

THE GARLAND NOMINATION, THE SENATE’S DUTY, AND THE SURPRISING LESSONS OF CONSTITUTIONAL TEXT

*Peter J. Eckerstrom**

ABSTRACT

In the 2016 election year, the Senate refused to consider President Obama’s Supreme Court nominee, maintaining that no language in the Appointments Clause imposes an affirmative duty on the Senate to give any nominee a vote and that the Senate’s power to refuse consent under that clause implies the authority to determine whether, and under what political circumstances, actual consideration of a nominee should occur. This Article contends that the text of Article II actually provides a surprising level of guidance in discerning the respective powers of President and Senate in the appointment process. Specifically, it concludes that Article II, Section 2—both understood in whole and in its parts—requires the Senate to consider a President’s nominees. It posits further that the Constitution’s language implies some modest, but important, requirements for what Senate consideration must entail. Specifically, it observes that settled understandings of the Senate’s rule-making authority require that the Senate provide a process by which a President’s nominee could plausibly be confirmed. This Article will also examine how the Constitution’s original framers, advocates and opponents understood the distribution of power between the branches set forth in the Appointments Clause. By evaluating the instant constitutional problem with primary reference to a semantic analysis of the text—and thereafter exploring the reliability of those conclusions with reference to original understandings of that text—this Article’s interpretive framework conforms to the interpretive approach fervently preached by Justice Scalia and usually praised by the leadership of the 114th Senate.

TABLE OF CONTENTS

INTRODUCTION 34

I. LESSONS FROM THE CONSTITUTIONAL TEXT: WHETHER THE SENATE MUST CONSIDER A NOMINEE 40

 A. *Vacancies to Be Filled Mandatorily and Promptly* 42

 B. *Refusal of Consideration Distinguished from Refusal of Consent* 47

* Chief Judge, Arizona Court of Appeals, Div. II. I would like to thank all the faculty and participants in Judicial Studies program at Duke University School of Law. This Article is a product of their collective academic focus on the judicial function. I am also grateful to Neil S. Siegel, the David W. Ichel Professor of Law at Duke, and Toni M. Massaro, Dean Emerita and the Milton O. Riepe Chair in Constitutional Law at the University of Arizona, College of Law for sharing their considerable wisdom on principles of textual and constitutional interpretation, and providing encouragement and advise throughout the publication process. I would also like to thank Beth Capin Beckmann, for donating her time to expertly edit the Article. Lastly, I am grateful for the assistance of my indispensable Judicial Assistant, Ruth Kea, and law clerk, Bernardo M. Velasco, for formatting and proofreading it. Others providing important feedback include Professors Mark Kende of Drake Law School, Mitu Gulati of Duke Law, and Andrew Coan, Director of the William H. Rehnquist Center on the Constitutional Structures of Government at the University of Arizona’s James E. Rogers College of Law.

C. <i>The President's Exclusive Power to Nominate Is Illusory Absent Senate Consideration</i>	48
D. <i>No Text Articulates or Implies Any Senate Authority to Refuse Consideration</i>	50
E. <i>Neither Constitutional Silence Nor Senate Rule-Making Power Authorizes Inaction</i>	51
II. WHAT CONSIDERATION MUST ENTAIL	54
A. <i>Conclusions from the Text Alone</i>	54
B. <i>Extra-Textual Sources of Constitutional Guidance</i>	55
III. FOUNDING-ERA UNDERSTANDINGS OF THE APPOINTMENTS CLAUSE	58
SUMMARY AND IMPLICATIONS.....	67

INTRODUCTION

In the 2016 election year, the Senate refused to consider President Obama's nominee to replace Supreme Court Justice Antonin Scalia. That now stands as a successful claim of Senate authority over the appointment process and an extraordinary partisan victory. To justify its refusal, the Senate Judiciary Committee of the 114th Congress maintained that: (1) no language in Article II, Section 2 imposes an affirmative duty on the Senate to give any nominee a vote and (2) the Senate's power to refuse consent implies the authority to determine whether, and under what political circumstances, actual consideration of a nominee should occur.¹

Specifically, the committee maintained that the advice and consent power endowed it with the constitutional authority to "withhold consent on any nominee submitted by this President."² It further explained that no nominee of President Obama's would receive Senate consideration because of the "circumstance" of the vacancy occurring during the presidential election year.³ And, it promised to postpone consideration of any nominee to ensure that "the American people [would] not [be] deprived of the opportunity to engage in a full and robust debate over the type of jurist they

¹ Letter from Hon. Charles E. Grassley, et al., Members of the United States Senate Committee on the Judiciary, to Hon. Mitch McConnell, Senate Majority Leader (Feb. 23, 2016) [hereinafter Grassley Letter].

² *Id.*

³ *Id.*

wish to decide some of the most critical issues of our time.”⁴

The committee’s letter addressed far more than a dispute about the scope of its duty in the event of an election year vacancy. There, the Senate essentially claimed authority under the Appointments Clause⁵ to decline consideration of any nominee of an individual President based on factors such as (1) the Senate’s perception of the importance of the appointment or (2) the political features of its timing. A Senate that claims those powers captures the authority to indefinitely halt the appointment process, to shift the appointment power to a subsequent President, and even to unilaterally reduce the size of the Court upon the emergence of a vacancy. Moreover, a Senate that claims the threshold power to decide *who* will be considered functionally usurps part of the President’s nomination power itself.

The Senate’s remarkable and successful claim raises a multitude of urgent questions. Will the new precedent persistently paralyze our nation’s ability to fill judicial vacancies each time a vacancy occurs when the Senate and Executive branch are respectively controlled by different parties? Will the precedent be confined to vacancies occurring in the last year of a President’s term? Or, will the Senate majority feel empowered to postpone all consideration of a President’s nominees until the next election cycle to secure the public’s input? Will the new precedent—anchored in the procedural assumption that the appointment process is, at core, an exercise of factional political power—undermine the public perception of the judicial branch as a neutral arbiter of the rule of law? If the new precedent demonstrably degrades the functionality and perceived legitimacy of the judiciary, does societal respect for the rule of law suffer? If so, how does that bode for the future cohesion of a culturally diverse and politically fractious society?

It could also be asserted that the questions are not so urgent. Is there really any functional difference between a Senate that refuses to consider a nominee and one that conducts a consideration process with no intent to ever confirm? If so, are the questions in the preceding paragraph merely alarmist hyperventilation by a faction that lacked sufficient political power to fill a vacancy?

This Article will not purport to answer all of these questions. But none of them can be coherently addressed without a threshold understanding of what the United States Constitution requires of the Senate in the

⁴ *Id.*

⁵ In this Article, “the Appointments Clause” will refer to the entirety of the Constitution’s language directing the process for appointment found in Article II, Section 2. References to the Nomination Clause, the Advice and Consent Clause, and the Recess Appointments Clause describe subparts of the Appointments Clause.

appointment process. At minimum, if the Senate's claim of authority over that process is accepted as constitutionally plausible and therefore lawful, the balance of power between the Senate and President in appointing Supreme Court Justices will have profoundly changed.

Just two years before the 2016 nomination crisis, the United States Supreme Court issued its opinion in *NLRB v. Noel Canning*.⁶ There, the Court resolved another dispute between the Senate and the President over their respective roles in the appointment process. That case addressed the scope of the President's power to bypass the Senate's advice and consent authority under the Recess Appointments Clause.⁷ The Court observed that, when determining "the allocation of power between two elected branches of Government[,] . . . '[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President."⁸ And, the Court placed considerable emphasis on historical practice in resolving the issues before it.

Perhaps for this reason, much of the contemporaneous political and academic debate surrounding Judge Merrick Garland's nomination centered on the lessons of historical precedent.⁹ But, the relevant historical paradigm can be characterized in a variety of ways.¹⁰ Robin Kar and Jason Mazzone

⁶ 134 S. Ct. 2550 (2014).

⁷ *Id.* at 2556–57.

⁸ *Id.* at 2559 (third alteration in original) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

⁹ See, e.g., Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 104 (2016); Barack Obama, President of the U.S., Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court (Mar. 16, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme> (noting recent history of divisiveness in the nomination process but also noting the process resulted in confirmed appointees); Roberta Rampton, *Senator Grassley: 'Standard Practice' to Wait on Court Nominee*, REUTERS (Feb. 13, 2016, 7:37 PM), <http://www.reuters.com/article/us-usa-scalia-grassley/senator-grassley-standard-practice-to-wait-on-court-nominee-idUSKCN0VN00C>; Geoffrey R. Stone, *The Senate Republicans, Merrick Garland and the Lessons of History*, HUFFPOST: THE BLOG (June 2, 2016, 09:53 AM), http://www.huffingtonpost.com/geoffrey-r-stone/the-senate-republicans-merrick-garland_b_10258520.html.

¹⁰ The appropriate use of historical gloss to resolve constitutional disputes, and the appropriate historical precedents to consider in so doing, are not settled constitutional questions. See Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 1–65 (comprehensively analyzing competing interpretive theories regarding the use of historical gloss to resolve constitutional disputes between the branches). Indeed, commentators have debated whether the appointment process for lower court federal judges could stand as precedent for the Garland nomination, how far back analysis of Senate practice should extend, and which prior appointment processes are the best analog. See Kar & Mazzone, *supra* note 9, at 73–82.

conducted the most comprehensive analysis of historical practice and arrived at persuasive and coherent conclusions. Nevertheless, even they conceded that “it would . . . be irresponsible to conclude that the Senate Republicans’ current plan [to refuse to consider the President’s nominee] definitively violates the Constitution . . . or does *not* violate the Constitution, given the evidence and arguments presented [as to historical practice].”¹¹ And, the new historical precedent, now established by the Senate’s successful election-year nullification of a President’s appointment power, has further muddled the lessons of past appointment history.

Academic recourse to historical practice not only failed to provide discernable constitutional boundaries after the death of Justice Scalia, it also jumped the gun. That analysis too quickly assumed that the text of the Constitution provided no useful guidance in evaluating the scope of the Senate’s advice and consent power. This Article revisits that text. It aspires to review comprehensively whether the Appointments Clause, and other pertinent constitutional language, can be harmonized with the Senate’s claim of authority. That review demonstrates that the text of Article II of the Constitution provides a surprising level of guidance in discerning the respective powers of the Senate and the President in the appointment process. It concludes that Article II, Section 2, both understood in whole and in its parts, requires the Senate to consider a President’s nominees. It will posit further that the Constitution’s language implies some modest but important requirements for what Senate consideration must entail.

Specifically, this Article will explain how the 114th Senate’s misreading of its textual authority under the Advice and Consent Clause: (1) compromises the President’s exclusive power to select nominees; (2) contradicts the evident purpose of the Appointments Clause as conveyed by its text (the mandatory and prompt appointment of important governmental functionaries); (3) bypasses the Constitution’s express prescription for how the size of the Court may be altered; (4) overlooks constitutional limitations on the Senate’s rule-making authority; and (5) cripples one of the intended constitutional checks on the Senate’s power over the appointment process.

