The Foundations of Advice & Consent: Original Intent & the Judicial Filibuster

James I. Wallner[♦]

ABSTRACT

This article examines three recent critiques of the judicial filibuster based on original intent. Such an examination suggests that arguments against the constitutionality of the judicial filibuster are dependent on flawed understandings of the Appointments Clause, the doctrine of separation of powers, and the principle of majority rule as it relates to the Constitution. Moreover, such arguments presume a degree of senatorial deference to the President in the confirmation process that stands in stark contrast to long-standing Senate practice. Basing the case for eliminating the filibuster for judicial nominations on constitutional or on republican grounds inadvertently undermines the doctrine of separation of powers, the independence of the judiciary, and calls into question the legitimacy of other established institutions in the Senate such as the committee system, the agenda-setting function of the majority party, and ultimately the legislative filibuster.

♦ James Wallner, Executive Director of the Senate Steering Committee. The views expressed here are the author's alone and do not necessarily reflect those of the Steering Committee.

I. INTRODUCTION

Senate Democrats utilized the so-called "nuclear option" in November 2013 to end the ability of a minority in the institution to filibuster all nominations other than for the Supreme Court with a simple-majority vote. Doing so violated the requirement in Rule XXII that debate on such nominations can only be brought to a close by a vote of three-fifths of senators duly chosen and sworn. [1] Notwithstanding the protest by Republicans that followed, members of both political parties have threatened this unorthodox maneuver in recent years in order to overcome what each perceives as illegitimate minority obstruction of their President's judicial nominations.[2]

Calls to abolish the judicial filibuster from both inside and outside the Senate have relied on remarkably similar arguments to justify their threatened use of the nuclear option to circumvent the super-majoritarian requirements of the institution's rules. First, opponents have argued that filibustering judicial nominations violates the Constitution's Appointments Clause and that Presidents are entitled to up-or-down confirmation votes on their nominations on the Senate floor. Second, both sides have argued that the routine practice of filibustering judicial nominations undermines the independence of the judiciary and thus violates the doctrine of separation of powers that forms the foundation of the constitutional structure. Finally, both parties have argued that, even absent an explicit constitutional bar against such filibusters, the practice nevertheless

[1] Democrats simply ignored Rule XXII by exempting all nominations other than for the Supreme Court from the super-majority requirements to end debate under cloture without following the procedures established by the rule. As a result, the nuclear option created a new precedent that is inconsistent with Rule XXII's requirement for an "affirmative vote of two-thirds of the senators present and voting" to end debate on a proposal to change the Senate's Standing Rules. Rule XXII has not been changed. It still requires an affirmative vote of "three-fifths of the senators duly chosen and sworn" to end debate on executive and judicial nominations. COMM. ON RULES AND ADMINISTRATION, STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 16 (2007) (Rule XXII: Precedence of Motions).

[2] *See* 150 CONG. REC. S14 (2005) (statement of Sen. Frist) ("If my Democratic colleagues exercise self-restraint and do not filibuster judicial nominations, Senate traditions will be restored. It will then be unnecessary to change Senate procedures. But if my Democratic colleagues continue to filibuster judicial nominees, the Senate will face this choice: Fail to do its constitutional duty or reform itself and restore its traditions and do what the Framers intended. Right now, we cannot be certain judicial filibusters will cease. So I reserve the right to propose changes to Senate Rule XXII."). *See also* Niels Lesniewski, *Reid Hints at Using 'Nuclear Option on Judges*, ROLL CALL, Apr. 5, 2013, *available at* http://www.rollcall.com/news/reid_hints_at_using_nuclear_option_on_judges-223635-1.html. In 2013, then-Majority Leader Harry Reid (D-Nevada) warned, "All within the sound of my voice, including my Democratic senators and the Republican senators who I serve with, should understand that we as a body have the power on any given day to change the rules with a simple majority, and I will do that if necessary."

subverts the republican principle of majority rule on which the Constitution is based.

Yet these arguments are dependent on flawed understanding of the Appointments Clause, the doctrine of separation of powers, and the principle of majority rule as it relates to the Constitution. They are not supported by the deliberations of the delegates to the Federal Convention at Philadelphia in 1787 or the ratifying debates and early practice that immediately followed adoption of the Constitution. Moreover, these arguments presume a degree of senatorial deference to the President in the confirmation process that stands in stark contrast to long-standing Senate practice. Indeed, basing the case for eliminating the judicial filibuster on constitutional or republican grounds inadvertently undermines the doctrine of separation of powers and the independence of the judiciary. Doing so also calls into question the legitimacy of other established institutions in the Senate such as the committee system, the agenda-setting function of the majority party, and, ultimately, the legislative filibuster.

While the constitutional and theoretical basis of the case against the filibuster in general has been examined in previous scholarship,[3] this article differs from the existing literature in several important ways. First, it focuses only on arguments against the *judicial* filibuster instead of filibusters of judicial *and* executive nominations, as well as legislative filibusters more generally. In contrast, the primary focus of the existing scholarship has been on the legislative filibuster. These treatments generally assert that the super-majoritarian vote threshold required to end a

[3] Akhil Reed Amar, *Lex Majoris Partis: How the Senate Can End the Filibuster On Any Day By Simple Majority Rule*, 63 DUKE L.J. 1483 (2014) (detailing why the Senate is not limited to eliminating the filibuster with a simple-majority vote at the beginning of a new Congress and how the institution can exercise its rulemaking authority to reduce, or otherwise eliminate, the super-majority vote requirement to end a filibuster at any point in a Congress); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011) (arguing that the filibuster is unconstitutional because it represents, at least in practice, a super-majority vote requirement to pass legislation); Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule is Unconstitutional and What to Do About It*, 55 B. C. L. REV. 39 (2014) [hereinafter *The Filibuster and the Framing*] (arguing that the filibuster is inconsistent with contemporary understandings of legislative practice at the end of the eighteenth century); Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U. L. REV. 1091 (2012) [hereinafter *The Originalist Case*] (making the case that the Constitution's Rules of Proceedings Clause does not permit the Senate to impose a super-majority vote requirement for the passage of legislation and that the filibuster is unconstitutional); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, FACULTY PUBLICATIONS, 21 CONST. COMMENT 445 (2004) (examining the constitutionality of the filibuster); Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28(1) HARV. J.L. & PUB. POL'Y 205 (2004) (reviewing the Senate's history of changing its rules with a simple-majority vote pursuant to the Constitution's Rules of Proceedings Clause); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996) (examining super-majority voting requirements in the House of Representatives and the Senate).

filibuster violates specific provisions of the Constitution, including: the Presentment Clause;[4] the tiebreaking role of the Vice President as Presiding Officer of the Senate;[5] the Quorum Clause;[6] the Senate Composition Clause;[7] and the Appointments Clause.[8] They also contend that the prevailing practice at the time of ratification and the historical practice under the Constitution provide further evidence that the filibuster is unconstitutional. Similarly, scholarship addressing the historical development of the filibuster and the evolution of obstruction in the Senate more generally focuses primarily on the legislative filibuster.[9]

To the extent that the existing literature addresses the question of the judicial filibuster, it does so only in passing.[10] Professor Dan Coenen more accurately reflects the narrow emphasis of existing scholarship on the filibuster when he implicitly refers to judicial filibusters in a brief discussion of the Appointments Clause in a footnote.[11] The common approach has been to indiscriminately apply arguments contending that the legislative filibuster is unconstitutional to judicial filibusters. The lack of a separate examination of whether the judicial filibuster itself is constitutional represents a significant limitation of the existing literature. For example, Coenen asserts that "no scholar has argued—at least in a focused and thorough way—that today's supermajoritarian filibuster system can continue to operate in the confirmation context even if that system is unconstitutional" in the legislative context.[12]

Notwithstanding important arguments in support of the constitutionality of the legislative filibuster, this article considers the case against the judicial filibuster based on original intent. To that end, the following examination advances the understanding of the constitutional and

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[4] U.S. CONST. art. I, § 7, cl. 2.

[5] U.S. CONST. art. I, § 3, cl. 4.

[6] U.S. CONST. art. I, § 5, cl. 1.

[7] U.S. CONST. art. I, § 3, cl. 3.

[8] U.S. CONST. art. II, § 2, cl. 2.

[9] GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE (2010); GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE (2006).

[10] Notable exceptions making the case that the filibuster is a desirable feature of the confirmation process include: Benjamin Eidelson, *The Majoritarian Filibuster*, 122 YALE L.J. 980 (2013) (distinguishing between filibusters in which a Senate minority representing a minority of Americans obstructs the majority representing a majority of Americans and filibusters in which a Senate minority representing a majority of Americans obstructs the majority representing a minority of Americans); Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO. L. REV. 331 (2005) (arguing that "without the filibuster, a President whose party controls the Senate could fill judicial vacancies without any check or balance").

[11] Coenen, *The Originalist Case*, *supra* note 3, at 1099 n.41.

