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TAKING THE COURT SERIOUSLY: A PROPOSED APPROACH TO SENATE CONFIRMATION OF SUPREME COURT NOMINEES

*Gary J. Simson**

Any observer of the Senate's debate of the Bork nomination could not help but be struck by the broad disagreement among Senators as to the appropriate standards for confirming a Supreme Court nominee. To what extent, if any, should Senators be influenced by their approval or disapproval of votes that the nominee is likely to cast on the Court? Are Senators obliged to defer to the President and confirm the nominee unless they have serious doubts about competence or integrity? On these and other questions of proper standards, consensus was obviously lacking.¹

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1. The following excerpts from speeches delivered consecutively on the Senate floor provide a good sense of the divergence of views:

Mr. GRAMM. . . . I have always felt no matter who was in the White House, if he sent a nominee to the Congress for confirmation in the Senate, I ought consider two aspects. No. 1, the person's experience and qualifications; I think it is reasonable to vote against somebody if you think they are not qualified.

. . . .
The second thing I think we have a right and an obligation to look at is integrity. Does this person have integrity? . . .

. . . .
Judge Bork has not been attacked because he lacks ability or because he lacks integrity. He has been attacked by exactly the same groups who opposed Ronald Reagan's election in 1980 and who opposed Ronald Reagan's election in 1984, groups trying to win in the Senate what they could not win at the ballot box. . . .

. . . .
[Judge Bork] is probably not going to be confirmed basically because of a philosophical dispute, a political dispute, concerning the direction of the Supreme Court. I think this injection of politics hurts the process. . . .

. . . .
Mr. LEAHY. . . . [T]he central issue in this nomination is the question of Judge Bork's judicial philosophy: His approach to the Constitution, and to the role of the courts in discerning and enforcing its commands. . . .

. . . .
After the nomination was made, we heard from some of the supporters of this nomination that the Senate should not consider Judge Bork's judicial philosophy. We were told that our only job was to make sure that the nominee was competent

The debate on the Bork nomination may have been unique in the clarity with which this broad disagreement on standards emerged.² It was hardly unique, however, as an instance in which such disagreement existed. With no express guidance in the Constitution as to applicable standards—the pertinent constitutional provision says only that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court”³—Senators often have buttressed their arguments for or against a nominee with competing versions of the appropriate standards for confirmation.⁴

and law-abiding. Any further inquiry, we were told, would be ideological, and somehow improper.

That is a tough argument for anybody to make. The proponents of that argument want us to ignore 200 years of constitutional history. That history tells us that the Senate has often considered and debated the judicial philosophy of nominees to the Supreme Court. In fact, after those debates, one-fifth of these nominees have not been confirmed.

133 CONG. REC. S14,788-91, S14,793 (daily ed. Oct. 22, 1987).

2. See generally H. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (2d ed. 1985).

3. U.S. CONST. art. II, § 2, cl. 2.

4. Compare, for example, the arguments made on the Senate floor by Senators Norris and Allen on the nomination of John J. Parker:

Mr. NORRIS. . . . When we are passing on a judge, therefore, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that this nominee possesses both of these qualifications—but we ought to know how he approaches these great questions of human liberty. This is the great tribunal that Roosevelt said and that everybody knows leads the way in constitutional questions for the change of our Government, the greatest lawmaking body on earth, with power that no one can overrule or override, whose word is final, whose decrees are final, and from whose word and judgment there is no appeal.

72 CONG. REC. 8192 (1930).

Mr. ALLEN. . . . I am going to vote for Judge Parker's confirmation because I believe it is my conscientious duty thus to do.

Ah, what kind of a Supreme Court shall we have presently if we are going to select judges to sit upon that bench according to . . . the preconceived notions we possess touching the doctrines we should like to have them believe?

What are we going to do in this body presently when a nomination for the Supreme Court comes in and we are told, “The future of the eighteenth amendment depends upon the interpretation of the Supreme Court, and this man is not wet enough or that man is not dry enough?”

72 CONG. REC. 8435 (1930). Consider also the defense of nominee G. Harrold Carswell that Senator Hruska offered to a radio interviewer and Senator Kennedy's response on the Senate floor:

Even if [as has been claimed] he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there.

R. HARRIS, *DECISION* 110 (1971) (quoting Senator Hruska).

Mr. KENNEDY. . . . Story, Holmes, Cardozo, Frankfurter—that is the standard of excellence to which all Presidents must strive. And if, as one Senator argued, “we can't have all Brandeises and Frankfurters and Cardozos and stuff like that there,” then the least we can do is to seek to come as close as possible. The fact that we cannot find a Frankfurter is no excuse for nominating a Carswell.

116 CONG. REC. 10,365 (1970). For discussion of these two unsuccessful nominations, see R.

Commentators have entered the fray with a wide variety of solutions. Mitchell McConnell, for example, treats Supreme Court appointments as basically a matter of presidential prerogative.⁵ In his view, the Senate is obliged to confirm any nominee who is not patently unfit. Senators should be satisfied if the nominee appears "competent"⁶ and has attained "some level of achievement or distinction."⁷ In addition, they should recognize that "altering the ideological directions of the Supreme Court" is part of the "constitutionally proper authority of the Executive in this area."⁸

Unlike McConnell, Laurence Tribe⁹ sees the Senate as an "equal partner"¹⁰ in the appointment process. As understood by Tribe, this equal partnership apparently does not entail an inquiry into general qualifications materially more demanding than the one proposed by McConnell: Senators must decide whether the nominee "is, in some minimal sense, 'fit' to serve";¹¹ they are "not bound to confirm manifestly inferior choices."¹² For Tribe, however, this equal partnership does entail a two-part inquiry by each Senator into the views that the nominee holds and is apt to express on the Court—a matter that McConnell regards as essentially only the

HARRIS, *supra* (on Carswell); Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 567-72 (1986) (on Parker).

5. McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7 (1970). Along similar lines, see Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989).

6. McConnell, *supra* note 5, at 33.

7. *Id.*

8. *Id.* at 32. According to McConnell, the Senate should not vote based on opposition to a nominee's views except in the "highly unlikely" event that the President selects someone of truly extreme views—"a nomination, for example, of a Communist or a member of the American Nazi Party." *Id.*

In 1984 McConnell, who wrote the article discussed above while serving as chief legislative assistant to a Senator on the Judiciary Committee, was elected to the Senate. During the floor debate on the Bork nomination, Senator McConnell, Republican of Kentucky, asked that his 1970 article be printed in the *Congressional Record* and suggested that the article accurately described the role that the Senate should play. 133 CONG. REC. S14,809, S14,819-20 (daily ed. Oct. 22, 1987). He claimed to see in the "imminent defeat" of the Bork nomination, however, the clear emergence of a "new standard of review"—one providing that:

We in the Senate are going to make our decision on any basis we darn well please, and if we object as a matter of philosophical persuasion to the direction the President is trying to move the Court, whether to the right or to the left, we can just stand up and say that and vote accordingly. No deliberation, no standards of excellence, no standards at all.

Id. at S14,820. Moreover, he stated "with no particular bitterness" that he planned to adhere in the future to this new standard because "it occurs to this Senator that if nobody else is applying [the] kind of strict, temperate standard [advocated in the 1970 article], then he should not either." *Id.*

9. L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985).

10. *Id.* at 132.

11. *Id.* at 141.

12. *Id.* at 85.

President's concern. First, Senators must determine whether the nominee's "vision of what the Constitution means" comes within the bounds of the "American vision."¹³ They should not vote to confirm unless they find that the nominee's vision conforms to "our idea of a just society," not simply the idea of what "might be a 'civilized' society in some people's eyes."¹⁴ Second, Senators must determine whether the nominee's appointment "would upset the Court's equilibrium or exacerbate what [they regard] as an already excessive conservative *or* liberal bias."¹⁵ To vote to confirm in the face of such a detrimental effect would be "to abdicate a solemn trust."¹⁶

Henry Monaghan offers yet another conception of the Senate's role. According to Monaghan, "[w]e are better off recognizing a virtually unlimited political license in the Senate not to confirm nominees."¹⁷ Senators should feel free to vote against a Supreme Court nominee based on "statesmanship, prudence, common sense, and politics."¹⁸ Monaghan defends this "wholly political"¹⁹ conception of the Senate's role on two grounds. First, it is not possible

13. *Id.* at 94, 96.

14. *Id.* at 96.

15. *Id.* at 107.

16. *Id.* Other commentators have argued for significant scrutiny of a nominee's views, but typically they have done so with less specific guidance to Senators. *See, e.g.,* Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657, 657 (1970) (maintaining that a Senator should vote against confirmation if the Senator "firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court"); Lively, *supra* note 4, at 573 (maintaining that a Senator should vote against confirmation if the Senator "believes a nominee's substantive views would be harmful to the nation's best interests"); Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 *WM. & MARY L. REV.* 633, 681 (1987) (maintaining that a Senator should vote against confirmation of any nominee "whose fundamental judicial or political values differ from those of the senator").

17. Monaghan, *The Confirmation Process: Law or Politics?*, 101 *HARV. L. REV.* 1202, 1207 (1988). Testifying in behalf of the Bork nomination several months prior to authoring the latter essay, Monaghan implicitly endorsed a very different conception of the Senate's role—a conception fairly close to McConnell's. He maintained that, in light of the nominee's "surpassing credentials" and the fact that "it is simply wrong to depict Judge Bork as a radical or to intimate that he lacks integrity," the Bork nomination "should have been met with acclamation." *On the Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 3, at 2926-27 (1987). At the start of his essay, Monaghan explains that after testifying in the Bork hearings:

I became persuaded that my submission was incomplete. Additional argument was necessary to establish that my testimony, if accepted, imposed a constitutional duty on senators to vote for confirmation. To my surprise, further reflection convinces me that no such argument is possible.

Monaghan, *supra*, at 1202.

18. Monaghan, *supra* note 17, at 1207.

19. *Id.* at 1207 n.21.

to "articulate a Senate role bounded in some meaningful way."²⁰ Second, "politicians face many issues at once," and it is dubious "that they are obliged to view all of them as matters of principle all the time."²¹

In this article, I propose an approach to Senate confirmation of Supreme Court nominees that conforms more closely to Tribe's approach than to McConnell's or Monaghan's but that varies greatly even from Tribe's. I share both Tribe's explicit assumption that the Senate is an "equal partner" in the appointment process and his implicit assumption that this equal partnership can be described, and should be implemented, in a systematic and principled way. I part ways with Tribe, however, on the form that this equal partner's systematic and principled approach should take. My proposed approach contemplates a far more searching inquiry into the nominee's basic fitness for the task and calls for an inquiry into the nominee's views that bears little resemblance to Tribe's two-part test.²²

Part I of the article identifies, and discusses the evaluation of, three factors central to a decision whether to confirm a Supreme Court nominee. Part II suggests how a Senator should aggregate his or her assessments of these factors to arrive at a final decision on the nomination. Together, Parts I and II provide a response to Monaghan's skepticism about the possibility of formulating a meaningfully-bounded approach by offering a concrete proposal that claims to meet this description. Part III defends the proposed approach against arguments for a more limited Senate role in the appointment process.

I emphasize at the outset what may be termed the "aspirational" nature of my approach. I have tried to fashion an approach that conscientious Senators should be able and willing to apply, not one that necessarily will prove highly popular among today's Senators. Immersed in the hectic world of Washington politics, subject to a variety of presidential and interest-group pressures, many Sena-

20. *Id.* at 1208 n.26.

21. *Id.* at 1207 n.21. Monaghan seems to be in a rather distinct minority among commentators in his conception of the Senate's role. See Ross, *supra* note 16, at 634 ("commentators generally agree that the Senate would abuse its constitutional prerogative if it rejected a nominee on grounds that were . . . blatantly political").

22. With limited exception, see *infra* note 26, I do not attempt to detail below the difficulties that I see with Tribe's approach. As my proposed approach should make clear, however, I do not think that his approach calls for a sufficiently rigorous examination of a nominee's general qualifications, and I believe that his two-part test misses the mark as far as the appropriate focus for an inquiry into the nominee's views. Tribe's approach is strongly criticized in Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations* (Review Essay), 95 YALE L.J. 1283 (1986). Although I agree with a number of Friedman's criticisms, I do not, as indicated in Part III-B, subscribe to various others.

tors may object to this approach as too complex or onerous to apply or too principled in the factors that it recognizes as relevant.

