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Commentary on Senate Confirmation of Supreme Court Justices

By Thomas P. Lewis*

I think the high quality of the papers presented and the credentials of their authors are a fitting tribute to Sid Ulmer,1 and I'm certainly happy to have a role in this symposium dedicated to him.

As a law professor, I am going to take a different approach than the political science professors in the Symposium have taken. As I interpret what I have heard and read in the papers that have been presented, there is general agreement that over time, considering our two hundred year history, ideology has not been a dominating force in the confirmation process. Yet, there is also general agreement on the proposition that once controversy erupts, and builds, for whatever reason, ideology then becomes the major factor in explaining how the senators vote. I found the Segal paper interesting and rather persuasive in its explanation of how the emergence of controversy, dependent on the presence of nonideological factors, clears the way for ideological disagreement with a nominee to come forward. Of course, I think there is always the possibility that a senator will conceal his disapproval of the nominee's ideology or judicial philosophy by grounding his challenge on a neutral factor, such as the nominee's qualifications.

I wondered when I read the political science papers what their purpose was, whether it was simply to inform us, or, as suggested in the Segal article, to offer to presidents or senators a basis for prediction. In that article's example, a president might change the sequence of nominations to influence results. I, too, am inclined to think, as the authors suggest, that had the Bork and Scalia nominations been reversed in sequence, both might have cleared the Senate, particularly given the shift in the control

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of the Senate in the interval between the nominations.

It occurs to me that some further hypotheses along this line could be suggested, one of which has been suggested by Professor Caldeira. Mr. Rader mentions that the Haynsworth nomination came after the Fortas chief justice nomination and the ensuing Senate ethical inquiry. I don't know if there was any retaliation at work, but was the Haynsworth nomination affected by this accident of timing? Timing, in the sense of the number of nominations that a president has made when a new nominee comes forward, particularly as that relates to the "balance" on the Court, offers another hypothesis. If the order of Justice Scalia's and Judge Bork's nominations had been reversed, and Bork had succeeded, Scalia would have come forward as the "swing" nominee. Scalia shows up in the estimates composed by the political scientists as more conservative than Bork. We're told that there wasn't a hint of anything in Scalia's background that would cast any doubt upon his qualifications. The idea is that a nonideological factor to trigger controversy was not available in Scalia's case. But could *nothing* have been uncovered if a harder look had been taken? If Justice Scalia had been presented as the swing nominee, would a harder look have been taken?

Justice Scalia's actual nomination presents another timing hypothesis, the exhaustion factor. Was a harder look at Scalia not taken because of the energy that had been expended in the Rehnquist chief justice inquiry? The exhaustion factor presents still another—not altogether serious—possibility. Might Bork have been approved if the Reagan administration had dared to nominate Ginsburg first, keeping in its pocket the knowledge that he had smoked marijuana, in case they had to disclose this information at the last moment to make sure he would not be confirmed? Then, with everyone exhausted from trying to defeat Ginsburg (the swing), nominate Bork and hope that Bork becomes an Anthony Kennedy. Maybe Bork wouldn't have gone through as easily as Kennedy did, but his chances might have been increased.

Beyond these reactions to the papers, I want to pose a final set of inquiries. There is some agreement among the speakers that we have entered a new era, perhaps triggered by the Bork hearings. The Segal article hints that there has been more focus on ideology since the desegregation cases. Whenever it started, the new era is, as Mr. Rader noted, a change from a look
generally at ideology to a focused look in a forecasting mode, in which the effort is to predict, "what will this nominee as a justice do—for us, against us," whoever "us" might be. In relation to this observation I pose the question, what should the Senate do with respect to ideology? Mr. Rader hopes that Senators will exercise restraint, and he sees, I think, the potential ruination of the Court if the Senate comes down too hard or too frequently with this kind of inquiry.

I doubt that the new era has much to do with the desegregation cases, but I do think it has something to do with events that began roughly at the time of those cases, that is, when Chief Justice Earl Warren was appointed to the Court in 1954. If one thinks about the Court and constitutional law in the pre-1954 era, a turning point in constitutional interpretation can be marked. In the early 1950s, the bulk of a constitutional law casebook was still given to cases dealing primarily with the structure of government and the powers of government in a federal system. Prior to 1954, constitutional development of the Bill of Rights, through Supreme Court interpretation, was glacial in nature. William Brennan joined Warren on the Court in 1956, and the two became close allies. Beginning in the 1960s a head of steam that would power rapid expansion of rights and liberties under the Bill of Rights was fueled by these Justices.

Chief Justice Warren’s biographers, at least one of whom compares him in greatness to Chief Justice Marshall, praise as his hallmark his “fairness” and the application of his standards of fairness to the judging of cases.² They candidly point to cases in which the results depended on his standard of fairness rather than on the language and “legislative history” of constitutional or statutory provisions. One of Warren’s biographers credits him with “remaking the Court in his image.” I think the identity of the chief architect (Warren or Brennan) is open to debate, but can anyone doubt that the Court was remade?

