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The Death of the Legal Process Ideal: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures

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ANOTHER SUCH VICTORY: CONSTITUTIONAL
THEORY AND PRACTICE IN A WORLD
WHERE COURTS ARE NO DIFFERENT
FROM LEGISLATURES†

John Hart Ely*

There is nothing worse than an idea whose time has come.

Linda Hunt¹

I. RECESS PERIOD FOR THE LEGAL PROCESS SCHOOL

Modern constitutional scholarship is generally characterized by a desire to take up the question . . . what politics should judges pursue, and on the basis of what conception of the good should they act?

Robin West²

[I]nstead of chastising courts for their imperial presumption, commentators celebrate them as the preferred forum for democratic deliberation.

Allan C. Hutchinson³

I never took the course on Legal Process. Indeed the idea that appointed and life-tenured judges should behave differently from elected officials had always seemed so evidently correct that it took me a long time to understand that it even had a label, let alone an entire “school” named after it.⁴ You can therefore imagine my befud-

† An earlier version of this Article was presented as the Sibley Lecture at the University of Georgia Law School on October 31, 1989. My research assistants Peter Savich and Maria Tai Wolff were especially helpful.

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¹ Quoted in Zarin, *A Part in the Play*, *The New Yorker*, July 30, 1990, at 39.

² West, *Progressive and Conservative Constitutionalism*, 88 *Mich. L. Rev.* 641, 644 (1990).

³ Hutchinson, *The Three ‘Rs’: Reading/Rorty/Radically* (Book Review), 103 *Harv. L. Rev.* 555, 555 (1989) (citing Dworkin and Tribe).

⁴ My own methodology for determining what issues are appropriately assigned to courts—and in this respect I am conventionally described as a member of the legal process school, e.g., M. Kelman, *A Guide to Critical Legal Studies 189-90* (1987)—is one rooted not in any supposed difference in reasoning capacity or political predilection between judges and other

dlement at what is going on today. The academic left is telling us

officials, but rather primarily in the fact that judges (at least federal judges) need not stand for reelection.

Approached philosophically—I have previously approached it more through an analysis of the Constitution—the general theory is that a group of equals in the “original position” attempting to frame a government would start from the presumption that no sane adult’s values are to count for more or less than any other’s, which would lead rapidly to the conclusion that public issues generally should be settled by a majority vote of such persons or their representatives—with two, perhaps three, exceptions: (1) where a majority of such persons votes to exclude other such persons from the process or otherwise to dilute their influence on it; (2) where such a majority enacts one regulatory regime for itself and another, less favorable one, for one or another minority; or (3) where other side constraints seem sufficiently important (and vulnerable to majority sentiment) that the framers decide by supermajority vote to designate them in a constitutional document and thereby render them immune to displacement by anything short of a similar supermajority vote in the future. The third exception seems to me more problematic than the first two for a liberal theorist. In the context of the American Constitution, however, that is an observation that is somewhat beside the point, as all three exceptions plainly characterize that document to a degree.

It seems to me to follow further—here comes the “legal process” part—that precisely because of their tenure, courts are the appropriate guardians of at least exceptions (1) and (2):

Obviously our elected representatives are the last persons we should trust with identification of either of these situations. Appointed judges, however, are comparative outsiders in our governmental system, and need worry about continuance in office only very obliquely. This does not give them some special pipeline to the genuine values of the American people: in fact it goes far to ensure that they won’t have one. It does, however, put them in a position objectively to assess claims—though no one could suppose the evaluation won’t be full of judgment calls—that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.

J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 103 (1980). That judges are to be the principal enforcers of the collection of provisions that make up exception (3) is entirely settled by history, and I have no quarrel with it: indeed the supposition that no right is to be thus designated unless it is unusually vulnerable to majority sentiment makes judicial enforcement appropriate. What does not follow from anything said above, or in my opinion from anything sensible said ever, is that judges are also to be given a license to create or “discover” further rights, not justified by exceptions (1) or (2) nor ever constitutionalized by a supermajority, and protect them as if they had been.

A more traditional “legal process” view disagrees with this last point, as it sees the comparative advantage of courts as residing in their greater capacity to gauge and refine the philosophical temper of their nation and times, to extract and develop principles from the traditions and moral beliefs of the American people and enforce them in the name of the Constitution. See, e.g., Hart, *The Supreme Court, 1978 Term—Foreword: The Time Chart of the Justices*, 73 *Harv. L. Rev.* 84, 99 (1959); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *Yale L.J.* 221, 243-54, 285-311 (1973). I find this approach entirely misguided. See J. Ely, *supra*, at 48-70. Today’s fight, however, is not with these commentators, but rather with those who reject our shared starting assumption that those who would justify judicial invalidation of legislation must do so on the basis of some characteristic that courts possess in greater measure than ordinary political officials. The more

there is no reason courts should feel an obligation to behave differently from elected officials. The large liberal academic center, always first to be second, is generally going along. And in what the naive might deem an ironic twist—though it is not likely greatly to surprise those radicals who understand their project—our recent Republican presidents have adopted the idea with a vengeance,⁵ and so to a substantial extent has Congress. Just about everybody is climbing aboard.

Naturally, the conviction that judges interpreting the Constitution are supposed to be doing something other than enforcing their own values survives in certain segments of the legal culture—albeit mainly among people educated in an earlier era. Nor am I suggesting (what is almost always an error) that the present is an entirely unique time. The attitude in ascendance has conspicuous precursors, notably the legal realist movement of the early twentieth century.⁶ In fact the legal realists were less likely than the legal culture is today to draw the fallacious inference from (a) the observation that judges in fact allow their politics to affect their constitutional interpretations to (b) the prescription that that's what judges *should* do:⁷ in that regard, today's development is new.⁸ It's basically a cycle, though, and as of

basic fight today is between those who worry at all about limits on judicial review, and those who do not.

⁵ See West, *supra* note 2, at 641 (footnote omitted):

American constitutional law . . . is in a state of profound transformation. The "liberal-legalist" and purportedly politically neutral understanding of constitutional guarantees that dominated constitutional law and theory during the fifties, sixties, and seventies, is waning, both in the courts and in the academy. What is beginning to replace liberal legalism in the academy, and what has clearly replaced it on the Supreme Court, is a very different conception—a new paradigm—of the role of constitutionalism . . . in a democratic state. Unlike the liberal-legal paradigm it is replacing, the new paradigm is overtly political—and overtly conservative—in its orientation and aspiration.

Professor West is not one to see only what scares her, and she does not commit that error here. She is quite clear that the legal process school is under serious attack from both ends of the political spectrum: "Both the progressives and conservatives seem increasingly willing to grant to the critics of liberal theory their main point . . . that constitutional adjudication is consequently necessarily political." *Id.* at 644.

⁶ The legal process movement is conventionally referred to as part of a post-realist reconstruction.

⁷ Indeed, the very point of early realists like Holmes and Brandeis was that judges should understand that what they are doing is not essentially different from legislating, and approach their jobs with appropriate restraint.

⁸ Of course the refrain that one's opponents are "reading their personal political views into the Constitution" is as old as the republic, and most of the time it has probably had some

1991, the neo-realists (which turns out to include your local critical legal scholar, and Ronald Reagan, and just about everybody in between) seem almost certainly to have won the day, which is to say about the next twenty years (about as long as anyone should ever try to predict anything anyhow).

A. Teachers and Students

This is a legacy of the sixties—the old conviction that if any private sentiment is strong enough it's entitled to carry the day.

Bart Giamatti

Dr. Spock was indicted for the wrong crime.

Vern Countryman

The generation coming of age in legal academia—we might as well admit it, the generation doing its most creative work⁹—received its legal education in the late 1960s or later. During this period, largely thanks to the disgraceful duo of Indochina and Watergate, impatience with institutional deference, impatience in particular with deference to the “democratic” branches, reached what may be an all-time high in this country. This impatience has reflected itself, with a vengeance, in legal scholarship.

It is articulated most clearly among those who identify themselves as critical legal scholars. Here one finds a general skepticism of traditional notions of judicial craft, as exhibited in the following from Mark Tushnet:

[C]onsider the craft of “writing novels.” Its practice includes Trollope writing *The Eustace Diamonds*, Joyce writing *Finnegans Wake*, and Mailer writing *The Executioner's Song*. We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion. To say that it does not look like Justice Powell's decision in some other case is like saying that a Cubist “portrait” does not portray its subject in the manner that a member of the academy would paint it. The observa-

foundation. It takes an unusually strong or apolitical judge to avoid being discernibly affected by her assessment of the politically desirable outcome. What is new is the evolving consensus on most fronts that that is the way judges are *supposed* to behave.

⁹ As they approach middle age, law professors tend to deny their dwindling creativity by becoming deans, media personalities, advisors to politicians, or some other form of jackanapes.

tion is true but irrelevant to the enterprise in which the artist or judge was engaged and to our ultimate assessment of his or her product.¹⁰

¹⁰ M. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law 54* (1988) (footnote omitted).

On the Constitution as a Lead Sheet. Over the years I've thought about trying to elaborate the metaphor between constitutional interpretation and jazz improvisation. It "works" on the gimmicky level that various approaches to interpreting the Constitution can validly be compared to various jazz styles. One might point to: approaches that embellish but never entirely lose the original melody; those that gradually abandon the original melody entirely but insist that each phrase relate to its predecessor; so-called "horizontal" approaches that abandon the melody but maintain a relation to the chord progression of the entire song; horizontal approaches geared to the chord progression of the particular line; "vertical" approaches that insist only on compatibility with the particular chord being played at the time, and so forth. (Having written that, I understand why music lecture rooms are equipped with pianos.) It should be no trick for readers of this Article to attach the names of various constitutionalists to these brief descriptions. If you have trouble placing a clause-bound "originalism," that's because it is essentially a rejection of any sort of "jazz" in this context. (The problem with this view is that the Constitution quite often—and quite intentionally, I think, though for present purposes that doesn't matter—gives us nothing but chords.) The sort of legal realism that is the subject of this Article also seems to me not to fit, as it totally rejects the relevance of the "chart" except, perhaps, as a device for inducing false consciousness.

The reason I haven't written this up is that it was never clear what anyone was supposed to learn from it about either constitutional theory or jazz—aside from something thoroughly trivial about the one she knew less about. (I do find it interesting that the way I play—basically a mix of the first, third, and fourth approaches mentioned—corresponds pretty well to the way I write about constitutional law, though I hasten to add that I am not so demented as to have sought this integration consciously.) The metaphor turns out not to be of much use in positioning us to say "this is just pounding—it doesn't count as constitutional law." For every time there develops what appears to be a consensus among musicians (and their listeners), to the effect that a certain interval is unacceptable noise, someone who can't be dismissed on any principled basis as "not a real musician" starts using it, and often others follow. Minor seconds and major sevenths weren't really accepted in jazz until the 1930s (classical music was often several decades ahead), and the raised fourth or tritone—originally if loosely, the "flatted fifth"—was controversial as recently as the 1940s, but today is accepted as commonplace, if not indeed a trifle tired. (While I suppose this too will pass, an unadorned minor or flatted ninth—one that is neither wrapped within a "bigger" chord nor formed by a fleeting, or "passing," note in the melody—still strikes my ear, as I believe it does most people's, as uncivilized. Indeed, I hereby propose the unadorned minor ninth as the artistic equivalent of *Roe v. Wade*, in place of Tushnet's blasphemous nomination of Joyce.)

This isn't to say that certain forms of constitutional interpretation aren't illegitimate for specific institutions in specific societies with specific constitutional charters: they are. All that can be inferred from this excursion is what Tushnet infers from the literary context, that those who assert the possibility of differentiating valid from invalid constitutional interpretation on the basis of "craft limits" of a sort they assert are recognized in the arts are likely to be badly disappointed when they get around to a close examination of the alleged analogues. There are, however, more valid ways of testing constitutional theories than by the educated "feel" of those in the "interpretive community."

In particular, the legal process school's core methodological assumption is scornfully cast aside, here by Duncan Kennedy:

I will have nothing to say about the impact of "institutional competence" considerations on the motives for lawmaking I discuss. I assume that the only grounds for distinguishing between courts, legislatures and administrative agencies as lawmakers are (i) that the false consciousness of the public requires it or (ii) that the decisionmaker has a quite specific theory about how his or her particular institutional situation should modify his or her pursuit of political objectives.¹¹

Critical scholars are not a fringe group in contemporary legal scholarship; in time it will be understood that their influence on the profession has approached that of their legal realist forebears, which is to say it will have been major. The large liberal center of legal academia, characteristically fearful of getting out of step with the latest trend, has been importantly affected by the anti-legal process message here.

It wasn't a hard sell. Most law teachers went to law school to become lawyers: if we'd wanted to be theorists we would have gone to graduate school. But we got high grades in law school (on examinations rarely designed to measure scholarly skills) and learned we could get this unconscionably cushy job: teaching yes—but with shorter hours, higher pay, and slimmer tenure requirements than other sorts of teaching—and almost an open invitation, at some schools a virtual obligation, to pass oneself off not simply as a lawyer but also as an expert on any subject on which he or she took two or more courses in college. Who among this group are the most likely to be drawn to constitutional law specifically? Generally those interested in public policy analysis, in figuring out what changes, on balance, would be good for society. And what gets in the way of simply doing that analysis and calling it constitutional law? The assumption that courts aren't supposed to behave exactly like legislatures. Thus it becomes a liberating day indeed when headlines like Kennedy announce that there is nothing improper in courts' imposing their own policy preferences in the name of constitutional law, indeed that

¹¹ Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *Md. L. Rev.* 563, 564-65 (1982). Mark Kelman confirms my instinct that Kennedy's position is atypical of critical scholars only in its candor. M. Kelman, *supra* note 4, at 192.

there even may be something vaguely fascist about supposing they should be doing anything else.

Thus, no less a luminary than Laurence Tribe—the Tyler Professor of Constitutional Law at Harvard, needless to say no “crit,” and himself a formidable influence on the profession—has resolutely refused to let himself get sidetracked worrying about the differences among various legal institutions,¹² but has forthrightly defined the constitutional task of courts as that of making “difficult substantive choices” among “inevitably controverted political, social, and moral conceptions.”¹³ And indeed, the legal literature generally analyzes constitutional issues in terms of wise social policy—which, felt strongly, is likely to be labeled “principle”—before proceeding to the inevitable demonstration that, properly understood, the precedents do not preclude the proffered outcome.¹⁴ The really fancy thinkers appear to

¹² See, e.g., L. Tribe, *American Constitutional Law* § 1-9, at 15-17 (2d ed. 1988); cf. L. Tribe, *Constitutional Choices* 6 (1985) (“For me, such questions [of how judicial review is legitimated] seem basically unanswerable; theories that offer or presuppose answers to them—any answers—seem not worth pursuing with passion or even worth criticizing in great detail.”).

