

Michigan Law Review

Volume 105 | Issue 6

2007

On Dworkin and Borkin

Tom Lininger

University of Oregon School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Judges Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Tom Lininger, *On Dworkin and Borkin*, 105 MICH. L. REV. 1315 (2007).

Available at: <https://repository.law.umich.edu/mlr/vol105/iss6/19>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ON DWORKIN AND BORKIN'

Tom Lininger*

ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS. By Richard Davis. New York: Oxford University Press, 2005. Pp. 3, 211. \$28.

JUSTICE IN ROBES. By Ronald Dworkin. Cambridge: Harvard University Press, 2006. Pp. 1, 308. \$35.

INTRODUCTION

In 2005, for the first time in 34 years,¹ the President of the United States faced the task of filling two Supreme Court vacancies in the same year.² A great national debate ensued. The debate focused not only on the qualifications of the President's nominees, but also on the nomination process itself. Acrimony seemed ineluctable. One nomination proved so controversial that the candidate withdrew her name.³ The hearings on the President's nominations dominated national news for months. Eventually, by January 31, 2006, the nomination hearings closed and the Supreme Court once again had a full complement of justices.⁴ Yet a number of vexing questions about the nomination process—and about the very duties of a Supreme Court justice—persist to this day.

Contemporaneously with the confirmation hearings in 2005–06, two authors published important works that helped to illuminate the national

* Assistant Professor, University of Oregon School of Law.

1. The Secretary of the U.S. Senate maintains a list of all Supreme Court nominations since 1789. See *U.S. Senate Statistics and Lists: Supreme Court Nominations*, www.senate.gov/layout/reference/nominations/Nominations.htm (last visited Sept. 10, 2006). This list indicates that the White House has not made two nominations to the Court in the same year since 1971, when President Richard Nixon nominated both William Rehnquist and Lewis Powell. President Ronald Reagan submitted two nominations in 1986, but only one nominee was new to the Court: the death of Chief Justice Warren Burger necessitated the nomination of a new justice (Antonin Scalia) and also a new chief justice (Rehnquist).

2. Justice Sandra Day O'Connor announced her resignation on July 1, 2005, effective upon the confirmation of her successor. William Branigin, Fred Barbash, & Daniela Deane, *Supreme Court Justice O'Connor Resigns*, WASH. POST., July 1, 2005, at A1. Chief Justice William Rehnquist died on September 2, 2005. David G. Savage & Henry Weinstein, *Supreme Court Picture Gets Complex*, L.A. TIMES, Sept. 5, 2005, at A10.

3. President Bush's first choice to succeed O'Connor was Harriet Miers, who then served as White House counsel. Miers withdrew on October 26, 2005. Jonathan Weisman, *Rift's Repercussions Could Last Rest of Term*, WASH. POST., Oct. 28, 2005, at A8.

4. On January 31, 2006, John Roberts, the replacement for Chief Justice Rehnquist, swore in Samuel Alito, the replacement for Justice Sandra Day O'Connor. Roberts had taken his seat on the Court on September 29, 2005. John David Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21.

debate. The first of these books, Ronald Dworkin's⁵ *Justice in Robes*, considers the proper role of morality in jurisprudence. Dworkin argues that judges' subjective, value-laden conceptions of justice are central to their adjudication, even when the judges aspire to absolute textual fidelity. Dworkin contends that judges must discern the morals and principles underlying the law and then apply these morals and principles as faithfully as the law itself. According to Dworkin, no judge can, or should, set aside such moralistic interpretation in favor of "strict constructionism."

A second author, Richard Davis,⁶ analyzes the modern process for nominating and confirming Supreme Court justices. In his book *Electing Justice: Fixing the Supreme Court Nomination Process*, Davis traces the evolution of this process over the last several decades. Davis notes that the controversy surrounding the 1987 nomination of Judge Robert Bork ushered in a new era. Bork had shared his political views candidly during his confirmation hearings, and he endured such vituperation that his name became a verb in popular parlance.⁷ The lesson of the Bork hearings is clear: any nominee who wants to win confirmation must hide his or her judicial philosophy and morality from public scrutiny. Davis contends that the present nomination and confirmation process places a premium on evasiveness, which is hardly an admirable quality in a Supreme Court justice.

The tension between Dworkin's book and Davis's book merits close attention. Dworkin insists that the moral philosophy of judges is, and should be, an important determinant of their jurisprudence. Yet, as Davis points out, the confirmation process for Supreme Court nominees does not permit meaningful discussion of normative matters. Thus the judicial philosophy that is so central in Dworkin's analysis is paradoxically inscrutable during the confirmation process that Davis analyzes.

This Essay will use Dworkin's and Davis's scholarship as a jumping-off point for a discussion of the Supreme Court nomination process. I argue that while Dworkin's and Davis's books, when read together, expose a significant problem with the current nomination process, a possible solution to this predicament may lie in a change to the judicial code of ethics and the procedural rules for confirmation of judges.

My analysis will proceed in four steps. Part I will address Dworkin's arguments. Part II will evaluate the analysis and evidence in Davis's book. Part III will consider an additional variable to which neither Dworkin nor Davis paid significant attention: the ethical rules for judges. Finally, Part IV will offer proposals for reforms that would permit forthright discussion of

5. Frank Henry Sommer Professor of Law, New York University School of Law.

6. Professor of Political Science, Brigham Young University.

7. Commentators now use the term "Borking" to refer to prolonged, virulent attacks on judicial nominees. Stephanie Seymour, *The Judicial Nomination Process: How Broken Is It?*, 39 TULSA L. REV. 691, 701 (2004). "Borking" carries a connotation of unfairness. Mark Tushnet, *By Definition*, 9 GREEN BAG 2D 11 (2005). After the Bork debacle, the goal of many Supreme Court nominees is to avoid "Borking" by refraining from candid discussion of judicial philosophy or morality. Davis, p. 166.

nominees' views during confirmation hearings, but would not unduly hinder the nomination process.

I. DWORKIN'S ARGUMENT

Ronald Dworkin, one of the nation's foremost legal philosophers,⁸ has solidified his legacy with his latest book. *Justice in Robes* presents a synthesis of Dworkin's jurisprudential theory. He explains the evolution of his thinking and the influences to which he has reacted. Most intriguingly, *Justice in Robes* includes several chapters challenging the leading proponents of competing jurisprudential theories. Accessible, provocative, and enlivened by frequent clash, *Justice in Robes* offers an ideal primer for students beginning their study of jurisprudence, and the book also rewards close scrutiny by scholars who are already familiar with Dworkin's philosophy.

