Vanderbilt Law Review

Volume 39
Issue 2 *Issue 2 - March 1986*

Article 5

3-1986

Break the Monopoly of Lawyers on the Supreme Court

Arthur S. Miller

Jeffrey H. Bowman

Break the Monopoly of Lawyers on the Supreme Court

*Arthur S. Miller**

*Jeffrey H. Bowman***

The framers of our Constitution did not see fit to make provisions that the membership of the Supreme Court must be only lawyers. They deliberately left it open to men of other learnings than the law. But from the very beginning we have kept it packed with lawyers, and now lawyers feel a vested interest in holding all seats on the Court for themselves.

Robert H. Jackson***

"The doctrines which best repay critical examination," Alfred North Whitehead once observed, "are those which for the longest period have remained unquestioned."[1] Since 1789 when George Washington appointed John Jay, a prominent lawyer, to be the first Chief Justice of the Supreme Court, few have questioned the requirement that a Supreme Court Justice must be a lawyer. The time has come—indeed, it is long past—to examine critically the basis of this fact. We should consider the advantages of having nonlawyers on the Court.

In 1916 President Wilson named the first Jew, Louis Brandeis, to the Court. In 1967 Thurgood Marshall became the first black to serve on the Court, and in 1981 Sandra Day O'Connor became the first female Supreme Court Justice. This Essay suggests that the final restriction to Supreme Court membership should be lifted: the appointment and confirmation of nonlawyers.

The Judiciary Act of 1789 provides that the President shall appoint "a meet person, learned in the law, to act as attorney-general for the United States,"[2] and a later act, establishing the Department of Justice, provides that the President shall appoint a

---

*Professor Emeritus of Law, The George Washington University.

**J.D. 1979, The George Washington University.

***Address by Robert H. Jackson, Assistant Attorney General of the United States, before the New York Bar Ass'n (Jan. 29, 1937), *reprinted in* 81 CONG. REC. 123, 124 (1937).

1. A. WHITEHEAD, ADVENTURES OF IDEAS 179 (Mentor ed. 1955), *quoted in* Miller, *A Note on the Criticism of Supreme Court Decisions*, 10 J. PUB. L. 139, 139 (1961).

2. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

Solicitor General, "learned in the law, to assist the Attorney-General in the performance of his duties."[3] Congress has enacted nothing, however, concerning the qualifications of Supreme Court Justices. The Constitution simply states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court."[4] There is no age limitation, no citizenship test, no requirement that appointees have a legal background, nor any other test.

All presidents have recognized the crucial significance of their nominations to the Court. Through the years, informal criteria have developed to shape their decisions. Of overriding importance is a nominee's political and ideological compatibility with the president. Geographic and theological factors also have influenced presidents seeking to gain favor with various religions and regions of the country for political purposes. Sex and race recently have become important considerations in the selection process. In fact, the only constant in the selection of the 101 men and one woman who have sat on the Supreme Court is that all of them have been lawyers.

No *a priori* reason exists for a Supreme Court Justice to be a lawyer. The members of Congress, who write the laws, need not be attorneys (although many are). The President, who proposes, administers and enforces our laws, need not have legal training. Once we recognize that the Supreme Court is America's authoritative faculty of political theorists and not a mere court of law, then we can readily see that the necessity for formal legal training is no greater for Supreme Court Justices than for officers of the other branches of government.

As Robert H. Jackson once observed, prior to joining the Court, "There is no constitutional protection for our lawyer monopoly. We must rely solely on the record of a trust well fulfilled to perpetuate lawyer control."[5] Attorneys, however, are not trained to resolve the moral, social, and political issues of public policy, which are precisely what the High Court confronts in constitutional cases. This shortcoming is no small matter for a court that rules not merely for the parties before it but for the entire nation and for generations yet unborn.

The argument for making membership on the Supreme Court

---

3. Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162, 162.