¹³ L. Tribe, *American Constitutional Law*, supra note 12, § 8-7, at 584; see also, e.g., id. § 1-8, at 13-14; L. Tribe, *God Save This Honorable Court* at ix (1985). To the same general effect, see, e.g., Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 470-71 (1981); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063 (1981); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L.J. 411, 424 (1981).

¹⁴ Under this approach every question of public policy is a constitutional question. Many do not regard this implication as an occasion for rethinking. Those who do are probably most likely to respond that not all questions of public policy are constitutional questions, only those that involve *rights*. Any constitutional attack, however, can be framed in terms of rights, see, e.g., *Coppage v. Kansas*, 236 U.S. 1, 18-19 (1915); *Adair v. United States*, 208 U.S. 161, 172-75 (1908); for that matter, the “right to choose”/“right to life” debate, “right to work” laws, “victims’ rights,” and so forth should also be consulted. The position that the only rights that count are those alluded to in the Constitution having been foresworn, the response that the disfavored cases don’t “really” involve rights is likely to translate into the position that they don’t involve rights the commentator thinks deserve recognition.

There are two standard strategies for “sophisticating” this approach (and, incidentally, drawing it out into a full-semester course). First, one can admit that where the judiciary is not in as good a position as other governmental actors to get a reliable grip on the facts bearing on the wisdom of the action in question, it should proceed cautiously. This might be styled a sensitivity to considerations of justiciability. Second, one might hold that in order to declare a legislative action unconstitutional, a court (or commentator) must conclude that it is not simply a bad idea, but a *really* bad idea. This introduces a second layer of unvarnished subjectivity.

The fact that so much legal writing today boils down so quickly to the expression of political preferences has contributed massively to the notorious lack of recent consensns within legal

understand (albeit tacitly) that such an approach is unacceptably reductionist, or perhaps what they understand is that it isn't a very interesting way to spend their time. In any event, they are drawn increasingly to the development and embroidery of "constitutional theories" that may borrow from other disciplines in new ways (new at least to lawyers), but whose relevance to any issue affecting how courts are supposed to act—or for that matter how any nonacademic segment of the profession or state is supposed to act—is elusive.¹⁵

Some of the people I've described, however, are getting a little long in the tooth themselves. Could this just be a rapidly passing fancy? I don't think so. Teachers are important forces in shaping future thinking. Sometimes societal forces can render a generation of students

academia about what counts as good scholarship. (In turn, the inevitable playout of that lack of consensus, in increasingly political hiring decisions, has understandably induced the literature to get still more political.) I suspect this description has always fit law more than other disciplines. (At no point have law teachers generally been anything other than lawyers who knew a good thing when they saw it, and there have for many years been an embarrassingly large number of professional journals in our business, most of whose publication decisions are made by persons with substantially less academic training and experience than even we have.) But the description seems to fit particularly well now.

¹⁵ In particular, I have in mind here the now-common discussions of techniques of literary criticism, cf. *supra* note 10 and accompanying text (describing application of musical and literary theory to constitutional interpretation), and the rediscovery of "the republican tradition," which a number of commentators find of significant intellectual interest but whose social and political assumptions seem substantially irrelevant to 20th century America.

The theory of judicial review articulated in *Democracy and Distrust* was intended to be as compatible with "republican" legislative and community behavior as with a "pluralist" model. See, e.g., J. Ely, *supra* note 4, at 80-82, 135. Indeed, by constitutionally condemning the infliction of "inequality for its own sake—[treating] a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members," *id.* at 153—it counseled a significant judicial push away from bare-knuckled pluralism in the direction of "public values." Thus, my point here is only that anything resembling a full-scale attempt to impose a "republican" political mentality seems badly out of place under contemporary conditions, and would in addition be unwarranted as a matter of constitutional interpretation, as no coherent account of the document supports it. This is hardly surprising, as the "republican" and "pluralist" models contended at the time of the framing, and if one had to pick a "winner," it would have to be the latter (personified perhaps most fully by James Madison), while the former is conventionally identified with the antifederalists, whose attempt to defeat ratification failed. This certainly doesn't mean republicanism is a *forbidden* model—the document defeats that claim as well—only that it cannot properly be imposed as constitutional law.

The increasing call in the legal literature for "different voices" denotes a worthy goal of judicial and academic appointments, and of a "legal process" approach to the allocation of political power. Presented as a first order theory of judicial review, however, it constitutes only another version of the reductionist view that judges should do what, based on their experience, seems right to them.

resistant to what their teachers are trying to get across: it happened in the late 1960s and early 1970s and produced the people I've been talking about, which is to say the generation of teachers most likely to influence the students of today. Might not today's students stage a similar rebellion against those very (realist) teachers? In time, of course; as I said, it's a cycle. What law school deans say on opening day is true: our students really are getting smarter all the time, and they don't come close to accepting everything their teachers say. On some issues the current student generation's rebellion against its teachers is likely to be felt quite swiftly. On the issue of whether courts should be trying to do something other than enforce their own political preferences, however, I'm afraid it will be a while.

In the first place, if "realism" is an attractive haven for young law teachers, it is even more so for law students. Meta-analysis, asking questions about questions rather than asking the questions themselves, is unfamiliar and frustrating, particularly for already flummoxed students who were hoping to find in the Constitutional Law course an outlet for the sort of political and moral debate they had enjoyed in college (and which may even have led them to suppose, however bemightedly, that they'd like to be lawyers). "Getting to the point"—well, is abortion murder or isn't it?—is more familiar and comfortable. In years past constitutional law professors battled to domesticate this impulse out of their students. But today, many teachers (by now it's probably most) agree with the student impulse, and direct their efforts toward bringing around the politically unenlightened—as of course one would if one thought it to be the unvarnished role of constitutional courts to find and do the politically correct thing. And many of them are very popular, I have no doubt also very gifted, teachers.

The stereotype has it, though, that today's law students are more conservative politically than their professors. Like most stereotypes this one has its counterexamples; it also contains a good deal of truth. Doesn't that suggest a quicker turnaround than I have predicted? Again, not on the legal process/legal realism dispute. In the first place, our conservative students aren't stupid. Given who's making the judicial appointments these days, why shouldn't judges enforce

their vision of the good society in the name of the Constitution?¹⁶ Awesome—er, I mean, Right On, Professor. Second, and on a less calculating level, today's students are unusually fertile ground for the realist message. Yuppies (and yuppie wanna-bes) don't need to be sold on instant gratification. The drugs of choice may have changed, but they still want their Maypo and they want it *now*,¹⁷ an impulse that is incompatible with the notion that in certain areas courts should await political decision. Thus, the victory over that archaic idea seems assured for some time to come: on the left and on the right, in the classroom and in the writings of emerging constitutional scholars,¹⁸ the "false consciousness" that judges should behave differently from other politicians is on the run.

B. *The Judicial Appointment Process*

One can imagine that people could have views on the merits of political issues . . . that contradict their views of the constitutional aspects of the same question. But the people who position themselves to be nominated for federal judgeships are not part of that imagined group.

Mark Tushnet¹⁹

¹⁶ How do the teachers miss this, you may ask? I expect true believers don't: presumably it's all part of the recipe for revolution. For liberals I suspect the myopia results from their general and unrealistic optimism about the power of reason to "enlighten" (get others to see things their way).

¹⁷ See N.Y. Times, July 21, 1989, at C1-C2 (reporting on "Beyond the Deficit Problem: 'Now-Now-ism' and 'The New Balance,'" a speech of Richard Darman to the National Press Club on July 20, 1989).

¹⁸ See, e.g., E. Chemerinsky, *Interpreting the Constitution* at xi (1987) (recommending open-ended modernism on the part of the judiciary, an "indeterminate, open-ended process"). "The core characteristic of open-ended modernism is its explicit premise that justices have, and should have, discretion in deciding constitutional cases, and that their decisions are inevitably based on their personal values." *Id.* at 109. Lest you suppose I have chosen some obscure eccentric to make my point, I hasten to point out that Chemerinsky is the author of the Foreword to the *Harvard Law Review's* 1989 Supreme Court issue, and thus presumptively the second "hottest" constitutional theorist in the country. See Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 Harv. L. Rev. 43 (1989) (an extended exposition of the same thesis; see especially, e.g., *id.* at 47-49). (Nor am I pulling a fast one by dragging you back to the historic recesses of 1989. By the same rough measure, the hottest constitutional theorist is Robin West, quoted above, *supra* note 5. See West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 Harv. L. Rev. 43 (1990); see also, e.g., *infra* note 26 (discussing positions of emerging academics)).

¹⁹ Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 Tex. L. Rev. 777, 780 (1987).

Over the past decade there have been important changes in the way federal judges are selected.²⁰ First, a good deal more attention than before seems to be devoted to the question of how prospective nominees are likely to vote on the issues that can be anticipated.²¹ Previously, thanks in part to the then prevailing “myth” that judges are not just another set of politicians,²² the tendency was to appoint “first-rate lawyers,”²³ the “fions of the bar,” without much attention to how exactly they were likely to vote on particular issues.²⁴ Second, judicial philosophy and political predilection have been conflated more explicitly than before, and the appointments process has achieved a degree

²⁰ I necessarily am talking mainly about former President Reagan here. It seems likely, however, that President Bush will behave in much the same way. See Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. Times, April 10, 1990, at A1, col. 2; see also *infra* text accompanying notes 41-51 (discussing appointment of Justice Souter). In significant degree this began with former President Carter, who did a fairly good job of stacking the lower federal courts with liberals. Carter had no strong philosophy of appropriate judicial behavior; this therefore appears in large measure to have been a by-product of his program of appointing large numbers of minorities and women. The intrusiveness of Senate confirmation hearings has also greatly increased over the past few years. E.g., Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 Harv. L. Rev. 1213 (1988).

²¹ See also *infra* note 105 (suggesting that more attention is now paid to appointments process because it is perceived as more important).

²² Indeed this was the model Ronald Reagan followed when he was Governor of California.

²³ Hart, *supra* note 4, at 101. (It's not my ideal either, as it tends to perpetuate uniformity of outlook. J. Ely, *supra* note 4, at 59. However, there are ways of dealing with that problem that are more responsible than discarding the idea that judges are supposed to behave differently from legislators.)

²⁴ President Ford made one appointment to the Supreme Court, that of John Paul Stevens, who appeared at the time, and indeed has turned out, to be somewhere between moderate and liberal. President Nixon got the opportunity to appoint four people, only two of whom could be comfortably classified as conservatives. President Johnson, it is true, made two liberal appointments, though one was an extremely close friend and the other was probably picked in part because Johnson discerned, correctly, that it was high time there was a black person on the Court. President Kennedy made two appointments, one of a liberal who didn't stay very long, the other of a man who did not appear to be much of a liberal at the time and has indeed proved not to be. President Eisenhower's appointments included two of the Court's most liberal and activist recent members (Warren and Brennan); on the other hand, of President Truman's four appointments three were quite conservative, one a moderate. Thus, to find a precedent for Reagan's approach (unless it's Carter) one has to go back to Franklin Roosevelt, who was quite single-minded about appointing men who could be counted on to side with the New Deal on issues of federal power. (It's true that Felix Frankfurter and Stanley Reed are not remembered as “liberal” justices, but that's because they stuck around long enough for the issues to change, not because Roosevelt's investigation was faulty.)

Of course presidents have always taken cognizance of the nominal political party (if any) of a prospective nominee, but historically—though this too is changing—to know that was not to know much. Moreover, appointments of members of “the other” party were not all that rare.

of "realism" that should put even the "crits" to shame. Recall that Reagan's judicial "litmus test," which actually made it into the Republican platforms in 1980 and 1984, was not "What does the candidate think about *Roe v. Wade*?" but rather "What does the candidate think about *abortion*?"²⁵ Should the answers to those questions run in opposite directions, the assumption is evidently that the latter is the more reliable datum. Better not to face that choice, though, as people for whom the answers differ are people to avoid, if not indeed dangerous schizophrenics.²⁶ Thus, although the nomination of Robert Bork to the Supreme Court was accompanied by the usual smoke about his being a judge who would follow the law instead of making it, few were fooled: Bork was named because he had spent a career essentially promising to reverse certain outcomes the Reagan Admin-

²⁵ See N.Y. Times, July 13, 1980, at 14, col. 1 ("We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."); N.Y. Times, Aug. 22, 1984, at A18, col. 1 ("reaffirming support" for such appointments). This works both ways. See, e.g., Senator Kennedy's attempts to get Judge Souter to share with the Judiciary Committee *his* moral views on abortion (though admittedly Kennedy and the rest of the Committee had been thwarted in attempting to discern Souter's legal views on the subject). N.Y. Times, Sept. 15, 1990, at 10, col. 5. (Actually this turned into a pretty neat whipsaw for Souter: having refused to share his legal views about abortion on the ground that that would be improper, see *infra* text accompanying notes 124-31, he then refused to share his moral views on the subject on the ground that they wouldn't properly affect his legal judgment. *Id.*)

²⁶ Thus in the writing of emerging academics, the position that judges should not invariably enforce their policy choices in the name of the Constitution has become not simply wrongheaded but essentially inconceivable. See, e.g., Estrich, *Controlling the Language, Winning the Debate*, 41 Harv. L. Bull. 33 (1989): "We could debate endlessly the question whether *Roe v. Wade* was rightly decided . . . I think it is; and every pro-choice person I know agrees. Every anti-abortion person I know thinks it isn't." See also Hirshman, Bronte, Bloom, and Bork: *An Essay on the Moral Education of Judges*, 137 U. Pa. L. Rev. 177, 202 n.158 (1988) (suggesting that I misdescribed my position when I indicated during my criticism of *Roe* that I am opposed to laws restricting abortion). I suppose I should be thankful that unlike my erstwhile colleague Estrich, Hirshman is at least aware of my discussion of *Roe*: having one's credibility questioned is recognition of a sort. However, given Professor Tushnet's obviously correct description of the incentive system, *supra* text accompanying note 19, I have some trouble imagining what my motive is supposed to have been. Indeed the first example Tushnet gives of the sort of politically suicidal position he has in mind is precisely the one Hirshman suspects I am feigning, that "it is a terrifically important thing for women to have the right to choose abortion . . . , [but there is no] constitutional warrant for the displacement of legislative decisions to restrict the availability of abortions." Tushnet, *supra* note 19, at 779.

istration found politically distasteful.²⁷ The popular support for Bork, of course, was thus rooted as well.²⁸

The reasons for the Senate's rejection of Bork may be more complicated.²⁹ The account most favorable to the senators is that they were convinced that Bork's purported allegiance to the legal process ideal was bogus, a cover for a remarkably consistent tendency to reach the politically conservative result, and rejected him for that reason. There is little doubt that genuine feelings along this line moved some of Bork's critics.³⁰ The notion that such suspicions are what account

²⁷ For example, Mario Cuomo observed:

Bork was selected not for his objectivity but because the President believes Bork will give him the results the President desires politically—for example, cut back of affirmative action.

