The focus for this collection of essays is whether ideology should be considered in the judicial selection process. The answer, obviously, is yes. Every President in American history, to a greater or lesser extent, has chosen federal judges based in part on their ideology. Likewise, since the earliest days of the nation, the United States Senate also has looked to ideology in the confirmation process. This is exactly how it should be. An individual’s beliefs influence how he or she will decide cases once on the bench. Therefore, it is appropriate, and indeed essential, for the appointing and confirming authorities to consider ideology.

My sense is that this issue is being raised now because Republicans are trying to prevent a Democratically controlled Senate from using ideology as a criterion in evaluating President George W. Bush’s nominees for the federal bench. They are trying to wrap themselves in the cloak of neutrality by saying that it is inappropriate for the Senate to consider a nominee’s ideology in the confirmation process. This is blatantly disingenuous and just wrong. During the last six years of the Clinton presidency, the Republican-controlled Senate repeatedly held up and blocked Clinton nominees who it thought were too liberal and whom it accused of being “judicial activists.” Now that the tables are turned, and the Republicans have the White House and the Democrats control the Senate, Republicans proclaim that ideology should not be considered in the nomination process. This is just plain hypocrisy.

Nor can it be justified, as some have tried to do, by saying that is different now because the Republicans were blocking nominees who “would not uphold the law.” All of the nominees, of both Clinton and Bush, would uphold the law, though they certainly differ in their views about what the law means and requires. Both during the Clinton administration and today, the entire confirmation process centers around the Senate using ideology to reject nominees; during the Clinton presidency, to deny seats on the bench to those whom Republicans perceived as too liberal; now to block those Democrats see as too conservative.

There is no doubt that President Bush is using ideology as an important factor in selecting federal judges. He has nominated for the federal bench very conservative individuals such as Charles Pickering,\textsuperscript{1} Carolyn Kuhl,\textsuperscript{2} Michael McConnell,\textsuperscript{3} Jeffrey Sutton,\textsuperscript{4} and Miguel Estrada.\textsuperscript{5} The President certainly has the power to pick anyone he wishes, and it is perfectly acceptable for him to select those whose views he shares. But there is no doubt that ideology is a key factor considered by the Bush White House in its judicial selections.\textsuperscript{6} The Senate, then, is equally justified in considering ideology and rejecting those whose views it regards as too conservative. Filling the federal bench

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is not an exclusive presidential prerogative; the Constitution obviously requires both presidential appointment and Senate confirmation, and each can and should consider ideology, as well as other factors.

In this essay, I want to make two points, one descriptive and the other normative. Descriptively, I will argue that ideology always has been considered by Presidents and Senates—more or less depending on the times and those in office—in the judicial selection process. I also will offer some thoughts as to why the fights over judicial selection seem to have increased in recent years. Normatively, I will argue that the consideration of ideology, by Presidents and Senates, is desirable.

Throughout this paper, I use the term “ideology” to refer to the views of a judicial candidate which influence his or her likely decisions as a judge. This includes, for example, the individual’s philosophy of judging and constitutional interpretation, such as whether the person would be an originalist or a non-originalist in interpreting the Constitution. Ideology also includes the individual’s views on disputed legal questions, such as current controversies over the right to abortion, affirmative action, the death penalty, and separation of church and state.

The focus of this article is solely on whether ideology is an appropriate consideration in judicial selection process. The article does not consider the separate question of the appropriate procedures in the Senate, such as whether the Senate has a constitutional duty to provide hearings for nominees and, if so, within what time frame. Nor does the article consider whether the current Senate is proceeding more or less quickly than the Republican Senate did during the Clinton years. That is a separate topic for another day.⁸

I. Ideology Always Has Mattered in Judicial Selection

The debate over the place of ideology in the judicial selection process has so far been framed in terms of whether it is appropriate for the United States Senate to consider the views of the prospective judge during the confirmation process. No one seems to deny that it is completely appropriate for the President to consider ideology when making appointments. In fact, they always have done so. Every President has appointed primarily, if not almost exclusively, individuals from the President’s political party. Ever since George Washington, Presidents have looked to ideology when making judicial picks. Some Presidents are more ideological than others; not surprisingly, these Presidents focus more on ideology in their judicial nominations. President Franklin Roosevelt, for example, wanted judges who would uphold his “New Deal” programs and President Ronald Reagan emphasized selecting conservative jurists.

