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ADVISE AND CONSENT

Yvette M. Barksdale[†]

In *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*,¹ Jeffrey Tulis argues that the late-twentieth century Senate, far from being the fearsome beast that many have perceived following the Bork and Thomas confirmation proceedings, instead is merely a paper tiger that has abdicated its constitutional responsibility to fully participate in the choice of persons for high public office, and in particular the Supreme Court. Tulis argues that the Senate currently has institutionalized a standard of deference to presidential nominees that is neither constitutionally required nor structurally sound. Instead, Tulis argues, the history of the Appointments Clause, the early eighteenth and nineteenth centuries' historical practice, and current institutional needs support broad, seemingly *de novo* Senate review of presidential nominations. In particular, Tulis argues that a vigorous Senate role in the appointment process would elevate the appointment debates from their current mooring in the muck of hardball Washington politics to a more constitutive, deliberative, and inclusive inquiry into the future direction of the Supreme Court. Unfortunately, states Tulis, the Senate's current standard of deference to presidential nominees prevents Senators from opposing the nominee on purely ideological grounds, or any grounds other than minimum character and competence, and thus forces opponents to search for tabloid gossip to defeat a nominee. This is what Stephen Carter has called the "disqualification" standard, a search for "disqualifications" rather than "qualifications."² Tulis would prefer to divert all of the energy that currently fuels a search for "disqualifi-

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1. Jeffrey K. Tulis, *Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331 (1997).

2. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 20-22 (1994).

cations" into a principled debate on the nominee's impact upon the future direction of the Supreme Court.³ He therefore argues that Senators in the advise and consent process should be able to consider all criteria relevant to the presidential selection of nominees, such as competence, character, ideology, political affiliation, geographic and ethnic diversity, and balance on the court.⁴

Michael Gerhardt does not directly challenge Tulis's position on Senate deference for Supreme Court appointments, but rather shifts his focus to the President's role in the appointment process. Gerhardt argues that Supreme Court appointments should be analyzed in the context of the role of appointments generally in the Presidency.⁵ Gerhardt discusses the factors that Presidents historically have considered relevant to presidential appointments, including "long term factors" such as a nominee's constitutional philosophy and "short term factors" such as political party and chances of confirmation.⁶ Gerhardt argues that the presidential appointment power should be viewed as one weapon in the arsenal of the Presidency that can be used to effect constitutional change, to either alter or preserve the institutional structure of the government.⁷ Gerhardt further argues that such constitutional change is one of the primary responsibilities of the President.⁸ Indeed, the success or failure of the Presidency, he argues, should be determined by the President's success in effectuating this change.⁹ Therefore, presidential appointments should be evaluated according to their effectiveness as a tool in effectuating this change, and not simply on the basis of the President's success in getting nominees confirmed, or even, presumably, the quality of nominees' overall service on the Court.¹⁰ Although Gerhardt's focus is on appointments as part of an overall evaluation of presidential performance, Gerhardt's view implicitly supports a more limited Senate advise and consent role than that of Tulis, because a President must have broad political power to make appointments to reasonably be held

3. See Tulis, *supra* note 1, at 1337.

4. See *id.* at 1340-41.

5. See Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359, 1359 (1997).

6. See *id.* at 1374.

7. See *id.* at 1381.

8. See *id.*

9. See *id.*

10. See Gerhardt, *supra* note 5, at 1381.

as strongly accountable for them as Gerhardt would advocate. Additionally, Gerhardt seems somewhat distrustful of a Senate role, as he argues that historically Senate opposition to Supreme Court nominees has been motivated primarily by partisan or political purposes, even though Senators have window-dressed that opposition with structural constitutional arguments.¹¹

I found both papers illuminating and thought-provoking. I particularly found telling both authors' observation that although the appointment of a Supreme Court Justice is perhaps one of the most structurally important decisions that our government makes, recent public commentary and analysis has generally descended to a game of personalities handicapping why a particular nominee has won or lost, or the qualities of the players, rather than the impact of those choices on the Court.¹² I found generally persuasive both commentators' wish to make the appointments process a more constitutive national debate about the institutional direction of the Court, rather than a soap opera about whether the nominee paid nanny taxes, or smoked marijuana in college. Moral and character issues obviously are relevant to the appointment of persons to whom you commit fundamental societal decisions. And, whether the charge is improprieties, such as the failure to pay nanny taxes or serious abuses of others, such as sexual harassment, such lapses reveal much about the qualities of potential officeholders. Nevertheless, an appointments process wholly obsessed with topics that only inquiring minds would want to know is seriously flawed.

However, I am not sure that I agree with either author's prescription for the problem, whether Tulis's no-holds-barred role for the Senate, or Gerhardt's proposed presidential power to unilaterally reshape constitutional structures.

I. TULIS'S NON-DEFERENTIAL SENATE

Because I am not an historian, I will not enter into the Tulis and Gerhardt debate concerning whether the prevailing historical practice was an equal Senate role, or a strong presidential responsibility.¹³ Also, for purposes of this commentary and despite reser-

11. *See id.* at 1372.

12. *See* Tulis, *supra* note 1, at 1342-47; Gerhardt, *supra* note 5, at 1372 74.

