

# FOREWORD: THE INTERSECTION OF PERSONAL CONVICTIONS AND FEDERAL JUDICIAL SELECTION

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## I. INTRODUCTION

I am honored to have been asked to write the foreword for the *Drake Law Review* and American Judicature Society's Fifth Annual Symposium issue. The Symposium's focus statement recites, "This Symposium issue will explore the role that personal convictions—including moral values, ethical principles, and religious beliefs—play in federal judicial selection, confirmation, and the decisionmaking of sitting Article III judges." I was requested to share my reflections on going through the confirmation

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process, as well as other relevant views or thoughts. The answer to the question raised by the focus statement should be “very little,” because judges should apply the law as written, not impose their own personal beliefs. Regrettably, however, court decisions indicate that with some judges the answer is just the opposite.

I respectfully suggest that the real issue should be: “How will a judge, or prospective judge, approach constitutional decisionmaking?” Does a nominee or judge view our Constitution as the paramount law of the land, the meaning of which remains constant until changed by the people and the people alone, or does he view our Constitution as a document that changes and evolves over time with judges having the responsibility to determine how and when it has changed? If a judge decides constitutional issues consistent with the implicit language of the Constitution, the intent of our Founders and the wishes of the American people, then the question of a judge’s personal convictions is not nearly so important. As Justice Felix Frankfurter wrote on one occasion, “The highest exercise of judicial duty is to subordinate one’s personal will and one’s private views to the law.”<sup>1</sup>

In recent years, however, some members of the Supreme Court have departed from this approach to constitutional decisionmaking. They have exercised their own independent judgment in determining what offends “the evolving standards of decency that mark the progress of a maturing society” (stated more succinctly, what offends “civilized standards of decency”).<sup>2</sup> Judges who engage in this type of exercise are making political decisions. Not surprisingly, special interest groups now see the confirmation of judges as elections for the highest political offices in the land, with the elections playing out in the United States Senate. As a result, comity and civility in the United States Senate have spiraled to new lows, and the confirmation process has become a bitter, mean-spirited political fight. The personal beliefs of judicial nominees—including their religious convictions—are often made the pivotal issue.

What role did my personal beliefs and convictions play in my nomination and lengthy confirmation fight? When I was interviewed at the White House regarding my nomination to the Fifth Circuit, I was not asked

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1. President Ronald Reagan, Address at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House (Sept. 26, 1986), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 53, 55 (The Federalist Society, 1986).

2. *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

about my religious beliefs, my thoughts on abortion, or my views on any other issue (there was more concern about my age—sixty-four—than my beliefs). However, I was closely questioned as to how I would construe our Constitution. Those conducting the interview sought to determine if I would respect the Constitution as a document that could only be changed and altered by the people. When I appeared before the Democratic-controlled Senate Judiciary Committee, the questions were altogether different. My faith, personal beliefs, and convictions were brought under intense scrutiny, despite the fact that the Constitution specifically provides “no religious Test shall ever be required as a Qualification” to hold any office.<sup>3</sup>

In this Foreword, I will briefly discuss my personal experience and explain why I believe it is extremely bad policy for judges to make judicial decisions based upon their moral values, ethical principles, religious beliefs, or anti-religious biases. I will also recommend solutions. If my suggestions should prevail, the personal feelings of judicial nominees will not be nearly so important.

I fully recognize that my views are shaped in part by the highly partisan confirmation battle that dominated my life for more than four years. I also realize that there are those who will disagree with my thoughts. That is okay—Americans have always disagreed and debated important political issues. That is a byproduct of our freedom and an essential ingredient of self-government. But my sincere hope is that this debate can be conducted with reason and civility.

## II. MY EXPERIENCE

In 1990, President George H.W. Bush nominated me to a district judgeship, and the Democratic-controlled Senate unanimously confirmed me. Coming from private practice with a political background and no judicial experience, the American Bar Association (ABA) gave me its median recommendation of “qualified.” In May 2001, President George W. Bush nominated me to the Fifth Circuit Court of Appeals. Democratic senators refused to consider any nominee not evaluated by the ABA, claiming that the ABA had a better network to evaluate judicial nominees than anyone else, that their judgment was impartial, and that it was the “gold standard” for confirmation. The ABA analyzed my ten-year record on the bench and gave me its highest rating of “well qualified.” In March 2002, on a straight party-line vote, I was bottled up in committee, becoming

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3. U.S. CONST. art. VI, cl. 3.

the first casualty of the Bush appellate nominees. Democratic senators ignored my ABA rating with no explanation, despite the fact that they had demanded the evaluation.

After I was bottled up in committee, Republicans regained control of the Senate in the November elections. In January 2003, President Bush renominated me. In October 2003, I became the fourth Bush appellate nominee with majority support in the Senate to face an unprecedented, and in my view, unconstitutional filibuster.

Why did Democratic senators ignore my ABA evaluation and refuse to give me a vote before the full Senate where I enjoyed majority support?<sup>4</sup> The answer was obvious. Abortion was the issue that drove the engines of opposition. Three times, once as a member of the Platform Committee at the Republican National Convention in 1976, a second time in the Mississippi Senate in the late 1970s, and a third time as President of the Mississippi Baptist Convention in the early 1980s, I had publicly opposed abortion. But as a judge, I had never ruled on an abortion case.