Senates always have done the same, using ideology as a basis for evaluating presidential nominees for the federal bench. Early in American history, President George Washington appointed John Rutledge to be the second Chief Justice of the United States.⁹ Rutledge was impeccably qualified; he already had been confirmed by the Senate as an Associate Justice (although he never actually sat in that capacity) and had even been a delegate to the Constitutional Convention. But the Senate rejected Rutledge for the position as Chief Justice, because of its disagreement with Rutledge’s views on a United States treaty with Great Britain.

During the nineteenth century, the Senate rejected twenty-one presidential nominations for the United States Supreme Court.¹⁰ The vast majority of these individuals were defeated because of Senate disagreement with their ideology.¹¹ Professor Grover Rees explains that “during the nineteenth century only four Supreme Court Justices were rejected on the ground that they lacked the requisite credentials, whereas seventeen were rejected for political or philosophical
reasons.”

During the twentieth century, too, nominees for the Supreme Court were rejected solely because of their ideology. In 1930, a federal court of appeals judge, John Parker, was denied a seat on the high Court because of his anti-labor, anti-civil rights views. In 1969, the Senate rejected United States Court of appeals judge Clement Haynsworth largely because of his anti-union views. The Senate then rejected President Nixon’s next pick for the Supreme Court, Federal Court of Appeals Judge Harold Carswell.

In 1987, the Senate rejected Robert Bork, even though he had impeccable professional qualifications and unquestioned ability. Bork was rejected because of his unduly restrictive views of Constitutional law, for instance, he rejected constitutional protection for a right to privacy, believed freedom of speech was limited only to political expression, and denied protection for women under the Equal Protection Clause. The defeat of Robert Bork was in line with a tradition as old as the republic itself.

Those who contend that ideology should play no role in judicial selection are arguing for a radical change from how the process has worked from the earliest days of the nation. Never has the selection or confirmation process focused solely on whether the candidate has sufficient professional credentials.

There is a widespread sense that the focus on ideology has increased in recent years. Indeed, this symposium and others like it are a response to this concern. There are several explanations for why there is such intense focus on ideology at this point in American history. First, the demise of the general public’s belief in formalism encourages a focus on ideology. People have come to recognize that law is not mechanical, that judges often have great discretion in deciding cases. They realize that how judges rule on questions like abortion, affirmative action, the death penalty, and countless other issues is a reflection of the individual jurist’s views. Bush v. Gore simply reinforced the widespread belief that judges’ political views often determine how they vote in important cases. Thus, Democratic voters want Democratic Senators to block conservative nominees and Republican voters want Republican Senators to block liberal nominees. This creates a political incentive for Senators to do so, and means that they will certainly not risk alienating their core constituency by using ideology in evaluating nominees.

Second, the lack of “party government” in recent years explains the increased focus on ideology. During the last six years of the Clinton presidency, the Senate was controlled by Republicans. During at least the first two years of the current Bush presidency, the Senate has been controlled by Democrats. If the Senate is of the same political party as the President, there will obviously be far fewer fights over judicial nominations. Certainly, confirmation battles are still possible, for instance through filibusters, or if the President lacks support from a faction of his own party. But in general confirmation fights are a product of the Senate and the President being from different political parties.

Finally, confirmation fights occur when there is the perception of deep ideological divisions over issues likely to be decided by the courts. Now, for example, conservatives and liberals deeply disagree over countless issues: the appropriate method of constitutional interpretation; the desirable scope of Congress’s power and the judicial role in limiting it; the content of individual rights, such as privacy. It is widely recognized that the outcome of cases concerning these questions will be determined by who is on the bench. Therefore, Senators know, and voters recognize, that the confirmation process is enormously important in deciding the content of the law. Interest groups on both sides of the ideological divide have strong reasons for making judicial confirmation a high priority, because they know what is at stake in who occupies the federal bench.
II. Ideology Should Be Considered in the Judicial Selection and Confirmation Process

There are many reasons why ideology should be considered in the judicial selection process.

First, most simply and most importantly, ideology should be considered because ideology matters. Judges are not fungible; a person’s ideology influences how he or she will vote on important issues. It is appropriate for an evaluator—be it the President, the Senate, or the voters in states with judicial elections—to pay careful attention to the likely consequences of an individual’s presence on the court.

