Judicial Selection and the Pursuit of Justice: The Unsettled Relationship between Law and Morality

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During the presidency of Ronald Reagan, judicial selection generated considerable controversy. In the two-year period immediately prior to the 1988 presidential election, judicial selection actually became, at times, the predominant public issue. The significant opposition to the elevation of William Rehnquist to Chief Justice\(^1\) gave way to more contentious battles over Robert Bork and other lesser known appellate and district court nominations. In their discussion of these events, commentators have demonstrated a partisan defense of one side or another.\(^2\) Writers sympathetic to the former President bemoan the " politicization" of the selection process; those opposed rejoice in the voice of the people being heard.\(^3\)

The judicial selection process, however, should not be evaluated solely in partisan terms. Beneath the straightforward political struggle lies disagreement over the respective institutional roles of the President and the Senate in the judicial appointment process. An even more profound tension exists

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1. Rehnquist was confirmed by a vote of 65 to 33, which Professor Herman Schwartz claimed was "the largest vote against a chief justice in history . . ." H. SCHWARTZ, PACKING THE COURTS 117 (1988).


3. Compare Fein, A Circumscribed Senate Confirmation Role, 102 HARV. L. REV. 672, 687 (1989) (expressing the concern that if the searching inquiry of the Bork confirmation becomes the norm, "the confirmation process will become a political battleground") with Totenberg, The Confirmation Process and the Public: To Know or Not to Know, 101 HARV. L. REV. 1213 (1988) (praising the Senate's actions as a surrogate for popular participation in the appointment process).
concerning whether, and if so when, law may be appropriately interpreted and applied in light of moral considerations.

This Article examines the judicial selection process during the Reagan years. The Article begins with a brief outline of the characteristics of those selected and the manner of their selection. Next, the Article considers the respective roles of the President and the Senate and concludes that both may properly inquire into a judicial candidate's fitness and philosophy. Finally, the Article examines judicial selection under President Reagan from a jurisprudential perspective to explore what those selections may reveal about the relationship between law and morality and the nature of the source of the obligation to obey the law. The Article demonstrates that this relationship remains unsettled even within camps of political foes and allies of particular nominees.

I. The Nature and Methods of Judicial Selections

President Ronald Reagan appointed 404 judges.\textsuperscript{4} Four of the appointments, including the elevation of William Rehnquist to Chief Justice, were to the Supreme Court, 83 to the courts of appeals, 292 to district court benches, 6 to the Court of International Trade, and 19 to the Claims Court.\textsuperscript{5} These appointments represent approximately fifty percent of the federal judiciary. This percentage, however, was not extraordinarily high. For example, in a tenure half as long, President Carter made appointments representing almost forty percent of the judiciary.\textsuperscript{6}

In terms of life experience, the average age of Reagan appointees was forty-nine years, just slightly younger than the average of fifty years for the judges chosen by President Carter.\textsuperscript{7} Of course, no objective measure of quality exists. However, using the American Bar Association (ABA) ratings, a study in \textit{Judicature} found that "the Reagan appointments may be seen as equaling the Carter appointees in quality and marginally surpassing the appointments of Ford, Nixon, and Johnson."\textsuperscript{8}

\begin{footnotes}
\item[4.] Office of Legal Policy, U. S. Dep't of Justice, Myths and Realities — Reagan Administration Judicial Selection 6 (1988) [hereinafter Myths and Realities] (much of the factual information in this section of the Article is derived from this widely circulated, but unpublished report).
\item[5.] Id.
\item[6.] Id. at 7.
\item[7.] Goldman, Reagan's Second Term Judicial Appointments: The Battle at Midway, 70 \textit{Judicature} 324, 328, 331 (1987).
\item[8.] Goldman, Reaganizing the Judiciary: The First Term Appointments, 68 \textit{Judicature} 313, 322 (1985). Professor Goldman found Reagan's second term appointments even better, surpassing those from the first term and constituting "the most professionally qualified group of appointees over the past two decades." Goldman, supra note 7, at 329.
\end{footnotes}
The selection process during the Reagan years began with an initial battery of interviews conducted by upwards of ten senior officials at the Department of Justice (Department). Sometimes a dozen or more candidates would be recommended to the Department by various sources: members of Congress, who frequently had their own merit panels; Department officials, who determined on the basis of a person's prior service on the bench, practice, or scholarly writing that such individual shared the President's judicial philosophy; or local colleagues and associates of the prospective candidate.

Interviewers at the Department commonly evaluated a candidate's ability by asking the aspirant to think through hypothetical legal problems of some complexity. They also made an effort to evaluate a candidate's demeanor and assess his or her commitment to impartiality and fairness. The Department summarized the information collected during the interviews as well as the results of preliminary reference checks and subsequently discussed the results with the Counsel to the President and the Attorney General.

The emerging consensus candidate was thereafter subjected to a full-field FBI investigation and an evaluation by the ABA screening committee. The ABA committee interviewed the candidate and members of the bench and bar familiar with his or her work. Assuming both investigations were favorable, the Attorney General presented the candidate to the President for his consideration. If the President approved of the candidate, he would formally announce and forward the nomination to the Senate for review by the Judiciary Committee, and ultimately, for consideration by the entire Senate.

The men and women selected by President Reagan using this selection process were, by and large, successfully confirmed. The Senate, however, did not confirm three candidates — one each at the Supreme Court, appellate, and district court levels. An additional number of candidates were nominated, but did not receive the full attention of the Judiciary Committee or withdrew in the face of controversy or unfavorable background information. Yet, the relative few who were turned away, or discouraged,

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9. The candidates were Robert Bork, Bernard Siegan, and Jefferson Sessions, respectively. H. Schwartz, supra note 1, at 96, 140, 149 n.66.

10. Most prominent, perhaps, was Judith Richards Hope, a respected lawyer who had been nominated for the United States Court of Appeals for the District of Columbia. When the 100th Congress adjourned sine die, it had not acted upon seventeen Reagan nominees. These candidates would have required renomination by President Bush in the next Congress to be considered further. To date, most of these neglected candidates have not been renominated.

11. The best known case of withdrawal prior to nomination, but after White House announcement, was that of Judge Douglas H. Ginsburg. Judge Ginsburg withdrew from consideration for the United States Supreme Court after published reports stated that he, at one time, used marijuana prior to his federal service. Professor Schwartz lists William Harvey, Michael Horowitz, Marion Harrison, and Lino Graglia as also withdrawing either before or after formal nomination. H. Schwartz, supra note 1, at 97-98.
were the subject of disproportionate debate and controversy in the course of their consideration. The dispute over the respective roles of the President and Senate in the selection process created a considerable element of this controversy.\textsuperscript{12}

II. THE ROLES OF THE PRESIDENT AND THE SENATE

A. An Historical Perspective

Article II, section 2 of the Constitution provides that "[t]he President... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law..."\textsuperscript{13} These words did not come easily to the convention delegates in 1787.\textsuperscript{14} Some delegates, notably James Wilson of Pennsylvania, advocated that the President should have complete authority to appoint judges without the Senate's acquiescence.\textsuperscript{15} Wilson feared that a collective body was incapable of the partisan-free deliberation necessary to select judges of ability and competence.\textsuperscript{16} By contrast, South Carolina's John Rutledge, who was later nominated as Chief Justice by George Washington, believed that exclusive power in the President would be monarchical.\textsuperscript{17} Perhaps Mr. Rutledge had second thoughts when the Senate subsequently rejected his nomination. Whether Rutledge did or not, the drafters of the Constitution ultimately decided to make the President's appointment authority conditional.

