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Recommended Citation

Steven H. Goldberg, Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No, 17 Geo. J. Legal Ethics 175 (2004), <http://digitalcommons.pace.edu/lawfaculty/78/>.

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ARTICLES

Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No

STEVEN H. GOLDBERG*

The Supreme Court justice selection season is just around the corner. The current Court has six Justices beyond the Social Security retirement age (the oldest eighty-three);¹ has not seen a new face in nearly a decade (the longest period without turnover in one hundred eighty years);² and has been the object of persistent press reports predicting multiple retirements in the near future.³ The rumors were so strong following the 2002 term that the editorial page suggestions for structural changes to make the judicial selection system “fairer” (come out the way I would like) appeared in bunches⁴ and the *Roe v. Wade*⁵ interest groups began preparing expensive television campaigns, one side claiming nominees “must commit to upholding *Roe*,” the other claiming the first was trying to “politicize the judiciary.”⁶ Only because the rumors were not true was the country spared another round of what Professor Stephen Carter has labeled “The Confirmation Mess”⁷ – no holds barred, rock ‘em, sock ‘em, hardball politics over the appointment and confirmation of a justice to sit on the nation’s highest court.

This essay is about the permanent damage to the Supreme Court and to the country that may occur if the current approach to judicial appointments

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1. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW, at li (7th ed. 2003) (citing the Justices’ birth years as Stevens (1920), Rehnquist (1924), O’Connor (1930), Ginsburg (1933), Scalia & Kennedy (1936), Breyer (1937), Souter (1939), Thomas (1948)).

2. *Id.* at xlix-li. The last appointment, Justice Steven Breyer, was in 1994. *Id.* at li.

3. See, e.g., Timothy M. Phelps & Tom Brune, *Supreme Court Seat Shuffle? Judges’ Retirements Would Spark First Shift in Decades*, NEWSDAY, May 18, 2003, at A23.

4. Judith Resnik, Editorial, *Supermajority Rule*, N.Y. TIMES, June 11, 2003, at A31; Stephen Gillers, Editorial, *Make a List*, N.Y. TIMES, June 11, 2003, at A31; David A. Schkade & Cass R. Sunstein, Editorial, *Judging by Where You Sit*, N.Y. TIMES, June 11, 2003, at A31.

5. 410 U.S. 113 (1973).

6. Robin Toner & Neil A. Lewis, *Lobbying Starts as Groups Foresee Vacancy on Court*, N.Y. TIMES, June 8, 2003, § 1, at 1.

7. STEVEN L. CARTER, THE CONFIRMATION MESS (1994).

continues, and offers an approach to the nomination and confirmation of Supreme Court justices that will help put the Court back in its proper place – out of the eye of the elective political storm.

I. THE COURT'S PROPER PLACE

The traditionally understood role of the Supreme Court as the nation's "neutral arbiter" – the least "political" of the three branches of government – is at greater risk today than at any time in our history. From the time of Chief Justice Marshall's decision in *Marbury v. Madison*,⁸ the Court has had an important and continuing place in determining the shape of the most powerful and freest nation on Earth. In his classic, *The American Supreme Court*,⁹ Professor Robert McCloskey explains the rise to political power of this non-democratic institution in a democratic society by focusing on how Americans of the late Eighteenth Century held simultaneously the "contradictory ideas" of popular sovereignty, which "suggests *will*," and fundamental law, which "suggests *limit*."¹⁰

For with their political hearts divided between the will of the people and the rule of law, Americans were naturally receptive to the development of institutions that reflected each of these values separately. The legislature with its power to initiate programs and policies, to respond to the expressed interest of the public, embodied the doctrine of popular sovereignty. The courts, generally supposed to be without will as Hamilton said, generally revered as impartial and independent, fell heir almost by default to the guardianship of the fundamental law. . . . [T]he devotion of Americans to both popular sovereignty and fundamental law insured public support for the institution that represented each of them.¹¹

This simultaneous reverence for majoritarian and non-majoritarian values has resulted in a Supreme Court that "blends orthodox judicial functions with policy-making functions in a complex mixture."¹² Its power comes from maintaining the mixture in "nice balance," while the limitations on that power come from "the fact that [the balance] *must* be maintained."¹³

It is in this place, which Professor McCloskey describes as "half judicial tribunal and half political preceptor,"¹⁴ that the Court must exist if it is to continue to be a useful, "venerated institution"¹⁵ in the continuing development of our constitutional, republican, democracy. The place is maintained by "the myth of an impartial, judicious tribunal whose duty it is to preserve our sense of

8. 5 U.S. 137 (1803).

9. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (3d ed. 2000).

10. *Id.* at 7.

11. *Id.* at 7-8.

12. *Id.* at 12.

13. *Id.*

14. MCCLOSKEY, *supra* note 9, at 14.

15. *Id.* at 14.

continuity with the fundamental law.”¹⁶ In short, the Court has not one place, but two. They are interdependent. It can maintain the first place – “half judicial tribunal and half political preceptor” – only by maintaining the half and half balance. Maintaining the balance perpetuates the public perception of the second place, that of “impartial, judicious tribunal,” not just another agenda driven political institution.

The Court’s dual-nature place, with its gap between reality and myth, has agitated academic commentators searching for consistency, predictability, and a rational theory of constitutional adjudication. The “good many gallons of ink [that had] been spilled”¹⁷ over the constitutional legitimacy and societal value of judicial review when Professor McCloskey wrote his book are a drop in the bucket compared to the barrels that have washed over the landscape of constitutional theory during the last half century. Professor Alexander Bickel’s “counter-majoritarian difficulty”¹⁸ has become the “obsession of modern constitutional scholarship.”¹⁹ It is not my purpose to add even an eye-dropper of ink to the debate amongst liberals, originalists, textualists, critical legal scholars, feminist scholars, interpretevists, non-interpretevists, neo-anythings, and any-other-here-ignored-school of constitutional interpretation. Whatever the “true” mode of constitutional interpretation and theoretically “proper” role for the Supreme Court, the half-century of fevered exposition has done little to diminish the force of Professor McCloskey’s observation that the argument is “perilously near to irrelevance,” the equivalent of arguing that “America was unwise to be the nation that it was.”²⁰

It is the paradoxical position of “half tribunal, and half political preceptor,” supported by the public perception of the Court as “impartial judicious tribunal,” that will be at risk if the President and the Senators do not exercise the wisdom and political fortitude to resist using the Supreme Court appointment process as an elective political football. It will be no small task, requiring no small amount of forbearance. The easy political capital for the President and Senators is in political posturing to one side or another of the “culture wars,” for which the Supreme Court has been the symbolic eye of the storm. The momentum from recent Presidential and Senatorial performances in attempting to fill lower federal court vacancies, unfortunately, is all in the wrong direction. Both political parties have adopted the current fashion of putting the judiciary into the center of electoral politics. It is time to stop.

16. *Id.* at 12.

17. *Id.* at 10.

18. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

19. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

20. MCCLOSKEY, *supra* note 9, at 10.

II “[SOMEBODY] SAVE . . . THIS HONORABLE COURT!”²¹

Justice John Paul Stevens, lamenting the Court’s venture into the 2000 Presidential election, observed, “Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”²²

The extent to which the Court’s reputation as the nation’s neutral arbiter suffered as a result of the decision in *Bush v. Gore*,²³ or any number of other decisions over the last half-century, is open to debate. Justice Stevens, however, is not the first to warn that the more the Court is viewed as political preceptor the more risk to the myth of neutral arbiter that supports the Court’s authority. Justice Felix Frankfurter made the same point in another important voting case. Dissenting from the suggestion in *Baker v. Carr*²⁴ that the Court should intervene to consider the constitutionality of a state voting scheme, he urged the Court to stay away from what would be considered a political question: “The Court’s authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction.”²⁵

It is not only Supreme Court Justices who have claimed the Court has destroyed the “nice balance” to which Professor McCloskey attributed the Court’s power. Commentators from the political left and the political right have, at one time or another, suggested that the Court’s intrusion into policy-making has politicized the Court and put its position as a “venerated institution” at risk.²⁶ That their insights about the Court’s excessive policy-making seem to flow when they do not like the Court’s decisions, and ebb when they do, does not mean there is no real danger from the claim or perception that the Court is “political.” Skepticism about the Court’s role as our neutral arbiter has increased at least

21. “God save the United States and this Honorable Court!” is the last line in the Marshal’s call that opens each session of the Supreme Court of the United States: “Oyez, oyez, oyez! All persons having business before the honorable, the Supreme Court of the United States, are admonished to draw near and give attention, for the Court is now sitting. God save the United States and this Honorable Court!”

22. *Bush v. Gore*, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

23. *Id.*

24. 369 U.S. 186 (1962).

