

# THE GRAMMAR OF ADVICE AND CONSENT: SENATE CONFIRMATION OF SUPREME COURT NOMINEES

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## I. INTRODUCTION

The constitutional provision for the Senate's advice and consent to Supreme Court appointments is, like many constitutional provisions, "open textured." Unlike other provisions, however, the instruction that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court . . ."<sup>1</sup> has not been interpreted by the Supreme Court nor elaborated in any judicial opinion.<sup>2</sup> Rather, the Senate's interpretation of its advice and consent role in Supreme Court appointments is the sole official source of constitutional interpretation in this area to date.

When a court interprets a constitutional clause, it provides a written opinion, articulating and justifying its interpretation. By contrast, when the Senate is the constitutional interpreter, no "opinion" is issued. This does not mean, however, that no interpretation has taken place. In the course of applying the advice and consent clause, by their justifications and criticisms,

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1. U.S. CONST. art. II, § 2, cl. 2.

2. While it would, theoretically, be possible for the judiciary to rule on a case involving the proper criteria for senators' consent decisions, it is likely that such a case would be dismissed as a "political question." See *Baker v. Carr*, 369 U.S. 186, 217 (1962); Henkin, *Is There a "Political Question Doctrine?"*, 85 YALE L.J. 597 (1976).

the senators articulate over time a set of regulative principles<sup>3</sup>—a “grammar”—governing the application of the advice and consent power.<sup>4</sup> Of course, the senators will not necessarily agree on all aspects of the power’s proper application. And, unlike a court, the Senate need not produce a “majority opinion.” Therefore, no definitive Senate interpretation of the advice and consent power is available.<sup>5</sup> However, regulative principles may be derived from an examination of senators’ justifications and arguments on the subject in general and in specific cases.<sup>6</sup>

This article will attempt to articulate and then evaluate the practice that the Senate has developed to govern criteria for advice and consent decisions.<sup>7</sup> Since established Senate practice in this area is not codified, this ar-

3. These “regulative principles” or “practices” of senatorial decision making are largely analogous to the “disciplining rules” of judicial decision making discussed in Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

4. The obligatory force of established practice is recognized in many areas in which the application of constitutional clauses is reserved to the legislative or executive branch. Practice serves as the norms governing these “non-justiciable” areas. For example, the President is obliged to constrain within the bounds of established practice his or her discretion in conducting foreign policy.

The Senate’s impeachment function is analogous to its advice and consent function in that in each case the Senate is called upon to interpret and apply a clause by which it is empowered to pass on the fitness for office of a member of another co-equal branch of government. Writing on the Senate’s impeachment function, Professor Black has suggested: “We have to divest ourselves of the common misconception that constitutionality is discussable or determinable only in the courts, and that anything is constitutional which a court cannot or will not overturn.” C. BLACK, *IMPEACHMENT: A HANDBOOK* 23-24 (1974).

5. There have been attempts by the Senate to codify the normative principles governing the appropriate criteria for advice and consent decisions regarding Supreme Court nominees. During one such attempt Senator Abourezk commented, “It is our duty, I believe, to propose certain standards which any nominee must meet . . . [W]e can articulate those standards by which every nominee will be measured before our consent is given to his or her appointment.” SENATE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE COMMITTEE ON THE JUDICIARY, 94TH CONG., 2D SESS., *ADVICE AND CONSENT ON SUPREME COURT NOMINATIONS* 3 (Comm. Print 1976).

6. The Senate’s interpretation of the advice and consent power has evolved over time and, presumably, will continue to do so. Therefore, in attempting to articulate the current state of practice in this area, this article will focus on Supreme Court nominations of the twentieth century. For a comprehensive study of Supreme Court nominations up to and including the beginning of this century, see C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (rev. ed. 1935).

7. This article’s approach to study of the advice and consent function is different from previous treatments of the subject. Most of the existing literature on advice and consent to Supreme Court nominations is historical description or political (i.e., partisan) analysis. See, e.g., H. ABRAHAM, *JUSTICES AND PRESIDENTS* 26-29, 39 (2d ed. 1985); J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 8, 18-35, 40-41, 216-37 (1968); Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 660-63 (1970); Grossman & Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, DUKE L.J. 557, 566-68 (1972) [hereinafter Grossman & Wasby, *Reflections*]; Halper, *Senate Rejection of Supreme Court Nominees*, 22 DRAKE L. REV. 102, 109 (1972); Kurland, *The Appointment and Disappointment of Supreme Court Justices*, 1972 L. & SOC. ORD. 183, 198; McHargue, *Sectional Representation on the Supreme Court*, 35 MARQ. L. REV. 13, 23 (1951); Pierce, *A Vacancy on the Supreme*

ticle will derive these Senate conventions from an analysis of senatorial rhetoric on the subject. Section II will present a model of the normative structure of current Senate practice in this area. Six controversial Supreme Court nominations of the twentieth century will serve as case studies illustrating the operation of this model. Section III will discuss the constitutional bases of these Senate practices, and evaluate their desirability.

*The Power of Practice:*

What is remarkable about the process by which the Senate interprets and applies the advice and consent clause is that the Senate has created a system by which it actually shapes (that is, both prescribes and, to some degree, constrains) its own behavior. The Senate's interpretation of this constitutional clause may be compared, to some extent, to judge-made constitutional law. Neither constitutional case law nor Senate practice is absolutely binding. Existing case law can be read narrowly. And there is no specific sanction for a justice who contradicts or overrules existing precedent. Likewise, a senator is ultimately free to violate senatorial conventions governing consent decisions. But both the renegade judge and the renegade senator can be (and likely *will* be) called on to justify to their colleagues and to the public (to constituents, in the case of senators), their behavior taken pursuant to their oaths of office. This accountability may in fact be more powerful in the case of senators than in that of judges; unlike Article III judges, senators who routinely or on crucial occasions fail satisfactorily to justify their behavior can be voted out of office.

The degree to which senatorial rhetoric accurately reflects the views of senators is not knowable (as indeed it is not knowable whether the legal reasoning in a judicial opinion represents the judge's real reasons for reaching a particular result). However, the normative structure governing consent

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Court: *The Politics of Judicial Support*, 39 TENN. L. REV. 555, 574, 577 (1972); Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 635-44, 658-69; Segal & Spaeth, *If a Supreme Court Vacancy Occurs Will the Senate Confirm a Reagan Nominee?*, 69 JUDICATURE 186, 188 (1986). The constitutional or "legal" analyses of the advice and consent function are virtually all of the prescriptive type—making constitutional arguments for a narrow or broad scope of Senate review of nominees. See, e.g., L. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985); Black, *supra* note 1; Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101 (1987); Friedman, *Balance Favoring Restraint*, 9 CARDOZO L. REV. 15 (1987) [hereinafter Friedman, *Balance*]; Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 CARDOZO L. REV. 1 (1983) [hereinafter Friedman, *Transformation*]; Gillers, *The Compelling Case Against Robert H. Bork*, 9 CARDOZO L. REV. 33 (1987); Kutner, *Advice and Dissent: Due Process of the Senate*, 23 DE PAUL L. REV. 658 (1974); McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7 (1970); Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983). See also Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (arguing that a twentieth-century trend toward "transformative" Supreme Court appointments may indicate a need for reform of the procedures for amending the Constitution).

criteria is binding in the sense that, whatever the senators' political motivations in regard to a given nomination, the senators are constrained to present their views regarding confirmation in acceptable terms. Where no acceptable criteria for opposition can be found, opposition may be politically impossible regardless of a senator's desire (for whatever political reasons) to oppose. This constraint is enforced by the senators' refusal to recognize some criteria as relevant to the debate and by their challenging the legitimacy of those criteria if raised.

For example, if a senator wishes to oppose a nomination because the nominee is black, and there are no "acceptable" criteria available as bases for opposition, the senator may be stopped from opposing the nomination. Of course, it is difficult to imagine a nominee who is unassailable on any basis more cogent than race. Nonetheless, if the senator were to fail to present an "acceptable" basis for opposing the black nominee, then his or her opposition would be rejected as illegitimate. Thus, the normative structure governing advice and consent criteria is binding in the sense that it operates as a threshold constraint on senators' confirmation decisions. As Donald Songer has observed, "Senators . . . may be deflected into opposition if they have a specific, salient reason for doing so—for example, if they believe that there is some prospect for tangible benefit from opposition, *and have a nonpolitical rationalization which makes opposition politically safe.*"<sup>8</sup>

Moreover, in order to participate in a confirmation debate, a senator must make legitimate—acceptable even if not persuasive—justificatory arguments. And, if a senator hopes to generate additional votes for or against confirmation in the course of debate (if indeed senatorial debate can actually affect senators' voting decisions), then his or her arguments must be both legitimate *and* persuasive.

