THE CONFIRMATION MESS

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Constitutional theory is widely regarded by scholars as one of the great disasters in contemporary legal thought. None of the popular theories is seen as finally workable, all are contingent and internally chaotic, and the courts that must do the serious work of interpreting the Constitution show no serious interest in any of them. The ever-messier business of nominating and confirming Justices to serve on the Supreme Court is, in its way, contributing to the chaos, and things were spiraling downward well before the Senate's decisive rejection of the nomination of Robert Bork. The Senate, unable to agree on the precise role that it should play in the selection process, now finds itself trapped between the notion that it should act to enforce a set of professional standards, reviewing nominees only to ensure that they possess proper qualifications, and the idea that it should inquire deeply into the substantive judicial philosophy of each nominee, to keep from the Court those whose constitutional visions are too extreme for the American people to stomach. Neither of these roles is a useful one for the Senate to play — the one because it trivializes the process, the other because it trivializes the Constitution. There is higher ground, however, and this is a small story about how the Senate might get there.

I. THE PAPER RECORD

It has become something of a commonplace in the wake of the Bork debacle to assert that Robert Bork was, on paper, perhaps the best qualified candidate in many decades to be nominated to serve on the Supreme Court.[1] The implication is that there exists a set of ideal objective criteria by which nominees should be judged. The criteria most bandied about (and not merely in the Bork battle) involve professional accomplishment: cases briefed and argued, law review articles authored, judicial or other public service, and so on. The list is perhaps not very different from what a top law firm or leading law

* Professor of Law, Yale University. Some of the themes presented in Part II of this essay were earlier set forth in Carter, *The Bork Fight: Too Much of a Good Thing?*, Atlanta Journal-Constitution, Oct. 18, 1987, at B1. Bruce Ackerman, Enola Aird, Akhil Amar, Lea Brilmayer, Harlon Dalton, Owen Fiss, Paul Gewirtz, Geoffrey Hazard, Suzanna Sherry, Kate Stith, Ruth Wedgwood, and Harry Wellington all were kind enough to read and respond to earlier drafts. Few agreed with much of what I had to say, but all were thoughtful and generous critics.

[1] *See, e.g.*, THE WHITE HOUSE REPORT: INFORMATION ON JUDGE BORK'S QUALIFICATIONS, JUDICIAL RECORD & RELATED SUBJECTS, *reprinted (as abridged) in* 9 CARDOZO L. REV. 187, 188 (1987) (describing Judge Bork as "one of the most qualified individuals ever nominated to the Supreme Court"); Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988).

school would look for in its next hire. The effect is to objectify a process that the Constitution seems to treat as political. In this idealized vision, appointment to the Court becomes not the outcome of a political struggle between President and Senate, but almost a reward for the lawyer who has compiled the most resume points when the time comes to stop and add up the scores.

Intellectual capacity is hardly irrelevant to qualification for service on the Supreme Court. The vision of appointment as a reward, however, does more than establish a baseline; it treats a Justiceship like a merit promotion, and it implies that "professional qualifications" are more important than anything else. The American Bar Association, like the Senate that routinely asks its advice, reinforces this vision through its system for rating nominees. The Association's Standing Committee on Federal Judiciary ranks nominees as "Well Qualified," "Not Opposed," and "Not Qualified."[2] The rating of "Well Qualified" is reserved for nominees "who meet the highest standards of professional competence, judicial temperament and integrity" — those who are "among the best available for appointment to the Supreme Court."[3] Those who are rated as "Not Opposed" are considered only "minimally qualified"; those rated as "Not Qualified" lack the "professional qualifications for appointment to the Supreme Court."[4]

It is plainly quite useful to a senator to be able to explain a vote against a nominee for the Supreme Court — or, for that matter, against a nominee for any federal court — on the ground that, whatever one may think of the individual's politics or policies, the nominee was not qualified. When the plum of appointment is not justified by the candidate's resume, then a member of the Senate must reluctantly break with the President and vote "No."

All of this sounds very impressive, and it possesses a clear, rational appeal that doubtless plays well on the stump. Indeed, it is perfectly sensible for the Senate to review a candidate's professional experience to determine whether she meets some baseline standard of legal and intellectual competence.[5] Serious difficulties arise, however, from

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[2] This is different from the system that the Association uses to rank nominees for the other federal courts. Those nominees are rated as "Exceptionally Well Qualified," "Well Qualified," "Qualified," and "Not Qualified." *See* AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 4–5 (1983).

[3] *Id.* at 8.