[12] Coenen, *The Filibuster and the Framing*, *supra* note 3, at 45.

normative foundations of the filibuster in the context of judicial nominations. Significantly, doing so draws the focus to the implications of arguments against the constitutionality of such filibusters for the Senate's institutional structure more generally.

This article situates the case against the judicial filibuster within the larger context of the doctrine of separation of powers and the original intent of the Framers. Such an approach is particularly important today given the increase in partisan polarization in American politics and the inter-branch coordination made possible by highly responsible political parties. One consequence of this development has been that it serves to circumvent some of the institutional barriers erected by the Framers to keep tyrannical government, at least as understood in 1787, at bay.

II. APPOINTMENTS CLAUSE

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.[13]

Opponents of the judicial filibuster have interpreted this clause as creating a constitutional obligation to give a President's nominations up-or-down confirmation votes on the Senate floor. For example, former senator and then-majority leader, Trent Lott (R-Mississippi), argued in 2003 that the filibuster stops the Senate from performing its "constitutional responsibility to advice and consent on the president's nominations."[14] Lott asserted that, as a consequence, the judicial filibuster "completely contradicts the intent, spirit, and language of the Constitution."[15] Senator John Cornyn (R-Texas), the Republican Whip in the 114th Congress, flatly asserted in 2005 that judicial filibusters were "unconstitutional filibusters" because they prevented a Senate majority from performing its duty to advise and consent to a President's nomination pursuant to the Appointments Clause.[16]

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[13] U.S. CONST. art. II, § 2, cl. 2.

[14] Allison Stevens, *Judicial Nominations Fight Moves to Senate Rules Panel as Frist Takes on the Filibuster*, CQ WEEKLY, June 7, 2003, at 1375.

[15] *Id.*

[16] Keith Perine, *Senate Soon to Plunge Back Into Controversy Over Confirmation Process*, CQ TODAY (January 3, 2005), *available at* http://www.cq.com/doc/news-1472190?7&search=UDX5g01T.

Embedded in these claims is the mistaken belief that a proper reading of the Appointments Clause stipulates that a President's nominations are entitled to up-or-down confirmation votes on the Senate floor and that the judicial filibuster is therefore unconstitutional because it empowers a minority in the institution to prevent such votes from occurring. Moreover, these claims are premised on the implicit assumption that a certain degree of senatorial deference to the President's judicial nominations is inherent in the Framers' understanding of the Appointments Clause. Yet these claims regarding the judicial filibuster and the proper extent of senatorial deference to the President in the appointment process are not supported by the text of the Constitution, deliberations of the Framers during the Federal Convention, or the ratifying debates and early practice of the new government.

A. Constitutional Considerations

The Constitution contains relatively few provisions regarding the internal operation of the Senate. For example, the Senate Composition Clause sets membership qualifications, term lengths, and gives each state two senators who vote per capita.[17] Article I, section 3, clauses 4 and 5 designate the Vice President as the President of the Senate (i.e., the Presiding Officer) and authorize the Senate to choose a President pro tempore to serve as its Presiding Officer in the Vice President's absence.[18] Additionally, the Presentment Clause establishes a process for considering presidential veto messages.[19]

Of these constitutional provisions, the Rules of Proceedings Clause is the most important for this article's purposes because it gives the Senate plenary power over its rules of parliamentary procedure. The clause explicitly stipulates: "Each House [*of Congress*] may determine the Rules of its Proceedings."[20] With this authority, the Senate establishes both the informal and formal parliamentary rules that govern its proceedings. These rules remain in effect from one Congress to the next according to the concept that the Senate is a continuing body. Rule V codifies the continuing body doctrine. It clearly states, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[21] Rule XXII requires a super-majority vote of

[17] U.S. CONST. art. I, § 3, cls. 1, 3.
[18] U.S. CONST. art. I, § 3, cls. 4–5.
[19] U.S. CONST. art. I, § 7, cl. 2.
[20] U.S. CONST. art. I, § 5, cl. 2.
[21] COMM. ON RULES AND ADMINISTRATION, STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 4 (2007) (Rule V: Suspension and Amendment of the Rules).

two-thirds of the senators present and voting to end debate and proceed to a final vote on proposals to change the Senate's Standing Rules, including rules V and XXII.[22]

Pursuant to the Standing Rules of the Senate, up-or-down confirmation votes on judicial nominations can essentially only be scheduled with the unanimous consent of all senators or through the cloture process in Rule XXII used to end debate (i.e., to overcome a filibuster). Specifically, Rule XXII requires an affirmative vote of "three-fifths of the senators duly chosen and sworn" to invoke cloture, or end debate, on any "measure, motion, or other matter pending before the Senate."[23] In short, a Senate minority of forty-one members may effectively block up-or-down confirmation votes on judicial nominations by voting not to invoke cloture to end debate.

Such behavior, therefore, is entirely consistent with, and made possible by, Rule XXII. Absent a clear constitutional provision stipulating otherwise, such filibusters are thus constitutional pursuant to the Senate's plenary power to determine its own internal rules of procedure under the Rules of Proceedings Clause. As a consequence, judicial filibusters are not unconstitutional, even if they are utilized to purposefully block up-or-down confirmation votes. Nevertheless, as discussed below, opponents of the practice have also argued that judicial filibusters are contrary to the original intent of the Framers, even though they may be technically permissible under the Constitution. They argue that the Appointments Clause is premised on an expectation of senatorial deference to the President's role in the confirmation process.[24] However, an examination of the debates of the Federal Convention below provides evidence that the judicial filibuster is not inconsistent with the original intent of the Constitution in this manner.

B. Original Intent

There is no explicit constitutional mandate for senatorial deference to the President in the Appointments Clause. Moreover, it is difficult to make a case that the Framers implicitly believed that presidents should be entitled to up-or-down votes on the Senate floor to confirm or reject their judicial nominees. First, the Framers were acutely aware of the possibility

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[22] Rule XXII, *supra* note 1, at 16.

[23] *Id.*

[24] See Reid Alan Cox, Tammi Kannar, Allyson Newton, & Evan Rikhye, *Filibusters and the Constitution*, FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES (2003), *available at* http://www.fed-soc.org/publications/detail/filibusters-and-the-constitution; Steven G. Calabresi, *Pirates We Be*, WALL ST. J., May 14, 2003, at A14.

that an executive could use the exclusive power of appointment to secure advantage and influence over the other institutions of government, as well as the people more generally. Such power over appointments was wielded by royal governors during the colonial period and was particularly offensive to those who would eventually support the revolution and occupy positions of leadership in government after independence was won.[25] The manner in which most of the new state constitutions dealt with the appointment power in the years immediately following independence reflected these concerns. The approach most common was to take the exclusive power of appointment away from the executive and to vest it instead with the legislature. In cases where the legislature did not assume the exclusive prerogative to make appointments, it shared the power with the executive. Only Maryland and Pennsylvania allowed the executive to make appointments independent of action by the state legislature in the years after independence.[26] Yet in both cases, a separate council was required to approve of the executive's appointments.[27]

With regard to the government established by the Constitution, the Framers considered four options on where to vest the appointment power during the Federal Convention: Congress; the President; the Senate; or some combination of the President and Senate.[28] For most of the Convention, the Senate was given the exclusive power to appoint judges and major executive branch officials.[29] This was not changed until the end of the Convention, when the delegates shifted the appointment power from the Senate to a joint arrangement where it would be shared between the President and the Senate on a co-equal basis.[30]

Congress was given the exclusive power to appoint the judiciary under the plan proposed by Edmund Randolph (Virginia) on May 29, which would form the basis of the Convention's subsequent deliberations.[31] However, most delegates agreed that this arrangement was suboptimal. For example, James Wilson (Pennsylvania) argued, "Experience shewed the impropriety of such appointmts. by numerous bodies. Intrigue, partiality,

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[25] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 143–50 (1969).

[26] *Id*. at 148-49 n.41.

[27] *Id*.

[28] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 119-26, 233 (Max Farrand ed., 1911); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 40-44, 495, 533, 539 (Max Farrand ed., 1911).

[29] The delegates early on in the Federal Convention gave to the President the exclusive power to appoint to minor offices not otherwise provided for in the Constitution. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 233; *see also* U.S. CONST. art. II, § 2, cl. 2

[30] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 533, 539

[31] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 18–28.

and concealment were the necessary consequences."[32] James Madison (Virginia) concurred, adding that members of the legislature "were not judges of the requisite qualifications."[33] Reflecting this widespread concern, Madison's motion on June 5 to strike appointment by the "National Legislature" and to leave the method of appointment blank, to be decided later, passed by a vote of eight states to two.[34]

Most of the delegates also opposed giving the appointment power to the President exclusively. John Rutledge (South Carolina) argued that he "was by no means disposed to grant so great a power to any single person" because it would look to the people like they were establishing a monarchy. [35] Similarly, George Mason (Virginia) "considered the appointment by the Executive as a dangerous prerogative" because it could "give him an influence over the Judiciary department itself."[36] Gunning Bedford, Jr. (Delaware) argued that granting the President an exclusive power over appointments would upend the tenuous balance that the delegates were trying to maintain between the interests of the small and large states because "it would put it in his [the President's] power to gain over the larger States, by gratifying them with a preference of their Citizens" for appointments.[37]

Only Wilson spoke out forcefully, and specifically, in support of granting the appointment power to the President exclusively, arguing, "good laws are of no affect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute."[38] The plan proposed on June 15 by William Patterson of New Jersey similarly granted the exclusive power of appointment to the executive.[39] Yet the delegates decided not to proceed to the consideration of Patterson's proposal.[40] Wilson's effort on July 18 to amend the Virginia Plan to give the executive the sole power of appointment suffered a similar

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[32] *Id.* at 119.

