

1997

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Recommended Citation

Jeffrey K. Tulis, *Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court*, 47 Case W. Rsrv. L. Rev. 1331 (1997)

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CONSTITUTIONAL ABDICATION: THE SENATE, THE PRESIDENT, AND APPOINTMENTS TO THE SUPREME COURT

Jeffrey K. Tulis[†]

The altered relation of President and Congress in the appointment of justices of the Supreme Court represents a remarkable institutional rupture in American political development. In the nineteenth century, nominations to the Supreme Court were the frequent occasion for conflict between the executive and the legislature over the composition of the Court, the power of competing partisan objectives, and the character of the constitutional order. Since the administration of William McKinley, the Senate has tended to defer to the President's choices, serving in most cases as a political rubber stamp for his nominations, his understanding of the Constitution, and his partisan objectives. Although every individual instance of institutional cooperation is not necessarily an example of irresponsibility, the century-long pattern of senatorial deference to the President is a remarkable illustration of constitutional abdication.

Over the course of the nineteenth century nearly one of every three presidential nominees to the Supreme Court was rejected by the Senate. In the present century there have been sixty-one presidential nominations but only six rejections by the Senate. Nine of every ten nominations have been confirmed in the twentieth centu-

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ry. Just as striking is the fact that in the nineteenth century nine justices were confirmed only after serious debate and controversy. In the present century, only the confirmations of Brandeis, Rehnquist, and Thomas have generated political controversy and public debate. And as we shall see, the nature of twentieth century conflict (even in its relatively rare appearances) is different from that of the previous century.

The nomination of Supreme Court justices is a useful window on the changed character of the constitutional order, on the transformation of separation of powers in institutional politics over the course of two centuries. From this overarching perspective, the nineteenth century emerges as a time in which institutional politics was agonistic, constitutional perspectives were contestable, partisans were institutionally loyal, arguments were often rhetorically sophisticated, and interbranch conflict was relatively symmetrical. In short, the nineteenth century national public arena appeared highly politicized.

Of course, in the nineteenth century, many fights were petty and otherwise unattractive, and there were several periods of cordial cooperation between the President and Congress regarding the Court, just as there are episodes of high constitutional drama in our own century and occasions of political conflict today. Yet, taken as a whole, the present century is markedly different from the last. For most of this century the Senate has been deferential to the President on Court appointments, indeed supinely deferential. The Senate (and the President) appear bereft of a constitutional understanding of their roles. Partisans are increasingly disloyal to their institution. The political relation of President and Senate is politically asymmetrical. In short, the twentieth century national public arena is, in many important ways, markedly apolitical.

In this article, I am less concerned with explaining the causes of this alteration of American politics than with diagnosing its character, to understand its meaning, and to articulate its significance. The meaning and significance of these events is not obvious. Although some scholars have responded to the political transformation,¹ most students of separation of powers have not noticed it at all. And some who know the facts characterize them much differently.²

1. *See generally* LAWRENCE TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985) (discussing the political significance of the selection of Supreme Court justices).

2. *See generally* MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF*

For example, the most insightful student of modern confirmation politics, Mark Silverstein, is more impressed by the level of conflict in recent battles for appointments to the Supreme Court than by the larger pattern of deference in which those conflicts were embedded. For him, Fortas's rejection in 1968, the more recent rejections of Carswell, Haynsworth, Bork, and Ginsburg, and the protracted conflict over Thomas all seem to reveal a recently politicized process, a departure from a "golden age" of comity and cooperation:

In 1968 the politics of judicial confirmations underwent an abrupt transformation, and the presumption respecting presidential control was honored more in the breach than in the observance. Seven of the last fifteen nominations to the Court have produced more than twenty-five negative votes in the Senate, and four nominees have been rejected.³

Silverstein insists that the Bork and Thomas battles were not "simply grotesque abnormalities in the traditional, business as usual model of judicial confirmations,"⁴ but instead were magnified examples of the current ruling norms. Silverstein fears that the "current process is disorderly, contentious and unpredictable."⁵ He seeks to understand the causes of a transformation of a politics of acquiescence into a politics of confrontation.⁶

There can be no doubt that there has been a resurgence of conflict between the President and Congress after a long period of cooperation. Silverstein offers a persuasive account of the causes of the change that he identifies. During the era of the Warren Court, he argues, the scope of judicial review was expanded, settled norms regarding the standing of litigants were shaken up, and relief offered by courts was greatly expanded.⁷ He describes these developments as a politicization of the Court and rightly notes that critical reaction to these developments were central to Republican attacks on the New Deal order beginning with Nixon.⁸ At the

SUPREME COURT CONFIRMATIONS (1994) (discussing the forces at work in the selection of Supreme Court nominees). See also JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS (1990) (discussing factors at work in failed nominations to the Supreme Court).

3. SILVERSTEIN, *supra* note 2, at 4.

4. *Id.* at 6.

5. *Id.*

6. See *id.* at 4-5.

7. See *id.* at 48-62 (discussing the Warren Court).

8. See SILVERSTEIN, *supra* note 2, at 105-06 (discussing the policies of President

same time, the internal organization of the Senate changed from a hierarchically organized body deferential to its leadership and attached to sets of civilizing "folkways"⁹ which constrained individual members to a body that became an incubator for presidential candidates.¹⁰ The Senate's hierarchical ways had been supplanted by channels for interest group influence and by mechanisms designed to afford individual members resources for publicity.¹¹ An altered judiciary and an altered Senate account for the recently politicized nomination process.¹²

Why is this account so different from the one that opens this article? Why does Silverstein see the repudiation of a golden age where I see the contemporary fruits of a decayed constitutional order? Silverstein's account rests upon a version of the neo-Wilsonian theory of separation of powers. For neo-Wilsonians, American politics has always seemed too conflictual, too agonistic, especially as compared to parliamentary regimes like that of Great Britain. Reformers following Woodrow Wilson have sought to introduce innovations into American politics that would "unify" the government and overcome the alleged defects of separation of powers.¹³ In Silverstein's account, however, the place of the British system as exemplar, is held by the golden age of deference.¹⁴ The "golden age" (i.e. the first seventy years of the twentieth century) stands as a normative order whose properties resemble those desired by neo-Wilsonian reformists. It is as if Wilson had succeeded in reinterpreting our polity, making it more British. From this perspective, twentieth century deference looks like a terrific improvement over the nineteenth century order. The new order achieved greater efficiency and greater accountability by a kind of prime ministerial dominance of the process.

Nixon).

9. For the classic statement of the "folkways" thesis, see DONALD MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 92-102 (1962) (describing internal behavioral norms of senators). On the obliteration of the folkways, see BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* (1989).

