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Mark Silverstein

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In January of 1932, following the retirement of Justice Oliver Wendell Holmes, President Herbert Hoover announced to all concerned that he would seek a moderate Republican to replace Holmes on the Court. A groundswell of support, however, quickly developed for Benjamin Cardozo, a Democrat and the respected Chief Judge of the New York Court of Appeals. The President nevertheless remained adamant; the appointment of Cardozo would bring a third New Yorker and a second Jew to the Court. Moreover, Holmes had already achieved almost mythical status as the voice of progressive and realistic jurisprudence and Hoover had little inclination to appoint a justice sure to follow in the Holmes tradition. The possibility of a Cardozo nomination appeared doomed until William E. Borah, the powerful Republican Senator from Idaho, met with Hoover and forcefully championed Cardozo as the best appointment regardless of residence or religion. Cardozo's nomination was announced soon thereafter and the nomination cleared the Senate without dissent or discussion. To the surprise of no one—including President Hoover—Cardozo quickly joined Justices Brandeis and Stone on the liberal wing of the Court.

To even the most casual observer of the Clarence Thomas proceedings, the often-told story of Cardozo's appointment[1] must appear as a wondrous fairy tale of a land far away and a time long ago. Political savants as well as typical citizens have expressed distaste for the current system, and the chair of the Senate Judiciary Committee has suggested a reexamination of the entire process. None of the participants have distinguished themselves in the tradition of a Borah (or a Hoover, for that matter) and there can be little doubt

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1. The full story is recounted in Henry Abraham, *Justices and Presidents* 201-205 (Oxford U. Press, 2nd ed. 1985).

that the nominees do not measure up to a Cardozo. Certainly the entire process has become more contentious.

From 1900 to 1968 only one nominee—John J. Parker in 1930—was rejected by the Senate. The failure of Lyndon Johnson to secure confirmation for Abe Fortas as Chief Justice in 1968 was quickly followed by the defeats of Clement Haynesworth and G. Harrold Carswell. Before the defeat of Judge Bork, President Reagan successfully elevated William Rehnquist to the chief justiceship but only after factious hearings and despite the fact that the new chief justice received more negative votes than any successful nominee in the twentieth century. Chief Justice Rehnquist, however, held this dubious record for only five years; Clarence Thomas easily shattered it in proceedings that quite literally stunned a nation. Therefore there is much to compel the conclusion that, for better or for worse, the nomination system in the last twenty-five years has undergone substantial changes.

This essay seeks to provide some explanations for these developments and, in so doing, to supply a broader context for considering a good deal of the recent controversy regarding judicial nominations. The central argument is that the system of confirmation of Supreme Court justices (and, to a lesser degree, lower court federal judges) is a far more democratic process than was the case decades ago. Profound changes in the structure of national electoral politics coupled with a general transformation of the United States Senate and an expansion of judicial power have altered the nature of the politics of Supreme Court nominations. The tightly structured, leadership-controlled politics of deference to presidential leadership, which often characterized the nomination process during much of the twentieth century, no longer predominates. In its place are extraordinarily visible public proceedings, in which nominees to the Court are subject to the crucible of modern participatory democracy.

In the years following World War II, the Democratic party emerged as the dominant political party in the United States. Democrats far outnumbered Republicans and Democratic hegemony appeared secure at both the state and national levels. Even during the era of the Eisenhower presidency, the assumptions of Roosevelt and Truman shaped the contours of American politics.[2] The overwhelming defeat of Barry Goldwater in the 1964 presidential election served as a stunning reminder of the fate that awaited those who challenged the fundamental principles of the New and Fair

2. William E. Leuchtenberg, *In the Shadow of FDR: From Harry Truman to Ronald Reagan* (Cornell U. Press, 1983).

Deals. Writing during this period, Samuel Lubell characterized the Democratic party as the "sun" of the American political solar system while relegating Republicans to an orbiting moon, "shin[ing] in the reflected radiance of the heat thus generated."[3] The coalition of minorities forged by Roosevelt—unionized labor, urban ethnics, middle class liberals, southern whites and northern blacks—comprised a remarkably broad social basis and formed the governing regime of post-World War II America.

Although the election of Ronald Reagan in 1980 marked the close of this period of Democratic dominance, the disintegration of the Roosevelt coalition had begun decades earlier. The causes of its demise are many: one of the most prominent was, and continues to be, race. A coalition anchored by southern whites and northern blacks contained the seeds of its own destruction. Roosevelt avoided the inherent contradiction within his own governing coalition by frankly downplaying the issue of civil rights. As the national Democratic party became increasingly dependent on a large black voter turnout, however, the promotion of civil rights policy became an important campaign pledge of the party. This produced a decided backlash. In the 1950s for example, one out of ten identifiers with the Democratic party was black; during the 1980s, it was one out of five.[4] In 1952, seventy percent of white Southerners considered themselves to be Democrats; by 1984 this percentage had been cut in half.[5] Throughout the 1960s and 1970s, the championing of civil rights policies designed to link blacks with the Democratic party produced the defection of southern whites. The once solid Democratic southland is now part of a distant political past; in 1988 George Bush won the states of the old Confederacy with well over fifty-five percent of the popular vote.