[33] *Id.* at 120.

[34] *See Id.* at 116. States voting in support of the motion were Massachusetts, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and Georgia. Connecticut and South Carolina opposed the motion. Madison's notes include New Jersey as voting in support of the motion, making the total vote nine states to two. However, the notes of Robert Yates (New York) support the official Journal's count of eight states to two. *See id.* at 126

[35] *Id.* at 119.

[36] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 83.

[37] *Id.* at 43.

[38] *Id.* at 538–539.

[39] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28 at 244.

[40] *Id.* at 313.

fate; the delegates rejected Wilson's proposal by a vote of two states to six.[41]

While Madison did not support vesting the power of appointment in Congress as a whole, he also opposed granting such power solely to the President. As an alternative, he was instead:

> inclined to give it to the Senatorial branch, as numerous eno' to be confided in- as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments.[42]

It is important to note that Madison distinguished between appointment by Congress and senatorial appointment. He acknowledged that the problems inherent in legislative appointment were less likely to plague appointment by the Senate. To the contrary, the Senate, "as a less numerous and more select body, would be more competent judges, and which was sufficiently numerous to justify confidence in them."[43] The logical implication of this argument is that lodging the power of appointment in too small a number of people, or giving it to one individual, would not be sufficient to instill confidence in the appointment process more generally.[44]

Other delegates supported senatorial appointment for different reasons. Luther Martin (Maryland) contended that the method would help ensure that those nominated would come from a wider geographic area. Martin asserted that "[b]eing taken from all the States it [*the Senate*] wd. be best informed of characters & most capable of making a fit choice."[45] Additionally, some feared that the President, as one individual, could more easily be persuaded to appoint flawed judges. As a consequence, Roger Sherman (Connecticut) "thought there would be a better security for a proper choice in the Senate than in the Executive."[46]

The delegates who preferred to give Congress the exclusive power to appoint supported senatorial appointment as the next best outcome.[47]

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[41] Only Massachusetts and Pennsylvania voted in support of Wilson's motion. Connecticut, Delaware, Maryland, Virginia, North Carolina, and South Carolina opposed the motion. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 37, 40.

[42] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 120.

[43] *Id.* at 233.

[44] *Id.*

[45] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 41.

[46] *Id.* at 43.

[47] For example, Charles Pinckney (South Carolina) and Sherman (Connecticut) were strong proponents of congressional appointment, as evidenced in the vote on Madison's motion to strike

Similarly, those few delegates who preferred presidential appointment also supported senatorial appointment as the next best outcome. The latter group viewed senatorial appointment as preferable to granting the appointment power to Congress as a whole.[48] Reflecting this broad coalition, exclusive senatorial appointment was adopted unanimously on June 13 in the Committee of the Whole.[49] This arrangement was subsequently approved by the Convention on July 21 on a vote of six states to three.[50] It would remain the method of appointment until September 4 when the Committee of Eleven altered the Appointments Clause to give the President the power to nominate and appoint officers and judges by and with the advice and consent of the Senate.[51]

Nearly all of the delegates supported this dividing of the power of appointment between the Senate and the President in lieu of their preferred outcome if such outcomes could not pass. Alexander Hamilton (New York) first suggested this arrangement on June 5.[52] According to the Convention notes taken by William Pierce (Georgia), Hamilton "suggested the idea of the Executive's appointing or nominating the Judges to the Senate which should have the right of rejecting or approving" immediately after Madison proposed senatorial appointment.[53] Yet according to Pierce's notes, Hamilton does not explicitly stipulate that Senate rejection of a nomination can *only* be expressed via a failed confirmation vote on the Senate floor. Rather, Hamilton gives meaning to "rejecting" by juxtaposing it to "approving." The opposite of approving is not approving. This article argues, therefore, the Senate may fail to approve a President's nomination by voting to reject the nomination or by simply not voting at all.

On July 18, the Convention narrowly defeated a motion by Nathaniel Gorham (Massachusetts) that would have essentially codified Hamilton's proposition.[54] While Gorham supported senatorial appointment over that by the Congress, he "thought even that branch too numerous, and too little

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appointment by the "National Legislature" on June 5. Only South Carolina and Connecticut voted against the motion. Yet South Carolina and Connecticut voted in support of senatorial appointment. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 44.

[48] *Id*. at 40–44.

[49] *Id*. at 233.

[50] Connecticut, Delaware, Maryland, North Carolina, South Carolina, and Georgia voted in support. Massachusetts, Pennsylvania, and Virginia opposed. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 72.

[51] *Id.* at 493–504.

[52] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 128.

[53] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 493–504.

[54] *See id.* at 40. Gorham's motion failed on a tie vote. States voting in favor of the motion included: Massachusetts, Pennsylvania, Maryland, and Virginia. States voting against the motion included: Connecticut, Delaware, North Carolina, and South Carolina.

personally responsible, to ensure a good choice."[55] As such, he "suggested that the Judges be appointed by the Execuve. with the advice and consent of the 2d. branch, in the mode prescribed by the constitution of Masts."[56] The Convention unanimously approved a similar compromise on September 7.[57]

Wilson's critique of this final arrangement speaks to the Framers' shared understanding of the Appointments Clause at the time of its adoption. Specifically, Wilson argued that "[a]ccording to the plan as it now stands, the President will not be the man of the people as he ought to be, but the Minion of the Senate. He cannot even appoint a tide-waiter without the Senate . . . ."[58] Mason attributed one of the reasons for his opposition to the Constitution to the new Appointments Clause, a flaw of which he described as "the improper power of the Senate in the appointment of public officers."[59] Importantly, none of the delegates present challenged these descriptions of the Senate's role in the confirmation process. All accepted that the Senate's role was to provide a check on the President's ability to solely determine the composition of the judiciary.[60] Most delegates simply viewed the check as beneficial, whereas Wilson and Mason viewed it as harmful. For example, Gouverneur Morris (Pennsylvania) argued, "that as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[61]

While the Constitution ultimately granted the power to nominate to the President exclusively, it simultaneously required the Senate to confirm those so nominated. In short, the Appointments Clause required both presidential and senatorial action. Importantly, this article argues that the Constitution envisions the President and Senate formally exercising that power jointly, yet independently. Even Wilson, the biggest proponent of presidential appointment at the Convention, acknowledged that under the Constitution the President could not act without the Senate and that the

[55] *Id.* at 41.
[56] *Id.*
[57] *Id.* at 533.
[58] *Id.* at 523.
[59] *Id.* at 639. It is important to note that while Mason opposed the compromise on the grounds that it involved the Senate in the performance of the executive's duties, he did not support granting the executive the exclusive power of appointment. Instead, he proposed the establishment of a Privy Council to advise the President on appointments, the members of which would be chosen by the Senate. *See id.* at 537.
[60] *Id*. at 539. See also *id*. at 40–44.
[61] *Id.* at 539.

President could not require senatorial concurrence. Wilson spoke to this understanding during the Pennsylvania ratifying convention:

> With regard to the appointment of officers, the President must nominate before they can vote. So that if the powers of either branch are perverted, it must be with the approbation of some one of the other branches of government: thus checked on one side, they can do no one act of themselves.[62]

Wilson thus acknowledged that the Senate may choose not to confirm the President's nominee in that the ability to choose logically follows from the Senate's co-equal role in the process. Wilson limited his remarks to simply saying that the President's nominees cannot be confirmed without the approbation of the Senate. Importantly, Wilson did not explicitly acknowledge that the President's nominees are entitled to a confirmation vote in the Senate.

