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# The Confirmation Process and the Quality of Political Debate

Jonathan L. Entin<sup>†</sup>

Because so many important public issues have become the subject of constitutional litigation, the selection of Supreme Court justices has potentially significant political consequences. For most of the twentieth century, debate over prospective appointments focused upon seemingly neutral concepts of professional competence—knowledge of the law, intelligence, experience, integrity, and aspects of character embodied in the notion of judicial temperament—rather than upon candidates' substantive views.<sup>1</sup> Recently, however, the debate has changed dramatically, and consideration of prospective justices' personal philosophy has dominated the confirmation process.<sup>2</sup> The former approach might be called the *competence model*, the latter the *ideological model*.<sup>3</sup>

Those who favor full discussion of major political issues might be expected to approve the emergence of the ideological model. After all, this approach emphasizes substantive constitutional visions and focuses directly upon subjects that lie at the heart of national debate. Besides, it is more honest than the competence model, which has often concealed substantive disagreements beneath layers of symbolic arguments about ethics and character.<sup>4</sup> In fact, the

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1. See, e.g., HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 4 (3d ed. 1992); JOEL B. GROSSMAN, *LAWYERS AND JUDGES* 50-51, 106-08, 199 (1965); Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 793-94, 796 (1957). For a critique of this approach, see Stephen L. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1185-88 (1988).

2. To be sure, some justices earlier in this century faced opposition explicitly premised upon ideological disagreement. Among them were Justices Stone, Hughes, Black, Stewart, and Marshall. All were confirmed at least in part because most senators were unwilling to vote against a nominee solely for reasons of philosophical difference. See ABRAHAM, *supra* note 1, at 196-97, 201, 214, 272-73, 293-94; JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 117-19, 124-27, 305-09 (1953); LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 89 (1985). Judge John Parker was defeated largely (although not exclusively) for ideological reasons in 1930, see *infra* note 42 and accompanying text, but he was the sole exception to the generalization stated above during the first two-thirds of the twentieth century.

3. These terms are my own, but they capture the two principal approaches to the confirmation process that have been taken in the extensive literature on the subject. See *supra* notes 1-2; *infra* note 5.

4. The Brandeis controversy is a notable example. His opponents objected to his progressive legal views but criticized him for alleged character flaws and professional improprieties. For a comprehensive account of the confirmation process, see A.L. TODD, *JUSTICE ON TRIAL* (1964). For a detailed analysis of the ethical criticisms, see John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

Similarly, Justice Black's selection was criticized by opponents of the New Deal on the basis of his alleged lack of judicial temperament rather than because he had been a staunch supporter of President Franklin D. Roosevelt's legislative program. ABRAHAM, *supra* note 1, at 213-14; HARRIS, *supra* note 2, at 306-08. Justice Clark's nomination was assailed as a blatant example of political cronyism by those who disagreed with his views about loyalty and security programs at the beginning of the Cold War. ABRAHAM,

emergence of the ideological model, most notably in the pitched battles over the nominations of Robert Bork and Clarence Thomas, has left virtually everyone dissatisfied with intensely confrontational debates that generate more heat than light.<sup>5</sup>

This Article examines the seeming contradiction between the rise of the ideological model and the increasing public revulsion against the degrading spectacle that the confirmation process all too often has become. The principal problem with recent confirmation debates has been the exaggeration of the stakes of argument. Participants have focused so single-mindedly on winning the immediate battle that they have lost sight of the limited impact that any individual justice can have on American law and society. I suggest that the kind of political discourse which can promote effective government has both normative and empirical components. The normative aspect involves values, goals, and visions. The empirical aspect requires an assessment of how the resolution of a particular issue will shape the immediate and distant future and an evaluation of the costs as well as the benefits of making particular arguments.

Because open debate is a core value in the United States, the conclusions drawn from this discussion might have broader significance for those who seek to elevate civic discourse. Indeed, Justice Brandeis viewed "public discussion [a]s a political duty,"<sup>6</sup> and one of the principal theories of the First Amend-

*supra* note 1, at 246-47; HARRIS, *supra* note 2, at 311-12.

5. Unhappiness over the Bork proceedings, in which the nominee was subjected to five days of intensive questioning about his passionate condemnation of much of the previous half-century's constitutional jurisprudence, stimulated extensive commentary about the Senate's role in the confirmation process. *See, e.g., Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146 (1988); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633 (1987); Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMMENTARY 283 (1990); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992); Symposium, *Confirmation Controversy: The Selection of a Supreme Court Justice*, 84 NW. U. L. REV. 832 (1990). Resolution of that issue is beyond the scope of this article.

Much of the dissatisfaction over the Thomas confirmation process stems from the extraordinary hearings on Professor Anita Hill's sexual harassment allegations. Those who believed Professor Hill were outraged that the Senate Judiciary Committee seemed not to take her charges seriously until they were disclosed by the press. Moreover, they were further enraged by the Senate's treatment of Professor Hill when she testified in public session. *See, e.g.,* Nell Irvin Painter, *Who Was Lynched?*, 253 NATION 577 (1991); Priscilla Painton, *Supreme Court: Woman Power*, TIME, Oct. 28, 1991, at 24; Anna Quindlen, *The Perfect Victim*, N.Y. TIMES, Oct. 16, 1991, at A25; Maralee Schwartz, *Feminists Vow to Seek Political Changes*, WASH. POST, Oct. 17, 1991, at A7. Those who rejected her claims were incensed that the nominee had been subjected to scurrilous attack. *See, e.g.,* Barbara Amiel, *Guest Editorial: Feminist Harassment*, NAT'L REV., Nov. 4, 1991, at 14; Abigail Thernstrom, *Rough Justice: The Plot That Failed*, NEW REPUBLIC, Nov. 11, 1991, at 14; Juan Williams, *Open Season on Clarence Thomas*, WASH. POST, Oct. 10, 1991, at A23. Even before the sexual harassment issue arose, however, the debate over the Thomas nomination was intensely adversarial. The first round of Senate hearings was devoted primarily to a meticulous exegesis of his speeches and writings at the behest of those who feared that he would vote to overrule *Roe v. Wade*, curtail affirmative action, and write a wide array of "New Right" notions into the Constitution.

6. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

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ment emphasizes the value of free speech for promoting self-government.<sup>7</sup> Our system of self-government rests upon a conception of deliberative politics that stresses fair consideration of rival positions.<sup>8</sup> Yet there is widespread unhappiness with the overall quality of contemporary political debate in this country. Too much of that debate is regarded as stirring up resentments rather than promoting solutions,<sup>9</sup> and this in turn is said to have alienated many Americans from the political process.<sup>10</sup> In short, we need to focus upon the content of political debate in order to understand how to enhance the quality of that debate.<sup>11</sup>

The analysis proceeds as follows. Part I traces the modern emergence of the ideological model to the rejection by the Senate of President Nixon's nomination of Judge Clement Haynsworth in 1969. This discussion demonstrates that the Haynsworth debate focused initially upon allegations of ethical impropriety that masked important substantive differences, but soon developed into a more explicit argument over constitutional philosophy, particularly in the area of civil rights. Part II appraises the extent to which the rejections of Haynsworth and Bork affected doctrinal developments that gave rise to those confirmation controversies, and assesses the effects of those disputes upon the quality of political discourse. Part III seeks to relate the stakes of the normative argument to the tone of confirmation debates and considers other functions that might be served by ideologically based opposition to prospective justices. Part IV concludes by attempting to derive some broader lessons for those who seek to promote a more deliberative politics in the United States.

### I. THE HAYNSWORTH NOMINATION AND THE IDEOLOGICAL MODEL

The competence model began to lose its dominance over the confirmation process a quarter-century ago in the debate over President Nixon's failed nomination of Clement Haynsworth. The competence model framed that debate for a time as his opponents emphasized alleged ethical lapses, but the critics also attacked Haynsworth's substantive views in what were, for the time, unusually explicit terms. Some of the same issues (and some of the same actors) animat-

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7. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). There are other theories of the First Amendment, but none contests the importance of protecting political speech. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984).

8. See, e.g., JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* 35-41 (1991); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 133-41, 232-56 (1993).

9. See, e.g., KATHLEEN HALL JAMIESON, *DIRTY POLITICS* (1992).

10. See, e.g., E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* (1991); JAMIESON, *supra* note 9.

11. Cf. DIONNE, *supra* note 10, at 15 (arguing that "we have tended . . . to focus too narrowly on the political process and not enough on the content of politics").

ed more recent confirmation debates in which the ideological model held sway.

President Nixon nominated Haynsworth, Chief Judge of the U.S. Court of Appeals for the Fourth Circuit, to replace Justice Abe Fortas, who had resigned under fire over allegations of ethical improprieties.<sup>12</sup> A moderately conservative South Carolinian with apparently impeccable academic and professional credentials,<sup>13</sup> Haynsworth soon incurred the wrath of liberals who saw him as hostile to organized labor and civil rights. This posed a dilemma for many senators who saw the nominee as technically fit but substantively wrong on important issues. The dominance of the competence model meant that those who disagreed with a candidate's views generally couched their opposition in other terms.

Because philosophical disagreement was widely viewed as an inappropriate basis for rejecting a prospective justice, the Senate opposition focused primarily—although, as will be seen, not exclusively—upon Haynsworth's own alleged ethical lapses.<sup>14</sup> By defining the issue this way, the critics were able to challenge Haynsworth on the same grounds that others had attacked Fortas. More important, this strategy gave those who were reluctant to resist a Court nominee on ideological grounds a more acceptable justification for voting against confirmation.<sup>15</sup>

The ethical questions concerned Haynsworth's participation in two cases in which he was alleged to have had a conflict of interest. In the first case,

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12. Fortas was forced off the Court in May 1969 following a less than forthright response to reports that he had an improper relationship with Louis Wolfson. That relationship included a lucrative financial arrangement with a Wolfson-sponsored foundation and claims that the Justice had offered to intervene with the Securities and Exchange Commission to sidetrack an investigation into Wolfson's business affairs. With the Nixon Administration hinting that the Justice might have committed a federal crime, Fortas resigned within days of the news reports. JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 6-12 (1991); LAURA KALMAN, ABE FORTAS 359-78 (1990); BRUCE A. MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 545-77 (1988); ROBERT SHOGAN, A QUESTION OF JUDGMENT 185-261 (1972).