13. *Compare* Tulis, *supra* note 1, at 1348-53 (arguing that nineteenth century Senate practice was to fully examine presidential nominees on all fronts) *with* Gerhardt, *supra* note 5, at 1362-72 (arguing that historical practice was more problematic, with Senate

vations,¹⁴ I will accept Tulis's position that an equal, completely non-deferential Senate role in the confirmation of Supreme Court justices is constitutionally permissible. My focus is whether Tulis's position that the Senate should participate equally in Supreme Court appointments is structurally desirable.

My own perspective is generally to favor more open, deliberative processes for collective value choices. I think that the selection of a Supreme Court Justice can be considered such a choice due to

opposition explained more by the particular political context in which the contested nominations were made, rather than by a general Senate philosophy of non-deference to Presidential nominations).

14. I have serious reservations about the soundness of this position as broadly stated. I agree that the Appointments Clause permits Senate consideration of some factors beyond minimum professional and ethical competence, at least when relevant to fitness. For example, an otherwise competent candidate may lack judicial temperament. Justice James McReynolds was apparently racist, ill-tempered, and classically non-collegial. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS, A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 177-80* (3d ed. 1992). A nominee might be too ideologically hidebound or polarizing for the Court to function properly. A candidate might also destroy the ideological balance of the Court. One example of this might be Bork's nomination after a series of conservative appointments. If the nominee is unfit for office for any reason, the Constitution permits Senate rejection.

However, Tulis seems to argue that the Senate may, or even is constitutionally *required*, to take a completely non-deferential advise and consent role. The Senate only can consider factors relevant to fitness for office, but also may make as wholly a political decision as the President. I disagree with this strong constitutional position. Here, the text of the clause is clear. It specifically grants the nomination power (and thus the initial selection power) to the President. Moreover, for reasons that I will address later in the paper, I think a truly non-deferential Senate role would in practice usurp the Presidential nomination power. (The recent Clinton-Anthony Lake fiasco points in this direction.) Additionally, even Constitutional Convention opponents of a presidential appointment power recognized that a Senate advise and consent role, as formulated, would lead to a strong presidential role in appointment. Indeed, some who favored Senate appointment criticized Presidential nomination on this ground. See Remarks of George Mason (July 21, 1787), in *JOURNAL OF THE FEDERAL CONVENTION* reported by James Madison (Koch ed., 1984). That the Convention nevertheless adopted a limited Senate advise and consent role suggests that the initial choice was strong presidential appointment rather than a coequal Senate role. Accordingly, I think that some deference is probably constitutionally required, and consequently, that Senators cannot reject a nominee because they prefer a different one. Gerhardt as well, seems to take this view of Senate power. See Gerhardt, *supra* note 5, at 1384.

However, my own preference is to read very few mandates into the structural decisions made in the original Constitution, but rather to see the role of the original Constitution as starting the country on a procedural journey in which these structural decisions politically evolve over time, within core legal limits, as the nature of the society and the needs of government change. Therefore, I am willing to at least posit that Tulis' "equal partner" role, although not constitutionally required, may be constitutionally permissible, if a strong enough case may be made. However, I think that case cannot be made for reasons that I later state.

the Supreme Court's central role in constitutional interpretation. Accordingly, if Tulis's claim at least partially is that a less deferential Senate plus the President is more deliberative and inclusive than a more deferential Senate plus the President, my predisposition would be to favor that position. For example, I have previously argued that the President should not have a unilateral role in administrative agency value selection, on the ground that such a role short-circuits the more broadly deliberative and participatory consensus-generating administrative process of public participation and debate.¹⁵

Tulis argues that eliminating the standard of deference would free the Senate to engage in a more principled debate about the qualifications of the candidate, which would extend to factors beyond simple competence and character such as the candidate's "ideology."¹⁶ Such a discussion, Tulis argues, would take the advise and consent debate out of the tabloid gutter and into this more enlightened ideological terrain.¹⁷ Certainly, this seems so. A Senate freed to "take off the blinders" may more honestly debate intellectual issues that would be off the table under a mere minimum competence and character standard. If the Senate is free to debate a wider range of factors, so is the public, thus elevating the level of debate generally.

However, even if eliminating Senate deference would elevate the level of debate, and I concur in Tulis's concerns about the debate's current tawdry nature, I wonder whether eliminating Senate deference might cause more problems than it solves. First, I question the Senate's ability to practicably advise and consent under a standard of non-deference without usurping the President's nomination power.¹⁸ Second, I wonder whether, even if practica-

15. See Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273 (1993).

16. See Tulis, *supra* note 1, at 1342-44.

17. See *id.*

18. Tulis argues that the Senate was non-deferential during the nineteenth century. See generally Tulis, *supra* note 1, at 1348-53. Therefore, one could argue, the Senate can and has exercised non-deference without usurping the Presidential nomination power. The rejection of Washington's nomination of Rutledge to be Chief Justice was one example. There is no evidence that the Senate sought to nominate some other Justice; instead, it appears that it merely wanted to reject Rutledge. However, that the Senate sometimes simply rejects one candidate without a larger nomination agenda does not necessarily mean that they will never have one. If the rejection is in opposition to a particular nominee, there is no reason for the Senate to try to select another. However, where the opposition is more general, the removal of Senate deference does risk Senate usurpation of the Presi-

ble, the elimination of deference excessively empowers the Senate, and in particular, powerful submajorities represented in the Senate, and thus diminishes the inclusiveness of the selection process. Third, I wonder whether this deliberative and inclusive selection process, if it occurs, will in fact address criteria relevant to judicial selection or whether the confirmation process will become merely another referendum on the "hot button political topics" of the day.

