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Judicial Ideology and the Survival of the Rule of Law:

A Field Guide to the Current Political War over the Judiciary

*Stephen B. Presser**

I. SHOULD JUDGES BE LEGISLATORS? THE BASIC PROBLEM

While virtually the entire legal academy has eschewed the notion for some time,¹ one can still find those outside academia who claim that

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1. For but a single example of the current belief in the legal academy, see Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. PITT. L. REV. 545, 547 (2004), who begins his piece by flatly declaring: "Judges make law." He supports this assertion with his impressive footnote 4:

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1–9 (1980); Aharon Barak, *Foreward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 62 (2002) ("Judges make law, and the public should know that they do."); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 315 (1997) ("[C]ourts do make laws (or, if you prefer, rules) that govern us[.]"); Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 639 (2003) ("As virtually every political scientist who studies courts asserts, and as discussed at length in our book, courts make public policy."); Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 684 (1986) (reviewing BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* (1985)) (noting that "the words of a[] [judicial] opinion take on a canonical role not unlike that played by the words in a statute").

Id. at 547 n.4. This attitude on the part of the legal academy probably dates back to the time that Oliver Wendell Holmes, Jr. claimed in 1881 that the judicial role was essentially a legislative one. That was the theme of Holmes' masterpiece, OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (43rd prtg., Little, Brown, & Co. 1949) (1881). See also *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate . . ."). It was certainly firmly established in some academic quarters by the time Holmes' hint was picked up and amplified in JEROME FRANK, *LAW AND THE MODERN MIND*

ours “is a government of laws, not men.”² The assertion that courts follow the law and do not make it up as they go along is arguably the single most important principle that guided the framers of the Constitution. In the famous *Federalist No. 78*, the essay that set forth the justification of judicial review, Hamilton quotes the Baron de Montesquieu’s argument that “there is no liberty if the power of judging be not separated from the legislative and executive powers.”³ Montesquieu’s thoughts mirrored those of Sir William Blackstone, the man who wrote the books that profoundly aided the formation and development of an American Common Law.⁴ In his first volume Blackstone stated:

[L]iberty, rightly understood, consists in the power of doing whatever the laws permit; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest.⁵

This is a basic statement of the rule of law. It is that one’s status in society, whether aristocrat or plebian, does not determine one’s rights; rather, the law applies equally to all. The inescapable implication of this is that if a judge changes the law, there is a potential loss of liberty, because the change alters what the law permits and risks favoring some persons over others. Blackstone continues:

[T]he liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, [though] hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.⁶

(1931). On the misbegotten nature of Holmes’ work, see generally ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* (2000).

2. See, e.g., *infra* notes 83–87 and accompanying text (discussing comments by Republican senators).

3. THE FEDERALIST NO. 78 (Alexander Hamilton), reprinted in THE FEDERALIST PAPERS 465 (Clinton Rossiter ed., Signet Classic 2003) (1961) (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Thomas Nugent trans., Hafner Publ’g Co. 1949) (1748)).

4. On Blackstone’s importance to American Law, see DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (Beacon Press 1958) (1941).

5. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 6 (1765).

6. *Id.* at 62.

With these words, Blackstone demonstrated his understanding that sometimes legal traditions give judges small discretion to bend the rules to render justice in the individual case, but this does not give judges license to dispense entirely with the rules themselves. Blackstone goes on to emphasize:

[The common law] is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.⁷

These words of Blackstone and the framers are rarely noticed in the legal academy today. No serious student of the United States Supreme Court can deny that, for some time now, the Court has been in the business of making rather than interpreting law.⁸ Indeed, we have moved so far away from a basic separation of powers theory that it can be argued that courts, even state courts, are “partners” with the legislature in making law.⁹ It has been obvious since at least the time of the *Legal Tender* cases,¹⁰ or perhaps since 1937 when the Supreme Court radically altered its views regarding freedom of contract and the sweep of Congress’ powers under the Commerce Clause, that the Supreme Court was making it up as it went along, and that the outcome

7. *Id.* at 69.

8. For a discussion, see, e.g., STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED* (1994) [hereinafter *RECAPTURING*]. Alas, even Justice Antonin Scalia appears to concede the point. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law.”).

9. See, e.g., Philip H. Corboy et al., *Illinois Courts: Vital Developers of Tort Law as Constitutional Vanguard, Statutory Interpreters, and Common Law Adjudicators*, 30 LOY. U. CHI. L.J. 183, 190 (1999) (noting that while the legislature is the primary lawmaker, “[l]egislative supremacy, however, must be distinguished from legislative exclusivity. Legislatures are not and have never been the sole lawmakers. Rather, state courts have the authority to create common law doctrines which embody their own view of public policy, subject to constitutional legislative modification”).

10. The “*Legal Tender*” cases involved the constitutionality of a federal civil war measure which made paper money “legal tender” for debts which had formerly only been payable in specie. In a 4–3 decision, *Hepburn v. Griswold*, 75 U.S. 603 (1870), the United States Supreme Court found the statute unconstitutional. Less than two years later in 1871, after two more Justices had been added to the Court by President Grant, the Court reversed course in *Parker v. Davis*, 79 U.S. 457 (1871), and decided that the statute was constitutional. As one account to be found on the web written by the distinguished commercial legal historian Gerald Dunne, has it: “Although the *Legal Tender* Cases upheld broad congressional power over the currency, they impaired the Court’s reputation for political independence and consistency.” Gerald T. Dunne, *Legal Tender Cases*, <http://www.answers.com/topic/legal-tender-cases>.

of cases would vary with the appointment of different Justices.¹¹ Nevertheless, what was done in later decades by the Court under Earl Warren and Warren Burger seemed different in quantity if not quality.

In the 1950s and 1960s, to a degree never seen before, the Court narrowed the reach of state and local authorities to regulate education, religion, redistricting, and abortion in a manner that represented a radical break with the past. The issue of judge-made law failed to inflame most of the population, at least until the 1980s, perhaps because the Court reached results¹² that accorded with the desires of an increasingly liberal national media, if not the politically dominant leaders of the Democratic party. Although “judges as law-makers” was occasionally a campaign issue for Republican candidates for office, it never seemed to gain much traction with the American electorate.¹³ Because these results were in accord with the desires of an increasingly liberal American legal professoriate, volumes constructing abstruse legal doctrinal theories were written defending the Warren Court and its progressive decisions, justifying what had been done.¹⁴

Furthermore, Republican Presidents vowed they would appoint “strict constructionists” to the Court, by which presumably they meant justices who would leave lawmaking to the legislatures and to the Constitutional

11. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the United States Supreme Court, as part of the so-called “switch in time that saved nine,” effectively, granted Congress much greater regulatory powers under the Commerce Clause by overruling the narrow construction of that clause engaged in just two years earlier in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Further, in *Jones & Laughlin Steel*, the Court refused to bar regulation of employment contracts in the manner it had earlier in a line of cases, of which *Lochner v. New York*, 198 U.S. 45 (1905), was the most prominent.

12. These results included desegregation of the public schools, ending the hegemony of Christianity in the public square, limiting the basis for selection in the state legislatures to units of similar population (“one-man, one vote”), and the creation of a “Constitutional right to privacy” which encompassed a right for married couples to secure means of contraception, and eventually included a broad right for women to secure abortions. For details, see, e.g., RECAPTURING, *supra* note 8.

13. *Id.* at 27, 174 (suggesting that it is no coincidence that since these decisions, Republicans have been substantially outnumbered in the House and have only controlled the Senate for brief periods).

14. See, e.g., ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (Oxford Univ. Press 1978) (1976) (examining the Supreme Court’s role in American government and society); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (putting forth the author’s theory of judicial review); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982) (inquiring into the legitimacy of constitutional policymaking that goes beyond the value judgments of the framers of the Constitution).

Amendment process.¹⁵ However, it was a Republican appointee, Harry Blackmun, who wrote *Roe v. Wade*, the decision that found a constitutional guarantee that women could abort a fetus before viability.¹⁶ Three more Republican appointees—Sandra Day O'Connor, Anthony Kennedy, and David Souter—confirmed that right in 1992 in *Planned Parenthood v. Casey*.¹⁷

The 1992 *Casey* decision and many other decisions of the Warren, Burger, and Rehnquist courts suggested to a substantial number of legal conservatives in the academy in the 1990s that something was very wrong on the Supreme Court.¹⁸ This understanding dovetailed with the Republican Party's campaign for the Presidency in 2000, when George W. Bush announced that his favorite Justices were Clarence Thomas and Antonin Scalia.¹⁹ These two justices had made it clear in their opinions that separation of powers remained important, and that it was wrong for the Court to make law. Those two were committed to what eventually came to be called "originalism," or "original understanding" jurisprudence, according to which the goal of constitutional interpretation is to derive the meaning of the words as they would have been understood by a reasonable person in 1789 at the time of the Constitution's framing, or at later dates when particular Constitutional Amendments were passed.²⁰ Using this approach, Scalia argued that there is no constitutional "right of privacy" which guarantees women the right to choose to terminate pregnancies.²¹ Clarence Thomas used

15. RECAPTURING, *supra* note 8, at 5, 27 (noting that such promises were made by Richard Nixon, Ronald Reagan, and George H.W. Bush).

16. *Roe v. Wade*, 410 U.S. 113 (1973). Blackmun was appointed by Richard Nixon in 1970.

17. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Sandra Day O'Connor was appointed by Ronald Reagan in 1981, Anthony Kennedy was appointed by Ronald Reagan in 1988, and David Souter was appointed by the first President Bush, in 1990.

18. See generally RECAPTURING, *supra* note 8 (explaining the relationship between morality, religion, and constitutional law).

19. See Stephen B. Presser, *The Scalias Court*, LEGAL AFFAIRS, Sept./Oct. 2004, http://www.legalaffairs.org/issues/September-October-2004/feature_presser_sepoct04.msp [hereinafter *Scalias Court*] (commenting on Bush's statement that Thomas and Scalia are "model judges").

20. For the most sophisticated articulation of originalism as a constitutional theory of interpretation, see KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999). For Scalia's view, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

21. *Planned Parenthood*, 505 U.S. at 980 (1992) (Scalia, J., concurring in part, dissenting in part) ("The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life. . . .' Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and

such an approach to argue that racial discrimination by state and local governments to pursue affirmative action is unconstitutional on the theory that the framers of the Fourteenth Amendment wanted a “color-blind constitution.”²² Thomas also argued that the First Amendment was designed to protect state establishments of religion, not to allow the federal courts to mandate a secular public square.²³

One other notable jurist, Judge Douglas Ginsburg, suggested that a true originalist must engage in a much narrower construction of the Commerce Clause to significantly restrict the ambit of permissible congressional lawmaking, which might well require the nullification of civil rights legislation, as well as many federal economic regulations.²⁴ Others, agreeing with Ginsburg, called for the return of this originalist

(2) the longstanding traditions of American society have permitted it to be legally proscribed.”) (citation omitted).

22. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., dissenting) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. ‘Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society.’”) (citation omitted).

23. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004). Justice Thomas concurred in the judgment and explained his view that the “establishment clause” is a “federalism provision” which means that it should not be “incorporated” via the Fourteenth Amendment against the states. *Id.* This would leave the states free to decide what to do with the integration of religion into the public square. *Id.*

24. For what seems to be Judge Ginsburg’s first use of the phrase “Constitution-in-Exile,” see Douglas Ginsburg, *Delegation Running Riot*, REGULATION: THE CATO REVIEW OF BUSINESS AND GOVERNMENT 1995, <http://www.cato.org/pubs/regulation/reg18n1f.html> (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)). In that review, originally published in 1995, Judge Ginsburg stated that:

[F]or 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes.

Id. It has been argued that Clarence Thomas’ adherence to the “Constitution-in-Exile” movement, as demonstrated by his concurrence in *United States v. Lopez*, 514 U.S. 549, 587 (1995):

would likely doom the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the sick leave portions of the Family and Medical Leave, the Freedom of Access to Clinics Act, as wells [sic] as minimum wage and maximum hour laws and labor and environmental laws.

Chris Bowers, *Clarence Thomas Joins Constitution in Exile Movement*, MyDD Direct Democracy Blog (June 1, 2005), <http://www.mydd.com/story/2005/6/1/14162/59646>.