The analysis will consider other features of the Constitution’s text relating to appointments including the Recess Appointments Clause. It will address the placement of the appointments clauses in Article II and the Constitution’s express endowment of “the executive authority” to the Presidency within that article. These features inform the scope of the Advice and Consent Clause. They demonstrate that the clause cannot be harmonized with the

¹¹ Kar & Mazzone, *supra* note 9, at 104.

Senate's claim that the phrase tacitly provides it with such dominant authority over the appointment process.

The textual analysis that follows is consistent with the interpretive framework adopted by the Court in *Noel Canning*. Although that opinion resolved a set of distinct legal questions, it stands as the Court's most recent precedent addressing the respective powers of the President and the Senate in the appointment process. Any complete analysis must account for how the Supreme Court might assess the constitutional parameters of a selection process for its own membership.¹²

Importantly, the Court's reasoning in *Noel Canning* does not elevate historical practice as the primary arbiter of disputed power. Rather, such history carries "great weight" only when direct constitutional guidance is found neither in the plain language of the Constitution, nor from the purpose conveyed by that language.¹³ For this reason, a threshold focus on the semantic meaning of pertinent constitutional text, the central project of this Article, fully conforms to the Court's most recent approach in evaluating appointment disputes between the branches.¹⁴

To parallel further the Court's interpretive framework in *Noel Canning*, this Article will examine how the Constitution's original framers, advocates, and opponents understood the distribution of power between the branches set forth in the Appointments Clause. Given the inherent challenges in

¹² This Article does not address whether, or under what circumstances, a dispute regarding the powers of the respective branches as to the appointment of Supreme Court justices would be justiciable. However, one can conjure plausible scenarios that might make it so. If a President were to bypass a recalcitrant Senate on the theory that the Senate had waived its constitutional opportunity to provide advice and consent or if the President were to enforce his own process for securing Senate consent in the absence of Senate action, the Court would be squarely faced with the decision of whether to seat an appointee arising from such a process.

¹³ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (quoting *Pocket Veto Case*, 279 U.S. 655, 690 (1929)); *id.* (quoting *State ex rel. Town of Norwalk v. Town of South Norwalk*, 58 A. 759, 761 (1904)) (observing that historical practice "is entitled to great regard" when constitutional phraseology is "of doubtful meaning." (internal quotation marks omitted)); *see also* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1264–65 (2015) (observing the majority opinion in *Noel Canning* seemed to embrace the "proposition, emphasized by Justice Scalia . . . that clear text is controlling, regardless of other considerations").

¹⁴ In the event the question never reaches the Court, it will be left to the President, the Senate, and the voters who elect both, to interpret the Advice and Consent Clause. But, given the Court's constitutional primacy as the final arbiter of such disputes, the Court's decisional framework set forth in *Noel Canning* should provide substantial guidance to the other branches and the public. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that it is the duty of the "judicial department to say what the law is"); *see also Noel Canning*, 134 S. Ct. at 2560 (adopting the *Marbury* principle for separation-of-powers cases).

deriving definitive constitutional meaning from such sources,¹⁵ that record is presented as confirmatory of, rather than necessary to, the textual analysis.

The thrust of this inquiry, however, will confine itself to the semantic meaning, context, and purpose conveyed by the words of the Constitution.¹⁶ To the extent the following textual analysis persuades, the resulting conclusions must carry considerable weight under almost all prevailing interpretive theories. Such theories either (1) posit the construction of text as the only mode of understanding constitutional or statutory law that enforces fidelity to democratic principles;¹⁷ (2) enshrine the text as the best evidence of drafters' intent;¹⁸ or (3) place the semantic meaning of the text at the apex of a hierarchy of interpretive abstraction.¹⁹ Indeed, the dominant theories of textual and constitutional interpretation diverge only when textual meaning can be reasonably perceived as ambiguous.²⁰ For this reason, inescapable understandings of text can theoretically support strong claims: even claims of near interpretive unanimity on disputed points of law.²¹

¹⁵ J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 46–59 (Geoffrey R. Stone ed., 2012) (summarizing the interpretive challenges and hazards of exclusive focus on the Framers' intent).

¹⁶ As Curtis Bradley and Neil Siegel observe, “[t]here is no canonical definition of textualism” and this Article does not purport to debate the question. Bradley & Siegel, *supra* note 13, at 1216 n.7. In the Part of the Article devoted to considering the “plain meaning” of the text, the author has strived to draw conclusions from the semantic meaning of the words, their context established by the other words of the Constitution and any purposes conveyed exclusively by those words. The author has relied on Justice Antonin Scalia and Bryan A. Garner’s specifications for the traditional boundaries of textual fidelity as articulated in their book on the topic, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). Bradley & Siegel, *supra* note 13, at 1281–82. That work is cited repeatedly during discussions of interpreting the text. In so doing, the author does not necessarily endorse its claims about the appropriate tools for resolving textual disputes when the text is ambiguous or subject to plausible competing interpretations. The traditional tools for interpreting text include determining the purpose of a text from its words and making structural observations about a document that informs those words: the latter, in textualist nomenclature, is called “context.” These textual approaches should not be confused with other modalities of constitutional construction that employ extra-textual evidence of the Constitution’s purpose or structure in resolving constitutional disputes.

¹⁷ See SCALIA & GARNER, *supra* note 16, at 9–28 (articulating textualist theory).

¹⁸ See, e.g., STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 88 (2010); ROBERT A. KATZMANN, *JUDGING STATUTES* 29 (2014) (advocating robust purposivism in textual interpretation that includes consideration of legislative history).

¹⁹ See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990) (advocating a pluralist approach to textual interpretation while conceding that “the statutory text is the most authoritative interpretive criterion”).

²⁰ BREYER, *supra* note 18, at 88.

²¹ *But see* Bradley & Siegel, *supra* note 13, at 1214 (maintaining that “[t]he constraining effect of clear text . . . is partially constructed by considerations that are commonly regarded as extratextual”).

Lastly, the Article will explore some of the implications of its conclusion: that the text of the Constitution requires the Senate to consider the President's nominees and provide a process for each nominee that could reasonably result in filling the vacancy. And, it will explain why the requirement of Senate consideration matters in practice—even if a controlling Senate faction resolves to ultimately withhold consent from a nominee before any consideration process has occurred.

I. LESSONS FROM THE CONSTITUTIONAL TEXT: WHETHER THE SENATE MUST CONSIDER A NOMINEE

After Justice Scalia's death, the partisan stakes for filling the vacancy were high. The political origin of the remaining justices was evenly divided between the two parties.²² The appointee would therefore tip the perceived ideological balance on the Court. Within the prior decade, the Court had recently been called upon to resolve monumental and politically incendiary issues. It had interpreted the First Amendment to prohibit common tools of campaign-finance reform, affirmed most portions of the Affordable Care Act, held for the first time that the Second Amendment's right to bear arms established a personal right, and that same-sex couples possessed a constitutional right to marry.²³ Three of those four cases it resolved by five-to-four margins.²⁴

Within an hour of Justice Scalia's death, the Republican Senate Majority Leader, Mitch McConnell, announced that the Senate would not allow President Barack Obama, a Democrat, to replace him.²⁵ Senate leadership subsequently maintained that the Constitution imposed no requirement upon it to consider President Obama's nominee. Rather, it asserted that its advice and consent role implied the authority to determine whether to consider a nominee at all—and that it “fulfill[ed]” its role by “withholding

²² Justices Ginsburg, Breyer, Sotomayor, and Kagan were appointed by Democratic Presidents. Justices Kennedy, Thomas, Alito, and Chief Justice Roberts were appointed by Republican Presidents. *A List of the Justices of the Supreme Court*, ASSOCIATED PRESS NEWS (Jan. 27, 2018), <https://apnews.com/bc9cfb3386884c7382bdc49f8116347b>.

²³ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁴ *Obergefell*, 135 S. Ct. at 2585; *King*, 135 S. Ct. at 2484; *Citizens United*, 558 U.S. at 316; *Heller*, 554 U.S. at 572.

²⁵ Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016, 6:34 PM), <http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248> (quoting McConnell as saying, “[T]his vacancy should not be filled until we have a new president”).

[its] support for the nomination during a presidential election year.”²⁶

Implicit in the Senate majority’s position were three tacit claims of power over the appointment process: to delay indefinitely the appointment of justices, to reduce unilaterally the size of the Court, and to shift the nomination authority to a subsequent President. Indeed, the Senate applied those claims in practice. The majority successfully delayed the appointment process for two Supreme Court terms. It shifted the nomination power to a President of its own party, Donald Trump, and secured the appointment of Justice Neil Gorsuch, a perceived ideological conservative, to fill a vacancy that had first occurred eleven months before the expiration of President Obama’s term. And, when it appeared President Trump might not win the fall election, important voices in the Senate Republican caucus suggested that they would refuse to consider any nominee a President Hillary Clinton might suggest—and thereby indefinitely reduce the Court’s size beyond the year its inaction had already assured.²⁷

The Senate majority embraced the notion that it had delayed the appointment process for ideological reasons. It specifically argued that the voters should have input at the ballot box precisely because of the expected ideological effect of the new justice on the court. That rationale would make little sense unless the criteria for judicial selection was ideological and partisan, rather than presumptively focused on a nominee’s qualifications.²⁸

²⁶ Press Release, Chuck Grassley, Chairman of the Senate Judiciary Committee, Grassley Statement on the President’s Nomination of Merrick Garland to the U.S. Supreme Court (Mar. 16, 2016), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-presidents-nomination-merrick-garland-us-supreme-court>; see also Grassley Letter, *supra* note 1; Press Release, Orrin Hatch, U.S. Senator, Hatch Statement on the Nomination of Merrick Garland to the Supreme Court (Mar. 16, 2016), <https://www.hatch.senate.gov/public/index.cfm/2016/3/hatch-statement-on-the-nomination-of-merrick-garland-to-the-supreme-court> (characterizing the withholding of consideration as itself the “exercise” of the Senate’s “advice-and-consent power”); Press Release, Orrin Hatch, U.S. Senator, Hatch: “Democrats are Peddling False Claims about the Constitution and the Supreme Court Vacancy” (Apr. 20, 2016), <https://www.hatch.senate.gov/public/index.cfm/2016/4/hatch-democrats-are-peddling-false-claims-about-the-constitution-and-the-supreme-court-vacancy> (quoting from an earlier speech that “Advice and consent begins with a judgment about the best way to exercise [the Senate’s] power in each situation.”).

²⁷ David A. Graham, *What Happens if Republicans Refuse to Replace Scalia?*, ATLANTIC (Nov. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081/> (quoting Republican Senators Burr, Cruz, and McCain who each stated separately that they would block any Clinton nominee, and discussing claims by conservative commentators of constitutional right to leave position vacant).

²⁸ Amita Kelly, *McConnell: Blocking Supreme Court Nomination ‘About a Principle, Not a Person’*, NPR (Mar. 16, 2016, 12:31 PM), <https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person> (reporting responses of various Senators to the nomination of Merrick Garland expressing Republican consensus that no nominee should be considered until after the election. Senator McConnell: “Let’s let the American People

By that standard, the delay resulted in a remarkable partisan triumph for the Republican Party. With the election of President Trump, the pending vacancy, and the age of several sitting justices, the Republican Party was positioned to secure ideological control of the Court for another generation.²⁹

But how does one evaluate that political victory through non-partisan lenses? Did it represent a legitimate assertion of political authority earned at the ballot box and contemplated by the Constitution? Or did the Senate's unprecedented claim of authority over the appointment process defeat the Constitution's intended design for the distribution of power between the branches? If so, was it ultimately a defeat for the rule of law and the civil society it fosters?