First, on a fairly pedestrian level, a Senate acting without deference may refuse to confirm any presidential nominee except the Senate's preferred choice. This scenario, even if it strengthens the debate, would not merely add a stronger Senate voice but would simply substitute a Senate appointment for a Presidential one.

Of course, the Senate could force this stalemate position under current standards of deference (witness Reagan's problems with the Bork and Fortas nominations, and Clinton's early Attorney General difficulties).¹⁹ However, accepted standards of deference, I think, raise the political costs of such Senate intractability and thus make it less likely (although obviously not impossible) that this impasse will occur.

Alternatively, presidents might escape from this meltdown scenario by preclearing prospective nominees with the Senate to avoid rejection. Indeed, presidential consultation obviously occurs now informally.²⁰ However, this option just moves the consent game to the nomination stage and, again, a standard of non-deference may make the Senate powerful enough to force Senate nomination in place of presidential nomination.²¹ If this occurs there

dential nomination power.

19. Gerhardt, for example, describes a "game of chicken" in which the President and Senate match wits over whether the nominee will be confirmed. *See* Gerhardt, *supra* note 5, at 1374-75.

20. *See, e.g.,* ABRAHAM, *supra* note 14, at 367-68 (describing the role of Senator Warren Rudman in George Bush's Justice David Souter nomination).

21. For example, several recent Senate Republican proposals drafted by Senator Phil Gramm would have permitted any Clinton Court of Appeals nomination to be blocked by a majority of the Republican Senators from that circuit. In circuits with few Republican Senators, such as the Second Circuit, one Republican Senator might block a Presidential nomination to the Court of Appeals. Another measure, sponsored by Senator Slade Gorton, would have required Republican Senators to vote against any nominee with whom the Clinton administration had not precleared the Republican Senators from the nominee's circuit. *See* Neil A. Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, Apr. 27, 1997, at A1. These proposals would transfer power not only from the President to the Senate, but also from the Senate or even Republican Senators to a minor-

are strong Article II concerns.

Moreover, even if a strong Senate role in selecting nominees would be desirable, how would this consultative Senate role occur?²² Would one hundred, or even fifty-one Senators have to agree to a short list? If so, how? By floor vote? Would the choice vest in the Senate Leadership or the Judiciary Committee? This transfer of nomination power from the President to the Senate may lead to too many chefs who spoil the chowder. And there is some historical support that this very problem in part drove the original decision to give the nomination power to the President instead of the Senate.²³

Of course, even with a non-deference standard, Senators may choose not to press the nomination issue in most cases, and thus in practice may defer even without an ethos that requires it. Thus, these hardball tactics may not be used. Nevertheless, the possibility of such strong-arm tactics would be present in each nomination, considerably shifting power from the President to the Senate.

ity of Senate Republicans. Fortunately, Senate Republicans rejected these proposals in conference, but only by a few votes for the Gorton proposal and a "somewhat wider margin" for the Gramm proposal. Instead, the conference adopted a "resolution" against "activist judges" (presumably this meant activist "liberal" judges, not activist "conservative" judges). See Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D22. However, that the proposals had substantial support by Senate Republicans suggests that many seek to force Clinton to appoint only strongly ideological conservatives.

If the Senate Republicans had adopted these proposals, a disappointed nominee may have had standing to challenge these rules in court on Appointment Clause and separation of power grounds. For example, nominees who are considered under rules which constrain Senators' votes may have standing, even if the nominee cannot demonstrate that she would have been confirmed regardless. See *Northeastern Fla. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993) (holding that non-minority contractors had standing to challenge a minority set aside program that required them to compete for contracts on an unequal footing even though they were unable to demonstrate that they would have gotten the contract but for the set-aside).

22. For example, Tulis and Gerhardt refer to Lincoln's Supreme Court nomination of a Senate delegation's recommended choice, Samuel Freeman Miller. See Tulis, *supra* note 1, at 1353; Gerhardt, *supra* note 5, at 1368-69. Tulis argues that this is a good example of the vigorous exercise by each branch of their constitutional roles, while Gerhardt argues that Lincoln simply made a pragmatic decision to concentrate on winning the Civil War rather than to argue with the Senate over nominations. The question, however, is not simply whether the Senate was consulted at the nomination stage, or even why, but whether the Senate has power to force a President to accept its choice. And, without an institutional standard of deference, the Senate's hand may be impermissibly strengthened.

23. See Remarks of Randolph (Saturday, July 21, 1787), in JOURNAL OF THE FEDERAL CONVENTION, *supra* note 14.

Moreover, even if empowering one hundred Senators to have an equal appointments role with the President would not overrun the President's role in appointments, such a strong Senate role may cause other problems. A non-deferential Senate process may decrease the inclusiveness of the appointments process and of the appointments. This is a problem both for legitimating the constitutive debate that the enhanced Senate role is supposed to engender, and also for protecting the inclusiveness and diversity of the Court. One strong requirement for having a constitutive debate must be to insure that all persons or groups in society are adequately represented. I think that this diversity of perspective is particularly important for debates about appointments, which, as Gerhardt argues, can shape non-elective political institutions that hold substantial government power.²⁴ The impact on inclusiveness of empowering the Senate is, I suppose, an empirical political science question to which I do not know the answer. I am not an historian, nor a political scientist. However, an initial analysis suggests that significantly enhancing Senate power may make the process for selecting Supreme Court Justices less inclusive, rather than more inclusive.