Although such a response would be understandable, it also would be unwarranted. At least for present purposes, I do not seriously question Monaghan's claim that politicians are not obliged to "view all [issues] as matters of principle all the time."²³ There may well be various matters that Senators are justified in resolving with their own or their party's welfare, rather than the welfare of the general populace, paramount in mind. I very seriously question, however, Monaghan's tacit assumption that if the above claim is true, then it also must be true that politicians are not obliged to view the particular issue of confirming a Supreme Court nominee as a matter of principle. The inference simply does not follow.

In contrast to Monaghan, I suggest that the implications of a decision to confirm a Supreme Court nominee are sufficiently great that, unless Senators are virtually *never* obliged to treat issues as "matters of principle," they must be obliged to accord this issue such treatment. First, as discussed in Part I, every decision of this sort significantly implicates important national interests. The same obviously cannot be said of a wide range of decisions that Senators commonly make. Second, a decision to confirm a Supreme Court nominee has a finality that the typical legislative decision does not. If legislation proves ill-advised, Senators may, with the concurrence of the House and the President, amend or repeal it. If a decision to confirm a Supreme Court nominee proves ill-advised, Senators in effect have no control over the length of time that it will continue to have deleterious effects. Article III of the Constitution essentially guarantees the successful nominee life tenure on the Court.²⁴

Ultimately, I believe that, out of either a sense of duty²⁵ or sensitivity to the great publicity and public attention that a decision on a Supreme Court nominee receives, a sizable group of Senators is quite open to an approach that promises to facilitate their making this decision in a systematic and principled way. Perhaps few, if any, of these Senators would be willing to adopt my proposed approach in all of its details. At a minimum, however, I am hopeful that they would recognize its usefulness both in guiding their con-

23. See Monaghan, *supra* note 17, at 1207 n.21; *supra* text accompanying note 21.

24. "... The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . ." U.S. CONST., art. III, § 1.

25. Cf. [Senator Charles McC.] Mathias, *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 207 (1987) (Senate decisions on nominations to the federal courts "may often be tough indeed, requiring an adherence to principle in the face of strong partisan pressures. For when the Senate carries out its function of advice and consent, its first loyalty must be not to the political parties, nor to the president, but to the people and to the Constitution they have established").

sideration of particular factors that they regard as important and in helping them place in perspective and sensibly weight their assessments of such factors.

I. FACTORS CENTRAL TO THE DECISION

I begin with a proposition that may seem modest but that is not uncontroversial and will be defended at length in Part III: A Senator's decision whether to vote for or against a Supreme Court nominee should reflect his or her informed judgment as to whether the nominee's appointment is in the nation's best interests. In general I suggest that, to reach such an informed judgment, a Senator principally should consider how positive or negative an influence the nominee's appointment is likely to have with respect to:

1. The outcome of cases of major national significance
2. Public confidence in the Supreme Court
3. The fairness and efficiency of the Supreme Court's decisionmaking process.²⁶

These three subject matters are peculiarly relevant to an informed judgment on Supreme Court appointments for two reasons. First, any appointment to the Court reasonably may be expected to have a material influence with regard to each. Second, each is a matter of substantial national importance. The substantial national importance of the outcome of cases of major national significance follows essentially as a matter of definition. That the Court often decides such cases should not be in serious doubt.²⁷ Public confidence in all our institutions of national government is vital in terms of national stability. Moreover, it may have special importance as regards the Supreme Court. Lacking the enforcement mechanisms of the President and Congress, the Court is especially reliant on public respect for its effectiveness.²⁸ Lastly, the fairness and efficiency of the

26. I use the formulation "influence with respect to" rather than "influence on" in an effort to make clear that the focus at the outset is not the appointment's ultimate impact on these three subject matters but rather the type of influence that the appointment would exert. Thus, for example, a Senator might find that an appointment's likely influence with respect to the first subject matter is very negative even though the nominee's vote will probably not have a material impact on the outcome of cases of major national significance unless and until the Court's membership changes significantly. As indicated in Part II-B *infra*, I do make allowance for impact to be considered at a later point in the decision process. I believe, however, that to avoid confusion and undue emphasis on short-term consequences, it needs to be considered separate from and subsequent to the considerations addressed in Part I. The part of Tribe's proposed two-part inquiry that addresses the Court's balance (*see* L. TRIBE, *supra* note 9, at 106-11; *supra* text accompanying notes 15 & 16) calls for the type of focus on impact that I regard as highly problematic and wish to avoid.

27. For anyone who does have doubts on the matter, see L. TRIBE, *supra* note 9, at 3-30.

28. *See* THE FEDERALIST NO. 78, at 503-04 (A. Hamilton) (Mod. Lib. ed. 1937);

Court's decisionmaking process has great importance by virtue of its implications for the sound and orderly development of nationwide law.²⁹

A. INFLUENCE AS TO OUTCOME OF CASES

As an initial matter, a Senator seeking to assess the first of the above factors—how positive or negative an influence the nominee's appointment is likely to have with respect to the outcome of cases of major national significance—must try to predict which issues are likely to assume such significance during the nominee's years on the Court. The task is obviously a difficult one, increasingly so as the focus moves further away from the present. It can be performed in a manageable and meaningful way, however, if done with recognition of its inherent difficulties. First, Senators should think in rather broad terms in identifying such issues. Essentially, they should identify as "issues" clusters of the types of issues apt to arise in specific litigation—"affirmative action," "limitations on reproductive freedom," "state immunity from federal regulation," and the like.³⁰ Second, Senators should limit their focus to the not too distant future. Ultimately, as indicated in Part II-B, Senators must take account of the underlying uncertainties in deciding how much weight to give to an assessment of the appointment's likely influence as to the outcome of cases. Having simplified the task of prediction, they must take care to avoid placing undue weight on the prediction reached.

After identifying the likely issues of future importance, a Senator must attempt to predict how the nominee, if confirmed, would vote on them. An obvious course of action—simply asking the

Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 796 (1957). Justice Powell not long ago made this point colorfully and persuasively in a televised interview when he discussed the Court's capacity for enforcing its judgment in the Nixon Tapes Case (United States v. Nixon, 418 U.S. 683 (1974)). *In Search of the Constitution: Justice Lewis F. Powell, Jr.* (Public Affairs Television, Inc., B. Moyers exec. ed. 1987).

29. I emphasize that, in singling out these three subject matters, I do not mean to preclude the possibility that, under certain circumstances, a Senator may be justified in treating another subject matter as more relevant to his or her confirmation decision than any or all of these three. It is entirely conceivable that, for reasons related or unrelated to the particular nominee, an appointment's likely influence with regard to another subject matter may have greater bearing on the interests of the nation. I suggest, however, that the three listed subject matters are generally of sufficient relevance that a Senator should not relegate any or all of them to secondary status without thinking seriously about the justification for doing so.

30. Senators reasonably could disagree as to whether a particular issue is one of major national significance, and in light of ideological differences, some such disagreement would seem inevitable. I am inclined to believe, however, that the level of disagreement would be relatively low. In particular, although ideological differences may translate into differing estimates of an issue's significance, they frequently seem to allow for consensus as to an issue's significance while generating different perceptions as to the issue's proper resolution.

nominee how he or she would vote—is apt to prove distinctly unhelpful. Since 1955, it has become customary for Supreme Court nominees to appear before the Senate Judiciary Committee and respond to questions.³¹ Citing the need to avoid prejudicing or appearing to prejudice their future decisionmaking on the Court, however, nominees routinely have refused to answer questions that call upon them to indicate their likely votes on issues apt to come before the Court.³² To the extent that nominees have been willing to discuss such issues in the committee hearings, they typically³³ have limited their remarks to explaining the issues' complexity or importance³⁴ or affirming broad principles that virtually no one

31. The first Supreme Court nominee to appear before the Senate Judiciary Committee was Harlan F. Stone in 1925. The committee permitted him to appear to respond to charges that he had acted improperly as Attorney General with regard to the indictment of a United States Senator. The next nominee to appear was Felix Frankfurter in 1939. Frankfurter appeared at the committee's invitation—an invitation apparently prompted by allegations that the nominee had ties to the Communist Party. Ten years later Sherman Minton aroused substantial opposition by declining an invitation to appear, and every nominee since John Marshall Harlan in 1955 has appeared. See Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157-63 (1988); Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109, 116-23 (1987).

32. See, e.g., *On the Nomination of Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 57-58 (1981):

Judge O'CONNOR. . . I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter. This would result in my inability to do my sworn duty; namely, to decide cases that come before the Court.

33. A notable exception was Robert Bork. He was far more willing than most nominees to discuss issues of this sort. See Ross, *supra* note 31, at 109-12, 139-40. His past statements were so unusually revealing of his likely votes on the Court, see *infra* text accompanying notes 36-39, and the votes thus indicated seemed so certain to meet with the disapproval of a majority of the Senate, that he probably felt that he had little choice in the matter. Unless he could persuade a number of Senators that he was more openminded on various important issues than his past statements might make it appear, his confirmation seemed doomed. For a range of views on the propriety and proper scope of Senate questioning of Supreme Court nominees, see Freund, *supra* note 31, at 1162-63; McKay, *Selection of United States Supreme Court Justices*, 9 U. KAN. L. REV. 109, 131-33 (1960); Mikva, *Judge Picking*, 10 DIST. LAW., Sept.-Oct. 1985, at 36; Ross, *supra*; Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213 (1988).

34. See, e.g., *On the Nomination of Judge Antonin Scalia to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 98 (1986):

would dispute.³⁵

In some instances, Senators have been able to gain substantial insight into a nominee's likely votes on important issues by examining statements that the nominee has made in the past as to how such issues should be resolved. One such instance was the Bork nomination. In articles, speeches, and the like, the nominee over the years had staked out positions contrary to the Court's on a wide array of constitutional issues.³⁶ Of course, it could be argued—and

Senator SIMON. . . . [A]re basic traditions pretty sound in the whole church-state area?

Judge SCALIA. I'm not sure what you mean by "basic traditions," Senator.

Senator SIMON. Interpretation of the constitutional principles in this area as they have emerged over the past two centuries.

Judge SCALIA. Well, I think what's sound is that—what's accepted—the problem in the area, Senator, is a problem that largely arises because of a natural conflict between the establishment clause and the freedom-of-religion clause. Both of those interests are very important. People ought to be able to practice their religion freely, and yet the Government cannot establish religion.

So you get cases like the case of the Jehovah's Witness, who, being a sabbatarian, wants to have Saturday off instead of Sunday, and wants to draw unemployment compensation when she's been offered a job that requires work on Saturday and turned it down.

And the way the Court resolved the case was to say it violated the freedom-of-religion clause for a State not to allow her to draw unemployment compensation simply because she refused to accept a job that would require her to work on Saturday.

Well, yes, that does protect freedom of religion, but, on the other hand, doesn't that somehow amount to an establishment of religion to have the State make a special rule to accommodate the religious belief of this sabbatarian?

That's the problem that runs throughout these cases. . . .

35. See, e.g., *On the Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to Be Associate Justices of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 65 (1971):

Senator BAYH. . . . Can the Government go out here on a fishing expedition and promiscuously bug telephones because the President, himself, seems to feel it meets a certain criterion; or should it meet the probable cause test that is not foreign to our system of jurisprudence?

Mr. REHNQUIST. I think the answer to the first part of your question is so clear that I should have no hesitancy in giving it, that, certainly, the Government cannot simply go out on a fishing expedition, promiscuously bugging people's phones. As to whether a standard of probable cause, in the sense of probable cause to arrest, in the sense of probable cause laid down by the Omnibus Crime Act of 1968, or probable cause to obtain a search warrant for tangible evidence, it seems to me those are the sort of questions that may well be before the Court, and I ought not to respond.

