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CONSTITUTIONAL LAW AS POLITICAL SPOILS

William P. Marshall*

INTRODUCTION

Senator Schumer notwithstanding,1 the source of our recent judicial appointments woes may actually be *Erie v. Tompkins.*2 In *Erie,* the Supreme Court formally subscribed to the position, associated with the Legal Realists, that law could not be understood as stemming from an objective, transcendental source.3 Rather, law was to be recognized as the product of judges empowered to decide legal questions.4 American law has yet to recover from this decision and its impact on the judicial appointments process has only begun to be realized.

In *Erie,* Justice Louis D. Brandeis applied the legal realist understanding of law to a relatively narrow issue—whose common law, federal or state, must a federal court apply as its rule of decision in common law cases? But the legal realist notion that law is not objective could be quickly understood as applicable to questions of constitutional, as well as common, law. Thus, at roughly the same historical moment as the Court decided *Erie,* President Franklin Roosevelt was busy appointing Justices to the Supreme Court he believed would uphold his New Deal legislation.5

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2 304 U.S. 64 (1938).

3 Id. at 79.

4 In *Erie* the Court abandoned a century old precedent allowing federal courts the power to fashion rules of common law, *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842), in favor of a mandate that federal courts must defer to the common law decisions of state courts. If, as the Realists argued, omnipresent principles of common law did not exist, then allowing federal courts to fashion the rules of decision in common law cases would, in effect, be no less than the authorizing of a federal power grab. Accordingly, allowing the federal courts to create common law rules of decision violated constitutional limits on federal power.

Nevertheless, while those in earlier times may have appreciated the insights of the realist critique, few surrendered entirely to a subjective view of the law. Rather, in previous eras, the belief that there was some sort of an objective “there” there in the determination of constitutional meaning continued to persist despite the realist challenge. On this basis then, Hebert Wechsler could lead a search for neutral principles of law during the 1950s and 1960s, while presidents of both parties selected judicial nominees based more on concerns of geographical, religious, and ethnic diversity than on ideological purity.

Things have changed. For a number of reasons, the view that the identities of judges are inextricably related to the results they will reach in constitutional law cases has achieved an unprecedented dominance in the contemporary political and legal landscape. Not surprisingly, the ascendance of this view has had dramatic implications for the judicial nominations process. In a world where law is seen as driven by the individual ideologies of particular judges, the power to choose who is elevated to the bench becomes the power, in effect, to decide constitutional questions. As a result, the nominations process has become the flashpoint in the struggle over constitutional meaning. The result of all this is that now, more than any time in our Nation’s history, politicians, academics, and even the judiciary itself, have come to regard constitutional law as little more than a political spoil.

This paper will explore the interrelationship between the current legal realist climate and the divisive battles over judicial nominations now occupying Washington. Part I of this paper provides the necessary background. I will highlight some recent events that have served to inculcate the realist perspective into the current political and legal cultures. I should emphasize, however, that my purpose in this respect is only to explain why the realist perspective has achieved such dominance; it is not to defend, or attack, the validity of the legal realist account. Nor do I contend that all the current political and legal players in the nominations debates would describe themselves as realists. Indeed, I suspect many would not. All sides, however, appear to believe that the results in constitutional cases will inevitably turn upon the philosophical and political orientation of who is appointed to the

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6 See id. at 493. According to Friedman, many legal intellectuals during the mid-twentieth century were “quite willing to admit that formalism was dead dry bones. But they shrank back in horror from the ultimate message of the realists (as they read it): that law was only politics or economics or personal whim or whatever.” Id.


8 See Michael J. Gerhardt, The Federal Appointments Process: A Constitutional and Historical Analysis 74-134 (2001) (noting that presidential nominations, including judicial appointments, have long been based on these and like factors).

9 As Professor Friedman notes, “[a]ll legal scholars and judges and lawyers—are in some sense legal realists.” Friedman, supra note 5, at 589.
judiciary, and in that sense everyone is at least a practicing realist, even if she does not consciously accept the realist theory.

In Part II, I demonstrate that although the costs in the current nomination battles are high, any compromise or reform of the judicial nominations process is unlikely to occur in the current climate. So long as compromising over candidates is seen as tantamount to political concession over such issues as abortion, religious freedom, gun rights, or any other hot button issue, one must be skeptical about whether institutional reform is possible. In Part II, I also address whether nominating and debating the merits of judicial candidates on the basis of their philosophical or political views should itself be considered a positive reform because it brings the ideological orientation issue to the fore.10 I contend that, while such an approach may be unavoidable in the current political climate, it is nevertheless not beneficial and may only serve to worsen the process because realist critiques and reactions tend to build upon themselves.