Where a senator's "real" reasons for opposition are unacceptable within the normative structure (as in the case of the racist senator), but the nominee is assailable on some other, *acceptable* grounds, those acceptable grounds will be presented as the basis for opposition. This dynamic has been widely noted, and several authors have written about the perceived discrepancy between senators' real and stated criteria for opposition.<sup>9</sup>

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8. Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 LAW & SOC'Y 927, 929 (1979) (emphasis added).

9. See, e.g., Grossman & Wasby, *Haynsworth and Parker: History Does Live Again*, 23 S.C.L. REV. 345, 354 (1971) [hereinafter Grossman & Wasby, *History*] (suggesting that ethics objections to Haynsworth served as a cover for ideologically-based objections); Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 575 (1986) (observing and objecting to a disparity between senators' stated and real criteria); McConnell, *supra* note 7 (suggesting that Brandeis, Haynsworth, and Carswell were each opposed because of their political views, although "fitness" was the publicly-stated reason in each case); Ross, *supra* note 7, at 649-51 (observing that concerns about a nominee's ethics and temperament are often used as a smokescreen to conceal misgivings about the nominee's political positions).

Because senatorial statements made in the course of a confirmation battle may not reflect the senators' real motives for supporting or opposing the nominee, those statements may be challenged as "mere rhetoric." Such rhetoric, however, is far from insignificant. It is senatorial rhetoric that creates, reflects, and reinforces Senate practice and convention governing the legitimacy of criteria for advice and consent decisions. Therefore, this article is not an attempt to reveal what "really" moves the senators to support or oppose any given nominee. It is, rather, an attempt to articulate and evaluate the grammar, the Senate practice, which governs the *process* by which senators may pursue their substantive goals in Supreme Court confirmation processes.

## II. THE HIERARCHY OF CRITERIA ACCEPTABILITY

An examination of the rhetoric of controversial Supreme Court confirmation processes of this century<sup>10</sup> reveals a normative structure that may be conceptualized as a hierarchical system of criteria. This hierarchy, composed of all possible criteria for consent decisions arranged along a continuum from the most acceptable to the least acceptable criteria, is divisible into four categories.

The first and most acceptable category of criteria, "judicial fitness," includes the nominee's intellectual competence, personal and professional ethics, and judicial temperament. The use of criteria from this category is never challenged as inappropriate. By contrast, the fourth and least acceptable category of criteria is the nominee's position on specific "single issues." Accusations of use of inappropriate, "single-issue" criteria are virtually never rebutted by defending the use of such criteria as legitimate but, rather, by denying that those are the criteria being used. Between these two categories (the first and fourth) appear two categories whose acceptability is controversial. The acceptability of the criteria of "theory of judging," the second category, and "substantive interpretation," the third category, is controversial. Use of these criteria is often challenged as inappropriate,<sup>11</sup> and those challenges are usually rebutted by defending the use of such criteria as appropriate.

As one might expect, senators tend to articulate their reasons for con-

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10. The approach of this article, as explained above, is to gain insight into Senate practice governing consent criteria for Supreme Court appointments by examining senators' justificatory speech and argumentation ("rhetoric") on the subject. Of course, in the case of uncontroversial nominations, little argumentation or justificatory speech will have been necessary. Therefore, this article focuses on controversial nominations. The sample of nominations consists of those of Haynsworth, Carswell, Brandeis, Parker, Fortas (as Chief Justice), and Bork.

Although this article focuses on these six cases, the theory presented is also derived from and is consistent with what may be observed in other twentieth-century confirmation processes. See generally H. ABRAHAM, *supra* note 7; J. HARRIS, *supra* note 7; L. TRIBE, *supra* note 7.

11. See, e.g., *infra* part II, § C.



sent decisions in terms of the most acceptable criteria applicable to the nomination in question. It also should be noted that, in many cases, one issue can be framed in terms of several different levels of criteria. For example, a senator who opposes a nominee because the senator expects that the nominee would vote against affirmative action programs for blacks (a Level IV single issue), might reframe that objection in terms of substantive interpretation (Level III), saying that the nominee misinterprets the equal protection clause; or in terms of theory of judging (Level II), saying that the nominee fails to recognize and support the ideal of equality embodied in the Constitution; or perhaps even in terms of judicial temperament (Level I), saying that the nominee is biased against blacks.

This is not to say that the categories of criteria are so malleable as to be meaningless. Senators' freedom to reframe issues in terms of more acceptable criteria is limited by the requirement that their arguments be plausible (and, sometimes, also persuasive)<sup>12</sup> in the terms in which they are presented. For example, if that nominee who is expected to vote against affirmative action has a long history of civil rights activism, it may be impossible to frame opposition in terms of a Level I claim that the nominee is biased against blacks. A Level II claim that the nominee fails to support the constitutional value of equality may also seem somewhat implausible in the case of this civil-rights activist nominee. The Level III claim that the nominee misinterprets the equal protection clause—that the clause, read properly, permits affirmative action—may seem plausible, and, if plausible, may or may not be persuasive to other senators as a basis for opposition. Thus, the categories of criteria, while somewhat malleable, are sufficiently discrete and meaningful that they represent real constraints on criteria for opposition. Both in justifying his or her own vote against confirmation, and also in participating in the debate about confirmation, a senator is constrained by the hierarchy of criteria acceptability.<sup>13</sup>

#### A. *Level I Criteria: Judicial Fitness*

At the "most acceptable" pole of the normative hierarchy, the Level I criteria of judicial competence, ethics, and temperament may be viewed as threshold criteria, widely acknowledged to be necessary, if not sufficient, for confirmation.<sup>14</sup> Level I, judicial fitness criteria are uncontroversially acceptable because they concern the basic qualifications required for successful ju-

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12. See *supra* part I, § A.

13. As David Bryden has observed, "Some say that politics was decisive in the Senate's rejection of Haynsworth and Fortas (for Chief Justice), but it was not the ostensible ground, and here as in life generally the need for plausible hypocrisy serves as a restraint on misconduct." Bryden, *How to Select a Supreme Court Justice*, *THE AMERICAN SCHOLAR* 201, 205 (1988).

14. See Freund, *Appointment of Justices: Some Historical Perspectives*, 101 *HARV. L. REV.* 1146, 1146 (1988).

dicial performance under any mainstream conception of the judicial function.<sup>15</sup> By deciding on the narrow grounds of Level I criteria, senators can avoid the more complex issues involved in the more controversial criteria.<sup>16</sup>

Judge George Harrold Carswell is an example of a Supreme Court nominee who was rejected primarily on Level I grounds.<sup>17</sup> Two major themes formed the basis for opposition to Carswell. The first and primary objection was that Carswell allegedly harbored racial prejudice and allowed such prejudice to affect his behavior as a judge.<sup>18</sup>

Senators opposing confirmation of Carswell made specific efforts to frame their concerns about the race-prejudice issue in terms of a most acceptable criterion, judicial temperament (Level I). For example, explicitly stating that only the most acceptable criteria were being applied, Senator Tydings asserted that:

I have consistently adhered to the position that . . . a man . . . should be confirmed . . . if he has demonstrated a character beyond reproach, professional competency equal to the task set for him, and a proper judicial temperament. By proper judicial temperament, I mean at least the ability to put aside one's own prejudices and biases so as to be able to approach every case with a fair and open mind. . . . Judge Carswell was simply unable or unwilling to divorce his judicial functions from his personal prejudices.<sup>19</sup>

Countering such attempts to frame objections to Judge Carswell's civil rights record in terms of judicial temperament (Level I), senators supporting confirmation reframed the civil rights issue as one of theory of judging (Level II), and then attacked the legitimacy of that criterion:<sup>20</sup>

15. See *infra* note 87.

16. As Professor Carter has observed, "[i]t is plainly quite useful to a senator to be able to explain a vote against a nominee for the Supreme Court on the ground that, whatever one may think of the individual's politics or policies, the nominee was not qualified." Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1186 (1988).

