

# Book Notes

## The Resurrection of Publius

*New Federalist Papers: Essays in Defense of the Constitution.* By Alan Brinkley,\* Nelson W. Polsby,\*\* and Kathleen M. Sullivan.\*\*\* New York: W.W. Norton Press, 1997. Pp. xii, 179. \$13.95.

In the *New Federalist Papers*, Alan Brinkley, Nelson Polsby, and Kathleen Sullivan assume the modern day roles of Alexander Hamilton, John Jay, and James Madison<sup>1</sup> to defend the U.S. Constitution from recent attacks by politicians and academic critics. Like their predecessors, Brinkley et al. fervently stand by the federal system established in 1789. Unlike their predecessors, Brinkley et al. do not argue for the ratification of a new constitution, but for the prevention of radical reforms to over two centuries of American constitutional law and structure.

The *New Federalist Papers* is an excellent critique of the current antifederalist challenge. By employing the rhetorical techniques of their predecessors,<sup>2</sup> Brinkley et al. effectively scrutinize the antifederalist arguments through factual and philosophical analysis. They equate the modern antifederalist challenge with the conservative agenda offered by the Republicans (p. 16),<sup>3</sup> beginning with President Reagan and continuing through

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1. See THE FEDERALIST (Clinton Rossiter ed., 1961).

2. The authors write concisely and use a simple format. Despite its lack of citations, the book is a scholarly work designed to be accessible to an average person with minimal knowledge of American constitutional law and political history.

3. The authors' critique is directed at the revitalized conservative wing of the Republican Party. The best evidence of this political slant is found in the preface of the *New Federalist Papers*, which is written by Richard C. Leone, the president of the Twentieth Century Fund (which provided support for the book). Leone states, "Today's new [antifederalist] movement is at once radical and conservative . . ." Richard C. Leone, *Preface* to NEW FEDERALIST PAPERS at v, vi (1997). Leone goes on to associate the modern antifederalists with "right-wing radio talk show hosts" and "radical conservatives." *Id.* To challenge the conservative agenda, the Twentieth Century Fund "asked" the three authors to compile the *New Federalist Papers*. *Id.* at ix.

the Contract with America. In *New Federalist* No. 2, for example, Brinkley notes:

One of the most striking developments of the last fifteen years has been the growing power of a conservative opposition not just to particular public programs, but also to the survival of the federal government as an institution capable of playing a significant role in American life. The aborted Republican revolution of 1995, and the Contract With America that formed its basis, was the most visible evidence of this assault (p. 15).

Brinkley and his coauthors go on to provide detailed criticisms of several key components of the Contract with America and the Republican agenda.<sup>4</sup>

The *New Federalist Papers*, however, suffers from one major problem: The authors' ideological and somewhat partisan bent occasionally prevents them from seeing the full complexity of the problem they attempt to address. As a consequence, their analyses are incomplete, and their alternative solutions often appear just as ineffective as those of the new antifederalists. Brinkley et al. suffer from the same blinding passion that led their predecessors to conclude that the Supreme Court was the "least dangerous" branch of government,<sup>5</sup> and that states had little to fear from the intrusion of the federal government into their affairs.<sup>6</sup>

In making this argument, the authors appear to equate the Democrats with the original Federalists and the Republicans with the Antifederalists. In light of this construction, Brinkley et al. seem to conclude that to defend the Constitution they need only to attack the conservative antifederalist position and to offer minor adjustments to the status quo, which was forged during periods dominated by liberal Democrats, such as the New Deal and the civil rights era of the 1960s.<sup>7</sup> In fact, there is only one passage in the *New*

Brinkley et al. are mostly correct in attaching the antifederalist label to the GOP. Recently, the Republicans have championed the devolution of federal powers to the states, and the reduction of the size, power, and influence of the federal government. See Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 *YALE L. & POL'Y REV.* 227, 227-28 (1996). The authors provide sound criticisms of this conservative agenda and convincingly refute the arguments proffered by the Republicans.

4. Compare THE CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 24-25, 32-33, 157-61 (Ed Gillespie & Bob Schellhaus eds., 1994), with NEW FEDERALIST NO. 11 (Kathleen M. Sullivan) (criticizing the proposed use of supermajorities to approve deficit spending and tax increases), NO. 10 (Nelson W. Polsby) (arguing against the imposition of federal term limits), and NO. 12 (Nelson W. Polsby) (noting the ineffectiveness of the line item veto as a reform measure to control spending on special interest projects).