The evidence that that's what the President wants and expects is in the statements by lobbyists on behalf of Bork, who are talking to conservatives and telling them that if Bork is selected, you'll get a change in abortion, you'll get a change in criminal justice. That's the proof positive.

Quoted in N.Y. Times, Sept. 13, 1987, at 37, col. 1. Governor Cuomo's characterization receives at least indirect corroboration from Bruce Fein, who spent the first Reagan term working on judicial selection in the Justice Department: "It became evident after the first term that there was no way to make legislative gains in many areas of social and civil rights. The President has to do it by changing the jurisprudence." Judging the Judges, Newsweek, Oct. 14, 1985, at 73. (This may not represent Judge Bork's own thinking, see *infra* note 30; my suggestion is only that it is why he was nominated.) For further remarks on the subject of attempting to achieve judicially what one cannot achieve legislatively, albeit this time from the left, see *infra* note 33 (quotation from Hodding Carter).

²⁸ See generally E. Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1989) (comprehensive narrative of the Bork nomination process, including discussion of the various interests supporting and opposing the nomination); P. McGuigan & D. Weyrich, *Ninth Justice: The Fight for Bork* (1990) (same).

²⁹ One thing can be said with certainty: many of the tactics employed against Bork were disgusting—such as the use of Oil, Chemical and Atomic Workers International Union v. American Cyanamid, 741 F.2d 444 (D.C. Cir. 1984), to suggest that he approved of mandatory sterilization, the charge that he favored the "separate but equal" doctrine, allegations that he was an agnostic, and the argument that although he had spent almost all of his career in teaching and government service, he had never functioned as a public interest lawyer. See E. Bronner, *supra* note 28, at 177-80, 261-63. Also disappointing (at least to one generally inclined to regard Senator Simon as relatively straightforward) was Simon's statement at the hearings that he had recently read *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and "[i]t sounded an awful lot like Robert Bork." 1 *The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Judiciary Committee, 100th Cong., 1st Sess. 314* (1987) [hereinafter *Bork Hearings*]. In fact, since his early and repudiated flirtation with *Lochner*, Judge Bork has been a tireless critic of the "substantive due process" theory of *Dred Scott*. To the extent Simon meant "only" to imply that Bork is a racist, the charge is without foundation.

³⁰ See, e.g., Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365 (1990); Ackerman, *Robert Bork's Grand Inquisition* (Book Review), 99 Yale L.J. 1419 (1990) (in such the same argument,

for the majority vote against him in the Senate, however, is one that strains credulity past the breaking point.

albeit from a more liberal perspective). Critics have cited Bork's early endorsement of *Lochner*-style substantive due process in Bork, *The Supreme Court Needs a New Philosophy*, *Fortune*, Dec. 1968, at 138, to which one might add his more recent habit of inferring from the fact that two commentators approve a line of cases that they must share a political agenda. E.g., Bork, *Styles in Constitutional Theory*, 26 *S. Tex. L.J.* 383, 393-94 (1985). (This latter point makes sense, of course, only if one is prepared to define constitutional theories strictly in terms of the outcomes they achieve, and is no fairer than suggesting that because Bork and the Grand Wizard of the Ku Klux Klan both disapprove of *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Bolling v. Sharpe*, 347 U.S. 497 (1954), they must have the same agenda.)

It is possible to make too much of these data. Bork's affair with *Lochner* was long since forthrightly faced and forcefully abandoned. Most of his commentary on constitutional law between 1971 and his hearings was quick and polemical, mainly speeches to sympathetic audiences, a style that particularly lends itself to oversimple pigeonholing. His post-rejection book, R. Bork, *The Tempting of America: The Political Seduction of the Law* (1990), is a vastly more discriminating work. (To pick a not entirely random example, its criticism of my work, however convincing or unconvincing, is among the fairest that has appeared, which unfortunately is no small sample.) But even here Bork can't resist the same revealing fallacy:

There is a remarkable consistency about these theorists. No matter the base from which they start, they all wind up in the same place, prescribing a new constitutional law that is much more egalitarian and socially permissive than either the actual Constitution or the legislative opinion of the American public. *That, surely, is the point of their efforts.*

Id. at 6 (emphasis added). (To the same effect is Bork's earlier indication, at Alexander Bickel's memorial service at Yale Law School, that there is a necessary "tension" between political liberalism and a philosophy of judicial self-restraint, which Bickel had "resolved" toward the end by becoming more conservative politically. See J. Ely, *supra* note 4, at 71-72. Normally one shouldn't be held responsible for what he says at a close friend's memorial service, but this was a prepared commentary on a matter of professional concern, which was subsequently published—and a direct rejection of the legal process ideal that one's constitutional inferences should not simply track one's politics.)

Moreover, on at least some occasions when political desire or necessity has conflicted with Bork's reiterated theory of judicial review, a jurisprudence of original intent, it has been the latter that seems to have given way. Repeatedly *The Tempting of America* forecloses issues by a simple citation of judicial precedents that are at least contestable as a matter of original intent. (Bork's impatience with such precedent under other circumstances is notorious.) See, e.g., R. Bork, *supra*, at 37 (eviscerating "construction" of privileges or immunities clause by *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)), at 63 (same opinion's indication that despite general language serious review under equal protection clause to be limited to racial discrimination), at 150 (imposition of a "reasonableness" test on all classifications), at 43 (limitation of Obligation of Contracts Clause to preexisting contracts), and at 48 (Justice Black's position that fourteenth amendment incorporates the Bill of Rights). It is true that the last two of these positions would be political anathema to an extreme right-winger, but each of them is legally settled beyond reasonable possibility of overrule—Black's with exceptions (indictment, civil juries) that there seems little question Bork would endorse. A virtue thus may have been made of necessity, endorsement of the precedents serving to save the discussion from consignment to what most readers would regard as the lunatic fringe. An understandable course, but not one open to an originalist. Perhaps more disturbing has been the fact that Bork has been a consistent champion of expansive executive power vis-a-vis Congress. While

The more believable explanation is basically the exact opposite, that during the hearings Bork resolutely refused to conflate law and politics, or at least to conflate them in a way that would promise delivery of certain outcomes the senators were prepared to make their own litmus tests. Thus, the best existing study of the Bork affair (and a studiously “balanced” work) characterizes Senator Kennedy’s opening salvo, the day the nomination was announced, in terms that seem only mildly overdramatic:

The speech was a landmark for judicial nominations. Kennedy was saying that no longer should the Senate content itself with examining a nominee’s personal integrity and legal qualifications, as had been the custom—at least publicly—for half a century. . . . In fulfilling its constitutional duty of “advice and consent” on judicial appointments, [Kennedy suggested] the upper house should take politics and ideology fully into account.³¹

In his opening statement at the Judiciary Committee’s hearings, Chairman Biden, describing what he would be looking for in a Supreme Court justice, made the point in quieter terms: “I believe all Americans are born with certain inalienable rights. As a child of God, my rights are not derived from . . . the Constitution . . . but . . .

there are grounds on which one might defend this attitude, the intent of the framers is not among them. (Executive power understandably escapes discussion in *The Tempting of America*.)

On the other hand, no one is or can be completely devoid of tendencies to let his politics influence his constitutional theorizing, and Bork is better than many in this regard. There certainly have been occasions when Bork’s constitutional outcomes have not been in accord with what appear to be his political predilections. E.g., *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986) (Bork, J., constitutionally protecting right to protest outside embassy). Noting that the case involved an Episcopal priest wishing to demonstrate outside the Soviet and Nicaraguan embassies seems to be cutting it a little thin; in any event it is difficult thus to “explain” *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984) (Bork, J., protecting constitutional right to display in subway posters sharply critical of President Reagan). Of course one can argue, if somewhat desperately, that both of those were judicial opinions subject to Supreme Court review. But one cannot thus dismiss Professor Bork’s 1981 testimony against the Human Life Bill, on the ground that it unconstitutionally sought to overrule *Roe v. Wade* by statute. See R. Bork, *supra*, at 289-90, 325. That testimony seems impossible to regard as signaling anything other than a genuine commitment to the legal process ideal. (To these exhibits can now be added the fact that despite what he understandably regards as the Senate’s stupid and unfair denial of his dream of serving on the Supreme Court, he continues—ironically unlike the very Senators who did him in, see *infra* note 33—to articulate the position that society’s fundamental value choices are to be made by the elected branches rather than the judiciary.)

³¹ E. Brouner, *supra* note 28, at 99.

were given to me and to each of our fellow citizens by the Creator and represent the essence of human dignity.”³² Such “natural rights” rhetoric dates back in our own history to the Declaration of Independence, but it wasn’t presented there the way Biden was presenting it, as a recipe on whose basis federal judges are supposed to overturn legislation enacted by the elected branches of our government. The natural rights rhetoric must have flowed smoothly for Senator Biden, who was raised a Roman Catholic, as the Catholic Church is essentially the only institution in twentieth century America that clings to the faith that that concept can provide humankind with a knowable and determinate set of moral commands. But in support of what rights is the concept here being adduced? Most conspicuously, as the hearings attest throughout, the rights to practice birth control and secure abortions, “natural rights” calculated to convert the most composed convent into Our Lady of Perpetual Commotion. Thus, no matter how trippingly the rhetoric rolled off his tongue, Biden was saying only what Senator Kennedy had said before him: there were certain political outcomes that he (or important elements of his constituency) simply had to have—no matter what.³³

Surely the popular campaign against Bork (like the popular campaign in his favor) was waged in these terms.³⁴ This seems the inevitable result of making such disputes matters of general controversy, as the public can’t be expected genuinely to understand and debate theories of constitutional interpretation. It also seems likely that such decisions will continue to be regarded by the general populace as politics as usual, at least for a considerable period: “Law has evolved in the public’s mind from a technical specialty, such as engineering or

³² 1 Bork Hearings, *supra* note 29, at 101.

³³ Note also the unspoken premise that the very body in which Biden and Kennedy sit, the United States Congress, cannot be counted on to deliver the desired outcomes. (That’s what makes it necessary for them to insist on justices who will do so whatever the inclination of the elected branches.) See 1 Bork Hearings, *supra* note 29, at 37 (Sen. Hatch quoting Hodding Carter):

The nomination of Judge Bork forces liberals like me to confront a reality we don’t want to confront, which is that we are depending in large part on the least democratic institution, with a small “d,” in government to defend what it is we no longer are able to win out there in the electorate.

Cf. *infra* text accompanying note 86 (when Supreme Court has ruled on a divisive issue, legislators can sidestep it and avoid retribution at the polls).

³⁴ M. Pertschuk & W. Schaezel, *The People Rising: The Campaign Against the Bork Nomination* (1989); sources cited *supra* note 28.

medicine, to a terrain for the struggle over public policy.”³⁵ And it would be most surprising if the terms in which constituents were reacting did not become in large measure the terms on whose basis the senators made their decision.³⁶

Robert Bork died by the sword that almost got him to the top. He was nominated because he bid fair to restrict abortion, enhance presidential power, get tough with criminals, and so forth—and he was rejected for the same reasons. Judicial philosophy, as opposed to the raw political desirability of the outcomes, had little to do with it either way. One might hope that the Senate’s overtly political reaction could be limited to cases like Bork’s, where (whatever the candidate’s own beliefs³⁷) the nomination was made for transparently political reasons.³⁸ There can be no question that that was an aggravating factor, but it seems likely that it will not be a limiting one. There is much in the Senate’s performance to suggest that, like the emerging academic consensus, and like Ronald Reagan as well, the Senate sees the political desirability of the outcomes reached as the sole appropriate test of judicial performance.³⁹

Writing in *The New York Review of Books* after the Senate’s rejection of Bork, Ronald Dworkin opined that the judge’s demurrer to Biden regarding the right to “privacy” had been “so thoroughly discredited in the hearings, and proved so generally unpopular, that [he] doubt[ed] that [it] will any longer be advanced even by lawyers and

³⁵ E. Bronner, *supra* note 28, at 349. (Actually it seems doubtful that law ever seemed as arcane to the public as engineering or medicine.)

³⁶ Conversely, the terms of the Senate debate are likely to powerfully influence the way the public thinks about issues of judicial qualification, and to an extent the way the Court conceives its own role. See Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations* (Review Essay), 95 *Yale L.J.* 1283, 1317 (1986).

³⁷ Bork’s post-rejection book, *The Tempting of America*, *supra* note 30, seriously presents a theory of judicial review, one he had been developing for some time. But that isn’t why he was nominated.

³⁸ See Moran, *Biden Taps Scholars to Rake Bork Record*, *Legal Times*, July 13, 1987, at 1, 10.

³⁹ Again, I am not suggesting that the present is unique in any of these respects. Just as there have been earlier eras when legal “realism” dominated academia and the idea of role differentiation was consequently denigrated, and earlier presidents who concentrated hard on trying to figure out exactly how prospective nominees would vote in particular cases of interest to them, there have been stretches—notably, perhaps, the mid-nineteenth century—when the Senate rejected judicial nominees for raw political reasons. See, e.g., J. Hurst, *The Growth of American Law: The Law Makers* 143-44 (1950).

judges who found [it] congenial before."⁴⁰ If Dworkin means to include law professors in this legion of the intimidated, I have to disappoint him: since when are we supposed to tailor our constitutional theories to either popular opinion or the theoretical insights of the Senate Judiciary Committee? Dworkin may have a valid narrower point, however: the contrary view is not likely to be articulated very clearly *by those trying to position themselves for appointment to, or promotion within, the federal judiciary*—at least not until control of the Judiciary Committee changes hands.

Perhaps you're beginning to wonder whether I am acquainted with the name David Souter, whose confirmation for the Supreme Court was both recent and smooth.⁴¹ I am. Indeed, I hereby mark Souter's Judiciary Committee hearings and Senate vote as exhibits to be introduced in support of my later claim⁴² that Senate muscle-flexings in this area are likely to be episodic and ultimately unavailing. But one should not try to make too much one way or the other of Souter himself at this point, for even by the end of the hearings we hadn't learned very much about him. Of course we learned *some* things. Judge Souter's answers were certainly fluent (the man speaks in paragraphs) and he assimilated well his advisors' admonitions not to come across as "another Bork" (either by stating his opinions in terms so sharp that someone might be moved to disagree, or by asking the various panel members to clarify their still more impenetrable "questions"). He also stated often enough that he is a "good listener" that the senators believed it (a surprising number indicating that this was qualification enough for them).

We learned one other thing that is more to the present point: whatever else he may or may not be, Justice Souter is not a strong devotee of the notion that constitutional adjudication is supposed to differ in kind from the decisions of elected politicians. When pressed for his judicial philosophy, he regularly invoked the adjectives "practical" and "pragmatic,"⁴³ words that conjure up a habit of thoughtful moderation but do not signal any attitude toward his judicial role that differs from what a responsible moderate would hope for in a candi-

⁴⁰ Dworkin, *From Bork to Kennedy*, N.Y. Rev. Books, Dec. 17, 1987, at 40.

