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Judicial Nominees: Defining the Terms of Senate Debates

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JUDICIAL NOMINEES

Defining The Terms Of Senate Debates

Since roughly the beginning of the Reagan administration the left wing of the Democratic senatorial cohort has enjoyed remarkable success in disparaging Republican nominees to the federal judiciary as mere "conservatives." Its argument has been that those nominees would decide cases on everything from abortion to economic regulation on the basis of their "conservative" policy preferences. Sadly, as a general rule, the conservatives have allowed the Democrats to get away with this distortion.

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Now the Republicans are in imminent danger of losing the coming battle over the judicial nominations of President Bush precisely because they have ceded that rhetorical high ground to the liberals, allowing them to define the terms of the debate. Even though every Republican President since Nixon has pledged that he would nominate as judges only those who would not substitute their own moral judgment for the text and intention of the Constitution, conservatives in the field generally have been rising to the liberal bait and defending the President's right to nominate "conservative" or even "anti-abortion" judges. While it might not be their intention, the implication of various conservative spokesmen is that after nearly 50 years of liberal judicial activism it is about time for a little conservative activism in the courts.

THIS IS NOT the message they should be sending. What has given moral weight to the judicial stances of the Republicans up to this point has been the clearly articulated belief that judicial activism is against the Constitution itself. In this view the liberal creation of new rights out of whole cloth — from privacy to abortion to homosexual sodomy — is wrong because the courts have exceeded their legitimate powers.

The conservatives need to reclaim their original and compelling argument that what they seek in nominees to the courts are not mere "conservatives" who will vote their policy preferences into law, but true "Constitutionalists" committed to interpreting the Constitution in light of its original meaning.

The ever vexatious issue of abortion is only the most glaring case in point. The problem with the Supreme Court's decision in *Roe v. Wade* is not that abortion is wrong or immoral (regardless of how many people may think it so, or how many of them voted for President George W. Bush in the recent election), but that it is one of those many morally complicated areas that was left by the Constitution for legislative resolution by the states. Thus, while President Bush should seek to nominate someone to the Court who would be willing to vote to overrule *Roe*, the nominee should be willing to do so not because he thinks abortion morally wrong or against his faith but only because the expansive pretensions of judicial power that gave the nation *Roe* (and its subsequent illegitimate progeny) are constitutionally wrong.

THE MOST important thing to look for in a nominee from the conservative point of view should be an abiding commitment to the belief that the Constitution is not a mere "thing of wax" to be molded as each generation might see fit, be it by liberal or even conservative hands. Rather, as fundamental law, the Constitution is to be understood, as Justice Joseph Story put it, as having a "fixed, uniform, permanent construction," and that its meaning is "not dependent upon the passions or parties of particular times, but the same yesterday, today, and forever."

This is what the great John Marshall meant when he argued that a written Constitution was "the greatest improvement on political institutions" and that, when it came to its interpretation, recourse to the "true intention" of those who framed and ratified it was deemed "the most sacred rule of interpretation." That understanding is the very essence of American constitutionalism and should be the only litmus test any President ought to use in picking his judges and Justices.

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