arthur J. Goldberg*, BRITANNICA, <https://www.britannica.com/biography/Arthur-J-Goldberg> [<https://perma.cc/YN7Y-ARBS>] (last visited Aug. 22, 2022).

317. EPSTEIN & SEGAL, *supra* note 19, at 29.

318. John M. Aughenbaugh, *Byron White*, THE FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/1371/548amue-white> [<https://perm.a.cc/KAW7-6C7U>] (last visited Aug. 24, 2022).

319. *Id.*

320. EPSTEIN & SEGAL, *supra* note 19, at 40.

321. *Id.*

Commission in 1936.<sup>322</sup> Historians and biographers have portrayed Douglas as “a restless jurist who regretted taking a seat on the Court in 1939 at the age of 40, cutting short a promising political career . . . .”<sup>323</sup> Late in his tenure on the Court, Douglas said that he would not resign, “while there’s a breath in my body, until we get a Democratic president.”<sup>324</sup>

However, party loyalists are not the only justices who retire strategically. Although President Nixon, a Republican, appointed Justice Lewis F. Powell Jr. to the Court, Powell was a lifelong Democrat, albeit a moderate-to-conservative one.<sup>325</sup> Powell elected to retire in 1987, in the latter half of President Reagan’s second term.<sup>326</sup> There would be a presidential election the next year, and Powell did not want to risk having to vacate his seat during a Democratic administration.<sup>327</sup>

History also shows that choosing a party loyalist for the Supreme Court does not guarantee that the justice will retire strategically. Chief Justice Rehnquist campaigned for Barry Goldwater and worked in President Nixon’s Justice Department.<sup>328</sup> Rehnquist chose not to retire during President George W. Bush’s first term and eventually died in office early in Bush’s second term.<sup>329</sup> Had Democrat John Kerry won the 2004 presidential election, Kerry would have gotten to nominate Rehnquist’s successor.

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322. *William O. Douglas, 1939-1975*, SUP. CT. HIST. SOC’Y, <https://supreme.courthistory.org/associate-justices/william-o-douglas-1939-1975/> [<https://perma.cc/W5T8-LPFF>] (last visited Aug. 9, 2022).

323. James L. Moses, *William O. Douglas’s “Political Ambitions” and the 1944 Vice-Presidential Nomination: A Reinterpretation*, 62 THE HISTORIAN 325, 325 (2000).

324. ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 186 (2003). Ultimately, “a severe stroke forced [Douglas] to retire to President Ford, who did not share Douglas’s ideology. In this case, health problems prevented Douglas from attaining a politically timed retirement.” Chabot, *supra* note 286, at 532.

325. Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST (Aug. 26, 1998), <https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/powell082698.htm> [<https://perma.cc/5AHF-ENPJ>].

326. *Supreme Court Nominations*, *supra* note 12.

327. EPSTEIN & SEGAL, *supra* note 19, at 39.

328. Linda Greenhouse, *William H. Rehnquist, Chief Justice of Supreme Court, Is Dead at 80*, N.Y. TIMES (Sept. 4, 2005), <https://www.nytimes.com/2005/09/04/politics/william-h-rehnquist-chief-justice-of-supreme-court-is-dead-at-80.html> [<https://perma.cc/C48W-Z5QA>].

329. *See id.*; *see also Supreme Court Nominations*, *supra* note 12.

Among the current justices, Brett Kavanaugh stands out for his extensive background in party politics. After graduating from law school in 1990, Kavanaugh completed three judicial clerkships, all for judges appointed by Republican presidents.<sup>330</sup> During the Clinton administration, Kavanaugh was Associate Counsel in the Office of Independent Counsel—and Clinton nemesis—Kenneth Starr.<sup>331</sup> Before President George W. Bush appointed Kavanaugh to the D.C. Circuit, Kavanaugh held various positions within Bush’s administration: Associate Counsel, Senior Associate Counsel, Assistant to the President, and White House Staff Secretary.<sup>332</sup>

Justice Kavanaugh has not commented publicly on his retirement plans. Indeed, it would be unusual for a relatively recently appointed justice still in his fifties to speak about his retirement. Nevertheless, his background reflects an enduring commitment to the Republican Party.

