The use of the economic benefit theory in support of exactions as stated by the courts and academics is most unrealistic. Firstly, some statements of this theory see relief from future property taxes as one of the "benefits" but conveniently ignore the fact that the land is no longer owned by the developer who has thereby been deprived of income from its use or sale. They also rely on the concept of development as a privilege granted by government. In so doing, they fail to establish how the practice of zoning as a restriction on the prior legally unfettered use has become transformed into a "privilege" granted by government. How do they explain to the spirit of Thomas Jefferson that the quintessential *right* to do with one's land as one wishes, subject only to the government's power of eminent domain for which it pays the landowner just compensation, has evolved into a *privilege* granted by a government which never had it and for which the landowner pays the government.

The essential error which courts have made in this area is to fail to distinguish between the general welfare power and the police power. The former uses *eminent domain to take property rights to confer a public benefit*, while the latter uses *regulation to restrict the use of property to avoid a public harm.*[178] To obscure this distinction by looking to the economic benefit theory and saying that an exaction is made because the need for it is "specifically attributable"[179] to a new subdivision is mere sophistry. Such recreational land uses are benefits to an entire community, especially in a modern era of high "automobility." To argue that the failure to exact is a harm is to do violence to any reasonable interpretation of proximate cause. Since public improvements are community benefits, their expense should be distributed throughout the community either by eminent domain[180] or a reasonable method of taxation.[181] Any other approach necessarily does a greater violence to the Constitution.

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178 *See* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 666 (1958); Johnston, *supra* note 45, at 912 n.189.

179 *Id.*

180 Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 224-25 (1931); Note, *Forced Dedications*, 20 HASTINGS L.J. 735, 743-45 (1969).

181 Harvith, *supra* note 45.

SENATE REJECTION OF SUPREME COURT NOMINEES

Thomas Halper†

The President proposes, as the saying goes, and the Senate disposes. The President, that is, "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court."[1] Ordinarily, in recent times, the Senate, like a symphony hall audience, has dutifully (if generally unenthusiastically) registered its approval.[2] Thus, from 1894 until 1968, there was but one exception to the rule of Senate acquiescence, the rejection of John J. Parker in 1930.[3] Other than Parker, the Senate approved, often with little deliberation, forty-five appointees during this seventy-four year span. In 1968, however, much to the surprise of most journalistic observers who had predicted a continuation of the pattern,[4] the Senate failed to confirm Abe Fortas as Chief Justice, thereby also blocking the nomination of Homer Thornberry as Associate Justice. Then in 1969, it rejected the nomination of Clement Haynsworth as Associate Justice. And in 1970, it turned down G. Harrold Carswell, who had been selected to fill the same vacancy. Most recently, in 1971 it posed a serious challenge to William Rehnquist before his ultimate confirmation. Earlier assumptions of senatorial complacency[5] have been left in a shambles.

By examining the history of the Court, we can see that senatorial rejection is by no means a new phenomenon. Up to 1894, at least one nominee was turned down, not voted on, or withdrawn in virtually every decade; and, in fact, in one three year period from 1844 to 1846, five nominations were rejected. Overall, twenty-five such nominations have suffered this fate, "a proportion far higher than for any other federal office."[6] These spurned nominees are listed in Table 1.

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1 U.S. CONST. art. II, § 2.

2 Kent and Story, however, felt that the Senate's role in the appointment process should not be perfunctory, but instead vital, as the key constitutional intermediary between presidential nomination and commission. 1 KENT, COMMENTARIES 310 (1826); 2 STORY, COMMENTARIES 1539 (1833).

3 Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 MISS. VALLEY HIST. REV. 213 (1963).

4 For erroneous journalistic assurances of confirmation, *see, e.g., Chief Confidant to Chief Justice*, Time, July 5, 1968, at 12 (Fortas); *Haynsworth*, Nation, Sept. 1, 1969, at 162 (Haynsworth); *Here Comes the Judge*, Newsweek, Feb. 2, 1970, at 19 (Carswell).

5 Thus, authorities writing during the period of senatorial quiescence discussed the Supreme Court and its place in the American political system without even mentioning the possibility of the Senate's rejection of a nominee. *See, e.g.*, B. SCHWARTZ, AMERICAN CONSTITUTIONAL LAW (1955); R. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960); A. NORTH, THE SUPREME COURT (1966).

