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THE SENATE'S POWER TO GIVE "ADVICE AND CONSENT" IN JUDICIAL APPOINTMENTS

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What exactly is the role of the United States Senate in providing "advice and consent" to presidential judicial nominations? This Article argues that the Senate's power to advise and consent is indeed a broad one. At the same time, however, it will show that there are in the Constitution itself norms for the responsible use of that broad power.

I. VIEWS OF THE FOUNDING

A. The Convention of 1787

An examination of the debates of the Constitutional Convention demonstrates the differences between the concerns regarding the judicial nomination process in the 18th century and those of the present day. The power to appoint the members of the judiciary was initially lodged in the legislature by the Virginia plan, but that was changed early on—without objection—to the Senate when James Madison pointed out that a smaller, more select body would be likely to do the job better.[1] It remained that way for most of the Convention, despite some significant debate—including even a tie vote which defeated a motion for presidential nomination with senatorial advice and consent.[2] An eleven member special committee proposed presidential appointment with the advice and consent of the Senate on September 4,[3] and this proposal was adopted on September 7.[4]

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1. *See* 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1797, at 233 (1911).

2. *See* 2 *id.* at 44.

3. *See id.* at 493-95.

4. *See id.* at 539-40.

There were three main arguments in the debate over executive versus Senate appointment. First, which branch was more likely to be familiar with fit appointees? Second, which branch could be held responsible more effectively? Third, which branch was more likely to be subject to "cabal"? It was argued that as a national official, the president would be more likely to know fit characters throughout the country.[5] He also would be more clearly responsible for his choices and less subject to "intrigue and cabal" than a larger body would be.[6] The Senate's supporters argued that it, rather than the president, would be more likely to know men throughout the whole breadth of the nation and less likely to favor a particular state or those near the seat of government.[7]

Underlying these arguments, although only occasionally brought out in debate, was the crucial fact that by mid-July the Convention had adopted the Connecticut Compromise, which provided for a Senate with equal state representation.[8] Thereafter, the small states tried to maximize the power of the Senate, while others tried to resist their efforts. Madison suggested that excessive Senate power was unfair not only to the large states, but also to the southern states as well.[9] By the end of the Convention, the Senate had gained enough power for several small state delegates to acquiesce in actually limiting the Senate's power.[10] This unease over creating a potential aristocracy, as Wilson put his fears on September 6,[11] may have had something to do with the shift to executive appointment.

Despite arguments advocating unrestricted presidential appointment power, the Convention provided for senatorial advice and consent.[12] The main reason given was to guard against "any incautious or corrupt nomination by the Executive," and against "any flagrant partiality and error."[13] Underlying the desire for this security were two factors. First, states were naturally concerned that their citizens might be excluded

5. *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1797, at 42 (1911).

6. *Id.*

7. *See id.* at 41, 81.

8. *See id.* at 15.

9. *See id.* at 81.

10. *See id.* For example, on September 6, Delegate Roger Sherman of Connecticut made the proposal to take from the Senate and give to the House of Representatives (each state having one vote) the power to elect the president in cases where there was no majority in the Electoral College. *See id.* at 527.

11. *See id.* at 522.

12. *See id.* at 43.

13. *Id.* at 80.

from consideration if a president made nominations from those closest to him, especially from his state.[14] Second, part of the background of the appointment power was the frequently discussed manner in which the English king had maintained control of Parliament through his patronage power.[15] (Simply put, the king "bought" a lot of people.) Some delegates, then, were concerned that a president might use appointment to draw too much power to himself.[16]

Still, some of the delegates were concerned that the Senate's power to advise and consent would not amount to much. Ellsworth of Connecticut thought that "[t]he right to supersede his nomination will be ideal only. A nomination under such circumstances will be equivalent to an appointment."[17] But most of the delegates apparently considered the requirement of Senate consent a worthwhile "security" for the proper exercise of the appointment power.[18]

Noticeably absent from the debates is any argument about the need for a Senate check on the president's power to appoint judges on the grounds of ideological concerns. That can be explained by two factors. First, the convention delegates generally shared the view that judges were not policy-makers, and therefore the political views of judges were not relevant to the judicial appointment. Second, since the Constitution had not yet been put into operation, different partisan views had not yet developed within the constitutional system, especially competing interpretations of the document. Therefore the "constitutional philosophies" of judges were not thought of as a crucial concern. To the extent that it was considered, it would have been a concern that judges be loyal to the Constitution, as they were required to be by oath.

B. The Federalist

Alexander Hamilton takes up the appointment power in *Federalist No. 76*, an authoritative early exposition of the Constitution.[19] He de-

14. *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1797, at 42 (1911). One must remember that state ties were much closer at the founding than they are now.

15. *See id.* at 31.

16. *See id.* at 43. This was the source of the provision that seemed to rule out a Reagan nomination of someone like Senator Orrin Hatch in the mid-1980s, namely, that no legislator may be appointed, during the term for which he was elected, to an office which was created or whose pay has been increased during that term. *See* U.S. CONST. art. I, § 6.

17. 2 FARRAND, *supra* note 1, at 81.

18. *Id.* at 83.

19. THE FEDERALIST NO. 76, at 385 (Alexander Hamilton) (Garry Wills ed., 1982).

fends presidential appointment (versus appointment by a select body of moderate number) by emphasizing that a president's clear and sole responsibility will sharpen his sense of duty and desire for reputation, and lead him to seek the best men for offices.[20] His personal attachments (ties of friendship and affection) will be fewer than the cumulative figure of such partialities of a body of men.[21] He would not be subject as much to "the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly."[22] Moreover, the compromises and logrolling necessary to get a legislative majority would often result in unfit appointments.[23]

Hamilton also argued, however, that the requirement of senatorial assent was valuable.[24] It would not undermine the advantages involved in presidential appointing, since this responsibility would still produce the necessary motives for doing it well.[25] Nor was it likely to be used often, especially because rejection put the nomination back in the hands of the president, whose next choice might not be any better.[26]

Why require the Senate's advice and consent? On this point, which is most directly relevant to this Article's inquiry, Hamilton stated that it "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[27] Out of a concern for both reputation and re-election, the president would be "ashamed and afraid" to bring forward unmeritorious candidates, whose only qualifications would be coming from particular states, or being personally allied to the president, or "possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."[28]