This was not the first time that Fortas's judicial ethics had been questioned. In the Spring of 1968, President Johnson nominated him to succeed retiring Chief Justice Earl Warren. Senate Republicans, sensing victory in the presidential election and hoping to give their candidate the chance to fill this important position, prevented a vote on the Fortas nomination. To make their position appear more respectable, the opponents alleged that Fortas had committed various ethical improprieties, specifically that he continued to advise Johnson on policy matters after ascending to the bench and that he accepted an unusually large fee for a series of university lectures. FRANK, *supra*, at 5-6; KALMAN, *supra*, at 327-58; MURPHY, *supra*, at 269-526; SHOGAN, *supra*, at 143-84.

13. Haynsworth graduated *summa cum laude* from Furman University and received his law degree from Harvard, where he ranked 51st in a class of 399 students. He went on to a distinguished career in a prominent South Carolina law firm; he served in naval intelligence during World War II and worked briefly in government during the Korean War. FRANK, *supra* note 12, at 17-18.

14. ABRAHAM, *supra* note 1, at 15. To avoid undercutting the ethics issue, the opponents chose not to ask Senator Edward Kennedy, who was suspected of covering up his involvement in a recent automobile accident in which one of his female staff members was killed, to take the lead against Haynsworth. See FRANK, *supra* note 12, at 30.

15. See FRANK, *supra* note 12, at 134.

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*Darlington Manufacturing Co. v. NLRB*,<sup>16</sup> he cast the deciding vote in favor of an employer accused of unfair labor practices; the Supreme Court unanimously reversed that decision. At the time, Haynsworth was a shareholder in a company that operated vending machines in three other plants owned by Darlington's parent corporation.<sup>17</sup> The other case, *Brunswick Corp. v. Long*,<sup>18</sup> involved a corporation in which Haynsworth had acquired \$16,000 worth of stock during the pendency of an appeal on which he sat.<sup>19</sup>

Behind these arguments, however, were fundamental differences of principle about the future direction of the Supreme Court. In fact, the validity of the ethical complaints was never entirely clear.<sup>20</sup> Haynsworth was opposed by those who viewed him as a clone of his fellow South Carolinian Strom Thurmond, the Senate's most notorious segregationist.<sup>21</sup> President Nixon had a well-publicized southern strategy, and Senator Thurmond was one of his strongest supporters, so the Haynsworth nomination was viewed as part of a political bargain with the South's most regressive elements.<sup>22</sup>

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16. 325 F.2d 682 (4th Cir. 1963) (en banc), *rev'd sub nom.* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965).

17. See FRANK, *supra* note 12, at 21-22.

18. 392 F.2d 337 (4th Cir. 1968), *cert. denied*, 391 U.S. 966 (1968).

19. FRANK, *supra* note 12, at 45, 53; see *infra* note 20.

20. These allegations have been dismissed by one leading commentator as "pure makeweight" and "utter[ly] unjustifiabl[e]." FRANK, *supra* note 12, at 2, 121, 134. The vending-machine company in which Haynsworth owned stock was not a party to the *Darlington* litigation and would not have been directly affected by the outcome of that case. Accordingly, Haynsworth had no reason to recuse himself and had an affirmative duty to sit. *Id.* at 42. Brunswick was a party, but Haynsworth's holdings were not great enough to require recusal under the judicial disqualification statute then in effect. See *id.* at 54. The Judicial Code of 1948 required a federal judge to refrain from participating in "any case in which he has a substantial interest." Act of June 25, 1948, ch. 646, 62 Stat. 869, 908.

Haynsworth himself declined to make this statutory argument. Instead, he characterized the purchase of the Brunswick stock as an oversight. He had been a member of the panel that heard *Brunswick*. The panel agreed on its decision that day; another judge was assigned to write the opinion. Six weeks later, Haynsworth accepted his broker's recommendation to purchase some Brunswick stock without recalling that he had sat in a case involving that company. He explained that if he had remembered the case, he would not have bought the stock. FRANK, *supra* note 12, at 53-54.

The judicial disqualification statute was extensively rewritten in response to the Haynsworth controversy. The new version eliminated the "substantial interest" provision and required recusal whenever a judge owned any financial interest, "however small," in a party to a pending case. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609 (codified at 28 U.S.C. § 455(b)(4), (d)(4) (1988)). Even under the amended disqualification statute, Judge Haynsworth would have been allowed to sit in *Darlington*. FRANK, *supra* note 12, at 131-33.

21. FRANK, *supra* note 12, at 59. Thurmond had been the Dixiecrat presidential candidate in 1948, NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* 32-36 (1969); ALEXANDER P. LAMIS, *THE TWO-PARTY SOUTH* 9 (expanded ed. 1988), and held the floor for more than 24 hours in a last-gasp filibuster against the Civil Rights Act of 1957. See generally NADINE COHODAS, *STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE* 174-92, 294-97 (1993). He had helped to sponsor Haynsworth's appointment to the Fourth Circuit in 1957. JACK W. PELTASON, *FIFTY-EIGHT LONELY MEN* 24 (1961). Thurmond deliberately played an inconspicuous role in the confirmation fight to avoid harming Haynsworth's chances. FRANK, *supra* note 12, at 74.

22. FRANK, *supra* note 12, at 66 (noting the "widespread suspicion that the appointment was the product of a deal between the President and Senator Thurmond"). On Nixon's southern strategy, see STEPHEN E. AMBROSE, *NIXON: THE TRIUMPH OF A POLITICIAN 1962-1972*, at 330-31 (1989). The selection of a Supreme Court justice from that region was part of his political plan. FRANK, *supra* note 12, at 29,

While the public attacks on Haynsworth initially centered on ethical improprieties, the real source of the Haynsworth controversy was his perceived hostility to labor unions and civil rights. The AFL-CIO made the defeat of Haynsworth one of its major priorities.<sup>23</sup> The labor federation cited seven cases in which he had sided with management and been reversed by the Supreme Court; six of the reversals had been unanimous.<sup>24</sup> One of those cases was *Darlington*, in which Haynsworth cast the deciding vote.<sup>25</sup> Another was *NLRB v. S.S. Logan Packing Co.*,<sup>26</sup> in which Haynsworth wrote the lower court opinion. Both cases involved employer misconduct in opposing efforts to organize unions in a region where labor forces had long been weak.

Haynsworth also had written some opinions that were unsympathetic to civil rights. For example, in *Simkins v. Moses H. Cone Memorial Hospital*,<sup>27</sup> he dissented from a ruling which prohibited private hospitals that received federal funds from refusing to serve African-Americans. Haynsworth contended that the receipt of such funds was not sufficient to transform the hospitals' segregation into state action for constitutional purposes.<sup>28</sup> To his opponents, this error was compounded by his grudging acceptance of *Simkins* in a later case in which he pointedly stated that he was "unpersuaded" that his earlier view was "incorrect."<sup>29</sup>

Haynsworth's most troublesome opinion was probably *Griffin v. Board of Supervisors*,<sup>30</sup> which appeared to countenance defiance of a school desegregation order. The local authorities in Prince Edward County, Virginia, closed their public schools to prevent integration. Haynsworth ruled that the federal courts should abstain from deciding the constitutionality of the school closing until the state courts had ruled. This was not just any desegregation case: Prince Edward County was one of the defendants in *Brown v. Board of Education*.<sup>31</sup> Eliminating public schools was part of the state's campaign of

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133. Nixon had made the liberal bent of the Supreme Court an important issue in the 1968 presidential campaign. AMBROSE, *supra*, at 154, 159, 658. He supported desegregation but opposed aggressive efforts to promote integration. *Id.* at 187, 316-17.

23. FRANK, *supra* note 12, at 30, 31.

24. *Id.* at 19-20, 56. Only one justice dissented in the seventh case. *Id.* at 32.

25. See *supra* notes 16-17 and accompanying text.

26. 386 F.2d 562 (4th Cir. 1967), *rev'd sub nom.* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

27. 323 F.2d 959 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964).

28. *Id.* at 971-77 (Haynsworth, J., dissenting).

29. *Eaton v. Grubbs*, 329 F.2d 710, 715 (4th Cir. 1964) (Haynsworth, J., concurring specially). Later cases indicate that Haynsworth was not a zealot on this issue. In *Doe v. Charleston Area Medical Ctr., Inc.*, 529 F.2d 638 (4th Cir. 1975), he refrained from reasserting the state action position he had defended in *Simkins* and which other courts had accepted in analogous circumstances. See *infra* note 37.

30. 322 F.2d 332 (4th Cir. 1963), *rev'd sub nom.* *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

31. 347 U.S. 483 (1954), *rev'g* *Davis v. County Sch.-Bd.*, 103 F. Supp. 337 (E.D. Va. 1952) (three-judge court). For discussion of the events leading to the filing of this lawsuit, see RICHARD KLUGER, *SIMPLE JUSTICE* 451-79 (1976); BOB SMITH, *THEY CLOSED THEIR SCHOOLS* 3-79 (1965).

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Massive Resistance to *Brown*.<sup>32</sup> Local authorities supported the creation of private schools for white students, while African-American children went without formal education of any kind for four years.<sup>33</sup> Civil rights advocates were outraged that Haynsworth had been prepared to subject these children to the tender mercies of segregationist officials and institutions.<sup>34</sup> The Supreme Court unanimously reversed his ruling, and the public schools reopened on a nominally desegregated basis in 1964.<sup>35</sup>

Although many disagreed with Haynsworth's views in these cases, they did not question his professional competence, which was the traditional standard for evaluating judicial nominees. No one at first believed that Haynsworth's labor law jurisprudence could keep him off the Court; even in their most optimistic initial projections, AFL-CIO officials anticipated no more than two dozen votes against confirmation on this ground.<sup>36</sup>

The same was probably true about his approach towards civil rights. There were respectable, though ultimately unpersuasive, legal arguments for his cautious positions.<sup>37</sup> The opposition conceded that Haynsworth was no judicial Massive Resister. Lewis Powell called him "a Southern moderate."<sup>38</sup> The

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32. See JAMES W. ELY, JR., *THE CRISIS OF CONSERVATIVE VIRGINIA* 30-89 (1976); BENJAMIN MUSE, *VIRGINIA'S MASSIVE RESISTANCE* 15-139 (1961).