6 J. HARRIS, ADVICE AND CONSENT OF THE SENATE 303 (1953).

Table 1

SUPREME COURT NOMINEES REJECTED BY THE SENATE

Name	Year
*Rutledge	1794
*Wolcott	1811
**Crittendon	1829
**Taney	1835
*Spencer	1844
**Walworth	1844
**King	1844
**Read	1844
*Woodward	1846
**Bradford	1853
**Badger	1855
**Micon	1857
*Black	1861
**Stanberry	1866
*Hoar	1869
**Williams	1873
**Cushing	1874
**Matthews	1881
*Hornblower	1893
*Peckham	1894
*Parker	1930
**Fortas	1968
***Thornberry	1968
*Haynsworth	1969
*Carswell	1970

*Nomination voted down
**Nomination withdrawn or not voted on
***Nomination not formally made because rejection of Fortas prevented Chief Justice Warren from resigning and creating the necessary vacancy.

Eleven nominees were voted down by the Senate, thirteen were withdrawn or were not voted on, and one was not formally named due to an earlier rejection having eliminated a vacancy. Since 103 nominees have been accepted, nearly one fifth of all presidential selections have been rejected. How is this to be explained?

I. Unqualified Nominees

The most obvious explanation for the rejections is simply that the nominees were not qualified. Certainly, this has been the most commonly heard response from the Senators themselves. Nor should this be surprising, for as one Washington journalist has wryly observed, "The notion seems widespread that the Senate ought to approve a Supreme Court nominee unless the man is proved either a blackguard or a legal incompetent so cretinous that mention of a tort puts him in mind of Viennese pastry."[7]

[7] Steinfels, *Carswell, Ideology and the Supreme Court*, Commonweal, Feb. 6, 1970, at 504.

How strange, then, that the Constitution does not require the Senate's confirmation vote to be based solely on the basis of competence. In fact, no basis whatever is even hinted at, though Hamilton in Federalist No. 76 speaks vaguely of preventing the "appointment of unfit characters . . . ."[8] Yet from a Senator's public relations viewpoint, competence is clearly the most easily defended voting rationale,[9] and academic commentators are prone to remark piously, "It can be hoped that the unseemly spectacle of even well qualified candidates failing to receive confirmation because of Senatorial pique with the President . . . is now less likely to be encountered."[10] This cry of "unqualified"—the most politic and common of explanations—is also, however, upon closer examination among the least persuasive of arguments.

One reason for this is that useful qualifications are quite difficult to prescribe. It might seem self-evident, for example, that Senators ought to require a prospective Justice to have demonstrated mastery of the process of judicial reasoning. The process, however, is most often analogical,[11] in which the question confronting the Court is: "When will it be just to treat different cases as though they were the same?"[12] Reasonable men will differ in their answers, for this imprecise and non-mechanical approach is "not so much a mode of attempting a proof, as a mode of attempting to dispense with the serious labor of proving."[13] More properly a form of argument than of logic, the analogy ensures that the judicial decision will depend upon that judgment lurking beneath the intellectual underbrush that Holmes christened the "inarticulate major premise."[14] Since there are no hard and fast rules as to what constitutes a valid analogy, examining the written work of a nominee rarely offers unambiguous and fatally damaging evidence as to his legal and rational limitations. A Senator's reaction to a nominee's work, as a consequence, is likely to be governed less by its logic than by the assumptions it embodies and the goals it furthers. Value considerations, in other words, are apt to be decisive: Does this nominee sufficiently appreciate the importance of law as an instrument of stability? or of change? Is he sufficiently solicitous of the rights of private property? or of the propertyless? Is he sufficiently protective of the rights of those accused of crime? or of society? The question, of

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[8] THE FEDERALIST No. 76, at 494 (Modern Library ed. n.d.) (A. Hamilton).

[9] Senator Roman Hruska (Rep., Neb.), nevertheless, defended Carswell's nomination in these terms: "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers and they are entitled to a little representation aren't they? We can't have all Brandeises, Frankfurters and Cardozos." N.Y. Times, March 17, 1970, p. 21, col. 1. With such friends, Carswell needed few enemies, for Hruska's defense probably damaged the nominee's chances for acceptance more than any attack by an opponent and plainly was acutely embarrassing to the Nixon administration.

