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## MERIT VS. IDEOLOGY

*Michael J. Gerhardt\**

### INTRODUCTION

In a provocative article, Stephen Choi of Boalt Hall Law School and Mitu Gulati of Georgetown University Law Center have suggested a tournament to determine the “best” judge in the United States.<sup>1</sup> They have proposed objective data and criteria for measuring which circuit court judges are the best qualified candidates for appointment to the United States Supreme Court.

Their project has been met with some skepticism in the legal academy. Some legal scholars doubt whether merit can be objectively measured; some believe Choi and Gulati’s criteria for measuring merit are flawed; others believe that merit depends on, or at least includes several factors Choi and Gulati do not take into account; and some believe that Choi and Gulati fail to develop criteria that would allow for measuring the quality of a large number of other qualified people from federal district courts, state courts, academia, and public or governmental service.

I call attention to Choi and Gulati’s project because I happen to like it. In particular, it does at least three things absent from the vast majority of legal commentaries on judicial selection. First, Choi and Gulati are willing to discuss merit. They do not just focus on what has gone wrong with a particular nomination or with the confirmation process. Their focus is not on what is ailing in the process but on what we might be able to find positive within it. Second, they eschew labels. They refuse to play the popular game of pigeon-holing judges based on their supposed ideology, or pre-commitments, to certain outcomes or ways of thinking about constitutional issues, regardless of the facts of particular cases.<sup>2</sup> They refuse to characterize candidates in extreme terms. Their concern is with merit, plain and simple. They propose

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<sup>1</sup> Stephen J. Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004).

<sup>2</sup> See generally *Should Ideology Matter: Judicial Nominations 2001: Hearings Before Subcomm. on Administrative Oversight and the Courts, Sen. Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *Hearings*].

criteria for measuring how well judges do their jobs. Third, they dare to employ empirical analysis in assessing the quality of a particular judge's performance on the bench. Social scientists make their living employing and critiquing empirical analyses of public and private behavior, even in studying judicial selection, and some of these social scientists are highly critical of what they regard as the lack of rigor in legal scholars' empirical analysis or their disdain for such analysis.<sup>3</sup> Empirical analysis is common to the fields of corporate law, securities, and law and economics; however, it is uncommon in legal scholarship assessing either judicial performance or the federal judicial selection process.

In this essay, I will use each of three different factors that I believe distinguish Choi and Gulati's project as lenses through which to discuss the apparent tension between merit and ideology in the federal judicial selection process, including the curious reluctance of many public officials and legal scholars to find an objective, or at least consensus-building, measure of merit to guide critical assessment of judicial nominations. I also illuminate the risks of trying to analyze the judicial selection process without taking into account each of the three factors.

In Part I, I assess different possible definitions of merit that could be used for measuring judicial performance. Examining these helps to illuminate the relationship between merit and ideology. In Part II, I examine the benefits of eschewing the labeling of judicial nominees on the basis of their supposed ideologies. Principal among these is that it frees us from the misleading and value-laden rhetoric commonly deployed for assessing judicial nominations. Because of ideological drift and other factors, the categories most scholars and others use in analyzing judicial performance are not static. In Part III, I address the challenges of constructing an empirical test for determining the relative impact of different factors on the fate of judicial nominations. These challenges need to be met in order for us to move beyond the unfounded assumption that ideology significantly matters to outcomes in the confirmation process.

## I. MERIT

It is rare in symposia or other studies on judicial selection to talk at length about merit. This reticence is surprising because it elides a basic question that presumably is of great interest to everyone concerned about the quality of judging: how do we measure fitness for office and

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<sup>3</sup> See, e.g., Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002), available at <http://polmeth.wustl.edu/papers/01/king02/pdf>.

particularly how do we determine who is best qualified for appointment to the United States Supreme Court? Before I discuss possible answers to this question, I consider briefly why legal academics and political leaders do not discuss merit in greater detail and with more candor than they do.

A. *The Reticence on Merit*

It is unclear why we fail to discuss merit more than we do. It is possible that when it comes to merit, we might all agree on more than what our leaders or academics typically acknowledge. It is possible, in other words, that we have greater consensus on merit than we know. Yet, if we have such consensus, it is unclear why it is not more prominent in discussions about, or debate within, the confirmation process. If, however, we cannot agree on what constitutes merit, this may be because we implicitly acknowledge that factors besides merit may be more important to the choices of whom to nominate and confirm.

Social scientists are largely, but by no means wholly, in agreement that merit is not pertinent to judicial selection. On their view, judges do one of two things: they either vote their policy preferences directly<sup>4</sup> or manipulate legal materials to maximize their policy or personal preferences.<sup>5</sup> Hence, social scientists largely argue that judicial selection is based on ideology, a predisposition to certain constitutional commitments, regardless of the facts of particular cases. As Harold Spaeth and Jeffrey Segal argue, the justices who are appointed reflect the values, or preferences, of the governing elite.<sup>6</sup> Once on the bench, they become nothing more than policymakers who simply happen to wear robes.

Imagining merit as distinct from ideology is no easy task. Indeed, no one seriously thinks that President George W. Bush has been using the same criteria that President Clinton employed in choosing which people to nominate to district and circuit court judgeships. Instead, we strongly suspect, based on leaks and outcomes that President Bush is considering different sets of judicial nominees than President Clinton did. The differences in these nominees go beyond mere party affiliations or allegiances; they reflect differences in experience, political commitments and service, and attitudes about how to decide constitutional cases. These attitudes are what some people might call

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<sup>4</sup> See, e.g., HAROLD J. SPAETH & JEFFREY A. SEGAL, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

<sup>5</sup> See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

<sup>6</sup> See SPAETH & SEGAL, *supra* note 4.

ideological commitments.

Yet, it is reasonable to wonder whether there are any selection criteria on which Presidents Bush and Clinton or their respective advisers would agree. They apparently did agree on two nominees—Judges Roger Gregory and Barrington Parker, Jr.—whom they nominated and who were ultimately confirmed by the Republican-led Senate in 2001.<sup>7</sup> Presidents Clinton and Bush would each claim that they had nominated the “best qualified” people as federal judges, but such claims implicate the question of how do we determine merit, or who are the best qualified people for judicial appointments? It is not immediately clear why or how both presidents could be appointing the best qualified people given that they appear to have been nominating quite different kinds of people to judgeships: people with different backgrounds, political experience, party affiliations, sponsors, and attitudes.

