Michigan Law Review

Volume 98 | Issue 6

2000

Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy

John C. Yoo
University of California at Berkeley School of Law (Boalt Hall)

CHOOSING JUSTICES: A POLITICAL APPOINTMENTS PROCESS AND THE WAGES OF JUDICIAL SUPREMACY

*John C. Yoo**

IN DEFENSE OF A POLITICAL COURT. By *Terri Jennings Peretti.* Princeton: Princeton University Press. 1999. Pp. ix, 371. $27.50

PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES. By *David Alistair Yalof.* Chicago: University of Chicago Press. 1999. Pp. x, 296. $27.50

William H. Rehnquist is not going to be Chief Justice forever — much to the chagrin of Republicans, no doubt. In the last century, Supreme Court Justices have retired, on average, at the age of seventy-one after approximately fourteen years on the bench.[1] By the end of the term of the President we elect this November, Chief Justice Rehnquist will have served on the Supreme Court for thirty-two years and reached the age of eighty. The law of averages suggests that Chief Justice Rehnquist is likely to retire in the next presidential term.

In addition to replacing Chief Justice Rehnquist, the next President may also enjoy the opportunity to select at least two other Justices. Justice John Paul Stevens, the next most senior member of the Court, will turn eighty-four by the end of the next presidential term and will have served on the Court for thirty years. Justice Sandra Day O'Connor, the third most senior member of the Court, will have turned seventy-four and have served for twenty-three years.

This Review is not intended to be a morbid exercise in the actuarial sciences. Rather, these numbers serve only to suggest that after six years in mothballs, the Supreme Court appointments process will be returning to active duty in relatively short order. This event will not be universally welcomed because many believe that the confirmation process has become too political or has failed to live up to the original

* Professor of Law, University of California at Berkeley School of Law (Boalt Hall). B.A. 1989, Harvard; J.D. 1992, Yale. — Ed. I thank Jesse Choper, Paul Mishkin, and Robert Post for their comments. Jason Beutler provided excellent research assistance.

1. The median age at retirement has been 70 after 15 years of service. These calculations are based on statistics found in HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 379-81 (1999).

constitutional design.[2] The relatively uncontroversial appointments of Justices Stephen G. Breyer and Ruth Bader Ginsburg notwithstanding, the political struggles over the nominations of Justice Clarence Thomas and Judge Robert H. Bork, and of Justice Rehnquist to be Chief Justice, suggest that future nominations will be contentious. If, as Professor Robert Nagel has observed, judicial power has expanded such that "in one direction or another, the Court will be a pervasive influence on a wide range of issues that can only in a partial and peripheral way be considered legal rather than political,"[3] it is only inevitable that players in the political process will seek to advance their preferences via Supreme Court nominations. Political attention in the next few years may even be greater than usual because the next President's appointments may well determine the Court's direction on high-profile issues, such as federalism, race, religion, and criminal procedure, that have been decided only by five-to-four votes.

Given the importance of the issues that nominees will decide if appointed, and the recent history of political struggles over the proper standards to apply to confirmations, it would seem to be the job of the legal academy to dispense useful advice that might lead to a more stable, non-controversial process. Academics, however, not only have provided little guidance for improving the Supreme Court appointments process, but often have taken an active role in these political battles. Further, scholars seem just as divided over what approach to take — whether Presidents and Senators should appoint nominees who are merely professionally qualified, or whether they should choose only those who agree with their political or jurisprudential preferences — as are the politicians.[4] It seems fair to say that finding a satisfactory answer to the "confirmation mess," as Professor Stephen Carter has aptly described it, has frustrated our best constitutional thinkers.[5]

---

2. *See, e.g.*, Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1185 (1988).

3. Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858, 860 (1990).

4. One can see this gap in the many articles and symposia that have appeared about the judicial appointments process since the struggle over the nominations of Judge Robert Bork and Justice Clarence Thomas. *See, e.g.*, Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988); Bruce Fein, Commentary, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989); John O. McGinnis, *The President, the Senate, the Constitution and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEXAS L. REV. 633 (1993); Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992); Symposium, *Confirmation Controversy: The Selection of a Supreme Court Justice*, 84 NW. U. L. REV. 832 (1990); Symposium, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992); Colloquium, *The Judicial Nomination and Confirmation Process*, 7 ST. JOHN'S J. LEG. COMMENTARY 1 (1991).

5. *See* Carter, *supra* note 2.

The likelihood that political and scholarly confusion will accompany the return of the confirmation process makes the appearance of two books, Terri Jennings Peretti's *In Defense of A Political Court*[6], and David Alistair Yalof's *In Pursuit of Justices*[7], particularly welcome and timely. Both written by political scientists, these works provide different views of the appointments process from which legal scholars have much to learn. While much of the legal literature, for example, has focused on the standards that the Senate ought to apply in confirming Justices, Yalof instead examines the more decisive process of presidential selection of Supreme Court nominees. Peretti, whose work aims at a wider-ranging discussion of the purposes of judicial review and the roots of the Court's legitimacy, approaches the question in a significant, and perhaps novel, manner. Instead of recycling the same qualifications-versus-politics debate, she first seeks to determine the proper role of the Supreme Court in the American political system, and from that inquiry infers the type of Justices that we should want. All too often, legal scholars debating Supreme Court appointments have ignored the fundamental issue of the Court's role, which Peretti argues should determine the way we think about choosing Justices.

This review will proceed in three parts. Part I will summarize and critique Yalof, while Part II will discuss Peretti. Part III will take up Peretti's challenge by attempting to rethink the appointments process in light of different theories of judicial review. I will argue that neither the indeterminacy of constitutional decisionmaking, as Peretti would have it, nor the expansion of judicial review, as many of our leading constitutional law professors believe, provides the sole explanation for the politicization of the confirmation process. Rather, I will argue that the emergence of judicial claims to supremacy in constitutional interpretation has much to do with the growing political attention to the ideology of Court nominees. In the conclusion, I will offer more practical reform ideas for the appointments process, based on the preceding sections.

I.

Professor Yalof ends where most law professors begin. With a few exceptions, scholars writing about the appointments process have focused almost exclusively on the Senate's role in confirming Justices.[8]

6. Terri Jennings Peretti is an Assistant Professor of Political Science, University of Connecticut.

7. David Alistair Yalof is an Assistant Professor of Political Science, Santa Clara University.

8. *See* sources cited *supra* note 4; *see also* John C. Yoo, *Criticizing Judges*, 1 GREENBAG 2d 277, 282-86 (1998) (discussing Senate's discretion in reviewing judicial nominees).

After reading Yalof's book, one is left with the impression that we have missed half the picture. As Yalof points out, even with the confirmation struggles of the last few decades, in the last 100 years the Senate has approved eighty-nine percent of the President's nominees to the Supreme Court (p. viii). Twelve of the last fourteen nominees to the Court have received Senate approval. "In overemphasizing the confirmation process we may be neglecting the most critical decision-making stage in most Supreme Court appointments," Yalof argues, namely the President's selection process (p. viii). Legal scholars would be wise to pay attention to the presidency, Yalof continues, because selection and confirmation constitute "a seamless web," in which mistakes in choosing a nominee may cause a contentious confirmation (p. viii).

Seeking to understand the first half of the appointments equation, Yalof organizes his analysis around case studies of each Supreme Court nominee from 1945 to 1987, whether they were confirmed or not. Unlike the rumor-filled snippets one sees in the newspapers, *In Pursuit of Justices* establishes a more authoritative record of why candidates make short lists but not the final cut. Yalof has assembled his historical account through extensive use of presidential archives and personal interviews with former presidents, attorneys general, and White House chiefs of staff and counsels. These short stories provide reason enough to buy this book, especially for anyone hoping to become a Supreme Court Justice. This enticement should place Yalof on the bestseller list for legal books. If the old saying that every Senator believes that he or she can (and should) become President is true, then the pool of contenders for a seat on the Supreme Court must be orders of magnitude larger.

