

A Broken Process in Partisan Times

■ Late on a January afternoon in 2006, Senator Charles Schumer was goading Samuel Alito to explain his stand on abortion rights. The Senate Judiciary Committee was in its second full day of hearings on Alito, George W. Bush's nominee to succeed Sandra Day O'Connor on the Supreme Court. Twenty-one years earlier, Alito had said that the Constitution did not protect abortion rights. Schumer, a Democrat from New York, wanted to know whether Alito had changed his mind, or whether he continued to oppose abortion rights. Alito repeatedly refused to answer, saying that he did not want to commit himself about an issue that he might have to decide after he reached the Court. "I would address that issue in accordance with the judicial process as I understand it and as I have practiced it," said Alito unhelpfully.¹

Schumer finally gave up trying to get Alito to answer his question, but not before getting in one last dig at the nominee. Schumer told Alito, "It is . . . as if . . . a friend of mine . . . 20 years ago said to me, . . . 'You know, I really can't stand my mother-in-law,' and a few weeks ago I saw him and I said, 'Do you still hate your mother-in-law?' . . .

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And he said, ‘Mmm, I can’t really comment.’ What do you think I would think?” Before Alito could answer, Schumer interrupted and added, “Let me just move on. You have a very nice mother-in-law. I see her right here and she seems like a very nice person.”²

Schumer’s frustration is easy to understand. Senators have rarely made much headway when questioning recent Supreme Court nominees about *Roe* or any other hot-button controversy. The questions have become routine, and the answers (or nonanswers) follow familiar patterns.³ These stylized exchanges between senators and nominees are a recent development. Public hearings on Supreme Court nominations did not become common until the 1950s, and, for most of the twentieth century, contested Supreme Court nominations were rare.⁴ In the seventy-four years between 1894 and 1968, the Senate rejected only one nominee to the Supreme Court (he was John J. Parker, whom a Republican-controlled Senate rejected by a 41–39 vote in 1930 even though he had been nominated by a Republican president, Herbert Hoover).⁵

During this period, presidents sometimes pursued remarkably bipartisan approaches to appointing justices. Most notably, Dwight Eisenhower, a Republican, selected William Brennan because he wanted to nominate a Catholic Democrat who would appeal to constituencies that might support Eisenhower in the next election. Eisenhower’s four other nominees, including California governor Earl Warren and three sitting federal court judges, were moderate Republicans. The Senate confirmed all five Eisenhower nominees by large margins.⁶ Warren and Brennan went on to become great liberals, while two of Eisenhower’s later appointees, John Marshall Harlan III and Potter Stewart, had distinguished conservative careers. Some people believe that the Eisenhower justices were the best group ever appointed to the Court by a single president.⁷

Eisenhower’s appointees left a legacy that made future presidents unlikely to repeat his strategy. The Warren Court thrust itself into

political controversies over racial segregation, school prayer, birth control, and the rights of criminal defendants, among other topics. As a result, the Court riveted the attention of voters and interest groups. The days when presidential candidates could ignore the Court in their campaigns, as Eisenhower had done, were over. Some presidential candidates, including both Richard M. Nixon and Ronald Reagan, made opposition to the Court's rulings a centerpiece of their campaigns. Presidents and senators scrutinized the views of Supreme Court nominees with new intensity, and partisan confirmation battles became regular events.

In the four decades since Earl Warren retired, seven nominations have been either rejected by the Senate or withdrawn by the president: two from Lyndon Johnson (Abe Fortas and Homer Thornberry), two from Richard Nixon (Clement Hainsworth and Harold Carswell), two from Ronald Reagan (Robert Bork and Douglas Ginsburg), and one from George W. Bush (Harriet Miers).⁸ In addition, George H. W. Bush's nomination of Clarence Thomas survived by a narrow 52–48 vote after a vitriolic debate that focused on allegations of sexual harassment.⁹

During this tumultuous period, three factors have shaped the process for appointing Supreme Court justices: a politically prominent and controversial Court; presidents who sought nominees who would advance their ideological perspectives while on the Court; and Senates that have battled fiercely about whether to confirm those nominees. It is unlikely that any of these features will soon disappear. In such circumstances, the Senate and the public must be able to articulate what kinds of justices they are willing to accept, and must have the opportunity to test whether a particular nominee meets those criteria.