Dworkin asks a simple question at the outset of *Justice in Robes*: "How should a judge's moral convictions bear on his judgments about what the law is?" (Dworkin, p. 1). Dworkin posits that morality and law are ineluctably intertwined. The interpretation of law is to a great degree a normative enterprise because the law leaves interstices in which judges must rely on their intuitive understanding of justice (Dworkin, pp. 18–21, 187). Even for those judges who do not explicitly embrace a moralistic interpretation of law, the act of articulating a legal interpretation entails explaining and justifying past legal practice, and this process draws out what the interpreter considers valuable. According to Dworkin, strict constructionism—the notion that a judge could set aside his or her morality and simply follow the letter of the law—is a hopeless fallacy.⁹

Dworkin does not lament the overlap of law and morality; he celebrates it. Jurisprudence benefits from a candid acknowledgement of law's moral underpinnings. After all, law itself is little more than a codification of

8. A former Rhodes Scholar and clerk for Learned Hand, Dworkin has taught at Yale Law School, at the NYU School of Law, and at Oxford University, where he succeeded H.L.A. Hart. Dworkin has written some of the most important legal philosophical works of our time, including *TAKING RIGHTS SERIOUSLY* (1977), *A MATTER OF PRINCIPLE* (1985), *LAW'S EMPIRE* (1986), *PHILOSOPHICAL ISSUES IN SENILE DEMENTIA* (1987), *A BILL OF RIGHTS FOR BRITAIN* (1990), *LIFE'S DOMINION* (1993), *FREEDOM'S LAW* (1996), and *SOVEREIGN VIRTUE* (2000). Justine Burley has recently published a compilation of essays criticizing Dworkin's work. This volume includes some responses by Dworkin himself. *DWORKIN AND HIS CRITICS, WITH REPLIES BY DWORKIN* (Justine Burley ed., 2004). An empirical study has shown that Dworkin is the most influential scholar in legal philosophy today. Brian Leiter, a professor of law and philosophy at the University of Texas, determined that more law review articles have cited Dworkin than have cited any other legal philosopher. See Top 10 Most Cited Faculty by Areas, 2002–03, http://www.leiterrankings.com/faculty/2002faculty_impact_areas.shtml (last visited Sept. 22, 2006). In fact, Dworkin's citations exceed the closest competitor's citations by a margin of four to one. *Id.* Dworkin's preeminence in the field does not mean that all legal philosophers concur with his theories. See Thom Brooks, *Book Review*, 69 *MODERN L. REV.* 140, 140 (2006) (reviewing *Dworkin and His Critics: with Replies by Dworkin* (Justine Burley ed., 2004)) ("[Dworkin] is one of the most cited and read legal philosophers alive. Yet this wide readership has not translated into more than a small number of disciples. It is quite rare to find anyone in the field identifying herself as a 'Dworkinian.' Indeed, Andrea Dworkin may well have the larger following.").

9. Dworkin's objections to exclusive positivism—an approach to legal interpretation that attempts to exclude moral considerations—pervade his book. *E.g.*, Dworkin, pp. 26–33, 198–211.

values,¹⁰ so it should not seem surprising that judges resort to their own conceptions of morality as a guide to the interpretation of law. Dworkin goes so far as to suggest that law is but a department of morality (Dworkin, p. 34).

Nearing the end of his distinguished career, Dworkin has decided to respond in a comprehensive manner to the theorists with whom he disagrees. For example, he inveighs against the originalism espoused by Supreme Court Justice Antonin Scalia. According to Dworkin, Justice Scalia focuses too much on the text of individual constitutional provisions, and too little on “constitutional integrity”—a broader notion that incorporates consideration of the entire Constitution, the principles that pervade the Constitution, and the history of this nation (Dworkin, pp. 118–19).

Dworkin resumes his criticism of H.L.A. Hart’s doctrinal positivism.¹¹ According to Dworkin, positivists believe that

a community’s law consists only of what its lawmaking officials have declared to be the law, so that it is a mistake to suppose that some nonpositive force or agency—objective moral truth or God or the spirit of an age or the diffuse will of the people or the tramp of history through time, for example—can be a source of law unless lawmaking officials have declared it to be. (Dworkin, p. 187)

Dworkin believes that proper legal interpretation is not so facile. Judges who must interpret the law draw on moral considerations in a way that positivism cannot explain (Dworkin, p. 187). A “judge or citizen who has to decide what the law is on some complicated issue must interpret past law to see what principles best justify it, and then decide what those principles require in the fresh case” (Dworkin, p. 141). The animating principles of law are a distraction for a positivist theorist,¹² but they are the central focus for Dworkin.

Seventh Circuit Judge Richard Posner also draws Dworkin’s ire. Labeled “Darwin’s new bulldog” by Dworkin, Judge Posner has argued that moral

10. A fascinating set of essays addressing this proposition appears in a 2003 symposium issue of the *American Journal of Jurisprudence*. The symposium, entitled *Has the Law Moral Foundations?*, includes contributions from several prominent legal philosophers. See, e.g., Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1 (2003).

11. In his seminal 1961 work, *The Concept of Law*, H.L.A. Hart defined doctrinal positivism as follows: “According to my theory, the existence and content of the law can be identified . . . without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of law.” H.L.A. HART, *THE CONCEPT OF LAW* 269 (2d ed. 1994). The ensuing debate between Hart and Dworkin played an “organizing role in the jurisprudential curriculum” of the latter twentieth century. Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 18 (2003). Leiter, who leads a new generation of legal philosophers, has suggested that the Hart/Dworkin axis may no longer provide the best organizational framework for the twenty-first century because scholarship in the area of jurisprudence has become much more nuanced. *Id.*

12. It is important to emphasize here that a subcategory of positivist theory, sometimes described as “inclusive positivism,” envisions a role for morality in legal interpretation. Scholars such as Jules Coleman at Yale have posited that “moral criteria [should] figure in tests for identifying valid law, but only if the legal community has adopted a convention that so stipulates.” Dworkin, p. 188 (summarizing Coleman’s theory). Dworkin criticizes the inclusive positivist perspective in pages 188–98 of his book.

theory cannot provide a "solid basis" for judgment (Dworkin, p. 81). Of course, Judge Posner favors the empirical approach more typical of the law-and-economics school. Dworkin chides Posner for underestimating the capacity of judges to apply morality to the task of judging. In one particularly biting passage, Dworkin suggests that "Posner's bad arguments may well be traps, for one of his central claims is that judges are not good at philosophical reasoning, and he may be tempting critics to help prove his claim by showing it is true of at least one . . ." (Dworkin, p. 74).