At first blush, it seems that an invigorated Senate will be more representative than a largely deferential one. For one thing, more people will have a stronger role in selecting a Justice. There would be 101 cooks, rather than 1 cook and 100 tasters, and therefore, arguably representation of at least 101 different points of view.

However, one can ask, what interests or viewpoint do these additional 100 cooks represent? And I think one could argue that because Senators are elected by a majority of the votes cast in each State, the Senate most intensely represents majority rather than minority interests.²⁵ That leadership rules give majority parties the balance of power within the Senate and on Senate committees such as the Judiciary Committee I think exacerbates the Senate's responsiveness to majority pressures rather than to minori-

24. See Gerhardt, *supra* note 5, at 1363-64.

25. By minority, I do not mean simply racial and ethnic minorities, although obviously these groups may be included. Rather, I mean any group whose views are not adequately represented by the prevailing "mainstream" political view. Today, I think that includes traditional liberals and progressives. In the late 1960s early 1970s, that may have meant Goldwater conservatives. See, e.g., Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1 (1996) (arguing that electing Senators by district would increase the representativeness of the Senate).

ty ones. Thus, a stronger Senate role may essentially cede power to a powerful minority, a majority of the majority, who if they vote as a bloc may control the institution. Those who are left out are those with voices that do not fit neatly into the political structure of either the majority or minority parties.²⁶

In contrast, the President, although also elected by a majority in each state, must campaign more broadly, both in the primaries and the general election, and is more likely to respond to the concerns of minority voices, whether on the left or on the right.²⁷ Thus, an enhanced Senate role may mean that the center gains power at the expense of the fringe.

I am not sure that this is desirable, particularly when appointing a Supreme Court that is supposed to check the power of political majorities.²⁸ Stephen Carter makes this point when he questions whether selecting a Court that must check majoritarian institutions by a broadly majoritarian process is desirable.²⁹ A strong Senate role may give you enhanced representation of the majority, but may decrease the power of those outside the majority to influence appointments to the Court and thus affect the direction of the Court. Thus, if the goal is to achieve some kind of constitutive consensus on the direction of the Court, I think the risk is that instead of consensus you simply give another lever to the majority to trample minority interests. To this end, it may not be coincidental that the Supreme Court was increasingly conservative during the nineteenth century era, in which Tulis argues the Senate strongly

26. Indeed, the Senate was generally designed to be a conservative check on the power of the people, by being less inclusive, and less representative. For example, one commentator has argued that the House of Representatives should participate in the advise and consent process to better protect the interests of all citizens, rather than of smaller states. See Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for our Time*, 54 OHIO ST. L.J. 1087 (1993).

27. See BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS 131-38 (1991) (generally discussing Presidents' historical tendency to consider geographic, religious, and recently, racial and gender balance in appointing Supreme Court justices, and specifically stating that Presidents often used Supreme Court appointments in part to woo a range of minority groups within the society).

28. Girardeau Spann argues that the Court is not "countermajoritarian," but instead often responds to intense, durable, and thus ultimately conservative majoritarian political forces. See GIRARDEAU A. SPANN, RACE AGAINST THE COURT 19-26, 102-03 (1993). Liberating the role of the Senate in confirmation would only exacerbate these majoritarian tendencies in the Court, making it even less able to check oppressive majoritarian practices.

29. See CARTER, *supra* note 2, at 114-15.

participated in the appointments process, and that this culminates in the Progressive Era courts, which routinely blocked populist neo-welfare state legislation. It may also not be coincidental that most Constitutional Convention supporters of a Senate appointment of Justices were delegates of Southern states committed to the preservation of slavery.³⁰

Of course, minority voices may have some power within the Senate because Senate practice requires broad consensus for action. Thus, a lone Senator may delay or even stop Senate business to have a point heard.³¹ However, these devices are probably less useful for appointments because at some point a vote must occur, unlike legislation where minority votes may block a vote altogether.³² Accordingly, although a minority Senate voice may delay a nominee whom they dislike, they ultimately can neither approve nor reject a nominee without majority Senate support. In contrast, these same minority voices may have more persuasive power with the President to be able to obtain an acceptable nominee. Accordingly, a more non-deferential Senate role may pull power away from those outsider voices and toward insider voices. Moreover, even if an outsider minority voice is represented in the Senate, it is likely to be simply by happenstance. Outsider voices as a whole, I think, are not as broadly represented in the Senate as they are in the House of Representatives or the White House.

Of course the argument can be made that this shift of appointments power to a less inclusive Senate is a good thing because it ensures that any particular Justice has broad majoritarian support, thus reducing the likelihood of fringe Justices. However, I am not as sure that fringe Justices are a bad thing, as long as no one "fringe" dominates the Court. Rather, I think that it is important that the Supreme Court be representative of the "fringes" as well as of the center, since the Supreme Court must consider fringe, not

30. See JOURNAL OF THE FEDERAL CONVENTION (Saturday, July 21, 1787), *supra* note 4. (describing a convention vote to vest judicial appointment in the Senate alone).