A memo detailing a December 6, 2001, conference call among liberal feminist groups discussed their strategy for fighting my nomination.<sup>5</sup> They wanted to let the Democratic senators know that the abortion issue was non-negotiable.<sup>6</sup> The groups opposing my nomination were not satisfied that I had pledged to follow Supreme Court precedent, nor were they impressed by the ABA evaluation that took into account whether I had followed controlling precedent.

Additionally, those opposing my nomination also attacked me because of my faith. People for the American Way (PFAW) devoted four pages of its report opposing my nomination to allegations I promoted religion from the bench.<sup>7</sup> This was absolutely not true. Their first criticism had nothing to do with my judicial duties.<sup>8</sup> It involved a statement I made as President of the Mississippi Baptist Convention to Mississippi Baptists in

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4. I had the unanimous support of Republicans, the support of the Senate's only Independent, and the support of three Democrats.

5. Audrey Hudson, *Feminist Groups Target Bush Judicial Nominees*, THE WASH. TIMES, Dec. 11, 2001, at A1.

6. *Id.*

7. PEOPLE FOR THE AM. WAY, REPORT OF PEOPLE FOR THE AMERICAN WAY OPPOSING THE CONFIRMATION OF CHARLES W. PICKERING, SR. TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT 20-24 (2002), [http://www.pfaw.org/pfaw/dfiles/file\\_53.pdf](http://www.pfaw.org/pfaw/dfiles/file_53.pdf) [hereinafter PFAW REPORT].

8. *See id.* at 20.

1984, six years before I went on the bench. In that speech, I told Mississippi Baptists that the Bible is the “absolute authority by which all conduct of man is judged.” I challenged Mississippi Baptists to live according to biblical teachings. Thus, PFAW attacked me—not for my actions or words as a judge, but for my remarks as a private citizen and lay leader of a religious organization supporting one of the most basic tenants of Christianity: the authority of scripture.

Further, PFAW criticized me for quoting scripture in an opinion.<sup>9</sup> In a 1995 district court ruling, I wrote, “[o]ne of the oldest recorded code of laws provides: ‘The innocent and the just you shall not put to death, nor shall you acquit the guilty.’”<sup>10</sup> PFAW may not like it, but the Levitical Code of the Old Testament is an ancient code of laws. The book of Exodus has been cited numerous times in Supreme Court decisions by Justices like Earl Warren, Thurgood Marshall, and William Brennan. Considering I was a district judge following Supreme Court precedent, this hardly seems a just criticism.

PFAW also criticized me for encouraging a defendant’s involvement in penitentiary ministries and services that they contended violated the Constitution’s Establishment Clause.<sup>11</sup> During the sentencing of an attorney who pled guilty to child pornography possession, I informed the defendant that “[t]here are many areas of service and ministry that you can engage in in the penitentiary.”<sup>12</sup> I made this suggestion as a result of testimony and statements about the “‘dramatic change’ in the defendant’s ‘religious attitude’ and his ‘relationship to God.’”<sup>13</sup> I did not force religion on this defendant; I merely suggested an avenue for continuing his spiritual growth.<sup>14</sup> But critics claimed these “benign comments” violated the Constitution.<sup>15</sup> This demonstrates the radical nature of the views held by

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9. *Id.* at 23.

10. *Barnes v. Miss. Dep’t of Corrs.*, 907 F. Supp. 972, 981 (S.D. Miss. 1995) (quoting *Exodus* 23:7). I quoted this passage in a habeas case involving a procedural question, not a question of guilt or innocence. I heard the petition many years after the petitioner’s conviction. Congress, subsequent to that case, greatly restricted the time for bringing habeas petitions.

11. CHARLES PICKERING, SR., *SUPREME CHAOS: THE POLITICS OF JUDICIAL CONFIRMATION & THE CULTURE WAR* 87–88 (2005); *see also* PFAW REPORT, *supra* note 7, at 21–22.

12. PICKERING, *supra* note 11, at 87–88.

13. *Id.*

14. *See id.* at 88.

15. *Id.*

those groups opposing my nomination. PFAW was so opposed to faith that they apparently would rather have had criminal defendants never be rehabilitated than to be exposed to religion in any manner, form, or fashion.

Those fighting my nomination were not content to challenge my nomination only on the basis of my opposition to abortion and my faith—they wanted more cover. Despite the fact that I had a good record on race and equal protection—a record of which I am proud—those who were opposing my nomination portrayed me as being insensitive to racial issues and inaccurately caricatured me as a racist. To allow me a chance to respond, Mike Wallace of CBS requested that I sit down with him for a segment on *60 Minutes*, promising that he would show my positive record on race and civil rights.<sup>16</sup> Wallace not only allowed me to speak to my record on civil rights, but he also interviewed the two African-American civil rights attorneys who had appeared before me most frequently, as well as Charles Evers, brother of slain civil rights activist Medgar Evers.<sup>17</sup> The civil rights lawyers effectively defended my record and Charles Evers noted that, in the late 1960s, I testified against Sam Bowers, Imperial Wizard of the White Knights of the Ku Klux Klan, in his murder trial for the firebombing death of civil rights activist Vernon Dahmer. Evers stated that I fought the Ku Klux Klan when it was difficult to do so. Senator Chuck Schumer appeared in the broadcast in opposition to my nomination.<sup>18</sup>