These stories also make for entertaining gossip, at times. One learns, for example, that President Clinton resisted appointing Justice Stephen Breyer to Justice White's seat because he felt that "Breyer was selling himself too hard, that his interests in the law were too narrow, that he didn't have a big heart."[9] According to Yalof, President Clinton offered the job *twice* to Secretary of Education Richard Riley, who turned him down quickly both times (pp. 197-98). In her personal interview with President Reagan, Yalof reports, Justice Sandra Day O'Connor emphasized her personal opposition to abortion and her belief that abortion was a legitimate subject for legislative regulation (p. 140). Yalof indicates that President Kennedy might have chosen Professor Paul Freund for Justice White's eventual seat, but for his re-

9. P. 200 (citations omitted). Unlike most of Yalof's research, much of the information concerning the Clinton and Bush administrations relies upon newspaper stories and books found briefly in the current events section of the bookstore. This, no doubt, is because presidential archival records are not yet available and administration officials may still feel some reticence in discussing decisions that occurred so recently.

fusal to serve as Solicitor General under Robert Kennedy, a rejection the young Attorney General took personally (p. 77). Apparently, Freund was persuaded by the advice of Felix Frankfurter that no job, not even that of Solicitor General, was worth that of a Harvard law professor, except for that of a Supreme Court Justice (p. 77). On a more bizarre note, the book indicates that when Chief Justice Burger retired, young lawyers in the White House Counsel's office removed Judge Ralph Winter, a well known conservative judge on the Second Circuit and a law professor at Yale, from consideration, in part because he was "not known for intensive preparation for class" (p. 152; citations omitted). If that eliminates one for a Supreme Court seat, many in the law professoriat will have their hopes dashed.[10]

These stories make *In Search of Justices* doubly welcome because they provide a break from much political science work about the Supreme Court. These days, it seems the fashionable thing is to classify every judicial decision into a few categories, so it can be incorporated into a huge database from which earth-shattering trends are spotted, like the tendency of Republican appointees to favor the police in criminal procedural cases. Yalof admirably bucks this trend, although, as a political scientist, he cannot resist the urge to identify several factors and frameworks that he believes govern the appointments process. He lists five political factors that constrain a president's constitutional discretion to nominate whom he chooses: (i) the timing of a vacancy; (ii) the composition of the Senate; (iii) the president's public approval ratings; (iv) the outgoing Justice's status and position on the ideological spectrum; and (v) the realistic pool of candidates (pp. 4-6).

Yalof follows this up with two more efforts to categorize the judicial nomination process. According to the author, Presidents since 1945 have employed three "decisional frameworks" in making Supreme Court appointments: a) an "open" framework, in which the selection machinery starts up after a vacancy occurs; b) a "single-candidate focused" framework, in which the President has settled on a candidate in advance; and c) a "criteria-driven" framework in which the President sets in advance certain criteria that prospective nominees must meet (p. 6). President Clinton's appointments characterize open frameworks; President Johnson's choices of Thurgood Marshall and Abe Fortas fall within the single-candidate framework; and President Reagan's nominations of Justice Scalia and Judge Bork meet the definition of the criteria-driven approach, in which the main factor was

10. As a former student of Judge Winter's in corporations and securities regulation, I can attest to the fact that whatever these young White House lawyers had thought of Judge Winter's level of preparation, he was an effective and successful teacher and mentor to students. Plus, he told a lot of funny jokes in class, which distinguished him from many of his colleagues.

judicial ideology. Yalof then introduces a list of ten factors that he believes have shaped the modern judicial selection process, which includes developments ranging from the bureaucratization of the Justice Department, to the expanded power of the Supreme Court, to the rise of divided government, to the appearance of interest group participation and media attention, to the innovation of computerized legal research (pp. 12-18).

Yalof fails to make clear, however, how useful these different frameworks, factors, and lists are in explaining the success of presidential strategies in selecting Justices. Yalof claims that the open framework allows the President more flexibility to respond to the changing political environment, but that this comes at the price of his or her long-term goals for the Court, which might be better served by a criteria-driven structure. *Pursuit of Justices* implies that the need to meet the immediate political environment will require presidents to sacrifice their judicial agenda. Stripped of all of the frameworks, Yalof's theory reduces to a study of the usual trade-off between politics and policy. Yet, Yalof never demonstrates in a satisfying manner whether his many case studies support these conclusions. In part, Yalof cannot make this connection because he does not attempt to evaluate presidential success in terms of the President's own goals for the Court. He also leaves the link between the case studies and his frameworks unmade because he often does not (or cannot) recreate the political cost-and-benefit choices that presidents have made in selecting Justices.

Yalof's discussions of Presidents Truman and Eisenhower exemplify this disconnect between the case studies and the theory. We learn that Truman's main goal in Supreme Court appointments was cronyism. Truman sought to nominate only Justices who were part of his close-knit political circle because he never had any clear agenda concerning the Supreme Court. Thus, he chose Harold Burton, an old friend and former Senate colleague, to be an associate Justice, and Fred Vinson, a poker buddy, to be Chief Justice (pp. 21-33). Yalof notes that while Truman adopted an open framework, he remained relatively immune to advice and clearly kept personal control over the process. Truman's use of an open selection process, therefore, apparently made little difference in the ultimate choice of a nominee. Yalof judges Truman's four Justices to have been mediocre, due to the president's desire to dominate the nomination process with his personal choices (pp. 39-40). Yet, Yalof does not ask whether Truman's true goal was to appoint "superlative Justices," in some objective sense, or whether he simply sought to use the Court as a vehicle for patronage. If his objective was the latter, then Truman appears to have satisfied his agenda for the Supreme Court.

Yalof's account of the Eisenhower administration is also unsatisfying. In response to Truman's cronyism, Eisenhower sought to appoint "individuals of the highest possible standing" (p. 42; citations

omitted). Continuing his practice as Supreme Allied Commander during World War II, Eisenhower delegated considerable authority to subordinates. In the area of judicial selection, Eisenhower relied upon his attorney general, Herbert Brownell, to develop the list of candidates to be considered. Eisenhower established, however, rigid criteria that sought to exclude judicial "left wingers," to use the president's words, and instead encouraged the appointment of "highly qualified, moderate" republicans who shared his "middle of the road" political philosophy (p. 42). He also made clear his desire to nominate candidates who were relatively young, so as to outlast a Democratic presidential successor, and who had previous judicial experience, so as to foreclose the potential appointment of New Deal Justices such as Black, Frankfurter, and Douglas. Quoting historians Gunther Bischof and Stephen Ambrose, Yalof describes Eisenhower's criteria as "[n]o senators with a somewhat radical reputation (Black), no allegedly radical college professors (Frankfurter), no bright young lawyer-professor types who rose to fame as tamers of Wall Street (Douglas)" (p. 43; citations omitted).

Although Yalof argues that a criteria-driven framework will yield more principled results, it is unclear whether Eisenhower's appointments achieved the President's Supreme Court agenda. His first two appointments did not even live up to the framework. Earl Warren received the Chief Justiceship because Eisenhower had promised him the first Court vacancy in exchange for Warren's support at a crucial turning point in the Republican convention of 1952. John Marshall Harlan received the next nomination because Brownell, his close personal friend, had promised him a seat on the Court. While William Brennan did not benefit from any personal ties, his appointment resulted from the administration's political need to nominate a Catholic; the Catholic vote had been of critical importance in Eisenhower's 1956 re-election.[11] Not only did the Eisenhower administration imperfectly implement a criteria-driven framework, it is also hard to conclude that the use of such an approach achieved Eisenhower's goals with regard to the Supreme Court. To be sure, two of his appointments, Harlan and Potter Stewart, earned respect in the legal community as "lawyer's lawyers." Nonetheless, Eisenhower quickly grew frustrated with the liberal decisions of Warren and Brennan, and though they would be ranked later as two of the five greatest Justices ever to serve on the Court, they achieved that fame for reasons that Eisenhower would have disapproved. Rather than creating a conservative Court, Eisenhower's method in choosing Justices yielded that great bane of conservative jurisprudence, the Warren Court.

11. Brennan's name appears to have arisen because Brownell and his deputy had been impressed by a "rousing" speech that Brennan delivered at the Attorney General's "Conference on Court Congestion and Delay in Litigation." *See* p. 58.

Yalof's effort to draw clear rules, frameworks, and flowcharts may be unconvincing because the pool of data is still limited.[12] One lesson emerges, however, that bears significance for the continuing debate over the appointments process. Viewed with a different point in mind than Yalof's, the case studies suggest that jurisprudential ideology is only one of the factors that presidents pursue in nominating Justices. Indeed, the behind-the-scenes account of judicial selection from Truman through Clinton indicates that ideological factors rarely predominate over more political or personal factors. Presidents regularly have chosen Justices for reasons of electoral politics (as in Nixon's desire to choose a Southerner), personal friendship, promises, political imperatives (such as re-election concerns or conserving political capital), or symbolism (choosing the first African American or woman). The rise of interest groups in the appointments process during the postwar period exacerbates this phenomenon. Presidents, it seems, may choose nominees either to placate an interest group or because a group's sympathizers in either the White House or the Justice Department have succeeded in influencing the process. Interest group participation makes it even less likely that a nominee's selection results purely or even mostly from the President's advancement of his agenda for the Supreme Court.