One nominee helped the Senate with that task. After Ronald Reagan nominated him to the Court in 1987, Robert Bork discussed his controversial jurisprudential views at length. The Senate decided

that these views were extreme and rejected him. Not surprisingly, more recent nominees have been less candid. They have played it safe, refusing to say anything meaningful about their view of the Constitution and the Court's role. In the post-Bork era, the hearings have become, in the words of Senator Arlen Specter, "a subtle minuet, with the nominee answering as many questions as he thinks necessary in order to be confirmed."¹⁰ A minuet indeed, formal and highly choreographed, with the nominee knowing just how to match each move the senators make.

The Bork hearings were rife with partisan rancor, and they remain intensely controversial. Yet, as Harvard Law School's Dean Elena Kagan observed some years ago, those hearings at least contained "a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee." Since then, hearings have often been no more than "a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis."¹¹ Or, more precisely, they have been a combination of platitudes, anecdotes, and scandals. Unable to engage nominees about substantive constitutional issues, senators have fished for evidence of wrongdoing. Clarence Thomas was investigated for sexual harassment. Stephen Breyer was questioned about whether he should have recused himself from cases that arguably affected his financial interests. Samuel Alito was asked about his membership in an ultraconservative alumni organization.¹² And so on.

Americans need a better way to talk about Supreme Court appointments, and they need it now, before any president nominates the Court's next justice. The stakes are high. In the summer of 2005, after more than a decade had passed without a single vacancy on the Supreme Court, Justice O'Connor announced her retirement and Chief Justice William Rehnquist died. George W. Bush suddenly had the opportunity to make not one but two appointments. He

chose John Roberts to replace Rehnquist and Alito to succeed O'Connor. In his presidential campaigns, Bush had promised to appoint judges like Antonin Scalia and Clarence Thomas, the Court's two most conservative justices.¹³ He appears to have kept his promise.¹⁴ During their first two terms on the Court, Roberts and Alito have consistently voted with Scalia and Thomas in important constitutional cases.¹⁵

Several long-standing constitutional doctrines are now in a precarious position, protected (if at all) by the slender margin of one vote. Another solidly conservative appointment could move the Court dramatically to the right. Scalia and Thomas, who were for many years at the Court's extreme right edge, might soon find themselves with a solid majority. Nobody can say with certainty what such a Court would do. If, however, we take the views of Scalia and Thomas as a guide, it would eliminate constitutional protection for abortion and gay rights; allow public sponsorship of religious ceremonies and programs; prohibit elected officials from implementing affirmative action programs; and limit the power of Congress and state legislatures to protect the environment.¹⁶ Some people will celebrate this possibility, others will lament it, but nobody should doubt that it is real.

Changes of this kind would affect every American. Choosing the next justice will thus be a serious matter indeed. American citizens and politicians need to decide if they want the Court altered so radically. Whether they favor or oppose the transformation, they will need to recognize what kind of nominee is likely to bring it about and what kind of nominee is likely to resist it.

The Job Description of a Supreme Court Justice

This book is about how to choose Supreme Court justices, but it will start with an examination of the Court itself and, more specifically, of

how justices decide constitutional cases. This combination of topics is unusual. Many books examine the appointment of Supreme Court justices, and many discuss how the Supreme Court should decide cases, but almost none connect the two subjects. That is a damaging mistake. To decide what kinds of justices we want, and how to get them, we first need to understand exactly what justices do. After all, when good managers search for a new hire, they first create a job description for the position they want to fill. The job description specifies the employee's duties, and the manager can then search for someone with skills and experiences that fit those duties. By the same token, if we want to know what sorts of people would make good Supreme Court justices, we should begin by ensuring that we have a clear understanding of what Supreme Court justices do.