[4] *Id.*

[5] Setting the baseline, however, may be difficult. The Senate's 1970 rejection of President Nixon's nomination of G. Harrold Carswell was based more or less explicitly on the conclusion that Judge Carswell was not competent to do the job, but sparked controversy nevertheless. Some commentators found the Senate's threshold approach problematic, *see, e.g.*, Halper, *Senate Rejection of Supreme Court Nominees*, 22 DRAKE L. REV. 102, 103–07 (1972), whereas others thought it was for the best, *see, e.g.*, McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7, 21–24 (1970).

treating the candidate's paper qualifications as sufficient in and of themselves to justify appointment. The obvious problem is that the model of the confirmation process as essentially a resume review is profoundly ahistorical. Those who designed the process plainly contemplated the Senate's role as a significant check on presidential discretion.[6] The less obvious problem is that even if the resume review model is appealing, the traditional credentials — prior judicial experience stands out as an exception — seem to bear little relation to the work of a judge. Why are excellence in legal scholarship or significant experience in litigation important parts of the ideal resume?

It is not really clear, for example, what the Senate should search for when it looks to see whether a nominee has a respected record as a legal scholar. A scholar may produce outstanding scholarship and show evidence of a fine mind. Yet the nominee who refuses to abandon positions taken as a scholar is arguably too closed-minded to serve as a judge; the scholar who abandons those positions at will is left open to the charge of sacrificing principle for expediency.

Especially in the field of constitutional theory, moreover, many legal scholars are accustomed to dealing with problems at a relatively high level of generality, often adducing principles from arcane philosophies and even from the air rather than from the needs of particular cases. Possibly such individuals are ideal Justices — perhaps they will do equal justice to all persons because they are not accustomed to thinking about parties as persons. But they may also be disastrous as Justices, precisely because their habits of mind may not press them to think hard enough about the practical problems that arise from the application of abstract principles to concrete cases.

Another claim, and one that partly answers the concern over a lack of familiarity with the problems of deciding real cases, is that the ideal nominee should have litigated real cases before real judges. But experience in twisting law to fit facts and facts to fit preferred results is an obvious qualification only for judging of a particular kind — the kind in which the answer is more important than the route one takes to find it. A skill at crafting an argument for a result is not the same as a skill at finding the result the law requires. If the second skill is more desirable in judges than the first, it may be more important to find lawyers who have done good work advising clients on the legality of planned conduct than lawyers who have built their

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[6] *See, e.g.*, THE FEDERALIST NO. 76, at 457 (A. Hamilton) (C. Rossiter ed. 1961) (suggesting that the Senate's role in confirmation "would be an excellent check upon a spirit of favoritism in the President" and make it less likely that "disposition of offices would be governed by . . . his private inclinations and interests"). The implications of the historical understanding have been picked over elsewhere, and in detail. *See, e.g.*, J. HARRIS, ADVICE AND CONSENT OF THE SENATE 17–35 (1953); L. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970).

reputations by solving their clients' problems in the courts. Although lawyers who brief and argue cases for a living also have experience rummaging through the record in search of holes and help, judges have law clerks to do that work for them, and therein lies an intriguing possibility: if one wants seriously to treat fitness for judging as a matter determined primarily by professional qualification, then perhaps judging should be treated as an independent profession, rather than as an extension of lawyering, and judgeships awarded to those who have invested time and effort in preparing themselves for the role.[7] The beginner might then learn how to judge in the tradition of apprenticeship, by sitting at the feet of the master, watching and, eventually, imitating when called upon to do some part of the work. The proper professional qualification for judging generally might then be apprentice judging — service as a law clerk.[8] (The usual one- or two-year term of service might of course need to be extended.) The most important professional qualification for the highest form of judging — the judging that the Supreme Court does — would be service as a judge on a lower court.

The rhetoric of confirmation debates often does treat service on a lower court as an important professional qualification. If judging is truly to be viewed as a profession, however, and if Justices of the Supreme Court are truly to be viewed as judges, then service on lower courts and the quality of that service (measured by the standards of the profession) should be the paramount qualifications. An occasional exception to the requirement of judicial experience might be made for the brilliant apprentice able to skip the years as journeyman and jump directly to master, except that even the most ardent advocates of the professionalization of the judiciary seem unprepared to appoint Justices directly from the ranks of even the best law clerks. This suggests that our devotion to appointing as Justices the individuals with the best professional qualifications does not readily lead us to treat judging as an independent profession. Perhaps the claim that professional accomplishment matters is itself a bit overstated. In that case, a Senate seeking a useful role in the confirmation process must find another standard to apply.

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[7] For an intriguing — but incomplete — argument for reforming the American judiciary by adopting aspects of the continental career-judiciary model, see Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 848–55 (1985).

[8] Consider the tasks that most law clerks perform. The clerks read briefs to get a sense of the issues raised. So must judges. The clerks meticulously work towards an impressive command of the facts and law involved. So should judges. The clerks are capable of dispassionate analysis of both parties' legal arguments. So ought judges to be. The clerks often draft opinions. So, one hopes, do judges. (In fact, it might be useful for the Senate to ask nominees who have been judges how they have used their clerks.) Law clerks, moreover, spend their terms in close company with living, breathing, working judges — in the case of the most successful law clerks, with Supreme Court Justices.