“Constitution-in-exile.”²⁵ The notion of a “Constitution-in-exile” purportedly supported by a group of conservative scholars, and the opposition to that notion by liberal scholars, underscore that what is at stake is a basic disagreement about the nature of the Constitution itself. There is a basic disagreement about whether it is proper for the courts to rewrite that document. In the rest of this paper, I will flesh out the nature of that current disagreement, especially as it manifests itself today in debates in the United States Senate. I suggest that there is still much to be said for the older and simpler view that courts should not legislate, and I argue that the critics of that conservative view are misguided.

II. THE INVENTION OF “JUDICIAL IDEOLOGY” AND THE ATTACK ON REPUBLICAN JURISTS

Prominent Democratic Senators, aided by prominent Democratic law professors and activists, were alarmed by the idea that George W. Bush’s appointees to the Supreme Court might seek to recapture “the Constitution-in-Exile.”²⁶ Accordingly, they invoked a new reading of the Constitution; they sought to implement a theory of jurisprudence that would perpetuate the power of judges to make law and seriously alter our understanding of the separation of powers. According to New York Senator Charles Schumer’s (D-N.Y.) stated views at hearings he convened on “judicial ideology,”²⁷ it was the responsibility of the United States Senate, exercising its “advise and consent” functions with regard to presidential nominees to the federal bench, to ensure that the

25. For a critique of those who would like to return to the “Constitution-in-Exile,” see e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 54–55 (2005) (critiquing the “originalist” approach to constitutional interpretation).

26. The “Constitution-in-Exile” has become an essentially pejorative term used by liberal law professors such as Cass Sunstein to represent the thought of judicial conservatives who believe, in particular, that the United States Supreme Court has gone too far in allowing Congress to impose regulation through the Commerce Clause. For a discussion of whether there really is such a thing as the “Constitution-in-Exile Movement,” see Posting of Orin Kerr to the Volokh Conspiracy Blog (Dec. 29, 2004 at 12:57 PM), http://volokh.com/posts/chain_1104346631.shtml. For a more scholarly approach to the question of the “Constitution-in-Exile,” see William W. Van Alstyne, *The Constitution In Exile: Is it Time to Bring It In From The Cold?*, 51 *DUKE L. J.* 1 (2001), and other articles and sources cited in the Oct. 2001 Symposium issue of the *Duke Law Journal*.

27. *Judicial Nominations: Should Ideology Matter?; The Senate’s Role in the Nomination and Confirmation Process: Whose Burden?: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *Ideology Hearings*].

judiciary was not dominated by any particular “judicial ideology.”²⁸ It thus became the task of the Senate to make sure that there was a “balance” of ideologies on the benches of the lower federal courts and of the Supreme Court.²⁹

For Senator Schumer and his liberal advisors, there were at least two “judicial ideologies.”³⁰ One was the ideology of the Bush nominees, presumably “originalism”—the idea that a judge should follow the original understanding of the Constitution and laws.³¹ The other ideology, referred to as the more progressive view exemplified by the Warren Court, was that it was the job of the justices and judges to create a “living Constitution,” the meaning of which changes as the needs of the times dictate.³² Senator Schumer maintained that it was the responsibility of each individual nominee to prove to the Senate that he or she would not contribute to an imbalance of ideologies on the bench.³³

28. For an analysis of those hearings, see Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate’s Current Reconsideration of the Confirmation Process Justified?*, 6 TEX. REV. L. & POL. 245, 264 (2001) [hereinafter *Ideology*].

29. *Id.*

30. See *Ideology Hearings*, supra note 27 (testimony of Professor Laurence Tribe of Harvard Law School, Cass Sunstein of the University of Chicago Law School, and Marcia Greenberger of the National Women’s Law Center). The story of these three advising Democratic senators on a strategy to battle Bush nominees can be found in Byron York, *Back to Bork?: A New Strategy of Demanding Nominees’ Views on Judicial Issues Ensures That the Next Supreme Court Nomination Battle Will Be Ugly*, THE ATLANTIC MONTHLY, Mar. 2003, at 30–35.

31. See *Ideology*, supra note 28, at 248–52 (describing the “originalist” judicial philosophies of Alexander Hamilton, President George W. Bush, and Justices Scalia and Thomas).

32. A classic description of the “living constitution” can be found in William Rehnquist, *Observation: The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). For a take on “judicial ideologies” that is somewhat more sophisticated than a simple differentiation between the “living constitution” and the “originalist” view, see SUNSTEIN, supra note 25 (describing four different constitutional jurisprudential approaches: (1) perfectionism (which roughly corresponds to the “living constitution” approach), (2) minimalism (which is sort of “living constitution” lite), (3) majoritarianism (which defers to the legislature to the greatest degree), and (4) fundamentalism (which is essentially the “original understanding” view)).

33. *Ideology Hearings*, supra note 27, at 112; see also *Ideology*, supra note 28, at 261–65 (exploring Senator Schumer’s ideas on who has the burden of proof in convincing the Senate it should confirm nominees). Having experienced a year with Justices Roberts and Alito on the bench, Senator Schumer, who now declares that the Senate was misled as to the judicial ideology of these two Bush nominees, has recently reiterated his view that nominees have a burden of persuading the Senate that their judicial ideology is acceptable. In a recent fiery speech to the liberal American Constitution Society, Senator Schumer declared: “The burden always lies with the nominee to show that he or she [has a judicial ideology that is] within the mainstream. And that burden cannot be met, as we’ve seen, by mouthing pleasant platitudes about modesty and stability at a confirmation hearing.” Press Release, Schumer Declares Democrats Hoodwinked Into Confirming Chief Justice Roberts, Urges Higher Burden Of Proof For Any Future Bush Nominees (July 27, 2007), available at <http://www.senate.gov/~schumer/SchumerWebsite/pressroom/record.cfm?id=280107>.

The U.S. Constitution says nothing about judicial ideology or about who bears the burden of proving a nominee fit or unfit for judicial office.³⁴ Still, because the Senate's role is to "advise and consent," some deference ought to be owed to the President's nominations. In light of this constitutional language, it seems logical to place the burden of proving a nominee unfit for office on any Senators who opposed his or her nomination. *The Federalist*, the greatest contemporary guide to the Constitution, suggests that the only grounds for resisting a nomination are cases in which the President has abused his or her discretion, such as by nominating unqualified political cronies or relatives.³⁵ By inventing a new "judicial ideology" element, Senator Schumer and his colleagues came up with a pretext to reject even the most superbly qualified nominations to the Supreme Court.

The witnesses called by the Republicans at the Judiciary subcommittee hearings on "judicial ideology," at which I was privileged to testify, attempted to argue that the idea of "judicial ideology" was a pernicious partisan fabrication, and that the only appropriate judicial philosophy was one of adherence to the rule of law. Therefore, the only appropriate grounds for resisting a nominee are lack of knowledge of the law or an unwillingness to follow the law as laid down.³⁶ In other words, they argued that there is one single appropriate approach to judging, and not a variety of appropriate judicial "ideologies." If the only appropriate role for judges is to conform their decisions to prevailing law, as argued by Montesquieu, Blackstone, and Hamilton, then to suggest there should be a "balance of ideologies" on the bench is to suggest that "right" should be balanced with "wrong," or that "good" needs to be balanced with "evil."³⁷

Senator Schumer and his advisors' notions about a "balance of ideologies" gave the Democrats political cover to oppose Bush nominees to the lower federal courts. It came close to giving the Democrats a justification for insisting that each Bush nominee be "balanced" with a nominee they favored. This would have given the Senate's "advise and consent" role a meaning as powerful as that of the President's Article II power to nominate judges. Senator Schumer was fairly candid about his desire to bolster the Senate's power in the

34. See U.S. CONST. arts. I–III.

35. See *Ideology*, *supra* note 28, at 247–49, 263 (examining what Alexander Hamilton had to say about how the Senate ought to exercise its "advise and consent" function when reviewing nominees to the bench).

36. *Id.* at 262.

37. Stephen B. Presser, *What a Real Conservative Believes About Judicial Ideology*, 6 GREEN BAG 285, 286 (2003).

judicial confirmation process; however, when Republicans threatened to revise the Senate rules so as to forbid filibustering of judicial nominations—a tactic which effectively required the consent of sixty Senators to confirm a judicial nominee—Republican and Democratic Senators struck a deal to allow most of the then-pending Bush nominees to the Court of Appeals to be confirmed.³⁸

Deference to Bush nominees, however, ended in 2006, when the Democrats succeeded in capturing a majority of the Senate seats, and very little has been heard lately of “judicial ideology” in the Senate itself. Before that happened, however, there were two interesting episodes where the idea of judges following the rule of law was reaffirmed, and the notion of multiple approaches to judging ostensibly repudiated. These were the confirmation hearings of George W. Bush’s two nominees to the United States Supreme Court: John Roberts and Samuel Alito.

III. THE ROBERTS HEARINGS: DEMOCRAT AND REPUBLICAN TAKES ON THE RULE OF LAW, SEPARATION OF POWERS, AND THE RIGHT OF PRIVACY

In the next two sections, I will examine how the confirmation hearings of John Roberts and Samuel Alito offered an opportunity for Democrat and Republican Senators to articulate two very different ideas of what a Supreme Court Justice ought to do. In general, the Republicans took the position that the only important questions to ask were about the qualifications of the nominee. In particular, they wanted to know whether the nominee was prepared to commit to the proposition that judges should judge and legislatures should legislate. The Democrats, however, following the lead of Senator Schumer, argued that it was appropriate to examine the “judicial ideology” of the nominee in order to discern the likely substantive outcome of the cases he would decide. The Democrats also took the position that it was the job of a justice to expand the set of rights articulated by expansive Warren and Burger court decisions.

The nominee for Chief Justice, John Roberts, sat for a short time on the United States Court of Appeals for the District of Columbia Circuit and was regarded before he ascended the bench as one of the best appellate advocates in the nation.³⁹ During his confirmation hearings,

38. *Gang of 14*, WIKIPEDIA, http://en.wikipedia.org/wiki/Gang_of_14 (describing the details of the political deal allowing most of the Bush nominees to the Court of Appeals to be confirmed).

39. See, e.g., Jeffrey Smith & Jo Becker, *Record of Accomplishment—And Some Contradictions*, THE WASH. POST, July 20, 2005, at A01 (“One hundred forty-six members of the

borrowing from baseball, Roberts gave his definition of what the rule of law required:

[A] certain humility should characterize the judicial role. Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ballgame to see the umpire.⁴⁰

Explaining that he did not “fully appreciate the importance of the Supreme Court in our constitutional system until he began to argue cases against the United States,” Roberts added:

Here was the United States, the most powerful entity in the world, aligned against my client, and yet all I had to do was convince the Court that I was right on the law, and the Government was wrong, and all that power and might would recede in deference to the rule of law. That is a remarkable thing. It is what we mean when we say that we are a Government of laws and not of men. It is that rule of law that protects the rights and liberties of all Americans.⁴¹

For Roberts, the job of a judge is only to follow the rule of law, not to pursue a particular ideology, or to set out to secure a certain set of results. The job of a judge is not to make the rules, but to follow them. He underscored this with a few final flourishes:

Mr. Chairman, I come before the committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.⁴²

A cynic might suggest that a nominee to the Supreme Court would say anything to get confirmed, and thus Roberts' comments should not be taken seriously. Most in the legal academy would probably so view

D.C. bar—Democrats as well as Republicans—signed a letter calling him ‘one of the very best and most highly respected appellate lawyers in the nation, and hailing his ‘unquestioned integrity and fair-mindedness.’”).

40. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Roberts Hearings*] (statement of John G. Roberts, nominee for Chief Justice).

41. *Id.* at 55–56.

42. *Id.* at 56.

Roberts' testimony, which they might characterize as naïve at best or duplicitous at worse. Yet the comments were made with the appearance of sincerity. Furthermore, Roberts has manifested the same judicial philosophy in subsequent public appearances.⁴³ Whether he is given credence in the academy (or among Democrats) or not, he does appear to believe that the role of judges is not to make law.