Dworkin criticizes John Rawls's doctrine of public reason on the ground that it inhibits judges' reliance on their own subjective morality. Rawls has sought to define the kinds of arguments that are permissible for officials in a politically liberal community, including judges (Dworkin, p. 252). Rawls insists that judges may only accept those justifications that all reasonable members of a political community would support (Dworkin, p. 252). Judges must eschew "controversial religious, moral, or philosophical doctrines," according to Dworkin's interpretation of Rawlsian theory (Dworkin, p. 252). Dworkin cannot abide such a jurisprudential straitjacket. He argues that it would be both impossible and undesirable for judges to forsake their own moral opinions on the ground that these opinions could diverge from the prevailing "public reason" (Dworkin, p. 254).

Dworkin's criticisms of these other theorists share a common denominator: he debunks what he believes to be the myth of neutral jurisprudence. Dworkin insists that no legal system can identify law without recourse to its merits. The title of his book, *Justice in Robes*, aptly summarizes his position: it is each judge's subjective understanding of right and wrong, rather than simply the intrinsic force of law itself, that determines justice in our legal system.

He ends by offering a new "intellectual topography." Rather than charting law and morality as two different intellectual domains, Dworkin suggests that they are coextensive. We should not deny the interrelationship of law and morality, but seek to understand it better. So enlightened, "[w]e would no longer doubt that justice plays a role in fixing what the law is. We could then concentrate on the more complex and important issue of precisely what that role is" (Dworkin, p. 35).

Dworkin's conflation of jurisprudence and morality is vulnerable to a number of criticisms. First, it is implausible to suggest that a readily ascertainable morality underlies a particular law. Some laws owe their origin to ugly political compromises that sought a middle ground between completely incongruous philosophies. After all, the legislature did not earn the moniker "the sausage factory" for its fealty to principle.

Second, the jurisprudential approach advocated by Dworkin might cause unpredictability in the administration of justice. To the extent that judges veer from the legal text to abstract moral or philosophical considerations, the rulings of these judges will be much harder to foretell. Pretrial settlement will be more difficult when trial outcomes are unpredictable. The legitimacy of the judicial system may suffer when unsuccessful litigants are unable to ascribe outcomes to readily discernible law.

Third, Dworkin's conception of normative decision-making seems better suited for the legislature than the judiciary. The job of legislators is to interact frequently with electors and express their views in the formulation of public policy. Judges, by contrast, are relatively isolated in courtrooms where they react passively to fact patterns presented to them. Legislators are in the best position to make normative judgments, and judges are best equipped to apply the legislative judgments in particular cases. A judge who resorts to abstract notions of right and wrong, rather than confining his or her analysis to the statute in question, is arguably usurping the legislative function.

Notwithstanding these criticisms, it is difficult to dispute the descriptive (as opposed to prescriptive) portion of Dworkin's book. Judges do in fact rely on their subjective normative philosophies in adjudicating cases for which the law does not dictate a clear outcome. Whether or not judges admit it, they *are* the law. Judges are as important as the statutory text, and perhaps even as important as the constitutional text; they are justice in robes.

The great significance of judges' normative philosophies heightens the importance of selecting judges in a manner that explores their philosophies. Dworkin himself explored this topic in two essays for the *New York Review of Books* in the midst of the controversy surrounding the appointment of new Supreme Court justices in 2005 and 2006.¹³ But the appointment process may lie outside the expertise of a legal philosopher. An interdisciplinary approach is necessary to bridge the rift between jurisprudence and real-politik.

II. DAVIS'S ARGUMENT

Richard Davis,¹⁴ a political scientist, analyzes the confirmation of Supreme Court nominees from a more practical perspective. Davis's latest work, *Electing Justice: Fixing the Supreme Court Nomination Process*, presents the results of careful investigation. He interviewed Supreme Court nominees including Justice Ruth Bader Ginsburg, Justice Stephen Breyer, and Judge Robert Bork, as well as U.S. Senator Orrin Hatch and key Senate staff. Davis also surveyed the available records of Supreme Court confirmation hearings since the 1960s, and his comprehensive analysis enables him

13. Ronald Dworkin, *Judge Roberts on Trial*, N.Y. REV. BOOKS, Oct. 20, 2005, at 17 (complaining that in Chief Justice Roberts's confirmation hearing, he only "reiterated banalities about being guided by the law, . . . or taking due account of precedent," but he scarcely revealed his "constitutional philosophy"); Ronald Dworkin, *The Strange Case of Judge Alito*, N.Y. REV. BOOKS, Feb. 23, 2006, at 15 (similarly criticizing Justice Alito's comments in his confirmation hearing).

14. Davis has written a number of important books analyzing the influence of the media and mass communication in American politics. These books include *THE PRESS AND AMERICAN POLITICS: THE NEW MEDIATOR* (3d ed., Prentice Hall 2001), *THE WEB OF POLITICS: THE INTERNET'S IMPACT ON THE AMERICAN POLITICAL SYSTEM* (1999), *NEW MEDIA AND AMERICAN POLITICS* (1998), and *POLITICS AND THE MEDIA* (1994). With his background in the political phenomenon of intense media scrutiny, Davis is well suited to analyze the evolution of Supreme Court confirmation hearings over the last three decades.

to draw a number of important conclusions about the transformation of the process for nomination and confirmation of Supreme Court justices.¹⁵

The central figure in Davis's story is Judge Robert Bork. Prior to the nomination of Judge Bork to the Supreme Court in 1987, the politics of confirmation hearings had been somewhat staid and predictable (Davis, p. 30). The president would select a nominee based on considerations such as ideology, competence, friendship, and representativeness of various constituencies (Davis, pp. 16–20, 40–51). The role of the U.S. Senate Judiciary Committee was to provide "advice and consent"—generally more of the latter than the former.¹⁶

Bork's nomination took more time to consider than any prior nomination. Statistics compiled by Davis document the ease with which Supreme Court nominees won confirmation in the pre-Bork era.¹⁷ As Davis observed, a total of 115 days passed from the nomination of Robert Bork to the withdrawal of his nomination by President Reagan. That time period almost equaled the combined periods between nomination and confirmation for all Supreme Court nominees in the 1970s (Davis, p. 68).