This record complicates the arguments made on behalf of presidential discretion and senatorial deference in Supreme Court appointments. Supporters of presidential dominance usually claim that the President's choice of a Justice is entitled to deference because the President, as the only member of the federal government elected by the entire nation, enjoys a democratic mandate for advancing his jurisprudential agenda. While the Senate has a checking role, so this argument goes, it ought to reject only nominees who appear to be unqualified out of respect for the President's majoritarian support. Even if this argument were true, it is unclear whether the Senate should continue to defer to presidential choices once it becomes clear that constitutional ideology is not the primary factor driving judicial selection. If Presidents regularly choose Justices for personal or political reasons, in addition to ideological ones, then the Senate perhaps ought to ratchet up the intensity of its scrutiny. While we the people may have voted for a President because we agree with his constitutional views, that mandate loses its force when the President chooses Justices to shore up his political support for re-election, or to add to his historical legacy, or to pass out judicial plums to his friends.[13]

---

12. *See* Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935, 935 (1990) (questioning whether "scientific generalization about Supreme Court appointments" is possible due to limited set of data).

13. Of course, one might respond that a winning president ought to reward the interest groups in his or her coalition that are concerned with judicial selection by appointing their desired candidate. In part, this conclusion depends on whether one believes that the Presi-

II.

Unlike Yalof, Peretti is not solely focused on the appointments process. Rather, her views on Supreme Court appointments grow out of a broader theory of judicial review and the role of the Court in the American political system. Peretti believes that criticism of the Court for judicial activism is misplaced. We should face up to the fact, Peretti believes, that the Court is a political actor, that its decisions are political, and that constitutional law merely expresses the normative preferences of the Justices. According to Peretti, therefore, Presidents ought to choose Justices solely to advance their *political* agenda, and the Senate ought to review nominees based on whether it agrees with the substantive results they are likely to reach in future cases. We should welcome, rather than reject, the growing participation of interest groups, the media, and political campaign methods in the appointments process. For Peretti, as Clausewitz might put it, the Court is merely the continuation of politics by other means.

Peretti's argument is logical and straightforward. It finds its genesis in the arguments of first the legal realists and then the critical legal scholars that judicial decisions are, for the most part, indeterminate. According to Peretti, contemporary constitutional theory has failed to establish neutral, principled grounds upon which the Supreme Court can decide any constitutional question. Originalism is unsatisfying because it is too difficult to reconstruct the framers' understanding and, because all interpretation is open to manipulation, its rules do not really restrain judicial discretion in a coherent manner (p. 41). Applying noninterpretivist theories, such as those of Ronald Dworkin, who advocates reliance upon some form of moral philosophy or contemporary values in reading the Constitution, does no better.[14] There may be no widely shared morals or values in the American political community; even if they exist, they rest at too abstract a level of generality to prove useful, and judges have little competence in identifying them (pp. 42-43). Jesse Choper's and John Hart Ely's process-based theories do not really separate process from substance because

dent and his mandate are, or ought to be, determined by interest group participation, at the expense of the policy views for which he was elected by the general public. Even if one believed that Presidents are subject to interest group politics in the area of judicial selection and ideology, there is no constitutional reason that the Senate ought to defer to the outcome of interest group bargaining on this issue. Indeed, one might conclude that the Senate (although itself subject to interest group pressures) ought to react to such a state of affairs by enhancing the intensity of its scrutiny of nominees in order to reduce the influence of interest groups on the judiciary.

14. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2-38 (1996).

representation-reinforcing values are easily manipulated and ultimately require substantive value choices as well.[15]

Because no theory has convincingly solved the countermajoritarian problem, Peretti argues that we should put aside our illusions about neutral judicial decisionmaking and embrace the notion that not only *are* Court decisions political, but that they *ought to be.* "[V]alue-voting and political motive," Peretti argues, are "both necessary and legitimate ingredients in constitutional decisionmaking." (p. 77). To defend her remarkable thesis, she marshals an impressive array of secondary literature, mostly from political science, to show that decisions based on personal preferences promote democratic values, that the Court does not suffer losses in legitimacy and power from political decisions, and that political judicial decisionmaking enhances political stability and the dispersion of power. At the very least, Peretti's book is useful reading for constitutional law scholars who ought to be more aware of the vast work on the Court as an actor in the national political system.

In making her claim about the representative nature of the Court, Peretti makes several striking observations about the appointments process. Judicial decisionmaking based on political preferences does not conflict with democracy, Peretti argues. First, political goals drive judicial selection, and second, Justices often remain true to the politics of the administration that nominated them. Like Yalof, Peretti highlights the importance of political motivations in the presidential selection of Justices, such as partisan affiliation and political ideology. About ninety percent of the judges appointed in each of the last four administrations, she notes, have come from the same political party as the President (p. 87). Partisan motives also drive Senate confirmation practice: the confirmation rate when the President and Senate are of different parties is significantly lower (fifty-nine percent) than when they are of the same party (eighty-nine percent), efforts to replace Justices of one party with nominees of the other party double the Senate rejection rate, and nominations that both effect such partisan replacements and that alter the ideological balance of the Court appear to triple the rejection rate (p. 88). Senatorial voting patterns show that Senators vote to confirm or reject controversial nominees based upon whether they belong to the same party as the nominating President. Political factors, such as partisan affiliation, presidential political strength, or ideology, rather than objective merit or qualifications, determine whether a Justice receives confirmation. It should be noted

15. Pp. 48-49. Peretti also argues that the more recent "provisional review" theories, which would escape the possibilities of judicial tyranny by allowing for initial, nonfinal, nonbinding Supreme Court decisions, only returns to the familiar interpretivist-noninterpretivist debate by drawing distinctions between Supreme Court decisions that are correct, and hence are final, and ones that are not.

that Peretti's account here does not mesh well with Yalof's more direct evidence on Supreme Court appointments. According to Yalof, some Presidents have consciously chosen to emphasize factors other than ideology, such as political cronyism, in choosing their Justices. Peretti's approach to the Court and its Justices cannot account for the actual record on presidential selection of Justices.

Nonetheless, Peretti faces a significant obstacle in her explanation of the political nature of the appointments process. One should see far less struggle between the President and the Senate over Supreme Court appointments, the Rehnquist, Bork, and Thomas nomination fights notwithstanding, if she were correct that judicial selection was simply subject to the same political process that governed, for example, legislation or administrative rulemaking. Given the divided government that generally has prevailed in the postwar period, Peretti's thesis would have predicted substantial political controversy over the O'Connor, Kennedy, and Souter nominations. Nonetheless, while the Senate has rejected twenty percent of all Supreme Court nominees in its history, only five nominees have failed to win Senate confirmation in the twentieth century (p. 94). Peretti attempts to downplay this evidence by arguing that recent Presidents have adjusted their nominations, depending on the power of the opposition party in the Senate, in order to reduce confrontation with the Senate and to conserve their political power. Ultimately, she admits, as she must, that "the competition between the Senate and president has not, in recent years, been as vigorous or as balanced as it should be to insure the Court's representativeness" (p. 99).

Putting this problem to one side, Peretti then advances the argument that political representation on the Court translates into politically sensitive decisionmaking by the Justices. According to Peretti, "the link between the value premises of a Justice's selection and then the value premises of her subsequent decisions is significant and consequential and constitutes an indirect form of political representation" (p. 84). Justices apparently dance with the person who brought them to the party. Surveying a rich political science literature (known primarily as the "attitudinal" model), Peretti observes that a strong link exists between a Justice's personal values and his or her decisions over time. Despite occasional surprises, presidents choose nominees because they know a candidate's values and they predict that the nominee will advance a desired ideology once on the bench. Peretti finds that at least three-quarters of the Justices generally satisfy presidential expectations about their judicial performance (pp. 130-31). The majority of these Justices prove successful because presidents used their appointments as an opportunity to extend their policy influence into the future. Presidents who are "surprised" by a nominee's future decisions usually failed to evaluate carefully a nominee's political views, as when President Madison appointed Joseph Story, or were subject to

constraints generated by other political leaders or by political conditions when they selected a nominee.

Peretti spends a great deal of effort establishing a link between presidential policy goals and judicial voting patterns because the representative nature of the Court is key to proving the rest of her thesis. Only by showing that the personal values that guide a Justice's decisions are connected to the values that the President (and Senate) validated in appointing the nominee can *In Defense of a Political Court* make its normative claim that value-voting by the Justices has any basis in democratic theory. Yalof's evidence, however, seems to throw a monkey wrench into Peretti's finely tuned model, as it seems clear from his case studies that Presidents have chosen only a few nominees because of agreement with their ideological views. Nonetheless, for Peretti, voting by personal preference allows the Justices to "reflect or represent the political values and policy views currently (or at a minimum recently) receiving official expression and representation in other branches of government and, by inference, receiving a significant measure of popular support" (p. 131). By voting their personal preferences, Peretti argues, Justices counterintuitively advance democratic control over judicial decisionmaking. She fails to explain, however, how this occurs as Justices become farther removed from the time of their appointment. Nor does Peretti allow any room for the case of Justices who change their jurisprudential views over time.

