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WHAT WE SHOULD LEARN FROM THE HILL vs. THOMAS FIASCO

DAVID R. DOW* & RICHARD A. WESTIN**

INTRODUCTION

Article II, Section 2, Clause 2 of the Constitution of the United States provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."¹ In the last five years, and especially since the Bork nomination, the meaning of "advice and consent" has become a topic of serious constitutional inquiry.² Indeed, shortly after the failed nomination of Robert Bork, the *Harvard Law Review* published five essays on the Supreme Court appointment process.³ More recently, the confirmation hearings of Clarence Thomas, and especially the re-opening of those hearings,⁴ have caused many to opine that the time has come to

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¹ U.S. CONST. art. II, § 2, cl. 2.

² See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). Much, of course, has been written in response to Bork's book. See, e.g., Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358 (1989); David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373 (1990); see also James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989); Scott R. Ryther, *Advice and Consent: The Senate's Political Role in the Supreme Court Appointment Process*, 1988 UTAH L. REV. 411 (1988); Michael J. Slinger et al., *The Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography*, 64 NOTRE DAME L. REV. 106 (1989); Paul Gewirtz, *Senators Should Use Activist Approach in Judging Nominees*, LEGAL TIMES, Aug. 10, 1987, at 18-19.

³ See *Essays on the Supreme Court Appointment Process*, 101 HARV. L. REV. 1146, 1146-1229 (1988). The particular essays included were: Bruce A. Ackerman, *Transformative Appointments*, *id.* at 1164; Stephen Carter, *The Confirmation Mess*, *id.* at 1185; Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, *id.* at 1146; Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, *id.* at 1202; and Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, *id.* at 1213.

⁴ Ironically, the eventual confirmation of Clarence Thomas in spite of Professor Anita Hill's charges and testimony would seem to exonerate Chairman Joe Biden's handling of the entire affair. That is, if he knew (with reasonable confidence) that publicly airing Professor Hill's allegations would produce a swearing match and nothing more (i.e., no hard evidence), then a rational Senator might well have chosen not to investigate the allegations

change the way the Senate exercises its constitutional role. These exhortations have come from many fronts: from members of the Senate Judiciary Committee itself, from the President, from the academy, and from the streets.

In this essay, we propose that the reason for the renewed interest in this constitutional provision—manifested both by the timing of the renaissance itself and the content of the arguments—can be traced to the difficulty of amending the Constitution, as that process is delineated in Article V. We further propose that the inelasticity of the Article V mechanism, coupled with the American voting public's apathy towards political activity, means that those issues which the voting public ought to forthrightly debate in the public domain have been squeezed off the political agenda where they belong and have instead intruded themselves into an inappropriate forum, namely the confirmation process. We do not urge that the advice and consent procedure utilized by the Senate be jettisoned and replaced, because given our view of the etiology of the problem, the debacle in the Senate is merely a symptom of a much deeper and more serious problem. Yet this problem is not amenable to an institutional solution. Our conclusion, therefore, is nothing more than a ukase: that the people participate in political debate in the manner the Framers ostensibly intended.

I. AMENDMENTS

Article V provides as follows:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or other Mode of Ratification may be proposed by the Congress⁶

as part of the hearing process. This is especially so if one believes what is not at all implausible: that the impact of the Hill vs. Thomas swearing match hurts women who have been (and who will be) sexually harassed.

⁶ U.S. CONST. art. V.

Satisfying these modes of amendment has proved to be extremely difficult.⁶ In fact, one pathway, the constitutional convention, has never even been tried.

Excluding the first ten amendments, which were essentially ratified contemporaneously with the Constitution itself,⁷ the Constitution has been amended only sixteen times, and it has not been amended at all for over two decades. Thus, for our nation's entire history, amendments occur at the stately pace of one every twelve to thirteen years—less than once a decade. Part of the explanation perhaps lies in the fact that Senate rules make it too easy to thwart majority will. A proposal to amend the Constitution must wend its way through a committee, where powerful Senators can defeat it without the necessity of a public vote.⁸ Although as a technical matter any Senator could force the issue from the committee by submitting a discharge petition, which must be acted upon the day following its submission,⁹ the difficulty is that the discharge petition itself must pass through four separate motions, with unlimited time for debate—and filibustering—on each.¹⁰ Between 1789 and 1966, there were exactly six such successful petitions.¹¹ Even the Senate does not take the amendment process seriously.