Delegates who opposed an exclusive presidential appointment power naturally echoed Wilson's understanding of the Senate's joint role in the appointment process. For example, Sherman was explicit about the Framers' opposition to an unchecked presidential appointment power in a July 1789 letter to John Adams: "Wherever the chief magistrate may appoint to office without control, his government may become absolute, or at least aggressive; therefore the concurrence of the senate is made requisite by our constitution."[63]

Finally, it can be inferred from the Framers' rejection of Madison's proposal during the Federal Convention to explicitly require Senate action to reject a presidential nomination that the Framers did not envision the Senate having a subordinate role in the appointment process and that the President's nominees were not intended to be guaranteed an up-or-down vote in the Senate. Specifically, Madison proposed on July 18, "Judges shall be nominated by the Executive and such nomination shall become an appointment if not disagreed to within [*blank*] days by two thirds of the second branch of the Legislature."[64] After debate on his proposal revealed significant concerns among the delegates, Madison acknowledged that he was "not anxious that 2/3 should be necessary to disagree to a nomination" and that, therefore, he was willing to modify his original proposal in order

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[62] 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 162 (Max Farrand ed., 1911).
[63] *Id.* at 358.
[64] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 38.

to eliminate the higher threshold requirement.[65] However, Madison did not remove the requirement that the Senate act to reject a nomination. The provision stipulating that the President's nominations "shall become an appointment if not disagreed to" remained in his proposal. Madison thus maintained the disproportionate relationship between the President and the Senate regarding appointments in his original proposal.[66] Significantly, this proposal explicitly requiring Senate action to disapprove a nomination was eventually defeated on a vote of three states to six.[67]

The Convention approved the underlying method of senatorial appointment immediately following the defeat of Madison's motion. Interestingly, the states voted the same way on the two questions, simply in the inverse.[68] The three states that supported Madison's proposal opposed senatorial appointment on the subsequent vote.[69] By extension, the six states that opposed Madison's proposal to give disproportionate power to the President over appointments supported the underlying method of senatorial appointment because it preserved the Senate's discretion.[70]

In short, Madison's proposal allows a better understanding of the meaning of the subsequent vote to give the appointment power to the Senate. Because it clearly created a presumption of deference to the President's choice on the part of the Senate by requiring action on the President's nominations in order to reject them, it is reasonable to conclude that the six states that opposed the motion subsequently supported senatorial appointment because the institution's role would not be circumscribed in the same manner. If the Senate was not required by the Constitution to act, and if the Constitution denied the President independent authority to confirm his nominations absent such action, it then logically follows that the Senate has the constitutional authority not to act in addition to the ability to reject a presidential nomination outright on an up-or-down confirmation vote.

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[65] *Id.* at 82.

[66] *Id.* at 38.

[67] States supporting Madison's proposal included: Massachusetts, Pennsylvania, and Virginia. States opposing the proposal included: Connecticut, Delaware, Maryland, North Carolina, South Carolina, and Georgia. *See id.* at 72.

[68] *Id.* at 72, 83. Massachusetts, Pennsylvania, and Virginia voted in support of Madison's motion and against the proposal reported by the Committee of the whole House that "the judges of which shall be appointed by the second Branch of the national Legislature." *Id.* at 72. Connecticut, Delaware, Maryland, North Carolina, South Carolina, and Georgia opposed Madison's motion and supported the proposal reported by the Committee of the whole House.

[69] *Id.* at 72.

[70] *Id.*

C. Ratification & Early Practice

The Appointments Clause was not much discussed during the state ratifying conventions. However, one anti-federalist, writing under the pseudonym "Federal Farmer," described the clause in a manner consistent with the Framers' understanding.[71]

> The executive is, in fact, the president *and* senate in all transactions of any importance: the president is connected with, or tied to the senate; he may always act with the senate, but never can effectually counteract its views: The president can appoint no officer, civil or military, who shall not be agreeable to the senate; and the presumption is, that the will of so important a body will not be very easily controuled, and that it will exercise its powers with great address.[72]

The independent and co-equal role that the Framers intended the Senate to play in the confirmation process is also acknowledged in the *Federalist*. For example, Alexander Hamilton wrote in *Federalist* No. 67 "the ordinary power of appointment is confined to the President and Senate *jointly*."[73] In *Federalist* No. 69, Hamilton delineated the Senate's role more clearly by juxtaposing the President's role in the confirmation process with the much stronger role played by the Governor of New York and the King of Great Britain. In New York, the governor could act independently to confirm his nominees if the Council, the body charged with confirming those nominated by the governor, was divided.[74] In contrast, Hamilton observed that in the new government established by the Constitution, "if the Senate should be divided, no appointment could be made."[75] It is important to note that Hamilton used the term "divided," which could logically mean a number of things including inaction. It is not clear that "divided" could

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[71] The identity of *Federal Farmer* is unknown. However, he is believed to be either Richard Henry Lee of Virginia or Melancton Smith of New York. The letters were addressed to "The Republican," who is believed to be George Clinton, the Governor of New York. Letters From the Federal Farmer to the Republican (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 234, 237 (Herbert J. Storing ed., 1981).

[72] *Id.* at 237 (emphasis added).

[73] THE FEDERALIST NO. 67, at 342 (Alexander Hamilton) (Ian Shapiro ed., 2009). The fact that Hamilton is discussing the president's recess appointment power does not alter the substantive meaning of his comment that "the ordinary power of appointment is confined to the president and Senate jointly." *Id*.

[74] THE FEDERALIST NO. 69, at 352 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[75] *Id*.

logically mean that the Senate rejected a President's nomination on an up-or-down confirmation vote that resulted in a tie. In such a scenario, the Vice President would be allowed to cast the deciding vote and would almost certainly be expected to do so in support of confirming the President's nominee.

Regardless, the underlying meaning of the clause remains the same: the President has no independent authority or constitutional obligation under the Appointments Clause to confirm his nominees absent Senate action. In contrast, the Framers clearly specified when the President could act independently to appoint nominees. The Recess Appointments Clause gives the President the authority to act independently to "fill up all Vacancies that may happen during the Recess of the Senate."[76] Thus, Hamilton refers to the President as having a "concurrent authority in appointing to offices," along with the Senate.[77] This is in stark contrast to the King of Great Britain, who was "the sole author of all appointments."[78]

In addition to providing helpful context with which to make better sense of the Senate's role in the confirmation process, *The Federalist* also provided an argument for why the President's authority to make judicial appointments should be circumscribed in the first place. Specifically, Hamilton argued in *Federalist* No. 76 that vesting the sole power of nomination *and* appointment in one person, or the President alone, would be harmful.[79] Such harm could be avoided, however, by granting a co-equal role in the appointment process to a "different and independent body."[80] Hamilton's use of the word "independent" here further signals that the Senate is free to choose the action it will take. Inherent in this choice is the ability to decide not to take action.

Notwithstanding this part of *Federalist* No. 76, opponents of the judicial filibuster often cite other passages in the essay where Hamilton described the Senate's role in the Appointments Clause as having a "powerful, though, in general, a silent operation."[81] Yet such a description does not, in and of itself, support the claim that the Senate ought to guarantee the President's nominations up-or-down confirmation votes. Rather, Hamilton simply reiterates his understanding that the Senate has a role in the confirmation process and that it is a powerful one. This power is

[76] U.S. CONST. art. II, § 2, cl. 3.
[77] THE FEDERALIST NO. 69, *supra* note 74, at 353 (Alexander Hamilton).
[78] *Id.*
[79] THE FEDERALIST NO. 76, at 385 (Alexander Hamilton) (Ian Shapiro ed., 2009).
[80] *Id.*
[81] *Id.*

not qualified in any way by an implicit presumption of deference to the President. The Senate *may* certainly abuse that power. Yet Hamilton acknowledged the possibility of such abuse in *Federalist* No. 76 and still refrained from arguing that the Senate should be prohibited in some way from abusing its power in the first place. In other words, abuse of the system is not synonymous with such behavior being unconstitutional.

Significantly, Madison affirmed this view during his presidency when he stood to benefit from the presumption of senatorial deference in the confirmation process. In an 1813 letter to the Senate regarding the Appointments Clause, Madison remarked "that the Executive and Senate, in the cases of appointments to office, and of treaties, are to be considered as independent and co-ordinate with each other."[82] Here, Madison uses the term coordinate to signify equality in rank between the President and Senate with respect to the confirmation process, much in the same way the House and Senate are coordinate houses of Congress with respect to the legislative process. According to Madison:

> The relation between the Senate and House of Representatives, in whom Legislative power is concurrently vested, is sufficiently analogous to illustrate that between the Executive and Senate in making appointments and treaties. The two Houses are in like manner independent of and co-ordinate with each other . . . .[83]

Just as the Senate has no obligation to vote on each piece of legislation that passes the House, there is no obligation for it to vote on every presidential nomination.

III. SEPARATION OF POWERS

Arguments against the judicial filibuster based on appeals to the Constitution are difficult to sustain absent an explicit constitutional mandate for senatorial deference to the President in the Appointments Clause or an implicit belief on the part of the Framers that the President's nominations are entitled to up-or-down confirmation votes on the Senate

[82] James Madison, PRESIDENT MADISON DECLINES A CONFERENCE WITH A COMMITTEE OF THE SENATE ON THE NOMINATING OF JONATHAN RUSSELL TO BE MINISTER TO SWEDEN, S. DOC. NO. 347 (1st Sess. 1813).