Finally, in Part III, I argue that the best opportunity to abate the current nominations crisis depends on the statesmanship of the key political players in the process—specifically the President and the majority and minority leaders of the Senate and the Senate Judiciary Committee. I conclude, however, that one should not hold out much hope that such leadership will be forthcoming.

I. THE RISE OF REALISM

The criticism that a particular constitutional decision is politically or ideologically motivated is neither new nor exceptional.11 Marbury v. Madison,12 for example, was criticized in its own time as an unwarranted power grab by the Federalist judiciary.13 Similarly, in the middle 1800s, Scott v. Sanford,14 along with its other travesties, was criticized as an overtly political act by a partisan Court.15 And, in the early part of the twentieth century, Lochner v. New York16 and its progeny were condemned by Justice Holmes and others as improper

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12 5 U.S. (1 Cranch) 137 (1803).
15 See Peter Irons, A People’s History of the Supreme Court 164-78 (1999).
16 198 U.S. 45 (1905).
attempts to graft the Court majority’s economic theories onto the United States Constitution.

Also not new is the broader view that all law, and not just a few isolated cases, is inherently reflective of the philosophical or political views of those empowered to adjudicate. Legal realism, with its powerful critique of common law assumptions, has been around at least since the early part of the twentieth century. And, the position that constitutional interpretation is also intrinsically subject to the political or ideological views of judges is also not a new phenomenon.

Recently, however, the notion that legal interpretation depends on the philosophical inclination of those assigned to decide cases has achieved greater resonance. Although legal and political observers may have long since acceded to the realization that constitutional law is at least partially dependent on the identity of judges, legal realism is no longer an abstraction. Rather, it is a visible component of the current legal and political cultures.

Undoubtedly, the catalyst for the ascension of the realist perception in contemporary political and legal culture is Roe v. Wade. While some decisions of the earlier Warren Court had also triggered claims of judicial overreaching, the impact of Roe in particular can not be overstated. For many, the belief that the case represented anything

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17 Id. at 75 (Holmes, J., dissenting).
18 Prominent early realists included such legal luminaries as Karl N. Llewellyn, Thurman Arnold, and Jerome Frank. Friedman, supra note 5, at 490-94. For a compelling account of the rise of legal realism that places the school’s ascendance within the context of the intellectual milieu of the period, see Edward A. Purcell Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value 74-94 (1973).
19 Charles L. Black Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657, 660 (1970); Lawrence H. Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History 92 (1985).
20 Many scholars argue that, at least to some extent, judicial ideology and political factors, such as the constituency from which the nominee is drawn, have long influenced the process by which the President and the Senate select and evaluate candidates for federal judicial appointments. See Tribe, supra note 19, at 19; Gerhardt, supra note 8, at 74-77. But see David J. Danelski, Ideology as a Ground for the Rejection of the Bork Nomination, 84 NW. U. L. REV. 900 (1990) (arguing that while political factors had clearly motivated the Senate since the earliest days of the republic, consideration of the judicial ideology of the individual nominee did not affect the confirmations process until the twentieth century).
21 See Carol M. Rose, Judicial Selection and the Mask of Non-Partisanship, 84 NW. U. L. REV. 929 (1990) (arguing that although disputes over ideology may have been behind earlier nominations battles, those battles were not explicitly waged on ideological grounds). According to Rose the realist vision was unmasked during the Bork nomination. “What seems to have distinguished the Bork nomination,” Rose writes, “is that, in this one instance, the figleaf or mask fell . . . in this case, the genie was out of the bottle.” Id. at 929. For more discussion on the effect of the Bork nomination on the rise of realism (and vice versa) see infra notes 26-27 and accompanying text.
22 410 U.S. 113 (1973).
more than the political inclinations of seven members of the Supreme Court was too hard to accept. The decision struck down the abortion laws of all fifty states, relied on a theory of privacy that had an unclear constitutional pedigree, and announced a three trimester framework for adjudging abortion rights that, to many onlookers, looked more like a statute than the product of legal reasoning. Indeed, even some pro-choice advocates found the decision difficult to fit into a coherent legal theory.\textsuperscript{24} In any case, \textit{Roe} became a rallying cry against a Court perceived to be overtaken by the political ideologies of its members and a target for a political strategy that would lead to the appointment of judges who would overturn the decision.