#### *E. Reform Proposals*

An important byproduct of the events discussed in Part I.F has been a dramatic increase in calls to reform the Supreme Court.<sup>333</sup> For example, the possibility of increasing the number of seats on the Court—often referred to as “court-packing”—has received serious attention in recent years after being considered a non-starter for decades.<sup>334</sup> Some scholars have proposed setting term limits for Supreme Court justices; the best-known of these proposals calls for limiting justices to a single, 18-year term.<sup>335</sup> Professor Samuel Moyn has proposed that Congress enact legislation that strips the Supreme Court of jurisdiction over certain topics, such as abortion and affirmative action.<sup>336</sup> Professors Daniel Epps and

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330. *Brett M. Kavanaugh, Associate Justice (2018-present)*, LEGAL INFO. INST., <https://www.law.cornell.edu/supct/justices/550amuel550gh.bio.html> [<https://perma.cc/9UHK-6TQY>] (last visited Aug. 9, 2022).

331. *See, e.g., id.*

332. *Id.*

333. *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1711–12 (2021).

334. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 164 (2019).

335. *Id.* at 173. As Epps and Sitaraman make clear, the term-limits idea originated with a student note written in 2004 and not in response to the events of 2016–2020. Nevertheless, the idea has received renewed attention in recent years. *See id.*

336. Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <https://bostonreview.net/articles/samuel-moyn-resisting-juristocracy/> [<https://perma.cc/UMU2-GUU4>].

Ganesh Sitaraman have suggested two changes: (1) a “Supreme Court Lottery,” in which “the Court would sit in panels selected at random from a large pool of potential Justices who would also serve as judges on the U.S. courts of appeals”; and (2) a “Balanced Bench,” which would require an equal number of Democratic-appointed and Republican-appointed justices, plus additional justices agreed upon unanimously by the Democratic- and Republican-appointed justices.<sup>337</sup> Professors Charles Tiefer and Kathleen Clark have suggested that the Senate majority “reinstate a supermajority cloture requirement for confirmation of Supreme Court Justices in exchange for the Senate minority party promise to filibuster nominees only if there are ‘extraordinary circumstances.’”<sup>338</sup> As Tiefer and Clark point out,<sup>339</sup> the Senate briefly operated this way under the Gang of 14’s 2005 agreement.<sup>340</sup>

Despite this increased attention on Supreme Court reform, there has been little movement toward actually implementing any of the various proposals. In April 2021, the White House announced the creation of a 36-member commission to study Supreme Court reform.<sup>341</sup> The Commission released a nearly 300-page report in December 2021.<sup>342</sup> In July 2022, a group of Democrats in the House of Representatives introduced a bill that would enact one of the proposals discussed above: limiting each justice to a single 18-year term.<sup>343</sup> The bill stands little chance of becoming law.<sup>344</sup>

Proposals to reform the Court are difficult—and probably impossible—to implement in the current political environment. There is no doubt that many Democrats would like to expand the Supreme Court and have President Biden nominate the new justices.<sup>345</sup> But even in the

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337. Epps & Sitaraman, *supra* note 334, at 181.

338. Charles Tiefer & Kathleen Clark, *Deliberation’s Demise: The Rise of One-Party Rule in the Senate*, 24 ROGER WILLIAMS U. L. REV. 46, 75 (2019).

339. *Id.*

340. See discussion *supra* notes 96–108 and accompanying text.

341. Kimberly Strawbridge Robinson, *Biden’s Supreme Court Commission: Who’s On It and Why Explained*, BL (Apr. 10, 2021, 7:01 AM), <https://news.bloomberglaw.com/us-law-week/bidens-supreme-court-commission-whos-on-it-and-why-explained> [<https://perma.cc/W4JU-WXHF>].

342. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, DRAFT FINAL REPORT (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf> [<https://perma.cc/STS9-RD2Y>].

343. Shawna Chen, *Democrats introduce bill limiting Supreme Court terms amid calls for reform*, AXIOS (July 26, 2022), <https://www.axios.com/2022/07/27/supreme-court-term-limits-democrats> [<https://perma.cc/255U-JQQK>].

344. See *id.*

345. See Burgess Everett & Marianne Levine, *2020 Dems warm to expanding Supreme Court*, POLITICO (Mar. 18, 2019, 5:04 AM EDT), <https://www.politico>

117th Congress, with Democrats in control of the House of Representatives and the Senate, there was no serious push to expand the Court.