II. THE PAPER TRAIL

For most Americans, the Supreme Court of the United States is shrouded in a distant and somewhat frustrating aura of legal majesty. The Justices hand down decisions that touch the lives of every American, and yet they are seen as untouchable, unreachable, and unpersuadable by public protest. Despite the bitter criticisms that it frequently faces, the Court retains an almost mythic character: the Justices meet, lawyers argue, and every now and then, unexpectedly, the Justices decide — and new, fundamental, unchallengeable law is made.

When the public hates what the Court decides, there is grumbling about amending the Constitution or appointing some new people who will turn things around. The grumbling, however, is an inevitable concomitant of an underlying tension vital to the constitutional scheme: the Constitution clothes the Justices in the raiment of independence, and if they seem so frustratingly distant that individual citizens and even organized pressure groups cannot hope to have much influence over what the Court decrees as fundamental constitutional law, that is simply evidence that the scheme is working well.

The moment when one of the distant and mystical guardians steps aside is a crucial political instant, a time when the Justices seem suddenly mortal, when one who wishes to join them comes before the bar of politics as a supplicant, when the elected representatives of the People of the United States can pass judgment. Suddenly there is an opportunity to influence the course of judicial decision, to show approbation or disapproval of the work of the Court. The rhetoric of the moment is irresistible: let us test this candidate, to ensure that he or she shares our values, is not out of step with the moral judgments of the American people, and will read the Constitution not according to some eccentric or extremist philosophy, but rather in the way that We the People demand.

The notion that the confirmation process should include a substantive review of the nominee's legal theories long antedates the controversies that have beset the confirmation process over the past two decades.[9] The idea has immediate appeal, for it is in the name of We the People that the entire apparatus of the federal government purports to exercise authority. Although the most forceful defenders

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[9] Inquiry into the nominee's substantive legal positions became the order of the day in the wake of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), when all nominees were for a time called upon to prove their antislavery convictions. *See* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 320–57 (rev. ed. 1926). For subsequent developments, see, for example, Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1, 5–37 (1983).

of judicial independence occasionally forget the fact, every federal judge is an agent of that apparatus. Different apparatchiks have different roles and might be insulated from pressures in a variety of ways, but judicial independence from the passions of the moment is not obviously equivalent to independence from the passionate sweep of history. The nation moves, and Justices very far ahead of it are as likely to be swept into irrelevance as those very far behind. Because the politically sensitive President nominates the Justices and the politically sensitive Senate must consent to the nominations, it is no easy matter to argue that the selection process was designed to be, or can practically be made to be, entirely distinct from politics.

There is a sense in which the ultimate amenability of the Court to politics is something to be celebrated, for the nomination process is often the only effective device by which the people can signal their approval of the work of the Court or try to force a shift in course. "Here the people rule," President Ford announced after the resignation of his predecessor,[10] and no doubt opponents of a defeated Supreme Court nomination are tempted to make the same proclamation. After all, if maintenance of the constitutional system requires a polity that believes that it governs itself, it is useful that the system should provide an occasional reminder of who ultimately is in charge. It ought to come as no surprise, consequently, that politicians so readily embrace the current academic fashion that invites the Senate to assess something called "judicial philosophy" in deciding whether to consent to a nomination.

But "judicial philosophy," especially as the term is used by proponents of quizzing judicial nominees about their own, is not easy to distinguish from the prediction of results in concrete cases. So slippery and elusive is the concept of judicial philosophy that trying to define it at all is, as Harold Schonberg wrote of playing chess against former world champion Tigran Petrosian, "like trying to put handcuffs on an eel."[11] Trying to define it in a way that accurately captures what the advocates of substantive scrutiny mean by it, but that does not threaten judicial independence, is harder still.

Most Americans, after all, know the Court principally by the results that it reaches. In public debate, aside from a handful of such political buzzwords as "intent of the Framers" and "judicial activism," judicial philosophy in the sense that is of interest to constitutional theorists does not exist. For most of the people, most of the time, Constitution and Court alike are dimly seen, indistinguishable abstractions. The Constitution is the thing that the Justices call upon when they let criminals run loose on the street or put segregationists in their

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[10] N.Y. Times, Aug. 10, 1974, at 1, col. 7.