This seems so obvious as to hardly require elaboration. Imagine that the President appoints someone who turns out to be an active member of the Klu Klux Klan or the American Nazi Party and repeatedly has expressed racist or anti-Semitic views. Assume that the individual has impeccable professional qualifications: a degree from a prestigious university, years of experience in high level legal practice, and a strong record of bar service. Notwithstanding these credentials, I think virtually everyone would agree that the nominee should be rejected. If I am correct in this assumption, then everyone agrees that ideology should matter and the only issue is what views should be a basis for excluding a person from holding judicial office.

On the Supreme Court, the decisions in a large proportion of cases are a product of the judges’ views. The federalism decisions of recent years—limiting the scope of Congress’s power under the commerce clause and section five of the Fourteenth Amendment, reviving the Tenth Amendment as a limit on federal power, and the expansion of sovereign immunity—have almost all been 5-4 rulings reflecting the ideology of the Justices. Beyond the obviously controversial issues like abortion, affirmative action, and the death penalty, virtually all cases about individual liberties and civil rights are a product of who sits on the bench. Criminal procedure cases often require balancing the government’s interests in law enforcement against the rights of individuals; this balancing will reflect the individual Justice’s views. Decisions in statutory cases, too, are a result of the ideology of the Justices. Frequently in statutory civil rights cases, the Court is split exactly along ideological lines.

Obviously this is not limited to the Supreme Court. Every case before the Supreme Court was first decided by the lower federal courts, and ideology matters there just as much. There may be more cases in the lower courts where ideology does not matter in determining outcomes—that is, where regardless of ideology any judge would come to the same conclusion—but that does not deny the large number of cases in which the judge’s views matter greatly. When I talk to a lawyer who is about to have an argument before a federal court of appeals, the first question I always ask is: who is your panel? That is because ideology matters so much in determining the result in so many cases.

Second, the Senate should use ideology precisely because the President uses it. Republicans who today are arguing for the Senate to approve nominations without regard to their views are being disingenuous when the President—from their party—is basing his picks so much on ideology. Under the Constitution, the Senate should not be a rubber-stamp and should not treat judicial selection as a presidential prerogative. The Senate owes no duty of deference to the President and, as explained above, never has shown such deference through American history.

Finally, ideology should be considered because the judicial selection process is the key majoritarian check on an anti-majoritarian institution. Once confirmed, federal judges have life tenure. A crucial democratic check is the process of determining who will hold these appointments. A great deal of constitutional scholarship in
the last quarter-century has focused on what Professor Alexander Bickel termed the "counter-majoritarian difficulty"—the exercise of substantial power by unelected judges who can invalidate the decisions of elected officials. The most significant majoritarian check is at the nomination and confirmation stage. Selection by the President and confirmation by the Senate is a legitimate mechanism of majoritarian control over the composition of the federal courts.

Those who oppose the use of ideology in the judicial selection process must sustain one of two arguments: either that an individual's ideology is unlikely to affect his or her decisions on the bench, or that, even if ideology will influence decisions, it should not be examined because the disadvantages to such consideration will outweigh the benefits.

The former argument—that a person's ideology is unlikely to affect performance in office—is impossible to sustain. Unless one believes in truly mechanistic judging, it is clear that judges possess discretion and that the exercise of discretion is strongly influenced by an individual's ideological beliefs. In cases involving questions of constitutional or statutory interpretation, the language of the document and the intent of the drafters often will be unclear. Judges will have to decide the meaning, and this is going to be a product of their views. Many cases, especially in Constitutional law, require a balancing of interests. The relative weight assigned to the respective claims often turns on the judge's own values. Given the reality of judicial decision-making, it is impossible to claim that a judge's ideology will not affect his or her decisions.

So opposition to considering ideology must be based on the latter argument: that even though ideology matters, it is undesirable for the Senate to consider it. One argument is that considering ideology will undermine judicial independence. Professor Stephen Carter makes this argument: "if a nominee's ideas fall within the very broad range of judicial views that are not radical in any non-trivial sense—and Robert Bork has as much right to that middle ground as any other nominee in recent decades—the Senate enacts a terrible threat to the independence of the judiciary if a substantive review of the nominee's legal theories brings about a rejection."