10. See SILVERSTEIN, *supra* note 2, at 142-47 (discussing the development of the New Senate).

11. See *id.* (describing broadened exposure for today's senators).

12. See *id.* at 33-74, 129-59 (describing changes in judicial and senatorial structures).

13. For an excellent account of the impact of neo-Wilsonian thinking, see JESSICA KORN, *THE POWER OF SEPARATION* (1996).

14. See *id.* at 38-40 (noting the conflict between judicial activism and reform).

Indeed, Silverstein argues that the "golden age" produced jurists of stature while our re-politicized process yields mediocre minds.¹⁵ Who were these men of stature? The list includes Holmes, Brandeis, Hughes, Cardozo, Frankfurter, Stone, Douglas, Jackson, Marshall, Fortas, and Warren. "These men, irrespective of personal or judicial philosophy, were among the best and brightest of their generations."¹⁶ Silverstein worries that we are unlikely to appoint such jurists again because the fact of conflict dissuades the talented and the prospect of inquiry inclines Presidents to nominate the unknown.¹⁷

Political conflict is not the culprit. Conflict did not preclude the nineteenth century order from selection of jurists of considerable stature: John Marshall, Joseph Story, Roger Brooke Taney, John Marshall Harlan, William Johnson, Benjamin Curtis, Samuel Miller, and Stephen Field. And according to Henry Abraham, "[t]he Brandeis confirmation battle still ranks as the most bitter and most intensely fought in the history of the Court."¹⁸

If the Brandeis exception to the overall pattern of deference in the present century evidences the possibility that stature may emerge from conflict, it must also be noted that this same "golden age" of deference produced the worst justices in American history. In 1970, law school deans and prominent law professors, political scientists, and historians were polled to ascertain their assessments of the overall stature of Justices who had served on the Supreme Court.¹⁹ The results of this survey placed Justices into one of five "rankings:" Great; Near Great; Average; Below Average; Failure.²⁰ All eight failures served in Silverstein's golden age: Van Devanter, McReynolds, Butler, Byrnes, Burton, Vinson, Minton, and Whittaker.²¹ One does not want to overemphasize the significance

15. See SILVERSTEIN, *supra* note 2, at 162.

16. *Id.* at 161.

17. See *id.* at 163-64 (describing the difficulties and ramifications of the Bork and Thomas nominations).

18. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 180 (3d ed. 1992). Abraham's book is the standard compendium of fact relied upon by all students of the confirmation process. I am no exception. It is an extraordinary resource. However, one cannot fail to be surprised that Abraham never highlighted or interpreted the pattern that emerged from his scholarly chronology. Indeed, one thesis of the book seems to be that the same forms of politics have characterized the process throughout its history.

19. See *id.* at 9.

20. See *id.*

21. See *id.* app. A at 412-14. More precisely, their combined period of service ranged

of polls like this one. I cite it merely to give pause to the notion that we recently abandoned a "golden age" of judicial selection.

One need not assume that political conflict lies at the root of contemporary dissatisfaction with the confirmation process. Conflict conducted under the auspices of a regime of deference is much different than conflict legitimately induced and self-consciously nurtured. And deference elicited under a regime of political conflict will likely be more responsible than modern abdications born of political amnesia. These are the theses I mean to advance by the evidence of deference in our century and conflict in the century past. Before the historical evidence can be presented it is necessary to defend the interpretation of the Constitution that informs its presentation.

I. CONSTITUTING CHOICE

Richard Nixon's petulance has become the core of our century's constitutional understanding of judicial appointment. Enraged by the Senate's rejection of his nominees Haynsworth and Carswell, Nixon wrote in a publicized letter to Senator William Saxbe that the Senate had denied him the right to see his choices appointed to the Court, a right accorded to all previous Presidents.²² Although Nixon was wrong,²³ his rhetoric found resonance even with many who disliked his choices.²⁴ Since Nixon's outburst, the question of the Senate's appropriate role has become a subject of popular and academic debate. But the frame of the debate continues to be marked by Nixon's perspective, a perspective internal to the Constitution and rooted in nearly one hundred years' practice. Partisans today argue about the scope and limits of executive and legislative power. Is the Senate encroaching upon the President's prerogative? Is the President trying to usurp legislative power?

These are questions internal to a constitution that constructs the institutions that are prompted (or not) to raise them.

To assess the functioning of the process, however, one must hover just outside the constitutional order and attempt to ascertain

from 1911, when Van Devauter was appointed, to 1962 when Whittaker stepped down. *See id.* app. D at 420-26.

22. *See* ABRAHAM, *supra* note 18, at 18.

23. Since 1789, 28 of the 142 nominees sent to the Senate for confirmation had been rejected. *See id.*

24. *See* MASSARO, *supra* note 2, at 109, 119.

the purposes for which the institutional structures and allocations of power are designed to serve. One of the attractions of Mark Silverstein's argument is that it clearly identifies one of these purposes: selecting good justices.²⁵ One of the limits of that same account, however, is that it assumes the standard of goodness to be an apolitical, professional proposition (i.e. legal stature).

There are a range of qualities that might make a good Justice. Legal acumen is only one among them. Or to put the same point differently, just what legal acumen is, is a politically contestable question. Many have noted, for example, that the tasks of the Supreme Court require interpretive and constructive capacities not generally practiced in lower courts where following precedents set by the Supreme Court rather than establishing them is the principal task.²⁶ To be sure, lower court experience is a desideratum for service on the Supreme Court, but not necessarily for all justices and not necessarily the most important quality even for those who bring it to the Court.²⁷ Particular views on public policy, larger constitutional understandings, symbolic representation of groups or regions, general qualities of judgment, fairness and impartiality, and capacities for statesmanship, are all routinely mentioned as qualifications for excellence as a Justice.²⁸

The qualifications for Justice of the Supreme Court are politically contestable on two levels. First, reasonable citizens differ on the necessary qualities or the hierarchy of qualities for an ideal justice. Second, the qualities one seeks in a particular choice often depend upon the composition of the rest of the Court. Thus, in recent years, some have appealed for talent that would bring "balance" to a body whose collective capacities and qualities are themselves the subjects of continuous political dispute.²⁹

25. See generally SILVERSTEIN, *supra* note 2, at 160-65.

26. See e.g., ABRAHAM, *supra* note 18, at 58 ("[E]xperience gained in the lower courts may be of little significance in the Supreme Court, as their procedural and jurisdictional frameworks are really quite different.").