It would be a mistake, however, to conclude that \textit{Roe} was a galvanizing force only for anti-abortion advocates. The very fragility of the decision, ironically enough, also heightened the awareness of its supporters that constitutional decision-making is susceptible to political or ideological forces. After \textit{Roe}, pro-choice advocates would be on high alert for any changes to the judiciary that might threaten \textit{Roe}'s existence.

\textit{Roe} thus became the subtext in the next major event in the rise of legal realism: President Reagan's nomination of Robert Bork to the United States Supreme Court. During the nomination hearings, Bork's opponents aggressively maintained that if he were chosen, he would inevitably reach certain decisions based upon his pre-conceived constitutional philosophy. They claimed, for example, that confirming Bork would result in the loss of a woman's right to choose, the evisceration of anti-discrimination safeguards, and a host of other controversial rulings on important constitutional issues.\textsuperscript{25} The strategy, of course, proved successful\textsuperscript{26} and the Bork nomination was defeated. But the aftereffects of the Bork nomination battle would extend beyond the nomination itself. Both sides learned that equating a nominee's judicial philosophy with particular results could be an effective tool in opposing judicial candidates. From Bork onward, there would be a premium in tying a judicial candidate to a set of specific positions. Thus, for politicians at least, the confirmation process came to be perceived, not as simply confirming a judge, but as supporting (or


\textsuperscript{26} Bork himself did little to disavow his opponents of the accuracy of their assertions. See, \textit{e.g.}, Judith Resnik, \textit{Changing Criteria for Judging Judges}, 84 \textit{U. L. Rev.} 889, 893 (1990) (claiming that Bork's testimony failed to rebut the notion that he showed little compassion for those who appeared before him in court).
opposing) a set of controversial results.

At roughly the same time liberals were attacking Bork, conservatives were preparing an attack of their own. As Dawn Johnsen has documented, the Reagan Justice Department prepared a series of memoranda during the 1980s calling for constitutional results to be effectuated, in major part, through the selection of federal judges.27 Specific areas of constitutional law were identified as needing a substantial overhaul, and the selection of judges of corresponding values and philosophies was deemed the way to get there. In the words of the Justice Department memorandum, “‘[i]here are few factors that are more critical to determining the course of the Nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.’”28 As outlined in the Justice Department documents, the political strategy was clear. Republican administrations should use the nominations process to achieve conservative results. Similarly, during Democratic administrations, Congressional Republicans should oppose Democratic nominees when their views and philosophies appeared inconsistent with conservative positions.

_Bush v. Gore_29 was the next important step in solidifying realism’s dominance. In both the Republican attack on the Florida Supreme Court decision and the Democratic attack on the judgment of the United States Supreme Court, judicial actions were described and denounced as mere partisan action and not judicial interpretation. The merits of legal claims in the case were almost besides the point as the press and politicians paid more attention to the partisan leanings of the judges involved in the case than to the legal principles at issue. The judges themselves, meanwhile, did little to dispel the criticism as, more often than not, the judicial players in the case acted more in line with political expectations than with what might be expected from their previous legal positions.30


30 Only Justice Stevens (nominated by Republican President Gerald R. Ford) and Justice Souter (nominated by Republican President George H.W. Bush) sanctioned a result in the case that would have resulted in a President of a party different from than the party whom nominated them. _See also_ Richard Briffault, _Bush v. Gore as an Equal Protection Case_, 29 FLA. ST. U. L. REV. 325, 372-73 (2001) (noting that the _Bush v. Gore_ majority’s ruling on federalism was inconsistent with the positions that the Justices in the majority had expressed in other cases); Richard Hasen, _Bush v. Gore and the Future of Equal Protection Law in Elections_, 29 FLA. ST. U. L. REV 377, 390-91 (2001) (noting that the majority’s expansive views of equal protections were inconsistent with the more narrow views of equal protection that the Justices in the majority
The realist account of *Bush v. Gore*, of course, was only magnified by the fact that the case took place against the backdrop of one of the most dramatic episodes in American political history. But the lesson of the case was perhaps most compelling for the nation’s political actors. Politicians learned that not only might the interpretation of constitutional law depend upon the identity of the judges deciding the cases, but the keys to the Oval Office could depend on the identity of those judges as well. *Bush v. Gore* thus increased exponentially in the minds of the political actors the stakes inherent in judicial nominations.31

The ultimate triumph of realism, however, came not with the bang of *Bush v. Gore*, but with a whimper32 in the relatively unheralded case of *Republican Party of Minnesota v. White*.33 In *White*, the Court reviewed a First Amendment challenge to a canon of judicial conduct that prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues. Under Minnesota’s judicial canon, it would be unethical, for example, for a candidate to declare he was pro-choice or pro-life while campaigning for judicial office.

