SUPREME COURT APPOINTMENTS IN PRESIDENTIAL ELECTION YEARS: THE CASE OF JOHN HESSIN CLARKE

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INTRODUCTION

When Supreme Court Justice Antonin Scalia died unexpectedly on February 13, 2016, Republicans in the U.S. Senate immediately made clear that they would not consider any nominee proposed by President Barack Obama. Because 2016 was a presidential election year, Majority Leader Mitch McConnell declared within hours of Scalia's passing: "The American people should have a voice in the selection of their next Supreme Court Justice."[1] True to their word, the GOP-controlled

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1 Juliet Eilperin & Paul Kane, *Obama Says He'll Nominate a Replacement for Scalia*, WASH. POST (Feb. 13, 2016), https://wapo.st/1R281yj [https://perma.cc/G8D5-DEKJ]; Mark Landler & Peter Baker, *Battle Begins over Naming next Justice*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/politics/battle-begins-over-naming-next-justice.html [https://perma.cc/KYH7-92H2].

Senate refused to take any action on Obama's nomination of Chief Judge Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit as Justice Scalia's successor. This inaction provoked widespread debate, but the vacancy remained open for new President Donald J. Trump to appoint Judge Neil M. Gorsuch, of the U.S. Court of Appeals for the Tenth Circuit, to Scalia's seat.[2]

The refusal to act on Judge Garland's nomination marked the first time in 150 years that the Senate had completely stonewalled a Supreme Court nominee.[3] But this does not mean that the confirmation process used to be genteel or straightforward. Since World War II, the only two Supreme Court appointments that had occurred during a presidential election cycle illustrated the fraught nature of such matters.

In October 1956, shortly after the opening of the Court's new term, President Dwight D. Eisenhower nominated New Jersey Supreme Court Justice William J. Brennan Jr. to succeed Justice Sherman Minton, who had retired for health reasons. Eisenhower chose Brennan in an effort to appeal to Catholic voters who traditionally supported Democrats.[4] The president acted quickly to put Brennan on the Court, giving him a recess appointment that meant that he was able to hear cases before the Senate got a chance to vote on his confirmation. This posed two potential problems. First, because the recess appointment came before the election, Brennan might not have received a permanent appointment had Eisenhower lost.[5] Second, even if Eisenhower won (as he of course did), the recess appointment could undermine Brennan's independence on the bench because the Senate might retaliate against

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2 On the scholarly debate, see Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 GEO. MASON L. REV. 15 (2016); Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017); J. Stephen Clark, *President-Shopping for a New Scalia: The Illegitimacy of "McConnell Majorities" in Supreme Court Decision-Making*, 80 ALB. L. REV. 743 (2017); Michael J. Gerhardt, *Practice Makes Precedent*, 131 HARV. L. REV. F. 32 (2017).

3 In 1866, the Senate took no action on President Andrew Johnson's nomination of Attorney General Henry Stanbery to succeed Justice John Catron, and then voted to eliminate the seat that Catron had occupied so that Johnson could not fill the position. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, at 99, 108–09 (5th ed. 2008); John P. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WIS. L. REV. 172, 181. That is the last time the Senate completely stonewalled a Supreme Court nomination. A less extreme situation arose in early 1881, during the final weeks of President Rutherford B. Hayes's term. The Senate did not vote on the nomination of Stanley Matthews before Hayes left office, but incoming President James A. Garfield quickly renominated Matthews, and the Senate narrowly confirmed his appointment. John P. Frank, *Supreme Court Justice Appointments: II*, 1941 WIS. L. REV. 343, 345–47.

4 ABRAHAM, *supra* note 3, at 207–08; SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 72–77 (2010).

5 STERN & WERMIEL, *supra* note 4, at 94.

him for controversial decisions or, more subtly, Brennan might at least subconsciously decide cases with that possibility in mind.[6]

And in June 1968, Chief Justice Earl Warren announced his retirement. The timing of the announcement was seen as a thinly veiled attempt to prevent the presumptive Republican presidential nominee, Richard M. Nixon, from appointing his successor. Warren and Nixon disliked each other from their days in Republican politics in their home state of California, and Nixon had strongly criticized the Warren Court's liberal rulings on criminal law and procedure.[7] President Lyndon B. Johnson, who was not seeking reelection, nominated Justice Abe Fortas as the new Chief Justice, but Republicans and Southern Democrats in the Senate filibustered the nomination, and Fortas eventually withdrew.[8]

Despite the small number of postwar Supreme Court appointments in presidential election years, the prospect of such appointments fueled interbranch tensions. The Brennan appointment played a significant role in the Senate's adoption of a resolution opposing recess appointments except in "unusual circumstances" to avoid "a demonstrable breakdown in the administration of the Court's business."[9] Although the resolution expressed only the sense of the Senate, the timing of this move was hardly coincidental: the vote occurred on August 29, 1960, just two days before Congress adjourned to concentrate on the general election, so it served as at least a symbolic warning against any last-minute recess appointments.[10]

Similarly, as Republicans often pointed out during the Garland stalemate, Vice President Joseph R. Biden, while chairing the Senate Judiciary Committee, had advised President George H.W. Bush not to

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6 Henry M. Hart Jr., a prominent professor at Harvard Law School, made precisely these points in criticizing President Eisenhower's recess appointment of Chief Justice Earl Warren after the unexpected death of his predecessor, Fred M. Vinson. *See* Henry M. Hart, Letter, *Hart Says Confirmation First*, HARV. CRIMSON (Oct. 2, 1953), *reprinted as Prof. Hart's Letter*, HARV. L. SCH. REC., Oct. 8, 1953, at 2.

7 STEPHEN E. AMBROSE, NIXON (VOL. II): THE TRIUMPH OF A POLITICIAN, 1962–1972, at 159, 274 (1989); BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 270 (1988).

8 ABRAHAM, *supra* note 3, at 227–28; LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 327–56 (1990); MURPHY, *supra* note 7, at 273–83, 289–368, 495–525.

9 S. Res. 334, 83d Cong., 106 CONG. REC. 18145 (1960).

10 Brennan was not the only Justice who got a recess appointment from President Eisenhower. So had Chief Justice Warren. *See supra* text accompanying note 6. And in 1958 Justice Potter Stewart first joined the Court as a recess appointee. ABRAHAM, *supra* note 3, at 213. Although the resolution was not binding, there have been no recess appointments to the Supreme Court since then. *See* Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 VA. L. REV. 1665, 1679–80 (2011); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 555 (2004).

try to push through a nominee while he was running for reelection in 1992.[11] This warning also seemed like no idle threat, coming only a few years after the controversy over the failed nomination of Judge Robert H. Bork and the tumultuous confirmation process for Justice Clarence Thomas.

It was not always thus. In 1932 a politically vulnerable President Herbert C. Hoover successfully appointed Benjamin N. Cardozo to succeed the retiring Justice Oliver Wendell Holmes. Not only did this election-year vacancy occur at the height of the Great Depression, but one of Hoover's previous nominees had been rejected by the Senate less than two years earlier.[12] Of course, Cardozo, the Chief Judge of the New York Court of Appeals, was one of the most respected and influential jurists in the country, and he was almost universally regarded as the obvious choice to succeed the legal giant Holmes.[13]

More striking, in 1916 Justice Charles Evans Hughes resigned from the Supreme Court to accept the Republican presidential nomination. If ever there was reason to defer action on a successor, this was it. Allowing President Woodrow Wilson to select the replacement for Hughes would deny the GOP nominee the chance to fill the seat he had vacated. Moreover, it would have been relatively easy to block the confirmation of a new Justice had opponents chosen to do so. Nevertheless, just five weeks after Hughes quit, the Senate confirmed Wilson's nominee. There is an Ohio connection to these events: the new Justice was John Hessin Clarke, who had been a federal district judge in Cleveland before his promotion. This article will explore the Hughes-Clarke transition and consider why the process went so smoothly.

I. CHARLES EVANS HUGHES

Charles Evans Hughes was appointed to the Supreme Court in 1910 by President William Howard Taft, who had wanted Hughes as his running mate in 1908.[14] By then Hughes was a national figure, but he

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11 138 CONG. REC. 16316–17 (1992) (statement of Sen. Joseph Biden).

12 Judge John J. Parker of the U.S. Court of Appeals for the Fourth Circuit was narrowly rejected by the Senate, largely due to opposition from organized labor and the NAACP. *See* ABRAHAM, *supra* note 3, at 32–33; KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN J. PARKER 19–31 (1990); JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 127–32 (1953).

13 *See* ABRAHAM, *supra* note 3, at 160–61.