[83] *Id.*

floor. Nevertheless, opponents of the judicial filibuster also contend that the practice undermines the constitutional doctrine of separation of powers. For example, one witness testifying before a 2003 Senate Judiciary Committee hearing on the judicial filibuster flatly asserted, "[T]he purpose of the filibuster is, in fact, to undermine a central component of separation of powers . . . ."[84] Similarly, President George Bush argued that same year that such filibusters threaten "judicial independence."[85] In testimony before the Senate Judiciary Committee, Steven Calabresi, a law professor at Northwestern University Law School, listed two specific ways in which judicial filibusters undermine the doctrine of separation of powers. First, they "weaken the power of the President."[86] Second, they "undermine judicial independence, by giving a minority of Senators, led by special interest groups, a veto over who can become a judge."[87]

Yet these arguments are dependent on a flawed understanding of the doctrine of separation of powers in general and how it relates to the composition and independence of the judiciary in particular. In contrast to these claims, diluting the Senate's role in the confirmation process instead undermines the doctrine of separation of powers as understood by the Framers. It does so by necessarily encroaching upon judicial independence and weakening the Senate's ability to check the President, both of which are critical to maintaining the requisite separation in the American constitutional system.

A. Separation of Powers in Context

One of the Framers' principal concerns was preventing the formation of a tyrannical government. Indeed, this concern animated nearly all of their debates on the structure, role, and powers of the new national government during the Federal Convention. Madison clearly defined what constituted a tyrannical government for the Framers in *Federalist* No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of

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[84] *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent, Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Comm. on the Judiciary*, 108th Cong., 26 (2003) (statement of Bruce Fein, Esq., Fein & Fein).

[85] Jennifer A. Dlouhy, *A New Level of Acrimony in Parties' War of Procedure*, CQ WEEKLY, May 10, 2003, at 1079.

[86] *Judicial Nominations, Filibusters, and the Constitution*, *supra* note 84, at 33 (statement of Steven Calabresi, Professor of Law, Northwestern University Law School).

[87] *Id*.

tyranny."[88] The Framers' solution to this problem, their method of preventing tyrannical government, was the doctrine of separation of powers.

The Constitution established three distinct branches of government, each of which corresponded to an inherent function of government. In *Federalist* No. 9, Hamilton acknowledged that the doctrine of separation of powers was central to overcoming the problems that had previously plagued the republican form of government.[89] With ratification of the Constitution, Hamilton argued, "the enlightened friends to liberty" had reason to hope that the republican form of government may finally be sustainable because "[t]he science of politics . . . has received great improvement."[90]

> The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior . . . these are wholly new discoveries . . . They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.[91]

In *Federalist* No. 49, Madison described this arrangement as "several departments being perfectly co-ordinate by the terms of their common commission" as stipulated in the "constitutional charter."[92] Separation here does not mean that all three branches are equally powerful. Rather, it means that they are of the same rank.

The doctrine of separation of powers requires that the three departments of government be separate and independent from each other. Indeed, separation was perfunctory without independence. This arrangement is articulated in *Federalist* No. 51.

> In order to lay a due foundation for the separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be

[88] THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).
[89] THE FEDERALIST NO. 9, at 43 (Alexander Hamilton) (Ian Shapiro ed., 2009).
[90] *Id.*
[91] *Id.*
[92] THE FEDERALIST NO. 49, at 256-257 (James Madison) (Ian Shapiro ed., 2009).

> essential to the preservation of liberty, it is evident that each department should have a will of its own . . . .[93]

Consequently, each department "should have as little agency as possible in the appointment of the members of the others."[94] In *Federalist* No. 47, Madison observed that the British Constitution was deficient in this respect because the executive, or Crown, had an undue influence over the composition of the judiciary: "[a]ll the members of the judiciary department are appointed by him.[95] Madison subsequently quoted Montesquieu in support of his claim that there could be no liberty "if the power of judging be not separated from the legislative and executive powers."[96] During the Convention, Madison similarly "considered the appointment by the Executive as a dangerous prerogative. It might give him an influence over the Judiciary department itself."[97] The implication of Madison's reasoning is "that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people."[98]

Yet there are exceptions to this principle, particularly with regard to judicial appointments. For Madison, there were two reasons why judicial appointments should be governed by a different process. First, the judiciary was intended to be an apolitical branch of the national government.[99] Selecting judges via popular vote would make it an inherently political branch.[100] Second, the nature of the role to be played by the judiciary required "peculiar qualifications" that may not be best secured by popular election.[101]

Viewed from this perspective, the Appointments Clause, by creating a joint presidential-senatorial role in the confirmation process, preserves judicial independence and the apolitical nature of the judiciary while simultaneously promoting the requisite qualifications in those nominated and confirmed. It does so by avoiding strict executive or legislative control over who is appointed to serve on the federal bench.[102] In contrast, the

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[93] THE FEDERALIST NO. 51, at 263 (James Madison) (Ian Shapiro ed., 2009).
[94] *Id.*
[95] THE FEDERALIST NO. 47, *supra* note 88, at 246 (James Madison).
[96] *Id.*
[97] 2 THE RECORDS OF THE FEDERAL CONVENTION of 1787, *supra* note 28, at 83.
[98] THE FEDERALIST NO. 51, *supra* note 93, at 263 (James Madison).
[99] *Id.* at 264.
[100] *Id.*
[101] *Id.*
[102] Ann Stuart Diamond, *The Zenith of Separation of Powers Theory: The Federal Convention of 1787*, 8 PUBLIUS 45, 58 (1978).

executive would wield disproportionate influence over the composition of the judiciary if the Senate's role in the Appointments Clause were subordinate and deferential to the President's, as argued by opponents of the judicial filibuster.[103] As a consequence, the independence of the judiciary would be significantly diminished if the Senate structured its internal rules of procedure in such a way as to facilitate the confirmation of those nominees, or otherwise guaranteeing them up-or-down confirmation votes on the Senate floor. Viewed from this perspective, the doctrine of separation of powers should be interpreted as necessarily circumscribing the President's decision rights in the confirmation process by granting the Senate a co-equal role in order to secure qualified nominees without jeopardizing the independence of the judiciary.

One response is that, while the Senate is a co-equal and independent branch in the confirmation process, a minority of senators ought not to have the ability to block a majority of the institution from acting. In short, opponents of the judicial filibuster may respond that there is nothing implicit in eliminating the filibuster that would inevitably make the Senate overly deferential to the President. By extension, eliminating the filibuster would not threaten the independence of the judiciary per se because doing so would not automatically give the President disproportionate influence over its composition. Rather, eliminating the filibuster simply empowers a Senate majority to vote on nominations over a minority's objections.

While it is true that empowering a majority vis-à-vis the minority does not, in itself, guarantee excessive senatorial deference to the President in the confirmation process, the relationship must be viewed in context of the current environment in order to fully grasp the implications of such arguments. The key consideration is the question of the spirit animating the Senate majority. In the current era of partisan polarization and homogenous parties, Senate majorities are unlikely to serve as an effective check on a President of their own party in the confirmation process. In short, the partisan spirit that characterizes so much of congressional deliberations today also facilitates increased deference to the President when the same political party controls both the presidency and the Senate.

B. Checks & Balances

Once separation has been created in principle, the question becomes how best to maintain the independence on which it depends. For this, the Framers relied on the concept of institutional checks on the political

[103] *See supra* note 2.

branches of government.[104] In contrast to the normative basis of the doctrine of separation of powers, however, the concept of checks and balances expressly requires the co-mingling of institutional powers. In short, a branch of government cannot effectively resist encroachments on its power by another branch simply by exercising power it already possesses. Rather, a branch of government needs additional powers not inherently associated with its purpose in order to defend itself.[105] Madison spoke to this understanding during the Federal Convention's debate over the Council of Revision.

> If a Constitutional discrimination of the departments on paper were a sufficient security to each agst. [sic] encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate and distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate.[106]

This argument would form the foundation of *Federalist* No. 51, in which Madison argued that "the great security against a gradual concentration of the several powers in the same department, consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[107] The "necessary constitutional means" include the President's veto and the super-majoritarian vote requirement to override that decision in the House and Senate.[108] This co-mingling of the legislative function with the executive branch explicitly violates separation of powers. Yet the President would be unable to resist legislative intrusion into his sphere of responsibility without such a means of self-defense.

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[104] Diamond, *supra* note 102, at 46.
[105] *Id*. at 63–64.
[106] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 77.
[107] THE FEDERALIST NO. 51, *supra* note 93, at 264 (James Madison).
[108] *Id.*

In the same way, the Appointments Clause gives to the Senate a share of the executive's power. Just as the President's discretion to exercise his veto power is not circumscribed in any way other than that clearly stipulated in the Constitution, so too is the Senate free to determine how it will exercise the power delegated to it to confirm those nominated by the President. When viewed from this perspective, it makes more sense why the Framers placed the Veto Clause in Article I of the Constitution,[109] which established the legislative branch, and the Appointments Clause in Article II, which established the executive branch. The power, or check, is located in the article to which its function most closely aligns.