⁴¹ As for the also smooth post-Bork confirmation of Justice Kennedy, see *infra* text accompanying notes 137-40.

⁴² See *infra* text accompanying notes 136-41.

⁴³ E.g., N.Y. Times, Sept. 19, 1990, at A1, col. 2.

date for Congress or the local board of selectmen. The judge's defense of various prior Supreme Court decisions on the ground that they were responses to "problems to be solved that the states [or Congress⁴⁴] simply would not address and the people wanted addressed"⁴⁵ is, similarly, not a theory of judicial review that even hints at role differentiation. "There are many things legislatures 'haven't done anything about' that should be left in precisely that condition,"⁴⁶ and attempting to sort among various pieces of "unfinished business" on the basis of which among them "the people really want" is a task so plainly ill-suited to appointed and life-tenured judges that one can be confident that any such purported performance would entirely reflect the judges' own notions of what needs doing.⁴⁷

The game thus quickly and understandably became an attempt to ferret out Souter's politics.⁴⁸ This proved a fool's errand, however, partly because Souter was cagier than his pursuers, and perhaps partly because, not being an overly passionate fellow generally, Souter seems not to invest deeply in whatever political views he happens to entertain either. But though the evidence was circumstantial, most observers thought they detected in some of Souter's answers a man considerably less conservative than they had been led to expect on the basis of reports that Souter had been "vouched for" by former Governor Sununu and Senator Rudman, and Judge Bork's pre-hearings opened paean to Souter.⁴⁹

What happened? There are at least four possibilities. First, Souter in fact may be another Bork—okay, another Anthony Keunedy—and just did a very good job of hiding it. Souter was nothing if not clever, and the passages in his testimony that gave some of us hope would hardly require a Houdini to get out of. Second, the White House may

⁴⁴ See N.Y. Times, Sept. 18, 1990, at A1, col. 3, B7, col. 3.

⁴⁵ The Recorder, Sept. 17, 1990, at 8, col. 4 (quoting Souter).

⁴⁶ J. Ely, *supra* note 4, at 117.

⁴⁷ But cf. N.Y. Times, Sept. 15, 1990, *supra* note 25 (Judge Souter indicating that his views on the morality of abortion could not properly affect his views on *Roe v. Wade*); *id.* at col. 1 (Souter expressing his view that judges "have not been placed upon courts in effect to impose our will. We have been placed upon courts to impose the will that lies behind the meaning of those who framed and, by their adoption, intended to impose . . . constitutional law of this country upon us all.").

⁴⁸ See, e.g., *id.* at col. 5 (Senator Kennedy's pursuit of Souter's moral feelings with respect to abortion).

⁴⁹ Bork, At Last, An End to Supreme Court Activism, N.Y. Times, Aug. 29, 1990, at A21, col. 2.

simply have screwed up. Rudman is no arch-conservative, Sununu no lawyer, and I doubt that Bork's conspicuous endorsement was even unambiguously welcomed, let alone the product of crucial inside information the rest of us lack.⁵⁰ Third, even if David Souter doesn't turn out to be an exact clone of, say, Antonin Scalia, there is no strong reason to suppose George Bush is any more an exact clone of Ronald Reagan when it comes to judicial appointments than he is otherwise. Fourth, the appointment was not to just any seat, but to that of Justice William J. Brennan, Jr. True, there was much liberal claptrap when moderate Justice Lewis Powell retired, about how it would be sacrilege to fill *his* seat with a conservative, but this time the point⁵¹ was valid: Brennan had anchored the Court's liberal wing for four decades. It is possible that this fact influenced Bush and his advisors. Indeed, replacing a moderate justice with a conservative and, later, a liberal with a moderate, seems exactly the course one might reasonably expect from a moderately conservative President with even a modicum of respect for judicial continuity.

However true that all may be, the Souter proceedings did not signal a return to the legal process ideal and indeed probably helped solidify the new wisdom that it is futile to pretend that one can judge potential nominees on anything other than their politics. What's more, though the specific incentives are likely to vary over time with changes in the control of the executive branch and the Senate, the general incentive system now in place seems unlikely to change for some time. Action breeds reaction, and the next liberal Democrat elected President is not likely to worry too much about judicial philosophy *per se*—we have seen that the Democrats in Congress are hardly sticklers for legal process—but rather to seek to redress what he will see as the political imbalance wrought by his predecessors.

This alteration of the reward system is likely to have unfortunate feedback effects on academia. The dream of high judicial appointment has probably always warped the work of constitutional law professors to a degree. Back in the "hions of the bar" days, one suspects it led mostly to the trimming of sails, thereby costing us some scholarly creativity. Two things are different now. First, the appoint-

⁵⁰ Cf. N.Y. Times, Sept. 17, 1990, at A18, col. 6 (Bork expressing surprise at some of Souter's testimony).

⁵¹ In fact, we heard less about this point this time, presumably because wolf had been cried on the earlier occasion.

ments of Justices Scalia and Kennedy and the attempted elevation of Judges Bork and Ginsburg, the first academics nominated for the Supreme Court since 1943,⁵² may have rekindled similar dreams in the bosoms of many law teachers. It's easy to see why presidents interested in radical reform through the courts would be drawn to professors: unaccustomed to the need for compromise and coming from a profession that puts a premium on personal consistency, academics are likely to be more doctrinaire and thus more "reliable."⁵³ The "Schwab's Drugstore effect"⁵⁴ on scholarly writing for the next few decades is not likely to be salutary, though.⁵⁵

The second difference is that, because of the changes in appointments criteria, the pressure is no longer toward maintaining a balanced, common law judge's image—"I'm no ideologue; I'd decide every case on its individual merits"—or even a consistent *judicial* philosophy, but rather toward pleasing one of the standard political constituencies. If you believe that the Court should not constitutionally invalidate state laws mandating affirmative action, you had better take the position that it *should* strike down state laws restricting abortion. Contrariwise, if you are prepared to uphold anti-abortion laws, you had better be prepared at the same time to *invalidate* affirmative

⁵² Wiley Rutledge was named that year. It's true he was a Circuit Court judge at the time of his appointment to the Supreme Court, but so were the four I mentioned in the text: my reference is to where the appointees in question had spent most of their careers. Felix Frankfurter and William O. Douglas were both appointed in 1939, the former directly from academia, the latter via a stint with the SEC.

⁵³ It is difficult to postulate any other reason why Reagan would have been drawn to academics. The last pre-Reagan President who seems to have cared greatly about precisely how his nominees would rule, Franklin Roosevelt, was also the last pre-Reagan President to favor professors.

⁵⁴ Legend has it that once Lana Turner was "discovered" sipping a soda at Schwab's, legions of lovehies took to hanging out there, sipping sodas and trying to look like Lana Turner.

⁵⁵ In addition to the increased incentive toward overtly political "constitutional theories," the Schwab's phenomenon may exacerbate existing academic incentives not to build on, or even to acknowledge merit in, the work of others. Instead, an author is likely to cite as dispositive early criticism of the perceived rival, and then present his own theory (or, more likely, to sketch the outline of his own theory, as some sinister outside force habitually decrees that "this is not the place for a full presentation" of the author's own approach). Law teachers are caught in something of a whipsaw here, in that academia generally rewards originality, whereas the law generally rewards lack of originality—that is, the existence of precedent. The tension thus created probably helps account for the common scholarly slalom in which the author's theory is said to be imminent in a series of judicial decisions, though no prior academic commentator has even come close to apprehending it. There is little professional risk in acknowledging the possibility that certain judges may be idiot savants.

action laws—even though neither position is easily reconcilable with any coherent philosophy of judicial review that is not heavily dependent on its purveyor's political preferences.⁵⁶ The pressure now, in other words, is to make no enemies on, pick one, the political left or the political right. (President Reagan appointed a remarkable percentage of the nation's conservative law teachers to the federal bench, many of them quite young. Discovering you were a conservative in 1980 was like buying stock in Apple Computer the same year.)

Thus, the entire gang appears to be on board. "Overrule the flag burning case," "Appoint Bork," and for that matter "Dump Bork," are all united in their message that the role of judges is no different from that of other politicians.⁵⁷ I doubt that the unity of left and right on this level surprises true believers on either side. The right must be confident it can prevail for the foreseeable future, and for the far left, it may be part of the long-term recipe for revolution. I can't help but wonder, though, if liberals along for the ride really understood what they were getting into.

⁵⁶ One taking an "originalist" line might choose the latter combination and argue that, whereas the Constitution has absolutely nothing to say on the subject of abortion, the fourteenth amendment was intended to outlaw all racial classifications. It's a fair shot, but I believe it fails. Neither the overall theory of the equal protection clause nor the specific intentions of its framers suggest the unconstitutionality of laws discriminating *in favor of* powerless minorities. See J. Ely, *supra* note 4, at 61-62, 170-72. (What one can say in favor of the *former* combination, without resorting to some form of the claim that "these laws are good and those are bad," is more elusive still.)

A combination popular for a time with those running for the Reagan Court was that laws limiting campaign contributions should be invalidated under the first amendment, but that few other laws should be.

⁵⁷ I was asked after presenting a version of this Article as the Sibley Lecture whether it constitutes a surrender. Certainly it is an admission that few people appear to agree with me, and that is a surrender of sorts. However, this Article is intended to convey just as clearly the idea that today's consensus is wrong—the suspicious may even suppose that to be its principal point—and to suggest the likelihood that after a few decades the legal process ideal will experience a renaissance.

II. MAYBE A "LEGISLATIVE JUDICIARY" IS OUR BEST HOPE FOR
A VIABLE SEPARATION OF POWERS, GIVEN CONGRESS'S
VANISHING ROLE AS A POLICY-MAKING FORCE

We are simply afraid to make any difficult decisions. We're afraid we'll make someone mad at us.

Congressman Ed Jenkins⁵⁸

You just don't see much good legislation anymore.

Former Governor Lester Maddox

In recent decades there has developed something approaching a consensus among political scientists and other observers that Congress has essentially lost the ability to function as a policy-making alternative to the executive. One important factor has been the breakdown of party discipline. In the late twentieth century members of Congress appear to regard the preferences of their party platform or leaders as a sort of tie-breaker, to be consulted only when the representative's particular constituent and other parochial interests do not dictate a course of action.⁵⁹ When this development is coupled with the fact that in a complex institution like Congress it is considerably easier to block initiatives than to push them through,⁶⁰ the results can be dramatic.⁶¹

Much of the fault lies in the related development, since the New Deal, of a sort of congressional reelection assurance plan.⁶² Modern

⁵⁸ The Politics of Anti-Politics, N.Y. Times, Sept. 26, 1990, at A24, col. 1 (editorial).

⁵⁹ E.g., S. Smith, *Call to Order: Floor Politics in the House and Senate* (1989). The related decline in party affiliation as an important determinant of elections has in turn contributed further to the pressure incumbents feel to concentrate on constituent (and other interest group) service. See M. Fiorina, *Congress: Keystone of the Washington Establishment* 112 (2d ed. 1989).

⁶⁰ E.g., Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. Pa. L. Rev. 810, 830-32 (1974); R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 10 (1968).

⁶¹ The result of the combination is "a decentralized legislature, its fragmented party coalitions guided by tolerant party leaders, that [is] best suited to trafficking in particularized benefits." Jacobson, *Running Scared: Elections and Congressional Politics in the 1980s*, in *Congress: Structure and Policy* 73 (M. McCubbins & T. Sullivan eds. 1987).

⁶² Although this characterization is mine, the system has been well documented by others. E.g., M. Fiorina, *supra* note 59; G. Jacobson, *The Politics of Congressional Elections* chs. 7-8, at 181-223 (2d ed. 1987); R. Davidson & W. Oleszek, *Congress and Its Members* 43-44 (3d ed. 1990). See generally T. Mann, *Unsafe at Any Margin: Interpreting Congressional Elections* 102 (1978) (examining link between electoral insecurity and accountability); D. Mayhew,

congressmen follow a fairly standard recipe for survival⁶³—a maximum of “casework,” or particularized services for constituents⁶⁴ (and other interest groups seen as critical to reelection⁶⁵) and a minimum of “programmatic” or legislative activity.⁶⁶

Congress: The Electoral Connection 53-59, 108-10 (1974) (discussing benefits of constituent service).

A. Maass, *Congress and the Common Good* (1983), is a conspicuous presentation of the view that Congress frequently seeks to act for the common good rather than merely aggregating private preferences. However, Professor Maass is also clear to the effect that the President is the dominant influence in the legislative process, whereas the legislature plays the subservient role of criticism and “control.” *Id.* at 10. “Control in this context means to exercise a check upon executive leadership, to oversee it, to criticize and influence it, and to approve, reject, or amend specific executive proposals.” *Id.* at 11. See generally *id.* at 3-18 (modeling executive-legislative relations). (Various reforms of the early 1970s were calculated to beef up Congress’s influence vis-a-vis the executive, but as Maass points out, they failed. *Id.* at 54-61.) In fact he makes the point that judicial examinations of “legislative history” would be more realistic if they shifted their focus from statements made in various congressional documents and debates to various records located in the executive branch, which is probably where the law was originated, almost certainly where the various alternative approaches were intelligibly weighed. *Id.* at 13-14. Maass’s quarrel is thus with commentators like the early Robert Dahl rather than with Fiorina et al.

⁶³ Even the rare dissenter from the proposition that casework matters importantly to one’s chances of reelection agrees that congressmen think it does. Johannes & McAdams, *The Congressional Incumbency Effect: Is It Casework, Policy Compatibility, or Something Else? An Examination of the 1978 Election*, 25 *Am. J. Pol. Sci.* 512, 516-17 (1981).

⁶⁴ See, e.g., B. Eckhardt & C. Black, *The Tides of Power: Conversations on the American Constitution 19-20* (1976); J. Ely, *supra* note 4, at 131; M. Fiorina, *supra* note 59, at 32-47, 53-67, 72, 86-90; A. Maass, *supra* note 62, at 228-30; D. Mayhew, *supra* note 62; M. Parenti, *Democracy for the Few* 195 (3d ed. 1980); *Image of a Senator: D’Amato Sticks to Local Interests*, *N.Y. Times*, May 11, 1988, at B5, col. 5.

⁶⁵ Fiorina takes account of the rapid growth in the influence of political action committees in his second edition, and correctly notes that, although it would now be a mistake to describe congressional casework as running only to the benefit of geographical constituents, the rise of PACs serves only to reinforce his more general point. M. Fiorina, *supra* note 59, at 124-29.