Of course, the President's discretion to nominate, as distinguished from his authority to appoint, is unfettered. If there are constraints upon whom may be nominated, or on what the President may inquire of a prospective nominee, they are political or prudential, not constitutional. Alexander Hamilton explained that:

\textsuperscript{12} For an annotated bibliography on this subject, see Slinger, Payne & Gates, The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography, 64 NOTRE DAME L. REV. 106 (1989).
\textsuperscript{13} U.S. CONST. art. II, § 2.
\textsuperscript{14} For a brief, but thoughtful, summary of the constitutional history, see Ginsburg, Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate, 1988 U. ILL. L. REV. 101, 103-05.
\textsuperscript{16} Id. By contrast, Roger Sherman was more confident in the role of the Senate, noting that the body "would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom." J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 316 (1966) (quoting Sherman). Apparently, Sherman believed wisdom is cumulative.
\textsuperscript{17} J. MADISON, supra note 16, at 67.
[In the act of nomination [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man, who with the approbation of the Senate should fill an office. . . . There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose — they can only ratify or reject the choice he may have made.]

The historical record suggests that the Framers may have anticipated that the Senate would rarely deny appointments. Thus, some have argued that the Senate cannot use judicial philosophy as the basis for withholding consent. But what individual Framers may have expected, and what they actually provided, are not necessarily the same. The plain text of the Constitution does not limit the Senate's role to merely the ascertainment of intellectual competence or judicial temperament. Even if the Constitution contains limits, scholars presently argue with some force that the seventeenth amendment, which establishes a more democratic means of Senate selection, and other contemporary developments, now favor a more expansive inquiry by the Senate.

One may have expected, however, a clearer, more settled conception of the Senate's role long before the Reagan administration. Curiously, that was not so. Perhaps the seedlings of doubt regarding the Senate's role took root because, for most appellate and district court nominations, the Senate found it unnecessary to assert its prerogative to block nominees. The men and women appointed by past presidents to these courts have been, with rare exception, competent professionals with little in their backgrounds to generate objection. Moreover, even when some element of controversy existed,

19. Hamilton conceived of the Senate's role as "an excellent check upon a spirit of favoritism in the President" precluding "the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." Id. at 457. But cf. Carter, The Confirmation Mess, 101 Harv. L. Rev. 1185, 1187 (1988) (suggesting that this passage reveals that the Framers "contemplated the Senate's role as a significant check on presidential discretion"). I disagree with Professor Carter's speculation that this is what the Framers "contemplated" as a matter of practice primarily because the clear emphasis of the passage is on the avoidance of cronyism; the passage says very little about the Senate's ability to inquire into philosophy. What the Framers guessed would happen, however, is not dispositive in light of what the Senate is permitted to do under a fair reading of the Constitution.
21. See L. Tribe, God Save This Honorable Court 132 (1985). Professor Tribe argues that in modern times greater emphasis is placed on diversity and democracy. He supports this proposition by pointing out that although the Framers believed that elite bodies would select the President and the Senate, these beliefs either never materialized or were the subject of amendment.
22. See generally J. Harris, The Advice and Consent of the Senate (1953).
senatorial courtesy often resulted in a prescreening of candidates that sheltered disagreement between the executive and the legislature from the public eye.23

Political memories are also short. Consequently, the Senate's role might have appeared passive and open to question because few contemporary opportunities existed to consider the role with respect to Supreme Court nominations. Prior to President Reagan's nominees, Justice John Paul Stevens was the only justice named to the Court for almost a decade. President Carter's single term provided no opportunity to appoint anyone to the Court. In addition, President Reagan's decision to break the gender barrier with the nomination of Justice Sandra Day O'Connor was so loudly applauded that those few concerned with her abortion views and prior experience were barely audible.24

Yet, this senatorial quiescence cannot obscure the fact that since the time of the Constitution's inception, the Senate has not hesitated to raise objections and deny appointments when it deemed such action necessary. The Senate rejected Washington's nominee, Rutledge, due to his opposition to the Jay Treaty.25 In addition, the Senate initially denied Roger Taney a seat because of his opposition to the national bank.26 Judge George Woodward's "Nativist" or anti-ethnic agenda could not withstand the glare of public scrutiny in the mid-nineteenth century.27 Others became mere historical


24. H. SCHWARTZ, supra note 1, at 63. Professor Schwartz observed that "[b]ecause O'Connor was the first female nominated to the Court, many liberals and feminists promptly supported her. Her only substantial opposition came from anti-abortion groups, who, seeing that she had supported liberalized abortion when she was in the Arizona Senate in 1970 and 1974, thought she was prochoice." Id.

25. See H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 73 (2d ed. 1985). Justice Rutledge had previously served on and resigned from the Court to accept the Chief Justiceship of the South Carolina Supreme Court. Id. Rutledge apparently disliked the rigors of the circuit riding that was then part of the Justices' job. Id. Professor Tribe relates that Oliver Ellsworth led the opposition against Rutledge. "Ellsworth has been called the Father of the Federal Judiciary because he sponsored the Judiciary Act of 1789, which established a system of lower federal courts and set the size of the Supreme Court." L. TRIBE, supra note 21, at 79.


27. L. TRIBE, supra note 21, at 87.
footnotes because they supported slavery\textsuperscript{28} or were antiunion.\textsuperscript{29} Still others were rejected for lack of ability.\textsuperscript{30} In all, the Senate has rejected almost one in four nominees to the Supreme Court.\textsuperscript{31}

It requires a certain historical forgetfulness, then, to conclude that the Senate has acted beyond its constitutional prerogatives in the Reagan years. The Reagan administration may have preferred a more agreeable Senate, especially after the Senate fell to the Democrats in 1986. Nevertheless, it is simply error, if not ahistorical and implicitly anti-democratic, to insist that the Senate circumscribe its investigation to “determining whether the nominee was intellectually competent and whether his nomination was tainted by cronyism, corruption, or crass political partisanship.”\textsuperscript{32} As Professor Louis Henkin observed: “In an appointment to the United States Supreme Court, the Senate comes second, but is not secondary. The standards the Senate should apply are the same as those that should govern the President: what would serve the national interest.”\textsuperscript{33}

B. President Reagan’s Judicial Policy Animates the Senate

In retrospect, several features of President Reagan’s judicial selection approach were likely to, and did, evoke more active attention from the Senate. First, beginning with the 1980 campaign, Ronald Reagan made judicial selection a cornerstone of his political vision for the nation. The 1980 Republican platform included a pledge to appoint:

\textsuperscript{28} 2 C. \textsc{Warren}, \textit{The Supreme Court in United States History} 320-57 (rev. ed. 1926). After \textit{Scott v. Sanford}, 60 U.S. (19 How.) 393 (1857), it became essential for a Supreme Court nominee to establish antislavery credentials. \textit{Id.}

\textsuperscript{29} Professor Tribe reports that the labor movement opposed John Parker, a nominee of President Hoover, for his prior opinion on the Fourth Circuit upholding “yellow dog” contracts, that is, those contracts requiring a pledge never to join a union. \textit{See L. Tribe, supra} note 21, at 90.