25. *Id.* at 267. There is some disagreement amongst constitutional law scholars about whether the public confidence in the Court comes from the legitimacy of its legal arguments or from the political popularity of its decisions, but whatever the basis for the opinion, the Court’s authority depends upon public acceptance of its authority.

26. *Payne v. Tennessee*, 501 U.S. 808 (1991) (Marshall, J., dissenting). Marshall accused Justice Rehnquist of inventing a novel and “radical” theory of *stare decisis* to produce the outcome in *Payne*. *Id.* at 845; see also Larry D. Kramer, Editorial, *No Surprise, It’s an Activist Court.*, N.Y. TIMES, Dec. 12, 2000, at A33; James J. Kilpatrick, Editorial, *Now Liberals Are Hollering About Court’s ‘Activism,’* ST. PETERSBURG TIMES, June 22, 1989, at 21A; Robert P. Hey, *Judicial Activism Stance Draw Fire*, CHRISTIAN SCIENCE MONITOR, Sept. 19, 1990, at 8; Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival Of Warren Court Activism*, 1996 SUP. CT. REV. 67 (1996).

since the “activism” label was attached to the Warren Court in the 1960s. The Rehnquist Court, despite its many statements extolling the virtue of judicial reticence, has gained a reputation for judicial activism that rivals or surpasses that of the Warren Court.²⁷ The Warren Court earned its activist reputation attacking the educational and voting scheme pillars of segregation – *Brown v. Board of Education*²⁸ and *Baker v. Carr*²⁹ – and by changing procedures in the criminal justice system that weakened “the peace forces against the criminal forces.”³⁰ The current Court earned its activist reputation re-waging the Civil War issue of states’ rights, restricting congressional power under the Commerce Clause and the Fourteenth Amendment – *United States v. Lopez*³¹ and *City of Boerne v. Flores*,³² and by its “naked act of political will”³³ in taking the 2000 presidential election out of the House of Representatives.³⁴ In between, the Burger Court decided *Roe v. Wade* – the spark that lit the electoral politics bonfire of the last three decades. Whatever one thinks of the importance or the rectitude of the decisions and the Courts that wrote them, few believe that they have increased respect for the Court’s role as neutral arbiter. In the world of Supreme Court jurisprudence, “activism” is an eight-letter, dirty word. It may be, as some have suggested, a derogatory label without content,³⁵ but it is one that Supreme Court majorities of every persuasion go out of their way to disavow – usually while doing something that risks being beyond what the public thinks is the Court’s ken. The *Bush v. Gore per curiam* opinion, as it took the election away from the Florida judiciary, legislature, and people, said: “None are more conscious of the

27. See, e.g., LUCAS A. POWE JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); Kramer, *supra* note 27.

28. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (education).

29. 369 U.S. 186 (1962) (voting).

30. The characterization of the Warren Court’s decisions in cases such as *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trial counsel requirement) and *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to a lawyer during interrogation) is that of then presidential candidate Richard M. Nixon. MARK SILVERSTEIN, *JUDICIOUS CHOICES* 11 (1994).

31. 514 U.S. 549 (1995) (restricting Congressional power under the Commerce Clause to impose gun restriction on states).

32. 521 U.S. 507 (1997) (restricting Congressional power under Section 5 of the 14th Amendment to pass the Religious Freedom Restoration Act which attempted to reverse *Employment Div., Dept. of Human Resources of OR v. Smith*, 494 U.S. 872 (1990)). *Smith* held that a state law of general applicability criminalizing peyote use, when applied to deny unemployment benefits to Native American Church members who lost their jobs because of such use, was constitutional and therefore survived plaintiff’s free exercise challenge.

33. The characterization is that of Jeffrey Rosen, *Disgrace: The Supreme Court Commits Suicide*, NEW REPUBLIC, Dec. 25, 2000, at 18.

34. The effect of the Court’s reversal in *Bush v. Gore*, 531 U.S. 98 (2000), of the Florida Supreme Court decision to allow a manual recount of presidential ballots was to take the matter from the political arena – where the result almost certainly would have been the same. A Florida recount, no matter when finished and irrespective of the “winner,” would have put the question of the identity of electors to the Florida legislature and any challenges of the Florida electors to the House of Representatives, both of which were controlled by the Republican Party.

35. See, e.g., Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275 (2002).

vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere."³⁶ Justice Douglas, finding a state's ban on the use of birth control devices by married couples unconstitutional (a problem we can safely assume was not on the minds of the framers of the Constitution) said in *Griswold v. Connecticut*:³⁷ "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch . . . social conditions."³⁸

There is no evidence to date that the opinions of the Warren, Burger, and Rehnquist Courts or the views of Justices and commentators about the Court's overreaching has reduced the public's confidence in the Court as neutral arbiter,³⁹ but the comments and actions of the main speakers in the public dialogue may change that. The Presidents, Senators, interest groups and the media have increasingly conducted and reported Supreme Court appointments as if they should be based on the same thing as election of a President or Senator – an issue-driven, political agenda.⁴⁰ The politicization of Supreme Court appointments has spread, with the President and the Senate, under the influence of interest groups and the glare of media, making an elective political issue of lower federal court vacancies. The coming Supreme Court vacancies will only exaggerate a trend that might well jeopardize the public's faith in the Court's "moral sanction." It has to stop if the Court's proper place is to be preserved.

Avoiding unproductive political wars over Supreme Court appointments is hardly a new idea. Some of the suggestions, such as abandoning judicial life tenure⁴¹ or requiring Supreme Court Justices to be confirmed by a supermajority,⁴² have been structural. Others, such as closed confirmation hearings, not having nominees appear, and limiting interest group involvement,⁴³ have focused on changing or managing the norms of the appointment process. None of these suggestions, unfortunately, address directly one of the primary reasons, if not *the* primary reason, for the political mess around Supreme Court appointments:

36. *Bush*, 531 U.S. at 111.

37. 381 U.S. 479 (1965).

38. *Id.* at 482.

39. Gallup News Service, *The Florida Recount Controversy from the Public's Perspective: 25 Insights* (Dec. 22, 2000), at <http://www.gallup.com/poll/releases/pr001222bii.asp>. The poll found overall public confidence in the Supreme Court unchanged, but that the *Bush v. Gore* decision did hurt the confidence of a majority of Gore supporters. *Id.*

40. See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* ch. 7 (2000); CARTER, *supra* note 7, at 5.

41. Philip D. Oliver, *Retire Life Tenure for Justices*, WALL ST. J., Sept. 18, 1987, § 1, at 14. see also Akhil Reed Amar & Steven G. Calabresi, Editorial, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23; Jack N. Rakove, *Judges: Conferring A Lifetime of Ideology*, N.Y. TIMES, May 13, 2001, § 4, at 5.

42. Resnik, *supra* note 4.

43. GERHARDT, *supra* note 41, ch. 10 (containing an exhaustive discussion of the pros and cons of these and other suggestions).

ideology. While ideology has been the source of an academic industry labeled Constitutional Theory, that industry has focused on Supreme Court decision-making and rarely on the Supreme Court appointment process. Whether the lack of attention is because it is a given that ideology is the problem causing the “confirmation mess,” it is assumed that ideology cannot be avoided in any event, or because the role of ideology is not acknowledged, few have openly argued that ideology should or should not have a role in the appointment process. Professor Ronald Rotunda is one of the few who have argued against a role for ideology in the Supreme Court appointment process.⁴⁴ He contends that Senators should neither inquire about nor consider nominees’ ideology, but rather, should inquire only whether they have “made any promises to the President or his aides, other than the faithful performance of their judicial duties.”⁴⁵ He rejects the suggestion that Senators “should use the [confirmation] hearing to learn about the nominee’s philosophy of constitutional interpretation.”⁴⁶ Acknowledging that ideology may influence Senatorial votes, he argues that recognizing that reality does not mean “Senators should consider [ideology], anymore than recognizing that sin exists means that we should aspire to it.”⁴⁷ Although he claims that history, tradition, and judicial ethics support his position, it is unclear whether he believes that senatorial abstention from inquiry will cause ideology (1) to not be any part of the process, (2) to be part of the process, but swept under the rug, or (3) to be part of the process, but a legitimate concern only for the President.

I disagree with Rotunda’s conclusion that history, tradition, and legal ethics suggest that Senators should not inquire about a nominee’s ideology. Further, I believe he is wrong to believe that failing to inquire about ideology would achieve any of his article’s three possible goals. But he is right to focus on ideology as a critical factor in the Supreme Court appointment process and right to look at history, tradition, and judicial ethics in assessing the proper attitude of the players in the process – the President, the Senators, and the nominees – towards ideology. Most importantly, I agree that ideology is the key to producing a less politicized process. Only I believe that it is attention to ideology, not an attempt to pretend it does not matter, that will help to de-politicize the Supreme Court appointment process.