36. See, e.g., *The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 308-16 (1981) (statement of Robert Bork); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). See generally *On the Nomination of Robert H. Bork to Be Associate Justice of the United States Supreme Court: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 5, at 6180-6285 (1987) (Senate Judiciary Committee report on the nomination); Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101 (1987); Gillers, *The Compelling Case Against Robert H. Bork*, 9 CARDOZO L. REV. 33 (1987).

essentially was by the nominee³⁷—that Robert Bork the academic free to wield a sharp pen (or tongue) from the sidelines must be seen as very different from Robert Bork one of nine Justices entrusted with presiding over the orderly growth of the law. It required considerable effort, however, *not* to find in Robert Bork's past statements strong guidance as to his likely votes on the Court. Senators both for and against the nomination clearly found such guidance,³⁸ and there seems little question that the person who nominated him did as well.³⁹

As others have noted,⁴⁰ however, Robert Bork was far from the usual nominee in terms of the type of "paper trail"⁴¹ that he had left for Senators seeking to predict his likely votes. Much more typical is the nominee who comes before the Senate having written or publicly said little or nothing directly addressing how the Court should be resolving the major issues of the day.⁴² In light of two basic realities, the most logical way of predicting likely votes on

37. See, e.g., *On the Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 1, at 129, 666-67, 855 (1987).

38. See Taylor, *Bork Fight: Tactics Supplant Issues*, N.Y. Times, Oct. 21, 1987, at A23, col. 1.

39. See Oakes, *Why the Smears by Bork's Allies?*, N.Y. Times, Sept. 22, 1987, at A35, col. 3.

40. See, e.g., Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1167-70 (1988); Ross, *supra* note 31, at 110 & n.3.

41. I borrow the phrase from Senator Kennedy. See Brinkley, *President Selects Appellate Judge to Become Justice*, N.Y. Times, Oct. 30, 1987, at A1, col. 6, D23, col. 4 (quoting Senator Kennedy's characterization of nominee Douglas Ginsburg—President Reagan's choice after the Bork nomination had failed—as "an ideological clone of Judge Bork—a Judge Bork without a paper trail").

42. To be sure, nominees with prior judicial experience may have had occasion on the bench to resolve many issues of the sort that they may be expected to encounter on the Court, and their opinions may well shed some light on their likely votes on the Court. These opinions, however, almost cannot help but shed considerably less light on likely votes than scholarship like Robert Bork's, because they are written under the onus of treating as definitive the precedents of the Supreme Court. However much the opinion-writer may disagree with any of the Court's precedents, he or she is obliged to accept them as the law of the land. Thus, for example, although at the time of his Supreme Court nomination Justice Kennedy had served as a federal appellate judge for about a dozen years, there was far less agreement as to his likely votes than Judge Bork's. See Greenhouse, *Senate Panel Approves Judge Kennedy*, N.Y. Times, Jan. 28, 1988, at A10, col. 1.

Probably the only opinion-writing that in general even approximates scholarship like Robert Bork's in its utility for predicting likely votes are some opinions by members of state high courts. In interpreting state constitutional or statutory provisions that duplicate or closely resemble federal ones, a state supreme court judge similarly offers relatively direct insight into his or her likely votes on the Court. Not only are the issues addressed very much like the ones that the nominee may be expected to see on the Court; but also the judge in resolving such issues enjoys a degree of interpretive freedom very much like that enjoyed by members of the Court. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985).

these occasions is to examine the nominee's past statements and activities for indications of his or her ideological leanings and conception of the judicial role and then, based on these indications, to draw inferences about likely votes. The two realities are, first, that virtually any issue of importance apt to come before the Court will lend itself to reasonable differences of opinion as to its proper resolution,⁴³ and second, that the way in which the nominee, if confirmed, will vote on such an issue will be significantly shaped by his or her political and social philosophy and attitudes about the role of courts.⁴⁴

In drawing inferences about likely votes, a Senator must be careful not to assume too readily that a nominee's apparent ideological tenets will translate directly into votes: A nominee's attitudes about the judicial role frequently may lead the nominee to vote differently on the Court than he or she would vote if placed in a purely policymaking position.⁴⁵ Even if a Senator is careful in this regard, however, the prediction of likely votes often cannot help but be quite uncertain. Most obviously, a nominee's ideology and conception of the judicial role may resist relatively precise identification. Furthermore, even if they are fairly clearly ascertainable, it may be rather unclear how they translate into votes, particularly if the nominee is quite openminded, generally willing and able to take seriously points of view in conflict with his or her own.⁴⁶ Perhaps most important, the ideological tenets and attitudes about the role of courts of any nominee—and, again, particularly more openminded ones—are subject to change. Elevation to the nation's most visible and powerful court, interaction with other Justices,⁴⁷ public criticism of the individual Justice or of the Court's performance in general,⁴⁸ personal experiences not arising out of the Justice's work on the Court⁴⁹—these and other factors may cause a Justice's ideol-

43. See Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1725-29 (1988); cf. Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 682-709 (1977) (discussing modern equal protection precedent). As Justice O'Connor has remarked, the Court's business essentially consists of issues as to which one can "write persuasively on either side." *In Search of the Constitution: Justice Sandra Day O'Connor* (Public Affairs Television, Inc., B. Moyers exec. ed. 1987).

44. See C. BLACK, *THE PEOPLE AND THE COURT* 161-66 (1960); Schauer, *supra* note 43, at 1729-31.

45. See, e.g., H. ABRAHAM, *supra* note 2, at 219-22 (discussing Justice Frankfurter).

46. See, e.g., Gunther, untitled essay in *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 409-14 (1987) (discussing Justice Powell).

47. See, e.g., H. ABRAHAM, *supra* note 2, at 260 (discussing influence of Justice Frankfurter on Justice Harlan).

48. See, e.g., *id.* at 304 (suggesting possible influence on Justice Blackmun of criticism of his opinion for the Court in *Roe v. Wade*, 410 U.S. 113 (1973)).

49. See, e.g., Powe, *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMM. 267, 268-69 (1989) (attributing Justice Douglas's "leftward

ogy and judicial philosophy to evolve significantly from the form that they took at the time of nomination.

Without denying the importance of these sources of uncertainty, I emphasize that predicting likely votes is hardly *so* uncertain as to justify not making the prediction, thereby eliminating from the confirmation decision the highly relevant factor of likely influence as to the outcome of cases. Rather, as indicated in Part II-B, the proper response to this uncertainty is to discount for it when deciding how much weight to assign to the assessment of this factor.⁵⁰

evolution" on free speech questions to "the passing from the scene of his patron FDR," "his summer travels in the third world," "experience *simpliciter* which by the mid-1950s caused him to believe that restrictions on speech were invariably motivated by fear, or worse," and "the waning of Douglas's presidential ambitions").

50. An interesting and relevant question that I do not attempt to address in this article is: What does history tell us about the degree of certainty with which a prediction appropriately may be made as to a nominee's likely votes? By comparing the Justices' actual votes with the votes that, based on information available upon reasonably diligent inquiry at the time of nomination, one would have predicted they would cast, one could achieve insights that would prove useful in applying the approach proposed in this article.

A number of commentators have attempted to generalize about a distinct but related matter: the extent to which the Justices have belied expectations that the Presidents who nominated them held at the time of their nomination. Their estimates have varied significantly. See, e.g., R. SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 147 (1971) ("about one justice in four whose performance could be evaluated did not conform to the expectations of his appointer in important matters that came before the Supreme Court"); L. TRIBE, *supra* note 9, at 50 ("Presidents who have tried to leave their mark on the Court by selecting Justices with care have only rarely found the meal unpalatable. For the most part, and especially in areas of particular and known concern to a President, Justices have been loyal to the ideals and perspectives of the men who have nominated them"); Friedman, *supra* note 22, at 1292 ("Most Justices fit at least very roughly the expectations that Presidents and Senators have at the time of nomination. But . . . there have been a substantial number of surprises"); Lively, *supra* note 4, at 564 ("The record of past appointments indicates that a president who endeavors to appoint someone whose performance will be sympathetic to administration policies likely will succeed. Given an enhanced combination of executive attention, preparation, and experience, nomination of a person whose performance proved unpredictable would seem an especially remote possibility"); Rehnquist, *Presidential Appointments to the Supreme Court*, 2 CONST. COMM. 319, 320-21 (1985) ("I think history teaches us that those [Presidents] who have tried [to 'pack' the Court] have been at least partially successful, but that a number of factors militate against a President having anything more than partial success") (reprinting a 1984 speech by then-Justice Rehnquist). For present purposes, I see no need to enter this debate. None of these accounts casts serious doubt on the viability of the inquiry that I propose into an appointment's likely influence as to the outcome of cases. Cf. Rehnquist, *supra*, at 319-21 (despite suggesting that a President reasonably can aspire to only rather limited success in trying to "pack" the Court with Justices who will vote consistently with Administration policies, maintaining that there is "no reason in the world" why a President should not try to pack the Court).

Parenthetically, I note that I question whether any attempt to generalize about the extent to which the Justices have belied presidential expectations can realistically hope to be highly persuasive. Most obviously, the entire enterprise is plagued by the enormous difficulty of establishing the specific nature of a President's expectations as to a particular nominee. The task is not easy even if one assumes that, in selecting nominees, Presidents have been motivated only by a desire to secure people who will vote their way on important issues.

Finally, to be comprehensive in assessing this factor, a Senator should consider whether the nominee is apt to prove particularly able to sway others on the Court to his or her views. The greater a Justice's ability in this regard, the greater his or her influence as to the outcome of cases. Typically, Senators will be unable to predict with any degree of confidence whether the nominee will be unusually able to attract other Justices' votes. At times, however, this prediction may not seem so undirected—for example, if the nominee is being put forward for Chief Justice,⁵¹ or if the nominee has demonstrated in past positions an ability to exercise intellectual leadership that seems extraordinary even for a nominee to the Supreme Court.⁵² On these occasions, a Senator should be prepared to make this prediction part of the assessment of likely influence as to the outcome of cases.

B. INFLUENCE AS TO PUBLIC CONFIDENCE IN COURT

Public confidence in the Court depends upon a variety of perceptions on the part of the public. Ideally, in trying to decide how positive or negative an influence a nominee's appointment is likely to have with regard to public confidence in the Court, a Senator would assess separately the appointment's likely influence as to each of these perceptions, and then arrive at an overall assessment on the basis of these more specific ones. To keep the inquiry manageable, however, a Senator probably should limit it to the several perceptions that seem most determinative of public confidence in the Court: How distinguished are the Justices in terms of intellectual credentials and prior professional experience? How great is their personal integrity? How objective, openminded, and candid are they in their decisionmaking? How representative are they of different groups in society?

In considering an appointment's likely influence as to the pub-

What issues were in the President's contemplation at the time of nomination? What resolutions were then preferred? Were there not at least some issues as to which the President did not expect the nominee to vote to the Administration's liking? Moreover, the task takes on significantly greater complexity once one factors in the reality that in making Supreme Court nominations, Presidents have been motivated not by a single consideration but by a wide array of them. See H. ABRAHAM, *supra* note 2, at 49-70 (providing an overview as to "why they get there").

51. See L. TRIBE, *supra* note 9, at 37 (Chief Justices "present the most obvious examples of the 'one Justice who can make a difference.' Although often in dissent, and sometimes lagging behind instead of leading the Court, one Chief can make all the difference in the constitutional world").

52. See, e.g., Freund, *supra* note 31, at 1151-52 (discussing Justice Brandeis). See also Ackerman, *supra* note 40, at 1168 ("In contrast to the normal nominee, here [in the case of Robert Bork] was a man whose public record suggested that he might possess both the transformative vision and legal ability needed to spearhead a radical judicial break with the past").

lic perception of the Justice's intellectual and professional distinction, a Senator should examine the nominee's various tangible achievements apt to affect this perception. Among the most relevant would be schools attended, degrees received, employment history, public service, and publications.⁵³

A Senator seeking to gauge an appointment's likely influence as to the public perception of the Justice's personal integrity needs to consider broadly the nominee's ethics in his or her professional and nonprofessional dealings. The Senator should be attentive to such matters as the nominee's sensitivity in the past to financial conflicts of interest,⁵⁴ history of compliance with generally applicable legal constraints and relevant professional codes of conduct,⁵⁵ and involvement with clubs or organizations with exclusive membership criteria.⁵⁶

In assessing an appointment's likely influence as to the public perception of the Justice's objectivity, openmindedness, and candor in decisionmaking, a Senator rather obviously needs to look for indications of the nominee's capacity for objective, openminded, and candid decisionmaking. Where the nominee has substantial judicial experience, his or her performance on the bench may be expected to offer direct and significant insight into this capacity. Where the nominee lacks such experience, a Senator's insight into this capacity almost invariably will be less direct but need not be less significant.⁵⁷ If the various governmental and private actors investigating and reporting on nominees are conscientious about their work,⁵⁸ a

53. Presidents generally have refrained from nominating obvious mediocrities. A nomination widely regarded at the time as an exception in this regard was President Nixon's nomination of G. Harrold Carswell. See *supra* note 4.

54. Senate concern with this matter figured prominently, for example, in the defeat of the Haynsworth nomination in 1969. For discussion of the incidents in question and a belated defense of the nominee, see McConnell, *supra* note 5, at 14-20.