Given these circumstances, the usual refrain from legal scholars is to insist that ideology matters, that it frequently makes the critical difference in whom the President nominates or whom the Senate confirms to Article III courts, and thus we need to focus on the likely ideologies of judicial nominees in evaluating whether they ought to be confirmed. Walter Dellinger’s proposed solution to the impasse over some of President Bush’s judicial nominees has the distinct virtue of smoking out whether ideology is what matters most to each side.<sup>8</sup> He proposes that each president agree to nominate at least one of a pre-selected few people approved by the opposition party in exchange for a relatively smooth confirmation process for every three or four people he prefers to appoint to a particular circuit court of appeals. For instance, in exchange for his getting Miguel Estrada, Bret Kavanaugh, and Tom Griffith appointed to the U.S. Court of Appeals for the District of Columbia,<sup>9</sup> President Bush would be obliged to nominate someone from a group of potential nominees approved by the Democratic caucus in the Senate. If the President were to refuse, then, Dellinger argues, it can

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<sup>7</sup> In his final year in office, President Clinton nominated Roger Gregory and Barrington Parker, Jr. to the U.S. Court of Appeals for the Fourth Circuit and for the Second Circuit, respectively. The Senate never acted on those nominations. Consequently, President Clinton in his last month in office designated both people as recess appointees to their respective courts of appeals. These appointments would have expired at the end of the next congressional session. In March of his first year in office, President George W. Bush announced his first set of nominees to the federal courts of appeals, including Gregory to the Fourth Circuit and Parker to the Second Circuit.

<sup>8</sup> See Walter Dellinger, *Broaden the Slate*, WASH. POST, Feb. 25, 2003, at A23.

<sup>9</sup> Estrada, Kavanaugh, and Griffith are three people on whose nominations by President Bush to the U.S. Court of Appeals for the District of Columbia the Senate never acted on. Democrats successfully blocked a floor vote on Estrada’s nomination, while the Judiciary Committee never acted on either Kavanaugh’s or Griffith’s nomination. I do not know Estrada personally, but I do know both Kavanaugh and Griffith. They have very kindly and generously given their time to lecture, more than once, to my classes.

only be because he clearly prefers not to compromise his prerogative to take ideology into account in nominating judges.

Dellinger poses a powerful test of presidential commitment to ideological criteria for judicial nominations. Nevertheless, it is possible that presidents may zealously protect their nominating authority—as did, for instance, Presidents Tyler and Madison in the 19th century<sup>10</sup>—for reasons other than their desire to ensure the ideological purity of their judicial nominations. Presidents may wish to preserve their autonomy to nominate people to judgeships for such other reasons as rewarding personal or party fealty, currying the favor of particular senators or constituencies, and broadening the diversity of the federal judiciary. Of course, none of these reasons for appointment is mutually exclusive from fulfilling certain ideological criteria. It is possible that presidents, or at least their advisers, might define merit as an additional criterion for nomination or perhaps the critical factor for choosing among potential nominees or for determining the potential sets of nominees for particular judgeships. Indeed, some presidents, or their advisers, might define merit as including a particular ideological orientation with respect to constitutional interpretation. It is not unprecedented by any means for presidents to select people as nominees based on the extent to which the nominees conform to the presidents' notions as to the duties they expect judges or justices to perform. President Reagan, for instance, seems to have defined merit, at least in part, as including certain ideological commitments.<sup>11</sup> He insisted that his staff and senators recommend candidates for judicial nominations that fit particular criteria, including a rigid commitment to original understanding in all cases. Thus, merit may not be neatly severed from ideology. It thus becomes necessary to examine different ways in which we can define merit and whether severing merit from ideology is possible, or in what ways, merit can be determined without any reference to ideology.

### B. *Imagining the Ideal Nominee*

Imagine, for a moment, you have been asked by the President to draft a list of qualifications for a nominee to the Supreme Court. Imagine further that you do not know which particular president has made this request. You are behind the Rawlsean veil of ignorance<sup>12</sup> as

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<sup>10</sup> See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (rev. ed. 2003).

<sup>11</sup> See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003).

<sup>12</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

to knowing anything particular about the President's party or the composition of the Senate. Is it possible to draft such a list, and if so, what would be on it?

It is not hard to imagine that some criteria are bound to make the list, though reaching consensus on the activities that would satisfy them may be difficult. First, we expect a nominee to have a high degree of legal acumen. We expect the nominee to be highly intelligent, perhaps to have performed quite well in law school, maybe even to have attended an elite law school. At the very least, we would want to make sure that the nominee has very sound legal skills; asks intelligent, probing questions; thinks clearly if not imaginatively about legal problems; identifies legal issues in a wide range of problems; is trained at problem-solving; and understands the special duties that she will be called upon to discharge.

Second, we expect a nominee to have an excellent judicial temperament. The ideal temperament for a justice is presumably to have the capacity to make decisions even-handedly, to be open-minded in listening to and considering the arguments in the cases that come before him, and to be respectful to litigants and other justices with differing opinions. A judicial temperament requires, of course, a disposition to follow, rather than to rewrite, the law. The nominee also needs to be able to handle the intense pressures that come with the responsibilities of a Supreme Court Justice.

Collegiality is a third criterion for an ideal nominee to the Court. Collegiality requires getting along with the other justices. It also entails being able to build coalitions and to maintain cordial relations with other justices, regardless of the extent to which one may agree or disagree with their views in particular cases. Maintaining cordial relations is no easy feat on a Court once described by Justice Holmes as "nine scorpions in a bottle."<sup>13</sup> Not all people who must work together in relatively close quarters successfully maintain respect and civility over long periods of time, but the ideal nominee must have some such capability.

The fourth criterion for the ideal nominee is excellent writing ability. The ideal nominee should be able to write clear, coherent opinions. It is especially important that the ideal nominee have the ability to craft opinions that reflect and can maintain the support of a majority of the justices in a given case. Moreover, it is important for the nominee to be able to compose opinions relatively quickly given the time pressures under which justices operate.

