Book Notes

Unresolved Tensions

Freedom's Law: The Moral Reading of the American Constitution. By Ronald Dworkin.* *Cambridge and London: Harvard University Press*, 1996. Pp. viii, 404. $35.00.

Our foremost framer of mellifluous titles follows *Law's Empire*[1] and *Life's Dominion*[2] with yet another impressive possessive, *Freedom's Law: The Moral Reading of the American Constitution.* If "empire" and "dominion" conjure images of coherence, organization, and firm rule in the service of a unifying theme, "freedom" sounds a more democratic, less centralized note. *Freedom's Law* comprises an introduction and seventeen short essays (fourteen of which appeared first in the *New York Review of Books*) on a wide-ranging array of constitutional topics, arranged loosely into three sections dealing with rights to life and death, free speech issues, and judicial philosophies. Instead of articulating a new approach, the work provides concrete examples of Dworkin's now familiar ideas in action. For those who would know the theory of *Law's Empire* by its fruits, *Freedom's Law* makes valuable reading.

In his introduction, "The Moral Reading and the Majoritarian Premise," Dworkin argues that the Constitution contains passages that its Framers intended as abstract expressions of moral principles (p. 2). Judges, the de facto final interpreters of the Constitution in contemporary America, ought to take these provisions (and only these) as invitations to engage in reasoning from principles of political morality (p. 2). Their conclusions will depend on the content of the political morality they bring to the hard constitutional cases that arise under those morality demanding clauses. Interpretation properly proceeds subject to the constraints of history and integrity: Judges may only bring political morality to bear where the Framers "meant" to express a general principle, rather than a specific legal directive, and where the judges'

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1. RONALD DWORKIN, LAW'S EMPIRE (1986).

2. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993).

principles cohere with precedent and the Constitution's structure (p. 10).

Students of Dworkin will find little new in this constitutional contextualization of the main arguments of *Law's Empire*.[3] The "moral reading" of the Constitution means the application of Dworkinian interpretive jurisprudence to the American constitutional text and tradition. However, in his introduction, drawing on arguments raised in *Law's Empire*[4] and developed elsewhere,[5] Dworkin proposes an interesting and original reformulation of our traditional definition of democracy.

Typically, we construe a democratic society to be one in which the majority rules, subject to the protection of individual rights initially determined by some majoritarian process. Dworkin calls this vision of democracy "the majoritarian conception," and he rejects it to define a democratic society as one where "collective decisions [are] made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect" (p. 17). He names his vision the "constitutional conception," thereby presupposing that constitutionalism is best justified without reference to majoritarianism.

Dworkin's definitional shift aims to eliminate what Alexander Bickel famously dubbed "the counter-majoritarian difficulty,"[6] namely the perception that unelected judges trump contemporary political majorities when they invalidate legislation as unconstitutional. The conflict between individual rights and majority enacted laws arguably represents the most important subject of debate in constitutional-political theory over the last half-century, so Dworkin's novel approach deserves our attention. However, the definitional shift that Dworkin attempts too glibly elides possibly irreconcilable tensions between conflicting ideas at the heart of our conception of liberal democracy. This Book Note challenges his definition in the hopes of illuminating its value for his constitutional arguments and for political theory more generally.[7]

Defining democracy to include rights protection a priori does not so much resolve the countermajoritarian difficulty as dissolve it. If democracy consists not in empowering majorities, but in exercising collective decisionmaking within the confines of rights protection, then judicial review comes not to counter democracy, but to fulfill it. Constitutional theorists of Dworkin's

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3. *See* DWORKIN, *supra* note 1, *passim*.

4. *See id.* at 167–72, 208–16.

5. *See* Ronald Dworkin, *Equality, Democracy and Constitution: We the People in Court*, 28 ALBERTA L. REV. 324, 335–36 (1990); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989).

6. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

7. Reviews of *Freedom's Law* have so far focused on the ways in which Dworkin's arguments omit those of the reviews' authors; none has yet focused on the book's novel definition of democracy. *See, e.g.*, Richard A. Epstein, *The First Freedoms*, N.Y. TIMES, May 26, 1996, § 7, at 12 (book review) (criticizing absence of libertarian property rights in book); Cass R. Sunstein, *Earl Warren is Dead*, NEW REPUBLIC, May 13, 1996, at 35 (book review) (criticizing Dworkin's appeal to abstract philosophical theory instead of low-level judicial consensus).

generation, such as John Hart Ely[8] and Bruce Ackerman,[9] have responded to Bickel's influential quandary in a variety of ways. Their approaches depend upon noticing some overlooked aspect of judicial review that makes the practice seem to serve, rather than thwart, democratic processes. Ely argues that judicial review should facilitate democratic participation, and Ackerman believes judicial review should enshrine the constitution-changing achievements of an unusually politically mobilized populace. By contrast, Dworkin's approach depends not on emphasizing any new feature of judicial review, but on conveniently redefining terminology.

We often speak of "democracies" when we wish to refer to systems that guarantee individual rights, not necessarily to those that embody majority rule in one form or another. On Dworkin's view, this usage would appear to capture the essence of democracy precisely. But does the existence of this colloquial usage provide sufficient grounding for a normative usage defining democracy in terms of only those collective decisions that embody the principle of equal concern and respect? The rights-protecting democracies of which we speak may rather be democracies by virtue of their electoral systems of one person, one vote, and good systems by virtue of their protection of rights. Though we sometimes use the word "democracy" to invoke the image of all that is politically good, on closer examination our usage may not prove correct or theoretically valuable.

Dworkin argues for his definition by distinguishing between the "statistical" and "communal" justifications for democracy (pp. 19–20).[10] The former conceptualizes collective action as an aggregation of individual decisions; the latter instead "presupposes a special, distinct collective *agency*" in democratic decisionmaking (p. 20). Dworkin then claims that the most prominent arguments for majoritarianism in fact rely on the communal justification. In the remainder of the introductory essay, he marches through possible justifications for the majoritarian conception based on concerns of liberty, equality, and community. In each case, he discovers that the principle in question leads not to the majoritarian vision, but to his own "constitutional" definition of democracy. One might be forgiven for wondering whether Dworkin has stacked the deck: Perhaps the "statistical" justification provides the best (though neglected) basis for majoritarianism, while the "communal" best serves Dworkin's preferred "constitutionalism."

Beginning with the argument that the positive liberty of self-government requires majoritarianism, Dworkin dismisses out of hand the possibility that the very statistical fact of participating in majoritarian decisionmaking satisfies the conditions of autonomy. The individual's power over collective decisions is

8. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)

9. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

10. *Cf.* DWORKIN, *supra* note 1, at 167–72, 208–16 (discussing communal identity and group decisionmaking).

simply "so tiny" that its reduction by countermajoritarian judges "cannot be thought to diminish it enough to count as objectionable" (p. 21). Yet why should the single voter's comparatively small power matter in calculating whether the reduction of that power is objectionable? Under the principle of one person, one vote,[11] governments may not promote "collective agency" by reducing the relative voting power of individuals.

In enunciating this principle, the Court evidently understood statistically effective, undiluted voting to lie at the core of self-government. Had the Court agreed with Dworkin's preference for the communal view of democracy, it could have reached the same result by holding that the Constitution prohibited discriminatory vote dilution but permitted vote dilution for benign purposes like communal expression.[12] Both communal and statistical justifications appear firmly grounded in constitutional language, history, theory, and practice. Neglecting one may facilitate elegance, but it does little to enhance depth.