4. U.S. CONST. art. II, § 2, cl. 2.

5. Address by Robert H. Jackson, Assistant Attorney General of the United States, before the New York Bar Ass'n (Jan. 29, 1937), *reprinted in* 81 CONG. REC. 123, 124 (1937).

the sole province of lawyers goes something like this: Cases coming before the Supreme Court often involve highly complex and technical legal matters. Only a lawyer with skills honed by a legal education and refined by experience in the adversary system of litigation can chart an informed course through the twists and turns of the law.

That argument, however, misses the mark on at least three counts. First, it wrongly presupposes that the Supreme Court is no different from any other court, and it thereby misconceives the true nature of constitutional decisionmaking. Second, the historical record shows that many Justices, including some of the most illustrious, came to the Court with little experience or achievement in the practice of law. Conversely, a distinguished record at the bar has not guaranteed insight or ability in handling the cases that come before the High Bench. Third, each Justice employs at least three law clerks, who generally are recent law school graduates. Given the vocational nature of legal education, they can be, and are, relied upon to steer a Justice through procedural technicalities.

The Supreme Court is emphatically not an ordinary court. It differs from both state supreme courts and lower federal courts. As Morris R. Cohen, no lawyer but a distinguished student of the judiciary, recognized some years ago: "[W]e cannot pretend that the United States Supreme Court is simply a court of law. Actually, the issues before it generally depend on the determination of all sorts of facts, their consequences, and the value we attach to these consequences. These are questions of economics, politics, and social policy which legal training cannot solve unless law includes all social knowledge."[6] Obviously, no single discipline can prepare Justices to resolve the spectrum of nonlegal issues confronting the Supreme Court. Justice Benjamin Nathan Cardozo experienced the great difference between the Supreme Court and other courts. When he moved from the New York Court of Appeals to the Supreme Court he found his prior distinguished judicial experience to be of little help: "[The New York Court of Appeals] is a great common law court; its problems are lawyers' problems. But the Supreme Court is occupied chiefly with statutory construction—which no man can make interesting—and with politics."[7]

---

6. M. COHEN, REASON AND LAW 73-74 (1950).

7. Statement by Justice Cardozo, *quoted in* R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 54 (1955).

The Supreme Court cannot escape dealing with economics and politics simply because it is a constitution that the Justices are expounding. The Constitution was designed to endure for ages to come; it is, in Woodrow Wilson's language, not "a mere lawyers' document" but the "vehicle of a nation's life."[8] The actual words of the Constitution are only a point of departure for making decisions. Those nebulous words set the terms for constitutional adjudication but do not control the results. Robert Jackson confirmed this view in 1937:

> Our Constitution is a general outline of great powers and institutions. It is not a legal document. We know that because the original instrument contains only about 4,250 words. Counsel would use ten times as many to express in legal jargon the single idea that if a corporation fails to pay its bonds the investor may resort to its property. Each word in our Constitution, setting up a whole system of government, had to carry a great load of meaning. It was never thought, when they spared words in the interest of simplicity, that we would reach a point where nothing is lawful unless the Constitution had a word for it. They set up a living National Government and left the future to fill in much of detail, according to its own experience, its judgment and its own patriotic purposes.[9]

Only by a transparent fiction can we say that constitutional decisions are logical deductions from the text of the document. Decisions on the relationships between federal government and state government, between President and Congress, or between government and individual are, in the final analysis, personal judgments of the Justices. They reflect the Justices' philosophies and predilections. Theodore Roosevelt understood this reality and, to the consternation of conservatives, openly stated, "The decisions of the courts on economic and social questions depend upon their economic and social philosophy."[10]

In 1930 Professor Felix Frankfurter expounded on the fluid nature of the Supreme Court's constitutional decisionmaking process: "The meaning of 'due process' and the content of terms like 'liberty' are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views . . . . Let us face the fact that five Justices of the Supreme Court *are* molders of policy, rather than the impersonal vehicles of revealed truth."[11] In

---

8. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 157 (1908).