Fifth, significant and meaningful professional experience is indispensable to an ideal nominee to the Court. This experience need

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<sup>13</sup> MAX LERNER, *NINE SCORPIONS IN A BOTTLE: GREAT JUDGES AND CASES OF THE SUPREME COURT* (1994).

not all have been in the public sector, but the more experience a nominee has first-hand with the legal system from top to bottom the better. Meaningful experience might include serving in a significant public office, which might enrich the nominee's understanding of the system from which the laws appealed to her Court will come. Rich professional experience is bound to sharpen a nominee's judgments, and provide a solid foundation from which to approach the significant legal questions that come routinely before the Supreme Court.

Sixth, integrity is essential to the ideal nominee. A nominee's integrity must be beyond question in order for her to be able to exercise the moral authority of a Supreme Court justice. Justices embody the law, and they need to comply with the very laws they expect all others to follow.

Closely related to nominees' integrity is their character. Stephen Carter and Larry Solum are just two of the many scholars who insist that a justice ought to have a strong, moral character.<sup>14</sup> At the very least, having a strong, moral character means having the courage of one's convictions and the strength not to alter one's opinions, or decide cases, for the sake of currying peer or public esteem.

There are other qualifications that ideal nominees might arguably need to satisfy. Besides the factors already mentioned, presidents might also be interested in a nominee's religion, ethnicity, gender, and health. These other factors might be important in diversifying the Court's composition or satisfying under-represented segments of society. Moreover, the age of a nominee has been very important to presidents who wanted to ensure that their appointee could serve on the Court long after they had left office.

Of course, the criteria that are relevant for determining ideal nominees are one thing, while the things which presidents or their advisers might consider in order to measure them are another. The values of those charged with selecting a nominee will inevitably influence what they choose to look at and how they will perceive it. Moreover, it might simply be unrealistic—or dangerous—to ignore factors such as timing, the president's party, the composition of the Senate, the nominee's political or party affiliation, or the composition of the Court. For instance, the composition of the Senate might be quite pertinent to a nominee's chances for confirmation. Indeed, a president might be inclined to choose different people, depending on whether his party controls the Senate or whether the minority has enough members to filibuster a contested nomination. Certain factors are bound to complicate the nominating process. For instance, the proximity of the

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<sup>14</sup> See generally STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS*, (2000); Lawrence Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659 (2004).



next presidential election cannot be ignored, because the opposing party has successfully rejected or delayed more than a few Supreme Court nominees in the hopes of preserving the vacancies for presidents from their parties.<sup>15</sup> And we have not yet mentioned a nominee's likely ideology or how well a potential candidate interviews for the job as possible complicating factors.

The large number of potential considerations helps to explain why some presidents, or their advisers, might prefer to break the nominating process into first- and second-order selection criteria. The first might allow for a relatively sizeable list of potential candidates, while the second might be used to cut the list down to size, if not down to one. Interviews might be used to cut a narrowed list even further, at which point a great deal depends on the interviewer, the questions asked, and the nominees' responses.

It is possible that recognizing the large numbers of potential considerations discourages academics from pondering the qualifications of ideal nominees to the Court. Academics might view such an exercise as futile, for they appreciate that Supreme Court nominees are not chosen in a vacuum. Yet, neither senators nor academics hesitate to evaluate nominees on the basis of some criteria. A question thus remains as to the appropriate criteria for measuring the quality of a particular nomination. Of course, the fact that a nomination falls short of an ideal is not necessarily an argument against it. A Supreme Court nominee usually enters the confirmation phase with at least a presumption, or likelihood, that he or she will be confirmed.<sup>16</sup> It thus usually takes something rather significant—not just some deviation from an ideal—to put a nomination in trouble. Nevertheless, the stronger a nominee's credentials, or the more closely he or she approximates an ideal, the tougher it may be to undermine the nomination. Thus, a look at another way in which to determine ideal credentials might be fruitful for providing at least one significant measure for evaluating the relative strengths of particular nominations.

### C. *Determining Merit in Reverse*

The prior section examined possible selection criteria on which there might be consensus at the outset of a selection process. This section considers determining qualifications by looking at merit in reverse; whether it is possible to infer from the justices we might generally agree were "great" or "excellent" what they might have had in

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<sup>15</sup> HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* (1999).

<sup>16</sup> See GERHARDT, *supra* note 10, at 182.

common prior to their appointments. The question is whether the signs of at least potential “greatness” or “excellence” were evident at the times of the appointments of those who later proved themselves to be first-rate justices.

I will use two examples to illustrate this tack. The first is the man for whom this Law Review takes its name: Justice Benjamin Cardozo. Justice Cardozo makes many, if not all, the lists of great justices, so the question naturally arises as to whether, or in what ways, this greatness was evident at the time of his nomination. Throughout his career—first as a lawyer specializing in appellate briefs, then as a judge and later Chief Judge of the New York Court of Appeals, Cardozo, nominally a Democrat, had enjoyed the confidence of all political factions.<sup>17</sup> Achieving this level of confidence was especially significant because he did it in an era when state courts and his court especially were widely revered. He was also the author of several highly regarded books, and had received honorary degrees from many universities, including Yale, Columbia (his alma mater), and Harvard. Many of his decisions in such areas as torts and contracts had influenced judges and courts throughout the nation. Thus, he evidently had, by the time of his appointment, compiled ample judicial experience, shown considerable legal acumen, and demonstrated excellent judicial temperament, collegiality, and leadership on a prominent court. His integrity and character were beyond reproach.

My second example involves another New Yorker, Charles Evans Hughes, whom many believe was a first-rate jurist (not once but twice!). When Hughes was first nominated and confirmed to the Supreme Court in 1910, he already had outstanding credentials.<sup>18</sup> He had been an active practitioner with one of the leading law firms in the country and a leader of the New York and national bars, and had devoted himself to substantial public service. At the time President Taft appointed Hughes as an Associate Justice, Hughes was serving with distinction as the Governor of New York. As an Associate Justice, Hughes authored a number of significant opinions and demonstrated respect for his colleagues and opposing arguments and had an even-handed temperament. After leaving the Court six years later to run unsuccessfully for President of the United States, he served as President of the American Bar Association, argued several cases successfully before the Supreme Court, performed significant pro bono work, served for four years as secretary of state under Presidents Harding and Coolidge, and served on the Permanent Court of International Justice. Few nominees to the Court have matched his record of public service

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<sup>17</sup> See generally ANDREW KAUFMAN, *CARDOZO* (1998).