[10] McKay, *Selection of United States Supreme Court Justices*, 9 KAN. L. REV. 105, 135 (1960).

[11] *See* Halper, *Logic in Judicial Reasoning*, 44 IND. L.J. 33 (1968).

[12] E. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1948).

[13] H. SIDGWICK, FALLACIES 232 (1884).

[14] This famous phrase was first used in O. W. HOLMES, *The Theory of Legal Interpretation*, in COLLECTED LEGAL PAPERS 203, 209 (1920).

course, is: What is "sufficient" and the answer is: It depends. It depends upon whom you are, what you have, and what you want. And inasmuch as values can be neither verified nor falsified,[15] value arguments quickly come to resemble childhood disputes over the alleged superiority of chocolate ice cream to vanilla. Thus, although specific Senators may oppose a nominee for reason of disagreement with his values (or "philosophy"), it is no easy matter to speak of useful value qualifications. For the only values that nearly every Senator would demand—like belief in the rule of law or willingness to uphold the Constitution—are so widely found among prospective nominees that they would probably exclude no one.

The difficulty of prescribing qualifications is due not only to the inevitable and unresolvable differences over values, but is also derived from the role of the Supreme Court itself. According to popular mythology, it is merely the highest of courts, and everything it does "must be done from inside the Legal Tradition."[16] Actually, however, it is primarily a political institution, which is to say, it is deeply involved in allocating material, social, and symbolic advantages and deprivations within American society.[17] Through its unique capacity to declare governmental acts constitutional or unconstitutional, it plays a large role in conferring or denying legitimacy to political institutions and policies, major and minor.[18] Senators normally recognize this, for they are likely to be result-oriented in their evaluations of Justices, in the sense that lawmakers are more interested in the practical consequences of a judicial decision than in the legal route by which it was taken.[19] There is, therefore, a strong tendency for them to interpret "qualifications" less in terms of legal ability than in terms of predicted policy outcomes of behavior. This kind of "qualification" is not based on objective standards of truth and falsehood, but merely on subjective standards of like and dislike and right and wrong. It is hardly surprising, then, that attempts to set down useful qualification guidelines very easily degenerate into platitudinous exhortations to virtue that are of precious little practical help.[20]

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15 A. AYER, LANGUAGE, TRUTH AND LOGIC 108 (2d ed. 1946).

16 C. CURTIS, LIONS UNDER THE THRONE 223 (1947).

17 This is in line with David Easton's view of "politics" as the authoritative allocation of values in a society. D. EASTON, THE POLITICAL SYSTEM ch. 5 (1953).

18 R. DAHL, DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE 207 (2d ed. 1972).

19 This fact has often been deplored by academic advocates of "neutral principles" of constitutional law. As Wechsler put it: "The man who simply lets his judgment turn on the immediate result may not . . . realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them . . . as courts of law . . . . [T]his type of *ad hoc* evaluation is, as it has always been, the deepest problem of our constitutionalism, not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics." H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW: SELECTED ESSAYS 17 (1961). *But cf.* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

20 *E.g.*, Commager, *Choosing Supreme Court Judges*, New Republic, May 2, 1970, 13, at 15-16.

Another reason for the unsatisfactoriness of an emphasis upon "qualifications" is that even those few useful criteria that can be known are notoriously difficult to enforce. There are, in other words, certain minimum standards of legal competency, intelligence, and morality on which there is general agreement, but which, nonetheless, may not be consistently applied. To some extent, this failure derives from senatorial ignorance of the nominee. With the exception of nominees named from the Senate itself—and thus assured of approval by dint of the tradition of senatorial courtesy—few of those named are well known to many Senators. Absent a strong senatorial desire to embarrass the President or to chastise the Court or a very intensive and knowledgeable interest group opposition effort, the Senate would have no reason to question the administration's favorable description of the man, and investigate his background in depth. Thus, several unqualified nominees have been confirmed because not enough Senators were aware of the men's failings to block their acceptance. On other occasions, doubtless a number of Senators knew of the nominees' defects but approved the appointments anyway, so as not to antagonize the President or public opinion or prevent a man with whose policies the Senators agreed from taking office. By the same token, some of the Senate's most virulent confirmation battles have involved nominees as eminently qualified as Brandeis[21] and Hughes.[22]