Writing for the Court, Justice Scalia found that the judicial canon restricted speech that is “‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office.”34 Accordingly, the provision was subjected to strict judicial scrutiny by the Court in its constitutional review—a heightened review that, according to the Court’s majority, the judicial canon did not survive.

From a First Amendment perspective, *White* was not surprising. The Court has long indicated that the First Amendment has its “fullest and most urgent application precisely to the conduct of campaigns for political office,”35 and *White* may simply be understood as a straightforward application of this principle. What was surprising about

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31 *Bush v. Gore*, however, added a new wrinkle to the Realist understanding. Because, as we have discussed, the Justices’ decisions in the case do not obviously comport with their particular judicial philosophies, the case also suggests that judicial decision-making could depend on “motivated reasoning” dictated by purely partisan, non-ideological concerns. See infra note 64.


34 *Id.* at 774 (citations omitted).


And if it be conceded that the First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.
White, however, was the ease with which the Court adopted an extreme realist perspective in reaching its decision. Minnesota had defended the judicial canon by arguing that it was intended to promote judicial impartiality. The Court, however, found that impartiality meant only a “lack of bias for or against either party to the proceeding.” An impartial judge was not one without a particular opinion that predisposes him to vote in a particular way in a particular case; instead impartiality meant only that a judge is not biased against a particular party to a particular proceeding. Under this interpretation of impartiality, a judicial candidate who expressed his “commitment” to rule a particular way on an issue because of an ideological predisposition would still be considered impartial. As Justice Scalia explained, “when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.”

Indeed, the Court went on to explain that eliminating preconceptions is unattainable, even if it is considered desirable:

For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: “Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers.” Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. “Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” . . . And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the “appearance” of that type of impartiality can hardly be a compelling state interest either.

The affirmation of legal realism in White could not be clearer. Judges will decide cases based, at least in part, on their political ideology. The state, accordingly, can not claim that it is improper for a candidate to announce her personal views because those views are part

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36 White, 536 U.S. at 775.
37 Id. at 776 (italics omitted).
38 Id. at 777-78 (citing Laird v. Tatum, 409 U. S. 824, 835 (1972) (memorandum opinion)).
of what sets her apart from other candidates.\textsuperscript{39} Contrast this result, however, against a legal background in which law is understood as objective. If law were objective, judges should reach (or at least strive to reach) the same results regardless of personal ideology. Accordingly, a state could consider it unethical (or at least misguided) for candidates to claim that their election should lead to different results than the election of others.\textsuperscript{40} \textit{White}, however, starts with the realist notion of non-objectivity as a given. It assumes, for example, that pro-choice or pro-life judges will decide cases in accord with their views on abortion and that the results in abortion cases thus may very well depend on the particular views of whichever judge hears the case. To the Court in \textit{White}, constitutional law goes to election winners.

\section*{II. Judicial Confirmation in an Age of Realism}

With the framework of legal realism in place, it is not difficult to see how the judicial nominations process has devolved to its current state. If constitutional results are seen as nothing more than the products of pre-existing individual predilections, then the support or opposition of a particular candidate really amounts to no more (or less) than lending support or opposition to a set of results that the particular candidate would be expected to reach. In that sense, a judicial nomination is the functional equivalent of a complex piece of legislation.

Under this view, any president is justified, as the Reagan Justice Department memo suggests, in intentionally attempting to appoint judges to the Court who will further his agenda. In fact, the nomination of a particular candidate can be seen as akin to proposing legislation. The nomination of a Susan Smith, for example, is thus the functional equivalent of sponsoring something like a “Susan Smith Act”—fully equipped with all the qualifications, provisos, and intricacies of complex legislation. If, for example, Smith is pro-choice, pro-gun rights, pro-federalism, anti-capital punishment, and anti-school prayer, and the President on balance supports those positions, she becomes a logical choice for nomination. Or, if Smith has an announced judicial ideology that the President believes will lead her to reach desirable

\textsuperscript{39} As Professor Chemerinsky notes: “[a]ll judges come on to the bench with views about important issues,” to which they will likely adhere even if they have not been expressed during the electoral campaign. Erwin Chemerinsky, \textit{Restrictions on the Speech of Judicial Candidates are Unconstitutional}, 35 IND. L. REV. 735, 744 (2002).