The rest of the book seeks to defend this paradoxical judicial role both by taking apart age-old criticisms of a political Court and by defending the Court's activities as appropriate in a pluralist political system. Peretti argues that judicial decisions are not all that threatening because the Court's power is easily checked by impeachment, congressional control over the Court's size and jurisdiction, constitutional and statutory amendment, the appointments process, and its need for the cooperation of the other branches for implementation of its decisions (pp. 137-47). Peretti's list only highlights the importance of appointments, however, as her other techniques for political control over the Court are rarely used and are highly controversial. Peretti discards the claim that political decisionmaking by the Justices will erode the Court's legitimacy by pointing out that public awareness of the Court's decisions or of the Justices is low,[16] that most Americans do not hold the Court as an institution in especially high regard, and that judicial decisions that violate some generally held ideals of impartial decisionmaking do not erode public support for the Court (pp. 173-80). Therefore, the more political the Court is, the more its decisions are politically responsive to views of the public and national elites, and the

16. In 1989, for example, a public opinion poll showed that only 9 percent of Americans could correctly name Rehnquist as Chief Justice, while 54 percent knew that Judge Wapner was the jurist on the television show, *The People's Court*.

more likely the Court will receive the political support necessary to preserve its authority.

Peretti reserves the end of her book for the two most difficult challenges to her analysis. First, she addresses the criticism that a political Court, however vague its representative nature, still acts in conflict with democratic values. In responding to this claim, she startlingly embraces pluralist theory. Relying upon the theories of Robert Dahl, Peretti argues that regular elections and the legislative process are imperfect transmitters of majoritarian preferences, and that instead we ought to view the national political system as promoting a pluralist structure in which diverse groups have the opportunity to challenge and influence government decisionmaking. Under this model, a political Court becomes merely "an alternative arena in which dissatisfaction with legislative or administrative decisions can be aired" (p. 219). The democratic legitimacy of the Court's authority is not important; what counts is that the Court establishes a different avenue for citizen and group desires to express themselves, and ultimately for widespread consensus for government decisions to be generated.

Peretti's second challenge arises from the first. If a political Court serves only as another forum in a pluralist system, why vest any power in such a redundant body at all? Her answer takes two parts. First, the Court provides a forum for groups that might be systematically excluded from the political process. Here, it is hard to distinguish her argument from the theories of *Carolene Products*, Jesse Choper, and John Hart Ely, which she had criticized earlier in the book. Second, the Court serves as an important fine-tuning instrument in the public policy process. It more precisely fashions public policies to specific situations and provides a feedback mechanism to the lawmakers.

In honestly addressing these questions, Peretti deserves much praise. Peretti is an obvious fan, if not a card-carrying member, of the critical legal studies ("CLS") movement.[17] CLS criticisms of the myth of objectivity in constitutional law, as in other areas of law, have value, but they have suffered from several shortcomings. Most glaringly, CLS has failed to promote any positive solution to replace the results of its attack in all directions on the objectivity and neutrality of law. For that reason, my colleague Phillip Johnson has compared critical legal studies to the work of an adolescent who revels in criticizing everything, but solving nothing.[18] CLS work on constitutional law reduces to an utterly result-driven enterprise in which achieving utopian social visions amounts to the only guide to legal decisionmaking. Peretti's

17. *See* pp. 36-45 (finding convincing CLS claims of "judicial subjectivity" and "constitutional indeterminacy").

18. *See* Phillip E. Johnson, *Do You Sincerely Want to Be a Radical?*, 36 STAN. L. REV. 247, 248 (1984).

work represents a serious effort to avoid this problem by sketching out a positive role for the Court in a CLS world where law really is nothing more than politics.

Despite this worthy effort, Peretti's work does not fully satisfy. If the law really is just politics, then constitutional law serves only as the expression of temporary policy preferences. By advancing its own ideological agenda, the Court merely serves as the means for that expression. Many constitutional law scholars will find it difficult to agree with this conclusion because Peretti's approach allows for no objective judgment or criticism of a judicial decision.[19] Peretti must acknowledge, therefore, that not only was the *Lochner* Court right, since it expressed the political views of the Justices of its day, but so too were the Courts of *Dred Scott*, *Plessy v. Ferguson*, and *Korematsu*, among others. If the Court is playing politics, and the political system allows the Court to pursue its agenda, then what the Court decides is, ipse dixit, constitutional. CLS-inspired analysis of constitutional law, ironically, devolves into a defense of the status quo, in that if law is just politics, then the problem is with the national society and culture and its preferences, rather than with constitutional law. Agreement with the notion that the law represents only the product of collective political, social, and cultural preferences that allow elites to dominate society means that there is not all that much any of us can do to reform the law or the Court.

Even if Peretti were right that constitutional law is just the continuation of politics by other means, she still fails to offer a convincing reason why we ought to vest any authority in the judicial branch. If the Court's function is purely political, it is difficult to see why we should not replace the Court with an alternative forum for the expression of group preferences, such as an agency or congressional office. Peretti offers no reason to think that judges are especially adept at performing the pluralist role she imposes on them; indeed, due to their isolation from the political system, they might be exceptionally inept at performing this function. Her answer that the Court has a distinctive role in fine-tuning public policy is not compelling in light of the record of the courts in frustrating and distorting the implementation of public policy in the United States.[20] Further, as recent works by Gerald Rosenberg[21] and Michael

19. Admitting this, she declares that there "are simply no absolute imperatives about the particular values or group interests that the Court must advance and protect." P. 233.

20. *See, e.g.*, Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL. ANALYSIS & MGMT. 369 (1991); *see also* JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989).

21. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

Klarman[22] have argued, the Court does a poor job of achieving social change, and, as some have maintained, the federal courts suffer from a number of structural difficulties in implementing their constitutional visions in a complex society.[23] The inescapable conclusion to Peretti's analysis seems to be that we ought to take away any public policy function from the courts.

Peretti's inability to offer a better explanation for the role of a political Court highlights a critical non sequitur in her argument. Even if the grounds for judicial decisionmaking were substantially indeterminate, it does not follow that the Court's role must be understood within a pluralist framework. *In Defense of a Political Court* provides no defense for the choice of the theory of Robert Dahl over those of John Rawls or Karl Marx. While Peretti has emptied judicial review of the idea of neutral constitutional adjudication, she simply has replaced it with yet another theory, that of seeking political stability through pluralist consensus-building, with little effort at explanation. Further, Peretti confuses pluralism's descriptive enterprise for normative justifications. It may be the case that much of modern American politics can be explained through the lens of interest group politics, although institutionalist and positive political theory work may have thrown this conclusion into doubt. Nonetheless, Peretti fails to explain why the Supreme Court or the other branches of government ought to adopt pluralism's normative goals — political stability, moderate policy choices, and social satisfaction — rather than other possible values in public lawmaking, such as social justice, rational policy choice, economic efficiency, or republican deliberation. Left-wing thinkers, for example, have criticized pluralism for centralizing political power in social elites, for pacifying groups oppressed by the capitalist system, and generally for suppressing other forms of political struggle based on broader classifications than mere interest groups.[24] Peretti adopts CLS methods to show that all law is indeterminate, but she provides no defense of her choice of political values in response to criticism from the same quarter.

In Defense of a Political Court proves ultimately unsatisfying because of its barren vision of the Constitution. If constitutional law becomes only the personal preferences of the Justices, then the Constitution itself does not impose limitations upon government

22. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

23. *See, e.g.*, John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1123, 1137-41 (1996).

24. *See, e.g.*, William E. Connolly, *The Challenge to Pluralist Theory*, *in* THE BIAS OF PLURALISM 3 (William E. Connolly ed., 1969); Frank Cunningham, *Pluralism and Class Struggle*, 39 SCI. & SOC'Y 385, 415-16 (1975-76).

power. For Peretti, the Court and the political branches might limit the breadth and depth of government action, but only for political reasons. If the people today believe that we should do away with federalism and the separation of powers, Peretti would not let the Constitution stand in the way. If the Court permitted the national government to harm racial minority groups, Peretti provides us with no way to dispute the constitutionality of that act. According to *In Defense of a Political Court*, the Constitution exerts no real binding force on prosecutors and police in their handling of suspects and defendants, it imposes no rules on government treatment of religious groups, and it provides no real guarantees for rights of due process or privacy. Not only is it impossible for us to judge the correctness of Chief Justice Taney's decision in *Dred Scott*, we cannot even decide whether we agree with the dissent or with Abraham Lincoln's criticisms of the case, aside from expressing our opposition to slavery on political or moral grounds.