[11] H. SCHONBERG, GRANDMASTERS OF CHESS 245 (rev. ed. 1981).

place, shoulder God out of the classroom or preserve the privacy of the bedroom. Although Americans do exhibit a chauvinistic pride in a Constitution that very few have read, when considering the constitutional rules under which we live, it is the Court, not the Constitution, that America blames or extols.[12]

It can scarcely be surprising, then, that Americans display an almost proprietary interest in the makeup of the Supreme Court and in those constitutional rights that the Court has decreed them to possess. The issue, however, is hardly one of constitutional interpretation. Never mind that theorists might question, for example, whether the right to reproductive privacy has a *constitutional* basis; those who think the right a good thing are satisfied that it has a *judicial* basis, that is, that the Supreme Court includes at least five Justices who want to protect it. When the people and their representatives talk of "protecting our basic rights," or even "maintaining the essential balance," it is hard to imagine that they mean much more than "making sure we still have the votes." The constitutional rights defined by the Court's decisions take on an independent virtue, quite distinct from any theory of constitutional interpretation, and it is those rights, not a theory, that the political rhetoric about judicial philosophy is meant to protect.

This is surely the message behind the purported discovery of a series of smoking guns in the intellectual baggage that Judge Bork brought to his confirmation hearings. Critics insisted that Judge Bork's constitutional theory was outside the mainstream of contemporary jurisprudence, but unless the mainstream is defined very narrowly, this charge is surely incorrect as a factual matter. One of the gravest weaknesses of the liberal constitutional theory that currently dominates the academy is its inability to point to much in the Constitution's text or history to explain the supposed wrongheadedness of the conservative assault on the work of the modern Court. Judge Bork was pilloried, for example, for his dogged reliance on the original understanding as a tool for interpretation.[13] Whatever the degree of controversy among legal scholars on originalism as a method, however, it is just that — a controversy. Originalism plainly has its supporters, including Justices of the Supreme Court of the United

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[12] For a wonderful account of the nation's stormy love affair with Constitution and Court, see M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF (1986).

[13] Other critics blasted Judge Bork as result oriented — enforcing a rigidly originalist perspective when it suited his purposes, and relaxing the requirements of originalism when the theory led to the wrong results. In the current state of constitutional theory, however, this is not much of a criticism. It can easily be made of virtually all the important work of the current Court, and similar inconsistencies haunt virtually every effort to work out a coherent approach to constitutional interpretation. In public debate, of course, the charge that a judge is result-oriented has greater or lesser force depending on the popularity of the results in question.

States, who do not blink at originalism as a strategy when it serves their interests.[14]

The more sophisticated version of the assault suggested that Judge Bork's theory as applied would lead to results out of step with what the American people would prefer. But this claim, too, is an argument over concrete cases, for the American people, whatever their reverence for the Constitution itself, however strong their affection for particular rights, cannot fairly be said to share a constitutional theory. The tendency in contemporary political rhetoric to say "philosophy" but mean "rights we like" was showcased during the Bork battle in the bizarre spectacle of elected representatives of the people of the United States solemnly propounding such questions as whether a Bork appointment would further or hinder the articulated interests (and, implicitly, the political programs) of women, or of nonwhites, or of a Congress jealous of its foreign policy prerogatives, until in the rush to explain what valued decisions a hypothetical Justice Bork would overturn, the Bork confirmation battle took on the aspect of an election contest in which one party accused the other of seeking to undermine the nation's traditional values.

That charges of this kind were made, and with real venom, hardly makes the Bork battle unique. In fact, the battle was unusual only because the charges were taken seriously and the nominee was rejected. Members of the Senate are practical politicians, not noted for voting to reject Supreme Court nominees if the vote will cause trouble back home. This in turn suggests that the fundamental charge against Judge Bork — that the results that a Justice Bork might reach would not match the results that the American people would prefer — was true. Certainly his views as understood by the American people

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[14] Every Justice who has sat on the Court in recent years has written or joined opinions invoking the original understanding to decide questions involving the separation of powers. *See, e.g.*, Bowsher v. Synar, 106 S. Ct. 3181, 3186–87 (1986) (Burger, C.J., joined by Brennan, Powell, Rehnquist, and O'Connor, JJ.) (appealing to original understanding on legislative action); INS v. Chadha, 462 U.S. 919, 946–51 (1983) (Burger, C.J., joined by Brennan, Marshall, Blackmun, Stevens, and O'Connor, JJ.) (same); Nixon v. Fitzgerald, 457 U.S. 731, 771–78 (1982) (White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (appealing to original understanding on punishment of the President). Elsewhere I have referred to this tendency to rely on originalism in separation-of-powers disputes as the "de-evolutionary tradition." Carter, *From Sick Chicken to* Synar*: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. (forthcoming). The same willingness to invoke the original understanding is apparent in cases involving individual rights, where even those Justices most noted for their vision of an evolving Constitution are capable of considerable originalist rigor. *See, e.g.*, City of Memphis v. Greene, 451 U.S. 100, 154–55 n.18 (1981) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (invoking original understanding of thirteenth amendment); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396–98 (1978) (Marshall, J., concurring in judgment in part and dissenting in part) (invoking original understanding of fourteenth amendment).

seemed out of step with their own. Yet even assuming an identity between the views he was perceived to have and the views he had in fact, what is the message in his rejection on this ground? The message must surely be that when the people and their senators and their President talk about "judicial philosophy," they have in mind not adherence to a particular theory, but "people who will reach the results we like," and that both the President and the Senate (and through them, perhaps, the people) see the appointment process as an opportunity to pack the Court with Justices who will vote the right way.