Why was Bork's confirmation so much more difficult? One possible reason is Bork's peculiar personality. He was unapologetic, even pugnacious, and would not back away from a fight. Rather than sidestep a difficult question, he would generally provide a forthright, principled answer. "Robert Bork's willingness to engage the committee in discussions of legal philosophy and defend many of his views on specific legal issues and even specific cases became a model to *avoid* for successive nominees" (Davis, p. 166).

The timing of the Bork nomination coincided with a period of contentious relations between the White House and Congress. In 1987, President Reagan's popularity was at a low ebb. Congress was ready to defy President Reagan in a manner that had seemed out of the question when his popularity had been higher (Davis, p. 71).

Meanwhile, a number of "external players" began to exert influence over the confirmation process. Interest groups factored much more significantly in the Bork confirmation hearings than ever before (Davis, pp. 24–30). Hundreds of interest groups entered the fray: left-wing groups such as the Alliance for Justice, the National Abortion Rights Action League (NARAL), and the National Organization for Women (NOW) vied against right-wing groups including the Institute for Justice, the Family Research Council, and Concerned Women for America. The heightened involvement occurred as the advocacy groups recognized that they could influence the Court's

15. Davis discussed his methodology in the acknowledgments at the start of his book. Davis, p. vii.

16. Davis, pp. 20–24, 30. The Senate frequently acquiesced in nominations. In some cases, nominees did not even testify in connection with their confirmation hearings. Davis, p. 21.

17. During the years 1789–1809, the average time period between nomination of confirmation was 2.56 days; from 1810–30, the average time period was 8 days; from 1831–50, 11.56 days; from 1851–70, 12.3 days; from 1871–90, 24.91 days; from 1891–1910, 8.33 days; from 1911–30, 24.1 days; from 1931–50, 12.62 days; from 1951–70, 57.91 days; from 1971–80, 38.6 days; from 1981–90, 94.3 days; and from 1991–94, 75.7 days. Davis, p. 67.

“policy-making” and also realized that their participation in the nomination battle helped boost their membership (Davis, p. 95). These groups brought intense pressure to bear on senators, prodding the senators to take aggressive positions in the confirmation hearings.

Beginning with the Bork hearings, the media took a much greater interest in the confirmation of Supreme Court nominees. Davis offers data contrasting the media coverage of Supreme Court nominations during the pre-Bork and post-Bork eras. The *New York Times*' references to confirmation hearings increased by 38%. The references in *Time* magazine increased by 300% (Davis, p. 98). Coverage of nominations on television news shows also increased dramatically (Davis, pp. 99–100). Part of the media interest was attributable to the greater engagement of advocacy groups. “Suzanne Garment, a Bork supporter, wrote that ‘there had never been anything remotely resembling the scale of the national media campaign that was launched against Bork.’”¹⁸ Another explanation for the increased media coverage was the transformation of communications technology in the 1980s—an era that saw the advent of twenty-four-hour television news and mass communication via the internet, among other developments.

The Bork hearings emboldened interest groups to take an active role in subsequent confirmation hearings. Examples of such groups include the aforementioned left-leaning organizations such as the Alliance for Justice, NARAL, and NOW, as well as right-leaning counterparts such as the Institute for Justice, the Family Research Council, and Concerned Women for America (Davis, p. 28). The groups now interview prospective nominees and present them with “litmus tests.” Some groups actually give the White House lists of acceptable nominees (Davis, p. 109). The media covers the machinations of interest groups just as thoroughly as the confirmation hearings themselves.

For its part, the White House trains nominees carefully for their media appearances and their congressional testimony. The conventional wisdom is that nominees should “frequently resort to nonreply answers that give the illusion of a reply but offer no substantive information about the nominee” (Davis, p. 166). For example, when President Clinton nominated Ruth Bader Ginsberg to the Court, a White House aide told her that she was “more likely to lose votes for what you say than what you don’t say” (Davis, p. 166). Nominee Antonin Scalia—no wallflower, to be sure—even declined to comment on whether *Marbury v. Madison* was wrongly decided (Davis, p. 166). As the nominees and their “handlers” are keenly aware, a nominee who candidly reveals his or her judicial philosophy may meet with the same fate of Judge Bork (Davis, p. 166).

Davis claims that “[i]n a sense, selecting justices for the Supreme Court is an election without voters” (Davis, p. 9). The nominee and his or her handlers at the White House develop an image they wish to project, and they script public appearances so the nominee does not stray “off-message.” The

18. Davis, p. 75 (quoting Suzanne Garment, *The War Against Robert Bork*, COMMENTARY, Jan. 1988, at 19).

White House arranges for nominees to meet under controlled circumstances with senators and key interest groups in advance of the confirmation hearings. The manipulation of the media, the careful engagement of interest groups, and the crafting of messages for public consumption are all hallmarks of modern electoral politics. Davis notes that the only missing ingredient is the ballot box.

Davis's description of the changes in the confirmation process is generally accurate, but his book does invite some criticism. First, he underestimates the salutary effect of intense public scrutiny since the Bork hearings. One might argue that the Bork confirmation hearing was not a debacle, but a vindication of democratic power as expressed in the Senate's "advice and consent" function. Public engagement in the selection of new Supreme Court justices brings a measure of accountability and increases public awareness of Court's important work. The term "Borking" may simply be no more than sour grapes.¹⁹ Public outcry has been beneficial in keeping unqualified nominees off the Court. Perhaps Harriet Miers would be wearing a robe right now if the public and the media had not been so vigilant.

A second shortcoming of Davis's book is his exaggeration of the Bork hearings' importance within the overall political landscape of the mid-1980s. The Bork hearings were subject to the same political forces that transformed all American politics in that period. The Bork hearings were not the harbinger of a new political era, but were simply the latest in a series of high-profile congressional hearings, such as the Iran-Contra hearing, that demonstrated the tremendous power of the media and growing influence of interest groups. Davis's book implies a uniqueness that the historical record does not support.