The only constitutional language that squarely addresses the appointment of a Supreme Court Justice is found in Article II, Section 2, and includes both the Appointments Clause and that clause's component, the Recess Appointments Clause. Those clauses read as follows:

The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.³⁰

As shall be explained, that language cannot be harmonized with the Senate's claim that it may lawfully refuse to consider a President's nominee.

A. *Vacancies to Be Filled Mandatorily and Promptly*

The Appointments Clause contains three operative parts: (1) the President "shall nominate," (2) he then "shall appoint," and (3) the latter action must occur "by and with the Advice and Consent of the Senate." In context then, the Senate's advice and consent role is the second step of a three-part process: nomination, Senate consideration, and appointment.³¹ All three steps are necessary for a vacancy to be filled.

decide." Senator Grassley: supporting refusal to consider any candidate until after the election because "[a] lifetime appointment . . . could dramatically impact individual freedoms and change the direction of the court for at least a generation." Senator Cornyn: "The next justice could change the ideological makeup of the Court for a generation . . ." (internal quotation marks omitted).

²⁹ Erwin Chemerinsky, *Chemerinsky: What Will the Presidential Election Mean for SCOTUS?*, A.B.A.J. (Sept. 6, 2016, 8:45 AM), http://www.abajournal.com/news/article/chemerinsky_what_will_the_coming_election_mean_for_scotus/.

³⁰ U.S. CONST. art. II, § 2.

³¹ See SCALIA & GARNER, *supra* note 16, at 167 ("Context is a primary determinant of meaning. . . . The entirety of [the pertinent text] thus provides the context for each of its parts.").

Crucially, the clause sets forth the beginning and ending steps of that process in mandatory terms: the President “shall” nominate and the President “shall” appoint. The text thus describes the Senate’s consideration of a President’s nominee as a necessary step occurring within a mandatory process. This directive, that the appointment process is mandatory, textually demonstrates the purpose of the clause: completed appointments. Put another way, the text of the clause, when read in its entirety, implies that Senate consideration is necessary for the clause to fulfill its purpose: the staffing of specified, important governmental positions.

In short, the clause’s mandatory language, read in the context of its evident purpose, describes a process for filling vacancies that is logically obligatory on both the President and the Senate. Indeed, the Constitution uses the words “with” and “by” to preface the Senate’s role of consideration: these are words of connection and derivation respectively. They linguistically wed the Senate’s role to the President’s expressly obligatory one.

The language immediately subsequent in the text, the Recess Appointments Clause, corroborates this construction. That clause authorizes the President to bypass Senate consideration altogether when the Senate lacks the institutional ability to provide it. Under that clause, when the two competing directives of prompt appointment and Senate consideration collide, the Constitution gives primacy to prompt appointment: an unambiguous textual elevation of governmental functionality over “checks and balances.” The Supreme Court has itself adopted this function-based reading of the Recess Appointments Clause. In *Noel Canning*, the majority observed that the purpose of that clause is to allow the President to “ensure the continued functioning of the Federal Government.”³²

To be sure, nothing in the Recess Appointments Clause itself commands urgent consideration when a candidate is nominated during a Senate session. And, the Senate is presumably empowered to balance the importance of filling vacancies against the quality of the President’s individual nominees in light of the time remaining before recess. But the Recess Appointments Clause does place a limit on the Senate’s power to impair the President’s mandate to staff the government—and it textually undermines any claim that the Senate is tacitly empowered to delay that process by postponing consideration beyond a recess.

³² NLRB v. Noel Canning, 134 S. Ct. 2550, 2561 (2014).

Thus, the Senate's specific claim here—that it possessed the constitutional authority to indefinitely disable the appointment process by declining to consider a President's nominee—cannot be harmonized with either the mandatory language within the Appointments Clause (which obliges the Senate to perform its advice and consent role) or the purpose conveyed by both pertinent clauses read together (that those important government positions itemized in Article II, Section 2 be promptly filled). If, as the text of Article II semantically provides, the appointment process is a mandatory one that should not be delayed even by Senate recess, it would be illogical to construe that text as granting the Senate power to unilaterally postpone that process indefinitely.

Indeed, if the Senate need not consider an individual nominee or, as claimed by the 114th Senate, consider *any* nominee of a particular President, then the Senate will have secured functional control over both the timing of appointments and whether certain vacancies are ever filled. But, as discussed, the appointments clauses set forth in Article II, Section 2 endorse functionality. Neither clause suggests that the Senate should be empowered to control the timing of when vacancies would be filled. To the extent Article II gives either branch control over timing, it gives it to the President. The text expressly provides the President with the exclusive power of nomination and therefore the authority to initiate the process.

Nonetheless, several constitutional scholars have maintained that congressional power to determine the size of the Supreme Court implies Senate authority to decline consideration of the President's nominee.³³ If the Senate is empowered to reduce the size of the Court through legislation, they reason, it surely crosses no constitutional boundary when it achieves the same result through legislative inaction.

³³ See Noah Feldman, *Obama and Republicans Are Both Wrong About Constitution*, BLOOMBERG (Feb. 17, 2016, 12:21 PM), <https://www.bloomberg.com/view/articles/2016-02-17/obama-and-senate-are-both-wrong-about-the-constitution> (arguing that the refusal to consider nominee and leave a position vacant is not a constitutional violation because Congress has control of the size of the Court); see also Johnathan Adler, *The Erroneous Argument the Senate Has a 'Constitutional Duty' to Consider a Supreme Court Nominee*, WASH. POST: VOLOKH CONSPIRACY (Mar. 15, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/15/the-erroneous-argument-the-senate-has-a-constitutional-duty-to-consider-a-supreme-court-nominee/> (quoting Noah Feldman to argue that the refusal to consider a nominee and leave a position vacant does not violate the Constitution); Michael D. Ramsey, *Why the Senate Doesn't Have to Act on Merrick Garland's Nomination*, ATLANTIC (May 15, 2016), <https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/> (making the same argument in the context of explaining why the Senate has no affirmative duty to act on a Supreme Court nominee).

This argument overlooks that the Senate is not unilaterally empowered to reduce the size of the Court. Congress must do so through the legislative process, “by Law,” as Article II, Section 2 requires. Article I, Section 7 of the Constitution provides that: “Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States”³⁴ Thus, a constitutionally permissive reduction of the Court would require the assent of two political bodies other than the Senate including, importantly here, the President.

The Constitution’s design for determining the size of the Court underscores why its text cannot be interpreted as empowering the Senate to refuse to consider a specific President’s nominees. If the Advice and Consent Clause could be construed to grant the Senate the power to leave a vacancy unfilled indefinitely, it would empower the Senate to achieve unilaterally results that the Constitution specifies must occur jointly through the legislative process. And, no language in the Constitution suggests the Senate may so bypass the legislative process to change the size of the Court. Rather, the Constitution describes a legislative process calibrated to include the checks and balances inherent in the participation of the House and the President. Thus, the Advice and Consent Clause cannot be read to provide the Senate a power that would so undermine the legislative process expressly prescribed for determining court size.³⁵

Vikram Amar and several other constitutional commentators have contended that Article II articulates no textual duty on the Senate to act on a Presidential nomination.³⁶ Specifically, Amar asserts that “[t]he text of the Constitution certainly does not use any language suggesting the Senate has a legal obligation to do anything.”³⁷ In so concluding, he correctly observes that the Appointments Clause does not attach the word “shall” to the Senate’s advice and consent role.³⁸ But Amar overlooks that using “shall” to describe the Senate’s role would have been linguistically confusing because one part of that role, the provision of consent, is semantically not obligatory on the Senate. And, as discussed, the language plainly describes the Senate’s role as

³⁴ U.S. CONST. art I, § 7.

³⁵ Feldman, *supra* note 33. In his commentary, Professor Feldman suggests that this constraint on Senate authority over the size of the Court would be “highly formalistic.” *Id.* But, it is a species of formalism that the Constitution expressly requires.

³⁶ Vikram David Amar, *The Grave Risks of the Senate Republicans’ Stated Refusal to Process Any Supreme Court Nominee President Obama Sends Them*, VERDICT (Feb. 26, 2016) <https://verdict.justia.com/2016/02/26>; Feldman, *supra* note 33; Ramsey, *supra* note 33.

³⁷ Amar, *supra* note 36.

³⁸ *Id.*

an indispensable second step to an unambiguously mandatory process.

Nor can it be correctly argued that, in the context of Article II, “shall” denotes a discretionary act.³⁹ Article II, Section 1, devoted to the procedures by which a President takes and leaves office, uses the word “shall” 25 times. In each case, it denotes an obligatory procedural step or event. For example, that section uses the word “shall” to describe the indispensable duty of the President to take the oath of office: “Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation”⁴⁰

In yet tighter context, Article II, Section 2 prefaces the President’s itemized powers in three different ways. That section does not state that the President “shall” make treaties. It does not state that the President “shall” appoint during a recess nor does it state the President “shall” grant reprieves and pardons. Rather, it states that he “shall have Power” to do these things. Elsewhere, that section uses the word “may” to describe (1) the President’s entitlement to receive opinions from his executive departments and (2) the Senate’s authority to delegate appointment authority to inferior officers or department heads.⁴¹

Thus, the Constitution calibrates the level of presidential duty attached to each of the individual powers set forth in Article II, Section 2. In so doing, it specifies whether the exercise of each power is discretionary or obligatory.⁴² By twice using the word “shall” in the Appointments Clause, the constitutional text articulates that the President’s twin duties of nomination and appointment are obligatory, not discretionary. Such a textual choice demonstrates the Constitution commands important vacancies be filled. It thereby implicitly suggests that doing so is necessary for the functioning of government itself. In this context, the Senate’s advice and consent role is semantically triggered by the President’s obligatory act of nominating a judge and is necessary for the subsequent obligatory act of appointing the nominee.

³⁹ In *A Fragment on Shall and May*, Nora Rotter Tillman and Seth Barrett Tillman contend that the terms “will” and “shall” may have had different uses at the time of the Constitution’s drafting than those accepted today. 50 AM. J. LEGAL HIST. 453, 455–56 (2010) (citing U.S. CONST. art. II, § 1, cl. 8). Specifically, they suggest that in 1787 “shall” was sometimes used to indicate futurity and “will” to instead indicate emphatic tense. *Id.* at 455. But the example they provide, the Oath Clause in Article II, Section 1, plainly uses “shall” to denote obligation and “will” to indicate futurity: “Before he enter on the Execution of his Office, he *shall* take the following Oath or Affirmation:—I do solemnly swear (or affirm) that I *will* faithfully execute the Office of President of the United States” *Id.* at 456 (citing U.S. CONST. art. II, § 1, cl. 8 (emphasis added)).

⁴⁰ U.S. CONST. art II, § 1, cl. 8.

⁴¹ U.S. CONST. art II, § 2, cl. 1.

