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Clothes for the Emperor

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CLOTHES FOR THE EMPEROR

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I. Professor Chemerinsky's View of Constitutional Theory

Formalism highlights the dichotomy between a value choice and the rule of law. Its creed shields decision making from the supposed subjectivity of contextualized adjudication, instead asserting that neutral and external precepts preexist and are primed for deductive, mechanical application to a given issue.[1] Professor Chemerinsky disbelieves that a jurisprudence so guided is either possible or desirable. Although he recognizes its seductiveness as explaining the continued search for formalist-friendly theory in modern disguise, Professor Chemerinsky ultimately exposes and defends constitutional jurisprudence for that which, to his mind, it truly is: a series of value choices reflecting the ideology of the particular Justices involved. He elaborates: "I always have had the sense that the power of the realists' critique of formalism, in part, was its confirming what people already knew; it was pointing out that the emperor really [wore] no clothes[.]"[2]

At least for discussion purposes, I am willing to permit Professor Chemerinsky to so disrobe the Emperor, and perhaps even willing to agree that doing so is valuable if not proper. Nevertheless, one consequence of recognizing constitutional theory as "transparent and explicit," "debated and discussed"[3] value choice is heightened politicization of the Supreme Court in both its constitutive and adjudicative aspects. Unthinkably, Justice becomes Candidate.

Perhaps by design, Professor Chemerinsky's remarks arrived just before the 2000 presidential election — a critical temporal and philosophical juncture for institutional configuration and Supreme Court decision making.[4] To some, the election signified less the nominal leader of the United States for the next four

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1. *See generally* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

2. Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 2 (2001).

3. *Id.*

4. The ideological splintering of the Rehnquist Court is evident in the number of 5-4 decisions it has rendered over the last three terms: 21/74, or 28.38%, during the 1999-2000 Term, by contrast to 16/92 or 17.40%, during the 1997-1998 Term. Gaylord Shaw, *Future of Court in the Balance*, NEWSDAY, Sept. 10, 2000, at A07. *See generally* Robert S. Greenberger & Jackie Calmes, *Next President Likely to Tip Balance of Supreme Court*, WALL ST. J., Oct. 2, 2000, at A36; Michael Doyle, *Supreme Court Back in Session, With Eye on Nov. 7; Election Day is the Most Crucial Date for the Court This Term Because a New President Will Fill Expected Vacancies*, STAR TRIB. (Minneapolis-St. Paul), Oct. 2, 2000 at 1A, *available in* 2000 WL 6991608. One vacancy could drastically affect Court rulings on the major policy issues of our age. The likelihood of that single vacancy is enormous; given the age and health of the current Justices and the six years that have elapsed since the last Supreme Court vacancy, the potential for even up to four Justices over the next one or two terms remains reasonably acute.

years than the ideological course of constitutional law for the next forty.[5] Ironically, the way in which Election 2000 unfolded reinforced the initial observation. Most recognized that the next President would likely select the next Supreme Court Justice; few could have foreseen that the then-current Court would arguably "select" the next President. Given reaction to the Supreme Court's hand in that outcome, the Court suffers significant threat to its credibility and perceived ability to act in non-partisan, non-ideological ways. Coupled with institutional and/or popular acceptance of Professor Chemerinsky's plea for explicit recognition of and access to sitting Justice's values, the perception of Justice as Candidate might be less far-fetched than previously suspected.[6]

II. Effects of Casting Constitutional Theory as Value Choice

A. Justice as Candidate

Elections are inherently political, as are the methods of creating law that follow. Candidates build platforms, seek votes and curry favor, reveal (with varying degrees of opacity) their stance on key issues, and fervently hope that unalloyed majoritarianism will cut their way. Most federal terms run two to four years, during which the official remains accountable to a constituency lest she or he seek continued public service. In legislative decision making, political pressure and influence are the rule — levied by congressional brethren and interest groups, effected through vote trading and deal making.

Federal judicial nominees are not elected in any direct sense. Instead, the President selects nominees to fill existing vacancies, and, after the advice and consent of the Senate and its Judiciary Committee, appoints for life those confirmed to the office. At least in theory, federal judges are therefore immune to much external political pressures in adjudicating cases. They need not answer to any constituent, and *must* not make deals with any colleague.[7] Observing the

5. For example, Professor Bruce Ackerman spins a scenario in which Newt Gingrich presides over the nation and a thoroughly Republican Congress. "President Gingrich" appoints and easily shepherds the confirmation of "hard-edged ideologues," who along with their brethren and Chief Justice Clarence Thomas, "dispatch[] the substantive principles of New Deal constitutionalism into the dustbin of history." Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2289 (1999). As Professor Ackerman wryly notes, the scenario is "not [his] favorite daydream." *Id.* It nevertheless reinforces the power that politics can wield over the court, and the effect that one four-year term can have on decades of jurisprudence.