<sup>18</sup> See *Charles Evans Hughes*, at [http://supreme.lp.findlaw.com/supreme\\_court/justices/past\\_justices/hughes.html](http://supreme.lp.findlaw.com/supreme_court/justices/past_justices/hughes.html).

prior to the Court, and fewer have had records of public service respected by the leaders of both parties, though this did not save him from having a significant minority of senators vote against his nomination as Chief Justice for fear of his allegiance to big business. Hughes brought statesmanship to the task of judging.

My point is not to suggest that either Cardozo or Hughes ought to be viewed as the model appointee to the Court. Rather, my point is that if we are sincerely interested in measuring merit we might be able to infer from their records, as of the respective times of these two widely respected jurists' appointments, appropriate criteria for meritorious appointments to the Court. It is, however, not clear that we can ever discuss merit without some reference to ideology. Indeed, we know that most presidents and senators are preoccupied with ideology in assessing judicial nominees. Consequently, we need to consider the implications of the linkage of merit to ideology in the federal judicial selection process.

## II. THE BATTLE OVER THE MAINSTREAM IN CONSTITUTIONAL LAW

The reasons for the attraction, or dominance, of ideology in judicial selection are obvious. First, national political leaders care about ideology because of the high stakes involved in judicial appointments. They understand that Article III judges enjoy life tenure and thus are immune from political retaliation against their decisions. Judicial opinions on constitutional law cannot be overturned through ordinary legislation but only by a superior court or the Court itself, or through the extraordinary means of a constitutional amendment. Consequently, national political leaders will spend a good deal of time trying to ensure that the people appointed as judges will exercise power in ways that are satisfactory to them. Second, national political leaders have almost no incentive to reach any consensus on merit. Most citizens pay little or no attention to lower court appointments, so leaders can expect little or no public backlash against their decisions on lower court appointments. In addition, presidents and senators are reluctant to relinquish their institutional prerogatives in the selection process. When they do so, it is only in exchange for something else that they have decided is more important to them, at least for the moment. There is little or no apparent political up-side to emphasizing merit, except in defense of embattled nominations. Presidents and senators might sometimes have incentives to reach accommodations, but accommodations are much harder to come by for presidents and senators from the opposition party. Presidents from one party and senators from the other often need conflict to sharpen the differences between them and to call attention to

the stakes involved in the selection process. Agreeing on merit would merely reduce, rather than preserve or expand, senators' discretion in subsequent confirmation proceedings.

Perhaps the most intense conflict that Republicans and Democrats have had over the past two decades in the selection process has been over who occupies the mainstream in constitutional law. Each side claims that its nominees are within the mainstream and the contested nominees of the other are not, as evidenced by the struggle over the Supreme Court nomination of Robert Bork.<sup>19</sup> More recently, Democrats have supported six filibusters against judicial nominees whose views on constitutional issues are, in their judgment, outside of the mainstream. The defenders argue that just the opposite is true.<sup>20</sup>

The contest to define the mainstream has not been merely rhetorical. A good deal is at stake. Each side desperately wants its nominees to be viewed as occupying the middle, rather than the extreme end of the spectrum in constitutional law. The middle is the safest, strongest ground. Moreover, opposing nominees because they are outside the mainstream puts the other side on the defensive. More importantly, each side appreciates the enormous stakes involved, for with each victory each side advances one step further in building a foundation for an enduring constitutional vision. The vision is important in guiding not just other judicial nominations but also the exercise of presidential and legislative authority. The prize is shaping constitutional law for at least the foreseeable future.

Although it is not hard to understand why political leaders care intensely about securing the mainstream—or the middle—in constitutional law, it is harder for someone outside of, or not invested in, the process to determine what counts as the middle. I consider in the next section some of the difficulties with determining the mainstream in constitutional law and propose some ways in which to figure out what is the mainstream, or middle.

#### A. *Problems with Defining the Middle in Constitutional Law*

There are several major problems with identifying the mid-ground in contemporary constitutional law. First, empirical analysis cannot easily capture what counts as the middle because the choices of what to

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<sup>19</sup> See generally ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989).

<sup>20</sup> See *Is the Constitutional Option Viable to Break Partisan Filibusters Against Judicial Nominees*, at [http://www.cfif.org/htdocs/legislative\\_issues/federal\\_issues/hot\\_issues\\_in\\_congress/confirmation\\_watch/constitutional\\_option.htm](http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/confirmation_watch/constitutional_option.htm); Sean Grindlay, *Judges Deserve a Fair Hearing in the Media* (Nov. 20, 2003), at [http://www.aim.org/briefing\\_print/99\\_0\\_5\\_0/](http://www.aim.org/briefing_print/99_0_5_0/); James L. Swanson, *The Coming Battle for the Court*, at <http://www.cato.org/dailys/04-29-03-2.html>.

emphasize or count are value-laden. Anyone looking to define the middle, or the mainstream (the two are not necessarily the same) in constitutional law must make judgments about relevance: are all cases relevant? Should we only look at the judgments or outcomes in particular cases, or should we also look at the reasoning, including its quality and extent? Where, for instance, do seemingly obvious cases like *Roe v. Wade*,<sup>21</sup> *Lawrence v. Texas*,<sup>22</sup> and *Lee v. Weisman*<sup>23</sup> fit? Some might argue that they are clearly on the “left” in constitutional law, but some others might argue they are consistent with a libertarian perspective on the right. Arguing that one or the other of these positions is correct is just another value judgment.

Second, an even bigger problem for defining the middle or the mainstream in constitutional law is that the categories we deploy in assessing judicial performance as well as the nominees’ views are not necessarily fixed. Because of the phenomenon of ideological drift, categories are not static; particular perspectives on constitutional law associated with particular political factions may over time be appropriated by or become associated with different political factions.<sup>24</sup> For instance, Chief Justice John Marshall reflected a “conservative” rather than a “liberal” perspective on constitutional law, because he usually favored the status quo. His successor as Chief Justice of the United States, Roger Taney, was understood, at the time of his appointment, as representing a “liberal” perspective on constitutional law because he was thought to favor progressive legislation and reform of the status quo. It is only because of ideological drift that each is now viewed differently.<sup>25</sup> New Deal liberals found they had a lot in common with the opinions of Chief Justice Marshall, because of their consistent support for a strong national government; and conservatives admired Taney’s ardent efforts to resist the expansion of the national government at the expense of state sovereignty.