The *60 Minutes* program was so powerful and positive that several members of the Congressional Black Caucus, a group that had opposed my nomination, came to my son, Chip, a member of Congress, and told him that they had done me an injustice and wanted to right the wrong. I knew that those battling my nomination were not about to let that happen. They had invested too much time, energy, and money fighting my nomination and attempting to demonize me to suddenly admit that it was okay to confirm me. A picture can speak louder than a thousand words, and I think the part of the *60 Minutes* presentation that impressed many people was the picture of our daughter, Allison, in a public school with her classmates who were mostly black. I think some members of the Black Caucus realized that, in contrast, few if any of the Senate Democrats who

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16. *60 Minutes: Judge Pickering Denies Racism* (CBS television broadcast Mar. 28, 2004) (abridged transcript), available at <http://www.cbsnews.com/stories/2004/03/25/60minutes/main608667.shtml>.

17. *Id.*

18. *Id.*

condemned me had sent their children to integrated public schools.<sup>19</sup>

Although the *60 Minutes* broadcast was powerful, it did not break the filibuster, and in January 2004, I accepted a recess appointment from the President to the Fifth Circuit.<sup>20</sup> To accept this appointment, I had to give up my lifetime appointment to the district court, knowing that if the Senate adjourned without confirmation to the circuit court, I would be forced to retire.

Under intense pressure from special interest groups, Democratic senators refused to relent on the filibuster of my nomination. As the Senate was winding down in December 2004, I flew back from Washington. While I was en route, Chip, who was the strongest supporter of my confirmation, went to the Senate floor in a last ditch effort to have me confirmed. I think everyone else had given up. Chip requested Majority Leader Bill Frist to make one last effort to bring my nomination to the floor. The Democrats refused. A flight delay in Washington caused me to miss the connecting flight from Memphis to my home. I knew that before the evening was over, I would either be confirmed to the Fifth Circuit, or be retired. Another passenger also missed the same flight. Together we rented a car and began to drive. My cell phone had lost its charge, so on the way home, driving through a thunderstorm on a borrowed cell phone, I learned that I had retired. The next morning I announced my retirement in front of the courthouse where I had served for more than fourteen years. I retrieved my personal belongings from my chambers and once again became a private citizen. My four-year confirmation battle was over, and my judicial services had concluded.

During the next two years, I wrote two books about the experience and the process: first, *Supreme Chaos: The Politics of Judicial Confirmation & the Culture War*;<sup>21</sup> and second, *A Price Too High: The Judiciary in Jeopardy*.<sup>22</sup> I consider each day that I served in the federal

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19. Cf. Thomas Sowell, *Lessons from Iowa*, TOWNHALL, Jan. 21, 2004, [http://www.townhall.com/columnists/ThomasSowell/2004/01/21/lessons\\_from\\_iowa?page=2](http://www.townhall.com/columnists/ThomasSowell/2004/01/21/lessons_from_iowa?page=2) (last visited Apr. 8, 2008) (noting Judge Pickering sent his children to integrated schools, “which is more than most liberal politicians will do, even today”).

20. See Press Release, The White House, President’s Statement on Appointing Judge Charles Pickering to Fifth Circuit Appeals Court (Jan. 16, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040116-19.html>.

21. PICKERING, *supra* note 11.

22. CHARLES PICKERING, SR., *A PRICE TOO HIGH: THE JUDICIARY IN JEOPARDY* (2007). I also co-authored an essay with Bradley S. Clanton, *A Proposal: Codification by Statute of the Judicial Confirmation Process*, 14 WM. & MARY BILL

judiciary a privilege and an honor. But now, as a private citizen, I can speak more freely on the issues confronting the judiciary.

### III. A BAD POLICY

Interpreting our Constitution as a changing, evolving document is extremely bad policy and has transferred all of the hot-button issues of the culture war from the political arena—the election of state legislators, United States congressmen, and senators—to the confirmation of judges, politicizing both the judiciary and the confirmation process. These issues include: abortion in its most extreme forms, partial-birth abortion, and abortion without parental or spousal consent or even notification; references to God in the public arena, in the public square, at public buildings, at ceremonies, within institutions, and even in the Pledge of Allegiance; pornography in its most degrading forms, including child pornography and hardcore pornography; the definition of marriage; and any reference to a supreme being having anything whatsoever to do with creation.

The Supreme Court has repeatedly held that not all rights enjoy constitutional protection, only those that are the most basic and fundamental. Once determined to be constitutionally protected, a right is removed from public debate and shielded from legislative action. I completely agree with those who contend it is the responsibility and duty of judges to protect constitutional rights—those specifically set out in the Constitution—from majoritarian oppression. However, I disagree that judges should interpret the Constitution in such a way that creates rights not enumerated in the Constitution. It has been appropriately said that anarchy by the masses is the cruelest form of tyranny. But tyranny by the elite few is no less oppressive.