\textsuperscript{40} A candidate in such an objective world could, of course, make the non-ideological claim that her training and experience would better enable her to reach correct decisions than her opponent. Thus, not surprisingly, such assertions by a candidate about personal qualifications were fully permitted under Minnesota’s judicial ethics laws.
results in certain cases, he might appoint her even if her positions on specific issues have not been explicitly identified.

At the same time, the Senators reviewing a judicial nomination might be expected to engage in a similar calculus. If Smith is pro-choice, pro-gun rights, pro-federalism, anti-capital punishment, and anti-school prayer, a Senator should evaluate his support for her nomination much as he would evaluate whether to support an appropriation bill that had pro-choice, pro-gun rights, pro-federalism, anti-capital punishment, and anti-school prayer elements. Indeed, this was exactly Senator Schumer’s point when he asserted the Senate should consider a judicial nominee’s ideology as part of the confirmation process.41

True, the science of nominating or opposing judicial nominees in order to accomplish specific results is not exact. A judge may decide not to vote on legal issues in the manner expected by her supporters or feared by her opponents.42 Additionally, the ideologies of judges who serve long periods on the bench may change over time.43 But then again, legislation does not always turn out the way one expects either.44 What, then, is problematic with either a president’s attempting to nominate judicial candidates on ideological grounds or a Senator’s efforts to oppose a candidate for ideological reasons? Indeed, if one of the benefits of the Court’s decision in *White* is to promote an informed electorate by allowing state judicial candidates to tell voters how they would approach sensitive cases, why is there not equal benefit to requiring federal judicial nominees to identify their positions so the Senate has the benefit of informed decision-making?45 Is transparency

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41 Schumer, *supra* note 1.
43 For example, see Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1, for an account of the changes Harry A. Blackmun underwent during his twenty-four year tenure on the Court.
45 Interestingly, Justice Scalia, who wrote the *White* opinion, did not feel that he should be forthcoming about his political or ideological views during his own confirmation. *Nomination of Judge Antonin Scalia: Hearings Before the Sen. Comm. on the Judiciary*, 99th Cong. 37 (1986):

Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.

Notably, Justice Scalia’s reluctance to share his political or ideological views during confirmation has been shared by his colleagues. *See Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Sen. Comm. on the Judiciary*, 103d Cong. 119 (1994); *Nomination of Ruth Bader Ginsburg, to be Associate Justice*
Despite the allure of this reasoning, however, problems abound with an appointments process that places such an emphasis on ideology. First, the process exacts a considerable toll on nominees. A candidate’s writings are scoured, her passages are taken out of context, and her positions are taken to the extreme. The result of all this is that, at the end of the process, a candidate’s views are more likely to be distorted beyond recognition rather than fairly represented.

Second, an overtly ideological appointments process may inherently exclude some of the most able judicial candidates because it rewards those who do not have a paper trail. Candidates who have written extensively, particularly on hot button issues, are easy targets for ideological opponents. The views of candidates with no written record, however, are less easy to discern, and opposition is accordingly less easy to galvanize. Nor can well-published candidates avoid controversy if their writings are nuanced and not easily categorized as belonging to one camp or another. The heavy-handed nature of confirmation hearings leaves little room for the exposition of complex ideas.

Third, an appointments process ensconced in ideology is intensely polarizing. Every vote on every judicial nominee becomes as heated as any vote on hot button issues because the decision over whether to confirm the judicial candidate is perceived as, in effect, a vote on those issues. The judicial appointments process thus becomes essentially a constant stream of factious votes. The resulting divisiveness and

46 Arguably, of course, this type of review is preferable to a process focused on discovering personal scandal. Unfortunately, however, candidate review is not an “either or” proposition. Ideological review only adds to the already extant personal investigation.

47 See also Lloyd N. Cutler, Confirmation Controversy: The Selection of Supreme Court Justice: The Limits of Advice and Consent, 84 NW. U. L. REV. 876, 878 (1990), for the view that this process could also result in the loss of “Justices who formulate broader and more creative statements than the particular case requires.”