6. I vividly recall sitting in a Constitutional Theory Seminar during the Fall of 1991, while the Thomas confirmation hearings raged. A classmate generically applied the term "candidate" to now-Justice Thomas. What struck me most, both then and now, was not the student's self-described "intentional misreference," but rather my failure immediately to notice it and the probability that I might have easily (but unintentionally) used the same term. The irony between President Clinton's presidential campaign and Justice Thomas's quest for the Court instructs. In many regards, the nominee could have been the candidate; the candidate, the nominee.

7. Of course, compromising one's position to ensure a majority ruling could be viewed as deal-making depending on how one defines the term.

distinctions between these bodies assumes too much, however, if it suggests that courts and politics are inimical.

If, as Professor Chemerinsky elsewhere observes,[8] the Supreme Court neither can be, should be, nor is apolitical, then both its decisions and *a fortiorari* the process by which its members are appointed and confirmed must be appreciated as politicized as well. While this observation may well be truistic inside congressional and academic halls,[9] its realization has widened during the past decade given the uniquely public turn of the confirmation process during the Bork and Thomas Senate hearings.[10]

Some might argue that one cannot heighten the politics of an already political process. To the contrary, explicitly accepting Professor Chemerinsky's exposé of constitutional jurisprudence as little more than "Justice X's Values" in magisterial disguise re-increases the political stakes by essentially recasting a Supreme Court nominee as "Candidate" in the hearts and minds of the general public (if not in the perception of the nominee herself). Society must anticipate and appreciate the potential effects engendered by increased informational access to the Supreme Court nominees and the interior workings of the Court to which they are appointed.

B. Knowledge as Power; Ignorance as Bliss

The Supreme Court once appeared above the fray, the institution a resplendent Justicia,[11] its members her "distant and mystical guardians."[12] Unlike the visible,

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8. *See, e.g.*, Erwin Chemerinsky, *Opening Closed Chambers*, 108 YALE L.J. 1087 (1999) (reviewing EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998)) (questioning Lazarus' underlying assumption favoring the possibility and desirability of an apolitical Court). While asserting that both the Legislature and the Court make value choices in making/construing law, Professor Chemerinsky carefully contrasts the procedural politics inherent in the legislative process (vote trading, lobbying) with the more insulated and formalized structure of constitutional decision-making. *Id.* at 1120-21.

9. *See, e.g.*, Ackerman, *supra* note 5, at 2330-31 (discussing Republican tactics in thwarting New Deal policies, accomplished in part by strategic refusal to challenge Roosevelt's appointment of Douglas, Frankfurter, or Murphy to the Supreme Court); Bruce A. Ackerman, *Transfomative Appointments*, 101 HARV. L. REV. 1164 (1988); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2204 (1999) (noting the prominence and centrality of ideology in the post-Bork confirmation era, but recognizing its role in the Brandeis, Parker, Haynesworth, and Fortas nominations). *See generally* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 86 (1985) (observing that the Senate's partisan rejection of a nominee of George Washington in 1795 "began a tradition of inquiry into the political views and public positions of candidates for the Court").

10. On the effects of highly public nominations, see ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); STEPHEN CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994); NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS (1998).

11. Such regal rhetoric occasionally devolves into derision, as when the majority noted that to overturn a certain state statute would be to follow "the preferences of a majority of this Court" improperly and "to replace judges of the law with a committee of philosopher-kings." Stanford v.

four-year clockwork of presidential politics as usual, the Supreme Court confirmation process was less overt and created a relatively permanent structure. The average citizen might not have considered how Justices arrived to the Supreme Court; appointed for life, they somehow just seemed to exist.

Coverage of the Bork and Thomas nominations changed public perception of this national myth through its scrutiny of the nominee's "judicial philosophy," constitutional "agenda," and character. Explicitly stating the content and assuming the primacy of their values to constitutional jurisprudence adds to the charge — including both merits and demerits — of confirmation qua election.