⁴² Feldman, *supra* note 33. This context for the use of “shall” in Article II, Section 2 contradicts Professor Feldman’s suggestion that the “shall” in the Appointments Clause nonetheless “confers some discretion on the executive.” *Id.*

As such, the Senate's role can only be understood as a procedural obligation. No other reading is functionally plausible or consistent with the intent conveyed by the words of the Appointments Clause.

B. Refusal of Consideration Distinguished from Refusal of Consent

To be sure, the Senate possesses an express textual power to refuse consent. That power, if deployed methodically after consideration, could equally obstruct the appointment of important government officers. Could it not be argued, then, that the Framers understood they were empowering the Senate to so obstruct the filling of vacancies?

Not in the same way. The Senate's refusal of consent, in contrast to withholding consideration, does not itself halt the mandatory process established to fill important vacancies. This is because the President retains the power to nominate sequentially other candidates who are, in turn, entitled to Senate consideration.⁴³ Serial nomination—when consideration is assumed—provides a check on the Senate's power by deterring it from unreasonably withholding consent to a President's first nominee. After all, they might find the second nominee less appealing than the first. For example, had the 114th Senate commenced consideration of Judge Garland, it may have ultimately been encouraged to grant consent given that no other nominee would likely be either so advanced in age or ideologically moderate in profile.⁴⁴ By contrast, the Senate's refusal to consider *any* nominee of a given President utterly disables the process: a process that the two controlling clauses articulate as both mandatory and urgent.

Furthermore, the Senate's potential refusal of consent, unlike the refusal of consideration, is expressly contemplated as part of the mandatory process set forth in the Appointments Clause. Indeed, withholding consent *completes* the first two of the steps envisioned by the clause: the President's exercise of the nomination power has occurred and the Senate has considered the nominee. The Senate's power to withhold consent is implicit in the words of the Constitution: the Senate's authority to withhold consideration is contradicted by the semantic meaning of the same words. To those

⁴³ As shall be discussed below, that is precisely how the Framers envisioned that the process would function in practice. See *infra* notes 45–46. But, this Part confines itself to arguments based exclusively on text.

⁴⁴ See Eliza Collins, *Flake is Ready to Move Forward with Garland's Nomination*, USA TODAY (Oct. 21, 2016, 9:31 AM), <https://usatoday.com/story/news/politics/onpolitics/2016/10/21/report-flake-ready-move-forward-garlands-nomination/92506676/> (reporting that Republican Senator Flake suggested that the Senate “move forward” with hearings for fear that Hillary Clinton would appoint a less-moderate justice).

committed to abiding by procedural law as expressed by constitutional text, that difference is crucial.

C. The President's Exclusive Power to Nominate Is Illusory Absent Senate Consideration

The Appointments Clause also provides guidance when considered in its individual parts. As Justice Scalia explained in his treatise on statutory interpretation, courts should construe legal texts to render every part operative.⁴⁵ In effect, this rule “holds that it is no more the court’s function to revise by subtraction than by addition.”⁴⁶ To avoid this risk, no part of a legal text should be “given an interpretation that causes it . . . to have no consequence.”⁴⁷ In conformity with this bedrock principle of both textual interpretation and logical communication, the Appointments Clause should not be construed so as to render any part of its language ineffectual.

That clause provides that the President “shall nominate.” Semantically, that power is exclusive to the President. Further, its context identifies it as a non-trivial executive prerogative. The Appointments Clause is found in Article II, Section 2, the paragraph of the Constitution devoted to itemizing the powers of the President. No parallel nomination or appointment authority is found in Article I, Section 8, which sets forth the powers of the Senate. Nor was it placed in the more neutral territory of Article III. And, Article II begins by stating that the President is endowed with “the executive power.” This structure and placement together suggest that the Constitution has categorized those powers itemized in Article II, Section 2 as primarily executive functions.⁴⁸

⁴⁵ SCALIA & GARNER, *supra* note 16, at 174–75.

⁴⁶ *Id.* at 174.

⁴⁷ *Id.* This canon of interpretation was well understood in the founding era. In later considering whether the Appointments Clause provided the President or the Senate with the power of removing non-judicial officers, George Mason, a delegate to the Constitutional Convention, observed to James Monroe that “it is a well known Rule of Construction, that no Clause or Expression shall be deemed superfluous or nugatory, which is capable of a fair and rational Meaning.” Letter from George Mason to James Monroe (Jan. 30, 1792), *in* 3 THE PAPERS OF GEORGE MASON, 1725–1972: 1787–1792, at 1254, 1255 (Robert A. Rutland ed., 1970).

⁴⁸ The Author recognizes that this can be characterized as a species of structural argument rather than as a textual argument. However, all textual interpretation theories elevate the importance of context in interpreting text. Thus, the more broadly one defines context, the more an argument can be construed as one of structure. However, the argument here confines itself to the context provided by the other words of the Constitution itself—not more general and debatable arguments about the Founders’ goals in generating a new Constitution.

Understood properly, then, Article II expressly endows the President with the broad power over executive functions. Indeed, most of the governmental posts identified in the appointments clauses are employed in executive departments: departments which the President is given express power to direct. This structure implicitly identifies the selection of such officials as, fundamentally, an executive function.⁴⁹ The unqualified nature of the President's nomination power thus conforms to the context of Article II. Furthermore, the President's authority to nominate finds its place alongside the clauses providing the President power to act as Commander in Chief, to direct the executive departments, to "grant reprieves and Pardons," and to make treaties.⁵⁰ Each represents a substantial grant of authority to the executive branch.

The President's exclusive power to nominate, read together with the exclusive, but qualified, power to appoint, signals a broader textual design to primarily empower the President to select Supreme Court justices. Conversely, the Senate's power to withhold consent, but not nominate or appoint, sounds in veto, not selection. Understood in its context, placed among important executive powers, the Senate's advice and consent role must be construed as creating a check on an appointment power otherwise defined as executive in nature.

Yet, the President's power to name a candidate would be a comparatively trivial one, hardly worthy of such prominent textual emphasis, if it did not include the power to have the candidate considered. Nomination without consideration is a futile act. Conversely, a Senate that claims the authority to withhold consideration of a nominee has captured concurrent authority to decide *who* will be considered. A Senate empowered to decline consideration of a nominee would functionally share the power of nomination itself.

Thus, one cannot construe the Senate's advice and consent authority to imply the additional power to withhold consideration without compromising the President's unique textual authority to nominate. Such a construction would render the Nominations Clause, which reads as an exclusive executive power, mystifyingly inarticulate. Put another way, the claim that the Senate's consent authority *tacitly* includes the power to refuse consideration altogether cannot be harmonized with the *express* constitutional language endowing the President with the exclusive power to nominate.

⁴⁹ U.S. CONST. art. II, § 2 ("The President . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .").

⁵⁰ *Id.*

D. No Text Articulates or Implies Any Senate Authority to Refuse Consideration

Just as neutral principles of textual interpretation require giving each operative word effect, they also forbid adding language that the authors did not include.⁵¹ If the Constitution had been framed to convey that the Senate would be granted concurrent control over who would receive consideration, very different words would have been used to describe such a process.

The words “by and with the advice and consent of the Senate, [the President] shall appoint” would be wholly inadequate to convey any Senate authority to refuse to consider a nominee. Those words semantically modify the President’s appointment power, not his nomination power. For this reason, the Senate’s power to provide advice and refuse consent does not textually include any power to determine whom the President can nominate. Nor does that phrase endow the Senate with authority over *which* President may nominate a judge or the political circumstances under which a President may do so. Textually, the phrase describes only the authority to grant or withhold consent to the appointment of *an already nominated candidate*. It does not articulate unilateral Senate authority to determine the size of the court or to control the timing of the appointment process. It certainly does not describe any power to add a substantial fourth step to the three-step process of nomination, consideration, and appointment—such as the consideration of the nominee by the public in an intervening presidential election.

To be sure, a founding era political theorist might argue that the legislative branch should retain all of these powers and, as will be seen, several delegates to the Constitutional Convention made arguments that the legislature should dominate the appointment process. But the words chosen at that Convention do not themselves imply, much less articulate, any such Senate authority. As explained above, the placement of the Appointments Clause in Article II, Section 2 among the list of the President’s specified powers instead of in Article I—or more neutrally in Article III—contradicts any notion that the Senate enjoys an unarticulated power to dominate the appointment process arising from its advice and consent role.

Far from providing textual support for inaction, the Advice and Consent Clause defines the lone Senate role in the appointment process as the essence of consideration. By definition and logic, both advice and consent are themselves acts of consideration. The Senate cannot provide advice regarding a candidate for appointment without participating in the consideration of that candidate. Similarly, the Senate cannot withhold or provide consent without considering a nominee. Thus, the 114th Senate claimed a power to withhold

⁵¹ SCALIA & GARNER, *supra* note 16, at 93.

consideration from words that describe only the provision of it. It claimed a power of inaction from text that describes only action.

E. Neither Constitutional Silence Nor Senate Rule-Making Power Authorizes Inaction

At the outset of the debate between President Obama and the Senate regarding the process for filling the vacancy, Professor Ilya Somin presented the thrust of the Senate's textual claim in a commentary published by *The Washington Post*.⁵² Specifically, he observed that the Appointments Clause is silent on the "specific procedure by which the Senate can refuse its consent."⁵³ Somin further observed that Article I, Section 5 affirmatively endows the Senate with the power to "determine the rules of its proceedings," a power that, in his view, necessarily included the power to refuse consideration altogether.⁵⁴ From this, he concluded that Article II, Section 2 "does not indicate whether it must do so by taking a vote, or whether it can simply refuse to consider the President's nominee at all."⁵⁵ Senator Orrin Hatch echoed this theory when he maintained in defense of his caucus that "the Constitution [does not] require the Senate to hold a hearing on a nominee, or even to take any action at all."⁵⁶

In essence, Somin's textual construction is based in equal part on express Senate rule-making authority and on an inference from constitutional silence. But the text of Article II renders both arguments unpersuasive.

The Senate's rule-making authority, the power to design its own deliberative procedure, does not operate independently of other constitutional mandates. Like all other constitutional provisions, its scope must be understood in harmony with the document as a whole.⁵⁷ Article I,

⁵² Ilya Somin, *The Constitution Does Not Require the Senate to Give Judicial Nominees an Up or Down Vote*, WASH. POST: VOLOKH CONSPIRACY (Feb. 17, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/17/the-constitution-does-not-require-the-senate-to-give-judicial-nominees-an-up-or-down-vote/>.

⁵³ *Id.*

⁵⁴ *Id.* (quoting U.S. CONST. art. I, § 5, cl. 2). Michael Ramsey also urged a species of this argument in his debate with Erwin Chemerinsky at the National Constitution Center. *See We the People: Does the Senate Have a Duty to Hold Hearings for Supreme Court Nominees?*, NAT'L CONSTITUTION CTR. (Apr. 7, 2016), <https://constitutioncenter.org/blog/podcast-does-the-senate-have-a-duty-to-hold-hearings-for-supreme-court-nomi> (arguing that the language in Article I, Section 5 of the United States Constitution gives the Senate the power to "determine the rules of its proceedings," and allows the Senate to deny consent to a Supreme Court nominee by refusing to hold a hearing).

⁵⁵ Somin, *supra* note 52.