The thrust of Hamilton's discussion is to suggest that the great *desideratum* regarding the appointment power is to secure "merit" by resisting temptations to geographic partiality (especially state) and personal partiality. In what would the merit consist? James Madison, in *Feder-*

20. *See* THE FEDERALIST NO. 76, at 385 (Alexander Hamilton) (Garry Wills ed., 1982).
21. *See id.*
22. *Id.*
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *Id.* at 386.
28. *Id.*

alist No. 51, suggests that there is something different about the qualifications of judges—so much so as to warrant making it an exception to the general principle (rooted in separation of powers) that no branch should participate in selecting another: "In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle; first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice, which best secures these qualifications," and second, because permanent tenure attenuates problems of dependence.[29]

The essential judicial qualifications apparently seemed so obvious to Madison (and, he appears to have assumed, his readers) that he did not bother to describe them. Hamilton discusses them briefly at the end of *Federalist No. 78*. He argues that a voluminous code of laws is a necessary inconvenience of free government, for "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[30] However, the records of precedents are very bulky and require long and laborious study. The result is that "few men . . . will have sufficient skill in the laws to qualify them for the stations of judges."[31] Fewer still have the knowledge and the necessary integrity.

If these are the primary qualifications of judges, and the requirement of Senate advice and consent is to ensure merit, then presumably the job of the Senate is to ensure that nominees have both the requisite knowledge of the law ("the rules and precedents") and the requisite integrity. The only hint of any requirement regarding substantive views of nominees is that they not be so "pliable" as to be "instruments" in the hands of the president.[32]

II. HISTORICAL EXERCISE OF THE POWER TO ADVISE AND CONSENT

How has the Senate exercised its power to advise and consent to executive nominations for Supreme Court positions? In my description of the history of Senate advice and consent, I will concentrate almost exclusively on those instances in which the Senate has rejected presidential nominations. This history demonstrates, as one scholar has shown, that the great majority of rejections can be explained by three factors: (1)

29. THE FEDERALIST NO. 51, at 348 (James Madison) (Garry Wills ed., 1982).
30. THE FEDERALIST NO. 78, at 399 (Alexander Hamilton) (Garry Wills ed., 1982).
31. *Id.*
32. THE FEDERALIST NO. 76, at 386 (Alexander Hamilton) (Garry Wills ed., 1982).

partisanship—cases in which the Senate and the presidency have been controlled by different parties; (2) timing—cases in which an appointment fell within the last year of a president's term; and (3) senatorial courtesy—the practice of the Senate deferring to a senator of the president's party who opposes a nomination to a judicial office involving his state.[33] This latter case is usually used with respect to district court judges, and only rarely applicable to a Supreme Court nomination.

A. Pre-Civil War

Before the Civil War, the Senate rejected thirteen men, one of them on two occasions.[34] Of these, ten were rejected when the Senate was controlled by the opposition party either in an election year or after an election but before the incoming president had taken office.[35] Another was rejected by an opposition Senate on grounds of hostility to previous political action.[36] Another was rejected, before there were firm party lineups, on mixed grounds, including past political action, failure to serve on the Court after a previous appointment, and personal (mental) instability.[37] Another rejection involved a mixture of political opposition and lack of legal distinction.[38] The final rejection was one of several where a major factor was opposition of a state senator to a nominee filling a seat that had become a "state seat" on the Court.[39]

B. Post-Civil War

Between 1866 and 1894, the Senate rejected seven more nominees.[40] One vacancy was abolished to deny Andrew Johnson an appointment.[41] An opposition Senate refused to confirm an outgoing president's nomi-

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33. *See* ROBERT G. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 96-105 (1971). The material from this section of this Article is largely based on this analysis of Senate rejections of presidential nominations for the Supreme Court.

34. *See id.* at 96 n.14.

35. *See id.* at 99 n.18.

36. Taney, for his implementation as Treasury Secretary of Andrew Jackson's command to withdraw U.S. funds from the Bank of the United States. *See id.*

37. Rutledge, in 1795, relative to his opposition to the Jay Treaty, which alienated Senate Federalists. *See id.*

38. Alexander Wolcott, opposed by New Englanders for his strict enforcement of embargo and nonintercourse acts, as collector of customs, an office he had held; but his legal abilities—or lack thereof—were also a major ground of opposition. *See id.*

39. The nomination of George Woodward for what had become a "Pennsylvania seat" on the Court was rejected in 1845; but another factor was his nativist views as well. *See id.*

40. *See id.* at 96 n.14.

41. Stanbury, in 1866. *See id.*

nation on one occasion.[42] Two rejections involved senatorial courtesy.[43] One was clearly based on the lack of legal eminence of the nominee.[44] The other two rejections involved some opposition to past political actions and personal characteristics.[45]

C. Twentieth Century

Between 1894 and 1968, the Senate rejected just one nominee, John J. Parker in 1930. His rejection was due in large part because of opposition from labor and civil rights groups.[46] In a somewhat attenuated sense, Parker's rejection could be considered an example of an opposition Senate, since there was a narrow Republican majority in the Senate, but one would have to consider the bloc of Progressive Republicans (such as LaFollette and Norris) to get the real measure of the Senate's politics.

The rarity of rejections throughout this period has been explained in various ways, but certainly one of the chief reasons is that there were few appointments by presidents who faced opposition Senates during this period. Only Truman and Eisenhower, in fact, faced opposition Senates. Only Eisenhower faced one during an election year, and in that case he chose a New Jersey Democrat, William Brennan, who was acceptable to the Senate.[47]

The reassertion of the Senate prerogative to reject in 1968 to 1970, in the Senate battles over Abe Fortas' nomination to succeed Earl Warren and Richard Nixon's efforts to get Southerners Clement Haynsworth and G. Harrold Carswell on the Court, is accounted for by a number of factors. Lyndon Johnson was a weak, lame-duck president in 1968, when he appointed Abe Fortas, while the Republicans looked forward to one of their own becoming president. The resentment of the opposi-

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42. Matthews, appointed by Hayes in 1881—although he made it to the Court with the next president, Garfield. *See id.*

43. Hornblower and Peckham were denied the "New York seat" in 1893 and 1894. *See id.*

44. Williams, in 1873. *See id.*

45. Hoar, in 1870, had made enemies by his personality, by certain recommendations as attorney general for circuit court appointments, and by his opposition to the impeachment of Johnson and support for civil service reform; Cushing, in 1874, had made enemies with very erratic political party affiliations over his career and also was the victim of misuse of a letter he had written to Jefferson Davis in 1861. *See id.*

46. *See* PHILLIP COOPER, THE UNITED STATES SUPREME COURT FROM THE INSIDE OUT 52 (1996).