On the positive side, increased access to the nominee's values and likely substantive rulings within the new media confirmation process would educate the public over the workings of the government and the judiciary under which it lives. Ideally, transparent Supreme Court rulings would encourage robust and nuanced discussion of the parameters of life, liberty, and property protected by the Constitution, rendering the public better equipped to sensitively respond to the confirmation process and to a supposed rule of law by exercising a voice, an opinion, and a vote. The process would become more democratic, less elitist.[13] As Professor Frankfurter notes:

> It is because the Supreme Court wields the power that it wields, that appointment to the Court is a matter of general public concern and not merely a question for the profession. In good truth, the Supreme Court *is* the Constitution. . . .
>
> . . . In theory, judges wield the people's power. Through the effective exertion of public opinion, the people should determine to whom that power is entrusted.[14]

There remains, however, the difficult task of increasing informational access to substance without devaluing into scandal or prurience. "Hearings are . . . not for the purpose of public amusement; not to have a legislative rodeo so that everybody may come in and have a good time."[15] Notwithstanding Senator Connally's entreaty, the media has recognized the public interest in judicial

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Kentucky, 492 U.S. 361, 379 (1989) (Scalia, J.).

12. Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1189 (1988).

13. The actual influence that a single constituent or public interest group can exert remains debatable. *See, e.g.*, Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 N.W. U. L. REV. 935, 946 (1990) (asserting circumscribed role of political action committees in confirmation battles when nomination is in the "independent judiciary" mode); Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 64 (1989) (noting alleged influence of narrow anti-Bork interest groups on confirmation).

Professor Freund has remarked on the closed confirmation system: "In the absence of open hearings and debates in the Senate on nominations, appraisals of nominees were furnished by a politically polarized press and by intimate correspondence among influential figures in legal and political circles." Freund, *supra* note 9, at 1149.

14. FRANK FRANKFURTER, *The Appointment of a Justice*, *in* FELIX FRANKFURTER ON THE SUPREME COURT 211, 216-17 (Philip B. Kurland ed., 1970).

15. *Id.* at 1160 (quoting Sen. Tom Connally) (citation omitted).

nominees, yet realizes as well its inclination to follow scandal or controversy. Hence, at the end of the day, the average person might know more about a nominee's purported sexual activity or charitable giving than about her deeply held values or judicial philosophy.[16] The possibility for substantial privacy invasion clearly exists, if for no other reason than the media's willingness to use private information to ostensibly "reveal" hypocrisy in a given public figure.[17]

True, those who sit on the Supreme Court should be viewed in more human terms. Knowing a potential Supreme Court Justice's views on capital punishment, abortion, or affirmative action demystifies both the person and the position and reinforces that whether legislative or "judge-made," constitutional law is neither divinely, nor for that matter, neutrally ordained.[18] Yet, if the public lacks respect for a particular Justice in knowing too many intimate details or political perspectives, it might not respect what that Justice (or any other) might say on a particular point. Access to information thus creates ciphers or promotes blandness among those with federal judicial aspirations — canny judges hiding values, or acceptable judges with no real position to speak of. If the public knows too much (or a dangerously small amount) about judicial philosophy, it might conclude that the Court can find an important-sounding rationale to justify *any* decision, or make law rather than interpret it. More importantly, the public might view the Supreme Court as an extension of itself, determined by the political positions of a certain age, and institutionalizing public opinion as law. Although a quasi-majoritarian notion, this undercuts respect for the permanency of Court decisions and the sanctity of precedent.

Professor Chemerinsky would assert that this future is already here, and that we are better off knowing the truth than being blinded by sophistry. He may well be correct. Nevertheless, the majesty that surrounds the Supreme Court instills and preserves necessary respect for the law and its guardian institution. If we lose the majesty, must we also sacrifice the respect? If ignorance is bliss, the inclination for many might be to choose it over information, given that knowledge — as power — corrupts. A question relevant to these observations, and one left unanswered by Professor Chemerinsky's persuasive rejection of formalism, is not whether, but why, many jurists and academicians have struggled to fit the Court's decisions within formalist confines. In other words, who knows that the Emperor has no clothes, and why is the farce perpetuated?

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16. For example, although the legitimacy of interpretivism and "natural law" as jurisprudential approaches were central to the Bork and Thomas confirmation hearings, one may question whether these intellectual debates truly engaged the public.

17. For example, if a nominee was on the record as opposed to abortion, but research revealed that either the nominee or someone within the nominee's immediate family had procured an abortion, the charge of hypocrisy would likely be made by those opposing that particular appointment.

18. To cite a less jurisprudential revelation: Whether one believed (and for disclosure purposes, I did) Professor Anita Hill's and others' testimony regarding Justice Thomas's fascination with anatomy, it was difficult to watch the Senate confirmation hearings without at least fleetingly imagining the alleged conversations with Justice Thomas as the relevant actor. Doing so invites a view of the Justices as gendered and human rather than as asexual, secular god/esses in black robes.