Significantly, the judiciary was not originally given a power with which to check the elected, or political, branches in the Constitution. Instead, the Framers secured its independence by granting its members permanent tenure and requiring the joint concurrence of both the President and the Senate to fill vacancies.[110] The Framers rejected proposals during the Convention that would have given the judiciary such a check via its participation in the Council of Revision.[111] As a consequence of the constitutional architecture designed in Philadelphia in 1787, the doctrine of judicial review was not firmly entrenched until the Supreme Court's ruling in *Marbury v. Madison* in 1803.[112]

Marbury v. Madison had significant implications for the Senate's role in the confirmation process because the decision had the effect of making the Supreme Court the final arbiter of legislation in the American political system.[113] In a sense, the Senate's role in the confirmation process became more important after the landmark decision because it was now needed to defend the institution against encroachments of the judiciary into the legislative sphere in addition to those of the executive. This does not contradict the observation that the Framers were concerned about a legislative despotism. Madison accurately reflected a common fear of the Framers in Federalist No. 48 that the legislature would eventually "draw[] all power into its impetuous vortex."[114] Yet such fears did not necessarily contradict their common belief that the three powers of government should be kept separate in order to prevent tyranny. Indeed, Madison goes on to write in *Federalist* No. 48 that the delegates at the Federal Convention

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[109] U.S. CONST. art. I, § 7, cls. 2–3.

[110] U.S. CONST. art. III, § 1; U.S. CONST. art. II, § 2, cl. 2.

[111] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 104, 139–40; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 28, at 73–80, 298.

[112] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[113] *See id.*

[114] THE FEDERALIST NO. 48, at 252 (James Madison) (Ian Shapiro ed., 2009).

based the Constitution on a simple foundational belief "that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time."[115] Viewed from this perspective, it becomes clear that undue deference to the President in the confirmation process would further shift the system away from legislative supremacy over powers that are inherently legislative in nature and would indirectly give the President, through the appointment of sympathetic judges, an undue influence over the legislative sphere.

Given these considerations, it is clear that the Appointments Clause permits a more active role for the Senate than routine deference to the President. To suggest otherwise presents significant complications for the doctrine of separation of powers and the idea of coordinate branches of government inherent in *Federalist* No. 47 and No. 51.[116] Under the Constitution, the judiciary is not subordinate to the executive. Rather, it is a coordinate branch of government, along with the executive and legislature. Indeed, the Supreme Court may even be called on to mediate conflicts between the President and Congress. The Court cannot perform this role if one branch or the other has a disproportionate influence over its composition. Put another way, the judiciary is unlikely to exercise much of a check on tyrannical government, as understood by the Framers, if the President nominates candidates sympathetic to his views and the Senate simply defers to his choice.

IV. REPUBLICANISM

Absent an explicit constitutional bar, judicial filibusters are clearly permitted under the Constitution pursuant to the Rules of Proceedings Clause. The Senate has plenary power over the manner by which it processes its work so long as its rules do not violate other explicit constitutional provisions.[117] Yet notwithstanding this, Coenen argues that the filibuster is unconstitutional because it undermines the constitutional mandate of legislative majoritarianism.[118] Coenen overcomes the challenge to his argument posed by the clear text of the Constitution by claiming that the super-majoritarian vote threshold to end debate on a question is

[115] *Id.* at 254.

[116] THE FEDERALIST NO. 47, *supra* note 88, at 245–47 (James Madison); THE FEDERALIST NO. 51, *supra* note 93, at 263–64 (James Madison).

[117] United States v. Ballin, 144 U.S. 1 (1892).

[118] Coenen, *The Originalist Case*, *supra* note 3, at 1095–96.

equivalent, in practice, to a super-majoritarian vote requirement for final passage of that question.[119] While this argument is premised on an analysis of the Senate's legislative functions, Coenen argues that a broader reading of the constitutional text and history argues against distinguishing confirmation votes from legislative business.[120]

Notwithstanding the difficulties presented by such an interpretation, Coenen's argument that the filibuster is unconstitutional because it prevents, in practice, a majority from acting, is undermined by his own logic. Implicit in his claim is the understanding that internal debate rules made pursuant to the Rules of Proceeding Clause are constitutional as long as they do not impede a majority from acting on the underlying question at some point. Yet his analysis ignores Rule XIX of the Standing Rules of the Senate, which states, "No Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate."[121] By strictly enforcing this rule, Senate majorities can limit the ability of individual senators, or the minority party more broadly, to block up-or-down confirmation votes on judicial nominations. Doing so simply requires the Senate to remain in the same legislative day until the filibustering members have exhausted their ability to speak on the nomination. This is the point at which those members who are committed to blocking an up-or-down confirmation vote on the Senate floor have given the two speeches allotted to them on the question under the Senate's rules. At that point, the Presiding Officer may put the question (i.e., call for a vote) on confirmation.[122] Confirmation of

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[119] *Id*. at 1117.

[120] Coenen, *The Filibuster and the Framing*, *supra* note 3, at 45.

[121] COMM. ON RULES AND ADMINISTRATION, STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 14 (2007) (Rule XIX: Debate). Paragraph 1(a) of Rule XIX states, "No Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate." Senate precedent defines legislative day as a "day, which continues from the beginning of a day's session following an adjournment until another adjournment." FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 714–15 (1992). A legislative day "is not effected in any way by a recess of the Senate." *Id.* A legislative day only ends with the Senate's adjournment. *Id.* According to Senate precedent, "A Senator is not entitled to speak more than twice in the same legislative day on the same question and when called to order during his third speech will lose his right to the floor." *Id.* at 782.While the clear text of Rule XIX provides Senate majorities with a means to overcome a judicial filibuster, the Senate may technically have to change its precedents governing the application of the rule. The Senate's precedents can be legitimately changed in a manner consistent with its Standing Rules by a simple-majority vote as long as doing so does not change, circumvent, contradict, or otherwise ignore the specific provisions of those rules.

[122] RIDDICK & FRUMIN, *supra* note 121, at 782. With the exception of the cloture process, there is no Senate rule to end debate and vote on the pending question. Under the Senate's rules and precedents, the Presiding Officer may put the question (i.e., call for a vote) when no senator seeks recognition. Rule XIX limits the number of times a member may speak on the Senate floor on any given question. "There is no motion in the Senate to bring a matter to a vote. In the absence of either cloture or a statutory

the nominee is a simple-majority vote. In sum, each senator may only speak twice in the same legislative day on any one question. Once a senator has given two speeches, that member may not speak again. The Senate votes when there are no senators on the floor who wish to and may speak.[123] Thus, it cannot be said that the judicial filibuster violates the constitutional mandate of legislative majoritarianism as Coenen claims. The Senate is thus free to require a super-majority vote to end debate on presidential nominations if it so chooses, even if the effect of such a provision is that those nominated are denied up-or-down confirmation votes on the Senate floor.

Notwithstanding Rule XIX and the ability of a Senate majority to overcome obstruction of a presidential nomination, critics of the judicial filibuster have also attempted to justify their efforts to end the practice with appeals to the theory of republicanism more broadly. Specifically, they have argued that Senate rules allowing a minority to block confirmation votes subvert the republican principle of majority rule and should be overturned, by a simple-majority vote in violation of those rules if necessary. Reflecting this view, Senator Cornyn argued in 2005 that the nuclear option should more appropriately be termed the "Majority Rules Option."[124] John Eastman, Professor of Law at Chapman University School of Law and Director of the Center for Constitutional Jurisprudence, testified before the Senate Judiciary Committee in 2003: "The use of the filibuster for dilatory purposes is particularly troubling in the context of the

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limitation of debate or a unanimous consent agreement, debate may continue indefinitely if there is a Senator or group of Senators who wish to exercise the right of debate." RIDDICK & FRUMIN, *supra* note 121, at 717. "As long as a Senator has the floor, the Presiding Officer may not put the pending question to a vote. But when a Senator yields the floor and no other Senator seeks recognition, and there is no order of the Senate to the contrary, the Presiding Officer must put the pending question to a vote." *Id*. at 716. Rule XIX, *supra* note 121, at 14. Rule XIX, paragraph 4 stipulates, "If any Senator, speaking or otherwise, in the opinion of the Presiding Officer transgresses the rules of the Senate the Presiding Officer shall, either on his own motion or at the request of any other Senator, call him to order; and when a Senator shall be called to order he shall take his seat, and may not proceed without leave of the Senate."

[123] RIDDICK & FRUMIN, *supra* note 121, at 783. According to Senate precedents, "The two speech rule requires not a mechanical test, but the application of the rule of reason." *See id*. at 782–83. Precedents define floor actions that do not constitute speeches for the purposes of the two-speech rule. Specifically, the Senate determined by vote in 1986 that the following procedural motions and requests do not constitute speeches for the purposes of enforcing the two speech rule: parliamentary inquiries, appeals from rulings of the Chair, points of order, suggesting the absence of a quorum, withdrawal of appeals, requests for the yeas and nays, requests for a division vote, requests for the reading of amendments, and requests for division of amendments. *See* CONG. REC. 101-2 (1990), at 17980–81. The Senate has also determined by precedent that the two-speech rule does not apply when the Senate is operating under cloture.