The migration of the civil rights movement from the rural South to northern cities further exacerbated the exodus of whites from the Democratic party. During the mid-1960s lower middle class white ethnics—another crucial component of the New Deal coalition—deserted the Democratic party, particularly at the national level. In the 1968 presidential campaign, George Wallace succeeded in drawing substantial support from this group and the 1980 election produced a marked movement of blue collar workers to the Republican national ticket. Michael Dukakis did manage to counter this defection in 1988, but only by splitting the blue collar

3. Samuel Lubell, *The Future of American Politics* 212 (Harper, 1952).

4. See, Robert Weissberg, *The Democratic Party and the Conflict over Racial Policy* in Benjamin Ginsberg and Alan Stone, eds., *Do Elections Matter?* (M.E. Sharpe, 1986).

5. Kenneth Janda, et al, *The Challenge of Democracy* 281 (Houghton Mifflin Co., 2d ed. 1989).

vote with George Bush.[6] Increasingly the ethnic, urban voter has identified the Democratic party with busing and the redistribution of benefits to black interests and the result has been a significant erosion of support from this traditional Democratic constituency.[7]

Race, of course, was not the sole cause of the decomposition of the Roosevelt coalition. By the late 1960s, younger voters lacking a personal attachment to the party of Roosevelt began to replace the generation with direct exposure to the welfare policies of the New Deal.[8] Traditional Democratic groups—union members, blue collar workers and Catholics—had undergone substantial changes in the years since the New Deal era. The Democratic party of Franklin Roosevelt was an association of minorities drawn, for the most part, from the lower end of the economic spectrum. Over the last several decades, however, income distinctions between working and middle class have eroded and union membership has declined. Increasingly Americans have identified themselves as part of the well-to-do middle class and this trend has produced a shrinking pool of voters who link themselves with the Democratic party.

Responding to these developments, the party has sought a new direction by focusing attention on the burgeoning American middle class. A battle for the heart of the Democratic party rapidly developed between old line Democrats with roots in the union halls and Democratic clubs of the United States and a new generation "who had earned their political spurs in the civil rights movement and later in the anti-war movement."[9] The balance of power in the party eventually shifted to the insurgents. Decidedly upper-middle class and college educated, these men and women achieved extraordinary victories during this era on a broad range of political issues. Their success in ultimately forcing the withdrawal of troops from Southeast Asia and subsequent legislation limiting the power of the executive branch in the conduct of foreign affairs was testimony to their emerging political power. But no less significant is the fact that most of the legislation in the last twenty years concerning environmental protection, consumer protection, occupational health and safety, gender discrimination, nuclear energy restrictions as well as reforms of the Democratic party and Congress are the

6. See New York Times/CBS News Poll in New York Times, Nov. 10, 1988, B6.

7. See e.g. Robert R. Huckfeldt and Carol Kohfed, *Race and the Decline of Class in American Politics* (U. of Illinois Press, 1989).

8. See e.g., Norman H. Nie, Sidney Verba, and John R. Petrocik, *The Changing American Voter* (Harv. U. Press, 1976).

9. Thomas Byrne Edsall, *The New Politics of Inequality* 49 (W. W. Norton, 1984) ("*The New Politics*").

product of what some have termed "the New Politics movement."[10]

The ability of New Politics groups to secure policy objectives is worthy of attention because these accomplishments took place despite a marked lack of success in national electoral politics. Although the choice of George McGovern in 1972 as the party's presidential nominee heralded the emergence of a new force in the Democratic party, it also revealed the inability of this new wing to appeal to a broad national electorate. The reforms of the nominating procedures adopted by the Democrats in the early 1970s continue to skew the nominating processes of the party in favor of this new, elite constituency despite the persistent efforts of party professionals to redress the balance. Thus the Democratic party displays a dual personality as power and control vest in the liberal, elite wing of the party while electoral success at the national level depends on the turnout of more conservative low and moderate income voters.[11]

The cleavage within the Democratic party has weighty implications for the selection of federal judges. The Democratic party of Franklin Roosevelt linked its diverse interests through the politics of patronage, compromise and vote-trading. The coalition might endure only if the leadership commanded sufficient resources to satisfy the needs of its constituent parts. Submerging ideological differences beneath pragmatic concern with goods and services marked the New Deal coalition. An appointment to the federal bench was a resource that could be measured against other available benefits. Therefore even the occasional controversial, ideologically charged appointment could not be permitted to upset the commitment to compromise and negotiation that held the party together.