31. See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

32. Consider, for example, the 1996 Clinton/Dole election year Congressional battles over proposals to increase the minimum wage. Republicans, led by majority leaders Robert Dole and Newt Gingrich, blocked a vote on the minimum wage for months, although a majority of the Congresspersons in both Houses supported the measure. See, e.g., *Democrats Block Dole on Gas Tax: They Demand Vote on Minimum Wage*, ST. LOUIS DISPATCH, May 8, 1996, at 1A (discussing attempts of Democratic Senators to force a minimum wage vote).

merely centrist, values and points of view in making decisions.³³ (Witness the historical concern with ensuring the geographic diversity of the Court, and later the religious, ethnic and gender diversity of the Court.³⁴) If you eliminate “fringe” or “minority” points of view, you decrease the likelihood that the Supreme Court will render decisions that are adequately reflective of the special concerns of outsiders in a majoritarian democracy.³⁵

For this reason, I think that the argument of many conservatives during the Nixon and post-Nixon era that their point of view was not adequately represented on the Supreme Court was well taken, and nominations such as that of Rehnquist and Scalia brought balance. The later problem, I think, was not this conservative balance, but rather was that Presidents Reagan and Bush sought to pack the Court with conservatives at the expense of those to the left and center.³⁶ For this reason, the current Court

33. The premise of our adversarial system is that Justices are supposed to make decisions only after listening to “all sides of the debate.” The theory is that judicial decisions are better when judges consider all perspectives and points of view. Obviously, the litigating attorneys are largely responsible for presenting this range of views. However, attorneys often have strategic interests in suppressing certain arguments, which a diverse bench might raise. Moreover, to hear a diversity of views Justices must be open to different voices and perspectives. This is more likely to happen with an inclusive bench. *But cf.* John O. McGinnis, *The President, the Senate, the Constitution and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633 (1993) (arguing for a strong Presidential role in Supreme Court Appointments). McGinnis asserts that the “diversity” or “balance” of the Court is not as important as a Court that will make “correct” decisions, and argues that the President is better able to apply “coherent” standards of “correctness” in appointments than the Senate. *See id.* This position assumes, however, that there is a “correct” interpretation of the Constitution that someone, whether a Senator or President, can determine. However, given the range of disagreement on even the basic foundational methods of constitutional interpretation by judges, scholars, and other interpreters from the inception of the Constitution, no political actor can claim special insight on the “correct” one. Because there are such diverse views on this issue, a Court should reflect this diversity.

34. *See* PERRY, *supra* note 27.

35. *See generally* LANI GUINIER, *THE TYRANNY OF THE MAJORITY, FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994) (arguing that winner-take-all majoritarian democracy creates permanent losers and thus a “tyranny of the majority” in historically divided societies, and calling for a conversation in which we can develop methods to make democracy more inclusive of outsider perspectives).

36. One of the things that has been remarkable about many recent ideological conservatives within the Republican party is their insistence that *only* bona-fide conservative judges be appointed to the Supreme Court, indeed to the federal judiciary generally. For example, there have been recent Republican proposals to give small groups of Senators a “veto” on Clinton Administration judicial appointments. These conservatives, whether they control Congress or the Presidency, or even neither, have sought to restrict the appointment of federal judges to those persons with whom they agree. For example, Presidents

may disproportionately represent conservative views, and Clinton could reasonably appoint some Justices to the left of center for balance.³⁷ Similarly, the Senate could, even under a deference standard, reject Presidential "fringe" nominees when the "fringe" threatens to pack and unbalance the Court. However, the risk of a broadly enhanced *non-deferential* Senate role is that this process of achieving representation and balance on the Court gets supplanted by a "vital center" impetus that moves all appointments to the fuzzy middle, blocking full reflection of the range of views within society and the legal profession.³⁸

In addition to my concern that the Senate may not adequately represent outsider views, I also question whether eliminating deference makes the confirmation process too broadly "political" as opposed to constitutive, and thus less suited to selecting Supreme Court Justices as opposed to political appointees.³⁹ Even if a Sen-

Reagan and Bush appointed few judges who could be considered even "middle of the road" in their ideological views. See, e.g., Nathaniel R. Jones, *Whither Goest Judicial Nominations, Brown or Plessy?, Advice and Consent Revisited*, 46 SMU L. REV. 735, 736-38 (1992) (arguing for a larger Senate role to balance out ideological Reagan/Bush judicial appointments). During President Clinton's tenure, conservative Republicans have sought to block Clinton appointments of even moderate judges. Some have even argued for impeachment of "liberal judges" who reach decisions with which they disagree. See *supra* note 21 and accompanying text; see also Neil A. Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, Apr. 27, 1997, at A1; Neil A. Lewis, *Move to Limit Clinton's Judicial Choices Fails*, N.Y. TIMES, Apr. 30, 1997, at D22.

37. For example, most would consider Justices Scalia, Thomas, and Rehnquist "conservative," and Justices O'Connor, Kennedy, and Souter moderately "conservative," leaving only Justices Stevens, Ginsburg, and Breyer moderately "liberal." With the loss of Justices Marshall and Brennan there are probably no true "liberal" justices on the Supreme Court.