33. SMITH, *supra* note 31, at 87-235. The federal government, with the cooperation of state officials, arranged for private financing of a system of "free schools" that operated during the fifth year of the public school closing. *Id.* at 236-59.

34. FRANK, *supra* note 12, at 20, 58-59.

35. *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964). For contrasting accounts of the situation in Prince Edward County since the public schools reopened, compare RAYMOND WOLTERS, *THE BURDEN OF BROWN* 116-25 (1984) (emphasizing continuing racial conflict) with Jonathan L. Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 WM. & MARY L. REV. 769, 774-75 (1993) (noting the return of most white children to public schools and the desegregation of a private academy established during Massive Resistance).

36. FRANK, *supra* note 12, at 30. Haynsworth was not reflexively anti-labor. He had sided with unions in 37 cases. *Id.* at 56.

37. The precise question in *Simkins* was mooted by the passage of Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C. §§ 2000d-2000d-7 (1988)), which prohibited racial discrimination in federally funded programs. The more general question, whether receipt of public funding makes a nominally private beneficiary a state actor for constitutional purposes, has continued to divide the courts. See, e.g., *Taylor v. St. Vincent's Hosp.*, 424 U.S. 948, 949 (1976) (White, J., dissenting from denial of certiorari) (collecting cases); *Grieco v. Orange Memorial Hosp. Corp.*, 423 U.S. 1000, 1004-05 (1975) (White, J., dissenting from denial of certiorari) (collecting additional cases). The Fourth Circuit has adhered to *Simkins* in the broader context. *Doe v. Charleston Area Medical Ctr., Inc.*, 529 F.2d 638, 642 (4th Cir. 1975). Judge Haynsworth was a member of the panel in *Doe* and subscribed to the opinion without mentioning his earlier reservations.

The argument for abstention in *Griffin* also was not frivolous. See, e.g., *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941). The Virginia Supreme Court had effectively ended Massive Resistance at the state level by invalidating the legislative centerpiece of the die-hard segregationists. *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959). At the same time, it seemed unlikely that the state courts would act promptly in the Prince Edward case. *Griffin v. Board of Supervisors*, 322 F.2d 332, 345 n.1 (4th Cir. 1963) (Bell, J., dissenting) (emphasizing state supreme court's refusal to expedite proceedings), *rev'd sub nom.* *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

38. FRANK, *supra* note 12, at 92. Haynsworth had sided with civil rights claimants in at least a dozen lower-profile cases, but they carried less weight with his critics than did *Simkins* and *Griffin*. *Id.* at 20, 59.



label was intended as a compliment, but it had distinctly negative connotations for civil rights advocates who regarded Haynsworth as too willing to tolerate delay and evasion in desegregation cases.<sup>39</sup> Haynsworth was, in short, too much like John Parker, his mentor and predecessor as Chief Judge of the Fourth Circuit, whose cramped reading of *Brown* had contributed to the snail's pace of school desegregation during the decade after that decision.<sup>40</sup>

Nevertheless, the Senate refused to confirm Haynsworth, the first rejection of a Supreme Court nominee since 1930. Ironically, the defeated nominee then was Parker, whose appointment drew the ire of a similar coalition of labor and civil rights advocates.<sup>41</sup> The real problem for Haynsworth was that mere professional competence was no longer sufficient for confirmation.

President Nixon responded by nominating Judge Harrold Carswell of the U.S. Court of Appeals for the Fifth Circuit, a move that has been characterized as "a bad legal joke."<sup>42</sup> There were no diversionary arguments about ethics. The nominee was widely regarded as incompetent.<sup>43</sup> Several of his

39. *Id.* at 59. Dr. Martin Luther King, Jr., in a statement written four months before Haynsworth issued his abstention decision in *Griffin*, explained why moderation on civil rights was inappropriate:

[O]ver the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Council or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for "a more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will.

MARTIN LUTHER KING, JR., *Letter From Birmingham Jail*, in *WHY WE CAN'T WAIT* 76, 84-85 (1964) (written April 16, 1963); see also Calvin Trillin, *Reflections: Remembrance of Moderates Past*, *NEW YORKER*, Mar. 21, 1977, at 85 (discussing various conceptions of "moderation" in the decade after *Brown* and noting that Attorney General Griffin Bell, who had written Georgia's anti-integration laws while serving as counsel to the Governor of Georgia, was characterized as a moderate at his confirmation hearing two decades later because his proposals to forestall desegregation were less extreme than those in Virginia).

40. On remand from the Supreme Court, Parker had written: "The Constitution . . . does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation." *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (three-judge court). Many opponents of *Brown* seized upon this language to justify their position. PELTASON, *supra* note 21, at 22-23. On the personal relationship between Haynsworth and Parker, see FRANK, *supra* note 12, at 18, 128.

41. See *supra* note 2. See generally KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN J. PARKER (1990); HARRIS, *supra* note 2, at 127-32; KLUGER, *supra* note 31, at 141-44; Joel B. Grossman & Stephen Wasby, *Haynsworth and Parker: History Does Live Again*, 23 S.C. L. REV. 345 (1971).

42. FRANK, *supra* note 12, at 135. Astonishingly, Carswell had been strongly recommended by former Attorney General William Rogers, who was then serving as Secretary of State, and Chief Justice Burger. *Id.* at 100.

43. *Id.* at 135 (characterizing Carswell as "demonstrably incompetent"); *id.* at 103 ("one of the poorest" federal judges in the South). In addition to an unusually high reversal rate, *id.* at 111; RICHARD HARRIS, *DECISION* 162-63 (1971), Carswell had a notably retrograde civil rights record. Before going on the bench, he had helped to draft the papers that converted a public golf club into a private one in order to allow its continued operation on a segregated basis. Carswell denied any role in that affair during his confirmation hearing, but the Senate Judiciary Committee had documentary evidence of his involvement

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Fifth Circuit colleagues refused to endorse him,<sup>44</sup> and one of Carswell's staunchest senatorial supporters conceded his mediocrity in a statement that effectively assured his defeat.<sup>45</sup> Not surprisingly, the Senate rejected Carswell, but by a narrower margin than it had defeated Haynsworth.<sup>46</sup>

At that point, President Nixon abandoned his quest to appoint a Southerner. Instead, he chose Judge Harry Blackmun of the Eighth Circuit, who had committed the same alleged ethical breach that caused Haynsworth so much difficulty. If anything, Blackmun's conduct was worse: he had sat in four cases in which his stock holdings arguably created a conflict of interest.<sup>47</sup> Nevertheless, Blackmun was unanimously confirmed.<sup>48</sup>

The Haynsworth and Carswell affairs foreshadowed recent confirmation fights. Haynsworth and Carswell, like Bork and Thomas, were chosen by a chief executive who sought to change the direction of the Supreme Court while facing a Senate controlled by the opposing political party during a period of deep interbranch distrust.<sup>49</sup> Perhaps for that reason, the debate over these earlier nominees marked an important turning point by legitimizing explicitly

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and he had been shown that evidence the night before he testified. FRANK, *supra* note 12, at 105-06. This was not the only evidence of Carswell's racial attitudes. As a candidate for the Georgia legislature, Carswell also had strongly advocated white supremacy. *Id.* at 102-03. As a district judge, he had frequently abused civil rights lawyers and refused to follow binding precedent. *Id.* at 104, 107-09; HARRIS, *supra*, at 38-39, 50-54.

44. HARRIS, *supra* note 43, at 139; *see also id.* at 44-45, 110, 139-40; FRANK, *supra* note 12, at 106-07, 112.

45. Senator Roman Hruska defended Carswell against claims that he lacked professional distinction by explaining that "there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there." FRANK, *supra* note 12, at 112; HARRIS, *supra* note 43, at 110. The remark was an "admittedly feeble—and ill-advised—attempt at a quip," Roman L. Hruska, Letter to the Editor, WALL ST. J., Sept. 12, 1988, at 15, but the humor was lost in the heat of debate. Whatever Hruska's intent, at least one other senator cited Carswell's modest intellect as a valid basis for confirmation. ABRAHAM, *supra* note 1, at 17.

46. The vote against Carswell was 45-51; Haynsworth lost by 45-55. FRANK, *supra* note 12, at 88, 116. The closeness of the Carswell vote suggests that he might have been confirmed had President Nixon pursued a sounder strategy with undecided senators. For discussion of some of Nixon's dubious tactics on Carswell's behalf, *see* JOHN MASSARO, SUPREME POLITICAL 116-33 (1990).

47. FRANK, *supra* note 12, at 120. Blackmun was a member of the panel in two cases involving a party in which he owned stock. *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964); *Hanson v. Ford Motor Co.*, 278 F.2d 586 (8th Cir. 1960). He owned shares in a party's parent corporation in a third case. *Mahoney v. Northwestern Bell Tel. Co.*, 377 F.2d 549 (8th Cir. 1967). In the fourth, he participated in a vote denying rehearing en banc after purchasing stock in one of the parties. *Minnesota Mining & Mfg. Co. v. Superior Insulating Tape Co.*, 284 F.2d 478 (8th Cir. 1960). For more detailed discussion of these matters, *see* *Nomination of Harry A. Blackmun of Minnesota to be Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 15-16 (1970) (letter from Deputy Attorney General Richard G. Kleindienst to Sen. James O. Eastland); *id.* at 45-48 (testimony of Harry A. Blackmun); S. EXEC. REP. No. 18, 91st Cong., 2d Sess. 2 (1970).

48. FRANK, *supra* note 12, at 124.

49. *See* Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1170 (1988). Bork attributed his defeat in part to the Republicans' loss of control of the Senate the year before his nomination. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 345 (1990).