The developing fissures within the Democratic party, however, placed this understanding of the governmental process in serious jeopardy. Thomas Edsall, for example, has chronicled the elite newcomers' disdain for the politics of vote-trading and their support of the congressional reforms that ultimately pared the ability of the leadership to cut the deals and compromises that formed the lifeblood of the old coalition.[12] More specifically, to the reform-minded wing of the Democratic party a judicial appointment was not simply another instance of federal patronage. During the 1960s and 1970s the federal courts expanded the ability of groups and interests to seek redress in the federal court system while simultane-

10. Benjamin Ginsberg and Martin Shefter, *A Critical Realignment? The New Politics, the Reconstituted Right, and the 1984 Election* in Michael Nelson, ed., *The Elections of 1984* (C. Q. Press, 1985).

11. See Edsall, *The New Politics* Ch. 1 (cited in note 9).

12. Id. at 46-49.

ously augmenting the array of remedies available to prevailing litigants. Groups broadly identified with the New Politics movement have utilized the expanded focus of the federal judiciary to achieve their policy goals, in effect offsetting electoral defeats with litigation victories.[13] Nominations to the federal bench, particularly at the level of the Supreme Court, quickly became the type of no compromise event that the old coalition had sought so hard to avoid.

As a result, the ante has dramatically increased in battles over appointments to the federal bench because a wide range of powerful interests has focused attention on the staffing of the federal judiciary. Democrats' mastery in counteracting electoral defeats through judicial decree gave rise to a reaction by components of the Republican coalition. Those Republicans were frustrated by their inability to turn national electoral success into enactment of legislation that implemented desired social changes. Although a good deal of the recent Republican resurgence at the national level may be attributed to the appeal of "Reaganomics,"[14] equally important has been the party's embrace of "family" values, a decision designed in part to appreciate the defection from the Democratic party by southern white Protestants and Catholic urban ethnics in the North. By way of example, political scientists Martin Shefter and Benjamin Ginsberg have explored how the Republican right to life position helped "to politically unite, under Republican auspices, two religious groups that had been bitter opponents through much of American history."[15] Despite significant electoral influence, movement conservatives have been frustrated by a federal judiciary that has removed many important social decisions from legislative and executive control.

For precisely this reason, many on the religious right were among the most avid supporters of Judge Bork and the most distraught at his defeat. Mirroring the efforts of many groups within the Democratic party, leaders of several conservative organizations have promised increased participation in the nomination process.[16] With powerful, antagonistic interests in both parties converging on the selection of Supreme Court justices in very visible, organized

13. The civil rights establishment, long connected to the Democratic party, has always considered the staffing of the judiciary to be of prime importance. The point here is that newer and often more politically powerful groups within the party now share this assessment. The net result is far greater participation in the confirmation process.

14. Kevin P. Phillips, *The Politics of Rich and Poor* (Random House, 1990).

15. Benjamin Ginsberg and Martin Shefter, *Politics by Other Means: The Declining Importance of Elections in America* 122 (Basic Books, 1990).

16. See e.g. Patrick B. McGuigan and Dawn M. Weyrich, *Ninth Justice: The Fight for Bork* (Free Cong. Research and Education Fdn., 1990).

efforts to control the outcome, one senator described the process as "the worst kind of sleazy political operation."[17] Similiar hyperbole on the part of participants is currently the norm in large part because the nomination process is no longer the province of political and legal insiders. In fact, the disorderly contentious proceedings that have marked recent confirmations merely reflect the media-dominated, participatory nature of modern American politics.

The shifts in electoral politics that have occurred during the last three decades mirror changes in the United States Senate over approximately the same period. Although the explosion of group representation in Washington over the last forty years is well documented, less appreciated is that citizen groups concerned with broad quality of life issues have expanded at twice the rate of groups representing traditional economic interests (farmers, unions, etc.).[18] Moreover, these groups have been particularly successful in developing alliances in the Senate. For the organized interest group, active participation and leadership by a member of the Senate in the group's activities assure the concerns of the group a place on the national agenda as well as the attention of Washington policy makers and the media. From the perspective of the individual senator, championing the concerns of these interests provides the opportunity for leadership in matters of national concern with the resulting national media attention. National visibility enhances the typical senate career.[19]

The attention to personal publicity and leadership outside the institution of the Senate is a recent development. During the last twenty-five years, the norms of the U.S. Senate and the behavior of individual senators have undergone major alterations. The adjustment in the operation of the institution and the style of its membership has had profound, if perhaps unappreciated, consequences for the Senate's role in the appointment of federal judges.