The labels “liberal” and “conservative” do not fit contemporary justices much better. For instance, Justice John Paul Stevens, appointed to the Court in 1976 by President Ford, is frequently described as a “liberal” by commentators and critics.<sup>26</sup> Yet, he hardly seems to have much in common with other “liberals” such as Associate Justices William Brennan and Thurgood Marshall, with whom he sat for many

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<sup>21</sup> 410 U.S. 113 (1973).

<sup>22</sup> 539 U.S. 558 (2003).

<sup>23</sup> 505 U.S. 577 (1992).

<sup>24</sup> See Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 637-38 (2002).

<sup>25</sup> See Michael J. Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399 (2002).

<sup>26</sup> See *John Paul Stevens*, at [http://www.britannica.com/ebc/article?eu=404877&query=john%20ford&ct;http://www.issues2000.org/John\\_Paul\\_Stevens.htm](http://www.britannica.com/ebc/article?eu=404877&query=john%20ford&ct;http://www.issues2000.org/John_Paul_Stevens.htm).

years. Nor does it seem appropriate to describe Justices Kennedy and O'Connor as strictly "conservative" because they have often favored protecting state sovereignty in Commerce Clause and Eleventh Amendment cases.<sup>27</sup> They also have voted to re-affirm the embattled decision in *Roe v. Wade*,<sup>28</sup> to strike down all anti-sodomy laws in *Lawrence v. Texas*,<sup>29</sup> and to strike down Virginia Military Institute's policy to exclude women.<sup>30</sup> It is probably more accurate to describe Justices Kennedy and O'Connor as today's moderates, though many senators would resist this label because it cedes the middle ground to these justices rather than others they might prefer to place there.

A third problem with fixing the middle ground in constitutional law is that justices sometimes shift their attitudes about constitutional law either generally or in particular cases. Justice Harry Blackmun is often described as evolving, or growing, over time into a more "liberal" justice.<sup>31</sup> Others might move in the other direction. Spaeth and Segal claim, that Justices Stevens and Souter each became more "liberal" over time, while Justice White became more "conservative" over time.<sup>32</sup> As Chief Justice William Rehnquist has sometimes been said to have moderated some views,<sup>33</sup> as he arguably did in writing the Court's opinions reaffirming *Miranda v. Arizona*,<sup>34</sup> concurring in the *Virginia Military Institute* decision,<sup>35</sup> and upholding the Family Leave Act as an exercise of Congress' authority pursuant to Section Five of the Fourteenth Amendment in *Nevada v. Hibbs*.<sup>36</sup>

A related problem with using the categories of "liberal" and "conservative" to describe judicial performance is that judicial nominees may not have fixed attitudes about constitutional law. Some people seem to assume that at least some nominees have ideological commitments at the times of their nominations that are impervious to change, but it seems virtually impossible to prove that this is true especially when the nominees themselves disclaim holding any such commitments.

Fifth, legal academics have done little to illuminate what may fall

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<sup>27</sup> See Otis H. Stephens, Jr. & John M. Scheb II, *American Constitutional Law: Overview of the Supreme Court's 1993 Term*, at <http://www.web.utk.edu/~scheb/93term.html> (last visited Jan. 22, 2005).

<sup>28</sup> See *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

<sup>29</sup> 539 U.S. 558 (2003).

<sup>30</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>31</sup> See *Harry Blackmun*, at <http://www.britannica.com/ebc/article?eu=382716&query=houdini%2C%20harry&ct> (last visited Jan. 22, 2005); <http://www.cnn.com/US/9903/04/blackmun.02/> (last visited Jan. 22, 2005).

<sup>32</sup> See SPAETH & SEGAL, *supra* note 4, at 218.

<sup>33</sup> See <http://www.michaelariens.com/ConLaw/justices/rehnquist.htm>.

<sup>34</sup> See *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>35</sup> See *Virginia*, 518 U.S. 515.

<sup>36</sup> 538 U.S. 721 (2003).

inside or outside the mainstream of constitutional law. Most legal scholars appear interested less in finding common ground than in delivering the knock-out punch against opposing points of view.<sup>37</sup> A common goal of legal scholarship is paradigm-shifting, but in pursuing this goal legal scholars will dismiss as wrong or dangerous points of view affiliated with the paradigms they are trying to undo. The pursuit of this goal is not likely to enrich our understanding of which views actually do rather than ought to fall within the mainstream of American constitutional law.

Sixth, the media hinders sophisticated discussions of judicial performance. The media has begun to shirk its traditional role in educating the public. It has moved from reporting "hard" news or facts and figures to reporting "soft" news or speculation and commentary.<sup>38</sup> The proliferation of media outlets and twenty-four hour news has put enormous pressure on newspapers and television reporters to emphasize scandal. The media prefers drama and conflict, because it gets people's attention. The media thus prefers to stick with the simple labels of "liberal" and "conservative." As candidates and commentators increasingly feel the need to characterize opponents in extreme terms, the media follows suit. Candidates are thus "liberal" or "conservative," and Justices are also one or the other. No one apparently begins as a moderate, or ends up as one. The middle in politics appears to be an unoccupied ground that the candidates fight to control, while the media simply covers the flashier portions of the fight.

### B. *Sketching the Middle*

Assessing ideologies is difficult without having some yardstick with which to measure them. It is possible that the measurement of an ideology is a purely normative matter, depending on its appeal to lawmakers and its consistency with constitutional law as they understand it. Even then, we need to define the middle, or moderation, as a means of curbing reckless or misleading rhetoric. We need our rhetoric to fit the complicated business of judging. So, the question is how accurately can we describe a middle course or the contours of the mainstream in constitutional law?

I offer a few possible answers, taking into account each of the

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<sup>37</sup> See, e.g., Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 NW. U. L. REV. 175 (1993); Suzanna Sherry, *Too Clever By Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921 (2001).