27. Following the categories of ratings by law school deans and other scholars mentioned earlier, see *supra* notes 19-20 and accompanying text, of the 12 "great" justices, only four had prior judicial experience. See Abraham, *supra* note 18, app. A at 53-55 tbl. 2 (Harlan, 1 year; Holmes, 20 years; Cardozo, 18 years; and Black, 1.5 years). Among the eight who had none were John Marshall, Joseph Story, Louis Brandeis, Felix Frankfurter, and Earl Warren. See *id.* All of the "below average" justices had prior judicial experience as did half of the "failures." See *id.*

28. See *id.* at ch. 4.

29. See PAUL SIMON, *ADVICE & CONSENT* 312 (1992).

For these reasons an institutional process designed to make it more likely that the Court be filled by excellent justices cannot be oriented to maximize one virtue or even one hierarchy of qualifications. Instead it must be designed to make it likely that appropriate qualities will be chosen across an array of different political circumstances. It must constitute an arena in which the criteria of choice themselves can be responsibly established.

Because the choice of justices is politically contestable in the several senses just mentioned, that choice is also a fit occasion for the polity as a whole to revisit the terms of its composition—the most basic, politically constitutive questions. (Indeed, although there is much to lament about the tawdry proceedings that surrounded the choice of Clarence Thomas, for example, there can be no doubt that the country was confronted with questions about and profited from discussion about its basic identity).³⁰ The purpose of the selection process extends beyond selection itself to the polity's need for periodic political reeducation. A deep defect in the American separation of powers system is the lack of institutional support for the kind of constitutional education necessary to its best functioning. The crucial point to stress here is that the process of judicial selection both depends upon and is necessary to sustain the activity of constitutional education.

Turning specifically to our textual Constitution, what is the most coherent interpretation of institutions arranged to secure "good" justices and to provide an appropriate national political education? Is Article II best interpreted as granting an appointment prerogative to the President, or is it, and the Constitution as a whole, best interpreted as indicating a shared responsibility of the President and the Senate? The text reads:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be estab-

30. For an excellent set of reflections on this issue, see RACE-ING JUSTICE, EN-GENERATING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

lished by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.³¹

On first glance this text is open to two reasonable interpretations. The text clearly refers to the "advice and consent of the Senate" as a necessary component of appointment, and it signals the role of the legislature in administration through its reference to inferior offices. This suggests an active coordinate role for the Senate. On the other hand, the set of responsibilities are all lodged in Article II (the article devoted to the presidency) rather than Article I (devoted to the Congress) or even Article III (devoted to the Court.) This might imply that the power to select justices is essentially an executive power to which the Congress should defer, except in unusual cases.

If one reads the same text in light of the purposes I described earlier, the case for the Senate's coordinate role becomes compelling. In light of the purposes of selection, why should the President or the Senate be involved at all? This is how the issue first emerged in the Federal Convention that drafted the Constitution and it is useful to return to the problem as the convention's delegates discovered it.

The initial proposal posed to the convention was that the justices be chosen by the entire legislature with no executive role. Charles Pinkney and Roger Sherman thought the task well suited to the special qualities of the legislature: deliberation and representation.³² Madison objected that the legislature, in its normal mode, might be inclined to factious dispute and intrigue.³³ On the other hand, he was not fully comfortable with choice by an executive either.³⁴ James Wilson thought the executive a suitable locus of choice because he would bring a national perspective to the task as well as serve as a clear focus of responsibility and blame for

31. U.S. CONST. art. II, § 2, cl. 2 & 3.

32. See NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 68 (Adrienne Koch ed., 1966) [hereinafter MADISON'S NOTES].

33. See *id.* at 112.

34. See *id.* at 68.

choices made.³⁵ Madison proposed that the Senate replace the Congress as a whole as the locus of choice.³⁶ Considerable debate ensued on this proposition, with James Wilson and Nathaniel Gorham pressing the case for the executive on the ground that a clear locus of "personal responsibility" was necessary. As a compromise, Gorham and Madison proposed a scheme borrowed from the Massachusetts constitution whereby the executive would appoint justices provided he had the concurrence of one third of the Senate.³⁷

This was a scheme that would have had the effect of institutionalizing deference to the President. George Mason noted this and made it the basis of his decisive objection:

Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive & Senate, the appointment was substantially vested in the former alone. The false complaisance which usually prevails in such cases will prevent disagreement to the first nominations. He considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself.³⁸

Mason's argument was compelling to the delegates because throughout the convention there were never more than two states in support of the proposition that this responsibility be lodged in the executive. By illuminating the problem of deference he alerted the delegates to the danger of any "compromise" that diminished a legitimate role for the legislature. Indeed, just after his speech, the convention voted to lodge the choice of justices in the Senate alone!

Edmund Randolph had earlier urged that the variety of perspectives represented in the Senate mirrored the "diffuse" nature of the choice to be made. But Madison, who inclined toward this view himself, continued to seek a compromise with partisans of the executive even though political necessity did not seem to require it. He appeared to recognize that the same characteristics that made the Senate a suitable locus of choice invited the possibility that choices would not actually be made in a timely manner. Two

35. See *id.* at 314-15.

36. See *id.* at 113.

37. See MADISON'S NOTES, *supra* note 32, at 314-15.

38. *Id.* at 346.

months after the convention had agreed to lodge the choice with the Senate, a final draft was approved which provided for nomination by the President and consent of the Senate (the text we now have). Deliberation was joined to responsibility. The structural properties of the President (principally his singularity) would ensure that a debate would occur, that choices would be made. The structural properties of the Senate (principally its plurality) would ensure that the choice that was made occurred after public debate.

The point of this brief account of the Convention is not to point to its authority (though for those who are so inclined it unquestionably endorses a strong Senatorial role). Rather, the point is to recover a perspective that raised the relevant questions. How were the political branches to be designed so that they would have a constructive role in the construction of a third, independent, branch? How can one secure the qualities needed in a judiciary, including independence, if it is chosen by a political branch? When the questions are posed this way, the coherence of the chosen solution becomes manifest. The President is an institution whose structural properties make it suitable to initiate and to conclude a process—not to select another member of a partisan administration. The Senate is an indispensable locus for deliberation and choice, not an appendage to a presidential “regime.”³⁹

There is no good constitutional reason why the range of considerations appropriate for a President in making a nomination are not appropriate considerations for a Senate in choosing to grant or withhold consent. Deference is often defended as a way of depoliticizing the choice. But if a President bases his nomination on a political calculus (e.g., where the nominee is from, what her views are, whether a range of ethnicities is represented on the Court) how is the President’s choice not “political”? Why should the Senate not consider these same factors? Ideally, public Senatorial debate about the range of considerations involved in a judicial selection make the choice more intelligent. The key to this possibility is that the Senate be publicly attentive to the full range of

