

THE NON-POLITICAL BRANCH

ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS.
Lee Epstein & Jeffrey A. Segal. Oxford University Press, 2005.
Pp. viii, 180. \$23.00.

Reviewed by MICHAEL R. DIMINO, SR.*

I. INTRODUCTION	450
II. HANDBOOK FOR THE CASUAL OBSERVER.....	451
III. PARTISANSHIP AND OBJECTIVITY	462
IV. EVALUATING <i>ADVICE AND CONSENT</i> AND RECENT NOMINATIONS	463
V. CONCLUSION.....	468

* Assistant Professor, Widener University School of Law (Harrisburg, Pa.). I wish to thank Jason Wolgemuth for his research assistance and the students in my seminar on Supreme Court Politics (Fall 2005) for their contributions to our discussions about the appointments process.

I. INTRODUCTION

Upon becoming the seventeenth Chief Justice of the United States, John Roberts argued that the seventy-eight to twenty-two Senate vote to confirm him to the Court demonstrated “what is for me a bedrock principle, that judging is different from politics.”¹ Lee Epstein and Jeffrey Segal would most vehemently disagree, as would most political scientists who study the aptly named “judicial politics” subfield.² Not only is judging *politics*, in that it represents a means of distributing societal benefits, but judging is *ideological*, in that “with scattered exceptions here and there, the decisions of judges, and especially the decisions of Supreme Court justices, tend to reflect their own political values.”³ None of this is to say that judges make decisions in exactly the same way other politicians do, but Epstein and Segal convincingly refute the standard claim by judges that they are “just” applying the law “neutrally.” The realization that judicial ideology matters to case outcomes may have driven the judicial selection process to become increasingly ideological and partisan, but to some degree it has brought ideology and partisanship to bear on the selection process from the time of the Founding. As the authors note, “Presidents, senators, and interest groups alike realize that the judges themselves are political.”⁴ Judging may in some ways be different from politics, but politicians’ judgments about judging most certainly are not.

Advice and Consent would be worth reading if only because of the reputations of the authors and the timeliness of the subject. Epstein and Segal are perhaps the two most recognized names

1. President’s Remarks at Swearing-In Ceremony of Chief Justice Roberts (Sept. 29, 2005), at <http://www.whitehouse.gov/news/releases/2005/09/20050929-3.html>. See also Breyer Says ‘Zero’ Politics on the Court, ABCNEWS.COM, Feb. 8, 2006, <http://abcnews.go.com/Politics/wireStory?id=1593267&CMP=OTC-RSSFeeds0312>.

2. Indeed, within political science the ideological motivation of Supreme Court Justices is “[t]he fundamental assumption” about their behavior. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557 (1989). See also DAVID ROHDE & HAROLD SPAETH, SUPREME COURT DECISION MAKING 72 (1976) (“[W]hen the justices make decisions they want the outcomes to approximate as nearly as possible th[eir] policy preferences.”).

3. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 3 (Oxford University Press, 2005).

4. *Id.* See also *id.* at 143 (“Judges are political, and their politics seeps into their decisions.”).

in judicial politics among active faculty, with Epstein having co-authored a casebook⁵ and another book analyzing Supreme Court strategizing,⁶ and with Segal having co-authored *The Supreme Court and the Attitudinal Model*,⁷ the book that has done more than anything else to debunk the myth that the Supreme Court applies the law without regard to ideology. Both authors, of course, have made several other contributions to the judicial politics literature in the most highly regarded journals in political science, and together they are co-authors of the indispensable resource, *The Supreme Court Compendium*.⁸

Their timing could not have been better. *Advice and Consent* went to press in 2005 after Justice O'Connor announced her retirement, but before Chief Justice Rehnquist's death and before President Bush's initial nomination of then-Judge Roberts, who was originally slated to replace Justice O'Connor. The nominations and confirmation of Judge Roberts, the aborted nomination of Counsel to the President Harriet Miers, and the nomination and confirmation of Judge Samuel Alito provide ready tests for the positions Epstein and Segal advance in their book.

This review will provide a preliminary analysis of those tests after summarizing and critiquing the path that Epstein and Segal take to convince us that politics has always been at the center of judging and judicial selection.

II. HANDBOOK FOR THE CASUAL OBSERVER

Advice and Consent's greatest accomplishment is also one of its greatest flaws. It explains decades of political-science research in simple-to-understand language, making use of history but avoiding the tedium so evident in Henry Abraham's classic but overrated *Justices and Presidents*.⁹ Unfortunately, because *Advice and Consent* is designed for the lay reader, experienced scholars

5. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA (5th ed. 2003–2004, vols. 1&2).

6. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

7. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

8. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS (3d ed. 2002).

9. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (1999).

of the judicial system will find little here that has not been covered in far more detail elsewhere.

