

Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments

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INTRODUCTION

The Senate's role in judicial appointments has come under increasingly withering criticism for its uninformative and "spectacle"-like nature.¹ At the same time, Britain has established two new judicial appointment processes—to accompany its new Supreme Court and existing lower courts—in which Parliament plays no role.² This Article seeks to understand the reasons for the inclusion and exclusion of the legislature in the U.S. and U.K. judicial appointment processes adopted at the creation of their respective Supreme Courts.³

The Article proceeds by highlighting the ideas and concerns motivating inclusion of the legislature in judicial appointments in the early American state constitutions, Articles of Confederation, and U.S. Constitution, noting how the Senate's role has evolved since the time of the Constitution's ratification. Part II charts the principal ideas and concerns motivating the Constitutional Reform Act's recent overhaul of Britain's judicial appointment system and rejection of a parliamentary role.

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1. See, e.g., Editorial, *The Sotomayor Nomination*, N. Y. TIMES, July 21, 2009, at A20, available at <http://www.nytimes.com/2009/07/21/opinion/21tue1.html?scp=3&sq=editorial%20July%202009%20Sotomayor&st=cse> (criticizing uninformative nature of Sotomayor confirmation hearing); see also DAVID M. O'BRIEN, JUDICIAL ROULETTE: A TWENTIETH CENTURY FUND TASK FORCE REPORT ON JUDICIAL APPOINTMENTS (1988) (critiquing Senate confirmation process and proposing reforms); BENJAMIN WITTES, CONFIRMATION WARS (2006) (proposing reforms to Senate confirmation hearing to reduce its spectacle quality, including prohibition on nominee testimony).

² Constitutional Reform Act 2005, Part 3, "Supreme Court."

³ Albeit created 220 years apart. The U.S. Supreme Court was established by the U.S. Constitution in 1787 and began operating in 1789. U.S. Const. Art. III; Judiciary Act of 1789. The U.K. Supreme Court was established by the Constitutional Reform Act of 2005 and began operating in 2009. Const. Reform Act 2005.

5. See, e.g., Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 161, at 67.

Thereafter, Part III compares and contrasts the reasons for inclusion and exclusion of the legislature in U.S. and U.K. judicial appointments. More specifically, Part III draws on Mark Tushnet's comparative constitutional law methodology⁵ to explore the functional, contextual, and expressive significances of the different choices made vis-a-vis legislative involvement in U.S. and U.K. judicial appointments.

The Article draws on functional analysis insofar as it charts the different functions served by the inclusion and exclusion of the legislature in U.S. and U.K. judicial appointments. According to Tushnet, "[F]unctionalists . . . look to how constitutional provisions actually operate in real-world circumstances, and . . . draw inferences about good constitutional design from the constitutional provisions that work best according to the functionalist's normative standards."⁶ Of note, Tushnet criticizes functionalism for its high degree of abstraction, i.e., for its failure to contextualize the analysis in the legal, political, and other cultural details of the particular systems at issue.⁷ Accordingly, Tushnet moves from functionalist to contextualist analysis to better understand the impact of different circumstances on the choices made.

Like Tushnet, the Article engages in contextual analysis by seeking to understand the inclusion vs. exclusion of the legislature in judicial appointments in the U.S. and U.K.'s legal, political, and other cultural contexts.⁸ According to Tushnet, contextualism "emphasizes the fact that constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation."⁹

6. Tushnet, *supra* note 193, at 73–74.

7. *Id.* at 74. See also James Q. Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 313 (Pierre LeGrand & Roderick Munday eds., 2003) ("Functionalism is an approach with many strengths, but it starts from at least one doubtful assumption: that all societies perceive life as presenting more or less the same social problems.").

8. See generally VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2009); THE *MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 161; Tom Ginsburg, *Lawrence Friedman's Comparative Law*, in *LAW, SOCIETY AND HISTORY: ESSAYS ON THEMES IN THE LEGAL HISTORY AND LEGAL SOCIOLOGY OF LAWRENCE FRIEDMAN* (Robert Gordon ed., forthcoming 2010) (emphasizing importance of context to comparative analysis).

Naturally, any reference to culture should be made cautiously so as to avoid perpetuating "national or other stereotypes." David Nelken, *Defining and Using the Concept of Legal Culture*, in *COMPARATIVE LAW: A HANDBOOK* 114 (Esin Orucu & David Nelken eds., 2007).

9. Tushnet, *supra* note 193, at 76. Indeed, contextualism cautions that "we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which

Lastly, the Article pursues expressive analysis by seeking to uncover the national identities and/or country self-understandings revealed by the different choices made with respect to the role of the legislature in judicial appointments.¹⁰ In pursuing each of these strands of comparative analysis, the Article is self-consciously hypothesis-generating rather than hypothesis-testing in nature.¹¹

In brief, the Article concludes that Tushnet's methodology is helpful in underscoring, as a functional matter, the importance of the difference between presidential and parliamentary systems with respect to the role of the legislature as a check on the other branches. The contextual analysis highlights the difference between legal and political constitutionalism characterizing the two systems, also helping to explain their divergent reliance on the legislature in judicial appointments. Finally, Tushnet's expressivist analysis reveals the U.S. and U.K.'s different resolutions of the tension between popular sovereignty and higher law principles in their judicial and judicial appointment processes.

it exists." *Id.* As Tom Ginsburg makes clear in reviewing Lawrence Friedman's body of comparative law writing, "culture matters." Tom Ginsburg, "Lawrence M. Friedman's Comparative Law," in *Law, Society, and History: Essays on Themes In the Legal History and Legal Sociology of Lawrence M. Friedman* at 9. (R. Gordon, ed. forthcoming 2010) For an example of contextualist analysis, see, for example, Judith Resnik, *Composing a Judiciary: Reflections on Proposed Reforms*, in CONSTITUTIONAL INNOVATION: THE CREATION OF A SUPREME COURT FOR THE UNITED KINGDOM, *Legal Studies: The Journal of the Society of Legal Scholars* 228, 228 (Derek Morgan ed., 2004) ("I sit an ocean and a legal culture away. Asked to comment on reforms in England and Wales, my response is shaped by knowledge of the legal system of the U.S., which shares aspiration similar with and has been much influenced by the judicial system of England and Wales, but is also very different from it.").

10. Tushnet, *supra* note 193, at 79–80. See generally ANTHONY BRUNDAGE & RICHARD COSGROVE, *THE GREAT TRADITION: CONSTITUTIONAL HISTORY AND NATIONAL IDENTITY IN BRITAIN AND THE U.S., 1870–1960* (2007). Tushnet makes clear, however, that "it is a mistake to think that a nation has a single self-understanding." Tushnet, *supra* note 193, at 82.

11. See generally John Gerring, *The Case Study: What It Is and What It Does*, in THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 98–99 (Carles Boix & Susan C. Stokes eds., 2007) ("[T]he world of social science may be usefully divided according to the predominant goal undertaken in a given study, either hypothesis *generating* or hypothesis *testing*. There are two moments of empirical research, a lightbulb moment and a skeptical moment, each of which is essential to the progress of a discipline.").

With these functional, contextual, and expressive analyses in mind, the Article turns first to the ideas and concerns shaping the inclusion of the legislature in judicial appointments in the early American republic.

I. IDEAS AND CONCERNS SHAPING CHOICE OF LEGISLATIVE INVOLVEMENT IN JUDICIAL APPOINTMENT PROCESSES IN THE EARLY AMERICAN STATE CONSTITUTIONS, ARTICLES OF CONFEDERATION, AND U.S. CONSTITUTION

A. Introduction to Judicial Appointment Provisions in the State Constitutions, Articles of Confederation, and U.S. Constitution

The early American state constitutions¹² and Articles of Confederation¹³ relied heavily on the legislature for judicial appointments. Indeed, nine of thirteen states looked exclusively to the legislature for the appointment of judges, as did the Articles of Confederation government. This substantial reliance on the legislature for judicial appointments was consistent with legislative and popular sovereignty in the early American republic, reflecting a rejection of the despotic British crown and skepticism about concentrations of executive power under British rule more generally. It also reflected early Americans' repudiation of the colonial judiciary, which had served without life tenure at the pleasure of the crown.¹⁴ Indeed, judges' lack of independence formed one of the charges against the crown contained in the Declaration of Independence, i.e., that King George had "made Judges dependent on his will alone."¹⁵

Although nine states relied exclusively on legislative appointment of judges, three of the four remaining states provided for gubernatorial appointment with legislative advice and consent. This was true, for example, of Massachusetts' constitution, which directed the governor to appoint judges with the advice and consent of counselors elected by the legislature.¹⁶ New

12. These state constitutions were enacted between 1776 and 1787.

13. The Articles of Confederation were enacted in 1777 and ratified in 1781.

14. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 105–06 (1992).

15. DAVID M. O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY* 26 (3d ed. 1997) (citing *THE DECLARATION OF INDEPENDENCE* (U.S. 1776)).

16. *Notes on State Constitutions*, in *THE DEBATE ON THE CONSTITUTION, PART TWO*, at 1087, 1091 (Bernard Bailyn ed., 1996) (reproducing MASS. CONST. OF 1780).

Hampshire's appointment provision was closely modeled after that of Massachusetts,¹⁷ and Maryland likewise provided for gubernatorial appointment with the advice and consent of a legislative council.¹⁸ Lastly, New York provided for judicial appointments made by a council composed of the governor and senators serving together.¹⁹ At the time of the drafting of the U.S. Constitution, Alexander Hamilton, among others, criticized the New York model for its lack of transparency, asserting that it was impossible to know when a candidate was rejected whether that was due principally to the involvement of the governor or the legislators.²⁰

Governing at the national level in the period before the U.S. Constitution, the Articles of Confederation invested sole authority to establish courts and appoint judges in the Confederation Congress.²¹ As such, they mirrored the judicial appointment provisions of most state constitutions and were motivated by similar ideas of legislative and popular sovereignty and a perceived need to protect against a despotic executive.

The U.S. Constitution's provision for executive nomination and legislative confirmation of judges was a pronounced departure from the nearly exclusive legislative control over judicial appointments in the early American republic and was a response to the perceived excesses of legislative and popular sovereignty under the early state constitutions and Articles of Confederation.²² At least as importantly, the shift to dual-branch appointment of judges was a response to the Constitutional Convention's "Great Compromise," or "Connecticut Compromise," in which the states gained equal representation in the Senate.²³ Following entry into the Compromise, delegates from the more populous states acted to constrain what they anticipated as the less populous states' undue influence in the Senate, voting in favor of dual-branch appointment as a type of check on the small states.²⁴

17. N.H. CONST. of 1776, *available at* http://avalon.law.yale.edu/18th_century/nh09.asp.

18. MD. CONST. OF 1776, *available at* http://avalon.law.yale.edu/17th_century/ma02.asp.

19. N.Y. CONST. of 1777, *available at* http://avalon.law.yale.edu/18th_century/ny01.asp.

20. THE FEDERALIST NO. 77 (Alexander Hamilton).

21. ARTICLES OF CONFEDERATION of 1781, art. IX.

22. Article II, Section 2 of the U.S. Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other officers of the United States."

²³ See *infra* Part I.B.

²⁴ See *infra* Part I.B.

The particulars of the Constitution's dual-branch appointment provision were substantially modeled after those of the Massachusetts Constitution.²⁵ Article IX of the Massachusetts Constitution provided: "All judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council [consisting of nine Senators chosen by the legislature]"²⁶

The Massachusetts model was not the first to be considered at the Constitutional Convention, however. Rather, as has been detailed elsewhere,²⁷ the first judicial appointment model considered in Philadelphia was that of Virginia, with a proposal that the "National Legislature" appoint the judges.²⁸ The Convention initially voted (nine to two) to locate the judicial appointment power exclusively in the Senate, and Senate appointment of judges remained the dominant model until close to the end of the Convention²⁹ when agreement was reached on equal representation of the states. Other judicial appointment models considered at the Convention included appointment by the President standing alone³⁰ and by the President with a one-third concurrence of the Senate.³¹ As such, Constitutional Convention

²⁵ Madison's notes on July 18, 1787, in *RFC*, Vol. II at 41-42 ("[Mr. Ghorum] suggested that the Judges be appointed by the Executive, with the advice & consent of the 2d branch, in the mode prescribed by the constitution of Mass.").

²⁶ See *Notes on State Constitutions*, *supra* note 7.

²⁷ See, e.g., SARAH BINDER & FORREST MALTZMAN, *ADVICE & DISSENT* (2009); *RECORDS OF THE FEDERAL CONVENTION*, VOLS. I-III (Max Farrand ed., 1967) [hereinafter 1 RFC, 2 RFC, 3 RFC]; GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); Henry Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988); David Strauss & Cass Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

²⁸ This was the so-called "Virginia Plan," introduced by Edmund Randolph and drafted by James Madison. 1 RFC, *supra* note 17 (Madison's notes of June 13, 1787 recording Mr. Randolph's propositions, including, "11. Resold. that a Natl. Judiciary be established . . . to be appointed by the 2d. branch of the Natl. Legislature, to hold their offices during good behaviour").

²⁹ Appointment by the Senate remained the dominant model of judicial appointments until shortly before the Convention's conclusion. Indeed, exclusive Senate appointment of judges was included in the draft constitution prepared by the Committee on Detail in August 1787. The final text of the Constitution was adopted on September 17, 1787.

³⁰ This was proposed by Alexander Hamilton and favored by James Wilson. John Rutledge objected to this proposal as granting too "great a power to any single person." According to Rutledge, "The people will think we are leaning too much towards Monarchy." Madison's notes of June 5, 1787, recording Mr. Rutledge's objection, 1 RFC, *supra* note 17, at 119.

³¹ This was proposed by James Madison. 2 RFC, *supra* note 17, at 42-43.

delegates considered three broad models of judicial appointment: the legislature acting alone, the executive acting alone, and different combinations of the legislature and executive acting together.

B. Why, in Greater Detail, was there a Shift from Legislative Appointment of Judges to Dual-branch Appointment in the early American republic?

