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The Senate and the Constitution

by
Vik D. Amar

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Notes

The Senate and the Constitution

Vik D. Amar

Two related schools of thought on the Supreme Court view it as the most important, if not the only, governmental institution involved in constitutional interpretation and societal value pronouncement. The first, associated with the Court's own broad dicta in *Cooper v. Aaron*,¹ sees the Court as the only institution whose constitutional judgment matters. On this view, the Constitution is exactly—no more than, no less than—what the Court says it is. The Court is thus the ultimate and supreme interpreter of the Constitution, and other governmental actors are bound to its interpretation.² The second school, often associated with Alexander Bickel, views the Court as a policy-making institution whose job is to “guard and pronounce enduring societal values.”³ The Court's mission, on this view, is to search for long-term societal interests and principles—to lead, to elevate and to instruct society.⁴

The two schools are not incompatible;⁵ proponents of the first define how others must react to Court decisions, while those who adhere to the second seek to give the Court guidance in making the decisions themselves. The problem with both of these perspectives, however, is that they obscure

1. 358 U.S. 1 (1958).

2. See also *Powell v. McCormack* 395 U.S. 486, 514 (1969); *United States v. Nixon* 418 U.S. 683, 703 (1974).

3. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 24–28 (2d ed. 1986).

4. See Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L. J.* 1567, 1581 (1985).

5. This general view of the Court anchors all of Bickel's more specific observations. *Id.* at 1575.

6. Professor Bickel, himself, subscribed to both. See A. BICKEL, *supra* note 3, at 264; see also Gunther, *The Subtle Vices of the "Passive Virtues" - A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1, 25 n.155 (1964) (“Bickel confuses Marshall's assertion of judicial authority to interpret the Constitution with judicial exclusiveness”); cf. Brest, *Constitutional Citizenship*, 34 *CLEV. ST. L. REV.* 1, 6 (1986) (“the Constitution does not appear to assign a privileged, let alone an exclusive role to the judiciary”); Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 *GA. L. REV.* 57, 63 (“nothing in *Marbury* implies that only the courts can interpret the Constitution.”)

and trivialize the roles of other governmental bodies in constitutional interpretation and value pronouncement.⁶ This Note examines the role of another federal institution—the United States Senate.

The Senate, while frequently in the news, has largely been ignored in the legal literature. Many pieces, of course, have touched on the Senate tangentially;⁷ others have discussed Congress without distinguishing between the two Houses;⁸ and still others have discussed the Senate's role in a particular process.⁹ None, however, has provided a systematic analysis of the Senate's place and function in the constitutional scheme.

Yet the Senate was central in the framers' scheme in many ways. To begin with, the framers at Philadelphia debated longer and more intensely about it than any other federal institution.¹⁰ In the end, they gave the Senate many of the powers, and much of the structure, of the pre-existing Congress under the Articles of Confederation. Most important for the purposes of this Note, a reexamination of the Senate and its place in the Constitution reveals the crucial role the Senate was to play in constitutional interpretation and societal value pronouncement.

In order to explore the Senate's important role in both of these areas, this Note considers four constitutional processes: legislation, impeachment, appointment and amendment. Each process requires more than one federal governmental body to interpret the Constitution and arrive at a consensus. In each process, the Constitution generally prefers the status quo if any one of the involved governmental bodies finds the proposed action constitutionally unacceptable.¹¹ For example, in federal legislation, four bodies—the House, Senate, the executive branch and the federal judici-

6. As Attorney General Meese has recently pointed out, this trivialization distorts our entire constitutional system: "[h]owever the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court. . . . [a constitutional] decision does not establish a 'supreme law of the land' that is binding on all persons and all parts of government. . . . Just as *Dred Scott* had its partisans a century ago, so does *Cooper v. Aaron* today." Meese, Speech at Tulane 7 (Oct. 21, 1986). While Meese attempts to identify part of the problem, he does not attempt to develop any solution, nor does he explore any implications or limitations of possible solutions.

7. See, e.g., Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Brooks, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. & PUB. POL'Y 189 (Winter 1987); Baird, *State Empowerment After Garcia*, 18 URB. LAW. 491 (1986).

8. See D. MORGAN, CONGRESS AND THE CONSTITUTION (1966); Brest, *Congress as Constitutional Decisionmaker*, *supra* note 5; Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449 (1971).

9. See, e.g., L. TRIBE, GOD SAVE THIS HONORABLE COURT (1985); R. BERGER, IMPEACHMENT (1973).

10. The delegates agreed early on about the need for a body elected by the people with proportional representation. See, e.g., 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION 49 (M. Farrand ed. 1911) [hereinafter FARRAND RECORDS] (remarks of James Madison). The debate over the makeup of a second legislative body, however, raged over the entire summer. See M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 91-159 (1913) [hereinafter FRAMING].