55. To accomplish its purpose, any inquiry into this matter almost certainly cannot be limited to adjudicated noncompliance with these norms. Cf. Totenberg, *supra* note 33, at 1225 (discussing press inquiry into nominee Douglas Ginsburg's marijuana use).

56. Among the items in nominee G. Harrold Carswell's past that caused considerable Senate consternation was his role in helping a municipal whites-only golf club become private so as to avoid the impact of Supreme Court decisions invalidating segregated public facilities. See R. HARRIS, *supra* note 4, at 18-19, 41-44.

57. In general, Senators may well tend to have less confidence in their assessment of a nominee's capacity for objective, openminded, and candid decisionmaking where the nominee lacks substantial judicial experience. This is not particularly problematic, however, because, as discussed in Part II-B, they would take their confidence in the specific assessment into account in deciding how much weight to give to their overall assessment of the appointment's likely influence as to public confidence in the Court.

58. The principal actors in this regard are: the FBI, see J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 239-40, 244 (1953); the American Bar Association's Standing Committee on Federal Judiciary, see H. ABRAHAM, *supra* note 2, at 32-39; the press, see Totenberg, *supra* note 33; and the Senate Judiciary Committee, see Ross, *supra* note 16.

Senator should have access to information about past statements and activities quite revealing of the nominee's general objectivity, openmindedness, and candor. In addition, in interpreting available information, a Senator appropriately may employ certain rules of thumb. One such rule might be that a nominee who has long served in a partisan role is apt to have limited capacity for objective decisionmaking.⁵⁹

In evaluating an appointment's likely influence as to the public perception of the Justices representativeness of different groups in society, a Senator should consider whether the nominee is a member of any group whose lack of representation or proportional underrepresentation on the Court casts substantial doubt in the eyes of the public on the Court's fairness and impartiality. In doing so, the Senator should take into account any view that such inadequate representation exists that is shared by a substantial proportion of the nation's people. He or she should assume, however, that the larger the proportion of people sharing the view, the greater the appointment's likely influence as to the public perception of the Justices' representativeness.

On some occasions, the public opinion relevant to gauging an appointment's likely influence as to the public perception of the Justices' representativeness may be so apparent as to require no serious investigation. The nomination of Sandra Day O'Connor in 1981 to be the first woman ever to sit on the Court was one such occasion.⁶⁰ When the relevant public opinion lacks such clarity, however, Senators should not be reluctant to make use of public opinion polls. Such polls are more than sufficiently sophisticated to ascertain this opinion with reasonable precision.⁶¹ Moreover, the questions are of the sort that in most instances Senators probably would need to do no more than locate the results of polls already commissioned.

C. INFLUENCE AS TO COURT'S DECISIONMAKING PROCESS

Like public confidence in the Court, the fairness and efficiency of the Court's decisionmaking process depends upon a number of variables. Also like public confidence in the Court, it is probably best considered for purposes of a confirmation decision in terms of only several such variables. Three seem particularly relevant: the

59. This rule of thumb runs counter to the Senate's longstanding practice (discussed in H. ABRAHAM, *supra* note 2, at 46-48) of giving relaxed scrutiny to nominees to the Court from the Senate's own ranks. Whether or not this rule is used, the approach proposed in this article rather clearly leaves no room for such special treatment of members of the "club."

60. See H. ABRAHAM, *supra* note 2, at 330-33; *In Search of the Constitution: Justice Sandra Day O'Connor*, *supra* note 43.

61. See generally N. BRADBURN & S. SUDMAN, *POLLS AND SURVEYS* (1988).

quality and fullness of deliberation and debate; the individual Justices' capacities for personal productivity; and the nature of interactions among the Justices.

In considering how positive or negative an influence a nominee's appointment is likely to have with regard to the first of these variables, a Senator should focus on an array of personal characteristics. Among the most important are some already discussed with regard to public confidence in the Court: objectivity, openmindedness, candor, and membership in a group unrepresented or underrepresented on the Court.⁶² Other pertinent characteristics include ones as diverse as the nominee's general analytical abilities, ability to empathize with persons whose background or circumstances differ significantly from his or her own,⁶³ and conversance with issues of public law.⁶⁴

62. The fact that these characteristics are relevant to assessing two factors does not indicate that the factors are not sufficiently discrete to warrant separate consideration. Rather, it simply underlines the importance of these characteristics to the overall decision. Objectivity and openmindedness are probably singled out more than any other characteristics as essential for a Justice of the Supreme Court. See, e.g., L. TRIBE, *supra* note 9, at 103 ("Perhaps the most important qualification for being a Supreme Court Justice is the possession of an open mind"); Frankfurter, *supra* note 28, at 793 (the work of the Court "demands the habit of curbing any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis. One in whose keeping may be the decision of the Court must have a disposition to be detached and withdrawn"). Also striking is the frequency with which these characteristics are invoked on occasions honoring a recently retired or deceased Justice—occasions on which the speaker or writer can be expected to identify qualities that in his or her view are basic attributes of an outstanding Justice. See, e.g., *In Memoriam: Honorable Hugo Lafayette Black, Proceedings of the Bar and Officers of the Supreme Court of the United States*, 92 S. Ct. app. 64 (Apr. 18, 1972) (remarks of George Saunders) ("As much or more than any Justice in the history of this Court, he sought to keep his own personal views out of his decisions"); *In Memoriam: Honorable John Marshall Harlan, Proceedings of the Bar and Officers of the Supreme Court of the United States*, 92A S. Ct. app. 19 (Oct. 24, 1972) (remarks of David Shapiro) ("Most impressive to a law clerk was the Justice's willingness to reopen any issue and his continuing concern about disagreement within the world of his own chambers. . . . These qualities were reflected in the care and candor with which he sometimes publicly changed positions on decided issues, and in the avowedly tentative nature of his exploration of new constitutional territory"); Gunther, *supra* note 46, at 410 ("[Justice Powell] displayed a genuine capacity to listen to and learn from both sides of an argument; he approached the cases before him with remarkable openmindedness. . . . [A] judge who practices detachment and seeks to preserve the integrity of the law rather than seeing it as merely a tool is rare and admirable indeed").

63. On the general importance to adjudication of being able to take other persons' perspectives, see Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). On its importance in a specific context, see Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 915-16 (1987).

64. The importance of prior judicial experience has been a source of controversy over the years. See H. ABRAHAM, *supra* note 2, at 52-61. Of the 104 persons who have sat on the Court, only 23 have had ten or more years of prior judicial experience and 42, including 9 of the 16 Chief Justices and such luminaries as Story, Brandeis, and Frankfurter, have had none at all. See *id.* at 52. For a vigorous rebuttal of the importance of such experience for service on the Court, see Frankfurter, *supra* note 28.

A Senator also needs to be sensitive to various personal qualities in assessing the nominee's capacity for personal productivity. Most obviously, are efficiency, organization, and diligence traits generally associated with the nominee? What is the nominee's capacity for decisiveness? Is the nominee's health materially in question?⁶⁵

Finally, an evaluation of likely influence as to the nature of interactions among the Justices calls for broad inquiry into the nominee's collegial abilities. For example, is the nominee someone who tends to move colleagues toward, rather than away from, consensus? Is he or she, to borrow a phrase used to eulogize Justice Harlan, "able to disagree without being disagreeable"?⁶⁶

Even with access to investigatory reports on the nominee, Senators ultimately may be unable to resolve with assurance various questions relevant to assessing the appointment's likely influence as to the Court's decisionmaking process. The fact that some questions may resist relatively clear resolution, however, does not mean that Senators cannot render a meaningful assessment of this factor. It simply means that they should be careful to take their uncertainty about the assessment into account when they decide how much weight to give to each factor.

II. AGGREGATING THE FACTORS

I suggest that a Senator's ultimate decision on a Supreme Court nominee should depend upon whether he or she concludes that the President, acting with the nation's best interests in mind, reasonably can be expected to nominate someone whose appointment would be likely to have, on the whole, a materially more positive influence with regard to the three factors discussed above.⁶⁷ If, in the Senator's view, the President reasonably can be expected to make such a nomination, the Senator should vote to reject the cur-

65. As one commentator has noted: "Presidents generally nominate persons whose health is robust because they hope that their nominees will have long tenures. Health therefore is not usually an issue and has never been a serious issue." Ross, *supra* note 16, at 648. Another commentator has recently criticized the Senate Judiciary Committee, however, for not treating then-Justice Rehnquist's health as a potentially serious issue in the 1986 hearings on his nomination to be Chief Justice. Totenberg, *supra* note 33, at 1218 (discussing need to question nominee about apparently serious health problem in 1981).

66. Warren, *Mr. Justice Harlan, As Seen by a Colleague*, 85 HARV. L. REV. 369, 370 (1971).

67. A Senator's focus obviously needs to be somewhat different on occasions when the President making the nomination is nearing the completion of his or her term. If the current President may not be the one to make another nomination if the present one fails, Senators need to broaden their focus to include the nominees whom the persons most likely to succeed the President reasonably could be expected to name.

rent nominee. Under the circumstances, the probable gain in terms of the three factors from defeating the nomination seems sufficiently substantial to outweigh the costs of doing so—most notably, the adverse effects on the Court of operating with a seat unfilled,⁶⁸ the further expenditures of time and effort required of the Senate and the President, and the risk that the person subsequently nominated will be less desirable. If, in the Senator's view, the President reasonably cannot be expected to make a nomination of the sort described above, the Senator should vote in favor of the current nominee. Here, the lesser probable gain from defeating the nomination seems too insubstantial to outweigh the costs, which are greater as a result of an enhanced risk of a less desirable alternative nominee.

I underline that the above formulation of a Senator's decision does not focus on whom the President, left to his or her own devices, reasonably can be expected to nominate. Rather, it focuses on whom the President *acting with the nation's best interests in mind* reasonably can be expected to nominate. As a logical matter, Senators who are themselves seeking to decide on the nomination in accordance with the nation's best interests must adopt this latter focus. They should be unwilling to yield at all to presidential preferences unless such preferences reflect the President's considered judgment as to how the nation's interests are best served. It may be objected that Senators adopting this posture are being not only principled but also unrealistic. The President may in fact have paramount in mind personal or partisan advantage, not the nation's best interests. These Senators, however, are not tacitly assuming the contrary. Rather, they in effect are simply refusing to recognize these other objectives in the hope that enough Senators will do likewise to force the President to revise his or her priorities.

A. PLACING THE ASSESSMENTS IN PERSPECTIVE

If a Senator's ultimate decision on a nomination is framed in the manner suggested above, his or her assessments of the three factors discussed in Part I are not useful until they are placed in perspective. More specifically, the Senator needs to consider the extent to which, from his or her viewpoint, each assessment is as positive as reasonably could be expected for someone whom the President would nominate with the nation's best interests in mind.

In considering this question for the first factor, a Senator should acknowledge that an assessment of how positive or negative an influence a nominee's appointment is likely to have as to the

68. See *infra* text accompanying notes 116-19.

outcome of cases of major national significance depends greatly upon the assessor's political and social philosophy. If, for example, a Senator and the President are highly incompatible ideologically, one is almost certain to view as quite negative an influence in this regard that the other sees as quite positive. In light of this reality, a Senator, in trying to gauge how positive an assessment reasonably could be expected for someone whom the President would nominate with the nation's best interests in mind, should be strongly guided by the President's ideology. To secure enough votes to win confirmation of the nominee, the President may well need to select a nominee whose appointment would be likely to have an influence as to the outcome of cases not as positive, from the President's viewpoint, as the President would like. In accommodating him- or herself to some Senators' different perceptions of an appointment's influence in this regard, however, a President generally can be expected to remain fairly close to his or her ideological base.⁶⁹ A contrary expectation would only seem reasonable in the unusual circumstance where the President is ideologically rather isolated from a majority of the Senate.