If this is so, then anyone who cares about the integrity of constitutional theory and the independence of the courts should be troubled. At bottom, all the ringing phrases about permitting the ascension only of Justices whose constitutional views are congruent with those of the people — even assuming that the senators know what the people are thinking — contradict first principles of judicial review. Beginning constitutional law students are taught that the Supreme Court serves as a countermajoritarian brake. The institution of judicial review exists precisely to thwart, not to further, the self-interested programs of temporary majorities.

Thus a worrisome paradox emerges. On the one hand, the courts exist at least in part to limit majority sway. On the other, the courts are to be peopled with judges selected at least in part because their constitutional judgments are consistent with those of the majority. Even for a critic who disdains theory and revels in concrete results, this process of judicial selection can be attractive only if one knows (and agrees with) the predilections of a majority of the senators — or of the people in whose name they render judgments on what the Constitution ought to be read to say. For the scholar who believes in the possibility of constitutional theory, the collapse of the nomination and confirmation process into a battle over concrete results carries the potential for disaster.

Constitutional theory is concerned principally with the Constitution as a document and the Supreme Court as an institution. For a constitutional theorist who cares about more than results, a decision is only as legitimate as the judicial process that it reflects. Constitutional theorists therefore take seriously the analysis that the majority in a given case presents in defense of its work. To the theorist, what matters is the legitimacy of the reasoning offered by the Justices to connect the Constitution to the end result. If there is no connection — if the decision seems to represent no more than a personal predilection or perhaps a guess — then a serious theorist must conclude that the Court is not doing its job. If the Justices are appointed because their personal predilections suggest an affection for particular results that the senators also like, the theorist must conclude that the Senate is trying to prevent the Court from doing its job.

To wrap the armor of countermajoritarian independence around individuals selected on the basis of predictions about how they will vote represents the enshrinement, through life tenure, of the popular political judgments of particular eras about the proper scope of constitutional protections — a peculiar fealty to pay to the notion of a written Constitution. Interpretation of a written Constitution should reflect a dispassionate search for fundamental constitutional principles that transcend even the most deeply felt popular passions of a given political moment.[15] Extending life tenure to the judiciary protects the possibility of that dispassionate search. A confirmation process aimed consciously at preserving or overturning particular precedents might be justifiable were the Justices to serve, for example, eight- or ten- or twelve-year terms. But if Justices are selected not because they are wise but because they are right, it is not easy to see why they *should* serve for life. Constitutional amendments — the locking-in of new binding rules — supposedly require something more than the concurrence of the President and a bare majority of the Senate. To concede the propriety of denying appointment to the Supreme Court on the basis of a prediction of concrete results is to encourage efforts to determine constitutional meaning through a different mechanism, one too easily manipulated by temporary political majorities.

Judicial independence, if the concept is to have any force, is not a cloak that can be thrown around a new Justice at the very last minute — after the administration of the oath. Independence must arrive earlier, and cover all potential nominees, from the moment that a sitting Justice retires or dies. A nominee is not independent when she is quizzed, openly or not, on the degree of her reverence for particular precedents. If the President who must select a nominee or the Senate that must confirm one can in effect elicit campaign promises while the vacancy exists, then they surely would be justified in complaining bitterly should those promises later be broken.

And yet it is easy to understand how a Senate casting about for its proper role in the process might have stumbled down the path toward electing rather than confirming Supreme Court nominees. It is all very well for constitutional theorists, who spend their professional lives divining and criticizing judicial philosophies, to call upon the Senate to do the same thing. As a matter of practical politics, however, it is remarkable that anyone would think the Senate able to do it.

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[15] To cherish dispassion (in the sense of relative objectivity) as a goal is not necessarily the same as proclaiming it as a real possibility. Rather, the effort to recognize and overcome one's own biases may itself be an important disciplining tool. *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985).