If useful qualifications are hard to formulate and apply, what of useful *disqualifications*? Might it not, in other words, be easier to say what a Justice ought not to be than what he ought to be? Consider, for instance, the criterion of previous judicial service. Surely, one might contend, the Supreme Court is no place for on-the-job training.[23] Nominees lacking lower court experience, according to this view, ought to be rejected. The apparent common sense of this argument, however, is refuted by history; for as one eminent Justice, who himself lacked such training, observed, "the correlation between prior judicial experience and fitness for the Supreme Court is zero."[24] Requiring significant judicial experience would have excluded many of the most illustrious of Justices, including Marshall, Story, Taney, Curtis, Miller, Bradley, Hughes, Brandeis, Stone, Frankfurter, Robert Jackson, and Warren. It would

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[21] *See* A. TODD, JUSTICE ON TRIAL (1964).

[22] *See* M. PUSEY, 2 CHARLES EVANS HUGHES ch. 63 (1951).

[23] Senator George Smathers (Dem., Fla.), for example, suggested that Congress require all Supreme Court appointees to have, at the minimum, five years experience in an inferior federal court or the highest state court. S. 3759, 84th Cong., 2d Sess., 100 CONG. REC. 7274 (1965). President Eisenhower also felt that prior judicial experience was essential. Rogers, *Judicial Appointments in the Eisenhower Administration*, 41 J. AM. JUD. SOC'Y 38 (1957). Only one of his five nominees, however, met Smathers' standard; the other four had a combined total of a mere eight years of experience. Since only twenty-six of the Court's ninety-nine Justices had extensive judicial experience prior to appointment, Eisenhower's record, rhetoric to the contrary notwithstanding, hardly constituted a departure from settled practice.

[24] Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957).

not, though, have prevented the naming of such mediocrities as Samuel Chase, Catron, Davis, Brown, Day, Sanford, and Vinson.

A still more extreme example of the folly of dogmatically applying seemingly sensible disqualification criteria concerns bigotry. Few would dispute the premise that racism has no proper place on the Court. Thus, the argument proceeds, a former slave-owner, an ex-member of the Ku Klux Klan, and an advocate of wartime detention camps for Japanese-Americans would obviously be disqualified. Yet their exclusion would have robbed the Court of three of its most ardent champions of the rights of racial minorities: John Marshall Harlan,[25] Hugo Black,[26] and Earl Warren.[27] On the other hand, the authors of the Court's most infamous racial decisions probably would have slipped through the net. Taney "freed his own slaves"[28] decades before he wrote *Dred Scott*,[29] and Brown's racial views were conventional and far less passionate than his bold stand in *Plessy v. Ferguson*[30] might indicate.[31]

All of this suggests that, while the Senate votes on the nominee, his qualifications are not apt to be decisive in determining his rejection. In fact, the most distinguished of historians of the Court could find only four instances in which charges of lack of qualifications played a decisive part in rejection,[32] and since his study, the number has grown by but one.[33] In trying to account for rejected nominees, then, it is not enough to examine their qualifications. We must look elsewhere, too, and in doing so, investigate two other possibilities—that the Senate's rejections tend to reflect its hostility toward the President or toward the Court itself.

II. The Senate and the President

To a considerable extent, senatorial-presidential conflict is endemic to the American constitutional system, due to formal constitutional checks and bal-

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25 *See* Westin, *Mr. Justice Harlan*, in Mr. Justice 95-96 (A. Dunham & P. Kurland rev. ed. 1964).

26 *See* J. Frank, Mr. Justice Black 100-07 (1949).

27 *See* Lewis, *Earl Warren*, in The Warren Court: A Critical Analysis 9 (Sayler, Boyer & Gooding ed. 1969).

28 Swisher, *Mr. Chief Justice Taney*, in Mr. Justice 42 (A. Dunham & P. Kurland rev. ed. 1964).

29 60 U.S. (19 How.) 393 (1856).

30 163 U.S. 537 (1896).