17. Nominated by President Nixon in 1970, Carswell was rejected by a Senate vote of fifty-one to forty-five. *Roll call vote on the Nomination of G. Harrold Carswell to be an Associate Justice of the Supreme Court*, 116 CONG. REC. 10,769 (1970).

18. *Nomination of George Harrold Carswell, of Florida, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 22-23 (1970) [hereinafter *Hearings on Carswell*]; see also SENATE COMM. ON THE JUDICIARY, REPORT ON NOMINATION OF GEORGE HARROLD CARSWELL, EXEC. REPT. NO. 14, 91st Cong., 2d Sess. 30, 69-70 (1970) [hereinafter REPORT ON CARSWELL].

19. REPORT ON CARSWELL, *supra* note 18, at 32-33.

20. The particular way in which civil rights charges have been handled deserves careful examination. Issues regarding the civil rights of blacks may be framed in terms of Level IV single issues (e.g., affirmative action), Level III substantive interpretations (e.g., whether freedom-of-association doctrine condones or condemns segregation), Level II theory of judging (e.g., articulating the constitutional value of equality), or Level I judicial temperament (e.g., bias against black litigants).

In all four of the cases examined in this article in which the nominees' civil rights records were attacked, opponents of confirmation framed their objections as concerns about the nomi-

[Judge Carswell's civil rights] rulings are consistent, not with an anti-civil rights bias, but with a constitutional conservatism . . . [I]t is no part of this committee's role in the confirmation process to insist either that a judge's decisions meet every specification of his detractors, or that he adhere to one particular judicial philosophy.<sup>21</sup>

The second theme in the opposition to Carswell was that he was a mediocre jurist. Senators Tydings, Hart, Kennedy, and Bayh complained that Judge Carswell's "credentials are too meager to justify confirmation"<sup>22</sup> and that "[h]e is—at best—an undistinguished lawyer, a mediocre judge, and an unimpressive thinker."<sup>23</sup> Thus, the opposition to Judge Carswell, based on civil rights charges and competency objections, was presented squarely as Level I opposition.

The supporters of Carswell's confirmation, unable to attack the Level I criteria (temperament and competence) articulated by his opponents, attacked instead the opponents' alleged *unarticulated* use of controversial criteria. The supporters alleged:

Carswell is qualified to take his seat on the Supreme Court on the basis of both temperament and professional ability. Opponents of confirmation, critical of his conservative judicial philosophy, have sought to attack him both for that and for any number of other alleged shortcomings they conceive him to possess. The substance of all of their testimony and proof is that Judge Carswell is a southerner, and a constitutional conservative.<sup>24</sup>

This attempt by supporters of confirmation to attack alleged *unarticulated* use of controversial criteria highlights the unavailability of the Level I criteria that *were* articulated.

Another nominee who was rejected on Level I grounds was Judge Clement F. Haynsworth, Jr.<sup>25</sup> The opposition to Judge Haynsworth was based

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nee's judicial temperament (Level I). In two of those cases, supporters of confirmation responded to the objections by accepting the legitimacy of the criteria, but denying the accuracy of the charges. See *infra* part II, § A (Haynsworth); part II, § B (Parker). In the other two cases, senators supporting confirmation responded to the civil rights charges by reframing the objections as Level III or IV objections and then challenging the legitimacy of the criteria. See *supra* part II, § A (Carswell); *infra* part II, § C. (Bork).

The approaches chosen—denying accuracy or challenging criteria—in defending these nominees against civil rights charges might have been based on the particular circumstances of the cases. Alternatively, one might speculate that, as the civil rights movement changed the consciousness of the nation, denying the accuracy of charges of racism ceased to be a politically viable approach, particularly in cases where there was strong evidence of racism (such as Carswell's 1948 speech stating: "I yield to no man . . . in the firm, vigorous belief in the principles of white supremacy . . . ." *Hearings on Carswell*, *supra* note 18, at 23).

21. REPORT ON CARSWELL, *supra* note 18, at 32-33.

22. *Id.* at 13.

23. *Id.* at 15.

24. *Id.* at 1.

25. Haynsworth, nominated to the Supreme Court by President Nixon, was rejected by a



primarily on charges that Haynsworth had violated canons of judicial ethics by sitting on cases involving corporations in which he had financial interests.<sup>26</sup>

In addition to the ethics charges, Haynsworth's civil rights record also formed a basis for objection.<sup>27</sup> As in the Carswell debate, the civil rights charges were framed as a matter of judicial temperament (Level I).<sup>28</sup> Supporters of confirmation in this case, however, unlike the Carswell case, accepted the legitimacy of the criteria employed, but denied the accuracy of the charges. Thus, the opposition to Haynsworth rested on Level I (ethics and temperament) charges. While the accuracy of those charges was disputed, the acceptability of the Level I criteria went unchallenged.

The opposition to the confirmation of Louis Brandeis also was framed in terms of the most acceptable, Level I criteria of ethics and judicial temperament. But, in this case, the opposition was unsuccessful. After a four-month confirmation battle, Justice Brandeis was confirmed.<sup>29</sup> In the Minority Report on the Brandeis nomination, the opponents of confirmation asserted that:

There were twelve separate and distinct charges made against the nominee affecting his conduct, standing, and reputation as a lawyer and his fitness for the high office for which he had been nominated. In addition to this[,] numerous protests, signed by men of high character, including lawyers and others, based upon the claim that he is unreliable and untrustworthy were submitted to the subcommittee.<sup>30</sup>

Among the "twelve charges" were charges that, while Brandeis was appointed to represent the public in the 1913 Interstate Commerce Commission railroad rate hearings, he joined the railroad companies in asserting that the existing revenues were insufficient, thereby betraying the public interest. It was also charged that after representing the United Shoe Company and defending its manner of doing business, Brandeis subsequently denounced United Shoe as operating illegally and endeavored to secure legisla-

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Senate vote of fifty-five to forty-five. *Roll call vote on the Nomination of Clement F. Haynsworth to be an Associate Justice of the Supreme Court*, 115 CONG. REC. 35,396 (1969).

26. SENATE COMM. ON THE JUDICIARY, REPORT ON THE NOMINATION OF CLEMENT F. HAYNSWORTH, JR., EXEC. REPT. NO. 12, 91st Cong., 1st Sess. 25, 53 (1969) [hereinafter REPORT ON HAYNSWORTH].

27. *Nomination of Clement F. Haynsworth, Jr., of South Carolina, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary, 91st Cong., 1st Sess. 330 (1969) [hereinafter Hearings on Haynsworth].*

28. *Id.* at 330-31.

29. President Wilson announced the nomination of Louis Brandeis on January 28, 1916. The Senate voted forty-seven to twenty-two in favor of confirmation on June 2, 1916. 53 CONG. REC. 9,032 (1916).

30. SENATE COMM. ON THE JUDICIARY, REPORT ON THE NOMINATION OF LOUIS BRANDEIS, SEN. DOC. NO. 409, 64th Cong., 1st Sess. 297-98 (1916) [hereinafter REPORT ON BRANDEIS]. For the full text of the twelve charges, see *id.* at 298-99.

tion against it. His detractors also alleged that Brandeis had advised a client to make an assignment for the benefit of his creditors while Brandeis simultaneously acted as the attorney of one of the client's largest creditors. Charges were also raised that, in the *Glavis-Ballinger* case, Brandeis had appeared for Glavis pretending to act without compensation and in the public interest when he was in fact acting for and in the interest of a private corporation and was paid a fee of \$25,000 for his services.