These criticisms do not detract from Davis's achievement. He has shown that the confirmation process is largely a charade in which nominees spend more energy avoiding tough questions than divulging their views. Like Dworkin, Davis would favor a more explicit discussion of judicial philosophy.

III. ETHICAL RULES FOR JUDGES

Neither author pays enough attention to the role of ethical rules for judges. Do the ethical rules create an obligation of candor that might override the political impulse to withhold information from the Senate Judiciary Committee? Or, alternatively, do the ethical rules compound the problem by providing a rationale for concealment of nominees' views?

The ethical rules for judges appear in the ABA *Model Code of Judicial Conduct*, and most states have adopted them to varying degrees.²⁰ These

19. Harvard Law School Professor Randall Kennedy suggests that rigorous scrutiny of Supreme Court nominees is defensible, even if the confirmation process has become much more politicized than ever before. Randall Kennedy, *The Case for Borking*, AMERICAN PROSPECT ONLINE, July 2, 2001, www.prospect.org/print/V12/12/kennedy-r.html.

20. MODEL CODE OF JUDICIAL CONDUCT (1990).

rules apply to state court judges and (due to the cross-reference in lawyers' ethical rules) to lawyers seeking appointment to judicial office.²¹ Federal judges are subject to a slightly different set of rules.²² Indeed, it is likely that virtually every nominee to the U.S. Supreme Court will be subject to some sort of ethical code for judges, whether that nominee is presently a federal judge, a state judge, or simply a lawyer.²³

While the ethical rules for judges do not presently include any obligation that judges or judicial candidates must forthrightly disclose their judicial philosophies in confirmation hearings, the *Model of Code of Judicial Conduct* requires that a candidate for judicial office "shall not . . . knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent."²⁴ The ethical rules for lawyers include similar provisions that prohibit affirmative misrepresentations of lawyers seeking appointment as judges.²⁵ The problem with these rules is that they only prohibit false statements and do not impose an obligation to be forthright. A candidate for judicial office could comply fully with existing rules by declining to make *any* statement concerning his or her own views. Even an evasive answer to a question about the candidate's views could be compliant with the present ethical rules for judges, provided that the answer does not make any affirmative misrepresentations.

Not only do the ethical rules for judges fail to require forthright disclosure of judicial philosophy, but the rules have generally provided many excuses for judges and nominees to dodge questions about substantive matters. A set of provisions has walled off certain topics from public discussion in order to avoid the appearance of "prejudgment." These provisions include two clauses that are particularly noteworthy: the "announce clause" and the "pledges and promises clause."

The announce clause originally appeared in the 1972 ABA *Model Code of Judicial Conduct*. This clause provided that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views

21. Rule 8.2(b) of the ABA's *Model Rules of Professional Conduct* (i.e., the ethical rules of lawyers who are not judges) provides that "[a] lawyer who is a candidate for judicial office shall comply the applicable provisions of the Code of Judicial Conduct." MODEL RULES OF PROF'L CONDUCT R. 8.2(b) (2002).

22. Federal judges are governed by the *Code of Conduct for United States Judges*, a slight variation on the ABA's *Model Code of Judicial Conduct*. CODE OF CONDUCT FOR UNITED STATES JUDGES (2000), available at www.uscourts.gov/guide/vol2/ch1.html (last visited on Jan. 20, 2007).

23. Interestingly, Supreme Court justices are not subject to any of these ethical rules once they are confirmed. Neither the Code of Judicial Conduct nor the Code of Conduct for United States Judges are binding on Supreme Court Justices. The Court addresses ethical matters on an ad hoc basis. *E.g.*, *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913 (2004) (Scalia, J., sitting alone) (determining that his recusal was not necessary when the Supreme Court reviewed a case involving Vice President Richard Cheney, with whom Scalia had recently traveled on a hunting trip).

24. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii)(2003).

25. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.2(a) (2002) (prohibiting an affirmative false or misleading statement of a lawyer seeking appointment or election to judicial office); MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2002) (prohibiting misrepresentation by lawyers in general).

on disputed legal or political issues.”²⁶ As of 2002, a total of nine states still included the announce clause in their codes of judicial conduct,²⁷ even though the ABA had dropped this clause from the *Model Code* in 1990.²⁸ The U.S. Supreme Court held that the announce clause was unconstitutional in 2002. In *Republican Party of Minnesota v. White*, the Court determined that the clause violated the First Amendment by restricting freedom of speech and denying the public information about the views of judicial candidates.²⁹ Justice Scalia, writing for the majority, noted that restrictions such as the announce clause would lead to vapid discussions of candidates’ fitness to serve on the bench.³⁰

While the announce clause perished, the pledges and promises clause remains in effect to this day. The pledges and promises clause provides that a candidate for judicial office shall not, “with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.”³¹ The Supreme Court was careful to note that its opinion in *Republican Party of Minnesota v. White* did not address the pledges and promises clause.³²

Underlying the pledges and promises clause is the supposition that judges cannot keep an open mind with respect to future cases if they take advance positions on key issues that could arise in those cases. As explained by a recently convened ABA Commission examining the need for changes to the *Model Code of Judicial Conduct*, the purpose of the pledges and promises clause is to prevent “improper pledges and promises that commit a judge or judicial candidate to decide a future case in a particular way.”³³ Simply put, the clause seeks to avoid prejudice.

Unfortunately, the pledges and promises clause has provided a convenient excuse for obfuscation or evasion by candidates for judicial office who face uncomfortable questions about their views on controversial subjects. If a question seems to implicate a matter that might possibly come before the court on which the candidate aspires to serve, the candidate can invoke the ethics rules to dodge the question. John Roberts and Samuel Alito used this

26. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B) (1972), *quoted in* *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002).

27. Francisco R. Maderal, Note, *Regulating Judicial Campaign Speech: Republican Party of Minnesota v. White on Remand*, 19 GEO. J. LEGAL ETHICS 809, 812 n.28 (2006).

28. *Republican Party of Minn.*, 536 U.S. at 773 n.5.

29. *Id.* at 774–88.

30. *See id.* at 774–78 (implying that, for example, limiting the discussion to the candidates’ personal backgrounds and work habits would not provide adequate information to evaluate their fitness).

31. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i)(2003).

32. *Republican Party of Minn.*, 536 U.S. at 773 n.5.

33. ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT TO THE ABA HOUSE OF DELEGATES 160 (2006), *available at* http://www.abanet.org/judicialethics/house_report.pdf.

strategy repeatedly in their confirmation hearings.³⁴ Senators who supported these nominees defended their refusal to answer questions,³⁵ while other Senators expressed exasperation that many matters of great importance seemed to be off limits to discussion during the confirmation process.³⁶ At the state level as well, a number of candidates for judicial office are declining to reveal their views on controversial issues and are citing the canons of judicial ethics as the reason for their reluctance.³⁷

In sum, the present ethical rules for judges do not foster the candid discussion of judicial philosophy urged by Dworkin and Davis. The present

34. For example, Judge Alito made the following comment in response to a question by Senator Feingold about the constitutional authority of a president to defy a criminal statute: "I think it would be irresponsible for me to say anything on the substance of the question here . . . I think anybody in my position can say no more than, 'This is the framework that the Supreme Court precedents have provided for us. And when the issue comes up, if it comes up, if it comes before me, if it is justiciable, I will analyze it thoroughly.' And that's all I can say." Transcript, *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court*, Part I of III, WASH. POST, Jan. 12, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/12/AR2006011201031.html>. In effect, according to Dean Lawrence Velvel of the Massachusetts School of Law, nominees Roberts and Alito placed themselves under a "gag rule" that allowed them to evade tough questioning. Lawrence R. Velvel, *Alito and Roberts' Self-Gag Rule is a Phony*, COUNTERPUNCH, Jan. 25, 2006, available at www.counterpunch.org/velvel/01252006.html (last visited Feb. 14, 2007).

35. The supporters of nominees Roberts and Alito insisted that these nominees should be evaluated under the "Ginsburg standard." In other words, just like Democratic nominee Ruth Bader Ginsburg, they should not be required to answer questions about matters that could possibly come before the Supreme Court. Carolyn Lochhead, *Alito Hearings Focus on Executive Power in Wartime*, S.F. CHRON., Jan. 10, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/10/MNGBHGL0F41.DTL> (last visited Feb. 14, 2007). Republican Senator Jon Kyl made this point especially forcefully:

[N]o judicial nominee should answer any question that is designed to reveal how the nominee will rule on any issue that could come before the court. This rule has come to be known as the Ginsburg standard because Justice Ginsburg stated during her own confirmation hearings that she would give no forecasts, no hints about how she would rule on issues, . . . Judge Alito, I'll tell you the same thing I told John Roberts. I expect you to adhere to the Code of Judicial Conduct. And I want you to know that I will strongly defend your refusal to give any indication of how you might rule on any matter that might come before you as a judge or to answer any question that you believe to be improper under those circumstances.

Transcript, *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court*, Part I of II, WASH. POST, Jan. 9, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/09/AR2006010900755.html> (last visited Feb. 14, 2007). See also *id.* (statement by Senator Hatch expressing similar views).

36. Senator Schumer indicated that he found "troubling" the unwillingness of Judge Alito to answer questions about his views on abortion, while Judge Alito offered opinions on other subjects. Transcript, *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court*, WASH. POST, Jan. 10, 2006, Part III of III, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011001418.html> (last visited Feb. 14, 2007). Senator Feingold made this comment after several senators admonished the Democrats about questioning Judge Alito about his views on the controversial issues of the day: "Mr. Chairman, it simply cannot be that the only person in America who can't express an opinion on a case where Justice O'Connor cast the deciding vote is the person who has been nominated to replace her on the court." Transcript, *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court*, Part I of II, WASH. POST, Jan. 9, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/09/AR2006010900755.html> (last visited Feb. 14, 2007).

37. Marcia Coyle, *Judicial Surveys Vex the Bench*, NAT'L L.J., Sept. 8, 2006, available at <http://www.law.com/jsp/article.jsp?id=1157629870187> (last visited Feb. 14, 2007).

rules actually have the opposite effect, providing an excuse for nominees and candidates to avoid expressing their views on divisive topics. Evasion is not simply an expedient political maneuver; it is also consistent with the present ethical rules.

IV. PROPOSALS FOR REFORM

Plainly the present process for confirming Supreme Court nominees is not ideal. This process allows nominees to assume a position of life tenure without meaningful prior screening of their judicial philosophy by the Senate Judiciary Committee—or by the people whom the senators represent. Are any reforms possible that could improve the process for selecting and confirming Supreme Court justices?

One proposal offered by Davis is to revise the Constitution so that Supreme Court justices must be elected, as they are in most states (Davis p. 170–78). Davis believes that this alternative would necessitate greater candor in the public pronouncements by candidates for the Court. Further, Davis posits that election of Supreme Court justices would perhaps reduce the influence wielded by special interest groups. But this proposal seems more detrimental than beneficial. There is little reason to be sanguine about the quality of public discourse in a Supreme Court race. The only nationwide elections held at present are for the office of president, and these races are rife with pandering on topics such as flag burning, gay marriage, and Willie Horton. Would the general public be capable of—let alone interested in—following a debate among Supreme Court candidates about the subtleties of administrative law or federal subject matter jurisdiction? In any event, is unlikely that sitting federal judges, many of whom have never before sought elected office, would be interested in entering a nationwide election for the U.S. Supreme Court. Finally, the influence of special interests in such an election would be at least as great as in the present confirmation process because candidates for elected office would be far more dependent on interest groups for financial backing.³⁸

Another alternative suggested by conservative theorists is to abolish or modify the filibuster rule.³⁹ According to proponents of this reform, nominees for the Supreme Court are presently deterred from discussing their views candidly because they know that the filibuster rule enables a

38. For these reasons and others, the ABA has long opposed the election of judges at both the state and federal levels. ABA COMM'N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY 96 (1997).