Having judges make political decisions through constitutional interpretation is bad policy for three primary reasons. First, it violates separation of powers; second, the judiciary is ill-equipped to make political decisions; and third, it constitutes judicial deviation.

#### A. *Violates Separation of Powers, Checks and Balances*

Our Founders formed our government based on two premises: the

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RTS. J. 807 (2006). Additionally, I wrote an article for *Engage*, a publication of the Federalist Society, entitled *Evaluating Judicial Nominees: Will a Nominee Respect and Protect the Amendment Process and the Right of the People to Participate*, ENGAGE, June 2007, at 132.



value of each individual—"all Men are created equal"—and the imperfection of humanity. The tyrannical rule of King George III instilled in them what Lord Acton would later pen: "Power tends to corrupt and absolute power corrupts absolutely."<sup>23</sup> The Founders carefully limited the authority of each branch. They recognized the necessity for separation of powers and checks and balances between the three branches of government to prevent any branch from wielding excessive power.

When courts strike down legislative enactments, not because they conflict with the language of our Constitution, but because judges personally find the statutes unreasonable and irrational, courts egregiously violate the separation of powers that was so carefully crafted by our Founders and have invaded the province of the executive and legislative branches of government.<sup>24</sup> Determining what is and is not reasonable or rational is a political decision to be made by the legislature, not by the judiciary.

Consider two nations that did not separate the powers of government and did not establish checks and balances. Though near in time, the French Revolution diverged far from our American experience. As one historian observed, "[t]he essential difference between the American Revolution and the French Revolution is that the American Revolution . . . was a religious event, whereas the French Revolution was an anti-religious event."<sup>25</sup> As I described in my book:

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23. F. Engel de Janösi, *The Correspondence Between Lord Acton and Bishop Creighton*, 6 CAMBRIDGE HIST. J. 307, 316 (1940) (quoting Letter from John Emerich Edward Dalberg Acton (Lord Acton), Professor of Modern History at Cambridge, to Bishop Mandell Creighton (Apr. 5, 1887)).

24. *See Plessy v. Ferguson*, 163 U.S. 537, 552, 557–58 (1896) (Harlan, J., dissenting). Justice Harlan reasoned that if the holding of the majority was carried to its logical conclusion, legislatures would be permitted to pass statutes that would be totally unreasonable and illogical. The majority indicated that if this happened, the Court would simply declare such acts unconstitutional. Justice Harlan responded, "I do not understand that the courts have anything to do with policy or expediency of legislation." *Id.* at 558. He wrote:

There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinant and separate. Each must keep within the limits defined by the Constitution.

*Id.*

25. PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 117 (1997).

The French Revolutionists submitted to no faith outside of themselves. They possessed no moral constraints to curb their vengeance, and blood ran like a river through the streets of Paris with Napoleon Bonaparte emerging to devastate Europe. The French Revolutionists established no rule of law, no separation of powers, no checks and balances. Their failure bred a disaster.<sup>26</sup>

Likewise, in 1917, communists led the Bolshevik Revolution in Russia. "Their philosophy espoused materialism and atheism. They rejected the rights of individuals and decried the importance of the human spirit."<sup>27</sup> Their constitution, nevertheless, promised grandiose rights. But these rights did not exist because they did not separate powers of government, did not create a carefully crafted system of checks and balances, nor was there rule of law. The resulting totalitarian regime murdered millions of Soviet citizens.

These examples illustrate the necessity of a clearly established rule of law, separation of powers, and the wisdom of checks and balances among the branches of government. They demonstrate that the structure of governance given to us by our Founders is more important than the Bill of Rights, because without the structure or safeguards, our Bill of Rights is an illusion, not a reality.

### B. *Ill-Equipped*

The fact that legislating from the bench violates separation of powers is not the only flaw with judges misinterpreting our Constitution. Courts have no process for receiving public input, developing a consensus, or compromising issues, as do the other two branches of government. The judiciary is ill-equipped to craft public policy or to make political decisions.

Compare a controversial act adopted by Congress and a controversial decision handed down by the Supreme Court. Congress passed the Civil Rights Act of 1964, which was extremely controversial at the time, but did so only after compromise, broad consensus, and the working of the democratic political process. Within three decades of its passage, we lived in a different America where the vast majority of Americans viewed race-based denials of equal rights as wrong and intolerable. Today, the Civil Rights Act has almost universal acceptance.

Just as many Americans were opposed to the Civil Rights Act in

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26. PICKERING, *supra* note 11, at 20.

27. *Id.*

1964, many Americans opposed abortion in 1973 when the Supreme Court decided *Roe v. Wade*.<sup>28</sup> More than three decades later, abortion divides our nation even more than in 1973. What is the difference between the acceptance of the Civil Rights Act of 1964 and *Roe*? The Civil Rights Act was adopted by the correct political process by the appropriate branch of government. Conversely, the principles established in *Roe* were determined by the wrong branch of government. The issue should have been decided by the constitutionally designated lawmaker, the legislature.