There is little recorded explanation for the shift from legislative to dual-branch appointment of judges at the Constitutional Convention. This is so in part because there are no detailed notes of the deliberations of the Committee of Eleven,³² the committee formed to resolve contested matters among the states.³³ It was the Committee of Eleven that proposed dual-branch appointment to replace the earlier consensus for exclusive Senate appointment following entry into the compromise on equal representation of the states in the Senate.³⁴ The importance of this compromise in shifting the choice of judicial appointment mechanism cannot be overstated.³⁵

As for the larger movement from reliance on legislative appointment of judges in the early American constitutions to dual-branch appointment in the U.S. Constitution, nearly a dozen ideas and concerns animated this shift, including (1) a perceived need to constrain the excesses of popular and legislative sovereignty in the early American republic, (2) Madison's belief in the wisdom of checks and balances overlaying a system of separated powers, and (3) a perceived need to temper Senate control with executive involvement once the compromise on equal Senate representation of the states had been reached.

These and other reasons for the U.S. Constitution's dual-branch appointment of judges are highlighted below.

32. SARAH BINDER & STEVEN SMITH, *POLITICS OR PRINCIPLES? FILIBUSTERING IN THE U.S. SENATE* (1996). Rather, there were reports of the conclusions reached by the Committee of Eleven. *See, e.g.*, 2 *RFC* at 547 (Madison's notes of proceedings referencing the "last Report of Committee of Eleven").

33. The Committee of Eleven was comprised of one delegate from each of the states represented at the Convention.

³⁴ The Committee of Eleven was constituted on July 2, 1787 to consider the question of equal representation of the states in the Senate. 1 *RFC* at 516 (Madison's notes of proceedings). Agreement was reached on the so-called "Great" or "Connecticut" Compromise on July 16, 1787. 2 *RFC* at 15 (Madison's notes).

³⁵ *See infra* Parts I.B.8&9.

1. Reaction to Perceived (and Actual) Excesses of Popular and Legislative Sovereignty in the Early American Republic

The single most important reason for the shift from the then-dominant legislative model of judicial appointment in state and Confederation constitutions to dual-branch appointment of judges in the U.S. Constitution was concern for the excesses of legislative and popular sovereignty in the early American republic and for insufficient executive oversight to protect individual liberties and minority interests.³⁶ Although the Philadelphia Convention was originally called to amend the Articles of Confederation to provide greater executive oversight, most Constitutional Convention delegates came to believe that more than mere amendment of the Articles was necessary to create an effective national government that would promote the rule of law and preserve human liberty.³⁷ What was needed was a new Constitution that would rein in legislative and popular sovereignty to a much greater degree than had been true in the first dozen years of the new republic.

Madison echoed this assessment in speaking to the Convention about the need to check legislative power:

Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.³⁸

Having served in the Virginia Assembly during the Articles of Confederation period, Madison had seen his and other proposals for reform “mangled by factional fighting and majoritarian confusion,”³⁹ which made him hesitant about placing too much appointment power in the legislative branch. Indeed, Madison

36. This story is well-told in a number of sources. See WOOD, *supra* note 17; see also BAILYN, *supra* note 5; MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); DANIEL HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD 1664–1830* (2005); GORDON S. WOOD, *EMPIRE OF LIBERTY* 22 (2009) [hereinafter WOOD, *EMPIRE OF LIBERTY*] (“By the 1780s many leaders had come to realize that the Revolution had unleashed social and political forces that they had not anticipated and that the ‘excesses of democracy’ threatened the very essence of their republican revolution.”).

37. James Madison, “Notes on Hamilton’s Speech to the Constitutional Convention on June 13, 1787,” 2 RFC, *supra* note 17, at 282–83.

38. *Id.* at 74 (Madison discussing the need to check legislative power).

39. WOOD, *EMPIRE OF LIBERTY*, *supra* note 24, at 31–36.

observed in *Federalist No. 10*, “The instability, injustice and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished”⁴⁰

In a related fashion, Hamilton rejected any suggestion that the House of Representatives appoint judges, concluding that “[t]he example of most of the States in their local constitutions encourages us to reprobate the idea.”⁴¹ The Constitutional Convention located the confirmation responsibility in the Senate, and not the House, because the Senate was intended as a more elite body,⁴² with election by the state legislatures (until the 1913 amendment provided for direct election of Senators), a minimum age requirement of 30, and a longer term of service (six years versus two). The dual-branch appointment method, with reliance on the Senate and not the House, was a direct response then to the perceived excesses of legislative and popular sovereignty in the pre-Constitution period.

2. Implementing Checks and Balances and Separation of Powers Principles

The choice of dual-branch appointment of judges was also importantly shaped by Madison’s checks and balances cautionary that “Ambition must be made to counteract ambition.”⁴³ In a July 17, 1787 speech at the Philadelphia Convention, Madison invoked checks and balances principles in emphasizing the importance of dual executive and legislative supervision of judicial appointments to preserve judges’ independence from incursion by either branch acting alone.⁴⁴ Indeed, Madison spoke against a pure separation of powers on the ground that it provided insufficient security against corruption and intrigue. Madison instead urged reliance on the mutuality of checks and balances to ensure the proper functioning of government operations.⁴⁵

40. THE FEDERALIST NO. 10, at 129 (James Madison) (Benjamin Fletcher Wright ed., 1961).

41. THE FEDERALIST NO. 77, at 488 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

42. See, e.g., WOOD, *supra* note 17, at 209 (“The Revolutionaries were generally confident that there existed in the community a ‘Senatorial part,’ a natural social and intellectual elite who, now that the Crown was gone, would find their rightful place in the upper houses of the legislatures.”).

43. THE FEDERALIST NO. 51 (James Madison).

44. Madison’s notes on his own speech to the Convention on July 17, 1787, 2 RFC, *supra* note 17, at 34–35.

45. *Id.* at 56 (comparing U.S. separation of powers with Britain’s balance of powers).

Madison addressed the desirability of checks and balances in a system of separated powers at greatest length in *Federalist No. 51*, stating: “[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”⁴⁶ Acknowledging that “[i]t may be a reflection on human nature, that such devices should be necessary to control the abuses of government,” Madison nevertheless observed, “But what is government itself, but the greatest of all reflections on human nature?”⁴⁷

More specifically, Constitutional Convention delegates believed that Senate confirmation of judges could serve as a check on executive corruption and intrigue (manifesting in the President’s personal preference or bias), just as executive nomination of judges could limit Senate corruption and intrigue (taking the form of vote-trading over individual appointments). In *Federalist No. 77*, Hamilton underscored the importance of the legislative check on executive discretion in judicial appointments: “In the only instances in which the abuse of the executive authority was materially to be feared [judicial appointments], the Chief Magistrate of the U.S. [the President] would . . . be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?”⁵⁵ Hamilton contrasted the U.S. Constitution’s dual-branch appointment provision with that of his home state, New York, which lacked any meaningful opportunity for the public to discern which actors had

⁴⁶ *Federalist No. 51*.

⁴⁷ THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

⁵⁵ THE FEDERALIST NO. 77, at 489 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

done what with regard to individual judicial appointments.⁵⁶ Under the U.S. Constitution, “[T]he public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the Executive.”⁵⁷

3. Belief that Dual-branch Involvement Would Promote Greater Stability in Judicial Appointments and Foster Greater Judicial Independence

Dual-branch participation and the mutuality of checks that resulted were also thought to provide greater stability to the judicial appointment process and greater independence to the overall judiciary. In *Federalist No. 76*, Hamilton observed that, in addition to serving as a check on executive favoritism and/or prejudice, participation by the Senate together with the Executive “would be an efficacious source of stability in the administration.”⁶⁰ Changes in presidential administration would have less of a destabilizing effect on judicial appointments and the resulting judiciary if they were counter-balanced by the ongoing participation of the Senate.⁶¹ Involvement by the House of Representatives would not serve this purpose because its membership would constantly change.⁶² That the Senate was the

⁵⁶ *Id.* at 486.

⁵⁷ *Id.*

⁶⁰ THE FEDERALIST NO. 76, at 483 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

⁶¹ THE FEDERALIST NO. 77, at 485 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“A change of the Chief Magistrate . . . would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices.”).

⁶² THE FEDERALIST NO. 77, at 488 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“A body so fluctuating and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned. The example of most of the States in their local constitutions encourages us to reprobate the idea.”).

more elite of the two legislative chambers also furthered the interests of stability in judicial appointments.⁶³ Finally, the mutuality of checks was thought to foster greater judicial independence than if judges were dependent for appointment on either branch standing alone.

4. Belief that Greater Transparency and Legitimacy of the Judicial Appointment Process Would Result from Dual-branch Involvement

The preceding arguments led naturally to another, and that was for the improved transparency and legitimacy of the judicial appointment system made possible by participation of both the legislative and executive branches. Hamilton argued that greater transparency and legitimacy would result because the two-step process would enable the public to discern whether fault with a particular appointment lay with the President for nominating an insufficiently qualified candidate or with the Senate for rejecting a well-qualified candidate.⁶⁴

5. Belief that Greatest Accountability for Judicial Appointments would be Achieved by Dual-branch Participation

Closely related to the previous point and to checks and balances principles more generally, many Convention delegates believed that greatest accountability for judicial appointments could be achieved by involvement of both the legislative and executive branches. Placing responsibility for initiating judicial appointments in the hands of a single actor, the President, rather than with the relatively numerous body of the Senate, would promote greater accountability for the quality of judicial appointments. Delegate Gorham of Massachusetts, for example, argued that the executive would be more answerable for the quality of judicial appointments than would individual Senators or the overall Senate.⁶⁵ Likewise, Pennsylvania delegate James Wilson “opposed the appointmt [of Judges by the] national Legis: Experience shewed the impropriety of such appointmts. by

63. WOOD, *supra* note 17, at 209.

64. THE FEDERALIST NO. 77 (Alexander Hamilton); *see also* MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 31 (2004) (“American Supreme Court justices have a particularly acute need for legitimacy. They must and do issue high-profile decisions that thwart the will of the democratic majority. . . . They depend on the voluntary compliance of the majority with their antimajoritarian decisions.”).

65. 2 RFC, *supra* note 17, at 41–42 (Madison’s notes on July 18, 1787).

numerous bodies. Intrigue, partiality, and concealment were the necessary consequences.”⁶⁶ Thus, “[a] principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.”⁶⁷

In *Federalist No. 76*, Hamilton argued that the President would do a better job of selecting high quality judicial candidates standing alone⁶⁸ than would the Senate standing alone⁶⁹ because the latter would be more susceptible to horse-trading or bargaining⁷⁰ while the President’s sole responsibility for nomination would “beget a livelier sense of duty and a more exact regard to reputation.”⁷¹

Hamilton nevertheless embraced what he perceived as the even better system of dual-branch appointment, reasoning that the President’s sense of responsibility vis-à-vis judicial appointments would be enhanced by Senate involvement:

It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to

⁶⁶ 1 *RFC* at 119.

⁶⁷ 1 *RFC*, *supra* note 17, at 119 (Madison’s notes on June 5, 1787); *see also, e.g.*, Strauss & Sunstein, *supra* note 17, at 1496 (discussing the decision to vest appointment power in the President).

⁶⁸ THE FEDERALIST NO. 76, at 481 (Alexander Hamilton) (Howard Mumford Jones ed., 1961). Hamilton presupposed that the President would be “a man of abilities, at least respectable.” *Id.* On this basis, Hamilton “proceed[ed] to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.” *Id.* Hamilton continued:

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have *fewer* personal attachments to gratify, than a body of men who may each be supposed to have an equal number

Id.

⁶⁹ Hamilton was concerned that, if sole authority for judicial appointments was instead located in the Senate, an assembly of men would be subject to “a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly.” *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

the discussion and determination of a different and independent body⁷²

Madison likewise believed that dual-branch appointment was important for accountability reasons because the President might not always be an enlightened actor, and Senate involvement as a check on the executive would therefore be critical.⁷³ As Madison framed the issue when he proposed presidential appointment with a one-third concurrence by the Senate: “This would unite the advantage of responsibility in the Executive with the security afforded in the 2d branch agst. any incautious or corrupt nomination by the Executive.”⁷⁴

6. Belief that Dual-branch Involvement would Produce Higher Quality Judicial Appointments

Convention delegates believed that evaluation of judicial candidates by both the legislative and executive branches would lead to higher quality appointments than if done by either branch acting alone.⁷⁵ Indeed, the Constitutional Convention debate focused very little on what the judicial qualifications should be and much more on which entity was better able to evaluate judges.

The possibility that the Senate might reject the President’s choice of judicial candidate was thought likely to make the President choose more carefully than in the absence of such a check. As Madison put it, involvement by the Senate provided a check against “any flagrant partiality or error.”⁷⁶ Hamilton’s *Federalist No. 76* echoed Madison in asserting that a Senate check on the President “would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”⁷⁷

7. Belief that Dual-branch Involvement would Produce More Diverse Judicial Appointments

72. *Id.* at 483.

73. THE FEDERALIST NO. 10 (James Madison).

74. 2 RFC, *supra* note 17, at 42–43 (Madison’s notes on July 18, 1787).

75. THE FEDERALIST NO. 76, at 480 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union...”).

76. 2 RFC, *supra* note 17, at 80–83 (Madison reporting on his motion for executive appointment of July 21, 1787).

77. THE FEDERALIST NO. 76, at 483 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

Because of Senators' geographic diversity, Constitutional Convention delegates believed that Senators would be able to draw on knowledge of a wider pool of judicial candidates than could the President standing alone, whose knowledge of prospective judicial candidates would likely be more limited to the national capital area.⁷⁸

The Senate's ability to promote geographic diversity in judicial appointments was asserted by Roger Sherman, among others.⁷⁹ Gouverneur Morris countered that the executive would of necessity be involved in matters involving every part of the nation and thus would have greater knowledge of geographically diverse candidates.⁸⁰ Delegate Gerry challenged Morris' position, however, in declaring, "[h]e could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate."⁸¹ In the end, the choice of dual-branch appointment tapped both the President's and Senators' knowledge of geographically diverse candidates.

As important as any of the above factors to the choice of dual-branch appointment were two pragmatic factors prompted by entry into the compromise on equal Senate representation of the states:

8. Belief that Senate Involvement Would Enable Better Representation of State Interests, Especially Small State Interests, than Presidential Appointment Standing Alone

Following entry into the Constitutional Convention's compromise on equal Senate representation of the states, small state delegates thought it essential to maintain a Senate role in judicial appointments to preserve and promote their interests.⁸² At

78. 2 RFC, *supra* note 17, at 41–42 (Madison's notes of July 18, 1787: "Mr. L. Martin was strenuous for an appt. by the 2d. branch. Being taken from all the States it wd. be best informed of characters & most capable of making a fit choice.").