III. TAKING IDEOLOGY OUT OF THE PROCESS – THE ONE IDEA SURE NOT TO WORK

Professor Rotunda contends that the lesson from history, tradition, and ethics is that Senators should not use confirmation hearings to “learn about the nominee’s

44. Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEO. J. LEGAL ETHICS 127 (2001).

45. *Id.* at 131.

46. *Id.* at 130.

47. *Id.*

philosophy of constitutional interpretation.”⁴⁸ In short, don’t ask about ideology. Ideology, of course, can relate to many enterprises from religion to politics to worldview. In the context of federal judicial selection, Professor Michael Gerhardt has observed: Ideology is “a loaded concept that can . . . allude to . . . a general philosophy about governing (or judicial decision making) or a deeply entrenched mode of approaching political or moral questions (including issues of constitutional interpretation).”⁴⁹ It is this broad view of political, constitutional, legal philosophy that cannot and should not be removed from the Supreme Court appointment process.

A. WHOSE HISTORY? WHAT LESSONS?

Professor Rotunda bases his contention that history militates against senatorial inquiry into ideology by focusing on the first half of the twentieth century, echoing President Richard Nixon’s view that the “traditional constitutional balance” is one in which the President dominates the Supreme Court appointment process and the Senate is passive. His selective choice to establish his historical imperative is neither unique nor rare. “Richard Nixon’s petulance,” according to Professor Jeffrey Tulis, “has become the core of our century’s constitutional understanding of judicial appointment.”⁵⁰ In a publicized letter to Senator Saxbe of Ohio defending his nomination of Judge G. Harrold Carswell, President Nixon said he had the right to nominate someone whose philosophy matched his own, that the Senate should not consider philosophy in confirmation, and that this right had “been freely accorded to my predecessors of both parties.”⁵¹

Nixon was wrong and, as a result, so is the “core of our century’s constitutional understanding.” Since 1789, “close to one out of five”⁵² Supreme Court nominations have been rejected by the Senate. Whatever one thinks of Professor Henry Abraham’s harsh judgment that President Nixon “must have known how

48. *Id.*

49. GERHARDT, *supra* note 41, at 254.

50. Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1336 (1997).

51. The full text of President Nixon’s Mar. 31, 1970 letter to the Republican Senator whom he would later appoint Attorney-General can be found among the Public Papers of President Richard Nixon at http://www.nixonlibrary.org/Research_Center/1970_pdf_files\1970_0099.pdf. Regarding the traditional balance in the nomination-confirmation process, President Nixon said (in part):

What is centrally at issue in this nomination is the constitutional responsibility of the President to appoint members of the Court – and whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment. The question arises whether I, as President of the United States, shall be accorded the same right of choice in naming Supreme Court Justices which has been freely accorded to my predecessors of both parties . . . if the Senate attempts to substitute its judgment as to who should be appointed, the traditional constitutional balance is in jeopardy . . .

52. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* 13 (4th ed. 1999).

wrong he was . . . his historical misstatement was a distinct disservice to country, Constitution, and Court,”⁵³ the relevant history of Supreme Court appointments goes back at least to 1795.

In President George Washington’s second term, the Senate rejected his nomination of John Rutledge to be Chief Justice. A delegate to the Constitutional convention and former Associate Justice of the Supreme Court,⁵⁴ Rutledge’s opposition to the Jay Treaty with Great Britain caused thirteen of the sixteen members of his own Federalist party to deny the first president and Father of His Country the Chief Justice of his choice.⁵⁵

During the nineteenth century, political party was the proxy for ideology. Almost all Supreme Court nominees belonged to the nominating President’s party;⁵⁶ and the Senate rejected a third of them.⁵⁷

In the first half of the twentieth century there was a relative decline of major political party influence on Supreme Court appointments. Every President, save Theodore Roosevelt and Calvin Coolidge, nominated members of the opposite party.⁵⁸ Passage of the Seventeenth Amendment, providing for popular election of Senators, coincided roughly with the beginning of a period of Senatorial deference to Presidential Supreme Court nominations. President Woodrow Wilson’s successful nomination of Louis D. Brandeis and President Herbert Hoover’s unsuccessful nomination of Judge John J. Parker were the only twentieth century confirmation dust-ups until President Nixon’s unsuccessful nominations of Judges Clement F. Haynesworth, Jr. and G. Harold Carswell.

There is a paucity of historical material concerning the subject of Senatorial inquiry until the second half of the twentieth century because nominees did not appear before the Senate until John Marshall Harlan testified at his 1955 confirmation hearing.⁵⁹ It is fairly well established, however, that ideology played a part in the two hotly contested matters of the first half of the twentieth century. While there was bitter opposition to Louis Brandeis because he was a Jew, his reformist ideology was unpopular with the country’s major economic interests. Similarly, Judge Parker’s rejection may have been due as much to what were perceived as anti-union judicial opinions as to his observation that “the participation of the Negro in politics is a source of evil.”⁶⁰

53. *Id.*

54. In a telling commentary on the importance of the Supreme Court of the United States in the 18th century, Rutledge resigned his position as Associate Justice to take a seat on the South Carolina Supreme Court. GERHARDT, *supra* note 41, at 51.

55. *Id.* at 51-52.

56. *Id.* at Ch. 3. The only exceptions were nominations by Presidents Tyler, Lincoln, and Harrison. Each one nominated a member of another party.

57. *Id.*

58. ABRAHAM, *supra* note 52, at 377.

59. There were two atypical appearances before Harlan’s – Harlan Fiske Stone after he had been confirmed and Felix Frankfurter who read a prepared statement. ROTUNDA, *supra* note 45, at 130.

60. HERMAN SCHWARTZ, PACKING THE COURTS 46-47 (1988).

For at least the last three decades, various Presidents and Senators have been overtly interested in and have asked questions about the “particular mind set” with which nominees would approach a legal problem. Senator Charles E. Schumer has recently characterized unarticulated senatorial consideration of ideology as a “not-so-dirty-little secret.”⁶¹ Dirty or not, it is hardly a secret. Three Republican Presidents have proudly made nominations that fit the political ideological profile for Supreme Court appointments adopted by the 1980 Republic platform. Democratic Senators have been aggressive in their questions to those nominees about their approaches to legal problems, with mixed results. Robert Bork was forthcoming (creating the new English language verb, “Borked”).⁶² Judge Antonin Scalia, by contrast, was a portrait in studied reticence during his Supreme Court confirmation hearing.

Whatever is to be said about the history of Supreme Court nominations, it does not establish a tradition of Senatorial deference to a Presidential prerogative. The nineteenth century rejection of a third of the presidents’ nominees has been repeated over the last thirty-five years.

The most important history for understanding the current nature of the Supreme Court appointment process begins in 1968. Political issues of the day have probably influenced nominations and confirmations of Supreme Court Justices throughout history,⁶³ but until 1968 the political disagreement took place within a relatively invisible nomination-confirmation process that did not publicly politicize the Court. Not even President Franklin Delano Roosevelt’s 1937 scheme to rescue the New Deal by packing the Supreme Court was an elective political issue. President Richard Nixon’s 1968 “southern strategy” to wrest the solid South from the Democratic Party focused on the Court. Promising to nominate to the Supreme Court only “strict constructionists” who would not widen the effect of *Brown* and who would not further weaken “the peace forces against the criminal forces,”⁶⁴ Nixon made the Court an express elective political issue. In 1980 the Republican Party made the selection of prospective Supreme Court justices “who respect traditional family values and the sanctity of innocent

61. ROTUNDA, *supra* note 45, at 130 (citing Senator Schumer’s July 1, 2001 appearance on the NBC television broadcast of *Meet the Press*).

62. The Oxford English Dictionary (<http://dictionary.oed.com>) lists “borked” as “political slang” and offers the following examples: 1987 *Los Angeles Times* 20 Sept. 4/3, I think this time the local minorities are ‘Borking’ up the wrong tree. 1991 *New Republic* 9 Sept. 21/2 ‘We’re going to Bork him,’ the National Organization for Women has promised. But if they succeed, liberals may discover that they have Borked themselves. 1993 *N.Y. Times Bk. Rev.* 23 May 11/1 This powerful force . . . that now goes around ‘Borking’ politically incorrect nominees. 2001 *Roll Call* (Electronic ed.) 5 July, Democrats . . . have established a tradition of ‘Borking’ Republican nominees.

63. For example, John Rutledge was defeated for his view of the Jay treaty; Nathaniel Clifford’s 1857 confirmation followed a debate over his pro-slavery views; and Roger Taney’s first nomination was rejected because of his position on the national bank. ABRAHAM, *supra* note 52, at 29-30.