\textsuperscript{30} H. \textsc{Schwartz}, \textit{supra} note 1, at 48. In considering the ultimately unsuccessful Nixon nomination of G. Harold Carswell, Senator Roman Hruska countered concerns about Mr. Carswell’s legal competence by stating: “Even if he was mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance? We can’t have all Brandeises and Cardozos and Frankfurters and stuff like that there.” \textit{Id.} (quoting Senator Hruska).

\textsuperscript{31} \textit{See Abraham, supra} note 26, at 282. Since the publication of the Abraham article, the Senate rejected Robert Bork and confirmed Anthony Kennedy. The President announced an intent to nominate Douglas Ginsburg to the Supreme Court, but Judge Ginsburg withdrew before he could be nominated because of certain questions pertaining to his personal behavior, practice experience, and possible ethical conflicts. \textit{Ginsburg Withdraws Name As Supreme Court Nominee, Citing Marijuana “Clamor.”} \textit{N.Y. Times}, Nov. 8, 1987, pt. 1, at A1, col. 6.

\textsuperscript{32} Fein, \textit{supra} note 3, at 687 (advocating a circumscribed senatorial role).

[W]omen and men . . . whose judicial philosophy is . . . consistent with the belief in the decentralization of the federal government and efforts to return decisionmaking power to state and local elected officials . . . who respect traditional family values and the sanctity of innocent human life.  

This statement unmistakably promised that President Reagan would scrutinize a judicial candidate's political or judicial philosophy. Not surprisingly, such philosophical screening invited the Senate to question whether someone with deeply held moral and political views could impartially apply the law when the law contradicted those values. More on this later, but for now suffice it to observe that from its pre-sovereign moments, the Reagan administration stated, unequivocally, that judicial philosophy mattered. The Senate merely responded in kind.

The diminution of senatorial courtesy or patronage also may have spurred a more intense and visible Senate interest. While members of Congress, especially those within the President's party, continued to have significant input with respect to district court nominees, this influence on appointments at the appellate and Supreme Court levels noticeably decreased. The White House and the Department of Justice stepped in to fill the gap and, as a consequence, a more uniform and centralized decisionmaking entity developed. The Department of Justice placed judicial selection within the Office of Legal Policy, thereby further accentuating the importance assigned to policy considerations in the selection process. This factor interacted with and highlighted the President's personal emphasis on judicial philosophy. As a result of the combination of centralization and Reagan's emphasis on philosophy, the Senate was even more likely to intensify its inquiry of judicial nominees.

This description of the increased importance of policy considerations should not be misunderstood as criticism. As already indicated, there is nothing illicit about the President or the Senate inquiring into judicial philosophy. The regrettable characterization of such inquiries as a "litmus test" is dismissed fairly as a red herring. To be sure, if either the President or the Senate reject candidates based on a few "yes" or "no" answers or

35. See infra notes 106-08 and accompanying text.
37. Professor Schwartz asserts that President Reagan's ideological screening was the most pronounced since John Adams' midnight attempt to pack the courts with sympathetic federalists before leaving office. H. SCHWARTZ, supra note 1, at 55. Whether one finds his assertion true is more than likely determined by one's political outlook. The fact that presidents have made these inquiries since the time of the nation's founding seems the more noteworthy point.
slogans, the procedure would have been properly open to criticism. Little in the record, however, supports chastising the President or the Senate on this score.\textsuperscript{38} What sloganeering did occur was orchestrated largely outside the formal selection process.\textsuperscript{39}

With the decisionmaking process centralized, a third factor prompted Senate scrutiny: the Reagan administration's proclivity to choose candidates who have compiled substantial written records, either as sitting judges, academics, or both.\textsuperscript{40} This facilitated the President's review of a candidate's beliefs, and it quite naturally became an important part of the confirmation inquiry. While the presence of a written record did complicate and lengthen the review process, it had two salutary effects. It brought to the bench at the appellate level both legal academics, who brought with them the type of comprehensive thinking about the law that teaching inspires,\textsuperscript{41} and state and federal trial judges, whose practical experience is invaluable to the competent administration of the courts.

\textbf{C. The De-emphasis of the Role of the American Bar Association in Judicial Candidate Selection}

The centralized selection process employed in the Reagan era had an additional feature: a slightly reduced role for the American Bar Association (ABA). The ABA became involved in judicial selection perhaps more recently than commonly thought. Not until the Eisenhower administration did any administration give substantial weight to the recommendation of ABA's Standing Committee on the Federal Judiciary or permit the ABA to

\textsuperscript{38} "[T]here is no objective evidence that a 'litmus test' in terms of specific policy views had been employed [by the Reagan administration] to accept or reject candidates." Goldman, \textit{supra} note 7, at 326.

Regrettably, no process works perfectly. Apparently some nominees had their beliefs mischaracterized or were opposed for specious reasons. See Lacovara, \textit{The Wrong Way to Pick Judges}, N.Y. Times, Oct. 3, 1986, at A31, col. 1 (past organizational involvement overshadowing obvious agreement with President's judicial philosophy and an apparently commendable record of public service). Experience suggests that those with multifaceted intellectual interests that are difficult to label in a "political" sense run this hazard more than others.


\textsuperscript{40} For a comment favorable to this practice because of the shortcomings of oral examinations of a judicial candidate, see Powe, \textit{The Senate and the Court: Questioning a Nominee} (Book Review), 54 \textit{TEX. L. REV.} 891 (1976).

\textsuperscript{41} Former Professors Bork, Bowman, Easterbrook, Ginsburg, Kennedy, Miner, Noonan, Posner, Ripple, Scalia, Tacha, Winter, Williams, and Wilkinson are examples.
evaluate all competing candidates before the nomination.42 Prior to this period, Professor Herman Schwartz related that the ABA was perceived as having an establishment or otherwise unrepresentative cast, making its influence only haphazard.43 The Reagan administration marginally de-emphasized the role of the ABA by submitting to the ABA only the names of candidates who cleared the internal process.

The ABA role presently remains in a state of flux. After some prodding, the ABA has sought to quiet criticism by publicly reaffirming earlier guidelines that indicate that it will not investigate or report on political or ideological matters.44 While ideology is fair game for the political branches of government, it is wiser for the multi-partisan membership of the ABA to avoid this thicket.

Beyond this, a good part of the wariness over the ABA's role stems from its resistance to making its judicial screening deliberations public.45 Presently, the ABA makes its investigative report available only to the Attorney General. Moreover, this report does not specify either the sources or the entire basis for particular comments evaluating a candidate. The ABA makes public its final rating only if the President nominates the individual. ABA representatives, however, will publicly testify about a rating's significance or meaning before the Senate Judiciary Committee.46

Liberal and conservative public interest organizations, seeking to apply the Federal Advisory Committee Act (FACA)47 to the ABA's judicial screening process, recently challenged the secrecy surrounding the ABA procedure.48 FACA requires, among other things, advance public notice and open meetings by advisory committees chaired or attended by an officer of the Federal Government.49 For these reasons, the ABA resisted the application of FACA to its judicial screening work from the statute's incep-

42. H. SCHWARTZ, supra note 1, at 61.
43. Id.
44. ABA To Avoid Politics, Ideology in Screening, Wash. Times, May 3, 1989, at A4, cols. 2-5. Although the ABA insisted that it did not review candidates based on ideology, it stated in an ABA publication: "'[P]olitical and ideological philosophy are not considered, except to the extent they may bear upon other factors . . . .'
46. ABA STANDING COMM. ON FED. JUDICIARY, WHAT IT IS AND HOW IT WORKS 9-10 (1988).
49. FACA, 5 U.S.C. app. § 10(a)(2)-(3), (e).
tion. Recently, in *Public Citizen v. United States Department of Justice*, the United States Supreme Court sanctioned the ABA's position. Straining to disregard the plain text of FACA, the Court permitted the ABA to keep its deliberations confidential.