Judge Roberts was not the only one making that point. Roberts' confirmation hearings began with remarks from Senator Arlen Specter (R-Pa.), who was chairing the hearings. Senator Specter remarked favorably that the new Chief Justice, because of his relative youth, would have "a very unique opportunity . . . to rebuild the image of the court away from what many believe it has become a super-legislature . . ."⁴⁴ Continuing in that vein, Senator Orrin Hatch (R-Utah) recognized that:

The judicial selection process . . . has changed because what some political forces want judges to do is change from what America's founders established. America's founders believed [that] separating the branches of Government with the Legislatures making the law and the Judiciary interpreting and applying the law [was] the linchpin of limited Government and liberty.⁴⁵

Senator Hatch observed, however, "Today some see the separation of powers not as a condition for liberty, but as an obstacle to their own political agenda. When they lose in the legislature they want the Judiciary to give them another bite at the political apple."⁴⁶ In closing, Senator Hatch stated, "We must use a judicial rather than a political standard to evaluate Judge Roberts' fitness for the Supreme Court. That standard must be based upon the fundamental principle that judges interpret and apply, but do not make the law."⁴⁷

Democratic Senators did not similarly endorse a modest judicial role in the course of the Roberts hearings. Instead of stressing that the job of the courts was to interpret, rather than make law, the Democrats on the judiciary committee claimed that it was the job of a justice to further the "progress" the Court had made in bettering the lot of the weakest and

43. Or so it seemed to me when he came to Northwestern to deliver a lecture and meet with some students and faculty in the spring of 2007. For a similar comment from someone (a friend and co-author of mine, who also has first-hand experience working in the Department of Justice with John Roberts) see Douglas Kmiec, *Why John Roberts Will Be a Superb Justice: Like Justice O'Connor At Her Best, He Respects Constitutional Limits*, FindLaw (July 25, 2005), http://writ.news.findlaw.com/commentary/20050725_kmiec.html.

44. *Roberts Hearings*, *supra* note 40, at 2.

45. *Id.* at 7–8.

46. *Id.* at 8.

47. *Id.* at 10.

poorest Americans, particularly minorities and women.⁴⁸ Senator Kennedy said:

We need a Chief Justice who believes in the promise of America and the guarantees of our Constitution, a person who will enter that majestic building near here and genuinely believe the four inspiring words inscribed in marble above the entrance: 'Equal Justice Under Law.' I look forward to hearing from Judge Roberts about whether, if he joins the Supreme Court, he will uphold the progress we have made and will guarantee that all Americans have their rightful place in the Nation's future.⁴⁹

In short, at the Roberts confirmation hearings, the Republicans claimed that they sought a Chief Justice who believed in the rule of law, but the Democrats claimed it was their duty to make sure that the new Chief Justice was committed to a particular substantive agenda.

Senator Chuck Grassley (R-Iowa) professed that it was the job of the Senate "to ensure that each person appointed to the Federal bench will be a true judge and not some sort of super-legislator."⁵⁰ Senator Grassley went on, in contrast to Senator Kennedy, to state:

I believe that the nominee should be someone who knows he or she is not appointed to impose his or her views of what's right or wrong. As Chief Justice Marshall said over 200 years ago, the duty of the judge is to say what the law 'is', not what it 'ought to be.' Moreover, the nominee should be someone who not only understands, but truly respects the equal roles and responsibilities of the different branches of Government and the role of our States in the Federal system.⁵¹

Senator Grassley maintained that:

[I]f we confirm individuals who are bent on assigning to themselves the power to fix society's problems as they see fit, a bare majority of these nine unelected and unaccountable men and women will usurp the power of the people—hijacking democracy to serve their own political prejudices. We do not want to go down that road, and we should not go down that road.⁵²

When the Senate Judiciary Committee came to vote on John Roberts' nomination as Chief Justice, the nature of what was at stake—the emerging difference over the judicial role between Democrats and Republicans and the influence of some academics over the process—

48. See, e.g., *id.* at 12. Senator Kennedy stated: "we need to know his views on . . . the removal of existing barriers to full and fair lives for women, minorities, and the disabled." *Id.*

49. *Id.* at 13.

50. *Id.* at 14.

51. *Id.*

52. *Id.*

became clear. Senator Grassley, observing that almost all the Republicans had voted for Justice Ginsburg, on the grounds that she was well-qualified for the Court and had not allowed her prior liberal professional legal activities⁵³ to influence their vote, declared that “maybe there’s a whole new ballgame out there with people when you have somebody with the competence of Judge Roberts, and we’re going to have the number of people voting against him that I anticipate will vote against him.”⁵⁴ Ginsburg was confirmed by a 96–3 vote; Roberts was eventually confirmed by a 78–22 vote.⁵⁵ All the votes against him were cast by Democrats.⁵⁶

Roberts was one of the most superbly qualified nominees ever to come before the Senate. As Senator Specter, who chaired the session, indicated, Roberts’ qualifications included “Harvard College, Harvard Law, magna cum laude, summa cum laude, [and] 39 cases argued before the Supreme Court of the United States.”⁵⁷ Considering these qualifications, Senator Hatch observed:

I’ve been involved in every Supreme Court nomination hearing and debate for the last [twenty-nine] years, and all but one of the current Supreme Court justices, and I have never in my whole time here seen

53. As Senator John Cornyn (R-Tex.) said of Ginsburg during the executive session that followed the Roberts hearings:

[S]he was not exactly a person that had held mainstream or consensus positions. She spent most of her career representing one client—the American Civil Liberties Union—on one side of issues. She’d supported taxpayer funding for abortion, constitutional right to prostitution and polygamy. And she opposed Mother’s and Father’s Days as discriminatory occasions. But nevertheless, Republicans on this committee put that aside and supported her nomination because she had terrific credentials, and because President Clinton was entitled to nominate someone to the Supreme Court of his choosing, while the Senate performed its advice and consent.

*Statements and Vote on Nomination of Judge John Roberts to be Chief Justice of the United States: Hearing of the Exec. Sess. of the S. Judiciary Comm., 109th Cong. 32 (2005) [hereinafter *Roberts Executive Session*].*

54. *Roberts Hearings*, *supra* note 40.

55. Bill Mears, *Roberts Sworn in as Chief Justice*, CNN, Sept. 29, 2005, <http://www.cnn.com/2005/POLITICS/09/29/roberts.nomination/index.html> (information giving recent confirmation votes for Supreme Court Justices, including that for Justice Ginsburg in the sidebar).

56. 124 CONG. REC. S10649-50 (Sept. 29, 2005) (Rollcall Vote No. 245). Those voting against Roberts were Senators Akaka (D-Haw.), Bayh (D-Ind.), Biden (D-Del.), Boxer (D-Cal.), Cantwell (D-Wash.), Clinton (D-N.Y.), Corzine (D-N.J.), Dayton (D-Minn.), Durbin (D-Ill.), Feinstein (D-Cal.), Harkin (D-Iowa), Inouye (D-Haw.), Kennedy (D-Mass.), Kerry (D-Mass.), Lautenberg (D-N.J.), Mikulski (D-Md.), Obama (D-Ill.), Reed (D-R.I.), Reid (D-Nev.), Sarbanes (D-Md.), Schumer (D-N.Y.), and Stabenow (D-Mich.). *Id.*

57. *Roberts Executive Session*, *supra* note 53, at 6.

a witness who made such sense and who literally was so superior in every way.⁵⁸

Senator Hatch indicated that “when you look at that overall testimony and record, it’s pretty tough to vote against this man if you’re really serious about being fair on judicial nominations to the Supreme Court.”⁵⁹ Senator Hatch’s statements implied that Roberts’ opponents were pursuing their ideological agenda at the expense of fairness in the judicial nomination process. Senator Hatch closed his statement in support of Roberts by quoting columnist David Broder of the *Washington Post*, widely regarded as the dean of the Washington pundits, who stated that Judge Roberts was “so obviously, ridiculously well-equipped to lead government’s third branch that it is hard to imagine how any Democrats can justify a vote against his confirmation”⁶⁰ Senators Hatch and Grassley were, of course, suggesting that only raw political concern and special interests could explain a vote against Roberts. Senator Patrick Leahy (D-Vt.), the ranking member of the committee, who ended up voting for Roberts, took umbrage at the assertion that politics rather than merits dictated the votes of some of his Democratic colleagues. Senator Leahy stated, “[T]o suggest that we are running with special interest groups and the Republicans aren’t—I think when this final vote is, you’ll find a lockstep vote on the Republican side for Judge Roberts; you’ll find a split vote on the Democratic side. And it’s kind of—you know, that sort of falls apart there.”⁶¹ Whatever that meant, the Democrats on the Committee did seek to mount a defense on the merits for the votes of some of them against Roberts,⁶² particularly Senator Kennedy, who argued that as a conservative former member of the Reagan administration, Roberts was simply likely to be too insensitive to the needs of poorer Americans to be trusted as Chief Justice.⁶³ David Broder wrote that during the hearings, Roberts was “so far from the caricature of a conservative ideologue depicted by some of the interest groups that their attacks seem absurd.”⁶⁴ Nevertheless, Senator Kennedy defended his announced vote against Roberts by tying his negative response to Roberts to his purported belief in the “march of

58. *Id.*

59. *Id.*

60. *Id.* (quoting David S. Broder, *Roberts’ Sterling Showing*, THE WASH. POST, Sept. 18, 2005, at B07).

61. *Id.*

62. *Id.* at 10.

63. *Id.*

64. Broder, *supra* note 60, at B07.

progress” accomplished by the Supreme Court in the Warren years and after stated:

The commitment to this march of progress was the central issue in John Roberts’ hearing. We asked whether he, as chief justice, would bring the values and ideals and vision to lead us on the path of continued equality, fairness and opportunity for all, or would he stand in the way of progress by viewing the issues that come before the court in a narrow and legalistic way, thereby slowly turning back the clock and eroding the civil rights and equal right gains of the past?⁶⁵

Senator Kennedy observed that Roberts had been an “aggressive activist in the Reagan administration, eager to narrow hard-won rights and liberties, especially voting rights, women’s rights, civil rights and disability rights.”⁶⁶ For Senator Kennedy, “John Roberts was on the wrong side of the nation’s struggle to achieve genuine equality of opportunity for all Americans; and despite many invitations to do so, Roberts never distanced himself from the aggressively narrow views of that young lawyer in the Reagan administration.”⁶⁷ Senator Kennedy conceded that “John Roberts is a highly intelligent nominee,” but believed that he evaded questions from Democratic Senators about how he might rule on cases as Chief Justice.⁶⁸ Thus, after four days of hearings, Senator Kennedy thought “we still know very little more than we knew when we started.”⁶⁹ Senator Kennedy noted Roberts’ statement that the judicial branch must decide cases according to the “rule of law.”⁷⁰ Senator Kennedy dismissed this idea by stating, “Of course, everyone agrees with that. Each of us took an oath of office to protect and defend the Constitution, and we take that oath seriously.”⁷¹ However, Senator Kennedy then qualified his agreement by stating that “[t]he rule of law does not exist in a vacuum; constitutional values and ideals inform all legal decisions.”⁷² According to Senator Kennedy, Roberts “never shared with us his own constitutional values and ideals.”⁷³ Senator Kennedy quoted Roberts’ statement “that a judge should be like an umpire, calling the balls and strikes but not making the rules,” but added:

65. *Roberts Executive Session*, *supra* note 53, at 10.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

Well, we all know that with any umpire, the call may depend on your own point of view. An instant replay from another angle can show a very different result. Umpires follow the rules of the game, but in critical cases it may well depend on where they are standing when they make the call. The same is true of judges.⁷⁴

Roberts' supporters argued that he was committed to following precedent and to a modest judicial role in which he would interpret rather than make law.⁷⁵ Senator Kennedy argued this was unrealistic and unwise, quoting the patron saint of American Legal Realism:

As Justice Oliver Wendell Holmes famously stated, the life of the law has not been logic; it has been experience. He has also said that legal decisions are not like mathematics; if they were, we wouldn't need men and women of reason and intellect to sit on the bench. We would simply input the facts and the law into some computer and wait for a mechanical result.