64. SILVERSTEIN, *supra* note 31, at 11.

human life”⁶⁵ a prominent part of their party platform. Understood to be a promise to choose nominees who opposed *Roe v. Wade*, Presidents Ronald Reagan, George Bush (the elder), and George Bush (the younger) ran on the platform and emphasized the selection of right-minded Supreme Court justices. Vice President Walter Mondale made Supreme Court appointments an issue in his unsuccessful 1984 presidential campaign.⁶⁶ President William Clinton did not make the beliefs of potential nominees a political issue, but promised during the 1992 campaign to make appointments in all areas that “looked like America”⁶⁷ and Supreme Court nominations from “officials with substantial experience and accomplishments in public service.”⁶⁸

Since 1968, thirteen nominations have been confirmed – two after fierce Senate battles – and six have been rejected or withdrawn. The Presidential initiatives putting Supreme Court appointments into the elective political process have contributed to the emergence of interest groups whose primary, if not sole, reason for existence is influencing federal judicial selections.⁶⁹ Opposition Senators have responded to Presidential “politicization” of Supreme Court nominations in kind. As recently as 2001, Senate Democrats gathered to consider a strategy for foiling the stated intentions of President George W. Bush to produce a judicial system designed to reach particular issue results.⁷⁰

The shift of the judicial appointment process from a patronage-like part of the political process to an elective political issue has been exaggerated by a sea change in media attention. Beginning with President Reagan’s 1987 Supreme Court nomination of Professor Robert Bork, and continuing through the current battles over President George W. Bush’s nominations to the lower federal courts, the increasingly intrusive glare of the media has increased public perception of a “political” federal judiciary. It has become a vicious circle in which the increased public awareness increases the politicians’ public posturing, which, by heightening the conflict, increases the media attention. This treatment of each judicial nominee as “a Supreme Court justice in miniature,”⁷¹ provides a preview of what we might expect when the next Supreme Court vacancies occur. It is not a pretty picture.

The recent shenanigans over the nomination of Miguel Estrada to the D.C.

65. *The 1980 Judiciary Plank for the Republican Party*, 3 CONG. Q. WKLY REP. 2030, 2046 (1980).

66. See, e.g., Myra MacPherson, *Election '84 and the Last Hurrahs; Reagan and Mondale: Touching Chords of Two Americas*, WASH. POST, Nov. 6, 1984, at B1; Bernard Weinraub, *Mondale, In Summation, Evokes Dr. King's Goal*, N.Y. TIMES, Nov. 4, 1984, at B17.

67. GERHARDT, *supra* note 41, at 131.

68. *Id.* at 228. President William Clinton’s priorities and relationship with the Senate did not allow him to fulfill candidate Clinton’s expectations for Supreme Court appointments.

69. Robert Shogan, Background Paper, *The Confirmation Wars: How Politicians, Interest Groups, and the Press Shape the Presidential Appointment Process*, in OBSTACLE COURSE: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE PRESIDENTIAL APPOINTMENT PROCESS 87, 137 (1996).

70. Neil A. Lewis, *Democrats Ready for Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19.

71. Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES, Aug. 11, 2002, at 38.

Circuit Court of Appeals present a representative, if unappealing, example of the dysfunctional process. Pursuing his stated desire to shape the Court (and what many believe to be his unstated desire to pander to a far-right wing political base.⁷²) the President selected a lawyer rumored to have strong views on current social issues, with no Bork-like trail of writings or judicial opinions to provide evidence of those views. When it became known that Estrada wrote position papers while at the Justice Department – papers of the kind provided to the Senate Judiciary Committee by Chief Justice Rehnquist and Professor Bork during their confirmation hearings – Estrada's opponents in the Senate demanded the position papers be furnished. Estrada refused. Republican Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, who had been a vigorous proponent of searching inquiry when a Democrat was making judicial nominations, pushed the Republican President's nominee to the Senate floor precipitously.⁷³ The Democratic opponents of the nomination filibustered the process to a halt.⁷⁴ The Democrats charged President Bush with trying to pack the Court with ideologues without giving the Senate an opportunity to examine the record.⁷⁵ President Bush said the Democrats were shamefully denying a seat on the D.C. circuit to an Hispanic.⁷⁶ The interest groups pumped out e-mail messages to rally the troops.⁷⁷ The media covered the battle as if it were the warm-up for the then approaching war with Iraq. The Democrats continued to filibuster. The Estrada nomination was going nowhere and he eventually withdrew. The Republican Senate majority is trying to change Senate rules to prohibit filibusters on judicial nominations.⁷⁸

72. See Roland Watson, *Bush Faces Tough Call in Selection of Supreme Court Judge*, TIMES (LONDON), June 16, 2003, at 13; Neil A. Lewis & Sheryl Gay Stolberg, *Vacancy or Not, Bracing for Supreme Court Fight*, N.Y. TIMES, June 20, 2003, at A20.

73. In response to President Clinton's appointment of Bill Lann Lee, a former NAACP attorney seen as dangerously liberal by Republican Senators, as assistant attorney general for civil rights, Senator Orrin Hatch promised that Lee would be one of "the most congressionally scrutinized bureaucrats in history." Brian McGrory, *Lee Named Acting Head of Rights Unit; President Retreats From Earlier Threat*, BOSTON GLOBE, Dec. 16, 1997, at A1. Though Hatch allowed individual Republicans to kill some of President Clinton's nominations using the home-state veto, he refused to give such deference in 2003 in an effort to move Bush's nominees through the Senate. Nick Anderson, *The Nation; Battle Over Judiciary Enters New Phase; As Democrats Prepare to Fight Bush Choice, Other Nominees Move Toward Approval*, L.A. TIMES, April 26, 2003, at 16. In order to try to shepherd President Bush's court nominations through Hatch "abandoned the longstanding 'blue slip' tradition, which let a single senator block a home-state nominee." Todd J. Gillman, *Filibuster Has Everyone Talking*, DALLAS MORNING NEWS, May 11, 2003, at A7.

74. Todd J. Gillman, *GOP Senators Go 1-for-2 on Judges; As Democrats Continue to Block Owen, Another Nominee is Confirmed*, DALLAS MORNING NEWS, May 2, 2003, at 11A.

75. James Politi, *Democrats Set to Block Bush Nominee*, FIN. TIMES (LONDON), May 1, 2003, at 8; David L. Greene, *Partisanship Reigns in Battle Over Courts*, BALT. SUN, June 15, 2003, at 1C; Amy Goldstein & Helen Dewar, *President Criticizes Filibusters*, WASH. POST, May 10, 2003, at A6.

76. Janet Hook, *Bush Vows to Fight On for Estrada*, CHI. TRIB., Mar. 7, 2003, at C14; James Gordon Meek, *Bush Rips Dems for Judge-Vote Block*, N.Y. DAILY NEWS, Feb. 27, 2003, at 19.

77. Jan Crawford Greenburg, *Stakes Are High In Estrada Filibuster*, CHI. TRIB., Feb. 14, 2003, at N1.

78. Adam Cohen, *For Partisan Gain, Republicans Decide Rules Were Meant to Be Broken*, N.Y. TIMES, May 27, 2003, at A24.

The Estrada imbroglio was only one episode in an increasingly divisive process of federal judicial selection, as President Bush has nominated and re-nominated⁷⁹ judicial candidates guaranteed to produce controversy and extraordinary “political” reaction by opposition Senators, who have one eye on the make-up of the federal judiciary and the other on the same electoral political process they believe is driving President Bush’s nominations. It has not been a process likely to suggest that judges are expected to play a different role in our system from politicians elected for their particular agenda.

History is clear. It does not even suggest that ideology is not or should not be an important consideration for both President and Senators. The Supreme Court appointment process is not one of Presidential dominance and Senatorial deferral. Although for a while in the nineteenth century party affiliation was a proxy for ideology, ideology has always been an issue. Since nominees started appearing before the Senate, a third have been rejected or withdrawn and ideology has been front and center as a consideration, in most cases, explicitly.