Another problem with the various reform proposals is that most of them aim to address what Epps and Sitaraman call the Court's "unprecedented legitimacy crisis," for the good of the Court and, ultimately, the country.<sup>346</sup> That is certainly a noble goal, but it does not reflect how people in power think about the Supreme Court.<sup>347</sup> As the events of recent years have made clear, senators are focused on winning—on getting nominees from their side confirmed to the Court, on preventing the other side from doing so, and on building a Supreme Court that will give them the results they want.<sup>348</sup> It is difficult to see how the various reform proposals—with the possible exception of court-packing, which would likely benefit one party at the expense of the other, at least initially—further those goals. For example, it is nearly impossible to imagine the two parties agreeing to reinstate the filibuster option for Supreme Court nominations, now that both parties have taken advantage of its elimination to confirm new justices with fewer than 60 votes.

Even a relatively small, common-sense reform that does not favor one party over another is difficult to implement. For example, the timing of Supreme Court vacancies in relation to presidential elections need not be controversial: the two sides could simply pick a date after which any new vacancies will be filled by the winner of the presidential election. Professor Clark has suggested May 1.<sup>349</sup> But such an agreement would require Democrats to voluntarily surrender their ability to block a nominee as Republicans blocked Garland, or to quickly confirm a nominee as happened with Justice Barrett. There is little incentive for Democrats to give up the ability to do to Republicans what Republicans just did to them.

In addition, history suggests that meaningful reform is unlikely. Political scientist Mitchel A. Sollenberger traces the history of judicial appointment reform back to 1808, when Connecticut Senator James Hillhouse proposed a constitutional amendment that would have required the "advice and consent" of both houses of Congress to judicial nominations.<sup>350</sup> From 1889 to 1926, there were 13 constitutional

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.com/story/2019/03/18/2020-democrats-supreme-court-1223625 [https://perma.cc/XKF2-U443].

346. Epps & Sitaraman, *supra* note 334, at 153.

347. For a detailed discussion of how people in power think about the Supreme Court, see notes 120–91 and accompanying text.

348. *See id.*

349. *See* Clark, *President-Shopping for a New Scalia*, *supra* note 136, at 805.

350. SOLLENBERGER, *supra* note 89, at 157.

amendments introduced in Congress that would have required Supreme Court justices to be popularly elected.<sup>351</sup> After reviewing roughly 200 years of reform proposals, Sollenberger concluded that efforts by politicians, academics, and interest groups to reform the process by which federal judges are appointed have achieved little success.<sup>352</sup>

Nevertheless, there are some reasons to believe that a de-escalation of the Supreme Court wars is possible. First, after a tumultuous few years, the Supreme Court is likely entering a period of relative calm. The oldest justice, Clarence Thomas, is 74.<sup>353</sup> Only one other justice, Samuel Alito, is in his seventies.<sup>354</sup> Five of the nine justices—Jackson, Kagan, Gorsuch, Kavanaugh, and Barrett—are in their fifties or early sixties.<sup>355</sup> There probably will not be many vacancies on the Court, if any, in the next five-to-ten years.

Second, the stakes have been lowered somewhat. Republican appointees comprise a majority of the Court, and that will almost certainly remain true for the foreseeable future. The question of whether *Roe v. Wade* will be overturned has finally been answered, eliminating one of the main contributors to the politicization of Supreme Court nominations.<sup>356</sup>

Third, as noted in Part III.C, there are some structural limits, and perhaps some political limits, to what each party can do to prevent presidents in the other party from appointing new justices. The Supreme

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351. *Id.* at 159.

352. *Id.* at 185.

353. *Current Members*, *supra* note 104.

354. *Id.*

355. *Id.*

356. See Ann Althouse, *Stepping Out of Professor Fallon's Puzzle Box: A Response to "If Roe Were Overruled"*, 51 ST. LOUIS U. L.J. 761, 761 (2007) ("*Roe v. Wade* is the central legal problem of our time. It has had an astoundingly powerful effect on American politics, influencing presidential elections and overwhelming the consideration of Supreme Court nominees."); Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 122 (2018) (referring to "[t]he continuing political salience of abortion in general, and *Roe v. Wade* in particular, as exemplified by Senator [Susan] Collins's initial concerns about Judge [Brett] Kavanaugh"); Jordan E. Pratt, *Disregard of Unconstitutional Laws in the Plural State Executive*, 86 MISS. L.J. 881, 933 (2017) (noting that when considering Supreme Court nominations, senators are "preoccupied with trying to extract a nominee's views and potential voting patterns on particular legal issues, such as whether *Roe v. Wade* ought to be overruled"); I. SHAPIRO, *supra* note 192, at 105–06 ("*Roe*, more than any other case or issue, is central to the modern war over the Court and the judiciary writ large.>").