9. Jackson, *supra* note 5, at 124.

10. President Theodore Roosevelt, Annual Message to Congress (1908), *reprinted in* 43 CONG. REC. 16, 21 (1908).

11. Frankfurter, *The Supreme Court and the Public*, 83 FORUM, June 1930 (emphasis in original), *quoted in* J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 313 (1953).

an oft-quoted statement, Charles Evans Hughes expressed a similar sentiment when, as Governor of New York, he said, "We are under a Constitution, but the constitution is what the judges say it is."[12]

No thoughtful student of the judiciary would deny that the Justices make law. Justices Byron White and William Brennan have publicly confirmed that the Court does much more than merely "interpret" the Constitution. Dissenting in *Miranda v. Arizona*,[13] Justice White wrote: "[T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution."[14] Justice White's view, of course, is new only in the sense of his candor. He went on, "This is what the Court historically has done. Indeed, it is what we must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers."[15] In 1980 Justice Brennan commented, "Under our system, judges are not mere umpires but, in their own sphere, lawmakers—a coordinate branch of *government*. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large."[16]

In construing the Constitution, the Justices must decide moral and social questions that, because of the peculiarities of the constitutional system, are cast before them. Each member of the Court is constrained only by his or her own sense of trusteeship of what are perceived to be the most revered traditions in our national system. The Court determines, as Chief Justice Earl Warren once said, what is best for the American people. "We, of course, venerate the past," said Warren, "but our focus is on the problems of the day and of the future as far as we can foresee it."[17] He went on to say that in one sense the Court was similar to the President, for it had the awesome responsibility of at times speaking the last word "in

12. Address and Papers of Charles Evans Hughes 139 (2d ed. 1916).

13. 384 U.S. 436 (1966).

14. *Id.* at 531 (White, J., dissenting).

15. *Id.*

16. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J., concurring) (emphasis in original).

17. Retirement Address by Chief Justice Warren, Supreme Court of the United States (June 23, 1969), *reprinted in* 395 U.S. at X-XII, X.

great governmental affairs"[18] and of speaking for the public generally. "It is a responsibility that is made more difficult in this Court because we have no constituency. We serve no minority. We serve only the public interest *as we see it*, guided only by the Constitution *and our own consciences.*"[19] Since the Court settles no litigated question solely by the Constitution's terms, it is the Justices' "consciences" that are determinative.

The Supreme Court long has decided constitutional cases on the basis of policy or sociological considerations. Two landmark cases in the last thirty-five years evidence the willingness of the Justices to make law. In *Brown v. Board of Education*[20] the Supreme Court overruled *Plessy v. Ferguson*,[21] which had upheld a Louisiana statute requiring "equal but separate accommodations for the white and colored races" in passenger trains. In *Brown* the Court stated that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[22] Central to this determination was the Court's psychological finding: "To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[23] This finding caused an uproar among the nation's bigots and exaggerated feelings of importance among some social scientists.

Plessy, however, was also a decision based on sociological and psychological considerations. In articulating the infamous "separate but equal doctrine," Justice Henry Brown rejected the "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."[24] Brown concluded that "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."[25]

The Court's decison in *Roe v. Wade*[26] also centered upon pol-

18. *Id.* at XI.
19. *Id.* (emphasis added).
20. 347 U.S. 483 (1954).
21. 163 U.S. 537 (1896).
22. 347 U.S. at 495.
23. *Id.* at 494.
24. 163 U.S. at 551.
25. *Id.*
26. 410 U.S. 113 (1973).

icy or sociological considerations. In *Roe* the Court for the first time identified a constitutional right to an abortion. Writing for the Court, Justice Harry Blackmun found that the fourteenth amendment's concept of personal liberty was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[27] Because the right to an abortion was a "fundamental right," state interference could be justified only by a "compelling state interest."[28] Justice Blackmun concluded that this compelling interest could not be in the life of the fetus, because the Court believed that no one could say when life begins. Moreover, the state had only limited interest in "potential life" prior to the seventh month of pregnancy, because until then the fetus had no chance for an independent existence.[29] Relying mainly on medical literature, Blackmun thus established a "trimester" system for outlining the state's power to regulate abortions.[30] Only in the last trimester did the state's interest become sufficiently compelling to permit it to proscribe abortions.