79. *Id.* at 41–42 (Mr. Sherman "add[ed] that the Judges ought to be diffused, which would be more likely to be attended to by the 2d. branch, than by the Executive.").

80. *Id.* at 80–83 (Madison's notes of July 21, 1787: **Gouverneur** Morris observed, "The Executive in the necessary intercourse with every part of the U.S. required by the nature of his administration, will or may have the best possible information.").

81. *Id.*

82. See generally Strauss & Sunstein, *supra* note 17, at 1500 ("The split between the large and small states was among the most important political issues

the Connecticut ratification debates, for example, Oliver Ellsworth spoke of the Senate's advice and consent role as important for ensuring participation by the smaller states in judicial appointments.⁸³

9. Belief that Presidential Involvement in Judicial Appointments Would Counter-balance the Senate's Over-representation of Small State Interests

At the same time, delegates from the larger states believed that involvement of the executive in judicial appointments was essential to correct for the over-representation of small state interests in the Senate once the Great Compromise was reached. Madison made clear the impact of the compromise on the shift from Senate to dual-branch appointment of judges when he stated:

[A]s the [Senate] was very differently constituted when the appointment of the judges was formerly referred to it, and was not to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that [there] shd. be a concurrence of two authorities, in one of which the people, in the other the states, should be represented.⁸⁴

Madison continued: "If the 2d branch alone [i.e., the Senate] should have this power, the Judges might be appointed by a minority of the people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States."⁸⁵

Thus, the dual-branch appointment of judges was understood as a compromise enabling representation of state interests by the Senate and the broader public's interest by the President.⁸⁶

of the period. Some delegates were fearful that all judicial nominees would come from large states.").

83. Elliott's Debates, "In the Name of the People of the State of Connecticut," in "The Debates in the Several State Conventions on the Adoption of the Federal Constitution [Elliott's Debates, Vol. 1], Ratification," <http://memory.loc.gov/ammem/amlaw/lwed.html>; see also James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 349–50 (1989).

84. 2 RFC, *supra* note 17, at 80–83.

85. *Id.*

86. See Strauss & Sunstein, *supra* note 17, at 1500, which asserts that the Senate's advice and consent role was intended to provide security in protecting

C. Substantial Evolution of the Senate's Judicial Appointment role from the Time of the Constitutional Convention

The Senate's role in judicial appointments has evolved substantially from that provided at the time of the Constitution's adoption. Among the most important changes are:

(1) *Senators' use of judicial selection commissions to recommend district court and court of appeals candidates to the president.* A practice that began during the Carter administration, Senators now oversee twelve judicial selection commissions operating in their home states to recommend local candidates for lower court judgeships.⁸⁷ Presidents have varied in the deference accorded Senators' lower court candidate recommendations, with more deference typically given to district than to appellate recommendations.

(2) *Individual Senator's invocation of a "blue-slip privilege" to block consideration of a nominee from the Senator's home state.* The blue-slip practice has varied in recent years, but typically works as follows: the Chair of the Senate Judiciary Committee (SJC) distributes blue slips to the home state Senators for the district court or court of appeals seat under consideration. If a home state Senator refuses to return the blue slip or returns it to the SJC Chair with an objection noted, then the President's nominee is not brought before the SJC for consideration.⁸⁹

against the confirmation of nominees "insensitive to the interests of a majority of the states. In this sense, political commitments were understood to be a properly central ingredient in senatorial deliberations."

87. U.S. Senators currently oversee seventeen or eighteen judicial selection (or "advisory") commissions in California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Massachusetts (possibly), Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. The Governance Institute & Institute for the Advancement of the American Legal System, "Options for Federal Judicial Screening Committees," Appendix (June 2010) (listing 18 states with judicial selection (or "advisory") commissions overseen by their respective U.S. Senators, with possible caveat for Massachusetts), available at http://www.brookings.edu/~media/Files/rc/papers/2010/0702_federal_judicial_wheeler/0702_federal_judicial_wheeler.pdf; see also Russell Wheeler, *Prevent Federal Court Nomination Battles: De-Escalating the Conflict over the Judiciary*, BROOKINGS INSTITUTION (Aug. 11, 2008), http://www.brookings.edu/papers/2007/1120_judiciary_wheeler_opp08.aspx.

89. See, e.g., Brannon Denning, *The "Blue-Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001).

92. The only way to overcome a filibuster and proceed to a vote on a given matter is for 60 Senators to vote for cloture, i.e., the end of debate. *Filibuster*

(3) *Use of filibusters and individual member holds to delay or prevent Senate confirmation hearings or votes.* A procedure by which a minority of senators can prevent the close of debate and thereby forestall a hearing or vote on a given matter,⁹² the filibuster did not develop until the mid-nineteenth century⁹⁶ and was not

and Cloture, SENATE.GOV, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited Sept. 19, 2010).

96. According to Binder, the first filibuster was in 1837. Sarah A. Binder, *The History of the Filibuster*, BROOKINGS INSTITUTION (Apr. 22, 2010), http://www.brookings.edu/testimony/2010/0422_filibuster_binder.aspx (recounting Sarah Binder's testimony before the U.S. Senate Committee on Rules and Administration on April 22, 2010). Catherine Fisk and Erwin Chemerinsky recount a different history of the filibuster. They date the first "dilatatory debate," defined as the "strategic use of delay in debate," to 1790 with deliberations over the location of the nation's Capitol. Fisk & Chemerinsky, *supra* note 74, at 187. The first filibuster of a judicial nominee was in 1881. Gerhardt, *supra* note 71, at 453.

introduced in its modern form until 1917. In recent years, filibusters and threats of filibuster have been used increasingly frequently against lower court nominations.

At the same time, there has been a marked increase in the placement of individual Senator's anonymous holds on nominations, which also delay confirmation hearings and/or votes.⁹⁷

(4) *Payment of courtesy calls by Supreme Court nominees with individual Senators prior to their confirmation hearings and/or votes.* This practice has provoked concern for whether Senators are pressing judicial candidates for commitments on particular issues or cases, given the lack of transparency and accountability associated with these private sessions.¹⁰⁰

(5) *Senatorial investigation of judicial nominees independent from those conducted by the executive branch.* Since the late 1970s, the Senate Judiciary Committee has conducted investigations of all judicial candidates in addition to those performed by the Justice Department, White House, and Federal Bureau of Investigation.¹⁰¹

(6) *Senate Judiciary Committee "gate-keeping" as to whether a confirmation hearing or vote will be scheduled on a given judicial nominee,* where the Committee's failure to call for a hearing or vote effectively kills a nomination.¹⁰³

(7) *Introduction of Senate confirmation hearings featuring testimony by nominees and other witnesses explicitly identified as supporting or opposing the nominee.*¹⁰⁵ Lengthy candidate

97. See, e.g., Gerhardt, *supra* note 71, at 450–51 (describing Senators' holds on judicial appointments); see also EPSTEIN & SEGAL, *supra* note 71, at 98 ("Holds occur when a senator asks his or her party leader to delay action on a nominee; it is then up to the party leader to grant the request and to determine the length of the delay.").

100. WITTES, *supra* note 1.

101. EPSTEIN & SEGAL, *supra* note 68, at 89–90.

¹⁰³ Gerhardt, *Federal Appointments Process*.

105. Supreme Court confirmation hearings were not held until the early twentieth century and not held regularly or publicly until the middle of the twentieth century. See, e.g., HENRY ABRAHAM, *JUSTICES, PRESIDENTS AND SENATORS* (7th ed. 2004).

109. See, e.g., MICHAEL GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000).

testimony is now part of the regular fabric of Article III confirmation hearings,¹⁰⁹ though some commentators have recommended abolishing it, given the “Kabuki theatre” that such hearings have become, with Senators’ grandstanding questions and candidates’ evasive responses.¹¹⁰

(8) *Submission of reports to the Senate Judiciary Committee by the American Bar Association Standing Committee on the Federal Judiciary, evaluating the professional qualifications of federal judicial nominees.* Established early in the Eisenhower administration, the American Bar Association Standing Committee on the Federal Judiciary plays a central role in the investigation and evaluation of federal judicial candidates.¹¹¹

In addition to these changes in the Senate process, there are a number of ongoing concerns with the Senate’s confirmation role that are important in considering the merits of legislative involvement in judicial appointments. These include (1) whether there should be a “presumption in favor of a nominee’s confirmation,”¹¹³ particularly at the Supreme Court level, i.e., whether the Senate should defer to the President’s choice of nominee;¹¹⁴ (2) the proper extent of Senate inquiry into the nominee’s judicial philosophy or ideology;¹¹⁵ (3) the proper extent

110. See, e.g., O’BRIEN, *supra* note 1; WITTES, *supra* note 1, at 119. But see MALTESE, *supra* note 86.

111. See, e.g., SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997); see also Mary L. Clark, *Carter’s Groundbreaking Appointment of Women to the Federal Bench: His Other “Human Rights” Record*, 11 AM. U. J. GENDER SOC. POL’Y & L. 1131 (2003).

113. COMISKEY, *supra* note 50, at 10, 192 (noting that “Senators owe the President no deference in appointing justices”).

114. See, e.g., GERHARDT, *supra* note 88; Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 663–64 (1970) (“In a world that knows that a man’s social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President’s, as a satisfactory basis in itself for a negative vote.” (emphasis added)).

115. See generally CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 148 (2007); see also COMISKEY, *supra* note 50, at 20 (“[T]here are clear indications that many of the Framers did countenance ideological scrutiny of nominees—or at the least would not have been surprised by it.”); Cass Sunstein, *Senate Committee Hearings on the Judicial Nomination Process*, 50 DRAKE L. REV. 429, 463 (2002) (Professor Cass Sunstein stating, “My basic conclusion is simple. Ideology should certainly matter, both for the President and for the Senate.”). But see John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L.

of the President's pre-nomination consultation with Senators regarding desirable judicial candidates;¹¹⁶ and (4) whether politicization of the nomination and confirmation process is appropriate.

Awareness of the extent to which today's Senate confirmation role differs from that intended at the time of the Constitution's adoption and of ongoing tension over the Senate's optimal judicial appointment role, is important for understanding the relevance of the U.S. model to the continuing debate over the possibility, and desirability, of a parliamentary role in U.K. judicial appointments, to which the Article now turns.

II. IDEAS AND CONCERNS SHAPING THE ONGOING ABSENCE OF PARLIAMENT FROM THE U.K. JUDICIAL APPOINTMENT PROCESS

Neither historically nor currently has there been a formal role for Parliament in judicial appointments. This is so even despite the doctrine of parliamentary sovereignty. This Part seeks to understand why this is. It begins with a brief introduction to the doctrine of parliamentary sovereignty, followed by an overview of judicial appointment practices in Britain. It then highlights the Constitutional Reform Act's (CRA) reforms of the U.K.'s judicial appointment system and the principal motives for it. This Part concludes by hypothesizing reasons for Parliament's ongoing absence from the judicial appointment process.¹¹⁸

REV. 633, 641 (1993) (arguing that choice of judicial nominee is properly exclusively that of the President).

116. See Sunstein, *supra* note 94 (noting that language of the "advice and consent" clause appears to assign an advisory role to the Senate pre-nomination). *But see* McGinnis, *supra* note 94, at 638–46 (arguing that there is no basis in text or practice for asserting a consultative role for the Senate in judicial appointments; rather, "advice and consent" modifies "appoint" and not "nominate" from which it is separated by a comma).

118. This Article seeks to avoid conflating "legislative involvement in judicial appointments" with "legislative confirmation hearings on judicial nominees." Rather, parliamentary involvement in judicial appointments could take a range of forms, including, *inter alia*, participation by Members of Parliament in judicial appointment commissions or parliamentary investigation and evaluation of judicial nominees without resort to public hearings and without resort to confirmation vote. Mary L. Clark, *Introducing a Parliamentary Confirmation Process for Supreme Court Justices?*, 2010 PUB. L. 464.

A. Introduction to the Doctrine of Parliamentary Sovereignty

William and Mary officially recognized Parliament's sovereignty, or "supremacy," when they executed a Bill of Rights with Parliament in 1689 following the English Civil War, Restoration, and Glorious Revolution of 1688.¹¹⁹ Pursuant to the doctrine of parliamentary supremacy, the legislature was acknowledged as *the* final arbiter of the law, rather than the Crown or the judiciary.¹²⁰

Blackstone articulated the orthodox account of parliamentary supremacy when he declared in his *Commentaries on the Laws of England*: "[T]here is and must be in all [forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside," and in England this "'sovereignty of the British constitution' was lodged in Parliament, the aggregate body of King, Lords, and Commons, whose actions 'no power on earth can undo.'"¹²¹

Blackstone's account has, at times, been more rhetorical than real, where British courts have from time to time reviewed parliamentary acts for compliance with constitutional norms since at least Coke's 1610 opinion in *Bonham's Case*.¹²² While that case

119. STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION 15–17 (2009) Pincus notes that, while Robert Walpole (Prime Minister for two decades beginning in 1720) insisted that the Revolution and its aftermath had established *parliamentary* sovereignty, the Opposition Whig ideology insisted that the Revolution had established *popular* sovereignty. *Id.* Parliamentary sovereignty is the dominant concept used today. Joyce Malcolm notes that, rather than "swearing to keep the laws and customs granted by the king's predecessors, William and Mary swore that they and their successors ... would govern 'according to the statutes in Parliament agreed on, and the laws and customs of the same.'" *J.L. & Pol.* (quoting Coronation Oath Act (1689), 5 W. & M. 3 & 2).

120. See, e.g., ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885). Rakove hypothesizes that the assertion of legislative supremacy might have been more about "prevent[ing] an arbitrary monarch from ruling in his own name and without parliamentary consent" than "enabling the good people of England to enact the laws they desired." Jack Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1052 (1997) (citing JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)).