Dworkin uses the communal justification to argue that free and equal self-determination requires a system that guarantees equal concern and respect for all. To ensure this, democracy requires built-in checks on majoritarian power. He rejects the possibility that statistically equal division of political power requires majoritarianism on the ground that some citizens (like Ross Perot) have more influence than others (p. 27). However, by insisting on the individual free choice of voters, democracy may self-consciously reject the notion that greater influence means greater political power. This insistence manifests itself in the Court's campaign finance holdings, in which the Court has affirmed its faith that individual decisionmaking can withstand excessive influence and remain a worthy basis for democratic self-government.[13]

Faith in human capacity for reflective decisions even in the face of powerful influence underlies the basic idea of democracy, however defined. If economic power means political power, then we must abandon not only the individual voter theory of democracy, but the communal theory as well. If money eliminates individual volition, money similarly overwhelms collective volition. The democrat must assert that voters' free will ultimately legitimates their voting decisions, else he must abandon democracy as a charade. Persuasion does not equal coercion. Indeed, the possibility of self-government finds its tenuous niche in the space between the two. So Ross Perot's money permits him to influence more voters than most citizens can, but so long as

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11. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

12. One person, one vote, might follow from the principle of equal concern and respect. But under the voting rights cases, equal protection requires factually equal treatment, and results from equal statistical participation. *See, e.g., id.*

13. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 791–92 (1978) ("[P]eople in our democracy are entrusted with the responsibility for . . . evaluating the relative merits of conflicting arguments. . . . But if there be any danger that the people cannot evaluate the information and arguments advanced by [economically powerful corporations], it is a danger contemplated by the Framers of the First Amendment." (footnote omitted)); *see also* Buckley v. Valeo, 424 U.S. 1 (1976).

Perot cannot coerce support, we must say that the principle of one person, one vote equalizes the power of each individual voter.

Finally, Dworkin claims that the ideal of community favors his vision of democracy because judicial review does not foreclose involved public debate, but rather "may provide a superior kind of republican deliberation" in the course of which active citizens may have more influence than they would merely by voting (p. 31). In fact, judicial decisions often do lead to robust public discussion, but for a reason that Dworkin, tellingly, never acknowledges. In American constitutional democracy, the *demos* preserves an ultimate check on the Court: the possibility of Article V amendment. If amendment were not possible, there would be no reason for judicial review to stimulate republican deliberation, since the Court's word would be final.

Supermajoritarian amendment strongly suggests that American constitutionalism, and indeed democracy itself, requires an element of individual, majoritarian vote participation. Consider a flag burning amendment duly adopted under Article V. If the Supreme Court refused to treat the amendment as law on the grounds that it violated citizens' right to equal concern and respect, would not the polity have lost some of its right to self-government? Would not the individuals who voted for the amendment have suffered a diminution in liberty and equality?[14]

Dworkin's definition of democracy cannot distinguish between an amendment and a law; both ought to be equally subject to judicial review. Yet our intuition that democracy requires that the supermajority's vote prove efficacious suggests the continued vitality of the statistical view of democracy. Neither the statistical nor the communal view alone can account for American constitutional democracy. Ultimate decisions about rights protection lie with the people, but they also seem to have an independent, nonmajoritarian basis: "*We* hold these truths to be *self-evident*."[15] The tension between statistically grounded majoritarianism and individual rights embodied in this sentence cannot be resolved by changing the definition of democracy to privilege the "truths" above the will of the People who hold them to be self-evident.

Dworkin's solution to the countermajoritarian difficulty suffers from the objection that his arguments "always seem to have happy endings" (p. 36). Dworkin responds that the "moral reading" justified in part by his definition of democracy has a beneficial influence on constitutional adjudication, not a pernicious one, so that the "objection" about happy endings is misplaced (pp. 36–37). But this conclusion (itself happy) neglects the possibility of dialectical tension between majoritarianism and rights at the heart of American constitutionalism, just as Dworkin's jurisprudence slights the possibility of a

14. *But cf.* Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1990) (arguing that amendment that controverted inalienable natural rights such as free speech would itself be unconstitutional).

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added)

similar, closely related dialectic between neutral rule following and morally influenced decisionmaking.

Dworkin's concluding essay on Judge Learned Hand reveals the dangers of eliding the conflict between majoritarianism and rights. Dworkin served as Hand's law clerk, and his efforts to unearth the hidden commonalities between their two diametrically opposed positions on judicial review reflect Dworkin's desire to see tensions not merely resolved, but explained away. In hard constitutional cases, Hand famously opted to grant preference to the legislature, rather than the judiciary:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.