11. See *infra* note 65.

ary—must usually agree that a proposed law is constitutional before it is enacted and effectively applied.¹² In effect, each of the four bodies has a constitutional veto. In impeachment proceedings, only the House and Senate are called upon to interpret the Constitution—this time, the “high crimes and misdemeanors” clause.¹³ In appointment, the President and the Senate are to exercise constitutional judgment before an appointment is given effect. In amendment, the House and Senate are to exercise independent constitutional interpretation of a sort. From this peek at the structure and processes of the Constitution, an interesting pattern begins to appear. The federal judiciary interprets the Constitution in only one, the President in two, the House in three, and the Senate in all four¹⁴ of these constitutional processes.¹⁵

12. If a President vetoes a bill because of constitutional scruples, the veto may of course be overridden by a two-thirds vote. Nevertheless, the President would still retain the pardon power, giving him in effect an absolute veto over all federal criminal legislation.

The model discussed here assumes that all constitutional questions must be able to be raised in an article III court. The plain words of article III itself, that “the judicial power shall extend to all Cases. . . arising under this Constitution,” would seem to compel such a result. See A. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 610–620 (1953); Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). If, however, as some scholars believe, see e.g., A. Amar, *supra*, at 210–29 (canvassing scholarship on jurisdiction-stripping), Congress can constitutionally remove jurisdiction from all article III courts in some constitutional cases, the role of the Senate vis a vis the federal judiciary in constitutional interpretation is even more important.

13. U.S. CONST. art. I, § 3, cl. 6.

14. This Note does not mean to suggest that this 4-3-2-1 model necessarily represents the only way to look at the Constitution and the processes it sets up, but rather that it is one very useful way. There may be other processes which, at times, require substantive constitutional interpretation by more than one federal body. Two possible examples are treaties and executive orders. Even if these two “processes” were included, the model would become a 5-4-3-2 one. In any event, the general point remains: the Senate was central in constitutional interpretation, especially in the important processes this Note analyzes. The federalists, and the antifederalists, recognized this centrality. This Note is simply a reminder.

15. This 4-3-2-1 model does not mean that there is nothing federal courts can do (in the realm of constitutional interpretation) that the Senate cannot. Indeed, federal courts, particularly the Supreme Court, have the power to review the constitutionality of state legislation, a power that Madison attempted, unsuccessfully, to give to the political branches as well. See, e.g., 2 FARRAND RECORDS, *supra* note 10, at 391 (remarks of James Madison). It is true that Congress, with the President’s consent or with two-thirds support, can displace a large percentage of state legislation by enacting preempting federal laws. See Amar, *supra* note 12, at 223, n.68. Nevertheless, the Senate’s ability to oversee state legislation seems constrained. Besides this review of state legislation, there are three related reasons why people commonly think of the Court (or federal courts in general) as the single most important guardian of the Constitution.

First, as this Note shall argue, other actors don’t always perform their duties of constitutional interpretation. Second, even if and when they did, this performance might be invisible to outsiders. Judicial review is easier to observe. Third, the Court’s role necessarily appears more *active*, since its decision to strike down a law occurs against a backdrop of the law’s legitimacy. The Court is typically the “last” word in a chronological (even if not an ontological) sense because other branches of the federal government have already considered a federal statute’s constitutionality before the Court takes the stage. Yet even chronologically, the Court is not always the “ultimate” interpreter. For example, a President may pardon a convicted defendant on constitutional grounds, even after the Court has rejected the defendant’s claim. Cf. T. JEFFERSON, 8 THE WRITINGS OF THOMAS JEFFERSON 310 (P. Ford ed. 1897) (Letter to Abigail Adams, Sept. 11, 1804, defending pardon of those already convicted in federal courts under Sedition Act).

A reexamination of the Senate's role in these processes will also reveal the special policy functions it was intended to perform. The Senate was designed to be a select deliberative body whose special job—unlike that of any other governmental institution—was to protect the people from policy and value preferences that would be unwise in the long-term.

Section I of this Note explores more deeply the Senate's role in each of these processes in order to develop a richer understanding of the upper house. This understanding has important implications, discussed in Section II, for how citizens should view the Senate, how the Senate should view itself, and how other institutions—like the Court—should view themselves and the Senate. Most important, those who would have other bodies assume Senatorial functions must demonstrate that the Senate can no longer function as it was intended.