Furthermore, with the exception of the repeal of prohibition (amendment XXI), the federal income tax (amendment XVI), and

⁶ Compare David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 39-44 (1990) (arguing Article V is clear and exclusive) with Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (asserting constitutional amendment not limited to strict application of Article V) and Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 492 (1990) (same).

⁷ The first ten amendments were ratified on 15 December 1791. The next amendment to be ratified was a response to a particular judicial decision, the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793). The Eleventh Amendment was ratified on 7 February 1795. This appears to be the only amendment ever to have immediately overruled a decision of the Supreme Court of the United States, a point we return to in the text.

⁸ See HENRY HAZLITT, *A NEW CONSTITUTION NOW* 125 (1974).

⁹ See Standing Rules of the Senate 17.4(b), Senate Manual 1987, S. Doc. No. 100-1 (1987).

¹⁰ *Id.* at Rule 19.1.

¹¹ MALCOLM E. JEWELL & SAMUEL C. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* 238, 284 (3d ed. 1977). Furthermore, even if the proposal escapes the committee, the filibuster, a profoundly anti-democratic practice, can defeat the proposal altogether or cripple it with modifications.

the Civil War amendments (numbers XIII, XIV, and XV), none of the post-Bill of Rights amendments have addressed divisive contemporary topics. Topics that have aroused the public ire have, to be sure, produced *interest* in amendments—including, for example, the effort to overrule *Baker v. Carr*,¹² to require a balanced budget, to enact an Equal Rights Amendment, and to prohibit flag burning—but all these efforts have failed. Indeed, over our nation's history, failed efforts to amend the Constitution outnumber successful efforts by a ratio of around one thousand to one.¹³

Partly as a result of the difficulty of effecting constitutional amendments, and in part a cause of this very difficulty, there has arisen a perception, common among judges, scholars, and the general population, that the Supreme Court effectively amends the Constitution. Article V has slipped into our political unconscious because it appears to be supererogatory. It is easier to accomplish change by judicial decision than by ratification of three-fourths of the states.

II. ADVICE AND CONSENT

This same perception, moreover, has fueled the debate over the meaning of the Advice and Consent Clause. Or, put differently, the debate over the Advice and Consent Clause stems from a recognition, perhaps tacit, that amending the Constitution is extremely arduous, which means that overruling Supreme Court decisions on constitutional questions rarely succeeds, which means in turn that Supreme Court Justices are checked only in theory—but not in practice—by the people's recourse to Article V.

Either of two cases might serve as benchmarks for an examination of this general malaise. *Brown v. Board of Education*,¹⁴ decided in 1954, overruled an interpretation of the Fourteenth Amendment that was barely over half a century old.¹⁵ *Griswold v. Connecticut*,¹⁶ decided in 1965, located or created, depending upon one's

¹² 369 U.S. 186 (1962).

¹³ Approximately ten thousand proposed amendments have died along the way. Paul Simon, *The Amendment Process in Perspective*, 73 ILL. B.J. 656, 657 (1987).

¹⁴ 347 U.S. 483 (1954).

¹⁵ *Id.* at 495 (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

¹⁶ 381 U.S. 479 (1965).

point of view, a right of privacy previously unrecognized. Both cases did what a constitutional amendment might have done, and indeed, what some had argued a constitutional amendment was required to do.¹⁷

Shortly after *Brown* was decided, Justice Jackson died. President Eisenhower nominated the second Justice Harlan to fill the vacancy. The first seat to be vacated following the *Griswold* decision was Justice Goldberg's, who resigned from the Court in 1965. President Johnson chose Abe Fortas as Goldberg's successor.