But Professor Carter never explains why judicial independence requires blindness to ideology during the confirmation or selection of a federal judge. Judicial independence means that a judge should feel free to decide cases according to his or her view of the law and not in response to popular pressure. This is why Article III's assurance of life tenure, and its protection against a reduction in salaries, provide independence. Judges are free to decide each case according to their consciences and best judgment; they need not worry that their rulings will cause them to be ousted from office. Professor Carter never justifies why this is insufficient to protect judicial independence. He subtly shifts the definition of independence from autonomy while in office to autonomy from scrutiny before taking office. But he does not explain why the latter, freedom from evaluation before ascending to the bench, is a prerequisite for judicial independence in the former, far more meaningful sense. In fact, the opposite order makes more sense. It is precisely because the framers of the Constitution's protections for judicial independence understood that judges would be subject to great ideological pressures, that they saw fit to insulate them from expressions of popular resentment. Judicial independence was therefore created by people who understood that judicial ideology matters.

Another argument against considering ideology is that it will deadlock the selection process, with liberals blocking conservatives and vice versa. The reality is that this is a risk only when the Senate and the President are from different political parties. Even then, every Senate—including the Republican Senate during the Clinton years and the Democratic Senate today—has approved a
large number of presidential nominations for the federal bench. There have been times when a number of nominations have been rejected—for instance, the Senate refused to confirm any of President John Tyler’s picks for the Supreme Court, and rejected two nominations in a row by President Nixon. But in over 200 years of history, deadlocks have been rare.

Most importantly, at times like now, when the Senate and the President are controlled by different parties, the solution to deadlocks is in the President’s hands: nominate individuals who are acceptable to the Senate. Presidents will have to select more moderate individuals than if the Senate was controlled by their political party. President Clinton undoubtedly was forced to select more moderate judges because the Senate was controlled by Republicans for the last six years of his presidency. President Bush would be far more successful in getting his nominations through the Senate if he chose less conservative individuals. The President has the prerogative to pick conservatives like Pickering, McConnell, Kuhl, or Estrada, but he should expect resistance in a Democratic Senate that would not be there if Bush selected more moderate nominees.

Finally, some suggest that using ideology is undesirable because it will encourage judges to base their rulings on ideology. The argument is that ideology must hidden from the process so as to limit the likelihood that once on the bench judges will base their decisions on ideology. This argument is based on numerous unsupportable assumptions: it assumes that it is possible for judges to decide cases apart from their views and ideology; that judges don’t already often decide cases because of their views and ideology; that considering ideology in the selection process will somehow increase this tendency. All of these are simply false. Long ago, the Legal Realists exploded the myth of formalistic value-neutral judging. Having the judicial confirmation process recognize the demise of formalism won’t change a thing in how judges behave on the bench.

The argument for considering ideology in judicial selection is simple: people should care about the decisions of the Supreme Court and other federal courts; they affect millions of people’s lives in subtle but profound ways. The ideological composition of the court will determine those decisions, and the appropriate place for majoritarian influences in the judicial process is at the selection stage.

Conclusion

I bring some personal experience to this topic. Twice during the Clinton years, I was under serious consideration for a federal judgeship. Once, the press reported that I was on a list of three names being considered to fill two vacancies on the federal bench. The other two individuals were picked. Another time, I received a call from the White House Counsel’s office that I was being considered for the Ninth Circuit.

In each instance, I was told that I was not selected because the Republican-controlled Senate would find me too liberal and not confirm me. In the latter instance, I was informed that my opposition to Proposition 209, which eliminated affirmative action in California, would likely prevent Republicans from confirming me.

I confess to being disappointed, but not at all surprised; I knew from the outset that ideology always has been a key part of the confirmation process. But now I feel outrage when I hear Republicans say that it is wrong for a Democratic-controlled Senate to look at ideology, when that is exactly what Republicans did for the last six years of the Clinton presidency. If I was too liberal for a Republican Senate, then nominees such as Miguel Estrada, Carolyn Kuhl, Michael McConnell, and Jeffrey Sutton should be regarded as too conservative by a Democratic Senate.

Ultimately, disputes over confirmations are battles over the proper content of the law. This is as it should be, and attention should not be diverted by claims that it is
improper to consider a nominee’s ideological orientation. Of course, ideology should and must be considered in the judicial selection process.