When judges decide they are not bound by the words of the Constitution as understood when adopted, they are assuming that they, better than the American people, can decide what conduct is right and what conduct is wrong. However, judges are ordinary human beings who make mistakes and face the problems of life as do all Americans. Judges are not imbued with any special insight, wisdom, or experience that should enable them to determine what is right and wrong for all other Americans.<sup>29</sup> For one to unilaterally arrogate unto oneself, even in conjunction with four other judges, the power (or to assume that one has the necessary wisdom) to determine what is good for all Americans and change our Constitution accordingly is tremendously presumptuous.

When judges seek to determine “the evolving standards of decency” of a “maturing society,”<sup>30</sup> whose standards of decency are they trying to determine? They certainly are not trying to determine the standards of decency of the average American. Invariably, when judges look outside our Constitution to determine its meaning, they look inside themselves.<sup>31</sup> They determine their own standards of decency and the standards of decency of those with whom they interact. It was just this kind of thinking and philosophy that brought on the American Revolution: someone far off, having little contact with the people, was determining what was best for the American colonies.

We Americans are fortunate that our Founders,

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28. *Roe v. Wade*, 410 U.S. 113 (1973).

29. *See* MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2005).

30. *See* *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

31. Edwin Meese III, Attorney Gen., Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985) (citing ROBERT H. BORK, *TRADITIONS AND MORALITY IN CONSTITUTIONAL LAW* (1984)), *in* *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 31, 38 (The Federalist Society, 1986).

[u]nlike the leaders of England or [ancient] Rome, . . . gave us a written Constitution so we would not be compelled to rely on the sense of justice, or the sense of decency of a particular judge, or even five judges, for our life, liberty, or property. Instead, we could rely on our Constitution as written and ratified by the people through their duly elected representatives.<sup>32</sup>

About the time I graduated from law school, I heard the story of a judge who was hearing arguments in a case. A young lawyer was passionately arguing that the court rule in his favor based on *stare decisis*. The judge leaned forward and asked the lawyer, “But is it right?”

There was a time when I might have thought this was a great question: a judge concerned about what is right [and wrong] rather than the niceties of the law. But who will we give—for the rest of their life and regardless of how they might decide—the power to determine what is right or wrong for America? Will it be a Democrat or a Republican? A conservative or a liberal? Will it be a Christian, someone of the Jewish faith, someone of another belief, or an atheist? Will it be someone from the Christian Coalition, or will it be a member of the ACLU or the People for the American Way? These rhetorical questions answer themselves. We should fight to uphold the principle that we have: “A government of laws and not of men.”<sup>33</sup>

Activist judges who perceive it is their duty to determine when and how our Constitution is changed seek to curb what they perceive to be prejudicial actions of others, or promote what they perceive to be progressive ideas, but what they in actuality are doing is imposing their own biases, predilections, and prejudices on all other Americans.

### C. *Judicial Deviation*

Those of us who believe the Constitution should only be changed or altered through the amendment process have allowed the opposition to frame the debate, and select the terminology. I fear that those in the middle who have not paid close attention, and who are not familiar with constitutional history, sense that they would rather have a “living Constitution” rather than a “dead Constitution”—an “activist judge” rather than an “inactive judge.” We need to rethink the terminology we use. I suggest a more appropriate description, a more accurate definition of the conflict over how our Constitution should be interpreted: “Judicial

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32. PICKERING, *supra* note 11, at 19.

33. *Id.* at 18–19 (quoting MASS. CONST. pt. 1, art. XXX).

Deviation v. Constitutional Restoration.” The dictionary definition of the word deviate is: “to stray [especially] from a standard, principle, or topic.”<sup>34</sup> Interpreting our Constitution as a changing, evolving document deviates from a number of established standards and principles.

First, interpreting our Constitution as an evolving, changing, morphing document deviates from the language and intent of the Constitution. Judges who see our Constitution as a morphing, changing document cannot justify their decisions with the text or original intent of the Constitution. Consequently, they have begun to look to current foreign law to determine the meaning of our Constitution, which was written in 1787. There are more than 190 nations in the world today. Many are egregiously repressive. Other nations are far more liberal than the United States. To properly represent clients, will lawyers now have to research the law of 190 nations, or at least the 120 that have some form of democracy? Which of these nations will we follow? Picking and choosing which foreign laws to follow and which to ignore is a political decision, not a judicial act of interpretation. Besides, we fought the American Revolutionary War so as not to be subject to foreign governance.

The Framers of our Constitution were the most capable group of people ever assembled to draft a political document. If they had intended that the courts should have the power to change or alter the Constitution, they would have said so. If they had, our Constitution would never have been adopted. The American people of the late 1700s were extremely skeptical of excessive power by any branch of government. They would have never approved such an unfettered grant of power to any of the three branches.

Our Constitution, approved by the people, describes a perfectly logical and reasonable method to change or add to our Constitution—the amendment process. The people have agreed to no other.

Second, interpreting our Constitution as a changing, evolving document deviates from the rule of law. The rule of law requires: (1) that what is expected of the citizens of a nation be clearly understood, and (2) known in advance.<sup>35</sup> Interpreting our Constitution as a changing, evolving document violates both of these principles. One cannot clearly understand, nor know in advance, that which has not yet been articulated.