Divided control of the White House and Senate is not a necessary condition for confirmation conflicts, however. The Democrats controlled both branches when Fortas's nomination to succeed Warren as chief justice failed. DAVID R. MAYHEW, *DIVIDED WE GOVERN* 197 n.60 (1991).

ideological considerations in the confirmation process. By the time of the Bork and Thomas nominations, issues such as ethics and character had almost completely disappeared in favor of ideological arguments.<sup>50</sup> Many of those arguments began from the premise that defeating a nominee would have a substantial impact upon the development of the law. Perhaps for that reason, the tone of those debates turned increasingly nasty.

## II. THE JURISPRUDENTIAL IMPACT OF IDEOLOGICAL BATTLES

As was noted in the introduction, the ideological model might be viewed as promoting deliberative politics by focusing attention upon substantive constitutional issues of greatest concern to the people. This view assumes that defeating a nominee on ideological grounds makes a difference, either by leading directly to the appointment of a justice whom opponents regard as ideologically more palatable, or by furthering other goals, such as public education or political mobilization, that promote the critics' ideals and visions. This Section considers whether the defeat of Haynsworth and Bork has really affected the development of the law. The next considers how the recent ideological campaigns might have served other functions.

Two preliminary observations are important. First, determining what might have been is a notoriously difficult undertaking.<sup>51</sup> What follows is hardly a systematic analysis but rather a selective comparison between the actual and the counterfactual. Second, the appointment of a justice whom opponents regard as more palatable need not necessarily lead to different outcomes in particular cases. The Supreme Court changes one member at a time. Each justice influences the Court's decisions, but the impact of those individual contributions is affected by many, often fortuitous, factors. For purposes of assessing judicial impact, therefore, ideological opposition can be deemed successful if it results in the appointment of an alternative candidate who moves the Court's center of gravity in the desired direction, even if the appointment does not immediately affect case results.

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50. At the beginning of the Thomas confirmation process, before the more notorious charges of sexual harassment arose, there was a minor ethical flap. Critics claimed that Thomas should have recused himself from one case in which he wrote the opinion, *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990), because his mentor and chief political sponsor, Senator John Danforth, owned several million dollars' worth of stock in one of the parties. See Monroe Freedman, *Thomas' Ethics and the Court: Nominee 'Unfit to Sit' For Failing to Recuse in Ralston Purina Case*, *LEGAL TIMES*, Aug. 26, 1991, at 20. This issue played almost no role in the confirmation debate.

51. See generally Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 *GEO. WASH. L. REV.* 339, 372-92 (1992).

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### A. After Haynsworth

Defeating Haynsworth was only half the battle for his opponents. There remained the question of whom President Nixon would nominate in his stead. The selection of the inept and malevolent Carswell, who came closer to confirmation than did Haynsworth, illustrates the risks inherent in opposing a prospective justice on ideological grounds.

Even Blackmun, who ultimately was approved, held a less-than-ideal civil rights record on the Eighth Circuit. Most notably, the Supreme Court reversed his decision in *Jones v. Alfred H. Mayer Co.*,<sup>52</sup> an important housing discrimination case. Blackmun held that the Reconstruction statute on which the claim rested did not apply to purely private behavior. This ruling, had it been allowed to stand, might have had a broader impact than any of Haynsworth's controversial decisions. While Haynsworth's opinion in *Griffin* had enormous symbolic significance, it was clear at the time that Prince Edward County represented the last gasp of Massive Resistance, rather than a threat to the future of public education in the former Confederacy.<sup>53</sup> Blackmun's opinion in *Jones v. Mayer*, by contrast, would have substantially limited legal protection for some victims of housing discrimination.<sup>54</sup>

Nor was this the only time that Blackmun had rejected an important civil rights claim.<sup>55</sup> He also wrote an opinion upholding a death sentence against an Arkansas African-American man who had been convicted of raping a white woman.<sup>56</sup> In symbolic terms, this case should have resonated at least as strongly as Haynsworth's ruling in *Griffin*, because it implicated the primordial racist canard about the African-American male's supposedly uncontrollable lust

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52. 379 F.2d 33 (8th Cir. 1967), *rev'd*, 392 U.S. 409 (1968). See FRANK, *supra* note 12, at 121.

53. BARTLEY, *supra* note 21, at 320-45; SMITH, *supra* note 31, at 261-62.

54. With the benefit of hindsight, we know that Blackmun's ruling in *Jones v. Mayer* also would have left many victims of other forms of racial discrimination without recourse. Several later cases held that a related Reconstruction statute prohibited private as well as governmental racial discrimination in the making and enforcement of contracts. The most notable of these was *Runyon v. McCrary*, 427 U.S. 160 (1976). The majority opinion relied heavily upon *Jones v. Mayer* and almost certainly would have come out differently had Blackmun's ruling prevailed. *Id.* at 168-75, 179. Two justices made clear that they would have reached a different result if *Jones v. Mayer* had been decided the other way. *Id.* at 186 (Powell, J., concurring); *id.* at 189-90 (Stevens, J., concurring). The lower court decision in *Runyon*, which the Supreme Court affirmed, had been written by Haynsworth. See *infra* note 85 and accompanying text.

55. *Jones v. Mayer* might have been overlooked because Congress passed another fair housing law while that case was pending in the Supreme Court. Civil Rights Act of 1968, tit. VIII, Pub. L. No. 90-284, 82 Stat. 73, 81-89 (codified as amended at 42 U.S.C. §§ 3601-3619 (1988)). Another possible reason for the lack of controversy over this decision was that Blackmun virtually apologized for reaching his conclusion, which he saw as dictated by unfavorable but still binding precedents, and almost invited the Supreme Court to reverse. *Jones v. Alfred H. Mayer Co.*, 379 F.2d at 44-46.

56. *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *vacated and remanded*, 398 U.S. 262 (1970). The defendant advanced a statistically based claim of racial disparities in the imposition of capital punishment. 398 F.2d at 141-44. Two decades later, Blackmun explained some of the methodological flaws that prompted his *Maxwell* ruling in a dissent that would have accepted a more sophisticated statistical analysis of such disparities. *McCleskey v. Kemp*, 481 U.S. 279, 354 n.7 (1987) (Blackmun, J., dissenting).

for white females. Yet this decision also seems to have gone unremarked, perhaps because the Supreme Court remanded the case for further proceedings on an entirely different issue.<sup>57</sup> Whatever the explanation, no one testified against Blackmun, and he was confirmed unanimously.<sup>58</sup>

To complete the picture, we also need to consider the selection of Lewis Powell, who labored mightily on Haynsworth's behalf.<sup>59</sup> Powell probably never would have been nominated had Haynsworth been confirmed, whereas Blackmun might well have been appointed regardless of Haynsworth's fate. The Nixon Administration seriously considered Blackmun for the chief justiceship that ultimately went to his lifelong friend Warren Burger, who in turn strongly recommended him to Attorney General Mitchell in the wake of the Carswell fiasco.<sup>60</sup> It is therefore likely that Blackmun would have been chosen for an early vacancy, perhaps the one that went to Powell, if Nixon already had "got[ten] his southern appointment."<sup>61</sup> If this hypothesis is accurate, the relevant comparison would not be between Haynsworth and Blackmun, but rather between Haynsworth and Powell.

In many respects, these two men were quite similar. Born in the same region about five years apart, both were leading members of the bar and pillars of their community, Haynsworth in South Carolina and Powell in Virginia. Politically, both were nominal Democrats who had supported Eisenhower.<sup>62</sup> From an ex ante perspective, however, Powell might have appeared a more threatening nominee for civil rights forces. Unlike Haynsworth, he had no judicial record, but the available evidence was hardly reassuring. While Haynsworth was "not very active" in politics,<sup>63</sup> Powell was heavily involved in the organization of Dixiecrat Senator Harry Byrd, the architect of Massive Resistance and the dominant figure in Virginia politics for almost half a century.<sup>64</sup> Moreover, Powell's law firm (although not Powell himself) represented the Prince Edward County authorities during most of the school desegregation litigation, although the firm balked at crossing the line between evasion and defiance.<sup>65</sup> Finally, as chairman of the Richmond school board he promoted

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57. The Court *sua sponte* vacated and remanded for consideration of the possibility that persons who had conscientious scruples against capital punishment had been excluded from the jury in violation of the subsequently announced rule in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), an issue that had not been raised in the lower courts. *Maxwell*, 398 U.S. at 266-67.

58. FRANK, *supra* note 12, at 122, 124.

59. *See id.* at 74, 76-77, 81, 91-92.

60. *Id.* at 117-18.

61. *Id.* at 135; *see supra* note 22 and accompanying text.

62. On Haynsworth, *see* FRANK, *supra* note 12, at 18. On Powell, *see* ELY, *supra* note 32, at 16.

63. FRANK, *supra* note 12, at 18.

64. ELY, *supra* note 32, at 16. Despite his support of Senator Byrd, Powell viewed Massive Resistance as "legal nonsense," although he never said so publicly. *Id.* at 41.

65. The firm withdrew from the proceedings when county officials closed the public schools. John W. Riely, Brown v. The Board: *A Very Personal Retrospective Glance*, VA. LAW., Feb. 1989, at 17, 18.

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policies designed to minimize desegregation.<sup>66</sup> Yet Powell faced only token opposition and was confirmed almost unanimously.<sup>67</sup>

In short, when nominated, neither Blackmun nor Powell appeared to differ significantly in ideology from Haynsworth. After confirmation, both men took a generally conservative line. On civil rights, for example, they joined the five-member majority in *Milliken v. Bradley*<sup>68</sup> that made cross-district or metropolitan relief in school desegregation cases much more difficult to justify. On other occasions Powell called for remedial limits in such cases.<sup>69</sup> Powell also wrote, and Blackmun joined, the five-to-four decision in *San Antonio Independent School District v. Rodriguez*,<sup>70</sup> which rejected a claim that the Constitution afforded a fundamental right to education; this decision was widely viewed as discouraging many other poverty-related constitutional claims. In addition, Blackmun subscribed to two opinions written by Powell for the Court that made exclusionary zoning claims much more difficult for plaintiffs to win.<sup>71</sup>

Although Blackmun wrote and Powell joined the opinion in *Roe v. Wade*,<sup>72</sup> their overall approach to sex discrimination was quite cautious.<sup>73</sup> Perhaps most notably, they refused to treat gender as a suspect classification.<sup>74</sup> The two also formed part of the majority in a five-to-four ruling that an employer's exclusion of disability benefits for pregnancy did not violate

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66. ELY, *supra* note 32, at 134-35. Powell sought to preserve public schools in Richmond, putting him at odds with the die-hard resisters.