Passing entirely the question of what judicial philosophy *is*, it should be perfectly plain that at any level much more sophisticated than "Will this nominee vote my party's line?" the members of the Senate are not competent to evaluate it. The carefully nuanced scholarly debate over judicial philosophy is certainly beyond the interest, and probably beyond the ken, of most members of the Senate. Their staff members, while bright, ambitious, enthusiastic, and, in many cases, well trained in the law, are unlikely to possess what Alexander Bickel hopefully referred to as "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."[16] Senators and their staff members will not have read deeply or broadly in the literature on judicial philosophy or adjudication or interpretation; even if they have, they will be unlikely to have the scholarly turn of mind vital to making sense of it all. This is no knock on the senators; it is, if anything, a knock on the notion that something as obscure and subtle as "judicial philosophy" is a sensible measuring stick for use in the essentially political process of selecting judges.[17]

The Senate is designed to be a deliberative body, but not necessarily a deeply intellectual one. This institutional characteristic can be counted a weakness only if one doubts the proposition of relative institutional advantage — that some organizational forms are better than others at performing particular tasks. The Senate may lack the institutional capacity to evaluate judicial philosophy in any non trivial theoretical sense, but that should not limit the senators to assessing the so-called "professional qualifications of the nominee." It simply means that the Senate ought to look elsewhere in seeking to discover what special expertise it might bring to bear on the confirmation process.

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[16] A. BICKEL, THE LEAST DANGEROUS BRANCH 25–26 (1962). Judge Bork is among those who doubt that even judges, about whom Professor Bickel was speaking, possess the virtues mentioned. *See* Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 389 (1985). Ronald Dworkin, in turn, has questioned whether Judge Bork himself possesses a judicial philosophy. *See* Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101, 104–12 (1987). The hunt for a nominee's judicial philosophy may be even more illusory than the text suggests if, as is conceivable, practical judges are unlikely to have one. *Cf.* N.Y. Times, Dec. 14, 1987, at B9, col. 5 (quoting a conservative activist who complained of Judge Anthony Kennedy: "He doesn't have a judicial philosophy we can get our hands on.").

[17] Possibly the Senate staff members, and even the senators themselves, can gain some rough-and-ready insights by attending seminars produced for their benefit by constitutional scholars, but to suppose that such seminars would suddenly confer an adequately sophisticated appreciation of the nuances of constitutional theory is to assume, on little evidence, a learning curve that is remarkably steep. And if, as may happen, the scholars conducting the seminars are also involved in an effort to sway sentiment against the nominee, then the quickly educated staff runs the risk of being trained to follow in the footsteps of Fred Cramer, an aide to Bobby Fischer during the latter's 1972 match with Boris Spassky for the World Chess Championship. Said Cramer: "My job is to complain, not to approve." S. GLIGORIC, FISCHER V. SPASSKY: WORLD CHESS CHAMPIONSHIP MATCH 1972, at 81 (1972).

III. THE SOUL OF DEMOCRACY

The Senate is less directly responsive to political pressures than is the House of Representatives because members of the Senate stand for election every six years rather than every two. In any given year, the entire House is never more than two years away from facing the voters, but two-thirds of the Senate is always a *minimum* of two years from the next election — usually more. In theory, then, the House, designed to respond to the popular will, is and should be swayed by passions when the American people are swayed by passions, generous when the people are in the mood to share what they have, parsimonious when the people are in the mood to keep what is theirs. The Senate is more capable than the House of reflective and deliberative consideration of the issues confronting the legislative branch. The House of Representatives might be considered the heart of the democracy. The Senate, then, must surely be the soul.[18]

The Senate, responsive to public will but also sharing some of the distance of the courts, has the ability to give voice not simply to the passions of the moment, but to the enduring and fundamental values that shape the specialness of the American people. The institutional design of bicameralism makes this balance possible: what the House votes in its haste, the Senate may reconsider at its leisure. The Senate has no special institutional perspective and no relevant special characteristic but this one. If the senators cannot successfully bring to bear on the confirmation process the characteristics that make their institution unique, then there is scarcely an argument available for resting the confirmation power in the Senate rather than in the House, or in the Congress as a whole.

Giving voice to the deepest common values of the American order does not mean masquerading as either a professional standards review board or a law school appointments committee. It means doing what responsible members of the Senate do best: representing their constituents by reaching conclusions based on a relatively disinterested dialogue, which may be a principally internal one, about the policy most congruent with the fundamental aspirations and long-term interests of the American people.