47. *See* JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 107 (1995).

tion Democratic Senate over the Fortas rejection, combined with questions of judicial ethics (alleged insensitivity to conflicts of interest) and political factors similar to those in the Parker nomination (civil rights and labor opposition), led to Haynsworth's defeat.[48] Carswell's rejection was based especially on civil rights opposition (involving a white supremacist declaration of his early career) and his very dubious legal qualifications in the face of an opposition Senate.[49]

The most recent, and very significant, Senate rejection—Robert Bork in 1987—occurred at a time when the Senate was newly controlled by the opposition Democratic Party. Bork's rejection also took place during the last two years of the second term of Republican President Ronald Reagan, already seriously weakened by the Iran-Contra controversy. Other key factors contributing to his defeat were confirmation hearings in which he failed to strike a popular chord, and his early career opposition to the 1964 Civil Rights Act. That opposition was used effectively to mobilize political opposition to him, especially in key southern states, the support of whose Democratic representatives was essential to Bork's nomination.[50]

More generally, the Bork defeat may have represented an increased recognition—with the greater salience of Supreme Court decisions themselves as political issues—that the Court plays a fundamentally political role in modern American politics. As political scientist Lawrence Baum notes: "[P]robably the key explanation for the intense scrutiny given to recent nominations is the increased prominence of the Supreme Court in the resolution of significant and controversial policy issues."[51] In Bork's case, the balance of the Court was (rightly) thought to be at issue, so there was an unusually massive mobilization against his nomination.[52]

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48. *See* LAURENCE BAUM, THE SUPREME COURT 36 (1995).

49. *See* MALTESE, *supra* note 47, at 14.

50. *See* BAUM, *supra* note 48, at 36, 57.

51. *Id.* at 53.

52. *See generally id.* I have focused here on the Senate rejections. A broader view, that took into account successful, but not easy, confirmations (such as Justice William Rehnquist's nomination as Chief Justice in 1986 and Clarence Thomas's nomination in 1990) would reinforce the suggestion that there may have been recent changes in the nature of the Supreme Court nomination process. On the other side, one must account for the very easy confirmations of President William Clinton's Supreme Court nominations by a Republican-controlled Senate.

III. PARTISANSHIP, IDEOLOGY, AND ADVICE AND CONSENT

This quick review of Senate rejections is only a partial history, of course. On the face of it, it might tempt one to make the argument that Senate confirmation is simply a straightforward political issue. But there are sound reasons not to make such a judgment.

For example, one could also analyze why some presidents succeeded in getting nominees through opposition Senates, even at the end of their terms. After all, on thirty-six occasions when the Senate and presidency were controlled by different parties, presidential nominations were successful twenty times.[53] Even when that situation occurred in the last year of a president's term, six out of seventeen have been confirmed. What accounts for those successes? Part of it, especially in the latter case, is that presidents realize that they must be more careful or accommodating in their selections. But another part of it is that senators are reluctant to base their opposition to a nomination simply on partisan grounds. Somehow, such grounds lack a certain kind of legitimacy, however real they are in practice. Usually, some factor other than partisanship alone must be present to make a respectable public case against a nominee.

The use of the term "partisanship" in this discussion presents an ambiguity, however, as there are very different strands of partisanship. One strand is the simple fact of patronage. One does not appoint members of opposition parties to important—or even unimportant—offices, because the distribution of offices is an essential ingredient to maintaining political group cohesion, and parties naturally feel that such appointments ought to be given as rewards to their own members rather than to opponents.[54] The intensely "practical" aspect of this rationale for acting makes it difficult to defend publicly as a matter of principle, although that is not a significant limitation to its being done. One factor limiting this ground, however, is that it should not prevent filling a Court seat for an undue period of time. Perhaps the only Senate to systematically prevent presidential nominations for an extended period of time on

53. This is based on an updating of Robert Scigliano's figures. *See generally* SCIGLIANO, *supra* note 33. Scigliano estimates that until mid-1970, there were twenty-six cases in which the Senate and presidency were controlled by different parties, and of these nominations, fifteen (57%) were rejected. Extending these figures through 1998 (a period that includes long spells of "divided government"), there are thirty-six cases, with only sixteen being rejected (only 44%).

54. This particularly explains opposition to appointments, more frequent before the 20th Amendment, during the period between a presidential election and the beginning of the new president's term.

partisan grounds was the Radical Republican Congress under Andrew Johnson.[55] Its reputation has not been enhanced by its manipulation of the size of the Court, in particular, to accomplish this. Few public figures, if any, would defend such a course of action today. The prospect of a shift of partisan control of the presidency must be relatively close at hand (usually during the election year) to justify frank partisan rejection of nominations.

But there is another strand of "partisanship," which is much more defensible theoretically, and which can be defended as something much more than "mere" partisanship. Often the division between parties includes important theoretical, or "ideological," differences. These can be relatively specific public policy positions—such as support of or opposition to a particular treaty, congressional powers to establish a national bank or declare paper money legal tender, or civil service reform, or abortion. But they also often merge into higher theoretical levels of debate about "constitutional principles"—such as nationalism versus states' rights, slavery and the Declaration, abortion and the right to life or right to privacy, and the "judicial philosophies" of "strict" or "loose" constructionism. What role should these ideological factors play in appointments to the Supreme Court, including Senate advice and consent? That partisanship is a legitimate factor, in some sense, is undeniable. The sense in which it is understood, however, is crucial to its legitimacy.

Examining the constitutional text, we should observe what is often the most important facet of a text, namely, what is not there. The text simply does not specify the grounds for Senate advice and consent any more than it specifies the grounds for presidential appointment. In this respect, it is quite unlike the impeachment power, for which the Constitution specifies particular grounds: "Treason, Bribery, or other high Crimes and Misdemeanors."[56] Strictly speaking, then, there is no specific constitutional limitation on the Senate's power to advise and consent. That would be a political question, in the sense that Congress has every right to exercise its own discretion in determining what constitutes the qualifications for a Supreme Court Justice and whether a nominee meets them.