⁶⁶ In his second edition, Fiorina backs away from his earlier claim that the increase in casework had resulted in a decrease of legislative activity and suggests that, with increases in staff, it is possible that they both have been increasing. *Id.* at 91. He goes on to point out, however, that despite the staff increases the quality of legislative work remains in serious doubt. *Id.* at 91-92. Moreover, the statistical evidence that moved him on this issue—a showing that between 1958 and 1978 positive constituent evaluations on the basis of the representative’s philosophy or ideology rose from 2% to 7%; on the basis of her stands on domestic policy, from 3% to 5%; and on the basis of her foreign policy stands, from 0% to 1%—also showed that over the same period positive evaluations on the basis of her attentiveness to her constituency rose from 11% to 25%. *Id.* at 89. Thus while one may not have been purchased at the expense of the other, 25% is still a lot bigger than 13%. The second edition also correctly cautions that the positive “policy” evaluations appear to have been based more on “position taking” than on actual legislative activity. *Id.* at 92-93; see also

Congressmen know that the specific impact of broad national policies on their districts is difficult to see, that effects are hidden, so to speak. . . . Thus, in order to attain reelection, congressmen focus on things that are both more recognizable in their impact and more credible indicators of the individual congressman's power—federal projects and individual favors for constituents.⁶⁷

As the mix has shifted, the reelection rate has gone up enormously.⁶⁸

Things titled statutes do still get passed, but what do they generally comprise? Sometimes just more of the same, pork barrel and other constituent service measures.⁶⁹ Legislation of broader import also sometimes emerges,⁷⁰ though it is likely to consist of an appropriation⁷¹ for a new or existing bureaucracy, "controlled" by what

D. Mayhew, *supra* note 62, at 61-73 (discussing "position taking," the public enunciation of a judgmental statement on anything likely to be of interest to political actors).

⁶⁷ M. Fiorina, *supra* note 59, at 68-69.

⁶⁸ *Id.* at 9; D. Mayhew, *supra* note 62, at 14. On the connection, see, e.g., *id.* at 57, 69; M. Fiorina, *supra* note 59, at 35-36, 50-52. Admittedly, the existence of a strong causal connection can be questioned. Johannes & McAdams, *supra* note 63. But see Fiorina, *Some Problems in Studying the Effects of Research Allocation in Congressional Elections*, 25 *Am. J. Pol. Sci.* 543 (1981) (rejecting findings of Johannes and McAdams); Yiannokos, *The Grateful Electorate: Casework and Congressional Elections*, 25 *Am. J. Pol. Sci.* 568 (1981) (concluding that constituent service is important to reelection prospects). For a response, see Johannes & McAdams, *Does Casework Matter? A Reply to Professor Fiorina*, 25 *Am. J. Pol. Sci.* 581 (1981). The important point for purposes of this Article, however, is that congressmen allocate their attentions on the assumption that there is one. See *supra* note 63.

⁶⁹ Actually, Congress seems to be getting less effective at logrolling and pork-barrel legislation (at least in up-front statutory form). See A. Maass, *supra* note 62, at 69. The tendency is thus toward "formula grants," often "controlled" by vague admonitions and thus respecting which the influence of members of Congress is more likely to be exerted at the administrative level. See *infra* text accompanying notes 72-77.

⁷⁰ Of course, Congress sometimes legislates in ways that are both quite directive and not explainable in terms of a desire to promote the interests of particular sets of members' constituents. The recent example most often cited is deregulation. See, e.g., M. Derthick & P. Quirk, *The Politics of Deregulation* (1985). Actually, this isn't a very clear counterexample to the Fiorina thesis—though it is to, say, the early Dahl—as leadership within the Ford and Carter Administrations had a good deal to do with bringing deregulation about. But counterexamples certainly are possible: if I believed otherwise, I would not have concluded this Article as I have. See *infra* text accompanying notes 144-49.

⁷¹ Congress certainly exercises influence at the appropriations stage. Generally, however, that influence is felt at the level, say, of eliminating (or restoring) a particular weapons system as opposed to enacting or even proposing a competing general approach to an area such as defense. One reason for this is that thinking big generally has been left of late for the executive (and the judiciary). Another is that tinkering with the specifics of programs (including weapons systems) seems often to spring from constituent interests and other personal political agendas as opposed to any larger substantive vision. See, e.g., Owens, *Micromanaging the Defense Budget*, 100 *Pub. Interest* 131 (Summer 1990); *Uprising in the House: Members Said*

amounts to no more than an admonition to "take care of" this or that problem.⁷² This combination in turn helps secure the framework for the reelection assurance plan. "The existence of the Washington system locks us into the New Deal way of doing things: pass a law, appropriate a lot of money, and establish a new federal bureaucracy. No reasoned analysis underlies that method of operation. The electoral interest of incumbent congressmen does."⁷³

How so? Most obviously, such a "law," by saying next to nothing, provides little by way of substantive content against which an incumbent's fitness for continuation in office can be measured. A statutory injunction to "do something" risks few votes. Second, such open-ended delegations leave maximum range for congressional scolding. Once they see (or purport to see) how such a formless mandate is being interpreted by those to whom they entrusted it, members are free to retort—each in accord with what he takes to be the preferences of his constituency—"That's not what we wanted you to do; indeed it's nothing short of a betrayal of the American people."⁷⁴ Finally, such unrestricted delegations give congressional committee chairpersons (and their staffs), and to a lesser degree other members of Congress who happen to be interested, significant informal influence over various executive branch interpretations⁷⁵—influence that can be

No to Bush on Military Without a Grand Design of Their Own, N.Y. Times, July 29, 1989, at A1, col. 4.

⁷² See, e.g., 122 Cong. Rec. 31,634 (1976) (statement of Rep. Levitas) ("When hard decisions have to be made, we pass the buck to the agencies with vaguely worded statutes."); Lobel, Emergency Power and the Decline of Liberalism, 98 Yale L.J. 1385, 1407-09 (1989) (noting some 470 open-ended delegations to the President to deal with "emergencies"); T. Lowi, *The Personal President: Power Invested, Promise Unfulfilled* 52 (1985); McDowell, Congress and the Courts, 100 Pub. Interest 89, 93-94 (Summer 1990); Schoenbrod, Congress Must Spell Out Where the Burdens of Clean Air Fall, Wall St. J., July 5, 1983, at 22, col. 3.

⁷³ M. Fiorina, *supra* note 59, at 69.

⁷⁴ Cf. 122 Cong. Rec. 31,622 (1976) (statement of Rep. Flowers):

[W]e stand back and say when our constituents are aggrieved or oppressed by various rules and regulations, "Hey, it's not me. We didn't mean that. We passed this well-meaning legislation, and we intended for those people out there . . . to do exactly what we meant, and they did not do it."

See also, e.g., Baker, Not the Declaring Type, N.Y. Times, Nov. 10, 1990, at 23, col. 1 ("Later, after the President has played the hand, Congress can revel in the wisdom of hindsight and profit by passing crowd-pleasing judgments.").

⁷⁵ Actually, as we persist in divided government (President from one party, majorities in Congress from the other), this kind of influence on the part of the committee chairpersons probably will diminish to some degree—though it will always be significant—as that of the ranking minority members increases.

heavily arrayed in support of the interests of one's geographical or other types of "constituents" (but, again, does not entail negative accountability).⁷⁶

However, influence exercised in either of these ways—by unofficial intervention into the enforcement process, or post facto allegation that the legislative will immanent in the statute has been thwarted—cannot be passed off as representing the judgment of "Congress"; rather, it will reflect the judgment and influence of a limited number of well-placed individuals. Nor, of course, is it calculated to add up to anything approaching a coherent policy judgment. Instead, it represents a series of ad hoc interventions by widely disparate persons, sometimes in the service of perceptions of the public interest, often quite flagrantly in the interests of their individual constituents. At our luckiest, "[p]ublic policy emerges from the system almost as an afterthought."⁷⁷

⁷⁶ As Professor Fiorina has noted:

The legislation is drafted in very general terms, so some agency, existing or newly established, must translate a vague policy mandate into a functioning program, a process that necessitates the promulgation of numerous rules and regulations and, incidentally, the trampling of numerous toes. At the next stage, aggrieved and/or hopeful constituents petition their congressman to intervene in the complex (or at least obscure) decision processes of the bureaucracy. The cycle closes when the congressman lends a sympathetic ear, piously denounces the evils of bureaucracy, intervenes in the latter's decisions, and rides a grateful electorate to ever more impressive electoral showings.

M. Fiorina, *supra* note 59, at 46-47; see also de Grazia, *Congressional Liaison: An Inquiry into its Meaning for Congress*, in *Congress: The First Branch of Government* 297 (1966) (congressional oversight of the administrative process); M. Fiorina, *supra* note 59, at 60-66 (suggesting that the decentralization of congressional power enables individual members to control specific policy decisions); Owens, *supra* note 71, at 141 (congressional oversight of the administrative process); Rabkin, *Micromanaging the Administrative Agencies*, 100 *Pub. Interest* 116, 119 (1990) (same); R. Ripley, *Congress: Process and Policy* 251-52 (1st ed. 1975) (interaction between Congress and the bureaucracy). See generally K. Slietpsle, *The Giant Jigsaw Puzzle: Democratic Committee Assignments in the Modern House* (1978) (study on committee assignments finds that freshmen representatives seek assignments to those committees in which their constituents have an important interest); A. Maass, *supra* note 62, at 40 (congressional oversight holds the bureaucracy accountable for administrative performance).

To give Congress its due, it did try to build a little more accountability into this routine by the device of the legislative veto (though in the process it hastened the trend toward flabby initial delegations). However, the legislative veto has been declared unconstitutional. *INS v. Chadha*, 462 U.S. 919 (1983).

⁷⁷ M. Fiorina, *supra* note 59, at 68. The system has "produced a Congress that [is] inordinately responsive without being responsible." Jacobson, *supra* note 61, at 73.

Sometimes the situation will be so sensitive politically that Congress will be leery of delegating the power of effective decision to the executive bureaucracy. What to do in such a case? An innocent might expect that Congress would be moved to make the troublesome decision or decisions itself—by passing some old-fashioned legislation, complete with standards and everything. Congressional decision entails congressional accountability, however, and thus an increasingly popular gimmick has been created for this kind of case, whereby the problem is passed off for effective decision by some third party. The 1988 creation of the military base-closing commission⁷⁸ is a recent textbook example of this, though it certainly was not without precedent.⁷⁹ The Salary Act of 1967⁸⁰ operates the same way, and Congress's repeated refusals to make the Federal Reserve more accountable politically are conventionally attributed to the fact that the Fed spares Congress "the responsibility of making painful choices about the economy."⁸¹ The Gramm-Rudman-Hollings Act⁸² was similar, though perhaps a little sneakier, in that the effective decision there was passed to the Comptroller General, whom Congress had reason to believe was in some sense "their guy," but at the same time wasn't so closely identified with them that they would have to take the heat when he axed some of their constituents' favorite programs.⁸³

⁷⁸ See Congress Agrees on Closing Bases but Leaves the Choices to a Panel, N.Y. Times, Oct. 13, 1988, at A1, col. 5.

⁷⁹ One might wonder how these examples differ from the earlier creation of administrative agencies to handle various problems. The answer is that the distinction is not sharp: a desire to escape the political heat that comes with decision may have helped account for the creation of such agencies as well. In most such cases, however, a seemingly larger element was a desire to assign an entire set of problems to a group of "experts" who could study them over time and develop more detailed and sensible solutions than Congress itself could: faith in expertise was part of the New Deal religion. (In the recent instances I cite, the desire to escape accountability plainly predominates.) To the extent I'm wrong about this distinction, however, my broader point, unfortunately, is only reinforced.

⁸⁰ 2 U.S.C. §§ 351-364, as amended by Act of Dec. 19, 1985, Pub. L. No. 99-190, 135 Stat. 1322 (1985).

⁸¹ N.Y. Times, Aug. 24, 1989, at A1, col. 4.

⁸² Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 901 (1985).

⁸³ The Supreme Court found unconstitutional this grant of executive power to an officer over whom Congress had removal authority. *Bowsher v. Synar*, 478 U.S. 714 (1986). I suppose we should be thankful that Congress doesn't have the full range of devices available to some state legislatures. In 1988 the California legislature, immobilized by conflicting pressures from two powerful interest groups (insurance companies and trial lawyers), placed on the November ballot four mutually inconsistent automobile insurance initiatives so complex and

The third party may also be the courts.⁸⁴ Walter Murphy and Joseph Tanenhaus have suggested that the Senate's "apparently illogical behavior"⁸⁵ in rejecting judicial nominees (like Bork) who think courts should generally defer to legislatures may be explainable in these terms:

One explanation is that some senators were loath to accept such power because it would have increased their responsibility—and accountability—to constituents. It can be comforting to elected officials who face divisive issues like prayer in public schools, federal aid to parochial schools, and abortion to wash their hands of the problems by mournfully proclaiming that the Supreme Court has spoken, wrongfully perhaps, but authoritatively. Thus, legislators can express sympathy with individual constituents of all persuasions without incurring heavy costs at the next election.⁸⁶

It briefly baffled me that everyone (advocates, critics, media alike) treated the Supreme Court as the final authority on the content of federal civil rights statutes. An observer who took the paper system seriously would respond that such a view is unfair, as Congress can always overrule an interpretation of a statute by amending it—it's not as if the Constitution were implicated. The answer, of course, is that by now we all know perfectly well that, whichever way the Court holds, the odds are extremely low that Congress is going to overrule it.⁸⁷ Thus, although the matter is "statutory," the Court is likely to be the last word. The last legally effective word, I should say: there will be plenty of scolding by individual members, generally with the television cameras rolling.

overlapping that the Stanford torts faculty was unable to explain either to their satisfaction, or to that of the rest of us, how even a person fairly clear of her goals should vote on them.

⁸⁴ Of course every delegation to the executive or an administrative agency is indirectly a delegation to the courts that review their actions, but sometimes Congress "cuts out the bureaucratic middleman" and makes its delegation directly to the judicial system. See McDowell, *supra* note 72, at 93-94.

⁸⁵ Murphy & Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 *Nw. U. L. Rev.* 985, 986 (1990).

⁸⁶ *Id.* at 986-87 (footnote omitted).

⁸⁷ The reasons here are various, including not only a desire to let the court system take the heat, but also, as noted earlier, the fact that it is easier to block legislation than to enact it. There are, of course, rare exceptions, such as Congress's amendment of Title IX of the Education Amendments of 1972, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. § 1687 (1988)), in reaction to the Court's statutory holding in *Grove City College v. Bell*, 465 U.S. 555 (1984).