121. William Blackstone, *Commentaries on the Laws of England* (1765), as quoted in BAILYN, *supra* note 5, at 201–02.

122. *Bonham's Case* (C.P. 1610), Coke, *Reports* (Act of Parliament will be void if against "common right and reason, or repugnant, or impossible to be performed"). See Joyce Lee Malcolm, *Whatever the Judges Say It Is? The Founders and Judicial Review*, 26 J.L. & POL. (forthcoming 2010), available at <http://ssrn.com/abstract=1597768>. As Malcolm recounts, "Coke claimed that basic principles of justice were so sacred that if the legislators 'were to

pre-dated the late seventeenth century recognition of parliamentary supremacy, recent work by Joyce Malcolm suggests that this practice of judges determining laws' compliance with constitutional norms (though not called "judicial review") did not measurably change following recognition of parliamentary supremacy.¹²³ Though the dominant view remains that parliamentary supremacy was the principal understanding by which courts abided, care must be taken in referencing the doctrine to avoid overstating the power of the legislature vis-a-vis the

transgress them it would be the right and duty of the judges to pay no attention to such enactments." *Id.* at 15 (quoting CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 28 (1914)).

Hamburger cautions that *Bonham's Case* was not "an argument for holding statutes void, but rather for equitable interpretation." Hamburger seeks to clarify that "judges used arguments about what was void in conscience or against natural equity to establish the moral foundation for their equitable interpretation of statutes, and this is what Coke did in *Bonham's Case*." Nonetheless, Hamburger acknowledges that *Bonham's Case* "was susceptible of being misunderstood, and many Americans took pleasure in a misinterpretation that allowed them to believe that judges could actually hold an act of Parliament unlawful." *Law and Judicial Duty* at 274.

123. Malcolm, *supra* note 101, at 7 ("Blackstone insisted Parliament's acts were beyond review by the courts. This view was still controversial. A year after the appearance of Blackstone's *Commentaries*[,] Lord Camden . . . insisted upon the traditional view that parliamentary legislation that was against law was unconstitutional and void."); *see also* Malcolm at 16-17 (recounting 1701 opinion in *City of London* in which the judges stated that an act of Parliament would be void if it instructed a judge to be a judge in his own cause in violation of impartiality principles); WOOD, *EMPIRE OF LIBERTY*, *supra* note 24, at 406 ("Even with the development of parliamentary sovereignty in the eighteenth century, English judges continued to interpret and construe parliamentary statutes in such a way as to fit them into the entire legal structure. Thus eighteenth-century English common law judges, despite having to acknowledge the sovereign law-making authority of Parliament, were left with an extraordinary amount of room for statutory interpretation and construction." (footnote omitted)); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 17 (2008). Hamburger observes, "[E]ven in England, they sometimes had to hold unconstitutional acts unlawful."

Hamburger provides a detailed account of English judges' responses to parliamentary supremacy in his recent *Law and Judicial Duty*. According to Hamburger, though judges were reluctant to overturn parliamentary enactments in the face of the doctrine of parliamentary supremacy, there were other "lesser" laws that judges voided on grounds of noncompliance with the constitution. Hamburger also underscores the importance of recognizing judges as interpreting parliamentary acts, as in *Bonham's Case*, rather than striking them down. *Id.* at 274.

courts. Still, parliamentary supremacy plays a critical conceptual role in understanding British law and politics.¹²⁴

B. Historic Judicial Appointment Practices in Britain

Nearly exclusive authority to name judges to courts high and low rested until 2005 with the Lord Chancellor,¹²⁵ a principal advisor to the Crown and, later, to the Prime Minister.¹²⁶ Until the very recent introduction of judicial appointment commissions at the lower court level and even more recently at the Supreme Court level, the Lord Chancellor collected information on potential judicial candidates by conducting private consultations, or “secret soundings,” with unnamed judges and senior bar members.¹²⁸ Whom the candidate knew and where the candidate came from (including where the candidate went to school) mattered heavily in this process.¹²⁹ The Lord Chancellor’s selection of judicial candidates were typically made by means of “taps on the shoulder” to serve.

Thus, despite the doctrine of parliamentary sovereignty, Parliament had no formal role in the judicial appointment process. Individual Members of Parliament (MPs) did, however, succeed in influencing judicial appointments behind the scenes. According to

124. BRUCE F. NORTON, *POLITICS IN BRITAIN* (2007) (“[P]arliamentary sovereignty may be a political fiction, but it continues to dictate the formal structures of the British constitution. . . . Each constitutional reform . . . has been accompanied by a ritual reaffirmation of the continuing centrality of parliamentary sovereignty to the legitimation of the state and government.”).

125. The Lord Chancellor position dates to 605. Peter L. Fitzgerald, *Constitutional Crisis over the Proposed Supreme Court for the United Kingdom*, 18 *TEMP. INT’L & COMP. L.J.* 233, 235 (2004).

126. The office of the Prime Minister was created in the early eighteenth century following the Glorious Revolution and 1701 Act of Settlement. See Pincus, *supra* note 98; see also JOHN LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2009).

128. Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 *FORDHAM URB. L.J.* 387, 397 (2007).

129. *Id.* at 396.

131. The Act of Settlement granted judges the rights of service in “good behavior,” replacing the prior convention of service at the pleasure of the Crown. The Act of Settlement 1701, 12 & 13 Will. 3, c.2, sec.3 (Engl.). It was not until 1760, that high court judges gained tenure in good behavior for the duration of their lives. Prior to that change, high court judges’ tenure could be terminated upon the succession of a new monarch and often was. 1799 saw the introduction, by Parliament, of judicial pensions, which, like life tenure in good behavior, promoted judicial independence.

Robert Stevens, “[w]hile the Act of Settlement¹³¹ may have been intended to prevent royal interference with the judges, Parliament showed no interest in curbing its tradition of interfering with the judges.”¹³²

This appointment process eventually came to be criticized for its lack of transparency and accountability, as the following discussion highlights.

C. Pre-CRA Critiques of British Judicial Appointment Practices

A number of commentators writing in the late 1990s and early 2000s predicted that reform of the judicial appointment process was imminent, given the deficits in transparency and democratic accountability resulting from the Lord Chancellor’s “secret soundings” and “taps on the shoulder” to serve. These commentators included Sir Thomas Legg¹³⁴ and Professors Robert Hazell,¹³⁵ Andrew Le Sueur,¹³⁶ Kate Maleson,¹³⁷ Robert Stevens,¹³⁸ and Diana Woodhouse.¹³⁹ For these and other commentators, the question was not whether there should or would be reform but, as Maleson framed it, “whether reform can be carried out within the existing structure or whether more substantive change to the system is required.”¹⁴⁰

Legg, who as Permanent Secretary to the Lord Chancellor had been the primary individual charged with screening judicial candidates, wrote, “slightly . . . heretically,” that in light of judges’

132. ROBERT STEVENS, *THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION* 10 (2002).

134. See, e.g., Thomas Legg, *Brave New World—The New Supreme Court and Judicial Appointments*, 24 *LEGAL STUD.* 45 (2004).

135. See, e.g., R. Hazell, ed., *Constitutional Futures Revisited: Britain’s Constitution to 2020* (2008).

136. See, e.g., Andrew Le Sueur, *Developing Mechanisms for Judicial Accountability in the UK*, 24 *LEGAL STUD.* 73 (2004).

137. See, e.g., KATE MALLESON, *THE NEW JUDICIARY: THE EFFECTS OF EXPANSION AND ACTIVISM* (1999).

138. See, e.g., STEVENS, *supra* note 111; Robert B. Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor’s Office*, 8 *OXFORD J. LEGAL STUD.* 222 (1988).

139. See, e.g., Diana Woodhouse, *The Constitutional and Political Implications of a United Kingdom Supreme Court*, 24 *LEGAL STUD.* 134, 151 (2004).

140. Kate Maleson, *Selecting Judges in the Era of Devolution and Human Rights*, in *BUILDING THE UK’S NEW SUPREME COURT* 305 (Andrew Le Sueur ed., 2004).

recently expanded powers of review, “there is now a strong case for requiring the candidate selected by the Prime Minister to be confirmed by a joint committee of both Houses of Parliament before his or her name is submitted to the Queen.”¹⁴¹ Legg was quick to add that a parliamentary confirmation process “need not necessarily involve a public hearing, as happens in the Judiciary Committee of the U.S. Senate.”¹⁴² Legg reasoned,

It is not just fitting, but, I believe, necessary that both the other two branches of government, that is the legislature as well as the executive, should concur in the appointment of the nation’s most senior judges. This is especially so since the legislature is the only branch of government with power to remove a senior judge.¹⁴³

Advocating a parliamentary role in greater detail, University of London Law Professor Kate Maleson highlighted the democratic accountability and public education benefits to be realized from legislative branch questioning of Supreme Court nominees.¹⁴⁴ In addition to these benefits, Maleson suggested that legislative hearings on Supreme Court nominees might help check the growing power of the executive because the executive would less likely be able to use Supreme Court appointments as a tool of political patronage if Parliament scrutinized its candidate choices.¹⁴⁵ Moreover, Maleson suggested that the role of partisanship or ideology in the Supreme Court appointment process could be ameliorated by a parliamentary confirmation process to the extent that “the involvement of a number of MPs from different parties ensures that no one ideological position will inevitably dominate.”¹⁴⁶ Maleson concluded, “The justification for the participation in some form of the elected branches of government

¹⁴¹ See *supra* note 128.

¹⁴² See *supra* note 128.

¹⁴³ Legg, *supra* note 113, at 46. Robert Stevens notes that Legg had supported House of Lords interviews of senior judge candidates pre-CRA because “judges have moved to take a more central stage in various political matters.” Stevens, *supra* note 106, at 28.

¹⁴⁴ Kate Maleson, *Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom*, 44 OSGOODE HALL L.J. 557, 561 (2006) (“If we accept that some form of public questioning of supreme court candidates or appointees by elected representatives is necessary to provide a link to the democratic process and greater public engagement with the judicial appointments process, then there are strong arguments for the legislature as the best forum for this process.”).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* Maleson acknowledges that “[p]artisan political concerns will not, of course, be absent from a hearing before a legislative committee.” *Id.*

in the appointments process of the highest ranks of the judiciary is, therefore, clear.”¹⁴⁷

Writing shortly before the Blair administration unveiled its constitutional reform proposal in 2003, Cambridge Law Professor Robert Stevens asserted that if a new U.K. Supreme Court were to be created, strong consideration should be given to introducing a parliamentary confirmation process for new Supreme Court justices.¹⁴⁸ Stevens advocated a parliamentary confirmation role, even while acknowledging intense British anxiety about any type of public confirmation process because of the perceived defects of the U.S. process.¹⁴⁹ Specifically anticipating the Blair administration’s recommendation of a Supreme Court appointment commission, Stevens declared, “Judges choosing judges is the antithesis of democracy.”¹⁵⁰ In its place, Stevens advocated public questioning of Supreme Court nominees by an elected body. “The choice of judges is too important to be left to a quango [a judicial appointments commission]. . . . [I]f there is to be a Constitutional or Supreme Court, its judges must be chosen by elected officials and subject to examination by a democratic body.”¹⁵¹ As Stevens correctly predicted, adherence to the “mythology” of parliamentary supremacy, taken together with an unwillingness to acknowledge the growing power of the courts, would be major impediments to appreciation of the need for legislative involvement in Supreme Court appointments.¹⁵²

147. Kate Malleson, *Introduction* to APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 6 (Kate Malleson & Peter H. Russell eds., 2006).

¹⁴⁸ See *supra* note 140.

149. STEVENS, *supra* note 111, at 143–46 (“[The British public] share a Hamiltonian willingness to leave the final choice to a wise elder (The Lord Chancellor); and they remain nervous about any further openness in the process. Many appear to be especially uncomfortable with any system which would allow judges to be questioned either about their political or personal views or their suitability to be judges.”). Later, Stevens opined that “[t]he idea of a potential judge being subjected by politicians to [that] kind of grilling . . . is, however, anathema to bench and bar alike.” *Id.* at 176. Stevens continued, “Moves in that direction run into the distaste created by the televised hearings on Robert Bork and Clarence Thomas before the U.S. Senate.” *Id.*

¹⁵⁰ See *supra* note 140.

¹⁵¹ See *supra* note 140.

152. *Id.* at 143–46 (“The English are somewhat reluctant to come to grips with the implications of a judiciary increasingly involved with what, in other societies, would be regarded as political issues. The cult of parliamentary sovereignty hangs so heavily in the air that the reality of recent transfers of powers to the judges and others is shrouded in its mythology.”).

D. The Government's 2003 Judicial Reform Proposals and Parliamentary Debate on the Possibility of a Legislative Role in Judicial Appointments

In June 2003, the Blair administration proposed abolishing the Appellate Committee of the Law Lords and establishing a new Supreme Court in its place.¹⁵³ At the same time, the Administration proposed a new way of appointing judges, including abolition of the Lord Chancellor's office, which was later revisited.¹⁵⁴ The Government's announcement was soon followed by the issuance of two consultation papers, "Constitutional Reform: A Supreme Court for the U.K."¹⁵⁵ and "Constitutional Reform: A New Way of Appointing Judges."¹⁵⁶ In neither consultation paper was there reference to the possibility of a formal judicial appointment role for Parliament.

Both Houses of Parliament held hearings on the Government's proposal.¹⁵⁷ A number of witnesses testified before the House of Commons Constitutional Affairs Select Committee in favor of parliamentary scrutiny or confirmation of judicial candidates.¹⁵⁸ These witnesses included Professor Robert Hazell, who emphasized the increased accountability to be had through parliamentary scrutiny, testifying, "Appointments to the judiciary are too important to be left to the judiciary alone, or to a Judicial Appointments Commission. The judges would be perceived to be a self-appointing oligarchy, especially if the Commission was chaired by a senior judicial figure"¹⁵⁹ (as it eventually was). As a

¹⁵³ See *supra* note 142.

¹⁵⁴ For a detailed account of how the CRA was proposed, debated, and ultimately enacted, see Andrew Le Sueur, *From Appellate Committee to Supreme Court: A Narrative*, in THE JUDICIAL HOUSE OF LORDS, 1876–2009, at 64 (Louis Blom-Cooper et al. eds., 2009).

¹⁵⁵ Department of Constitutional Affairs, "Constitutional Reform: A Supreme Court for the U.K." (2003), available at <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>

¹⁵⁶ Department of Constitutional Affairs, "Constitutional Reform: A New Way of Appointing Judges," (2003), available at <http://www.dca.gov.uk/consult/jacommission/judges.pdf>

¹⁵⁷ For House of Commons committee hearing, see *supra* note 143; for House of Lords committee hearing, see *supra* note 149.