14 *See* 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 239 (1951). Coincidentally, Hughes succeeded Taft as Chief Justice in 1930; Taft was appointed as Chief Justice by President Warren

had no interest in the vice presidency. He had come to prominence in 1905, when he served as counsel to two special New York legislative committees. The first investigated exorbitant rates for natural gas and electricity, and the second uncovered abuses in the insurance industry; both resulted in the enactment of significant statutory reforms in the spring of 1906 and also led Congress to pass the first legislation forbidding corporate contributions to political campaigns.[15] Hughes accepted the Republican nomination for governor of New York a few months later and defeated newspaper magnate William Randolph Hearst in the general election, then was reelected in 1908.[16] Although he was in many respects a successful governor, Hughes quickly accepted Taft's offer of the Supreme Court appointment.[17]

During his first stint on the bench, Hughes wrote several opinions for the Court in important cases. This was unusual for a relatively junior Justice, which he was during those six years.[18] Those cases addressed such questions as the scope of federal power under the Commerce Clause and issues relating to civil rights. Some of them have had enduring significance.[19]

The Commerce Clause ruling in the *Shreveport Rate Case*[20] upheld federal authority to regulate some intrastate rail charges in order to protect interstate freight shipments. The dispute arose because the Interstate Commerce Commission (ICC) had approved higher per-mile rates for shipping goods from Shreveport, Louisiana, into various Texas destinations than Texas regulators had authorized for shipments of the same goods within the state. As a result, shippers had an incentive to avoid going through Shreveport when delivering their goods to Texas

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G. Harding in 1921 after starting his post-White House years as a professor at Yale Law School. *See* 2 *id.* at 650–59; JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 3, 274 (2004); LEWIS L. GOULD, FOUR HATS IN THE RING: THE 1912 ELECTION AND THE BIRTH OF MODERN AMERICAN POLITICS 184 (2008).

15 *See* 1 PUSEY, *supra* note 14, at 132–68. The federal law was the so-called Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864.

16 *See* 1 PUSEY, *supra* note 14, at 169–80, 240–50.

17 *See* 1 *id.* at 269, 271–73.

18 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–21, at 400 (1984) (9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES Stanley N. Katz ed.).

19 In addition to the cases discussed here, Hughes wrote the opinion of the Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which held that all resale price maintenance agreements violated the antitrust laws. Under such agreements, the maker of a product requires sellers to charge retail customers a minimum price even if the seller wants to sell below that price. *Dr. Miles* was the leading precedent on the subject for nearly a century until it was overruled by *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), which held that retail price maintenance agreements should be evaluated on a case-by-case basis.

20 Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

destinations. This, according to the ICC, represented unlawful discrimination against interstate commerce, so the federal agency ordered the railroads to raise their intrastate Texas rates to eliminate the disparity.[21]

Upholding this order in 1914, Justice Hughes emphasized "the complete and paramount character" of federal authority under the Commerce Clause.[22] This comprehensive power extended to "all matters having such *a close and substantial relation* to interstate traffic that the control is essential or appropriate to the security of that traffic."[23] It did not matter that the railroads had some intrastate traffic along with their interstate shipments:

> Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.[24]

Shreveport remains a leading example of an approach to the Commerce Clause that emphasizes economic realities.[25] At the time, the Supreme Court often took a more formalistic approach to the Commerce Clause, relying on categorical definitions that distinguished between commerce on the one hand and such activities as agriculture, mining, and production on the other. A leading statement of the formalist view appeared in an early antitrust case: "Commerce succeeds to manufacture, and is not part of it."[26] Usually, but not always, formalism reflected a narrow view of federal regulatory authority, whereas realism reflected a more expansive view. Formalist and realist decisions existed in some tension until the New Deal, when the Court—in an opinion written by Chief Justice Hughes after his return to the bench—endorsed realism as the proper way to analyze Commerce Clause disputes.[27]

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21 *Id.* at 345–46, 349.

22 *Id.* at 350.

23 *Id.* at 351 (emphasis added).

24 *Id.* at 351–52.

25 *See* SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 61–63 (1951); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1090 (2000).

26 United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

27 *See* National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Although some modern cases have overturned federal laws as exceeding the scope of the commerce power, those rulings have not endorsed a return to formalism. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

Hughes also wrote two important civil rights decisions during this period. One of these was *Bailey v. Alabama*,[28] a Thirteenth Amendment case that struck a blow against the peonage system that had ensnared many poor African Americans in the South. This ruling invalidated a statute that made it a crime for any worker to fail to repay an advance from his employer. Hughes reasoned that this statute was designed to force workers to perform their contracts on pain of imprisonment, but the Thirteenth Amendment prohibits states from "compel[ling] one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt."[29]

The *Bailey* opinion was notable in several respects. For example, *Bailey* was a high-profile case in which the federal government appeared as amicus curiae in support of the worker.[30] The case was argued less than two weeks after Hughes joined the Court, and it was unusual for the junior Justice to receive such a plum writing assignment.[31] Moreover, peonage statutes like the one at issue here disproportionately affected African Americans, a fact that the Justice Department emphasized in its argument.[32] Yet Hughes began his substantive discussion by deeming the racial aspects of the case to be irrelevant: "We at once dismiss from consideration the fact that [Bailey] is a black man."[33] Instead, the opinion focused on the threat of imprisonment for breach of contract and found the Alabama statute unconstitutional for that reason. We cannot tell why Hughes crafted the opinion as he did, but his approach in *Bailey* fit within a broader freedom-of-contract jurisprudence that had emerged during this era while avoiding the difficulties of confronting racial discrimination head-on when the Court recently had shown a notable lack of sympathy for challenges to segregation.[34]

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28 219 U.S. 219 (1911).

29 *Id.* at 244.

30 *Id.* at 220; BICKEL & SCHMIDT, *supra* note 18, at 858, 860–61, 871–72.

31 The case was argued on Oct. 20–21, 1910; Hughes arrived at the Court on Oct. 10. *Bailey*, 219 U.S. at 219; 1 PUSEY, *supra* note 14, at 274. For discussion of how Hughes came to write the opinion, see BICKEL & SCHMIDT, *supra* note 18, at 863–64.

32 *Bailey*, 219 U.S. at 222; BICKEL & SCHMIDT, *supra* note 18, at 861–62.

33 *Bailey*, 219 U.S. at 231.

34 On freedom of contract, see, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915), which struck down a state law forbidding yellow-dog contracts; *Adair v. United States*, 208 U.S. 161 (1908), which struck down a federal law forbidding yellow-dog contracts in the railroad industry; *Lochner v. New York*, 198 U.S. 45 (1905), which struck down a state law limiting the working hours of bakers. Hughes was not on the Court when *Adair* and *Lochner* were decided; he dissented in *Coppage*. *See Coppage,* 236 U.S. at 42 (Day, J., dissenting) (noting that Hughes joined this dissenting opinion). On segregation, see *Berea College v. Kentucky,* 211 U.S. 45 (1908), which rejected a challenge to a law that required educational institutions to teach students of different races in

The other important Hughes civil rights opinion from this period, *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*,[35] eventually helped to undermine segregation, although its implications went unrecognized for many years. This 1914 case involved the constitutionality of an Oklahoma statute that was similar to the Louisiana statute that the Supreme Court had upheld in *Plessy v. Ferguson*,[36] but the Oklahoma measure had a novel twist. In addition to requiring separate but equal railroad cars on trains operating wholly within the state, the law allowed companies to have whites-only luxury facilities, such as sleeping, dining, and first-class cars, without providing similar upscale facilities for African Americans.[37] The lower courts rejected a challenge to the entire measure.

Hughes wrote an opinion for the Supreme Court that affirmed the lower courts insofar as the Oklahoma measure mirrored the Louisiana law that was upheld in *Plessy*,[38] but he questioned the constitutionality of the provision for whites-only luxury facilities. The state defended this provision on the basis that there was insufficient demand for such luxuries on the part of African Americans, but Hughes dismissed this "volume of traffic" argument as beside the point: "It makes the constitutional right [to equal protection of the laws] depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one."[39] Because the Constitution guaranteed individuals the right to equal protection, the state could not permit railroads to deny any African American passenger accommodations offered to white passengers just because only a small number of blacks might be willing or able to pay for more expensive arrangements.

This analysis appears to be in real tension with the approach taken in *Plessy*, which focused on whether the segregation law was "reasonable" and applied a highly deferential test of reasonableness that most likely would have upheld the provision allowing whites-only luxury accommodations due to the prospect of limited black demand for those facilities.[40] By emphasizing the individual right rather than

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separate locations; *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899), which rejected a challenge to the closure of the only public high school for African Americans; and *Plessy v. Ferguson,* 163 U.S. 537 (1896), which rejected a constitutional challenge to a Louisiana law requiring segregated seating on train cars and endorsing the separate but equal doctrine. All of these cases were decided before Hughes joined the Court.

35 235 U.S. 151 (1914).

36 163 U.S. 537 (1896).

37 *McCabe*, 235 U.S. at 158.

38 *Id.* at 159–60.

39 *Id.* at 161.

40 *Plessy*, 163 U.S. at 550–51.

aggregate demand, Hughes opened the door to further challenges to segregation. But the broader possibilities would have to wait, because Hughes identified "an insuperable obstacle" to striking down the whites-only luxury provision in the case before him: the Black plaintiffs had never sought or been denied any luxury accommodations on any railroad that was covered by the provision.[41] Accordingly, the plaintiffs were not entitled to relief because they had not suffered a legally cognizable injury and their claim was premature—in doctrinal terms, they lacked standing and their claims were not ripe.