⁵⁶ Press Release, Orrin Hatch, U.S. Senator, Senate Should Not Hold Hearings for Obama SCOTUS Nominee (Mar. 16, 2016), <https://www.hatch.senate.gov/public/index.cfm/2016/3/sen-orrin-hatch-senate-should-not-hold-hearings-for-obama-scotus-nominee>.

⁵⁷ SCALIA & GARNER, *supra* note 16, at 167–69 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.)

Section 5 does not authorize the Senate, by setting its own parliamentary rules, to take otherwise unconstitutional acts or contradict plain constitutional directive.

The Supreme Court itself has emphasized this limitation on Senate rule-making authority in the context of appointments. In *Noel Canning*, the Court acknowledged the power of the Senate to determine the length of its own sessions, but also observed:

The Constitution explicitly empowers the Senate to “determine the Rules of its Proceedings.” And we have held that “all matters of method are open to the determination” of the Senate, as long as there is “a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained” and the rule does not “ignore constitutional restraints”⁵⁸

Somin overlooks both of these limitations on Senate rule-making authority.

Senate procedure must bear a reasonable relation to the result that the procedure facilitates. Here, the “result . . . sought to be attained” must be the Senate’s performance of its textual mandate to provide timely advice and consent on a President’s nominee and to facilitate the Constitution’s purpose of staffing important government posts.⁵⁹ The Senate cannot claim that it reasonably pursues those constitutional purposes when it utterly refuses to activate *any* process, much less those set forth in its own rules, for evaluating nominees.

Nor can Senate rule-making authority “ignore constitutional restraints.” For example, the phrase immediately preceding the Appointments Clause in Article II, Section 2 provides that the President has the power to make treaties “with the Advice and Consent of the Senate . . . provided two thirds of the Senators . . . concur.”⁶⁰ The Senate could not determine instead, based on its rule-making power, that it would hereafter take three-quarters of the Senators to concur. The Senate’s general authority over its own internal procedures is thus subordinate to other, more specific, constitutional text that circumscribes the Senate’s rule-making authority in the context of ratifying treaties.⁶¹ Nor could the Senate claim constitutional sanction under its rule-making authority to thwart the President’s power to “convene” the Senate—even though parliamentary rules for gathering Senate members are

316, 406 (1819)).

⁵⁸ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014) (internal citations omitted) (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)).

⁵⁹ *Id.*

⁶⁰ U.S. CONST. ART II, § 2.

⁶¹ See SCALIA & GARNER, *supra* note 16, at 180–88 (explaining that when two provisions of the same statutory scheme facially conflict, they are to be read in harmony and the more-specific provision controls over the general).

generally governed by the Senate's rules. In short, Senate rule-making authority is necessarily subordinate to, and must be exercised in accordance with, express constitutional directive. Thus, to the extent a persuasive case has been made that the constitutional text demonstrates a requirement that (1) consideration of nominees occur; (2) in a reasonably prompt fashion; and (3) with a purpose of filling vacancies to facilitate governmental function, the mere existence of Senate rule-making authority provides no entitlement to disregard that mandate.

Somin's second suggestion—that Article II is silent on the question of Senate consideration—simply mischaracterizes that text. As explained above, Article II semantically imposes on the Senate a duty to perform its advice and consent role. To review, that text gives the President the exclusive power to nominate: an illusory power if it does not trigger Senate consideration of the nominee. And, the text sets forth a mandatory process, which must necessarily include Senate consideration, to promptly fill important governmental posts.

Furthermore, as discussed, a fundamental canon of textual interpretation, endorsed by Justice Scalia, forbids adding language that the authors did not provide. If the Appointments Clause had been crafted to empower the Senate to disregard a President's nominees in contradiction of apparent goals reflected in its language, it would not have conveyed such a counterweight with textual silence. As discussed, had the Constitution been crafted to convey that the President and Senate essentially shared the power of nomination, the Appointments Clause would not have been placed exclusively in Article II, among the list of Presidential powers and the phrase "he shall nominate" would have been qualified.

Contrary to Somin's suggestion, then, the relevant text is far from indifferent as to whether the Senate must consider a President's nominees. Rather, the Constitution's silence is dispositive only in providing no support for the Senate's novel claim of dominant authority over the appointment process. And, although Article I, Section 5 authorizes the Senate to employ its own parliamentary process once the President has selected a nominee, the text of Article II requires that the process be designed to fulfill the Senate's constitutional role in appointment. Withholding consideration altogether, the functional equivalent of withholding discharge of its obligatory constitutional role, contradicts that directive.

II. WHAT CONSIDERATION MUST ENTAIL

A. *Conclusions from the Text Alone*

Based on the text and context in Article II, then, “advice and consent” is an obligatory process that requires the Senate to consider a President’s individual nominees. But what must that consideration involve? Although the Constitution specifies no particular process beyond an expectation that advice and consent occur, its text does provide guidance on what consideration must entail.

Article I, Section 5 endows the Senate with the authority to “determine the Rules of its Proceedings.”⁶² As explained above, the Senate’s constitutional entitlement to adopt its own rules of procedure does not relieve the Senate of complying with its duty to provide advice and consent. Importantly here, however, those limits on rule-making authority also impose some general, but meaningful, constraints on the procedural features of consideration itself.

To review, the Senate’s rules are textually subordinate to the more specific directives of the Constitution.⁶³ Indeed, in *Noel Canning*, our Supreme Court required “a reasonable relation between the mode or method of proceeding established by the rule and the [constitutional] result which is sought to be attained.”⁶⁴ Therefore, any specific procedures promulgated by the Senate for the conduct of “advice and consent” must enable it to perform the constitutional duties set forth in the Appointments Clause. As discussed above, the repeated obligatory language within that clause, considered together with its recess-appointment provision, demonstrates a textual requirement that important government vacancies be filled in a reasonably prompt fashion. At minimum, then, any Senate procedure for providing advice and consent must be designed to timely facilitate the potential confirmation of a nominee. Put another way, *the Senate has an affirmative constitutional duty to provide a process by which a nominee will receive consideration, and through which an appointment can plausibly occur.* Because any appointment could only occur through the consent of the Senate, that process must include some avenue by which the Senate, as a body, could eventually express its consent to confirm a nominee within a reasonable time frame.

⁶² U.S. CONST. art. I, §5.

⁶³ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2574 (2014).

⁶⁴ *Id.* (internal quotation marks omitted) (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)).

The text of the Appointments Clause also sets forth some implicit constraints on that process. As previously observed, the text describing the Senate's powers in the appointment process, the Advice and Consent Clause, limits only the President's power of appointment—not the power of nomination. Specifically, the Senate's role is textually and semantically confined to providing advice and consent as to an already-nominated candidate. Nothing in the text of Article II, Section 2 provides either the President or the Senate the discretion to determine, as a threshold matter, whether nomination or consideration will occur based on their views of optimal political timing or ideological advantage. Rather it specifies that the President “shall nominate” and, thereafter, that the President “shall appoint” in a timely manner.

For these reasons, the Appointments Clause does not provide the Senate with the threshold authority to determine whether, and under what political circumstances, it will consider a President's nominee. When the leadership of the 114th Senate maintained that it would consider no nominees of President Obama until after the voters had spoken in the 2016 presidential election, it may have been presenting a politically palatable and ultimately successful rationale. But it was not articulating a constitutionally correct basis for refusing to consider a lawfully nominated candidate for the United States Supreme Court. Instead, it was asserting a power over the appointment process that the Constitution plainly did not provide it.

B. Extra-Textual Sources of Constitutional Guidance

The text provides only general guidance and leaves important procedural questions unanswered. For example, does the mandate—that the Senate provide some procedure that facilitates the timely confirmation of an individual nominee—require a vote from the full Senate on every nominee? Arguably, a constitutionally compliant procedure need only *potentially* result in such a vote. Nor does the text itself confine individual Senators to any particular criteria once they actually consider a particular nominee. If the constitutional text provides only general standards for what consideration must entail, does the Senate necessarily possess unlimited discretion to shape procedure within those broad confines? Or, are there additional constitutional constraints on the Senate process arising from other approaches to interpreting the Appointments Clause?

In *Noel Canning*, the Court held that, when express constitutional text provides ambiguous direction, or no direction, “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions’ regulating the relationship

between Congress and the President.”⁶⁵ In fact, it resolved several procedural disputes arising from the Recess Appointments Clause largely on that basis.⁶⁶ It further suggested that a practice “of at least twenty years duration” might be considered “[l]ong settled and established.”⁶⁷

In addressing whether the Senate could constitutionally withhold consideration of Judge Garland on grounds that the vacancy arose in the last year of a President’s term, Robin Kar and Jason Mazzone have conducted a comprehensive analysis of historical practice to answer that distinct question.⁶⁸ Although this Article contends that such an approach was not necessary given the express guidance provided in the Constitution, historical practice could be marshalled to address procedural questions for which the Constitution truly provides no direction. Curtis Bradley and Neil Siegel have explored some of the analytical challenges in divining the appropriate application of the “historical practice” interpretive gloss.⁶⁹ A nuanced review of the Senate’s historical practice in considering presidential nominees, which comprehensively addresses those analytical challenges, is beyond the scope of this thesis (which focuses on the lessons of constitutional text). But, in light of the Court’s reasoning in *Noel Canning*, such a review could conceivably provide the Senate additional, more specific, direction on what a constitutionally compliant advice and consent process must include. Because such an inquiry becomes relevant only in answering procedural questions left unresolved by the text of the Constitution, any insights from the Senate’s historical practice in discharging its advice and consent role could not undermine the minimum requirements for that practice arising from the words of Article II, Section 2, as identified above.

Theoretically, founding-era understandings of Article II, Section 2 can also provide an extra-textual source of constitutional guidance. Although the interpretive value of such evidence is a matter of fierce academic dispute,⁷⁰ Justice Breyer’s majority opinion in *Noel Canning* marshalled such understandings of the Recess Appointments Clause in resolving disputed appointment power.⁷¹ Furthermore, the leadership of the Senate majority,

⁶⁵ *Id.* at 2559 (alteration in original) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

⁶⁶ *Id.* at 2568–69 (using lessons of historical practice to resolve meaning of “vacancies that may happen”); *id.* at 2562–67 (following the same practice to determine the definition of “recess”); *id.* at 2566–67 (following the same practice to determine the length of actionable recess).

⁶⁷ *Id.* at 2559 (second alteration in original) (quoting *The Pocket Veto Case*, 279 U.S. at 689, 690).

⁶⁸ Kar & Mazzone, *supra* note 9, at 104.

⁶⁹ See generally Bradley & Siegel, *supra* note 13 (analyzing, comprehensively, competing interpretive theories regarding the use of historical gloss to resolve constitutional disputes between the branches).

⁷⁰ See generally WILKINSON, *supra* note 15.

⁷¹ See *infra* notes 74–76 and accompanying text.

which declined to consider President Obama's nominees, have persistently lauded "originalist" understandings of constitutional text and have eulogized Justice Scalia as a proponent of that modality of interpretation.⁷²

For those reasons, and because the drafters, explicators, opponents, and ratifiers of the Constitution did describe, sometimes at length, their understandings of how judicial selection would function under the words of the Appointments Clause, this inquiry would be incomplete without considering that record. To be clear, however, the plain-text analysis presented in Part II above has been conducted independently of any evidence of the Framers' intent or contemporary understandings of that text in the founding era. Founding-era understandings are thus offered as confirmatory of, rather than necessary to, that analysis.