5. THE FEDERALIST NO. 78 (Alexander Hamilton).

6. See THE FEDERALIST NO. 46 (James Madison).

7. In some instances, the authors' biases are rather explicit. For example, in *New Federalist* No. 2 Brinkley shows his partisan colors when, discussing the budget deficit, he states: "The Clinton administration, the first presidency in a generation to envision important new government programs, found itself a prisoner to the deficit almost from the beginning" (p. 16). Brinkley goes on to call the Clinton health care program and welfare reform plan "victims" of the deficit (p. 16). The most telling statement of this sort, however, is when Brinkley notes: "The Republican Congress, ideologically committed to

*Federalist Papers* that truly places the blame for the antigovernment movement on both parties. Shedding his ideological blinders for a brief moment, Brinkley states in *New Federalist* No. 16:

The result [of the government's failure to respond properly to the internal and external changes in American politics and society] is our present political moment—in which leaders of *both* parties vie with one another in expressing their hostility to big government, in proclaiming their faith in local and private solutions to what used to be considered national and public problems, and in proposing measures to free the entrepreneurial talents of the nation from the shackles of centralized regulation and control (p. 129, emphasis added).

Unfortunately, the authors do not adequately address the severity of this negative bipartisan sentiment underlying the antifederalists' arguments.

In general, this political slant manifests itself in two ways. First, the authors defend the status quo in situations in which the system is clearly not working. This defense sometimes entails dismissing valid and provocative proposals to reform government. Second, the authors often fall short of offering feasible suggestions to cure the real and perceived problems of modern American politics. An analysis of these problems might have provided for a stronger rebuttal to the antifederalist attack and shed some light on what is necessary to get the federal government back on the track envisioned by Hamilton, Jay, and Madison.

Structurally, Brinkley et al. divide their nineteen essays into five parts that weave history, law, and philosophy into a defense of the Constitution.<sup>8</sup> The basic thesis in all of these papers is that the concerns faced by Hamilton, Jay, and Madison, including factionalism,<sup>9</sup> tyrannical majorities,<sup>10</sup> and concentrations of power,<sup>11</sup> remain the major concerns of American politics today (pp. 7-14). The best way to combat these concerns, the authors argue, is to maintain the foundations of the status quo and to protect the Constitution and its federal system zealously (pp. 14, 20-22).

The authors' defense of the status quo often amounts to little more than a defense of the Democratic Party. For example, in *New Federalist* No. 14,

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scaling back government for its own reasons, has found the deficit its greatest ally . . ." (p. 16).

8. Part One revisits the Framers' original conceptualization of government to show the continuing importance of the Constitution. In Part Two, the authors discuss and refute the criticisms of the U.S. government that have fueled the antifederalist cause. Part Three examines and attacks the recent proposals to amend the Constitution. In Part Four, the authors analyze the critical balances that they believe can be maintained only under the traditional constitutional regime. Finally, in Part Five, Brinkley et al. offer several alternative solutions to the current state of politics, solutions which would not necessitate a substantial alteration of the American constitutional system.

9. See THE FEDERALIST NO. 10 (James Madison).

10. See *id.*

11. See THE FEDERALIST NO. 51 (James Madison).

Kathleen Sullivan refutes attacks on majority-minority U.S. House districts drawn under the Voting Rights Act of 1965,<sup>12</sup> a policy that was created and supported by Democrats over the last thirty years (pp. 104-10).<sup>13</sup> In *New Federalist* No. 15, Sullivan refutes the arguments in favor of devolving federal power to the states (pp. 111-21). She uses the opposition to several Democrat-backed programs as signs of the growing antifederalist effort (pp. 111-21).<sup>14</sup> These discussions provide the most stark examples of a partisan bias.<sup>15</sup>

The authors' political slant also may have led them to underestimate the depth of the problem that the antifederalist movement represents. Throughout their book, Brinkley et al. propose relatively minor changes to the political system. The authors attempt to show how small reforms can solve the problems for which Republicans have offered major constitutional and legislative changes. In most cases, the authors are on point. For example, using a constitutionally compelled supermajority to prevent tax increases, a Republican proposal the authors critique (pp. 17-18), is akin to using an atom bomb to kill an ant.