67. The vote in his favor was 89-1. Even the Virginia NAACP endorsed his confirmation. ABRAHAM, *supra* note 1, at 22, 313.

68. 418 U.S. 717 (1974).

69. The fullest exposition of his views came in *Keyes v. School Dist. No. 1*, 413 U.S. 189, 236-53 (1973) (Powell, J., concurring in part and dissenting in part); *see also* *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 991-95 (1976) (Powell, J., concurring).

70. 411 U.S. 1 (1973).

71. *Village of Arlington Hts. v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (requiring showing of discriminatory intent to establish constitutional violation); *Warth v. Seldin*, 422 U.S. 490 (1975) (5-4 decision) (establishing restrictive standing rules). The *Arlington Heights* plaintiffs ultimately prevailed on their statutory claim. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Hts.*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

72. 410 U.S. 113 (1973). *Roe* was a 7-2 decision, and Blackmun's conservative friend Burger was part of the majority. At the time, abortion was hardly the ideological issue that it later became. GERALD N. ROSENBERG, *THE HOLLOW HOPE* 183-84, 258-64 (1991).

While Blackmun remains the Court's strongest supporter of abortion rights, Powell's position was not as consistent as many prochoice advocates might have preferred. For example, he rejected the Reagan Administration's plea to overrule *Roe*. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419-20 & n.1 (1983). At the same time, he consistently supported restrictions on public funding of abortions. *See Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977) (*per curiam*); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977). Powell wrote the majority opinions in *Maher* and *Beal*.

73. The characterization in the text is not intended to slight the Court's substantial advances in promoting gender equality during this period. *See* Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 132 (Vincent Blasi ed., 1983) [hereinafter *THE BURGER COURT*].

74. *Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (Powell, J., joined by Burger, C.J., and Blackmun, J., concurring in the judgment).

Title VII,<sup>75</sup> and both strongly dissented from a decision that forbade states to operate all-female nursing schools.<sup>76</sup> In the latter case, Blackmun complained about the "too easy" tendency to apply "rigid rules in this area of claimed sex discrimination" and warned against "relegat[ing] ourselves to needless conformity."<sup>77</sup>

Their conservatism extended beyond civil rights to issues of federalism. Blackmun and Powell were part of the majority in *National League of Cities v. Usery*,<sup>78</sup> which limited federal regulation of state governmental activities. Powell consistently supported this approach to the Tenth Amendment, often in dissent.<sup>79</sup> In particular, he wrote the principal dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>80</sup> which overruled *National League* in an opinion written by Blackmun.<sup>81</sup>

To be sure, these justices were not ideologues.<sup>82</sup> Of course, neither was

75. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). Ironically, Haynsworth had been a member of the court of appeals majority whose decision was reversed by the Supreme Court. See *infra* note 89 and accompanying text. The court of appeals was effectively vindicated by the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

76. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 733-35 (1982) (Blackmun, J., dissenting); *id.* at 735-45 (Powell, J., dissenting).

77. *Id.* at 734, 735 (Blackmun, J., dissenting).

78. 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

79. See, e.g., *EEOC v. Wyoming*, 460 U.S. 221, 265-75 (1983) (Powell, J., dissenting); *id.* at 251-65 (Burger, C.J., joined by Powell, Rehnquist, and O'Connor, JJ., dissenting); *FERC v. Mississippi*, 456 U.S. 742, 771-75 (1982) (Powell, J., concurring in part and dissenting in part).

80. 469 U.S. 528, 557-79 (1985) (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ., dissenting).

81. It is difficult to assess their approach to the issues that prompted organized labor to oppose Haynsworth because the Court's docket contained many fewer cases involving traditional union-management conflicts after 1970 than it had earlier. See Theodore J. St. Antoine, *Individual Rights in the Work Place: The Burger Court and Labor Law*, in *THE BURGER COURT*, *supra* note 73, at 157. Blackmun and Powell were not especially sympathetic to union positions in those traditional cases, however. See, e.g., *Hudgens v. NLRB*, 424 U.S. 507 (1976) (5-4 decision with Blackmun and Powell in majority and Powell filing brief concurrence) (holding that employees have no constitutional right to engage in peaceful primary picketing of retail store in shopping center); *Connell Constr. Co. v. Plumbers Local Union No. 100*, 421 U.S. 616 (1975) (5-4 decision, written by Powell and joined by Blackmun) (narrowly construing labor exception to antitrust laws). On the other hand, they sometimes supported union positions, occasionally taking opposite positions in the same case. See, e.g., *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397 (1976) (5-4 decision with Blackmun in majority and Powell in dissent) (barring injunction against sympathy strike called in violation of no-strike clause in union contract); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972) (5-4 decision with Blackmun in majority and Powell in dissent) (limiting successor employer's obligations under contract negotiated by predecessor).

Some of the Court's later cases involved conflicts between labor and civil rights interests. The most notable of these concerned seniority. Blackmun and Powell were in the majority when the Court ruled that bona fide pre-1964 seniority plans do not violate Title VII even if they perpetuate the effects of past discrimination. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 348-55 (1977). The Court, with Powell in the majority and Blackmun in dissent, later extended that holding to post-1964 seniority systems. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). The latter ruling reversed an en banc decision of the Fourth Circuit to which Haynsworth subscribed. *Patterson v. American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980) (en banc).

82. Although Blackmun is now regarded as one of the Court's last liberals, that is a comparatively recent development. During his first few terms, "he was largely an echo of Chief Justice Burger; references were commonly made to the 'Minnesota Twins.'" FRANK, *supra* note 12, at 131. And while Powell was

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Haynsworth. We cannot know what Haynsworth would have done had he been confirmed, but his performance on the Fourth Circuit after his rejection provides a very tentative basis for speculation.<sup>83</sup> His civil rights record remained rather conservative, but not completely so. For example, he ruled that federal antidiscrimination laws did not prohibit a neighborhood swimming pool association from excluding African-American members and guests, a decision that the Supreme Court unanimously reversed in an opinion written by Blackmun.<sup>84</sup> On the other hand, he wrote an important opinion holding that a Reconstruction statute forbidding racial discrimination in the making and enforcement of contracts applied to private schools which refused to admit nonwhite students, a decision that was affirmed by the Supreme Court.<sup>85</sup> A few years later, he also subscribed to opinions that were favorable to a state university's affirmative action program.<sup>86</sup> His position in this regard was congruent with Justice Powell's.<sup>87</sup>

Haynsworth's views on gender-related questions were similarly mixed. For example, he rejected a constitutional challenge to a school district's rule requiring pregnant teachers to stop work regardless of their medical condition, a decision that was subsequently reversed by the Supreme Court.<sup>88</sup> Perhaps

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hardly a liberal, his retirement was viewed with dismay by many who appreciated his cautious approach to contentious questions. See ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 17-20 (1989); Gerald Gunther, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 409 (1987). In other words, it is probably more accurate to characterize Blackmun and Powell as centrists who served as swing votes on many issues. Vincent Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT*, *supra* note 73, at 198, 210-11.

83. At least two cautionary points should be mentioned here. First, a circuit judge is still a lower court judge who is bound by precedent and subject to reversal. Cf. J. Harvie Wilkinson III, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 417, 417 (1987) (reminding retired Justice Powell, who had asked to sit by designation on the Fourth Circuit, that "we get reversed"). Second, it may be that Haynsworth, like his mentor John Parker, "was a better judge after [his rejection for a seat on the Supreme Court] than before it." Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1155 (1988) (quoting Justice Black).

84. *Tillman v. Wheaton-Haven Recreation Ass'n*, 451 F.2d 1211 (4th Cir. 1971), *rev'd*, 410 U.S. 431 (1973).

85. *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975) (en banc), *aff'd*, 427 U.S. 160 (1976). Haynsworth did not rule for the plaintiffs in all particulars. He rejected their bid for attorney's fees because there was no express authority for such an award. *McCrary*, 515 F.2d at 1089-91. The Supreme Court affirmed that ruling.

86. This case involved the constitutionality of university regulations requiring a form of affirmative action relating to the racial and gender composition of the student government and honor court. The tangled history of the case is summarized in the various opinions in *Uzzell v. Friday*, 625 F.2d 1117 (4th Cir.) (en banc), *cert. denied*, 446 U.S. 951 (1980). For present purposes, the relevant point is that Haynsworth consistently subscribed to opinions that would have allowed the university to justify the regulations, which ultimately were invalidated by the district court. See *Uzzell v. Friday*, 592 F. Supp. 1502 (M.D.N.C. 1984).

87. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

88. *Cohen v. Chesterfield County Sch. Bd.*, 474 F.2d 395 (4th Cir. 1973) (en banc), *rev'd sub nom. Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). In a later case, Haynsworth voted to strike down a similar maternity leave policy for public school teachers but dissented from an order reinstating the plaintiffs to their positions. *Paxman v. Campbell*, 612 F.2d 848, 861-64 (4th Cir. 1980) (en banc) (Haynsworth, C.J., concurring and dissenting).



on the basis of that reversal, Haynsworth soon afterward joined an opinion finding the exclusion of pregnancy from an employer's disability benefits to be a form of illegal sex discrimination, but that decision also was overturned by the Supreme Court in a decision supported by both Powell and Blackmun.<sup>89</sup> Haynsworth's position on abortion is not clear because he never wrote an opinion on the subject.<sup>90</sup> He did, however, subscribe to decisions that upheld abortion rights.<sup>91</sup>

This unsystematic overview of postnomination behavior bolsters the sense, suggested by his prenomination record, that Haynsworth probably would have compiled a moderately conservative voting record similar to that of Blackmun and Powell, particularly during their early years on the Court. Of course, there might have been differences on particular issues, but it is unlikely that Haynsworth would have aligned himself at the far end of the judicial spectrum. What would have happened later is uncertain. Blackmun's subsequent evolution toward liberalism could not have been confidently predicted during the confirmation process. Such an evolution seems implausible for Haynsworth, but perhaps it is less incongruous to suppose that he might have occupied the role of crucial swing vote that made Powell so influential.