Although the challenge in *McCabe* failed due to bad lawyering,[42] Hughes's emphasis on the individual right rather than aggregate demand would make a difference in a brilliantly conceived lawsuit a quarter century later. The first case that the NAACP brought to the Supreme Court in its challenge to segregation in higher education relied on the *McCabe* theory. In *Missouri ex rel. Gaines v. Canada*,[43] the Court—in an opinion by Chief Justice Hughes—held that a state that operated a law school for whites could not refuse to provide a legal education to a Black applicant simply because there was insufficient demand among African Americans to make it feasible to open a separate law school. The brilliance of the litigation strategy manifested itself in the decision to focus on Missouri, which was willing to subsidize African Americans attending out-of-state institutions, so even a loss would mean that Black applicants could obtain a state-subsidized legal education somewhere. But the NAACP won the case: Hughes explained that the Constitution required Missouri to provide substantially equal opportunities for legal education "within the State" and not elsewhere.[44] *Gaines* was the first of a series of challenges to whites-only graduate and professional schools that helped to pave the way for the successful challenge to segregation in public schools in *Brown v. Board of Education*[45] two decades later.

In short, by 1916 Hughes was well on his way to a distinguished judicial career. Despite his success as governor, he happily accepted a seat on the Supreme Court because he had had his fill of the rough-and-tumble of elective politics and was delighted to return to his calling in the law.[46] Yet things did not work out as he expected. To understand why requires an appreciation of the state of the Republican Party after the 1912 election.

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41 *McCabe*, 235 U.S. at 162–64.

42 BICKEL & SCHMIDT, *supra* note 18, at 781.

43 305 U.S. 337 (1938).

44 *Id.* at 349.

45 347 U.S. 483 (1954).

46 1 PUSEY, *supra* note 14, at 268–69.

By 1912, the Republicans had held the White House for sixteen consecutive years and for thirty-six of the previous forty-four. Only Democrat Grover Cleveland interrupted a GOP run that began with Abraham Lincoln's election in 1860.[47] President William Howard Taft, who had served as Theodore Roosevelt's secretary of war, got the 1908 nomination with Roosevelt's blessing and easily won the general election.[48] Before long, however, Roosevelt became frustrated with his protégé's performance and policies.[49] After vacillating in 1911, Roosevelt announced early in 1912 that he would challenge Taft for the GOP presidential nomination. Their long and bitter contest ended with a rupture at the national convention, after which Roosevelt and his supporters formed a third party to contest the general election.[50] With the Republicans split, Democratic candidate Woodrow Wilson easily won the presidency with a strong plurality of the popular vote and a landslide majority of the electoral vote. Taft ran behind Roosevelt, carrying only two small states, and the Democrats enjoyed a Congressional sweep, gaining 63 seats in the House and capturing a majority in the Senate for the first time in 20 years.[51]

The Republicans remained deeply divided going into 1916. Roosevelt was angling to make a comeback, but the Old Guard that had supported Taft the last time had not forgiven Roosevelt's apostasy. Many party activists regarded Hughes as the only potential candidate who could lead a united GOP into the campaign against Wilson.[52] This was not the first time that Hughes had been touted for the White House: there had been efforts on his behalf in 1908, although he did not aggressively seek the nomination that ultimately went to Taft, whom he held in high esteem.[53] And he explicitly rejected overtures to accept the 1912 nomination as a compromise choice between Taft and Roosevelt, stating that he was committed to remaining on the bench.[54]

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47 Andrew Johnson, a Unionist Democrat from Tennessee, served out the bulk of Lincoln's second term, but Lincoln won the 1864 presidential election. Lincoln's victories make the Republican electoral run even longer than indicated in the text.

48 CHACE, *supra* note 14, at 12, 27; GOULD, *supra* note 14, at 1–2, 4.

49 CHACE, *supra* note 14, at 17–18; GOULD, *supra* note 14, at 15–16. For a detailed chronicle of the relationship between Roosevelt and Taft, see WILLIAM MANNERS, TR & WILL: A FRIENDSHIP THAT SPLIT THE REPUBLICAN PARTY (1969).

50 CHACE, *supra* note 14, at 94–95, 105–06, 117–22, 167–68; GOULD, *supra* note 14, at 30–31, 40–41, 49–53, 56–75, 125, 140–47.

51 CHACE, *supra* note 14, at 238–39; GOULD, *supra* note 14, at 174–76.

52 S.D. LOVELL, THE PRESIDENTIAL ELECTION OF 1916, at 10–26 (1980); 1 PUSEY, *supra* note 14, at 315.

53 1 PUSEY, *supra* note 14, at 233–39.

54 1 *id.* at 300–01.

Hughes did not, at least initially, want the 1916 presidential nomination, either. He told those who were promoting his candidacy that he was not interested, but he never declared unequivocally that he would reject the nomination.[55] Hughes supporters continued their efforts, and despite his seeming reluctance to jump into the fray, the Justice was the front-runner going into the convention.[56] Hughes won the nomination on the third ballot, routing all of the competition.[57] The climactic vote occurred on Saturday, June 10. Hughes was having lunch at home with his family when the telegram officially notifying him of his nomination arrived. He prepared a lengthy responsive telegram accepting the nomination. Before that, however, he wrote a terse letter of resignation from the Supreme Court and had it delivered to the White House.[58]

II. JOHN HESSIN CLARKE

On July 14, less than five weeks after Hughes resigned, President Wilson nominated Clarke, whom he had appointed to the U.S. District Court for the Northern District of Ohio almost exactly two years earlier, to fill the vacancy.[59] The Senate unanimously confirmed Clarke's appointment to the Supreme Court on July 24.[60]

Wilson chose Clarke largely at the behest of Newton D. Baker, who had become secretary of war in March, barely two months after completing his second term as mayor of Cleveland.[61] Baker was especially influential with Wilson, whom he strongly supported for the

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55 LOVELL, *supra* note 52, at 23–24; 1 PUSEY, *supra* note 14, at 316–17, 320–22.

56 LOVELL, *supra* note 52, at 33–36; 1 PUSEY, *supra* note 14, at 317–20.

57 LOVELL, *supra* note 52, at 44–49; 1 PUSEY, *supra* note 14, at 326–29.

58 LOVELL, *supra* note 52, at 50; 1 PUSEY, *supra* note 14, at 329–32.

59 53 CONG. REC. 11046 (1916). Wilson had nominated Clarke for the district judgeship on July 15, 1914, 51 CONG. REC. 12169 (1914); the Senate confirmed six days later on July 21, 1914. 51 CONG. REC. 12431 (1914).

60 53 CONG. REC. 11516 (1916).

61 Baker was an ally of Mayor Tom Johnson; he served four terms as the elected city solicitor, most of them under Johnson, and succeeded him as leader of the local Democratic Party in 1911. He promoted city regulation of streetcar fares, municipal ownership of electricity plants, women's suffrage, and home rule as well as the development of a spacious downtown mall, the construction of a new city hall, and support of the precursor of the Cleveland Orchestra. C.H. CRAMER, NEWTON D. BAKER: A BIOGRAPHY 40–55 (1961); DOUGLAS B. CRAIG, PROGRESSIVES AT WAR: WILLIAM G. MCADOO AND NEWTON D. BAKER, 1863–1941, at 39–49, 51–59 (2013). During the two-month interval between the end of his term as mayor and his appointment as secretary of war, Baker established the law firm now known as BakerHostetler and remained part of that firm for the rest of his life, except for his years in Wilson's cabinet. CRAMER, *supra*, at 76; CRAIG, *supra*, at 65, 239–40.

1912 Democratic presidential nomination at some risk to himself. One of the other contenders that year was Ohio Governor Justin Harmon, who narrowly won the primary in the Buckeye State. Harmon's supporters tried to impose a unit rule that would have required the entire delegation to support the governor, but Baker gave a brilliant floor speech that persuaded the national convention to overturn Ohio's unit rule and helped to turn the tide toward Wilson.[62] Baker played a significant role in the general election campaign, making speeches in several states, organizing events, and offering sound advice to the Democratic National Committee. After the election, Wilson twice offered him high-level positions in the administration, but Baker declined because he wanted to carry on his work as mayor.[63]

But there was more to the Clarke nomination and the additional background related to the 1916 election. Wilson seriously considered replacing Vice President Thomas R. Marshall, whom he regarded as a lightweight and who got onto the 1912 ticket only as part of the maneuvering at the Democratic National Convention that required forty-six ballots to select a presidential nominee.[64] One of Wilson's closest advisors suggested Baker as the replacement, but the president thought that the secretary of war would be much more valuable where he was.[65] Anticipating a close election and recognizing Ohio's enormous importance in the Electoral College, Wilson nevertheless was sympathetic to the idea of appointing someone from the Buckeye State to the Supreme Court.[66]

These factors help to explain why Wilson took Baker's recommendation seriously, but they cannot by themselves account for how Baker decided to promote Clarke, either for the Supreme Court, or earlier for the district court. In fact, Clarke had been a distinguished lawyer before he went onto the bench and had been active in Ohio Democratic politics for many years. And although he had served only

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62 CRAMER, *supra* note 61, at 60–64; CRAIG, *supra* note 61, at 61–62; CHACE, *supra* note 14, at 149–50.