Occasionally Congress will summon the courage to assign to *itself* the effective decision authority regarding problems it knows it has been ducking, and to seek to build in procedural safeguards to prevent its continuing to do so. The War Powers Resolution of 1973⁸⁸ has been its most notable effort along these lines, in my opinion an admirable one. Unfortunately, the experience under the Resolution has been that when push has come to shove, Congress has lacked the hardihood to hang in there and take the heat.⁸⁹

I am not arguing that Congress has lost the ability to make life miserable for the President. It still knows how to get in the way; the Senate's refusal to confirm Justice-designate Bork and both houses' refusal to enact a constitutional flag burning amendment are conspicuous recent examples. A willingness thus to obstruct might well on occasion prove a useful bulwark against tyranny.⁹⁰ It should be noted, though, that in each of the cited instances, Congress's affirmative approval of the executive's plan was inescapably required. Such occasions are rare, however, given the existence of so many broad delegations to the executive, whether actually granted by Congress or simply acquiesced in. And Congress's willingness to become involved where there exists an even vaguely articulable option not to has been highly restricted of late. The contribution it is able to make toward insuring that the policy judgments enforced for and against the American people represent the combined judgment of a group of persons (some of whom are not beholden to the President), has thus become very questionable.⁹¹ "[Congress] can act negatively, to disrupt the

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⁸⁸ 50 U.S.C. §§ 1541-1548 (1988).

⁸⁹ See, e.g., Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 Colum. L. Rev. 1379, 1380-83 (1988); cf. Cole, *Book Review*, 99 Yale L.J. 2063, 2078-79 (1990) (similar experience under National Emergencies Act of 1976).

⁹⁰ Those who find the distinction helpful might say that the "system of checks and balances" is working—to a degree at any rate—even if the "separation of powers" is not.

⁹¹ It has reached the point where senators and representatives, without any evident sense of irony, can scold the executive for not having come up with a legislative program to deal with one or another pressing problem. See A. Maass, *supra* note 62, at 15, 170 (citing examples); Schoenbrod, *How the Reagan Administration Trivialized Separation of Powers (and Shot Itself in the Foot)*, 57 Geo. Wash. L. Rev. 459, 460 (1989).

Presidents are loath to point out the irony here, as they are entirely satisfied with a Congress that does not regard policy initiative as part of its job. Cf. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 Stan. L. Rev. 1093, 1123 (1990) ("For the latter half of the twentieth century, a tacit deal has existed between the President and Congress: He'll take the responsibility as long as he can make the

policy the President pursues, but it cannot act affirmatively to carry out a comprehensive substitute policy of its own, even if through structural reform it could develop the capacity to create it."⁹²

Of course the disappearance of Congress even here, as an independent influence on federal policy, has not been complete. There's enough of a trend, however, to suggest that we have a problem with respect to the separation of powers. Hence the further suggestion of this Part's title: perhaps it is a good thing that the federal courts generally, and the Supreme Court in particular, are being urged on all sides to drop the pretense that they shouldn't behave like legislators. Given Congress's vanishing act,⁹³ this development may represent our best hope of providing an effective policy counterbalance to the President for the foreseeable future.⁹⁴ (In particular, liberal supporters of the development might be moved by the fact that at least for the time being our presidents are coming from the right half of the political spectrum.) Might what's happening not make sense as a way of providing a liberal counterweight, perhaps indeed our best contemporary hope of approximating the sort of balanced system the framers envisioned?

decisions, and it will live with a lack of power as long as it doesn't have to be held accountable.").

⁹² J. Sundquist, *The Decline and Resurgence of Congress* 306 (1981). Despite a good deal of post-Vietnam bravado, this pattern has persisted in the foreign policy area as well. "[M]ost of the major post-Vietnam foreign policy initiatives, from detente under President Nixon to global anti-Sovietism under Reagan, still emanated from the executive. When Congress acted, it was to revise, endorse, or prohibit foreign policy proposals initiated by the executive branch." C. Arnson, *Crossroads: Congress, the Reagan Administration, and Central America* 12 (1989).

⁹³ Perhaps this development is not as recent as I have painted it. Elements of it have surely existed for a long time, e.g., A. Maass, *supra* note 62, at 45-63, as have advocates (and specimens) of an overtly political judiciary. I have argued that as of 1991 we are witnessing a coincidence of "high" stages on each cycle. If you think I'm wrong about that, though—it is always difficult to place the present in historical context—please feel free to regard this as simply a rhetorical device. Even if each of these developments dated back to the dawn of the republic, the textual suggestion to which this footnote is appended might still be made (more forcefully, one would suppose)—and it would still be emphatically rebuttable.

⁹⁴ Cf. E. Bronner, *supra* note 28, at 352:

There is an irony to the fact that fewer and fewer Americans participate in the political process, yet they turned out in massive numbers to play a role in the Bork controversy. Since the work of the Supreme Court has come to provide so much of the framework for social policy issues, democracy—in which citizens make choices through public debate, local referenda, and elected representatives—was replaced with a substitute form: debate over a nominee to the Supreme Court.

See also R. Bork, *supra* note 30, at 3 (instructive that pro-choice and anti-abortion demonstrators tend to picket the White House and the Supreme Court, but not Congress).

III. FAT CHANCE

There are two objections to this suggestion, one theoretical and debatable, the other practical and dispositive.

A. Objection One: The Suggestion Is Wrong in Principle, as the Alternative Policy-Making Center Should Be Democratically Selected

1. First Rejoinder: Says Who?

In my opinion an entirely convincing argument can be made that it would be inconsistent with the overall theory of our Constitution, particularly as it has evolved by amendment over the past 150 years, for one of our principal policy-making organs to be unelected.⁹⁵ It is obvious, however, that most contemporary commentators are not convinced, as they argue either openly for an appointed judiciary that enforces its own values in the name of the Constitution, or for what will amount to the same thing, judicial enforcement of the values held by "society" (albeit, mysteriously, not by its elected representatives).⁹⁶

It is true that this disagreement with Objection One is never made explicit. The commentators do not, for example, admit (let alone proclaim) that what they are actually proposing is a version of the old idea of "mixed government," a combination of democracy and oligarchy, as developed in the writings of such theorists as Locke and Montesquieu. Given that these two men are conventionally recognized as important influences on the framers, one might wonder why not,⁹⁷ but of course the answer is obvious: "undemocratic" has become a dirty word in this country, to the point where even its approximate invocation would be rhetorical suicide. "In essence, there are two choices: abandon the term democracy as the major premise in analysis or redefine it to portray accurately the nature of government embodied in the Constitution. Because the former is improbable, the latter is essential."⁹⁸ Thus, the position is wrapped in gobbledygook—generally stressing how democratic it is to have an unelected judiciary superim-

⁹⁵ The argument is made in J. Ely, *supra* note 4, chs. 1 & 4. It entirely convinced its author.

⁹⁶ See *id.* at ch. 3.

⁹⁷ Of course the Senate was originally conceived as something of an aristocratic counterbalance to the "democratic" House of Representatives, though the ratification of the seventeenth amendment in 1913 probably interred that rationale once and for all.

⁹⁸ Chemerinsky, *supra* note 18, at 76.

posing “our” values on the decisions of our elected representatives⁹⁹—but it prevails nonetheless. Down deep most commentators simply do not agree that our principal policy-making organs must be democratically selected.

2. *Second Rejoinder: Given the Changes in the Appointments Process, the Suggested Model Is a Good Deal More “Democratic” Than It Used to Be*

Federal judges have always been appointed by one elected official and confirmed by a bunch of other elected officials (since 1913, directly elected officials). During periods when the judge’s job was widely conceived as involving something other than the ordinary political skills, however, it would have been difficult to maintain that this method of selection rendered federal judges “democratic officials.” Indeed, again precisely because of the then-prevailing assumption that judges weren’t just another set of politicians, even state judges who were actually elected (and reelected) by the people were not regarded until recently as democratic officials in the usual sense. Only rarely, for example, were they turned out of office for unpopular decisions:¹⁰⁰ Rose Bird had to stand for reelection in a way that Roger Traynor never did.¹⁰¹

What it was about Felix Frankfurter that supposedly “fooled” Franklin Roosevelt was the “legal process” joker, the assumption that there are times when one may strongly disapprove of a law without

⁹⁹ An unusually circular version of the point—that no one could deny that the United States is a democracy, yet the United States Constitution (as construed by the commentator) incorporates a value-imposing judiciary—is rediscovered by every generation. E.g., E. Rostow, *The Sovereign Prerogative* ch. 5 (1962); Bishin, *Judicial Review in Democratic Theory*, 50 S. Cal. L. Rev. 1099, 1112 (1977); Chemerinsky, *supra* note 18, at 77 (“[I]f one defines ‘democratic’ more broadly to reflect the actual nature of decisionmaking, all government institutions are, at least, somewhat ‘democratic’ . . .”).

¹⁰⁰ See Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 Am. B. Found. Res. J. 345, 362-65; J. Hurst, *supra* note 39, at 130-34.

¹⁰¹ We now kick our state judges out of office—I’m assuming that in this as in so much else, California is where the future happens first—and reelect 97% of our congressmen. I don’t believe it’s because they’re better; instead I would suggest it’s because both “branches” have evolved to the point where members of Congress have less to do with difficult and conspicuous political choices. (Incumbent governors, faced with tougher and more visible choices as Washington provides less and less financial help, have also become politically very vulnerable. Sec, e.g., N.Y. Times, Nov. 8, 1990, at A1 col. 4.)

being prepared to declare it unconstitutional.¹⁰² Once that joker is expelled from the deck, however, as both recent presidents and the Senate Judiciary Committee have indicated they intend to do, the deal is changed somewhat. Candidates whose political views have been thoroughly checked, and who then have been all but required to pledge that they will enforce those political views in the name of the Constitution, can be said—in an admittedly limited sense, but one that would not have rung true before—to have been “democratically” selected. (The Secretary of Labor isn’t elected either, but she is certainly a “political” official, and we fully expect her to behave like one.) On the other hand, federal judges still do not have to stand for reelection—nor, unlike the Secretary of Labor, do they have a boss who must—a fact that renders them significantly less “accountable to the people” than they otherwise would be.¹⁰³ So this second rejoinder

¹⁰² I’m not sure this account is correct. Roosevelt was not clearly a civil libertarian. At all events he was focusing on issues of federal power, on which Frankfurter’s constitutional (as well as his political) views were well known and reliable. See also *supra* note 24 (discussing Roosevelt’s appointment of Frankfurter).

¹⁰³ On my approach, this difference is crucial. See *supra* note 4. Some might ask at this point whether members of the House of Representatives really have to stand for reelection any more, given that 98% of them were reelected in both 1986 and 1988, 96% in 1990, a year in which virtually all the pundits predicted a sizeable anti-incumbent backlash. For discussion of this question, see Tushnet, Schneider & Kovner, *Judicial Review and Congressional Tenure: An Observation*, 66 *Tex. L. Rev.* 967 (1988). It’s a fair question, but three observations are in order:

(1) Despite the statistics, congressmen worry about reelection. E.g., Jacobson, *supra* note 61; T. Maun, *supra* note 62. (This is hardly a surprise: other officials, such as governors, senators, and presidents, certainly have to worry about reelection—on senators, see, e.g., Dixon, *The Power of Incumbency is a Myth*, *N.Y. Times*, June 12, 1990, at A21 col. 2—and congressmen are not so coldly rational and self-confident as to sharply distinguish their own situation. Even at law schools that routinely grant tenure, people without tenure worry about getting tenure. Cf. R. Fenno, *Home Style: House Members in Their Districts* (1978) (recounting incumbent concern about reelection). This *concern* (whatever the actual statistical probabilities) is what gives congressmen incentives to take steps to adjust the process, or perhaps to ally themselves with constituent majorities in ways that unjustifiably disadvantage minorities, so as to ensure their reelection.

(2) It turns out that one of the few things that actually does affect an incumbent’s chances of reelection, redistricting (see Tushnet, Schneider, and Kovner, *supra*, at 979), is on my theory the paradigm example of something the courts should carefully police. The argument of the cited article surely should qualify broadside allusions to “the countermajoritarian difficulty,” and it points the way for much relevant research. While I don’t pretend to have fully assimilated its implications (any more than its authors do), its negative implications for my own work seem (to me, and therefore predictably) attenuated. Indeed, my reaction to the authors’ review of the actual occasions of judicial intervention was that in general the Court had been intervening roughly as *Democracy and Distrust* would have them intervene, where

also is attenuated, but it cannot be dismissed entirely: given the changes in the selection system, judges are now closer to “ordinary politicians” than they used to be. The “argument from democracy” against the evolving “new separation of powers” thus may be one that I find convincing, but admittedly under present conditions it is debatable.

B. Objection Two: The Court Won't Provide an Effective Counterbalance to the Power of the President

The Supreme Court has certainly held its own over the past 200 years; indeed, its influence has for the most part grown quite steadily.¹⁰⁴ That does not mean, however, that it is realistic to suppose that it can fill the vacuum left by the disappearance of Congress as an effective policy counterbalance to the executive. The more serious the Court becomes about presenting itself as a policy-making alternative to the President, or for that matter the more it is seen as playing that role, the more the President will be induced (and to a degree has already been induced) to apply the screws.¹⁰⁵ And, because of his

Congress appears to have been monkeying with the process so as to ensure the continued incumbency of its members (reapportionment, campaign finance, political speech), or reflecting a skewed version of its actual constituency (gender discrimination). See Tushnet, Schneider & Kovner, *supra*, at 987-90.

(3) Finally, one of the principal reasons there are so few electoral rejections of incumbent congressmen is that they have effectively taken themselves out of the business of legislating. See *supra* text accompanying notes 61-94; Tushnet, Schneider, and Kovner, *supra*, at 977-78; see also M. Fiorina, *supra* note 59, at 7 (average congressional turnover per election in 19th century was 40-50%). It is the point of the instant Article that the proper role of the courts is not to take the business of legislating over for them but rather to get them back into it. In particular, see *infra* text accompanying notes 148-49.

¹⁰⁴ Unlike Congress, the Supreme Court's agreement is never affirmatively required before a given policy can take effect. See *supra* text accompanying notes 90-92. However, again unlike Congress—and probably contrary to what most observers would abstractly describe as the contemplated system—the Court has not in general proved hesitant to involve itself in controversies it retains the legal discretion to avoid.

¹⁰⁵ Thus, Professor Kamisar has suggested that the reason appointments to the Supreme Court have become more political in recent years is that they now are seen as more important than they used to be, which change in perception is presumably related to changes in judicial behavior:

The modern view . . . is that a president should get his pick once you satisfy considerations of ability, integrity and competence. People only recently have made a contrary argument. But it never came to a test before because presidents really never gave that much weight to ideology. With all respect, a Supreme Court appointment was not considered that important until 20 years ago.

Quoted in Wash. Post, July 1, 1987, at A9, col. 2.

vastly larger staff (this is what we call an understatement), his singular access to the media—and, if I may be permitted to mention it, the fact that he is an elected official—he will inevitably dominate.