While *In Defense of a Political Court* admirably remains true to its initial intellectual assumptions, its conclusions on this score suggest that its initial observations were not as compelling as at first glance. To be sure, it seems undeniable that personal values have driven some of the decisions of some of the Justices. Yet, Peretti has not shown (which I think that she must) that Justices have value-voted in every case. One can identify many examples where Justices voted against their personal preferences because they believed that the Constitution required a different result.[25] While there may be many people whose actions and understandings are caught in the amber of the dominant values in our society, Justices are probably the actors with the most freedom to defy those structures. Peretti also goes too far in suggesting that the Constitution lacks meaning and force except as one norm among many others. There are many things that the government today does not attempt because of the Constitution's requirements. For the most part, the government has not restricted political speech in our history, it still operates within the broad outlines of the original separation of powers, and states still enjoy some elements of sovereignty. To be sure, this is a difficult point for Peretti to prove because it is impossible to demonstrate how American history would have been different if there had been only an utterly malleable Constitution. Nonetheless, despite the many adjustments to, and modifications of, constitutional meaning over the last two centuries, many of the outlines of the original Constitution remain today.

25. Some cases where Justices probably voted against their preferences on the merits of the public policy issues at stake include Justice Scalia in *Texas v. Johnson*, 491 U.S. 397 (1989) (concerning flag burning), Chief Justice Rehnquist in *Morrison v. Olson*, 487 U.S. 654 (1988) (concerning the authority of independent counsel), and Justices Kennedy and O'Connor in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (concerning abortion).

Rather than devoting so much energy toward showing that there is no such thing as constitutional law, Peretti might have more usefully asked why there is so much constitutional law all around us. If Peretti were correct that constitutional law really boils down to personal preferences and political ideologies, we should have dispensed with the Constitution a long time ago, given the temptations and political imperatives that have arisen in the nation's history. Peretti's theory of law as politics cannot explain why a European welfare state model of government did not fully emerge in the wake of the Great Depression, or why the United States has never witnessed successful communist, socialist, or religious political parties. Peretti cannot explain why we still have a separation of powers, despite the emergence of an administrative state, or why we still have sovereign states, even with the nationalization of markets and society.[26]

The answer to these questions, some have suggested, is that the Constitution establishes enduring norms that impose observable limits on government authority. This should not be surprising. As a multicultural society constantly replenished by successive waves of immigration, the American people do not share a common genealogical, cultural, religious or geographic heritage. If there is anything that binds the many different groups that make up the American people, it is the Constitution, which serves as America's civic religion. Interest groups may vie for influence in a pluralist system in which the Court is a political actor, but the Justices (as well as the other actors in the political system) may not enjoy the political freedom to value-vote, as Peretti would have it, because they have already internalized the Constitution's values of the separation of powers, federalism, and individual rights. Put a different way, Peretti's theory views preferences as independent of political activity; what she fails to understand is that the Constitution itself, as well as the act of engaging in political deliberation, may generate and shape preferences.

All of this is not to say that Justices do not pursue ideological or political agendas on the Court. What Peretti has confused, however, is the difference between politics broadly defined and differences over judicial ideology. Peretti believes not only that Justices have specific preferences on policy questions such as social security, taxes, and international relations, but also that they pursue their goals by voting their beliefs. Current Justices, it seems to me, do not vote in most cases because they agree with a legislature or agency's outcome on a specific policy question, but rather they take account of broader considerations abut the proper role of the Court, vis-à-vis the other branches and the states, in public lawmaking and in interpreting the Constitution. To borrow the distinction made by H.L.A. Hart, Jus-

26. *See* Edward L. Rubin & Malcolm Feeley, *Federalism, Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

tices pursue their own ideology considering the rules of recognition — the process by which society makes laws — rather than the substantive rules — themselves.[27] Thus, the Justices may have different personal attitudes toward affirmative action or abortion or the death penalty, but these views need not correlate with their votes on how much deference the judiciary ought to provide to Congress, or how far the Bill of Rights and the Reconstruction Amendments go in removing certain issues from the control of either the states or the federal government. While these disputes, no doubt, are political or ideological, they form a far more narrow category that excludes the wider philosophical, moral, intellectual, or partisan differences that shape politicians' and people's views on policy questions.

Issues of judicial ideology, as opposed to general policy conflicts, do not pose the same concerns about the comparative political incompetence or the unrepresentative nature of the Court. As opposed to questions of policy that require political leaders to represent the policy's values, or that involve choices between different social costs and benefits, questions of legal and constitutional dimension — such as what branches should make certain decisions, what decisions are removed from politics completely, or what institutional procedures are necessary to promote the rule of law — seem to fall within the special competence of judges and lawyers. Indeed these questions may be the very "political" questions that are best suited for judicial resolution. By focusing on only broader political value-voting, Peretti fails to see that more subtle differences over judicial and constitutional ideology can be particularly legal and not just a subterfuge for politics-as-usual. The next Part will show why judicial ideology bears particular importance for the appointments process.

III.

Despite these difficulties with her law-as-politics thesis, Peretti makes the important contribution of clarifying how we ought to think about the judicial appointments process. After the Bork and Thomas confirmation hearings, scholars reached a stopping point in their analysis of the relative roles of the Senate and President. Henry Monaghan nicely expresses the reigning scholarly consensus; after examining the constitutional text, structure, and history, he finds no constitutional barriers that restrict the Senate's freedom in examining a nominee's judicial or political ideology.[28] Once Monaghan acknowl-

27. *See* H.L.A. HART, THE CONCEPT OF LAW 91-96 (1961).

28. *See* Henry Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1207 (1988); *see also* Michael Stokes Paulsen, Book Review, *Straightening Out the Confirmation Mess*, 105 YALE L.J. 549, 562 (1995); Charles Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970).

edges that politics govern the appointments process, there is not much more for the law to say. Differing only slightly from Monaghan's basic conclusions, other prominent legal scholars have urged the Senate to consider more than qualifications in the confirmation process. Some, like Laurence Tribe, argue that the Senate ought to articulate its own vision of constitutional law and enforce it through confirmations,[29] while others, such as Stephen Carter, believe that the Senate ought to examine nominees for their moral character.[30] Robert Nagel, who accepts a norm of substantive, ideological review by the Senate, believes that confirmation hearings present the opportunity for legal thinking to be exposed to political values and forms of discourse so that the Justices can understand the political consequences of their decisions.[31]

Many of these conclusions seem driven by the idea that if the Justices are acting as the legal realists would predict, then the Senate ought to intervene more aggressively in examining a nominee's personal views. Although *In Defense of a Political Court* begins with that assumption, it skillfully moves beyond it. Peretti's signal contribution is her effort to link the appointments process not just to how we think Justices make decisions, but also to our understanding of the role of the Court in the political system. As a normative matter, the Senate's approach to appointments should reflect the grounds upon which judicial review is based, and the manner in which the other branches respond to its exercise. It is not enough, as previous writers have done, to declare that the Constitution imposes no standards on the President or Senate in choosing their nominees, and then to throw up one's hands in despair. As I have argued elsewhere, based on my experience serving as General Counsel of the Senate Judiciary Committee, even when the Constitution does not impose specific standards to guide government officials, the members of the political branches still develop quasi-constitutional norms to limit the exercise of their plenary or discretionary functions.[32] We should seek to determine the basis of judicial review and its role in the political system, and then infer from that relationship the quasi-constitutional norms that should guide the President and Senate in choosing Justices.

The first step in this analysis is to understand the significant change in the nature of judicial review that began during the Warren Court and has accelerated during the Rehnquist years. Initially, judicial review was a modest doctrine based on a narrow reading of the Court's powers. In *Marbury v. Madison*,[33] Chief Justice John Marshall did not

29. *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 131 (1985).

30. *See* Carter, *supra* note 2, at 1199.

31. *See* Nagel, *supra* note 3, at 873.

32. *See* John C. Yoo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROBS., Spring 1998, at 1, 16-18.

33. 5 U.S. (1 Cranch) 137 (1803).

invalidate Section 13 of the Judiciary Act of 1789 because the Court had an important role in settling great political questions or in articulating social norms. Rather, judicial review arose from the nature of a written Constitution and the Court's role in resolving cases and controversies involving federal law. It was inevitable, Marshall noted, that cases brought to the Court would raise conflicts between statutes and claims based on the Constitution. As a written document adopted through popular ratification, the Constitution expressed higher law that superseded any ordinary legislative enactment. Therefore, in deciding a case between two parties, Marshall concluded, the Court had to give effect to the higher law of the Constitution over more ephemeral legislation.