63 CRAMER, *supra* note 61, at 68–70; CRAIG, *supra* note 61, at 62–63. The connection between the two men went back even further than 1912. As an undergraduate at Johns Hopkins, Baker had taken a course with Wilson, who was visiting from Princeton; Baker also lived in the same boarding house as Wilson at the time, although the distinguished professor and the young student apparently never really got to know each other. CRAMER, *supra* note 61, at 23; CRAIG, *supra* note 61, at 21.

64 CHACE, *supra* note 14, at 158; GOULD, *supra* note 14, at 93–94.

65 JOHN MILTON COOPER, JR., WOODROW WILSON: A BIOGRAPHY 339–40 (2009); CHARLES E. NEU, COLONEL HOUSE: A BIOGRAPHY OF WOODROW WILSON'S SILENT PARTNER 249–50 (2015).

66 COOPER, *supra* note 65, at 340.

two years as a trial judge before his nomination to the high Court, Clarke had earned wide respect for his judicial work.

John Clarke was born in New Lisbon (now known simply as Lisbon), Ohio, the seat of Columbiana County, on September 18, 1857 (coincidentally just three days after the birth of William Howard Taft). He graduated from what was then Western Reserve College (now Case Western Reserve University) in 1877, and read law with his father, a prominent lawyer who was active in Democratic politics and served for a time as a common pleas judge. He was admitted to the bar in 1878 and practiced locally for a couple of years.[67] In 1880 Clarke moved to Youngstown, where he had acquired a half-interest in the local newspaper, the *Vindicator,* and developed a thriving law practice.[68]

He also became active in Democratic politics in his new community. He made his mark at the state level with a rousing speech advocating direct election of U.S. senators at the 1894 party convention.[69] And in 1896, Clarke played a leading role in taking on the American Protective Association, a secretive anti-Catholic organization that was supporting the Republican candidate for mayor. He got the local Democratic Party to oppose that group, and he had the *Vindicator* take a strong stand against religious bigotry; those efforts resulted in the defeat of the GOP candidate.[70] At the same time, he opposed the free silver movement and refused, for that reason, to support William Jennings Bryan, whose famous "Cross of Gold" speech had helped him secure the 1896 Democratic presidential nomination. Instead, Clarke endorsed the dissident Gold Democratic ticket that attracted virtually no support, locally or nationally, in a contest that was won easily by another Ohioan, William McKinley.[71]

The following year in 1897, Clarke accepted a job offer from a Cleveland law firm and relocated once more. One of his new partners, William E. Cushing, had been a friend of Louis D. Brandeis at Harvard Law School.[72] In addition to miscellaneous trials, Clarke became general counsel of the Nickel Plate Railroad and also represented the Erie

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67 HOYT LANDON WARNER, THE LIFE OF MR. JUSTICE CLARKE: A TESTAMENT TO THE POWER OF LIBERAL DISSENT IN AMERICA 2–5 (1959); Carl Wittke, *Mr. Justice Clarke—A Supreme Court Judge in Retirement*, 36 MISS. VALLEY HIST. REV. 27, 27 (1949). A slightly different version of Professor Wittke's article was published as *Mr. Justice Clarke in Retirement*, 1 W. RSRV. L. REV. 28 (1949). Subsequent references will be to "Mr. Justice Clarke—A Supreme Court Judge in Retirement."

68 WARNER, *supra* note 67, at 5–8; Wittke, *supra* note 67, at 27.

69 WARNER, *supra* note 67, at 16–17.

70 *Id.* at 17–19.

71 *Id.* at 19–27.

72 *Id.* at 27, 29; ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 3 (1946); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 30–31 (2009).

Railroad, the Pullman Company, and other railway clients.[73] Despite the heavily business clientele, he was drawn to progressivism and became allied with Mayor Tom L. Johnson, who was elected mayor of Cleveland for the first of four terms in 1901.[74] Johnson had brought Newton Baker into public service early in his first term, initially as assistant law director and then as law director; in 1903 Baker became the first elected city solicitor and was reelected four more times before winning the mayoralty for himself after Johnson's death in 1911.[75] In later years, Clarke and Baker would become the closest of friends.[76]

Johnson also helped to rehabilitate Clarke's political fortunes, which had declined after his apostasy in 1896, despite his support for such reforms as workers' compensation, civil service reform, the minimum wage, limits on working hours, home rule for cities, and initiative and referendum.[77] Their alliance was instrumental in securing for Clarke the Democratic endorsement for the U.S. Senate in 1903, but the Republicans swept the election for the General Assembly and easily returned GOP incumbent Marcus A. Hanna for another term.[78] A decade later, following the ratification of the Seventeenth Amendment, Clarke again threw his hat into the ring for a seat. Ohio voters would directly choose a U.S. senator for the first time in 1914, so it was fitting that Clarke, who had come to statewide prominence two decades earlier with his stirring state convention speech promoting this idea, would be a candidate. But securing the party's nomination required that he win a primary against the state attorney general, and that proved to be a daunting challenge.[79]

Meanwhile Judge William L. Day, whom President Taft had appointed to the U.S. District Court for the Northern District of Ohio, resigned on May 1, 1914, after just less than three years on the bench, at least in part because he found his judicial salary inadequate.[80] At the

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73 WARNER, *supra* note 67, at 29–31; Wittke, *supra* note 67, at 27.

74 WARNER, *supra* note 67, at 46–48; Wittke, *supra* note 67, at 27. For more on Johnson, see HOYT LANDON WARNER, PROGRESSIVISM IN OHIO, 1897–1917, 54–86 (1964).

75 CRAMER, *supra* note 61, at 42; CRAIG, *supra* note 61 at 39–41.

76 WARNER, *supra* note 67, at 49, 179–80, 185, 191–94, 197–98; CRAMER, *supra* note 61, at 217, 235, 245–47, 258, 268–69, 274; Wittke, *supra* note 67, at 33, 41, 43–45, 47.

77 WARNER, *supra* note 67, at 45–46, 50.

78 WARNER, *supra* note 67, at 49–51; Wittke, *supra* note 67, at 27–28. As it happens Hanna had been born in New Lisbon two decades before Clarke. HERBERT CROLY, MARCUS ALONZO HANNA: HIS LIFE AND WORK 1 (1912).

79 WARNER, *supra* note 67, at 54–57.

80 WARNER, *supra* note 67, at 59; *Biographical Directory of Article III Federal Judges, 1789–present: Day, William Louis*, FED. JUD. CTR., https://www.fjc.gov/history/judges/day-william-louis [https://perma.cc/BEL3-97HM]; Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 414, 425 (1993).

urging of Mayor Baker and with the support of Attorney General James C. McReynolds, who would be appointed to the Supreme Court only a few weeks later, President Wilson nominated Clarke to fill the vacancy on the district court.[81] There were several other candidates for the post, but Wilson chose Clarke in part because of his progressive views as well as his high professional reputation among Ohio lawyers.[82] The Senate unanimously confirmed his appointment less than a week after receiving the nomination from the White House.[83]

Assessing Clarke's performance as a district judge is difficult because he published only fifteen opinions, and those opinions were not representative of the more than 600 cases of which he disposed before his appointment to the Supreme Court.[84] But we can get some sense of how he handled his judicial responsibilities from several cases.

He inherited a docket that was badly behind and took a number of steps to ease the backlog.[85] For example, he expeditiously disposed of a long-running set of patent disputes and in doing so blasted the litigants for allowing the proceedings to linger for years.[86] In another case he ordered a party to provide a more definite explanation of the basis for its claim that the patent at issue was invalid. Judge Clarke denounced

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81 McReynolds came to detest Clarke while they were colleagues on the Supreme Court and refused to sign the farewell letter that the rest of the Justices sent to Clarke when he retired. WARNER, *supra* note 67, at 66, 134 n.21. Supreme Court of the United States, *Resignation of Mr. Justice Clarke*, 260 U.S. v, v–vi (1922) (farewell letter).

82 WARNER, *supra* note 67, at 59–60; ABRAHAM, *supra* note 3, at 139, 144.

83 51 CONG. REC. 12431 (July 21, 1914). Wilson formally nominated Clarke six days earlier. 51 CONG. REC. 12169 (July 15, 1914).

84 WARNER, *supra* note 67, at 61 (providing the total number of cases that Judge Clarke disposed of); James F. Fagan, Jr., Abrams v. United States*: Remembering the Authors of Both Opinions*, 8 TOURO L. REV. 453, 513–14 n.370 (1992) (listing his published decisions). In addition, Judge Clarke wrote two opinions while sitting by designation on the U.S. Court of Appeals for the Sixth Circuit, which hears cases from Ohio, Michigan, Kentucky, and Tennessee. *See* Lenoir Car Works v. Trinkle, 228 F. 634 (6th Cir. 1915) (affirming a damage award to the estate of a worker who was killed in an industrial accident); The Charles Hubbard, 229 F. 352 (6th Cir. 1916) (affirming a damage award in a Great Lakes shipping collision).