31 Thus, a recent biographer, noting that Brown was born into an old Puritan family in a tiny Massachusetts community, characterizes him as "a classic representative of the American Protestant, white 'Anglo-Saxon,' middle-class, small town tradition." Goldfarb, *Henry Billings Brown*, 2 The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions 1553 (L. Friedman & F. Israel ed. 1969). As an adult, Brown practiced law in the decidedly non-slave state of Michigan and was active in the most important pro-freedmen institution of the day, the Republican party.

32 C. Warren, The Supreme Court in United States History 758 (1928). Henry Abraham, perhaps the leading contemporary constitutional historian, names only two rejected nominees whom he believes were truly unqualified. H. Abraham, The Judicial Process 84-85 (2d ed. 1968).

33 Judge G. Harrold Carswell.

ances,[34] extraconstitutional developments,[35] differing electoral constituencies,[36] clashing personal and party values and ambitions,[37] and so on. Sometimes, this conflict focuses on a presidential nominee to the Court, who becomes a pawn in the struggle and may be rejected. Why does this conflict erupt at some times but not at others? Several explanations may be offered.

First, the "jackal theory": a substantial portion of the Senate is always potentially hostile to the President, but will oppose him on a matter as important as a Supreme Court nomination only if he appears especially weak politically. The Senate, in this view, is like a jackal whose readiness to strike is conditioned on its enemy's inability to retaliate.

Since the President's strength is related to his electoral performance and declines toward the end of his administration when the number of rewards and punishments at his disposal shrinks drastically, this working schema was created to facilitate analysis: Presidents who will be re-elected are considered strongest. This includes the first terms of all two-term Presidents and the first three terms of Franklin Roosevelt. That these Presidents have been elected once and will be elected again is a testament to their popularity with the electorate and effectiveness with the Congress. Presidents who will be elected only once are considered next strongest. This includes all one-term Presidents and all Vice-Presidents who became President and were elected once through their own efforts. That they have been elected once and could be elected again but were not suggests that they were less strong than those who were. Presidents who cannot be re-elected were considered the next strongest. This includes the second terms of all two-term Presidents except Franklin Roosevelt. An informal two-term tradition made binding by the twenty-second amendment prevented these Presidents from running again, and this inhibition weakened them significantly.[38] Finally, Presidents who ascended to the office from the vice-presidency and were not elected on their own are considered the weakest. That they were never elected probably indicates a lower level of popularity with the electorate and of effectiveness with Congress. Presidents assassinated during their first terms and President Nixon are excluded from this schema, since their full electoral stories were not or have not been played out to their conclusions. If there is any worth to the jackal theory, we would expect the percentage of nominees turned down—the "rejection rate"—to increase as the President's strength decreases. Table 2 expresses the findings.

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[34] *E.g.*, the President's authority to veto acts of Congress. U.S. CONST. art. I, § 7.

[35] *E.g.*, the emergence of the President as Chief Legislator. *See* L. KOENIG, CONGRESS AND THE PRESIDENT (1965).

[36] *E.g.*, the President's national constituency versus the Senator's state constituency.

[37] These clashes have recently become especially pronounced, as the Senate has emerged as one of the chief pathways to the presidency. Almost all the leading pre-convention Democratic presidential hopefuls in 1972, for example, were Senators (McGovern, Kennedy, Humphrey, Muskie, and Jackson).

[38] L. KOENIG, THE CHIEF EXECUTIVE 59-63 (rev. ed. 1968).

Table 2

REJECTION RATES FOR PRESIDENTS OF VARIOUS STRENGTHS

	Presidents who will be re-elected	Presidents who will be elected only once	Presidents who cannot be re-elected	Presidents who were never elected
Appointments Confirmed	39	35	14	4
Appointments Rejected	3	8	5	6
Rejection Rate	7.3%	18.6%	26.3%	60%

Clearly, the data support the jackal theory, for there is a strong relationship between presidential weakness and rejection of appointees. This leads us to expect an even higher rejection rate in a President's last year in office, when he is most vulnerable as a "lame duck." Not only are the rewards and punishments at his command at their lowest point, but also the desire of his senatorial opponents to have his successor make appointments is at its zenith. Our expectation is confirmed. Eight out of fifteen lame duck nominations have been rejected, a rejection rate of 53.3%. Vice-Presidents who ascended to the presidency and were not re-elected fared especially poor, losing all four of their lame duck nominations.