The book begins with a primer on the American judicial system and the importance that judging plays in the making of governmental policy. Because *Advice and Consent* wisely attempts to address the politics of appointments to both the Supreme Court and the lower federal courts, for both are contentious and significant in today's politics, it was necessary for the authors to describe the place of both, and they have done so admirably. Insets clearly describe the jurisdiction of the Supreme Court, the courts of appeals, and the district courts, and also provide readers with introductory information about the decision-making and opinion-writing processes of the courts. The discussion glosses over certain subtleties. For example, it mentions (without elaborating) that state courts sometimes decide federal issues while neglecting to mention that it is common for federal courts to decide state issues.¹⁰ Those problems are likely to be of minimal significance for the reader who is attempting to understand the appointments process.

Perhaps thinking that the recitation of jurisdictional limitations and the like was too dry, the authors attempt to use examples to make their points. The examples appear forced, however, because they are used sporadically. Epstein and Segal may have done well to consider using a few specific cases throughout the work to illustrate points they address in different chapters. This approach would allow uninitiated readers to understand the arguments after becoming familiar with only a few cases, and would provide continuity for the book as these cases could be relied upon in making a variety of points, including, for example, the effect of ideology on judicial decision-making, senators' use of cases in confirmation hearings, and the Court's jurisdiction and procedures. One possibility would be to use a Nixon-Court case cutting back on the exclusionary rule—*United States v. Calandra*¹¹ and *United States v. Ceccolini*¹² come to mind—and contrast the positions of the Nixon-appointed Justices with the positions of the Justices

10. See EPSTEIN & SEGAL, *supra* note 3, at 16.

11. 414 U.S. 338 (1974) (holding that the exclusionary rule does not apply to grand jury proceedings).

12. 435 U.S. 268 (1978) (holding that the testimony of live witnesses ordinarily will not be excluded from a defendant's trial as fruit of an unconstitutional search).

(particularly Chief Justice Warren and Justice Fortas) whom they replaced.

Instead, the authors choose to focus on *Katz v. United States*,¹³ though only for a few pages.¹⁴ *Katz* revolutionized constitutional criminal procedure by providing that police activity is a “search”—and thus implicates the protections of the Fourth Amendment—only where a reasonable expectation of privacy is infringed.¹⁵ The previous test had been tied to notions of property rights, concluding that the Fourth Amendment was implicated when the police had trespassed onto an area controlled by the person attempting to invalidate the “search.”¹⁶ The detail the authors provide about *Katz* is not enough to understand its complexity, certainly not enough for lay readers to understand why it has become such a central case in criminal procedure, and at the same time, excessive for the purpose of illustrating the simple point that the authors are trying to make (which is that *Katz* was convicted in a district court and appealed his conviction to the court of appeals and the Supreme Court). Thus, the reader who understands *Katz* is left wondering whether the authors will use the importance of the *Katz* doctrine to illustrate a broader point about appointments politics (they do not), the reader who has never heard of *Katz* is left wondering why it matters for appointments purposes that *Katz* was arguing about whether a phone booth is a constitutionally protected area (it does not), and both are left wondering whether there is any reason to choose *Katz* as an illustration over hundreds of other possibilities of more recent vintage (there is none that I can tell).

Epstein and Segal do attempt to use *Bush v. Gore*¹⁷ as an illustration of both the political effects of court decisions and the political nature of judicial decision-making, but here again they provide far less detail than necessary to make a convincing demonstration of the second point. To be sure, many others have made the claim that *Bush v. Gore* was so transparently devoid of legal reasoning that it must have been a partisan

13. 389 U.S. 347 (1967).

14. See EPSTEIN & SEGAL, *supra* note 3, at 11–15.

15. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

16. See *Goldman v. United States*, 316 U.S. 129 (1942); *Olmstead v. United States*, 277 U.S. 438 (1928).

17. 531 U.S. 98 (2000).

decision by five Justices who preferred a Bush presidency to a Gore one.¹⁸ But the only support Epstein and Segal offer for their cynical assessment is that the Court's "five most conservative members, all Republicans themselves, effectively decided the election of 2000 in favor of the Republican candidate."¹⁹

After the general introduction to the players in the appointments process, *Advice and Consent* proceeds to discuss the logically preceding issue of vacancies. The information in this chapter is likely to be entertaining to novices—many will no doubt be interested to hear of President Johnson's pressuring of Arthur Goldberg to resign so that President Johnson could appoint his friend Abe Fortas, for example—but Artemus Ward's recent book-length treatment of the subject, *Deciding to Leave*,²⁰ provides a much more thorough analysis for those readers who are drawn to examining the reasons Justices leave the High Court. Other scholars have also documented the evidence on which Epstein and Segal rely for their analysis of lower court departures.²¹

18. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* (2003); *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* (Ronald Dworkin ed., 2002); *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman ed., 2002); Laurence H. Tribe: *eroG v. hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001). But see, e.g., RICHARD A. POSNER: *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643 (2005).

19. EPSTEIN & SEGAL, *supra* note 3, at 17. The text is misleading as to the partisan nature of *Bush v. Gore*. In stating that the decision may well have been different if "five liberals (Democrats) sat on the Supreme Court instead of five conservatives (Republicans)," Epstein and Segal convey the misimpression that the party labels of the Justices correlate better with their ideologies than is actually the case. *Id.* The fact that two of the Justices in the minority in that case, Justices Stevens and Souter, were liberal Republicans is information that readers may find significant in determining whether the case was decided on partisan grounds. Also potentially significant but unmentioned in the book are the facts that Justice Souter and Justice Breyer agreed with the substance of the per curiam decision's equal protection analysis, though disagreeing with the majority's choice of remedy. See *Bush v. Gore*, 531 U.S. 98, 133–35 (2000) (Souter, J., dissenting); *id.* at 145–47 (Breyer, J., dissenting).

20. ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* (2003).

21. See Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900–1987*, 52 J. POL. 457 (1990); David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. Q. 458 (2000); James F. Spriggs II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991*, 48 POL. RES. Q. 573 (1995) (all cited in EPSTEIN & SEGAL, *supra* note 3, at 153 n.11).

Though Epstein and Segal's work here is not original, it is well done and gives readers essential information and a few anecdotes without belaboring their points. They effectively argue that Justices (and lower court judges) often time their retirements to coincide with presidential administrations to their liking, and that Congress is likely to create new judgeships during periods of unified government—both providing considerable support for their thesis that politics pervades the appointments process from beginning to end. They are fair, however, in acknowledging that health and economic concerns have often factored in Justices' retirement decisions,²² though less so in the years since Congress has provided generous retirement benefits for judges under the 1954 Retirement Act,²³ now supplemented by the "Rule of 80," which provides that a judge is eligible for retirement when his age and years of service combined are eighty or greater.²⁴

Advice and Consent next turns to the presidential nominating decision—another topic covered more thoroughly in a book devoted to the subject.²⁵ Again, Epstein and Segal do a nice job of noting that Presidents attempt to achieve multiple goals in naming certain individuals to the federal bench, including satisfying (or creating) political debts; appealing to certain racial, sexual, religious, geographic, or ideological constituencies; rewarding personal friends; and making the courts more receptive to the Presidents' policy views. Above all, the authors note, consideration must be had of the preferences of the Senate, lest the President's choice be defeated, "in which case he cannot accomplish his objectives, whatever they might be."²⁶ These factors have been weighed differently by different presidents, from the cronyism of President Truman to the electoral politics of President Nixon and the ideological examination of President Reagan. Overall, however, ideological compatibility has been a requirement for presidential nominations to the Supreme Court, and we should not be

22. See EPSTEIN & SEGAL, *supra* note 3, at 34–36.

23. See WARD, *supra* note 20, at 158–60.

24. *Id.* at 195.

25. DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999).

26. EPSTEIN & SEGAL, *supra* note 3, at 52.

surprised by the high degree of confluence between the ideologies of Presidents and their nominees.²⁷

Predicting any individual President's selection is nearly impossible to do, because so much depends on political context. But surely it would not have surprised Epstein, Segal, or their readers that John Roberts would be President Bush's choice to succeed Chief Justice Rehnquist, or that Samuel Alito would be selected ultimately to fill Justice O'Connor's seat. Both are perceived as reliable, intelligent, experienced judicial conservatives who are respected enough to have a good chance of confirmation before a Republican Senate. John Roberts, in particular, is highlighted in the book as a likely nominee.²⁸ Even President Bush's selection of Harriet Miers was no surprise under this analysis, for such a selection permitted the President to reward a personal friend, replace the first female Justice with another female, and—he might have hoped—avoid a political battle in the Senate because her name was suggested to him by the Senate Democratic leader.²⁹

Having discussed the presidential nomination decision, Epstein and Segal next turn to the confirmation process, where they argue that the process is no less—but no more—political than earlier portions of the appointments game. Ironically, given that the book will draw attention because of its conclusion that politics pervades both the judicial process and the judicial appointments process, one of the most questionable claims Epstein and Segal make is that a nominee's professional *qualifications* “play a crucial role” in his or her quest for Senate confirmation.³⁰ As with the rest of the book, there is little new here: The analysis concerning the importance of qualifications

27. See EPSTEIN & SEGAL, *supra* note 3, at 121–24. See also LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985).

28. See EPSTEIN & SEGAL, *supra* note 3, at 61, 63–64.

29. See *CNN Late Edition with Wolf Blitzer*, Oct. 30, 2005, available at <http://transcripts.cnn.com/TRANSCRIPTS/0510/30/le.01.html> (interview with Senator Reid, in which Senator Reid stated that he “suggested Harriet Miers” to the President).

30. EPSTEIN & SEGAL, *supra* note 3, at 103. The authors later offer the appointment of Benjamin Cardozo, a Democrat, by Republican President Herbert Hoover as a potential example of an appointment based purely on merit. They overlook political factors that played a decisive role, specifically, the weak political position of President Hoover. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 36–39 (7th ed. 2005); YALOF, *supra* note 25, at 4.

appears in other articles,³¹ and Segal himself, along with two co-authors, pioneered the method that Epstein and Segal use in *Advice and Consent* to assess the past Supreme Court nominees' qualifications.³²