49 Polarization, moreover, only worsens when, as now, one side makes clear its intention to use the appointments process to accomplish ideological results. See Steven G. Calabresi, Advice to the Next Conservative President of the United States, 24 HARV. J. L. & PUB. POL’Y 369, 376-78 (2001) (arguing that a conservative president should be uncompromising in nominating judges whom he believes will tow the conservative line). In those circumstances, opposition hardens and both sides may use all weapons at their disposal to assure that the other side’s ideological agenda is not accomplished. Thus, currently we have seen the Democrats resort to the filibuster in their opposition to Bush nominees while Republicans have utilized both recess nominations and all-night confirmation sessions to attempt to see their nominations through. See, e.g., Senate
politicization is inevitable.\footnote{As Ward Farnsworth has warned, when a side attempts to uncompromisingly use the nominations process to accomplish ideological results “[t]hings are said that one regrets; relationships are injured and reputations soiled; the impression that the process has become undignified and unpleasant—politicized—naturally takes hold.” See Farnsworth, supra note 48 (noting the divisiveness inherent in the uncompromising strategy of judicial nominations advocated by Calabresi). But see also, Henry Paul Monaghan, Essays on the Supreme Court Appointment Process: The Confirmation Process: Law Or Politics?, 101 HARV. L. REV. 1202, 1207 (1988), for the view that “we are better off recognizing a virtually unlimited political license in the Senate not to confirm nominees.”}

This polarization, moreover, tends to breed on itself. The natural reaction of a political party that believes that the other side is attempting to effectuate constitutional change by nominating particular judges is to fight those nominations when it is out of power, and to nominate judges who will accomplish constitutional change to their benefit (and undo the effects of the previous Administration’s nominees) when it is in power.\footnote{Senator Schumer’s call to review the ideology of judicial nominations was based in part upon his concern that President Bush was appointing judges expressly based on their ideology. Schumer, supra note 1.} There is little room for compromise under these circumstances. Neither party can be expected to engage in unilateral disarmament when the stakes are so high.

Finally, and perhaps most troubling, an ideologically-driven appointments process legitimizes ideological judicial decision-making. The power of the realist critique rests solely in its descriptive account of judicial decision-making. It contends that judges ultimately can not fully escape their preconceived values, or what Oliver Wendell Homes once called their “can’t helps.”\footnote{Letter from Oliver Wendell Holmes Jr. to Harold Laski (Jan. 11, 1929), in THE ESSENTIAL HOLMES 107 (Richard A. Posner ed., 1992).} Legal realism, however, is less powerful as a prescriptive model for what law should be—at least if we are to believe that there should be a difference between judicial and legislative decision-making.\footnote{The virtue of a judge’s efforts to minimize as much as possible the influence of her political views in deciding cases is referred to by Lawrence Solum in a series of important articles as judicial “character.” See Solum, supra note 42; see also Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, 61 S. CAL. L. REV. 1735 (1988).} Why should unelected judges be empowered to decide some of the most important issues of the day if they are no more than political actors themselves?

The problem with wholly succumbing to the realist vision in the judicial nominations context is that it completely abandons the notion that judges should at least aspire to decide cases on grounds other than their own pre-existing philosophical or political dispositions. After all, it is one thing to descriptively maintain that judges are influenced by their existing political views, but quite another to prescriptively claim that judges should be unconstrained in applying their political views to Democrats Block Vote on Judge, CHI. TRIB., Aug. 1, 2003, at C24; Karen MacPherson, They Could Have Danced All Night; They Talked Instead, PITT. POST-GAZETTE, Nov. 13, 2003, at A1.
existing cases. As Martin Redish explains, recognizing the validity of the realist insight does not mean that one has to accept that all law is nothing more than simple political preferences. The ascendance of the legal realism model, however, suggests exactly that, and in the process effectively encourages confirmed judges to vote pursuant to their political beliefs.

Consider, for example, a judge who testifies in her confirmation proceedings that she believes *Lochner v. New York* is good law. If she is confirmed after being subject to ideological scrutiny, she might rightfully take from her confirmation that she is free to decide cases consistent with her *Lochner* views regardless of judicial precedent. She was confirmed as a pro-*Lochner* judge, and the expectations of her supporters, and her detractors, is that she will carry this view to the bench. An overtly ideological appointments process, then, effectively licenses judges to act in accord with their political leanings. The result is a system of unbridled legal realism wherein no judge may believe that she has any obligation other than to act on her political inclinations.