B. JUDICIAL ETHICS DO NOT SPEAK TO THE ISSUE

Judicial ethics provide no more imperative than history for Professor Rotunda’s conclusion that Senators should not inquire about or consider a nominee’s ideology. The Canon of Judicial Ethics on which he relies – 5A(3)(d)(i) – neither mentions nor is aimed at ideology:

(3) A candidate for judicial office (d) shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.⁸⁰

From this Canon about making promises concerning conduct in office, Professor Rotunda claims “[i]t is wrong for a nominee to promise to vote a certain way, to promise (or appear to promise) to vote to overrule or to not overrule a particular precedent, or promise to *approach a legal problem with a particular mind set*.”⁸¹ I have no quarrel with the observation that it would be fruitless or harmful to ask nominees questions they are ethically prohibited from answering, but the cited Canon talks neither about “mind set” and how a judge might “approach a legal problem” nor about “appear to promise.” Canon 5A(3)(d)(ii), by contrast, says a candidate shall not “make statements that commit or *appear to commit* the candidate with respect to cases, controversies or issues that are likely to come

79. Judge Charles Pickering of the District Court in Mississippi was rejected by a Democratic controlled Senate. After the 2002 election, in which the Republicans took control of the Senate, President Bush re-nominated Pickering. Jan Crawford Greenburg, *Bush Lashes Democrats on Judicial Filibusters*, CHI. TRIB., May 10, 2003, at 10; Joan Biskupic, *Bush Unwavering Push for Conservative Bench*, USA TODAY, May 8, 2003, at 2A.

80. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (1990) [hereinafter MODEL CODE].

81. ROTUNDA, *supra* note 45, at 133 (emphasis added).

before the court”⁸² but it is specifically aimed at statements about cases, not statements about judicial philosophy.

Professor Rotunda apparently finds his ethical argument in a combination of the two parts of the Canon – though he does not articulate that – and a melding of ideology with decisions in specific cases. He makes his case by inveighing against questions that ask how a nominee “would vote on particular legal questions.”⁸³ He uses as an example a question United Families of America proposed a Senator ask now-Justice Ginsburg at her 1980 confirmation hearing to sit on the D.C. Circuit: “Can the Congress limit the jurisdiction of the federal courts in, say, school busing cases?” He applauds Senator Howard Metzenbaum’s reason for refusing to ask the question: “You don’t mean that every nominee up for confirmation ought to have his or her views explored . . . on all of the controversial issues . . . ?”⁸⁴

Whatever might be the prudential answer to Senator Metzenbaum’s rhetorical question, nothing in Canon 5 would have prohibited then lawyer Ginsburg from answering the proposed separation of powers question. At least for the reach of an ethical prohibition, a question that asks how a nominee would decide a particular case is not the same as a question that asks about the nominee’s approach to constitutional interpretation generally, or in a specific area. “Would you vote to uphold a state statute that prohibits abortion at any time beyond one week from conception?” for example, is a world apart from, “Do you consider privacy to be a fundamental right within the liberty guarantee of the 14th amendment?” The answer to the second question might provide an insight into how the nominee would approach answering the first, but that hardly makes it unethical for the nominee to answer the question, or unwise for the Senator to ask it. This is nothing more than recognition of the important difference between “particular mind set” or “approach,” on the one hand, and “vote to overrule or to not overrule a particular precedent case” on the other. The American Bar Association’s disapproval of testing a nominee’s “particular political or ideological philosophies,”⁸⁵ which Professor Rotunda cites in support of his conclusion, adds little. Neither the ABA’s “ideological philosophies” tautology nor a prudential argument about what Senators should ask amounts to an ethical proscription. Nothing in the Canon of Judicial Ethics prohibits a nominee from answering questions about the nominee’s political or judicial ideology, philosophy of constitutional interpretation, or general views about the structure and interpretation of the Constitution.

Professor Rotunda seems to concede that there is no real ethical proscription to answering questions about ideology. He finds his ethical bar by resort to the

82. MODEL CODE Canon 5A(3)(d)(ii) (1990) (emphasis added).

83. ROTUNDA, *supra* note 45, at 131.

84. *Id.* at 129.

85. *Id.* at 141 n.63.

slippery-slope argument that if ideology questions are answered, particular case questions, which he considers beyond the ethical pale, will follow: “if those questions [that probe his or her views of what the law is or should be] are fair game, others [that inquire about deciding particular cases] are as well.”⁸⁶ Senator Schumer’s recitation of the questions he would ask a nominee – some about constitutional interpretation and some about future cases – lends some support to the slippery-slope fear, but whatever caution it might raise for the wisdom of making ideology fair game in the confirmation process, it does nothing to create an ethical problem. Questions about ideology – be they about the proper role for the court, the proper approach to determining fundamental rights, or the breadth of the first amendment’s coverage – are of a different order than questions about issues *de jour* – be they slavery, separate but equal, New Deal legislation, or abortion.⁸⁷ There is a critical ethical difference between promising to “overrule or not to overrule a particular precedent” and explaining “the particular mind set” with which the nominee might “approach a legal problem.” The former is something no prospective justice should indulge. The latter is something no prospective justice should be without.

IV. IDEOLOGY, YES; AGENDA, NO.

It does not follow, of course, that because neither history nor ethics prohibit the President and the Senate from considering ideology in the Supreme Court appointment process that it would be prudent for them to do so. Indeed, it would probably be best for the public perception of the Court if we could go back to the days before 1968 when the selection of Supreme Court Justices was not on the public radar screen and party affiliation was more important in the process than ideology. It would probably be better, also, to go back to the days before humans had nuclear weapons, but both nuclear weapons and the importance of ideology for the Supreme Court appointment process are here to stay. The perceived elective political stakes for the President and individual Senators are too high to ignore. Pressure will be intense from interest groups hoping to prove their worth by influencing appointment to the Court that “really” counts.⁸⁸ The electronic media, running out of wars, murders, and the “winner” of the latest “reality” TV show⁸⁹ needs desperately to fill their 24/7, wall-to-wall, “entertainews” approach to each month’s “story of the century.”⁹⁰

86. *Id.* at 133.

87. It is true that during his July 1, 2001 appearance on the NBC television show, *Meet the Press*, Senator Schumer overlooked the important difference between specific issues and ideology. *Id.* at 128; *see also infra* text accompanying note 110.

88. Shogan, *supra* note 70, at 137.

89. The progress on “Joe Millionaire,” an ABC “reality” show, “American Idol,” a Fox talent search of sorts, and “Survivor,” a CBS “reality” contest has been a regular part of both morning and evening news casts.

90. BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA CULTURE* 4 (1999).

The question is whether there is any way to avoid damaging the neutral arbiter myth that supports the Court's authority in the face of a bare-knuckled political battle over how a new Supreme Court Justice is likely to view *Roe v. Wade*, affirmative action, school prayer, school vouchers, homosexuality, flag burning, or any of the other issues deemed at stake in the "culture wars."

Critics of a Court that is "half judicial tribunal and half political preceptor" will answer the question by arguing that the simple way for the Court to maintain public perception that it is "an impartial, judicious tribunal" has nothing to do with judicial selection and everything to do with the court avoiding injudicious decisions by minding its proper place as the critics define it.

The initial problem with that answer, of course, is that injudiciousness, like beauty, is "in the eye of the beholder."⁹¹ Despite Cassandra-like predictions from the losers of "injudicious" decisions, no single opinion or a group of opinions to date has destroyed the myth of the neutral arbiter. Except for short bursts from small groups, there is no evidence that any opinions have brought the Court into the kind of long-term public disrespect that would jeopardize the apparent approving consensus of the American people and the Court's resulting place of influence in our constitutional republican democracy.

The second problem with looking to avoidance of injudicious decisions is prediction. The Justices have some ability, by attention to reticence, to sidestep when litigants bring questions to the Court that the elective political process cannot decide, has avoided for so long it has lost its claim of right to decide, or has decided in a way antithetical to the society's core values. Leaving to others the argument over the propriety of a judicial sidestep, judicial prescience and political history rarely match. With the exception of the endless cultural struggle to "fix" America's greatest mistake and its ripples – black slavery (*Dred Scott v. Sanford*⁹²), segregation (*Plessy v. Ferguson*⁹³), desegregation, (*Brown v. Board of Education*⁹⁴), political exclusion (*Baker v. Carr*⁹⁵), and affirmative action (*Bakke v. Regents*⁹⁶) – most of the enduring cultural-political questions with which the Court has been involved were neither "enduring," nor was the decision predictably dangerous to long-term public respect for the Court.

The dispute over the national bank, the cases hindering and then implementing the New Deal, the criminal procedure revolution, and the relatively recent infusion of power into the First Amendment represent significant issues of the day in which the Court played a role. Looking back from 2003 at those decisions,

91. The idea about beauty being more about the person of the opinion than the object viewed has many literary references. "Beauty is in the eye of the beholder" is from Margaret Wolfe Hungerford's *Molly Bawn*.

92. 60 U.S. 393 (1856).

93. 163 U.S. 537 (1896).

94. 347 U.S. 483 (1954).

95. 369 U.S. 186 (1962).