¹⁵⁸ CONSTITUTIONAL AFFAIRS COMMITTEE, REPORT ON JUDICIAL APPOINTMENTS AND A SUPREME COURT (COURT OF FINAL APPEAL), 2003–4, H.C. 48-I, at 27–28 (U.K.) [hereinafter JUDICIAL APPOINTMENTS REPORT I].

¹⁵⁹ ROBERT HAZELL, UNIV. COLL. LONDON, WRITTEN EVIDENCE SUBMITTED TO THE SELECT COMMITTEE ON CONSTITUTIONAL AFFAIRS OF THE HOUSE OF COMMONS (2003) (U.K.), available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48we12.htm>.

compromise, Hazell favored post-appointment parliamentary hearings for high level judges as a means for the legislature and public to get to know the new judges, i.e., as a type of “meet and greet.”¹⁶⁰

The Commons committee did not cite its reasons for rejecting the possibility of a parliamentary role in judicial appointments.¹⁶¹ Rather, the committee echoed Hazell in suggesting as a preferable alternative having currently serving justices testify before Parliament on the activities of the Supreme Court.¹⁶³

Shortly thereafter, the House of Lords Select Committee on the Constitutional Reform Bill heard testimony on the possibility of a parliamentary role in appointing judges.¹⁶⁵ Malleon testified, *inter alia*, that the sensationalism of the U.S. Supreme Court confirmation process had contributed to a failure to appreciate the importance of an appointment role for Parliament. Hazell reiterated his proposal for post-appointment hearings with new Supreme Court justices.¹⁶⁷ As with the Commons committee, the Lords committee did not detail its reasoning in rejecting a judicial appointment role for Parliament.¹⁶⁸

E. Highlights of the CRA Reform and the Principal Motives for It

¹⁶⁰ See *supra* note 144.

¹⁶¹ The Committee’s report simply stated, “[W]e heard no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges.” JUDICIAL APPOINTMENTS REPORT I, *supra* note 128, at 27 para. 87.

¹⁶³ This view was expressed by several members of the House of Commons Constitutional Affairs Committee. *Hearing on CRA Reform Before the House of Commons Constitutional Affairs Committee* 11 (2003) (U.K.) (statement of Keith Vaz, MP).

¹⁶⁵ SELECT COMMITTEE ON THE CONSTITUTIONAL REFORM BILL, FIRST REPORT, 2004, H.L. 125-I, at 99–100 (U.K.) [hereinafter CONSTITUTIONAL REFORM REPORT I].

¹⁶⁷ SELECT COMMITTEE ON THE CONSTITUTIONAL REFORM BILL, FIRST REPORT, 2003–4, H.L. 125-II (U.K.) (testimony of Hazell on April 6, 2004).

¹⁶⁸ See House of Lords report, *supra* note 149.

The CRA 2005, as enacted, abolished the Appellate Committee of the House of Lords, establishing in its place a free-standing Supreme Court, which began operating in October 2009.¹⁶⁹ Eleven of twelve Appellate Committee members became justices of the new Court and a twelfth was named several months later.¹⁷⁰ The CRA substantially constrained the Lord Chancellor's role in judicial appointments, replacing his nearly exclusive authority to name judges with very limited review of two new judicial appointment commissions charged with screening and recommending judicial candidates at the Supreme Court and lower court levels.

More specifically, the CRA provided for the Supreme Court appointment commission to be called into being for each vacancy, chaired by the Court's President, vice-chaired by its Deputy President, and include one member from each of the judicial appointment commissions (JAC) for England and Wales, Northern Ireland, and Scotland.¹⁷¹ The CRA directs the Supreme Court appointment commission to recommend one candidate for each vacancy.¹⁷² The Lord Chancellor is empowered to accept, reject, or seek reconsideration of the Commission's candidate, up to three times for each vacancy.¹⁷³ Following this review, the Lord Chancellor forwards the selection to the Prime Minister, who forwards it to the Queen for royal assent.¹⁷⁴ Parliament has no role in the Supreme Court appointment process.

¹⁶⁹ "The Supreme Court; History," available at <http://www.supremecourt.gov.uk/about/history.html>

¹⁷⁰ See, e.g., Frances Gibb, *Sir John Dyson: A Good Choice for the Supreme Court, at Long Last*, TIMES ONLINE (Mar. 25, 2010), <http://business.timesonline.co.uk/tol/business/law/article7074204.ece>.

¹⁷¹ The CRA specified the composition of the JAC for England and Wales (with 15 members, including 5 judges, 5 legal professionals, and 5 lay members), Constitutional Reform Act, 2005, c. 4, sch. 12 (U.K.), while the Judiciary and Courts (Scotland) Act, 2008, c. 3, sch. 1, provided for 10 members, including five judges and/or lawyers and five lay members of the JAC in Scotland (referred to as "Judicial Appointments Board" in the Scottish Act), and the Justice (Northern Ireland) Act, 2002, c. 26, § 3, and Justice (Northern Ireland) Act, 2004, c. 4, sch. 1, provided for the composition of the JAC in Northern Ireland (13 members likewise to be drawn from the judiciary, legal profession, and lay public).

As noted in Part B, above, judges had historically been substantially involved in judicial appointments behind-the-scenes, providing informal evaluations of prospective judicial candidates to the Lord Chancellor through so-called "secret soundings."

¹⁷² CRA 2005.

¹⁷³ Constitutional Reform Act, 2005, c. 4, § 29 (U.K.).

¹⁷⁴ Constitutional Reform Act 2005, Part 3 "Supreme Court." More recently, the Constitutional Renewal Bill, 2008–9, H.L. Bill [34] (Eng.), sought

The CRA also created a second judicial appointment commission (the “Judicial Appointment Commission for England and Wales”) to screen and recommend a large volume of lower court judges each year.¹⁷⁵ This JAC is much larger in size than the Supreme Court commission and is permanent, rather than temporary, in nature.¹⁷⁶ As with Supreme Court appointments, the Lord Chancellor must accept, reject, or seek reconsideration of each candidate recommended by the JAC for England and Wales and cannot name candidates independent of the commission process.¹⁷⁷ As with Supreme Court appointments, there is no role for Parliament in lower court appointments.

A number of considerations informed the CRA’s creation of a new Supreme Court and introduction of two new judicial appointment processes: (1) modernizing the constitution and governance system through embrace of separation of powers principles in response to European Convention on Human Rights requirements;¹⁷⁸ (2) promoting judicial independence; (3) checking executive power; (4) increasing transparency, legitimacy, and accountability of the judicial appointment processes; and (5) increasing bench diversity.

1. Modernizing the Governmental Structure

Much of the change reflected in the CRA was motivated by a desire to modernize the U.K.’s constitution and governance system.¹⁷⁹ Most urgently, removal of the highest court from the

to eliminate the Prime Minister’s role, instead providing for direct recommendation by the Lord Chancellor to the Queen.

¹⁷⁵ Constitutional Reform Act 2005, sched. 12, “The Judicial Appointments Commissions,” Part 1, “The Commissioners.”

¹⁷⁶ Constitutional Reform Act, 2005 (U.K.); see also Kate Malleson, *The New Judicial Appointments Commission in England and Wales*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, *supra* note 124, at 39, 48.

¹⁷⁷ Constitutional Reform Act, 2005, c. 4, § 29 (U.K.).

¹⁷⁸ A brief word on terminology: the Author uses the phrase “separation of powers” to capture one of the Government’s motives in enacting the CRA because that is the term used by the Government itself. Dep’t of Constitutional Affairs, “Constitutional Reform: A Supreme Court for the U.K.” (2003). The Author is nevertheless mindful that Britain’s parliamentary system has been characterized more by a balance than a separation of powers.

¹⁷⁹ Peter Russell, *Conclusion*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, *supra* note 141, at 420, 421–22 (“Judicial reform in the U.K. is part of a larger process of modernization.”); see also MALLESON, *supra* note 116, at 40 (“The government’s underlying purpose for these changes generally and the creation of the judicial appointments commission specifically is to modernize the constitution and the legal system.”).

legislature was thought necessary to reflect greater adherence to separation of powers principles and was driven in large part by European Convention on Human Rights (ECHR) Article 6, requiring independent tribunals for the hearing of individual human rights claims.¹⁸⁰ Replacing nearly exclusive authority of the Lord Chancellor to name judges with reliance on appointment commissions also reflected a growing self-consciousness about the Lord Chancellor's anomalous position as a member of all three branches of government, in turn reflecting heightened attention to separation of powers principles.

Prompting greater awareness of separation of powers principles was the growing power and status of the U.K. judiciary relative to Parliament, enabled in part by enactment of the Human Rights Act 1998 (HRA), incorporating the ECHR into U.K. domestic law.¹⁸¹ Pursuant to the HRA, U.K. courts, including the U.K.'s highest court, were required to declare whether domestic law was compatible with ECHR standards.¹⁸² As a result, courts gained significant power of judicial review.¹⁸³

Also significant to this growth in judicial power was the "direct effect" given European Court of Justice (ECJ) rulings over individual countries' law, including conflicting national constitutional law. Because ECJ rulings are supreme, national courts, including the U.K.'s highest court, have been empowered

180. See, e.g., COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, OFFICE OF THE LORD CHANCELLOR IN THE CONSTITUTIONAL SYSTEM OF THE UNITED KINGDOM, DOC. NO. 9798, 2003 Sess., available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc03/EDOC9798.htm> (recommending that the U.K. "consider the creation of a Supreme Court to avoid the combination of functions in the House of Lords"). Increased self-consciousness about the presence of the highest court in the upper House of Parliament was also thought prompted by the heightened attention given the court due to the Pinochet case in the late 1990s. See, e.g., Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 116 (2009).

181. See, e.g., DANNY NICOL, EC MEMBERSHIP AND THE JUDICIALIZATION OF BRITISH POLITICS 1-2 (2001).

¹⁸² Human Rights Act 1998.

183. Parliamentary supremacy had already been undermined by U.K. enactment of the European Communities Act of 1972, which acknowledged European community law, as determined by the European Court of Justice ("ECJ") in Luxembourg, as superior to U.K. domestic law. The effect of this subordination of U.K. domestic law to ECJ decisional law was most famously demonstrated in *Factortame*, where the Appellate Committee of the House of Lords enjoined enforcement of a parliamentary law held to violate European community law. See, e.g., JOHAN STEYN, DEMOCRACY THROUGH LAW, at xvi (2004); Paul Craig, *Britain in the European Union*, in THE CHANGING CONSTITUTION 84 (Jeffrey Jowell & Dawn Oliver eds., 2007).

to strike down inconsistent domestic law, including constitutional law.¹⁸⁴ This growth in judicial power was an overarching factor driving both the creation of the new Supreme Court and the overhaul of the judicial appointment system.

2. Promoting Judicial Independence

Another motivation for the CRA reform was interest in fostering greater judicial independence. The location of the U.K.'s highest court in the upper house of Parliament had become increasingly untenable. While almost all Law Lords foreswore involvement in the legislative process because of the apparent conflict in roles (where Law Lords were empowered to debate bills as legislators and pass judgment on the resulting legislation as judges),¹⁸⁶ a perception of (or, more accurately, anxiety about a perception of) a lack of judicial independence nevertheless persisted.¹⁸⁷ This was redressed by moving the highest court out of Parliament.¹⁸⁸

3. Checking Executive Power

CRA reform of the judicial appointment process was also thought necessary to counterbalance the growing power of the Prime Minister's office, which, under Thatcher and Blair, had assumed presidential-like authority.¹⁸⁹ By establishing a free-standing Supreme Court with newly expanded powers of judicial review and creating a Supreme Court appointment commission led by the Court's most senior members, the CRA substantially substituted the judiciary for the executive in judicial appointments, bolstering the power of the judiciary to check the executive.¹⁹⁰ As former (Law) Lord Johan Steyn observed more generally of the CRA (and HRA) reforms, "The claim that the courts stand between the executive and the citizen is no longer an empty constitutional

184. See, e.g., DAMIAN CHALMERS & ADAM TOMKINS, EUROPEAN UNION PUBLIC LAW: TEXT AND MATERIALS 46 (2007); NICOL, *supra* note 146, at 6.

¹⁸⁶ Stevens, *English Judges*.

¹⁸⁷ Department of Constitutional Affairs, "Constitutional Reform: A Supreme Court for the U.K."

¹⁸⁸ CRA 2005.

¹⁸⁹ STEVENS, *supra* note 111, at 147 ("The more presidential style of Mrs. Thatcher and the declining importance of Parliament and other institutions were factors in making judges, as protectors of the Constitution, more important.")

¹⁹⁰ CRA 2005.

idea. It has been invigorated and become a foundation of our modern democracy.”¹⁹¹

4. Improving Transparency, Legitimacy, and Accountability of the Judicial Appointment System

CRA overhaul of the judicial appointment process, at all court levels, was further motivated by a felt need to increase the transparency, legitimacy, and accountability of the candidate screening and selection process, where the Lord Chancellor had previously relied on confidential contacts with unnamed informants to evaluate potential appointees. Historically, the lack of transparency in the judicial appointment system had not “significantly dent[ed] public confidence in the judicial process for the simple reason that very few people knew or perhaps cared about how senior judges were appointed.”¹⁹² With the growth of judicial power under the HRA, the news media began paying more attention to the Law Lords, and a need for transparency in the appointment process was increasingly perceived.¹⁹³

Commentators writing before the CRA was enacted made clear that it was not the *actual* legitimacy of the judges and judiciary that concerned them, where British judges were thought enormously well qualified and intellectually distinguished.¹⁹⁴ Rather, it was a question of the *perceived* legitimacy of the judges and judiciary that was thrown into doubt by reliance on confidential consultations and the apparent necessity of personal connections to obtain a judgeship.¹⁹⁵ Malleon, among others, underscored the importance of reforming the judicial appointment system to promote the public’s trust and confidence in the legitimacy of the appointment process and resulting judiciary.¹⁹⁶ The legitimacy problem was thought to be much more acute in the higher than lower courts because reforms had already been implemented at the lower court level pre-CRA to create a more open appointment

¹⁹¹ Steyn, *supra* note 147, at xix.

¹⁹² Malleon at 296-302.

¹⁹³ Malleon, *supra* note 119, at 296–302. Thus, the House of Commons Constitutional Affairs Committee concluded in its CRA hearing report: “[I]n order for the judiciary to continue to command public confidence, it is vital that the process by which judges are selected and appointed must also command confidence.” JUDICIAL APPOINTMENTS REPORT I, *supra* note 128, at 36.