Senators supporting Brandeis responded to the Level I (ethics) attack both by denying the accuracy of the Level I charges, and by contending that the opposition to Brandeis was really based not on the acceptable Level I criteria which had been put forward but, rather, on unacceptable Level III, substantive interpretation criteria.<sup>31</sup> The Majority Report rebutted each of the Level I accusations;<sup>32</sup> and Senator Walsh asserted that Level III, substantive interpretation concerns formed the real basis of the opposition to Brandeis:

The real crime of which the man is guilty is that he has exposed the inequities of men in high places in our financial system . . . . He has written about and expressed views on "social justice," to which vague term are referred movements and measures to obtain greater security, greater comfort, and better health for the industrial workers—signifying safety devices, factory inspection, sanitary provision, reasonable hours, the abolition of child labor, all of which threaten a reduction of dividends.<sup>33</sup>

Thus, in the Brandeis debate as in the Carswell and Haynsworth debates, the response to a Level I attack was to deny the accuracy of the charges, and/or to challenge the Level I attack as a sham concealing what was really an unacceptable Level II, III, or IV attack. In all three debates, the acceptability of Level I criteria was unchallenged.

#### B. *Level IV Criteria: Single Issues*

Unlike Level I criteria, which are fully acceptable, "single issues" (Level IV) are, by consensus, unacceptable criteria. "Single issue" criteria, although commonly referred to in this manner, are problematic *not* because of the singleness or multiplicity of the issues involved. It is not a question of num-

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31. During the Brandeis confirmation process there was also considerable discussion of the role of antisemitism in the confirmation controversy. (Justice Brandeis was the first Jew to become a justice of the Supreme Court.) Brandeis himself wrote that the dominant reasons for opposition to his confirmation were that he was "considered a radical and [was] a Jew." A.T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 491 (1956).

Nevertheless, as one would expect, whatever influence antisemitism may have had, it was never raised overtly as a basis for opposition. As observed earlier, whatever their real motivations, the senators are nonetheless constrained to present their views in "acceptable" terms.

32. See REPORT ON BRANDEIS, *supra* note 30, at 177-211.

33. *Id.* at 234.

bers. In fact, a senator could plausibly be attacked for basing his or her decisions on any number of "single issues." The real problem with what are called "single issue" criteria is that it is the nominee's predicted vote on the issue (should it come before the Court)—the outcome, the result—rather than the legal reasoning process producing that outcome, which forms the basis for the senator's consent decision. Senatorial application of result-oriented, single issue criteria would undermine the ability of the judiciary to render impartial decisions based on principles of law. Application of single issue criteria would thereby compromise the independence of the judiciary and violate the separation of powers.

Because Judge John J. Parker was rejected<sup>34</sup> largely on a single issue criterion, his case particularly illuminates the normative power of the hierarchy of criteria and its navigation by senators.<sup>35</sup> The single issue on which the opposition to Parker centered concerned the legality of "yellow dog" contracts (employment contracts in which the employee must agree, as a condition of employment, not to be or become a member of a labor union). In *International Organization of United Mineworkers v. Redjacket Co.*,<sup>36</sup> Judge Parker upheld the legality of such contracts. While supporters of the Parker nomination maintained that that decision was simply the application of a precedent set by the Supreme Court in *Hitchman Co. v. Mitchell*,<sup>37</sup> opponents contended that *Hitchman*<sup>38</sup> was clearly distinguishable and that Parker's holding in *Redjacket*<sup>39</sup> reflected Parker's own anti-union bias.

This accusation—that Judge Parker not only took the "wrong" position on this single issue as a matter of public policy, but that as a judge he was *biased* in his rulings on such matters—was a way for the opponents of confirmation to reframe a single issue (Level IV) objection as one of judicial temperament (Level I). By framing the accusation as one based on judicial temperament (fairness and the absence of bias), Parker's opponents defined their complaint as one based upon a most acceptable, Level I criterion, judicial temperament, rather than upon the unacceptable Level IV criterion, single issue positions.

In response to this framing of opposition in terms of Level I criteria, senators supporting confirmation impugned the motives of the opposition, saying that the AFL, the NAACP, and certain senators were attempting to

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34. Nominated by President Hoover in 1930, Parker was rejected by a Senate vote of forty-one to thirty-nine. *Roll call vote on the Nomination of John J. Parker to be an Associate Justice of the Supreme Court*, 72 CONG. REC. 8,487 (1930).

35. Unfortunately, there are no records of the deliberations in the full Committee. Senator Overman introduced a motion to the Committee that Judge Parker be invited to appear to respond to the charges against him. However, that motion was voted down. W. BURRIS, *THE SENATE REJECTS A JUDGE: A STUDY OF THE JOHN J. PARKER CASE* (1962).

36. *International Org. of United Mineworkers v. Redjacket Co.*, 18 F.2d 839 (1927).

37. *Hitchman Co. v. Mitchell*, 245 U.S. 229 (1917).

38. *Id.*

39. *International Org. of United Mineworkers v. Redjacket Co.*, 18 F.2d 839 (1927).

"break down the American judiciary."<sup>40</sup> The pro-Parker senators contended (as has been widely suggested since Parker's defeat) that Parker's rejection was really a rejection of the *laissez faire* decisions of the Court of the 1920s.<sup>41</sup> Thus, the pro-confirmation senators attempted to frame the yellow dog contract issue as a Level IV, single issue, result-oriented criterion and thereby to delegitimize the opposition.<sup>42</sup>

### C. Level II and III Criteria: Theory of Judging and Substantive Interpretations

The criteria of Level II, "theory of judging," and Level III, "substantive interpretations," are of controversial acceptability. Some senators contend that they are acceptable, even obligatory, criteria, while others contend that they are inappropriate. These two distinct levels of criteria are often conflated under the rubric of the term "judicial philosophy." Because this conflation obscures the crux of the controversy surrounding these two levels of criteria, this article will address each separately.

Advocates on both sides of the controversy about Level II (theory of judging) criteria acknowledge that there is a choice of theories of judging available to a justice.<sup>43</sup> These theories have been given a variety of labels, but two common terms for the two main approaches often contrasted in confirmation controversies are "strict constructionism" and "judicial activism."<sup>44</sup>

Because the terms "strict constructionism" and "judicial activism" are

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40. W. BURRIS, *supra* note 35, at 16 (quoting Senator Fess).

41. See, e.g., L. TRIBE, *supra* note 7, at 108-10; Swindler, *The Politics of Advice and Consent*, 56 A.B.A.J. 533, 542 (1970).

42. The other of the two main issues raised in opposition to the confirmation of Judge Parker was his civil rights record. Consistent with the tendency to articulate the most acceptable available criteria for opposition, the civil rights issues were framed as a matter of judicial temperament (Level I)—"dispassion" and the absence of "prejudice." *Nomination of Hon. John H. Parker to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Subcomm. of the Senate Comm. on the Judiciary*, 71st Cong., 2d Sess. 75 (1930). Senators supporting confirmation responded to these charges not by objecting to the (Level I) criteria employed but, rather, by claiming that the evidence presented was insufficient to sustain the charges. *Id.* at 77.

43. As Professor Bator stressed at the Bork hearings, "the mainstream includes both those who would give the Constitution the most expansive interpretation and allow judges to exercise a wide power to redress wrongs and expand rights as they see fit, and those who see a more limited role for the Court, closer to the text and intention of the framers of the Constitution and the Amendments, and who support a larger role for the democratic branches of government." Statement of Paul Bator, *Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., 1475-76 (1987) [hereinafter *Hearings on Bork*].

44. While numerous and subtly differentiated theories of judging have been developed in the jurisprudential literature, see Fiss, *supra* note 3, such refinements are not relevant to the present study, because the discourse surrounding confirmation controversies has generally been at a level of generality at which identification of these two main approaches has sufficed.

loaded, vague, and arguably inaccurate,<sup>45</sup> this article will refer to what has previously been called "strict constructionism" as the "minimalist" theory of judging; and it will refer to what has been called "judicial activism" as the "maximalist" theory of judging. The minimalist theory favors minimal judicial interference with legislative and executive decision making. It leaves to the preferences of the majority (as expressed through the elected branches) all decisions not specifically and affirmatively prohibited by the text or history of the Constitution.<sup>46</sup> By contrast, the maximalist theory of judging favors a distillation by justices of the values embodied in the Constitution, and the articulation and application of those values in a developing constitutional law.<sup>47</sup>

As distinct from theory of judging (Level II), "substantive interpretation" (Level III) is defined in this article as the nominee's interpretation of specific constitutional clauses or doctrines (such as the applicability of the equal protection clause to women as a group, or the existence of a constitutional "right to privacy"). A justice's substantive interpretations are analytically distinct from his or her theory of judging (although the former will be influenced by the latter; maximalists may feel more free, for example, to find "unenumerated" rights in the Bill of Rights). A justice's chosen theory of judging is not by itself determinative of his or her interpretation of particular constitutional clauses. Even minimalist justices, constrained to decide cases solely on the basis of the "text and history of the Constitution," may differ among themselves as to what that text and history indicate with regard to, for example, whether the equal protection clause protects women as a group. And, certainly, maximalist justices, committed to deciding cases based on constitutional text, history and "values," are free to arrive at varying interpretations of what particular constitutional clauses mandate. Thus, while theory of judging and substantive interpretation do interact in the course of judicial decision making, these two functions remain analytically distinct.