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34. WEBSTER’S NEW COLLEGIATE DICTIONARY 310 (1973).

35. David F. Forte, *The Rule of Law and the Rules of Laws*, 38 CLEV. ST. L. REV. 97, 99 (1990).

Finally, interpreting our Constitution as a morphing, changing document deviates from *Marbury v. Madison*,<sup>36</sup> the precedent and authority that some judges rely upon to change and alter our Constitution. *Marbury* did establish that the Supreme Court will determine the constitutionality of actions of government. But in *Marbury*, the Court exercised considerable restraint, something judges interpreting the Constitution as an evolving document fail to do. In that case, the Constitution gave original jurisdiction to the Supreme Court in only a limited number of instances.<sup>37</sup> Congress added additional cases over which the Supreme Court would have original jurisdiction.<sup>38</sup> The Court declined to inappropriately and unconstitutionally exercise power granted it by Congress, but not given to the Court by the Constitution.<sup>39</sup> Chief Justice John Marshall, writing for the Court, emphatically stated that our greatest improvement to political institutions was our “written Constitution”; that our Constitution came from the supreme authority, “the people”; that our Constitution is “the fundamental and paramount law of the nation”; that our Constitution cannot be changed by “ordinary means”; that courts cannot intrude into matters delegated to the executive; that courts cannot consider “[q]uestions in their nature political”; that the courts as well as the executive and legislative branches are bound by the Constitution; and that if the courts are not bound by the Constitution, it would be “immoral” to require that they take an oath to support the Constitution.<sup>40</sup>

In 1856, a majority of the Supreme Court disregarded the text of the Constitution, ignored facts, held an act of Congress unconstitutional, and ruled that blacks were not citizens and should not have access to the courts.<sup>41</sup> Justice Curtis dissented, appropriately pointing out:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, . . . we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.<sup>42</sup>

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36. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

37. *Id.* at 173–74.

38. *Id.* at 174–75.

39. *Id.* at 175–76.

40. *Id.* at 169–80.

41. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406–07, 452 (1856).

42. *Id.* at 621 (Curtis, J., dissenting).

What is the result of politicizing the judiciary? A September 2005 poll by the American Bar Association revealed that the judiciary is held in lower esteem than at any other time in our history, largely because the judiciary has entered the realm of politics and is oftentimes perceived as legislating, not adjudicating.<sup>43</sup> In a recent study, the Heritage Foundation and the Brookings Institution found that one out of two prospective nominees now declines nomination.<sup>44</sup> Justice Thomas has reported that the brightest and best law graduates are now directing their career paths away from a judicial track.<sup>45</sup> With respect for the judiciary at an all-time low, successful lawyers making far more money than members of the Supreme Court, one out of two prospective nominees saying “no thanks,” and the brightest and best of our law graduates not even willing to enter the starting gate, the likely result will be lackluster nominees with no paper trail to follow. The brain drain from the federal judiciary could be enormous in the not-so-distant future. This should cause alarm to all Americans. A competent and capable judiciary to administer justice is essential for any modern civilized nation. The politicization of the judiciary poses a serious threat to the quality, integrity, independence, and diversity of the federal judiciary.

#### IV. SOLUTIONS

As previously pointed out, my confirmation proceeding was extremely hostile and focused not on my judicial philosophy, but on my personal beliefs and convictions. If we restore civility to the confirmation process, establish a binding procedure for confirming judges, and restore our Constitution, rather than evolve it, we will have gone a long way toward strengthening and depoliticizing the judiciary and deescalating the highly partisan and bitter fighting over confirming federal judges.

##### A. *Returning to Civility*

Judicial nominees began regularly appearing before the Senate Judiciary Committee in 1950,<sup>46</sup> after the advent of television. But it was

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43. Martha Neil, *Half of U.S. Sees “Judicial Activism Crisis”*: ABA Journal Survey Results Surprise Some Legal Experts, A.B.A. J. E-REPORT, Sept. 30, 2005, <http://www.abanet.org/journal/ereport/s30survey.html>.

44. Virginia Thomas, Op-Ed., *A Wake-Up Call*, WALL ST. J., Sept. 5, 2003, at A8.

45. See PICKERING, *supra* note 22, at 229.

46. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 88 (2005).

not until the confirmation hearing on Judge Robert Bork in 1987 that confirmation proceedings became harsh and oppressive.<sup>47</sup> Since that time, the level of acrimony has continued to escalate and expand. It is not necessary to destroy reputations, impugn motives, assail integrity, malign character, or demagogue the race issue in order to properly evaluate how a nominee will interpret our Constitution. A senator should be able to evaluate a nominee and vote her convictions, up or down, without this type of destructive attack. Special interest groups might not make their partisan points without these mean spirited assaults, but the objective should not be partisan advantage—it should be a judiciary with integrity and ability. I fear that if the bitterness and mean-spiritedness of the judicial confirmation process does not diminish, Presidents will be reluctant to nominate the most qualified potential nominees because they have too much of a record to distort. This could have a serious negative impact on the judiciary.