<sup>38</sup> See MARVIN KALB, *ONE SCANDALOUS STORY: CLINTON, LEWINSKY AND THIRTEEN DAYS THAT TARNISHED AMERICAN JOURNALISM* (2001); BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF THE MIXED MEDIA* (1999).

difficulties described above. First, we can identify the middle ground as what each of the contending sides in confirmation contests seeks to occupy. We can thus define it at least as an aspiration. We can assess nominees based on how well they fit the description of the middle ground, or mainstream, of their supporters. One problem with this definition is that it might allow one side to define the terms on which it prefers for its nominees to be assessed, without any second-guessing; however, this understanding of the mainstream puts pressure on supporters to be careful about how they characterize nominees or risk having them fail to meet expectations.

A second possibility is to define the mainstream as the pool of people who have made it successfully through the confirmation process. They constitute a large and diverse pool, which reflects the approval of the governing elite. The problem with this understanding of the mainstream is that it fails to take into account the facts that many people make it through the process without close scrutiny and that presidents and senators have not agreed with everything decided by the judges whom they have approved.

Moreover, defining the mainstream as those whom the Senate has confirmed merely gives each side an incentive to push the envelope. With each victory in the confirmation process, each party has expanded the possibilities for its nominees. Once people are confirmed, their parties can point to them as examples, or precedents, to guide future confirmation proceedings.

A more interesting but speculative test might be to ask whether the President would still nominate, or the Senate still approve, the same judges if they knew what kinds of decisions they would make. In many cases, nominees are relatively blank slates, and judges and justices presumably fulfill special obligations independent from presidential and senatorial influence. So, it might not be fair to attribute to presidents and senators all the decisions made by the judges and justices they have approved.

Third, the mainstream could be understood as simply consisting of the views of those at the center of the Court. Today that would presumably mean Justice O'Connor, because she almost never dissented in the October 2003 Term.<sup>39</sup> The problem is that she did not decide these cases alone, and it is unclear why those with whom she joined in majority opinions ought to be excluded from the mainstream. Moreover, the center can shift, and there is no guarantee that she will be there as often next year. Nor is it clear why dissenters ought to be excluded entirely, because dissents sometimes later become the law.

The fourth and final possibility is to define the mainstream as

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<sup>39</sup> See Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004, at A1.



something more dynamic and broader than a specific Court or specific Justice at a particular moment in time. For one thing, the Court is not alone in making constitutional law. Our political leaders make a great deal of constitutional law, much of which eludes judicial review.<sup>40</sup> Moreover, the Court approves the vast majority of the constitutional decisions that it does review. It would also be wrong to assume that every Court decision reflects mainstream constitutional values. Sometimes the Court gets it wrong, as it did in *Chisholm v. Georgia*,<sup>41</sup> *Dred Scott v. Sanford*,<sup>42</sup> and *Korematsu v. United States*.<sup>43</sup> The constitutional views of presidents and senators are relevant to the makeup of the mainstream, because they have the power to try to move the Court in different directions or perhaps keep it on course by virtue of their respective authority in the appointments process. They also have the power to shape enduring policies. Consequently, it is possible to define the mainstream as the dominant doctrine, outlook, and thinking on constitutional law over time. The Supreme Court provides the doctrine, the courts and national political leaders shape the outlook of an era, and all of these along with constitutional commentators in a wide variety of fora inform the thinking on constitutional law. This perspective on the mainstream has the virtue of encapsulating the constitutional activities of a given era. The main problem with this perspective is that there is no method on which all people could agree for determining the relevant doctrine, outlook, and thinking of a particular era. Historians might be in the best position to give us this information but only in retrospect. It is a challenge, to say the least, for someone to step outside of his or own time to develop a credible perspective on it.

### III. PROVING IDEOLOGY MATTERS

Proving what many people suppose—that ideology matters more than anything else to most presidents in nominating judges and most senators in voting on their confirmation—is no small feat. There are a number of complications with determining the extent to which ideology was a major factor or the primary basis for the President's nominating and the Senate's voting on the confirmation of various judicial nominees. After briefly reviewing these, I make some modest suggestions for future empirical analysis on the significance of ideology

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<sup>40</sup> See Michael J. Gerhardt, *The Constitution Outside the Court*, 51 *DRAKE L. REV.* 775 (2003).

<sup>41</sup> 2 U.S. 419 (1793).

<sup>42</sup> 60 U.S. 393 (1857).

<sup>43</sup> 323 U.S. 214 (1944).

in the judicial selection process.

A. *Ideology's Elusiveness*

There are a number of problems with proving empirically whether and, if so, how much ideology was a factor in the nominating or confirmation phase. First, reaching consensus on what qualifies as ideology is difficult. Although I understand ideology as a pre-commitment to certain constitutional values or to resolving particular questions of constitutional law regardless of the facts of particular cases, this is but one understanding.<sup>44</sup>

The second problem is that not every judicial nominee has a well-conceived or thoroughly worked-out constitutional ideology. Indeed, judicial nominees often publicly disavow commitment to a particular constitutional ideology. Moreover, ideology presumably functions as a blinding mechanism, so that it is conceivable that some nominees may not be aware that they have certain ideological commitments.

Third, and perhaps most importantly, the relevance of ideology to particular judges' decisions or to particular confirmation decisions may not be evident in the public record. If the President and his nominees deny that they have particular ideological commitments, then the burden shifts to the other side to prove them wrong. This is precisely the dynamic with President Bush's judicial nominees. He has publicly defended his nominations on the ground of merit, and disavowed that he has employed a litmus test or chosen nominees based on particular ideological commitments.<sup>45</sup> His nominees publicly disavow such commitments.<sup>46</sup> Consequently, skeptical Democrats must infer his selection criteria—including any preference for ideological pre-commitments—from the kinds of nominees that he has chosen.

Moreover, most judicial nominations fail because of inaction. For instance, the Senate in President Clinton's final year in office failed to act on more than sixty of his judicial nominations. There is little or no record on these nominees, so it is not possible to prove precisely why the Judiciary Committee did not hold hearings or votes on these nominees.

In addition, Senate debates over nominees rarely employ the term "ideology." More often than not, the focus in confirmation contests has been on such matters as the nominee's integrity, experience,

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<sup>44</sup> See, e.g., *Hearings*, *supra* note 2 (statement of Orrin G. Hatch) (characterizing ideology as distinctly outside of the realm of judicial decision-making as envisioned in the Constitution).

<sup>45</sup> See Joyce Purnick, *Ideology? Well, Who's to Judge*, N.Y. TIMES, July 2, 2001, at B1.