Nonetheless, the following review of that evidence does suggest that the Framers intended the words to be understood as they have been semantically constructed above. That evidence also suggests some additional constitutional constraints on the Senate's exercise of their advice and consent role. Specifically, the Framers of Article II, Section 2, both those advocating and opposing its ultimate ratification, universally thought that the selection process for the Supreme Court should focus on the nominee's qualifications for the post. And, prominent advocates for ratification—and founding-era constitutional scholars—identified the President's implicit power of serial nomination as a check on Senate arbitrariness in the conduct of its advice and consent role. At minimum, those features of our nation's intellectual history should receive careful review by any Senator claiming fidelity to the "original" intentions of our nation's founders.

⁷² See, e.g., Prepared Floor Statement, Chuck Grassley, U.S. Senator, Justice Antonin Scalia and His Role in Protecting Individual Liberties (Feb. 22, 2016) ("He focused legal argument on text and original understand[ing] rather than a judge's own views of changing times. . . . Justice Scalia's role as a textualist and an originalist was vital to his voting so frequently in favor of constitutional liberties."); Press Release, Orrin Hatch, U.S. Senator, Hatch Statement on the Passing of Justice Antonin Scalia (Feb. 16, 2016) ("As a scholar and a jurist, he led a much-needed revolution in the law, based on the enduring principle that the role of a judge is to say what the law is, not what the law should be."); Press Release, Mitch McConnell, U.S. Senator & Majority Leader, Justice Antonin Scalia (Feb. 13, 2016) ("[T]his giant of American jurisprudence almost singlehandedly revived an approach to constitutional interpretation that prioritized the text and original meaning of the Constitution.").

III. FOUNDING-ERA UNDERSTANDINGS OF THE APPOINTMENTS CLAUSE⁷³

As explained, the words of the Constitution articulate a design for the appointment process at odds with the 114th Senate's broad claim of authority over that process. The preceding analysis includes conclusions about constitutional purposes evident from its unadorned text: the Nominations Clause identifies the Presidency as the superior institution to select a candidate for the Supreme Court. And, the mandatory language of the Appointments Clause seeks to ensure that important governmental posts be filled. The text also insists that the posts be filled promptly, a point established by the Recess Appointments Clause. Those purposes each implicitly pursue government functionality or, in the parlance of the founding era, governmental "vigour."⁷⁴

Although the Court's interpretive framework in *Noel Canning* gave primacy to the guidance provided by the unvarnished constitutional text, including the purposes manifest by its words, it also sought to further clarify constitutional purposes, when necessary, by considering the Founders' contemporaneous understandings of that text. For example, before further analyzing the Recess Appointments Clause, the Court articulated the broad purposes of that clause with reference to Alexander Hamilton's explication of those goals in Federalist No. 76.⁷⁵ It also relied on "the Founders'" use of the word "recess" during the Constitutional Convention and Hamilton's assumptions about the expected length of a Senate session to resolve whether that term referred to intra-session recesses as well as inter-session recesses.⁷⁶

⁷³ As noted above, the author recognizes the hazards of relying exclusively on original understandings of constitutional text to resolve a constitutional question. This Article nonetheless conducts such a review to conform to the interpretive approach conducted by the Court in *Noel Canning* and to confirm that the foregoing textual discussion—which does not depend upon any original understandings of the text—in fact conforms to those understandings. See KATZMANN, *supra* note 18, at 19 (finding utility in legislative history to confirm or reinforce a court's understanding of text). Finally, one may recognize the limitations of complete dependence on an originalist modality for constitutional interpretation without claiming that founding-era understandings of the text are useless. For example, original understandings of constitutional design might carry special interpretive weight when those understandings were shared unanimously in the era.

⁷⁴ In *Noel Canning*, the majority construed the Constitution generally, and the Recess Appointments Clause, specifically, as provisions designed to foster the "vigour of government." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577 (2014) (quoting THE FEDERALIST NO. 1 (Alexander Hamilton)).

⁷⁵ *Id.* at 2558–59.

⁷⁶ *Id.* at 2561–62, 2566.

The Court presumably referred to such sources, the record of the Constitutional Convention and the Federalist Papers, because those sources provide insight into founding-era understandings of constitutional meaning. The former provides the best historical evidence of the Framers' intent contemporaneous to drafting the Constitution. The latter represents the most prominent public effort, by Framers and Federalists, to explicate the virtues of that document and thereby endorse it for ratification by the States.⁷⁷

At the Constitutional Convention, the delegates debated which institution, the "executive" or the legislature, should be empowered to appoint judges. In that debate, they focused on which of those branches could be most trusted to elevate a candidate's qualifications over partisan, geographic, or personal interests. When the Convention first addressed the topic on June 5, 1787, James Madison recorded the opening statement by James Wilson of Pennsylvania:

Mr. Wilson opposed the appointmt [sic] (of Judges by the) national Legisl: Experience shewed [sic] the impropriety of such appointmts. by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.⁷⁸

Madison agreed, and recorded his own thoughts, presented on the Convention Floor, as follows: "Mr. Madison disliked the election of the Judges by the Legislature or any numerous body. Besides, the danger of intrigue and partiality, many of the members were not judges of the requisite qualifications."⁷⁹ Delegates Nathaniel Gorham of Massachusetts and Edmund Randolph of Virginia echoed the preference for executive authority over appointments. Gorham observed that the "[e]xecutive would . . . be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone."⁸⁰ Randolph argued from his experience that "[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."⁸¹

⁷⁷ James Madison, albeit one of its authors, described the Federalist Papers to Thomas Jefferson as "the most authentic exposition of the text of the federal Constitution, as understood by the Body which prepared & the Authority which accepted it." Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), *in* 9 THE WRITINGS OF JAMES MADISON 218 (Gaillard Hunt ed., 1910).

⁷⁸ Notes of James Madison (June 5, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 119 (Max Farrand ed., 1966) (1911) [hereinafter FARRAND'S RECORDS].

⁷⁹ *Id.* at 120.

⁸⁰ Notes of James Madison (July 18, 1787), *in* 2 FARRAND'S RECORDS at 43.

⁸¹ Notes of James Madison (July 21, 1787), *in* 2 FARRAND'S RECORDS at 81.

Several delegates countered that the legislative branch should wield the appointment power. But even they anchored their arguments, in part, on the suitability of that institution in choosing the appointees with the best qualifications. Luther Martin of Maryland maintained that the Senate would be a better institution for identifying the most “fit” persons for the court because that institution was “taken from all the States” and would therefore be “best informed” of the candidates for the job.⁸² Roger Sherman and Elbridge Gerry each emphasized the same point.⁸³ Oliver Ellsworth worried that the President’s stationary location—as distinguished from the Senate whose members would travel to their home states—would make the President “more open to caresses & intrigues than the Senate.”⁸⁴ Of course, worries about consolidating too much power in the Executive also were also prevalent among that contingent.⁸⁵

Benjamin Franklin, who fell initially into neither camp, advocated for a process that would produce the most qualified candidates. Franklin invited the Convention to consider what other institutions, beyond the executive and the legislature, might be empowered to appoint judges. According to Madison’s notes, Franklin suggested in a “brief and entertaining manner” that fellow “Lawyers” should select jurists because in Scotland they “always selected the ablest of the profession in order to . . . share his practice (among themselves).”⁸⁶

But, as we know from the finished document, those contending that the Presidency was the institution most capable of identifying the most qualified candidates prevailed; Article II gave the President the power to both nominate and appoint. It expressly gave the Senate only the power to counsel the President on his selections and either grant or withhold consent to them. Notably, the initial draft presented to the Convention had empowered the “National Legislature” to choose the newly established “National Judiciary.”⁸⁷ And many delegates opposed shifting the nomination power to the President. But, as seen, even those delegates assumed that a primary goal of any constitutional design was to secure the appointment of judges based on their qualifications rather than on other self-interested motivations.

⁸² Notes of James Madison (July 18, 1787), *supra* note 80, at 41.

⁸³ *Id.* at 41, 43 (Sherman); Notes of James Madison (July 21, 1787), *supra* note 81, at 80 (Gerry).

⁸⁴ Notes of James Madison (July 21, 1787), *supra* note 81, at 81.

⁸⁵ *Id.* at 81, 83 (George Mason: “He [Mason] considered the appointment by the Executive as a dangerous prerogative.” Ellsworth: “The Executive will be regarded by the people with a jealous eye.”).

⁸⁶ Notes of James Madison (June 5, 1787), *supra* note 78, at 119.

⁸⁷ *Id.*

In Federalist No. 76, Alexander Hamilton defended Article II's endowment of nomination authority to the President. In so doing, he presumably sought to address the concerns of his audience: those considering whether the Constitution should be ratified. Paralleling the focus of both factions at the Convention, Hamilton accepted that the institution best suited to select Supreme Court justices would be the one that could be most trusted to elevate qualifications above "partialities."⁸⁸ Hamilton advocated for the Presidency as the institution best suited to select qualified candidates because the "sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation."⁸⁹ In articulating the deficiencies of the legislative branch, he observed:

[I]n every exercise of the power of appointing offices by an assembly of men we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. . . . [T]he intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party will be more considered than those which fit the person for the station. . . . And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.⁹⁰

Thus, he maintained that the constitutional text, by removing the Senate from the nomination process, would prevent a regime where partisan considerations would prevail over a candidate's fitness for the post.

It is also clear that the President's nomination authority was understood by both its advocates and opponents as an important, exclusive power. Although Oliver Ellsworth argued that the nomination and appointment power should reside exclusively in the Senate, he recognized that giving the executive branch nomination authority, subject only to Senate veto, would mean that the President retained functional control over selection. He warned: "A nomination under such circumstances will be equivalent to an appointment."⁹¹ Luther Martin later complained that the President's power to nominate was tantamount to the power of appointment, stating it gave

⁸⁸ THE FEDERALIST NO. 76, at 429 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

⁸⁹ *Id.* Although organized political parties had not yet emerged, the Constitution's architects recognized both the inevitability and dangers of factionalism to governmental function. See THE FEDERALIST NO. 9, *supra* note 88, at 118 (Alexander Hamilton) ("A firm Union will be of the utmost moment to the peace and liberty of the States as a barrier against domestic faction . . ."); THE FEDERALIST NO. 10, *supra* note 88, at 122 (James Madison) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.").

⁹⁰ THE FEDERALIST NO. 76, *supra* note 88, at 429.