The Court in *Roe v. Wade* read a right of privacy into the Constitution. Nothing in the Constitution could answer the question, "When does life begin?" Nonetheless, finding new rights in the Constitution was far from novel. Although Professor Archibald Cox described the Court's decision in *Roe* as "sweep[ing] away established law supported by the moral themes dominant in American life for more than a century in favor of what the Court takes to be the wiser view of a question under active public debate,"[31] and Professor John Hart Ely concluded that the Court's decision was not based on principles found in the Constitution,[32] the Court's method of reading a pregnant woman's right to privacy into the Constitution did not differ markedly from many other decisions.

The questions these cases pose are: Do lawyers alone have the wisdom to make such sociological and moral decisions as *Plessy*, *Brown*, and *Roe*? Should only lawyers deal with political theory in the way the Supreme Court has in the *Legislative Reapportion-*

---

27. *Id.* at 153.

28. *Id.* at 155.

29. *Id.* at 163.

30. *Id.* at 163-65.

31. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 54 (1976). "Neither historians nor lawyers will be persuaded that all the details prescribed in *Roe v. Wade* are part of either natural law or the Constitution." *Id.*

32. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (asserting, oddly, that *Roe* "is not constitutional law").

ment Cases?[33] Can only lawyers deal in a definitive way with the troublesome questions concerning the relationship of church and state presented by the *Prayer Cases*?[34] Although the list of cases may be extended to cover the full range of socioeconomic questions that remain of fundamental importance to this country, the answer to these questions remains the same. No one can argue validly that lawyers have better consciences or better insight into the "great governmental affairs" than do nonlawyers. The work of the Supreme Court is different from that of any other court. It is, as Justice Frankfurter once remarked, "a very special kind of court."[35] The cases that come before the Supreme Court require the Justices to answer questions for which neither law school, legal practice, nor the usual pre-judicial career provides the necessary skills. Lawyers do not have a monopoly on governmental wisdom.

Those who insist that a first-rate legal education and extensive legal practice are prerequisites for membership on the Court apparently assume that previous members of the Court have been well schooled in the law. The historical record, however, reveals that this assumption is incorrect. Only 55 of the 102 individuals to serve on the Supreme Court even attended law school, and of those, only 38 graduated. Thus, although Supreme Court Justices traditionally have been lawyers, the statistics show that the presence of law school graduates on the Court is a comparatively recent phenomenon. During the first one hundred and fifty years of the Court's history, most Justices learned law by serving apprenticeships under practicing attorneys, the common practice of the time. Not until 1845 was there a Supreme Court Justice who had attended law school. The long forgotten jurist, Justice Levi Woodbury, attended Tapping Law School in Litchfield, Connecticut for one year. In 1851 the Supreme Court boasted its first law school graduate when the equally obscure Benjamin Curtis joined the Bench. But it was not until 1957 that the Supreme Court was composed entirely of law school graduates. Justice Stanley Reed, appointed by President Franklin D. Roosevelt, did not have a law degree; and Justice James Byrnes, another Roosevelt appointee, was the last Justice who did not attend law school.

Learning in law is certainly a consideration in making an ap-

33. *See* Baker v. Carr, 369 U.S. 186 (1962), and its aftermath.

34. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

35. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957).

pointment to the Supreme Court, but it should not be the most important factor. Professor Henry Steele Commager has pointed out that "[w]hen we survey the history of our highest court, we do not find a necessary or even a strong circumstantial connection between legal erudition and judicial eminence."[36] Indeed, the history of the Supreme Court reveals that some of the most brilliant Justices had legal resumés that were limited and woefully brief. Nevertheless, their judicial careers overshadowed contemporaries who came to the Bench with the stature and recognition gained through years of practice or service on the bench of a lower court.

Contrasting the career and training of Chief Justice John Marshall with that of Justice Joseph Story provides striking support for this point. Chief Justice Marshall was self-taught in the law. His only formal instruction came when he attended one course of lectures at the College of William and Mary. By comparison, Justice Story began the study of law in the offices of Samuel Sewall, later Chief Justice of the Massachusetts Supreme Court. At the time of his appointment, ten years after Marshall, Story was recognized as one of the foremost legal scholars of the day. Yet, it was Marshall and not Story who intellectually dominated the Court in the early nineteenth century.

A similar contrast can be found in the careers of Justices Hugo Black and Felix Frankfurter. After graduation from the University of Alabama Law School, Justice Black's practical legal experience was confined to trying labor law and personal injury cases in Birmingham, Alabama. When appointed to the Supreme Court in 1937, he had not practiced law in ten years. Justice Frankfurter, on the other hand, was hailed at the time of his appointment in 1938 as one of the most brilliant men ever named to the Court. It was only fitting, many thought, that Frankfurter was nominated for the "scholar's seat," which previously had been filled by Justices Oliver Wendell Holmes and Benjamin Nathan Cardozo. Justice Black, however, had much more influence on the development of constitutional law than did Justice Frankfurter.

More recently, few would dispute that Earl Warren's skills were more those of a politician than a lawyer when he was named Chief Justice in 1953. Nevertheless, he guided the Court through one of its most siguificant periods—the so-called civil rights/civil liberties revolution.

The point need not be labored: it simply is wrong to assume

36. Commager, *Law Without Lawyers*, WASH. POST MAG., Sept. 30, 1984, at 11.

that a Supreme Court Justice must possess legal training and experience to serve on the Court. The work of the Court does not require individuals to undergo years of legal training. As Justice William Douglas once remarked, the questions that the Justices resolve are "delicate and imponderable, complex and tangled. They require at times the economist's understanding, the poet's insight, the executive's experience, the political scientist's understanding, the historian's perspective."[37]

"For the most part," Professor Philip Kurland of the University of Chicago Law School has commented, "judges are narrow-minded lawyers with little background for making social judgments."[38] Adding the representation of other disciplines such as economics, medicine, religion, or philosophy, to name to few, can only aid the Court in its heavy responsibilities of interpreting the Constitution. As Robert Jackson asked, "Does the record convince that legal knowledge, and that alone, is adequate to the settlement of the great public questions now settled with only lawyer votes?"[39] To Jackson, the answer was a clear "no." "If, as the Court has said, it has only one duty in these cases, 'to lay the article of the Constitution which is involved beside the statute which is challenged and decide whether the latter squares with the former,' " Jackson asked, "are we the only men fit to do it?[40] And if, as has been charged by some of its own members, the Court goes beyond this and 'sits in judgment on the wisdom of legislative action,' " Jackson continued, "do we possess the only wisdom?"[41]

Jackson bemoaned the fact that "[l]awyers bring to the Court only one kind of thinking—at most."[42] And that way of thinking has been a drag on the Court's work. Noting that "[l]egal philosophy sets up a method of thinking that is not accepted by any other profession," Jackson stated that "[o]ther men are known by their fruits, we judge our work only by logic."[43] Jackson observed that "Congress looks forward to results, the courts look backward to precedents, the President sees wrongs and remedies, the courts look for limitations and express powers. The pattern requires the

37. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 414 (1960).

38. Oster & Doane, *The Power of Our Judges*, U.S. NEWS & WORLD REP., Jan. 19, 1976, at 29, 29 (quoting Professor Kurland).