39. In light of the constitutional design it is both odd and striking that the Senate’s role in Supreme Court confirmations is more controversial than its role in the confirmation of cabinet appointments and ambassadors. In the latter cases, Presidents have a claim to some sort of deference given that part of the function of those offices is to effect administration policy. If the Senate has a legitimate stake in appointments (and it does because effecting administration policy is not the only function of these offices) surely the case for active involvement is greater for appointments to a third, independent, branch.

considerations, not some smaller subset of the President's bases for choice. No process, of course, can insure wisdom, but Senatorial involvement makes a wise choice more probable than choice by an executive alone, given the contestable nature of the criteria for choice. And however wise the choices, one can surely argue that an active Senatorial role makes these decisions more democratic and more legitimate.⁴⁰

II. DEFERENCE

Nineteenth century Senatorial practice was generally consistent with the constitutional perspective described above. As we shall see, the full range of considerations that Presidents (then and now) employ in making nominations were debated in the Senate. In the present century, Presidents have continued to choose their nominees for the full array of reasons nominees were chosen by their counterparts in the previous political era. Only the Senate has changed. In our era, Senators have become more deferential in general—that is, they have shown a greater tendency to raise no important questions about nominees—and they have become deferential in a second more specific sense. When Senators do choose to challenge or probe the qualifications of nominees, as they have done in the recent cases that so concern Silverstein, they have limited themselves to public discussion of only two or three relevant considerations.

The contemporary Senate operates under a kind of unwritten law that it may probe some issues and not others, that it may defend its choices with some reasons, not others. This "common law" proscribes rejection of nominees on the basis of any considerations other than (1) legal competence; (2) moral turpitude; or (3) financial improprieties or conflicts of interest. Of course, Senators often are motivated to reject nominees for reasons other than those that they can legitimately defend publicly. Thus, John Massaro has argued that all recent failed nominees were rejected because of

40. That the Constitution seems to generate, at the same time, minimal and ideal expectations for its institutions is a point that was stressed by its most astute architects. Thus *The Federalist*, when defending the provisions for the presidency, model their ideal on the figure of Washington while insisting that men of that caliber will rarely fill the office. The office seems designed both with Washington in mind, and in the expectation that "there would always be a great probability of having the place supplied by a man of abilities, at least respectable." *THE FEDERALIST* NO. 76, at 510 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

ideological differences with Senators of the party opposite. Massaro admits that "the dominant role of ideology is not easily recognizable."⁴¹ It is not easily recognizable because Massaro must develop evidence (and he does so) to demonstrate that Senators act for reasons other than those that they publicly state.⁴² Massaro's research hurdle (to get behind the words of Senators) is itself evidence of a profound reversal of the logic of American constitutionalism.

For a constitutional system, hypocrisy is a virtue. A political order that can force politicians to go to the trouble of translating their ambitions and interests into a language of constitutional argument is one of the high achievements of the "new political science" described by *The Federalist*. However insincere, the arguments offered take on a life of their own; they constrain the possible moves of interest and they call forth the translation of interest into argument by opponents. A well-functioning constitutional regime recapitulates daily the behavior expressed by Hamilton in Federalist No. 1: "My motives must remain in the depository of my own breast. My arguments will be open to all and may be judged by all. They shall at least be offered in a spirit which will not disgrace the cause of truth." In separation of powers conflicts, partisans are led to find constitutional arguments to defend actions prompted by ordinary political calculation. Subsequent political calculations are altered by the new terrain of constitutional discourse.

The modern confirmation process does not work this way. Because Senators who wish to oppose nominees on the basis of their constitutional views must express that opposition in terms of the narrow categories of interest and professional competence, the constitutional logic is reversed. One must find an interest to serve as an excuse for a reason! Or more accurately, one must find a low minded reason to serve as an excuse for a high minded one!

This development is not merely an astounding theoretical implication of modern tendencies. It fairly captures the empirical reality of contemporary confirmation battles. Consider for example, the Senate's rejection of Richard Nixon's nominee, Clement Haynsworth. Nixon made it clear to the Senate and to the public that his own reasons for nominating Haynsworth were that he was

41. MASSARO, *supra* note 2, at 1.

42. *See id.* at 8-24.

a Southern conservative who adhered to a "strict constructionist" interpretive view.⁴³ During the hearings on his nomination no one seriously attacked Haynesworth's views, but instead opponents produced evidence of "patent insensitivity to some financial and conflict-of-interest improprieties."⁴⁴ The Senate rejected Haynesworth on a vote of fifty-five to forty-five.⁴⁵ "A livid President Nixon . . . chose to lay the blame for his nominee's defeat on 'anti-Southern, anti-conservative, and anti-constructionist' prejudice."⁴⁶ Senators were publicly adamant in denying that the nominee's views (or region) had anything to do with their decision. In both deed and words they conceded that it would be illegitimate for them to reject the nominee had they not stumbled upon the discovered improprieties.⁴⁷

In rejecting Haynesworth, Democratic Senators were surely paying back their Republican counterparts for their rejection of Lyndon Johnson's nominee for Chief Justice, Abe Fortas. At the time of his nomination, Fortas was serving on the Court as an Associate Justice. Most commentators agree that the motive for the Republican rejection of Fortas was opposition to the Warren Court. Yet Fortas became the focus for this discontent because lapses in judgment off the Court opened him to an attack from which other liberal members of the Court, say Warren himself or Brennan, would have been immune. Fortas remained a close confidant of President Johnson while on the Court and this "cronyism" became the basis of a charge of judicial impropriety. Senators discovered that the Justice had met with President Johnson at least eighty-seven times, working with him on presidential speeches and reelection strategy. At the time of his withdrawal as a nominee for Chief Justice, there was also speculation that Fortas was engaged in questionable financial practices. Those rumors later proved true and thus caused the Justice to step down from the bench altogether. Fortas had "signed a contract to receive \$20,000 a year for life from the Wolfson Family Foundation for 'consulting'—a yearly fee that would continue to be paid to his wife in the event of his

43. See ABRAHAM, *supra* note 18, at 14-18.

44. *Id.* at 15.