38. Several commentators have argued for the importance of diversity and balance in Supreme Court nominations. See, e.g., LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985) (arguing that the Senate should be able to consider balance on the Court in confirming Justices); David A. Strauss & Cass R. Sunstein, *The Senate, The Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992) (arguing that the Senate should abandon deference to Presidential appointments, given Reagan/Bush Republican era court packing, (or charitably, selecting justices uniformly faithful to the Executive's view of Constitutional interpretation)). For example, when the Bork nomination arose, many feared or hoped Bork would be the "swing" justice that would solidify a majority "conservative" Court. Strauss and Sunstein argue that in these circumstances the Senate has a responsibility to force the President to add more balance to the Court, rather than to defer. See *id.* I think this point is well taken in the context in which one fringe or flank threatens to co-opt the court. In these circumstances, it can be argued that a nominee otherwise qualified is unqualified, or unfit for office because the justices' nomination would disrupt the balance or diversity of views on the Court. But see Gerhardt, *supra* note 5, at 1380-81; McGinnis, *supra* note 33, at 647-52 (arguing that the President has a responsibility to fill the Court with Justices that share her constitutional view).

39. See generally CARTER, *supra* note 2, at 86-96 (arguing that Supreme Court Justices

ate role provides this broadly deliberative, inclusive public debate and selection process, what issues are debated and what criteria are actually used by the Senate in consenting? Currently, standards of deference channel the "criteria" at least publicly⁴⁰ into specific qualifications for office. The elimination of deference may instead channel the criteria to political outcomes (e.g., we should select a Justice who will uphold the right to die, or will strike down affirmative action policies) rather than judicial qualifications, writ large, or even the broader "institutional direction" issues that Gerhardt identifies in his piece.⁴¹

I think that this outcome-focused debate is particularly illegitimate for Supreme Court appointments where the decisions of the Court are about government structure. That is, the Supreme Court generally decides not which particular policy outcomes are desirable, but rather who has power to select the outcomes—private persons, or the government, and if the government, then which part (federal or state, which branch of federal, etc.). That the consequence of this structural choice may determine the political outcome, in some circumstances, such as with abortion rights, for example,⁴² does not mean that the judge's decision is a policy one.

For example, a judge who decides that an OSHA regulation is unconstitutional is making a judgment about the power of government, not about the advisability of the regulation. This is not to say that judicial decisions are thus "apolitical" in the sense that they are merely rationally deducible conclusions from objective premises found in the words of the Constitution, or settled precedent, or philosophical truth. Rather, even when the judges' decisions are influenced by "political" considerations, the decisions are still about the structure of government.

This is true, I think, even in those areas such as substantive due process or equal protection where the claims are most strongly

should be selected on the basis of their interpretative jurisprudence rather than on whether their values reflect the values of the public).

40. Privately, of course, Senators may use any criteria they wish, but there may be political consequences of disapproval where at least a minimally acceptable public case may not be made for the decision.

41. See generally Gerhardt, *supra* note 5.

42. Thus, state power to regulate abortion probably means some anti-abortion legislation would be enacted, given that anti-abortion advocates have considerable political power in some states.

made that the judge's decision is purely political, that is, that judges import their own view of what ought to be appropriate public policy into the Constitution. Even here, the Court primarily decides which areas should be regulated by government, more so than whether particular results are good or not, on their own merits. Judges may import, I think, a vision of reality, an understanding of the world and how it functions, which then affects, perhaps in some cases even determines their decision. However, even here, their ultimate choice is about government structure. Thus, for example, a Justice's perception that structural racism is a major characteristic of the American society may significantly affect the Justice's view on the constitutionality of affirmative action, including the applicable level of scrutiny and the evaluation of the adequacy of state interests asserted to justify race-conscious affirmative action programs.⁴³ Those judges who "see" or "know" of the existence of structural racism may more likely decide that the government may adopt race conscious programs to remedy that racism. Those who do not "see" or are not open to arguments about such structural racism, but who believe that racism is merely an historical problem that has isolated current consequences, such as random acts of racism by a limited number of individual racists, may be more likely to decide that race conscious methods unfairly privilege one racial group and thus are constitutionally impermissible. Even here though, the Justices are not simply deciding on the advisability of affirmative action as policy, but rather are deciding whether government institutions have constitutional power to make that choice. The Justices' world views may influence their decision on this matter. However, the decision nevertheless is structural, not policy based.⁴⁴

Accordingly, although the Justices' decisions may be influenced by "political" considerations, the decisions are not therefore political decisions, but rather are ideological decisions about the

43. Compare *Adarand Constr. v. Pena*, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring) with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., concurring).

44. That this world view is so relevant supports a selection that ensures that the Court adequately represents a range of world views, which will permit analysis from many different vantage points. Nevertheless, some nominees may have world views so contrary to reality that they are therefore unfit to serve. A judge who factually denies the existence of the Holocaust or the history and legacy of racism and sexism in America should be unqualified for office.

limits of politics. Thus, the "ideology" that is relevant to the qualifications of the Justices is not simply a Justice's views up or down on particular social policies, but rather a Justice's institutional views on the structure of government, a Justice's philosophy of constitutional interpretation, and a Justice's view of the nature of the world.