On its face, FACA applies to any advisory committee, whether or not created or funded by the government, that is "utilized" by the President or one of the agencies. Calling "utilized" a "woolly verb," the Court in *Public Citizen* manufactured a distinction between the "provision of advice," which the ABA undeniably did, and "utilization" of it, which the Court said must be understood not by its dictionary definition, but in terms of Congress' purposes. Disregarding the purposes articulated in the statute's accompanying Conference Report, which fit the ABA committee remarkably well, the Court narrowly interpreted Congress' purpose as merely avoiding wasteful expenditures and biased advice by a multiplicity of advisors, rather than liberally opening the federal advisory process to public scrutiny. Attempting to bolster this non-textual reading of the statute, the Court drew upon other isolated fragments of FACA's expansive legislative history. In addition, according to the majority, executive practices contemporaneous with the passage of FACA indicated that neither the Kennedy nor the Johnson administrations apparently ever thought FACA applied to the ABA judicial screening committee.

Three members of the Court concurred in the majority's judgment that FACA could not require the ABA to open its proceedings, but strenuously disputed the Court's method of statutory interpretation. Instead, Justice Kennedy, writing for the Chief Justice and Justice O'Connor, found that the application of FACA to the President's nomination authority was contrary to...
to the President's Article II authority. Admitting the general principle that a court must seek a statutory construction whenever feasible to avoid a constitutional question, the concurrence stated that "this principle cannot be stretched beyond the point at which such a construction remains 'fairly possible.'" Here, the concurrence concluded that the constitutional question could be avoided only by "the unhealthy process of amending the statute by judicial interpretation." Finding that in the constitutional text, the President explicitly and exclusively possesses the power to nominate, the concurrence stated that no intrusion by the legislative branch was tolerable. FACA, according to the concurrence, constituted a "direct and real interference" with the President's responsibilities.

Despite the severe infirmity of the majority's reasoning, for purposes of this Article, the Court's opinion settled the question of whether the public could utilize FACA, in a woolly or polyester fashion, to pry the lid off the ABA's screening process. Perhaps in the background of both the majority and the concurring opinions lay concern for the ability of the President to obtain honest advice in a public forum. In this respect, the Court's opinion is consistent with President Jefferson's observations to Secretary of the Treasury Gallatin that:

Recommendations when honestly written should detail the bad as well as the good qualities of the person recommended. That gentlemen may do freely if they know their letter is to be confined to the president or the head of a department. But if communicated further it may bring on them troublesome quarrels. In G. Washington's time he resisted every effort to bring forth his recommendations.

Even though its pre-screening influence may have decreased slightly during the Reagan years, the ABA's ability to label a candidate as "not qualified" clearly continued to place constraints on the selection process. While President Carter and other presidents nominated several candidates so las-

59. Id. at 2581. Justice Scalia did not participate. As Assistant Attorney General for the Office of Legal Counsel in 1973-74, Justice Scalia previously considered the question, reaching a result similar to that of the Kennedy concurrence. See Memorandum for the Federal Appellee at 5 n.3, Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558 (1989) (Nos. 88-494; 88-429).


62. Id. at 2578.

63. Id. at 2581.

64. Id. at 2584.

65. J. Harris, supra note 22, at 47 (quoting VIII P. Ford, The Writings of Thomas Jefferson 211 (1987)).
beled, President Reagan did not. In addition, the ABA’s screening process may have slowed the Reagan trend toward selecting academics, because the ABA appeared to accord greater weight to practice experience and yielded an unexpectedly low “qualified” rating for some of those going from the classroom to the courtroom.\(^6\)

III. THE QUESTIONS ASKED AND ANSWERED: NOMINEE INQUIRY DURING THE REAGAN ERA

Because both the President and the Senate have broad authority to inquire into the background, fitness, and philosophy of nominees, it is worthwhile to examine how this power was exercised during the Reagan years. As noted earlier, the President’s criteria were manifest in the Republican Party platform.\(^6\) Nevertheless, the administration engaged in some unnecessary denial that these criteria amounted to ideological screening.\(^6\) The President, it was asserted, was more interested in having judicial candidates with a “proper” conception of the judicial role than candidates who could be easily identified as liberal or conservative.\(^6\) Although this may be true, the platform statement revealed that the administration was also interested in judges who favored certain outcomes, such as greater deference to state law, traditional family values, and the protection of innocent life. Throughout the Reagan era, giving more precise content to these statements in the political platform in light of existing court precedent tested the administration’s commitment to another principle it held dear: judicial restraint as a neutral principle.

The tension between desired conservative ends and judicial methodology, however, was not always problematic. In application to contemporary circumstances, there is often a striking confluence of conservative outcomes and the methods employed by a restrained judge.\(^7\) This fact was well-appreciated, if not always explicitly acknowledged, by the President’s judicial selection team. For example, one administration report, which portrayed as “myth” the notion that the President selected judges on the basis of political

\(^6\) MYTHS AND REALITIES, supra note 4, at 4.
\(^67\) See supra notes 34-41 and accompanying text.
\(^68\) MYTHS AND REALITIES, supra note 4, at 5.
\(^69\) Id. at 5-6.
\(^70\) Some conservatives were not reticent about noting the relationship between judicial restraint and conservative ends. See Stern, Judging the Judges: The First Two Years of the Reagan Bench, 1 BENCHMARK, July-Oct. 1984, at 3.
ideology, later stated with satisfaction that a study found Reagan judges
tougher on crime than both Carter and Nixon judges.  

Certainly, opponents of President Reagan's nominees believed that their
philosophical and political interests would suffer under Reagan judges
adopting a restrained decisionmaking posture. But the opposition, too, in-
isted on speaking in code. Instead of judicial restraint, the opposition's en-
coded formulation focused on whether a nominee occupied the
"mainstream" of legal thought. Not surprisingly, opponents claimed that
a fair number of the legal positions important to the President could not be
located in the mainstream. Like actual streams, the "mainstream" also
tended to shift, making it difficult for some Reagan nominees to locate, let
alone navigate, it successfully.

At the risk of cartographical error, the so-called mainstream, for at least
some of the President's political opposition, flowed at various times through

71. MYTHS AND REALITIES, supra note 4, at 5-7 (citing Rowland, Songer & Carp, Presi-
dential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges, 22
LAW & SOC'Y REV. 191 (1988)).