In a few instances, however, the authors go too far in their support of incremental change. For example, in *New Federalist* No. 5 Nelson Polsby dismisses some common criticisms of the American two-party system. Although Polsby admits the American electoral system is imperfect and may not allow for institutional representation of the full spectrum of political views (pp. 39-40), he argues that the status quo sufficiently accommodates varying interests and that the alternatives to the two-party system are even more problematic (p. 42). For Polsby, proportional representation and a vibrant multiparty system are undesirable because they are somehow less efficient or effective in developing policy (pp. 42-43).

Because of his support of the status quo, Polsby lacks the objectivity necessary to admit that an open and multifaceted system could create an environment in which minority interests are respected because coalitions would be necessary when developing policy.<sup>16</sup> Proportional representation, for

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12. 42 U.S.C. §§ 1971-1973 (1994).

13. See PETER BROWN, *MINORITY PARTY: WHY DEMOCRATS FACE DEFEAT IN 1992 AND BEYOND* 302-05 (1991). In *New Federalist* No. 14, Sullivan briefly notes that opposition to majority-minority districts flows from the same source as the recent attacks on affirmative action and other programs designed to remedy past racial discrimination (p. 106). For a discussion of the Democrats' nearly single-handed role in developing and supporting such civil rights programs, see BROWN, *supra*, at 302-05.

14. Sullivan notes opposition to the "motor voter" legislation and the Brady Bill handgun checks, two programs associated with the Democrat agenda (p. 111). Sullivan also briefly touches upon the constitutional challenge to federal criminal statutes that are enforced by local law enforcement officers (pp. 118-19).

15. Partisanship should not be confused with ideology. Although the two concepts are almost impossible to separate, partisanship relates to formal party or group structures that serve a political function. Ideology, on the other hand, can exist without a formal organizational structure.

16. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 95 (1994); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 133-34 (1995); cf. Mark A. Graber, *Conflicting Representations: Lani Guinier and James Madison on Electoral Systems*, 13 *CONST. COMMENTARY* 291 (1996) (comparing Lani Guinier's model of proportional representation to

example, may allow for racial minority representation in districts that are not majority-minority.<sup>17</sup> A third party might force the two major parties to represent their constituencies better.<sup>18</sup> Polsby's position is tainted by the fact that he believes in a liberal Democratic agenda; as a result, he sees only a two-party dichotomy of political opinion and policy options. Limiting voters to two choices, however, may not be in the best interest of American political development, and some electoral reform might be warranted.

In the final part of the *New Federalist Papers*, each author discusses what he or she believes to be a broad change to cure the ills of the current political system. Brinkley discusses the importance of information accessibility to improving democracy (pp. 139-50), Sullivan writes about reforms in the media to ensure the distribution of accurate and insightful information (pp. 151-57), and Polsby offers his opinion that American democracy still works structurally and should not be changed (pp. 159-79). All three pursue an underlying theme of restoring legitimacy and public confidence in the federal government—something they view as having been lost in recent years because of scandal and the antigovernment rhetoric often employed by politicians in their quest for office and power.

The confidence-in-government issue is first raised explicitly by Brinkley. In *New Federalist* No. 16, he states that "the major challenge of our time is finding a way to restore [the] eroded faith" (p. 132). He argues that changes in the domestic population and the international economy have created a variety of new problems for the United States (pp. 127-29). Nevertheless, he offers only weak solutions to this problem.<sup>19</sup> In both *New Federalist* No. 16 and the final section, Brinkley et al. still fall short of effectively dealing with the confidence problem because they do not offer a solution to the leadership vacuum.<sup>20</sup> In so failing, they also may have inadequately addressed the most fundamental problem in American politics—how to reestablish the populace's belief in *positive government*.

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James Madison's Federalist electoral system).

17. See GUINIER, *supra* note 16, at 94-101; KYMLICKA, *supra* note 16, at 134.

18. See GORDON S. BLACK & BENJAMIN D. BLACK, *THE POLITICS OF AMERICAN DISCONTENT: HOW A NEW PARTY CAN MAKE DEMOCRACY WORK AGAIN* 16 (1994).