In 1960, the seminal work on the U.S. Senate described a hierarchical institution, governed by widely shared norms, where influence and power varied directly with seniority within the institution.[20] The committee system governed the Senate of the 1950s. Committees controlled policymaking and, within committees, leaders chosen solely on the basis of seniority dominated the proceedings. Activity on the floor of the Senate was typically con-

17. Senator John C. Danforth, quoted in The New York Times, Oct. 9, 1991, A20.

18. Jack Walker, *The Origin and Maintenance of Interest Groups in America*, 77 Am. Pol. Sci. Rev. 390-406 (1980).

19. Barbara Sinclair, *The Transformation of the US Senate* (Johns Hopkins U. Press, 1989) ("*Transformation*").

20. Donald Matthews, *U.S. Senators and Their World* (U. North Carolina Press, 1960).

strained; the norm of civility and respect for the expertise of committees precluded floor amendments and restricted important decisionmaking from the floor of the Senate. Hence policymaking in the Senate of the 1950s took place in the highly structured confines of the committee system and leadership rested with a handful of senior senators. Virtually unchallenged was the norm of specialization. Senators were admonished to develop expertise within a narrow sphere of specialization and to reciprocate by respecting the expertise of others. A high value was placed on courtesy and reciprocity; senators were expected to avoid personal attacks and to help colleagues when possible without undue regard for partisanship. Indeed, as Professor Matthews noted, the highly structured "folkways" of the Senate precluded senators from exercising the extraordinary powers of individual members under the Senate's rules; to do so, and thus to obstruct the operation of the institution, would be to violate the unwritten rules of the game and invite not cooperation but retaliation from one's peers.[21]

Within this highly structured world, newcomers were expected to serve an apprenticeship. A freshman senator likened his status to that of a child, to " 'be seen and not heard.' "[22] His committee assignments were often those that senior senators found unattractive. Without exception, younger members were expected to play a subservient role to more established colleagues. In the Senate of the 1950s, the young senator inevitably lacked the resources to become a force within the institution; both the formal rules and the norms of the membership sustained the power of senior members.

Observers characterized the Senate of this era as a "small town" where one got along by going along. Because many committee assignments reflected the reelection needs of individual senators, the focus on specialization did not necessarily impede a senate career. Abiding by the norms of the institution promised even a newcomer the aid, if needed, of his elder colleagues in a reelection battle. Furthermore, even the most junior senator might be beguiled by the prospect of someday assuming a leadership position. Without question the widely accepted norms of the Senate of the 1950s did confine behavior, but the advantages of acceding to the constraints also typically outweighed those of being a maverick.

The centralized leadership and hierarchical structure of the Senate help in explaining the extraordinary success rate of presidents from 1900 through much of the 1960s in obtaining Senate confirmation of Supreme Court nominees. Apart from the rejection

21. Id. at Ch. V.
22. Id. at 93.

of Judge Parker in 1930, the Senate confirmed every Supreme Court nominee during that period. In the nineteenth century, the Senate rejected one of every three presidential nominations to the Court. The Senate of that era, however, was a far more partisan institution. With senators appointed by state legislatures—the seventeenth amendment was ratified in 1913—powerful state party leaders often dominated the Senate and used their power to funnel patronage to local party organizations. The typical senator of the nineteenth century had a secure local power base and little tolerance for centralized leadership within the institution. As a result, simple partisan opposition to the nominating president explained many of the negative votes during the nineteenth century.[23] Furthermore, in such a highly partisan age in which many senators were the leaders of local political organizations, the unwritten rule of senatorial courtesy (which required the names of federal appointees to be referred to the senators from the states in which the appointees resided and gave those senators, particularly if from the same party as the president, a virtual veto over the nomination) was respected even at the level of a Supreme Court appointment.

The tightly structured, less partisan Senate of the twentieth century, in which reciprocity, courtesy and deference to leadership confined behavior no doubt enhanced the likelihood of a victorious nominee to the Court. To a significant degree, successful presidential strategy often consisted of the cultivation of a few key senators with the unquestioned ability to deliver the votes of their colleagues. Lyndon Johnson, for example, often spoke of a Senate consisting of a few "whales" and many "minnows."[24] In any battle within the Senate, particularly in securing its advice and consent on appointments, the president needed only to negotiate with the appropriate "whales." The extensive resources of the executive branch could be employed to cultivate important votes without public scrutiny or participation. In the highly structured world of the Senate at mid-twentieth-century, few senators would challenge the leadership. For the typical senator of this era, an appointment, even to the Supreme Court, was rarely critical to the interests of constituents and failure to support the leadership could have an adverse impact on the ability to achieve other goals.