<sup>46</sup> See Raymond Hernandez, *An Infuriating Success: Schumer Draws Fire for Tactics Blocking Judicial Nominations*, N.Y. TIMES, Nov. 1, 2003, at B1.

competence, and temperament.<sup>47</sup> When the debates do shift focus to nominees' commitments to, or expression of, particular constitutional views, they feature discussions about whether the nominee comes from the "mainstream" of constitutional law.

Fourth, proving ideology matters to nominations or confirmation decisions is complicated by the fact that these decisions are invariably based on multiple factors. Presidents, or their counselors, usually employ a range of criteria for making decisions on whom to nominate.<sup>48</sup> In the Senate, a single factor is not usually determinative, because different senators base their decisions on different factors. Nor is it unusual for presidents and senators to base public decisions on factors they do not disclose. It is not incumbent upon them to disclose all the grounds for their constitutional decisions.

Moreover, presidents and senators must make different kinds of decisions in the selection process. Because presidents are responsible for choosing nominees, they can make decisions about which persons they think are best qualified or best fit their selection criteria. Senators are often able to provide input and even make specific recommendations on nominations, but their primary responsibility is to determine not necessarily whether the nominee is ideal or the best qualified but rather acceptable according to whatever criteria each senator decides is relevant. It is thus not unthinkable that one-hundred different senators may use one-hundred different sets of criteria for evaluating judicial nominees.

### B. *How to Show Ideology Matters*

The aforementioned problems are not necessarily fatal to the enterprise of proving that ideology makes a difference to outcomes in the confirmation process. Patterns invariably emerge within the process. For instance, the Senate usually approves the vast majority of a president's judicial nominations. One could try to identify what the nominees who have made it through the process successfully have in common or what traits or characteristics are shared by those who have been unsuccessful. These are not necessarily easy ventures, but they are not impossible. For instance, social scientists such as David Yalof have shown what they regard as the characteristics that the people nominated to the Supreme Court over the past few decades have had in common.<sup>49</sup>

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<sup>47</sup> See Kenneth B. Noble, *Hatch Assails A.B.A. Over Vote on Bork*, N.Y. TIMES, Sept. 11, 1987, at A14.

<sup>48</sup> See DAVID YALOF, *THE PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999).

<sup>49</sup> See *id.*; Lee Epstein, et al., *The Norm of Prior Judicial Experience and its Consequences*

Once one sets out to demonstrate the particular significance of a single factor, such as ideology, the task becomes somewhat more complicated. To make this showing, one needs, at the outset, to determine the relevant independent and dependent variables.<sup>50</sup> The variable that is to be explained—in the case of the confirmation process, the vote share, or how senators voted on particular nominations, or the absence of a vote on a particular nomination—is the dependent variable; it “depends” or turns on other variables. The latter are what social scientists call independent or “explanatory” variables, because they help to explain the dependent variable. The independent or explanatory variables are not themselves explained by the theory one is trying to prove; they simply do the explaining. My purpose is to clarify that, as an empirical matter, ideology is not the outcome that needs to be proved; instead, it is one of the variables that determines outcomes in the confirmation process. Thus, we need to determine, even before we can prove the hypothesis or theory underlying much of the discussion in this symposium—that ideology matters significantly in the confirmation process—what proxies stand for ideology and what other variables are potentially relevant to outcomes in the confirmation process.

One cannot prove that ideology matters without initially determining how ideology manifests itself. The most obvious possibilities are statements and actions of nominees that accord with, or explicitly embrace, particular ideologies. If the nominees have been judges, then their opinions might reflect ideologies or perhaps the absence of them. In addition, they might have given speeches, written articles or books, or made statements that reflect ideological commitments or their absence. If the nominees have not been judges, then their activities in the public or private sectors might reflect their commitments to certain ideologies, though these can be disavowed as merely doing the bidding of superiors or clients. More relevant for people who have yet been judges are writings, speeches, or statements. Also relevant may be the testimony and the support of those claiming to know the nominees best. Put slightly differently, one might ask which groups support nominees and why or on what bases. But people who are not judges, even if they are academics, can credibly claim that their public musings do not reflect what they would do as judges because their duties as judges require them to do things, such as following precedent, that they are not required to accept as scholars or commentators.

It is easier to settle on the independent variables other than ideology. The first is Senate composition. Presidents often take the

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*for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003).

<sup>50</sup> For an excellent primer on statistical analysis, see RAY C. FAIR, *PREDICTING PRESIDENTIAL ELECTIONS AND OTHER THINGS* (2002).

composition of the Senate into account in deciding on whom to nominate and when. The strength of a president's party's representation in the Senate is obviously important, because it determines which parties control the Judiciary Committee, the agenda on the floor of the Senate, and the length of debate. If the minority party controls at least forty seats in the Senate, it can then block some judicial nominations by filibustering them.<sup>51</sup> Threatening filibusters or holds, which are, in effect mini-filibusters, can sometimes influence whether and when presidents make certain nominations.

A second factor is timing. Election years tend not to be good times for presidents to make judicial nominations, particularly to the Supreme Court. In the nineteenth century, the Senate did not act on at least nine Supreme Court nominations, supposedly because the majority party was trying to keep the vacancies open until after the next presidential election.<sup>52</sup> In President Clinton's final year in office, the Senate did not act on more than sixty of his judicial nominations.<sup>53</sup> Similarly, the Democratically-led Senate did not act on dozens of the first President Bush's judicial nominations in his final year in office, presumably because of a desire to keep as many judicial vacancies for the next President.<sup>54</sup>

Timing might matter in a different way. Most failed nominations do not get so far as receiving Committee votes; they fail because of inaction. Moreover, not all nominations that get hearings are scheduled for Committee votes. Consequently, one needs to figure out how long a nomination has gone without a hearing or whether it has gotten a Committee vote within a certain period of time, presumably the average length of a time between a nomination and a Committee vote. Those nominations exceeding the average length of time without yet getting a hearing or Committee vote are unlikely to be approved.

Third, sponsoring senators may make a difference to the fate of at least some judicial nominations. The more powerful the senator, the more likely it is that nominees he has supported will be confirmed. For instance, the Senate has confirmed a number of nominees who worked for Senator Hatch.<sup>55</sup> Indeed, Senator Hatch convinced President Clinton to nominate a former aide to a District Court in Utah, after he had held up every other judicial nomination pending President Clinton's compliance.<sup>56</sup> It also possible that sponsoring senators might signal

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<sup>51</sup> See SEN. R. XXII, available at <http://www.rules.senate.gov/senaterules/rule22.htm>.