An example of a nomination that was opposed primarily on the controversial Level II and III grounds is President Johnson's 1968 nomination of Associate Justice Abe Fortas to be Chief Justice.<sup>48</sup> Pursuing a theory of judging (Level II) attack, senators opposing confirmation voiced strong disapproval of Justice Fortas as a "judicial activist." Senator Eastland asserted: "An examination and analysis of his opinions and decisions as an Associate

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45. In fact, the two terms really are not even properly juxtaposed as opposites: "strict constructionism" describes a mode of legal interpretation, while "judicial activism" describes a (high) level of judicial intervention in majoritarian processes.

46. See Fiss, *supra* note 3, at 743 n.10.

47. *Id.* at 744-63.

48. This nomination was not actually rejected by the Senate. Rather, it was withdrawn by the President in view of strong opposition to the nomination. *Message of Presidential withdrawal noted: Abe Fortas (to be Chief Justice)*, 114 CONG. REC. 29,577 (1968).



Justice clearly demonstrate that his judicial philosophy disqualifies him for this high office. Unfortunately, it is apparent from the nominee's performance as Associate Justice that he has joined ranks with those judicial activists . . . ."<sup>49</sup>

Senators opposing confirmation also voiced disapproval of Justice Fortas' substantive interpretations (Level III). Senators Thurmond and Ervin each made lengthy attacks upon a number of Supreme Court opinions construing the first, fifth, sixth, and fourteenth amendments in which Justice Fortas had joined.<sup>50</sup> For example, Senator Ervin complained that in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*,<sup>51</sup> "the Court stretched the free speech clause of the first amendment further than it has ever been stretched . . . in the history of this Republic."<sup>52</sup> Senator Ervin went on to object to several fifth amendment cases including *Miranda v. Arizona*<sup>53</sup> that, he said, "have seriously handicapped our law enforcement officers in apprehending criminals."<sup>54</sup> Senator Ervin also attacked several sixth amendment right-to-counsel cases in which Justice Fortas had participated, saying, "it is time for the Supreme Court members to realize that society and the victims of crime are just as much entitled to justice as the accused and to stop inventing artificial rules . . . as they did in the *Wade* and the *Gilbert* and the *Stovall* cases."<sup>55</sup> Beginning an attack on a multitude of fourteenth amendment decisions as flawed constitutional interpretations, Senator Ervin contended that "one of the cases that illustrates this the most is the case based—allegedly based—I will put it this way—on the Equal Protection clause of the Fourteenth Amendment—*Harper v. Virginia Board of Elections*."<sup>56</sup>

In addition to the objections to Fortas' theory of judging and substantive interpretations, opponents of the nomination questioned Fortas' judicial ethics. They contended that during his tenure as associate justice, Fortas had acted inappropriately in his interactions with the President. Senator Griffin quoted press statements alleging that Fortas was involved in matters such as advising the President on ways to deal with steel price increases, helping to frame measures to avoid transportation strikes, and advising the

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49. SENATE COMM. ON THE JUDICIARY, REPORT ON THE NOMINATION OF ABE FORTAS, EXEC. REPT. No. 8, 90th Cong., 2d Sess. 18 (1968) [hereinafter REPORT ON FORTAS].

50. *Nomination of Abe Fortas of Tennessee to be Chief Justice of the United States and Nomination of Homer Thornberry of Texas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 107-251 (1968) [hereinafter Hearings on Fortas].*

51. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968).

52. *Hearings on Fortas*, *supra* note 50, at 130.

53. *Miranda v. Arizona*, 384 U.S. 436 (1966).

54. *Hearings on Fortas*, *supra* note 50, at 133-34.

55. *Id.* at 142.

56. *Id.* at 147.

President on foreign policy. Suggestions were also made that Justice Fortas was involved in efforts to secure certain executive and judicial appointments by President Johnson.<sup>57</sup>

An ethics charge was also raised concerning Fortas' accepting a \$15,000 fee for delivering a series of lectures at the American University School of Law while he was an associate justice. The basis of this objection was that the money used to pay Justice Fortas had been donated by wealthy persons who might foreseeably be involved in litigation before the Supreme Court.<sup>58</sup>

These were the only ethics charges raised during the hearings on Fortas' nomination as Chief Justice. The more serious ethics charges that ultimately led to Fortas' resignation were not raised until several months after the confirmation hearings.<sup>59</sup>

A question arises at this point as to why, if senators tend to articulate their reasons for consent decisions in terms of the most acceptable criteria applicable to the nominee, and if Level I (ethics) objections were applicable in the Fortas case, the senators nonetheless employed Level II and Level III criteria to oppose confirmation. The answer to this question appears to lie primarily in the fact that the ethics charges available were not sufficiently serious to ensure defeat of the nomination. Since the Fortas nomination was considered crucial to the political balance of the court,<sup>60</sup> and since the Level I ethics charges were not serious enough to ensure Fortas' defeat, senators opposing confirmation may have considered it necessary to employ the controversial Level II and III criteria in this case.<sup>61</sup>

Another nomination that was opposed primarily on Level II and III grounds was that of Judge Robert H. Bork. The defeat of the Bork nomination by the greatest margin of any Supreme Court nomination ever to come to the Senate floor<sup>62</sup> lends an initial aura of plausibility to suggestions by both supporters<sup>63</sup> and opponents<sup>64</sup> of confirmation that the application of

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57. *Id.* at 147-49.

58. REPORT ON FORTAS, *supra* note 49, at 17.

59. The very serious ethics charges that resulted in Fortas' resignation did not arise until the spring of 1969, during the Nixon presidency, many months after President Johnson had withdrawn his nomination of Justice Fortas to become Chief Justice. It was not until May 6, 1969, that industrialist Louis Wolfson released to government investigators documents indicating that the Wolfson Foundation had agreed to make lifetime payments of \$20,000 per year to Fortas or his widow. (That agreement had been made while Wolfson was under investigation by the Securities and Exchange Commission.) Justice Fortas drafted his letter of resignation on May 14, 1969. See B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 18-20 (1979).

60. See *Hearings on Fortas*, *supra* note 50, at 56.

61. See *infra* note 83.

62. L.A. Times, Oct. 24, 1987, § II, at 8, col. 1.

63. SENATE COMM. ON THE JUDICIARY, REPORT ON THE NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, EXEC. REPT. No. 7, 100th Cong., 1st Sess. 227 (1987) [hereinafter REPORT ON BORK].

64. Heymann & Wertheimer, *Why the United States Senate Should Not Consent to the Nomination of Judge Robert H. Bork to Be a Justice of the Supreme Court*, 9 CARDOZO L. REV.

the Senate's advice and consent power in the Bork confirmation process was fundamentally different from the application of that power to previous nominations. However, while the Bork process may have appeared different from previous confirmation processes, the criteria employed by opponents of Bork's confirmation were those that would be predicted by the hierarchy-of-criteria model.<sup>65</sup>

It was not possible to base successful opposition to Bork on the judicial fitness (Level I) criteria of competence, ethics, and temperament. Bork was widely acknowledged to be acceptable on those dimensions. Since the most acceptable criteria were unavailable as a basis for effective opposition, opposition would have to be framed in terms of more controversial criteria: theory of judging (Level II) or substantive interpretations (Level III). This dynamic was directly acknowledged by supporters of confirmation: "[N]o one seriously questions that Judge Bork is eminently qualified by virtue of his ability, integrity, and experience. Therefore, opponents attacked Judge Bork in other areas, such as his view of the judiciary's role in our democracy."<sup>66</sup>

The emphasis on Bork's theory of judging (Level II) and substantive interpretations (Level III) is clearly reflected in the Judiciary Committee Report delineating the Committee's reasons for recommending against confirmation. The initial five-page section discussing the nominee's background and basic qualifications (Level I)<sup>67</sup> is followed by a twenty-page discussion of his theory of judging (Level II).<sup>68</sup> The major subheadings in this section of the Report are: "Judge Bork's View of the Constitution Disregards This Country's Tradition of Human Dignity, Liberty and Unenumerated Rights"; and "The Theory of Precedent or 'Settled Law' Held by Judge Bork Cannot Transform His Judicial Philosophy Into An Acceptable One for the Supreme Court."<sup>69</sup>

After thus condemning Bork's theory of judging, the Report goes on to discuss "Bork's Position on Leading Matters."<sup>70</sup> These "Leading Matters" consist of Bork's substantive interpretations of specific constitutional clauses and doctrines (Level III). Of the Committee's criticisms of Bork's substantive interpretations, the first concerns Bork's position on the existence of a constitutional right to privacy.<sup>71</sup> The Committee also rejects

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21, 26 (1987).