And yet this does not mean that there are no reasonable limits on the Senate, even if no one (except those who will eventually vote for or against the senators' re-election) can enforce them. I have already given an example of one limit: virtually no one would argue that a freshly

55. *See* MALTESE, *supra* note 47, at 35.

56. U.S. CONST. art. II, § 4.

elected Senate of one party could "legitimately" deny every nomination of a newly elected president simply because of the president's party affiliation. There are other examples as well. Would the Senate be justified in refusing to confirm the nomination of a lower court judge on the grounds that he had struck down a Congressional bill of attainder? That is, could someone be rejected on the grounds that he had refused to violate the Constitution?[57] How many today would justify opposition to a nominee simply because he was black, or she was a woman? Regional balance would not be ruled out completely, but what if a senator would vote only for Southerners, irrespective of how many Southerners were already on the Court?

These are examples of what would generally be conceded to be "arbitrary" or "unreasonable" uses of the conceded Senate power. Something more than that is required, something arguably related to the qualifications of a good Supreme Court Justice. In this respect, the power of advice and consent is similar to one aspect of the impeachment power. "Treason" and "bribery" have better defined content than "other high Crimes and Misdemeanors," and the latter phrase has occasioned considerable debate. Some have argued that it limits grounds for impeachment to indictable crimes (*e.g.*, Nixon's lawyer in the Watergate controversy). Others have argued that it means "whatever a majority of the House of Representatives considers it to be at a given moment in history" (*e.g.*, Gerald Ford relative to an attempted impeachment of Justice William O. Douglas).[58] Ford is closer to the truth but goes too far. Being a Republican (or Democrat), for example, by itself could hardly be considered a "high Crime" or "Misdemeanor." The Congress may be uncontrollable by any other branch in its impeaching of a judge, but that is not equivalent to saying that all its impeachments are automatically legitimate. Congress has the final say, as a matter of political *power* and it can properly employ a broad political understanding of "high Crimes and Misdemeanors," as Hamilton shows in *Federalist No. 65*, but it is not unlimited in its discretion, as a matter of political *right*.

The Senate's power with respect to appointments is not even limited by specific constitutional criteria such as the grounds for impeachment. But, if all agree that the power could be used illegitimately by employing "arbitrary criteria," then where do limits come from? Presumably criteria are arbitrary when they do not relate to a nominee's capacity to

57. Of course, there might be arguments as to whether this or that law was a bill of attainder; but that is a separate issue.

58. *Impeachment Mostly Political*, THE CINCINNATI POST, Jan. 24, 1998, at 4A.

perform the duties of the office satisfactorily, defining such satisfactory performance in a quite broad sense. Therefore, questions of the appropriate exercise of the Senate's power to advise and consent seem to come down to an understanding of how judges should perform their duties and what qualities are required for them. That is, the criteria for confirmation ultimately must be pushed back to the question of the nature of judicial power in our constitutional system.

Some of the criteria are relatively clear-cut, and do not need discussion in the present context. For example, a person who is not a lawyer (or, at least, who does not have the knowledge of the legal system and its basic procedures that lawyers must have) would not have an essential qualification for the office. Indeed, for the Supreme Court, one would expect more than just minimal legal expertise. One would expect excellence in the capacity to deal with the "rules and precedents" of our law, to which Hamilton referred.[59] Likewise, one would expect strict personal and professional integrity, as both Justice Fortas and Judge Haynsworth learned; though neither of them had violated any law, one was forced to resign and the other was rejected by the Senate at least partly because of failures to live up to a strict code of judicial ethics.[60]

But perhaps there *are* important and legitimate "political grounds," in some sense, that must be considered in the whole appointment process by both the president and the Senate.

IV. "POLITICAL" CRITERIA FOR SUPREME COURT JUSTICES

The predominant lens through which legal history is viewed today is legal realism, which, in varying degrees according to its more or less extreme forms, holds that judges are basically "politicians in robes." The ultimate determinants of judicial decisions are the social and political views of the judges, rather than "mere" interpretation of law.[61]

Legal realism seems to have rather strong empirical support from the historical record. Marshall was a Federalist and took strong nationalistic views. Taney was a Jacksonian Democrat and took strong states' rights views, and so on down to the egalitarianism and libertarianism of Warren, Black, Douglas, and Brennan and the conservatism of Burger and Rehnquist. Occasionally judges break the mold, as the "political liberal" but "judicial conservative" Frankfurter seemed to, but even he

59. See *supra* note 30.

60. See MALTESE, *supra* note 47, at 14.

61. *See, e.g.*, WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS (1968).

endorsed a moderate legal realism, as many of his comments on his hero, Justice Oliver Wendell Holmes, Jr., attest.[62]

Legal realism can certainly point to evidence of political judges, but at the same time it is not proof that judges must be political. Not even the argument that *any* judge can be faulted for some of his decisions proves this. There is at least some evidence on the other side, that law itself, rather than judges' personal views, can genuinely determine judicial decisions. Perhaps the most interesting fact is simply the many unanimous decisions that appellate courts hand down each year. A less obvious, but important, piece of evidence is found in the very proof that legal realists use to discount the law. The typical first step in an argument for legal realism is the citation of cases in which judges have distorted the law in the service of their own political views. But the very argument that judges have distorted the law is testimony to a belief that the undistorted law can indeed be known and that the distortion is not therefore inevitable.

There is a large gap between the proposition that judges' decisions are sometimes shaped by their political views and the proposition that they must be shaped by them. The first, unlike the second, is compatible with the more traditional (pre- and anti-legal realist) position that judges ought to follow the law, are capable of following it, and may be justly criticized when they do not. If no particular judge ever fully lives up to the ideal, that is no reason to dispense with the ideal. It is this ideal that underlies the Constitution's provisions for judicial power and the early practice of American political history.

Legal realism, on the other hand, has been dominant in the legal profession since the turn of the century, and is the foundation for contemporary constitutional law. The shift from the former to the latter is tied up with a change in the very nature of judicial review in the course of American history, and necessarily results in a different understanding of the power of appointing the judges who will exercise that power.

Are legal realists correct when they argue that judges are merely politicians in robes, and is it inevitable, then, that judges ought to be appointed primarily with a view to their political opinions? The answer is complicated by the equivocal use of the word "political."