## B. After Bork

If the Haynsworth affair began the transition from the competence model to the ideological model, the Bork controversy marked its culmination. Perhaps the most striking feature of the Bork debate was that the opposition focused almost exclusively upon the nominee's judicial philosophy. Bork's critics ran a sophisticated—and occasionally fallacious—publicity campaign against

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89. *Gilbert v. General Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976). See *supra* note 75 and accompanying text.

90. Similarly, Haynsworth never wrote on the Tenth Amendment. He did, however, subscribe to two panel opinions that rejected *National League of Cities* claims. *Vehicle Equip. Safety Comm'n v. National Highway Traffic Safety Admin.*, 611 F.2d 53, 54-55 (4th Cir. 1979) (upholding federal regulation requiring automobile manufacturers to attach a unique vehicle identification number to each passenger car); *Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977) (upholding application of Equal Pay Act to state and local governments).

91. *Northern Va. Women's Medical Ctr. v. Balch*, 617 F.2d 1045 (4th Cir. 1980); *Doe v. Charleston Area Medical Ctr., Inc.*, 529 F.2d 638 (4th Cir. 1975). Although Haynsworth never wrote an opinion on abortion, he apparently took a restrictive approach to sexual privacy. He rejected a married couple's constitutional challenge to their sodomy conviction on the ground that they had waived their right to privacy by allowing a third party to observe their activities. *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976) (en banc). A decade later, the Supreme Court, with Justice Powell writing a concurring opinion, upheld the constitutionality of a state sodomy law as applied to private, consensual homosexual activity. *Bowers v. Hardwick*, 478 U.S. 186, 197-98 (1986) (Powell, J., concurring). Powell later admitted to second thoughts about his vote in that case. Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3; Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3.

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him.<sup>92</sup> Still, with the possibly misleading exception of abortion, Bork's defeat does not appear to have had a substantial effect on the evolution of legal doctrine. In some respects, moreover, current law may be even less attractive to those who opposed Bork than it would have been had he been confirmed.

Judge Bork was rejected by the Senate because his views on important constitutional issues were regarded as extreme.<sup>93</sup> President Reagan responded to Bork's defeat in much the same way that President Nixon reacted to Haynsworth's—by nominating someone who might have been even less palatable to the original nominee's opponents. Reagan's second choice was Judge Douglas H. Ginsburg, whom he had recently appointed to the District of Columbia Circuit.<sup>94</sup> Although no one questioned his competence, Ginsburg had served in the Administration and enjoyed the vocal support of the officials who had promoted Bork; he was also twenty years Bork's junior and therefore could be expected to have a longer tenure than Bork.<sup>95</sup> Dealing with Ginsburg turned out to be considerably easier for the opposition than counteracting Carswell had been. Ginsburg's candidacy lasted only a few days; he withdrew after revelation of his use of marijuana while a member of the Harvard law faculty.<sup>96</sup> Ultimately, Judge Anthony Kennedy of the Ninth Circuit, a less strident conservative, was confirmed with the endorsement of some of Bork's most strenuous opponents.<sup>97</sup>

Justice Kennedy's positions have generally been entirely congruent with those espoused by Bork, and, from the standpoint of Bork's opponents, in the field of civil rights they have been at least marginally worse. Kennedy was part of the majority in a series of cases decided during the Spring of 1989 that made civil rights claims much more difficult to prove and affirmative action programs much more difficult to justify. He wrote the opinion in *Patterson v. McLean Credit Union*<sup>98</sup> which narrowly construed a Reconstruction statute prohibiting racial discrimination in the making and enforcement of contracts,

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92. See BRONNER, *supra* note 82, at 157-60, 177-80; Suzanne Garment, *The War Against Robert H. Bork*, COMMENTARY, Jan. 1988, at 17, 19-21, 22-23, 25.

93. Not all of the Senate opposition was ideological. Some was based upon political calculation. BRONNER, *supra* note 82, at 285-86, 289-92. Although some senators advanced dubious reasons for their negative votes, *see id.* at 293-95, those grounds had a distinctly secondary place in the confirmation debate. This was a significant departure from the structure of the arguments about Haynsworth.

94. Douglas Ginsburg is not related to the Supreme Court's newest member, Justice Ruth Bader Ginsburg, although both received their undergraduate education at Cornell University and served together on the D.C. Circuit for seven years. Lest there be any confusion, the following discussion refers to *Douglas* Ginsburg.

95. BRONNER, *supra* note 82, at 328-31. One member of the American Bar Association's Standing Committee on the Federal Judiciary, which screens prospective appointments, remarked: "It looks to me like we may be going from a Bork to a Borklet." Mary Thornton, *ABA Evaluation of Ginsburg Is Not Expected Before Dec. 1*, WASH. POST, Oct. 31, 1987, at A4.

96. BRONNER, *supra* note 82, at 332-35.

97. Some concern was expressed that Judge Kennedy had a narrow and generally unsympathetic approach to civil rights, but the confirmation process proceeded without a hitch. *Id.* at 337-38.

98. 491 U.S. 164 (1989).

thereby precluding claims for on-the-job harassment. Perhaps the only saving grace was the majority's refusal to overrule *Runyon v. McCrary*,<sup>99</sup> an important precedent which held that the statute proscribed private as well as governmental discrimination, after having asked the parties to file supplemental briefs on that question.<sup>100</sup> Whether Bork would have interpreted the statute as narrowly as Kennedy did is uncertain, but he is unlikely to have supported the attempt to repudiate *Runyon* because, as Solicitor General, Bork had filed an amicus brief urging the Court to rule as it did in that case. In *City of Richmond v. J.A. Croson Co.*,<sup>101</sup> Kennedy stopped just short of endorsing a rule that would invalidate all racial preferences except those accruing to actual victims of discrimination. Instead, he supported a standard that would subject all such preferences to "the most rigorous scrutiny by the courts."<sup>102</sup> The following term, he strongly dissented from a decision upholding minority preferences in certain Federal Communications Commission proceedings, comparing affirmative action programs to "the 'race-conscious measures'" that had been upheld in *Plessy v. Ferguson*,<sup>103</sup> and quoting one of the most obnoxious passages in the *Plessy* opinion in support of his view that no racial preference can be benign.<sup>104</sup> Most recently, he wrote the majority opinion holding that a significant reduction in the power of individual county commissioners immediately after the election of the first African-American to win the office in decades did not violate the Voting Rights Act.<sup>105</sup>

On abortion, which occupied a central place in the Bork debate and in his own confirmation hearing, Kennedy also has been generally hostile to the right to choose. He joined the majority opinion in *Webster v. Reproductive Health Services*,<sup>106</sup> which significantly expanded the range of permissible abortion restrictions. The following year, he wrote the opinion in *Ohio v. Akron Center for Reproductive Health*,<sup>107</sup> which upheld a one-parent notice requirement for minors seeking abortions. In a case decided the same day, he expressed support for a two-parent notice requirement even in the absence of a judicial bypass procedure; a majority of the Court found the presence of this alternative essential to the validity of a two-parent notice requirement.<sup>108</sup> Kennedy also

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99. 427 U.S. 160 (1976).

100. *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988) (per curiam) (order requesting briefs on whether to overrule *Runyon*).

101. 488 U.S. 469 (1989).

102. *Id.* at 519 (Kennedy, J., concurring); see also *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

103. 163 U.S. 537 (1896).

104. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 631, 634-36 (1990) (Kennedy, J., dissenting).

105. *Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992).

106. 492 U.S. 490 (1989).

107. 497 U.S. 502 (1990).

108. *Hodgson v. Minnesota*, 497 U.S. 417, 480-501 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part).

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was part of the majority in *Rust v. Sullivan*,<sup>109</sup> which upheld the so-called “gag rule” prohibiting recipients of federal family planning funds from discussing abortion with patients.

According to prochoice activists, however, the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>110</sup> vindicated their opposition to Bork’s appointment.<sup>111</sup> Although Kennedy coauthored the plurality opinion that declined to overrule *Roe v. Wade*,<sup>112</sup> his position hardly represents an unequivocal victory for prochoice forces.<sup>113</sup> The plurality opinion downgraded abortion from a fundamental right<sup>114</sup> to a liberty interest.<sup>115</sup> Moreover, the opinion rejected the trimester framework of *Roe* and adopted a deferential “undue burden” standard for assessing abortion regulations.<sup>116</sup> All but one of the regulations at issue were upheld under that standard, a conclusion that required the overruling of two recent precedents.<sup>117</sup>

Almost all of these cases were five-to-four decisions, and Kennedy consistently took the conservative side—in some, the most conservative position. Except for the latest abortion ruling, perhaps the only significant subject on which the Court took a more liberal position than it would have had Bork been confirmed was flag burning. Two recent five-to-four decisions have found this activity to be a constitutionally protected form of political protest. Kennedy wrote an anguished concurrence explaining his vote to uphold the First Amendment claim in *Texas v. Johnson*<sup>118</sup> and joined the majority opinion in *United*

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109. 111 S. Ct. 1759 (1991).

110. 112 S. Ct. 2791 (1992).

111. For example, the head of the Women’s Legal Defense Fund explained that the ruling was “a clear indication of how right we were to oppose Bork.” Al Kamen, *Center-Right Coalition Asserts Itself*, WASH. POST, June 30, 1992, at A1, A9.

112. 410 U.S. 113 (1973).

113. Some commentators take a more optimistic view of the decision because *Roe* was not overruled. Even the optimists, however, recognize the fragility of that precedent, which survived by a 5-4 margin. See, e.g., Kathleen M. Sullivan, *A Victory for Roe*, N.Y. TIMES, June 30, 1992, at A23.

114. *Roe*, 410 U.S. at 152-53.

115. *Casey*, 112 S. Ct. at 2807, 2816.