I. THE SENATE'S ROLE OF CONSTITUTIONAL INTERPRETATION AND VALUE PRONOUNCEMENT IN FOUR CONSTITUTIONAL PROCESSES

A. *Impeachment*

In impeachment, the Senate performs a narrow kind of constitutional interpretation. The Senate is called upon to give meaning to a particular clause of Art. I, the "high crimes and misdemeanors" clause.¹⁶ To be sure, the Senate has considerable latitude in performing this difficult interpretation.¹⁷ What is important to note here is that however the Senate interprets the clause, its interpretation is final and unreviewable by the courts.¹⁸

Professor Black contends that the ability of Congress to restrict the jurisdiction of federal courts will avoid what he considers to be an undesirable review.¹⁹ This argument, however, fails to explain why, if federal courts were closed, *state* courts could not entertain suits challenging the Senate's verdict.²⁰ What's more, Black's emphasis on congressional jurisdiction-stripping ignores the body of literature that suggests—based upon

Thus, this Note argues not that federal courts are unimportant interpreters of the Constitution, but rather they are not the only ones.

16. "The Senate shall have the sole Power to try all Impeachments." U.S. CONST. art. I, § 3, cl. 5.

17. See C. BLACK, *IMPEACHMENT: A HANDBOOK* 17-51 (1974).

18. While the guilt or innocence of the impeached is clearly not reviewable, as this might prejudice the outcome of any post-impeachment criminal trial, some have urged that the Court (or courts) have the power to second-guess the House and Senate's definition of "high crimes and misdemeanors." See, e.g., R. BERGER, *supra* note 9, at 103-22 (arguing that since "high crimes and misdemeanors" has discernible meaning, the Court can oversee Senate's determination). However, Berger's analysis confuses the issue of whether there are standards with that of who should apply them.

19. C. BLACK, *supra* note 17, at 58-63.

20. The question whether state courts have jurisdiction in suits for mandamus to compel federal officials is a complicated one. For a discussion, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 428 (2d ed. 1973).

a straightforward reading of Article III—that it is unconstitutional to deny access to all federal courts in constitutional cases.²¹

Thus, a distinction is needed for why this constitutional interpretation—in impeachment—is uniquely committed to the Senate whereas other kinds—such as the constitutionality of legislation—are not. Professor Scharpf provides a convincing textual answer, arguing that the *judicial* nature of the clause that gives the Senate the “sole power to try” all impeachments effectively ousts other ‘courts’ of jurisdiction to review the Senate.²² To put the point another way, because the Senate sits as a *court* of impeachment, its judgments on all questions of law and fact should be deemed *res judicata* in any subsequent judicial proceeding in another court.²³ This notion of the Senate as a “final interpreter” in impeachment is supported by debates at the Philadelphia Convention,²⁴ by Joseph Story’s *Commentaries*, and especially by Hamilton’s 65th Federalist.²⁵

21. See Clinton, *supra* note 12; see also Amar, *supra* note 12.

22. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 539 (1966) (“It may . . . be reasonable to construe the express constitutional authorization of Congress to decide [impeachment] disputes as an equally explicit exception to the general grant of judicial power to the courts in Art. III. But this rationale is unavailable . . . where the Court . . . is presented with a challenge to the validity of a *legislative* or *executive* decision.”) (emphasis in original).

The leading case in this area, *Powell v. McCormack*, 395 U.S. 486 (1969), is consistent with this ‘*res judicata*’ theory of impeachment. In *Powell*, the Court refused to allow the House of Representatives to deny Adam Clayton Powell a seat. But article I, § 5, cl. 1—the clause that gives the House the power to ‘judge’ the qualifications of its members—refers back to article I, § 2, cl. 2, which specifies only age, residence and citizenship as ‘qualifications’ for membership. The House, in *Powell*, did not purport to refuse to seat Powell because of his age, residence or citizenship. If the Senate, in impeachment, has decided that an officer has committed “treason, bribery, or other high crimes and misdemeanors,” it is acting within its constitutional powers. The holding of *Powell* would not argue for a court review of the Senate’s definition. See 395 U.S. at 521 n.42 (hinting that Court might defer to House adjudication on issues of age, residence, and citizenship).

23. See A. Amar, *A Jurisdictional View of the Political Question Doctrine* (unpublished manuscript on file with author); see also C. BLACK, *supra* note 17, at 10 (discussing judicial nature of trial by Senate); U.S. CONST. art. III, § 2 (referring to “*trials of cases of impeachment*”) (emphasis added).

24. See C. BLACK, *supra* note 17, at 57, 59.

25. Justice Story argues that impeachment trials were moved from the jurisdiction of the Court, where they resided in early drafts, to the Senate because the framers wanted a body that would appreciate the seriousness of various political crimes, and a body that would not owe anything to the accused (as the Court might if it were impeaching the President who appointed members to it). See 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION* 220 (1833).

Hamilton suggests two other reasons. First, he argues that a decision of this magnitude should be made by a group of many, rather than few, to reduce the likelihood of an erroneous result. Second, and more important, the need for reconciling an acquittal to the people, after the House (the most representative body) has voted for the articles of impeachment, dictates that the decision be made by a group that is in some sense politically accountable to the people.