45. See *id.*

46. *Id.*

47. See John Anthony Maltese, *The Selling of Clement Haynesworth: Politics and the Confirmation of Supreme Court Justices*, 72 JUDICATURE 338 (1989) (discussing the nomination of Clement Haynesworth and its effect on justice selection procedures).

death." The Director of the Foundation was under investigation by the Securities and Exchange Commission and Fortas knew this when he signed for a fee more than half his salary as a Justice. Although Fortas backed out of the contract six months into it and returned his initial fee, he was saddled with the strong appearance of impropriety. "Wolfson was subsequently convicted on charges of stock manipulation and served nine months in prison."⁴⁸ It is odd that Fortas has been rated "near great" by Court watchers.⁴⁹

Having lost on Haynsworth, Nixon engaged in what Henry Abraham has called "an act of vengeance" against the Senate.⁵⁰ He nominated a judge from Florida, G. Harrold Carswell, who had once campaigned for a legislative seat in Georgia as a White Supremacist.⁵¹ His odious views did not prove to be the publicly stated basis for his rejection, however. Most Senators came to accept the view of the legal community that Carswell was an incompetent lawyer and judge.⁵² The best his supporters could do in rebuttal was to claim that he was not incompetent, just mediocre, and that mediocrity deserved representation on the Court.⁵³

Said the President's floor manager during the debate, Senator Roman Hruska, "They [the mediocrities] are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Cardozos, and Frankfurters, and stuff like that there."⁵⁴

Nixon's response to this defeat well illustrates that the politics of deference reversed the logic of constitutional discourse: "When all the hypocrisy is stripped away, the real issue was their [Haynsworth and Carswell's] philosophy of strict construction of the Constitution—a philosophy that I share."⁵⁵ Senators were adamant in their responses that this was not so. Despite private misgivings on just this score they insisted that his "judicial philosophy" was not, and could not, be the issue.⁵⁶ Were there a competent Southern strict constructionist they would willingly confirm

48. *Id.* at 340.

49. See ABRAHAM, *supra* note 18, at app. A.

50. *Id.* at 16.

51. See *id.* at 15-16.

52. See *id.* at 16.

53. See *id.* at 16-17.

54. ABRAHAM, *supra* note 18, at 16-17. The reader might find it interesting, as I do, that the three exemplars of too much excellence were Jewish.

55. *Id.* at 18 (citing a Presidential television address, the text of which is printed in *Text of Nixon Statement on High Court*, N.Y. TIMES, Apr. 10, 1970, at 1).

56. See MASSARO, *supra* note 2, at ch. 4.

him or her despite their strong preference for nominees of a very different stripe.⁵⁷

The other recent Senatorial rejections were of Ronald Reagan's nominees, Robert Bork and Douglas Ginsburg. Bork stands as a striking exception to the patterns of deference. He was rejected, and his constitutional and jurisprudential views were a focus of the debate. At the close of this article, I shall suggest that this is an exception that proves the rule. It is not an "outlier" but rather evidence of how politics comes to be perceived in an era of deference.

Douglas Ginsburg, nominated by Ronald Reagan after the Bork defeat, brought a conservative judicial and scholarly record to the table. He was not defeated on it. Rather, revelations and admissions that he had smoked marijuana while a Harvard Law professor in 1978 forced his withdrawal from consideration.⁵⁸

The politics of deference is also revealed by the manner in which successful nominees are interrogated by the Senate Judiciary Committee. Nearly all nominees refuse to answer questions regarding their interpretation of previous cases decided by the Court.⁵⁹ They often state that to answer would compromise their independence on the bench by committing them to positions in advance of the facts of particular cases.⁶⁰ Anthony Kennedy, Antonin Scalia, David Souter, Ruth Bader Ginsburg, and Clarence Thomas all responded this way.⁶¹ Often the question concerned the nominees'

57. *See id.*

58. *See* STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 174 (1994); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 276 (1996).

59. *See* Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68, 75 (1991) (noting the routine refusal of Supreme Court nominees to answer questions due to "professional norms of impartiality."); Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 712 (1995) (noting that "nominees routinely refuse to answer detailed questions on issues likely to come before them once they are on the bench."); Stephen L. Carter, *Judge Breyer, Please Clean Up*, USA TODAY, May 16, 1994, at 13A (stating that "the Senate has never . . . rejected a nominee for refusing to answer its questions").

60. *See e.g.*, Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983) (discussing the testimony of Supreme Court nominee Sandra Day O'Connor); Neil A. Lewis, *Ginsburg Promises Judicial Restraint if She Joins Court*, N.Y. TIMES, July 21, 1993, at A1.

61. *See The Nomination Of Judge Clarence Thomas To Be An Associate Justice Of The Supreme Court of the United States Before the Committee on the Judiciary*, 102d Cong., 180-81 (1991) [hereinafter *Thomas Hearings*]; *The Nomination Of Judge Anthony M. Kennedy To Be An Associate Justice Of The Supreme Court Of The United States*

understanding of *Roe v. Wade*, and the immediate response usually was that the issue was likely to come before the court and therefore could not be commented upon.⁶² Scalia was bold enough to suggest that he could not divulge his views on *Marbury v. Madison* for the same reason!⁶³

The notion that it is inappropriate for justices to comment upon previous cases because they address an issue that is likely to come before the court has never been seriously challenged by Senators. Few would disagree that it would be inappropriate for a nominee to comment upon pending litigation or a particular case that had not yet been decided. But no good reason has been offered by nominees to justify silence about previous cases—cases which they undoubtedly discuss if they are law professors, for example. The argument that comments “on the record” will bias their ability to evaluate the merits of some future case is no sounder than the claim that sitting justices who wrote opinions on prior precedents should recuse themselves from consideration of like cases in the future. One cannot find this point made in any of the transcripts of judiciary committee hearings since 1980.

As is now well known, Clarence Thomas not only refused to discuss *Roe v. Wade*, he denied ever discussing it previously or forming an opinion about it.⁶⁴ As uncomfortable as Senators became during the subsequent re-hearings that addressed Anita Hill’s allegations, that question of moral impropriety found greater resonance in the Senate’s understanding of its legitimate role than did the possibility that the nominee had not formed intelligent views about cases that he himself deemed to be most important for the polity.

Before the Committee on the Judiciary, 100th Cong. 136, 233 (1987); *The Nomination Of Judge Antonin Scalia To Be An Associate Justice Of The Supreme Court Of The United States Before the Committee on the Judiciary*, 99th Cong. 37, 45-47, 57, 97-98, 102 (1986) [hereinafter *Scalia Hearings*]; *Excerpts From Senate’s Hearings on Ginsburg Nomination*, N.Y. TIMES, July 22, 1993, at A10; *Excerpts From Senate’s Hearings on Souter Nomination*, N.Y. TIMES, Sept. 15, 1990, at A10 [hereinafter *Excerpts from Souter Hearings*].