Surely no one would expect professional qualifications to be irrelevant, and we should not be surprised to learn that a well qualified nominee would be expected to receive forty-five more votes for confirmation than would a nominee "universally deemed unqualified."³³ But the flip side of that coin is that a majority of senators' votes are entirely unaffected by qualifications, even in the extreme case of a "universally" conceded unqualified nominee. Even those nominees rated as "very unqualified" receive support from a majority of the Senate.³⁴ As the authors note later, "the odds are high that [senators] will vote for an undeserving candidate who is ideologically proximate (think of southern Democrats and Clement Haynsworth [sic]), thus underscoring the role of politics."³⁵

Just as significant, and more troublesome from the point of view of evaluating the truth of the authors' claim that qualifications are important, Epstein and Segal's method for assessing qualifications depends to some degree on the nominees' ideologies. In other words, "qualifications" are in no way an attempt to objectively quantify the quality of a nominee's résumé. Instead, the term is used merely as a synonym for fitness for the Court (as judged by newspaper editorial writers), with all the problems of vagueness and subjectivity associated with such a definition. Editorials about the fitness of each nominee were

31. See, e.g., Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145 (2005).

32. See Charles D. Cameron et al., *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990).

33. EPSTEIN & SEGAL, *supra* note 3, at 103.

34. *Id.* at 106.

35. *Id.* at 114. It is possible that the authors meant to refer to G. Harrold Carswell, whom everyone now recognizes was incompetent. Haynsworth, however, was very qualified at the time of his nomination—he was the well respected Chief Judge of the Fourth Circuit—despite the concerns about his ethics and solicitude for the legal arguments of minorities and unions that were manufactured by Senate liberals who opposed him because of ideology. See generally JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT (1991). Both Haynsworth and Carswell had relatively low "qualifications" as measured by Epstein and Segal. EPSTEIN & SEGAL, *supra* note 3, at 66, 95.

collected from four newspapers,³⁶ and the content of the editorials was evaluated.

The choice of this peculiar definition appears to be deliberate. Epstein and Segal explain that the goal is to assess “senators’ . . . *perceptions* of whether a candidate is qualified or not,”³⁷ and that any measure of those perceptions should be based on data from outside the Senate itself. I agree, of course, that senators’ statements about nominees’ qualifications are unreliable, but so too are editorialists’. A few examples of the curious results of this data should suffice to prove my point. Both Associate Justices who were nominated for Chief Justice during the period of the study (Fortas in 1968 and Rehnquist in 1986) were seen as *less* qualified *after they had served on the Supreme Court* than they were for their initial appointments.³⁸ Perhaps Fortas’s decline is explicable on the basis of ethical concerns, but in Rehnquist’s case the sole apparent reason for the lower score in 1986 was dissatisfaction among editorial writers with the conservative tenor of his opinions. (At least no other reasons are offered by Epstein and Segal.)

Robert Bork, who had been Solicitor General, a professor at Yale Law School, and a judge on the D.C. Circuit, was considered by the editorialists to have rather mediocre “qualifications.” Ranking only incrementally higher was Thurgood Marshall, who had also been Solicitor General and a Circuit Judge, in addition to heading the NAACP Legal Defense Fund and coordinating the ultimately successful challenge to American *de jure* segregation. Surpassing Judges Bork and Marshall in terms of their “qualifications” are Arthur Goldberg, whose qualification was that he was Secretary of Labor,³⁹ and Sandra Day O’Connor, who at the time of her nomination was a mid-level state appellate judge.⁴⁰

36. EPSTEIN & SEGAL, *supra* note 3, at 104. Though the researchers attempted to use two liberal papers and two conservative ones, it might surprise conservatives that the *Los Angeles Times* was one of the papers chosen to represent their point of view.

37. *Id.*

38. For the perceived qualifications of the nominees, as discussed in this paragraph, see EPSTEIN & SEGAL, *supra* note 3, at 105 fig. 4.4; JEFFREY A. SEGAL, PERCEIVED QUALIFICATIONS AND IDEOLOGY OF SUPREME COURT NOMINEES, 1937–2005, <http://ws.cc.stonybrook.edu/polsci/jsegal/qualtable.pdf> (last visited Apr. 17, 2005).

39. Justice Frankfurter quipped that Robert Kennedy “said Arthur Goldberg was a scholarly lawyer. I wonder where he got that notion from.” Felix Frankfurter Oral History Interview, at 52–53, *quoted in* O’BRIEN, *supra* note 30, at 34.

40. “[Y]ou have to go back some decades to find a Supreme Court nominee with as slender a record as O’Connor’s prior to her nomination (perhaps Charles Whittaker,

These inexplicable assessments of the “qualifications” of giants of the profession leads one to conclude that Robert Bork and Thurgood Marshall’s noteworthy service prior to their nominations earned them several enemies and a reputation based on their politics, and that the editorial writers were influenced more by this reputation than the nominees’ qualifications. The nominees scoring highest are not just those with exceptional minds and experience, but (with the notable exception of Justice Ginsburg) those who have managed not to become well known for their politics before their nominations. When Epstein and Segal write that “the qualification scores square with our impressions of the nominees,”⁴¹ we are entitled to question the judgments leading to such impressions.