Court cannot function without a quorum of six justices.<sup>357</sup> If there is a long period of divided government, with the Senate refusing to confirm any new justices, the quorum requirement could come into play. Politically, the Garland blockade showed that having eight justices instead of nine for over a year did not bother the American people.<sup>358</sup> What is not known is how the electorate would react to a much longer vacancy period, or multiple vacancies at the same time. At some point the party in control of the Senate would likely feel some political pressure to confirm at least one new justice.

Someday, politicians may commit to changing the way the Supreme Court operates and how its justices are confirmed. For now, though, meaningful reform appears unlikely.

#### IV. ADVANTAGE, MCCONNELL

As explained in Part III, Senator McConnell's implicit prediction that having the Senate play a much greater role in Supreme Court nominations will benefit his party in the long run is probably correct. This is largely because the Senate is more likely to be controlled by Republicans than Democrats in the future.<sup>359</sup> But that is not the only reason why the new norms favor Republicans. In addition, the GOP is starting this new era of increased Senate control with what is essentially a two-justice head start.

In 2022, the Congressional Research Service found that since the 1970s, "approximately 19 days, on average, elapsed between the date on which it was publicly known that a Justice was leaving the Court and the date on which the President publicly identified a nominee for the vacancy."<sup>360</sup> Meanwhile, in the 40 years before the unusually fast confirmation of Justice Amy Coney Barrett in October 2020,<sup>361</sup> the average time from a Supreme Court nomination to a vote in the Senate was

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357. 28 U.S.C. § 1.

358. See discussion *supra* note 13 and accompanying text.

359. See discussion *supra* Part III.A.

360. BARRY J. McMILLION, CONG. RSCH. SERV., IN11878, PRESIDENT'S SELECTION OF A SUPREME COURT NOMINEE: THE NOMINATION OF JUDGE KETANJI BROWN JACKSON IN HISTORICAL CONTEXT 1 (2022), <https://crsreports.congress.gov/product/pdf/IN/IN11878> [<https://perma.cc/9D83-V8U2>].

361. Barbara Sprunt, *Amy Coney Barrett Confirmed To Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM ET), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> [<https://perma.cc/D5KA-EZ7H>].

72 days.<sup>362</sup> Adding those two periods together, it usually takes around three months to fill a Supreme Court vacancy.

Suppose, then, that the Senate adopted a rule that all Supreme Court vacancies arising more than 90 days before the next presidential election will be filled by the current president, and all vacancies arising within ninety days of a presidential election will be filled by the winner of that election.<sup>363</sup> That would be a reasonable rule based on an historical assessment of the time needed to fill a vacancy.<sup>364</sup>

Applying that rule to recent events, the vacancy created by Justice Scalia's death in February 2016—just under nine months from the next presidential election—would have been filled by President Obama, and the vacancy created by Justice Ginsburg's death in September 2020—46 days before the 2020 election—would have been filled by President Biden.<sup>365</sup>

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362. *How Is A Supreme Court Justice Nominated and Confirmed?*, POLITICOPRO (Sept. 24, 2020), <https://www.politicopro.com/blog/supreme-court-justice-nomination-and-confirmation-process/> [<https://perma.cc/G5KS-6UGT>]; see also Tucker Higgins, *A Supreme Court confirmation before Election Day would be quick, but not unprecedented*, CNBC (Sept. 25, 2020, 6:35 PM EDT), <https://www.cnbc.com/2020/09/25/how-long-to-confirm-supreme-court-justice.html> [<https://perma.cc/BYF4-3W3J>] (“Going back to 1975, it has taken about 67 days on average for an associate justice to be confirmed after being nominated.”).

363. See Charles M. Leedom, Jr., *Constrained Supreme Court Expansion: A Plan for Remediating the Effects of Mitch McConnell's Norm-Busting "Advice and Consent" Procedures*, 47 OHIO N.U. L. REV. 293, 317 (2021) (proposing a constitutional amendment providing that “the President may not make a nomination during the period starting ninety days before the next Presidential Election and ending on the next Presidential Inauguration Day”). Leedom's proposed amendment also “provides for automatic confirmation of nominations made more than ninety days before a Presidential Election Day unless a majority of Senators reject the nomination in their final vote . . . .” *Id.* at 319. Leedom's amendment thus addresses the situation that arose when Scalia died by forcing the Senate to act on a nomination like Garland's, even if the party in the majority at the time would prefer to wait until after the election.