We all believe in the rule of law, but that is just the beginning of the conversation when it comes to the meaning of the Constitution. Everyone follows the same text, but the meaning of the text is often imprecise and you must examine the intent of the Framers, the history and the current reality. And this examination will lead to very different outcomes depending on each justice's constitutional world view. . . .⁷⁶

Senator Kennedy's statement was a tour-de-force of the "living constitution" view.⁷⁷ But he used this perspective to conclude that senators must ask Roberts what his jurisprudential views were and ask whether Roberts' view was "a full and generous view of our rights and liberties and of government's power to protect the people, or [rather a] narrow and cramped view of those rights and liberties and the government's power to protect ordinary people?"⁷⁸ Senator Kennedy concluded that "[T]here [was] insufficient evidence to conclude that Judge Roberts' view of the rule of law would include as paramount the protection of basic rights . . . voting rights, women's rights, civil rights and disability rights."⁷⁹ For Senator Kennedy, in "all the hoopla and razzle-dazzle in four days of hearings," there was little to suggest "that a

74. *Id.*

75. For a very thoughtful example of an argument for confirming Roberts and the attack on those who opposed his confirmation, see David N. Mayer, Mayerblog, *Confirmation Abuse* (Sept. 5, 2005), <http://users.law.capital.edu/dmayer/blog/blogIndex.asp?entry=20050905.asp>.

76. *Roberts Executive Session*, *supra* note 53, at 11–12.

77. I have no proof to support this, but this part of Kennedy's explanation for his vote, and, in particular, Kennedy's invocation of Holmes, certainly could have been drafted by a liberal law professor such as Cass Sunstein or Laurence Tribe. See, e.g., York, *supra* note 30.

78. *Roberts Executive Session*, *supra* note 53, at 12.

79. *Id.*

Chief Justice John Roberts would espouse anything less than the narrow and cramped view that staff attorney John Roberts so strongly advocated in the 1980s.”⁸⁰ For Senator Kennedy, Roberts had the burden of showing that he was the kind of progressive on “basic rights” that Kennedy was, and having failed to make that showing, in Kennedy’s opinion, Roberts did not deserve to be confirmed. Senator Kennedy stated:

No one—no one—is entitled to become Chief Justice of the United States. The confirmation of nominees to our courts by and with the advice and consent of the Senate should not require a leap of faith. Nominees must earn their confirmation by providing us with full knowledge of their values and convictions they’ll bring to decisions that may profoundly affect our progress as a nation towards the ideal of equality. Judge Roberts has not done so. His repeated reference to the rule of law reveals little about the values he would bring to the job of Chief Justice of the United States.⁸¹

Senator Kennedy thus embraced Senator Schumer’s notion that the nominee has the burden of proof in his hearings. For Senator Kennedy, the nominee can only meet that burden by demonstrating that he was the kind of “progressive” Holmesian legal realist Senator Kennedy thought the Court needed. Only such a man or woman could be depended upon to move the Constitution along a progressive path. That, for Senator Kennedy, was the job of the Court. To confirm Roberts, Senator Kennedy concluded, would be to put “at serious risk the progress we have made towards our common American vision of equal opportunity for all of our citizens.”⁸²

80. *Id.*

81. *Id.*

82. *Roberts Executive Session, supra* note 53. In addition to the comments from Republican Senators which follow, for the dangers of abandoning professional qualifications and adherence to the rule of law as the most important factors in evaluating a nominee, see the comments of Senator Lindsey Graham (R-S.C.):

If we could, if we could look at the person before us based on qualifications, character and integrity and not have—require them to show an allegiance to a particular case or a cause, it would serve the country well. Because liberals and conservatives come and go, but the rule of law is bigger than all of our philosophies. . . .

. . . .

. . . And there needs to be one place left in American discourse and politics for the quietness of the merits of individuals to trump the loudness of special interest groups. And the last place I know of is the courtroom. And the reason that I think Justice Roberts will be a justice for the ages: He’s probably the most qualified guy, top two or three people in the history of the nation, that he believes beyond anything else that the rule of law is for the unpopular cause, is for the quiet discussion, not the loud political campaign, and that he believes deep down and loves the law more than he loves politics. And that’s all you can ask of anybody that comes through our gatekeeping

At the Roberts hearings, and those of Samuel Alito, the Republicans claimed that their commitment was only to the rule of law, to a Supreme Court which believed in the separation of powers and which would devote itself to the interpretation of law rather than judicial legislation. The Democrats, on the other hand, or at least a good portion of them, demanded Justices that were committed to a “progressive agenda” to implement a purported “common American vision of equal opportunity for all our citizens.”⁸³ Stated another way, one party committed to a narrow reading of the Constitution consistent with the original understanding of the framers, and another party committed to a broader interpretation in order to preserve the right of privacy in general and a constitutional right to abortion in particular. Pursuant to these goals, the Republicans stressed the qualifications and the modest judicial philosophy of Roberts, while some of the Democrats, most notably Senators Kennedy, Schumer, Joseph Biden (D-Del.), and Dick Durbin (D-Ill.), stressed that Roberts’ history was not that of a champion of civil rights and the right to privacy.

Thus, Senator Jon Kyl (R-Ariz.), in his closing statement before the vote on Roberts, observed that even newspapers presumed liberal in their editorial stance endorsed the confirmation of Roberts.⁸⁴ According to the *Chicago Tribune*, Senator Kyl noted “. . . Roberts richly deserves to be confirmed. He has the mind, the manner and the modesty to be a fine Chief Justice. . . . His evident devotion to the law and to the Constitution ought to humble those partisans who want Supreme Court justices instead to evangelize for political causes. . . .”⁸⁵ Picking up the theme of non-partisanship, Senator Kyl then quoted the *Los Angeles Times*:

[i]t will be a damning indictment of petty partisanship in Washington if an overwhelming majority of the Senate does not vote to confirm John G. Roberts Jr. to be the next chief justice [sic] of the United States. As last week’s confirmation hearings made clear, Roberts is an exceptionally qualified nominee, well within the mainstream of American legal thought, who deserves broad bipartisan support.⁸⁶

here; will you adhere to the law more than you’ll adhere to anyone’s political philosophy?

Id.

83. See, e.g., *supra* notes 62–82 and accompanying text (discussing Democratic Senators’ statements during the Roberts confirmation).

84. *Roberts Executive Session*, *supra* note 53.

85. *Id.* (quoting from an editorial endorsement of John Roberts, Editorial, *John Roberts for Chief Justice*, CHI. TRIB., Sept. 20, 2005, at C18).

86. *Id.* (quoting from an editorial endorsement of John Roberts, Editorial, *Confirm Roberts*, L. A. TIMES, Sept. 20, 2005, at B12).

And even the *Washington Post*, no friend of the Bush administration, stated:

John G. Roberts should be confirmed as chief justice [sic] of the United States. He is overwhelming[ly] well-qualified, possesses an unusually keen legal mind and practices a collegiality of the type an effective chief justice [sic] must [have]. He shows every sign of commitment to restraint and impartiality. Nominees of comparable quality have, after rigorous hearings, been confirmed nearly unanimously. We hope Judge Roberts will similarly be approved by a large bipartisan vote.⁸⁷

For Senator Biden, though, the superb qualifications of Roberts meant very little. As he put it, “though I and other committee members gave Judge Roberts ample opportunity, in my view he did not provide to the American people any assurances that he embraced fully the Constitution’s enduring values when it comes to fundamental constitutional rights. . . .”⁸⁸ Senator Biden’s principal concern seemed to be what he called the “right to privacy,”⁸⁹ which more commonly referred to as the “right of privacy,” is the purported constitutional foundation of *Roe v. Wade* and *Planned Parenthood v. Casey*. Senator Biden compared Roberts’ testimony to that of then-Judge Anthony Kennedy’s testimony at his confirmation hearings:

In response to the question. . . . about what factors he would use in considering the scope of the right to privacy, Justice Kennedy stated and I quote, ‘The essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of a person to manifest his or her personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her potential.’⁹⁰

Those words of then-Judge Kennedy’s, somewhat reworked, would later emerge as the “mystery passage,” in *Planned Parenthood v. Casey*, the 1992 case upholding *Roe v. Wade*.⁹¹ Senator Biden unfavorably

87. *Id.* (quoting from an editorial endorsement of John Roberts, Editorial, *Confirm Roberts*, WASH. POST, Sept. 18, 2005, at B06).

88. *Roberts Executive Session*, *supra* note 53.

89. *Id.*

90. *Id.*

91. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“Our cases recognize ‘the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’ Our precedents ‘have respected the private realm of family life which the state cannot enter.’ These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these

compared Justice Kennedy's testimony to that of Roberts, who, "declined to associate himself with anything approaching the broad sweep of Justice Kennedy's vision, instead casting his formulation in a very narrow and crabbed way. Not only would Judge Roberts not tell this committee how broadly the right to privacy extends; he declined even to endorse the general right to privacy."⁹²

Senator Biden found it most disturbing that Roberts "repeatedly said he believed in the right to privacy, as does, quote, 'every member of the court, to some extent or another.'⁹³ Senator Biden went on to say, "I want to know to what extent [Roberts believes in the right to privacy] because if [it is] the extent to which Thomas and Scalia believe in the right to privacy, I cannot support in good conscience this man."⁹⁴ Thomas and Scalia had both indicated their view that whatever the extent of the right to privacy it did not support the abortion rights guaranteed by *Roe v. Wade* and *Planned Parenthood v. Casey*.⁹⁵ Thus, it is probably not too much of a leap to say that, in voting "no" for Roberts, Senator Biden was endorsing the views of the purported author of the "mystery passage," Justice Kennedy, and indicating that he would not support a nominee who would not support *Roe v. Wade*. For Senator Biden, then, as for his Democratic colleague, Senator Kennedy, the most important matters in deciding whether to support or oppose the Roberts nomination were not Roberts' superb qualifications, nor his adherence to the rule of law. They were, purely and simply, the likely substantive outcomes of the cases Roberts would decide, and, for Senator Biden, cases involving the "right to privacy" in particular.

Remarkably, there were some Democratic Senators who did support Roberts, but who did so based on their interpretation of his testimony which led them to conclude not only that he would *not* overrule *Planned*

matters could not define the attributes of personhood were they formed under compulsion of the State.") (citations omitted).

92. Press Release, Joseph L. Biden, Jr., *Biden Votes No on Judge Roberts*, (Sept. 22, 2005), available at <http://biden.senate.gov/newsroom/details.cfm?id=246272&>.

93. *Roberts Executive Session*, *supra* note 53.

94. *Id.*

95. This is certainly the implication of Justice Scalia's opinion, which Justice Thomas joined, in *Casey*, 505 U.S. 833, 979, 981 (1992) ("That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life.' Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.") (citation omitted).

Parenthood v. Casey and *Roe v. Wade*, but that he supported a general right to privacy, and eschewed the judicial philosophy of “originalist or literalist philosophies.” The best example was the closing statement of Senator Herb Kohl (D-Wis.):

During a private meeting with him, as well as through four impressive days of testimony, Judge Roberts made clear that he will be a modest judge. He assures us that he will address each issue on its merits and approach each argument with an open mind. He recognizes that judges should not substitute their policy preferences for those of Congress, and of course I agree. Judge Roberts sees a clear boundary to the judge’s role; [he] told us repeatedly that his personal views about issues did not matter. He assured us that he will not be an activist, and that he will rarely, if ever, look to overturn precedent; rather, precedent, not his version of how the law should be, will mark the beginning of his constitutional analysis.

Judge Roberts recognizes the right to privacy in the Constitution, and he understands that people have a right to rely on it. He made clear his agreement with the cases on the right to privacy that led to the court’s decisions in *Roe* and *Casey*.

Judge Roberts rejected originalist or literalist philosophies. He does not bind the constitution to narrow interpretations of the past. Too many judicial activists have used this philosophy to limit our rights and freedoms. Judge Roberts believes that as society evolves, our interpretation of the Constitution must evolve with it.⁹⁶

Senator Kohl chose “to take Judge Roberts at his word and believe that those words will bind him throughout his tenure on the court.”⁹⁷ Senator Kohl, then, found Roberts to be precisely the man Senator Biden did not. Senator Biden argued that Roberts’ views on the right to privacy were the issue, but Senator Kohl not only had no problems with those views, he praised Roberts for his fidelity to precedent and to a modest conception of the judicial role. To give credit where credit is due, in other words, Senator Kohl’s support for Roberts was not ostensibly based on a partisan political agenda, but on Senator Kohl’s articulation of what he understood to be the demands of the rule of law.