Because the President had every right to inquire into judicial philosophy, and because many
Americans shared President Reagan's concern with judicial decisions that frustrate legitimate
law enforcement efforts, it was unclear why the administration disguised these policy concerns.
If anything, the reluctance to candidly acknowledge that both policy and judicial methodology
guided Reagan judicial selection might have unintentionally weakened, rather than enhanced,
the intellectual claim that a posture of judicial restraint could be wholly neutral.

72. See generally Biden, Choosing Judges, 8 NAT'L L.J., Mar. 24, 1986, at 13 (arguing that
the Constitution requires that the President select nominees from the "mainstream of Ameri-
can jurisprudence").

73. In the Bork nomination, Senator Biden, the chairman of the Senate Judiciary Com-
mittee, authorized preparation of a formal response to the White House analysis of Judge
Bork's record. In this unpublished, but widely circulated, document dated Sept. 2, 1987, it is
clear that those who found Judge Bork outside the "mainstream" of legal thought viewed
Judge Bork as implementing the President's legal philosophy. U. S. SENATE, COMM. ON THE
JUDICIARY, RESPONSE PREPARED TO WHITE HOUSE ANALYSIS OF JUDGE BORK'S RECORD
13 (Sept. 2, 1987). For example, the response document states:

From the outset of his Administration, Reagan has made clear his desire to fill the
Judiciary with people who decide cases as he would. Though the President's term
will end in 18 months, the nomination of Bork gives Reagan the opportunity to write
his views into the law for years to come.

Id.

74. This seemed most evident in the consideration of Professor Bernard Siegan for an
appellate court vacancy. Of the nominations rejected, Professor Siegan's was probably the
least well-considered. A genial, scholarly man, appointed to serve with former Chief Justice
Burger on the Bicentennial Commission, Professor Siegan had the misfortune of being virtu-
ally last in line. Following the Bork and Ginsburg experiences, enough bad blood flowed be-
tween the political branches to sink almost any nominee. The Siegan nomination thus tended
to confirm that a nominee's chances varied directly with the remaining tenure of the nominat-
ing President. See Segal & Spaeth, If a Supreme Court Vacancy Occurs, Will the Senate Con-
the incorporation doctrine, especially as it pertained to the expansion of
directions afforded criminal defendants. The mainstream’s course also engulfed
the right to privacy, including the abortion right (although perhaps for stra-
tegic reasons, privacy was most often discussed outside the divisive abortion
context), and a fairly expansive view of equal protection, including, at times,
sexual preference and nonremedial affirmative action. Given that aspects
of each of these issues continue to dominate the Supreme Court’s calendar,
one cannot credibly claim that a particular view of any of these subjects is
definitively correct.

To be fair, a few serious scholars, who often find
themselves in opposition to the President, acknowledge that with respect to
each subject a “wide range” of constitutional opinion exists and that “a phi-
losophy must be more than a bumper sticker.”

Unfortunately, many op-eds, editorials, advertisements, and position pa-
pers appearing contemporaneously with the hearings showed much less rec-
ognition of these subtleties. On the conservative side, the meaning of judicial
restraint was more or less assumed rather than discussed. Yet, the applica-
tion and meaning of the principle is not always self-evident. For example,
consider the application of judicial restraint to the otherwise uncontroversial
apportionment clause of the fourteenth amendment. The amendment pro-
vides: “Representatives shall be apportioned among the several States ac-
cording to their respective numbers, counting the whole number of persons
in each State, excluding Indians not taxed.”

What does judicial restraint
mean for the counting of illegal aliens? How would a “restrained” nominee
arrive at a decision? The amendment’s text suggests use of the broadest pos-
sible term, that is, persons, not citizens, but the purpose of the clause ap-
ppears largely to affect the political interests of citizens. As for legislative
history, the concept of “illegal alien” did not exist when the 39th Congress
proposed the fourteenth amendment. Yet, the Census Bureau has always
counted illegal aliens. Does it matter that the Supreme Court has included
illegal aliens within the definition of “person” for purposes of the equal pro-

75. See generally H. SCHWARTZ, supra note 1, at 169-70, app. I (by negative implication).
76. Professor Stephen Carter observed: “[C]ritics insisted that Judge Bork’s constitu-
tional theory was outside the mainstream of contemporary jurisprudence, but unless the main-
stream is defined very narrowly, this charge is surely incorrect as a factual matter.” Carter,
supra note 19, at 1191.
77. L. TRIBE, supra note 21, at 97.
78. U.S. CONST. amend. XIV, § 2.
79. The United States has, since 1790, followed a consistent practice of counting all aliens
for purposes of apportionment. In this respect, the first census act directed that “every person
whose usual place of abode shall be in any family [on census day] shall be returned as of such
family.” Act of Mar. 1, 1790, § 5, 1 Stat. 101, 103. This section remained unchanged in
tection clause, or is that a wholly separate analytical exercise even though contained in the same amendment?

The opposition similarly tended to paint too broadly, as its focus on roughly characterized outcomes, rather than legal reasoning, suggested. During the Bork hearings, for example, the discussion of the right to privacy focused on whether privacy was good or bad. However, Judge Bork questioned the origin of the right, not its wisdom. Similar questions had been raised by a wide range of scholars from Archibald Cox to Philip Kurland. This scholarly concern with constitutional theory, and ultimately democratic legitimacy, seemed often lost on popular critics, and even some senators and witnesses.

Perhaps the worst example of this outcome fixation was the circulation by a number of organizations of simple-minded statistical evidence purportedly subsequent censuses and has been the standard test for the census ever since. See, e.g., Act of 1810, § 5, 3 Stat. 548, 552; Act of Mar. 23, 1830, § 5, 4 Stat. 383, 386.

Although Congress contemplated excluding aliens following the passage of the fourteenth amendment, it rejected the proposition expressing constitutional concerns. For example, both the Seventy-first and Seventy-second Congresses considered such exclusion, but the Senate Legal Counsel issued an opinion in 1929 which concluded that, after a review of both the fourteenth amendment and the Constitution, the fourteenth amendment did not exclude aliens. This issue was re-examined during the period that the author headed the Office of Legal Counsel, and the author reached a similar conclusion against exclusion. Subsequently, the United States defended the practice of counting illegal aliens for apportionment purposes in Ridge v. Verity, 715 F. Supp. 1308 (W.D. Pa. 1989) (entering summary judgment for the United States on standing grounds, the court rejected claims of standing by individual members of Congress suing in their individual capacity as well as the separate standing claims of states and organizations).


83. Professor Stephen Carter makes a similar point by drawing out the confusion during the Bork hearings between privacy rights that have a judicial basis and rights that have a constitutional basis. Thus, with some obvious cynicism, he wrote that "[w]hen the people and their representatives talk of 'protecting our basic rights,' or even 'maintaining the essential balance,' it is hard to imagine that they mean much more than 'making sure we still have the votes.' " Carter, supra note 19, at 1191. However, if Professor Carter correctly asserts that our fundamental rights are perceived as wholly dependent upon the shifting majorities of the Supreme Court, then his statement demonstrates why it is necessary for both the President and the Senate to pursue more forthrightly the type of jurisprudential inquiry outlined later in this Article. See infra notes 93-134 and accompanying text.
Judicial Selection

showing that Judge Bork was "pro-business" or "anti-criminal defendant." Such nose counting produced tremendous distortion. As Professor Paul Freund wrote forty years ago:

A case may present, in one aspect, an issue of civil liberties; it may also involve issues of federalism, or of the relation of the Court to the legislature, or of the standing of the litigant to invoke judicial redress at all.