⁹¹ Notes of James Madison (July 21, 1787), *supra* note 81, at 81.

him “a power and influence, which together with the other powers . . . would place him above all restraint and controul [sic]” and make him “a KING, in everything but the name.”⁹² In evaluating an earlier Convention proposal essentially identical in language to that eventually adopted by Article II, George Mason opined that such a design—providing exclusive power of nomination to the President with a Senate power to veto any nominee—“substantially vested” the appointment power in the President “alone.”⁹³

Although opponents complained that Article II’s language made the power of nomination an exclusive prerogative of the President under the terms of Article II, Hamilton, a prominent advocate, agreed. While describing the President’s contemplated authority under that article, Hamilton explained in Federalist No. 76 that: “In the act of nomination his judgment alone would be exercised.”⁹⁴ In Federalist No. 77, Hamilton compared the Constitution’s design to New York’s own state process and observed: “In that plan [the Constitution’s] power of nomination is unequivocally vested in the executive.”⁹⁵

After ratification, the newly formed Senate debated which branch held the power to remove officers, a question not addressed in Article II. According to John Adams’s notes, two Senators commented that the President should have such power because the Constitution essentially gave the President the power to appoint. Senator Ellsworth, a former opponent of that presidential power, stated: “The President, not the Senate, appoint [sic]; they only consent and advise.”⁹⁶ And, Senator Read likewise construed Article II primarily vesting the power of appointment in the President. “It is not an equal sharing of the power of appointment between the President and the Senate,” he observed.⁹⁷ “The Senate are only a check to prevent impositions on the President.”⁹⁸

In his commentary on the powers conferred by Article II, Justice Story expressed this prevailing understanding: “The president is to nominate, and thereby has the sole power to select for office.”⁹⁹ In the context of diplomatic appointments, Thomas Jefferson tersely summarized his understanding of

⁹² Luther Martin, *Information to the General Assembly of the State of Maryland* (Nov. 29, 1787), in IV THE COMPLETE ANTI-FEDERALIST 27, 67 (Herbert J. Storing ed., 1981).

⁹³ Notes of James Madison (July 21, 1787), *supra* note 81, at 83.

⁹⁴ THE FEDERALIST NO. 76, *supra* note 88, at 430 (Alexander Hamilton).

⁹⁵ THE FEDERALIST NO. 77, *supra* note 88, at 433 (Alexander Hamilton).

⁹⁶ JOHN ADAMS, *Notes of a Debate in the Senate*, in 3 THE WORKS OF JOHN ADAMS 407, 409 (Charles Francis Adams ed., 1851).

⁹⁷ *Id.* at 411–12.

⁹⁸ *Id.* at 412.

⁹⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 376 (1833).

the extent of the Senate's advice and consent power as follows: "They are only to see that no unfit person be employed."¹⁰⁰ As part of the same dispute, President George Washington accepted the counsel of James Madison, John Jay, and Thomas Jefferson that the Senate's advice and consent authority was limited to the power of "approbation or disapprobation of the person nominated by the President, all the rest being Executive and vested in the President by the Constitution."¹⁰¹

In short, the Constitution's framers, including proponents and opponents of the ultimate language set forth in Article II, strove to design an appointment process that would best elevate the candidate's qualifications above partisan interests. The majority of that body deliberately chose the Presidency over the Senate as the superior institution to effectuate that goal. For this reason, both the proponents and opponents of so empowering the executive branch understood that Article II was not contemplated to provide equal power to the Senate in either the nomination decision specifically or the appointment process as a whole. Our nation's most prominent governmental architects, including Alexander Hamilton, James Madison, John Jay, Thomas Jefferson, and George Washington, all read Article II, Section 2 in this way. Any construction of the Advice and Consent Clause that would entitle the Senate to choose which judicial nominees it would consider, and thereby capture a concurrent power over nomination itself, and which could fully negate an individual President's ability to appoint, would not be consistent with founding-era understandings of that text. And the further premise—that the Senate might insist that the President's nomination authority be subject to ideological review by voters in an intervening election—would have been squarely at odds with the Framers' unanimous intent to design an appointment system focused only on qualifications and resistant to factional political influence.

The founding-era record also suggests that the Appointments Clause was understood to include express and implied procedural checks on both the President and the Senate. Of course, the President's textually exclusive powers to nominate and appoint describe express limitations on Senate authority. Meanwhile, the Senate's power to withhold consent stands as the lone textual limitation on a President's discretion in appointing judges. But important founding-era constitutional theorists also contemplated how these respective checks would function in practice.

¹⁰⁰ Thomas Jefferson, *Opinion on Powers of the Senate Respecting Diplomatic Appointments* (Apr. 24, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, 30 NOVEMBER 1789–4 JULY 1790, at 379 (Julian P. Boyd ed., 1961).

¹⁰¹ GEORGE WASHINGTON, *Diary Entry of Tuesday, 27th* (April 27, 1790), in THE DIARY OF GEORGE WASHINGTON, FROM 1789 TO 1791, at 128 (Benson J. Lossing ed., 1861).

In Federalist No. 76, Hamilton explained that the President's power to nominate, and the Senate's duty to consider the nominee, stood central to the separation of powers calibration. Hamilton dismissed concerns that the Senate's "consent" power might allow that body to assume ultimate control over judicial appointments. He observed that "[t]he Senate could not be tempted by the preference . . . to reject the one proposed[] [by the President] because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination."¹⁰² Of course, Hamilton's above notion assumes a Senate that will actually consider the merits of nominated candidates.

As Hamilton explained, the political enforcement of checks and balances would occur through the faithful discharge of the consideration process itself. That process would assure that: "The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the executive."¹⁰³ Hamilton contemplated the President's power to nominate, and the Senate's concomitant duty to consider any nominee, as necessary checks to prevent the Senate from securing functional control over the appointment process.

Joseph Story, a Justice of the United States Supreme Court from 1811 to 1845, and an early scholar on the meaning of the new Constitution, sought in his *Commentaries on the Constitution of the United States*, to "bring[] before the reader the true view of [the Constitution's] powers, maintained by its founders and friends."¹⁰⁴ Therein, he analyzed the respective powers of the Chief Executive and the Senate in the appointment process. He specifically explained how the appointment process was understood to function when the Senate rejected a nominee: "[I]n case of a rejection, the most that, can be said, is, that he [the President] had not his first choice. He will still have a wide range of selection; and his responsibility to present another candidate, entirely qualified for the office, will be complete and unquestionable."¹⁰⁵ That the Senate would be duty-bound to consider the President's nominee is implicit in Story's functional understanding of the text. If, instead, the Senate were permitted to refuse to consider any nominee, the President's duty to present another candidate would not be "complete and unquestionable" but

¹⁰² THE FEDERALIST NO. 76, *supra* note 88, at 430 (Alexander Hamilton).

¹⁰³ THE FEDERALIST NO. 77, *supra* note 88, at 433 (Alexander Hamilton).

¹⁰⁴ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES viii (Thomas M. Cooley ed., 4th ed. 1873).

¹⁰⁵ 3 STORY, *supra* note 99, at 377.

rather irrelevant and non-existent.

Nor did Story envision any risk of dysfunction presented by the Senate's advice and consent power. In his view, the consideration process would subject the Senate to public scorn if it rejected a qualified candidate:

Nor is it to be expected, that the senate will ordinarily fail of ratifying the appointment of a suitable person for the office. Independent of the desire, which such a body may naturally be presumed to feel, of having offices suitably filled . . . there will be a responsibility to public opinion for a rejection, which will overcome all common private wishes.¹⁰⁶

But the Senate would be shielded from the scorn arising from rejecting a "suitable person" if it refuses to consider any nominee and claims, as it did with respect to Judge Garland, that such refusal has nothing to do with the nominee's qualifications.

Story understood Article II to be energized by the mutual duties imposed on the President and the Senate. In explaining why the Senate would not predictably succumb to a President's political pressure to appoint unfit nominees, Story expressed confidence that the senators' sense of "duty to their country" would encourage the "firm discharge of their duty [to provide advice and consent] on such occasions."¹⁰⁷ He explained why the Senate could not exert undue influence over the President: "It is certain, that the senate cannot, by their refusal to confirm the nominations of the president, prevent him from the proper discharge of his duty."¹⁰⁸ But, if the Senate need not consider the President's nominees at all as the 114th Senate claimed, they could—and did—achieve precisely that.

Read together, Hamilton and Story's assumptions about how the contemplated checks on Senate authority over appointments would function all presuppose that Article II imposes an obligation on the Senate to consider a President's individual nominees to assess their qualifications. This is so whether the check is enforced by the President's ability to serially nominate candidates, by the leverage of the public opinion when a qualified candidate is rejected, or by the assumption that both branches possess a duty to execute the purposes of the Appointments Clause.

In addressing a novel constitutional dispute about the mechanics of diplomatic appointments in 1790, Thomas Jefferson worried that the Senate might attempt to interfere with the President's executive management of appointees by refusing to confirm any nominee whose assignment defied the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 378.

¹⁰⁸ *Id.* at 380.

Senate's organizational preference:

It may be objected that the Senate may, by continual negatives on the *person*, do what amounts to a negative on the *grade*; and so indirectly defeat this right of the President. But this would be a breach of trust, an abuse of the power confided to the Senate, of which that body cannot be supposed capable.¹⁰⁹

Here, Jefferson characterizes the Senate's use of a *de facto* power to persistently withhold consent ("continual negatives on the person") as "an abuse of the power" when deployed to capture greater authority than specified by Article II. Jefferson refers to another express presidential power to further illustrate the point:

So the President has the power to convoke the legislature; and the Senate might defeat that power by refusing to come. This equally amounts to a negative on the power of convoking. Yet nobody will say they possess such a negative, or would be capable of usurping it by such oblique means. If the Constitution had meant to give the Senate a negative on the grade or destination, as well as the person, it would have said so in direct terms, and not left it to be effected by a sidewind. It could never mean to give them the *use* of one power thro[ugh] the *abuse* of another.¹¹⁰

Thus, Jefferson rejected any construction of the Appointments Clause that divines Senate authority from the combination of constitutional silence and *de facto* procedural leverage. Jefferson understood the Senate's advice and consent role to imply no additional power over the appointment process beyond an evaluation of the nominee's fitness for the post. In the same argument, Jefferson describes the Senate's role as a limited one, specifically, "to see that no unfit person be employed."¹¹¹

Under Jefferson's view, then, the Senate's advice and consent role cannot be construed to imply Senate control over the identity of the nominees who will be considered, over the timing of the process, or over the identity of the Presidents who may select nominees. Professor Somin's suggestion—that the Senate may functionally capture such dramatic extra-textual authority because the text fails to expressly prohibit it from doing so—was not a constitutional construction favored by Thomas Jefferson. As Jefferson observed, the Constitution does not textually empower the Senate to capture "one power thro[ugh] the abuse of another."¹¹² To paraphrase Jefferson's view of Senate appointment authority: if the Constitution had been designed to provide the Senate with such a dominant role over appointments through

¹⁰⁹ Jefferson, *supra* note 100.

¹¹⁰ *Id.* (footnotes omitted).

¹¹¹ *Id.*

¹¹² *Id.*

its advice and consent authority, “it would have said so in direct terms.”¹¹³

In summary, a review of the record of the Constitutional Convention, the Federalist Papers, and the writings of prominent founding-era scholars strongly suggest: (1) that the Framers strove to create a process for judicial appointment that elevated a candidate’s qualifications for the post above the self-interest of the selecting body; (2) that the Presidency, rather than the Senate, was deliberately chosen as the best institution to effectuate that goal; (3) that the President’s ultimate authority to serially nominate candidates and the consideration process mandated by “advice and consent” would function as a necessary counterweight to a Senate’s ability to otherwise capture the appointment power; and (4) that the Senate’s advice and consent role was neither understood to compromise the President’s exclusive authority over selection nor to provide the Senate dominant authority over the appointment process.