Lyndon Johnson's failure to secure Senate approval for the Fortas nomination in 1968 marked the end of the era of presidential control of the judicial selection process. By the late 1960s a break-

23. Abraham, *Justices and Presidents* at 40 (cited in note 1).

24. Bruce Allen Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* 276 (W. Morrow, 1988) ("*Fortas*").

down in party leadership and the traditional norms of the Senate produced a new Senate populated by younger, more independent senators, compelled by a shrinking electorate to serve the particularized needs of powerful constituency groups.[25] Procedural reforms introduced earlier in the century—before 1929, for example, the Senate met in closed session to consider judicial nominees and it was not until 1939 that the practice of calling nominees to appear before the Senate judiciary committee began[26]—would merge with changes in the "folkways" and the politics of the Senate to alter significantly the politics of judicial nominations.

The most basic change was that of membership. Between 1958 and 1965, twenty-three additional northern Democratic members entered the Senate. Decidedly more liberal than their elder colleagues—and less electorally secure—the career and policy goals of these senators were not necessarily advanced by compliance with Senate norms. Frustration with the traditional ways of the Senate coupled with sharpened ideological disputes between northern and southern members made the Senate of the early 1960s a contentious place. Unwilling to conform to the old model of apprenticeship, the new members demanded greater participation in the policy process. Floor activity increased as the northern newcomers often used this forum to pursue legislative goals.[27] The new membership successfully campaigned to increase the number of subcommittees and, in effect, guarantee junior senators greater responsibility and authority. The push by new members for increased influence within the institution culminated in the Legislative Reorganization Act of 1970, which furthered the trend toward redistribution of power by restraining the power of committee chairs and limiting each member of the Senate to service on no more than one prestigious committee.

Even more important than the structural changes that empowered junior members at the expense of their more senior colleagues was the erosion of the old norms of institutional behavior and the development of a new Senate style.[28] A younger, more volatile electorate, the growth of powerful interest groups, and the influence of mass media produced a new type of senator. The highly visible

25. The best description of this appears in Sinclair, *Transformation* (cited in note 19).

26. See, Paul Freund, *Appointment of Justices: Some Historical Perspectives*, 101 Harv. L. Rev. 1146 (1988). Until 1929, a two thirds vote of the Senate was required to open the Senate debate to public scrutiny.

27. Barbara Sinclair also attributes a good deal of this increased floor activity to conservative reaction to the activism of the new membership. See, Sinclair, *Transformation* at 43-44 (cited in note 19).

28. See, Sinclair, *Transformation* at Ch. 6 (cited in note 19).

generalist replaced the behind-the-scenes specialist. No longer did a senator's committee assignment define the range of interests and influence. The rising costs of reelection campaigns encouraged senators to attract out-of-state campaign contributions by expanding, rather than narrowing, their scope of activities. The modern senator seeks national media exposure because power and influence is no longer simply a product of seniority coupled with the respect and admiration of one's peers but can be achieved outside the institution by becoming a highly visible spokesperson on a range of important national issues.

One result is that while committees remain the critical arena of legislative activity, floor activity has increased, allowing senators, regardless of seniority or committee assignment, to participate actively in the policymaking process. The growth in staff personnel has permitted senators to engage in the more public and visible aspects of their work while the mundane, routine legislative work is delegated. The 1960s also witnessed the passing of the norm of apprenticeship; by the 1970s first term senators arrived with a full legislative agenda and the expectation, and resources, to play a major role in the legislative process. The folkways of the older Senate precluded individual senators from exercising their prerogative to interfere with the day-to-day operations of the institution; in the more fluid, less constrained world of the modern Senate, members are far more willing to use the rules of the Senate to further personal or policy goals and even the most junior member is likely to engage in filibuster and extended debate. The consequence is a Senate made up of powerful, independent contractors in terms of their careers both as legislators and as candidates.

The implications of these changes for the president's ability to successfully control nominations to the Court are enormous. The explicit division of labor of the Senate of the 1950s coupled with the disproportionate distribution of resources based on seniority ensured that the number of influential and consequential senators on any particular issue would be quite small. For the most part, leadership was able to deliver votes and presidential courtship of key votes typically produced a sufficient majority to ensure a successful appointment to the Court. Thus one leading student of the appointment of federal judges noted that the defeat of John J. Parker in 1930 was not due solely to the documented opposition of the NAACP and the AFL but also because President Hoover simply was unable to control influential senators within his own party.[29]