> [I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law... the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.[34]

Judicial review springs from the judiciary's unique function in deciding cases or controversies under federal law.[35]

Marbury's grounding of judicial review in the Court's case-deciding function left ample room for the other branches to engage in constitutional interpretation while performing their own constitutional duties. This departmentalist understanding of constitutional review recognizes that the President and Senate may use their own plenary powers to restrict, frustrate, or challenge the decisions of the Court. Often associated with Thomas Jefferson, this theory of concurrent review assumes that each branch of the government is coordinate, equal, and supreme within its own sphere of action.[36] President Jefferson, for example, enforced his belief that the Alien and Sedition Acts were unconstitutional by refusing to prosecute offenders. As he wrote to Abigail Adams,

> You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for

34. *Marbury*, 5 U.S. (1 Cranch) at 176.

35. *See* ROBERT L. CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 15-17 (1989).

36. *See id.*; CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 94-96 (1986); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228-38, 255-62 (1994).

> them. Both magistracies are equally independent in the sphere of action assigned to them.[37]

Jefferson articulated the same theory in considering whether to resist Marshall's subpoena for papers involving the Burr conspiracy.[38] Following the departmentalist understanding of judicial review, President Andrew Jackson vetoed a bill to incorporate the Bank of the United States, even though the Supreme Court had held in *McCulloch v. Maryland* that Congress could establish the Bank under the Necessary and Proper Clause.[39] Wrote Jackson: "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."[40]

Judicial review's originally modest grounds also leave a legitimate avenue for resistance to Supreme Court decisions. If the Court has embarked on a direction that is unfaithful to the Constitution, the people can act through the other branches of government to forestall the Court in the hopes that it may reverse itself. As President Abraham Lincoln declared in his first inaugural address, "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit."[41] Nonetheless, he continued, "the evil effect following [an erroneous decision], being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice."[42] Because the effects of judicial review are limited to the case presented, Lincoln even suggests that the Court's decisions apply only to the parties, and not to other citizens who might disagree — an argument Lincoln made at least as early as his debates with Senator Douglas over *Dred Scott*. To allow Court decisions to have a broader effect, Lincoln concluded, would deprive the people of the right of self-government. "[I]f the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions," he declared, "the people will

---

37. Letter from Thomas Jefferson to Abigail Adams, Sept. 11, 1804, *in* 10 WORKS OF THOMAS JEFFERSON 89 n.1 (Paul L. Ford ed., 1905).

38. *See* John C. Yoo, *The First Claim: The Burr Trial*, United States v. Nixon, *and Presidential Power*, 83 MINN. L. REV. 1435, 1449-50 (1999).

39. 17 U.S. (4 Wheat.) 316 (1819).

40. Andrew Jackson, Veto Message, July 10, 1832, *in* 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 582 (1896).

41. Abraham Lincoln, First Inaugural Address, Mar. 4, 1861, *in* 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 9 (1896).

42. *Id.*

have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."[43]

This Jefferson-Lincoln view of judicial power, one consistent with the reasoning of *Marbury*, bears several implications for the selection of Supreme Court Justices. Coordinate constitutional review reduces the importance of appointments to the Court. If the Court's decisions do not extend so broadly as to bind other government actors, and if the other branches play an equal, coordinate role in making constitutional law, then it may not be as important that the Court serve a representative function. As the Court is not irrevocably fixing "the policy of the government upon vital questions affecting the whole people," democratic government may not require that the Justices act in sync with the elected branches or with popular wishes. Further, the narrow scope of judicial review allows the people to resort to other political avenues, such as the executive or legislative branches, to correct erroneous (or undesired) Court decisions. While the Court may still act in a countermajoritarian manner, its reach is limited to individual cases. If the Court has interpreted the Constitution in a way that is acceptable to the political system, then its norms will spread throughout not just the judiciary, but the political branches as well. If not, then opponents can turn to the political system to challenge, narrow, and perhaps overturn the effects of a Court decision. This reduces the need to resort to the appointments process as a second-best method for reversing the Court's long-term policy direction. Rather, the President and Senate can seek nominees who excel at deciding cases, the primary purpose for the federal courts.

Interest in the ideological positions of nominees, however, becomes increasingly significant to the political branches once their freedom to interpret the Constitution comes under challenge. Many academics, such as Carter, Nagel, and Peretti, view the recent struggle over the appointments process as an almost inevitable consequence of the expansion of judicial review to many of the social issues of the day. There is much truth to this observation, but it is not the only change in judicial review that has contributed to the politicization of the appointments process. Of equal, if not greater, importance has been the Court's movement toward judicial supremacy in recent decades. The Court's expansion into areas of social concern, standing alone, does not seem sufficient to generate all of the political controversy over judicial nominations, given the record of limited compliance with Supreme Court decisions. Judicial resolution of questions concerning privacy, criminal rights, and race relations may explain why different groups display interest in Court nominations, but not why the leaders of the other branches of government do. Previous historical periods,

43. *Id.*

in which the Court played a central role in national controversies, such as those over the national bank, the extent of Reconstruction, or government regulation of the economy, did not witness the rise of political interest in the ideology of nominees to the Court (as opposed to those of the sitting Justices) that characterized the Bork nomination. While the New Deal period did focus political attention on the ideology of nominees, this was a single-issue concern — whether nominees supported the expansion of federal power during the Great Depression — rather than a consideration of a nominee's broader views on policy or even constitutional theory. Until Judge Bork, it appears that the Senate had never rejected a Supreme Court nominee because of his jurisprudential views.[44]

All of that has changed, and it seems that the Court's recent effort to transform judicial review into a doctrine of judicial supremacy is an indispensable contributing factor. The emergence of judicial supremacy certainly seems to have occurred at the same time as the rise of interest in the ideological views of the Justices. *Marbury v. Madison*, as noted above, did not rest on a claim that the Court had the final, definitive say on interpreting the Constitution, only that its power to declare laws unconstitutional arose from its duty to decide cases. It was not until *Cooper v. Aaron* in 1958 that the Court first clearly declared that its interpretations of the Constitution bound all other government officials.[45] Not only did the Court declare that its opinions were the "supreme Law of the Land," but that it was "supreme in the exposition" of the Constitution.[46] *Cooper* identified the Constitution with the Court's decisions as well as with the constitutional text. Commentators at the time launched scathing attacks upon the Court's claim,[47] although some more recently have sought to defend *Cooper* as necessary to ensure compliance by state officials with *Brown v. Board of Education*.[48] Indeed, the Court's declaration of its own supremacy did little to overcome the massive resistance to *Brown* by state and local

44. *See* NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 37-50 (1998).

45. 358 U.S. 1 (1958).

46. *Id.* at 18.

47. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 259-64 (1962); PHILIP KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 116 (1970); Henry Monaghan, *Constitutional Adjudication: the Who and When*, 82 YALE L.J. 1363, 1363 n.2 (1973); J. Harvie Wilkinson, *The Supreme Court and Southern School Desegregation, 1955-1970*, 64 VA. L. REV. 485, 520 (1978).

48. 347 U.S. 483 (1954). *See* Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387.

officials, which did not begin to wane until the late 1960s with more vigorous enforcement of civil rights by the political branches.[49]

While the Warren Court may not have truly claimed supremacy over the coordinate branches, its more conservative successors took the next step. In *United States v. Nixon*, the Burger Court claimed for itself the right to make final determinations on the scope of executive privilege, found that the judiciary's constitutional need for the Watergate tapes superseded the executive branch's desire for secrecy, and ordered President Nixon to produce the tapes.[50] While recognizing that the President enjoyed an executive privilege in limited cases, the Court held that the President could not impose an absolute shield on all communications with his subordinates. Rather, secrecy in executive communications had to yield to the judiciary's need for information to conduct criminal trials. Most importantly, the Court rejected the claim that the President possessed the constitutional authority to determine independently questions of executive privilege. Where *Cooper* established judicial supremacy over the states, *Nixon* extended it to the Presidency. One might argue, as the *Nixon* Court did, that *Nixon* only applied the rules of *Marbury*. In *Marbury*, however, the Court did not issue an order to an executive official, nor did it claim that its interpretation of the Constitution in the course of doing so would be supreme.

Despite its alleged efforts to reverse the Warren Court revolution, the Rehnquist Court has actually expanded the judiciary's claims to supremacy. In *Planned Parenthood v. Casey*,[51] the Court reaffirmed the core holding of *Roe v. Wade*: that a constitutional right to privacy included a woman's right to an abortion. Declaring its resistance to political and popular efforts to reverse *Roe*, the unprecedented plurality decision seemed to tie the Court's legitimacy and power to the very idea of the rule of law. "To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing," the plurality of Justices O'Connor, Kennedy, and Souter declared.[52]

> So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested

49. The Court would not seek vigorous enforcement of *Brown v. Board of Education* until Congress had enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965. *See* Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971); Green v. County School Board, 391 U.S. 430 (1968).