Borrowing from sociologist Erving Goffman, four basic, admittedly broad possibilities exist.[19]

	Known to "self"	**Not known to "self"**
Known by others	1. The Court, its commentators, and the public are all aware that constitutional decision making is in reality the value choices made by particular justices at a particular time.	2. Although the Court is not institutionally aware or does not believe that its constitutional decision making is really value choice, at least some others are so aware.
Not known by others	3. The Court is well aware that its constitutional decision making is really value choice, but is willing to actively conceal subjectivity or passively permit others' erroneous perception of the more objective rule of law.	4. Neither the Court nor most commentators and/or the public knows or accepts that constitutional decision making equals value choice.

If the collective view of constitutional theory fits within categories one or three, then the Supreme Court is well aware of the realities of the adjudicative process. In category one, the Supreme Court enjoys a complicit audience; everyone knows the realism of the process but is willing to subordinate that knowledge to the creation and perpetuation of a grander-sounding principle. If so, then the "fuller discussion" urged by Professor Chemerinsky is rejected; the public chooses "ignorance" and thus need not be saved from it. This might embody Professor Chemerinsky's view: he states his recurring sense that "the power of the realists' critique of formalism, in part, was its confirming what people already knew."[20] In category three, the Court should be faulted for its unwillingness to, in Professor Chemerinsky's words, lift the veil to reveal that "there is no great Oz behind the curtain."[21] If so, the public is being misled, and should be permitted the benefits that fuller discussion would confer. Categories two and four presuppose that the Court itself is not aware of what it is doing — a strange notion, particularly category two, which suggests that commentators and the public have greater insight into Justices' psyches than the Justices themselves.

If Category three or four best represents the realities of constitutional processes and perceptions thereof, then Professor Chemerinsky's assertions have their best

19. *See generally* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).
20. Chemerinsky, *supra* note 2, at 2.
21. *Id.* at 16.

position and most important role: to convince those who care about such issues of the truth of his assertions, and explain why his theory, as well as constitutional theory generally, matters. It is also those contexts in which the effects of the "revelation" on both the confirmation process and respect for the institution of the Court must be addressed.

III. Clothes for the Emperor

In Hans Christian Andersen's fairy tale, two maleficent "cheats" convinced the fabled emperor that their magnificent garments became invisible to anyone unfit for the office he held or incorrigibly stupid.[22] In believing the crafty grifters, neither the emperor, his closest ministers, nor his subjects were initially willing to admit their inability to see the cloth. It was only after an innocent child very publicly proclaimed his truth that others, including the emperor, realized their self-delusion. Nevertheless, the emperor soldiered on in the processional.

Employing Goffman's paradigm, the situation moves from one where no one (save the tailors) know of the extent of the fraud to one where all know, yet permit the charade to continue. One might speculate over why circumstances so unfolded. Were the parade watchers shocked, relieved, or primed for revolt? Were they embarrassed, wishing to clothe the emperor, or embarrassed that they, too, were misled — and willing to continue the farce to save face? Anderson neither states why the emperor is willing to continue or how the parade-watchers thereafter react to his nudity.

One might pose similar questions to Professor Chemerinsky. If, as he vehemently asserts, formalism is but transparent garb for values, then society must consider what aspects of institutional legitimacy become vulnerable to the resulting public glare. While Professor Chemerinsky partly clothes his "Philosopher King" with individual ideologies, part of that legitimacy remains exposed.

Such unvarnished truth at the confirmation level as well as the decisional one requires that we work harder to balance respect and realism regarding the Supreme Court and its workings. Society should focus on supplementing the possible loss of regard occasioned by increased access to the nominee and the process by better educating the public about the wrenching and honorable nature of the Court's deliberative function and by celebrating judicial characteristics over political perspectives — ability to think rationally, fairly, and in a non-biased manner, appreciation for the real consequences of judicial decisions, and an ethic that transcends the transient leanings of a particular culture or age.[23]

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22. Hans Christian Andersen, *The Emperor's New Clothes, in* ANDERSON'S FAIRY TALES 66 (1946).

23. *See, e.g.*, Carter, *supra* note 12, at 1201; Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962, 975 (1990) (arguing for the importance of a judicial nominees having a morally reflective nature and morally sound set of values); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1878, 1909 (1988) (arguing that judges should embrace the obligation of judgment by using their judicial powers "in a way which we respect").