This dialogue has little to do with predicting results in specific cases. A reflective Senate would refuse to speculate about a potential nominee's likely votes, and would eschew any inquiry into judicial philosophy, not merely because the body might be institutionally incapable of evaluating a nominee's philosophy, but also because the long-term interest of the American people requires what, at a deep

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[18] To stretch the metaphor even further, the executive branch might be said to be the brain, and the judiciary the conscience. The life's blood is, of course, the free and open exchange of ideas.

level, most Americans probably want or believe that they have: an independent judiciary. This shared understanding on the desirability of a particular institutional design — courts that are beyond direct political manipulation — does not, of course, rise to the level of a sophisticated theory of law or politics. Deeply shared values of this kind, however, form a more reliable basis for judgments likely to affect the course of the nation for years to come than do vague and more elusive theories about constitutional interpretation. A reflective Senate would understand the threat to judicial independence that is posed when the appointment process is used, by Senate and President alike, as a means for pursuing the short-term partisan end of validating or overturning particular lines of cases.[19]

The ideal judge in the federal system deliberates largely in the absence of distinct political pressures, and the ideal Supreme Court Justice must be most independent of all. Although there plainly is substance in Alexander Bickel's metaphor of the judicial process as "endlessly renewed educational conversation,"[20] the picture of a Supreme Court that acts mindful of the popular disobedience of unpopular edicts lurking just beyond a horizon guarded by the passive virtues seems less apt in the contemporary climate than it might have been in an earlier age. Circumvention of unpopular opinions has become a sophisticated science, but a secret one. Public proclamation of defiance is over. Thus there is no longer what Bickel envisioned: a judicial struggle to preserve legitimacy in the sense of effective authority. And yet the dialogic metaphor still has much to recommend it, and a sensible and morally reflective court, as it works over time to sharpen and refine its doctrine, will consider (along with many other texts) the text of public opinion, which, both in its substance and its fervor, may carry important truths. The essential force of Bickel's metaphor is his realization that a judicial opinion is nothing more than an argument for the proposition that an initiative is right or wrong, and an argument can only slow someone down. It is at best a plea for rational reconsideration: a brake, not a wall.

Judicial review *is* effective law, because when courts hand down controversial decisions, even the political actors who criticize the decisions most vigorously obey them on pain of being painted as disres-

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[19] The tough question is what the Senate should do if its members feel bound (under the argument presented here) to ignore the nominee's "judicial philosophy," when they know full well that the President has (illegitimately) taken that very factor into account. One possibility is to ignore the illegitimate factor in any case, on the ground that the President's breach of duty should not lead to the same breach by the Senate. If, however, the Senate cannot comfortably countenance what the President has done, it is better to reject the nominee out of hand, citing the President's illegitimate conduct, than to damage the judiciary further by adding another layer of substantive review.

[20] A. BICKEL, THE MORALITY OF CONSENT 111 (1975).

pectful not simply to the Court, but to the law on which their own authority is founded. This obedience is another example of a deeply shared commitment to a public value (here, the rule of law) that binds political action despite, or perhaps because of, its lack of theoretical sophistication. No doubt there are lines that bound permissible legal discourse, bounds beyond which no rational Justice would go, but the specification of those lines is a question of politics. The nature of the system for the selection of nominees — indeed, the nature of the people doing the selecting — serves to ensure that no one with views truly beyond the bounds of politically acceptable discourse could ever be considered seriously as a nominee. It is folly to pretend that an electable presidential candidate would imagine proposing a Justice whose ideal discourse would transgress those boundaries.[21]

There is, in other words, no reason for the Senate to set itself the task of keeping off the Court nominees whose views stray too far beyond the discourse of the mainstream, for the senators are then policing for criminals unlikely to appear. If a nominee's ideas fall within the very broad range of judicial views that are not radical in any nontrivial sense — and Robert Bork has as much right to that middle ground as any other nominee in recent decades — the Senate enacts a terrible threat to the independence of the judiciary if a substantive review of the nominee's legal theories brings about a rejection.

The dilemma, then, is this: how can the Senate carry out its responsibility to give voice to the deepest values and aspirations of the American people, while at the same time not compromising the necessary independence of the Justices? The answer may be to undertake what members of the Senate seem mysteriously reluctant to do — to try to get a sense of the whole person, an impression partaking not only of the nominee's public legal arguments, but of her entire moral universe.

The rhetoric of judging insists that judges should put aside their personal beliefs when called upon to decide what the law requires. In constitutional adjudication especially, however, no matter how much judges strive to interpret without regard to their background morality, they cannot hope for a complete separation of judgment from judge. In this sense, constitutional interpretation is like the interpretation of any other text. The words of the Constitution do not, by themselves, determine very much, and all who must strive to interpret and apply the text, no matter how great their intellectual force or legal sophistication, must at some point make leaps of faith not wholly explicable by reference to standard tools for interpreta-

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[21] *See* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 823–24 (1983).

tion.[22] There is in every interpretive task a moment when the interpreter's own experience and values become the most important data. That moment cannot be spotted in advance, any more than the pressing issues of ten years hence can be predicted today. But it is certain that the moment will come, and the Senate can help the nation to be ready when it does.