50. 418 U.S. 683 (1974).

51. 505 U.S. 833 (1992).

52. *Id.* at 868.

> with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.[53]

In *Casey*, the plurality argued that its right to decide cases was more than that; its power to interpret the Constitution was the power to "call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[54] The *Casey* Court argued that due to the Court's supreme power to decide constitutional questions, the other branches, and the people, had to accept the judiciary's resolution of great political and social questions, and end their efforts at resistance.

While one might dismiss *Casey* as the excessive rhetoric of a plurality, *City of Boerne v. Flores*[55] made clear the Rehnquist Court's belief in its own supremacy. In response to *Employment Division v. Smith*,[56] Congress enacted the Religious Freedom Restoration Act ("RFRA")[57] to restore the strict standard of review for laws that burden free exercise rights. It claimed the authority under Section 5 of the Fourteenth Amendment to decree the substance of the Bill of Rights as they applied to the states. The Court, however, rejected a congressional role in interpreting the Bill of Rights at variance with its decisions. "As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing," Justice Kennedy wrote for the Court.[58] "The power to interpret the Constitution in a case or controversy remains in the Judiciary."[59] Dispelling any doubt about its plenary powers, the Court emphasized that it exercises "primary authority to interpret" the Constitution's prohibitions on government action.[60] According to the Court, Congress can only enact remedial legislation to enforce the Bill of Rights, as interpreted by the judiciary. Last term, in *United States v. Morrison*,[61] the Court reaffirmed the logic of *Boerne* by striking down a statute that provided a civil remedy for violence against women. No Justice has dissented from the judicial supremacy holdings of either *Boerne* or its progeny.

---

53. *Id.*

54. *Id.* at 867.

55. 521 U.S. 507 (1997).

56. 494 U.S. 872 (1990) (holding that neutral, generally applicable laws may restrict religious practices even when not supported by a compelling government interest).

57. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb - bb-4 (1994).

58. *City of Boerne*, 521 U.S. at 524.

59. *Id.*

60. *Id.*

61. 120 S. Ct. 1720 (2000); see also United States v. Dickerson, 120 S. Ct. 2326 (2000) (invalidating federal statute that attempted to reverse Miranda warnings).

For all of the concern over a conservative judicial counter-revolution, on the issue of judicial supremacy the Burger and Rehnquist Courts have fully embraced and even expanded *Cooper*. Where *Cooper* announced that the Court's interpretations of the Constitution bound state officials, a result possibly consistent with the departmentalist approach to constitutional review, *Nixon* and *Boerne* expanded the Court's supremacy over the coordinate political branches. *Casey* suggested that the Court's decisions even precluded citizens and groups from actively dissenting from judicial interpretation of the Constitution. The Burger and Rehnquist Courts' aggressive rhetoric has not been the only distinctive characteristic of the recent rise of judicial supremacy; the surrender of the other branches has proven truly remarkable. In the Watergate Tapes case, President Nixon readily complied with the Court's demand for production. Two decades later, President Clinton failed to challenge the Court's supremacy in determining the boundaries of executive privilege in *Clinton v. Jones*. Despite the nearly unanimous support in Congress for RFRA, Congress obeyed the Court's decision and has not yet enacted another statute challenging *Smith*. Congress has not even attempted to employ its own plenary powers, such as through the Spending or Commerce Clause, to convince states to protect religious liberty.[62] To be sure, one might claim that the notion of judicial supremacy had gained wider acceptance throughout society well before *Cooper*, *Nixon*, *Casey*, and *Boerne*, because of the need to have a final resolver of constitutional uncertainty. It is unclear, however, when this idea firmly took root in the absence of judicial decisions that articulated the concept and put it into practice.

Judicial supremacy changes the constitutional structure in a way that leads to the more political appointments process that we have today. Ending departmentalism closes off many of the valid methods for resistance to the Court's decisions. As demonstrated by the Virginia and Kentucky Resolutions of 1798, Jefferson and Madison believed that states could declare their opposition to unconstitutional actions of the federal government. It is still a matter of historical dispute whether they believed that the states could go farther in interposing or nullifying unconstitutional federal laws.[63] *Cooper* and, more importantly, *Casey* have formally blocked off that avenue of resistance. Several Presidents, including not just Jefferson and Lincoln, but also

62. *See* Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-97 Term*, 19 CARDOZO L. REV. 2259 (1998) (proposing ways to enact a religious freedom statute after *Boerne*).

63. For an interesting discussion of the differences between Jefferson and Madison on this point, and its relevance to the political struggle over nullification, see DREW MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 139-51 (1989).

Theodore Roosevelt and Franklin Roosevelt, believed that the other branches of government could take action, at odds with the Supreme Court, based on their own interpretation of the Constitution. *Nixon* and *Boerne* have formally eliminated the possibility that the coordinate branches can use their powers to resist and frustrate Court decisions. According to *Casey*, at some point even the people must cease their struggles and accept the Court's resolution of a controversial constitutional issue. To be sure, the Court's decisions cannot *force* the states, the other branches, or the people from challenging Supreme Court decisions. Nonetheless, these decisions declare such action to be constitutionally illegitimate and a virtual attack on the rule of law.

Foreclosing the legitimate methods for resisting Court decisions naturally leads to the politicization of the appointments process. When the Court decides to invalidate moral, social, or economic legislation as unconstitutional, it has removed an area of policymaking from the political arena. Judicial supremacy, as advanced by the Warren, Burger, and Rehnquist Courts, seeks to remove any legitimate methods using the coordinate political branches or the states to challenge this transfer of issues from the political to the legal sphere. Once individuals and groups cannot turn to their elected representatives or even to their own efforts at direct action to promote their constitutional visions, they must turn to the appointments process to change the direction of the Supreme Court. Efforts to inject politics into the selection of judicial nominees actually embody the polity's ongoing discussion concerning the values that will govern society. By constitutionalizing more areas of life, and by pursuing the notion of judicial supremacy, the Court itself has shunted normal political activity from the world of policy into the world of Court appointments.

Indeed, the Court's claim to supremacy may also have triggered the emergence of political campaigning techniques in the appointments process. In seeking to reverse undesirable Court decisions, players in the political process (not just interest groups, but also political parties and individual members of the House and Senate) must go farther than merely altering the Court's jurisprudential instincts. They also must seek the appointment of individuals who are likely to reverse particular decisions and doctrines. This is no easy task because individuals do not resemble legislation, which can be assembled piece by piece to achieve consensus, and they cannot be recalled once confirmed. This difficulty in reversing Court decisions, in contrast to the more precise methods offered by presidential order or congressional statute, may explain (without justifying) why different political actors have employed such exaggerated claims and aggressive tactics in supporting or opposing Court nominees.

These two approaches to the role of courts yield different implications for the appointment process. Under a theory of coordinate constitutional review, in which each branch of government interprets the

Constitution in the course of executing its own duties, a President and Senate can focus upon appointing judges who demonstrate the qualities of outstanding lawyers. According to *Marbury*, Jefferson, and Lincoln, constitutional interpretation arises from the judiciary's primary function of deciding cases. Therefore, the President and Senate should strive to select nominees whose qualifications and records suggest that they would excel at deciding cases in as impartial a manner as possible, by practicing the lawyerly craft according to the best standards of the legal profession. This is not a plea for common law constitutionalism in judicial selection, or an argument on behalf of judicial minimalism.[64] One can select Justices who both excel at practicing the lawyer's craft and are capable of developing a broad constitutional vision, such as Chief Justice Marshall and Justice Story.[65] Rather, the originally modest grounds for judicial review suggest that the appointments process should seek those whose background, character, and qualifications suggest that they would make impartial adjudicators of disputes.

A system of coordinate constitutional review reduces the importance of judicial appointments in the political system. Selecting superb lawyers makes it less likely that the Court will expand beyond its function of dispute resolution into that of final constitutional arbiter. On this understanding, leading politicians or constitutional law theorists might make the worst possible appointees, because they might only be interested in pursuing their own ideological agenda and in increasing their power through the expansion of judicial supremacy. Jeffersonian departmentalism establishes three centers of power in the process of constitutional interpretation, which reduces the comparative importance of the Court in the resolution of great social questions. Even if the political branches err and select nominees who seek to pursue their own personal policy preferences, coordinate constitutional review limits the damage by providing for multiple avenues of resistance and opposition. Political actors need not devote substantial resources to Court appointments because they have other methods to achieve their political goals. Of the two different theories of judicial review, this one best fits the approaches that Yalof describes were pursued by many Presidents. A theory of coordinate review means that Presidents can choose to use judicial selection for purposes other than pursuing preferred ideological agendas because selections to the Court are not so important that mistakes cannot be corrected.