1. *Control by Overrule?*

Though overrule by constitutional amendment may be the most obvious method of controlling the Supreme Court, we can say quite confidently as of 1991 that it is not an effective one. In 1980 I wrote: "Our recent experience with the Equal Rights Amendment, endorsed by both major parties and hardly advancing a radical proposition, corroborates the difficulty of amending the Constitution. In all our history only four decisions of the Supreme Court have been reversed by constitutional amendment."¹⁰⁶ Just one in this century¹⁰⁷ (and that one essentially invited by the Court¹⁰⁸), I might have added. I thought for sure I was going to have to eat these words—in fact the first draft of this Article did so—in light of the recent flag burning brouhaha. President Bush's swift rhetorical onslaught on *Texas v. Johnson*¹⁰⁹ had quite effectively forced almost every member of Congress to choose between (a) agreeing with him that the first amendment should be amended, and (b) taking the courageous "opposing" position (which "prevailed" over Bush's token disagreement) that before we amend the Constitution we should pass a new and slightly different *statute* outlawing flag burning, in the hope that the Supreme Court would also be intimidated and change its mind. As of the passage of the Flag Protection Act of 1989, I would have given approximately even odds that the Supreme Court would engineer a "switch in time," and about nine-to-one that if it didn't, *Congress* would cave in and vote to amend the Constitution in the way the President wanted.

¹⁰⁶ J. Ely, *supra* note 4, at 46.

¹⁰⁷ The eleventh amendment overruled *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); the fourteenth, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); the sixteenth, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); and the twenty-sixth, *Oregon v. Mitchell*, 400 U.S. 112 (1970).

¹⁰⁸ The twenty-sixth amendment was a development that Justice Black's opinion announcing the judgment of the Court in *Mitchell* quite clearly (and I have no doubt knowingly) invited, by leaving states that wanted to deny the vote to eighteen-year-olds the onerous task of enforcing one set of voter qualifications for federal elections, and another for state elections.

¹⁰⁹ 491 U.S. 397 (1989).

Well, neither of them caved,¹¹⁰ God bless 'em.¹¹¹ Wrapping himself in the flag may have helped President Bush defeat Governor Dukakis, but it wasn't enough to pull off a constitutional amendment. And if Old Glory can't do it, what can?

2. *Control by Appointments?*

Though on the surface one might expect the appointments power to be a relatively effective control mechanism, historically its utility also has proved to be limited: "It has . . . proved hard to predict how someone in another line of work will function as a justice and one sometimes wonders whether the appointee who turns out differently from the way the President who appointed him expected is not the rule rather than the exception."¹¹² The possibility of surprise can never be entirely eliminated. I suspect, however, that the recent changes in the appointments process we have noted have done much to alter this assessment (which was published the year Ronald Reagan was first elected President). As indicated, there seems to be more concentration now than before on how the candidate is likely to vote on various issues.¹¹³ Moreover, candidates now are much less frequently involved in any functional sense "in another line of work." All five of the post-Nixon appointees to the Supreme Court (plus the two Reagan nominees who didn't make it) were, at the time, members of Federal Circuit Courts of Appeal.¹¹⁴ This represents quite a dramatic shift.¹¹⁵ History strongly supports what common sense would have

¹¹⁰ *United States v. Eichman*, 110 S. Ct. 2404 (1990); 136 Cong. Rec. H4087 (daily ed. June 21, 1990); 136 Cong. Rec. S8719, S8736-37 (daily ed. June 26, 1990).

¹¹¹ Clowns like Johnson and Eichman have gotten enough attention without our providing them another, still brighter, spotlight.

¹¹² J. Ely, *supra* note 4, at 47; see also, e.g., Friedman, *supra* note 36, at 1291-1302 (the ideological stance of a Justice, especially over the long run, is often difficult to predict at the time of nomination).

¹¹³ See *supra* text accompanying notes 21-24; cf. J. Ely, *supra* note 4, at 207 n.18 ("At least with the benefit of hindsight, it seems in general the 'fault' [underlying "mistaken" appointments] has lain in the limited sophistication of the appointive authority's predictive apparatus rather than in any drastic change in the appointee.").

¹¹⁴ True, Judge Souter hadn't yet actually decided any cases as a member of the First Circuit Court of Appeals, but he had served seven years on the New Hampshire Supreme Court.

¹¹⁵ From the dawn of the republic through Nixon, 103 men served on the Supreme Court (counting Hughes twice): only 37 of them (or 36%) came from lower courts, federal or state (counting Hughes, whose prior service was on the the Supreme Court, and Thurgood Marshall, who came from the Solicitor Generalship but previously had served on the Second

suggested, that persons who have already served as judges make vastly more predictable justices.¹¹⁶ (Also, as I alluded to above,¹¹⁷ even for lower court appointments, President Reagan favored academics—who for the reasons cited tend to be more predictable than practitioners or politicians.) Finally, the apparent elimination of the legal process “joker” has enormously enhanced predictability.¹¹⁸ The behavior of candidates who have been induced to assure the administration (and the Judiciary Committee) that they will make no nice distinctions between their political views and their judicial philosophy is much easier to anticipate.

Of course the Senate may not just roll over. On two occasions since 1930—specifically in 1970 and 1987—it has voted not to confirm the President’s first choice.¹¹⁹ Each of these cases was, however, in some sense special. Judge Bork had devoted a career to becoming the most confrontational conservative on the block (a distinction that both made and unmade him). The rejection of Judge Haynsworth is more complicated, but much of the opposition had little to do with Haynsworth himself, resulting instead from a combination of liberal frustration that Abe Fortas had not become Chief Justice two years

Circuit). There was, moreover, remarkable stability over time. From the turn of the 20th century through Nixon, the figures were 44 and 15 (34%); for Franklin Roosevelt through Nixon, 25 and 9 (36%). Prior to Reagan and Ford (who went one for one) the only “hundred percenters” (counting both state and federal judges) were Jefferson (three for three), Arthur (two for two), Tyler, and John Quincy Adams (both one for one). For collections of these and similar statistics on the Supreme Court, see A. Blaustein & R. Mersky, *The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States* (1978); *Congressional Quarterly, Guide to the U.S. Supreme Court* (E. Witt 2d ed. 1990).

¹¹⁶ Thus of the 22 “surprises” Professor Friedman discusses (Story, McLean, Baldwin, Taney, Swayne, Miller, Davis, Field, Salmon Chase, Holmes, Day, McReynolds, Stone, Hughes, Reed, Frankfurter, Burton, Vinson, Clark, Warren, White, and Blackmun), Friedman, *supra* note 36, at 1292-1301, only three had previously served on federal courts and three on state courts. (I am again counting Hughes, as his “surprising” tenure apparently was his second!)

¹¹⁷ See *supra* text accompanying notes 52-53.

¹¹⁸ Cf. Friedman, *supra* note 36, at 1303 (suggesting that presidential inability to control the direction of the Court has resulted partly from “the relatively slight emphasis placed on ideology by some Presidents”).

¹¹⁹ In 1968 a combination of ethical problems forced President Johnson’s choice to succeed Earl Warren as Chief Justice, Associate Justice Abe Fortas, to withdraw his name from consideration. (The next year he resigned from the bench entirely, upon disclosure of receipt of money from a financier under indictment.)

earlier¹²⁰ and displaced opposition to Nixon's appointee to that position, Warren Burger, who had been regarded as somewhat Borkian himself.¹²¹ (Burger had been Nixon's first appointment and may for that reason have received some extra deference.¹²²)

The easy confirmation of Judge Souter—despite the combination of administration assurances that he was all that conservative Republicans could hope for, and Democratic control of the Senate and its Judiciary Committee—corroborates the proposition that the Senate has no taste for frequent opposition. Indeed, the idea was originally floated that although it was entirely appropriate to ask nominees (like Bork) to explain discussions of current legal issues they had published in law reviews and elsewhere, it would somehow be improper to ask nominees (like Souter) who *hadn't* published what they thought about the very same issues. (The notion was thus to transpose the existence of a "paper trail" from an evidentiary liability, a repository of possible prior inconsistent statements, to a prerequisite to asking any questions at all about live legal issues.¹²³) This is, if anything, upside down, in that nominees who have not commented publicly are precisely those the Senate needs to question if it is to learn anything. And while I certainly am not suggesting we should make publication a necessary qualification for judicial office, God save us if we should make it a disqualification.

Thus, that ground rule, while bruited early, faded soon, but was quickly replaced by another that was every bit as nonsensical, though more limited in scope. Although it was never phrased in precisely these terms, this Committee acceded to what amounted to the issuance of a "free pass" to the nominee to pick one issue respecting which it would be "improper to comment" because it was likely to come before the Court. As is well known, Souter picked abortion. He

¹²⁰ See Freund, Appointment of Justices: Some Historical Perspectives, 101 Harv. L. Rev. 1146, 1155-56 (1988).

¹²¹ Compare (Circuit Judge) Burger, What to Do About Crime in U.S., U.S. News & World Rep., Aug. 7, 1967, at 70, with (Professor) Bork, Why I Am For Nixon, New Republic, June 1, 1968, at 19.

¹²² This may also help account for Souter's having had an easy time getting through. I hesitate to push the point too hard, however, because while it is true that no President since Cleveland has had his first nominee to the Court rejected, a total of only five nominees overall since then (counting Ginsburg) have gone down to defeat.

¹²³ See, e.g., Lewis, Souter and Senate: How Far Should Questions Go?, N.Y. Times, July 26, 1990, at A16, col. 1.

shared with the Committee his views on affirmative action,¹²⁴ capital punishment,¹²⁵ the *Miranda* rule,¹²⁶ and the authority of federal courts to order states to raise their taxes in order to fund the enforcement of federal rights.¹²⁷ These issues, like abortion, all come before the Court year after year for clarification of a controversial principle it has previously established; lurking perpetually in each of their backgrounds is the question of whether the principle itself should be reconsidered. However, Souter was "sure the Senators would understand" that it would be improper for him to comment on *abortion*, at which point the senators would nod sagely and agree that they certainly didn't want to be a party to anything improper.¹²⁸ Certain senators went so far as to praise Souter for his courage in taking this stand. Arlen Specter, often lauded for having bested Bork by acute cross-examination,¹²⁹ indicated early on that it was "a tribute to Judge Souter's character that he took the position that he would not come to Washington to be interviewed for this position if he was going to be asked" his views on *Roe v. Wade*.¹³⁰ Chairman Biden, also admiringly, may have come closer in assessing to what Souter's position was a tribute:

Senator Biden suggested that Judge Souter, who at every turn portrayed himself as a pragmatist, was simply taking the pragmatic course.

¹²⁴ See N.Y. Times, Sept. 17, 1990, at A18, col. 4; N.Y. Times, Sept. 19, 1990, at A24, col. 3.

¹²⁵ See N.Y. Times, Sept. 18, 1990, at B7, col. 2.

¹²⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966); see also N.Y. Times, Sept. 18, 1990, at A1, B7, col. 1 (noting that Souter strongly defended *Miranda* during his testimony).

¹²⁷ That is, the rule of *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990). See N.Y. Times, Sept. 19, 1990, at A24, col. 3. Judge Souter also suggested during the hearings that white collar criminals should be incarcerated following a first offense more often than they are now. See N.Y. Times, Sept. 15, 1990, at 10, col. 5 (Senator Kennedy referring to this point, made in earlier testimony by Souter).

¹²⁸ See, e.g., *infra* note 132.

¹²⁹ It doesn't come across that way from the transcript, but since I was just about as far away as anyone could get at the time without leaving the planet—in the Maldives, under about 90 feet of water—I guess I'll have to take the word of those who watched it on television.

When Souter's name was originally put forward by the President, Specter vowed to put him "under the microscope," N.Y. Times, July 24, 1990, at A19, col. 1, and was identified by the *Times* as one of the two "expected to be the most vigorous Senators in seeking precise answers from Judge Souter." N.Y. Times, July 26, 1990, at A16, col. 3.

¹³⁰ Quoted in N.Y. Times, July 27, 1990, at A12, col. 4.

“If he said he was for it, Biden would be satisfied, and [Senator Charles] Grassley would go into orbit If he said he wasn’t, it would be the opposite. A nomination that was not in trouble would then be in trouble no matter what he said.”¹³¹

Whatever lay behind it, this “one-issue-pass” approach worked.¹³² Souter was confirmed, ninety to nine. Since it so evidently makes no principled sense whatever,¹³³ we should ask why the Democratic-con-

¹³¹ Nat’l L. J., Oct. 1, 1990, at 3, col. 3 (quoting Biden referring to himself and to Senator Grassley).

¹³² On occasion Souter’s flashing of his free pass was amalgamated with a claim that he hadn’t really given the matter of *Roe v. Wade* much thought. This prompted the following September 14 interchange with Senator Herb Kohl:

[Q.] [D]o you recall your feelings about *Roe v. Wade* back when it was promulgated?

[A.] I frankly don’t remember the early discussions on it. I mean, everybody was arguing it. . . .

[Q.] You had no—you had no opinion about it than just to say, “Wow”?

[A.] Oh, I doubtless—I doubtless had an opinion. No, I didn’t just say wow.

[Q.] What was your opinion in 1973 on *Roe v. Wade*?

[A.] Well, with respect, Senator, I’m going to ask you to let me draw the line there

[Q.] O.K. With respect to *Roe v. Wade* just once more, is it fair to state even though you’re not prepared to discuss it, understandably, that you do have an opinion on *Roe v. Wade*?

[A.] It—I think it would be misleading to say that. I have not got any agenda on what should be done with *Roe v. Wade* if that case were brought before me.

I will listen to both sides of that case. I have not made up my mind.

Quoted in N.Y. Times, Sept. 15, 1990, at 10, col. 3. Before his nomination, Justice Souter served as Attorney General of New Hampshire, on the New Hampshire Supreme Court, and, briefly, on the First Circuit Court of Appeals. He also apparently fills his free time with scholarly reflection upon the problems of his profession. As Professor Levinson noted in 1981, though: “*Roe v. Wade* was undoubtedly the most important constitutional decision of the past decade Not to have views on *Roe v. Wade* is equivalent to not having views on the nature of the Constitution itself or on the nature of the Supreme Court’s role in a constitutional system.” Levinson, Should Supreme Court Nominees Have Opinions?, 233 *Nation* 375, 375 (1981). Souter’s added twist is thus perhaps best read as an indication—and indeed this is what he seems to say—that while he (naturally) had a (privileged) opinion of whether *Roe v. Wade* was correct as a matter of constitutional interpretation, he is undecided about whether it should be overruled. Aside from the claim of privilege, this strikes me as an entirely understandable position, albeit one—did no one pick this up?—that unmistakably signals his view of *Roe*. (Whether a correct decision should be overruled is not ordinarily a question that gives one pause.)