However, I think that without some expectation of deference, with limited criteria for rejection, a full Senate role in assessing nominees would deteriorate necessarily into a forum on policy issues like the first, rather than judicially relevant factors like the latter. That is, although a less deferential Senate role may get you out of the tabloid gutter, it may only get you as far as the most recent public opinion poll. This is because I think that politicians tend to care less about the process of how a judge reaches a decision and more about the decision itself. This results from the fact that political constituencies care about outcomes. Process is important only if it affects policy outcomes. For example, a conservative Senator may dislike government regulation on principle. However, politically, the Senator cares more whether the government enacts particular regulations, rather than whether a government role in regulation is theoretically advisable. What this means, I think, is that if politicians engage in a no-holds-barred evaluation of judicial nominees, the debate is likely to descend to an inquiry into the nominee's position on substantive political issues. Nominees who agree most with the majority of the Senators would get confirmed. Nominees who agree less may not. The confirmation process thus becomes primarily a referendum on political support for particular policy issues that are likely to find their way before the Supreme Court. If the selection process turns into yet another coffee klatch about the hot button political topic of the day, you still do not have this deliberative, inclusive, constitutive debate about the structure of the government, and thus are you necessarily better off than under the current structure? Conversely, deference at least requires evaluation on the basis of arguable "qualifications" rather than mere political preferences.

In contrast, because the President is answerable to a broader range of constituencies, nakedly issue-laden considerations are less likely to be the entire mix. Also, because judicial appointment matters more in presidential elections than in Senate ones, a President is more likely to be accountable for judicial nominations than

the Senate.⁴⁵ This means that Presidents are less able than Senators to play one-issue political games.

But, one might argue, what if Senators were precluded from finding out nominees' views on particular issues, but could inquire only into the nominees' judicial philosophy, approach to government, approach to constitutional interpretation, etc.? That is, if Senators do not know what policy outcomes the Justice will select, how could they vote on that basis? If the Senate could talk only about philosophy, and not about abortion, then perhaps you would have this higher-minded debate and selection process.

Perhaps one consequence of such a limitation would be a more deliberative debate about institutional structure. If so, I agree that in principle this would be a good thing. However, although the debate may be more high-minded, would the decision be as well? My concern is that although there would be the appearance of a public deliberation, Senators acting without deference would still vote on a nominee's perceived potential policy decisions, rather than on a choice of institutional direction. Moreover, because Senators would not know the nominee's views on these issues, they would vote with less information and more speculation. In contrast, institutionalized deference to presidential choices forces Senators to adopt a rational standard. It requires Senators to have articulated reasons to reject a nominee, rather than purely political preferences. This deference, I think, would require Senators to adopt criteria arguably germane to the selection of Supreme Court Justices.⁴⁶

II. GERHARDT'S CONSTITUTIVE PRESIDENCY

Michael Gerhardt argues that it is the President's constitutional responsibility to use the powers of his or her office to achieve

45. In the most recent presidential election, the Dole campaign tried to make judicial appointments a campaign issue. In contrast, Supreme Court appointments are less likely to be an issue with Senate races. But compare for example, the 1992 Illinois Senate race in which Senator Carol Moseley Braun defeated incumbent Alan Dixon, at least in part because of the feminist fallout from Alan Dixon's decisive 1991 vote to confirm Justice Clarence Thomas.

46. See McGinnis, *supra* note 33, at 665-67 (arguing that a large Senate role would lead to confusion between "politics" and "jurisprudence"). In contrast, Tulis argues that eliminating deference will permit Senators to actually voice their ideological concerns, rather than hiding them behind "low reasons" substituting for "high-minded" reasons. See Tulis, *supra* note 1, at 1343. One risk, though, is that eliminating deference permits Senators to voice any reason for rejection, including reasons that appeal to the current popular sentiment.

constitutional change.⁴⁷ This position is really fascinating, as it seems to be a stark amplification of the President's role as principal guardian of the Constitution, a role we traditionally think of as that of the Supreme Court.⁴⁸ However, when you ask who might better take on this responsibility, a presidential role looks attractive. The President has a variety of tools at her disposal, including: (1) some degree of influence over the administrative bureaucracy, where much government work occurs; (2) the ability through the "bully pulpit" to shape and marshal public debate; and, (3) the power to use her relationship with Congress to implement a legislative agenda that carries out this philosophy. When you add the power of the President to shape the judiciary, often including the Supreme Court, the reality of presidential power makes the idea of this responsibility look attractive.

The persuasiveness of this view increases when you contrast Congress's more limited institutional power to shape constitutional structures. One example of this limited Congressional capacity to make sweeping constitutional changes is the difficulty Newt Gingrich encountered as Speaker of the House when he tried to reshape government from the 104th Congress. Congress, with its multiplicity of players and limited cohesiveness, is difficult to harness as a body into a unified vehicle for reshaping government to a particular vision.

However, I am troubled by the specter of a Presidency in which the officeholder routinely concludes that his job is to reshape the government. I'm not sure that I agree that the President should be able *carte blanche* to send the country off in a particular constitutional direction, simply because he wins one election.