[124] Daphne Retter, *'Nuclear Option' By Any Other Name Still Fighting Words in Senate*, CQ TODAY, (Mar. 15, 2005, 11:00 PM), http://www.cq.com/doc/news-1575657?4&search=awPCq0NM.

judicial confirmation process" because it "thwarts . . . the majority in the Senate and the people who elected that majority."[125] Similarly, former Senator Tom Harkin (D-Iowa) asserted, "issues of public policy should be decided at the ballot box, not by manipulation of arcane procedural rules."[126] Professor Eastman argued that judicial filibusters thwart majority rule because they prevent the President, who is chosen by the majority of the nation, from performing the primary role in the confirmation process by appointing judges that reflect the political views of the country. As a consequence, according to Eastman, "over time, the electorate, by choosing Presidents, can have an impact on the outlook of the judiciary."[127] Eastman continued:

> To assign to this body [*the Senate*] a role that would guarantee that that cannot happen, even after the president has been elected and a majority in this body has expressed their willingness to confirm his nominees, is in a sense to thwart, not just the majority of this body, but the majority of the people in the Nation as a whole.[128]

In his opening statement at the 2003 Judiciary Committee hearing on the judicial filibuster, Senator Cornyn quoted Hamilton in *Federalist* No. 22: "The fundamental maxim of republican government . . . requires that the sense of the majority should prevail."[129]

A. Majority Rule and the Constitution

The indictment of the judicial filibuster on republican grounds derives its legitimacy from the assumption that the "Constitution was written to establish majority rule."[130] Yet this assumption is plainly contradicted by considerable counter-majoritarian features of the Constitution, some of which are central to the Appointments Clause—such as the role of the

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[125] *Judicial Nominations, Filibusters, and the Constitution, supra* note 84, at 22 (statement of John Eastman, Professor of Law, Chapman University School of Law & Director, Center for Constitutional Jurisprudence).

[126] Niels Lesniewski, *Reid Has 51 Votes to Change Filibuster, Advocates Say*, ROLL CALL (Jan. 3, 2013, 4:26 PM). http://www.rollcall.com/news/reid_has_51_votes_to_change_filibuster_advocates_say-220519-1.html.

[127] Statement of John Eastman, *supra* note 125.

[128] *Id.*

[129] *Id.* at 2 (opening statement of Sen. John Cornyn, member, S. Comm. on the Judiciary) (quoting THE FEDERALIST NO. 22, at 109 (Alexander Hamilton) (Ian Shapiro ed., 2009)).

[130] *Id.* at 32 (statement of Steven Calabresi, Professor of Law, Northwestern University Law School).

Electoral College in determining the President, as well as the Senate itself.[131] Specifically, equal representation in the Senate permits a majority of senators, potentially representing a minority of the electorate, to pass legislation and confirm presidential nominations.[132] Given this, it is entirely possible to imagine a scenario where a minority in the Senate, representing a majority of the electorate, utilizes the filibuster to thwart a majority in the Senate, representing a minority of the electorate.[133] Eidelson refers to such filibusters as majoritarian filibusters.[134] He distinguishes them from counter-majoritarian filibusters where a minority of the Senate, representing a minority of the electorate, utilizes the filibuster to thwart a majority of the Senate, representing a majority of the electorate.[135] Viewed from this perspective, there is nothing about the filibuster, per se, that violates the principle of majority rule. According to Eidelson, it is only the subset of filibusters that can be categorized as counter-majoritarian that are inconsistent with republican principles of majority rule.[136] Eidelson illustrates that majoritarian filibusters are particularly prevalent in the confirmation process.[137] He observes that "[m]ore than half of the failed attempts by a Senate majority to invoke cloture on presidential nominees during this period [1991-2010] have reflected majoritarian filibusters."[138] As a consequence, eliminating the ability of a Senate minority to filibuster judicial nominations may paradoxically increase the counter-majoritarian characteristics of the confirmation process today.

Opponents of the judicial filibuster have not addressed these concerns when making an argument on republican grounds. For example, Senator Cornyn neglected to put the Hamilton quote from *Federalist* No. 22, mentioned above, in its proper context when he cited it in his critique of the filibuster's counter-majoritarian features.[139] In *Federalist* No. 22, Hamilton simply offered a critique of the Articles of Confederation. In *Federalist* No. 22, Hamilton neither offered an explanation nor a defense of the Constitution and its many provisions, including the Appointments Clause; that came later. Particularly relevant to the question examined here,

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[131] *See* Fisk & Chemerinsky, *supra* note 10, at 336.

[132] FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 7–8 (1999).

[133] Fisk & Chemerinsky, *supra* note 10, at 336.

[134] Eidelson, *supra* note 10, at 986.

[135] *Id*. at 985, 1004–07.

[136] *Id*. at 1014.

[137] *Id.* at 1022–23.

[138] *Id.*

[139] *See supra* note 127.

Hamilton claimed that "[t]he right of equal suffrage among the States" in the Articles of Confederation cannot be justified on republican grounds.[140] The argument that "sovereigns are equal, and that a majority of the votes of the states will be a majority" was instead "logical legerdemain," disproven by "plain suggestions of justice and commonsense."[141] Hamilton observed, "[i]t may happen that this majority of states is a small minority of the people of America."[142] Subsequent essays of the *Federalist*, including those written by Hamilton himself, defend the Senate's role in the Appointments Clause—despite the fact that the institution's equal representation allows for the possibility of a majority of states appointing judges when that majority potentially represents a minority of the American people.[143] This suggests that something other than an adherence to republican theory, as strictly construed, motivated the Framers when crafting the Appointments Clause in the first place.

Similarly, Eastman failed to acknowledge the counter-majoritarian aspects of the Electoral College when he argued that Presidents should be given deference in the confirmation process because they represent a majority of the electorate.[144] Eastman's argument is contradicted by the fact that the Electoral College conveys the counter-majoritarian features of equal representation of the Senate to presidential elections.[145] As such, it is entirely permissible under the Constitution for a President to be elected with the support of a minority of the national electorate but a majority of the Electoral College. Given just these two constitutional features of the American political system, it is not entirely clear that eliminating the judicial filibuster would restore the principle of majority rule to the confirmation process, or that the Framers ever intended for that process to be governed strictly by republican principles in the first place.

B. Implications of the Republican Critique

Fisk and Chemerinksy argue that the filibuster may be considered counter-majoritarian only to the extent that any procedural mechanism or legislative norm that prevents up-or-down votes on the Senate floor are also counter-majoritarian.[146] Senator Orrin Hatch (R-Utah), then Chairman of the Senate Judiciary Committee, asserted in 2003, "Denying

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[140] THE FEDERALIST NO. 22, *supra* note 129, at 109 (Alexander Hamilton).
[141] *Id.*
[142] *Id.*
[143] *E.g.*, FEDERALIST NOS. 65, 67, 69, 76, and 77.
[144] *See* statement of John Eastman, *supra* note 125.
[145] U.S. CONST. art. II, § 2, cl. 3.
[146] Fisk & Chemerinksy, *supra* note 10, at 334–335.

undisputedly well-qualified nominees the up or down vote they deserve does not fulfill our senatorial duties–it abdicates them . . . The President and the American People have a right to an up or down vote on judicial nominees."[147] Yet such a critique of the judicial filibuster on republican grounds inadvertently implicates other Standing Rules and well-established Senate practices that may also serve to block up-or-down confirmation votes. For example, Senate Rule XXXI requires that all nominations made by the President be referred to the appropriate committee for review.[148] Because a nomination is not eligible for consideration on the Senate floor until a committee has reported it,[149] the Senate's committee system empowers a small number of members to effectively block a confirmation vote well before forty-one senators have the opportunity to mount a filibuster on the Senate floor. Additionally, committee rules giving the chairman the prerogative to schedule hearings and markups, as well as those allowing members to delay a markup by one week, empower an individual senator to singlehandedly delay any nomination.[150]

Opponents of the judicial filibuster also have difficulty distinguishing the practice in theory from the blue-slip process for judicial nominations and the long-standing practice of senatorial courtesy on which it is based. With the former, forty-one senators are required to block an up-or-down confirmation vote.[151] In the latter, the opposition of one senator is sufficient to prevent certain judicial nominations from receiving a confirmation vote on the Senate floor at all.

Significantly, Rule XXXI also envisions situations in which the Senate *does not* act on a presidential nomination, even after it has been reported out of committee:

> Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or

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[147] 149 CONG. REC. S14,098–99 (2003) (daily ed. Nov. 6, 2003) (statement of Sen. Hatch).

[148] STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 43–44 (2007) (Rule XXXI: Executive Session–Proceedings on Nominations).

[149] *Id*. at 43.

[150] RULES OF PROCEDURE OF THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY. I. MEETINGS OF THE COMMITTEE, *available at* http://www.judiciary.senate.gov/about/rules ("At the request of any member, or by action of the Chairman, a bill, matter, or nomination on the agenda of the Committee may be held over until the next meeting of the Committee or for one week, whichever occurs later.").

[151] *See* Sarah A. Binder, *Where do Institutions Come From? Explaining the Origins of the Senate Blue Slip*, 21 STUD. IN AM. POL. DEV. 1 (2007).