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62. *See, e.g.*, Alfred S. Neely, *Mr. Justice Frankfurter's Iconography of Judging*, 82 KY. L.J. 535 (1993); MR. JUSTICE HOLMES (Felix Frankfurter, ed. 1931).

V. THE "CONSTITUTIONAL VIEWS" OF NOMINEES

The most important power exercised by the Supreme Court is the power of judicial review, the power to strike down laws or actions made by the more accountable political branches in our constitutional system. In a certain sense, this power is political, because it is a determining factor in public policy when it is exercised. But the deeper and more crucial question is whether the power consists of the exercise of *judicial* will or the application of the will of the *law*. To the extent that the determination of public policy which results from judicial review flows from judicial application of the will of the law, there seems to be no problem from the standpoint of democratic principles. If judicial political views in the more immediate sense—judicial will—are the basis of decisions which dictate public policy in important respects, serious questions are raised in a generally democratic society.

A. Traditional Views

During roughly the first century of American history, there was general agreement that judges were to exercise judgment, not will.[63] There were many bitter disputes over constitutional issues and judicial decisions, but the debaters shared the same general ideal: the judge was to enforce the law, above all, the fundamental law of the Constitution, and not his own will or his own political preferences.[64] It is true that in general Marshall gave a "Federalist" reading to the document and Taney a "States' rights" view. But it is also true that on occasion Marshall restricted national powers (*e.g.*, he refused to apply the Bill of Rights to the states, which would have ensured federal judicial control over many state actions), and Taney upheld doctrines more typically associated with Federalists (*e.g.*, in cases where he vigorously enforced the contract clause). And both of them agreed that the Constitution had a meaning which was authoritative, even though they sometimes disagreed on what that meaning was.[65]

Thus, in early American history, disputes over the judicial appoint-

63. *See generally* THE FEDERALIST NO. 78 (Alexander Hamilton).

64. *See generally* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 17-117 (1986).

65. While it would be something of a digression to get into the issue too far, I will at least indicate here my opinion that Marshall was generally the more correct in his reading of the document. After all, the Constitution was in its origins a Federalist document. But it is probably just as important to note that, whoever was correct, both of them believed strongly that there was a correct view, and would have rejected the notion that the Constitution was whatever an interpreter wanted it to mean. *See id.* at 384-88.

ments certainly took into account nominees' (and potential nominees') political views as they were reflected in their constitutional views. The primary job of the Court was, after all, to be a "bulwark" of the Constitution against attempts to violate it. Accordingly, the constitutional views of potential justices were clearly an important part of their qualifications for the office. But whatever the differences in their particular views, the various parties shared the ideal that the Constitution did have a fixed and cognizable meaning and was the standard by which to judge nominees.[66]

This attention to such "political" views is cited in support of making the political views of nominees a criterion of Senate judgment today as well. But, in fact, the intellectual framework of those who make these current arguments is quite different. That is because the whole notion of "constitutional views" has been transformed by legal realism in the twentieth century. Only with an understanding of that change can we understand clearly the proper constitutional scope of the Senate's power to advise and consent.

B. The Transformation of Judicial Power

What we call "judicial review" today is quite different from traditional conceptions of judicial review. The process by which an essentially changed meaning was given to the words was a slow and complicated one, but it can be summarized briefly in the following way.[67]

From the end of the nineteenth century to 1937, the Supreme Court engaged in a new, activist form of judicial review, although the justices firmly argued—and their opponents seemed to confirm—that they were only doing what American judges had always done. The most important element of the new activism of the Court was the use of the due process clause as a vague general guarantee of fundamental rights, including above all freedom of contract, or property rights. Because the Constitution only embodied the right vaguely, in the allegedly amorphous confines of the due process clause, the job of defining and enforcing property rights—giving content to the clause—was left to the justices. Since the justices of that era for the most part had laissez-faire economic views, which reflected the prevailing ideology of the legal profession during their formative professional years, the judges quite naturally regarded economic regulation with considerable reserve, suspicion, or hos-

66. *See supra* note 64 and accompanying text.

67. For a more complete treatment of the following points, see generally WOLFE, *supra* note 64, at 119-322.

tility, often finding it incompatible with fundamental rights.[68]

It was easy to think that this was what the framers had provided for, since the founding generation did, in fact, have a high regard for property rights, and did seek to protect them, for example, through the contract clause. But the mainstream position of the founding era was that judicial review was limited to clear violations of the Constitution, and the due process clause was considered a matter of legal procedure rather than fundamental rights. It was no accident, then, that the due process clause was not used in that period as a vague general guarantee of fundamental rights.[69]

Ironically, the enemies of laissez-faire due process, who could have pointed out that the Court had departed from the Constitution, instead generally conceded that the Court was being faithful to original intent, and argued that the original intent was outdated and ought to be replaced with new views more appropriate for modern circumstances. They did this without scuttling the Constitution entirely, by accepting the elevation of the due process clause to a vague general guarantee of fundamental rights, but then arguing that the new notions of what fundamental rights consist of ought to be controlling.[70]

In these initial phases of the development of modern judicial power, the argument for giving constitutional phrases a new, more up-to-date meaning was used to defend legislative enactments against judicial review; that is, it was used as a grounds for judicial restraint. But the same kind of argument could be used to give a new *judicially* enforceable meaning to the Constitution as well, which could be used as an instrument of judicial activism to strike down legislative enactments. That is precisely the direction that modern judicial review eventually took.[71]

Beginning in the late 1930s, the Court slowly developed a much heightened protection of certain "preferred freedoms" (expanded conceptions of freedom of speech and religion).[72] Then, in 1954, its *Brown v. Board of Education*[73] decision transformed American political life, serving as a catalyst for the civil rights movement. The success in transforming race relations in the nation armed the Court with both considerable moral authority and confidence that it could serve the same noble

68. *See id.* at 223-41.
69. *See id.* at 17-37.
70. *See id.* at 144-60.
71. *See id.* at 258-89.
72. *See id.* at 248-56.
73. 347 U.S. 483 (1954).

purposes in other areas, and in the 1960s it undertook to further social reform in a number of areas: *e.g.*, criminal defendants' rights, reapportionment, equal protection, and privacy. The Burger and Rehnquist Courts that followed were more erratic, cutting short or nibbling at the edges of some Warren Court precedents, extending others dramatically, and adopting more middle-of-the-road policies in some areas, but in general not departing from the general approach to judicial decision making.[74]