116. *Id.* at 2818-21.

117. *Id.* at 2823 (overruling *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)).

Caution is likewise appropriate in assessing Kennedy’s opinion in *Lee v. Weisman*, 112 S. Ct. 2649 (1992). That ruling upheld a challenge to officially sponsored prayers at a public school graduation ceremony. His position came as a surprise in light of indications in an earlier opinion that he favored “[s]ubstantial revision” of Establishment Clause doctrine to permit greater accommodation of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Kennedy’s approach in *Lee* is actually closer to that of the dissenters than to that of the other justices in the majority. Both Kennedy and the dissenters focused upon the question of coercion; they differed only in their assessment of the facts, with Kennedy emphasizing the inherent coerciveness of the prayer in that ceremonial setting. 112 S. Ct. at 2658-61. His opinion explicitly left open the questions he raised in *County of Allegheny*. *Id.* at 2655. Kennedy declined to join either of the two concurring opinions that reaffirmed the existing approach to the Establishment Clause. See Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 823 (1993). In short, we should not attach undue significance to Kennedy’s apparent break with conservative constitutional doctrine in this case.

118. 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring).

*States v. Eichman*.<sup>119</sup> Meanwhile, Bork testified in support of a constitutional amendment that would have overturned these rulings.<sup>120</sup>

To be sure, Kennedy's style has been less confrontational than Bork's. He has not single-mindedly pursued a right-wing agenda.<sup>121</sup> At the same time, Kennedy is one of most conservative members of a very conservative Court.<sup>122</sup> The ideological approach to confirmation focuses primarily upon outcomes rather than rationales. While philosophical and methodological differences among justices are important, such differences matter more to legal scholars than to political activists and the general public. A woman who finds it difficult to obtain an abortion will not care very much whether the legal obstacles she must surmount are upheld under a deferential standard of review or because there is no constitutional right to sexual privacy. From this standpoint, the differences between Bork and Kennedy are much less important than their similarities. Indeed, from a purely pragmatic perspective, liberals might

119. 496 U.S. 310 (1990).

120. *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 99-114 (1989); *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 199-219 (1989); see also BORK, *supra* note 49, at 127-28.

121. For example, Kennedy wrote a widely praised opinion that gave respectful attention to the First Amendment implications of a broad, proplaintiff ruling in a libel case. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991). He also supported a ruling that rejected a rape victim's claim for damages against a newspaper arising from the publication of her name. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). And he dissented in a death penalty case in which the Court rejected a claim of prejudicial pretrial publicity. *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1917-19 (1991) (Kennedy, J., dissenting).

It is entirely possible, however, that Judge Bork might have taken some of the same positions. *Cf. Oilman v. Evans*, 750 F.2d 970, 993-1010 (D.C. Cir. 1984) (Bork, J., concurring) (en banc), *cert. denied*, 471 U.S. 1127 (1985) (emphasizing First Amendment considerations in support of dismissing libel suit).

Kennedy's lack of zealotry on the Ninth Circuit was one reason that many staunch conservatives preferred more ideologically pure nominees such as Bork and Ginsburg. Some Justice Department officials regarded Kennedy as "an eighty percenter, meaning . . . he could be counted on [by the Reagan Administration] in 80 percent of the [ideologically significant] cases, but not more." BRONNER, *supra* note 82, at 328-29.

122. For example, he joined Chief Justice Rehnquist's plurality opinion upholding a state prohibition on nude dancing on the basis that prohibiting public nudity is a permissible means of protecting public order and morality. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461-62 (1991). He also joined the majority in a decision that overruled two recent precedents that prohibited the use of victim-impact testimony in capital cases. That issue had not been raised by the parties, but the Court asked for supplemental briefing and expedited the case. *Payne v. Tennessee*, 111 S. Ct. 2597 (1991). And he supported an especially controversial ruling that severely restricts the scope of the Free Exercise Clause in freedom of religion cases. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

More generally, Kennedy's overall voting patterns reflect his conservatism. He sided with Chief Justice Rehnquist and Justice O'Connor more than 80% of the time in each of his first four terms. He agreed with Justices Scalia and White almost as often and, in any event, far more often than he did with any of the other more senior members of the Court. *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 420 (1991); *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 369 (1990); *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 395 (1989); *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 351 (1988). The pattern changed somewhat in Kennedy's fifth term, when he voted most often with Justice Souter. Even then, he agreed with the four conservatives and with Justice Thomas noticeably more often than he did with the relatively more liberal Justices Blackmun and Stevens. *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 379 (1992).

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have been better off had Bork been confirmed. Bork was older, less physically fit, and more abrasive than Kennedy.<sup>123</sup> For this reason, he probably would not have served as long or had as much influence as Kennedy will. In light of President Reagan's ideological commitments, Bork's opponents could not have expected a nominee who would meet their criteria; the choice was not between a bad candidate and a good one, but rather between a bad candidate and an unspecified yet certainly unattractive alternative. Compared to that alternative, Bork might have done less harm than his detractors feared. Whatever the plausibility of this hypothesis—a matter about which reasonable persons might differ—Bork's opponents do not appear to have considered it very seriously before launching their attack.

### III. THE STAKES OF ARGUMENT AND THE PURPOSES OF OPPOSITION

The preceding discussion suggests that defeating an objectionable nominee does not necessarily alter the course of jurisprudence. This conclusion does not mean that the ideological model is futile or that those who disagree with a prospective justice's views should remain silent. In a system of deliberative politics, citizens are entitled, perhaps even obliged, to express their opinions on important public questions. But the difficulty of changing the direction of doctrinal development through ideologically based opposition suggests that greater attention should be paid to what is really at stake in these situations. Focusing upon the stakes of argument has implications for the kinds of arguments that should be made. In particular, desperate searches for any information that might discredit a nominee ought to be avoided, if only because the short-term benefits are unlikely to be great, and the long-term harm to the political system could be significant because they can erode the sense of comity that is essential to political deliberation. Nevertheless, recent confirmation disputes have had a distinctively no-holds-barred quality.

The Haynsworth and Bork affairs provide additional reasons to focus upon the stakes of argument. These episodes illustrate some inherent limitations of the ideological model. This approach may focus political debate upon important substantive questions, but those who adopt the strategy will find it difficult to prevail, at least in the short term. The President enjoys unique advantages in the confirmation process, most notably the power to select the nominee<sup>124</sup> and numerous informal resources that can be used to obtain support for the

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123. Indeed, some of these considerations seem to have influenced the Reagan Administration's choice of Scalia over Bork when Rehnquist was elevated to Chief Justice in 1986. ABRAHAM, *supra* note 1, at 352; BRONNER, *supra* note 82, at 32.

124. U.S. CONST. art. II, § 2, cl. 2.

prospective justice.<sup>125</sup> The Senate, by contrast, lacks the institutional stomach for prolonged confrontation over judicial vacancies, as shown by the alacrity with which Blackmun and Kennedy were confirmed. A chief executive who really cares about the direction of the Supreme Court can usually outlast the opposition simply by continuing to propose philosophically compatible candidates. That is precisely what Presidents Nixon and Reagan did after the Senate rejected their first choices. Moreover, their second choices—Carswell and Ginsburg—were in many respects even less attractive to the opposition than were the original nominees.<sup>126</sup> The third choices—Blackmun and Kennedy—did not differ substantially from the original nominees, at least in the short term.

Two qualifications are necessary. First, the replacement of Haynsworth by Blackmun does appear to have had some long-term substantive impact. Even if that impact could have been predicted during the confirmation process, the relevant comparison would then be between the southerners Haynsworth and Powell; their biographical and personal similarities caution against exaggerating the effects of Haynsworth's defeat.

Second, as Johnson's failed nomination of Fortas to succeed Chief Justice Warren demonstrates, the ideological approach can succeed in making a real difference. No one would regard Fortas and Burger as jurisprudential clones. Special factors contributed to success in that instance, however. Specifically, President Johnson was a lame duck, the opposition sensed victory in an election that was less than five months away, and Warren's resignation was perceived as motivated by political considerations and personal animosity toward the likely winner.<sup>127</sup>

In short, the ideological approach is a very uncertain strategy. Defeating a philosophically obnoxious candidate is extremely difficult. Even if the effort succeeds, a determined chief executive might well propose another objectionable nominee. Therefore, ideological opponents could face the arduous task of beating two nominees in order to obtain a more acceptable alternative.

The uncertainty of immediate success does not necessarily justify rejection

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125. See, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 289-90 (1940); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 34-36, 46 (1960); CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 29-30 (2d ed. 1960); DALE VINYARD, *THE PRESIDENCY* 97-108 (1971).

126. Indeed, the opponents suspected that both Carswell and Ginsburg were chosen at least partially out of spite. FRANK, *supra* note 12, at 148 n.15; BRONNER, *supra* note 82, at 331.

127. Warren despised Richard Nixon, an old rival from California. When it appeared likely that Nixon would win the 1968 presidential election, Warren resigned in an effort to prevent him from choosing the next chief justice. BERNARD SCHWARTZ, *SUPER CHIEF* 680-82 (1983); G. EDWARD WHITE, *EARL WARREN* 306-07, 309 (1982). Warren's revulsion stemmed from Nixon's efforts to obtain support for Dwight Eisenhower in the California delegation to the 1952 Republican National Convention. Those efforts undercut Warren's hopes of emerging as a compromise candidate in the event of a convention deadlock. *Id.* at 139-43; SCHWARTZ, *supra*, at 23. For further discussion of Warren's antipathy toward Nixon, see *id.* at 171, 283-84, 336-37, 399-400. The transparency of Warren's motivation fueled Senate opposition to the Fortas nomination. WHITE, *supra*, at 307-09.

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of the ideological model. That approach can promote a more deliberative politics even if the opponents fail to defeat a particular nominee.<sup>128</sup> Those who oppose a prospective justice on ideological grounds need not prevail in order to conclude that their efforts furthered other valuable goals, such as public education or political mobilization. Unfortunately, actual experience suggests that the ideological model has not clearly elevated the level of political dialogue in this field.