62. Both Souter and Thomas, for example, refused to discuss their views on abortion and the *Roe v. Wade* decision during their hearings. See *Excerpts from Souter Hearings*, *supra* note 61, at A10; *Thomas Hearings*, *supra* note 61, at 180-81.

63. During his confirmation hearings, Scalia stated, “I do not think I should answer questions about any specific Supreme Court Opinion, even one as fundamental as *Marbury v. Madison*.” *Scalia Hearings*, *supra* note 61, at 33.

64. See *Thomas Hearings*, *supra* note 61, at 222.

III. POLITICS

Compared to the practices of the twentieth century, the nineteenth century Senate was highly politicized. As Henry Monaghan stated:

During the [nineteenth] century, the Senate rejected or tabled Supreme Court nominations for virtually every conceivable reason, including the nominee's political views, political opposition to the incumbent President, a desire to hold the vacancy for the next President, senatorial courtesy, interest group pressure, and on occasion even the nominee's failure to meet minimum professional standards.⁶⁵

The contrast of this earlier political order with our era of deference is especially striking in the case of the Senate's rejection of President George Washington's nominee for Chief Justice in 1795, John Rutledge. If ever deference were appropriate, as well as expected, it would have been due the President for this nomination. Washington was twice elected President unanimously, with no opposition. His stature as war leader, founder, and the nation's first President made him "the object of the most intense display of hero worship this nation has ever seen."⁶⁶ It is probably fair to say that he had experienced the power of his mythic status during his time in office—he was probably even more revered then as politician than now as signifier of honesty for school children.

Moreover, Washington had nominated a jurist of unquestioned distinction. Rutledge had served as a judge on South Carolina's Chancery court, had been Governor of that state, and had served as a delegate to the Federal Convention that drafted the Constitution.⁶⁷ Indeed, because Rutledge had been chairman of the Convention's Committee of Detail, Washington referred to him as the man who "wrote the Constitution."⁶⁸ The President had earlier nominated Rutledge to the post of Associate Justice for the very

65. Henry Paul Monaghan, *The Confirmation Process: Law or Politics?* 101 HARV. L. REV. 1202, 1202 (1988); see also ABRAHAM, *supra* note 18, at 39-48 (discussing the rejection of various candidates).

66. BARRY SCHWARTZ, *GEORGE WASHINGTON: THE MAKING OF AN AMERICAN SYMBOL* 13 (1990).

67. See ABRAHAM, *supra* note 18, at 72-73; RICHARD BARRY, *MR. RUTLEDGE OF SOUTH CAROLINA* 303, 314 (1942).

68. ABRAHAM, *supra* note 18, at 67 (quoting BARRY, *supra* note 67, at 353).

first term of the Supreme Court and he had been confirmed by the Senate and appointed.⁶⁹ But Rutledge resigned before the Court's term began to assume the post of Chief Justice of the South Carolina Supreme Court. When John Jay resigned as Chief Justice of the Supreme Court in order to become Governor of New York, Washington appointed Rutledge Chief Justice on a recess appointment and he presided over the August 1795 court term. When the Senate convened it rejected his permanent appointment on a vote of ten to fourteen. Rutledge, a Federalist, was rejected by a Federalist controlled Senate because his views were not Federalist enough; he had opposed the Jay Treaty.⁷⁰

James Madison's nominee, Alexander Wolcott, was rejected on a vote of nine to twenty-four by a Senate concerned that as United States Collector of Customs in Connecticut, he had vigorously enforced embargo and intercourse acts.⁷¹ Ulysses Grant's nomination of his popular Attorney General, Ebenezer Hoar, was rejected by a vote of twenty-four to thirty-three after seven weeks of debate.⁷² According to Henry Abraham, "[t]he majority was furious with Hoar for his refusal to back their strictly partisan suggestions for lower-court nominees, his active labors on behalf of a merit civil service system for the federal government, and his opposition to Andrew Johnson's impeachment."⁷³ Grover Cleveland nominated his Secretary of the Interior, Lucius Quintus Cincinnatus Lamar. Lamar, a former professor of mathematics, law, ethics, and metaphysics, had served in both houses of Congress. Lamar also had served in the executive and legislative branches of the Confederacy and had written the Mississippi Ordinance of Secession. These facts prompted a six week confirmation battle at the end of which he was narrowly confirmed, thirty-two to twenty-eight.⁷⁴

Under the traditional system, many nominees were rejected because of the Senate's opposition to the policies of the President, rather than the positions of the nominee. This occurred for two sorts of reasons. Often Senators attempted to preserve the seat for an incoming President and deny the choice to a lame duck. They thus anticipated that the composition of their own body would be

69. *See id.* at 73.

70. *See id.* at 41.

71. *See id.*

72. *See id.* at 127.

73. ABRAHAM, *supra* note 18, at 127.

74. *See id.* at 141.

different and generate a different choice if delay were successful. In other cases, rejection manifested the power of separation of powers to resolve conflict on one dimension by generating it on another. Thus, a President's nominee might be held hostage for a legislative demand seemingly unrelated to the judiciary.

John Quincy Adams nominated former Senator John Crittendon late in his term. Incoming President Andrew Jackson's loyal Democrat supporters in the Senate objected to the choice of a Whig for the Court and succeeded in postponing, and thereby killing, the nomination.⁷⁵ Unelected President Tyler had five nominations rejected as Henry Clay's faction in the Senate anticipated (wrongly) that he would succeed Tyler as President.⁷⁶ Two of these nominees were actually one individual, Edward King, who suffered the indignity of rejection twice.⁷⁷ After the rejections of King, Reuben Walworth, and John Spencer, James K. Polk defeated Clay. In the interim between Polk's election and his inauguration, Tyler was finally able to secure one (of two) late term nominations, that of Justice Samuel Nelson.⁷⁸

The Senate failed to act on Millard Fillmore's nominee Edward A. Bradford in anticipation of a presidential victory by Franklin Pierce.⁷⁹ In the interim between election and inauguration it rejected two more Fillmore nominees, Senator George E. Badger and William C. Micou.⁸⁰ Badger was rejected on a very close vote, twenty-five to twenty-six, because although his own views seemed to be approved by the majority, his clear affiliation with Whig administrations in the past prompted the Senate to reject one of its own sitting members.⁸¹

James Buchanan's nominee Jeremiah S. Black was rejected by one vote, twenty-five to twenty-six just prior to Lincoln's inauguration.⁸² Buchanan had chosen a northern Democrat acceptable to the South, but unacceptable to Stephen Douglas as being too strong a Union man.⁸³ In an odd coalition, Douglas joined northern Re-

75. *See id.*

76. *See id.* at 107.