19. Brinkley offers five proposals: (1) "[E]nhance both the status and performance of public employees" (p. 132); (2) "remind the public of the many things government has done" (p. 133); (3) "make clear the tasks at which government has failed, to point out what is wrong with existing policies and institutions" (p. 134); (4) "create some real sense of connection with . . . followers" (p. 134); and (5) "introduc[e] into political discourse habits of reasoned reflection, making it an activity we can take seriously as an intellectual endeavor" (p. 135). These steps amount to educating the public about the abilities and limits of government; in other words, controlling expectations. Such a methodology does not solve the problems that the nation faces. Instead, it attempts to constrain the public's reaction to a political success or failure.

20. Their solutions amount to improving the quality and quantity of information given to Americans (pp. 151-57); instructing politicians and the media to end negative journalism and to start accentuating the positive achievements in government (pp. 139-50); and asking the American public simply to believe in government again (pp. 123-36, 159-79). Although accountability and responsible action are important to the relegitimization of American federalism, leadership is the key element that the authors fail to address.

The American public is discontented with the state of American politics.<sup>21</sup> The negativism and scandal that have surrounded American politics for the last decade are due, in large part, to a lack of effective and productive leadership. In following the general rule that it is much easier to destroy than it is to create, so too is it easier to run a negative campaign filled with mudslinging and misstatements than it is to tackle tough issues with programmatic and policy-based solutions.<sup>22</sup> As Brinkley himself admits, American politics exploits ignorance about issues and does not seek to educate or explain policy choices—what Brinkley calls the “cultivation of ignorance” (p. 135). Although it is apparent Brinkley sees the problem, it is unclear whether he truly knows how to solve it.

Brinkley et al. certainly offer better options than the modern antifederalists, but their proposed solutions are insufficient to solve our current predicament. Perhaps it is time to look beyond the two-party system and common molds of government. The *New Federalist Papers* itself shows that partisanship can blind even the most thoughtful and well-intentioned of civic authors. One could argue that the parties have grown complacent because elections are only about defeating one opponent and competing with one set of ideas. Politicians do not necessarily need to provide positive leadership; they need merely to defeat their Democratic or Republican opponent on the predesignated Tuesday in November.

Somewhat radical ideas may now be required to reform the American political system, much as a radically centralized government based on a written constitution was needed to build a nation in 1789. Solutions such as proportional representation or a multiparty system may actually be worth consideration as a means of reconnecting the people with their government. Proposals like these can promote a strong federal system and lend legitimacy to government. They are also founded on a belief in positive government and a faith in the ability of political leaders that has been lost over the last thirty years. Although Publius may not have conceived of them 200 years ago, these alternatives are certainly based on ideas with which he would agree.

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21. See E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 10 (1991); JACK W. GERMOND & JULES WITCOVER, MAD AS HELL: REVOLT AT THE BALLOT BOX, 1992, at 508-18 (1993); LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 3-4 (1996).

22. See KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY 204 (1992); BARBARA G. SALMORE & STEPHEN A. SALMORE, CANDIDATES, PARTIES, AND CAMPAIGNS: ELECTORAL POLITICS IN AMERICA 159-61 (2d ed. 1989).

## Picking Moderate Judges

*Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan.* By Sheldon Goldman. New Haven: Yale University Press, 1997. Pp. xv, 428. \$45.00.

Some books are gifted for their timeliness. A crisis can make the emergence of a scholarly work so apt it ceases to be “academic” in the traditional sense and becomes a comment on the political moment. By virtue of the current crisis in judicial appointments—the slow pace of lower court appointment that has left dozens of federal bench seats unfilled for years on end<sup>1</sup>—Professor Goldman’s *Picking Federal Judges* fits this bill. *Picking Federal Judges* is a thorough and richly detailed elucidation of the partisan, policy-oriented, and personal factors that contributed to the selection of lower court judges from 1933 to 1989. Using archival evidence from each presidency of the period covered, Professor Goldman has reconstructed the maneuverings and machinations that resulted in 373 appointments (and numerous failed nominations) to the federal bench.