96. 438 U.S. 265 (1978).

one might argue that by intervening, the Court furthered public perception that it acted as “an impartial, judicious tribunal.” Even the still raging, quarter-century political storm over *Roe v. Wade* was not clear to the 1973 observer of the public dialogue, let alone a cloistered Supreme Court Justice. In 1973, prohibiting abortion was not any politician’s idea of a good election issue. Abortion had not been prohibited in America for most of the nineteenth century. It became banned in almost every state during the Victorian era, but by 1973, twenty states had repealed their abortion bans⁹⁷ and the mainstream medical, legal, and public health associations argued for the result in *Roe*.⁹⁸

Even if the Court has provided grist for the mill of critics on the left and right when they were dissatisfied with the decisions, the message the President and Senate send through their conduct of the appointment process is likely to have a greater influence on the public’s perception of the Court than any particular decision or group of decisions. If they treat the appointment process as just another political battleground it will have more negative effect on public perception than anything nominees are likely to do while on the Court.

There is a superficial attractiveness to the idea that if the President and Senate do not consider ideology in the nomination-confirmation process there will be no risk that the process will politicize the Court. But the idea that ideology should not be an important part in the consideration of Supreme Court nominees flies in the face of both reality and prudence.

Reality. Reasons other than ideology have been articulated for twentieth century Senate rejections, but as more than one commentator has suggested, “these issues were employed in large part to mask ideological opposition.”⁹⁹ Since 1968 – the entire time of political awareness for more than three-quarters of the electorate – Presidents and Senates have been locked in a kind of Prisoner’s Dilemma over ideology that shows no sign of abating. And even if a President and Senate agreed not to consider ideology, or conspired to consider it, but to take the appearance out of the process, they would be unlikely to succeed. Neither the interest groups nor the media would suffer the silence.

Prudence. More importantly, ideology should be a central part of the nomination-confirmation process. The President and Senators are not doing their jobs if they do not pay some attention to a nominee’s approach to the law, to the Constitution, to the society, and to life in general. Observers from as diverse perspectives as Chief Justice Rehnquist and Professor Laurence Tribe have argued that ideology is at the center of the nomination-confirmation process. The Chief Justice suggests that a President who does not consider ideology in

97. See *Roe v. Wade*, 410 U.S. 113, 140 (1973).

98. *Id.* at 133-34.

99. JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 109 (1990).

nominating has not given the Court the attention it deserves.¹⁰⁰ Professor Tribe argues that a Senate that does not consider ideology in confirming has not performed its constitutionally mandated check and balance function.¹⁰¹ It seems silly to suggest that a nominee for the Court should come with no ideology. Then Justice Rehnquist put it well when he said,

It would be not merely unusual, but extraordinary, if [Supreme Court nominees] had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.¹⁰²

Ideology, however, is different from agenda. The ideology important for a Supreme Court Justice is that relating to the Court's proper role in the American scheme of government, the nominee's general philosophy about Supreme Court decision-making, and the nominee's mode of approaching issues of constitutional interpretation. That bundle of ideas, which might be characterized as judicial philosophy, is very different from a nominee having a political or judicial agenda. A political agenda is the approach we associate with political campaigns – the platform, the specific policy goals for which the candidate hopes to either muster or reflect popular choice. In the context of Supreme Court appointments, this agenda is about how a nominee expects to vote on future cases or views past precedents. A judicial agenda (more closely related to judicial philosophy) is a matter of emphasis. In the context of Supreme Court appointments, agenda signifies a greater interest in pressing an ideology than in deciding cases.

The difference between ideology and agenda is critical. A nominee with an ideology can be expected to be *influenced* by it. A nominee with an agenda can be expected to be *driven* by it. In the difference between ideology and agenda, judicial independence is at stake. It is not the judicial independence of the particular nominee from promises made – the most ardent promise (should any nominee ever be foolish enough to provide it) is virtually impossible to enforce against a life-tenured jurist with salary protection – but the judiciary's independence from *will*, be it popular or within the heart of the Justices.

The genius of our constitutional system – or at least the political history lesson from a successful democracy – is that the Supreme Court presents a limiting, leavening, and long-term policy perspective on short-term popular will. If the Supreme Court is staffed to accommodate popular will, or if the President, Senate, and public believe it should reflect popular will, its limiting function will be stripped from the “nice balance.” The “nice balance,” of course, requires that judicial independence from popular will not become judicial supremacy over

100. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 209 (2001).

101. LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* ch. 6 (1985).

102. *Laird v. Tatum*, 409 U.S. 824, 835 (1972).

popular will – a caution as old as the republic. Alexander Hamilton, the originator of the idea that the judiciary was the “least dangerous”¹⁰³ branch of government, believed the answer was in governmental structure. The executive had the sword, the legislature had the purse, the judges were appointed by the elected President and Senate, and the judge’s tenure was at the mercy of the legislature’s opinion of the judge’s good behavior. Good behavior, for Hamilton, meant the judges’ duty to “declare the sense of the law.”¹⁰⁴ In addition to charging the two elected branches of the government with staffing the Court and overseeing the propriety of the conduct of the Justices, the Constitution, also, provided structural checks. It left the number of Justices to the legislature and amendment of the Constitution to the people.

As it turned out, however, only one of the structural checks on judicial supremacy has proven to be more than theoretical. The “good behavior” check was exercised for the first and last time in 1805. The Jeffersonian Republicans impeached the Federalist Associate Justice Samuel Chase on grounds clearly related to politics of the day, but his acquittal by a Republican controlled Senate marked the last attempt to impeach and convict a sitting Justice. Changing the number of Justices on the Court was an occasionally effective method for the Senate to alter the Court to conform to popular will,¹⁰⁵ until a Democratic controlled Congress emphatically rejected President Franklin Roosevelt’s 1937 plan to reduce the influence of the anti-new deal “four horseman”¹⁰⁶ by increasing the number of Justices on the Court. Since then, “court packing” to achieve a current political objective has been a universally understood pejorative. Constitutional amendments to reverse Supreme Court decisions have been only slightly more successful. Of the many such amendments offered, only the Sixteenth Amendment, providing for a national income tax, made its way into the Constitution.

The one effective structural check on judicial supremacy is the joint responsibility of the two elected branches of the government to staff the Court. If the President and the Senate are to exercise a meaningful popular will check on judicial supremacy, they must do it with the long-range view that mirrors the life tenure of the Justices and the Court’s long-range influence and not the short-range view that reflects the currents of political positions.

103. THE FEDERALIST NO. 78 (Alexander Hamilton).

104. *Id.* (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”).

105. GERHARDT, *supra* note 41, at 154-55. The First Congress’ number of six Justices was reduced to five by the Federalists fearing a Jefferson appointment and restored to six when the Jeffersonians took control of the Congress. During the argument about a national bank, the Senate denied President Jackson’s nomination of Roger Taney by abolishing the seat. When Jacksonians controlled the Congress, the Court was expanded to nine, enhancing President Jackson’s influence. A radical Republican Congress reduced the size of the Court to thwart President Andrew Johnson and restored the seats when Johnson left office. *Id.*

106. Associate Justices Pierce Butler, James C. McReynolds, George Sutherland, and Willis Van Devanter. *Id.*

V. IDEOLOGY CENTERED, AGENDA REJECTING APPOINTMENT PROCESS

The President and Senate can exercise a meaningful influence on the Court's role in shaping society by paying express attention to how prospective Justices view the Court's role, how they approach constitutional analysis, and how they understand various constitutional provisions. If the President and the Senate are serious about their duty, there is a formula that is simple to follow, but politically difficult to accept. It emphasizes their obligations as public servants at the possible cost of a lost opportunity to score current political points: (1) Inquire about long-term Court issues, rather than hot button issues of the day. (2) Search for individuals with a well thought-out judicial philosophy who can ensure that no single philosophy dominates the Court. (3) Keep ideologues of any stripe off the Court by looking for individuals whose respect for the Court's historic role is greater than their adherence to any particular ideology.

The first step, as with most journeys, is the most difficult. Neither the President nor the Senators should seek a nominee's views on the political questions of the day, or ask about how particular cases should be or have been decided. This is the most difficult step because these are the questions with which the interest groups and the media are obsessed, and interest groups and the media are the things with which politicians are obsessed. Interest groups and the media are properly interested in resolution of current hot button issues; they are the grist for the political mill of election campaigns; they are what popular sovereignty is all about. The President and the Senators are properly interested in those issues as campaigners and when passing and enforcing legislation. But they have other obligations, as well. Their unique opportunity to choose the members of the other branch of government is such an obligation. To put it bluntly, their obligation to provide the country with a Court that will have the proper view of its place and of the Constitution is more important than finding a Justice who will vote the "right" way on abortion – whatever that right way is – or the "right" way on whatever will be the hot button issue of 2020.