The 1968 battle over the Fortas nomination signalled an abrupt

29. See, Abraham, *Justices and Presidents* at 42 (cited in note 1).

departure from the old Senate style. Although the Fortas defeat can be attributed to several factors, Bruce Murphy's definitive biography of Justice Fortas chronicles the significance of the challenge by a group of young Republicans to the authority of the Republican minority leader Everett Dirksen.[30] President Johnson had secured Dirksen's pledge of support for Fortas and his promise to deliver Republican votes; Dirksen's failure to do so not only doomed the nomination but also testified to the declining influence of Senate leadership. The battles over Haynesworth and Carswell further evidenced the growing independence of individual senators and the importance of broad, highly visible, national issues to even the most junior members of the Senate. The Bork nomination battle, fought for the most part not within the halls of Congress but in the national media, disclosed the extent to which the "whales" no longer controlled the "minnows." The spectacle of the Thomas nomination was simply the next, albeit giant, step in the evolution of this process.

By the 1980s, the broad distribution of resources within the Senate coupled with the extraordinary independence of individual members presented the president with a far more difficult and complex arena in which to operate. The current Senate is a more open and effective forum for the expression of diverse interests than was the case thirty years ago. In and of itself, this fact increases the likelihood of contentious battles over any presidential nomination. When these developments are linked to important changes in the nature of judicial power, however, the unique democratization of the process of judicial confirmation emerges.

Perhaps it is fitting that the final ingredient in the constellation of forces that has reshaped the nomination process should emerge from the efforts of the Warren Court during the 1960s. It was, after all, the alleged excesses of that Court that powered much of the Republican rhetoric of that era and led to the unabashed efforts over the last several administrations to pack the Court with judicial conservatives. The Warren Court in effect changed the very nature of judicial power in the United States by redefining the constitutional and discretionary limits on the exercise of federal judicial power and expanding the range of remedies available to successful litigants.[31] These changes enhanced the ability of the judiciary to forge linkages with important constituency groups and to serve

30. See, Murphy, *Fortas* at 299 (cited in note 24).

31. This trend remained unabated during the years of the Burger Court. See e.g., Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* Ch. 2 (Addison-Wesley Pub. Co., 1990).

these groups in much the same manner as the executive or legislative branch. Because the judiciary has developed the means to serve new constituencies, the appointment of federal judges is of vital concern to a multitude of powerful and important political interests.[32]

Considered from this perspective, the real revolution of the Warren era was to diminish the significance of the limitations on judicial power contained in Article III as well as the prudential limitations established by an earlier Court which "insure[d] that the federal courts would not intrude into areas committed to other branches of government."[33] The roots of many of the Warren Court's most notable achievements—for example, *Brown v. Board of Education*[34] and the move to nationalize the Bill of Rights—can be found in the decisions of the Hughes, Stone and Vinson Courts. But the Warren Court's almost casual disregard for threshold jurisdictional and justiciability issues stands in stark contrast to the work of its predecessors. The examples are legion. In *Baker v. Carr*[35] the Court swept away the constraints of the political question doctrine to confront the reapportionment controversy despite relatively recent precedent to the contrary.[36] The abstention doctrine—articulated most forcefully by Justice Frankfurter in *Railroad Commission v. Pullman Co.*[37]—provides that a federal court should decline to exercise jurisdiction when a constitutional issue rests on unsettled state law. During the Warren era, however, the abstention doctrine fell into disuse in the haste to secure federal court adjudication of important constitutional rights.[38] During this era the rules governing standing to sue,[39] mootness,[40] and federal-state comity,[41] all designed to limit the exercise of federal judicial power, were relaxed as the Warren Court strove to expand judicial power to its constitutional limit.

The willingness of the Court to disregard the prudential limits on judicial power altered the very nature of the federal judiciary. The freedom from a cramped view of its powers under Article III coupled with almost complete control over its own docket gave the Court the opportunity to compete for constituency support. This is

32. Much of this analysis is drawn from Mark Silverstein & Benjamin Ginsberg, *The Supreme Court and the New Politics of Judicial Power*, 102 Pol. Sci. Q. 371 (1987).
33. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).
34. 347 U.S. 483 (1954).
35. 369 U.S. 186 (1962).
36. See e.g., *Colegrove v. Green*, 328 U.S. 549 (1946).
37. 312 U.S. 496 (1940).
38. See e.g., *Dombrowski v. Pfsiter*, 380 U.S. 479 (1965).
39. See *Flast*, 392 U.S. 83 (1968).
40. See *Wirtz v. Glass Bottle Blowers Ass. Local 153*, 389 U.S. 463 (1968).
41. See *Dombrowski*, 380 U.S. 479.

particularly the case in view of the expansion of judicial remedies that took place at the same time. Many commentators have noted the extent to which the judicial decrees of this era required detailed, specific and often affirmative actions on the part of losing parties.[42] The trend continues, producing a federal judiciary with the power to detail the manner in which other governmental units will conduct their business and to provide successful litigants with remedies similar to those previously available only through the executive or legislative branches.