NOTES


3 Professor McConnell was nominated to the Tenth Circuit on May 9, 2001. See David L. Greene & Thomas Healy, Bush Sends Judge List to Senate, Baltimore Sun, May 10, 2001 at 1A.

4 Jeffrey Sutton was nominated to the Sixth Circuit on May 9, 2001. See David G. Savage, Bush Picks 11 for Federal Bench, Los Angeles Times, May 10, 2001 at 1.

5 Judge Estrada was nominated to the District of Columbia Circuit on May 9, 2001. See Neil A. Lewis, Bush Appeals For Peace On His Picks For the Bench, N.Y. Times, May 10, 2001 at A29.


7 Although there is a range of disagreement among “originalists,” the term generally refers to those, generally from the conservative side of the political spectrum, who endeavor to interpret the Constitution on the basis of the framers’ original views. Compare Harry V. Jaffa, Original Intent And The Framers of the Constitution: A Disputed Question(1994) with Robert Bork, The Tempting of America: The Political Seduction of the Law (1990), and Jack Rakove, Original Meanings (1996).


9 Laurence Tribe, God Save This Honorable Court 87, 90-91 (1985).


11 See also Jeffrey K. Tulis, Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court, 47 Case W. Res. 1331 (Summer 1997).

12 Rees, supra note 10.


14 Id. at 77. See also Bob Woodward & Scott Armstrong, The Brethren 56-57 (1979).

15 See id. at 74-75.

16 See Bork, supra note 7 at 95-100.


19 121 S.Ct. 545 (2000).

20 It is ironic that those opposed to the use of ideology in the judicial nomination process rarely comment on the fact that state judges are elected in almost all the states of the union.

21 This is not so ridiculous a proposition. Justice Hugo Black was a member of the KKK. See Gerald T. Dunne, Hugo Black And The Judicial Revolution 71-75 (1977).


23 See, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001) (5-4 decision finding no private cause of action under Title VI of 1964 Civil Rights Act against recipients of federal funds for practices that have discriminatory impact in violation of regulations promulgated under that provision); Circuit City v. Adams, 532 U.S. 105 (2001) (5-4 decision that Federal Arbitration Act requires arbitration of state law employment discrimination claims); Buckhannon Board v. West Virginia Department of Health and Human Services, 532 U.S. 598 (2001) (5-4 decision holding that to be “prevailing party” under attorney fees statute, it is insufficient that plaintiff is catalyst for legislative action).


25 This is a difficult proposition to swallow. If judicial decisions could be made so algorithmically, there would be little reason to have a court, let alone any nomination and confirmation process, to begin with! The decision could be made merely according to a set of written equations, or even by a computer. Moreover, if a judge’s own values did not affect his or her decisions, there would be no reason for judges to recuse themselves from cases giving rise to conflicts of interest.


27 U.S. CONST. art. III § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at
stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office").

28 This is a very old principle. Lord Edward Coke, for instance, one of the most important figures in English legal history, wrote, "Honorable and reverend judges and justices, that do or shall sit in high tribunals and courts or seats of justice...fear not to do right to all, and to delivery your opinions justly according to the laws; for feare is nothing but a betraying of the succors that reason should afford. And if you shall sincerely execute justice, be assured...that though thereby you may offend a great many favourites, yet you shall have the favourable kindnesse of the Almighty...." Quoted in Catherine Drinker Bowen, The Lion And The Throne: The Life of Edward Coke 523 (Atlantic Monthly 1957) (1956). King James I fired Coke as Chief Justice of King's Bench because of Coke's rulings in cases like Dr. Bonham's Case, 8 Co. Rep 113b, 77 Eng. Rep 646 (K.B. 1610), which famously declared that the Court had the power to strike down laws which violated the common law. See Bowen at 314-317, 384-388.

29 Tulis, supra note 11 at 1350.

30 Id. at 1336; Woodward & Armstrong, supra note 14 at 15-16.

31 "Legal realism" refers to a school of thought which sees law as developing not by the discovery of internally operating logical or natural laws, but according to political pressures, experiences, and experiments which result in social structures designed to perpetuate (or to alter) existing sociological or class lines. See Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Harv. L. Rev. 431 (1930). See further N.E.H. Hull, Reconstructing The Origins of Realistic Jurisprudence: A Prequel to The Llewellyn-Pound Exchange over Legal Realism, 1989 Duke L.J. 1302.