Roe v. Wade is this era's national bank controversy, New Deal struggle, and breakdown of segregation. It does not achieve its status because a majority of the populace is interested in reversing a woman's right to terminate a pregnancy,¹⁰⁷ but because it is the signature for a wider social issue – the extent to which the elected government, reflecting its view of the social, moral, religious views of the majority, can impose those views on the entire society. Unlike the hot button issues of earlier eras that related to societal structure (including the issue of slavery), the "privacy" issues deal exclusively with cultural texture. The 1980 Republican platform's family values plank was about *Roe*. President Reagan's nominees were allegedly required to pass a *Roe* litmus test. Senator Joseph

107. Karlyn Bowman, Gallup News Service, *Abortion Attitudes Today*, (Jan. 2000), at http://www.gallup.com/poll/guest_scholar/gs000112.asp (July 18, 2003).

Biden, an important Democratic member of the Senate Judiciary Committee, announced that his vote depended upon a nominee's view of *Roe*.¹⁰⁸ When vacancies on the Court seemed imminent in 2003, the interests groups from one side of the divide and the other focused on *Roe* as the *sine qua non* of qualification. The President and many Senators will be sorely tempted to give great, if not determinative, weight to the next nominees' views of *Roe*. It will play to – maybe be demanded by – their core constituencies. In a democracy in which less than half the eligible voters regularly bother to cast a ballot, intensity of interest is a more valuable political coin than any opinion poll majority.

If the President and the Senators are more interested in the long-term future of the nation than in their own temporary political gain, they will resist the temptation to ask or talk about *Roe* or any other of the hot button issues of the culture wars. Those issues put the wrong focus on the process. In a political version of Gresham's Law, "bad questions drive out good."¹⁰⁹ At least since the Federalists and the Republicans were intensely interested in the best structure for their new government, the popular hot button issues of the day have been of greater interest and reportage (and more likely to gain the questioner political capital) than abstract questions about the role of the Court, the theory of constitutional analysis, and the meaning of portions of the Constitution. If focus on the "bad" questions is allowed to "drive out the good," there will be at least three unfortunate consequences: (1) Decision-makers who care about the nominee's influence on the long-term future of the Court will not gain the information they need. (2) Decision-makers, the public, and, in time, the potential Justices themselves, will begin to believe that only the popular questions matter in choosing a nominee, changing the Court, permanently, from an oracle for the law to an orifice for popular choice – something of which our government already has at least two. (3) The quality of the jurist that will emerge from a *Roe* driven process is likely to be less than we need.

Thirty years after *Roe*, a nominee with a firm view about whether it should be overruled, is unlikely to be a good Justice. Whatever the nominee's view about the propriety of the constitutional analysis in *Roe*, the Court has been reticent to overturn a precedent of its age and social interest, doing so only in the rare instance where a different societal reality demands it. A nominee who knows enough to resolve those issues without being in the crucible where the vote counts, might know enough to be a legislator, but knows too little to sit on the Court.

It is important that the nomination and confirmation process not focus on how a nominee would decide a hypothetical case or rule on a particular precedent. It is equally important that the ideology, "philosophy of constitutional interpretation,"

108. GERHARDT, *supra* note 41, at 313.

109. "Bad money drives out good" is attributed to Sir Thomas Gresham (1519-1579) a financial advisor to Queen Elizabeth I of England. 5 NEW ENCYCLOPEDIA BRITANNICA 489 (2002).

“particular mind set” or whatever one call’s the perspective from which a nominee will “approach a legal problem,” become a major factor in assessing a nominee’s suitability. Questions about ideology will help to illuminate a nominee’s views about the long-term issues that matter for the Court’s place in our societal structure. While there may be no necessary correlation between methods of constitutional interpretation and views of the Court’s role in society, the existence of a continuum from the pure textualist, who believes that everything that matters is in the Constitution, to the pure non-interpretivist, who believes that the Constitution is a starting place at best, is proof that ideology is critical to the functioning of an institution that decides societal issues of current importance by reference to a relatively short, two centuries-plus-old document full of general phrases. “We are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt.”¹¹⁰ In addition to focusing on more relevant issues, exploration of ideology will make the selection process more transparent, more informative, and more honest. As a possible bonus, attention to a nominee’s ideology might overshadow the focus of the various interest groups on how the nominee would decide a particular case or the obsession of the media with whether the nominee is among the majority of the nominee’s generation who once smoked a joint.¹¹¹ The latter is no small matter. The increasing popularity of smear politics, fueled by media fascination with the personal and the sensational, has created a world in which Caesar’s wife might have second thoughts about public life. Attention to ideology, with its implications for the direction of the Court, might push the personal garbage beyond the public dialogue and public interest.

In extolling the advantage of inquiry about ideology, it is only fair to acknowledge the problem of execution. Aside from the likelihood that such an inquiry will score no political points for the questioner, ideology or philosophy about the Constitution, the Court, and its work is not, generally, what Presidents and Senators know. And slipping from the general philosophy to the particular hypothetical is easy to do if one is not careful. Consider Senator Schumer’s proposed First Amendment questions: “What’s your views on the First Amendment? How broad, how narrow? . . . Well, how does that stack up in terms of campaign finance reform? Would you vote to knock out much of campaign finance reform?”¹¹² Leaving aside whether the questions are fashioned so that

110. Professor Thomas C. Grey, who coined “interpretivist” and “non-interpretivist” eventually disagreed with himself. MICHAEL J. GERHARDT ET AL., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 65-66 (2d ed. 2000) (citing Thomas Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984)).

111. President Ronald Reagan withdrew Douglas Ginsburg’s nomination after he was accused of smoking pot sometime in his past. For a withering critique of the role of interest groups and the media in the judicial selection process, see CARTER, *supra* note 7.

112. ROTUNDA, *supra* note 45, at 128 (reporting Senator Schumer’s comments on NBC’s telecast of *Meet the Press* on July 1, 2001).

they fairly could be answered without more definition, they cover a continuum from the most general view about the sweep of the First Amendment to the most specific about how the nominee might vote on the constitutionality of an unspecified portion of the campaign-finance reform act. Questioning about ideology will not be easy. Senators will have to learn something new, depend heavily on staff, consult with theorists who can identify the issues, and work with lawyers who can frame a simple question designed to evoke a complex answer.

Asking about ideology begs the question: What should be done with the answer? An obvious response is that the popular sovereignty check on judicial supremacy suggests leaving it to the political process. A President should not nominate and the Senate should not confirm someone whose ideology is not acceptable. If the President and the Senate have different ideas of “acceptable,” the normal political process of compromise will sort it all out. Even if the process is messy, at least it will be messy about the right issues. A less obvious and undoubtedly less likely response is that successful compromise between majority and minority views is the essence of an enduring democracy. The President and the Senators, in pursuit of their joint obligation, should endeavor to maintain various judicial philosophies on a Court that helps to shape the democracy. Conceding that such an unselfish view has not prevailed since the Federalists tried to hijack the judiciary in 1801, the advantage of this less likely response is that it sends the message to all concerned that the Court is not a political prize to be captured.

Inquiry into ideology and insistence on answers, in addition to identifying relevant considerations and helping to take the focus from political issues of the day, might help identify the nominee whose political or judicial agenda is not obvious from past statements or actions. The Bork experience cautions nominees not to be forthcoming about their ideology. That, unfortunately, is the wrong lesson. Whether Robert Bork should have a seat on the Court aside, it probably was not his ideology – his philosophy about either the Court or the Constitution – that defeated his candidacy. President Reagan’s delay in coming to his defense,¹¹³ Democratic political payback,¹¹⁴ Bork’s infamous firing of Watergate Special Prosecutor Archibald Cox,¹¹⁵ his “confirmation conversion” from previously stated positions,¹¹⁶ or some combination of all of them are at least as likely. As Professor Carter has observed, Bork “had much to answer for.”¹¹⁷ But the real problem for Judge Bork was that he was perceived as someone whose ideology was a crusade. The problem was not with what he believed, but how fervently he

113. GERHARDT, *supra* note 41, at 83.

114. *Id.* at 85.

115. *Id.* at 163.

116. *Id.* at 197.

117. CARTER, *supra* note 7, at 48.

believed it and how often he expressed it. In politicking for the position,¹¹⁸ he provided ammunition for his opponents, but most importantly to the outcome, he painted himself as a man with an agenda. While Senator Ted Kennedy's "Robert Bork's America" speech may have been "a patent fit of gross hyperbole,"¹¹⁹ it succeeded at least in part because Robert Bork's *agenda* made the hyperbole plausible to many.