The most interesting and articulate critic of John Roberts in the Senate was Senator Charles Schumer (D-NY), who chaired the earlier hearings on “judicial ideology.” For many years, Republicans had criticized liberal special interest groups for using the courts to achieve

96. *Roberts Executive Session*, *supra* note 53.

97. *Id.*

things they could not at the ballot box.⁹⁸ Presumably realizing that the best defense is often a good offense, Senator Schumer took the position that:

[S]ome years ago a number of extreme groups and individuals decided that they could not abide the direction that America was going in. They tried to change America through the presidency. They won a few elections. They tried to change it through Congress, but they could not because those are elected branches of government, and electoral politics fundamentally decides things in the middle. So they decided to try and change America through the courts, the one non-elected branch of government. . . .

In 2000, they helped elect a president who embraced their vision. That president signaled that he agreed with them that America could and should be changed through the courts.⁹⁹

According to Schumer, President Bush indicated his willingness to join this alleged Republican conspiracy to turn back the clock by constantly praising Scalia and Thomas as his two favorite justices, and “[t]hat meant that the president subscribed to their viewpoint that America should be radically changed through the courts and that the clock should be rolled back using legal theories like originalism and strict constructionism.”¹⁰⁰ Just as Cass Sunstein described conservative

98. For a sampling, see for example, Posting of A.J. Sparxx to polipundit.com, *Liberal “Legal Expert” Wants Supreme Court Increased*, Jul. 27, 2007, <http://polipundit.com/index.php?p=18347> (“We all know that liberals can’t win at the ballot box, so they push their agenda through judicial activism.”); Michael Gaynor, “*Scalito*” to reenforce Scalia and Thomas, Oct. 31, 2005, <http://www.renewamerica.us/columns/gaynor/051031> (“A liberal minority needs federal judges to advance their agenda—allowing child pornography as free speech, mandating same-sex marriage, removing ‘under God’ from the Pledge of Allegiance, banning school prayer and preventing the death penalty for murderers and terrorists—because they can’t win these issues at the ballot box.”); or, most comprehensively, Eddie Thompson, *The 2004 Elections: What The Revolt [which gave George W. Bush reelection and solidified Republican control of Congress] Was All About*, Nov. 10, 2004, <http://www.authorsden.com/visit/viewarticle.asp?id=15897> (“After nearly half a century of using the Supreme Court of the United States of America to mold our society contrary to the will of the people, liberal royalty fiddled while Pat Buchanan’s Cultural Revolution was burning in our streets, our churches, and our living rooms. They mocked him; laughed him to scorn. They aren’t laughing today. Hollywood belittled people of faith by creating caricatures of fundamentalist Christians as Bible-toting pumpkins too stupid to take seriously. They are taking them seriously today. Court decisions concerning abortion on demand, prayer in school, and pornography as free speech were just the beginning. Middle America could see the writing on the wall. Instead of capitulating, however, the majority availed themselves of the one right not even the Supreme Court could steal from them: the right of self-determination at the ballot box—the ultimate balance of power.”); see also *infra* note 114 and accompanying text (rebutting the contention that Republicans were trying to change the country through the courts by noting the Republican success in the 2000 and 2004 elections).

99. *Roberts Executive Session*, *supra* note 53.

100. *Id.*

jurists as “radicals,” or “fundamentalists,”¹⁰¹ Schumer painted jurists who wanted to undo the judicial legislation of the Warren and Burger courts as reactionaries bent on taking away Americans’ rights.¹⁰²

Schumer conceded that Roberts was “one of the best advocates, if not the best advocate, in the nation,” and that his intellectual powers were formidable, but nevertheless, “being brilliant and accomplished is not the number-one criteria for elevation to the Supreme Court. There are many who would use their considerable talents and legal acumen to set America back.”¹⁰³ Those “many,” other than Thomas or Scalia, were never identified, and it is very difficult to believe that even Thomas or Scalia would view their jurisprudence as designed “to set America back.”

Presumably because Roberts, like virtually every nominee before him, refused to give much of an indication as to which way he might rule in cases that might come before him, Schumer all but accused Roberts of misleading and deceiving.¹⁰⁴ He declared, “[t]here’s an obligation of nominees to answer questions fully and thoroughly, because they’re essential to figuring out a nominee’s judicial philosophy and ideology—to me, the most important criteria for choosing a judge.”¹⁰⁵ But the idea of “judicial ideology” was that of Schumer and his advisors, like Sunstein, Laurence Tribe, and Marcia Greenberger.¹⁰⁶ In the past, it had been the practice of both parties not to force nominees to address specific cases that might come before them, a practice that was followed, for example, with Justices Ginsburg and Breyer. Schumer, in a splendid maneuver, or perhaps splendidly disingenuously, said that attitude should not apply because the prior nominees were not suspected of being part of a jurisprudential conspiracy “to set America back.”¹⁰⁷ Schumer claimed that because Roberts was a Bush nominee, and because Bush embraced the views of Thomas and Scalia, two justices bent on “set[ting] America back,” there was a heavy

101. See generally Presser, *Ann Coulter*, *infra* note 150 (analyzing Sunstein’s excoriation of “right wing” judges who have a “radical” agenda and are “fundamentalists”).

102. *Roberts Executive Session*, *supra* note 53.

103. *Id.*

104. See *supra* note 33 (stating that following the first term of the Roberts/Alito court, of course, Senator Schumer crossed the line and did accuse Alito and Roberts of such deception).

105. *Roberts Executive Session*, *supra* note 53.

106. See York, *supra* note 30 (telling the story of these three serving as advisors to the Democratic Senators).

107. *Roberts Executive Session*, *supra* note 53.

presumption that Roberts was like them, and Roberts had not overcome this presumption.¹⁰⁸

Schumer repeatedly asked Roberts to indicate some disagreement with Thomas' views, including those on the right to privacy and on Congress' power under the commerce clause.¹⁰⁹ Roberts quite prudently refused to indicate disagreement with one of his future colleagues, but this purportedly lost him Schumer's vote. Schumer had gone into the hearings with a presumption of guilt against Roberts. Unlike in the Courts, where one is innocent until proven guilty, in the Senate, for Schumer, Roberts was guilty until proven innocent, and for Schumer there was no such proof. Schumer said, "Judge Roberts is clearly brilliant. His demeanor suggests he well might not be an ideologue. But he did not make the case strongly enough to bet the whole house."¹¹⁰ Schumer conceded that there might be less than a fifty percent chance of it, but still "there is a reasonable danger that he will be like Justice Thomas, the most radical [sic] justice on the Supreme Court."¹¹¹ Schumer concluded, "[b]ecause of that risk and its enormous consequences for generations of Americans, I cannot vote yes. I must reluctantly cast my vote against confirmation."¹¹²

Senator John Cornyn (R-Tex) had a hard time taking seriously Schumer's views on what the Republicans were doing. In language of extraordinary bluntness, he stated, "the notion that this president [George W. Bush] and the party that has won the election in 2004, 2000, and who currently holds the majority in the Senate and in the House are trying to change America through the courts is the exact opposite of the truth."¹¹³ In almost a point by point rebuttal of Schumer, Senator Cornyn went on:

In fact, the most contentious issues we've had come before us, whether it's the issue of same-sex marriage, whether people can display the Ten Commandments in public, whether the Pledge of Allegiance itself is constitutional because it contains the words "one nation, under God," these are all examples of decisions and positions being advocated by the minority in the courts who want to overturn the ability of the majority to determine the rules and laws by which our society is governed. And in fact, it's those who embrace this idea of an evolving Constitution, that it is all about the courts making

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

decisions that some judges feel is good for us and when they feel that the majority is unable or unwilling to govern itself consistently with the fundamental values and notions contained in the Constitution.¹¹⁴

The contrast between Schumer's and Senator Cornyn's comments in the Senate clearly demonstrates that for the Democrats, the enemy jurisprudence was originalism and strict construction, while for the Republicans it was "this idea of an evolving Constitution."¹¹⁵ Playing a tune that pleased the Republicans, Senator Cornyn accused Schumer of illegitimate behavior, playing politics with the Court, and undermining the rule of law.¹¹⁶ Scoffing at Schumer's complaint that Roberts had refused to make clear how he would rule in cases that might come before him (or, in Schumer's phrasing, revealing his "judicial ideology") Senator Cornyn said:

I submit that particularly in courts of law, no one—no one—is entitled to know ahead of time what the outcome will be, because the very premise of our judicial process is that courts are supposed to be fair and listen to both sides or all sides of an argument, that judges are supposed to be disinterested in the outcome and impartial, and that judges, finally, be independent of the political process. So no one is entitled to know what Judge Roberts—how Judge Roberts will rule on these hot-button issues of the day. No one is. Senators are not entitled to know, presidents are not entitled to know. In fact, I think what Judge Roberts demonstrated was the ideal of fairness, impartiality and commitment to the rule of law.¹¹⁷

The same point about the rule of law and judicial philosophy was made by Senator Sam Brownback (R-Kan.). Commenting on Roberts' failure under questioning from Senator Durbin to demonstrate that he would always be on the side of the underdog, Senator Brownback endorsed Roberts' view:

[I]f the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says that the big guy should win, well, then, the big guy is going to win, because my obligation is to the Constitution. That's the oath. The oath that a judge takes is not that I will look out for particular interests; the oath is to uphold the Constitution and laws of the United States, and that's what I would do.¹¹⁸

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Roberts Hearings, supra* note 40, at 448.

Senator Brownback argued, “I think that’s exactly what the American people expect and want, a judge to be a judge, not a partisan.”¹¹⁹ Finishing with the typical Republican flourish, Senator Brownback stated:

[J]udges once confirmed are checked only by their own self-restraint. It seems to me that this nominee sincerely believes and will adhere to this check of judicial restraint. It’s my hope that he’ll set a model on that that [sic] will be a nation of laws—governed by laws and not by men.¹²⁰

Overall, the Roberts hearings made it clear that the Democratic and Republican Senators had very different ideas of what a Supreme Court Justice ought to do.

IV. JUDICIAL IDEOLOGICAL WARS CONTINUED: BORKING ALITO

The Roberts hearings had moments of contention, and clearly laid out the parties’ competing views on the judiciary, but they were just a prelude to the coming battle over a nominee to succeed Justice O’Connor. Everyone understood that Roberts would very likely replicate the views of the Chief Justice who preceded him and for whom he had clerked. But O’Connor was the swing vote on cases involving abortion, affirmative action, and religion, and tended to vote on the side favored by the Senate liberals. If Bush were to nominate someone in the mold of Thomas or Scalia, that person would likely swing the Court in a conservative rather than a liberal direction on these issues.

Accordingly, although the Republican and Democratic positions in the Alito hearings were similar to those displayed in the Roberts’ hearings, the fireworks were more considerable. In the end, Alito was confirmed by a much smaller majority than Roberts, 58–42, and only four Democrats voted for his confirmation.¹²¹ All of the Republicans, save one, voted to confirm Alito.¹²² As the Associated Press reported:

That is the smallest number of Senators in the party opposing a president to support a Supreme Court Justice in modern history. Chief Justice John Roberts got 22 Democratic votes last year, and Justice

119. *Roberts Executive Session*, *supra* note 53.

120. *Id.*

121. 152 CONG. REC. S348 (Jan. 31, 2006) (Rollcall Vote No. 2). Those Democrats voting for Alito were Senators Byrd (D-W.Va.), Conrad (D-N.D.), Johnson (D-S.D.), and Nelson (D-Neb.).

122. *Id.* The Republican who did not vote to confirm was Lincoln Chafee of Rhode Island.