Prior to this time, the Court had a number of doctrines that slowed the development of constitutional case law, for example, the doctrine of “standing”—who can sue as a plaintiff, and what issues a particular plaintiff can litigate—and the doctrines

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of ripeness and mootness. Moreover, there were presumptions of constitutionality and rules designed to avoid constitutional issues, for example, the rule calling for the interpretation of statutes to avoid constitutional issues where possible. Chief Justice Warren was impatient with—and not much interested in—these doctrines, and the country was a little impatient with some of them as well. With Justice Frankfurter, on the other hand, a case might have taken nine years to get to the Supreme Court, and yet, be remanded without a decision on the merits because of some technical flaw or gap in the record. Chief Justice Warren was impatient with such restraint, and we see, through the Warren-Brennan era, substantial modifications in the content or application of these doctrines.

I know the following is open to debate, but I think there was more commitment during the pre-Warren era to the *Marbury v. Madison* tradition that constitutional case law is a byproduct, not the end purpose, of the Court’s role. The Court occasionally has to face a constitutional issue because it is necessary to the resolution of a case between real, adverse parties. There was a gradual shift through the Warren-Brennan era to a conviction, occasionally admitted, that the Court’s primary role is to give the public guidance as to the meaning of the Constitution as the Court sees it. The “case” is a vehicle for the Court; the goal is not so much to resolve the dispute between particular parties as it is to govern the country in the sphere of the Constitution.4

Large segments of the population applaud the results reached during and following the Warren-Brennan era. But even while applauding, must we consider some possible costs? The idea is abroad that we now have a number of constitutional rights, rights that have come to be regarded as very important to those affected, but that have no real anchor in constitutional text or history. If so, what does this mean for us today?

I watched most of the Bork hearings, and what I found to be significant was the tenor of the questions and the testimony by the senators and witnesses in opposition. There appeared to be an assumption that judges and justices write on a more or

3 5 U.S. (1 Cranch) 137 (1803).
4 As the Court’s caseload grew during its history it was inevitable that its docket would increasingly become issue-driven. The shift in emphasis should be understood as one of degree; debate will center on whether the Court has shifted too actively toward a governing role.
less clean slate. The outcomes of cases seemed to be the only criteria by which judges are to be measured. If a judge can be associated with a result that went against an identifiable interest, one can then attribute to that judge a hostility toward that identified interest. A result is never the product of any other values that may have been stated in an opinion. In Bork's situation, some of this result-oriented analysis was applied to cases, but probably more was applied to his nonjudicial writings. Bork was portrayed simply as being against or for this or that interest group. (I am not a close student of Bork's writings or his case decisions. My point goes to the tenor of the hearings, not to the ultimate merits of his positions.)

Placards at a recent address delivered by Justice Scalia were instructive in this respect. The Justice was placarded as an oppressor; a major complaint was his dissent in a case in which the majority reached a result that many applaud. Justice Scalia's dissent quarreled sharply both with the majority's approach to statutory interpretation and with its reasoning. His critics were moved by the fact that he cast his vote against a disadvantaged group.

In his address, Justice Scalia said that the justices will ultimately reflect the people. This is an insightful observation: the Constitution will come to mean what the people think it means, because the justices will be drawn from the people. I would add the observation, though, that what the people think the Constitution means, and more particularly, what they perceive as the role of the justices, are influenced, even largely determined, by what the justices say and do. Wherever we enter this circle, if the perception emerges that the justices do, indeed, write on a clean slate, i.e., that they are not hedged about by constitutional or statutory text or various concepts that relate to the process

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5 Justice Scalia delivered the biannual Swinford Lecture, sponsored by the University of Kentucky College of Law and the Kentucky Bar Association, on September 14, 1988.

6 See Johnson v. Transportation Agency, Santa Clara County, Cal., 107 S. Ct. 1442 (1987). Justice Scalia accused the majority of inverting the meaning of statutory language that he felt spoke with "a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship." Id. at 1465 (Scalia, J., dissenting). Justice Scalia does not omit policy considerations as he sees them from his opinion, but the more constant theme of his opinion is that the Court's result is based on indefensible statutory interpretation, specious reasoning, and the misuse of precedents. See id. at 1465-76 (Scalia, J., dissenting).

7 See Scalia Lecture, supra note 5.
of litigation, but sit to administer justice according to their own standards of fairness, what then?

I believe this perception of judicial function was at work in the Bork hearings. But if this is the perception, couple it with life tenure for those appointed as justices, and what can we expect the Senate to do? This perception may explain the emergence of the "constituency" problem mentioned during the earlier presentations. At the Bork hearings there was a massive organization of lobbying groups. If it is perceived that the Court simply reaches results on the basis of what the justices believe is fair—on issues that touch so many of us—without any other basic restraints, it is obvious that constituencies will develop around certain types of nominees and marshal their forces to sway the Senate. The Senate will have less and less choice about the wisdom of thoroughly politicizing the confirmation process. If such Senate inquiries should lead to the ruination of the Court, as Mr. Rader fears they will, the ultimate question is: who should be blamed?