364. After reviewing the recent history of Supreme Court vacancies, nominations, and confirmations, J. Stephen Clark proposed “a norm of proceeding with election-year nominations whenever the occasion for a nomination—whether by vacancy, notice of impending vacancy, or otherwise—happens by, say, May 1.” Clark, *President-Shopping for a New Scalia*, *supra* note 136, at 805. Under Professor Clark's proposed “norm,” President Obama would have appointed Justice Scalia's successor, and President Biden would have gotten to replace Justice Ginsburg. *Id.*

365. This assumes that applying this rule would not have changed the outcomes of the 2016 or 2020 elections. Both were close races, and it is certainly



Of course, that is not what actually happened. Both vacancies were filled by justices nominated by President Trump.<sup>366</sup> In that sense, the GOP has begun this new era of Supreme Court appointments with a two-justice head start.

That head start is significant because Supreme Court vacancies simply do not arise very often: in the last 50 years, there have only been 17 vacancies on the Court.<sup>367</sup> There were no vacancies at all during Jimmy Carter's presidency, nor were there any between July 1994 and July 2005.<sup>368</sup> Opportunities to flip a Supreme Court seat—from a Democrat-appointed justice to a Republican-appointed one or vice versa—are rarer still. In the past 50 years, only six justices have replaced someone nominated by a president from the other party:

- 1975: Stevens replaces Douglas (Democrat-appointee to Republican)
- 1991: Thomas replaces Marshall (Democrat-appointee to Republican)
- 1994: Breyer replaces Blackmun (Republican-appointee to Democrat)
- 2009: Sotomayor replaces Souter (Republican-appointee to Democrat)
- 2010: Kagan replaces Stevens (Republican-appointee to Democrat)
- 2020: Barrett replaces Ginsburg (Democrat-appointee to Republican)<sup>369</sup>

The GOP's two-justice head start, which includes a rare "flipped" seat, is significant. According to Charles M. Leedom, Jr., it has resulted in a conservative super-majority on the Supreme Court that could last for decades to come.<sup>370</sup>

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conceivable that having a vacant Supreme Court seat in November 2020 would have galvanized conservative voters, resulting in the reelection of President Trump.

366. See *Supreme Court Nominations*, *supra* note 12.

367. *Id.*

368. *Id.*

369. *Id.*

370. Leedom, *supra* note 363, at 301–02.

## CONCLUSION

A major premise of this Article, as reflected in its title, is that Mitch McConnell's handling of Supreme Court vacancies in recent years represents a gamble. McConnell is betting that having the Senate play a much more prominent role in determining who sits on the Court will benefit his party in the long run. But it is important to acknowledge that McConnell may not see things that way at all.

There are different ways of looking at McConnell's words and actions in recent years. Perhaps Senator McConnell simply says and does whatever will get him what he wants in that particular moment. Under this view, there is no grand strategy to move the Supreme Court to the right by having the Senate play a larger role in Supreme Court appointments. When Justice Scalia died, McConnell really did not want President Obama to appoint Scalia's successor.<sup>371</sup> McConnell had the power to prevent that from happening, and he prevented it.

Indeed, McConnell could have said any one of a number of things to justify his refusal to consider Merrick Garland's nomination. He could have said that the American people elected a Republican Senate in 2014 as a check on President Obama, and the Garland blockade was such a check. He could have pointed out that under the Constitution, the Senate is free to withhold its consent to a Supreme Court nominee in any way it chooses.<sup>372</sup> He also could have said nothing at all. Instead, McConnell said, again and again, that the Senate would not act on Garland's nomination because the 2016 presidential campaign was underway, and it was important to "give the people a voice" in who replaces Justice Scalia.<sup>373</sup>

It is also possible that McConnell understands the bet he has made, but he is not terribly concerned about being wrong. Perhaps his goal is to

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371. See Jason Silverstein, *Here's what Mitch McConnell said about not filling a Supreme Court vacancy in an election year*, CBS NEWS (Sept. 19, 2020, 1:32 PM), <https://www.cbsnews.com/news/mitch-mcconnell-supreme-court-vacancy-election-year-senate/> [<https://perma.cc/Z27V-ABGN>] (noting that McConnell said the following in an August 2016 speech: "One of my proudest moments was when I looked Barack Obama in the eye and I said, 'Mr. President, you will not fill the Supreme Court vacancy.'").