The fact that senators vote consistently with the views of those editorial writers may be important, but it is not surprising and certainly does not prove the point for which Epstein and Segal offer it—namely, that a nominee’s ability apart from politics is a significant determinant of his or her success in the confirmation process. Neither does it offer much advice to Presidents in nominating individuals. The President can be told that senators will be more likely to vote for a qualified nominee than an unqualified one, but no President can plan nominations around a strategy for nominating qualified nominees if he cannot depend on individuals such as Bork and Marshall receiving exemplary ratings. More effective advice would be “nominate people without track records”—advice which is now, regrettably, commonplace, and has led to the search for stealth candidates rather than for brilliance.

Of course criticizing another’s methodology is easier than developing one’s own, and I have no ready substitute for assessing qualifications that would completely satisfy my concern of “vagueness and subjectivity.” A nominee’s American Bar Association (ABA) rating could serve that purpose, but the ABA’s split decision on the “qualifications” of Robert Bork underscores the subjectivity in that organization’s evaluation of a

appointed in 1957, but even Whittaker had been a federal judge for three years before he was nominated).” MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 52 (2005). Justice Whittaker left the Court after his inability to handle the work resulted in a nervous breakdown, and is widely considered to be a judicial failure. Epstein and Segal’s data give both him and O’Connor the highest possible rating for “qualifications.”

41. EPSTEIN & SEGAL, *supra* note 3, at 105.

nominee's "judicial temperament"⁴²—a problem that, as Epstein and Segal note, has led to the ABA having a diminished role in the screening of President Bush's nominees.⁴³ Indeed, Epstein and Segal's assessment of qualifications may have incorporated this flaw of the ABA ratings, as editorialists may be expected to take their cues on a nominee's qualifications from the ABA.

Advice and Consent's discussion of the importance of qualifications focuses on the qualifications of Supreme Court nominees. Had Epstein and Segal considered the effect of qualifications on the confirmation process for lower court nominees in recent years, the data may have been even less impressive. In a study published after the release of *Advice and Consent*, John Lott found, "By most measures, the higher the quality of the judge [as measured in citations to published opinions once seated on the bench], the more difficult [i.e., longer] is the confirmation process."⁴⁴ It appears that times have changed, and the history on which Epstein and Segal base their conclusions about the importance of qualifications is not effective at predicting modern practice.

In a portion of the book that should be especially helpful to readers who lack a thorough understanding of the operation of Congress, Epstein and Segal combine a black-letter tour of the process—the role of the Judiciary Committee, interest groups, public opinion, senatorial courtesy, and blue slips—with an analysis of senatorial behavior highlighting the degree to which politics and ideology play central roles in senators' behavior. Other scholars, of course, have made these points before, but Epstein and Segal do a very nice job discussing the most recent developments in this process, such as the debate over the

42. *Id.* at 72 (As Epstein and Segal note, this criterion is to include "the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law.") (citing ABA STANDING COMMITTEE ON FEDERAL JUDICIARY, [http://www.abanet.org/scfedjud/Federal_Judiciary%20\(2\).pdf](http://www.abanet.org/scfedjud/Federal_Judiciary%20(2).pdf) (last visited Apr. 16, 2006)). See generally NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 116–17, 127–30 (1998).

43. EPSTEIN & SEGAL, *supra* note 3, at 22, 74–75.

44. John R. Lott, Jr., *The Judicial Confirmation Process: The Difficulty with Being Smart*, 2 J. EMPIRICAL LEGAL STUD. 407, 434 (2005).

propriety of recess appointments,⁴⁵ and do not just rehash the historical summaries that are available elsewhere.⁴⁶

The portion of the book that has the most opportunity to influence public perceptions of the judicial process and by extension the confirmation process is Chapter 5, “Politics, Presidents, and Judging.” It is there that the authors introduce readers to the attitudinal model of analyzing judicial politics. That model holds that judicial decisions are driven by judges’ attitudes, and not “legal” factors such as text, precedent, and the like. The attitudinal model is widely accepted in political science and within that literature “those who continue to cling to the myth of neutral judging” are roundly derided.⁴⁷

My only regret with regard to this section is that it is so brief. Epstein and Segal demonstrate that Presidents can effect substantial policy shifts on the Court through their nominations by showing the empirical correlation between the ideologies of Presidents and their nominees.⁴⁸ In this effort they follow on the heels of Laurence Tribe and several others who have presented the same thesis since at least twenty years ago.⁴⁹ Epstein and Segal update the claim and add insightful information about the performance of circuit judges, but their defense of the attitudinal model is less detailed than it could have been, given that they could have drawn directly on their own published works to make a more involved version of the argument.

Epstein and Segal are the perfect people to write a text explaining to the casual observer that courts are political institutions, and that the appointments process is the opportunity for democratic involvement in that form of politics. If politics drives judicial decisions (particularly on the Supreme Court), and if judicial decisions are to play as central a role in American government as they do, then Supreme Court appointments are as important for democracy as are elections—

45. See EPSTEIN & SEGAL, *supra* note 3, at 81–82. Also helpful in analyzing recent trends in the appointments process is David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner’s Dilemma*, 26 CARDOZO L. REV. 479 (2005).