39. Jackson, *supra* note 5, at 124.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

court to go forward by looking backward."[44] That statement was not really accurate: the Justices have always been interested in consequences. They are, without exception, result oriented. They differ mainly in the results they wish to further.

Jackson found, however, that lawyers "do not let the realities of life influence . . . legal decisions."[45] As an example, Jackson mentioned a request for an opinion he had received while counsel to the Internal Revenue Service, asking when a marriage would change a taxpayer's status:

> A young lawyer, destined I am sure, for high judicial honors, prepared the answer. He set forth the rule of law that a fraction of a day will not be recognized. Then he added the rule as to service of process by which we exclude the day of service from the count. He arrived by this legal logic at the decision that a marriage is effective on the day following the day of ceremony. Though I could point to no flaw in the legal reasoning I did not sign that opinion, though I signed many worse ones.[46]

Jackson concluded that the young lawyer's "reasoning was similar to that by which courts sometimes reach decisions that seem to me far from the realities of life."[47] This conclusion is not quite correct; Jackson more accurately could have said that lawyers and lawyer-judges have differing perceptions of those realities.

Two months later, Jackson made the same point somewhat differently in another speech:

> I have not said, and would not say, anything that would reflect upon the sincerity or the integrity of the justices of the Supreme Court. The difficulty with the Court is that it has lost touch with reality, that the actual problems faced by working people, and for that matter employers as well, come to the Court through books and printed briefs and lawyers' windy arguments. The living currents of thought and action do not penetrate the monastic seclusion of the justices.[48]

Again, Jackson's statement is not entirely correct; the monastic seclusion of the Justices is more apparent than real. They are sentient beings who, speaking generally, are fully aware of societal tensions and disputes. It is the interpretation they place on those facts that is important.

Robert Jackson was not the only prominent jurist to see the advantages of having nonlawyers on the Supreme Court. In a 1968

---

44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. Address by Robert H. Jackson, Assistant Attorney General of the United States (Mar. 24, 1937), *reprinted in* E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 114 (1958).

television interview, Justice Black answered an interviewer's question, "Could a non-lawyer possibly be a judge of the Supreme Court of the United States?" by saying:

> I don't see why he shouldn't. Not at all. I'm not sure that you should have all of them non-lawyers, because if you're going to have a government of law, you've got to have somebody that knows something about the basic fabric of it. But I see no reason why. I don't see, for instance, why in his day Socrates wouldn't have been a great judge had he been appointed one.[49]

Justice Black went on to say that Walter Lippmann and "many others" could be "good" Justices.[50]

Surely Jackson and Black are correct. The cases that come before the Supreme Court encompass diverse areas such as politics, economics, sociology, and medicine. Clearly, Supreme Court Justices who must decide constitutional questions need a special type of mind. Judge Learned Hand described the needs of a constitutional jurist as follows:

> I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbons and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne, and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supple institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.[51]

Judge Hand's prescription accurately portrays the intellectual demands on a Supreme Court Justice. Nevertheless, that prescription is difficult to follow. Most Supreme Court Justices, including the present members of the High Court, have not fulfilled Hand's requirements. This failure may in part be attributed to the type of legal education that modern lawyers receive. "If law schools are seriously concerned about 'educating,'" said Georgetown University President Timothy S. Healy, "they have to spend time outside the 'training' ambit—with sociology, political science, economics,

---

49. Interview with Justice Hugo Black, United States Supreme Court Justice, in Alexandria, Va. (Sept. 1968), *reprinted in* 27 CONG. Q. 6 (1969).

50. *Id.* at 7.