SUMMARY AND IMPLICATIONS

Evaluated by “plain text” standards, the 114th Senate’s refusal to consider the President’s nominee was a violation of constitutional design: the Senate’s claim of such authority can neither be harmonized with plain constitutional directive expressed in Article II, Section 2 or founding-era understandings of that text. Nonetheless, the Senate’s claim functionally prevailed, resulting in a dramatic political victory for the Republican Party that will likely carry substantial long-term implications for the shape of American jurisprudence.

More troubling yet, this Article demonstrates that, on the question of whether the Senate possesses *some* duty to consider a President’s nominees, the issue does not present a “close case.”

The text of Article II, Section 2 expressly provides the President with the exclusive authority to nominate candidates. Yet, the 114th Senate captured an extra-textual power over nomination by claiming it possessed the final authority to decide who would be considered and under what circumstances.

The text describes an obligatory three-step process for appointing important governmental officials. The Senate claimed that it owed no duty to discharge its advice and consent role as to an individual nominee, the necessary second step in that process.

The text expressly authorizes Presidents to fill government posts when the Senate is not in session, elevating the value of prompt appointment over

¹¹³ *Id.*

Senate consideration. The Senate claimed the unilateral power to indefinitely delay appointments by withholding consideration for over a year and through the changing of elected Senate bodies.

The text locates the Appointments Clause in Article II, Section 2 among the Constitution's enumeration of presidential powers and expressly describes two of the three steps of that process as powers of the President. The 114th Senate nonetheless viewed itself as broadly empowered to determine who would be considered (the power of nomination), to enjoy complete control over the timing of any appointment, and thereby to delay the appointment process until a subsequent President took power.

The text semantically confines the Senate's advice and consent authority to a review of the nominee already chosen by the President. The Senate read these same eight words as authorizing it to constructively eviscerate an individual President's power to effectively nominate at all. Indeed, the text fails to describe any Senate authority in the appointment context beyond the Senate's limited advice and consent role. Yet, the Senate construed this silence as permission to dominate the appointment process altogether.

The Constitution's hostility to the Senate's claim of authority is confirmed by a review of the record of the Constitutional Convention, the Federalist Papers, and other writings of influential founding-era constitutional commentators. Those documents demonstrate that the Appointments Clause was originally understood in conformity with the obligatory process that clause describes for filling governmental vacancies. The Senate's claim, that it may indefinitely delay and dominate the process, thereby trivializing an elected President's role, would have surprised the architects, promoters, and adopters of the Constitution.

This is because those who drafted, debated, and ratified Article II believed they had bestowed the primary authority over appointments on the President. They believed they had provided only a limited veto power to the Senate. They believed they had endowed the President, not the Senate, with the exclusive and important prerogative to nominate and appoint. They believed the Appointments Clause installed inherent limits on the Senate's potential abuse of their advice and consent authority. Specifically, they understood the President's power to have his nominees serially considered as an important and necessary check on the Senate. Otherwise, they feared the Senate might reject qualified nominees out of cynical self-interest—which is arguably what the 114th Senate did.

In short, the 114th Senate's claim of authority, to the extent based on fidelity to the United States Constitution, is not a correct one. A comprehensive review of Article II, Section 2 demonstrates the Senate's

inaction violated both the letter of, and purpose conveyed by, the Appointments Clause.

Not all constitutional disputes invite a multitude of plausible constructions. As Jack Balkin observes, it takes little practical or evaluative judgment to apply Article I, Section 3 of the Constitution.¹¹⁴ That provision reads: “The Senate of the United States shall be composed of two Senators from each State.”¹¹⁵ By contrast, reasonable constitutional scholars might differ on which constitutional principles, and tools of construction, should be marshalled to define “cruel and unusual” punishment under the Eighth Amendment. Balkin thus draws a distinction among constitutional rules, standards, and principles—constitutional requirements set forth in different levels of abstraction—in evaluating the amount of interpretation or construction necessary to resolve a constitutional question.¹¹⁶

Here, we have scrutinized constitutional text that sets forth a procedural rule for filling vacancies on the United States Supreme Court: the Appointments Clause. That language, while subject to more interpretive leeway than Article I, Section 3, is sufficiently concrete to markedly limit the range of plausible interpretations of that language. Indeed, this Article submits that a searching review of the unadorned text of Article II, Section 2, conducted with reference to the full implications of the Senate’s claim of authority, confirmed by founding-era understandings of that language, can produce only one plausible verdict: that the Senate’s complete refusal to consider President Obama’s nominee was an assertion of raw political will in violation of the Constitution.

But, if a Senate majority has the express constitutional power to ultimately withhold consent *after* consideration, does it functionally matter that the Constitution prohibits the Senate from withholding consideration? It should. Justice Antonin Scalia, eulogized by contemporary political conservatives like those in the Senate majority, spent his career maintaining that rigorous fidelity to constitutional design is necessary to promote enduring democratic values. As if chiding Senator McConnell from beyond the grave, Justice Scalia observed: “A system of democratically adopted laws cannot endure—it makes no sense—without the belief that words convey discernible meanings and without the commitment of legal arbiters to abide by those meanings.”¹¹⁷ Notably, the United States Constitution itself, apart

¹¹⁴ See Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 241, 251 (David Dyzenhaus & Malcom Thorburn eds., 2016).

¹¹⁵ U.S. CONST. art I, § 3.

¹¹⁶ Balkin, *supra* note 114, at 251–53.

¹¹⁷ SCALIA & GARNER, *supra* note 16, at xxix.

from the Bill of Rights, contains little substantive law. It is mostly concerned with establishing a procedural framework for the conduct of a democracy, with its primary tool the separation of powers. The Senate's disregard for that framework—when the partisan stakes were especially high—was a rejection of the animating premise of that document.

Furthermore, an institutional recognition that the Constitution demands Senate consideration of nominees would also have concrete effects on the nomination of federal district and circuit court judges. As to such judges, both Senate factions have refused to consider nominees for those posts during the last year of a President's term. This Article brings the lawfulness of that practice into question—at least to the extent the processes for those appointments are viewed as controlled by Article II, Section 2 and to the extent the Senate has the time remaining in its session to feasibly conduct an advice and consent process.

Even if one contends that the ultimate enforcer of constitutional fidelity must be the public, on the battleground of the electoral process, the Constitution has designed the terms of that engagement. To justify their refusal to consider any nominee of President Obama, the Senate made the political claim that it was harnessing a power that the Constitution provided it, and that it was doing so in a fashion with the most deference to democratic ideals: let the voters decide in the upcoming election! Setting aside the question of whether a presidential election can reasonably be viewed as a referendum on a single judicial appointment, this was a posture the Senate was not constitutionally entitled to strike.

In essence, the Senate made a claim of fidelity to democratic ideals when it was instead violating the Constitution's rules for conducting our republican government. While the voting public might not have the patience to parse the above textual arguments which demonstrate that fact, the names Alexander Hamilton, Thomas Jefferson, George Washington, and James Madison carry considerable prestige among the lay public as arbiters of constitutional design. Each of them accepted that the Constitution endowed the President, not the Senate, with the dominant role in selecting and appointing Justices to the United States Supreme Court. For this reason, reference to unanimous founding-era understandings of text might plausibly have elevated the importance of correct constitutional process in the public mind and intimidated senators seeking re-election to conform to that process. This was especially so given that Republican Senate leadership had specifically praised Justice Scalia's adherence to founding-era understandings of text in explaining why the process for choosing his replacement should await an intervening election.

Let us suppose the 2016 election had occurred with the threshold public understanding that the Senate's refusal to consider any nominee of President Obama's was a violation of the law or, at minimum, a defiance of our constitutional Founders' understandings of separation of powers. Under such circumstances, any political referendum, especially as to the election of embattled Republican Senators, might have told a different tale.¹¹⁸ And, in prospectively contemplating those political risks, those Senators might have prevailed on their caucus to allow consideration of Judge Garland.

Furthermore, had the Senate abided by constitutional design and considered President Obama's nominees, the Senate leadership may not have been able to control the votes of its caucus. The political calculation of Republican Senators, especially those facing re-election, may have changed had they been (1) required to individually reject a moderate and qualified Justice; (2) after that Justice had been humanized during the theater of public hearings; and (3) knowing that his rejection would only set the stage for another confirmation process for another nominee: one perhaps hailing from the Senator's home state with a compelling personal narrative.¹¹⁹

The above reputational pressures on individual Senators were the very checks that Alexander Hamilton and Justice Story envisioned as necessary to prevent the rejection of qualified nominees on inappropriate partisan grounds. In this way, correct understandings of constitutional mandates place political actions in appropriate context. The constitutional procedure at issue here, carefully devised to balance government function with checks on power, was designed to do precisely that.

Although the results of this analysis may place the actions of the 114th Senate in harsh light, this article's interpretive framework—an evaluation of the instant constitutional problem with primary reference to a semantic analysis of the text—conforms to the interpretive approach fervently

¹¹⁸ Republican incumbents, Senators Pat Toomey, Roy Blunt, and Ron Johnson of Pennsylvania, Missouri, and Wisconsin, respectively, were narrowly reelected by margins of 1.7%, 3.2%, and 3.4%, respectively. *2016 Senate Election Results*, POLITICO (Nov. 8, 2016), <https://www.politico.com/mapdata-2016/2016-election/results/map/senate/> (last updated Dec. 13, 2016, 1:57 PM). Had each of those races gone the other way, President Obama could have sought confirmation of Judge Garland by a democratically controlled Senate during his lame-duck term.

¹¹⁹ A prominent potential nominee was Judge Jane Kelly of the Eighth Circuit Federal Court of Appeals who hails from Iowa and sits in Cedar Rapids. See Grant Rodgers, *Jane Kelly Supreme Court Nomination Could Pressure Grassley*, DES MOINES REG. (Mar. 4, 2016, 1:35 PM), <http://www.desmoinesregister.com/story/news/crime-and-courts/2016/03/04/fbi-vetting-jane-kelly-supreme-court-seat-lawmakers-say/81321026/>. Judge Kelly, a rape survivor and former public defender, had been strongly endorsed for appointment to the Eighth Circuit by Senator Charles Grassley, the Republican Chairman of the Senate Judiciary Committee. Senator Grassley faced re-election in the fall of 2016. *2016 Senate Election Results*, *supra* note 118.

preached by Justice Scalia and for which he was eulogized by the leadership of that Senate. However, the author has not chosen those interpretive tools here primarily to expose political hypocrisy.

Instead, the foregoing analysis seeks *terra firma*. Acknowledging the primacy of the text offends no prevailing modality of constitutional interpretation. Indeed, the competing theories of construction become relevant only when such language fails to resolve a constitutional question. For this reason, when we strive to identify indisputable semantic understandings of constitutional text, we stand on neutral interpretive turf. Such conclusions from text, in those cases when they are available and discernible, have the potential to provide the concrete constitutional rules that are necessary for our democracy to function—even when the political motivation to evade them is especially acute.