At first, the job description for Supreme Court justices might seem self-evident: their job is to apply the Constitution and other laws to decide important legal controversies. If we try to become more specific, however, complications quickly arise. The justices must interpret and apply the law when its meaning is unclear and contested. How do they decide what the law means in such difficult cases, and what experience and skills must they have in order to do so well?

Public debates about recent Supreme Court nominations have revolved around two manifestly unsatisfactory answers to that question. One view regards Supreme Court justices as neutral umpires who never invoke anything other than their apolitical, technical expertise about legal rules, while a second view treats them as ideologues who decide cases on the basis of a political agenda. Neither of these blunt models provides an adequate account of what justices do or of how to evaluate a nominee to the Court.

For example, at the 2005 hearings on the nomination of John Roberts to be chief justice, Senator Orrin Hatch maintained that the Senate must apply a “judicial rather than a political standard to eval-

uate Judge Roberts' fitness for the Supreme Court." Hatch emphasized that "judges interpret and apply but do not make the law."¹⁷ For that reason, he said, nominees to the Supreme Court should not have to answer questions about how they would rule in cases that might come before the Court. By answering such questions, nominees would make commitments that would prevent them from being truly "impartial and independent."¹⁸

Senator Schumer, by contrast, told Roberts that "the most important function of these hearings . . . is to understand your legal philosophy and judicial ideology."¹⁹ In particular, said Schumer, the nominee "should be prepared to explain [his] views of the First Amendment and civil rights and environmental rights, religious liberty, privacy, workers' rights, women's rights and a host of other issues."²⁰ According to Schumer, the Senate had to be able to inquire into judicial ideology because well-qualified justices interpreted the Constitution very differently from one another. "Justice Scalia thinks he is a fair judge and . . . Justice Ginsburg thinks she is a fair judge . . . but in case after case they rule differently."²¹

Hatch and Schumer articulated two inconsistent views of what Supreme Court justices do and how the Senate should evaluate them. For Hatch, a nominee's political values were irrelevant because judges should be neutral arbiters, more comparable (as John Roberts himself claimed) to umpires than to politicians. For Schumer, a nominee's political values were the crux of the matter because judges vote ideologically.

Each man had part of the truth. Hatch captured fundamental aspects of the judicial role when he said that judges must be "impartial and independent," and that judges have a duty to interpret and apply the law. Yet Schumer was also correct when he pointed out that some justices are identifiably conservative and others are identifiably liberal, and that this difference matters greatly in how they rule. In the end, neither Hatch nor Schumer could be wholly correct because

each of them was partially correct. Judges are neither umpires nor ideologues; their role is more complex.

What Justices Do and How to Choose Them

If we want to improve the Supreme Court appointments process, we have to come up with a better account of the tasks that Supreme Court justices perform. The next chapter begins that project. We will look carefully at the text of the Constitution and the challenges it poses. We will also explore the Supreme Court's decision-making procedures, and we will examine the jurisprudence of justices such as Hugo Black, Sandra Day O'Connor, and Antonin Scalia so that we can understand what distinguishes one jurist from another.

This work will take several chapters. Yet we can even now sketch the job description of a Supreme Court justice. Justices cannot be mere umpires whose task is to apply clear instructions in neutral fashion. The reason why is not hard to identify: the Constitution does not provide judges with a clear set of instructions to follow. Unlike the rules of baseball, it speaks in abstract phrases, and nobody can interpret those phrases without making politically controversial judgments. That is why John Paul Stevens, Antonin Scalia, and Ruth Bader Ginsburg (to name only a few examples), who are all excellent lawyers, interpret the Constitution very differently from another. They are not misbehaving, nor are they recklessly imposing their judgments on the country. On the contrary, each of them makes politically controversial judgments because there is no other way for them to do their jobs.