46. See, e.g., TRIBE, *supra* note 27; Richard D. Freer, *Advice? Consent? Senatorial Immaturity and the Judicial Selection Process*, 101 W. VA. L. REV. 495 (1999); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992); Jeffrey K. Tullis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331 (1997).

47. EPSTEIN & SEGAL, *supra* note 3, at 127.

48. See *id.* at 130–35.

49. See, e.g., TRIBE, *supra* note 27.

for better or worse.⁵⁰ They fulfill that goal, but do so less convincingly and less thoroughly than might be expected.

III. PARTISANSHIP AND OBJECTIVITY

By and large, *Advice and Consent* is written without an overt partisan slant. As discussed below, Epstein and Segal's treatment of the American Bar Association's politics is fair, and they go so far as to "fundamentally agree" with Robert Bork "that the appointments process is political because federal judges and justices themselves are political."⁵¹ But, being political scientists, Epstein and Segal make no claims about which way to interpret the Constitution and statutes is correct, so they find Republican judges' conservative decisions and Democratic judges' liberal decisions sufficient proof that both are political, and always have been.⁵² Law professors, by contrast, argue that only those who disagree with them (the law professors) are behaving politically.

But on occasion Epstein and Segal take a few shots at Republicans that give away their political sympathies. For example, several times throughout the text they refer to Justice Ginsburg as "moderately liberal" because she votes in a liberal direction sixty percent of the time,⁵³ but they refer to Justice Scalia as "extremely conservative"⁵⁴ and "very conservative"⁵⁵

50. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000–01 (Scalia, J., concurring in part and dissenting in part) ("Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies; if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the 'liberties' protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.") (citation omitted).

51. EPSTEIN & SEGAL, *supra* note 3, at 144.

52. *See id.*

53. EPSTEIN & SEGAL, *supra* note 3, at 124, 126.

54. *Id.* at 126, 139. Justice Kennedy is also referred to as being "conservative" at the time of his appointments, though he might be considered as moderate as Justice Ginsburg. *See id.* at 110.

because he votes in a conservative direction sixty-six percent of the time. Surely the six percent difference cannot account for such a change in rhetoric.⁵⁶

IV. EVALUATING *ADVICE AND CONSENT* AND RECENT NOMINATIONS

Throughout *Advice and Consent* the mood is one of tempered realism. The reader is informed of the politics inherent in judging and both the nomination and confirmation processes but told that the situation really isn't all that bad because (1) it is normatively good to have a political check on the Judiciary when the Judiciary makes so many political decisions; and (2) a President can avoid ideological fights if he nominates qualified individuals, because senators will usually vote in favor of qualified nominees even if those nominees are ideologically very distant from the senators.⁵⁷

The first reason is controversial, but Epstein and Segal perform an important service by educating their readers as to the effect of ideology on judging. If judging were non-ideological (as many proclaim and some naïvely believe), then there would be no reason to inquire into the ideology of nominees. But, as Epstein and Segal demonstrate, differences in judicial voting patterns correlate with differences in ideology, so that one can anticipate conservative decisions from a judge believed at the time of his appointment to be conservative. Under that reality, eliminating ideology from the appointments process permits judges to make political decisions based on their ideology without any accountability to the public. Such a government is antithetical to most Americans' conceptions of democracy.

With regard to the second reason, however, Epstein and Segal vastly overestimate the importance of qualifications in the

55. *Id.* at 66.

56. Also of some significance may be the snide comment that President Bush, Senator Frist, and Representative DeLay (whose very mention may be a shot at Republicans, given that the House plays no role in the appointments process) use "judicial activism" to mean "liberal." *Id.* at 64. The comment may well be accurate, but it is unsupported. The authors more appropriately make their point that ideology matters to this President in the preceding few pages, when they discuss explicit ideological tests. *Id.* at 60–63. At most this quarrel is a minor one, though, for Epstein and Segal argue that all Presidents use ideology, and in particular note that President Franklin Roosevelt sought to appoint only "true liberal[s]." *Id.* at 62.

57. *Id.* at 114 (reporting a 94.8% chance that a senator will vote for the confirmation of a nominee who is both "highly qualified" and "ideologically very distant" from the senator).

current era. To be sure, good qualifications are better for a nominee than is a record or suspicion of incompetence. Detractors of Judge Roberts and Judge Alito were left with one less arrow in the quiver after conceding that nobody could criticize the “qualifications” of the man who had been perhaps the nation’s best appellate lawyer, or the nominee who had been a respected circuit judge for fifteen years. And Ms. Miers’s nomination was doomed in no small measure because of her perceived lack of qualifications.⁵⁸ But whereas Epstein and Segal argue that Presidents can generally count on bipartisan support of their qualified nominees, such is not now the case.