III. THE BARRIERS TO REFORM

Despite the political polarization and the harms to judicial institutions that have resulted from the current ideological battles over judicial nominations, I suspect there is no relief in sight. The only possible reform, it seems to me, is for the key players, such as the President and the minority and majority leaders of the Senate and Senate Judiciary Committee, to provide leadership and agree to minimize the role of ideology in the appointments process in favor of a system that chooses judges based upon an appraisal for excellence in judicial craft removed from political inclination. Such an approach presumably would be similar to the one proposed by Lawrence Solum in this Symposium when he advocates that judges should be appointed

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54 Not all legal scholars have conceded that this is necessarily a bad way to interpret the Constitution. Justice Benjamin Cardozo, who would not likely have gone so far as to condone this approach if used by his contemporaries, wrote that Chief Justice John Marshall “gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he molded it while it was still plastic and malleable in the fire of his own intense convictions.” BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 169-70 (1921).


on the basis of their judicial “character.” 57

The idea is admirable, but I am afraid it will not work. We are not in a time of political statesmanship in any area. And, it is particularly unlikely that a regime of political statesmanship will take hold in the debates over judicial selection in the foreseeable future. Let me suggest a few reasons for this pessimism.

First, the stakes are simply too high. The issues subject to judicial review are too important for a political party with the ability to effectuate policy goals by nominating judges favorable to their agenda to willingly cede its power. Abortion rights, affirmative action, gay rights, and political redistricting, for example, are issues at the top of both parties’ agendas. They are also matters subject to judicial review and resolution. Why should the nominating party refuse to use its judicial nominations powers to affect judicial decisions on such matters when those issues are so important to its constituency? 58

True, the nominating party may be forced to compromise if the opposing party has political strength sufficient to force concessions, but the party in power has no more incentive to yield its power in the appointments process than it has to support legislation that is inconsistent with its agenda. At the same time, the opposing party has no incentive, other than that dictated by the political balance of power, to abandon any of its weapons or prerogatives in fighting the other party’s efforts. To neither side, will the promotion of an idealistic vision of judging likely be as high a priority as the achievement of specific constitutional results.

Second, statesmanship is particularly unlikely to take hold of the nominations process when the Supreme Court is as closely divided as it is over key issues. The Court’s steady stream of 5-4 decisions serves as a constant reminder of the importance of having sympathetic Justices on the bench. Both sides see themselves as either one vote away from losing an important constitutional principle or as one vote away from achieving a major constitutional victory. Moreover, even in the absence

57 Solum, supra note 42. By judicial character, Solum means judges who will decide cases based upon a formalist’s rather than a realist approach to legal issues.

58 Indeed, as Robert Nagel, writing in 1990, pointed out, it is the fact that the Warren Court and later the Burger Court began to routinely exercise judicial power in these areas that has made compromise on judicial nominees all the more difficult. Nagel, supra note 10. Once the Court announced that the resolution of important policy matters such as gender rights, campaign finance, parochial aid, abortion and other matters were within its dominion, the stakes for controlling the judiciary grew correspondingly higher. Id. at 860. In this respect, the actions of the Rehnquist Court have only added to the strength of Nagel’s insight. By using judicial power to invalidate a wide range of legislative initiatives including such matters as affirmative action, see Gratz v. Bollinger, 539 U.S. 244 (2003); Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001), presidential powers, see Clinton v. New York, 524 U.S. 417 (1998), and civil rights legislation, see Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); U.S. v. Morrison, 529 U.S. 598 (2000), the Rehnquist Court has only added to the political importance of controlling the federal courts.
of close votes, political efforts to change the Court may be expected when one side sees the Court as opposed to its particular agenda and therefore in need of reform. The problem now, however, is that both conservatives and liberals view the Court as hostile territory. Neither side is therefore likely to be satisfied until a Court majority has been solidified in its favor—an event that for neither side is likely to come soon.

Third, even if both sides were to agree to a course of statesmanship, there is considerable doubt as to whether political consensus could be reached over candidates based upon qualifications such as excellence or character. The issue, after all, is not whether the candidate is herself committed to mastering the judicial craft removed from political influence; the question for political calculation is how the candidate’s record is perceived. And, in that sense, the hold of the realist critique may be unshakeable. No matter how committed a judicial candidate is to not letting her political views affect her legal judgment, she will be seen as a political actor by those who disagree with her on key issues.

For example, pro-life or pro-choice proponents are unlikely to believe that a judge who rules against them on abortion rights will have made her decision based upon pure legal reasoning. Those who disagree with the ruling may of course concede that the judge herself believes that her pro-choice or a pro-life ruling is based upon a politically neutral legal judgment. But, to her opponents, the judge’s intent is not the point. To them, the judge could only have reached the result she did through the influence of her political views whether or not she consciously recognized that influence. In a realist world, unfortunately, legal principle is only in the eye of the beholder. It has no independent status.