A topical catalog of decisions or of votes of individual Justices is likely perforce to focus on the winning and losing litigants and the social interests with which they are identified: big business, taxpayers, labor, political or religious minorities, and so on. To rely on any such scheme of analysis is a dubious approach to an understanding of the Supreme Court.

The result-oriented criticism of President Reagan's nominees may have also misled the public in ways that should generate considerable concern. Any suggestion that judicial candidates are evaluated on the basis of whether popular policies are advanced or favored litigants are advantaged cannot be reconciled with the concept of "equal justice under law." Few laymen are familiar with the first line of the judicial oath to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . ."

Even fewer laymen will long believe these words if prominent lawyers or public officials in a judicial nomination proceeding not only fail to repudiate the notion of such partiality, but also tolerate, or worse, propagate it.

The contest between judicial restraint and the "mainstream" was also portrayed as one of adherence to original intent versus noninterpretativism. This line of inquiry similarly tended to be unenlightening. Despite lengthy symposia, the meaning of original intent in a great many contexts still remains unclear. A few make a mockery of the concept by suggesting that it "would keep the Constitution in a powdered wig and knee breeches . . . [and] would lock us into the moral vision and limited experience of people centuries ago." To my knowledge, no serious advocate of the concept has ever made this suggestion. Rather, the proposition is simply that judges must make constitutional decisions by starting with the text, drafting, and ratifica-

88. See H. Schwartz, supra note 1, at 34.
tion history of the Constitution, ascertaining the relevant principles there-from, and applying those principles to the contemporary circumstances presented by a specific case. Stated this way, there is far less disagreement with original intent as a method of interpretation. The more severe disagreements come, of course, in application. As one observer stated:

The text of the Constitution, as anyone experienced with words might expect, is least precise where it is most important. Like the Ten Commandments, the Constitution enshrines profound values but necessarily omits the minor premises required to apply them . . . . History can be of considerable help, but it tells us much too little about the specific . . . intentions, and no one foresaw, or could have foreseen, the disputes that changing social conditions and outlooks would bring before the Court.

Certainly, some would be astonished to know that Robert Bork made this observation twenty-one years ago. The observation was just as true at his confirmation hearing, and in that lies a serious academic shortcoming. While there is a considerable body of constitutional legal history to inform the attempts at defining the opaque terms of the Constitution, few constitutional scholars have undertaken the difficult task of assembling the material into useful form for the profession and the courts. Consequently, law students are taught cases and little else. If the cases got it “wrong,” it is foolish to expect the hurried practitioner or overburdened judge to undertake original scholarship. Today, it is a rare case for even the Supreme Court to rely on anything more than its own precedent.

89. An important question for all adherents to the original understanding is at what level of generality should courts interpret constitutional provisions. In this regard, Professors Farber and Sherry write: “Does the Eighth Amendment require judges to apply some general concept of ‘cruel and unusual’? Or does it address only what specific punishments the framers meant to forbid?” D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 383 (1989). Robert Bork answers that “the problem of levels of generality may be solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support.” Bork, The Constitution, Original Intent, and Economic Rights, 23 SAN DIEGO L. REV. 823, 828 (1986).


91. For a very helpful collection of historical insights into original meaning, see D. FARBER & S. SHERRY, supra note 89. Professors Farber and Sherry relate that despite the reawakened interest in originalism, even as fostered by the Constitution’s bicentennial, they were “shocked to discover” that very little of the original history of the Constitution was readily available. Id. at xiii.

92. The Court has sometimes dismissed, perhaps too easily, the original meaning, finding that it was forgotten in the “‘crucible of litigation.’” See, e.g., Wallace v. Jaffree, 472 U.S. 38, 106-07 (1985) (Rehnquist, C.J., dissenting) (quoting id. at 52 (Stevens, J.)).
IV. **JUDICIAL SELECTION THROUGH A JURISPRUDENTIAL LENS**

Not far beneath the surface of the mainstream lie some questions of greater moment. These go beyond superficial inquiries concerning judicial restraint versus activism. Looking through a jurisprudential lens, the defense or attack of original meaning can be seen as raising longstanding questions pertaining to the unsettled relationship between law and morality and the obligation to obey the law.

In an absolute form, the search for original intent in the law as written or promulgated seemingly denies the necessity for a relationship between law and morality in order for the law to have obligatory force. In this sense, one may truly characterize original intent as an affirmation of the positivist school of jurisprudence. Positivism concentrates on the law as formally enacted. Scholars have justified positivism over time in a number of ways. For example, over a century ago, John Austin located the obligation to obey the law in the State's coercive power to apply sanctions.93 People obey laws not as a result of moral inquiry but out of a desire to avoid the coercive sanction of the State, whether loss of life, liberty or fine.94 On the irrelevance of morality to the assay of law's validity, Austin emphatically wrote:

The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, . . . the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.95

In this century, H.L.A. Hart found assertion to be the answer to the question of why the law is obeyed: namely, that those are the established rules of the political system.96 One law professor has characterized Hart's thesis: ""[T]he answer under Hart's model to the question 'why am I obligated to drive under 65 mph' is just like the answer to the question 'why am I "obligated" (when playing chess) to move my bishop diagonally'?""97

94. Id.
95. Id. at 185.
Yet, Hart was more equivocal than Austin in the face of moral claim. The immoral law was still valid, but it did not "'supplant morality.'"\(^98\) Hart’s equivocation, however, is baffling. Did it mean to say there was a legal obligation to obey the law, but not a moral one? Hart largely leaves unanswered the fact that from the time of the ancients the good citizen has been likened to the law-abiding citizen.\(^99\) Hart attempted to bridge this gap by asserting that certain "natural facts" exist which are common to both law and morality.\(^100\) This "minimum content of natural law" is a necessary predicate to law because, in its absence, "men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible."\(^101\) In making this claim, Hart wandered a significant distance from Austin and the positivist fold.

By comparison, Hans Kelsen’s positivism draws the theory closer to the philosophy directly undergirding original intent.\(^102\) Law was to be obeyed, not because it was necessarily just, but because it coincided with first principles — represented by the Constitution and the enactments (or norms) of the legislature.\(^103\) Consequently, Kelsen argued: "[T]he basic norm of a legal order prescribes that one ought to behave as the ‘fathers’ of the constitution and the individuals — directly or indirectly — authorized (delegated) by the constitution[al] command."\(^104\)

These positivist notions cannot be dismissed lightly. At least as implied by Kelsen, and later refined by Jefferson into the "consent of the gov-