In restoring civility, the nation need only look to her founder. George Washington has long been recognized as the indispensable person in the founding of our nation. The more I study history, the more convinced I am that we would never have come together as one nation without George Washington's presence and involvement. No other individual could have brought the Southern and New England Colonies into one union. Why? I am persuaded that it was not only because of Washington's integrity and ability, but also because of his civility. At age sixteen, he transcribed and committed 110 rules of civility to his behavior.<sup>48</sup> Civility marked the actions and behavior of George Washington. He respected other people, and consequently he was highly respected.

My personal odyssey through confirmation chaos did not reveal a reasoned and rational debate on my qualifications, integrity, or judicial temperament. Opponents mischaracterized statements, maligned my reputation, portrayed court proceedings inaccurately, and used inappropriate racial attacks to obstruct and finally block my confirmation. Two University of Colorado researchers have written there is "an understandable and widespread frustration with the current tenor of political debate. There is a growing realization that our inability to deal with a broad range of problems is largely attributable to the destructive

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47. For Bork's own account of the events following his nomination, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 267–343 (1990).

48. RICHARD BROOKHISER, *FOUNDING FATHER: REDISCOVERING GEORGE WASHINGTON* 127 (1996).



ways in which the issues are being addressed.”<sup>49</sup>

Personal political attacks are not new. In 1954, Senator Joseph McCarthy grilled special counsel for the Army, Joseph Welch, unmercifully. Welch finally responded to McCarthy in those now famous words, “Have you no sense of decency sir, at long last? Have you left no sense of decency?”<sup>50</sup> McCarthy responded that he knew his questions hurt, to which Welch interrupted and replied they did hurt him, but also, “Senator, I think it hurts you, too, sir.”<sup>51</sup> Welch was correct: when we abandon civility, we damage not just others, but ourselves as well. Although personal attacks are not new in politics, the orchestrated efforts of special interest groups have escalated the scope and intensity of these destructive attacks to new levels. The Senate of today, unlike the Senate of the 1950s, is neither willing nor able to take action and address the problem.

Another example of personal attack was the attempt to paint Justice Samuel Alito as a racist and a bigot. Senator Lindsey Graham addressed Justice Alito saying, “[l]et me tell you this, guilt by association is going to drive good men and women away from wanting to sit where you are sitting . . . I am sorry that your family has had to sit here and listen to this.”<sup>52</sup> Martha-Ann, Justice Alito’s wife, left the room in tears. Just like the McCarthy hearings, this moment of awakening shook the American public. Every television network carried the footage of Martha-Ann leaving in tears. Those attacking Justice Alito did not view him as a real flesh-and-blood human being with feelings and pride in his record and reputation. Rather, they saw him as a mere political pawn, dehumanized, and fair game for political attack.

Jim Wright warned against such cannibalism when he resigned as Speaker of the House of Representatives in 1989. Wright proclaimed,

[I]t is grievously hurtful to our society when vilification becomes an accepted form of political debate, when . . . harsh personal attacks on

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49. Guy Burgess & Heidi Burgess, Co-Directors, Conflict Research Consortium, Univ. of Colo., *The Meaning of Civility* (1997), <http://www.colorado.edu/conflict/civility.htm>.

50. 2 ON TRIAL: AMERICAN HISTORY THROUGH COURT PROCEEDINGS AND HEARINGS 136, 150 (Robert Marcus & Anthony Marcus eds., 1998).

51. *Id.*

52. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of The Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 548 (2006) (statement of Sen. Lindsey Graham).

one another's motives, one another's character, drown out the quiet logic of serious debate on important issues. . . . Surely, that's . . . unworthy of our American political process.

All of us in both political parties must resolve to bring this period of mindless cannibalism to an end.<sup>53</sup>

Unfortunately, in America today, there is a premium on boorish behavior. Incivility in government, media, and commerce caters to our lesser nature and becomes a vicious cycle. Restoring civility is the first step in improving the judicial confirmation process.

Before we think that the return to civility is beyond possibility, consider that what we face today in our nation is not unlike the times and climate William Wilberforce faced in Great Britain during the early nineteenth century. He had two great passions: the end of British involvement in the slave trade and the restoration of civility among the British peoples.<sup>54</sup> Wilberforce in his own lifetime succeeded in both missions.

### B. *Repairing the Process*

The procedure for confirming federal judges is broken and in chaos. While it is true that the "Gang of Fourteen" agreement and the confirmation of Justices Roberts and Alito took the confirmation battle out of the headlines and off the front pages of newspapers, the underlying problems have not been addressed. When my nomination became controversial,<sup>55</sup> I was utterly amazed to find that there was no binding process for confirming federal judges.

Confirmation of federal judges in the Senate is based on historical precedent, traditions, and courtesies. Many members of the Senate have

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53. James Wright, Speaker of the House of Representatives, Address to the U.S. House of Representatives (May 31, 1989), in WILLIAM SAFIRE, LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 443, 445 (updated and expanded ed. 2004).