Chief Justice Roberts drew twenty-two “no” votes, and Justice Alito drew forty-two (only one of which came from a Republican), and by far the most commonly cited reason for the votes against confirmation was disagreement with the way they would decide cases. Time and again senators opposed to the two nominees stressed that they had no quarrel with the judges’ qualifications, but were voting against them because either they thought they were too conservative,⁵⁹ or with regard to Judge Roberts, they did not know enough to determine whether he was too conservative.⁶⁰ As Senator Lautenberg, who introduced Judge Alito and proceeded to vote against him, put it, “The question before us is not . . . whether Judge Alito is qualified for the Supreme Court. The real question is whether Judge Alito is the right person for this seat on the Supreme Court.”⁶¹

Epstein and Segal conclude ultimately that “it is too soon to tell” whether the “purely ideological opposition” to Judge Bork was “an anomaly or a portent of changes to come.”⁶² The Roberts and Alito hearings remove all doubt on that score, if

58. Segal has computed Miers’s perceived qualifications as lower than all successful nominees in recent history. The last nominee to be confirmed despite equivalent qualifications was Sherman Minton. See SEGAL, *supra* note 38.

59. 152 CONG. REC. S260, 283, 299, 300 (daily ed. Jan. 30, 2006) (statements of Sens. Menendez, Dorgan, and Rockefeller in Alito debate); 152 CONG. REC. S340, 342 (daily ed. Jan. 31, 2006) (statements of Sens. Chafee and Landrieu in Alito debate); 151 CONG. REC. S10273 (daily ed. Sept. 21, 2005) (statement of Sen. Boxer in Roberts debate); 151 CONG. REC. S10365, 10366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama in Roberts debate); 151 CONG. REC. S10529, 10537 (daily ed. Sept. 28, 2005) (statement of Sen. Harkin in Roberts debate).

60. 151 CONG. REC. S10521 (daily ed. Sept. 27, 2005) (statement of Sen. Durbin in Roberts debate); 151 CONG. REC. S10529, 10539, 10577 (daily ed. Sept. 28, 2005) (statements of Sens. Schumer and Clinton in Roberts debate).

61. 152 CONG. REC. S260, 282 (daily ed. Jan. 30, 2006) (statement of Sen. Lautenberg in Alito debate).

62. EPSTEIN & SEGAL, *supra* note 3, at 116.

indeed any remained after the Democratic filibustering of President Bush's nominees to the courts of appeals. The remaining question—about which it may well be too early to discern an answer—is whether the Republicans will respond in kind, leading to all nominations being explicitly debated in terms of ideology.⁶³

During the Roberts and Alito deliberations, Senate Republicans pointed to their support of President Clinton's two nominees (both of whom were confirmed with greater than ninety to ten margins) in saying that they view the selection of Supreme Court Justices as a presidential prerogative, with the limitation that the nominee be qualified. Opinions about the deference due the President, however, have a way of varying depending on the party of the current President,⁶⁴ and one would hardly be surprised to see Republicans oppose a qualified liberal nominee of the next Democratic President.⁶⁵ On the contrary, one would be surprised (and disappointed, if one supports the Republicans' judicial agenda) if they did not return the Democrats' volley. Senators are in a prisoner's dilemma and one side has defected, whether one sees the defection as Senator Hatch's ideologically based foot-dragging on Clinton nominees or current Democrats' ideologically based minority obstructionism. Republicans (many of them, anyway) believe that the Judiciary and the Senate would be better if the Senate did not consider ideology in evaluating nominees.⁶⁶ But surely

63. As discussed earlier, Epstein and Segal correctly point out that ideology has been a large part of the appointment process from the beginning. In recent decades, however, considerations of ideology have motivated opposition which has taken the form of appeals to more neutral values, such as ethics. Such appeals were made in the nominations of Judge Parker, Justice Fortas, and Judge Haynsworth, and to some degree that of Judge Alito himself. See, e.g., FRANK, *supra* note 35, at 134 (“[A] frontal attack [on Haynsworth’s ideology] would not have worked, so recourse had to be taken to character assassination.”); JOHN MASSARO, SUPREME POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 159 (1990); Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 577 (“While most senators who voted against Judge Haynsworth publicly attributed their opposition to the conflict of interest issue, it is reasonable to speculate . . . that the issue provided a convenient justification for opposition generated in fact by ideological or political considerations.”).

64. See STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE APPOINTMENTS PROCESS 64–65 (1994); Erwin Chemerinsky, *Federal Judicial Selection in the New Millennium: Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620 (2003).

65. Cf. EPSTEIN & SEGAL, *supra* note 3 at 25 (noting the varying positions of senators on whether the Senate is required to provide judicial nominees a vote).

66. I admit that this over-simplifies the thought processes of Senate Republicans. Surely they are more likely to be accepting of eliminating Senate scrutiny of judicial

the worst outcome of all for the Republicans is to prevent themselves from considering ideology when the Democrats abide by no such constraint. Perhaps Democrats similarly believe that it would be better for neither party in the Senate to evaluate ideology, but they are more likely to achieve their preferred ends if they consider ideology than if they do not. Thus, both parties have an incentive to consider nominees' ideologies regardless of whether the other party does, and as a result, decisions to confirm or reject nominees will be based on political calculations.