Senators must also be sensitive to the significance of ideology in considering the extent to which their assessments of the second and third factors—an appointment's likely influence with regard to public confidence in the Court and with regard to the fairness and efficiency of the Court's decisionmaking process—are as positive as reasonably could be expected for someone whom the President would nominate with the nation's best interests in mind. In general, however, they should make substantially less allowance with these factors than with the first for differences in assessment arising out of ideological differences. For two reasons, the effect of ideology on assessments of these factors should be substantially less. First, a number of the matters relevant to assessing these factors do not significantly invite ideologically-based differences in perception. Consider, for example, the nominee's candor and collegial abilities. If Senators and the President make a reasonable attempt to be objective, their perceptions of these matters, though not entirely value-free, should not vary materially as a result of ideological differences. Second, even those matters that significantly invite ideologically-based differences in perception do not implicate ideology as fully as it is implicated in assessments of the first factor. Thus, for example,

69. Cf. Udall, *A Master Stroke*, Wash. Post, July 13, 1981, at A13, col. 2 ("My Democratic friends ought to be grateful [about the O'Connor nomination]. . . . It's almost inconceivable to me that they could do any better. Ronald Reagan isn't going to appoint liberal Democrats").

although the degree of openmindedness that a Senator or President perceives in a nominee is rather obviously affected by the Senator's or President's ideology, ideology should hardly be determinative of the issue. Openmindedness has an objective component that meaningfully limits the range of reasonable differences in perception. In an effort to simplify and keep manageable a Senator's overall decision, I suggest that unless a Senator is ideologically quite different from the President, he or she should make only minor allowance with the second and third factors for differences in assessment arising out of ideological differences.

A Senator obviously cannot determine very precisely the difference between his or her assessment of a factor for the nominee and the most positive assessment that reasonably could be expected for someone whom the President would nominate with the nation's best interests in mind. As a step toward a final decision, however, it seems both feasible and useful for a Senator to try to characterize any such difference or "deficiency" as immaterial, material, or extreme. I propose the following as a rough guide to intuition in working with these obviously inexact characterizations: A deficiency with regard to a particular factor is immaterial or material depending upon whether it is sufficiently great as to suggest that in selecting the nominee the President did not carefully consider the nation's best interests with regard to the factor and the nominee's acceptability to the Senate in that regard. A deficiency with regard to a particular factor is material or extreme depending upon whether it is so great as to suggest that in selecting the nominee the President virtually ignored the nation's best interests with regard to the factor and the nominee's acceptability to the Senate in that regard.

B. WEIGHTING THE FACTORS

Under the proposed formulation of a Senator's ultimate decision on confirmation, a Senator should vote to reject any nominee who, in his or her view, is materially deficient on the whole and vote to confirm any nominee who is not. Having characterized any deficiencies that may exist, a Senator therefore still must decide whether they indicate material deficiency overall.

The appropriate conclusion to draw seems clear in two types of situations. If a Senator finds that the nominee is not materially deficient as to any factor, the Senator should conclude that the nominee is not materially deficient overall and, on that basis, vote to confirm. If, on the other hand, a Senator finds that the nominee is not less

than materially deficient as to each factor, the Senator should reach the contrary conclusion and, on that basis, vote to reject.

In situations where the appropriate conclusion is not so apparent, I suggest that a Senator should attempt to determine roughly how much weight each factor deserves in the final decision. Based on these determinations, the Senator may then undertake the necessarily somewhat impressionistic task of ascertaining whether the deficiency or deficiencies that exist make the nominee materially deficient on the whole.

Two considerations seem particularly relevant to determining the weight to be accorded each factor: the relative importance of the three factors; and the relative degree of confidence that the Senator has in his or her assessments of the three factors. The latter consideration will depend upon various sources of uncertainty. I attempted in Part I to call attention to those that seem most significant.⁷⁰

With regard to the former consideration, I suggest that a Senator most reasonably would proceed as follows. First, as a tentative measure of relative importance, the Senator should establish in approximate terms the relative importance that he or she generally attaches to the subject matters to which the three factors refer—i.e., the outcome of cases of major national significance, public confidence in the Court, and the fairness and efficiency of the Court's decisionmaking process. Since, by hypothesis, the Senator is seeking to arrive at the decision on confirmation that best serves the nation's welfare, he or she should use relative importance to the national welfare as the criterion for estimating relative general importance.

Second, the Senator should ascertain whether special circumstances exist that, for the short term, make any of the factors materially more or less important than usual. A Senator who believes that such circumstances exist with respect to a particular factor should adjust upward or downward his or her tentative estimate of the factor's importance. Assume, for example, that a retirement leaves the Court very closely divided on many issues of major national significance. Under the circumstances, the person appointed to fill the vacancy almost certainly will have a highly significant impact for the foreseeable future on the outcome of important cases.⁷¹ Senators, whatever their ideological bent, sensibly would

70. See, e.g., *supra* text accompanying notes 46-49 and text following note 66.

71. As proponents and opponents of the Bork nomination were well aware, Justice Powell's retirement was a case in point. See Taylor, *Court's Vacancy Clouds Term That Opens Today*, N.Y. Times, Oct. 5, 1987, at A1, col. 1.

regard these as special circumstances making the factor of the appointment's likely influence as to the outcome of cases more important than usual. Assume instead that a retirement leaves the Court with a sizable majority apt to vote on almost all issues of major national significance in the way that a Senator would prefer. No matter who is appointed, the Court in the foreseeable future is very likely in important cases to reach results congenial to this Senator. The Senator justifiably would view these as special circumstances making the appointment's likely influence as to the outcome of cases less important than usual. Special circumstances are also readily hypothesized for the two other factors.⁷²

I underline that in adjusting upward or downward his or her tentative estimate of a factor's importance, a Senator should be mindful of the extent to which the special circumstances prompting the revision may not persist beyond the relatively near future. Highly foreseeable short-term effects of confirming the nominee deserve to be taken into account. In taking them into account, however, a Senator will rarely, if ever, be justified in departing dramatically from his or her tentative estimate of a factor's importance. To do so would almost certainly unfairly denigrate the importance of the long-term consequences of confirming the nominee.

C. RESOLVING THE HARD CASES

If Senators sensibly could weight the three factors with anything approaching mathematical precision, the ultimate decision whether the nominee is materially deficient overall would be greatly facilitated. Quite obviously, however, they cannot, and the ultimate decision is inevitably approximate and complex. Is a nominee materially deficient overall who is materially deficient as to only one factor but that factor is entitled to substantially more weight than either of the other two? What about a nominee who is materially deficient as to two factors and all three factors are entitled to roughly the same weight? Or a nominee who is extremely deficient

72. Assume, for example, that based on public opinion polls and other barometers of public sentiment, public confidence in the Court reasonably may be found to be so high that, regardless of who is appointed to fill an existing vacancy, it is very unlikely to fall to a troublesome level in the foreseeable future. A Senator who so viewed public confidence in the Court appropriately would regard these as special circumstances making the appointment's likely influence as to public confidence in the Court less important than usual. Assume instead that based on indicators such as a diminution in the numbers of cases decided by full written opinion or a proliferation of decisions without majority opinions, the Court's decisionmaking process reasonably may be found to be highly inefficient. A Senator who so viewed the Court's decisionmaking process would rightly consider these as special circumstances making the appointment's likely influence as to the fairness and efficiency of the Court's decisionmaking process more important than usual.

as to one factor and that factor is entitled to substantially less weight than either of the other two?

In confronting such questions, a Senator cannot help but fall back to some extent on intuition. As a guide to intuition, however, a Senator may wish to proceed with certain presumptions for situations that generally appear to militate strongly for or against a finding that the nominee is materially deficient. As a final ingredient of my proposed approach, I suggest two such presumptions as particularly appropriate. First, a nominee who is materially deficient as to only one factor is not materially deficient overall. Second, a nominee who is extremely deficient as to one factor is materially deficient overall. In my view, absent very substantial disparities in the weights assigned to the three factors, a Senator very reasonably could treat these presumptions as determinative.

III. THE CONSTITUTIONAL BACKDROP

In developing the approach set forth in Parts I and II, I proceeded on the assumption that a Senator's decision whether to vote for or against a Supreme Court nominee should reflect his or her informed judgment as to whether the appointment is in the nation's best interests.⁷³ I thereby implicitly rejected two frequently asserted limitations on the proper scope of such a decision: First, a Senator should not consider an appointment's likely influence as to the outcome of cases, in general, and the light that a nominee's political and social philosophy and attitudes about the judicial role may shed on this likely influence, in particular. The President alone has the right to try to shape the direction of the Court and to consider ideology and judicial attitudes to that end.⁷⁴ Second, in deciding (without regard to likely influence as to the outcome of cases) whether a nominee is sufficiently well-qualified to deserve appointment to the Court, a Senator should be concerned with manifest unfitness, not promise of excellence. The President is entitled to a strong presumption that his or her judgment on the adequacy of the nominee's qualifications is correct.⁷⁵

I first consider below whether the language of the appointments clause and the history of its adoption indicate that the clause is most reasonably interpreted as allocating to the Senate a role circumscribed by these two limitations. I then consider the cogency of

73. See *supra* text accompanying note 26.

74. See, e.g., Friedman, *supra* note 22; Goldwater, *Political Philosophy and Supreme Court Justices*, 58 A.B.A.J. 135, 140 (1972); McConnell, *supra* note 5, at 12-13, 32.

75. See, e.g., 116 CONG. REC. 7487 (1970) (remarks of Senator Long during Carswell debate); Fein, *supra* note 5, at 672-73, 687; McConnell, *supra* note 5, at 33.

this interpretation from a more systemic perspective, one that examines how well it fits into the constitutional scheme. I investigate the implications of such an interpretation for the effective functioning of the Court as well as its consistency with general constitutional principles and concerns.

A. LANGUAGE AND HISTORY OF THE APPOINTMENTS CLAUSE

Article II, section 2, clause 2 of the Constitution provides in part that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."⁷⁶ On their face, these words make clear that the President has an initiating role in the appointment process and the Senate a checking one. They say nothing, however, as to which factors the President or Senate legitimately may take into account for the various types of appointments covered. They also contain no suggestion that the Senate is limited to a narrower range of factors than the President or that the Senate has any duty to defer to the President's judgment in evaluating factors within its domain.⁷⁷

If the framers of the Constitution intended that the Senate be bound by the two limitations described above, it is surprising to say the least that they left no trace of this intent in the words of the appointments clause. The natural expectation would be that they would have done so, because these limitations would relegate the Senate to a decidedly subordinate role in the appointment process. The framers' silence in this regard thus gives rise to an inference that they had no such intent.⁷⁸

76. U.S. CONST. art. II, § 2, cl. 2.

77. To the contrary, see McConnell, *supra* note 5, at 32:

The President is presumably elected by the people to carry out a program and altering the ideological directions of the Supreme Court would seem to be a perfectly legitimate part of a Presidential platform. To that end, the Constitution gives to him the power to nominate. . . . [I]f the power to nominate had been given to the Senate, as was considered during the debates at the Constitutional Convention, then it would be proper for the Senate to consider political philosophy.

With all due respect, this inference from the word "nominate" is more than the word can bear. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1534 (1981) (nominate: "to propose by name for office as a preliminary to appointment upon approval or confirmation by some person or body < the President . . . shall ~, and, by and with the advice and consent of the Senate, shall appoint ambassadors").

78. Cf. Black, *supra* note 16, at 658-59 (discussing meaning of word "advice" in appointments clause); Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 387-88 (1979) (discussing inference to be drawn from other constitutional language).

The history of the clause prior to and roughly contemporaneous with the framing also casts doubt on the existence of such an intent.⁷⁹ The records of the Constitutional Convention indicate a general understanding that the clause made the Senate a major player, a force to be reckoned with, in the appointment process. On June 1, 1787, the Convention, in its initial action on appointments, agreed to a provision urged by the proponents of a strong executive—one authorizing the President to appoint all officers “not otherwise provided for.”⁸⁰ On June 13, in response to the concerns of delegates opposed to a strong executive, a motion was adopted that modified this provision by giving the Senate the power to appoint judges.⁸¹ On September 4, the Special Committee on Postponed Matters reported out a provision that rejected this division of appointments between the President and Senate in favor of a division of authority in the appointment process: The President would nominate and, by and with the Senate’s advice and consent, appoint.⁸² After debate in which the only serious opposition came from proponents of a strong executive,⁸³ this provision won final adoption.⁸⁴ In its final form, the clause therefore represented an important compromise between the supporters and opponents of a strong executive—a compromise in which the supporters yielded substantially more ground than a conception of the Senate’s role as circumscribed by the two limitations under discussion would suggest.⁸⁵

The debates in the state ratifying conventions offer no real basis for inferring either the existence or nonexistence of an original intent that the Senate abide by these two limitations. The appointments clause was rarely discussed, and on the few occasions when it was, it was characterized in very different ways. While some claimed that it granted the executive monarchical powers, others

79. For a remarkably summary attempt to use history to establish such an intent, see Fein, *supra* note 5, at 672-73 (deducing the “Hamiltonian model of the Senate’s confirmation power” from two lines of THE FEDERALIST and then simply characterizing this model as “the Framers’ vision”). For general discussion of the role of history in constitutional interpretation, see C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70 CORNELL L. REV. 253 (1985); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

80. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66-67 (M. Farrand ed. 1911).