51. Address by Learned Hand delivered to the University of Pennsylvania Law School's Justice Society (June 1930), *reprinted in* L. HAND, THE SPIRIT OF LIBERTY 81 (I. Dilliard ed. 1960).

history, philosophy, theology."[52] Whatever the reason for the failure of today's Justices to meet Learned Hand's prescription, his words point up a clear lesson: those chosen to be Justices need not come only from the ranks of lawyers. Federal judge Irving Kaufman recently remarked that Supreme Court Justices should be paragons of virtue, intellectual titans, and administrative wizards.[53] They should have open minds willing to listen to all sides of a dispute.

Many individuals who are not lawyers would contribute greatly to resolving the moral, social, and political questions that come before the Supreme Court. Examples are easily found: philosophers such as Robert Nozick and John Rawls; political scientists such as Walter Murphy, Dean Alfange, and Henry Abraham; economists such as Lester Thurow, Robert Lekachman, and Thomas Sowell; politicians such as Nancy Kassebaum and Daniel Patrick Moynihan; or a statesman such as Ralph Bunche. Any of these people would lend additional philosophical and moral profundity to Supreme Court decisionmaking. (It is a matter of historical record that Professor Edward Corwin of Princeton, not a lawyer but a highly respected constitutional scholar, thought he would be named to the Court by Franklin Roosevelt.) Would not the Supreme Court be better equipped to handle its cases with the advantage of their wisdom? The participation of such people on the Court would not make the difficult questions easier but could help insure that those questions are wisely decided.

The American Bar Association (ABA) presents a substantial obstacle to Senate confirmation of a nonlawyer to the Supreme Court. The ABA is a national, professional association of attorneys. Because of its large membership and national scope, the ABA is recognized as a major voice of the legal profession in the United States. In 1946 the ABA formed the Committee on the Federal Judiciary. The Committee is composed of fourteen members whom the ABA President appoints on a regional basis. The Committee has secured a role in the selection process of federal judges. At the circuit court level, the Committee regularly has made recommendations to the President regarding the qualifications of serious candidates for lower-court judgeships. In 1969 Deputy Attorney General Richard Kleindienst announced to the ABA annual convention

---

52. Miller, *There Are Too Many Lawyers on the High Court*, Wash. Post, July 20, 1980, at El, col. 2.

53. Kaufman, *Keeping Politics Out of the Court*, N.Y. TIMES MAG., Dec. 9, 1984, at 72, 86.

that "the Nixon Administration had 'accorded' the Association's Federal Judiciary Committee absolute veto power over all federal candidates to the bench (Supreme Court excepted) whom it considered unqualified."[54] In recent years, the names of those persons under consideration by the White House for the Supreme Court also have been submitted to the ABA for grading as to professional qualifications. Presidents Eisenhower, Nixon, Ford, and Reagan have all relied on the Committee to help screen prospective nominees.

The powers of the ABA Judiciary Committee cannot be underestimated. The Committee effectively blocked the nomination of Mildred Lillie, a California appellate judge, who but for the Committee's action might have been the first woman named to the Supreme Court.[55] At the request of the Nixon Administration, the Committee investigated Ms. Lillie and unanimously voted her "unqualified" to serve on the Supreme Court. Within hours, the Committee's decision was made public and her appointment became politically impossible.

Professor Henry J. Abraham, who has studied the role of the ABA in the nomination process, asks this question: "[s]hould a limited, private-interest group be accorded power of such magnitude that . . . 'the White House will never submit a nomination when the ABA's federal judiciary committee has issued a not qualified rating?' "[56] The answer is easy: as witness the favorable recommendation for Nixon's nomination of the late G. Harrold Carswell—who was totally unqualified. Obviously, the ABA cannot be relied upon to make wise decisions. There should be no such quasi-official role in the constitutional nominating process for a private body such as the American Bar Association. Delegating to a private organization the power to veto or approve a person's selection to the Supreme Court runs contrary to established constitutional principles. The ABA is accountable to no one for its acts. We cannot assume that it is an impartial arbiter of judicial competence.