65. As Senator Kennedy has commented, "a bipartisan majority . . . opposed the nomination, not because the hearings were different from other confirmation hearings, but because Judge Bork's views on questions of individual rights and liberties are inconsistent with our nation's sense of justice." Letter from Senator Kennedy to author (January 20, 1988) (discussing Bork confirmation hearings).

66. REPORT ON BORK, *supra* note 63, at 215.

67. *Id.* at 3-8.

68. *Id.* at 8-28.

69. *Id.* at 8, 21.

70. *Id.* at 30.

71. *Id.* at 30-35.

Judge Bork's previous<sup>72</sup> and current<sup>73</sup> interpretations of the equal protection clause, as regards the protections afforded to women. Judge Bork's interpretations of the first amendment speech clause also are held out as unacceptable for purposes of confirmation.<sup>74</sup>

Another area in which Judge Bork's substantive interpretations were assailed was civil rights: "The committee believes that Judge Bork's unfailing criticism of landmark developments . . . reflect[s] a pronounced hostility to the fundamental role of the Supreme Court in guarding our civil rights."<sup>75</sup> It is interesting to note that the writers of the Committee Report did not choose to frame the civil rights issue as a Level I "bias/temperament" objection. Rather, consistent with the overall approach of the opposition, they implied that Bork's Level I qualifications were not in question but that his substantive interpretations (Level III) were so unacceptable as to preclude confirmation. Not surprisingly, the defense to these charges came in the form of challenges to the very use of the substantive interpretation (Level III) criteria employed by the opposing senators.

Another area in which objections were raised concerned Bork's role in the aftermath of Watergate. The concerns in this area were framed primarily as objections to Bork's view of executive power (substantive interpretation, Level III) and only secondarily as questions regarding his basic commitment to legality in government (ethics, Level I).<sup>76</sup> Consistent with the thrust of the opposition to Bork, which focused on Level II and III concerns, even the Watergate objections, which could easily have been framed in terms of ethics (Level I), were framed primarily in Level III, substantive interpretation terms.

Although the charges of impropriety regarding Bork's actions following the Saturday Night Massacre were serious, Bork's role in those events remained open to varying interpretations. Particularly in light of former Attorney General Richardson's testimony<sup>77</sup> corroborating Bork's testimony on this matter, pro-Bork senators were able to conclude that "what emerged . . . is an even clearer picture of a courageous and principled man."<sup>78</sup> Even the senators who opposed Bork equivocated regarding Bork's culpability. The report concluded: "The Evidence and Testimony on Certain Factual Matters are Contradictory but at a Minimum They Establish That Judge Bork's Actions Immediately Following the Saturday Night Massacre Reveal a Misunderstanding of the Separation of Powers."<sup>79</sup> The ambiguity regard-

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72. *Id.* at 45.

73. *Id.* at 46.

74. *Id.* at 56.

75. *Id.* at 36.

76. *Id.* at 66.

77. *Hearings on Bork, supra* note 43, at 1646-83.

78. *REPORT ON BORK, supra* note 63, at 303.

79. *Id.* at 68.

ing Bork's culpability in this matter almost certainly contributed to the senators' hesitancy to frame this as a Level I ethics issue, or to make the issue a main basis of opposition.

The only other allegation regarding ethics that was made during the confirmation process concerned Judge Bork's actions in *Vander Jagt v. O'Neill*.<sup>80</sup> These ethics charges arose from suggestions made by Judge Bork's colleague, Senior United States District Judge James F. Gordon, that Judge Bork had attempted to circumvent the established District of Columbia Circuit Court procedures for promulgating opinions in order to have his view of the *Vander Jagt* case become the majority opinion of the court when, in fact, it was the minority opinion.<sup>81</sup>

Even while this matter was presented as one that should cause serious concern, the objections were phrased not so much to suggest that Judge Bork was unethical (Level I), but rather to suggest that his actions showed him to be an ideological zealot, willing to sacrifice judicial etiquette, the rights of litigants, and basic forthrightness to advance his "judicial philosophy" (Levels II and III).<sup>82</sup> Again—a judicial ethics charge was framed as a "judicial philosophy" charge thus employing the charge as evidence in the Level II and III attack, rather than wasting the charge by employing it solely as a Level I objection (since it was essentially conceded that Bork was acceptable by Level I criteria).<sup>83</sup>

Thus the opposition to the Bork nomination was based predominantly on Level II and III criteria.<sup>84</sup> Predictably, much of the defense of Judge

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80. *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983).

81. REPORT ON BORK, *supra* note 63, at 226-27.

82. See *id.* at 81.

83. It is frequently observed that "ideological considerations" (Level II and III criteria) will be particularly salient in confirmation battles where the vacant seat is viewed as a "swing vote" crucial to the political balance of the Court. See, e.g., L. TRIBE, *supra* note 7, at 128-51; Dworkin, *supra* note 7, at 102; Grossman & Wasby, *Reflections*, *supra* note 7, at 557.

This observation is borne out by the cases examined in this article. In both the Fortas and the Bork cases, the vacant seat was considered crucial to the balance of the Court. In each of those cases the senators were forthright in identifying their concerns with the balance of the Court. For example, objecting to the "ideological" impact of the Fortas nomination, Senator Griffin complained, "[i]n the past, other Presidents . . . have been . . . somewhat concerned about maintaining some degree of political balance on the Court . . . ." *Hearings on Fortas*, *supra* note 50, at 56. And Senator Metzenbaum, in his opening statement at the Bork hearings, warned that "the confirmation of this nominee is likely to tip the Court radically on key constitutional issues." *Hearings on Bork*, *supra* note 43, at 28.

Both Bork and Fortas were overtly opposed on Level II and III grounds, even though there were Level I (ethical) issues also raised. This willingness by senators to oppose on the more controversial grounds may be attributable in large part to the fact that in each case a pitched battle over a "swing vote" was anticipated, and the Level I charges were not considered either sufficiently serious (in the Fortas case), see *supra* text accompanying notes 57-61, or sufficiently conclusive (in the Bork case), see *supra* text accompanying notes 76-83, to ensure defeat.

84. Although Bork was not heavily criticized on the Level I criterion of "judicial temperament" in the customary sense of that term (impartiality and the absence of bias), Bork's tem-



Bork took the form of challenging the acceptability of those controversial criteria. Even after Judge Bork's defeat, his supporters complained that:

Judge Bork is unquestionably a man who possesses high intelligence, integrity, professional competence and judicial temperament . . . Ordinarily, this should put an end to any debate about Judge Bork's fitness to serve on the Supreme Court. However, politics and philosophical considerations were emphasized during the consideration of this nomination.<sup>85</sup>

### III. THE CONSTITUTIONAL BASIS OF THE HIERARCHY OF CRITERIA

The foregoing examination of six controversial Supreme Court nominations of the twentieth century illustrates the operation of a normative structure of Senate practice governing criteria for advice and consent decisions. Less binding than statute, but more binding than custom, these established Senate practices shape not only the senators' discourse about confirmations, but also their actual decisions about whether and on what grounds to oppose a given nominee. Central to this normative structure is the hierarchical system of criteria acceptability.