39. The term "filibuster" refers to an attempt to extend debate on a proposal in order to delay or completely prevent a vote on its passage. Under the Senate's present rules, the Senate as a whole may end a filibuster if sixty or more senators vote for cloture. In 2005, after Democrats filibustered confirmation votes on several of President Bush's judicial nominees, Senate Majority Leader Bill Frist proposed to make procedural changes reducing the power of the minority to filibuster. Bill Frist, Former Senate Majority Leader, U.S. Senate, Address to the 18th Annual Federalist Society National Convention (Nov. 12, 2004) (transcript available at <http://www.fed-soc.org/Publications/Transcripts/frist04.pdf>).

determined group of forty-one senators to derail any nomination.⁴⁰ But there is no reason to believe that the elimination of the filibuster rule will diminish the political risks of candor. The reality is that the filibuster rule provides protection to the minority party, and the elimination of this rule would only reduce the inhibition of Supreme Court nominees if they share the partisan affiliation of the majority party.

A more plausible solution would be to retain the present nomination and confirmation procedure, but to make changes that would necessitate greater disclosure by Supreme Court nominees of their judicial philosophies and moral views. Five reforms would greatly advance this cause: (1) modifying the ethical rules to require greater disclosure of judicial philosophy by all candidates and nominees; (2) narrowing the scope of the pledges and promises clause; (3) appointing a referee to determine the validity of nominees' invocation of ethical rules as a bar to answering questions during confirmation hearings; (4) requiring the recording of all comments by nominees, or likely nominees, in their discussions with the White House after the announcement of a vacancy on the Supreme Court; and (5) increasing the ABA's involvement in vetting nominees before the conclusion of confirmation hearings.

First, the ethical codes for lawyers and judges should include new provisions requiring forthright disclosure of judicial philosophy by anyone seeking appointment to the bench. This affirmative obligation would counterbalance some of the other provisions in the ethics codes, such as the pledges and promises clause, which may create a disincentive for disclosure. Another benefit of this proposal would be that the quality of the discussion in confirmation hearings would depend less on the artful questioning of senators—many of whom are not lawyers—than on the nominee's own ethical obligation to lay out his or her views thoroughly. The ABA could develop a list of topics that merit discussion by a Supreme Court nominee during confirmation hearings. This list could appear in the commentary published with the new ethical rule. The ABA could carefully craft questions that are general enough to avoid committing a nominee to prejudgment in a particular case, but that are focused enough to elicit valuable information about the nominee's judicial philosophy.⁴¹

Second, the ABA should revise the pledges and promises clause so that it does not hinder legitimate attempts to discover nominees' judicial philosophies. As presently written, the clause provides that judicial nominees

40. Supreme Court nominees know that a Republican filibuster thwarted the nomination of Abe Fortas to become Chief Justice. Recent Democratic filibusters have blocked nominations of federal judges by the Bush Administration. Charles Babington, *Filibuster Precedent? Democrats Point to '68 and Fortas*, WASH. POST, Mar. 18, 2005, at A3.

41. After all, the purpose of the pledges and promises clause is not to squelch discussion of a nominee's views, but rather to confine that discussion so that it does not compromise the nominee's impartiality in adjudicating particular future cases. The ABA Commission, reevaluating the *Code of Judicial Ethics*, noted the distinction between statements "that will not interfere with future decision making, and improper pledges and promises that commit a judge or judicial candidate to decide a future case in a particular way." ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, *supra* note 33, at 160.

shall not, "with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."⁴² This language is far too expansive. It does not contain any temporal parameters: how soon would the matter need to come before the court in order to preclude discussion of the matter by judicial candidates? The mere "likelihood" that a matter might reach the court is hardly a limiting principle. As the Seventh Circuit Court of Appeals has observed, "[t]here is no almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."⁴³ The clause would benefit from the addition of a final sentence: "The declaration of a judicial candidate's views concerning a general legal theory or category of cases shall not be deemed to violate this rule, even if a case that exemplifies such a theory or that falls within such a category might one day come before the court on which the candidate aspires to serve."⁴⁴ The new sentence would not allow prejudgment of particular cases likely to come before the court, but this language would allow judicial candidates to explain their views on important legal questions, thereby allowing the Senate to fulfill its duty of advice and consent.⁴⁵

Third, the Senate should appoint an official to serve as a referee adjudicating "objections" by nominees who refuse to answer senators' questions on ethical grounds. The referee might be a lower court judge or an academic

42. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (2004).

43. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993).

44. The Supreme Court's ruling in *Republican Party of Minn. v. White*, 536 U.S. 765 (2005) surely does not preclude a revision of the pledges and promises clause. The Court addressed the now-defunct announce clause, not the pledges and promises clause. In any event, while the Court appeared to imply that the pledges and promises clause is constitutional as presently written, the Court hardly indicated that the pledges and promises clause is necessary. There is no constitutional mandate for the pledges and promises clause, except perhaps the obvious requirement that due process requires a judge who has not prejudged a particular case. If anything, constitutional considerations militate in favor of easing restrictions on speech by judges and judicial candidates. See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 209-10 (2004) ("*White* carefully tiptoed around the Pledges or Promises Clause, although, as previously indicated, its uncertain treatment of the definition of impartiality and of the regulation of only campaign statements calls this Clause into question, too").

45. Unfortunately, the latest draft of a proposed revision to the ABA's version of the pledges and promises clause does not narrow the clause sufficiently. In December 2006, a blue-ribbon commission issued a report that included draft language for a new version of the clause, along with a number of other proposed revisions to the *Code of Judicial Conduct*. The amended version of the pledges and promises clause would be virtually identical to the prior version. In fact, a new comment guiding interpretation of the clause would arguably make it more restrictive. "The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result." ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, *supra* note 33, cmt. 13 to Proposed Rule 4.1. Because a candidate's opinions on a legal issue naturally suggest a preference for a particular result, the proposed comment thirteen could hinder disclosure of a candidate's views. The dividing line between permissible and impermissible opinions will be hard to discern, and that ambiguity may have a chilling effect (or it may invite candidates to hide their views where disclosure would be uncomfortable). The ABA House of Delegates will consider the proposed changes at its February 2007 meeting.

with expertise in the area of ethics. This referee could hear, *in camera*, the information that the nominee believes is subject to the ethical rule prohibiting disclosure. The referee could then resolve the objection promptly. Perhaps the ethical rules should be revised to clarify that a nominee who discloses his or her views pursuant to a ruling by the ethics referee would be absolved of any responsibility for an ethics violation, in much the same way that Rule 1.6 absolves lawyers from violating their confidentiality obligations when a judge has ordered disclosure.⁴⁶ The presence of the referee would eliminate the temptation for overbroad invocation of “ethical objections” that are little more than a subterfuge for avoiding unpleasant questions. A right of appeal to a federal court might ensure the fairness of the referee’s rulings.