But if it is a mistake to suppose that justices are like umpires, it is likewise a mistake to assume that they are just politicians or ideologues. Although justices must make politically controversial judgments, their decision making differs sharply from that of legislators and other officeholders. For example, justices share a strong commit-

ment to impartiality. That commitment prohibits them from favoring certain persons, groups, constituencies, or causes over others. Justices also share a concern about procedure. Judges' procedural values sometimes produce decisions that are strikingly different from those of other political branches. For example, judges sometimes uphold the rights of notorious criminal defendants who would have received nothing but hostility from elected officials.

Observations of this kind suggest what the job description for Supreme Court justices should look like. The job of a Supreme Court justice will involve, among other things, invoking two kinds of values. Justices will have to appeal to ideological values, by which I mean political and moral values of the sort that distinguish liberals from conservatives. Many of these values will describe what sorts of inequalities are justifiable in a free society. They will include, for example, convictions about whether gay couples are entitled to all the rights enjoyed by heterosexual couples, and about whether it is always wrong for the government to distinguish among persons on the basis of race, even when (as with affirmative action plans) the government's purpose is to aid disadvantaged minorities.

Judges will also, however, have to recognize a set of values that I will refer to as "procedural": values that pertain to the jurisdiction, responsibility, or operation of institutions, including courts. These values might include, for example, the idea that all criminal defendants must have an opportunity to contest the state's evidence against them, or the principle that courts should defer to Congress with regard to disputes about how to spend federal funds. Procedural values, like ideological values, can be contested and controversial (and, indeed, the categories may overlap: the proposition that "accused terrorists must receive all the rights afforded to other criminal defendants" describes a value that is both procedural and recognizably liberal). Different nominees will have different views about which values are appropriate. Choosing a good justice means,

among other things, choosing someone who will invoke an attractive combination of ideological and procedural values when interpreting the Constitution.

Senators may have criteria of this sort in mind when they say, as they often do, that they would like to know a nominee’s “judicial philosophy.” A judicial philosophy is, presumably, a judge’s perspective upon how to do his or her job. That perspective will include the ideological and procedural values needed for the interpretation of the Constitution. Yet senators and commentators often talk about judicial philosophy in terms that make it seem technical and politically neutral. They say, for example, that judicial philosophy is about respecting the intentions of the people who wrote the Constitution, or about exercising “judicial restraint.”

That is a mistake. In the end, any effort to assess nominees entirely through nonpolitical criteria is a dead end. It matters what claims of justice a nominee finds compelling. And it likewise matters how he or she understands the role of courts. Every justice will have both ideological convictions and procedural convictions about the limits of the judicial role. It is the combination of these convictions that generates a distinctive judicial philosophy and defines how a justice will do his or her job.

Such a philosophy amounts to a view about what judicial review is good for. It describes what kinds of problems should lead courts to intervene in policy disputes and what kinds should be left to the discretion of other officials. Though nominees to the Court often wax poetic during their confirmation hearings about the virtues of judicial humility, every single justice to serve on the Court during the last half century has believed that, in some circumstances, bold judicial action was desirable. They have disagreed, of course, about which circumstances justify such action. As a result, each justice on the Court has left certain areas to the discretion of elected officials and intervened in others. The nation’s task, when it assesses nomin-

ees to the Court, is to identify and evaluate the nominee's views about what judicial review is good for and about when deference is appropriate. These are the views that will shape the nominee's career on the Court.

Presidents have, in fact, paid a lot of attention to the judicial philosophies of their nominees, especially in the years since the civil rights revolution of the 1960s. The Senate's handling of the issue has, however, been clouded by public confusion about what ingredients define a judicial philosophy and about what counts as a legitimate ground for rejecting a president's nomination. The result has been the "subtle minuet" of question-and-evasion described by Senator Specter, in which the most critical questions about a nominee almost always go undiscussed, and by which the nation is deprived of the ability to deliberate over what kind of justice it wants.