The hierarchical system of criteria acceptability follows from the constitutional provisions that structure the process of appointments to an independent, principle-oriented, countermajoritarian judiciary in a way that requires the consent of an elected, representative, majoritarian body. Senators' views about the proper role of the judiciary inform their positions on the relevance and propriety of each category of criteria.<sup>86</sup>

A foundational precept of the constitutional role of an independent judiciary is that judges must render decisions based on the rigorous and consistent application of principles, not their personal preferences, much less their bias.<sup>87</sup> The pervasive agreement about this foundational precept underlies and is reflected in the broad consensus that Level I criteria (competence, ethics, and judicial temperament) are acceptable, indeed obligatory, criteria for consent decisions. Competence in legal reasoning, high ethical

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perament, in a more general sense, did come under attack. There were numerous comments to the effect that Judge Bork was lacking in basic compassion and in commitment to human rights and to principles of basic fairness. See, e.g., REPORT ON BORK; *supra* note 63, at 44.

Questions as to Judge Bork's temperament, in the sense of his personal and ideological stability, were also raised. Several senators used the term "confirmation conversion" to refer to Bork's dramatic post-nomination change in position on several constitutional issues. See, e.g., *id.* at 194, 211.

85. *Id.* at 226.

86. See Beiser, *The Haynsworth Affair Reconsidered: The Significance of Conflicting Perceptions of the Judicial Role*, 23 VAND. L. REV. 263, 267-72 (1970); Gewirtz, *Senators Should Use Activist Approach in Judging Nominees*, Legal Times, Aug. 10, 1987, at 18.

87. See Fiss, *supra* note 3. But cf. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (presenting a contrary view consistent with critical legal theory).

standards, and unbiased, judicious temperament are prerequisite to the consistent rendering of rigorously reasoned and principled decisions of law.

The same precept, that the essence of the judicial function is to render decisions based on principles, underlies the broad consensus that Level IV ("single issue," result-oriented) criteria are unacceptable. Because of the principle-based nature of the judicial function, a judicial nominee must be evaluated on the basis of the anticipated process of his or her application of principles, regardless of whether that process will produce a senator's preferred outcome in any particular case.

This duty to uphold principles rather than the preferences of the body politic forms the basis of the legitimacy of the "countermajoritarian" judiciary.<sup>88</sup> For senators to demand that the judiciary *not* do its constitutional duty to render decisions based on principle, but rather act as an agent of the legislature furthering particular preferences, and for senators to enforce this demand by the threat or reality of nonconfirmation, would subvert the independence of the judiciary and violate the constitutional requirements of separation of powers.<sup>89</sup>

In addition, a justice committing him or herself to a particular outcome on an issue likely to come before the Court would obstruct that justice's impartial consideration of the arguments presented by the parties when the issue was subsequently litigated.<sup>90</sup> For these reasons, senators and academics on both sides of the debate about consent criteria, including those advocating a very broad scope of Senate review, join in the consensus that predicted judicial behavior with regard to particular single issues (Level IV) is an inappropriate criterion for advice and consent decisions.<sup>91</sup>

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88. See Fiss, *supra* note 3.

89. Senator Mathias has asserted that "[a] judge must take his seat on the bench confident that he is not expected to decide cases in any particular way because of the views of the leaders of either of the other two branches. Instead, he must emerge from the nomination process knowing that the President and Senate have confidence that he will preside with only one unalterable loyalty, to the Constitution, and with only one purpose, to assure the individual standing before him a judgment based upon the law of the land." Mathias, *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 204 (1987).

90. Another way to frame an objection to single issue criteria is to state that, if the judiciary is to maintain its independence, justices cannot be confirmed for the purpose of fulfilling senators' political agendas. This reasoning, however, is flawed in that it does not take into account the likelihood that confirmations will still be made in accordance with a "political agenda"—the President's—if the Senate defers.

Yet another reason put forth for the unacceptability of single-issue criteria is that, if single issues were to be considered, it would be impossible ever to confirm any nominee because the senators would never reach a consensus on the specific issues. See Friedman, *Balance*, *supra* note 7. This argument, however, can probably be dismissed on the ground that it should be no more or less difficult for the Senate to take positive action on single-issue bases in its advice and consent role than in its legislative role.

91. This consensus is so well established that its constitutional basis is often assumed rather than articulated. See, e.g., REPORT ON BORK, *supra* note 63, at 195; L. TRIBE, *supra* note

The consensus about the precept that courts must render decisions based on legal principles is reflected in the consensus about the acceptability of Level I criteria and the unacceptability of Level IV criteria. By the same token, the controversy surrounding the conflicting theories of judging and conflicting substantive interpretations is reflected in the controversy about the relevance and propriety of Level II and III criteria.

Maximalist senators favor consideration of a nominee's theory of judging (Level II) because, they maintain, a willingness to distill and articulate constitutional values is an important part of a justice's role. Moreover, maximalists contend that, since the constitutional values that will be perceived, distilled, and articulated by the justices are not predetermined by the text or history of the Constitution, there is good reason for senators to inquire into the sorts of values that the nominee would be likely to articulate in order that the majority might assert its value preferences in the confirmation process.<sup>92</sup>

By contrast, minimalist senators have at times attempted to deny that they too apply Level II criteria. Such denials have generally rested on the argument that it is not appropriate to look beyond Level I criteria to scrutinize a nominee's "judicial philosophy" (which term is used ambiguously to refer to both Level II and Level III criteria) because a minimalist justice will exercise virtually no discretion in his or her near-mechanistic application of the specifically enumerated requirements of the Constitution. Therefore, after confirmation the majority-rule democratic process will proceed with only minimal (non-discretionary) intervention by the minimalist justice.<sup>93</sup>

Clearly, this is only an argument against scrutinizing the substantive interpretations (Level III) of minimalist nominees. Obviously, minimalism

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7, at 116-17; McKay, *Selection of United States Supreme Court Justices*, 9 U. KAN. L. REV. 109, 131 (1960); Ross, *supra* note 7, at 679.

92. Professor Henry Monaghan has also expressed this view, saying: "the Senate's role in the appointment of Supreme Court judges is properly viewed as largely 'political' in the broadest sense of the term . . . . [T]he political nature of the Senate's role, like that of the President, helps ameliorate the 'countermajoritarian difficulty': by increasing the likelihood that Supreme Court judges will hold views not too different from those of the people's representatives, the Senate can reduce the tension between the institution of judicial review and democratic government." Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1203 (1988) (citation omitted).

93. Reflecting this line of argument, Friedman proposes that ability, temperament, and integrity (Level I criteria) should be the only criteria employed by senators—with an additional criterion to be employed in exceptional cases to exclude a nominee with views that are regarded as so repugnant that harm would be done by the very airing of such views through the voice of the Supreme Court. See Friedman, *Balance*, *supra* note 7. In addition to this policy argument, Friedman also argues for a narrow scope of Senate review based on historical analysis. See Friedman, *Transformation*, *supra* note 7.

Another proponent of narrow review, A.M. McConnell, contends that philosophy and ideology are appropriate considerations for a President in making a nomination, but that for the Senate to include philosophy or ideology when "codifying a test for confirmation" degrades the Court and dilutes executive authority. See McConnell, *supra* note 7, at 23, 32.

advocates would have to scrutinize a nominee's theory of judging (Level II)—as they did in the case of Fortas, but then they claimed was inappropriate to do in the case of Bork—in order to determine whether the nominee *was* a judicial minimalist.<sup>94</sup> Only if the nominee were found to be a judicial minimalist would the foregoing argument for narrow review apply. If, on the other hand, the nominee were found to be a maximalist, then minimalism advocates would, as in the Fortas case, accuse him or her of "judicial activism" as a Level II basis for opposition in itself.

Thus, both maximalist and minimalist senators do consider theory of judging (Level II) in their advice and consent decisions, although their underlying rationales for doing so differ. For maximalist senators, a maximalist theory of judging as well as the content of the values the nominee is likely to articulate would be important criteria for advice and consent decisions. For minimalist senators, who believe that judicial maximalism is to be guarded against, a minimalist theory of judging would be an important criterion for consent decisions. Thus, while the two sides have different rationales for scrutinizing the nominee's theory of judging (Level II), both maximalist and minimalist senators apply Level II criteria in advice and consent decisions.