(pp. 342–43).[16]

To Dworkin, the passage minimizes a single citizen's "*power* over a collective decision, which . . . is all but illusory," and privileges his "*role* as a moral agent participating in his own governance, which is sometimes better protected if the mechanisms of decision are not ultimately majoritarian" (p. 344). But surely Hand's point in the passage is precisely the contrary: The act of voting matters because when a citizen casts a vote for the laws that govern her life, judges do not undermine her. While her single vote may not determine the outcome of an election, it means something all the same. The fact that the vote *counts* invests it with constitutive meaning.

Nonetheless, the visions of Hand and Dworkin have in common a tendency towards the absolutism of consistency. Hand, like Dworkin, recoiled from the tension between majoritarianism and individual rights; believing himself compelled to choose one, he simply chose the former where Dworkin chooses the latter. Dworkin has followed his "boss and . . . friend" after all (p. 264).

If law's empire was the principle of constraint that kept law bound within the realm of integrity, then freedom's law turns out, at the last, to be the moral conviction that engenders freedom—the protection of rights that alone ensures the existence of true democracy. Can moral conviction actually serve as such a law, such a protector? In Dworkin's optimistic view, it can. If we doubt it, and insist on the primacy of citizens' voices, then we can rely on nothing other than the tendency of dialectic to persist long after synthesis has been declared.

—Noah R. Feldman

16. Quoting LEARNED HAND, THE BILL OF RIGHTS 73–74 (1958).

The Politics of the Confirmation Process

The Selling of Supreme Court Nominees. By John Anthony Maltese.* *Baltimore, MD: Johns Hopkins University Press*, 1995, Pp. xii, 193. $26.95.

I

Ever since the brutal confirmation hearings of Robert Bork, President Ronald Reagan's failed nominee to the Supreme Court, scholars and commentators have bemoaned the current state of the judicial confirmation process.[1] Some critics have invoked a golden age of Supreme Court nominations when the qualifications of the nominees took precedence over petty politics and ideological infighting (p. 10). In *The Selling of Supreme Court Nominees*, John Anthony Maltese argues that the flaw in this widely held view is that such a golden age never existed. If the confirmation process is a mess today, it was just as much of a mess at the dawn of the Republic.

Maltese brings a fresh eye to the confirmation process, using historical and archival resources to construct engaging accounts of past and current confirmation contests. He has a political scientist's appreciation for the larger political context within which the confirmation process is situated. And he writes an appealing and lively narrative of several critical confirmation struggles, describing the political intrigues of the past as if they were the subject of a contemporary journalistic account.

But while Maltese's short book is illuminating and lively, it is also incomplete. Maltese's claim that the confirmation process has always been "political" offers only a superficial response to critics of the current process. His analysis of how the confirmation process has evolved since the early nineteenth century does not adequately explain the fundamental changes in confirmation politics that he describes. Nor does Maltese take sufficient account of what may be the most important historical development shaping the politics of judicial selection: the changing role of the Supreme Court itself.

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1. *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS 3–22 (1994); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, NINTH JUSTICE: THE FIGHT FOR BORK 221–26 (1990); DAVID M. O'BRIEN, JUDICIAL ROULETTE 95–106 (1988); R.H. Bork, Jr., *The Media, Special Interests, and the Bork Nomination*, *in* MCGUIGAN & WEYRICH, *supra*, at 245–78; Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061, 1061–65 (1994); Twentieth Century Fund Task Force on Judicial Selection, *Report of the Task Force*, *in* O'BRIEN, *supra*, at 3–11 [hereinafter Task Force].

II

Although the Constitution grants the president the power to nominate Supreme Court Justices "by and with the Advice and Consent of the Senate,"[2] the exact division of these roles and the scope of the Advice and Consent Clause have always been contested. According to Maltese, the vague dictates of the Constitution have demarcated only the broadest boundaries of a process that has, almost from the start, been fiercely contested and frequently bitter (pp. 12–35). Far from being the first nominee to suffer a long and partisan confirmation battle, Robert Bork was merely one of the most recent in a long series of nominees who have seen their formal qualifications eclipsed by ideological conflict over their personal record and judicial philosophy (p. 10).