85 WARNER, *supra* note 67, at 60–61.

86 In his first ruling, Clarke wrote: "The construction covered by the patent under discussion in this case is very simple, and comprises but few elements, yet the case has been permitted by counsel to hang about the courts undecided for 10 full years . . . ." Kellogg Switchboard & Supply Co. v. Dean Elec. Co., 231 F. 190, 193 (N.D. Ohio Sept. 21, 1915). Two weeks later, he wrote that a dispute over a different patent "has been permitted . . . to hang about the courts for 10 years without trial, while witnesses have died and the memories of the living as to important facts have failed." Kellogg Switchboard & Supply Co. v. Dean Elec. Co., 231 F. 194, 195 (N.D. Ohio Oct. 6, 1915). Four weeks later, Clarke chronicled the dilatory pace of yet another dispute over a third patent that was filed in 1906 and, after a few desultory preliminary maneuvers, had "hung along, more dead than alive, ever since." Kellogg Switchboard & Supply Co. v. Dean Elec. Co., 231 F. 197, 198 (N.D. Ohio Nov. 2, 1915), *aff'd per curiam*, 257 F. 425 (6th Cir. 1919). The Sixth Circuit did not explain why it took more than three years to resolve the appeal in the last of these cases.

the long-standing lawyers' practice of referring to numerous other patents in pretrial submissions but then relying on only a handful of features of just a few of those patents at trial, leaving the judge with "no guide whatever, when hearing oral testimony, for determining what is relevant and what is not relevant to the issue."[87] He rejected the idea that litigation was a game of wits among lawyers and viewed lawsuits as "sincere and candid attempts to reach the real point of difference between the parties to them, and to secure a just settlement of such difference."[88]

Judge Clarke also was a stickler about jurisdiction, dismissing cases that had no business in the federal courts. In his very first published opinion, he rejected a "collusive attempt" to bring a wrongful-death claim on behalf of the widow and children of a Summit County man in federal court.[89] The claim was based on Ohio law, but the lawyers for the family did not want the case heard in state court for some reason. The only way to get the case into federal court was to file the claim on behalf of someone who was not a legal resident of Ohio. To that end, the lawyers arranged to have the Italian consul in Cleveland appointed as the administrator of the man's estate. The consul was a citizen of Italy and, the lawyers asserted, could sue Ohio defendants in federal court. But the decedent had no estate other than the wrongful-death claim, so the consul was "a party only in name and form—not in any real or substantial sense."[90] He did not know the man who had died or any of his surviving family members. The lawyers had sought to "trifle with and defeat the jurisdiction of our state courts, to impose upon the federal court the trial of cases which it is not created to try, [and] to delay the trial of cases properly pending here."[91] The case could not be heard in federal court and would have to proceed in state court.

Similarly, Judge Clarke strictly construed the federal statute that allows the defendant in a state-court case to remove the matter to federal court if the federal court has jurisdiction over the dispute. When a New Jersey corporation tried to remove a lawsuit filed against it in the Cuyahoga County Court of Common Pleas (an Ohio trial court), Judge Clarke put his foot down. The plaintiff in the state court was a foreign national, and the corporation was based outside of Ohio. The jurisdictional statutes then in effect would have prevented the plaintiff from filing his lawsuit in federal court as an original proposition.

87 Coulston v. H. Franke Steel Range Co., 221 F. 669, 671 (N.D. Ohio 1915).

88 *Id.* at 672.

89 Cerri v. Akron-People's Tel. Co., 219 F. 285, 292 (N.D. Ohio 1914).

90 *Id.* at 291.

91 *Id.* at 292.

Accordingly, the defendant corporation could not remove the case to federal court and the matter must return to the state court.[92]

None of these cases dealt with high-profile issues, but they demonstrated that Clarke was a capable and efficient jurist.[93] This meant that Clarke might be a good choice for the Supreme Court as part of Wilson's effort to capture Ohio's electoral votes in November. It also meant Baker's recommendation of Clarke carried substantial weight with the chief executive. Baker made sure that the White House had the background materials that had been prepared in support of Clarke's nomination to the district court in 1914. But Wilson still was not completely persuaded, so he dispatched Baker to sound out Clarke about his general views on antitrust, a subject of great concern to the President, but one that Clarke had never faced during his time on the bench.[94] The chief executive had persuaded Congress to pass the Clayton Act, which expanded federal antitrust law, and to create the Federal Trade Commission, whose responsibilities included antitrust enforcement.[95] Baker returned to Washington with a reassuring report. And Brandeis may also have put in a good word about Clarke at least in part on the basis of glowing words from his law school friend Cushing, who had been the Cleveland judge's law partner.[96]

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92 Ivanoff v. Mechanical Rubber Co., 232 F. 173, 174 (N.D. Ohio 1916).

93 Clarke sometimes had his decisions reversed on appeal, but that does not detract from the point. Occasional reversal is a feature of the appellate process. A lower court judge once pointedly reminded a retired Supreme Court Justice that "*we* get reversed." J. Harvie Wilkinson III, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 417, 417 (1987). I have found sixty appeals from Clarke's decisions; he was reversed in seventeen cases, but seven of those cases involved scientifically complex patent issues. In one of the other reversals the Supreme Court ultimately upheld Clarke's ruling. The Sixth Circuit reversed an unpublished ruling by Clarke. Biwabik Mining Co. v. United States, 242 F. 9 (6th Cir. 1917). The Supreme Court later reversed the Sixth Circuit and upheld Clarke's original decision. United States v. Biwabik Mining Co., 247 U.S. 116 (1918). The Sixth Circuit also reversed Clarke in an immigration case that turned on the relationship between two sections of the same statute. Clarke ruled one way, based on an earlier Supreme Court decision. *Ex parte* Woo Shing, 226 F. 141, 143–44 (N.D. Ohio 1915). The court of appeals subsequently reversed Clarke on the basis of a Supreme Court ruling issued in the interim. Woo Shing v. Fluckey, 250 F. 598 (6th Cir. 1918) (per curiam). The Supreme Court decision recognized the disagreement among lower courts and specifically cited Clarke's ruling to illustrate the conflict. United States v. Woo Jan, 245 U.S. 552, 553 (1918).

94 WARNER, *supra* note 67, at 63; COOPER, *supra* note 65, 340; ABRAHAM, *supra* note 3, at 144; Wittke, *supra* note 67, at 28.

95 COOPER, *supra* note 65, at 226–36; WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 271–78 (1965); TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880–1990, at 118–20 (1992).

96 WARNER, *supra* note 67, at 63; COOPER, *supra* note 65, at 340; ABRAHAM, *supra* note 3, at 144; MASON, *supra* note 72, at 513 n.†; Wittke, *supra* note 67, at 28.

So Wilson sent Clarke's name to the Senate, which confirmed him unanimously, and without debate, only ten days later.[97] Along the way Senator Warren G. Harding, the Ohio Republican who would win the presidency in 1920, told the Judiciary Committee that the nominee was "[a] fine man, a great lawyer, an able and highly respected judge" who was "eminently fit and worthy of a place on the Supreme Bench of the United States."[98] There was grousing among conservative commentators, but that came too late to have any impact on the confirmation.[99] Clarke stayed on the Court for only six years, retiring on his sixty-fifth birthday in 1922 to devote himself to the cause of world peace.[100] Although he did in fact promote American entry into the League of Nations and other initiatives after leaving the bench, there is reason to believe that his decision to retire was prompted by the death of both of his sisters and concern about his own declining health as well as disillusionment with what he viewed as the triviality of much of his work on the Supreme Court.[101]

This is not the place for a comprehensive assessment of Justice Clarke's performance on the Supreme Court.[102] But it might be useful to touch briefly on some of his opinions relating to the First Amendment. The most important of the cases in this area is *Abrams v. United States*,[103] in which Justice Oliver Wendell Holmes wrote a famous dissenting opinion, joined only by Justice Brandeis, that was at the time "the most protective construction of the First Amendment in the history of the U.S. Supreme Court" and spawned doctrinal developments that ultimately afforded broad protection to free speech.[104] In this 1919 opinion, Holmes endorsed the marketplace of

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97 *See supra* text accompanying notes 59–60.

98 John P. Frank, *The Appointment of Supreme Court Justices: III*, 1941 WIS. L. REV. 461, 467.

99 WARNER, *supra* note 67, at 64; Wittke, *supra* note 67, at 29.

100 WARNER, *supra* note 67, at 112; Wittke, *supra* note 67, at 27, 33.

101 WARNER, *supra* note 67, at 112–13; Wittke, *supra* note 67, at 33. On Clarke's promotion of world peace and the League of Nations, see WARNER, *supra* note 67, at 115–78; Wittke, *supra* note 67, at 37–41. For a comprehensive statement of his views, see JOHN H. CLARKE, AMERICA AND WORLD PEACE (1925).

102 For such an assessment, see David M. Levitan, *The Jurisprudence of Mr. Justice Clarke*, 7 U. MIA. L. REV. 44 (1952).

103 250 U.S. 616 (1919).