81. *Id.* at 232-33.

82. 2 *id.* at 498.

83. *See, e.g., id.* at 538-39 (remarks of James Wilson).

84. *Id.* at 539.

85. *See generally* J. HARRIS, *supra* note 58, at 17-25.

maintained that it made the President subservient to the Senate.⁸⁶

Hamilton's three essays in *The Federalist* addressing the clause⁸⁷ provide the strongest support for locating these two limitations within original intent. According to one commentator, each of these essays "emphasizes that the Senate would exercise a high level of deference toward the president's appointment."⁸⁸ According to another, the essays describe the Senate's role as "limited to a passive review of the qualifications of the persons nominated by the President."⁸⁹

For several reasons, however, the support that these essays in fact provide for locating the limitations within original intent is relatively meager. First, the essays are hardly free from ambiguity. They easily may be read as authority for a Senate role substantially less deferential than the one these commentators describe.⁹⁰ Thus, read in isolation, passages such as the following may appear to offer impressive support for a high degree of Senate deference:

[A]s [Senators'] dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.⁹¹

Read alongside passages such as the one below, however, these passages seem to become materially less potent as authority for a sharply circumscribed Senate role:

If by [the Senate's] influencing the President be meant *restraining* him, this is precisely what must have been intended. . . . [T]he restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid its evils.⁹²

Second, whatever the degree of senatorial deference these essays may indicate is due, they nowhere assert that the Senate is any more limited than the President in the *range* of factors that it may take into account. Third, as a staunch proponent of a strong executive, Hamilton may fairly be suspected of at least subconsciously shading the truth in favor of executive power in his rendition of the intent behind the clause.⁹³

86. *See id.* at 25-26.

87. THE FEDERALIST NOS. 66, 76, & 77 (A. Hamilton).

88. Ross, *supra* note 16, at 641.

89. J. HARRIS, *supra* note 58, at 18.

90. *See, e.g.*, Black, *supra* note 16, at 661-62; Grossman & Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, 1972 DUKE L.J. 557, 560-61 & n.13.

91. THE FEDERALIST NO. 76, at 494 (A. Hamilton) (Mod. Lib. ed. 1937).

92. *Id.* NO. 77, at 498 (A. Hamilton).

93. *See* Ross, *supra* note 16, at 641.

Two writings much less celebrated than *The Federalist*, but also roughly contemporaneous with the framing, tend to belie any original intent that the Senate observe the two limitations in question. One is a letter from John Adams to Roger Sherman in the fall of 1789; the other is an entry by President Washington in his diary in August 1789.

In his letter to Sherman, Adams criticized the division of authority established by the appointments clause. According to Adams, the authority should have been placed in the President's hands alone. The following passage from the letter indicates rather clearly that Adams regarded the Senate's role as substantially more significant than the two purported limitations would allow:

[The requirement of Senate confirmation] lessens the responsibility of the Executive. . . . The blame of an injudicious, weak or wicked appointment, is shared so much between him and the Senate that his part will be too small.⁹⁴

The relevant entry by Washington in his diary was his record of the views that he had expressed that day to a committee of the Senate. The committee had been appointed to discuss with Washington a question of appropriate appointment procedure: should the President submit nominations to the Senate in writing or instead submit them in person and remain for the Senate's debate and vote? In urging the propriety of the former procedure, Washington revealed a conception of the Senate's role in the appointment process essentially incompatible with the two limitations at issue:

[I]t could be no pleasing thing I conceive, for the President, on the one hand to be present and hear the propriety of his nominations questioned; nor for the Senate on the other hand to be under the smallest restraint from his presence from the fullest and freest inquiry into the Character of the Person nominated. The President in a situation like this would be reduced to one of two things: either to be a silent witness of the decision by ballot, if there are objections to the nomination; or in justification thereof (if he should think it right) to support it by argument. Neither of which might be agreeable; and the latter improper; for as the President has a right to nominate without assigning his reasons, so has the Senate a right to dissent without giving theirs.⁹⁵

Because Adams was not a delegate to the Constitutional Convention, his understanding of the appointments clause arguably is not a very good guide to the framers' intent. In addition, because Adams, like Hamilton, was a firm proponent of a strong executive, he too may be suspected of a certain lack of objectivity on the matter at hand. Hamilton, obliged to describe the clause uncritically in his adopted role in *The Federalist* of defender of the Constitution,

94. 6 THE WORKS OF JOHN ADAMS 427 (C. Adams ed. 1852-65).

95. 30 THE WRITINGS OF GEORGE WASHINGTON 373-74 (J. Fitzpatrick ed. 1931-44).

may have allowed his bias to manifest itself in an unduly pro-executive rendition of original intent. On the other hand, Adams, free in his letter to vent his displeasure with the resolution reached, arguably permitted his bias to show itself in a rendition of original intent that exaggerated the authority yielded to the Senate.

The significance of Washington's diary entry is far more difficult to discount. Washington, of course, was not only present at the Constitutional Convention; he presided over it. Furthermore, his claim to objectivity in expressing the view that he stated to the Senate committee is rather formidable: As President, he would seem to have had an interest in acknowledging to the committee a much narrower scope of Senate authority than he did.⁹⁶

Two instances in which the Senate rejected nominations by President Washington provide further reason to doubt that the two asserted limitations have any roots in original intent. As the Supreme Court has acknowledged on a number of occasions,⁹⁷ Congress's actions in the early years of the Republic offer important insight into the intent behind the Constitution's various provisions.⁹⁸ With so many of its members having participated in the Constitutional Convention or a state ratifying convention, Congress in these early years presumably acted with a high degree of awareness of the intended constitutional bounds.

The first instance, which came in the First Congress's first year, vividly illustrates that the Senate did not consider itself obliged to adopt a highly deferential pose. The nominee rejected was Benjamin Fishbourn, the President's choice for naval officer of the Port of Savannah, Georgia. The Senate did not reject

96. Cf. K. BROUN, G. DIX, E. GELLHORN, D. KAYE, R. MEISENHOLDER, E. ROBERTS, & J. STRONG, *MCCORMICK ON EVIDENCE* §§ 276, 279 (E. Cleary 3d ed. 1984) (discussing the traditional exception in hearsay law allowing into evidence hearsay statements that are declarations against pecuniary or proprietary interest and explaining the exception as resting in part on the special reliability thought to inhere in statements against interest).

97. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Myers v. United States*, 272 U.S. 52, 136 (1926); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319-20 (1851).

98. I emphasize that this "important insight" cannot simply be regarded as determinative. It needs to be placed in proper perspective. In particular, as Justice Brennan has pointed out, "[l]egislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the Members of the First Congress as any other." *Marsh v. Chambers*, 463 U.S. 783, 814-15 (1983) (Brennan, J., dissenting). Furthermore, "the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. . . . To be truly faithful to the Framers, 'our use of the history of their time must limit itself to broad purposes, not specific practices.'" *Id.* at 816 (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring)). See generally C. MILLER, *supra* note 79, at 52-70.

Fishbourn because of any strong conviction that he was unfit for the post. Rather, it did so because the two Senators from Georgia had made it known to their colleagues that they had a candidate whom they preferred. The day after the nomination was defeated Washington responded to this initial exercise of "Senatorial courtesy" by nominating the person favored by the Georgia Senators.⁹⁹

The second instance, which took place in 1795, directly casts doubt on the purported limitation that the Senate must vote on a nominee to the Supreme Court without regard to likely influence as to the outcome of cases, in general, and the light that the nominee's ideology and judicial attitudes may shed on that influence, in particular. On this occasion, the unsuccessful nominee was the well-known John Rutledge, the President's choice to be Chief Justice of the Supreme Court.¹⁰⁰ Federalist Senators led the attack on the nomination, and they based their opposition primarily on Rutledge's outspoken criticism of the recently ratified Jay Treaty with Great Britain. Although this opposition centered on a particular issue, it reflected both broad-based disagreement with the nominee's ideology and general concern about the appointment's likely influence as to the outcome of cases. As Charles Warren explained in commenting on the Rutledge rejection, "owing to the violent revolt against its terms by the anti-British faction in this country, support of the treaty was regarded by [the Federalists] as the touchstone of true Federalism."¹⁰¹

B. SYSTEMIC CONSIDERATIONS

In the preceding section, I have suggested that the language and history of the appointments clause militate against recognition of the two limitations in question. I suggest here that, on balance, systemic considerations do the same. After discussing three considerations that I believe weigh quite heavily against recognition, I address the principal considerations that have been raised in favor.

1. *The general role of representatives.*—The framers of the Constitution nowhere provided that the people's elected national representatives should exercise their decisionmaking authority in the manner that, upon deliberation, they determine to be in the nation's best interests. Some of the framers no doubt adhered to con-

99. The history and scope of Senatorial courtesy are discussed in H. ABRAHAM, *supra* note 2, at 26-29; J. HARRIS, *supra* note 58, at 215-37.

100. Rutledge was one of the original members of the Supreme Court but, in a move that attests to the Court's limited prestige and allure before John Marshall took over at the helm, had resigned in 1791 to become chief justice of the South Carolina Supreme Court.

101. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 129 (rev. ed. 1926).

ceptions of representation substantially different from this deliberative, nationally-minded one—conceptions, for example, such as the pluralist one of representatives as essentially charged with making decisions responsive to the pressures placed on them by their constituents.¹⁰² If, however, *The Federalist* may be regarded as accurately capturing the conception of representation prevalent among the framers, the deliberative, nationally-minded conception of representation has a significantly stronger claim than any other to describing the intended role of national representatives.¹⁰³ Various passages in *The Federalist* reflect this conception. For example, one essay speaks of representative government as serving to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”¹⁰⁴ Similarly, another essay maintains that “[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society.”¹⁰⁵

This deliberative, nationally-minded conception of representation may well have less power than a pluralist one to explain how our national representatives have exercised their decisionmaking authority in the 200 years since the Constitution was adopted. Its normative importance, however, seems undeniable. Not only was the conception widely shared among the framers; it apparently also was quite influential in shaping their work. As Cass Sunstein has argued, the way in which the Constitution structures the national government and the federal-state relationship is explicable at least in part as an attempt to “bring about public-spirited representation” and to “provide safeguards in its absence.”¹⁰⁶

The two limitations under discussion deny what this general conception of representation affirms: that a national representative’s decisions should reflect his or her considered judgment as to the course of action in the nation’s best interests. In light of the stature of this general conception, its incompatibility with the two limitations significantly disfavors their recognition.

2. *Separation of powers.*—Where the appointment of officers in the executive branch is concerned, it is not at all inconsistent to

102. See generally R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

103. See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-45 (1985).

104. THE FEDERALIST NO. 10, at 59 (J. Madison) (Mod. Lib. ed. 1937).

105. THE FEDERALIST NO. 57, at 370 (A. Hamilton or J. Madison).

106. Sunstein, *supra* note 103, at 43.

adhere to both of the following propositions: Senators have a duty to make an informed judgment as to whether the appointment is in the nation's best interests; and Senators should give the President a great deal of leeway to appoint people to his or her ideological liking. Very simply, the job of executive officers is to serve the President, to help the President realize his or her goals. As a result, Senators making an informed judgment with regard to such appointments sensibly recognize as a good that the appointee is ideologically compatible with the President and leave to the President the question whether the nominee is sufficiently ideologically compatible with the President to serve him or her well.¹⁰⁷

If the job of Supreme Court Justices were to serve the President, a similar case could be made for allowing the President a free hand to appoint Justices to his or her ideological liking. Clearly, however, this is very much not their job.¹⁰⁸ They are supposed to be sufficiently independent of the President to be able to judge objectively the constitutionality of executive acts. By refusing to leave solely to the President consideration of a nominee's ideology and the appointment's likely influence as to the outcome of cases, Senators help ensure that the Court has this degree of independence of the President and that it does not decide cases as if serving the President were its job.¹⁰⁹

3. *Legitimacy of judicial review.*—Unelected and essentially guaranteed life tenure, the Justices of the Supreme Court enjoy an insulation from popular pressures that enables them to evaluate the constitutionality of acts of the people's elected representatives much more thoughtfully and dispassionately than those representatives reasonably could be expected to do.¹¹⁰ In a society committed to democratic principles, however, important questions of legitimacy arise when these officials not chosen by the people nor subject to popular recall exercise their judicial review authority in a manner significantly at odds with majority sentiment.¹¹¹ The process by which the Justices are appointed stands as a principal, if not *the* principal, protection against serious disparity between the will of the majority and the way in which the Justices exercise their authority of judicial review.¹¹² Though not elected by the people, the

107. See Black, *supra* note 16, at 660.

108. See generally Symposium: *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM. & MARY L. REV. 209 (1989).

109. See Black, *supra* note 16, at 660; see generally Biden, *The Constitution, the Senate, and the Court*, 24 WAKE FOREST L. REV. 951 (1989).