Indeed, Maltese finds striking parallels to the Bork confirmation battle in the first failed Supreme Court nomination—the 1795 nomination of John Rutledge as Chief Justice (pp. 10–11, 26–31). Rutledge initially appeared to be a safe choice for Chief Justice. The Senate had unanimously made him an associate justice just six years earlier, and his credentials were widely considered to be impeccable. But on the eve of his nomination, Rutledge came under attack for his public critique of the Jay Treaty—then a subject of hot debate in the Senate. The partisan press attacked Rutledge as "a character not very far from mediocrity" (p. 29) and published accusations that he had failed to repay substantial debts (p. 30). Alexander Hamilton, a staunch supporter of the Treaty, even charged that Rutledge was insane. After his nomination was soundly rejected by the Senate, the humiliated Rutledge retired from the Court and returned to private practice in Charleston, where he was later rumored to have attempted suicide. Rutledge was not the only candidate to taste such bitter defeat. Maltese tells similar stories about the failed nominations of Stanley Matthews (1881) (pp. 36–44), John Parker (1930) (pp. 56–69), Abe Fortas (1968) (pp. 71–72, 131–32), Clement Haynsworth (1969) (pp. 70–85), and G. Harrold Carswell (1970) (pp. 12–17).[3]

Although debates over judicial nominations have long featured partisan conflict and personal scandal, the confirmation process has changed significantly since the early nineteenth century. Maltese argues that the principal historical trend has been toward greater openness and publicity. "[W]hat is different about today's appointment process," he argues, "is not its politicization but the range of players in the process and the techniques of

2. U.S. CONST. art. II, § 2, cl. 2.

3. Maltese is not the first to tell the stories of these nominations. For other accounts, see, e.g., HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (3d ed. 1992) (reviewing all Supreme Court nominations from 1789 to 1992); JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS (1990) (examining failed nominations of Abe Fortas, Clement Haynsworth, G. Harrold Carswell, Robert Bork, and Douglas Ginsburg).

politicization they use" (p. 143). Until the early 1900s, the selection of Supreme Court nominees occurred almost entirely behind closed doors. Public hearings were not held in the Senate, and even Senate debates over nominees were conducted in secrecy. Presidents did little open lobbying and rarely spoke of their nominees in public. Press scrutiny and public attention were limited.

Maltese dates the opening up of the confirmation process to the period immediately after the Civil War. Social and technological change fueled by industrialization and the rise of monopoly capital promoted a massive expansion of the number of interest groups operating in American politics (pp. 36–37). National interest groups first actively lobbied against a presidential nominee to the Supreme Court in 1881, when the National Grange (a farm lobby) and the Anti-Monopoly League spoke out against the nomination of Stanley Matthews, a former senator with strong ties to railroad interests (pp. 36–41).

The Matthews battle notwithstanding, the full impact of interest group involvement in the confirmation process was not felt until two critical changes in Senate procedure stripped away the shroud of secrecy that had enveloped the process since its inception: the institution of direct Senate elections in 1913, and the opening of floor debate on nominees in 1929. Along with another innovation of this era—public hearings—these developments placed the confirmation process in the harsh glare of the public spotlight and, in the process, greatly increased the influence of interest groups and the public on Senate deliberations about Supreme Court nominees (pp. 36–37).

Another important change that occurred during this period, Maltese observes, was the rise of the modern "institutional presidency" (pp. 116–20).[4] With the expansion of presidential resources and administrative support during the New Deal, presidents actively began to employ staff resources to screen, select, and secure the confirmation of Supreme Court nominees. Entire staff units emerged to manage the president's involvement in the confirmation process, and increasingly, presidents themselves began to campaign publicly for their nominees. At the same time, participation by nominees in their own confirmation hearings also became commonplace. Although nominees had occasionally spoken in hearings and to the press in the early 1900s, it was not until the 1950s that this became regular practice (pp. 92–109).[5]

Maltese closes his book by reflecting on the experiences of President Clinton's Supreme Court nominees, Ruth Bader Ginsburg and Stephen Breyer, both of whom were easily confirmed. He argues that the history of the confirmation process indicates that political struggle, personal scandal, and hard questions about ideology and judicial philosophy will always have the

4. The characteristics and origins of the "institutional presidency" are described in John P. Burke, *The Institutional Presidency*, *in* THE PRESIDENCY AND THE POLITICAL SYSTEM 383 (Michael Nelson ed., 1990).