¹³³ Of course a nominee should refuse to answer questions about particular pending cases: nobody disputes that. She should also feel free to indicate when she has not thought through a particular subject (though the claim here should be credible). She should feel free as well to point out that a judge’s view of various issues is likely to be importantly affected by the substantive and procedural peculiarities of the cases in which they arise, and that any judge, herself included, is entitled, in fact duty-bound, to change her earlier views on a subject should counsel or her colleagues convince her she should. It would also be a *principled*, if highly

trolled Judiciary Committee and Senate went along with it. Sure, Souter looked better than the Democrats had expected, but it may be—the point is we don't know—that he looked that way because he was permitted to pick the one issue they had advertised as critical going in and, by fiat, to shield his views on it. The more convincing explanation thus seems to be that the Bork affair was not yet three years past, and the Senate simply lacked the stomach for another donnybrook so soon.¹³⁴ In order to protect their incumbency, though, it apparently seemed wiser not to push Souter very hard on *Roe* than to run the risk that he would come out against it and thus turn up the political heat. If you're planning to roll over, you don't want to ask too many questions: better to spend your allotted time suggesting that the nominee visit an Indian reservation.¹³⁵

Of course, the Senate is not likely always to be so docile as it proved in Souter's case; it will recurrently decide to "get tough" with a nominee. But even that isn't likely to matter much (except to the ritual victims), as the Senate's idea of getting tough these days is to pester, and the President can be pretty sure that he will ultimately be able to appoint someone whose predicted performance is not importantly different from that of his first choice.¹³⁶ The Senate, and anti-adminis-

debatable, position to refuse to offer any opinion that might prove relevant to some future case. (Taken seriously, of course, this would mean basically that no nominee should testify to much of anything beyond her name, rank, and serial number, suggesting that a nominee thus disposed might better refuse altogether to appear. On the other hand, Justice O'Connor attempted to take, and by and large succeeded in taking, a position very close to this at her confirmation hearings. See Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 Ga. L. Rev. 913, 950-51 (1983).) It does not, however, seem consistent to share one's opinions about a number of contested questions of law that we all know perfectly well will come before the Court during the nominee's prospective tenure, but to withhold one's opinions about other such questions (or one other such question). When the opinion withheld respects what the nominee has reason to believe is the subject the committee regards as most relevant to her confirmability, the drama builds. Convincing the committee that withholding that particular opinion (but not others) is somehow required by the ethics of our profession provides a final confirmation of the nominee's mastery of the situation.

¹³⁴ Of course, Justice Kennedy—Bork's ultimate replacement—had also been easily confirmed. See *infra* text accompanying notes 137-40.

¹³⁵ See N.Y. Times, Sept. 21, 1990, at A12, col. 6.

¹³⁶ See also 3 Bork Hearings, *supra* note 29, at 2927 (testimony of Professor Henry Monaghan); E. Bronner, *supra* note 28, at 325 (remarks of Sen. Robert Dole to an aide: "I've been talking to folks on the floor, particularly Southern Democrats. They see a no vote as a no-lose proposition. They can please blacks, women, liberals. And in the end they figure the administration will get another conservative on the Court.'). On each of the two occasions

tration interest groups, are unlikely to have the energy to gear up for many concerted oppositions in a row¹³⁷—and beyond the occasional ritual slaughter, the likely political returns diminish. Thus, there has been little indication (pre- or post-appointment) that Justice Kennedy is philosophically much different from Bork,¹³⁸ and while subsequent

since 1930 when a nominee to the Supreme Court was rejected, the President's *second* choice was turned down as well. (Douglas Ginsburg's name was withdrawn before proceeding to the hearing stage, but that seems for present purposes not very different from a Senate rejection.) Each second choice had a fatal nonideological flaw, however: Judge Carswell seemed simply not qualified intellectually, and Judge Ginsburg was identified by informants as having smoked marijuana on a number of occasions. In addition, Carswell was plainly a "screw you" nomination in both style and substance, a caricature of the caricature of Haynsworth the Senate had refused to confirm. Reagan indicated he was going to send that kind of replacement up for Bork, but didn't. (Ginsburg is conservative, but a good deal less contentious than Bork.) I suppose it is conceivable, though, that the Senate may fall into a pattern of "flexing its muscles" by rejecting *two* candidates every few vacancies. For the reasons developed in the text that too is not likely to matter greatly, except to the victims. (Curiously, President Cleveland lost two nominees too, when William B. Hornblower and Wheeler H. Peckham were both rejected in 1894. Thus on three of the four most recent occasions when a presidential nominee was rejected, *two* were. The exception was the rejection of nominee John J. Parker in 1930, followed by the nomination of Owen J. Roberts, who was confirmed. Parker and Roberts were not philosophically very different; if anything, Parker, defeated by conservatives, probably panned out as somewhat more supportive of New Deal measures than his replacement. Freund, *supra* note 120, at 1155.)

¹³⁷ See, e.g., Wash. Post, Nov. 13, 1987, at A11, col. 2 (quoting Sen. John McCain: "Nobody wants to go through that again. There's just too much blood on the floor.").

¹³⁸ See generally Chemerinsky, *supra* note 18, at 44-45 (noting that Justice Kennedy, in his first term, cast the fifth critical vote in a series of conservative decisions); James v. Illinois, 110 S. Ct. 648, 657-61 (1990) (Kennedy, J., dissenting) (joined by the other Reagan appointees on the Court, Kennedy argued that the impeachment exception to the exclusionary rule should be expanded). Despite ex-Judge Bork's criticism of the flag burning decision, it would not have been out of character for a Justice Bork to have joined the majority (as Kennedy did) in invalidating the Texas statute. Political expression was one right to which both Professor Bork and Judge Bork were prepared to give comparatively strenuous protection. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20-35 (1971); *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986); *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984). *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) is the only major case in which Bork and Scalia (who joined the Supreme Court majority in voiding the flag burning statute) voted differently while they were both on the Court of Appeals (they agreed 98% of the time, R. Bork, *supra* note 30, at 284), and it was Bork who came down on the side of the first amendment. (Admittedly the expression protected in *Ollman* was a newspaper criticism of a Marxist political science professor for allegedly using his class as a soapbox for revolution.) Even Bork's ability to explain in clear terms what seemed to elude certain other commentators, that the (since-invalidated) statutory "fix" for *Texas v. Johnson* was not distinguishable in terms of the logic of the first amendment from the law the Court had earlier struck down, N.Y. Times, July 20, 1989, at A14, col. 4, suggests at least the possibility of some deep sympathy with that logic, as thoroughgoing opponents of a position rarely are able to characterize it with much sensitivity. Finally, of

developments have moved Justice Blackmun significantly to the left,¹³⁹ at the time of his appointment he was not regarded as importantly different in terms of predicted performance from Haynsworth.¹⁴⁰

course, Bork, as a narrowly confirmed "originalist," would have unusual incentives to enforce vigorously those rights that unarguably are to be found in the document.

I don't suppose I've lulled you into forgetting the troublesome datum that Bork has been critical of *Johnson* since it came down. See R. Bork, *supra* note 30, at 127-28. He seems to have chosen, however, to spend the next phase of his career as a sort of all-purpose conservative critic of the judicial scene, in which role criticism of the flag burning decisions seems de rigueur. I'm certainly not suggesting insincerity here—this does not appear to be an issue that Bork had previously addressed—only the understandable pull of the role he has assumed since his rejection (which choice in itself, by the way, is also quite understandable). My point is that the pulls on a Justice Bork would have been quite, perhaps dispositively, different. To the same effect, see Anastaplo, Bork on Bork, 84 Nw. U.L. Rev. 1142, 1165 (1990). (Bork's criticism of *Johnson* has alluded to a purported distinction, between the substance of what was being said and the mode of saying it, R. Bork, *supra* note 30, at 127, that is so shallow and widely discredited it is at least doubtful that he would have relied on it, after debate, had he been the deciding vote in an important Supreme Court case. Texas outlawed desecration of the state or national flag, as opposed to other pieces of cloth, because of the *sentiments* such desecration conveyed: that is the relevant first amendment point. See Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1497-98 (1975).)

It is entirely possible that I am wrong in this speculation. (Neither I nor even Bork can be entirely sure about how he would have voted in *Johnson* had he become a Justice, though I grant you he is the better witness by a fair margin.) In any event, the flag case, at least thus far, seems an isolated event: Kennedy does not generally seem to be evolving as significantly more "liberal" than Bork would have been (though if characterizations like this help encourage him to do so, that would be all right too). Cf. *Minnick v. Mississippi*, 111 S. Ct. 486 (1990) (Keunedy writing the opinion for the Court that expanded a criminal defendant's right to counsel); *infra* note 139 (possible effect of academic criticism on Blackmun).

¹³⁹ Subsequent appointments "to his right" have moved him, as they have others before him, to the left. Moreover, the formative case for Blackmun plainly was *Roe v. Wade*, where his longtime association with the Mayo Clinic and consequent deference to the opinions of doctors seem to have overcome any "legal process" instinct he might have previously harbored toward distinguishing desirable policy from constitutional law: the opinion is a classic in its assimilation of the two. It thus was attacked not only from the political right, e.g., Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, but also by liberal legal process aficionados, e.g., Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920 (1973), apparently leaving the Justice with little use for either perspective.

¹⁴⁰ At the time of his appointment Blackmun was reputed to have been Chief Justice Burger's recommendation. Whether or not this is true, the rumor was certainly known to the Senate. See N.Y. Times, Apr. 15, 1970, at 34 col. 6 (nominee Blackmun "appears strikingly like Mr. Burger in judicial philosophy"). In the 1971 Term, Blackmun voted with Justice Rehnquist 81.0% of the time, with Justice Brennan 48.3% of the time. The Supreme Court, 1971 Term, 86 Harv. L. Rev. 50, 301 (1972). For an enlightening look at the pre-*Roe* Blackmun (and in particular his concern for privacy), see Wyman v. James, 400 U.S. 309

It is possible that the Senate could truly toughen up and attempt to do more than harass, that is, to demonstrate a determination to hold out until it gets somebody who fits *its* agenda. Possible, yes, but two things should be noted. First, no matter how tough it gets, the best the Senate will be able to hope for is compromise. It can hold out till hell freezes over, and it still won't acquire the ability to send a nomination up.¹⁴¹ Second, you shouldn't hold your breath. Habits of deference die hard, especially for a body whose members' principal priorities seem to be keeping (a) out of the line of fire, and (b) their jobs.

An obvious objection to the suggestion that presidents will be able by virtue of their appointment power to exercise relatively effective control over the Supreme Court is that justices outlast presidents. Thus, the argument would run, the "other branch" in our reconfigured separation of powers will comprise people generally appointed not by the President but by his predecessors. There are two answers to this. First, one shouldn't be misled by recent conspicuous cases of justices who vow to die on the bench and then decide not to die at all. In the 122 years since we finally settled on a nine-person Supreme Court, presidents have made sixty-seven (confirmed) appointments to it. That's one appointment every 1.82 years,¹⁴² which means that a President serving eight years gets to make, on average, 4.39 appointments—a President serving a four-year term half that many. Consequently, by the end of a President's term, several of the justices *are* likely to be his appointees.¹⁴³

(1971) (Blackmun, J., for the Court); see also, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 759 (1971) (Blackmun, J., dissenting).

¹⁴¹ It is also my impression that the President generally wins games of chicken. Cf. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 *Stan. L. Rev.* 877, 915-16 (1990) (describing a failed attempt to coerce the President to sign an amendment by inserting it in a general appropriations bill). In this context a stalemate will mean an empty seat on the bench, something there are legitimate pressures from all sides to avoid.

¹⁴² Obviously there are short-run ups and downs, but (somewhat contrary to my intuition) this number has not increased—and thus the number of appointments per four-year term has not decreased—over the long term.

¹⁴³ From Inauguration Day 1869 to Inauguration Day 1989, 22 men served as President, yielding a precise average of three Supreme Court appointments per President. A President not serving out a term for which he was elected is almost certain to be replaced by a philosophical soulmate. (Indeed, as we are about to note in the text, most presidents are likely to be.)

Beyond that, so long as we remain in a pattern of Republican presidents, which many pundits are predicting will be quite a while, the objection becomes even more attenuated: if they were all appointed by Republicans (*and* checked for dangerous tendencies to let their notions of constitutional compulsion stray from their political preferences) it won't matter greatly to, say, a President Quayle that he didn't personally put them there. Naturally we won't have Republican presidents forever. Over the course of our history, however, presidents have run in streaks—a run of Democrats, a run of Republicans, a run of Somebody Elses. If this continues, and I know no reason to suppose it won't, the general point will remain valid. For every President except the comparatively rare one who has interrupted a long reign by the other party, most of the sitting justices—given the expulsion of the legal process joker (and the consequent reduction of surprise)—are likely to be quite simpatico.

CONCLUDING CONSTRUCTIVE POSTSCRIPT

Our best hope for a viable counterbalance to the President thus remains with Congress. It would certainly be a good thing, as many well-meaning commentaries have suggested, if Congress would pull up its socks and get back into the policy-making business. Some glimmers of hope are cited here, among which are the beginnings of a restrengthening of the political parties¹⁴⁴ and some moves away from "subcommittee government"¹⁴⁵ toward a more "floor-centered" Congress.¹⁴⁶ But they certainly are no more than glimmers, and even if Congress were serious it would be years before either showed real effects. Given the incentive system we have described, it is difficult to imagine Congress ever enthusiastically reinserting itself into the policy-making (and heat-taking) arena without significant outside prodding, and equally difficult to imagine the voting public's ever insisting that it do so.¹⁴⁷

There are other potential prodders, however: the *courts* can play a useful role in forcing Congress to perform its constitutionally-contem-

¹⁴⁴ See P. Herrnson, *Party Campaigning in the 1980s* (1988).

¹⁴⁵ See Shepsle, *The Changing Textbook Congress*, in *Can the Government Govern?* 238-66 (J. Chubb & P. Peterson eds. 1989).

¹⁴⁶ Thus far, however, there is little evidence that floor-generated legislation proves any more coherent than committee-generated legislation. S. Smith, *supra* note 59.

¹⁴⁷ E.g., M. Fiorina, *supra* note 59, at 76-77.

plated functions.¹⁴⁸ Helping devise such judicial Congress-prodding doctrines thus seems to me the most productive use that can currently be made of a constitutional scholar's time; at any rate it's how I've been spending mine lately.¹⁴⁹ The attentive reader will discern in such efforts an attempt to resolve what might have been taken to be the paradox in my work between the call for deference to the considered products of legislatures and the observation that legislative products are frequently unconsidered. You also will not have missed the unsurprising fact that what is suggested is yet another "legal process" technique. It is, however—as most of my earlier work has been as well—an "activist" use of legal process, one I am suggesting will ultimately be more useful in reinvigorating our separation of powers than the more common contemporary impulse toward having the courts do the legislating themselves.

¹⁴⁸ See, e.g., A. Bickel, *The Least Dangerous Branch* 143-56 (1962); J. Ely, *supra* note 4, at 131-34.

¹⁴⁹ Ely, *supra* note 89, at 1405-17, 1420; Ely, *supra* note 141, at 926; Ely, *supra* note 91, at 1135; Ely, *Kuwait, the Constitution, and the Courts: Two Cheers for Judge Greene*, 8 *Const. Commentary* (forthcoming 1991).