While other books<sup>2</sup> and scholarly articles<sup>3</sup> have been written on the subject of lower court judge selection, no previous work has addressed the subject so comprehensively over such an extended period. In setting down the nomination stories in a single narrative, Goldman is able to illustrate clearly differences in presidential style; Johnson micromanaged (p. 160), but Eisenhower had other interests (p. 114). Goldman colors the story with a fairly

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1. For an account of the crisis, see William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary* (visited Mar. 6, 1998) <<http://www.uscourts.gov/cj97.htm>>. See also John H. Cushman, Jr., *Senate Imperils Judicial System, Rehnquist Says*, N.Y. TIMES, Jan. 1, 1998, at A1; *Nightline: Courts in Crisis: Where Have All the Judges Gone?* (ABC television broadcast, Aug. 4, 1997), available in 1997 WL 12826126.

2. See, e.g., KERMIT L. HALL, *THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-61* (1979) (covering the rise of party influence in 19th-century appointments); JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* (1953) (discussing exercise of the advice-and-consent power through the Truman Administration); *THE JUDGES WAR: THE SENATE, LEGAL CULTURE, POLITICAL IDEOLOGY AND JUDICIAL CONFIRMATION* (Patrick B. McGuigan & Jeffrey P. O’Connell eds., 1987) (presenting various essays on judicial appointments); KEVIN L. LYLES, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* (1997) (discussing district court nominations since the Kennedy Administration); HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988) (dealing principally with Reagan-era nominations).

3. See, e.g., William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1 (1990); Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137 (1995); see also Michael J. Slinger et al., *The Senate Power of Advice and Consent on Judicial Appointments: An Annotated Research Bibliography*, 64 NOTRE DAME L. REV. 106 (1989).

unambitious argument, maintaining that appointments by presidents during times of party instability (such as the New Deal era or the time of the "Reagan Revolution") are marked by ideological (policy) considerations, while appointments at other times are more party-oriented (partisan) in nature.

The subject that provokes today's reader most, however, is the negotiation of conflicts between the President and the Senate. Unfortunately, the book lands where it should begin to leap, as it is with the close of the Reagan Administration that we see the origins of our present problem. The same crisis that makes Goldman's book so timely, the culmination in the Clinton era of the forces set in motion in the late 1980s, entails a shift in circumstances sufficiently drastic to make this elaborate work more one of history than of political science.

## I

According to Professor Goldman, during the years covered by the book individual senators had only one role in the lower court nomination process: influencing appointments to seats in their home-state jurisdictions. Rebellion *en masse* against a president's nominees was a virtually unheard-of phenomenon. The rare occasions on which the Senate did attempt to block a slate of nominees wholesale were generally limited to election years<sup>4</sup> and to disputes over state representation on circuit courts.<sup>5</sup>

Public involvement in the lower court nomination process, like across-the-board Senate opposition, was almost never an influential factor. Goldman relates the involvement of small nongovernmental activist groups on both sides of the appointments of the first African Americans and women to the federal bench (pp. 51, 101), but otherwise he offers no mention of public action taken to promote or stop a lower court candidate.

## II

The back room confirmation process ended with active campaigning by

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4. Goldman, for example, describes Republican stonewalling in the months before Truman's unexpected election in 1948 (p. 81).

5. For example, Senator Hiram Fong of Hawaii blocked all of Nixon's Ninth Circuit nominees to ensure the appointment of a Hawaiian to fill one of the vacancies on that court (p. 209). Goldman cites only one occasion on which senators blocked confirmations along party lines for reasons other than patronage. This occurred in 1947, when the do-nothing 80th Congress so reviled by then-President Truman made a feeble ideological stand. According to Goldman, Republican Alexander Wiley of Wisconsin, Chairman of the Judiciary Committee, announced he would not accept "leftist" nominees. Wiley's committee caused only minor delays, however, and confirmations declined only slightly, from 16 in 1946 (when the Democrats still held Congress) to 10 in 1947 (p. 81). Unfortunately, Goldman offers us only one brief paragraph to explain the Wiley-Truman conflict.