The issue, finally, is not what sort of theory the nominee happens to indulge, but what sort of person the nominee happens to be. There are two senses in which this judgment ought to matter. First, the nominee ought to be a person for whom moral choices occasion deep and sustained reflection. Second, the nominee ought, in the judgment of the Senate, to be an individual whose personal moral decisions seem generally sound. In moments of crisis, we call upon the Court for a statement of law and, more often than most theorists care to admit, we receive instruction in practical morality instead. At such times, what matters most is not what sort of legal philosophers sit on the Court, but what sort of moral philosophers sit there. Even when times are less difficult and the issues less divisive, the background moral vision of the judge and the degree of her moral reflectiveness nevertheless play significant parts in shaping her interpretive conclusions. This background moral vision and the capacity for moral reflection are perhaps the most important aspects of the judicial personality, and it is for these that the Senate, which enjoys the political space to reflect on the fundamental values of the nation, ought to be searching.

Thus the political task in the real world of real interpretive problems is to people the bench not with Justices holding the right constitutional theories but with Justices possessing the right moral instincts. In this sense, it is far less useful to know that a nominee has ruled that private clubs violate no constitutional provisions when they discriminate against nonwhites than to know whether the nominee herself has belonged to a club with such policies, and for how long. A legal theory leading to the conclusion that private clubs are not regulated by the Constitution is a matter of debate, a matter on which one may take instruction, a matter for a later change of mind. But a lifelong habit of associating by choice with those who prefer not to associate with people of the wrong color tells something vitally important about the character and instincts of a would-be constitutional interpreter, something not easily disavowed by so simple an expedient as, for example, resigning from the club.

Legal theories, like legal institutions, are ultimately no better than those who take them in charge. Within the universe of acceptable

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[22] This insight is as old as interpretation. For a more detailed elucidation of my own views on the point, see Carter, *The Right Questions in the Creation of Constitutional Meaning*, 66 B.U.L. REV. 71, 81–87 (1986).

legal discourse — a universe for which the system will screen quite effectively without aid from the Senate — a morally upright proponent of an unpopular or eccentric theory will likely turn out to be a better Justice than one who propounds an acceptable theory but whose personal morality is cynical or mendacious. But "better" is used here in a special sense: the morally superior Justice will be better than the one with the right philosophy in the sense that her instincts will be morally sound, and those instincts, when brought to bear on concrete cases, should be of salutary rather than destructive effect on the Court and on the country.

The Senate would not, of course, be able to predict the particular results that the morally upright Justice would reach in concrete cases, and the reflective Senate would not try. There would be no campaign promises. And yet, over the very long run, as new and unexpected issues arise, there should evolve a healthy convergence between the moral direction of the Justice and the fundamental moral vision of the nation the Justice serves. The popular sense should come to be one of a good, trusted, upstanding individual sitting on the bench, so that even when the people dislike her work, they will obey her — not simply because of her legal authority, but because she is someone held in respect. This prospect might in turn reduce today's tension between the ideal of judicial independence and the demand that the courts support particular political programs. And in the worst of times, when fresh and unexpected issues present grim moral choices, the times when the courts might be most desperately needed, the morally superior individual will almost certainly be the morally superior jurist.

There is, of course, a risk to an approach that seeks to evaluate the personal moral judgment of the nominee: the wall between the public and the private domains, a wall that is dear to liberal and libertarian theory, might be breached. "Has this nominee violated marital vows?" the senators might demand. "Has that one voted Republican? Used marijuana? Had an abortion?" None of these queries can be dismissed as entirely irrelevant, unless one wants to suppose a theory of human motivation that rigorously separates the moral premises for actions on the two sides of the wall. Relevance, however, is not the same as propriety, and the question is who will decide what lines of relevant inquiry are nevertheless inappropriate. Perhaps the Senate is too risky a place to lodge the power of decision. And yet, if members of the Senate who must reach a moral judgment on the nominee are not to be trusted to draw a line between what may legitimately be considered and what may not, then it is not easy to see why they ought to be trusted with any other aspect of the confirmation decision. For if there is indeed a line between the two, its very location — like the location of the line that bounds rational discourse — is a question not of abstract theory, but of politics. Senators inclined to vote "No" because the nominee has had an abor-

tion, or because she refuses to say whether she has or not, must make their decisions in light of the practical political consequences. The political consequences of rejecting a nominee because she has had an abortion, in turn, say something important about the kind of moral judgment that the American people are prepared to respect.

That perhaps is too idealized a notion of the relationship between the American people and the Supreme Court. Perhaps results really are all that matter. Presidents often act as though they value only results, the interest groups that campaign for and against each nomination seem bent entirely on prediction, and the Court itself is hardly immune to the criticism that the result in many cases is all that drives its analysis. But even if there is in the end less truth than aspiration in the vision of an independent and reflective Supreme Court, the Senate of the United States, designed to combine a degree of political sensitivity with the distance necessary for reflection and deliberation, should be the last institution of government to surrender the myth.