5. This point has, of course, been noted by other scholars. *See, e.g.*, CARTER, *supra* note 1, at 65–66.

potential to play a prominent role in deliberations over Supreme Court nominees. Nonetheless, Maltese sees in the Ginsburg and Breyer nominations a route by which presidents can circumvent the recurring imbroglios of the past. Candidates who are highly qualified and ideologically moderate, he suggests, generally avoid bruising confirmation fights and are approved by a secure majority in the Senate (pp. 156–57).

III

The Selling of Supreme Court Nominees is engaging and brisk reading. The case studies—many of which are based on extensive historical research—provide new insights into past confirmation battles while placing the current debate over the confirmation process in historical perspective. Maltese offers a good descriptive account of the changes that have occurred in the confirmation process over the last two centuries. Yet his analysis of how and why the Supreme Court confirmation process has changed is ultimately unconvincing.

Maltese's core argument is that the confirmation process has always been political. From the Rutledge nomination to the present day, candidates have commonly faced intrusive inquiries into their personal lives and ideological beliefs. Yet this observation does not reveal all that much about the politics of Supreme Court nominations. The Supreme Court is, after all, an important political institution; the process and principles of legal interpretation have long been at the center of American politics. The process of selecting justices of the Supreme Court is therefore inherently "political." Contrary to Maltese's assertion, few critics of the confirmation process really believe that the consideration of potential justices ever was or ever will be devoid of politics. What many critics do claim, however, is that the qualifications of nominees, rather than their ideology, should be the focus of attention.[6] Maltese offers nothing to dispel their concerns. A close reading of his own historical accounts suggests that the highly ideological tenor of recent nomination hearings is a relatively new phenomenon.[7] Although conflict in the Senate over a nominee

6. *See, e.g., id.*; MCGUIGAN & WEYRICH, *supra* note 1; O'BRIEN, *supra* note 1; Bork, *supra* note 1; David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900 (1990); Davis, *supra* note 1, at 1063; Task Force, *supra* note 1.

7. *See also* Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1175–76 (1988) (describing President Franklin Delano Roosevelt's effort to "pack" Court with justices who agreed with his New Deal policies); Danelski, *supra* note 6 (arguing that ideological opposition to Supreme Court nominations began at turn of twentieth century). *But see* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 92 (1985) (arguing that "the upper house of Congress has been scrutinizing Supreme Court nominees and rejecting them on the basis of their political, judicial, and economic philosophies ever since George Washington was President"). Of course, the ideology of Supreme Court nominees was not immaterial in earlier years. Presidents have always taken ideology into account when deciding whom to nominate to the Supreme Court. John Adams, for example, appointed the "Midnight Judges" in an effort to maintain the Federalist view of the Constitution into Jefferson's term, *see* HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 56 (1988).

because of partisan politics, the nominee's personal flaws, or the nominee's stance on a particular issue has always been a feature of confirmation debates, conflict over nominees because of their political and judicial views probably dates back only to the confirmation of Louis D. Brandeis in 1916, and did not result in the rejection of a nominee until John J. Parker in 1930.[8] Maltese briefly notes this shift during his discussion of the rise of interest groups,[9] yet he does not respond to those who argue that it is this change above all that has poisoned the confirmation process.[10]