Reagan Administration conservatives. Reagan's staff attacked the courts for "constitutionally dubious and unwise intrusions upon the legislative domain" (pp. 297-98) and made the selection process a public issue. Like most ideological revolutions, Reagan's quickly outstripped him in its pace. Lobbying groups such as the National Rifle Association opposed and forced the withdrawal of one Reagan nominee, Andrew Frey, whom they saw as insufficiently conservative (pp. 78-79).<sup>6</sup> Three right-wing senators (including Orrin Hatch) tested the credentials of another nominee, Joseph P. Rodriguez, through an ideology questionnaire. Although the senators soon abandoned the questionnaire approach (pp. 83-84),<sup>7</sup> the ideological nature of the nomination process continued, and the intervention of senators from states outside prospective judges' jurisdictions grew. Goldman, unfortunately, passes over these controversies and fails to note their significance as harbingers of the current crisis.

Liberals also had a role in the transformation of the process. In 1984, a set of liberal organizations in the umbrella group Alliance for Justice formed the Judicial Selection Project to research and oppose "egregious" nominees.<sup>8</sup> Liberal opposition resulted in at least a few very close confirmation votes on somewhat dubious grounds.<sup>9</sup> In 1985 and 1986, public-interest group involvement caught steam with liberal opposition to the nominations of Jefferson Sessions to Alabama's southern district and Daniel Manion to the Seventh Circuit.<sup>10</sup> A "major controversy[,] . . . fueled [in part] by the active participation of such interest groups as People for the American Way" (p. 308), contributed to Sessions's withdrawal<sup>11</sup> and a bitter squeak-through

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6. The Andrew Frey controversy and other Reagan-era appointments are more completely covered in SCHWARTZ, *supra* note 2, *passim*.

7. Strom Thurmond, then Chairman of the Judiciary Committee, found himself in rare agreement with the *Washington Post* that the three senators had overstepped their bounds. See *Who Clears Judges?*, WASH. POST, Apr. 8, 1985, at A10. Rodriguez was later confirmed. See SCHWARTZ, *supra* note 2, at 85.

8. SCHWARTZ, *supra* note 2, at 76.

9. Alex Kozinski, now on the Ninth Circuit, was opposed for "improper furniture procurement practices" at his last government job, as well as for allegedly misleading statements about how well he got on with his coworkers there. See *Disputed Judicial Nomination Sent to Floor*, WASH. POST, Sept. 13, 1985, at A23. Kozinski was confirmed by an exceptionally close vote, 54-43. See Ben A. Franklin, *Senate Confirms Appellate Judge*, N.Y. TIMES, Nov. 8, 1985, at B10. Nominee Sid Fitzwater, who had posted allegedly threatening signs at election time in minority precincts in his native state of Texas, was opposed by Americans for Democratic Action and various minority groups. He was confirmed to a district court seat by a vote of 52-43. See SCHWARTZ, *supra* note 2, at 94-95.

10. Liberal groups saw Sessions as racially insensitive—he had made offhand comments some interpreted as prejudiced—and Manion as both insensitive and unqualified. See Howard Kurtz, *Votes on Judge Nominees Become Politically Risky*, WASH. POST, June 28, 1986, at A5.

11. Attorney General Edwin Meese blamed "several liberal organizations," who he said were apparently willing "to smear anyone in order to advance their agenda" for Sessions's defeat. Ironically, Sessions later won election to a U.S. Senate seat from Alabama (and a place on the Judiciary Committee that had opposed his nomination) (p. 309). As a senator, Sessions has been vocal in his opposition of Clinton nominees. See Sandra Torry & Toni Lucy, *In Rocky Session, Judge of U.S. Appeals Court for D.C. Confirmed*, WASH. POST, Mar. 20, 1997, at A14 (quoting Senator Orrin Hatch as accusing Sessions and others of "playing politics with judges").

victory for Manion.<sup>12</sup>

These nominations were, notably, opposed not just by senators from Alabama and the Seventh Circuit states, respectively, but by an array of senators from across the country. Goldman notes these battles, but he does not identify them as the beginnings of a change in the very nature of the confirmation process, as they would soon prove to be. Two simultaneous shifts had, with the Sessions and Manion debates, begun to occur: shifts both from private to public and from local to national intervention. Interest groups were thus poised for a real fight when the nomination of Robert Bork to the Supreme Court (and the ensuing opposition) fanned the debate on ideology into the well-known firestorm it became.<sup>13</sup>

Why did the heat in the ideological kitchen rise so fast in the 1980s? It would be easy to attribute the changed tone of the process entirely to Reagan and the ideological revolution that he brought to Washington. But in reality, the roots are deeper. By 1980, the civil rights and women's rights movements had achieved many victories in the statute books and the *United States Reports*. With the changing statutes and post-Warren Court decisions, however, came an inevitable political backlash that threatened the movement's goals. The Equal Rights Amendment was defeated,<sup>14</sup> and when Reagan was elected, it appeared the pro-civil-rights tide was turning.