77. *See id.* at 40.

78. *See ABRAHAM, supra* note 18, at 107.

79. *See id.* at 40.

80. *See id.* at 112.

81. *See id.*

82. *See id.* at 40.

83. *See ABRAHAM, supra* note 18, at 115.

publicans in defeating the nomination and preserving the choice for Lincoln, his victorious presidential opponent.⁸⁴

The most impressive example of presidential repudiation occurred during the administration of Andrew Johnson. Johnson, who was impeached on eleven counts, and nearly convicted, spent nearly a year searching for a candidate whose qualifications would be unassailable, finally settling on Attorney General Henry Stanbery.⁸⁵ But, as Henry Abraham has said, "it is doubtful that the Senate would have approved God himself had he been nominated by Andrew Johnson."⁸⁶ Rejection of the nominee was not enough for the Reconstruction Senate. It also abolished the seat itself through legislation that additionally provided that the seat of the next vacancy would also be abolished.⁸⁷ Three years later during the term of Ulysses Grant, it restored the seats taken from Johnson.

From the preceding facts, it should be clear that not all confirmation battles were occasions for serious debate about the structure of the constitutional order or the proper principles of constitutional interpretation. What is striking about the cases of political "hard-ball" is not that arguments were elevated, but that they were honestly pitted against executive arguments of the same kind. Presidents did not have a monopoly on region, party affiliation, ethnic representation, or any other political consideration. Each confirmation battle was, in part, a battle over what those considerations should be, and the Senate participated fully.

In addition to battles fought on relatively low ground, several confirmation disputes did afford the nation an opportunity to reconsider its constitutive principles. Roger Brooke Taney's political views and his larger understanding of the relation of the national and state governments were the explicit subjects of his two confirmation battles. Taney was rejected when nominated for Associate Justice by Andrew Jackson in January 1835, and the Senate voted to eliminate the seat but failed to secure the agreement of the House.⁸⁸ Six months later, Jackson nominated Taney again, this time for Chief Justice to succeed John Marshall.⁸⁹ A three month

84. *See id.* at 115-16.

85. *See id.* at 124.

86. *Id.* at 124-25.

87. *See id.* at 125.

88. *See ABRAHAM, supra* note 18, at 99-100.

89. *See id.* at 100.

battle ensued. The opposition was led by Clay and Webster who generally advanced the constitutional perspective of their own favorite for the post, Joseph Story.⁹⁰ Taney won on a vote of twenty-nine to fifteen, a wider margin than the intensity and stakes of the battle would have suggested.⁹¹

Taney's infamous *Dred Scott* opinion was the explicit focal point of the confirmation politics surrounding the nomination of Nathan Clifford by President Buchanan. Indeed, the vacancy occurred because of the resignation of *Dred Scott* dissenter Benjamin R. Curtis, a resignation tendered by Curtis as a public critique of the Taney court.⁹² In his dissent, Curtis had challenged every aspect of Taney's jurisprudential posture and that attack fueled the opponents of Clifford.⁹³ Buchanan's nominee possessed an odd political profile—a slavery apologist from Maine with a record of strong support for Jacksonian egalitarianism.⁹⁴ The absence of two of his opponents for the vote and the last minute change of mind of another made possible a slender victory, twenty-six to twenty-three.⁹⁵

Concern regarding the proper role of the state in regulating the economy informed the discussion of twice nominated Samuel Matthews. Rejected at the end of Hayes' term, President Garfield renominated Matthews despite his personal connections to corporate interests and worry regarding his economic views.⁹⁶ The battle took nearly two months and enough votes shifted to produce a one vote victory.⁹⁷ Recent scholarship has shown that the economic development of the American polity cannot be explained by the alleged universal imperatives of economics. Rather, crucial decisions are taken at moments of constitutive significance when the

90. See *id.* at 101.

91. See *id.* One indication of the importance of this battle to the polity as a whole is the fact that it became a topic of local political dispute. For example, in Taney's own home state, a resolution was introduced to the Maryland House of Delegates supporting confirmation. See CARL BRENT SWISHER, ROGER B. TANEY 312 (1935). "The House, however, not only failed to adopt the resolution, but directed by a vote of fifty to sixteen that it be expunged from the journal." *Id.*

92. See ABRAHAM, *supra* note 18, at 114.

93. See Christopher L. Eisgruber, *Dred Again: Originalisms Forgotten Past*, 10 CONST. COMMENTARY 37, 46-62 (1993).

94. See ABRAHAM, *supra* note 18, at 114.

95. See *id.* For a superb discussion of Taney and Curtis's opinions in *Dred Scott*, see Eisgruber, *supra* note 93, at 46-62.

96. See ABRAHAM, *supra* note 18, at 136.

97. See *id.* at 136-37.

very idea of economics is itself up for grabs.⁹⁸ The Matthews confirmation battle was perceived by its protagonists as just such a moment.

In the nineteenth century, Senators appealed to the full array of arguments and considerations available to presidents. They also took advantage of, or created, a large menu of political devices to effect their will. Nominees were formally confirmed, formally rejected, rejected through postponement, rejected through forced withdrawal, and precluded through control over the structure of the judicial body itself. In addition, one Senate (joined by colleagues in the House) successfully petitioned Abraham Lincoln to nominate Samuel Freeman Miller. Although well known to lawyers and doctors (he had both law and medical degrees) and very well regarded by people Lincoln trusted, Lincoln did not know Miller himself. He followed the wishes of the legislature and Miller was confirmed within thirty minutes after the nomination was formally considered.⁹⁹

One must not conclude that the nineteenth century was a "golden age" in the sense that some have (mis)described the first six decades of the twentieth century. No utopia existed, where choice was always principled and jurists usually distinguished. It was rather a political order in which it was almost always possible to embarrass interested partisans by the constitutional implications of their positions. It was rather a political order in which the usual competition for partisan advantage was marked by the contention of institutions structurally composed to represent different perspectives on democratic choice. It was rather a political order whose legislators were more self-consciously political, more aware of the stakes involved in decision, more willing to contest the choices posed, or to challenge the poses presented.