Second, the "image theory": a substantial portion of the Senate is always potentially hostile to the President, but will oppose him on a matter as important as a Supreme Court nomination only if he has an obviously unpopular image with the electorate. His unpopularity increases the incentives for opposition by making defeat of the nominee more likely and the chances of the President or his party losing the next presidential election greater. The ineffectiveness dramatized by a senatorial defeat would be especially embarrassing and damaging to a President already burdened with an unfavorable public image.[39] His unpopularity also reduces the costs and risks of opposition, for the likelihood that he will be defeated on the nomination and that his party will be defeated in the next presidential election seriously restricts the sanctions he can bring to bear against recalcitrant Senators. This has the effect of influencing marginal Senators who do not feel strongly about the nominee and would support him under other circumstances. That the Court is "our most important symbol of government"[40] and that much of its importance lies in its symbolic role[41] reinforces the tendency on the part of the Senate to take advantage of the President's falling public image.

[39] In this regard, note the importance of effectiveness to the perception by the citizenry of the legitimacy of public authority. S. LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 64-70 (1960).

[40] T. ARNOLD, SYMBOLS OF GOVERNMENT 196 (1935).

[41] *See* C. BLACK, THE PEOPLE AND THE COURT (1960); Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Halper, *Supreme Court Responses to Congressional Threats: Strategy and Tactics*, 19 DRAKE L. REV. 292 (1970).

If there were validity in this "image theory," we would expect Presidents suffering from poor public images to have rejection rates significantly higher than Presidents not suffering from such images. Table 3 indicates the rejection rate for unpopular Presidents.

Table 3

APPOINTMENT RECORD OF UNPOPULAR PRESIDENTS

President	Years of Unpopularity	Appointments Confirmed	Appointments Rejected
J. Adams	1798-1801	3	0
J. Q. Adams	1825-1829	1	1
Van Buren	1837-1841	3	0
Tyler	1841-1845	1	4
Fillmore	1850-1853	0	0
Pierce	1856-1857	0	1
Buchanan	1860-1861	3	0
Lincoln	1861-1862	0	0
A. Johnson	1865-1869	0	1
Grant	1875-1877	2	0
Cleveland	1893-1897	3	3
Hoover	1930-1933	1	1
Truman	1946-1947 and 1951-1953	0	0
L. Johnson	1968-1969	0	2
		17	13

The rejection rate for unpopular Presidents is 43.3%, well over twice the level of that of other Presidents, 18.3%. The image theory thus receives very substantial support.

One question that arises at this point is whether the jackal and image theories are mutually reinforcing. The answer is an unambiguous "yes." For 18.6% of the appointees of all Presidents elected only once were rejected, as against 31.3% of those of unpopular Presidents elected only once; 26.3% of the appointees of all Presidents in the second of two terms were rejected, as against 60% of those of unpopular Presidents in their second terms; and 60% of the appointees of all Presidents not elected were rejected, as against 75% of those of unpopular Presidents not elected. By the same token, while 53.3% of the appointees of lame duck Presidents were rejected, 75% of those of unpopular lame ducks were turned down.

It may be objected that both the jackal and image theories assign an unrealistically passive role to the President. And certainly, the "degree to which a President is willing to fight for a nomination is a crucial, though not necessarily conclusive, factor."[42] Yet it must be kept in mind that both theories posit presidential vulnerability, not inactivity; and the fierce support of an unpopular President may be a very mixed blessing to a nominee finding him-

[42] Grossman & Wasby, *Haynsworth and Parker: History Does Live Again*, 23 S.C.L. Rev. 345, 349 (1971).

self a proxy in someone else's war. President Johnson's backing of Justice Fortas for the Chief Justiceship merely brought on attacks of "croneyism," for example, and President Nixon's more discreet maneuverings on behalf of Judges Haynsworth and Carswell were no less futile.[43] To a sizeable degree, in short, Senate rejection of Supreme Court nominees seems to reflect the chamber's relationship with the President.

III. The Senate and the Court

The Supreme Court, as the "least dangerous branch,"[44] has been embroiled in fewer major conflicts with Congress than has the President. What is more likely than such a clash is that an overly adventurous Court has raised hackles among the general public, and become unpopular with large portions of it. In these circumstances, some Senators may be more willing to oppose an appointee than would otherwise be the case. The appointee is not likely to repudiate the decisions of his colleagues-to-be, and thus voting on whether to approve him may seem to some Senators similar to voting on whether to approve the Court itself.