372. McConnell did say something close to this on February 22, 2016: "Article II, Section II of the Constitution grants the Senate the right to withhold its consent, as it deems necessary." Wadington, *supra* note 124. However, as explained in Part I.F, this was not McConnell's primary justification for refusing to consider the Garland nomination. See discussion *supra* Part I.F.

373. *McConnell on Supreme Court Nomination*, *supra* note 125.

confirm as many conservatives as possible to the federal bench, and if the methods he uses to achieve that goal create problems for a future Republican leader, they are that future leader's problems to solve. By this measure, Mitch McConnell was an extraordinarily successful Senate Majority Leader.<sup>374</sup> Together with President Trump, he got three new justices confirmed to the Supreme Court—more than Presidents Obama, George W. Bush, or Clinton (two each), even though each of those presidents served two terms to Trump's one.

McConnell deserves more credit than anyone else—with the possible exception of President Trump—for the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.<sup>375</sup> Three of the five justices in the majority were confirmed on McConnell's watch.<sup>376</sup> Their decision overturning *Roe v. Wade* gave conservative Republicans a victory five decades in the making.<sup>377</sup>

When it comes to the federal courts, and especially the Supreme Court, Mitch McConnell's legacy is secure. Nevertheless, his words and actions will have a profound impact on the future of the Court. As McConnell surely knows, the day will eventually come when the shoe from the Garland blockade is on the other foot: a Republican in the White House, a Democratic majority in the Senate, and a Supreme Court vacancy in the last year of the president's term. That could happen as soon as 2028, or it might not happen for another hundred years. But eventually it will happen, and history shows that when it does, the Democrats will respond to the Garland blockade in kind. Democrats may even extend the principles behind the Garland blockade to the year before a presidential election, or even earlier still. If Democrats truly believe that the Supreme Court seat

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374. See John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/UG9V-SKQY>] (“Trump appointed 54 federal appellate judges in four years, one short of the 55 Obama appointed in twice as much time.”); Jordan Sekulow, *Victory: A Record Number of Conservative Judges Confirmed as Another Circuit Flips*, ACLJ (Nov. 15, 2019), <https://aclj.org/constitution/victory-a-record-number-of-conservative-judges-confirmed-as-another-circuit-flips> [<https://perma.cc/W8MV-E6XN>].

375. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

376. See *Supreme Court Nominations*, *supra* note 12.

377. *Roe v. Wade* was decided in 1973. *Roe v. Wade*, 410 U.S. 113 (1973). *Dobbs* was decided in 2022, 49 years after *Roe*. *Dobbs*, 142 S. Ct. 2228.

now occupied by Justice Gorsuch was “stolen,”<sup>378</sup> then nothing is really off the table.

After Justice Scalia’s death in February 2016, Mitch McConnell made a series of decisions that fundamentally transformed the Senate’s role in Supreme Court nominations. He launched an unprecedented blockade of President Obama’s nominee,<sup>379</sup> and he consolidated much of the power over Supreme Court nominations in his own hands. McConnell’s strategy succeeded in creating a six-to-three Republican-appointee majority on the Supreme Court.

Whether McConnell’s strategy—and the new rules and norms resulting from it—will benefit his party going forward remains to be seen. This will depend to a great extent on which party controls the Senate more often in the future. While that is difficult to predict, the Senate’s rural and small-state biases give the GOP structural advantages that will be difficult for Democrats to overcome. In the long run, Senator McConnell’s gamble will probably pay off. Time will tell.

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378. Morgan Phillips, *Schumer: If Republicans confirm new justice, they ‘will have stolen’ 2 SCOTUS seats*, FOX NEWS (Sept. 22, 2020, 4:48 PM EDT), <https://www.foxnews.com/politics/schumer-republicans-steal-scotus-seats> [https://perma.cc/7SPT-UURB]; Editorial Board, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html> [https://perma.cc/NYX4-HQPN].

379. Clark, *Senators Can’t Be Choosers*, *supra* note 173, at 391 (“Until the McConnell moratorium in the face of the Scalia vacancy in 2016, there is, literally, no past instance of a Senate imposing a moratorium on Supreme Court nominations and responding to unwelcome presidential nominations with calculated disengagement and determined inaction.”).