Clarence Thomas—who was confirmed in 1991 on a 52–48 vote—got 11 Democratic votes.¹²³

John Kerry, fresh from his narrow loss of the Presidential election in 2004, unsuccessfully tried to organize a filibuster against the Alito nomination, and remarked after the Alito confirmation that, “United States senators [who voted against Alito] refused to stand silent while President Bush packed the Supreme Court with far-right ideologists.”¹²⁴ Picking up the theme that other liberal senators had sounded in the Alito (and Roberts) hearings, Kerry said, “[t]hose [who voted against Alito] who believe in privacy rights, who fight for the rights of the most disadvantaged, who believe in the balance of power between the president and Congress took a stand in support of our country and our Constitution.”¹²⁵

By Alito’s confirmation, the clear nature of the parties’ differences over what kind of men and women ought to be appointed to the Court appeared even more starkly than they did in the Roberts’ hearing. John Kerry called Alito, and by extension, Roberts, “far-right-ideologies,” bent on trampling on the disadvantaged, upsetting the balance of powers, and a danger to the country and Constitution.¹²⁶ Unfortunately, during the Alito hearings the Democrats overplayed their hand a bit. Like Senators Kerry, Kennedy, and Schumer, Democrats sought to paint Alito as not only an ideologue¹²⁷ but also as a bigot.¹²⁸ As the Associated Press reported, the turning point came not at anything Alito had said or done, but at the reaction of his wife to the Democrats’ strategy. Following a grilling by Senator Kennedy:

Mrs. Alito fled the hearing room in tears after Sen. Lindsey Graham, R-S.C., expressed regret to Alito that Sen. Edward Kennedy, D-Mass., and other Democrats had attacked him for his membership in the Conservative Alumni of Princeton (CAP).

123. Associated Press, *Alito Sworn in as Supreme Court Justice*, MSNBC, Jan. 31, 2006, <http://www.msnbc.msn.com/id/11111624/>.

124. *Id.*

125. *Id.*

126. *Id.*

127. At the age of thirty-five while seeking a job as a lawyer in the Justice Department under Reagan in 1985, Alito had made clear his belief that abortion and “one-person, one-vote” were not protected by the Constitution. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 12 (2006) [hereinafter *Alito Hearings*] (statement of Sen. Edward Kennedy, Member, Senate Comm. on the Judiciary).

128. *Id.* at 12 (discussing Alito’s voting record and alleged membership in an alumni group at Princeton that opposed admission of women and wanted to limit the admission of racial minorities).

Some articles in CAP's magazine—not written by Alito—had voiced inflammatory anti-feminist and anti-gay views. Graham asked Alito whether he was a “closet bigot.” Alito replied, “I’m not any kind of bigot.”¹²⁹

As the National Affairs writer for *MSNBC*, Tom Curry indicated, “At that moment and at many others during his testimony, Alito appeared to be a sober, cautious and phlegmatic judge.”¹³⁰ He came from a lower middle class family, he attended Princeton University and the Yale Law School, he sat on the Court of Appeals in the Third Circuit, mainly in Newark, New Jersey for fifteen years, and he garnered the respect of all of his colleagues, a number of whom, in an unprecedented move, testified to what a fair jurist Alito was.¹³¹

Fifty-four of Judge Alito's law clerks, Democrats, Republicans and Independents alike, signed a letter to the [Senate Judiciary] Committee that stated “We collectively were involved in thousands of cases and it never once appeared to us that Judge Alito has prejudged a case or ruled based on political ideology. . . . It is our uniform experience that Judge Alito was guided by his profound respect for the Constitution and the limited role of the judicial branch.”¹³²

Probably seeing the inevitable, even some Democrats tried to distance themselves from the bullying and distorting tactics of some of their colleagues. One of the four Democrats who voted to confirm Alito, Senator Robert Byrd (D-W. Va.) asked, “[H]ave we finally come to the point where our nation's assessment of its Supreme Court nominee turns more on a simple-minded sound bite or an exploitive

129. Tom Curry, *Why Bush Won the Alito Fight*, *MSNBC*, Jan. 31, 2006, <http://www.msnbc.msn.com/id/11099780/>.

130. *Id.*

131. See, e.g., *Alito Hearings*, *supra* note 127, at 660 (statement of Hon. Ruggero J. Aldisert) (“[B]ased on my experience, I can represent to this Committee that Judge Alito has to be included among the first rank of the 44 judges with whom I have served on the Third Circuit, and including another 50 judges on five other courts of appeals on which I have sat”); *id.* at 658–59 (statement of Hon. Maryanne Trump Barry) (“He is a fair-minded man, a modest man, a humble man, and he reveres the rule of law. If confirmed . . . [he] will serve as a marvelous and distinguished Associate Justice of the Supreme Court”); *id.* at 654–55 (statement of Hon. Edward R. Becker) (“[W]e have sat on over a thousand cases together Sam Alito is a wonderful human being. . . . Sam Alito is the soul of honor. . . . Judge Alito's intellect is of a very high order. He is brilliant [He] is not an ideologue. . . . He is a real judge deciding each case on the facts and the law, not on his personal views”); *id.* at 663 (statement of Hon. Leonard Garth) (“I have heard concerns expressed about whether Judge Alito can be fair and evenhanded. Let me assure you from my extensive experiences with him and with my knowledge of him, going back, as I have stated, over 30 years—that he will always vote in accordance with the Constitution and laws as enacted by Congress.”).

132. *Alito Hearings*, *supra* note 127, at 14 (statement of Hon. Charles E. Grassley, U.S. Senator from Iowa).

snapshot than on the answers provided or withheld by the nominees?"¹³³ Thus, at least one Democrat disavowed what Curry called a "contrived confirmation ritual."¹³⁴

Whatever legal academics might think, for the Senate Republicans, at least rhetorically, the rule of law still existed, separation of powers still existed, and it was the job of judges, like Chief Justice Roberts' "umpires," to find the law rather than to make it, and to come to judging without a preconceived agenda. For the Democrats, however, it was the job of judges to expand the Constitution in order to protect the rights of the least fortunate, even if that meant changing the interpretation of the Constitution, and even if that meant a legislative role that ran against the idea of the separation of powers. This was the Democrats' version of the rule of law, since they believed it was the task of law to expand the right of privacy, rights of minorities in general, and the benevolent power of the federal government. Democrats preferred judges who displayed a particular "ideology," or, to be more blunt, who were committed to a particular result orientation—an orientation that would preserve and enhance the right of privacy in particular, and a woman's "right to choose" to have an abortion on demand.

For the Democrats and the liberal interest groups who supported them, only "radicals" who wanted to oppress the poor, innocent, or helpless invoked the separation of powers, original understanding, or the rule of law as conceived by Thomas and Scalia. To sympathize with Thomas or Scalia was to effectively consign women to back alley abortions, or to erode minorities' civil rights. For the Democrats, especially in the manner they sought to paint Alito, Alito was no different from Robert Bork, and what he would do was essentially no different from what it was claimed Bork would have done. Thus, for those who sought to smear Alito, their playbook had been nicely written by Senator Kennedy in his infamous 1987 "Robert Bork's America" speech on the Senate floor. In that speech, Senator Kennedy stated that:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of government.¹³⁵

133. Curry, *supra* note 129.

134. *Id.*

135. Kennedy's "Robert Bork's America" speech is quoted and its mendacity is analyzed in a splendid article by Gerhard V. Bradley, *Slaying the Dragon of Politics with the Sword of Law: Bork's Tempting of America*, 1990 U. ILL. L. REV. 243, 244 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)).

No one who has read Bork's work could honestly reach such a conclusion.¹³⁶ Senator Kennedy himself eventually admitted to Bork that Bork should not take his attack personally, that it was merely politics.¹³⁷ The tactic of shamelessly and falsely smearing a conservative nominee came to be called "Borking," based on the invention of horrendous consequences that would result from a nominee's judicial philosophy, and for the ritualized assertion that the nominee was far out of the judicial "mainstream." It called for the conclusion that because the consequences of a nominee's jurisprudence would be evil, then the nominee himself or herself must, accordingly, be evil, or at least "radical."¹³⁸

It was not just Democratic Senators who tried to "Bork" Alito. As an account in the *Legal Times* put it:

[L]iberal interest groups are staking their campaign against Samuel Alito Jr. on a simple strategy: Transform Alito into Robert Bork by any means possible—whether the shoe fits or not.

'There are many similarities,' notes People For the American Way's Ralph Neas, who led the coalition opposed to Bork and is helping lead the effort against Alito. Not least of these is that Alito, like Bork, is a conservative judge picked to replace a moderate swing justice . . .

But just how closely Alito's jurisprudence mirrors Bork's is open to debate, but that's almost beside the point. What matters in the mounting slugfest over Alito's nomination to the Supreme Court is whether his opponents can sell the idea that the mild-mannered jurist is just a quieter, gentler version of Bork . . .

[S]haping public opinion and then persuading constituents to roar at their senators have become important elements of any judicial [confirmation] campaign. But it's particularly crucial in Alito's situation, where a handful of moderate Republicans and Democrats

136. Bork said of Kennedy's speech, "[N]ot one line of that tirade was true." BORK, *supra* note 135, at 268. As Bork himself later put it, "A lot of lies were being told, and it would have been good if somebody had been out there rebutting them . . ." Bork, now a distinguished fellow at the conservative Hudson Institute, went on to say, "You have to have your countervailing soundbites, although it's a hell of a world where we choose Supreme Court justices by soundbites." T.R. Goldman, *Lobby Groups Following Bork Playbook for Alito*, LEGAL TIMES, Dec. 13, 2005, available at <http://www.law.com/jsp/article.jsp?id=1134394504003>.

137. See BORK, *supra* note 1365, at 280–81.

138. Bork explained more generally:

The interest groups of the Left proceed by systematic lying about judicial nominees who adopt the traditional approach of interpreting the Constitution according to its actual meaning. . . . The left wing has discovered an effective tactic of labeling any conventional jurist an ideologue with a right-wing agenda and hence 'outside the mainstream.'

Robert H. Bork, *Adversary Jurisprudence*, THE NEW CRITERION, May 2002, at 17.

will determine whether he cruises to confirmation next month, barely squeaks by, loses an up-or-down vote, or is filibustered.

To defeat Alito, says John Samples, who directs the Cato Institute's Center for Representative Government, opponents must prove 'not just that he's conservative or that he's against abortion personally—they need to show he's nuts.'¹³⁹

And that is precisely what Senate Democrats and liberal interest groups tried to do, although Alito's nuttiness was purportedly demonstrated simply by charging that he was "radical," "out of the mainstream," or unsympathetic to women and minorities. Thus, Senators Kennedy, Schumer, and others insisted that Alito was fatally tainted by his remarks when applying for a job in the Reagan justice department against judicial activism and particular rights-expanding decisions by the Warren and Burger courts.¹⁴⁰ They ignored overwhelming evidence that Alito, like Roberts, had a clear reputation of being fair-minded by his colleagues,¹⁴¹ as well as the rating from the federal judiciary committee of the ABA stating that Alito, like Roberts, was "well-qualified" for the bench, the highest rating that the ABA awards.¹⁴² That "well-qualified" rating had earlier been regarded as the "gold standard" of judicial qualifications by some of the Democrats,¹⁴³ but in the effort to tarnish Alito, it suddenly held no persuasive power.

Academics were not absent from the attempt to "Bork" Alito, either. Sunstein, now perhaps the most visible and distinguished liberal scholar, purportedly had researched Alito's many judicial opinions, and, as Senator Kennedy explained in the opening Alito Hearings:

Judge Alito has ruled the vast majority of the time against the claims of the individual citizens. He has acted instead in favor of government, large corporations and other powerful interests. In a study by the well-respected expert, Professor Cass Sunstein of the University of Chicago Law School, Judge Alito was found to rule against the individual in 84 percent of his dissents. To put it plainly, average Americans have had a hard time getting a fair shake in his

139. Goldman, *supra* note 136.

140. *See, e.g., Alito Hearings, supra* note 127, at 12, 346–52 (statements of Sen. Edward Kennedy, member, Senate Comm. on the Judiciary).

141. *See supra* note 131 (describing evidence of Alito's reputation).

142. *See, e.g., Jesse J. Holland, Alito Gets High Marks from Bar Association, Jan. 4, 2006, http://www.breitbart.com/article.php?id=D8EU0PRG1&show_article=1* (discussing Alito's reputation).