Moreover, judicial unpopularity is inevitably accompanied by an erosion of the Court's appearance as sacrosanct and nonpolitical. This image, however, is one of its chief lines of defense against its foes. Thus, the erosion leaves opposition to the Court easier, less costly, and more effective—and this opposition may, of course, take the form of opposition to specific nominations. In fact, opposition to nominations, as contrasted with that to the Court in general, is an especially attractive approach, for it raises no real constitutional questions of separation of powers that can be turned against the Senate by its enemies.[45] Opposition to an appointment, in other words, seems more legitimate to the electorate because it is explicitly sanctioned by the system's great legitimator, the Constitution.

If there were substance to this theory, we would expect the rejection rate to rise during periods of the Court's unpopularity. The data distributed themselves in this fashion:

Table 4

APPOINTMENT RECORD OF UNPOPULAR COURTS

Years of Unpopularity	Appointments Confirmed	Appointments Rejected
1857-1869	5	4
1933-1937	0	0
1957-1958	2	0
1967-1972	6	4
	13	8

[43] Of course, the strong support of a popular President can be an important asset, indeed, as President Wilson's tenacious battle for Brandeis illustrates.

[44] A. Bickel, The Least Dangerous Branch (1962).

[45] Nonetheless, President Nixon made such charges against the Senate which was about to reject Judge Carswell. N.Y. Times, Apr. 2, 1970, at 28, col. 6.

The rejection rate during periods of unpopular Courts is 38.1%, nearly triple the 13.5% rate prevailing at other times. An unpopular Court, then, plainly permits or encourages greater opposition to nominees. A caveat is due, however, for the number of appointments made during such periods is small because the Court has not ordinarily been very unpopular. The exceptions—the years from *Dred Scott*[46] through *Ex parte McCardle*[47] and from Franklin Roosevelt's election to *West Coast Hotel v. Parrish*,[48] the Court-curbing battle of the Eisenhower years,[49] and the contemporary disenchantment[50]—have produced only twenty-one nominations. Yet though the number of nominees is small, there are signs that the Court's unpopularity interacts with presidential unpopularity and weakness, making confirmation in these relatively few cases truly difficult. Thus, the rejection rate for those seven instances when Court and presidential unpopularity both are present is 57.1%, and for the three instances when Court unpopularity and a lame duck President coexist is 100%. And Presidents unlucky enough to be elected but once and during a time of Court unpopularity have seen two-thirds of their nominees rejected. Presidents in the first of two terms and non-elected Presidents have not fared well, either, though they have been involved in only five cases and one case, respectively.

An unpopular Court, then, seems to promote rejection—especially if the Court's unpopularity coincides with presidential weakness or unpopularity—but it has occurred too infrequently to be counted as a truly major causal factor.

IV. Conclusions

Although the Senate is asked to confirm a nominee, there seems little question that in the overwhelming number of instances his qualifications are not decisive (and often are not even important) in influencing the chamber's actions. It is far more likely to reject or confirm him as a part of its general pattern of opposition to or support for the President. Thus, a President who is weak electorally or unpopular in the Senate reduces the cost to Senators of opposing him and may fail to obtain confirmation for a nominee whose talents might surpass those of several other appointees who were accepted. President Hoover discovered this when he nominated Judge Parker, and President Lyndon Johnson when he chose Abe Fortas for Chief Justice. By the same token, an

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[46] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). See A. Blaustein & C. Ferguson, Desegregation and the Law 81-86 (1962).

[47] 74 U.S. (7 Wall.) 506 (1868). *See* Kutler, *Ex parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 Am. Hist. Rev. 835 (1967).

[48] 300 U.S. 379 (1937). *See* R. Jackson, The Struggle for Judicial Supremacy (1941).

[49] *See* W. Murphy, Congress and the Court, chs. 6-10 (1962); C. Pritchett, Congress Versus the Supreme Court (1961); D. Morgan, Congress and the Constitution ch. 13 (1966).

[50] *See* Halper, *supra* note 41.

electorally strong President or one who is popular with the Senate so raises the costs of opposition that rank mediocrities can be approved with hardly a murmur of dissent.