<sup>52</sup> See ABRAHAM, *supra* note 15.

<sup>53</sup> See *Republicans Create Judicial Vacancy Crises, Then Blame Democrats*, at <http://democrats.senate.gov/~dpc/pubs/107-2-75.html>.

<sup>54</sup> See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

<sup>55</sup> Jonathan Groner, *The Judge Maker*, *LEGAL TIMES*, Aug. 19, 2002, at 1.

<sup>56</sup> See GERHARDT, *supra* note 10.

nominees' possible commitments to particular ideologies, if the senators are well known or can be shown to prefer nominees with such commitments.

Fourth, a president's popularity might have an effect on a nomination's fate. The President's political strength, as reflected in his approval ratings with the public, might show the risks involved in a fight with the President. The more closely a nomination is identified with the President or the more it means to him or his policies, the more likely that the popularity of the president or his policies will be an important factor. The more popular the president or the policies with which the nominee is associated, the more likely it is that this popularity will benefit his nomination. The more political coinage that a president has on which to draw in confirmation contests, the more likely it is that senators will suffer some political damage or loss from such confrontations. Some senators might choose contests over some judicial nominations because they believe the conflicts can improve their standing with important constituencies or can underscore their own political commitments. But contests are not likely to be completely cost-free, particularly insofar as the presidents remember them and have the means and opportunity to seek retaliation.

A related factor may be party cohesion or fidelity. The extent to which senators from the same party are willing to stand together on judicial nominations makes a big difference as to whether they can successfully filibuster or defeat nominations in Committee or on the Senate floor. The degree of cohesion or unity within a caucus is pertinent to how much power it can wield under the Senate rules to strike deals with the President. Sometimes senators do not do what their party leaders or presidents from their parties tell them to do. Sometimes divisions in the ranks of the senators from the President's party can be a problem for many nominees, with some joining together with members of the opposition party to defeat them.

The sixth factor is whether the blue-slip process is in place at time of a nomination.<sup>57</sup> The blue-slip process allows a senator to block a nomination made to an office in that senator's home state. This process is usually available to senators from both parties, but sometimes presidents or Senate leaders have restricted it to senators only from the president's party. If this process is in place in whatever form, it expands senators' opportunities to block nominations. It particularly reinforces the strength of the majority party in the Senate. If that party is targeting the expression of support for particular policies or ideologies, then nominees who can be shown to have made such expressions face potentially serious obstacles to their confirmation from

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<sup>57</sup> On the blue-slip process, see generally Brannon Denning, *The Blue Slip: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001).

the beginning.

Seventh, the number of witnesses called for and against nominations is likely to be pertinent to their chances to succeed in the confirmation process. The number of people testifying, particularly against a nomination, is likely to signal some problem with the nomination. Of course, numbers alone do not indicate the reasons for support or opposition. Some people may be opposed because of their supposed ideological commitments, but one must go behind these numbers in order to determine this information.

Eighth, the American Bar Association's ratings on nominees may affect the fate of nominations. Positive ratings do not guarantee confirmation, but negative or largely unfavorable ratings are bound to lower considerably a nominee's chances for confirmation. Even split ratings can be problematic, though not necessarily fatal. The American Bar Association comes as close as any group to providing a "neutral" assessment of a nominee's qualifications, and its ratings may be used by either side in a confirmation contest depending on the extent to which they are favorable or unfavorable.

These are just eight factors, besides ideology, that are likely to affect the fate of judicial nominations. The odds are that nominations will not falter simply because of one of these factors. Moreover, it is possible, if not likely, that the stated grounds of opposition to judicial nominations might not be entirely credible; they might reflect, at least to some extent, a pretext to oppose a nomination. For instance, the Judiciary Committee never acted on President Clinton's nomination of Elena Kagan to the U.S. Court of Appeals for the District of Columbia in 2000. She never got a hearing, much less a vote, on her nomination, in spite of her strong credentials. Indeed, she is now the Dean of Harvard Law School. No one expressed opposition to her because of her ideology. Instead, opposition, to the extent it was ever manifest in public, focused more on whether the appellate court to which she had been nominated had a caseload to justify filling all of the seats to which the President had nominated people.<sup>58</sup> Some people might view this opposition as merely a pretext to preclude the confirmation of someone whom the opposition party feared might be a liberal activist or who would then occupy a seat that it would have preferred for one of its own to occupy. After President Bush took office, Republican leaders changed position and acknowledged the court's caseload justified filling all its seats.<sup>59</sup> And President Bush then nominated Miguel Estrada to one of them. It is possible that at least some opposition to the Estrada

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<sup>58</sup> See <http://www.independentjudiciary.com/courts/courtlong/cfm?CourtID=18> (last visited Jan. 22, 2005).

<sup>59</sup> Neil A. Lewis, *Party Leasers Clash in Capitol Over Pace of Filling Judgeships*, N.Y. TIMES, May 10, 2002, at A1.

nomination derived in part from a desire for payback, though the grounds cited by opponents related to Estrada's temperament and imputed judicial ideology. Although payback is another possible factor that needs to be monitored in the confirmation process, it is hard to verify, because senators rarely acknowledge that it is the basis for their opposition.

In the final analysis, proving that ideology significantly affects the fate of nominations is not easy. Proving it may be so difficult that many people simply opt for anecdotal evidence or merely analyzing the appeal of a particular nominee's ideology. After all, it is not necessary to prove that all nominees shared commitments to problematic ideologies but rather only the ones that senators end up choosing to oppose for stated or unstated reasons. The higher, or more powerful, the court to which someone has been nominated, the more likely senators will be concerned about the person's likely judicial ideology. In any event, as long as senators do not fear the President, senators remain relatively free to pick and choose which nominees to oppose and on what bases.

#### CONCLUSION

I close with a challenge. I challenge others to talk more openly about merit in judicial selection and particularly whether merit can be defined separately from ideology. If it can, then we have to wonder why more scholars, presidents, and senators do not separately define these concepts. If not, then we need to explain why we should not simply join forces with the many social scientists who believe that judges are simply policymakers who wear robes.