The modern approach can be characterized in this way: Constitutional provisions are not absolutes to be taken literally, but rather should be considered as stating *presumptions* in favor of certain principles, such as liberty (due process), equality (equal protection), and freedom of speech and religion (First Amendment). The job of "interpretation" is really one of applying these principles by weighing them against competing considerations as cases arise, with the burden of proof lying more heavily on the state to justify its regulation in proportion to the importance of the individual right being asserted. The job of the courts can thus be viewed as thinking through the foundations and implications of various competing social principles and establishing the proximate rules by which they will be balanced against each other and applied in particular situations. So viewed, it is clearly a legislative more than an interpretive power—will rather than judgment—and it is frequently defended precisely on the grounds that the Court has done a better job of making policy regarding individual rights than legislatures have.[75]

The new form of judicial review required a new theoretical foundation. This was clearly seen by Alexander Bickel. In his 1962 book *The Least Dangerous Branch*, he opened with an attack on *Marbury v. Madison*[76] as an inadequate foundation for the practice of judicial review.[77] What was needed, he said, was principled justification for it in the form of a policymaking power that the courts could exercise, that others were unlikely to perform, and which did not tread unacceptably on the other branches' responsibilities.[78] The history of constitutional commentary throughout the period since then can be characterized as a search for such a new justification.

This understanding dominant in the scholarship on judicial review

74. *See* WOLFE, *supra* note 64, at 292-321, 359-77.

75. *See id.* at 327; *see also* CHRISTOPHER WOLFE, JUDICIAL ACTIVISM 73-75 (1997).

76. 1 U.S. 137 (1 Cranch 1803).

77. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1-14 (1962).

78. *See id.* at 24.

underlies the contemporary practice of judicial review, but with a significant difference: the Court does not put forward publicly such a theory of judicial review. In its practice, it still facially operates as if judicial review consisted of what *Marbury v. Madison* described: judges defending the Constitution against laws that violate it. Why doesn't the Court come forward with a new explanation of what it is doing, one that is more in line with the general view of the legal profession that judges exercise what is fundamentally a legislative power? One suspects that it is because no one is sure whether the legitimacy of the Court's exercise of judicial review could survive such an admission. And the Supreme Court's power, after all, is unusually dependent (especially in any controversy where it lacks the vigorous support of the president) upon its prestige or "moral capital" or legitimacy.[79]

Or, to put it another way: For all the success of legal realism among scholars, intellectuals, and lawyers, it has not been established in the sphere of public discourse so clearly as to be able to dispense with what legal realists consider "the myth of the Constitution." That is why, as Bickel pointed out, "in almost regular cyclical fashion, we witness atavistic regressions to the simplicities of *Marbury v. Madison.*"[80]

VI. DISTORTIONS OF THE SENATE'S ADVICE AND CONSENT POWER

The ambivalence about publicly proclaiming the nature of modern judicial power has had curious effects on the process of advice and consent. If legal realism is correct, and if it is publicly stated as one's understanding of judicial power, then one would expect senators simply to say that they are going to vote for or against a nominee because of his political (*i.e.*, policy) views. In fact, few senators do so—perhaps none as baldly as that.

There is a considerable reluctance to appear "political" in the evaluation of nominees for judicial office. Moreover, one ground of criticism of judicial nominees is sometimes that *they* are too political, as occurred with some Reagan judicial nominations (and certainly with some earlier Democratic nominations). In both cases, the assumption was that judges ought not to be "political."

One result of this tendency has been to focus considerable attention on legal credentials, whenever this is a plausible ground.[81] This is not

79. *See* Planned Parenthood v. Casey, 505 U.S. 833, 866 (1992).

80. BICKEL, *supra* note 77, at 74.

81. *See, e.g.*, William Bradford-Reynolds, *Senate Confirmation Not Always Fair—But Necessary*, HOUSTON CHRON., Dec. 3, 1997, at 47.

usually a question of minimal legal qualifications, but of the exceptional abilities that one expects of a Supreme Court nominee. But in borderline cases, evaluations of "professional" qualifications can certainly be affected by seeing them through the prism of ideological views. Candidates for judicial office who have middling abilities and ideological views contrary to those that are dominant in the legal profession may have more difficulties than middling candidates of more conventional views.

Nelson Polsby once wrote a perceptive article on "Presidential Greatness" in which he pointed out that the ranking of "great presidents" is usually done by historians and political scientists whose political views were forged in the fire of the Depression and New Deal, and for whom greatness is typically associated with the "strong" presidency of Franklin Roosevelt.[82] One effect of that tendency was to undervalue presidents who were not so assertive publicly, such as Dwight Eisenhower.[83] One may surmise that similar underlying ideological factors affect evaluation of judicial or legal abilities. For example, in a 1970 poll of history, political science, and law scholars, a number of the justices who were part of the laissez-faire Court majorities (from roughly 1890 to 1937) received harsh treatment relative to justices from other eras or ideologies, some of them being put in categories a notch below their desserts, especially given some of those placed ahead of them.[84] At any rate, the issue of legal qualifications is subject to greater manipulation than may appear at first glance.

When legal qualifications are not a plausible issue, another tendency is to do some muckraking in the nominee's past, trying to find an issue that can either be raised as a question of personal ethics and integrity, or that will alienate key interest groups that have influence with senators. On occasion, this can lead to considerable stretching of points, as in the

82. Nelson W. Polsby, *Against Presidential Greatness*, 63 COMMENTARY 61 (1977).

83. Not surprisingly, however, events after 1960 such as the Vietnam War and Watergate contributed to a substantial revision in the evaluation of Eisenhower.

84. *See* ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 32-51 (1978). I think it would be difficult to defend the evaluation of VanDevanter and Butler as "failures" (the lowest category), apart from ideological opposition, and the ranking of Fortas as a "near great" (was this an overreaction to his having been forced off the Court recently?). Of the twelve justices ranked as "great justices," apart from the historical "shoo-ins" (Marshall, Story, and Taney), seven (possibly eight) were anti-laissez faire or modern egalitarian justices. And will the long-run view really rank Brandeis, Stone, Cardozo, Black, Frankfurter, and Warren—all "greats" according to the survey—ahead of Miller, Bradley, Taft, and Sutherland—all of whom are ranked as "near greats"? Perhaps, but we shall see. It is hard to believe that ideology did not have a significant impact on some of these evaluations.

rather silly hubbub in 1986 about the deed to Rehnquist's home having a restrictive covenant clause (one which had been legally unenforceable for thirty-five years, and which, it turned out, was also present in the deeds to the homes of some liberal Democrats in the Washington, D.C. area).