Even if the ABA were removed from the nomination process, we may safely anticipate that there would be formidable resistance in the Senate to the confirmation of a nonlawyer. The tradition and custom of naming only lawyers to the Supreme Court would not die easily. Undoubtedly, there would be much questioning of a

54. H. ABRAHAM, JUSTICES AND PRESIDENTS 23 (1974).

55. *Id.* at 29.

56. *Id.* at 23 (quoting speech by Richard Kleindienst, Deputy Attorney General, to the Annual Convention of the American Bar Association, Dallas, Texas (Aug. 10, 1969)).

nonlawyer nominee's qualifications and competence to serve on the Court. Because of the practical difficulties of securing senatorial confirmation, the first nonlawyer to serve on the Supreme Court should be a member of the United States Senate.

This idea is not new; it is borrowed from Justice William O. Douglas. In his autobiography, *The Court Years*,[57] Justice Douglas relates a conversation he once had with President Franklin Roosevelt. The President was disappointed with a number of his judicial appointments and asked Douglas why lawyers were "so conservative" and turned out to be such "stodgy judges." Douglas told Roosevelt that "there was nothing in the Constitution requiring him to appoint a lawyer to the Supreme Court." Roosevelt paused for a moment before saying, "Let's find a good layman." Douglas cautioned Roosevelt, however, by advising him, "You'll have to pick a member of the Senate . . . . The Senate will never reject a layman as a nominee who is one of their own." Roosevelt agreed and proclaimed, "The next Justice will be Bob LaFollette." Unfortunately, President Roosevelt died before the nomination could come about.

The Roosevelt-Douglas dialogue reveals a keen sense of appreciation for the time-honored custom by which the Senate gives virtually automatic confirmation to the nomination of its own members. The last senator to be nominated to the Supreme Court was Harold Hitz Burton in 1945. Burton had distinguished himself not in law but in politics; he had been a mayor of Cleveland and a United States senator from Ohio. At the time of his nomination, Burton had not opened a law book on behalf of a client in at least a dozen years. Burton's lack of legal experience, however, did not concern the Senate. Without referral to the Senate Judiciary Committee, Burton's nomination was unanimously confirmed on the same day it reached the Senate. Although Justice Burton's service on the Court was, at best, mediocre, his nomination suggests a method to overcome the practical difficulties of bringing the first nonlawyer to the High Bench.

In judging the proposal made in this Essay, remember that the proper discharge of the judicial function of the Supreme Court of the United States depends not on technical legal procedures, but rather on correctly appraising existing social conditions and accurately judging the effects of conduct. Law is more than logical unfolding; it is sociological wisdom. The Constitution is an appeal to

57. W. DOUGLAS, THE COURT YEARS 281 (1980).

the decency and wise judgment of those with whom the responsibility for its interpretation rests. The legal profession should not have a monopoly on stocking the Supreme Court. A profession that opinion polls show is not held in high regard by many Americans surely is not the sole source of the requisite qualities of wise judging.

Alfred Whitehead also once said that many ideas, when first broached, seem foolish.[58] Surely it is not foolish, when one reflects on the question, to break the closed shop of lawyers on the Supreme Court. One hundred and fifty years ago Alexis de Tocqueville wrote that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[59] The time has come for nonlawyers to take part in that debate.[60]

58. A. BRECHT, POLITICAL THEORY 262 (1959).

59. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (1945).

60. *Cf.* Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 24-25 (1985):

> Someday the point may go without saying, but now it seems important to keep repeating that under the robes, Federal judges are ordinary members of the comfortable classes—not so different from those on the Senate Judiciary Committee or your state public utilities commission. It does not overcorrect much to think of the Justices of the United States Supreme Court, in the exercise of their majestic power of judicial review, as members of a nine-member committee reviewing the decisions of a dispute-resolution bureaucracy, deciding many minor political issues and a few important ones, guided in those decisions by what their committee has said and done before, by their sense of the professional and popular culture, and, in a relatively few cases, by the words of the Constitution.