Fourth, new ethical rules are necessary to rectify the present asymmetry whereby the White House gains extensive information about a prospective nominee’s views, while the Senate and the public can only see a rehearsed, guarded performance during confirmation hearings. Any lawyer who speaks with a representative of the executive or legislative branch concerning possible nomination to fill a vacancy on the Supreme Court should be required to record every statement made by that lawyer, and to retain all such recordings for a period of five years. This rule would help to guarantee that nominees do not make secret pacts with the White House, only to evade discussion of their philosophical views during Senate confirmation hearings. The tapes of the nominees’ discussions with the White House would be available to the ethics referee at the confirmation hearing, so that the referee could judge whether the nominee is answering senators’ questions forthrightly. To be sure, a requirement that nominees record their interactions with the White House will raise objections under the separation of powers doctrine. But the scope of executive privilege has narrowed somewhat in the last few decades,⁴⁷ and the *in camera* review of such material by the ethics referee would preserve its confidentiality. In the final analysis, any concerns about the separation of powers seem somewhat disingenuous when the purpose of the measure is simply to preserve the symmetry envisioned by the Founders when they required the Senate’s advice and consent for the appointment of federal judges.

Fifth, a more active role for the American Bar Association would help to bring nominees’ judicial philosophies to light. At present, the ABA prepares ratings of nominees’ competence, but the ABA does not scrutinize the nominees’ ideology.⁴⁸ The ABA’s Standing Committee on the Federal Judiciary

46. MODEL RULES PROF’L CONDUCT R. 1.3 (2002).

47. *E.g.*, *Clinton v. Jones*, 520 U.S. 681 (1997) (rejecting Clinton’s claim that a sexual harassment suit against him should be delayed until the end of his presidency in order to avoid discovery while he was in the White House); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding Independent Counsel Act that allowed an investigator to probe the White House and executive branch agencies); *United States v. Nixon*, 418 U.S. 683 (1974) (insisting on disclosure of White House tapes that recorded conversations between the president and various aides).

48. For example, on January 9, 2006, the chair of the ABA’s Standing Committee on the Federal Judiciary submitted a letter to Senator Arlen Specter, Chair of the Senate Judiciary Commit-

treats politics as the third rail: "The selection of a member of the Supreme Court involves many other factors of a broad political and ideological nature within the discretion of the President and the Senate but beyond the special competence of the [Standing Committee]."⁴⁹ Ironically, this reluctance to consider matters of judicial philosophy abdicates a duty for which the ABA is uniquely equipped. The members of the Senate Judiciary Committee (many of them nonlawyers) are ill-equipped, however, to assess a nominee's jurisprudential theory. The ABA could collect and present such information without evaluating it. The ABA's reports could cull information about judicial philosophy from interviews with the nominee and from the nominee's prior opinions. A nominee's refusal to speak with the ABA would risk a low rating on judicial competence, and history has shown that nominees with low ABA ratings do not fare well in confirmation hearings.⁵⁰

CONCLUSION

That the shadow of Robert Bork looms above the modern confirmation process was evident in the Senate Judiciary Committee's questioning of the latest Supreme Court nominee, Judge Samuel Alito. Several senators wanted to know why Alito had publicly declared in 1988 that Bork was "one of the most outstanding nominees of this century."⁵¹ Alito's response to this questioning underscored the dysfunction of the present confirmation process. Rather than explain the extent to which Bork's philosophy aligned with Alito's own, Alito ascribed his support of Bork to his loyalty to President Reagan, for whom Alito was then working as a Justice Department attorney. Alito did not dare address Bork's philosophy, except to say that he disagreed with some of Bork's views.⁵²

The strategy paid off for Alito. A man who had publicly allied himself with Bork protected himself from "Borking" by evading a thorough disclosure of his ideological similarity to Bork. Basically, the 2005–06 confirmation hearings were an "opt-in" exercise—nominees who did not

tee, offering insight into Judge Samuel Alito's background and competence as a judge, but avoiding any comment about his judicial philosophy. A link to this letter appears on the Standing Committee's Web Page, <http://www.abanet.org/scfedjud/SCpage/Alito-letter.pdf>.

49. Letter from Stephen L. Tober, Chair, ABA Standing Comm. on Fed. Judiciary, to the Honorable Arlen Specter, Chair, U.S. Senate Judiciary Comm., at 1–2 (Jan. 9, 2006) (alteration in the original) (quoting Letter from Lawrence Wash. Chair, ABA Standing Comm. on the Fed. Judiciary Web Page, to Senator James Eastland, Chair, U.S. Senate Judiciary Comm. (Jan. 26, 1970)), available at <http://www.abanet.org/scfedjud/Alito-letter.pdf>.

50. In the last two decades, the ABA's weakest rating has been for the Clarence Thomas, who encountered great difficulty in his confirmation hearings. Bob Dart, *Thomas ends testimony; Bush confident*, ATLANTA J. CONST. Sept. 17, 1991, at E1 (recounting ABA's ratings of prior Supreme Court nominees).

51. Transcript, *1988 Alito Comments to Bork's Nomination*, WASH. POST, Jan. 8, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/08/AR2006010800528.html>.

52. Bob Egelko, *How Alito Explained His High Regard for Bork*, S.F. CHRON., Jan. 17, 2006, at A5 (noting that after Alito explained his prior support for Bork as mere loyalty to the Reagan Administration, senators gave up this line of questioning).

wish to divulge their jurisprudential theories could withhold that information with impunity.

This nation should aspire to more. A meaningful role for the Senate in the selection of Supreme Court justices requires review not only of nominees' backgrounds, but also of their normative and moral orientations. Only those nominees who have revealed their ideologies should serve on the Supreme Court.

This Essay has proposed reforms of ethical rules, the procedural rules for confirmation hearings, and the role played by the ABA, all with the purpose of drawing out Supreme Court nominees' judicial philosophies. Heeding Dworkin's teaching about the centrality of morality in legal interpretation, and acknowledging Davis's evidence that the present system for screening nominees' views is broken, this Essay offers a set of strategies that could revitalize a substantive discussion of jurisprudence. After all, there is little point in securing the Senate's "advice and consent" without providing the information necessary for the task.