To be sure, Maltese describes some of the most important changes in the confirmation process. His explanations of these developments are cursory, however, and other critical changes in the process are overlooked altogether. For example, Maltese documents the increased involvement of interest groups in confirmation battles in the twentieth century. But he never asks why, if all institutional impediments to interest-group involvement were lifted as early as 1929 (p. 89), interest groups did not become fully involved in the confirmation process until the 1960s. In discussing the changes in the confirmation process, Maltese notes that Supreme Court nominees have testified before the Judiciary Committee on a regular basis only since 1955 (p. 93). Yet he never explains why nominees refused to speak on their own behalf until the Harlan Fiske Stone nomination in 1925 (p. 99), and why it then took another thirty years for nominees to participate in hearings on their nominations on a regular basis. Similarly, Maltese observes that the rise of the "institutional presidency" during the New Deal allowed presidents to advocate much more actively on behalf of their nominees, but he does not explain why presidents rarely even mentioned their nominees in public before Reagan took office (p. 113).

Maltese's failure to explain the historical transformation of the confirmation process leads him to overlook an important and obvious factor that may lie behind many of the changes in the confirmation process—namely, the historical evolution of the role of the Supreme Court. It should come as no surprise in some respects that the Haynsworth, Carswell, and Bork nominations provoked greater scrutiny and public fervor than nominations of the nineteenth century, for in the twentieth century the role of the Court fundamentally

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8. *See* Danelski, *supra* note 6, at 920.

9. "[I]nterest groups have played an active, although irregular, role in the Supreme Court confirmation process since 1881 . . . . The Matthews nominations are a milestone because of that Prior to Matthews, Senate opposition blocked seventeen Supreme Court nominations, but each was a result of partisan politics, sectional rivalries, senatorial courtesy, or lack of qualifications" (p. 36).

10. Maltese similarly fails to comment on a broader pattern that is clearly apparent in his own historical data: the significant increase in the confirmation rate of Supreme Court nominees in the last century. According to Maltese, there were 20 failed nominations to the Supreme Court in the nineteenth century whereas there were only 6 failed nominations in the twentieth century. When only nominations on which a formal confirmation vote was held are included in the analysis, the number of rejections in the twentieth century (4) is still half that of the nineteenth century (8) (p. 3, tbl. 1). Conversely, the number of successful nominees was roughly the same in the two periods: 46 nominees were confirmed in the nineteenth century and 54 in the twentieth century. *See* TRIBE, *supra* note 7, at 142–51.

changed. After a century and a half of cautious challenges to federal laws, the Supreme Court was thrust into the center of national political debate during the 1930s, when it struck down central elements of President Roosevelt's New Deal.[11] With rulings ranging from civil rights to marital privacy to criminal law, the Court again entered the center of national political debate in the 1950s. Not only did the Court stake out controversial positions on matters of national importance, but it also became much more active in striking down laws passed by the Congress.[12] In the wake of this transformation, no Supreme Court nominee could pass through the confirmation process without being scrutinized for his or her orientation toward the burning issues of the day. Little wonder, then, that the nomination of Bork—arguably the most prominent critic of the post-New Deal constitutional order ever to be nominated to the Court—provoked a political response of a very different character than had been seen in the nineteenth century.

Maltese's failure to acknowledge the vastly increased scope and impact of the Supreme Court's rulings undercuts his proposal for improving the confirmation process. Having canvassed the entire history of the confirmation process, Maltese does little more at the close of his book than encourage presidents to choose uncontroversial nominees and spend more time screening them (pp. 156–57). This might be good advice if presidents only sought to secure easy confirmation of their nominees. But as a proposal for reform, it is inadequate. Presidents are well aware of the risks inherent in the confirmation process. They do not choose controversial Supreme Court nominees to risk political disaster but because the appointment of justices is a powerful means by which they shape the direction of national policy.[13] And that, like the political nature of the confirmation process, is unlikely to change.

—Oona A. Hathaway

11. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 161–69 (1960).

12. From 1960 to 1990, the Supreme Court struck down federal laws at the rate of approximately two per year, more than twice the rate of the preceding 60 years and four times the rate since the founding of the country. David Adamany, *The Supreme Court*, *in* THE AMERICAN COURTS 5, 23 (John B. Gates & Charles A. Johnson eds., 1991).

13. *See* Ackerman, *supra* note 7.