104 DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 355 (1997). Although Holmes's *Abrams* dissent is rightly regarded as a progressive landmark, he was much less sympathetic to civil rights claims brought by African Americans. For example, he wrote the dissenting opinion in *Bailey v. Alabama*, 219 U.S. 219, 245–50 (1911), in which Hughes wrote for the Court to strike down a peonage law. *See supra* notes 28–34 and accompanying text; *see also* BICKEL & SCHMIDT, *supra* note 18, at 866–71. And Holmes declined to join Hughes's opinion in *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151 (1914), which raised serious questions about the

ideas as "the best test of truth."[105] But the majority opinion in *Abrams* was written by Justice Clarke, and he relied heavily on recent opinions that Holmes wrote.

Abrams involved a prosecution of five young Russian Jews—Jacob Abrams, Mollie Steimer, Hyman Lachowsky, Samuel Lipman, and Jacob Schwartz—who emigrated to this country to escape anti-Semitic persecution by the czarist government.[106] Supporters of the Bolshevik Revolution, they staunchly opposed American intervention in the Russian civil war because they feared the restoration of a regime that had long oppressed Jews.[107] They printed about 5,000 copies of leaflets, some in English entitled "The Hypocrisy of the United States and Her Allies" and others in Yiddish with a headline that was translated as "Workers—Wake Up!!"[108] The leaflets were thrown from the window of a building on the Lower East Side of New York City one evening, and distributed on the street the next morning. The five emigres were quickly arrested for and convicted of violating a provision of the Espionage Act that made it a crime to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" that was "intended to" bring the government, the armed forces, or the flag of the United States into "contempt, scorn, contumely, or disrepute," or to "urge, incite, or advocate any curtailment of production in this country" of any item "necessary or essential to the prosecution" of the U.S. war "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war."[109] Judge Henry De Lamar Clayton (who as a member of Congress had introduced the antitrust law that bears his name) sentenced the three surviving male defendants to the maximum sentence of twenty years' imprisonment and Steimer to fifteen years.[110]

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validity of an Oklahoma segregation law before concluding that the legal challenge suffered from fatal procedural flaws. *See supra* notes 35–45 and accompanying text. Holmes concurred only in the result, *McCabe*, 235 U.S. at 164, which meant that he agreed that the challenge to the law should fail but also showed that he did not endorse Hughes's concerns about the validity of the Oklahoma statute. For further discussion of Holmes's views in *McCabe*, see BICKEL & SCHMIDT, *supra* note 18, at 780–81.

105 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

106 RICHARD POLENBERG, FIGHTING FAITHS: THE *ABRAMS* CASE, THE SUPREME COURT, AND FREE SPEECH 4–5 (1987).

107 *Id.* at 36–42.

108 *Id.* at 49–50 (English), 51–52 (Yiddish).

109 Sedition Act of 1918, ch. 75, § 3, 40 Stat. 553 (repealed 1921).

110 POLENBERG, *supra* note 106, at 88, 95–96, 98–100, 145–46, 339, 341. Jacob Schwartz had died the night before the trial began, officially of pneumonia during the 1918 influenza pandemic, but many of his supporters suspected that he had been beaten to death by law enforcement officers. Judge Clayton was a district judge in Alabama who was sitting in New York by designation to help the local federal judges deal with a heavy docket. President Harding

Justice Clarke wrote for a seven-member majority in affirming the convictions and sentences. Quoting liberally from the English leaflet and the translation of the Yiddish leaflet that the government introduced at trial, he concluded that the former was "clearly an appeal to the 'workers' of this country to arise and put down by force the Government of the United States which they characterize as their 'hypocritical,' 'cowardly' and 'capitalistic' enemy"[111] and that the latter sought to "persuade the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war."[112] He added that "the manifest purpose" of the Yiddish leaflet "was to create an attempt to defeat the war plans of the Government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war."[113]

Summarily dismissing the defendants' First Amendment defense, Clarke explained that the Court, in unanimous decisions written by Justice Holmes only a few months earlier, had rejected similar arguments advanced by opponents of American participation in World War I.[114] One of those cases, *Schenck v. United States,*[115] upheld a conviction under an earlier version of the Espionage Act for mailing antiwar leaflets to men who had been drafted into the armed forces. Holmes had introduced the clear and present danger test in *Schenck* but held that the test was satisfied there, explaining that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[116] The other case, *Frohwerk v. United States,*[117] affirmed the conviction of the editor of a German-language newspaper for publishing antiwar articles and did so in a brief opinion based on *Schenck.*[118]

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commuted the sentences in late 1921, and the four prisoners agreed to be deported to the Soviet Union.

111 *Abrams*, 250 U.S. at 620.

112 *Id.* at 620–21.

113 *Id.* at 622.

114 *Id.* at 619.

115 249 U.S. 47 (1919).

116 *Id.* at 52.

117 249 U.S. 204 (1919).

118 *Id.* at 206–07. The Court at the same time upheld the conviction of Eugene Debs for violating the Espionage Act by making an antiwar speech in Canton, Ohio. Holmes dispatched the First Amendment argument in three sentences, the first of which cited *Schenck* and the second and third of which alluded to *Frohwerk*. *Debs v. United States*, 249 U.S. 211, 215 (1919).

The defendants argued that their only interest was in preventing the United States from intervening in Russia, so they did not intend to hinder the war against Germany. Clarke dismissed this point as legally irrelevant. Even though they were concerned exclusively about Russia, "the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe."[119] Anything the defendants did to disrupt U.S. intervention in Russia necessarily would disrupt the effort against Germany, and that was sufficient to uphold their convictions.

Justice Clarke also wrote for the Court sixteen months later in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,*[120] which upheld an order that banned a socialist newspaper from the mail. The postmaster general revoked the second-class mail permit of the *Milwaukee Leader* on the basis of articles, to paraphrase the Espionage Act, "which contained false reports and false statements, published with intent to interfere with the success of the military operations of our Government, to promote the success of its enemies, and to obstruct its recruiting and enlistment service."[121] The publisher argued that the Espionage Act was unconstitutional to the extent that the statute authorized the postmaster general to prohibit the mailing of newspapers based on their content, but Clarke relied on *Abrams* and the earlier Holmes opinions to conclude that "the Espionage Act is a valid, constitutional law."[122] Clarke also explained that the revocation of the permit was not an arbitrary decision by an unaccountable bureaucrat: the post office department had to conduct a formal hearing, and its decision was subject to judicial review to make sure that the decision was supported by substantial evidence.[123] Although noting that the articles that led to the mailing ban were "written more adroitly than the usual pro-German propaganda," they showed that the publisher "was deliberately and persistently doing all in its power to deter its readers from supporting the war in which our Government was engaged and to induce them to lend aid and comfort to its enemies."[124]

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119 *Abrams*, 250 U.S. at 623.

120 255 U.S. 407 (1921).

121 *Id.* at 412.

122 *Id.* at 409–10 (citing *Schenk*, *Frohwerk*, and *Debs* as well as *Abrams*).

123 *Id.* at 412–13.

124 *Id.* at 415.

Justice Brandeis wrote the principal dissent.[125] He maintained that the Espionage Act did not authorize the postmaster general to ban all issues of a publication from the mail even if a particular issue might be excluded. Construing the statute as broadly as the government urged would raise serious questions about its constitutionality, and courts as a matter of prudence should avoid interpreting a statute in a way that might render it unconstitutional.[126] In particular, allowing the postmaster general to exclude all future issues of a newspaper "would prove an effective censorship and abridge seriously freedom of expression."[127]

In contrast to the cases discussed so far, Justice Clarke dissented in *Schaefer v. United States*,[128] which upheld the convictions of several editors and officers of two German-language newspapers that published articles that were deemed to undermine the war effort in violation of the Espionage Act. Unlike Brandeis, joined by Holmes, who thought that the convictions violated the First Amendment under the clear and present danger test,[129] Clarke concentrated on evidentiary issues. One defendant, a bookkeeper who had no authority over what was published, "had no more to do with the policy of the paper than a porter would have with determining the policy of a railroad company" and so could not be convicted of anything.[130] Two other defendants were entitled to a new trial because the judge had not properly instructed the jury.[131]

We can draw two tentative conclusions from this discussion. First, Justice Clarke had a narrow view of freedom of speech and freedom of the press. He wrote for the Court in *Abrams* and the *Milwaukee Leader* case, and he joined the opinions rejecting speech claims in *Schenck* and *Frohwerk*.[132] And he did not mention the First Amendment in his *Schaefer* dissent. Second, despite his unwillingness to rely on the First Amendment, Clarke's separate opinion in *Schaefer* is the only dissent

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125 *Id.* at 417–36 (Brandeis, J., dissenting). Justice Holmes wrote a brief dissent that endorsed Brandeis's analysis and explained the evolution of his own thinking on the question of the postmaster general's legal authority. *Id.* at 436–38 (Holmes, J., dissenting).

126 *Id.* at 429–30 (Brandeis, J., dissenting).

127 *Id.* at 431 (Brandeis, J., dissenting).

128 251 U.S. 466 (1920).

129 *Id.* at 482–83 (Brandeis, J., dissenting).

130 *Id.* at 496 (Clarke, J., dissenting).

131 *Id.* at 500–01 (Clarke, J., dissenting).