On the other hand, this approach can escalate to an open pitched battle, as it did in the Anita Hill allegations against Clarence Thomas, which are still viewed in profoundly different ways by partisans of different stripes today. Of course, such muckraking is not restricted to judicial nominees—it is quite widespread today, and is often a way of discrediting leading political figures. But it can be successful, and it has the advantage of seeming more or less "nonpolitical" on its face, which makes it an attractive method to discredit judicial nominees with whom one disagrees on ideological grounds, without resting the case publicly on those grounds.

When objecting to nominees on ideological grounds, it is possible to minimize the political character of the opposition by adopting somewhat indirect approaches. For example, one might object that the nominees' views are "extreme," or argue that nominees with a different ideological position would provide "better balance" on the Court. While this does not avoid the question of political views completely, the "political" character of the opposition is muted somewhat, since the objection is directed less to the specific substance of the nominees' views than to their general unrepresentativeness. The somewhat hidden implication is that, since the nominees' views are distinctly outside the "mainstream," they are probably somewhat idiosyncratic and not likely to be based on correct interpretations of the law.

The most controversial way to object to nominees on the grounds of their political views (taken in either the broad or the narrow sense), while avoiding the appearance of playing partisan politics with a nonpartisan office such as a judicial position, is simply to argue that those views are wrong *constitutionally*. That is, one can embrace what legal realists consider the "myth of the Constitution"—namely, that the Constitution has a definite and determined meaning that binds judges, and also those who nominate and confirm them—and then argue that nominees' views are not in accord with the Constitution.

This approach is perhaps easier for those who are identified with "originalism" to adopt, because that position rejects the assumptions of legal realism. Believing that there really is a cognizable and intelligible Constitution with a fixed meaning, the invocation of "the real meaning" of the Constitution should be perfectly plausible as a basis for evaluating

judicial nominees in a non-partisan manner. But what if the "real meaning" of the Constitution has become identified with one party? What if "non-partisan" interpretation of the Constitution has become a partisan political position?

For those who accept legal realism's assumptions, all views are partisan (although perhaps some are partisan in a more statesmanlike manner). One possibility for them would be to adopt straightforwardly a political stance, acknowledging that opposition to a given nominee stems from the nominee's policy views. This method, however, smacks too much of partisanship for many people. The so-called "myth" of the Constitution still has a powerful hold on us.

An alternative is to argue, somewhat ambiguously, that the nominee does not hold the "right" constitutional views, suggesting that this criterion transcends ordinary policy views even if the (unstated) criterion for "correct constitutional views" is basically having correct policy outcomes. This can be awkward, however, if the core objection to a nominee is that he or she is too likely to abide by a fair reading of the Constitution itself as it was understood by those who wrote it. How can one make a credible ideological case against a nominee on the basis of the Constitution when one believes not that the Constitution is fixed, but that judges ought to keep it up-to-date by giving it an "evolving" meaning, one which will fit (the judicial perception of) the needs of the time?

One way to accomplish this somewhat indirectly can be seen in the case of Judge Bork. He was hostile to some leading Court decisions which had rather tenuous roots, if any, in the Constitution itself.[85] Thus, he was challenged for being "outside the mainstream." By identifying the Constitution with what the Supreme Court had said it meant in those cases, Bork's opposition to past decisions of the Court was transmuted into opposition to the Constitution itself.

So, for example, an opponent of originalism could take the abortion decision in *Roe v. Wade*[86] and use criticism of that decision as a basis for arguing that the critic is opposed to some "important constitutional rights," even though abortion rights are a recent Court creation without any roots in the Constitution itself. Opponents can thus wrap themselves in the folds of the Constitution while defending decisions which are really only judicial accretions to it.

These distortions of the advice and consent process reflect "our" schizophrenic thought about the Constitution. *Legal elites* generally

85. Most obviously, *Roe v. Wade*, 410 U.S. 113 (1973).

86. 410 U.S. 113 (1973).

take a legal realist view that emphasizes the inevitability and even desirability of judges bringing political views to bear on constitutional adjudication (though there is a spectrum of views as to how much discretion judges have to apply these views). But *politicians* are reluctant to make these views the explicit grounds for evaluating judicial nominations (just as judges are leery about proclaiming from the bench that they "make" law rather than merely interpret it). At least part of the reason for this reluctance is that they have insufficient confidence (probably justified, in my opinion) that *popular opinion*, encouraged by a minority of scholars associated especially with originalism, will accept a flat-out politicization of the nomination process.

The confirmation process can be "rationalized"—made coherent and consistent—only if the fundamental underlying question is resolved. Are justices supposed to interpret a law of the Constitution that is fixed and independent of "judicial will"? If so, then the criterion for Senate confirmation ought to be the ability of the nominee "to say what the law is" as well. Are justices supposed to take the majestic generalities of the Constitution and mold them in accord with their best conceptions of what a good political order for circumstances like ours would be? If so, then the criterion for Senate confirmation ought to be the ability of the nominee to so mold the Constitution.

The Constitution's understanding of the answer to that question seems clear to me. Justices are to exercise, not will, but judgment. The fundamental criterion for judicial nominations and confirmation, then, ought to be the nominees' commitment and ability to read the Constitution well and to apply it faithfully. And it is the obligation of the President to appoint on the basis of this criterion, and no less the obligation of the Senate to evaluate his nominees on the same basis.

VII. OBSTACLES TO AN EFFECTIVE SENATE ROLE

But will the Senate live up to that responsibility? One of the real obstacles to doing so is the fear politicians have of being labeled "partisan." There is a real irony in this. The non-partisan, constitutionally-based understanding of the judicial role is often attacked today for being "partisan." This is not really surprising, as those committed to views different from those embodied in the Constitution could be expected to portray their own views as "constitutional" and those of their opponents as "partisan." What is more disappointing, if not surprising, is that the fear of being labeled partisan so often seems to be effective in disarming Senate opposition to judicial nominees who seem likely to be committed to an activist judiciary, even when the charges of partisanship come from

those who have themselves clearly adopted partisan positions.