143. *See, e.g., Alito Hearings, supra* note 127, at 14 (noting the unanimous "well qualified" rating for Alito and observing that "this recommendation should have much weight for my colleagues on the other side [that is the Democrats], who have time and time again described the rating of the ABA as, quote, [the] 'gold standard'" (statement of Sen. Charles Grassley, Member, Senate Comm. on the Judiciary).

courtroom. In an era when America is still too divided by race and by riches, Judge Alito has not written one single opinion on the merits in favor of a person of color alleging race discrimination on the job: in 15 years on the bench, not one.¹⁴⁴

Supporters of Alito, including fifty-four of his clerks and a number of his third circuit colleagues, challenged the implication that Alito was biased against anyone.¹⁴⁵ Yet even if Senator Kennedy's assertions were correct, they would tell us nothing about the appropriateness of Alito's jurisprudence. Judges do not choose their cases. Alito and his supporters quite plausibly maintained that he decided cases on the law rather than on the socioeconomic status of the parties, and a percentage outcome against individuals, say, rather than corporations, tells us nothing about who was in the right. What does it mean for Alito to rule against individuals in eighty-four percent of his dissents? How many of his votes writing majority opinions or concurring with them were for individuals? Yet that does not matter either. Similarly, Senator Kennedy's careful phrasing that, "Judge Alito has not written one single opinion on the merits in favor of a person of color alleging race discrimination on the job," might well imply that he has written several upholding race discrimination claims on a matter of procedure rather than substance. As any lawyer knows, procedural rulings (involving rules of evidence, motions for discovery, and many other matters) can often determine the outcome of a case by encouraging a settlement. This seems to be the same kind of "politics," rather than truthful argument, in which Senator Kennedy engaged in the Bork matter. Finally, it appears to be more than a coincidence that Sunstein, Laurence Tribe, and Marcia Greenberger, all of whom had advised the Democrats on political strategy with regard to the Bush nominees, advocated hard-hitting attacks on the nominees,¹⁴⁶ attacks in which the actual jurisprudence of the nominee mattered much less than the manner in which his jurisprudence could be mischaracterized for partisan purposes.¹⁴⁷

144. *Id.* at 12.

145. See *supra* note 131 (listing support for Alito).

146. See York, *supra* note 30 (reporting that Laurence Tribe of Harvard Law School; Cass Sunstein of the University of Chicago School of Law, and Marcia Greenberger of the National Women's Law Center "had appeared at a Democratic retreat and reportedly urged lawmakers to take an aggressive stance against Bush's judicial nominees," because "[o]nly a more assertive and openly ideological" approach by Senate Democrats could "stop the White House from packing the courts with doctrinaire conservatives. Democrats simply had to be tougher on Bush nominees").

147. See *supra* Part IV (discussing the strategy to demonize Alito).

There have certainly been struggles over the confirmation of judicial nominees in the past. One example is the struggle over Louis Brandeis, a Massachusetts progressive lawyer and the first Jew nominated to the Court.¹⁴⁸ What began with Bork was qualitatively different. With Brandeis, one could probably discern anti-Semitism, or some other form of elite bias against the nominee, but with Robert Bork it seemed to be something different. It had become a broad-based mendacious and scurrilous attack coordinated by special interest groups. With the efforts to defeat the nominations of Roberts and Alito, we saw coordination include a select group of liberal academics as well.¹⁴⁹ By the time the vote was taken on Alito, we also saw that there was a clear party split. Perhaps it is fair to say that we had completely reached the point where the need to satisfy political constituencies (at least in the case of the Democrats) had taken the place of jurisprudential considerations.

Some of our more strident, but most perceptive political commentators on the right have argued that the current strategy of committed liberals has been little more than name-calling of conservatives, that liberals have resorted to slinging mud rather than engaging in reasoned discourse with conservatives, and that liberals have refused to debate conservatives on the issues, preferring instead, if possible, to blacken their character.¹⁵⁰ This is now the tactic used against Supreme Court nominees as well as talk radio hosts¹⁵¹ and other more overtly partisan actors.

And it is not simply Supreme Court justices who get themselves tarred with the terms, “radical,” “out of the mainstream,” or “right wing”—all characterizations hurled as epithets. MoveOn PAC, an arch-liberal political action committee, did a notable job in 2005, at the time filibusters were being threatened against Bush nominees to the Court of

148. Michael Boudin, *Justice Brandeis: The Confirmation Struggle and the Zionist Movement*, 85 YALE L.J. 591, 591 (1976). “Brandeis was nominated by Woodrow Wilson in January, 1916, and the nomination was met almost at once by fierce opposition. Conservative Bostonians, boasting Harvard President A. Lawrence Lowell among them, petitioned the Senate against the nomination; editorials inveighed against Brandeis as a radical; and segments of the bar denounced Brandeis as unethical in character and unjudicial in temperament, in a campaign culminating in a letter of opposition signed by ex-President Taft and six other present or former Presidents of the American Bar Association.” *Id.*

149. York, *supra* note 30.

150. The liberal reaction to Ann Coulter is probably the best example of liberals choosing character attacks over reasoned discourse. See generally, Stephen B. Presser, *Was Ann Coulter Right? Some Realism About ‘Minimalism’*, 5 AVE MARIA L. REV. 23 (2007) [hereinafter Presser, *Ann Coulter*] (summarizing Ann Coulter’s argument that liberals refuse to debate the real issue).

151. See, e.g., AL FRANKEN, RUSH LIMBAUGH IS A BIG FAT IDIOT AND OTHER OBSERVATIONS (1996) (satirically attacking Limbaugh and the political right).

Appeals bench, of painting these lower-court nominees as villains.¹⁵² At that time, the latest *Star Wars* movie was popular, featuring an evil galactic Senator bent on nefarious domination. MoveOn PAC ran a brilliant television spot and a broadside ad, criticizing the Republicans in general and Senator Bill Frist (R-Tenn.) for considering a procedural tactic, known as the “nuclear option,” which would have eliminated Senate filibusters for judicial candidates through a simple majority vote.¹⁵³ A poster featured a cloaked figure that bore a resemblance to the evil “Sith” Senator from the *Star Wars* movie, and the text read:

The Republic stands at the brink of chaos. Seduced by a dark vision of ultimate power, one Senator schemes to destroy all opposition, replacing the old guardians of peace and justice with his own loyal minions. Sound familiar?

We’re not talking about a galaxy far, far away.

Right now, in Washington, D.C. Senator Bill Frist and radical Republicans are preparing to seize total control over our independent courts, long the defenders of freedom in our republic. To dominate the courts, Senator Frist is threatening to use the ultimate weapon, the “nuclear option,” breaking senate rules to eliminate the right to filibuster—giving absolute power over judicial nominations to one party for the first time ever.¹⁵⁴

Senator Frist was not, of course, seeking to “break senate rules.”¹⁵⁵ Rather, he sought, in effect, to amend them to clarify that the filibuster, itself a creature of Senate rules, was not intended to stall judicial nominees, and by using it in that context, the Democrats were wrongly sabotaging the choice of the majority.¹⁵⁶ Still, with this wonderful and literally diabolical ad, MoveOn PAC turned the tables on the

152. The term used for the nominees was “far right clones,” whom President Bush had designated to replace “fair judges.” See generally David Chang, *One Senator Leans Toward the Dark Side*, USC DAILY TROJAN, May 25, 2005 (“To capitalize on last week’s release of the final installment in the “Star Wars” series, MoveOn PAC has released a new ad, which evokes the film’s storyline of a power-hungry senator to parody the current controversy over judicial nominees.”).

153. For a discussion about the “nuclear option,” called by the Republicans the “Constitutional Option,” see, e.g., Helen Dewar and Mike Allen, *GOP May Target Use of Filibuster: Senate Democrats Want To Retain the Right to Block Judicial Nominees*, WASH. POST, Dec. 13, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A59877-2004Dec12.html> (discussing the political climate surrounding former Chief Justice Rehnquist’s possible vacancy).

154. *Move-on.org and the Ethics of Silly Arguments*, May 23, 2005, <http://www.ethicsscoreboard.com/list/moveon.html> (quoting, discussing, and criticizing the Moveon.org broadside).

155. See Dewar & Allen, *supra* note 153, at A1 (noting that the Constitution only calls for the advice and consent of the Senate, not a two-thirds vote).

156. *Id.*

Republicans and argued that they were seeking to interfere with freedom by “eliminat[ing] the right to filibuster,” a right which existed only in the Senate rules.¹⁵⁷ Moreover, MoveOn PAC’s ad made the rather extraordinary assertion that a Senate “majority vote” amounted to “absolute power over judicial nominations” in one party.¹⁵⁸

The overheated rhetoric of MoveOn PAC did not differ in degree from that of at least one distinguished academic, the University of Chicago’s Sunstein. In his boldly titled book, *Radicals in Robes: Why Right-Wing Courts are Wrong for America*, Sunstein accused Justices Scalia and Thomas and originalist jurists like them on the lower courts, whom he labeled “fundamentalists,” of plotting to take away the rights of Americans and impose a religious-like orthodoxy on them.¹⁵⁹ Sunstein compared these judicial “fundamentalists” to homegrown intolerant religious fundamentalists, such as Jerry Fallwell, and to such foreign apostles of fundamentalism as the Taliban.¹⁶⁰ Sunstein made clear his preference for the kind of jurisprudence manifested by Republican jurists like Sandra Day O’Connor and Anthony Kennedy, who, particularly in right of privacy cases, would not disturb established precedents like *Roe v. Wade*.¹⁶¹

V. “THE MYSTERY PASSAGE,” “THE RIGHT OF PRIVACY,” AND THE ROLE OF JUDGES

As indicated, much of the questioning of Roberts and Alito revolved around the “right of privacy,” and much of the bare-knuckle politics was a simple fight over whether *Roe v. Wade* would survive. Another way of looking at this jurisprudential struggle is to say that the confirmation battles over Roberts and Alito (and Thomas and Bork before them) were over a particular act of judicial legislation—*Roe v.*

157. *Move-on.org*, *supra* note 154.

158. *Id.*

159. See SUNSTEIN, *supra* note 25, at 55 (noting that fundamentalists claim their constitutional approach is the only legitimate approach to constitutional interpretation).

160. *Id.*; see also Presser, *Ann Coulter*, *supra* note 150, at 27–31 (objecting to Sunstein’s characterization of conservatives as “fundamentalists” but conceding that some of his arguments have merit including his interpretation that the Second Amendment affords a right to a militia and not firearm ownership, and his interpretation that the Fourteenth Amendment’s Equal Protection Clause did intend for the Constitution to be “color blind,” are both legitimate).

161. See SUNSTEIN, *supra* note 25, at 30 (stating that minimalist judges, like O’Connor, are cautious and that the law should be moved by nudges, not earthquakes). These precedents were, of course, based on an interpretation of the Constitution (finding a right to privacy in penumbras and emanations of the Bill of Rights which purportedly guaranteed women a right to choose to terminate pregnancies), and would, at least in the opinion of Justice Kennedy, extend this right of privacy to protect consensual homosexual sodomy from prosecution. *Lawrence v. Texas*, 539 U.S. 558, 562–65 (2003).

Wade. Perhaps it does not go too far to say that this question was about the extent to which the value of separation of powers ought to trump the “right of privacy.” Or, put only slightly differently, the issue was whether Justice Anthony Kennedy’s jurisprudence, praised in the Roberts hearings by Senator Biden,¹⁶² should dominate on the Court as it now does, or should instead be replaced by traditional attitudes toward judicial legislation and traditional conservative originalist jurisprudence.

An example puts this at its starkest. Following his confirmation, Justice Kennedy explained his vote in *Planned Parenthood v. Casey* in the three person plurality opinion which upheld the “essence” of *Roe v. Wade*, and reinforced the constitutional availability of abortion on demand,¹⁶³ in part by writing that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they found under the compulsion of the state.”¹⁶⁴

Justice Kennedy later used this reasoning to support his decision in *Lawrence v. Texas*, holding that the State could not make consensual homosexual sodomy a crime.¹⁶⁵ The Massachusetts Supreme Judicial Court quoted similar language from the *Casey* plurality opinion in its majority decision finding a right to marriage between same-sex partners in the Massachusetts Constitution.¹⁶⁶ It has been argued that the “mystery passage,” means that no government, local, state or national, can legislate morality. It has been claimed also that the “mystery

162. See *supra* notes 88–95 and accompanying text (discussing Senator Biden’s impressions during the confirmation hearings).