---

64. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

65. This idea is similar to Neal Devins's point criticizing Sunstein's arguments for judicial minimalism as "0% principle 100% of the time." *See* Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1992 n.84 (1999) (book review).

Under a theory of judicial supremacy, however, the appointments process assumes a more crucial role. Once the Court's interpretation of the Constitution assumes finality and supremacy, controlling the Court's direction becomes a valuable prize in the political struggle over policy. With other methods for influencing constitutional law precluded, changing the personnel on the Court becomes the only way to win this contest. One then would expect either the President or the Senate to seek to fill the Court with Justices who share their policy preferences in an effort to lock in their policies well beyond the next election. Political actors with these goals in mind ought to select nominees with very different backgrounds from those of the departmentalist model. Rather than lawyers, the judicial supremacist might seek out political leaders, constitutional theorists, and even philosophers, who not only agree with the ideological views of the President or Senate, but also believe that the Court should retain the final say on the interpretation of the Constitution. Because of the high stakes involved, Senators would pay little deference to the President's selection, and one would expect voting in the Senate to follow party lines.

If the Court were to enjoy the power in the American political system called for by judicial supremacy, it would be surprising if the political players did not seek to influence the judiciary to achieve their goals. In this respect, the features of the appointments process shaped by a context of judicial supremacy are similar to those predicted by Peretti's arguments for a political Court. Neither Peretti nor the judicial supremacy approach, however, explains why recent Presidents have nominated Justices such as Kennedy, Souter, Ginsburg, and Breyer, and why the Senate has swiftly and easily confirmed them. At the time of their nomination, these last four appointments to the Court did not fit the model of the politically astute leader or the broad constitutional theorist, nor were they closely identified with any jurisprudential agenda. The recent record indicates that divided government can produce a surprising twist in the political model of the appointments process. When opposite political parties control the Presidency and the Senate (or even when the President's party lacks a filibuster-proof majority in the Senate), their efforts to pursue their agendas through Court appointments may cancel each other out. Ironically, this leads to the selection of the same class of nominees as the departmentalist approach, which emphasizes lawyers over ideologies.

CONCLUSION

These different approaches to judicial review bear different implications for reform of the appointments process. After the Bork and Thomas fights, numerous remedies have poured forth to fix the confirmation mess. Some critics have proposed a more influential and

permanent pre-nomination role for the Senate;[66] some want more questioning of nominees in open Senate hearings,[67] while some want less;[68] some think that a nominee's qualifications are all that matter,[69] while some believe that political views are just as important; some think that nominees should announce criteria for confirmation in advance;[70] some would like to see less interest-group involvement;[71] some think a two-thirds requirement for confirmation would improve things,[72] while others have become enamored by the idea of judicial term limits.[73] Most of these reforms view the politicization of appointments — whereby I mean the effort by the political branches to achieve their policy goals by applying standard legislative and campaign techniques to nominees — as an enduring feature of the modern process, whether one believes it is desirable or not.

Yalof and Peretti seem to assume that the rise in the politicization of the appointments process will be a permanent development as well. For Yalof, Presidents face a trade-off between achieving their jurisprudential agenda and seeking a cooperative relationship with the Senate. Presidents must decide whether risking a confrontation with the Senate — by nominating an ideologically pure but politically controversial Justice — is worth the political capital that they may need for other issues. For Peretti, Presidents and Senators must act in the appointments arena to achieve their ideological goals, just as they would with legislation. She views the politicization of judicial selection not only as inevitable, but as a welcome event. The more honest the political actors are in the appointments process, the more open the debate over our politics will be, and the more democratically representative our Justices will be. Further, Peretti would expect that the appointments process ideally should yield politicians who are both interested in acting in harmony with the political branches but also wish to expand the political power of the Court.

---

66. *See* Strauss & Sunstein, *supra* note 4.

67. *See, e.g.*, William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings*, 62 TUL. L. REV. 109 (1987).

68. *See, e.g.*, Norman Vieira & Leonard E. Gross, *The Appointments Clause: Judge Bork and the Role of Ideology in Judicial Confirmations*, 11 J. LEGAL HIST. 311, 332-33 (1990); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1162-63 (1988).

69. *See, e.g.*, Fein, *supra* note 4.

70. *See* Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 992 (1992).

71. *See, e.g.*, Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 580-86 (1988).

72. *See, e.g.*, Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 14-16 (1991).

73. *See, e.g.*, Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541 (1999) (book review).

Recent changes in the appointments process are no doubt a reaction by the political system to the growth of the influence of the Court in everyday life. As I have argued, this has resulted not just from the extension of the Constitution to many areas of social life, but also from the modern rise of judicial supremacy. If we are to engage in a reform of the appointments process, with the object of removing the excessively political techniques that Presidents, Senators, and interest groups have brought to bear, we must change the importance of the Supreme Court in American life. When the Court no longer ultimately determines the great controversies of the day, the other actors in the political system will not place so much importance on controlling the selection of the Justices. Achieving this end can take two possible paths: reversing the Court's modern extension of the Constitution into any number of issues that strike at individuals' moral, ethical, religious, or social beliefs; or reaffirming the notion of coordinate constitutional review and rejecting the Court's efforts to seize supremacy in interpreting the Constitution.

The first approach seems neither realistic nor desirable. At this point, the Court is not going to engage in the wholesale surrender of its Equal Protection, Due Process, or First Amendment jurisprudence. Even if it were willing, the Court cannot resign from the job of defending individual rights. Despite recent calls from both the right and the left to do away with judicial review, it is a necessary function of the federal courts to refuse to enforce laws that come into conflict with the Constitution. Reversing judicial supremacy, however, seems far more practical and worthwhile. Like fear, judicial supremacy exists only if the other branches of government and the people believe it to exist. No matter how strident the Court's claims to supremacy, the political branches can reject the notion simply by continuing to interpret the Constitution themselves, by enforcing their own constitutional visions using their own powers, and by, at times, ignoring the Court. For example, while Congress may respect *Boerne* for the idea that the courts cannot be drafted into enforcing a different interpretation of the Constitution, Congress should still use its plenary powers to expand the protections for religious freedom. While Nixon and Clinton did not present the best test cases, a future President might challenge judicial supremacy by refusing to comply with judicial discovery orders for privileged material.[74]

This second course of action for reforming the confirmation mess is more appealing because much of it can be achieved by the unilateral action of the political branches. By contrast, other efforts at reform seem somewhat quixotic because the Court is not going to withdraw

74. This is what I believe Jefferson initially did in the Burr case, which led him and Chief Justice Marshall to reach an accommodation between the branches over executive privilege. *See* Yoo, *supra* note 38.

from the race, privacy, criminal procedure, religion, or speech areas; the Senate is not going to impose a two-thirds vote requirement for confirmation; and we are not going to amend the Constitution to impose term limits on judges. Less sweeping procedural changes in the appointments process will not make much difference unless we first decide upon the normative goal that ought to guide the selection and confirmation of Supreme Court Justices.

If the political actors wish to counter the Court's drive toward supremacy, it can use the appointments process to begin a transition back to a system of coordinate constitutional review. This approach might bear many advantages over immediate efforts to deny the binding effect of Supreme Court decisions, as the Court's function in promoting the rule of law may have important benefits for political stability. But the President and Senate can begin the transitional period by seeking nominees who deny the Court's own supremacy. While the goal is to reduce value-voting among the Justices, nominating individuals for their specific views on constitutional interpretation may be necessary in order to reverse the recent trend. Further, appointing Justices because of their views on constitutional and legal interpretation does not place nearly as much strain on our democratic system as does the appointment of Justices for their views on policy.

Appointing lawyerly craftsmen to the Court might not be sufficient to effect this transformation, as they would feel bound to respect precedent, even that which expands the Court's power. Instead, political actors with these goals in mind might seek, as ideal nominees, lawyers or lower court judges who have worked in the executive or congressional branches, especially in capacities where they worked on constitutional issues. These lawyers are more likely to possess a developed sensitivity to the constitutional prerogatives of the President and Congress, and they are less likely to be wedded to the notion that the Court must be supreme in the interpretation of the Constitution. The political branches might seek academics and intellectuals, not limited to just lawyers or law professors, who also doubt the Court's role as final expositor of the Constitution and its role as arbiter of social controversies. Regardless of the outcome of the next presidential election, that is a litmus test upon which both the President and Senate could agree.