132 He also joined the opinion in *Debs*, *see supra* text accompanying note 118, and in *Pierce v. United States*, 252 U.S. 239 (1920), which upheld the convictions of members of the Socialist Party for distributing an antiwar leaflet that had been written by a prominent Episcopal clergyman. Only Justice Brandeis, joined again by Holmes, dissented. *Id.* at 253–73 (Brandeis, J., dissenting).

by any Justice other than Holmes or Brandeis in any of these cases. The Court rejected the First Amendment claims in all of these cases and would continue to do so for at least another decade.

Whatever we make of Justice Clarke's jurisprudence on this or any other subject, we still should remember that he took his seat on the Supreme Court in an election year and did so without any real political controversy. Let us try to understand how that happened.

III. UNDERSTANDING CLARKE'S SMOOTH CONFIRMATION

No one suggested that filling the vacancy left by Justice Hughes's resignation should be deferred until after the presidential election. But if ever such a suggestion might have resonated, this was the time. After all, Hughes was the nominee of the opposition party and he had held the vacant seat. And it was not at all speculative to think that he could have won. Indeed, he would have defeated Wilson had he carried California and received the Golden State's thirteen electoral votes; he lost there by fewer than 4,000 votes as a result of a conflict between Progressive Governor Hiram Johnson and the Old Guard of the state GOP in the contest for the Republican nomination for a U.S. Senate seat (ultimately won by Johnson) that reflected the Taft-Roosevelt split in 1912.[133]

In fact, opponents could have prevented Clarke, or any other nominee proposed by President Wilson, from being confirmed in the Senate. Whatever other procedural devices might have been available to slow down the confirmation process, senators simply could have filibustered to prevent the nomination from coming to a vote. In 1916 the Senate did not have a rule to cut off unlimited debate. And filibusters had become increasingly common in the preceding quarter-century, although not nearly as routine as in modern times.[134] Not until March 1917, in the wake of the filibuster that blocked Wilson's proposal to arm American merchant vessels, did the Senate adopt a cloture rule

133 LOVELL, *supra* note 52, at 136–45, 171–72; 1 PUSEY, *supra* note 14, at 340–49, 361–62.

134 SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 5–6, 9–11, 60–62 (1997); FRANKLIN L. BURDETTE, FILIBUSTERING IN THE SENATE 16–39, 43–80, 83–115 (reissued ed., Russell & Russell, Inc. 1965) (1940).

to cut off debate.[135] But Republicans did not even threaten to obstruct Clarke's confirmation, let alone filibuster.[136]

GOP acquiescence did not reflect a view that Supreme Court appointments lacked importance. Only nine days before Hughes resigned from the Court, the Senate confirmed Justice Brandeis more than four months after Wilson nominated him to fill the seat previously occupied by the recently deceased Justice Joseph R. Lamar. Critics, including Harvard President A. Lawrence Lowell and six former presidents of the American Bar Association (among them William Howard Taft), wrote to the Senate Judiciary Committee that Brandeis was unfit, attacking the nominee as a dangerous radical who had supposedly violated legal ethics. On June 1, the Senate confirmed him by a vote of 47–22.[137]

The opposition to Brandeis was heavily tinged with anti-Semitism. But the role of the judiciary had already become a flashpoint of political debate. In the decade or so before Clarke was nominated, the Supreme Court had decided several controversial cases that rejected progressive legislation. The most notable was *Lochner v. New York*,[138] which struck down a state law that limited the working hours of bakers. Other decisions invalidated laws banning yellow-dog contracts that employers used to keep their employees from joining labor unions.[139]

And the controversy extended well beyond the Supreme Court. State courts around the country also rejected or eviscerated progressive reforms. For example, the Ohio Supreme Court struck down a statute that provided for an eight-hour day for employees on public works projects,[140] and either narrowly construed worker-protection laws, or allowed employers to invoke a variety of common law defenses to defeat claims by employees.[141] Perhaps the most notorious state-court ruling

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135 BINDER & SMITH, *supra* note 134, at 79; BURDETTE, *supra* note 134, at 115–28; THOMAS W. RYLEY, A LITTLE GROUP OF WILLFUL MEN: A STUDY OF CONGRESSIONAL-PRESIDENTIAL AUTHORITY 3–4, 94–131, 147–49 (1975).

136 Even if the 1917 cloture rule had been in effect in 1916, the Republican minority was large enough to sustain a filibuster against Clarke or another Wilson nominee. The cloture rule required a two-thirds vote to end debate; the GOP had forty senators, eight more than one-third of the ninety-six-member body.

137 ABRAHAM, *supra* note 3, at 141–44; HARRIS, *supra* note 12, at 99–113; MASON, *supra* note 72, at 465–505; UROFSKY, *supra* note 72, at 430–58; LEWIS J. PAPER, BRANDEIS 211–38 (1983); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 291–98 (1984); A.L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS 69–127, 132–33, 159–60 (1964).

138 198 U.S. 45 (1905).

139 Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

140 City of Cleveland v. Clements Brothers Constr. Co., 65 N.E. 885 (Ohio 1902).

141 *See* Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How* Mapp *Became a Fourth Amendment Landmark Instead of a First Amendment Footnote*, 52 CASE W. RSRV. L. REV. 441, 443–44 (2001).

was *Ives v. South Buffalo Railway Co.*,[142] which invalidated New York's workers' compensation law; the very next day, 146 female employees died in the Triangle Shirtwaist Factory fire in lower Manhattan.[143]

These rulings provoked widespread debate and proposals to limit judicial power. *Ives* in particular incensed Theodore Roosevelt, who kicked off his challenge to Taft in February 1912 with an impassioned speech to the Ohio Constitutional Convention. Roosevelt specifically advocated that the people be allowed to "recall" unpopular court decisions at the ballot box.[144] That proposal might have doomed his chances of wresting the presidential nomination from Taft,[145] but he was hardly alone in seeking to prevent the judiciary from blocking social and economic reform. In fact, the Ohio convention that Roosevelt addressed endorsed a proposal to amend the state constitution to forbid the state supreme court from invalidating laws without the concurrence of at least six of its seven members, and the voters approved this amendment.[146]

Despite the adoption of the Ohio amendment, few restrictions on the judiciary gained traction. Even that scheme never worked very well, and it was eventually repealed.[147] But the controversy about the role of the courts suggests that there could have been significant debate about the Clarke nomination. Consider the role of William Howard Taft. As President, Taft regarded Supreme Court appointments as one of his most important responsibilities, and meticulously evaluated candidates for each of the six seats he filled during his single term in the White House.[148] Even after he became Chief Justice in 1921, Taft sought to use his influence to get what he regarded as sound Justices to the Court.[149] And during the years between the end of his presidency and his

142 94 N.E. 431 (N.Y. 1911).

143 WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, 47 (1994). For more on the fire see LEON STEIN, THE TRIANGLE FIRE (1962); DAVID VON DREHLE, TRIANGLE: THE FIRE THAT CHANGED AMERICA (2003).

144 Address of Theodore Roosevelt (Feb. 21, 1912), *in* 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 378, 384–86 (1912).

145 *See* ROSS, *supra* note 143, at 137–51; GOULD, *supra* note 14, at 58–59; CHACE, *supra* note 14, at 105.

146 *See* Entin, *supra* note 141, at 445–52. Other proposals to restrict judicial power during this period are discussed in Ross, *supra* note 143, at 193–232.

147 *See* Entin, *supra* note 141, at 452–66.

148 ABRAHAM, *supra* note 3, at 130–38; MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 182–84 (2013); JONATHAN LURIE, WILLIAM HOWARD TAFT: THE TRAVAILS OF A PROGRESSIVE CONSERVATIVE 120–28 (2012); 1 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY 529–37 (1939).

149 ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 160–75 (1964).

ascension to the center chair, he also regarded Supreme Court appointments as the preeminent domestic political concern.[150]

Indeed, in 1916 Taft sought to persuade Hughes to accept the Republican presidential nomination in large measure because he feared that Wilson's reelection would decisively and perhaps permanently shift the Court in the wrong direction. But not even Taft suggested that GOP senators block Wilson's nominee to replace Hughes. The former chief executive conceded that Wilson would get to fill Hughes's seat, but he emphasized "the vacancies [Wilson] is likely to fill if he is to be re-elected. He can almost destroy the [C]ourt."[151] In short, giving up one seat now would save multiple seats later. For Taft that tradeoff was definitely worthwhile. This approach implies that Taft and the Republicans recognized a norm under which the Senate should act on a Supreme Court nomination even in a presidential election year.

One other factor might have made obstruction of the Clarke confirmation unattractive. As noted above, the Senate recently had spent more than four months on the Brandeis appointment. It is possible that the members simply lacked enthusiasm for the idea of yet another pitched battle over the Supreme Court so soon after the Brandeis controversy. There is no direct evidence for this hypothesis, but it is consistent with the aftermath of more recent confirmation fights.

For example, Justice Antonin Scalia (whose death led to the stalemate over the Garland nomination) was confirmed unanimously in 1986, soon after Justice William H. Rehnquist was elevated to Chief Justice. Rehnquist's promotion generated intense debate, leaving critics of Scalia unable to mount effective opposition to his appointment despite their concerns about him.[152]

The limits of the Senate's institutional stomach for consecutive battles over Supreme Court appointments can also be seen in more complex situations. After Justice Fortas resigned under pressure in May 1969, President Nixon nominated Judge Clement F. Haynsworth of the U.S. Court of Appeals for the Fourth Circuit as his successor. The Senate rejected him on the basis of alleged ethical improprieties relating to his having participated in two cases in which he had a conflict of interest, although the underlying concerns seem to have been his perceived

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150 *Id.* at 176.