Since the decision in *Brown*, the Constitution has been amended four times, and since *Griswold*, it has been amended only twice. Three of these amendments deal directly with the political process: The twenty-third, ratified in 1961, provides electoral votes for the District of Columbia;¹⁸ the twenty-fourth, ratified in 1964, deals with poll taxes or other taxes as impediments to exercising the franchise;¹⁹ and the twenty-sixth, ratified in 1971, extends the right to vote to eighteen year olds.²⁰ The twenty-fifth, ratified in 1967, deals with the death, resignation, or incapacity of the President.²¹ None of these amendments can fairly be described as controversial.

In the interim, the composition of the Court has changed rather dramatically. In July of 1971, the date of the last effective constitutional amendment, the Supreme Court of the United States consisted of the following Justices: Burger (Chief), Black, Blackmun, Brennan, Douglas, Marshall, White, Stewart, and Harlan. Justice Powell succeeded Black in 1972; Justice Stevens succeeded Douglas in 1975; Justice O'Connor succeeded Stewart in 1981; and upon Burger's resignation in 1986, Justice Rehnquist was elevated to Chief and Justice Scalia filled the vacancy.

Two of these additions to the Court were Reagan nominees (O'Connor and Scalia). In addition, Reagan filled the vacancy created by Justice Powell's resignation. He first nominated Robert

¹⁷ See, e.g., *id.* at 507 (Black, J., dissenting).

¹⁸ U.S. CONST. amend. XXIII.

¹⁹ *Id.* amend. XXIV.

²⁰ *Id.* amend. XXVI.

²¹ *Id.* amend. XXV.

Bork. The Senate rejected Bork by a vote of 58 to 42.²² Reagan then nominated Douglas H. Ginsburg, who withdrew his nomination approximately one week later.²³ The Senate confirmed Reagan's third nominee, Anthony M. Kennedy, by a vote of 97 to 0.²⁴

Following Justice Brennan's resignation in July 1990, President Bush nominated David Souter, who was confirmed by a vote of 90 to 9.²⁵ And following the announcement of Justice Marshall's resignation, Bush nominated Clarence Thomas, who was confirmed by a vote of 52 to 48.

Thus, since the date of the last effective amendment of the Constitution (1971), two Presidents have appointed five of the nine Justices. In addition, with Justice Brennan's resignation, the only sitting Justice who was on the Court at the time of *Griswold* is Justice White. Notably, Justice White's concurrence in the *Griswold* case eschewed reliance on the right of privacy.

In other words, since 1971, the issue of advice and consent has been relevant in no fewer than seven instances; and during the Reagan-Bush era, it has been germane no fewer than five times. The Senate's consideration of these nominees has taken on a new fervor—not an unprecedented fervor, but a fervor that has been absent for decades.

The first Supreme Court nominee to appear before the Senate was Harlan Fiske Stone, who briefly appeared at his nomination hearing in 1925. However, not until the nomination of Felix Frankfurter in 1939 did the nominee actually appear before the Senate and answer questions. Professor Freund has pointed out that the Senate's consideration of these nominees, both during its closed and its currently open sessions, has always included a strong political, i.e., partisan, factor.²⁶ Even so, the process itself changed

²² See GERALD GUNTHER, CONSTITUTIONAL LAW B-6, B-7 & n.1 (12th ed. 1991).

²³ See *id.* at B-7 n.1. Ginsburg was nominated on 29 October 1987 and withdrew on 7 November. *Id.*

²⁴ *Id.*

²⁵ *Id.* at B-7 n.2.

²⁶ Freund, *supra* note 3, at 1157. Freund also provides interesting numerical detail. From 1789 to 1874, twenty nominations were rejected, withdrawn, or indefinitely postponed; from 1874 to 1900 there were five such occurrences. *Id.* at 1147. In all, during the nineteenth century, nearly one quarter (twenty-five out of one hundred eight) of the nominations were rejected, withdrawn, or indefinitely postponed. *Id.*

During this period, the Constitution was amended four times, with three of these amend-

during the New Deal era. In Professor Freund's words, "the focus of concern in the Senate underwent a marked shift, coincident with the Court's increased activity in judging the merits of social and economic legislation under the Due Process Clauses of the Fifth, and especially the Fourteenth, Amendments."²⁷