54. STEPHEN TOMKINS, WILLIAM WILBERFORCE 54–62 (2007).

55. For five months, I had no publicly announced opposition, even though a dozen or more of the other Bush appellate nominees were immediately and publicly opposed. It was only after my hearing before the Senate Judiciary Committee that my nomination was opposed. The opposition groups were looking for a vulnerable conservative nominee to send a message to the President, "Don't send us a conservative nominee for the Supreme Court, or this is just a taste of what you can expect." To these groups "conservative" meant one who did not agree with them on abortion.

only the vaguest idea of these traditions, precedents, and courtesies. Every chairman of the Judiciary Committee since the 1960s has interpreted them differently, causing an escalation of the battle and extending an invitation for retaliation.

An essential step toward solving the confirmation problem is to adopt a comprehensive binding procedure that is fair to all Presidents and all nominees, regardless of the political party of the President making the nomination. These binding procedures can be accomplished either by statute or by a standing Senate rule. Such a rule or statute should provide, at a minimum, that nominees be given a timely and respectful hearing. The rule or statute should also require that, within a reasonable period of time, nominees be given an up or down vote before the full Senate. Such a binding process would allow the Senate to exercise its constitutional duty to confirm or reject by majority vote, and it will enable nominees to timely assume their judicial duties, or if not confirmed, get on with their lives.

In order to adopt such a procedure, I realize that senators will have to give up some of their individual power to block a judicial nomination, and I am aware that passage of such a binding procedure will be difficult. But a problem that weakens both the Senate and the judiciary cries out for solution. If statesmen could emerge to produce our Constitution in 1787 with all of the divergent theories and philosophies of government that abounded at that time, certainly statesmen can emerge today to lead us out of the judicial confirmation quagmire. My hope is that there will be those who are more concerned about strengthening our judiciary and protecting its integrity than partisan advantage. Adopting a binding procedure for confirming federal judges will be a huge step toward solving the problems connected with confirmation.

### *C. Restoring Our Constitution*

Returning confirmation to a more civil and respectful proceeding and adopting a binding procedure for confirming federal judges will greatly benefit the confirmation process and the judiciary, but these steps do not address the underlying problem. The main problem causing the confirmation battles—and the problem that is weakening our judiciary—is the question of how our Constitution will be changed. Our Constitution will change over time as America changes. The only question is who will bring about these changes? Will it be the American people through the amendment process, or will it be five judges reacting to their own biases, predilections, and preferences determining what they perceive to be the “standards of decency” of our nation and the entire world?

A changing Constitution, conceived only in the minds of five judges, leaves the American people disillusioned and dismayed that their fundamental and basic law, the Constitution, has been altered and changed, not by their act and will, but by the vision of five Justices who seek to change and mold the Constitution.

Protecting and honoring the amendment process and allowing the people to change the Constitution to meet the needs and understandings of an advancing and more compassionate civilization will assure a healthy Constitution—a Constitution that is strong, robust, and vibrant; a Constitution that is healthy because it grows and changes in a normal manner through a process established and ordained by the Constitution; a Constitution that is strong because it binds all three branches of government; a Constitution that is robust because the people are involved in changing it as they, and they alone, determine it should be changed; and a Constitution that is vibrant because it is respected by the American people as the permanent and paramount law of the land.

From 1789 until 1971, the amendment process was honored. The Constitution was amended twenty-six times for an average of one amendment every seven years (seven times from 1933 to 1971, for an average of once every five years). But, there has been no amendment initiated and adopted in the last thirty-five years—not since *Roe v. Wade*. One finds absolutely no basis in the Constitution for the Court to alter, evolve, or change the Constitution. The only constitutionally-approved method of changing the Constitution is the amendment process.<sup>56</sup>

The amendments adopted by the people through their elected representatives between 1789 and 1971 dealt with hot-button issues. These amendments abolished slavery; guaranteed the privileges and immunities of citizenship, due process, and equal protection of the law to the citizens of all states; provided for the direct election of senators; brought about prohibition and the repeal of prohibition; established the right of women to vote; provided term limits for the President; granted suffrage to the citizens of the District of Columbia in presidential elections; abolished poll taxes; and extended the right to vote to eighteen-year-olds. During this time, our Constitution was healthy, strong, robust, and vibrant. It was the expression of the people's will, remaining so until changed by the people and the people alone.

We do not need judicial deviation. It is counter-productive. What we

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56. See U.S. CONST. art. V.

need is constitutional restoration. Twenty-seven times during our history the American people have restored our Constitution through the amendment process.<sup>57</sup> These amendments revitalized our Constitution, making it strong and healthy, and bringing it up to date. We need to again return to the process of restoring our Constitution only by the process of amendment. To accomplish this, I propose a constitutional amendment that will make the implicit explicit: our Constitution cannot be changed or altered by the courts, only by the people through the amendment process. In the future, courts will interpret our Constitution according to the common understanding of the relevant provision at the time the provision was adopted.

#### V. CONCLUSION

It is incumbent upon each generation to do all it can to strengthen and improve the rule of law. If we can depoliticize the judiciary and return hot-button social issues to the legislative and executive branches of government where they belong, we will have made our contribution to maintaining the rule of law. When that is done, the personal beliefs and convictions of nominees and judges will not be nearly as relevant.

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57. Twenty-six amendments were adopted through 1971. The Twenty-Seventh Amendment, initiated in 1789, was finally ratified in 1992.