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99. Consider, for example, the trial of Socrates as recounted by Plato, and Socrates' decision to abide by the law rather than flee imprisonment and death. Plato, "Crito," The Dialogues of Plato (B. Jowett trans. & J. Kaplan ed. 1950). Plato, however, observed that Socrates' compliance followed only his failure to convince Athens that her laws were unjust. Failing in this regard, Socrates posited that under the laws, if he disregarded the law, he would be "doing what only a miserable slave would do, running away and turning [his] back upon the compacts and agreements which [he] made as a citizen." Id. at 59.
101. Id. at 189, 190-95. According to Hart, the minimum content consisted of "forbearances." For example, the avoidance of killing or the infliction of bodily harm; the acknowledgment of approximate equality, such that without cooperation no one person could dominate another for more than a short time; limited altruism as proof that men are neither angels nor devils; the recognition of some concept of property as a means of husbanding limited resources; and the acceptance of need for some coercive system of rules in light of the limited understanding of man to perceive his long-term interest or avoid weakness of will. Id. at 189-95.
103. Id. at 115-16.
104. Id.
erned,” they bolster democratic principles. More specifically, as related to judicial selection, they suggest that the personal values of the positivist judicial candidate can be largely put to one side, because regardless of personal belief, the law will be applied impartially. It does not matter whether the positivist judicial candidate or judge believes that Oliver North was a hero or a scoundrel, because the only relevant question for him will be whether the law prohibits lying to Congress and whether Mr. North lied. The positivist judge may sympathize with those in a religious order, who harbor illegal aliens seeking sanctuary from oppression in Central America, but the judge will find nonetheless a conspiracy to violate the immigration laws. Again, Kelsen wrote:

> Just as the actual behavior of the individuals may or may not correspond to the norms of positive law regulating this behavior, positive law may or may not correspond to an ideal law presented as justice or ‘natural’ law. . . . [Positive laws’s] existence is independent of its conformity or nonconformity with justice or ‘natural’ law.

Thus, for the positivist, the validity of the law is dependent not upon its compatibility with morality, but “by virtue of the fact that it has been created according to a definite rule and by virtue thereof only.”

Despite these arguments, there is considerable discomfort with positivism. At the theoretical level, Lon Fuller took direct issue with Hart’s claim that the proper end of human activity was mere survival. For Fuller, the substantive content, the core element, of natural law was the imposition of a

105. See generally Jurisprudence Understanding and Shaping Law 403 (W. Reisman & A. Schreiber eds. 1987) (comparing Kelsen’s conception of origin of authority and origin of law with earlier writers).

106. Senator Biden, similarly, observed during the hearings for Abner Mikva:

> I frankly do not know how we could approve any Members of the U.S. Senate, U.S. Congress, a member of any legislative body, or anyone who ever served in a policy decision, who has taken a position on any issue, if the rationale for disqualifying you is that you have taken strong positions. That is certainly not proof of your inability to be objective and avoid being a policymaker on the bench.

107. Of course, North was tried before a jury, and ample evidence suggests that his jurors may have tempered the law with their own collective sense of fairness. One juror observed: “Being a veteran myself, you know, I wouldn’t want to down another veteran . . . . Col. North, well, maybe I don’t know whether he’s all that bad or all that good . . . . He was guilty but I don’t think he should go to jail for it.” Ex-NSC Aid is Acquitted on 9 Charges, Wash. Post, May 5, 1989, at A1, col. 5 (statement of juror Earl F. Williams).

108. H. Kelsen, supra note 102, at xiv.

109. Id. at 113.

“morality of duty” that, through communication, would make it unnecessary to live in “hideous misery.” Apart from such abstraction, the argument coming from natural law becomes simply, though hauntingly, that separating law from moral inquiry inevitably results in injustice in specific cases.

The prospect for such injustice genuinely troubled the Senate committee with reference to Judge Bork’s privacy views. How could Judge Bork provide assurance that he would protect privacy in a just manner if he was willing to allow states to legislate in ways that did not conform with privacy values? But whose privacy values? The values of the legal realist protecting the privacy and sanctity of liberty of contract? The values of the critical legal studies disciple promoting the reallocation of social power in whatever form? The values of Aristotle advancing proportionality, rectification, and equality? The less agreement over the applicable set of normative values, the more likely that the positivist will seek refuge in the concept of “the law is the law.”

111. Id. Here, Fuller is referring to Hart’s claim that “an overwhelming majority of men do wish to live even at the cost of hideous misery.” Id. (quoting H. Hart, supra note 96, at 189-95).


113. This difficulty, of course, cannot be finessed by uncritical reference to the natural law or natural rights. In this respect, a longstanding complaint about the reliance upon natural law, perhaps dating back to Aristotle’s use of the term “nature” in the Nichomachean Ethics, is its indeterminacy. Justice Holmes once commented: “The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.” Holmes, Natural Law, 32 HARV. L. REV. 40, 41 (1918). But see Rice, Some Reasons For A Restoration of Natural Law Jurisprudence, 24 WAKE FOREST L. REV. 539 (1989).

114. Even when scholars agree over a given set of normative values or rights, as there exists with regard to the fundamental rights captured in the Bill of Rights, there can be substantial disagreement over what these rights contain and to whom they apply. Several features of the Constitution, including its indefinite language and its explicit reference to unenumerated rights in the ninth amendment, suggest that the Court should construe these rights broadly in the natural law tradition. See Moore, The Written Constitution and Interpretivism, 12 HARV. J.L. & PUB. POL’Y 3 (1989). Moore argues that Madison and Hamilton were aware that the natural law was “not very knowable.” Id. at 13.

If you are going to worry about this problem in the context of judicial power, your main concern should be to get the right judges on the bench, those who know that liberty exists and know what it means. Those judges are constrained. Of course, the trick is to figure out who they are. Not a small trick . . . .

Id. By contrast, the late Justice Hugo Black warned against reliance upon “natural rights” because they “degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for [the Supreme] Court a broad power which we are not authorized by the Constitution to exercise.” Adamson v. California, 332 U.S. 46, 70 (1947) (Black, J., joined by Douglas, J., dissenting).
The positivist refuge was not enough to enable Judge Bork to survive Senate scrutiny. For example, his decision in *Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co.*\(^{115}\) raised a striking moral dilemma, and he answered it with the cold text of the statute. The case concerned a West Virginia chemical plant where the lead concentrations permitted by law nevertheless presented a health hazard to pregnant female employees.\(^{116}\) The company established a policy whereby fertile women had a choice: either enter a competition for a handful of lower paying jobs or provide proof of sterilization.\(^{117}\) When the union challenged the policy as violative of the general duty provisions of the Occupational Safety and Health Act,\(^{118}\) Judge Bork decided that the policy was not the type of hazard envisioned by the statute or its legislative history.\(^{119}\) As a good positivist, Bork conceived of his role as not to resolve what he acknowledged was a tremendous moral dilemma, but to follow the law as written. He wrote:

> As we understand the law, we are not free to make a legislative judgment. We may not, on the one hand, decide that the company is innocent because it chose to let the women decide for themselves which course was less harmful to them. Nor may we decide that the company is guilty because it offered an option of sterilization that the women might ultimately regret choosing. These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy.\(^{120}\)

The explanation did not prove sufficiently availing for confirmation. Senator Metzenbaum called Bork's decision "inhumane,"\(^{121}\) and Harvard Law Professor Kathleen Sullivan said: "He did not see that fundamental liberty to procreate as demanding a reading of the statute that would have protected these women."\(^{122}\) The dissatisfaction with Judge Bork's response illustrated that an essential point of contention left unresolved by the judicial selection dialogue during the Reagan years was neither the respective roles of the President and the Senate, nor the elusive meaning of judicial restraint or "mainstream" jurisprudence. Instead, it was whether judges were required to temper the hard, sharp edges of the law with compassion. Again, how-