¹⁹⁴ Department of Constitutional Affairs, “Constitutional Reform: A New Way of Appointing Judges” (2003).

¹⁹⁵ Stevens, *English Judges*.

¹⁹⁶ Malleon, *supra* note 119, at 309–13.

process, including introduction of a judicial appointment commission.¹⁹⁷

Improved democratic and procedural accountability were also important motivations for the CRA reform, though these should not be overstated, where the CRA does not require that the judicial appointment commissioners or Lord Chancellor actually be elected officials.¹⁹⁸ Nevertheless, the CRA's judicial appointment reforms introduced a marked degree of democratic and procedural accountability insofar as (1) the members of the judicial appointment commissions are known, not secret; (2) the lower court judicial appointment commissions publicly announce judicial vacancies and post information on their candidate selections on a public website; and (3) the Lord Chancellor is constrained in his discretion to review the recommendations of the judicial appointment commissions and is required to publicly state his reasons for rejecting any of the commissions' recommendations.

5. Increasing Bench Diversity

A fifth principal motivation for the CRA reforms was interest in diversifying the bench by sex, race, ethnicity, class, and professional background.²⁰⁰ By contrast with the previous appointment system's reliance on private consultations, the CRA charged both appointment commissions with making selections "solely on merit" and free of political patronage.²⁰¹ With their emphasis on merit rather than on whom a candidate knew, the appointment commissions were thought to offer potential for achieving greater diversity as well as competence, where "merit"

197. *Id.*

198. Section 2 of the CRA is entitled, "Lord Chancellor to be qualified by experience," and it defines "qualifying experience" as service as a cabinet officer, MP, peer, practitioner, law professor, or "any other relevant qualifying experience." Constitutional Reform Act, 2005, c. 4, § 2 (U.K.).

200. JUDICIAL APPOINTMENTS REPORT I, *supra* note 128, at 36–37. This ongoing need for diversity is amply illustrated by the current composition of the U.K. Supreme Court, where 11 of 12 justices are male, all are white, and 11 of 12 are Oxbridge educated (i.e., educated either at Oxford or Cambridge, or both). *See, e.g.*, the Supreme Court, "Biographies of the Justices," available at <http://www.supremecourt.gov.uk/about/biographies.html>

201. *See* Constitutional Reform Act, 2005, c. 4, § 63(2) (U.K.).

was no longer to be understood in narrowly constrained, tradition-bound ways.²⁰²

F. Possible Hypotheses for the Historic and Ongoing Absence of Parliament from the Judicial Appointment Process

Why, given the history and tradition of parliamentary supremacy in the U.K., has there not been a role for Parliament in judicial appointments, historically or currently? What follows is a series of non-exclusive hypotheses. Because the British government continues to debate the possibility of a parliamentary role,²⁰⁵ none of these hypotheses should be understood as a permanent bar.

1. The Nature of the Parliamentary System

The single biggest reason why Parliament has not participated in the judicial appointment process is because the executive arises out of the legislature, with the result that the legislature is not a check on the executive. The Prime Minister and his or her top Cabinet officers, including the Lord Chancellor, have historically been MPs or peers (though the CRA no longer requires that of the Lord Chancellor²⁰⁶), and so the two entities are more accurately understood not as checks upon one another, as in the U.S. presidential system, but as working together with overlapping goals and interests.²⁰⁷

2. Revulsion at the Senate Process

Beyond the nature of the parliamentary system, the single biggest factor militating against parliamentary involvement in the judicial appointment process is revulsion at the spectacle-like nature of U.S. Supreme Court confirmation hearings, specifically

²⁰² See, e.g., Malleon, *supra* note 141, at 51–53.

²⁰⁵ See *infra* Part II.G.

²⁰⁶ Section 2 of the CRA requires that the Lord Chancellor be highly qualified but does not limit that to service as an MP or peer. See *supra* note 155.

²⁰⁷ See, e.g., Graham K. Wilson, *Congress in Comparative Perspective*, 89 B.U. L. REV. 827, 830 (2009) (“The crucial difference between Congress and all true parliamentary systems is that legislatures in parliamentary systems also have the constitutional responsibility for creating and sustaining the government.”).

those of Robert Bork and Clarence Thomas.²⁰⁸ The Bork and Thomas hearings “left a shiver of horror running through the system that we should have anything like that. Nothing else is really known about the confirmation hearings, except what people read about the Bork hearings and the Thomas hearings.”²¹⁰ In brief, Senate confirmation hearings are regarded as a travesty, embarrassing all who are involved.²¹¹ One witness at a CRA hearing in the Commons predicted that the undignified nature of parliamentary scrutiny or confirmation proceedings could affect the regard with which the MPs themselves were held.²¹²

Whether revulsion at the Senate confirmation process actually motivated rejection of the possibility of parliamentary involvement or is simply rhetoric explaining a long-standing opposition to parliamentary involvement in judicial appointments is not known. What is most likely is that distaste at the U.S. process confirmed the “rightness” of Parliament’s historic nonparticipation.²¹³

3. Concern for the Politicization of the Judiciary

Another factor cited by the Government and Parliament in refusing to recognize a judicial appointment role for Parliament is belief that there cannot be a parliamentary scrutiny or confirmation

208. See, e.g., JUDICIAL APPOINTMENTS REPORT I, *supra* note __ at para. 462 (Lord Bingham of Cornhill testifying on Dec. 11, 2003 before the House of Commons Constitutional Affairs Committee: “I do not see a role for Parliament in appointing members of the supreme court. There has been a good deal of discussion over the years about the very familiar process of nomination which the United States have adopted and I myself have never heard anybody in this country who was other than completely hostile to it.”).

210. *Id.*; see also Malleon, *supra* note 119, at 309–13 (“Since the highly politicized U.S. Senate confirmation hearings of candidates Robert Bork and Clarence Thomas, the use of confirmations has become almost as distasteful in the UK as judicial elections.”).

²¹¹ The public drama of the Prime Minister’s Question Hour notwithstanding, there is substantial consensus that judges, and prospective judges, should not be subjected to public questioning of this sort. See Judicial Appointments Report II; Malleon, *supra* note 119.

212. JUDICIAL APPOINTMENTS REPORT II, *supra* note 156, at 10 (testimony of Matthias Kelly, Chair, Law Society, on November 18, 2003).

213. The Author thanks Julie Suk for bringing this point to her attention at the ASCL Comparative Law Works-in-Progress Workshop in May 2010. As she suggested, one reason for the ongoing exclusion of Parliament from the judicial appointment system might be path dependency, i.e., Parliament has not been involved historically and will continue not to be involved.

process without it being infected by politics.²¹⁴ In post-CRA debate on the possibility of recognizing a judicial appointment role for Parliament,²¹⁵ the Government questioned whether parliamentary involvement might cause “questioning during the hearing [to] stray away from the candidate’s experience into matters of a more political nature.”²¹⁶ The Government also expressed concern that parliamentary involvement in judicial appointments could lead to decisions “based on factors other than the candidate’s ability to do the job,”²¹⁷ including vote “swaps” for nonjudiciary-related matters.

4. Concern for the “Partisanization” of the Judiciary

Intimately related to concern for the undue politicization of the judicial appointment process is concern for excessive partisanship infecting the appointment process and even the judicial process itself (i.e., concern for the appointment process affecting judicial behavior).²¹⁸ Concern was expressed for the possibility of parliamentary voting on judicial candidates along pure party lines, as occurs increasingly frequently in U.S. judicial appointments.²¹⁹ According to Malleeson, this concern contributed significantly to opposition to recognizing a parliamentary appointment role.²²⁰

Yet another concern is that the judiciary would begin to reflect the partisan nature of the appointments process through its announcement of more decisions along party lines. Where the British judiciary has long been prized for its cross-bench behavior, i.e., for its lack of partisanship, this would represent a change. Skepticism should, of course, accompany any claim of nonideological behavior by judges. That said, overtly partisan appointment of and voting by judges would represent a perceptual, if not actual, change in British judicial experience.

214. CONSTITUTIONAL REFORM REPORT I, *supra* note 134; JUDICIAL APPOINTMENTS REPORT I, *supra* note 128.

215. *See infra* Part II.G.

216. LORD CHANCELLOR & SECRETARY OF STATE FOR JUSTICE, THE GOVERNANCE OF BRITAIN: JUDICIAL APPOINTMENTS, 2007, Cm. 6252, at 37 (U.K.) [hereinafter THE GOVERNANCE OF BRITAIN], *available at* <http://www.justice.gov.uk/consultations/docs/cp2507.pdf> (“To adopt such an approach in this country could lead to the strong perception that judicial appointments were being politicised, and such a perception could have an impact on confidence in the independence of the judiciary.”).

217. *Id.* at 38.

218. CONSTITUTIONAL REFORM REPORT I, *supra* note 134; JUDICIAL APPOINTMENTS REPORT I, *supra* note 128.

219. THE GOVERNANCE OF BRITAIN, *supra* note 172, at 38.

220. MALLEESON, *supra* note 116.

5. Concern for Undermining Judicial Independence

Another concern arising from fear of the undue politicization and/or “partisanization” of the judicial appointment process is worry about negative impacts on judicial independence, including concern that judicial candidates might be pressed in hearings to state their positions on actual cases or controversies likely to come before them as judges.²²¹ Indeed, in one of its CRA consultation papers, the Government underscored its intention to promote judicial independence by excluding Parliament from the appointments process: “One of the main intentions of the reform is to emphasise and enhance the independence of the Judiciary from both the executive and Parliament. Giving Parliament the right to decide or have a direct influence in who should be the members of the Court would cut right across that objective.”²²²

6. As a Result of the Doctrine of Parliamentary Sovereignty, There is No Perceived Need for Parliament to Shape the Courts Through Participation in Judicial Appointments

Because of the doctrine of parliamentary supremacy, there was no perceived need for Parliament to shape the courts through participation in judicial appointments. As final arbiter of the law, Parliament could override any decision of the Appellate Committee of the House of Lords. Therefore, there was no felt need for Parliament to be involved in judicial selection. Instead, Parliament could “wait and see” how the Appellate Committee and other courts decided cases and then “correct” or amend the relevant case law as necessary. As scholar Danny Nicol has noted, “Judicial impotence vis a vis Parliament gave MPs little incentive to take much interest in court decisions. For MPs, the constitution was what happened. The courts operated only on the fringes of the political arena; the role of judicial review was ‘sporadic and peripheral.’”²²³

7. Some MPs Have Exercised Behind-the-Scenes Influence, Both Historically and Currently

221. CONSTITUTIONAL REFORM REPORT I, *supra* note 134; JUDICIAL APPOINTMENTS REPORT I, *supra* note 128.

222. DEP’T OF CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES (2003).

223. NICOL, *supra* note 146, at 3–5.

As the brief history of British judicial appointment practices suggests,²²⁴ individual MPs have influenced judicial selection throughout history, even though Parliament had no formal role in the appointment process. Because of this behind-the-scenes influence, there may well have been less perceived need for Parliament to weigh in on judicial appointments as a formal matter.

8. Lord Chancellor's Judicial Appointments were Considered Top Quality. Therefore, There was No Perceived Need to Reform the Process.

Yet another explanation for the historic lack of parliamentary involvement in judicial appointments is that the Lord Chancellor-controlled system was thought to produce a top-flight judiciary—the rival of the world's judicial systems. As a result, the appointment process went largely unquestioned. The perceived and actual quality of the British judiciary served as a damper, both historically and recently, on any sense of need for reform of the judicial appointment process.²²⁷ When the Government introduced its judicial appointment reform proposals in 2003, it took great pain to underscore Britain's high quality judiciary and make clear that reform was prompted by perceptual, and not actual, concerns.²²⁸

9. Parliamentary Scrutiny May Lead to Safe, Unimaginative Judicial Candidates

Today's reluctance to involve Parliament in the judicial appointment process is informed for some by awareness that the need to obtain a parliamentary majority for confirmation might result in the selection of safe or "unimaginative" candidates. As Richard Drabble, Chair of the Bar Council's Working Party on the Supreme Court, testified at the House of Commons Constitutional Affairs Committee hearing on the CRA: "If you go for confirmation hearings or some other check that is Parliament, I

²²⁴ See *supra* Part II.B.

²²⁷ Indeed, it continues to serve as a damper on meaningful judicial diversification efforts. See, e.g., MALLESON, *supra* note 116.

²²⁸ See, e.g., "Constitutional Reform: A New Way of Appointing Judges" (2003).

think the real danger is unimaginative appointments”²²⁹ Drabble explained, “You have the minister facing a need to carry a parliamentary majority behind a particular appointment . . . and [] you get a minister who will not make the imaginative appointment for fear of Parliament rebuffing him.”²³⁰

10. It May Serve Parliament’s Interests Not to be Involved

It may, of course, serve Parliament’s interests not to be involved in the judicial appointment process because Parliament can then more freely critique judges and judicial opinions from the outside,²³² including judicial determinations of the compatibility of parliamentary acts with the European Convention on Human Rights.²³³ Thus, it may be politically expedient for Parliament to maintain its distance from the judicial appointment process.

11. Parliament’s Weakening Stature May Dictate its Noninvolvement in Judicial Appointments

Finally and pragmatically, Parliament might not have been recognized with a judicial appointment role because of its weakening stature.²³⁴ As courts continue to gain power, e.g., to review legislation for compliance with EU conventions, Parliament is increasingly marginalized.²³⁵ Because of Parliament’s decreasing stature, it is unlikely to be recognized with a judicial appointment role.

²²⁹ See FN 221.

²³⁰ See, e.g., JUDICIAL APPOINTMENTS REPORT II, *supra* note 156, at 9 (testimony of Mr. Drabble, Bar Council Chair, on November 18, 2003).

²³² The Author uses the term “critique” rather than “criticize” in recognition that Parliament is not meant to criticize judges or judicial opinions. See, e.g., SELECT COMMITTEE ON THE CONSTITUTION, RELATIONS BETWEEN THE EXECUTIVE, THE JUDICIARY AND PARLIAMENT, 2006-7, H.L. 151 (U.K.).

²³³ As mandated by the Human Rights Act 1998. Admittedly, hypothesizing as to what Parliament “may believe” is a fiction, where Parliament is an institution composed of more than 600 members.