In addition to favoring Level II scrutiny, maximalism advocates also favor consideration of a nominee's substantive interpretations (Level III). This is so because, given a maximalist judiciary, future implementation of majority preferences will be circumscribed not only by the Constitution's text and legislative history, but also by the substantially discretionary substantive interpretations of the Court. This theme—that, since the Supreme Court is at least in part a law-making institution, it is only reasonable for the Senate to consider what sorts of law a given nominee would be likely to make—is the basis of most of the academic arguments supporting broad (that is, Level II and III) Senate review of nominees.<sup>95</sup>

In contrast, minimalism advocates contend that consideration of sub-

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94. The ambiguous use of the term "judicial philosophy" to refer to both theory of judging (Level II) and substantive interpretations (Level III) obscures this dynamic since, after establishing that the nominee is a judicial minimalist, supporters say not that it would be inappropriate to go on to consider the nominee's substantive interpretations (Level III) but, rather, announce that "judicial philosophy" should not be considered.

95. See, e.g., L. TRIBE, *supra* note 7, at 113-21 (arguing that since "strict constructionism is a myth," and since the vote of one justice *can* make a difference, and since it is possible roughly to predict a justice's future voting behavior, it is both acceptable and incumbent upon Senators to take a nominee's views into consideration, particularly as those views will affect the balance of the Court in the context of the existing balance at the time of the nomination); Black, *supra* note 7, at 657 (contending that "a senator . . . ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court . . ."); Kurland, *supra* note 7, at 203 (arguing that the Senate has a duty to go beyond threshold considerations of ability and ethics in deciding whom to confirm to "engage in the governance of this country"); Rees, *supra* note 7, at 966 (observing that the more the Court's role is viewed as policy-making, the weaker are objections to "overtly political judicial selection").

stantive interpretation (Level III) is an inappropriate criterion because judges are supposed essentially to "find" rather than "make" law, and so their substantive interpretations should be nondiscretionary.<sup>96</sup> The problem with this minimalist argument is that, as noted earlier, a justice's theory of judging is not by itself determinative of his or her interpretation of particular constitutional clauses.<sup>97</sup> Even minimalist justices may differ in their substantive interpretations of particular areas of constitutional text and history such as, for example, what degree of protection the fourteenth amendment affords to women.

Thus, the flaw in the minimalist argument against application of substantive interpretation (Level III) criteria is that it rests on the false premise that application of a minimalist theory of judging (Level II) will result in a determinate interpretation of law in any given case. It may be true that if the one "perfect" methodology of judging were discovered and applied, this methodology would render the one perfect interpretation of law in each case, and that this interpretation would be determinate, predictable, and replicable—like a chemistry experiment. It is true that if such a perfect methodology were known, then inquiry into nominees' substantive interpretations would be superfluous and inappropriate. In such a case the sole question would be: "How well will this nominee apply 'the method?'" But in reality we have yet to discover such a judicial methodology; and therein lies the flaw in the minimalist argument against Level III criteria.

In reality there is indeterminacy in the substantive legal interpretations that will be rendered by competent justices applying the best available judicial methods. Each justice fills the interstices in constitutional law with his or her own substantive interpretations of the relevant clauses. This is *not* to say that the justice applies his or her personal preferences; the process remains one of applying legal principles to the facts of the case. But in those interstitial areas of law about which reasonable justices can disagree, each justice's own substantive interpretations will be applied. Insofar as the nominee's substantive interpretations will thus be relevant to his or her per-

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96. However, advocates of minimalism will make "exceptions" in cases of maximalist nominees on the basis that *those nominees will*, if confirmed, "make" law and exercise broad discretion and that consideration of substantive interpretations is therefore relevant in their cases. Minimalism advocates imply that the *proper* senate role would be to consider only Level I criteria, but that, because of aberrational exercise of judicial power by activist justices, the senators are forced to apply aberrational (Level II and III) criteria in advice and consent decisions. As Senator Thurmond argued:

Ideally, the Supreme Court is thought to be removed and insulated from politics, and if the members of the Court had wished it, the Court would still be nonpolitical in its function. However, in the last decade and a half, the Court has made so many decisions affecting the lives of the American people in very fundamental ways that it would seem to me that the Senate, as representatives of the people, is entitled to consider these views . . . .

Hearings on Fortas, *supra* note 50, at 180.

97. See *supra* Part II, § C.



formance as a justice, those substantive interpretations (Level III) must also be relevant and appropriate criteria for senators to consider in making advice and consent decisions.

One might object at this point that senatorial consideration of Level III, substantive interpretation criteria would be result-oriented and therefore subject to the same objections that make Level IV, single issue criteria unacceptable. However, in reexamining the objections to Level IV criteria, it becomes clear that those objections do not apply to Level III criteria.

The three main objections to Level IV criteria were summarized above.<sup>98</sup> The first objection was that consideration of Level IV, single issue criteria would undermine the paramountcy of principle over preference in the judicial process.<sup>99</sup> This objection would not apply to Level III criteria. Quite the reverse, the Level III inquiry is precisely an inquiry into what principles the nominee would be likely to apply in those areas in which the law is less than fully determinate.

The second objection to Level IV criteria was that consideration of Level IV, single issues would compromise the independence of the judiciary by making the justices responsive to the public.<sup>100</sup> This objection would not apply to Level III criteria because the substantive interpretations presented by a nominee at his or her confirmation hearings would represent nothing more or less than the principles that the nominee had derived from his or her best legal reasoning to date. There would be no inconsistency in a justice changing his or her substantive interpretations in light of a more persuasive line of reasoning. A justice would be expected to remain open to changing his or her substantive interpretations in a given area in response to reasoned arguments, regardless of public preference. Nonetheless, this potential for the justice to change and develop his or her substantive interpretations would not render the Level III inquiry useless. While it would be expected that a justice would remain open in his or her legal reasoning, it is nevertheless unlikely that, after confirmation, a justice's legal reasoning would undergo dramatic transformations affecting his or her interpretation of numerous constitutional provisions.

The third objection to Level IV criteria was that a justice committing him or herself to a particular outcome on an issue likely to come before the Court would hinder that Justice's impartial consideration of the parties' arguments when the issue was subsequently litigated.<sup>101</sup> Like the first and second objections to Level IV criteria, this third objection would not apply to Level III criteria. The crucial difference between Level IV and Level III criteria, with respect to a justice's subsequent impartiality, is that the Level III inquiry into substantive interpretation asks what interpretations of

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98. See *supra* Part III.

99. *Id.*

100. *Id.*

101. *Id.*

law—that is, what legal principles, what line of reasoning—the nominee is likely to apply; whereas the Level IV inquiry into single-issue positions asks what the result or outcome will be on a given issue. While a justice committed to a particular outcome could not, by definition, be impartial, a justice prepared to apply his or her best interpretations of law, without bias, would indeed be impartial.

Thus, the objections to single issue (Level IV) criteria are inapplicable to substantive interpretation (Level III) criteria. And the minimalist argument against substantive interpretation (Level III) criteria—that judges are supposed to find rather than make law—is flawed in that it falsely assumes that the application of a minimalist methodology of judging (Level II) will result in determinate substantive interpretations (Level III). The main objections to Level III criteria are thus shown to be either inapplicable or inaccurate. Therefore, given that there are no dispositive objections to Level III inquiry, and that “[t]he confirmation process is the last chance to affect the least accountable branch of government,”<sup>102</sup> it would seem appropriate for senators to consider the substantive interpretations of nominees.

#### IV. CONCLUSION

The Senate is to date, and will probably remain, the final interpreter of the advice and consent clause. In the course of interpreting and applying this clause in the context of Supreme Court nominations, the Senate has developed a grammar of criteria for advice and consent to Supreme Court appointments. The established acceptability of judicial fitness (Level I) criteria and unacceptability of single issue (Level IV) criteria reflects the established precept that it is the role of the judiciary to render unbiased decisions based on principles of law. By the same token, the controversiality of the criteria of theory of judging (Level II) and substantive interpretation (Level III) reflects the controversy about maximalist and minimalist theories of the judicial function. Whatever the merits of the opposing viewpoints in that controversy, it can be seen that the issues turn on the differing conceptions of the role of the Supreme Court in American society. Consequently, the acceptability of Level II and III criteria may be expected to vary as conceptions of the Court's role shift over time.

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102. Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213 (1988).