110. See C. BLACK, *supra* note 44, at 173-78.

111. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962).

112. See Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283-86 (1957); Wright, *The Role of the Supreme Court in a*

Justices must be nominated by a President and confirmed by a Senate who are. When these officials responsive to and representative of the people take into account how positive or negative an influence an appointment is likely to have with regard to the outcome of cases, the probability of such a disparity is greatly diminished.¹¹³

If, in accordance with one of the two limitations in question, only the President takes this factor into account, the protection against such a disparity is materially less.¹¹⁴ An appointment process in which both the President and Senate consider this factor necessitates some accommodation on the President's part to the type of influence in this regard that a majority of the Senate would like to see. It requires the President in making a nomination to gravitate to some extent away from his or her ideological base and toward the ideological center of the Senate. As a result, it offers greater assurance than a process in which only the President considers this factor that the persons appointed will be ones who will exercise their judicial review authority in a manner that does not vary dramatically from the wishes of the majority.

4. *Prolonged vacancies.*—An appointment process in which the Senate does not abide by the two limitations in question promises to result in longer delays in filling vacancies than a process in which the Senate takes these limitations to heart. Very simply, the likelihood is enhanced that the Senate will reject a nominee and require the President to come forward with another for the Senate to consider anew. For a combination of reasons, however, this potential for longer delays in filling vacancies does not appear to militate significantly in favor of recognizing the two limitations.

First, a potential for longer delays in filling vacancies is probably not a weighty consideration unless it means that vacancies are likely to remain unfilled for all or most of a term of the Court.¹¹⁵ A

Democratic Society—Judicial Activism or Restraint?, 54 CORNELL L. REV. 1, 9-11 (1968). Other forms of protection are noted in Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1572 (1988); Wright, *supra*, at 11.

113. In taking the distinctive position that neither the Senate nor the President should take into account likely influence as to the outcome of cases, Stephen Carter loses sight of this consideration. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1193-94, 1197 n.19 (1988). Carter essentially derives his position from the principle that the Supreme Court should serve as a "countermajoritarian brake" (*id.* at 1193). So doing, he in effect wrongly exalts this principle of "countermajoritarian brake" at the expense of what Alexander Bickel termed the "countermajoritarian difficulty" (A. BICKEL, *supra* note 111, at 16) and leaves no room for the vital role that presidential and Senate participation in the appointment process plays in alleviating this difficulty.

114. See Black, *supra* note 16, at 660; Monaghan, *supra* note 17, at 1203, 1207-08.

115. For a decidedly more urgent view of such vacancies, see *Text of President's Address on Foreign and Domestic Issues*, N.Y. Times, Aug. 13, 1987, at A8, col. 1 ("As soon as the Senate returns from its recess next month, it should consider Judge Bork's qualifications, and

vacancy on the Court while it is in session is always somewhat problematic. It may cause the Court to divide evenly on some cases and not reach a majority result. In addition, it may cause the Court to some degree to deliberate less fully and speak with less authority.¹¹⁶ Affirmances by an equally divided Court, however, are hardly a phenomenon limited to occasions on which a vacancy exists on the Court. They also occur at times as a result of recusals and absences due to illness.¹¹⁷ The prospect that for several months they will arise with greater frequency than usual is not a pleasant one, but neither does it seem cause for great concern.¹¹⁸ Moreover, if the Justices believe in a specific instance that an affirmance by an equally divided Court would be particularly problematic, they always have the option of setting the case for reargument when the vacancy has been filled.

The possibility that a vacancy may cause the Court to deliberate somewhat less fully and speak with somewhat less authority is not entirely hypothetical. It does not seem sufficiently substantial, however, to be a basis for serious concern. Indeed, if, as the Court has assured us, there is nothing so special about having a criminal jury of twelve that we should feel materially less confident in the nature of the deliberations and the validity of the verdict rendered by a jury of six,¹¹⁹ it is difficult to imagine that we should be worried about a drop in quality of the Court's work when its membership falls to eight or even seven.

Second, vacancies are not likely to remain unfilled for all or most of a Supreme Court Term under an appointment process in which Senators fail to observe the two limitations at issue.¹²⁰ Both the President and the Senate have too much to lose to allow the process to degenerate into a battle of wills in which the President comes forward with one after another nominee unpalatable to a majority of Senators and the Senate proceeds to vote the nominee down. The weight of other business, public pressure to bring the Court to full strength, and other practical realities can be expected to drive the President and Senate toward mutual accommodation.

then vote yes or no, up or down. This nation and its citizens deserve a full bench with nine justices when the Court convenes in October").

116. See Friedman, *supra* note 22, at 1316.

117. For example, in the Court's 1984-85 Term, when Justice Powell was absent from the bench for ten weeks due to illness, there were eight such affirmances and five more were avoided by setting the cases for reargument. See Taylor, *Tie Vote: What Happens*, N.Y. Times, Oct. 5, 1987, at B9, col. 3.

118. *Cf. id.* ("The Court has been short one or more members at various times in the past without any great problems resulting").

119. See *Williams v. Florida*, 399 U.S. 78 (1970).

120. *But see* Friedman, *supra* note 22, at 1316-17.

In selecting an initial nominee, the President may misestimate the extent to which it is necessary to deviate from his or her preferences to secure Senate approval, or the President simply may decide to take a substantial risk of rejection. In observing this nominee's defeat, however, the President acquires both a better understanding of the distance between his or her preferences and those of a majority of the Senate and a substantially stronger set of incentives to meet the Senate at least halfway. In short, with or without the two limitations in question, the spectre of Supreme Court vacancies lying unfilled for long periods of time as a series of nominees are put forward and voted down seems highly remote.¹²¹

5. *Access to, and competence to assess, relevant information.*— In arguing against serious consideration by the Senate of an appointment's likely influence as to the outcome of cases, Richard Friedman maintains that the Senate is "less likely than the President and his advisers to know the nominee intimately" as well as "less able to consider the nominee's record reflectively."¹²² If, as Friedman seems to be suggesting, the Senate has less access to, and competence to assess, relevant information than the President, a Senator's role in evaluating likely influence as to the outcome of cases should not necessarily be nonexistent. It should, however, be narrowly limited—probably limited to taking into account whether, in the Senator's view, the nominee is extremely deficient in this respect. In addition, a Senator would also seem obliged to give great deference to the President's implicit judgment that the nominee is well-qualified in other respects.

Although Senators generally may be on less familiar terms than the President with the nominee, it is dubious that they generally have less access to information bearing on the wisdom of appointing him or her to the Court. Indeed, it may well be that they

121. A consideration that might be argued in tandem with prolonged vacancies is interference with other Senate duties. Both proceed on the assumption that nonadherence to the two limitations is apt to result in frequent Senate rejection of Supreme Court nominees. As suggested above, however, it is far from clear that nonadherence to the limitations means that the process typically will include rejection of at least one nominee and perhaps two or three. The President has the ability to make reasonable accommodation for Senate preferences in his or her choice of even an initial nominee, and both the President and Senate have interests in ensuring that the process does not drag on. Another reason why interference with other Senate duties is not a material consideration here lies in the importance of the task at hand. Basically, if nonadherence to the limitations does not cause the Senate to devote an amount of time to Supreme Court appointments disproportionate to the relative importance of such business, the fact that it means less time for other Senate business does not seem a weighty concern. For reasons indicated at the outset of this article, *see supra* text accompanying note 24, I submit that the business of confirming Supreme Court nominees ranks sufficiently high in importance on the Senate's list of activities to create a strong presumption against any claim that this consideration is material.

122. Friedman, *supra* note 22, at 1313.

generally have more. Most obviously, the Senate Judiciary Committee hearings take place only after the President has indicated the person of his or her choice. Perhaps these hearings often do not reveal anything materially related to the wisdom of the appointment that the President did not already know. It is difficult to believe, however, that they do not do so at least at times. Moreover, to the extent that the general trend in the hearings has been toward more probing investigation,¹²³ they can be expected to prove more eye-opening for Presidents in years to come.¹²⁴ Another, and perhaps even more important, source of post-nomination information is the press.¹²⁵ As Judge Ginsburg had the misfortune of learning,¹²⁶ the most relentless of investigators is almost certainly the press, and the press typically does not bring to bear the full force of its investigatory powers until its list of persons rumored to be possible nominees is superseded by an official list of one.¹²⁷

The notion that the Senate is any less competent than the President to assess the wide range of information relevant to appointing someone to the Court is also open to serious doubt.¹²⁸ There seems no firm basis for regarding one as any more or less competent than the other. On the one hand, being somewhat more insulated from interest-group pressures, the President and his or her advisers may have a greater capacity for dispassionate reflection. On the other

123. See generally Freund, *supra* note 31; Ross, *supra* note 16.

124. For commentary strongly supportive of an aggressive committee role, see Totenberg, *supra* note 33.

125. See *id.*

126. See Roberts, *Ginsburg Withdraws Name As Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. Times, Nov. 8, 1987, at A1, col. 6; Taylor, *Haste and Ideological Fights Set Nomination on Course Ending in Its Doom*, N.Y. Times, Nov. 8, 1987, at A34, col. 1.

127. The American Bar Association's Standing Committee on Federal Judiciary has varied in the timing of its reports, depending on whether prior to nomination the Administration notified the committee of possible nominees and requested its evaluation of them. On the shifts in Administration practice since 1956—the year that the committee began evaluating actual or potential Supreme Court nominees—see H. ABRAHAM, *supra* note 2, at 35-38.

128. See [R.] Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate*, 1988 U. ILL. L. REV. 101, 111-12. Writing recently in the *Harvard Law Review*, Bruce Fein argued not that the Senate is less competent than the President to make this assessment but instead the more extreme position that it is simply incompetent to do so:

The Senate, simply stated, is ill-suited intellectually, morally, and politically to pass on anything more substantive than a nominee's professional fitness for the office of Supreme Court Justice. . . . [S]enators tend to be intellectually shallow and result-oriented.

Fein, *supra* note 5, at 673. I obviously do not share Fein's dismal view of the Senate, and he says virtually nothing that might persuade me to share it. He offers this stinging indictment of Senators' abilities essentially in the form of a bald assertion. Perhaps Senators can derive some measure of comfort from the fact that Fein appears to hold most members of the Supreme Court for the past fifty years in similarly low esteem. See Fein, *Error in the Court*, 75 A.B.A.J., Apr. 1989, at 56.

hand, being less homogeneous in its views, the Senate may be sensitive to a broader range of relevant considerations.

6. *Judicial quality.*—In opposing active Senate consideration of an appointment's likely influence as to the outcome of cases, Friedman also suggests that it "might more often lead in the long run to the rejection of nominees like Brandeis and Hughes—two of 'this century's most esteemed Justices' . . .—and to the selection of mediocrities."¹²⁹ The difference between "nominees like Brandeis and Hughes" and "mediocrities" is sufficiently large that more rejections of nominees like Brandeis and Hughes need not mean more selections of mediocrities. For purposes of discussion, I therefore treat the above as two distinct suggestions—first, that active consideration of the sort described leads to fewer Justices who serve with great distinction, and second, that it leads to more mediocrities on the Court.

Friedman is most obviously on shaky ground here in suggesting that active Senate consideration of likely influence as to the outcome of cases leads to more "mediocrities" on the Court. He tacitly assumes that a Justice's mediocrity or excellence should be measured in terms of factors more objective than how positive or negative an influence the Justice has had as to the outcome of cases. It is dubious, however, that a Justice's quality can properly be measured without giving substantial weight to this rather subjective but, as argued in Parts I and II, highly relevant factor. Under this view, active Senate consideration of this factor is actually essential to avoid "mediocrities" on the Court.