> take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess . . . shall not again be considered unless they shall again be made to the Senate by the President.[152]

This clause of Rule XXXI acknowledges that the Senate may choose not to act on a nomination and stipulates that, in certain circumstances, such inaction constitutes rejection of the President's nomination. When combined with the other Senate rules and practices discussed above, it clearly allows a minority to reject a President's nomination absent a failed up-or-down confirmation vote on the Senate floor.

Finally, a critique of the filibuster on republican grounds has implications for the ability of Senate majorities to set the agenda by scheduling legislation and nominations for floor consideration. It is the prerogative of the majority leader by long-standing practice to move to proceed to the consideration of the Senate's floor business.[153] As a result, he exercises broad discretion in scheduling confirmation votes for the President's nominations, particularly for lower level positions. However, attempts to delegitimize the judicial filibuster because it empowers a minority of the Senate to frustrate the will of the majority also implicate, on a normative basis, the majority leader's ability to engage in these agenda-setting functions when not clearly speaking for a majority in the institution. It is unclear how a judicial filibuster differs from a majority leader simply refusing to schedule a confirmation vote on a presidential nomination, particularly if the effect of both actions is to prevent a majority of the Senate from having the opportunity to vote to confirm the nominee. Indeed, opponents of the judicial filibuster cite such tools in their attempts to mitigate concerns of Senate majorities that eliminating the filibuster will make it easier for members of the minority to partner with sympathetic members of the majority to confirm nominations made by a President of the opposite party. For example, Ed Whalen addressed such concerns that moderate Republicans would join with the minority Democrats to confirm President Barack Obama's nominees after the 2014

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[152] Rule XXXI, *supra* note 148, at 43–44.

[153] According to Senate precedent, "motions to proceed to the consideration of bills and resolutions on the calendar are *usually* made by the Majority Leader or his designee, who, as spokesman of his party and in consultation with his policy committee, implements and directs the legislative schedule and program." RIDDICK & FRUMIN, *supra* note 121, at 655 (emphasis added). There is no provision in the Senate's rules or precedents stipulating that motions to be proceed can only be made by the leader.

congressional elections in which Republicans regained the majority in the Senate.[154] "If the [Judiciary] committee reported such a nomination to the full Senate, Mitch McConnell, as the new majority leader, could simply refuse to schedule a vote on the nomination."[155] Whelan fails to make clear how the decision of one individual senator to block an up-or-down confirmation vote on a judicial nomination on the Senate floor differs from a filibuster when a majority of the Senate is presumed to support the nominee in both cases.

All of these internal rules and practices were established pursuant to the Rules of Proceedings Clause of the Constitution. As a consequence, they are constitutional unless they violate other constitutional provisions. This is how legitimate and illegitimate rules can be distinguished from each other. The judicial filibuster does not violate any explicit constitutional provision and thus represents a constitutional exercise of the Senate's rule-making power. In the current environment of partisan polarization, it can even be argued that the judicial filibuster is fully consistent with the spirit of the Appointments Clause, the independence of the judiciary, and the separation of powers that animated the debates of the Federal Convention and the Constitution it produced.

V. CONCLUSION

Despite the flawed assumptions underlying the arguments made by opponents of the judicial filibuster there is nothing inherent in the practice of filibustering judicial nominations that makes it a permanent feature of the Senate or impervious to criticism and beyond reproach. To the contrary, such filibusters have increased dramatically in recent years. They have been utilized on an increasing basis by Senate minorities of both political parties to obstruct the President and Senate majorities. Yet setting aside the question of whether or not such obstruction is legitimate, this article has simply suggested that efforts to justify ending the practice via the nuclear option cannot be legitimately based on appeals to the Constitution or the republican principle of majority rule.

The case for ending the ability of a minority to block an up-or-down confirmation vote on the Senate floor rests, at its most basic level, not on constitutional grounds that such filibusters are illegitimate, but rather on the ability of a simple majority to determine the institution's rules.

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[154] Ed Whelan, *Don't Bring Back the Judicial Filibuster*, NAT'L REV. ONLINE (Nov. 5, 2014, 4:00 AM), http://www.nationalreview.com/article/392048/dont-bring-back-judicial-filibuster-ed-whelan.

[155] *Id.*

Whether or not a Senate majority ought to act on its ability to eliminate the judicial filibuster is thus a political question. It is not a constitutional or theoretical question. And therein lies the problem for the constitutional architecture erected by the Framers. One long-time opponent of the judicial filibuster inadvertently captured this dynamic shortly after the 2014 mid-term elections gave Republicans a Senate majority: "The only real prospect for much-needed improvement in the federal courts requires a good Republican President *and* a Senate Republican majority that can exercise its majority power to confirm good nominees."[156]

Notwithstanding the reference to "good" nominees, this observation illustrates how partisanship serves to undermine the Appointments Clause of the Constitution and the doctrine of separation of powers on which it is based. Hamilton argued in *Federalist* No. 76 that a President persuading a sufficient number of senators to confirm a nomination based on considerations other than merit would be "improbable."[157] In *Federalist* No. 51, Madison prescribed ambition and institutional self-interest as a vital defense against tyrannical government. He argued that the institutional architecture erected by the Constitution would work in tandem with the extended republic of the United States to ensure that "a coalition of a majority of the whole society could seldom take place on any other principle than those of justice and the general good."[158] However, such coalitions in the current environment, absent the filibuster, may be more likely based first and foremost on partisan considerations rather than on the nominee's merit or larger questions of justice and the general good.

Neither Hamilton nor Madison anticipated the level of partisan polarization in contemporary American politics. As a consequence of such polarization, partisan considerations may inappropriately predispose senators to support a President's nominations if they are from the same political party. When this occurs, the constitutional system no longer works in the manner for which the Framers designed it. In such an environment, a President or congressional party leaders may be able to persuade a large number of senators to support a nomination for largely partisan reasons. Similarly, Madison's institutional ambition no longer motivates the Senate to resist encroachments by the executive and judiciary into its sphere of responsibility when its members no longer view themselves as senators first and members of a particular political party second.

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[156] Whelan, *supra* note 154.
[157] THE FEDERALIST NO. 76, *supra* note 79, at 385–86 (Alexander Hamilton).
[158] THE FEDERALIST NO. 51, *supra* note 93, at 267 (James Madison).

While he opposed the compromise embedded in the Appointments Clause, John Adams presciently articulated the dangers partisanship posed to it in a letter to Roger Sherman shortly after the Constitution was ratified.

> We shall very soon have parties formed; a court and country party, and these parties will have names given them. One party in the [H]ouse of [R]epresentatives will support the president and his measures and ministers; the other will oppose them. A similar party will be in the Senate; these parties will study with all their arts, perhaps with intrigue, perhaps with corruption, at every election to increase their own friends and diminish their opposers. Suppose such parties formed in the Senate, and then consider what factious divisions we shall have there upon every nomination.[159]

To the extent the judicial filibuster makes it more difficult for a majority party to operate in the manner described by Adams, then it serves to reinforce the Framers' view of the proper role of the Senate in the Appointments Clause, the doctrine of separation of powers, and judicial independence.

The successful use of the nuclear option to circumvent the Senate's rules in November 2013 to eliminate the judicial filibuster also has broader implications for the Senate's role in the federal government precisely because the majority's justification for utilizing the nuclear option to overcome minority obstruction on nominations cannot be distinguished on constitutional or theoretical grounds from the legislative filibuster. Both are sanctioned by the Senate's plenary power to structure its internal rules of procedure in a manner consistent with its specified constitutional responsibilities. Not only is the filibuster thus constitutional, its use today is thoroughly consistent with, and indeed may be needed to maintain, in the current polarized atmosphere of American politics, the Senate's unique role as envisioned by the Framers. In this sense, it may even be argued that the judicial filibuster is consistent with the Constitution and the original intent of the Framers in a way that the legislative filibuster is not precisely because one if its effects is to circumscribe the ability of highly cohesive parties to work in tandem with the President to overcome the separation of

[159] 6 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 434–435 (Charles Francis Adams ed., 1851).

powers and place sympathetic nominees in the judiciary. Viewed from this perspective, the judicial filibuster increases the ability of the Senate to check encroachments by the executive and, after *Marbury v. Madison*, the judiciary, into the legislature's sphere of responsibility.

Notwithstanding these differences between the judicial and legislative filibusters, it is important to underscore here that the successful utilization of the nuclear option is likely to impact both in the same way. As the ability of the majority to change the Senate's rules at will becomes institutionalized, the remaining super-majoritarian provisions that periodically frustrate majorities are placed in greater jeopardy. Put simply, the risk that the legislative filibuster will be eliminated via the nuclear option grows concurrently with the bipartisan ambivalence of Senate majorities and minorities to the use of the nuclear option to eliminate filibusters for judicial nominations. As a consequence, the normative barriers defending the legislative filibuster, and the entire rules regime represented by the Standing Rules of the Senate, will gradually be undermined as future majorities are frustrated by those rules.