Though *Advice and Consent* appears to do a poor job of predicting the extent of Democratic opposition to Chief Justice Roberts and Justice Alito, it does a somewhat better job in discussing the factors that those Democratic senators would encounter in deciding whether to filibuster the nominees. While Chief Justice Roberts never faced a realistic prospect of a filibuster, there was an attempt to filibuster Justice Alito, who was confirmed only after a successful seventy-two to twenty-five cloture vote. In fact, his confirmation depended on the cloture votes of some senators who voted against his confirmation. Had all forty-two senators who opposed confirmation stuck together to maintain a filibuster, Republicans would have had to resort to the "nuclear option" to force a vote.⁶⁷

Would *Advice and Consent* have predicted the invocation of the filibuster by Democrats who were themselves conceding its dismal chances of success? The book does not go into enough detail to allow one to predict when a filibuster will be likely, but it does argue that a fear of "antagoniz[ing] their constituents" and "alienating voters" is the reason senators do not filibuster all nominees whom they oppose for policy reasons.⁶⁸ The key task is to determine the circumstances under which the public will support a filibuster and in assessing which "public" matters most to each Senator.

nominees if they can depend on the President to be conservative and select conservative nominees. One's willingness to cede power to the White House may therefore depend on one's assessment of each party's chances of taking or maintaining control of the Presidency and the Senate. I do not think this complication affects the analysis in the text, however.

67. EPSTEIN & SEGAL, *supra* note 3, at 25–26. See generally Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004) (providing a fuller discussion on the "nuclear option").

68. EPSTEIN & SEGAL, *supra* note 3, at 100.

Epstein and Segal would do well to provide more information about the factors weighing on the decisions of individual senators, but the omission is excusable because no Supreme Court nominee had been filibustered between the Fortas and Alito nominations. Certainly it would be worthwhile to note that the Alito filibuster was spearheaded by Senator Kerry, a very liberal Massachusetts Senator who faces no serious in-state electoral opposition, and who seeks to set himself up for another presidential nomination in 2008—at which time he will have to appeal to Democratic primary voters who may well be enthusiastic about his opposition to President Bush’s nominees. (Similar electoral calculations no doubt informed Senator Clinton’s decision to join the filibuster, for she will be courting the same primary voters and is unlikely to face a tough challenge for her New York Senate seat.)

On the other hand, senators for whom the relevant voters were not reliably liberal faced a different situation. For them, a filibuster might indeed “antagonize their constituents,” and we predictably saw that some red-state Democrats voted for Alito and/or voted for cloture. Those senators may have seen a filibuster as risking the ire of both voters who support the nominee and those who are upset at the expenditure of time and energy and the diversion from other duties entailed by infinite “debate.”⁶⁹

Epstein and Segal note that (perhaps ironically, due to the greater influence of Supreme Court Justices) Supreme Court nominees are less likely to trigger filibusters than are nominees for lower courts. This is the case, argue the authors, because senators must gauge the level of electoral opposition their actions will promote, but only where those actions will interest the public. Thus, there is a negligible cost to filibustering lower court nominees (as there was a negligible cost to then-Chairman Hatch’s refusal to grant a committee hearing to many of President Clinton’s nominees) because the public does not care about continued vacancies on those courts and the Senate can continue its business during a modern-day filibuster, which lacks

69. Apparently Senator Chafee, the only Republican to vote against Justice Alito’s confirmation, falls in this latter category. He voted for cloture, even though that vote allowed Justice Alito to take his seat on the Court, after asking, “How are we going to get anything done if we can’t work together?” *Alito Filibuster Fails, Confirmation Vote Expected Tuesday*, Jan. 31, 2006, <http://www.foxnews.com/story/0,2933,183204,00.html>.

the talk-a-thon quality of the infamous civil rights filibuster of Senator Thurmond and *Mr. Smith Goes to Washington*.⁷⁰ As Epstein and Segal astutely note, since the Senate has changed its procedure to allow for filibusters that do not monopolize the floor, it is much less costly to filibuster a nominee: “By making the filibuster less destructive to the Senate and less onerous to those carrying it out, Senate rules also make filibusters more likely.”⁷¹ Such analysis suggests that Republicans could force Democratic senators with moderate constituencies to pay a political price for their filibusters simply by requiring that filibusters stop the business of the Senate. Until the public is made to care about filibusters of lower court judges, however, there is little reason to suspect that they will occur less often.

V. CONCLUSION

Advice and Consent is an excellent introduction to the appointments process. For those who are interested in the courts but lack training in political science or law, this text is a wonderful resource. It combines the lessons of a wealth of scholarly articles and books into a compact, entertaining, easy-to-read volume. What is more, the authors’ efforts to make the book as current as possible have been successful, and some of the book’s discussions of recent controversies are the most enlightening sections.

Unfortunately, the person already familiar with the literature on the appointments process will find little new research here aside from those times when the authors discuss newly developing issues such as the recess appointments controversy, the “Gang of Fourteen” agreement not to filibuster nominees except in “extraordinary circumstances,” and the like. The remainder of the text is largely a summary of research already available in much more detail. The reader who is serious about studying judicial nominations, confirmations, retirements, or decision-making would find more of value in volumes devoted to those topics than in this one, which tries to do a little of each.

70. See EPSTEIN & SEGAL, *supra* note 3, at 100–01.

71. *Id.* at 25.