First, I question the stability of a system in which each presidential election results in a change in the constitutional structure of government. Decisions of constitutional structure are fundamental questions about the relationship between our institutions of government. At least initially, the prospect that these relationships are dependent upon quadrennial election results is troubling. Such constant change does not give any single structure an opportunity

47. See generally Gerhardt, *supra* note 5, at 1380.

48. In his symposium presentation, Dean Gerhardt disclaimed any normative position on Presidential power, but rather stated that his goal was to discuss and evaluate how Presidents in fact exercise their power. However, I think that the standards that Gerhardt uses to evaluate the exercise of Presidential power have normative implications.

to work nor enable people to see the structure's advantages and disadvantages. In addition, placing at issue constitutional structures at every election lowers constitutional debates to the level of current public opinion regarding current public concerns, rather than debates on the fundamental underlying values upon which our system is built.⁴⁹ Consequently, these questions of constitutional structure simply become tied to the latest Gallup poll, rather than in-depth inquiries into our national values.⁵⁰ Moreover, even if making presidential elections about these structural issues would make the election debate more constitutive, I am not sure that you want presidential elections to always be constitutive in this sense, rather than actually about "bread and butter" policy issues of importance to the electorate. Thus the New Deal debate was originally about public welfare, and only turned into a constitutive debate when the interpreted Constitution stood in the way of improving public welfare. One advantage of a Supreme Court role in making these choices is that the *stare decisis* which attaches to Supreme Court decisions ensures at least some degree of stability for constitutional decisions. This does not mean that change does not occur, but rather that a fair amount of public and institutional consensus beyond mere election results is necessary for constitutional change to occur.

Second, elections are not usually about these questions of constitutional structure, but instead about public welfare. There are some periods, and perhaps the present is one of them, when for political and other reasons, questions of constitutional structure take center stage. Then, perhaps the election of a President is indeed a public choice on these constitutional questions. In other times, however, elections are about more pedestrian, or at least political, matters. During these times, a President who reshapes government, I think, exceeds his or her public mandate. I am much more com-

49. Perhaps, though, this is a chicken and egg issue (i.e., perhaps the way to get the public to think about these issues is to make the issues election concerns).

50. However, if elections become referendums on underlying values (for example, the legitimate role of government in regulating private behavior), elections could become the focal point for these grand national debates. However, if in the end, as many argue, the public "votes its pocketbook," then even the most high level discussion becomes in the end a policy choice, such as for or against tax cuts, or Medicare cuts, etc. Add to this the propensity of politicians to run away from any issue that they may lose, and the idea that elections are national referenda on structural constitutional issues is problematic (witness the much anticipated but ultimately nonexistent debate on the future of the welfare state in the 1996 Clinton/Dole election).

fortable with the President using the political powers of her office to better manage government, improve the lives of residents, and advance the interests and policies of the United States abroad, than I am with each elected President seeking broad constitutional change. Of course, a more limited Presidential role may cause constitutional change, but only as an incidental effect of other Presidential goals. For example, even though, as Gerhardt suggests, Lincoln and Roosevelt rewrote the rules of federalism and of separation of powers, such constitutional change resulted from their attempts to meet the practical needs of the society.

I think that these structural questions should be primarily the responsibility of the Supreme Court, rather than that of the President. Of course, this forces us to return to the question of who decides who is on the Supreme Court, under what standards, and by what process. Thus, perhaps even if one does not buy the idea that the President is the arbiter of constitutional change, one can argue that the President must address constitutional change when Supreme Court appointments are at stake. Therefore, this brings us full circle to the question of what should be the relative responsibility of the President and the Senate in choosing Justices.

I think that the special qualities of presidential deliberation are well suited to nominations. First, the President institutionally is better suited than the Senate to picking one candidate out of a list of many. Many of the practical problems with a Senate role in the selection that I addressed earlier come from the need to consult many voices. Of course one benefit of consulting many voices is that you distribute power, but the Senate may not distribute power well. And at least in terms of flow-through power, the President may be more sensitive than the Senate to the range of voices that should participate in the debate. The President is also more directly accountable on the question of appointments than the Senate, where any one confirmation vote is only one of many.⁵¹ Accordingly, a President may be more apt to take the choice of the candidate seriously.

The President, however, is not necessarily more broadly inclusive than the Senate, and depending upon his or her constituency, may exclude a range of voices, or may simply make choices that are ill-advised. Of course, under a minimum competence and

51. See *supra* note 45 (discussing Alan Dixon's loss of his seat arguably because of his vote to confirm Clarence Thomas).

character standard, the Senate may consider competence. But, although complete non-deference is problematic, there may be room for a limited Senate check on the President's ideological choices as well.

III. CONCLUSION

I agree with Tulis that the current non-ideological minimum competence standard has degenerated into a mudslinging contest rather than a constitutive debate. I also agree with Tulis and Gerhardt that this constitutive debate is worthwhile, and that a wide range of considerations beyond minimum character and competence should be relevant to the appointments decision. However, I am not persuaded that either an equal partnership Senate role, or a unilateral Presidential role works. Enhancing the power of the Senate devolves power to a body that may be too majoritarian and too political to make either inclusive or constitutive claims. Similarly, leaving the decision entirely to the President risks poor decisions. Perhaps a standard that requires Senators to frame their ideological inquiry in terms of qualifications, rather than politics, may be preferable. The Senate therefore could consider judicial philosophy or ideology when relevant to fitness for office. As a result, the Senator voting would have to make a good faith decision and public case that these ideological considerations are so strong that they make the nominee unfit for office.

Sometimes a nominee's ideology will be extremely relevant to even minimum qualifications for the office. A nominee who is otherwise extraordinarily well-qualified simply may not be the person of the hour, because they are ideologically disastrous for that particular court. One example might be Bork. Apart from the tactics of some of the opposition, which many have challenged, Bork may have been ideologically unqualified for a Court stacked by Nixon and Reagan with a virtual conservative litmus test. In contrast, where the Senate simply disagrees with the nominee's ideology, the choice should remain that of the President. A completely non-deferential Senate role weakens rather than strengthens the appointments process.