This change has assured that a nominee can no longer be judged on the basis of scholarship, intelligence, experience, and wisdom. Attention to judicial qualities has been supplanted by a searching inquiry into how he or she is likely to develop (or impede) areas of constitutional law that touch upon politically contentious topics. The consequence is that the hearing process now has as its primary activity the spectacle of Senators and the nominee playing artful cat and mouse games over how the nominee can be expected to rule in not-so-hypothetical cases. The result, in a word, is a fiasco. It is not so much that the hearings are inquisitorial and political—that is unfortunate but not unprecedented—it is rather that the focus of the political inquiries now occurs at far too low a level of generality.²⁸ Rather than discussing matters of high abstraction, the hearings have decayed into pedestrian case recitals that resemble nothing so much as first-year constitutional law courses.

One can hardly imagine that the Framers intended the advice and consent process to take this form. At least some of the Fram-

ments being the Civil War amendments.

"From 1894 to 1930 there were no further rejections." *Id.* at 1151. Professor Freund argues, correctly in our judgment, that the manner of Senate inquiry changed during this period, with the nomination of Brandeis serving as the watershed event. *Id.* Brandeis was confirmed strictly along party lines. *Id.* at 1152. The first nominee to be rejected this century was John J. Parker, whom Hoover had nominated following the confirmation of Charles Evans Hughes to succeed Chief Justice Taft in 1930. *Id.* at 1153-54.

The next significant battle did not occur until President Johnson attempted to elevate Justice Fortas to Chief. Indeed, Professor Freund attributes the Senate's rejection of Nixon's first nominee, Clement Haynsworth, to a partisan backlash from the Fortas fiasco. *Id.* at 1155.

²⁷ *Id.* at 1151. This very shift in focus provides the foundation for Professor Ackerman's notion of "transformative appointments." He concludes that the Senate that rejected Bork thereby rejected a broader Reagan agenda much as the Senate that confirmed the Roosevelt nominees thereby endorsed the New Deal. We do not necessarily disagree with this pragmatic assessment, though we will argue that this occurrence is constitutionally unfortunate.

²⁸ On levels of generality, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

ers expected that judicial nominees would be scrutinized for judicial merit, not ideology. Wilson noted that confirmation by the entire Congress was unappealing since it would likely result in "intrigue, partiality and concealment."²⁹ Madison persuaded Pinckney and Sherman to withdraw their motion that confirmation be subject to the entire Congress, and he urged that the matter be left in the hands of the Senate because that body was viewed as, "numerous enough to be confided in [but] not so numerous as to be governed by the motives of the other branch; and . . . sufficiently stable and independent to follow their own deliberative judgments."³⁰ Not a single Framers expressed the view that judges would (or should) be rejected on political grounds. If anything, such evidence as there is suggests that the Framers expected that the process of congressional confirmation might check the executive's tendency to appoint for political reasons.³¹ Simply put, it is impossible to imagine that the Framers anticipated that the process would look as it currently does, and it is equally impossible to imagine that they would be pleased with what we have. About the only positive thing we can say about the current process is that it limits the President's power to install an ideological extremist, but surely that observation is to damn with faint praise.

III. AILMENT AND CURE

The question is whether this use of the advice and consent procedure as a substitute for robust public debate of central issues of governance is appropriate. Our belief is that it is not.

Modern constitutional theory begins with Alexander Bickel.³² Bickel's theory of judicial review was articulated at around the time of *Brown* and *Griswold*, two decisions that could have taken the form of amendments in accordance with Article V. But the simple fact of the matter is that at the time *Brown* was decided

²⁹ ARTHUR T. PRESCOTT, *DRAFTING THE FEDERAL CONSTITUTION* 658 (1968). Simple executive selection with no confirmation procedure at all was rejected as being too monarchical. *Id.* (quoting John Rutledge).

³⁰ *Id.* at 660 (quoting John Rutledge).

³¹ *See, e.g., id.* at 668 (noting Mason's view that unfettered executive appointment would give President too large a control over the judiciary).