²³⁴ See, e.g., ALEXANDER HORNE, HOUSE OF COMMONS, THE CHANGING CONSTITUTION: A CASE FOR JUDICIAL CONFIRMATION HEARINGS? (2009), available at <http://www.spg.org.uk/spg-paper-1.pdf>.

²³⁵ See, e.g., 687 PARL. DEB., H.L. (5th ser.) (2006) 3–7 (U.K.) (debating relative weight of parliamentary sovereignty versus judicial rule of law determinations in the post-HRA era).

G. Post-CRA Evolution of Attitudes Toward Parliamentary Involvement in Judicial Appointments

Despite these hypotheses for Parliament's historic and continuing noninvolvement, there has been some shift in attitudes toward parliamentary involvement in judicial appointments in the post-CRA period.

First, the Brown administration proposed expanding Parliament's role in judicial appointments and contracting that of the executive, even despite Parliament's weakening stature.²³⁶ Shortly after entering into office in 2007, the Brown administration announced its intention "to surrender or limit powers which it considers should not, in a modern democracy, be exercised exclusively by the executive," including judicial appointments, and noted the possibility of a parliamentary role instead.²³⁷ More specifically, the Brown administration explored the possibility of post-appointment parliamentary hearings with new judges and justices in its 2007 "Governance of Britain" consultation paper.²³⁸

Much of the interest in contemplating post-appointment hearings for judges comes from Britain's very positive experience with post-appointment parliamentary scrutiny hearings for Bank of England Monetary Policy Committee members, conducted by the Treasury Select Committee since 1997.²³⁹ These hearings have been thought highly successful in a likewise sensitive context.

Second, the Brown administration and Parliament began experimenting with pre-appointment parliamentary scrutiny hearings for non-judicial public appointments. The Government proposed Parliamentary scrutiny of certain executive functions in the interest of "achiev[ing] a more appropriate balance, better

²³⁶ See FN 206.

²³⁷ THE GOVERNANCE OF BRITAIN, *supra* note 172, at 27–28.

²³⁸ MINISTRY OF JUSTICE, THE GOVERNANCE OF BRITAIN—JUDICIAL APPOINTMENTS, 2007, Cm. 7210, at 43 (U.K.) [hereinafter MINISTRY OF JUSTICE, JUDICIAL APPOINTMENTS]. The paper also raised the possibility of nonbinding pre-appointment hearings on judicial nominees. *Id.* at 41. The Government subsequently reported that most respondents opposed a pre-appointment Parliamentary role regarding judges. MINISTRY OF JUSTICE, THE GOVERNANCE OF BRITAIN—CONSTITUTIONAL RENEWAL, 2008, Cm. 7342, at 34 (U.K.) [hereinafter MINISTRY OF JUSTICE, CONSTITUTIONAL RENEWAL]. The Government ultimately rejected the possibility of pre-appointment parliamentary hearings, recognizing that "pre-appointment hearings could be a way of giving Parliament a real and meaningful say in appointments," but concluding, "[T]he Government has serious reservations about adopting this approach." MINISTRY OF JUSTICE, JUDICIAL APPOINTMENTS, *supra*, at 40.

²³⁹ See, e.g., House of Commons Treasury Committee website, available at <http://www.parliament.uk/business/committees/>

accountability, and greater public confidence.”²⁴⁰ The pre-appointment scrutiny hearings are intended to focus on the candidate’s professional qualifications and personal integrity, leading to a committee recommendation for or against appointment at the conclusion of the hearing.²⁴¹ The pre-appointment scrutiny hearings held to date²⁴² have been thought to have gone generally well.²⁴³

That pre-appointment scrutiny hearings for nonjudicial posts could be agreed upon by the executive and legislature suggests that a proposal for pre-appointment review of judicial candidates might receive more favorable consideration today than it did in the lead-up to the CRA. Still, current public attitudes, at least as reflected in responses to the Government’s consultation papers, do not support such a change.

III. COMPARATIVE ANALYSIS OF THE INCLUSION AND EXCLUSION OF THE LEGISLATURE IN U.S. AND U.K. JUDICIAL APPOINTMENT PROCESSES

This Part draws on Mark Tushnet’s comparative constitutional law methodology in seeking to understand *why* the judicial appointment processes adopted at the time of establishment of the U.S. and U.K. Supreme Courts were structured so differently with respect to legislative involvement and what that might reveal about the U.S. and U.K.’s national identities and/or country self-understandings. More specifically, the Article follows Tushnet’s lead in seeking to understand the functional, contextual, and

240. MINISTRY OF JUSTICE, CONSTITUTIONAL RENEWAL, *supra* note 189, at 28.

²⁴¹ See FN 208.

242. See, e.g., INNOVATION, UNIVERSITIES, SCIENCE AND SKILLS COMMITTEE, FIFTH REPORT, PRE-APPOINTMENT HEARING WITH THE CHAIR-ELECT OF THE ECONOMIC AND SOCIAL RESEARCH COUNCIL, DR. ALAN GILLESPIE CBE, 2008-9, H.C. 505 (U.K.).

243. See *Children’s Chief No Patsy—Balls*, BBC NEWS (Oct. 19, 2009), <http://news.bbc.co.uk/1/hi/8313572.stm>; see also Peter Waller & Mark Chalmers, *An Evaluation of Pre-Appointment Scrutiny Hearings*, in HOUSE OF COMMONS LIASON COMMITTEE, THE WORK OF COMMITTEES IN SESSION 2008-9, H.C. 426, at 68 (U.K.).

245. See *id.* Tushnet also articulates a universalist element of comparative constitutional law analysis, mainly relevant to discussions of human rights norms and not to the question of legislative involvement in judicial appointments. *Id.* at 68–72.

expressive elements of the U.S. and U.K. choices with respect to legislative involvement in judicial appointments.²⁴⁵

A. Functionalist Analysis

From a functionalist perspective, it is striking the extent to which the ideas and concerns animating inclusion of the Senate in the U.S. judicial appointment process mirror those informing the CRA overhaul of the U.K. judicial appointment systems generally, including concern for: (1) promoting separation of powers; (2) safeguarding judicial independence; (3) checking executive power; (4) promoting transparency, legitimacy, and accountability in judicial appointments; (5) promoting diversity of judicial appointments; and (6) ensuring high quality judicial appointments. These are all functional in nature, i.e., concerns for the improved functioning of the judicial appointment system.

There was only one consideration informing inclusion of the Senate that was not also a motivation for the CRA judicial appointments overhaul.²⁵⁴ That was concern for promoting the stability of the Article III appointment system. Promoting stability would, naturally, be a greater concern in a fledgling democracy like the U.S. than in a well-established one like the U.K.

Although reasons for the inclusion of the Senate in the U.S. judicial appointment system substantially overlap with those informing CRA overhaul of the U.K. judicial appointment system generally, the ideas and concerns animating inclusion vs. exclusion of the legislature in U.S. and U.K. judicial appointment processes diverge dramatically, also for functionalist reasons. Most importantly, the question of legislative involvement turns on functional, or structural, differences between presidential and parliamentary forms of government. In the U.S. presidential system, the legislature and executive are designed as checks on one another. By contrast, in the U.K. parliamentary system, the executive arises out of the legislature with the result that they do not serve as checks on one another. Therefore, there is little applicability of a dual-branch (executive-legislative) appointment system in the U.K.

Another functional reason for the disparate inclusion and exclusion of the legislature in U.S. and U.K. judicial appointments relates to the former's history of judicial supremacy and the latter's history of parliamentary supremacy. As a functional matter, the dual-branch appointment of judges, with its mutuality of checks, promotes confidence in (and the legitimacy of) U.S. courts' power of judicial review.²⁵⁷ By contrast, parliamentary supremacy means that MPs are not particularly interested in what the courts do or who the judges are. And, as noted above, it may serve individual MPs' interests not to be involved in judicial appointments because they can more freely criticize judicial decisions.

Yet another reason for the differential involvement of the legislature in U.S. and U.K. judicial appointments relates to which branch of government was thought best able to evaluate prospective judges. In the U.S., the Senate was intended as a senior, elite body, able to identify good judicial candidates, while the Parliament, particularly the House of Commons was, and is,

²⁵⁴ Even federalism was a shared concern, where "federalism" concerns informed inclusion of JAC representatives from England and Wales, Scotland, and Northern Ireland in the U.K. Supreme Court appointment commission. CRA 2005 sched. 12, "Judicial Appointment Commissions."

²⁵⁷ See, e.g., Posner and Landes, Resnik.

not. Rather, the House of Commons is increasingly perceived as an ineffective and scandal-laden body (given MP expense- and other recent scandals), prompting Government and judicial leaders to keep their distance so as to avoid an associated taint.²⁵⁸

In the end, functionalist analysis sheds some light on the different choices made with respect to legislative involvement in judicial appointments, but it also suggests a need for something more—understanding of the different contexts in which these choices were made – to which the Article, and Tushnet’s model, now turn.

B. Contextualist Analysis

In looking to the legal, political, and other cultural contexts in which the U.S. and U.K. judicial appointment systems were developed, the U.S.–U.K. comparison can be understood as both a most-similar and most-different case study. The U.S. and U.K. are similar in that they have a shared history, a shared Anglo-American legal tradition, and are both common law countries with strong commitments to individual liberty and the rule of law.²⁵⁹ Both court systems require concrete (i.e., actual cases or controversies) rather than abstract (i.e., pre-enactment) questions for review.²⁶⁰ Both systems feature life-tenured judges, removable (short of mandatory retirement in the U.K.) only through action by the legislature.

In addition to the 220 years separating the establishment of the U.S. and U.K. Supreme Courts and attendant judicial appointment systems, there are other differences of import to the question of legislative involvement in judicial appointments. First the U.S. has a written constitution, while the U.K. has a largely unwritten one (though composed in part of written conventions). Second is the contrast between the U.S. presidential and U.K. parliamentary systems, which cannot be over-stated, with the executive arising

²⁵⁸ It is for this reason that parliamentary examination of judicial candidates, when contemplated, is more likely anticipated in the House of Lords Constitutional Committee.

²⁵⁹ *But see* PAUL CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA 9 (1991) (asserting implausibility of comparing U.S. and U.K., given different histories, governmental structures, political cultures, and traditions).

²⁶⁰ *See, e.g.*, Tushnet, *supra* note 195, at 254–55.

²⁶² It is principally for this reason that Graham Wilson terms the Congress–Parliament comparison a “most different” comparison, rather than a “most similar” comparison. Wilson, *supra* note 164, at 831–32.

out of the legislature in the latter.²⁶² Third, and in a closely related fashion, the U.S. governance system is predicated on *checks* and *balances*, while the British governance system is premised on a *balance* of powers.²⁶³ Fourth, the Senate remains a powerful institution, while Parliament has weakened in stature. Fifth, as noted above, the U.S.' highest court has been a free-standing institution since its creation,²⁶⁴ while the U.K.'s highest court resided in the upper house of Parliament until 2009.

Additionally, the U.S. has had strong-form judicial review since the time of the Supreme Court's decision in *Marbury v. Madison* (1803), while the U.K. has had relatively weak-form review until the Human Rights Act's recent authorization of judicial review of parliamentary acts for compatibility with the European Convention on Human Rights.²⁶⁷ The Supreme Court is the final arbiter of U.S. law,²⁶⁸ while Parliament still fulfills that role in Britain insofar as the HRA assigns Parliament the role of addressing any inconsistencies that courts flag between parliamentary acts and the European Convention. Lastly, the U.S. does not mandate judicial retirement, while the U.K. has done so since 1959.²⁶⁹

With these similarities and differences in mind, the Article offers two over-arching contextual reasons for the marked overlap in ideas and concerns animating inclusion of the Senate in the U.S. judicial appointment system and the CRA overhaul of the U.K. judicial appointment system generally: (1) the ideas and concerns motivating the U.S. and U.K. judicial appointment reforms were inherent to the larger process of reforming constitutional democracies; and (2) both the U.S. and U.K. were undergoing

²⁶³ While Britain's "separated" powers were historically enumerated as the "King, Lords, and Commons," with the primary distinction between the Crown and Parliament, *see, e.g.*, Bailyn, *Ideological Origins* at 201-02, the United States' separated powers were, and continue to be, the executive, legislative, and judiciary.

²⁶⁴ The Judiciary Act of 1789 provided the infrastructure for the U.S. judicial system. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

²⁶⁷ *See supra* notes 161 and 162.

²⁶⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

²⁶⁹ Judicial Pensions Act 1959 (introducing age 75 mandatory retirement). The mandatory retirement age was subsequently reduced to 70 by the Judicial Pensions and Retirement Act 1993. *See* Mary L. Clark, "Judicial Retirement and Return to Practice: A Comparison of Approaches in the U.S. and England and Wales," *Catholic L. Rev.* (forthcoming 2011).

²⁷¹ *See generally* Bailyn, *supra* note 5 (citing Paine, Locke, etc.).

transitions from predominantly political to predominantly legal understandings of their constitutions at the time of establishment of their Supreme Courts and adoption of their respective judicial appointment systems. These are addressed in turn below.

First, the U.S. and U.K. were undergoing significant constitutional change at the time of their judicial appointment reforms—in 1787 and 2005—and many of the ideas and concerns motivating the judicial appointment reforms were reflective of those informing constitutional reform more generally. These included concern for: promoting separation of powers, checking executive power, promoting transparency, legitimacy, and accountability in government operations, and safeguarding judicial independence.²⁷¹ Naturally, the change undertaken in the U.S., with the replacement of the Articles of Confederation by the Constitution, was far more comprehensive in nature than enactment of the CRA, which principally relates to the composition and structure of the higher courts.

Second, both the U.S. and U.K. underwent transitions from largely political understandings of their constitutions (characterized by strong legislative control) to predominantly legal understandings (characterized by expanded judicial review) at the time of establishment of their respective Supreme Courts and attendant judicial appointment systems.²⁷² In the U.S., the early American state constitutions and Articles of Confederation were more political than legal in orientation, characterized by substantial legislative and popular sovereignty. The U.S. Constitution reflected a shift to a more legal than political understanding, with its checks on legislative action and embrace of higher law principles.