Reagan's ideological energies, however, were limited by the fact that the House appeared a permanent roost of the Democratic Party.<sup>15</sup> Having control of only the Senate (from 1981 to 1987),<sup>16</sup> the Republicans chose to use their power where they had it: in judicial appointments.<sup>17</sup> At the same time, liberals realized that their earlier victories meant little if they could not be repeated in the lower courts. The grassroots organizations that had been so

12. Manion was confirmed despite opposition from 44 law school deans and a Democratic filibuster. He was confirmed by a margin of only one vote (p. 312). Slade Gorton, who voted for Manion's confirmation, was defeated for reelection the following year partly as a result. See Doug Underwood, *Hanford Seen as "Gorton's Iran" but Both Sides Agree That Adams Capitalized on Senator's Mistakes*, SEATTLE TIMES, Nov. 9, 1986, at B1 (quoting Karen Marchioro, head of the state Democratic party, as saying that "[w]e were sliding down a greased rope until Manion").

13. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 271 (1990) ("My nomination was . . . merely one battleground in a long-running war for control of our legal culture . . ."); ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989) (providing a history of the confirmation debate); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992) (presenting a Senate-focused opposition account of the nomination); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE: THE FIGHT FOR BORK* (1990) (presenting a conservative, pro-Bork account of the nomination); MICHAEL PERTSCHUK & WENDY SCHAEITZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989) (covering the mobilization of interest groups against the nomination).

14. See Adam Clymer, *Time Runs Out for Proposed Rights Amendment*, N.Y. TIMES, July 1, 1982, at A12.

15. The Democrats had held control of the House since 1955. See *THE WORLD ALMANAC AND BOOK OF FACTS 1997*, at 120 (1996).

16. See *id.*

17. See SCHWARTZ, *supra* note 2, at 3-9.

effective in promoting civil rights goals in the 1970s turned their energies to defending these goals where they were most under attack—in America's courthouses. Public pressure from the left collided with public pressure from the right, and a skirmish turned into a war.

*Picking Federal Judges*, while an admirable account of the process from 1933 to 1989, presents only a limited impression of the current character of lower court judicial appointment. The picture the book paints of the behind-the-scenes give-and-take between individual senators and the President pays too little attention to activists from outside the government structure. Under Presidents Bush and Clinton, the vitriolic public and national intervention in the appointment process that began in the Reagan years has become a force impacting every judicial appointment.

### III

While Professor Goldman describes lower court selection as “rarely a subject of national interest,” one more prone in fact to “public indifference” (p. 2),<sup>18</sup> lobbying groups have, in the last fifteen years, marshaled public opinion to an unprecedented extent to make their cases to the Senate. Led from the left by the Alliance for Justice<sup>19</sup> and from the right by the Judicial Selection Monitoring Project,<sup>20</sup> groups have used such public political weapons as newsletters, mass mailings, newspaper columns, television appearances, and the Internet to exert influence over senators' confirmation decisions.<sup>21</sup> Conservative senators such as Phil Gramm and Charles Grassley have taken up the rallying cry and found ways of opposing candidates in the name of preventing judicial activism.<sup>22</sup>

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18. In a footnote, Goldman concedes that “[i]t can be argued that this was less the case during the Reagan administration,” but he does not portray the Reagan shift as a sea change (p. 2 n.a.).