For example, ideologically based opposition to an objectionable nominee may encourage the selection of more moderate candidates in the future. But the President might also respond by selecting persons with very pronounced views as long as the likelihood of confirmation is sufficiently high. Alternatively, the chief executive might resort to obscure candidates with no track record on controversial matters, or to politically clever choices whose attitudes are better known but who are difficult to defeat in a confirmation vote. The first presidential response might help to focus public debate, but our recent experience suggests that such debate will be more confrontational than deliberative. The alternative responses are as likely to obscure as to illuminate public discourse.

The scenarios outlined in the previous paragraph are not entirely hypothetical. President Nixon chose the first course in reaction to the Haynsworth affair. His next choice, nominated concurrently with Powell, was William Rehnquist, a strong conservative whose views were regarded as so extreme that the American Civil Liberties Union opposed his confirmation, marking the first time that the organization had ever taken a position about a nominee or candidate for any public office.<sup>129</sup> President Bush adopted the other two strategies in the aftermath of the Bork controversy. His first appointment was the almost unknown David Souter,<sup>130</sup> his second the very conservative Clar-

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128. The unlikelihood of ultimate success does not necessarily imply that the ideological model is illegitimate or unfaithful to the constitutional scheme. Thoughtful commentators who originally supported the competence model have, upon further reflection, concluded that the Senate is entitled to exercise its own judgment about Supreme Court nominees. *E.g.*, Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1206-08 (1988).

129. ABRAHAM, *supra* note 1, at 22, 318-22; SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 366-67 (1990).

130. ABRAHAM, *supra* note 1, at 366-67. The choice of the almost unknown Souter, who was widely suspected of being a closet extremist, rather than a moderate, raises questions about the idea promoted by some commentators that the ideological approach can produce greater interbranch cooperation in the longer run. *E.g.*, Strauss & Sunstein, *supra* note 5, at 1514-15. Underlying this suggestion is the game theorists' notion that cooperation can emerge from a "tit-for-tat" strategy in which adversaries respond reciprocally to each other. See generally ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984).

The ideological significance of Souter's appointment is difficult to assess. While Souter joined Kennedy as coauthor of the *Casey* plurality opinion and has taken some other positions reflecting a less than zealous adherence to New Right principles, his overall record has been quite conservative. During his first two years on the Court, he has voted with the more liberal justices (Blackmun and Stevens, and—during his first year—Marshall) considerably less often than he has sided with others. *The Supreme Court, 1991 Term—Leading Cases*, *supra* note 122, at 379; *The Supreme Court, 1990 Term—Leading Cases*, *supra* note 122, at 420.



ence Thomas, a clever choice because many who disagreed with his views found it difficult to oppose the confirmation of an African-American.<sup>131</sup>

Another function served by ideological opposition is that of political mobilization. For example, the debate over the Thomas nomination galvanized large numbers of women into unprecedented electoral activity in 1992; many who had not participated in politics before did so for the first time, and many others who had previously worked in politics did so to a greater extent than before.<sup>132</sup> Clarence Thomas's confirmation became an important issue in the reelection campaigns of several senators who voted for him. Alan Dixon, an Illinois Democrat who had never lost an election in a political career spanning more than four decades, was defeated for renomination by Carol Moseley-Braun, an African-American female candidate who emphasized the incumbent's support of the new Justice and went on to become the first African-American woman ever to serve in the Senate.<sup>133</sup> Similarly, Arlen Specter, a Pennsylvania Republican, faced a strong challenge from Lynn Yeakel, a political novice who based her campaign largely upon Specter's role in aggressively attacking Anita Hill, Thomas's principal antagonist during the confirmation hearings.<sup>134</sup> Overall, an unprecedented number of women ran for the Senate, and an unprecedented number won seats in 1992, largely in reaction to the Senate's handling of the Thomas nomination.<sup>135</sup> To the extent that the Thomas nomination was a campaign issue, however, the electoral debate typically related to sexual harassment and Hill's credibility.<sup>136</sup> Less clear is the extent to which these campaigns represented meaningful discussions of more general legal and constitutional questions that were the foundation of the ideological opposition to Thomas.

Finally, ideological opposition can serve as a tool for longer-term public education about the legal system, the structure of government, the meaning of rights, and the role of the Supreme Court. The degree to which any of these functions was served by the debates over Bork and Thomas is ambiguous. The low level of those debates raised concerns that the judicial selection process

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131. TIMOTHY M. PHELPS & HELEN WINTERITZ, *CAPITOL GAMES* 73-78 (1992). During his first year on the bench, Justice Thomas voted substantially more often with the most conservative members, Chief Justice Rehnquist and Justice Scalia, than with anyone else. *The Supreme Court, 1991 Term—Leading Cases*, *supra* note 122, at 379.

132. *See, e.g.*, PHELPS & WINTERITZ, *supra* note 131, at 426-27.

133. MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 352 (1991) (on Dixon's career). Bob Benenson, *Incumbent Tremors in Illinois: Democrat Dixon Dumped*, 50 CONG. Q. WKLY. REP. 739, 739-40 (1992) (on Moseley-Braun's election).

134. Beth Donovan, *Women's Campaigns Fueled Mostly by Women's Checks*, 50 CONG. Q. WKLY. REP. 3269, 3269-70 (1992).

135. Jeffrey L. Katz & Ceci Connolly, *Women, Minorities Rock Records, But Ideology Will Barely Budge*, 50 CONG. Q. WKLY. REP. 3557, 3559, 3561-62 (1992).

136. *See* DAVID BROCK, *THE REAL ANITA HILL* 9-11 (1993); PHELPS & WINTERITZ, *supra* note 131, at 425-57; *see also supra* note 5 (collecting representative commentaries on Hill's charges during Thomas confirmation hearings).

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had become excessively politicized, the distinctive position of the Court undermined, and the public so disenchanted with politics that urgent reforms were needed.<sup>137</sup> Perhaps the pendulum has begun to swing in a new direction with the nomination of Justice Ruth Bader Ginsburg. Those who strongly disagreed with her views treated her with respect, even as they made clear the extent of their differences. Not even her onetime leadership role in the American Civil Liberties Union caused difficulty.<sup>138</sup> Her treatment sharply contrasted with the vilification heaped upon presidential candidate Michael Dukakis in 1988 for his mere membership in the organization.<sup>139</sup>

### IV. CONCLUSION

It bears emphasizing that this discussion does not address the legitimacy of either the competence model or the ideological model. Rather, its central inquiry is the extent to which the transition from the former to the latter has promoted more meaningful political discourse in the confirmation process. That the answer is ambiguous should lead us to ponder the broader implications of our recent experience.

General dissatisfaction with the Bork and Thomas proceedings suggests that the ideological approach has not encouraged the appropriate level of political deliberation about the Supreme Court or the Constitution. We should not have unrealistic standards, however. We live in a nation committed to "uninhibited, robust, and wide-open" discussion of public issues.<sup>140</sup> Although many arguments made in the course of such discussion will appeal to our rational faculties, others necessarily will have emotional and symbolic significance.<sup>141</sup> Mr. Dooley's famous observation that "[p]olitics ain't bean bag"<sup>142</sup> ought to caution us against expecting all political discourse to attain the level of the

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137. See *supra* note 5 (collecting representative commentary).

138. See WALKER, *supra* note 129, at 304-05.

139. See *id.* at 368-70. To be sure, Dukakis was running for elective office whereas Ginsburg was nominated for an appointive one. Even if that distinction matters—why it should is uncertain, especially when the appointive position carries life tenure—it cannot fully explain the absence of controversy about Ginsburg's active role in the ACLU. Morton Halperin, President Clinton's nominee for the new position of assistant secretary of defense for democracy and peacekeeping, has become the target of ideological attacks based in part upon his leadership positions in the ACLU. Eric Schmitt, *Ideological Clash Over a Pentagon Nominee*, N.Y. TIMES, Nov. 20, 1993, at 1.

140. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

141. See, e.g., *Cohen v. California*, 403 U.S. 15, 24-25 (1971); cf. George E. Marcus & Michael B. MacKuen, *Anxiety, Enthusiasm, and the Vote: The Emotional Underpinnings of Learning and Involvement During Presidential Campaigns*, 87 AM. POL. SCI. REV. 672 (1993) (arguing that people use emotions as tools for efficient information processing and thus emotionality enhances their abilities to engage in meaningful political deliberation); see also MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964).

142. Like many familiar maxims, this one is usually quoted out of context. The full text is: "'Politics,' [Mr. Dooley] says, 'ain't bean bag. 'Tis a man's game; an' women, childher, an' prohybitionists'd do well to keep out iv it.'" FINLEY P. DUNNE, *MR. DOOLEY: IN PEACE AND IN WAR* xiii (1898).

Lincoln-Douglas debates. Nevertheless, the quality of the confirmation arguments has been extremely disturbing. Many have been vituperative, extreme, or misleading, creating political polarization and civic alienation. Too often the participants have seemed more interested in winning a short-term political battle than in facilitating deliberative politics or effective government. Unfortunately, the same can be said about many other aspects of contemporary political discourse.<sup>143</sup>

Deliberative politics and effective government ultimately require a degree of comity that is inconsistent with slash-and-burn rhetoric. Our system rests upon many unexpressed understandings and an uncoded, but shared, sense of limits. These understandings and limits help us avoid open warfare over every dispute. They reflect an appreciation of life's uncertainties, a faith that today's losers can be tomorrow's winners, and that those who are in opposition now will eventually have to govern. In an important sense, the confirmation battles analyzed in this article remind us of the abiding significance of these lessons. If we learn these lessons well, we might experience more meaningful politics and achieve greater public faith in government.

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143. See DIONNE, *supra* note 10, at 15-17 (discussing how 30-second campaign spots focus on character assassination or divisive social issues, rather than positive information about candidates or causes); JAMIESON, *supra* note 9, at 50-60, 84-100 (discussing the use of television and of veiled attacks—harnessing private prejudices which are publicly denied—to wage attack campaigns); MICHAEL PFAU & HENRY C. KENSKI, *ATTACK POLITICS* 13-60 (discussing attack politics in the Reagan era and the 1988 elections) (1990).