Less often than the rejection reflecting senatorial opposition to the President, it has reflected an opposition to the Court itself. Many Senators see a nomination as providing an opportunity to vote their disapproval of the Court, and when that institution is sufficiently unpopular, such opposition may be substantial—perhaps supplying the margin of defeat in several cases.

Following the Johnson and Nixon experiences, the question that naturally arises is whether future Presidents will face such confirmation battles. If they are unpopular with the Senate and weak electorally, the answer may well be "yes," and it is now fashionable for commentators to muse on "the possibility that, with insoluble problems, we are in an age of one-term Presidents."[51] Certainly, rejections seem to come in spurts—Presidents whose terms of office comprise but one-sixth of the life of the Republic have been associated with three-fifths of the rejections—and the Fortas affair resuscitated the almost moribund senatorial prerogative. While opposing—and even defeating—a presidential nominee to the Court appeared to be only a theoretical possibility a few short years ago, it is now a very real, and to some a very attractive, alternative today. The unpopularity of the Court, which has not only given Senators an opportunity to "vote it down" at confirmation time but has also made it less sacrosanct and nonpolitical and thus easier to oppose, has accentuated this trend. Presidents, as politicians, will surely try to take these factors into account and avoid senatorial troubles, but the last four rejections imply that even crafty and experienced operators may miscalculate. In the short run future, then, rejections or near-rejections must be counted as real possibilities. Probably, this will remain true only for a relatively brief duration, for history suggests that the possibility of rejection does not remain constant but varies with the speed and vengeance of an Iowa barometer.

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[51] Lewis, *Land of Hope and Glory*, N.Y. Times, Jan. 9, 1971, at 27, col. 1.

ETHICS: THE GRIEVANCE COMMISSION

Lee Gaudineer†

I. INTRODUCTION

The entire legal profession is condemned by the public for the misconduct of a few of its members. All too often it is the misconduct of the few that receives publicity, while the high standards of conduct and competency practiced by the majority pass unnoticed. When the misconduct of the few is ignored by the majority, public condemnation is justified. With public condemnation comes a lack of confidence in the integrity of the profession.

There has been in recent years a growing awareness throughout the nation that the ethics of the profession must be more thoroughly defined, specifically adopted, and uniformly enforced.[1] This includes minimum standards of conduct for the individual lawyer as they relate to the profession, his nonprofessional life and the public in general. Prior to this time, the ethics of the profession were governed by general statutory language[2] and local custom.[3] Enforcement was left to the discretion of the local bar association and the courts. Obviously, this resulted in "selective prosecution" and a lack of confidence by the public in the integrity of the profession.

Iowa joined this national endeavor to regenerate public confidence in the profession. It was not until September 16, 1958, that the Iowa supreme court made the original *Canons of Professional Ethics*, as propounded by the American Bar Association, specifically applicable in Iowa.[4] Uniform enforcement of these "ethical canons of conduct" was needed. Previous to the adoption of these canons for Iowa, it was felt that public confidence could be

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[1] The original *Canons of Professional Ethics* were adopted by the American Bar Association in 1908. However, they were not specifically made applicable in Iowa until September 16, 1958, when Supreme Court Rule 119 was adopted. The American Bar Association commenced on August 14, 1964, to study a detailed revision of the Canons. This study culminated on August 12, 1969, in the adoption of the new *Code of Professional Responsibility*. This new *Code of Professional Responsibility* was reviewed and studied by the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. It was, thereafter, recommended for adoption in Iowa to the Board of Governors, with a few minor changes. The Board of Governors of the Iowa State Bar Association on December 3, 1970, accepted this recommendation and, in turn, filed a special report with the Supreme Court of Iowa, recommending that the new *Code of Professional Responsibility*, as modified, be adopted in Iowa. The supreme court on October 4, 1971, after adopting another minor change relating to contingent fee cases, adopted this Code as the *Iowa Code of Professional Responsibility for Lawyers*.

[2] IOWA CODE §§ 610.2, 610.14, 610.24 (1971).

[3] *In re* Condon, 166 Iowa 265, 271, 147 N.W. 769, 772 (1914).

[4] Iowa Sup. Ct. R. 119, IOWA CODE (1958).