Senators confront another problem too. Their task is more complicated than the president's. Senators must decide not only what kind of justice they would most like to see on the Court, but also how much deference (if any) they owe to the president's choice. Do senators have the right to insist on a nominee whose views are consistent with their own? Or must they accept the president's selection, provided that the nominee is competent and of good character? The Constitution does not supply any clear instructions about these important questions. Not surprisingly, presidents and their supporters have often claimed that senators should defer to the president's choice. In fact, as we shall see, when a president nominates moderate lawyers from his or her own party, the Senate has good, practical reasons to defer to the president's choice. But there are no sound arguments, either constitutional or practical, for requiring deference when presidents nominate persons whose judicial philosophy is ideologically rigid or extreme.

That conclusion is important, because there are at least three reasons why senators might prefer moderate justices to more extreme

ones. First, opposition senators might favor moderate justices simply as a compromise. Senators who disagree with the president's view about the Court's role will be more comfortable with a moderate representative of the president's vision than with a more dogmatic one. Second, there are important connections between moderation and the judicial role. Judges must avoid ideological commitments that would prevent them from evaluating novel claims of justice with an open mind. Judges also have an obligation to respect the policy-making authority of other political institutions. These two aspects of the judicial role both benefit from moderation, understood as a willingness to temper one's own judgments about justice with due regard for the opinions and judgments of others. For that reason, moderation is a distinctively judicial virtue. Third, the character of American politics today supplies another reason to favor moderate nominees. Interest groups and political elites are now remarkably polarized, but the American citizenry shares more moderate views. In such circumstances, moderate nominees will better represent the constitutional values of most Americans than will the dogmatic candidates favored by powerful interest groups on both the left and the right.

When senators suspect that the president has chosen an extreme or dogmatic nominee, they have the right to contest that choice. How should senators do that? Here again, the Senate's task is more complex than the president's. The confirmation process is much more public than the nomination process. Senators, commentators, and citizens have come to treat the confirmation hearings as a kind of trial, after which the nominee must be confirmed unless the senators elicit enough damaging testimony to convict the nominee of incompetence, malfeasance, or extremism. That approach to the confirmation hearings is a mistake, and it undermines the Senate's ability to fulfill its constitutional responsibilities. For the most part, the Senate should investigate nominees the same way that presidents do: on the basis of their record and reputation. If, after that review,

the Senate is skeptical that the nominee's judicial philosophy is acceptably moderate, the Senate should put the burden on the nominee to prove otherwise. If a nominee refuses to answer questions that are genuinely about his or her judicial philosophy, rather than about how he or she would decide particular cases, then the nominee's evasions would provide the Senate with legitimate grounds for refusing to confirm him or her.

If senators are willing to shift the burden of proof to the nominee, they can escape the subtle minuet of question-and-evasion that has dominated recent hearings on Supreme Court nominees. Americans will thereby acquire a richer capacity to deliberate about what kinds of justices they want. Of course, the recommendations advanced here will not change the confrontational character of Supreme Court confirmation proceedings. They may even exacerbate it. Some people find the conflictual character of Supreme Court nominations deeply disturbing. Do the reforms I propose really justify the risk of making the conflict worse?

The answer to that question depends on a fuller elaboration of the arguments I have just sketched. The following chapters provide that elaboration, beginning with an explanation of why justices cannot avoid making politically controversial judgments when they interpret the Constitution. Chapter 2 shows that the language of the Constitution demands such judgments, and chapter 3 shows that familiar ideas such as "strict construction," "originalism," and "judicial restraint" provide only false hope of relieving justices of that responsibility. Together, these chapters show that, to produce a good job description for a Supreme Court justice, we need to ask *how* justices make politically controversial decisions, not *whether* they ought to do so.