Perhaps the most obvious case is the severe criticism directed at Republicans in the 1980s for a supposed litmus test on abortion for judicial nominees. While this litmus test was fully defensible—the Constitution says nothing about abortion or the modern autonomy right, and therefore judges should be expected to rule accordingly—it seems clear that many Republicans were embarrassed by the charges and denied that there was such a test. Whether this litmus test existed remains an open question, though it seems clear that if there were such a test, the Republicans did a poor job of applying it.[87]

At the same time, it was clear that there was a reverse litmus test for most Democrats, a test not justified by the Constitution itself, but only by the evolving meanings that liberal jurists have wished to read into it. This test was evidenced by the Bork nomination controversy as well as other judicial appointments since 1993, but this litmus test seems curiously uncontested. It is not subject to the same media criticism that the Republican litmus test faced, and there was no sign of embarrassment about it among Democrats. And it seems not to be much contested on the Senate Judiciary Committee today in the consideration of Clinton nominees.

Why this double standard? It seems likely that the answer to this question can be found in the political preferences of the academy and those for whom it provides standards, including the major organs of public opinion. Even senators and representatives often feel somewhat intimidated by what are widely regarded as complex legal questions, and tempted to defer to "expert" opinion on such matters. But the experts, heavily concentrated in the academy, are generally ideologically sympathetic to activist judges and defend these judges' "constitutional" views. Loath to challenge the experts, senators and representatives fall into what might be called a "culture of deference" to the judiciary and the legal intellectuals who provide their defense.

Moreover, being tarred with the public accusation of being "partisan" in handling judicial nominations is obviously undesirable. Insofar as politicians—especially those who do not have very safe seats—are naturally "risk-averse," they may be tempted to avoid taking stands that may be easily misrepresented to the constituents in the next election.

The most recent form of pressure on the Senate to abdicate their constitutional responsibilities has been the criticism of the Senate Judi-

87. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (where five Republican appointees refused to overturn the central holding of *Roe v. Wade*).

ciary Committee for not approving presidential nominations of lower court judges more quickly.[88] In some ways, this smacks of the political struggle over creating a government "shutdown" that occurred during President Clinton's first term. The Republican Congress and the Democratic President fought bitterly over a variety of budget issues, and the government had to shut down for a period of time, until Congress—successfully tagged in public opinion with being responsible for the shutdown—gave way and legislation to authorize government action was passed. (Why the Republicans had any more responsibility than the President for the shutdown was never very clear. It took both sides to create a stalemate, after all.)

Likewise, the possibility of stalemate looms over any Senate that would reject presidential nominees for judicial office on the grounds that they were not committed to proper interpretation of the Constitution. Senate rejection, after all, simply leads to another presidential nomination. In the meantime, responsibility for vacancies in the judiciary can be laid at the feet of the obstructing Senate. Fear of being successfully characterized as partisan obstructionists seems likely to have been a factor in Republican reluctance to challenge President Clinton's judicial nominations and the willingness of the Republican Senate even to push through many judicial nominations in the waning days of the 105th Congress.[89]

This is a failure of will, I believe, on the part of those who have a responsibility for participating in the judicial nomination process and a responsibility to oppose the confirmation of judges who are committed to judicial activism, which is inconsistent with the Constitution. Neither "legal experts" nor those who raise cries of partisanship when there is opposition to "political" positions on sound "constitutional" grounds should be permitted to intimidate those who hold such responsibility.

VIII. THE SENATE'S ROLE

The protection of constitutional rights is ensured because their roots in the Constitution will prevent them from being set aside with fluctua-

88. *See, e.g.*, Dan Carney, *More Challenges to Clinton Nominees Cause Judicial Stalemate*, 55 CONGR. Q. WKLY. REP. 2912 (1997).

89. *Judicial Selection Nomination Project of the Center for Law and Democracy at the Free Congress Foundation*, WKLY. UPDATE (Oct. 28, 1998). This report notes that no Clinton nominee had ever been defeated in the Senate Judiciary Committee or on the Senate floor (though this did not account for nominees whose likely defeat led to withdrawal of the nomination). On the other hand, one should note that Clinton's Supreme Court nominees, in particular, have been less activist than they might have been.

tions in public opinion. The habit of judges informally revising the Constitution to add new rights creates the conditions for revising it by subtracting rights as well. Only adherence to the fixed meaning of the Constitution can give us the confidence that we will achieve the purposes of "a government of laws, not men."

Limiting the judicial function to interpreting the Constitution guarantees the political branches their legitimate powers, which keeps policymaking in the hands of those who are most accountable to the people so that the laws of our society are truly based on popular consent and not on the preferences (even if they are well-intentioned) of just one segment of it. In many cases even the "line-drawing" that must sometimes be done between freedom and license, between a just recognition of and an excessive pursuit of equality, must be done by representatives subject to popular control. Self-government is not a need that stops as soon as "rights" become an issue, giving way to rule by judges.

The crucial questions underlying the confirmation process are whether the Senate considers itself bound by the Constitution, and by its provision for a limited, *i.e.*, nonlegislative, form of judicial review and whether it demands that nominees share such a view in order to be confirmed. If it does, that will provide fair grounds for opposing nominees who are committed to different views of judicial power. The Senate's power of advice and consent is a broad one, though it is not arbitrary. A fair interpretation of the qualities required of judicial nominees by the Constitution emphasizes legal capacity, personal integrity, and a commitment to abide by and defend the Constitution.[90] No fear of accusations of partisanship should prevent a Senate from actively insisting that judicial nominees meet these constitutional requirements.

90. I note in passing a complicated question that the Senate must consider in applying constitutional standards. Even originalists committed to the authority of the Constitution may accept that, under certain circumstances, an unbroken and largely unchallenged string of precedents may be authoritative, even where the original decision was incorrect. In evaluating nominees, then, senators can legitimately include consideration of precedent in evaluating candidates. For further discussion of this point, see Chapter 8 of my book HOW TO READ THE CONSTITUTION: ORIGINALISM, CONSTITUTIONAL INTERPRETATION, AND JUDICIAL POWER (1996).