Scholars have long recognized that groups unable to compete in the legislative or executive arena often turn to the courts for access to government power.[43] This "out-group" notion of interest litigation, however, fails to appreciate the extent to which the Warren Court altered the very nature of the federal judiciary's relationship to the body politic.[44] Relaxing the justiciability standards and expanding both the limits of class action[45] and the range of remedies available to group litigants benefited not only the poor and the weak but many more affluent, upper-middle class interests. By the late 1960s, an assortment of these interests—environmentalists, feminists, consumer groups—found the judiciary to be an important ally in the battle to secure their goals. For example, the development of a substantial body of consumer and environmental protection law during the last three decades could not have taken place without an activist judiciary sympathetic to the litigation of claims in federal courts. Thirty years ago the groups seeking access to the federal courts may well have been predominantly the politically impotent; today, however, the liberalized limits on judicial power combined with new tools of judicial power have made the judiciary an attractive ally for a host of powerful constituent groups.

These developments have created a more powerful and independent judiciary principally because they armed the judiciary with important political support to fight the battles with congressional and executive branch opponents. The New Deal generation of liberals, for example, was apprehensive of a judiciary that con-

42. See, e.g., Donald L. Horowitz, *The Courts and Social Policy* (Brookings Institution, 1970); Abraham Chayes, *The Role of the Judge in Public Interest Litigation*, 89 Harv. L. Rev. 1281 (1976).

43. See Richard Cortner, *Strategies and Tactics of Litigation in Constitutional Cases*, 17 J. of Pub. Law 287 (1968).

44. For an interesting essay on the limitations of the "out-group" theory of interest group judicial activity, see Susan Olson, *Interest Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 J. of Pol. 854-82 (1990).

45. In 1966, for example, the Supreme Court amended Rule 23 of the Federal Rules of Civil Procedure to facilitate class actions. The significance of allowing claims that would be *de minimis* if asserted individually to be aggregated to group litigation can not be overstated.

stantly injected itself into the affairs of state without the political muscle to survive the inevitable political counter-attack.[46] The modern judiciary, however, has greater resources both to shape public policy and to serve constituencies and, as a result, greater ability to fight such political battles. For example, the efforts to limit the power of the federal courts by groups opposed to busing or limitations on school prayer have been countered by a broad coalition of interests that support an active judiciary.[47] Many groups opposing Judge Bork's elevation to the Supreme Court did so precisely because of his cramped understanding of the role of the modern federal judiciary. A letter, authored by the general counsel of the Audubon Society and delivered to the members of the Senate Judiciary Committee, asserting that Judge Bork's rulings in standing to sue cases would limit the ability of environmental groups to seek federal judicial relief typifies this development.[48] Similar fears motivated a wide range of groups that saw in Bork a substantial threat to their interest in an active and dynamic federal judicial system. The same, of course, can be said for Clarence Thomas.

During the last two decades powerful groups have found the federal courts to be a valuable institutional ally. Limiting the constraints on the access to the federal courts has opened the doors of the federal judiciary to an ever-widening array of interests. Innovation in the nature and scope of the decrees issued by these courts has vastly increased the ability of the judiciary to serve these interests. The political implication of these developments is that potent political forces will fight to ensure that the judiciary continues to play an activist role in the development and implementation of national policy.

CONCLUSION

In the months following his failed appointment to the Supreme Court, Robert Bork toured the country. Speaking before various conservative and business groups, he asserted that his defeat was the product of the "first all-out political campaign with respect to a ju-

46. This is precisely why judicial liberals in the mold of Felix Frankfurter and Louis Brandeis placed such emphasis on the notion of justiciability; it permitted the judiciary to avoid battles it could not win without sanctioning results it found distasteful. The best expression of this notion of judicial liberalism appears in Alexander Bickel, *The Least Dangerous Branch* (Yale U. Press, 1986).

47. Examples are detailed in Silverstein and Ginsberg, 102 Pol. Sci. Q. at 385-87 (cited in note 32).

48. Described in Michael Pertshuk and Wendy Schaetzel, *The People Rising: The Campaign Against the Bork Nomination* 184 (Thunder's Mouth Press, 1989).

dicial nominee in the country's history."[49] Aside from the self-serving nature of much of his analysis,[50] Bork almost had it correct: the campaign to defeat him was an intensely political effort aimed at denying an outspoken critic of modern judicial activism a seat on the United States Supreme Court. Such an event, however, cannot be explained as simply a reaction to Bork and his jurisprudence; his defeat was merely an important step in a new confirmation system that has evolved over the last several decades.