The next three chapters accordingly investigate how judges deal with political controversies. Chapter 4 goes behind the scenes at the Supreme Court to contrast judicial decision-making procedures with

legislative ones. Chapter 5 focuses on an interesting and understudied feature of judicial decision making: sometimes the justices can agree across political lines, even in visible and controversial cases. The chapter uses that fact to identify critical commitments, to values such as impartiality and procedural integrity, that characterize the judicial perspective on politically controversial judgments. Chapter 6 then builds upon the insights of previous chapters to sketch the judicial philosophies of William Brennan, Hugo Black, Sandra Day O'Connor, Stephen Breyer, and Antonin Scalia. By doing so, it illustrates what it means for a jurist to exhibit a distinctive judicial philosophy, and it describes the kinds of values that ought to be the focus of attention when the nation is choosing its next Supreme Court justice.

With a job description for Supreme Court justices in hand, chapters 7, 8, and 9 turn to the nomination and confirmation process. Chapter 7 studies the evolution of nominating practices during the twentieth century. It observes that presidents ought to care about a nominee's judicial philosophy, and that they have, with very few exceptions, done so. It also points out that, over the last forty years, presidents have raised the stakes for confirmation hearings by applying ideological litmus tests to candidates more aggressively than had been done in the recent past. Chapters 8 and 9 turn, at last, to the Senate's role. Chapter 8 argues that the Senate has no obligation to defer to the president's choice of nominees unless the nominee is a judicial moderate. Chapter 9 considers how the Senate should modify the confirmation process to discharge its constitutional responsibilities most effectively.

The book's last two chapters analyze what Americans should demand from the next set of confirmation hearings. Chapter 10 explains why moderation is a distinctively judicial virtue, and why presidents and senators have, in many circumstances, a responsibility to prefer moderate nominees. Chapter 11 reviews the changes that Americans and their representatives must make in order to replace

the empty political theater of recent confirmation battles with more substantive deliberation.

Does It All Come Down to Political Power?

Before we embark on this argument, we should consider one objection that might fell it at the start. This book assumes that Americans can, and should, deliberate about what kinds of justices they want, and about how to get them on the Court. It assumes, in short, that ideas matter—that how we think about Supreme Court appointments will influence how the process actually goes. But perhaps that is not so. People sometimes suggest that Supreme Court appointments all come down to political power. If presidents have enough clout in the Senate (either because of their popularity, or because their party enjoys a solid majority), then they can and will appoint justices who will aggressively pursue the president’s own ideological and political agenda. If they lack clout, they have to compromise, so they will appoint moderates. And that’s all there is to say.

No doubt about it: political power matters hugely to the Supreme Court appointments process. Most hotly contested confirmation battles have occurred when one party controlled the White House and its rival controlled the Senate.²² A powerful and popular president may be able to push through his preferred candidates without regard to what opposition senators think. So power is a big part of the story. But it is not the whole story, as even a moment’s reflection will show. To begin with, presidents have to decide what kinds of justices they want to appoint. They might decide that they prefer moderates even if they have the power to appoint other justices. When the Senate is closely divided, senators who hold the swing votes will likewise have to decide what to do. The outcomes of the Bork and Thomas hearings, for example, were hardly foregone conclusions; several senators made up their minds only after listening to

much of the argument and monitoring public reaction to it. Finally, ordinary citizens, too, will have to decide how to react when presidents nominate (or promise to nominate) dogmatic candidates to the Supreme Court, and when senators either confirm or reject those nominees. Citizens will have to decide, in particular, how to evaluate the actions of the president and the senators at election time. In 1992, for example, Illinois voters unhappy about the confirmation of Clarence Thomas ousted their incumbent Democratic senator, Alan Dixon, who had supported Thomas, in favor of his challenger in the primary election, Carol Moseley Braun.²³

While it would be a mistake to ignore the importance of blunt power to the appointments process, it would also be a mistake to ignore the power of ideas. Public understandings of the appointments process will affect how that process is conducted, how the Court is perceived, and, ultimately, how well the Court can perform its constitutional duties. Right now, those public understandings are in disarray, and the evasive exchanges at the confirmation hearings are an embarrassment to the constitutional system. Americans can, and should, expect something better. The goal of this book is to show what that something would look like.