151 1 PUSEY, CHARLES EVANS HUGHES, *supra* note 14, at 319.

152 ABRAHAM, *supra* note 3, at 278–79; JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 109–21 (2009); RICHARD A. BRISBIN JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 59–62 (1997); TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 1–14 (2000).

hostility to labor unions and especially to civil rights.[153] The Senate also rejected Nixon's next nominee, Judge G. Harrold Carswell of the U.S. Court of Appeals for the Fifth Circuit, who was widely viewed as incompetent.[154] At that point, Nixon chose Judge Harry A. Blackmun of the U.S. Court of Appeals for the Eighth Circuit. Blackmun's ethical lapses were worse than Haynsworth's in that he had sat in four cases in which his stock holdings gave him an apparent conflict of interest.[155] Blackmun also had written opinions that rejected important civil rights claims.[156] But none of that resonated, and Blackmun was confirmed unanimously.[157]

Similarly, when Justice Lewis F. Powell retired in 1987, President Reagan nominated Judge Robert H. Bork of the U.S. Court of Appeals for the District of Columbia Circuit. A pitched battle ensued, because Bork had made clear in his academic writings, judicial opinions, and speeches that he regarded much modern legal doctrine as not simply wrong but entirely illegitimate. The Senate rejected the Bork nomination, 58-42.[158] Reagan then nominated Bork's younger D.C. Circuit colleague Douglas H. Ginsburg, another strong conservative, but he withdrew in the wake of revelations that he had used marijuana (sometimes with students) while teaching at Harvard Law School.[159] At that point, Reagan turned to Judge Anthony M. Kennedy of the U.S. Court of Appeals for the Ninth Circuit. Kennedy was less strident than Bork, but he had a very conservative civil rights record in particular. Nevertheless, Kennedy was unanimously confirmed with the vocal support of many of Bork's most outspoken critics.[160]

CONCLUSION

Supreme Court appointments in presidential election years have long been politically fraught. The appointment of Justice John H. Clarke in 1916, just over three months before the election, could have been especially contentious precisely because he was nominated to replace the candidate running against the incumbent chief executive. Yet,

153 ABRAHAM, *supra* note 3, at 10–11; JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 4–12, 19–22, 88–89 (1991).

154 ABRAHAM, *supra* note 3, at 11–12; FRANK, *supra* note 153, at 100, 105–09, 116, 135.

155 FRANK, *supra* note 153, at 119–20.

156 *Id.* at 121.

157 ABRAHAM, *supra* note 3, at 13–14; FRANK, *supra* note 153, at 122–24.

158 ABRAHAM, *supra* note 3, at 281–83; ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 97, 142–60, 180–83, 322–27 (1989).

159 ABRAHAM, *supra* note 3, at 283; BRONNER, *supra* note 158, at 330–35.

160 ABRAHAM, *supra* note 3, at 283–85; BRONNER, *supra* note 158, at 336–38.

Clarke was easily and unanimously confirmed. We should not assume that the ease of his confirmation reflected broad political consensus about judicial appointments, particularly in comparison with contemporary partisan warfare on that subject. There is ample evidence that the Supreme Court was highly salient to politically engaged Americans, even then. We cannot turn back the clock, but perhaps knowing how things played out a century ago can put current battles into broader perspective.

AFTERWORD

Justice Ruth Bader Ginsburg's death on September 18—forty years and three months to the day after she became a judge[161]—made 2020 the second consecutive presidential election year with a Supreme Court vacancy.[162] She, like her dear friend and jurisprudential foil Antonin Scalia, who died in February 2016, enjoyed iconic status, although among different segments of the population. Their iconic status added to the challenges of filling their seats during such a fraught political season. The most recent election-year confirmation battle before 2016 occurred in 1968 in connection with Chief Justice Earl Warren's retirement announcement, which was widely understood to be strategically timed to prevent a political rival from naming his successor.[163] Before that, we must go back to 1932, to the retirement of Justice Oliver Wendell Holmes, for an analogous example of the departure of a judicial figure of such prominence.

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161 Justice Ginsburg's appointment to the U.S. Court of Appeals for the District of Columbia Circuit was confirmed by the Senate on June 18, 1980, and she received her commission the same day. *See* 126 CONG. REC. 15238, 15313 (1980); *Biographical Directory of Article III Federal Judges, 1789-Present, Ginsburg, Ruth Bader*, FED. JUD. CTR., https://www.fjc.gov/history/judges/ginsburg-ruth-bader [https://perma.cc/SC8P-TK3T].

162 The author was a law clerk for Justice Ginsburg in 1981–1982, when she was a member of the U.S. Court of Appeals for the District of Columbia Circuit.

163 *See supra* notes 7–8 and accompanying text. Justice Sherman Minton retired for health reasons in 1956, another presidential election year, but he was not a prestigious judicial figure. The controversy that year involved President Eisenhower's decision to give Justice William J. Brennan a recess appointment in the fall before nominating him for a permanent appointment in January 1957. *See supra* notes 4–6 and accompanying text. In addition, Justice Anthony M. Kennedy was confirmed during an election year in February 1988, but that timing reflected the protracted controversy over filling the seat of Justice Lewis F. Powell. Kennedy was the third nominee to succeed Powell, who retired in June 1987: The Senate rejected the nomination of Judge Robert H. Bork, and Judge Douglas H. Ginsburg withdrew after reports that he had used marijuana with students while teaching at Harvard Law School. *See* Jonathan L. Entin, *The Confirmation Process and the Quality of Political Debate*, 11 YALE L. & POL'Y REV. 407, 423 (1993).

The contrast between the replacement of Justice Holmes in 1932 and the replacement of Justices Scalia and Ginsburg could not be more striking. President Herbert C. Hoover quickly nominated Chief Judge Benjamin N. Cardozo of the New York Court of Appeals, who was confirmed by voice vote less than ten days later.[164] As with the appointment of Justice John Hessin Clarke to succeed Justice Hughes in 1916, the explanation cannot be that Supreme Court appointments were regarded as politically insignificant.[165] Two examples of intense confirmation battles occurred in 1930, less than two years before Justice Holmes retired. First, in February, twenty-six Senators voted against confirming Charles Evans Hughes as Chief Justice following the resignation of the terminally ill William Howard Taft.[166] Second, in May the Senate rejected President Hoover's nomination of Judge John J. Parker of the U.S. Court of Appeals for the Fourth Circuit to succeed Justice Edward T. Sanford.[167]

Of course, Cardozo was an extraordinary figure. Today we do not have anyone remotely like him who could command widespread bipartisan support to succeed such iconic figures as Scalia and Ginsburg. That reflects the greater intensity of contemporary Supreme Court politics. The Court's electoral salience has increased in recent years, and the parties have become more ideologically polarized. Because the Senate's rules now allow a simple majority to confirm a new Justice, the parties have every incentive to maneuver for maximum advantage. It therefore should come as no surprise that senators have engaged in rhetorical gymnastics to justify their inconsistent approaches to filling the Scalia and Ginsburg vacancies. Whatever the benefits of constitutional interpretation by the political branches as a general proposition, we should not expect elected officials to advance carefully reasoned rationales for what are ultimately political decisions.[168] Of course, the Supreme Court is a political institution and many of its decisions have political implications.[169] And many cases

164 *See* 75 CONG. REC. 3942 (Feb. 15, 1932) (nomination); 75 CONG. REC. 4632, 4633 (Feb. 24, 1932) (confirmation without objection); *supra* notes 12–13 and accompanying text.

165 *See supra* Part III.

166 *See* 72 CONG. REC. 3591 (Feb. 13, 1930); *supra* note 14.

167 *See* 72 CONG. REC. 8487 (May 7, 1930); *supra* note 12 and accompanying text.

168 *See, e.g.*, Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 ADMIN. L. REV. 31, 45–46 (1991); Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 227 (1990).

169 There also is both anecdotal and empirical evidence that Justices try to time their departure from the Court so that their successors can be appointed by a President of their party. *See* Ross M. Stolzenberg & James Lindgren, *Retirement and Death in Office of U.S. Supreme Court Justices*,

have more than one legally defensible answer, so a justice's values and experience might legitimately affect the result.[170] Nevertheless, too many important actors currently seem to believe that Court decisions on significant issues are mainly if not exclusively about politics. Such a pervasive belief cannot be good for the rule of law, the Supreme Court as an institution, or the nation as a whole. How we got to this point is itself a matter of political debate, the resolution of which is a matter for another day, but it is far from clear how to improve the situation in the near term.

47 DEMOGRAPHY 269 (2010). To the extent that this phenomenon exists, Justices do not always succeed in timing their departures. Justices Scalia and Ginsburg died while a President of the other party was in office, for example. And other Justices, such as Brennan and Hugo L. Black, have retired during the presidency of a chief executive of the other party for health reasons.

170 *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805–07 (1982).