Furthermore, even assuming *arguendo* that Friedman's measure of judicial quality is sound, his conclusion that active Senate consideration of likely influence as to the outcome of cases leads to more mediocrities on the Court still does not follow. On the one hand, there is no reason to suppose that, either in anticipation of active Senate consideration of this factor or in response to the Senate's rejection of a nominee based largely on its active consideration of the factor, the President suddenly would become indifferent in selecting a nominee as to whether he or she is apt on the Court to be a "mediocrity," as Friedman uses the term. On the other hand, if, as I propose in Parts I and II, Senators take seriously not only likely influence as to the outcome of cases but also likely influence as to public confidence in the Court and as to the fairness and efficiency of the Court's decisionmaking process, there is no reason to suppose that they will allow onto the Court any nominees who promise to be

129. Friedman, *supra* note 22, at 1286.

what Friedman would call "mediocrities."¹³⁰

Friedman's suggestion that active Senate consideration of likely influence as to the outcome of cases leads to fewer Justices who serve with great distinction is more difficult to discount. Active Senate consideration of this factor undoubtedly does give rise to the possibility that the Senate will reject some nominees who would serve with great distinction in terms of factors more objective than influence as to the outcome of cases.¹³¹ For several reasons, however, this possibility is not particularly troubling and does not weigh materially against active consideration of likely influence as to the outcome of cases.

First, the rejection of a nominee who would serve with great distinction in terms of factors more objective than influence as to the outcome of cases does not necessarily mean that the Court will be without someone who would serve with great distinction. It means this only if one assumes along with Friedman that the degree of distinction with which a Justice serves should be measured "objectively" without regard to the Justice's influence as to the outcome of cases. As argued above,¹³² however, such an assumption seems unwarranted.

Second, although active Senate consideration of likely influence as to the outcome of cases may lead to the rejection of some nominees who would serve with great distinction in terms of more objective factors, it by no means follows that it frequently will have this effect. In particular, it may be expected to have this effect quite infrequently if the nominees' promise of such distinction is relatively apparent and if Senators in evaluating nominees generally adhere to the basic contours of the approach proposed in this article. On the one hand, Senators virtually could not help but find with a high degree of certainty that nominees strongly evidencing this promise rank very high in terms of both likely influence as to public confidence in the Court and likely influence as to the fairness and efficiency of the Court's decisionmaking process.¹³³ On the other

130. I am assuming that a Justice's influence as to public confidence in the Court and his or her influence as to the fairness and efficiency of the Court's decisionmaking process are the type of more objective factors that Friedman has in mind and that would figure prominently in his estimate of a Justice's quality. If this assumption is incorrect, then my objections to Friedman's conception of judicial quality are even more broad-based. With regard to the more objective nature of these two factors, see *supra* text following note 69.

131. It also gives rise to the possibility that the President in anticipation of a rejection will fail to nominate persons meeting this description. If I am correct below, however, in discounting the significance of the possibility mentioned in the text, the limited significance of this possibility would seem to follow.

132. See *supra* text accompanying notes 129 and 130.

133. See *supra* note 130.

hand, since nominees strongly evidencing this promise almost invariably would be quite openminded,¹³⁴ Senators typically would not have a great deal of confidence in their assessment of likely influence as to the outcome of cases and therefore would tend to discount it.¹³⁵ Under the circumstances, unless a majority of Senators viewed the nominee as *extremely* deficient with regard to likely influence as to the outcome of cases, the nomination almost certainly would prevail.

Lastly, although active Senate consideration of likely influence as to the outcome of cases may prevent the President from putting some persons on the Court who would serve with great distinction in terms of more objective factors, it also may have a very opposite, and patently very salutary, effect. It may force the President to think about nominating various persons who show obvious promise of such distinction but whom the President, if left to his or her own ideological preferences, would not seriously consider.

7. *Politicization of the Court.*—Friedman also argues that overt Senate consideration of likely influence as to the outcome of cases is undesirable because it tends to make the public and the Justices themselves see the Court as merely another political decisionmaker.¹³⁶ Although this argument does not directly militate against Senators tacitly taking into account likely influence as to the outcome of cases, it does do so indirectly. If Senators cannot openly inquire in the Senate Judiciary Committee hearings into an appointee's likely influence in this regard and openly debate it on the Senate floor, their ability to assess it accurately—and, hence, the defensibility of their attempting to assess it—is significantly diminished.¹³⁷

Friedman's concern about the public perception of the Court is ill-founded. It is not at all apparent that the Senate's overt inquiry into and debate about likely influence as to the outcome of cases broadly conveys the message that the Justices are essentially a group of political actors, deciding cases basically by voting their policy preferences. More likely, the message generally conveyed is

134. See *supra* note 62 and text accompanying notes 58, 59, and 62.

135. See *supra* text accompanying notes 46 and 47.

136. Friedman, *supra* note 22, at 1317-18. Along similar lines, see Mikva, *supra* note 33, at 39.

137. The discussion below takes as a given the openness of the hearings and floor debate. Closing them to the public would respond partially to Friedman's concerns, but the option of doing so today is, if not unconstitutional (*cf.* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (first amendment right of access)), at least politically unthinkable. Until 1929 the Senate considered all nominations for federal office in closed executive session, unless there was a two-thirds vote requiring otherwise in a particular instance. See Freund, *supra* note 31, at 1157-58.

a very different one: that the Constitution allows substantial room for reasonable differences of opinion as to its proper interpretation, and that a Justice's interpretation of the Constitution cannot help but be influenced to some degree by his or her political and social philosophy.

Furthermore, to the extent that overt Senate inquiry into and debate about likely influence as to the outcome of cases may naturally tend to convey the former message, Senators can counter this tendency quite effectively by the way in which they conduct these inquiries and debates. Basically, Senators need to take the time to put their questions and comments in proper perspective. They must make clear to the public, for example, why the nominee's political and social philosophy is a relevant concern and how much significance they assign it in their confirmation decision. If, in providing this perspective, Senators are guided by the approach set forth above in Parts I and II, the likelihood that the inquiry and debate will communicate the former message would appear to be fairly minimal.

Finally, in one important respect, overt Senate consideration of likely influence as to the outcome of cases actually has positive value in helping avoid a public perception of the Court as a highly political decisionmaker. Presidents often have made no secret of the fact that they take likely influence as to the outcome of cases into account in selecting a nominee.¹³⁸ By openly inquiring into and debating this factor, the Senate makes clear to the public that the President does not have a free hand to place on the Court persons to his or her ideological liking. So doing, it helps ensure that the public sees the Court as independent of the President, rather than as an extension of the President's will.

Friedman is no more persuasive in objecting to overt Senate consideration of likely influence as to the outcome of cases because of its possible impact on the Court's perception of itself. In his view, such consideration fosters among the Justices a political perception of their role and thereby makes them more political in their decisionmaking. First of all, however, if Senators inquire into and debate this factor in a manner basically consistent with the approach set forth in Parts I and II, it is difficult to imagine that the nominee or the Justices already on the Court would understand the inquiry and debate as indicating that Justices are expected to vote in an essentially political way. The distinction between a message that Justices should vote according to their policy preferences and a message that Justices cannot help but be influenced to some degree

138. See H. ABRAHAM, *supra* note 2, at 67-68.

by their political and social philosophies may be too subtle for some members of the public to grasp. It is well within the grasp, however, of anyone with sufficient legal acumen to be nominated to the Court.

Second, even if Senators do inquire into and debate likely influence as to the outcome of cases in a way that suggests that Justices should be highly political in their decisionmaking, it is dubious that the nominee, once seated on the Court, will take the suggestion to heart or that the Justices already on the Court will do so. They are not apt to regard the Senate as nearly as expert as themselves on the topic of proper criteria for judicial decisionmaking. In addition, essentially guaranteed life tenure, they are not likely to feel under any particular pressure to adopt the Senate's view.

Lastly, if conducted properly, Senate inquiry into and debate about likely influence as to the outcome of cases actually may tend to make the Justices less political in their decisionmaking. By bringing into the open a nominee's political and social philosophy, the Senate may make the nominee more sensitive when on the Court to the extent to which this personal philosophy may exert an undue influence on his or her decisionmaking.

IV. CONCLUSION

Since 1900, the Senate has rejected only about one out of ten Supreme Court nominations.¹³⁹ Though not nearly as low as the concurrent rejection rate for Cabinet nominations,¹⁴⁰ this rate is sufficiently low to suggest that the Senate during these years generally has been content to adopt a notably deferential pose. In addition, most observers would agree that this relatively low rejection rate owes a great deal more to Senate acquiescence than to presiden-

139. There have been 58 nominations since 1900. Four were voted down by the Senate (Parker in 1930, Haynsworth in 1969, Carswell in 1970, and Bork in 1987); one was withdrawn in the face of a Senate filibuster (Fortas in 1968 for promotion to Chief Justice); and one was withdrawn after revelations in the press that virtually ensured defeat (Ginsburg in 1987). I count all six of these unsuccessful nominations as "rejections." See J. HARRIS, *supra* note 58, at 302-03 (characterizing as "rejections" not only nominations formally rejected but also ones withdrawn by the President or not acted on by the Senate); McKay, *supra* note 33, at 130 (same). I do not count as a rejection the failure of the Thornberry nomination in 1968, because it was simply a consequence of the rejection of the Fortas nomination with which it had been paired. With Justice Fortas remaining on the Court as an Associate Justice rather than moving up to succeed Earl Warren as Chief Justice, the Associate Justice seat for which Judge Thornberry had been nominated failed to open up. (When Chief Justice Warren responded to the failure of the Fortas nomination by withdrawing his resignation, the apparent vacancy in the Chief Justice's chair also disappeared.)

140. See J. HARRIS, *supra* note 58, at 259; Oreskes, *Senate Rejects Tower*, 53-47; *First Cabinet Veto Since '59*, N.Y. Times, Mar. 10, 1989, at A1, col. 6.

tial restraint.¹⁴¹

At first glance this twentieth-century history may appear to constitute a significant counterweight to arguments for the type of approach that I have proposed for Senate confirmation of Supreme Court nominees. It is unclear, however, why Senators should give this modern history substantial weight. It belies not only the authority that Senators apparently were intended to exercise,¹⁴² but also the authority that they in fact did exercise for many years: The rejection rate for Supreme Court nominations was much more formidable prior to 1900 than since—roughly one out of four.¹⁴³ To be sure, this modern history is of a piece with other developments marking a significant shift in power in this century away from Congress and toward the President.¹⁴⁴ Moreover, perhaps there are certain matters with regard to which Senators only sensibly and responsibly define the scope of their constitutional authority by giving substantial weight to a shift in power that has taken place. It is far from apparent, however, that the appointment of Supreme Court Justices is such a matter. Absent serious argument to the contrary, it seems appropriate to assume that it is not.

In closing, I emphasize one implication of this article that its title and principal focus may tend to obscure: Senators are not the only participants in the Supreme Court appointment process who should feel a responsibility to exercise their decisionmaking authority with the nation's best interests foremost in mind. The President should as well. I have framed my proposal in terms of the Senate's role in the process largely because the relevant debate historically has centered on the Senate's, rather than the President's, appropriate role. For reasons that should be apparent from my arguments in support of the proposal, however, I believe that the proposal also provides the basic ingredients for the nominating approach that a President should follow.

141. See, e.g., Grossman & Wasby, *supra* note 90, at 559, 587-88; Monaghan, *supra* note 17, at 1202-03; Totenberg, *supra* note 33, at 1213. Tempting as it may be to see in the rejection in 1987 of the Bork nomination a widely-shared commitment among Senators to independent-minded review, there is good reason not to do so. Among other things, the Senate's rather speedy and unanimous approval of the Scalia and Kennedy nominations in 1986 and 1988 suggests that the fate of Judge Bork is probably best understood in less sweeping, more case-specific terms. Cf. *id.* at 1225-27 (discussing the Kennedy confirmation process); Kaplan, *Scalia Was 'Worse' Than Bork*, N.Y. Times, Oct. 19, 1987, at A23, col. 1 (criticizing "the Senate's somnambulism when it came to Judge Scalia").

142. See *supra* Part III.

143. See J. HARRIS, *supra* note 58, at 303. (Harris counts 20 rejections out of 81 nominations through 1894. If the Senate's actions for the remainder of the 1890s are added in, the totals prior to this century were 20 rejections out of 83 nominations. With regard to what constitutes a rejection, see *supra* note 139.)

144. See generally P. SHANE & H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* (1988).