³² *See, e.g.,* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

(i.e., 1954) the last substantive amendment to the Constitution that touched an area of major public concern was over two decades old.³³ Furthermore, if one believes that the repeal of Prohibition was peculiar and ought not to count for purposes of examining the operation of Article V, then at the time of *Brown*, the last substantive amendment—in the sense of an amendment that addressed and resolved a contentious and basic political issue—was the woman's suffrage amendment, passed in 1920.³⁴

And, of course, in between *Brown* and *Griswold* no further amendment activity in areas of major public debate transpired. The Constitution, in other words, had gone another decade without serious revision—and, more to the point, without serious discussion of serious revision. Jefferson's concern over the ossification of constitutions seems to have been realized, and his injunction that the Constitution must expire at the end of nineteen years has contemporary resonance.³⁵

For several decades now political theorists have argued that the unsullied operation of our political system is chimerical in any event. There is no doubt some truth to the critique that the political system never truly represents the will of the populace,³⁶ but there is also no doubt a great deal of falsity to that critique—as is evinced not only by the disturbing level of support for Louisiana Klansman David Duke but also by the more sanguine operation of the California referendum system.

Our contention, then, is that there is no genuine *institutional* barrier to the level of participation that we enjoin as the remedy for the confirmation mess. There are, however, strategic barriers,

³³ U.S. CONST. amend. XXI (repeal of Prohibition, the Eighteenth Amendment). The Twenty-first Amendment was ratified in December 1933.

³⁴ U.S. CONST. amend. XIX.

³⁵ See Dow, *supra* note 6, at 43 n.212 (quoting letter of Thomas Jefferson). This aspect of Jefferson's thought seems to have received scant attention from constitutional theorists. *Id.* Mason's belief that the Constitution be readily amendable reflects a similar concern. See Prescott, *supra* note 29, at 686. See generally Dow, *supra* note 6, at 41-43.

³⁶ The literature on this topic is enormous. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); CHARLES E. LINDBLOM, *POLITICS AND MARKETS* (1977); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1513-30 (1990); see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 32 (1991); Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986). Our view, as the text intimates, is that this concern is overstated.

but these seem, if anything, to provide support for our proposal. For example, consider the idea of a constitutional amendment that would expressly protect the right of privacy.³⁷ One could imagine that such an amendment would, in the abstract, easily command a majority of support in three-fourths of the states. Ask the typical American voter whether he or she believes that the Constitution should protect such a right, and the requisite support even for the high hurdle of Article V is surely within grasp.

But the amendment would not exist in the abstract. It would be accompanied by a legislative history, which would give guidance to the Supreme Court when this hypothetical amendment was invoked. As part of that legislative history, a Senator from Massachusetts who would be speaking on behalf of the amendment would be interrupted by a Senator from South Carolina. The South Carolinian would say: "May I ask my colleague from Massachusetts whether this amendment would protect the right of married couples to engage in private consensual acts in their homes?" And the Senator from Massachusetts would respond affirmatively, at which point the Senator from South Carolina would ask, "And would it protect private consensual acts even between (or among) nonmarried persons?" And again the response, more tentatively, would be affirmative. Finally, the Senator from South Carolina, now quite agitated, would ask whether it protects homosexuals. Here the Senator from Massachusetts has two choices. If he says yes, the amendment is dead; if he says no, it would be, if not dead, still seriously endangered, for not only would the gay community mobilize to defeat it, but its political allies would be betraying the homosexual population were they to support such an amendment.

There may be other reasons why we do not have a constitutional amendment that expressly recognizes a right of privacy, but this is one reason, and the dialogue is as easy to construct where the abortion issue is concerned. The confirmation process is what it is because we are unwilling to debate these deeply contentious questions in public, where they belong, and then place them

³⁷ Elsewhere, one of us has noted how much easier things would have been were there such an amendment. David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479, 488 n.22 (1990).

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before the people.

CONCLUSION

If the American public were to take the Constitution, and especially its amendment mechanism, seriously, then the confirmation process could begin to focus not on the nominee's ideology but instead on the nominee's sheer competence for the job. Talk of fixing the confirmation process would be unnecessary, as there would be no real reason to indulge in the farce that we do today. We would have a Supreme Court not of Justices whose views at the time of their confirmation were concealed, but of Justices who were truly selected from among the best legal thinkers in the land. That is simply not what we have now, and we are all the poorer for it.