To further drive this point home, let us return for a moment to *Bush v. Gore*. One of the more intriguing aspects of the case is that academic criticism of the opinion tended to break down along partisan lines. Generally, those who supported then-Governor Bush found the Court’s opinion to be correct or at least intellectually defensible, while those who favored then-Vice President Gore saw the decision as wrong.

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59 Critics from the left, to use but one example, have harshly condemned the Court for purportedly imposing an anti-civil rights agenda. *See, e.g.*, Jed Rubenfeld, *The Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1141-42 (2002). Meanwhile, again using just one example, voices on the right have assailed the Court for ostensibly furthering a gay rights agenda. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting). The complete list of attacks on the Court from both the left and the right are too numerous to be catalogued.

60 *See, e.g.*, Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 1 (Bruce Ackerman ed., 2002) [hereinafter QUESTION OF LEGITIMACY].
if not entirely lawless.61 This was so, interestingly enough, even though
the opinion’s stance on such issues as equal protection, federalism,
political question, and standing was more in line with the judicial
philosophy of those who might be expected to support candidate Gore,
while the dissents’ views advocating narrower interpretations of equal
protection, more limited views of federalism, and less expansive notions
of federal judicial power were more in accord with the jurisprudence of
those who might otherwise be expected to support candidate Bush.62

Some might suggest that the academic reaction to Bush v. Gore
simply proves that the ivory tower of academia is no more removed
from cynical partisanship than are the halls of Congress.63 There is,
however, a less harsh, albeit more troubling explanation. As Cass
Sunstein explains, the players in Bush v. Gore, both on and off the
Court, may be led more by “motivated reasoning” than by explicit
partisan purpose.64 That is, the academics’ political leanings affected
their analysis more subconsciously than deliberately. But, in many
ways that conclusion is more disturbing than would be the conclusion
that the academics’ views were affected by conscious partisan
calculation. After all, one can attempt to overcome conscious bias in
order to achieve an objective stance. The conclusion that subconscious
motivation affects legal judgment, however, makes objectivity all but
impossible.

If motivated reasoning explains not only the academic response to
Bush v. Gore but also the Court’s decision itself, it adds yet another nail
in the coffin of statesmanship. Why should the politicians involved in
the nominations battles follow a course of choosing judges based upon
an ideal of judicial excellence or character when that ideal may be
unattainable? The safer course is to continue to fight nomination battles
on overtly ideological grounds that more predictably reflect the
politicians’ political agendas.

61 See, e.g., Cass R. Sunstein, Does the Constitution Enact the Republican Party Platform?
in BUSH V. GORE, supra note 60. See also Larry D. Kramer, The Supreme Court in Politics, in
THE UNFINISHED ELECTION OF 2000 (Jack N. Rakove ed., 2001) for the view that Bush v. Gore is
the latest in a series of cases, including Dred Scott, to intrude into the realm of political decision
making. But see, also, Bruce Ackerman, Off Balance, in QUESTION OF LEGITIMACY, supra note
60, for the more extreme position that Bush v. Gore goes further than Dred Scott, 60 U.S. (19
(1973), by completely eschewing any pretense of enunciating “enduring principles rooted in the
nation’s historic constitutional commitments.”

62 See supra note 31 and accompanying text.

63 Indeed, some have argued that with respect to partisan decision-making, Bush v. Gore
suggests that the Supreme Court is no different than the halls of Congress.

CONCLUSION

The insights of Legal Realism have left an indelible mark upon the landscape of American law. Whatever the theoretical merits of the realist vision, the practical ramifications of the notion that judges are motivated by their own ideological predilections have drawn the judicial nominations process into a downward spiral. Believing they can achieve substantive policy aims by selecting or rejecting judicial candidates who might promote or frustrate their preferred constitutional vision, politicians have proven increasingly eager to evaluate prospective judges on ideological grounds.

This pattern is troubling. It fosters a more divisive and less productive political and legal culture, and it places the presidential and congressional imprimatur on partisan judicial decision-making. The ideal solution to the problem would be for the President and Senate leaders to make statesmanlike efforts to reduce the role of ideology in the nominations process. Such a scenario, however, is unlikely. The current climate of cynicism toward the prospect of judicial impartiality and the corresponding pitch battles that attend judicial nominations are unlikely to end so long as politicians, academics, and judges themselves accept the notion that constitutional law amounts to little more than political spoils.