The obvious tactical lesson for nominees from the Bork experience is that being viewed as an ideologue – someone with either a political or a judicial agenda – will get you in trouble. There is a lesson for Presidents and Senators as well. Ideology matters. Lost in the revulsion about the worst parts of the Bork experience is that the discussion about judicial philosophy was useful in assessing whether Robert Bork had an ideology or the ideology had him. Presidents choosing nominees and Senators confirming them should ask about ideology, should insist on answers, and should listen carefully to the content and the tone of the nominee's responses. No nominee should be allowed to hide behind the spurious claim that answers would be unethical. A nominee who claims to have no opinions is either not being forthcoming or is not qualified. Someone who is one nomination and confirmation away from a seat on the Supreme Court and cannot express an opinion about the role of the Supreme Court, how the Constitution should be interpreted, and what various parts of the Constitution mean should be rejected for insufficient intellectual fortitude. Hamlet would not have made a good Justice. By the same token, overwhelming certainty about the propriety of one's ideology is the mark of a nominee too certain to be a judge.

Agenda, as I have used it, is an amalgam of qualities that suggest an advocate, rather than a decision-maker – legislative character rather than judicial character. While no person is all one or all the other, one does not have much difficulty, at least in retrospect, in differentiating between the second Justice John Marshall Harlan and Justice Antonin Scalia. Both fit many people's definition of conservative, but while Justice Harlan appeared to be a decision-maker with a vision, Justice Scalia appears to be a visionary pursuing particular decisions – a Justice with an agenda.

Professor Stephen Carter has said, "The issue, finally, is not what sort of theory the nominee happens to indulge but what sort of person the nominee happens to be."¹²⁰ In a more expansive suggestion about testing character, Professor Ronald Dworkin urges inquiry into the general political and social views of nominees, because no Justice can insulate "his decision from his own most basic convictions about political fairness and social justice."¹²¹ Professor Gerhardt, however,

118. GERHARDT, *supra* note 41, at 196.

119. ABRAHAM, *supra* note 52, at 298.

120. CARTER, *supra* note 7, at 151.

121. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 313 (1996).

worries that “focus on the nominee’s moral character is bound to make judicial confirmations much messier . . . bound to turn on perceptions or even on swearing contests between conflicting witnesses about private conduct with arguably public implications.”¹²²

Understanding the nominee’s judicial character strikes me as the most important aspect of the nominee’s qualifications – worth the extra mess, if necessary. The extra mess, however, should be avoidable. Judicial character is not exactly “good character” in the general sense. Even a charge of sexual harassment, though it raises questions about personal relationships and sensibilities, seems to have less to do with judicial competence than qualities like honesty, open-mindedness, patience, intellectual curiosity, and interest in the opinion of others, to mention a few. Those who believe that Justice Clarence Thomas is less than they would like in a Supreme Court Justice complain about what they perceive as flaws in his judicial character (or about how he votes) long after the “he-said, she-said” has faded.

Judicial character, whatever else it entails, suggests a person with sufficient hesitation, as a matter of character, so that decisions await controversies. Judicial character also values the tradition of the Court. Tradition is the real governor maintaining the Court as “half judicial tribunal and half political preceptor.” While the Court’s inability to interpret the Constitution without a case and controversy is a structural restraint on judicial supremacy, it is what Professor McCloskey called the “‘courtly’ attributes”¹²³ that keeps the Court in its place. The Court does not give advisory opinions, has exercised (mostly) consistent discretion not to venture into certain areas of constitutional consideration, and usually considers itself bound by its precedents. Both the rarity and the relative longevity of the Court’s policy-making are due to the Court’s adherence to the law’s tradition. The structure and rules of legal analysis, the notion of *stare decisis*, and the constitutional tradition that policy is the province of the majoritarian governmental institutions, unless they act or fail to act in a way that offends the core values of the society, inhibit the half of the Court that is “political preceptor.”

Agenda is the enemy of tradition. The two eternal questions for the Court are when to exercise its power to identify core values and when to change its mind about core values. Justices with agendas are too eager to answer those questions too quickly. A nominee who does not have a view about how the Constitution should be interpreted, about what should be the role of the Supreme Court and about what various parts of the Constitution mean has no ideology and is not qualified for the important work of a Supreme Court Justice. A nominee whose reasons for coming to the Court are to influence

122. GERHARDT, *supra* note 41, at 315.

123. McCLOSKEY, *supra* note 9, at 12.

future decisions in accord with the nominee's views about political questions of the day, correct what the nominee views as past mistakes of the Court, or change the way the Court operates has an agenda, is an ideologue, and is not qualified for the important work of a Supreme Court Justice. People who have strong political positions about legal issues are poor choices for the bench, not because they are bad people, but because they do not have the judicial character.

CONCLUSION

It will be difficult to establish the norm that politicians should not appear to politicize the Supreme Court. The Court's moderating, counter-majoritarian function has been so important to our history that responsible politicians must do what it takes to preserve it. Some semblance of reason in the process will develop if Presidents and Senators realize that ideology on its own normally should almost never disqualify a candidate, while agenda should always. The realization depends as much on a positive view about ideology as it does on a negative view of agenda. Instead of pretending that ideology does not matter, Presidents and Senators should acknowledge that there are varying respectable views about the Court and the Constitution, that it is important to know a nominee's views, and that those views are not disqualifying unless they are beyond the pale or held with such ferocity that they will override all other considerations. There will, of course, be differences of opinion as to what is too ferocious and as to where the pale ends, but politics, government, and society are about conflicting views. One can only ask for good faith, and then vote in the next election against politicians who refuse to exercise it.

Acceptance of the place for ideology and rejection of any place for agenda will diminish the worst parts of the appointment process and will stop the Court from spinning out of its traditional place and into the elective political maelstrom. If ideology in a reasonable nominee were not a basis for challenge, President George W. Bush might not feel compelled to nominate an ideologue who writes that "the wife is to subordinate herself to her husband and that the woman is to place herself under the authority of the man,"¹²⁴ or one who in a political speech characterizes *Roe* as "the worst abomination of constitutional law in our history" and pray for "Please, God, no more Souters."¹²⁵ If agenda were an automatic disqualifier, Democratic Senators might not feel compelled to reject for the appellate court an apparently fair-minded district court judge unlucky enough to

124. Jennifer Lee, *Attack on Judicial Nominee Leads Panel to Delay Vote*, N.Y. TIMES, Friday, Apr. 11, 2003, at A22 (discussing district court nominee Dr. James Leon Holmes, a former President of Arkansas Right to Life).

125. Editorial, *Unfit to Judge*, WASH. POST, Apr. 11, 2003, at A26 (discussing appellate court nominee William Pryor, Attorney General of Alabama and outspoken culture wars warrior).

be sponsored by a Senator who made public statements taken to be racist¹²⁶ or oppose a well-qualified, well-respected constitutional law scholar because of his scholarship.¹²⁷

Interest groups on the “right” and the “left” are raising money and gearing up for a political campaign about abortion, affirmative action, school prayer, and other specific culture war issues. It is unlikely that the groups on either side of the divide represent anything near a majority of Americans,¹²⁸ yet they are driving the federal judiciary appointment process and are bidding fair to drive the coming Supreme Court appointments. The First Amendment and our understanding of an open and democratic society suggest that there is little more important than their right to political speech. But that does not mean that the President and the Senate need to listen when they speak to the wrong issues. It is a given that a consequence of free speech is that there will be nonsense and falsehood in the public dialogue. The system works when the listeners – in this case the President and the Senate – know how to separate the good from the bad, the fair from the unfair, the right from the wrong. When it comes to the Supreme Court, ideology is inevitable; agenda is intolerable.

126. Judge Charles Pickering, a district court judge in Mississippi, was a controversial appointment whose rejection by the Senate Judiciary Committee when Democrats controlled the Senate was due more to the foot-in-mouth disease of minority leader Senator Trent Lott than to any suggestion that Pickering was a judge with an agenda – a charge that was made against another rejected nominee, Judge Patricia Owens. Nick Anderson, *Battle Over Judiciary Enters New Phase: As Democrats Prepare to Fight Bush Choice, Other Nominees Move Toward Approval*, L.A. TIMES, Apr. 26, 2003, at A16 (“Democrats attacked Owens as a conservative ‘judicial activist.’”).

127. Judge Michael McConnell, a respected law professor, former Supreme Court clerk to Justice William Brennan, and advocate of the Court’s traditions was confirmed only after heated objection based not upon his judicial ideology, but upon what liberal interest groups feared might be his positions on *Roe v. Wade*, 410 U.S. 113 (1973) and on *Bob Jones University v. United States*, 461 U.S. 574 (1983) – cases he would be in no position to overrule as a circuit court judge.

128. See generally GERHARDT, *supra* note 41, at 69-72. Public choice theorists, contending that narrow interest groups have more influence on legislators than larger groups with diffuse interests, have put a scholarly mantle on the old political wisdom that intensity is more important than numbers. *Id.*