The CRA likewise reflected a shift from a predominantly political understanding of the British constitution to a more legal one, with a stronger judiciary and increased judicial independence. According to Danny Nicol, writing with particular regard to the significance of the HRA, the U.K.'s "accession to the [European] Community represented the decisive turning point" in this shift from political to legal understanding of the constitution. Accession

272. This is not to suggest that judicial review is not political. As convincingly argued in *The Least Dangerous Branch*, the exercise of judicial review is an exercise of political power. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986); see also BARRY FRIEDMAN, *WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

274. NICOL, *supra* note 146, at 7.

“constituted the strongest challenge to the political constitution because fundamental doctrines developed by the European Court of Justice (ECJ) conflicted directly with the legislative supremacy of Parliament.”²⁷⁴ At bottom, Nicol argued, “the decision to join the Community was a decision to switch from a politics-based model of governance to one firmly based on law.”²⁷⁵

With these contextual significances in mind, discussion now turns to the expressive importance of the inclusion vs. exclusion of the legislature in U.S. and U.K. judicial appointments.

C. Expressivist Analysis

What do these different approaches to the role of the legislature in judicial appointments reveal about the U.S. and U.K.’s national identities and/or self-understandings? Among other things, the inclusion vs. exclusion of the legislature reflects the two governance systems’ different resolutions of the tension between obeisance to popular sovereignty and higher, or “fundamental,” law principles.²⁷⁶ This is a tension most famously articulated by the late Harvard Law professor Robert McCloskey.²⁷⁷ The U.S., with its eventual embrace of judicial supremacy, reflects greater attention to transcendent legal norms and principles, while the British governance system, with its historic embrace of parliamentary supremacy, has more traditionally reflected ideas of popular sovereignty.²⁷⁸

The U.S. and U.K. have not been static in their resolution of this tension, however. Rather, the early American republic moved from a primary focus on popular sovereignty and the centrality of the legislature to a dynamic relationship between popular

²⁷⁵ *Id.*

²⁷⁶ It also, of course, reflects the revulsion with which the U.S. judicial appointment process is viewed and the desire to safeguard U.K. judges and judicial independence from this American type of politicization and embarrassment.

²⁷⁷ See generally ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (4th ed. 2005). I thank my colleague Fernanda Nicola for bringing this idea to my attention. Cf. Langbein, *et al.*, *History of the Common Law* at 496-500 (noting tension between forces of popular sovereignty and predictable, “learned,” judge-made law in the U.S.).

²⁷⁸ The Author acknowledges that, in applying this concept to the British governance system, the Author takes McCloskey out of context, where his work was grounded in the American experience. The Author also acknowledges the potential dangers of insufficiently distinguishing parliamentary and popular sovereignty, where the 1688 revolution ultimately came to be known for introducing parliamentary sovereignty, though Opposition Whigs argued that it established popular sovereignty. See *supra* note 114.

sovereignty and higher law. This movement largely occurred in the 27-year period between the Revolution and *Marbury* (1776 to 1803),²⁷⁹ while Britain travelled a similar path over a three-hundred year period (from the 1701 Act establishing parliamentary sovereignty to the CRA 2005 building a strengthened judiciary).²⁸⁰

This tension between popular sovereignty and higher law *principles* (paralleling the political vs. legal constitutionalism noted in Part B, above) risks overstatement, of course, where forces of popular sovereignty and higher law should not be conceived of in binary opposition, i.e., as either/or propositions.²⁸¹

²⁷⁹ While the origins of judicial review are actively debated in the academic literature, William Michael Treanor compellingly charts the development and use of judicial review at the state, lower federal court, and Supreme Court levels between 1776 and 1803. William Michael Treanor, "Judicial Review Before *Marbury*," 58 *Stan. L. Rev.* 455 (2005).

²⁸⁰ Fitzgerald, *supra* note 104, at 267. Fitzgerald remarked:

Of all the various reforms put forth by this government, including the HRA, devolution, and reform of the House of Lords, the Constitutional Reform Bill represents the single most fundamental and radical change in the British constitutional settlement in over three hundred years. While not its primary object, the bill will necessarily prompt a wider debate on the question of whether Parliament or the judiciary should decide whether any given law passes constitutional muster.

Id. Fitzgerald continued:

[T]he result might well be a judiciary that is much more prone to engage in the broader style of judicial review that parliamentary sovereignty effectively curtailed. All that is needed is for a judge to decide, as U.S. Chief Justice Marshall did when presented with an appropriate case, that it is ultimately the rule of law that is the paramount principle underlying the restructured British constitutional settlement, something which the judiciary in Great Britain appears to be increasingly willing to contemplate.

Id. at 267–68; *see also* Jeffrey Jowell & Dawn Oliver, ed., *The Changing Constitution* (6th ed. 2007) at xiii, xv ("Although the British constitution remains in some respects a 'political constitution' it is becoming increasingly formalized ... Overall in the U.K., the move from a primarily political constitution to a law-based one is likely to continue, with important implications in the reduced scope of party politics and an increased role for the courts."); NICOL, *supra* note 146, at 1 ("Law undeniably occupies a more central role in British politics than it did thirty years ago. *Indeed, we have witnessed nothing short of the transformation of the British constitution from a constitution firmly based on politics to one increasingly based on law.*" (emphasis added)); *id.* ("[A]ccession to the Community has proven the prime catalyst in the transformation of our public law, not least because it presented a wholesale challenge to the legislative supremacy of Parliament.").

²⁸¹ Stephen Gardbaum, for example, in 2001 hypothesized that the U.K.'s Human Rights Act might represent an integration of parliamentary/popular supremacy, on the one hand, and judicial supremacy (or higher law tradition), on the other. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *AM. J. COMP. L.* 707 (2001). As a follow-up to his earlier

Indeed, McCloskey himself highlighted the integration of the two forces in the operation of the U.S. Supreme Court.²⁸² Moreover, the “people” as sovereign can support recognition of higher, or fundamental, law, as Daniel Hulsebosch argues occurred with the ratification of the U.S. Constitution: “Ratification, therefore, not only resulted in the passage of the Constitution. It also catalyzed a reconception of the nature of constitutions as enforceable against legislatures because decreed by the citizenry in their constitutive role as ‘the people.’”²⁸³ Hulsebosch continues: “Legal scholars have rediscovered popular sovereignty as a polestar for interpreting the founding era. They recognize that ... the process of writing [the state and federal constitutions] contributed to a new sense that constitutions were the source of fundamental law,” thereby integrating popular sovereignty and fundamental law.²⁸⁴ Indeed, Hulsebosch, like Friedman, Hamburger, and Malcolm, suggests that American colonists before the Revolution had already conceived of a higher law tradition to which legislative acts were answerable.²⁸⁵ It is with this in mind that Hulsebosch notes

article, Gardbaum in 2010 found that the U.K.’s HRA implementation had achieved a relatively desirable balance between parliamentary and judicial supremacy. Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT’L J. OF CONST. L. 167 (2010).

²⁸² See, e.g., McCloskey at 247 (observing, “Judicial review in its peculiar American form exists because America set up popular sovereignty and fundamental law as twin ideals and left the logical conflict between them unresolved.”).

²⁸³ HULSEBOSCH, *supra* note 24, at 237–38; accord JED SHUGERMAN, *THE PEOPLE’S COURTS: THE RISE OF JUDICIAL ELECTIONS AND JUDICIAL POWER IN AMERICA* (forthcoming 2011) (popular sovereignty and higher law tradition are not inherent opposites).

²⁸⁴ Hulsebosch at 237.

²⁸⁵ Friedman, *The Will of the People* at __; HAMBURGER, *supra* note 102, at 17 (“Judges in America did not have to create for themselves a power over constitutional law, for already in England judges had a duty to decide in accord with the law of the land, including the constitution. . . . Judges therefore assumed they had no choice but to decide in accord with the law of the land.”); Malcolm, *supra* note 101, at 16 (“Coke’s interpretation [in *Bonham’s Case*] took hold and established an approach that the American colonists enthusiastically endorsed. Here was judicial review as it would be developed in the U.S.”), Malcolm at 23 (“The colonists were steeped in customary English views on the use of judicial review and the need to hold both executive and legislative actions accountable to higher law.”); see also BILDER, *supra* note 33 at 4, 10-11; cf. LaCroix, *supra* note 202 (describing the Privy Council’s review of colonial judgments).

Hamburger asserts that the American colonists employed a “creative” understanding of *Bonham’s Case* to argue for the voidance of parliamentary acts on grounds of violation of constitutional norms or principles: “Even with the

colonists' rage against British interference with colonial judges, juries, and judgments.²⁸⁶

Hamilton built on this early American understanding of higher law principles when he insisted that legislators were merely agents of the people and that the people, having entered into the Constitution (as higher law), could not have their will, or sovereignty, undermined by the legislature. Hamilton further cautioned that just as the legislature was not supreme to the people, neither was the judiciary. Rather, the judiciary, like the legislature, was charged under the Constitution with abiding by the people's will in recognizing or respecting certain transcendent values and legal principles. As such, forces of popular sovereignty and higher law were integrated to a significant degree in the early American republic.²⁸⁷

More specifically for this Article's purposes, the U.S. dual-branch appointment of judges incorporated the dual forces of popular sovereignty and higher law insofar as there was

benefit of *Bonham's Case*, it required considerable dexterity to argue that judges could hold acts of Parliament unconstitutional ... In 1761, James Otis argued in the *Writs of Assistance Case* against the statutory authority for the writs, and according to the rough notes taken in court by the young John Adams, Otis said that "[a]n Act [of Parliament] against the Constitution is void." *Id.* at 275. Subsequently, Hamburger observed, "[T]he confidence of American [colonists] that judges could hold acts of Parliament void did not last very long. The turning point was the publication of Blackstone's Commentaries." *Id.* at 278. As a result, colonial lawyers largely gave up on *Bonham's Case*. *Id.*; accord Treanor at 468-69.

286. HULSEBOSCH, *supra* note 24, at 238 ("The American provincials had also argued—and, more important, acted—as though their legal systems could play a large role in curtailing legislation that they viewed as inconsistent with their constitution. That is why they responded so strongly to the imperial agents' attempts to displace colonial judges and juries."); see also WOOD, *supra* note 17, at 456 ("The growing mistrust of the legislative assemblies and the new ideas rising out of the conception of the sovereignty of the people were weakening legislative enactment as the basis for law. . . . Thus all the acts of the legislature, it could now be argued, were still 'liable to examination and scrutiny by the people, that is, by the Supreme Judiciary, their servants for this purpose; and those that militate with the fundamental laws, or impugn the principles of the constitution, are to be judicially set aside as void, and of no effect.'") (quoting PROVIDENCE GAZETTE, May 12, 1787)).

²⁸⁷ See Hulsebosch at 239 ("Recent scholarship also assumes that law and politics were discrete categories before the 1780s and then Federalists took constitutions out of the political sphere and tried to insulate them within the legal sphere. This rigid distinction between law and politics was, however, not prominent in early modern legal culture.").

²⁹⁰ See, e.g., McCloskey at 247, observing:

involvement by the two overtly political branches and capture by neither, which in turn facilitated judicial independence. Because of their appointment process, according to McCloskey, U.S. judges were sensitive to popular sentiment, never moving too far afield from mainstream public views in their pursuit of higher law principles.²⁹⁰

As with the U.S., it is important to recognize the dynamic relationship between popular sovereignty and higher law principles characterizing the British judicial system. A.V. Dicey, in his highly influential *Introduction to the Study of the Law of the Constitution* (1885), declared, “English constitutionalism combined two guiding principles: (a) the sovereignty of parliament; (b) the rule of law.”²⁹¹ In a related fashion, J.A.G. Griffith, writing in *The Politics of the Judiciary*, asserted that British judges abided these two forces insofar as they were the “keepers of constitutional principles” while also reflecting a particular (conservative) understanding of the public interest.²⁹² Thus, the U.K. governance experience, like the U.S., has been, and continues to be, characterized by an amalgam of parliamentary and popular sovereignty, on the one hand, and higher law principles, on the other.

To what extent are the dual forces of popular sovereignty and higher law reflected in the U.K. judicial appointment process today? Here, the answer departs from that in the U.S. in a potentially surprising way. The absence of parliamentary involvement, taken together with recent strictures on the role of the executive in judicial appointments (*i.e.*, CRA limitations on the Lord Chancellor’s role) and introduction of the judiciary’s new role in vetting judicial candidates, suggests a predominance of higher law principles over popular sovereignty.

Thus, while the U.S. has resolved the tension between popular sovereignty and higher law principles by incorporating both, *i.e.*, by involving the overtly political branches in the judicial appointment process and embracing judicial supremacy, the U.K. has retained the doctrine of parliamentary supremacy, all the while giving ever-increasing power to judges to review Parliamentary acts and recommend judicial appointments. As such, the U.K.

²⁹¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885); see also Jeffrey Jowell, “The Rule of Law and its Underlying Values,” in *The Changing Constitution* at 6 (noting, “[S]ome of our judges have recently suggested that Dicey’s hierarchy of principle, with the Rule of Law playing second-fiddle to the sovereignty of Parliament, might be changing, and that ‘the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.’”) (citation omitted).

²⁹² Griffith at 198.

appears to be moving from a system of popular sovereignty to one of increasing judicial sovereignty, including over judicial appointments.

CONCLUSION

What then does the divergent treatment of the legislature in judicial appointments say about the U.S. and U.K. from a comparative perspective? Why is the legislature involved in U.S. judicial appointments, and not in the U.K. with its tradition of parliamentary sovereignty? Using Tushnet's functional, contextual, and expressivist analyses, this Article concludes that the disparate involvement of the Senate and Parliament reflects their different roles and statuses in their respective governance systems, with a more significant role played by the Senate, perhaps unsurprisingly, given the Founders' intent that it be an elite body, and a less significant role played by the Parliament, surprising primarily because of the doctrine of parliamentary sovereignty. Given recent growth in judicial power in the U.K., some commentators, writing from a functionalist perspective, have warned of a potential crisis in democratic legitimacy and accountability arising from the absence of a legislative check on judicial appointments.²⁹⁵

From a contextualist perspective, the Senate's involvement in judicial appointments makes sense given the centrality of the legislature to the American governance system and recognition of the political nature of judicial appointments. Parliament's increased marginalization from power makes its non-participation in judicial appointments likewise understandable currently though not historically.

As for the expressive element of comparative analysis, the inclusion vs. exclusion of the legislature reflects, among other things, the U.S. and U.K.'s different resolutions of the tension between popular sovereignty and higher law, with an integration of the two forces in the U.S. judicial appointment process and increased attention to higher law principles in the U.K. judicial appointment process.

²⁹⁵ Stevens, *English Judges*.