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115. 741 F.2d 444 (D.C. Cir. 1984).
116. *Id.* at 445.
117. *Id.* at 445-46.
119. *American Cyanamid*, 741 F.2d at 445, 450.
120. *Id.* at 445.
121. *Bork Hearings*, supra note 81, at 468.
ever, the application of compassion requires agreement on the applicable moral principles, and the Senate committee viewed Judge Bork's views with suspicion. Thus, the Senate devoted substantial hearing time toward obtaining Bork's assurances of fidelity to the precedent he had called into question over the length of his career.123

Assume, however, that there is enough agreement over a background set of moral principles that most people would be offended by a case presenting the facts of *American Cyanamid*. This would not seem to be a farfetched assumption, since both Judge Bork and Senator Metzenbaum identified the difficult moral dilemma posed by the company's sterilization policy. What approaches might a judge seeking to do *justice* follow? One course may be to pursue what has been called the "judicial lie."124 Indeed, Judge Bork contemplated this approach in *American Cyanamid*, but rejected it.125 He wrote: "There is no doubt that the words of the general duty clause can be read, albeit with some semantic distortion, to cover the sterilization exception contained in [the company's] fetus protection policy."126 Judge Bork, however, reasoned that this did not represent the "plain meaning" of the statute. Relying on caselaw construing similar provisions and legislative history, he found that "[i]t seems to us safer . . . to confine the term 'hazards' under the general duty clause to the types of hazards we know Congress had in mind;"127 namely, "air pollutants, industrial poisons, combustibles and

123. *See generally Bork Hearings*, supra note 81, at 116-17 (Senator Biden questioning Judge Bork on the decision of *Griswold v. Connecticut*, 381 U.S. 479 (1965)); id. at 150-51 (Senator Kennedy questioning Judge Bork on his legal justification for the overruling of state statute in *Griswold*); id. at 182-83 (Senator Hatch questioning Judge Bork on the unpredictability of the right to privacy); id. at 240-41 (Senator Simpson asking Judge Bork to elaborate on his beliefs regarding the type of privacy that is protected under the Constitution).


125. Justice Brennan recently rejected a similar invitation to the judicial lie in *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814 (1989). In *Mallard*, Justice Brennan, writing for the Court, found that the language in 28 U.S.C. § 1915(d), which provided that "'[t]he court may request an attorney to represent an indigent [person]' " meant what it said — namely, request rather than require. *Id.* at 1818. The Court stated: "We emphasize that our decision today is limited to interpreting § 1915(d). We do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel . . . ." *Id.* at 1822. The Court also did not reach the question of whether the court has inherent authority to order the attorney to serve. Dissenting, Justice Stevens wrote: "The relationship between a court and the members of its bar is not defined by statute alone. . . . In context, I would therefore construe the word 'request' in § 1915(d) as meaning 'respectfully command.'" *Id.* at 1823, 1826 (Stevens, J., dissenting).

126. *American Cyanamid*, 741 F.2d at 447.

127. *Id.* at 449.
explosives, noise, unsafe work practices and inadequate training and the like."\textsuperscript{128}

In the end, it did not turn out "safer" for Judge Bork to adopt this narrower construction; indeed, Senator Metzenbaum's criticism suggests that Judge Bork should not have been reluctant to give the statute its broadest construction to protect the economically less advantaged women against the company. However, had Judge Bork relied upon his moral misgivings, could he not then be faulted for imposing his unenacted moral beliefs in the course of his public duties?

Geraldine Ferraro strongly argued against a public official imposing private moral beliefs upon the public during the 1984 presidential campaign. Ferraro made the argument with respect to the dichotomy between her private and public views on abortion. Mario Cuomo said something similar, but less absolute, at the University of Notre Dame by stressing the lack of consensus on the subject of abortion.\textsuperscript{129} In response, Henry Hyde argued that it was the duty of every public official to act on his moral beliefs to create the moral consensus.\textsuperscript{130} Congressman Hyde's formulation appears persuasive for those legislators who speak only after direct election and in a binding way only as a body. The same claim, however, may not be as easily accepted for executive officers charged with implementing the law as written, or \textit{a fortiori}, for federal judges who must interpret the law without ever facing electoral scrutiny.

If it is more appropriate for a legislator than a judge to champion that the law be read in light of normative or moral principle, is it also fitting for a legislator to seek to accomplish this end by questioning a sitting judge about a prior decision? It is generally agreed that judicial candidates should not be asked to make commitments about how they would rule in the future.\textsuperscript{131} This undermines judicial independence and the separation of powers and does violence to the impartiality that judges are expected to bring to the individual facts and circumstances of different cases. Inquiries about prior decisions raise similar concerns. Moreover, with an existing precedent, a risk exists that \textit{ex post} interrogation of the deciding judicial officer may cloud its meaning. The senior Senator Gore, in questioning Abe Fortas in 1968,

\textsuperscript{128} Id. (quoting the OSHA Review Commission).


\textsuperscript{131} See Ross, \textit{The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees}, 62 \textit{Tul. L. Rev.} 109 (1987).
observed that “a judge is under the greatest and most compelling necessity to avoid construing or explaining opinions of the Court lest he may appear to be adding to or subtracting from what has been decided, or may perchance be prejudging future cases.” 132 One should not overstate this objection, however, as past cases reveal a great deal about legal competence and reasoning.

The “judicial lie,” of course, is not the only alternative available to a judge pursuing the path of justice. Indeed, some of history’s most profound philosophical figures from Socrates to Ghandi would presumably urge the judge to follow the law as written or resign. 133 Thomas More, who was willing to give benefit of law to the devil, and chastised Roper for his apparent willingness to cut down every law in England to achieve his moral ends, might at the very least urge the avoidance of direct clashes between law and morality. 134 For this reason, it can reasonably be assumed that Thomas More would counsel judicial candidates to have a healthy respect for the principle of *stare decisis*, not only as a means of bringing stability to the law, but also as a means of maintaining the social fabric which may be incapable of the sustained pressure of moral questioning and justification at every turn. In short, a judge must be prudent about construing broadly Thomas Aquinas’ well-known injunction in the face of an “unjust law.” Once a federal judge signals a willingness to step beyond the bounds of restraint to declare the unjust enactment to be no law at all, he necessarily challenges his own source of, at least, temporal authority.

V. Conclusion

In sum, under a jurisprudential lens, there is more to the examination of the judicial selection process than meets the political eye. Much time and effort in the Reagan era was expended to defend the relative prerogatives and scope of questions permitted to be asked by the President or the Senate. As indicated, claims that either the President’s or the Senate’s inquiry is constrained by the Constitution proved to be without merit. Similarly, the skirmishing under the unilluminating banners of judicial restraint or the putative “mainstream” of legal thought obscured, rather than enlightened, the more fundamental jurisprudential dialogue. In a number of different

132. See Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States, and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 100-01 (1968) (statement of Senator Albert Gore, Sr.).


134. R. BOLT, A MAN FOR ALL SEASONS 65 (1962).
guises, the dialectic over judicial selection during the Reagan era reveals a
groping for a better understanding of the enigmatic relationship between law
and morality and the source of the duty to obey the law. The age-old tension
between positivism and the less determinate natural law thus persists.