The demise of the Roosevelt coalition as the governing regime in post-New Deal America created a Democratic party split between the declining blue collar ethnic wing and an emerging elite wing with a dramatic focus on middle class lifestyle issues. To this elite wing of the Democratic party, the judiciary has been an important agent in securing and protecting many policy gains of the last three decades. Not surprisingly, increased reliance on the judiciary by elements of the Democratic party produced a counterreaction among important forces within the Republican party resulting in added scrutiny of the judiciary by powerful elements within both parties. Changes in the institutional folkways and rules of the Senate have made individual senators far more sensitive to the demands of group interests while also diminishing the ability of the leadership to present a united position on many issues. With power spread more broadly throughout the Senate and with many senators seeking visible, national issues to champion, conflicts over nominees to the federal bench, particularly the Supreme Court, are certain to arise. The changes in judicial power and the ability of the courts to serve the needs of powerful and important political groups virtually guarantee that these battles will be well financed and highly visible.

The modern confirmation process that emerges resembles a continuing cat and mouse game between the Senate and the executive. The president, upon naming a candidate with an acceptable "conservative" judicial philosophy, mounts a campaign to outflank the inevitable opposition. Foes of the nominee in the Senate unite to devise a strategy which will focus attention on the threat posed by the candidate to an activist judiciary. An obvious consequence is that the stature of the candidate becomes, at best, a secondary con-

49. Quoted in Ethan Bonner, *Battle for Justice: How the Bork Nomination Shook America* 341 (W. W. Norton, 1989).

50. Judge Bork does not to hesitate to characterize his defeat as the result of liberal elites' self-interested refusal to accept his disinterested, faithful-to-the-Framers interpretation of the Constitution and the role of the federal judiciary. Portraying the battle as essentially one between evil and good may serve to rally the faithful but has nothing to do with political reality. See Robert Bork, *The Tempting of America: The Political Seduction of America* (Collier Macmillan, 1990).

sideration. President Reagan undercut potential opposition to his initial nominee by naming the first woman to the Court; the fact that Sandra Day O'Connor presented a somewhat sparse resume for a potential Supreme Court Justice was lost in the general euphoria that a woman had finally been named to the Court. The White House responded to the Bork defeat by seeking less controversial and well-known candidates. In the bizarre world of modern confirmations, the mediocre record of Judge Souter was considered an important asset by the Bush Administration. Armed with a strategy of refusing to engage the Senate Judiciary Committee in any meaningful discussion of his judicial philosophy and a quaint, ascetic demeanor, Souter won easy confirmation. Liberals in the Senate reacted to the reality of Justice Souter on the Supreme Court by vowing to deny confirmation in the future to any nominee who refused to respond to the committee's inquiries. Flushed with the success of disengagement, however, the Bush White House continued the strategy but sought to undercut potential opposition by nominating Clarence Thomas, whose race and Horatio Alger life story diverted attention from his marginal professional qualifications.

The lesson of history is that service on the Court may transform individuals of limited stature or parochial background into giants of American law and politics. Notwithstanding the possibility of growth and development on the Court, however, the inescapable conclusion is that in the immediate future we are unlikely to see nominees with the stature of a Felix Frankfurter or the legendary experience and background of a Thurgood Marshall. These men ascended to the Court the product of a highly static process controlled by political and legal elites. The system of confirmation today is a far more democratic process, shaped by extraordinary public participation and media coverage. That, of course, is the decided teaching of the Clarence Thomas proceedings. Thirty years ago sexual harassment was generally unacknowledged as a wrong; equally significant, in comprehending the events of the Thomas confirmation, however, is the fact that thirty years ago there were few organized women's groups and they had limited political impact. Moreover, women had little impetus for careful scrutiny of Court appointments. Today, women are not only politically organized but many consider appointments to the Court critical to the realization of policy goals. The obvious confusion and discomfort of many Senators as the Senate virtually imploded during the firestorm of the Thomas nomination is powerful testimony to the fact that the confirmation process is no longer within the control of traditional leadership elites.

It is within the often unseemly clash of opposing interests that the modern liberal-democratic state seeks to achieve rough consensus on its most pressing and divisive issues. Given the developments of the last several decades, it should not be surprising that this struggle now defines the selection of our judges. From this perspective, the cries to depoliticize the process are not only naive but, perhaps, too hastily considered. The apparent decorum of the past was achieved at the expense of participation and accountability. Few who viewed the agony and personal tragedies of the Clarence Thomas proceedings can avoid the almost instinctive desire to return to less visible and contentious proceedings, but the stakes are too high and involve the vital interests of too many forces to seek refuge in the ways of the past.