IV. AN EXCEPTION THAT PROVES THE RULE

Unlike any of the other confirmation battles since the New Deal, and like the most interesting fights of the nineteenth century, the defeat of Robert Bork turned upon explicit and profound conflicts over interpretative posture, doctrinal understanding, and ideological presupposition. In his contentious hearings, Bork was ques-

98. See generally GERALD BERK, *ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER 1865-1917* (1994).

99. See ABRAHAM, *supra* note 18, at 118-19.

tioned on law review articles he had written, public statements he had made, decisions he had rendered sitting as an Appeals judge, and actions he had taken as Solicitor General. One scholar, who found it a challenge to document the ideological underpinnings of previous confirmation fights had no difficulty in this case:

Unlike the Fortas, Haynsworth, and Carswell cases, where much of the Senate debate focused on non-ideological considerations such as ethics and competence, the deliberations on Bork centered on the nominee's ideology.¹⁰⁰

Few public debates in American politics have probed issues as thoroughly. Senators were better prepared than usual, if not quite as well prepared as Nina Totenberg reported:

The Senate Judiciary Committee's job must be to investigate the nominee thoroughly. Usually, it fails miserably, relying with great consistency on the press and even the Bar Association to do its work. . . . [T]he Committee's hearings on the nomination of Judge Robert Bork were . . . the first time the process worked properly. . . . The Senate, for a change, gave itself enough time, and the Senators prepared themselves. They asked probing but, for the most part, respectful and proper questions, and they knew enough to follow up and find out what the nominee really meant in his answers.¹⁰¹

The tone of the hearings was set on the first day, which is usually the occasion for uncontested praise by partisans who introduce the nominee. One of the first to testify was former President Ford, who read a statement that seemed to summarize Robert Bork's resume. As he was graciously thanked by the Chair, Senator Biden, and had begun to leave, Senator DeConcini interrupted to say that he had not planned to ask the President a question but he did indeed need to:

DeConcini: "Mr. President, have you had a chance to read any of his law review articles, in particular the *Indi-*

100. MASSARO, *supra* note 2, at 159. Massaro, like many political scientists, uses ideology as an umbrella term for any factor with an ideational component, including interpretive posture, doctrinal views, policy preferences, and political worldview.

101. Nina Totenberg, *The Confirmation Process and the Public: To Know or Not To Know*, 101 HARV. L. REV. 1213, 1220, 1227-28, (1988).

ana Law Review [sic] article of 1971, or any of his law review articles that are of a controversial nature?"

Ford: "I have not read individual law review articles. I have read synopses of some of those articles, comments pro and con by individuals who were interested."

DeConcini: "Thank you, Mr. President."¹⁰²

The article to which DeConcini referred covered several of the issues that were to become the focus of the hearings and the subsequent Senate floor debate: the nominee's jurisprudence of original intent and its application to doctrinal disputes regarding the right to privacy, civil rights, gender discrimination, criminal procedure, separation of powers, antitrust law, and labor relations.¹⁰³ Senator Paul Simon, a member of the Judiciary Committee, is convinced that had a vote been taken before Bork discussed his views he would have been easily confirmed.¹⁰⁴ He is convinced that enough Senators did not like what they came to learn about Bork's views that a majority formed against him during the course of debate.¹⁰⁵

Robert Bork offers a different interpretation. Bork agrees that the fight was truly and deeply about "original intent jurisprudence" in the sense that his defeat was a defeat of that view.¹⁰⁶ But he insists that he lost because of a sleazy behind the scenes vilification campaign orchestrated by his liberal opponents.¹⁰⁷ The real Robert Bork was defeated by the success of Senator Kennedy's distorted caricature of him and his views. The real Bork, if allowed to be heard, would have won. After the defeat, he resigned from the Court of Appeals and wrote a book defending his interpretation of the events.¹⁰⁸

102. ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 216 (1989).

103. See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 1-35 (1971).

104. See SIMON, *supra* note 29, at 52 ("[W]hat defeated Robert Bork in the Judiciary Committee hearings was Robert Bork. If a vote had been taken when the hearings began, he would have emerged with a 9-5 or 8-6 majority on the Committee.")

105. See *id.* at 54-66 (discussing Bork's testimony, the Committee's reaction, and the ensuing debate which led to his defeat).

106. See ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 300-01 (1990).

107. See *id.* at 282-93.

108. See *id.*

Although I am inclined toward Paul Simon's interpretation (there was a behind the scenes campaign on Bork's behalf, too, and the judge's intellect does not appear nearly as overpowering as he thinks it to be) for the present argument it does not matter whether either (or both) interpretations are correct. What does matter is that Presidents, citizens, and especially, Senators, want to avoid another like confrontation if at all possible. Law professor Stephen L. Carter worried that talented men and women would be dissuaded from entering public life due to the negative aspects of such a proceeding.¹⁰⁹ He fears our polity has become indecent.¹¹⁰ "To Bork" has become a verb in our political lexicon for which there are no self-acknowledged subjects. The Twentieth Century Fund formed one of its task forces to recommend changes in the selection process.¹¹¹

My point is this: at the very time when the political order appeared to work as designed, most consider it to have failed. This is the meaning of institutional conflict in an era of deference. To be sure, the conduct of Senators did not meet the standard of conduct of the ablest nineteenth century leaders, such as Webster, Clay, or Calhoun, but that too is a symptom of the same problem. Senators were hesitant in many of their questions, follow-ups were not as probing as Nina Totenberg reported, considerable effort was devoted to securing the testimony of dozens of experts, generally law school professors, on the merits and demerits of Bork's views because Senators were not capable of unassisted inquiry.¹¹² These features of the contemporary scene, like the revulsion for politics that the process induced, are the product of a kind of political

109. See CARTER, *supra* note 58, at 5.

110. See *id.* at ix.

111. See TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 3-11 (1988).

112. One example may usefully illustrate the Senators' limitations. Bork argues that there are no "unenumerated" rights in the Constitution. Only those rights explicitly stated in the text or referred to by the "founders" in reference to the text are judicially enforceable rights. Yet Bork has had no problem in discovering unenumerated powers in the Constitution, powers that were not mentioned or referred to during the ratification of the instrument. No Senator asked him about this. See SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* 2-10 (1993) (discussing this problem and a host of others generated by Bork's jurisprudence); STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 94 (1987) (citing, for example, the willingness of Bork and the New Right to enforce their view of Protestant Christianity despite the fact that the literal text of the Constitution "does not rest on particular religious beliefs or on the presumption of religious agreement").

amnesia. Senators, like citizens, are out of practice. Their counterparts in the nineteenth century knew what they were doing.

The political culture that made possible the nineteenth century order vanished, while the basic Constitutional design of separation of powers persisted. The Constitution was designed to be free of political culture beyond that which could be generated by the operation of the Constitution itself. This case of abdication raises the larger question of whether constitutionalism so understood is possible. Did the basic institutional design actually depend upon a political culture that gave it birth and sustained it for more than a century? Has the persistent Constitution become necessarily wedded to contemporary political culture, a culture that, unknowingly, repudiates the Constitution to which it is attached?