19. During the Bush Administration, the Alliance for Justice was active in rallying opposition to a variety of conservative nominees, including those opposed on racial insensitivity grounds, see Sharon LaFraniere, *How Ryskamp Nomination Was Defeated: Rights Groups Waged a Grass-Roots Effort*, WASH. POST, Apr. 14, 1991, at A6, membership in discriminatory clubs, see LYLES, *supra* note 2, at 165, and sexual harassment, see TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION 123-24* (1992) (crediting the Alliance for Justice with passing Anita Hill's name along to Senator Howard Metzenbaum, through whom she later became a witness against Supreme Court nominee Clarence Thomas). The process had, by the time Thomas was nominated in 1991, become so highly politicized that the activists worried they were offending the public and hurting their own causes. See Al Kamen & Michael Isikoff, “A Distressing Turn”: *Activists Decry What Process Has Become*, WASH. POST, Oct. 12, 1991, at A1 (quoting Arthur Kropp, then President of People for the American Way, as asking, “Are we going to be barred from talking to the Senate Judiciary Committee? . . . Are we going to become persona non grata?”).

20. See Judicial Selection Monitoring Project Press Release, Jan. 23, 1997 (visited Dec. 2, 1997) <<http://www.4judicialrestraint.org/adopt/oppose.htm>>.

21. See, e.g., Terry Carter, *A Conservative Juggernaut: Judicial Attacks Push Debate to Right, Put Hatch in Middle*, A.B.A. J., June 1997, at 32.

22. See Neil A. Lewis, *Republicans Seek Greater Influence in Naming Judges*, N.Y. TIMES, Apr. 27, 1997, at 1.

The effects of this phenomenon are unambiguous. Clinton quickly learned he would face strident opposition to the nomination of anyone appearing even remotely leftist; he has accordingly made few such nominations.<sup>23</sup> Liberals, hamstrung by their minority status, have been left to voice their discontent without much practical effect. No doubt emboldened by their experience with judicial nominees, Republican senators meanwhile have moved on to oppose appointed executive branch officials on ideological grounds.<sup>24</sup> Similarly, talk of impeaching "activist" judges, led by House Majority Whip Tom DeLay, is probably a direct result of the right's success in blocking nominations.<sup>25</sup>

It is possible that the current phenomena—the rise in the influence of interest groups and the mounting power of a rebellious Senate—are temporary blips on the EKG of the federal judiciary.<sup>26</sup> It is most likely, however, that these new influences on the selection process are here to stay. Political interest groups have come to realize how much is at stake in the lower federal courts. They will continue to exert whatever pressure they can on senators to reject nominees they see as "extremist." Senators will obey the wills of their geographical, ideological, and financial constituencies. The judiciary that results will be "Soutered"—chosen for its moderation.<sup>27</sup>

This is not an entirely negative effect. Moderation and balance are, after all, what we expect of our judges. Unfortunately, from some of the groups active in scrutinizing judicial appointments, we can also expect demagoguery, misinterpretation, and ensuing hailstorms of condemnation brought down on perfectly respectable nominees. A great number of bright, capable, and imaginative lawyers may, as a result, never make it to the bench; some of their ambitious juniors, witnessing the risks of speaking out or taking controversial cases, may "bland down" to aid their future prospects. In either case, the results will be deeply regrettable.

—Thomas E. Shakow

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23. See Ted Gest et al., *The G.O.P.'s Judicial Freeze*, U.S. NEWS & WORLD REP., May 26, 1997, at 23 (noting the failed internal White House proposal to nominate Georgetown Law Professor Peter Edelman to the D.C. Circuit).

24. It is difficult to imagine the experience of Bill Lann Lee, the President's unsuccessful choice for Assistant Attorney General for Civil Rights, occurring in a climate where the President actively fought the Senate and won on judicial nominations. See Roberto Suro, *Lee Nomination Fails as Panel Divides on Affirmative Action*, WASH. POST, Nov. 14, 1997, at A1.

25. See David Kairys, *Clinton's Judicial Retreat*, WASH. POST, Sept. 7, 1997, at C1.

26. We may, for example, be experiencing the last throes of "payback" for the defeat of Bork; it seems unlikely the relevant parties have forgotten that Clinton himself was among the forces opposing Bork's nomination. See GITENSTEIN, *supra* note 13, at 259 (discussing Clinton's opposition and proposed testimony against the Bork nomination). It is also possible that bravado goes with ownership of all of Capitol Hill, and the Republican Senate will feel less brave should the GOP lose control of the House.

27. No disrespect, obviously, is meant to the eminent Associate Justice, who must himself appreciate how his smooth confirmation was at least in part a function of what interest groups did *not* know.