163. Until Alito and Roberts joined the Court, the Court’s abortion decisions could surely be read as amounting to “abortion on demand.” See generally Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 304 (2005); Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85, 88 (2005) (“No state can effectively prohibit any abortion, at any time of pregnancy, for any reason.”). With the current composition of the Court however, more regulation of abortion seems permissible, for example, the grisly procedure of intact dilation and extraction, or as its detractors call it “partial birth abortion.” *Gonzales v. Carhart*, 127 S.Ct. 1610, 1632 (2007) (stating that the Partial Birth Abortion Ban Act of 2003 prohibiting intact dilation and evacuation procedures both before and after viability is not unconstitutional).

164. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (Kennedy, J., O’Connor, J., and Souter, J., plurality opinion).

165. *Lawrence*, 539 U.S. at 574 (Kennedy, J., majority opinion).

166. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“Our obligation is to define the liberty of all, not to mandate our own moral code.” (quoting *Lawrence*, 539 U.S. at 559)).

passage” means the Court is claiming “the unconstrained power to define for all Americans which particular interests it thinks should be beyond the bounds of citizens to address through legislation.”¹⁶⁷

The “mystery passage,” derided by Justice Scalia as the “sweet-mystery-of-life” passage,¹⁶⁸ offers a Justice like Kennedy the power to infuse the Constitution with a radically individualistic approach to life and to find unconstitutional any sort of legislation based on morals. Justice Scalia believes that with *Lawrence v. Texas*, and presumably with the “mystery passage,” the Court majority “has taken sides in the [ongoing] culture war,” and legislatively imposed its radically individualistic cultural preferences on the nation.¹⁶⁹ This was done in the name of the Constitution, of course; Scalia’s point was that the *Lawrence* Court did not respect the separation of powers. Indeed, it was reading things into the Constitution that were not there.

The Senate critics of Alito and Roberts seemed to embrace the right of privacy, and their reading of the right of privacy, at least insofar as Justice Kennedy was quoted in support of it, certainly seemed similar to the “mystery passage.”¹⁷⁰ But the “mystery passage” is maddeningly obscure. We do not make up the meaning of life or the universe on our own. Culture, and even the state, is indispensable in forming our identities and our values.

In its obscurity, the “mystery passage” gives license to judges to do whatever they want—in short, to impose their values on us. As Scalia implies, questions about the meaning of life may be better addressed by Democratic institutions, like the legislature, if they are addressed by government at all. Constitutional rulings should not turn on individual justices’ conceptions of the universe.¹⁷¹ It seems better to let such matters turn on the original understanding of the Constitution, at least if that original meaning can be discerned, and if our democratic tradition and our traditional Blackstonian understanding of the rule of law is to be maintained. In short, judges should be bound by the rule of law, and should not have the discretion legislatively to insert their own particular political, philosophical, moral, or cultural views into the Constitution.

167. M. Edward Whelan III, Senate Testimony on *Roe v. Wade*, June 22, 2005, available at http://www.eppc.org/publications/pubID.2377/pub_detail.asp.

168. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

169. *Id.* at 602 (Scalia, J., dissenting) (“[T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”).

170. *Id.*

171. *Id.*

VI. CONCLUSION: THE “ANTI-MYSTERY PASSAGE”

The “mystery passage” authorizes the courts to dispense with morality, but it ought to be understood that our eighteenth century founders generally embraced morality.¹⁷² My favorite founder’s statement is that from Samuel Chase, a colorful figure who was the only United States Supreme Court justice ever to be impeached, but who also was a powerful intellect, fully in the mainstream of federalist jurisprudence.¹⁷³ In a time of national turmoil, Chase reminded his grand jurors:

First that *our free Republican Governments* cannot be preserved without the *Republican virtues of probity, and industry; frugality, and temperance.* 2d That without the restraint of Laws *Liberty* cannot exist in a State of Society. 3d That *good* Laws cannot be put in execution without *good morals*; and 4th That *Religion* and *piety; morality* and *virtue*, are the only pure foundations of *National* happiness.—Any government, whatever may be its form, that does not give protection and Security to the *property* and the *Civil and religious liberties* of its Citizens is unworthy of obedience, and defense.—Any government that does not *distinguish* virtue; *discourage* vice; and *reward* merit, cannot deserve the respect and esteem of its Citizens.¹⁷⁴

This 1802 Grand Jury charge might be thought of as the “anti-mystery passage.” Where the “mystery passage” is all about radical individualism, if not secular humanism, Chase’s words show a preference for morals, religion, virtue and, thus, altruism. “Privacy,” while it might perhaps still be protected through the protection of property and civil and religious liberties, was not at the center of that jurisprudential universe.¹⁷⁵ Virtue, altruism, self-sacrifice, and the community were. The “mystery passage” is all about “self-

172. I have tried to make this case in two monographs. See generally STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 7* (Carolina Academic Press 1991) (attempting to delineate original structural understanding of the Constitution and to elaborate on supraconstitutional principles of government the drafters meant to embody); RECAPTURING, *supra* note 8, at 42–49 (arguing that in order to fully grasp the original intent of the framers, we must acknowledge the crucial linkage between religion, morality, and the law, as the framers understood it).

173. See generally ORIGINAL MISUNDERSTANDING, *supra* note 172, at 37–47 (discussing the jurisprudence of Justice Chase, and its contribution to the political climate during the early years of our nation and beyond).

174. RECAPTURING, *supra* note 8, at 90–91. The quotation is from Samuel Chase’s manuscript Jury Charge Book, found in the Vertical File of the Manuscript Division of the Maryland Historical Society in Baltimore. The book is a collection of jury charges Chase made to grand juries in 1798–1800, 1802–1803, and 1805–1806. The quoted portions are found on pages 34–35 of the manuscript from a jury charge delivered in 1802.

175. *Id.* at 91 (suggesting that morality and religion are at the center of the jurisprudential universe).

actualization,”¹⁷⁶ but the earlier legal tradition Chase represented was something different.¹⁷⁷

At this point in our jurisprudential history, I have tried to suggest that the right of privacy, and the world view of the “mystery passage” are in the ascendant, but there is a clash of cultural values, as represented by the senatorial defenders of Roberts and Alito, and perhaps it is time once again for their views to receive a fair hearing in the academy. Perhaps it is significant that the flag protection amendment, which once garnered the support of eighty percent of the American people,¹⁷⁸ could find only a handful of proponents in the American legal academy.¹⁷⁹

Given that Americans generally have been a moderate people, whenever there is a clash of values, there is a tendency to try to find some compromise for the sake of peace, to forge some Aristotelian mean. The Alito and Roberts (and before them the Bork and Thomas) hearings were not about compromise, but were about stark ideological or at least philosophical positions—a war between individualists and traditionalists. It is probably significant that Sunstein has tried to come up with a judicial philosophy based on pragmatic compromise, one which he calls “judicial minimalism.”¹⁸⁰ Sunstein’s “judicial minimalism,” though, typified by Justices Kennedy¹⁸¹ and O’Connor,¹⁸² appears to endorse many if not all of the problematic acts of judicial legislation regarding the Commerce Clause, race, religion,

176. See *id.* at 13–16 (discussing “self-actualization” and what it means in contemporary constitutional law).

177. *Id.* at 91 (“Chase’s thought . . . might be fairly summed up by suggesting that [he] believed that *there could be no law, constitutional or otherwise, without morality and that there could be no morality without religion.*”).

178. *Flag Protection Amendment Fails in the Senate*, 3/29/2000, <http://usgovinfo.about.com/library/news/aa032900b.htm> (“Standing in front of an American flag, Sen. Hatch closed debate on the Flag Protection Amendment earlier today stating that it carried the support of 80 percent of the American people, and urging its passage.”).

179. My own experience as a consultant to the Citizens’ Flag Alliance (CFA), a grassroots organization advocating the passage of the Flag Protection Amendment, has been that few legal academics openly supported its passing. One other American law professor, Richard Parker of Harvard, also served as an occasional consultant to the CFA. Both Parker and I testified before assorted congressional committees urging the passage of the amendment, but to the best of my knowledge only one other law professor, Colorado’s Robert F. Nagel, made an argument similar to ours. While I suspect other law professors shared our views, I can testify with some certainty we were a tiny minority in the academic community.

180. See generally SUNSTEIN, *supra* note 25, at xii, 27–31 (explaining minimalist philosophy); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362 (2006), available at <http://www.michiganlawreview.org/archive/105/2/sunstein.pdf> (defining minimalism).

181. SUNSTEIN, *supra* note 25, at 31, 92–99 (contending that Justice Kennedy is a minimalist).

182. *Id.* at 29–30, 146–50 (contending that Justice O’Connor is a minimalist).

and abortion of recent years.¹⁸³ If this is “minimalism,” or even “moderation,” these words, for Sunstein, have a different meaning than most people would derive from them.

It is perhaps significant that the new Chief Justice has indicated his desire to respect precedent, and only modestly correct judicial errors.¹⁸⁴ Perhaps he and Justice Alito may seek moderation as a jurisprudential philosophy. On the other hand, the fact that Justice Kennedy has so often ended up the swing vote on the plethora of 5–4 cases in the 2006–2007 term may indicate that now the future of the Court is in Justice Kennedy’s hands,¹⁸⁵ who actually follows no particular jurisprudential philosophy. His record this last term simply demonstrates his desire for a particular set of results.

Perhaps we can do better. If the Senate hearings teach us anything, it is that if one school of jurisprudence really did stand for the rule of law, and the other jurisprudence stood for making the rules up as the judges went along, maybe, as hinted earlier, we should not seek moderation and compromise. As indicated earlier, if we still aspire to have a government of laws not men, then moderation and compromise on jurisprudence are attempts to reach an Aristotelian mean between good and evil, and not to be recommended.

The Democrats in the Senate who voted against John Roberts and Samuel Alito appeared to like the idea of courts expanding rights in general and the conception of the “mystery passage” in particular. For these Democrats, the idea of courts making law appeared to be fine, but to approve of this notion is, of course, to weaken the separation of powers. To embrace the “mystery passage,” then, is to seriously weaken, and maybe even to abandon the separation of powers. Blackstone, Montesquieu, and Hamilton would have hesitated before signing on to the “mystery passage.” So should we.

Perhaps it is, after all, more than a bit naïve to argue that judges do not make law and perhaps our politicians simplified the issues at stake

183. *Id.* at 27–30.

184. This seems to be the thrust of his majority opinions in the cases involving school assignments based on race and campaign finance reform. *See e.g.*, *Parents Involved in Cmty. Schs. vs. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2753–54 (2007) (abrogating *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (2005)); *Fed. Election Comm’n v. Wisc. Right to Life, Inc.* 127 S. Ct. 2652, 2654 (2007) (clarifying *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)).

185. For a discussion of Justice Kennedy’s importance, see Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007 available at <http://www.nytimes.com/2007/07/03/washington/03memo.html?ex=1188360000&en=ee6c62b0ab3878ae&ei=5070> (“A new dynamic emerged in the Court’s last term, which ended last week with Justice Kennedy standing in the middle, all alone. Not only the lawyers, but also the justices themselves, are now in the business of courting him.”).

in the confirmation hearings in order to energize and seek the approval of their political bases, particularly with regard to the right to privacy and the issue of abortion. Nevertheless, when we confront that issue, there does seem to be a difference between those who argue for leaving matters to the legislature and those who favor a more expansive role for the courts. Law professors can deride the “going around in circles about whether the nominee will just ‘find’ the law or will actively seek to remake it in his own image.”¹⁸⁶ Nonetheless, what is being circled about are separation of powers and the rule of law itself, and, if we still favor popular sovereignty and self-government, these should still matter to us.

186. For such derision see the prepared statement of Laurence Tribe, Alito Hearings, *supra* note 127, at 1507.