The recent impeachment of federal judge Harry Claiborne has raised the issue of how much process the Senate must provide in impeachment proceedings, and whether a court can review the Senate’s decision on process grounds. While Professor Scharpf’s ‘*res judicata*’ analogy would tend to preclude such a challenge, this kind of judicial second-guessing does not seem to implicate the concerns that Story and Hamilton had about judicial second-guessing of the Senate’s interpretation of the clause.

For those who see impeachment as an exclusively political remedy, any judicial involvement will be problematic. There are plausible reasons for viewing impeachment in this way: “Impeachment is not a criminal prosecution; removal from office is not a penalty. . . . What is at stake, on both sides [of the

B. Legislation

The constitutional interpretation the Senate performs here is broader in that each Senator must interpret the entire Constitution—rather than one clause—and compare it with the proposed legislation. In this sense, the Senate is performing the equivalent of judicial review.²⁶

The Convention and ratification records make clear that the Senate was intended to act as a check against unconstitutional legislation.²⁷ Indeed, this checking function was a primary reason the Senate was created. At the Convention, the delegates agreed that “if the legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself In a single house there is no check.”²⁸

Besides this check against general unconstitutional usurpation by the House, the Senate was to guard especially against federal encroachments on the constitutional rights of states: “The equal vote in the Senate was given to secure the *rights* of the states”²⁹

In addition to these constitutional judgments, the Senate was intended to perform a very special policy function in legislation. First, the interests of states—as distinct from their rights—were to be considered. Even Hamilton, the ardent nationalist, conceded that “[i]t is proper that the influence of the states should prevail [in the Senate] to a certain extent.”³⁰ These interests were not to dominate, however.

The tension between states’ interests and those of the union rose to the surface frequently in the ratification process and in the early days of the Republic. In the ratification debates of New York, for example, a proposed amendment by Delegate Lansing that Senators be recallable by state legislatures (as representatives under the Articles of Confederation

trial] is the welfare of a nation. . . . It is the welfare of the Republic that is the subject, not the welfare of [the official]. . . . Impeachment and removal are a unique political mechanism, created by our Constitution, a proceeding *sui generis*.” N.Y. Times, July 21, 1974, reported in 120 CONG. REC. 24716 (1974).

26. Indeed, given that a federal court’s ability to review constitutionality is constrained by the article III case or controversy doctrine, as well as mootness and ripeness considerations, the Senate’s review is in some sense broader.

27. See Hicock, *The Framers’ Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. (1986).

28. 1 M. FARRAND, *supra* note 10, at 254 (statements of James Wilson). Madison confirms this notion: “A Senate, as a second branch . . . distinct [and independent] from and dividing power with the first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation” See THE FEDERALIST NO. 62, at 367 (J. Madison) (C. Rossiter ed. 1961).

29. 2 J. ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 319 (1901) (remarks of A. Hamilton at New York ratifying convention) (emphasis added).

30. *Id.* at 319 (remarks of A. Hamilton). As Joseph Story put it: “The equal vote in the Senate is, . . . at once a constitutional recognition of the sovereignty remaining in the states, and an instrument for the preservation of it. It guards them against (what they meant to resist as improper) a consolidation of the states into one simple republic.” 2 J. STORY, *supra* note 25, at 179.

were) spawned a detailed discussion of this topic. To Lansing, the amendment made sense if the Senate was to better represent the interests of the states. The proposed resolution, which lost, was strongly contested by Hamilton and other New York Federalists. Hamilton, in particular, made it clear that Lansing's premise was wrong: "It has been remarked, that there is an inconsistency in our admitting that the *equal vote in the Senate* was given to secure the rights of the states, and at the same time holding up the idea that their interests should be sacrificed to those of the union. But the committee certainly perceive the distinction between the rights of a state and its interests. The rights of a state are defined by the Constitution, and cannot be violated without a violation of it, but the interests of a state have no connection with the Constitution . . . Is he [the Senator] simply the agent of the state? No. He is an agent for the Union, and he is bound to perform services necessary to the good of the whole, though his state should condemn them."³¹ Thus, when the interests of the state and those of the union pointed in opposite directions, the Senator was to look to the good of the *entire public*.³²

31. 2 J. ELLIOT, *supra* note 29, at 319-320 (remarks of A. Hamilton). Hamilton's remarks were echoed by other Federalists in the New York ratification. Delegate Livingston, for example, remarked: "[Senators] are not to consult the interest of any one state alone, but that of the Union. This could never be done if there was a power of recall." *Id.* at 291.

32. This is even more true, as will be discussed *infra* Section III, after the 17th Amendment, which freed Senators from state legislatures. See *infra* notes 82-84 and accompanying text.

This is not to say that the pressure on individual Senators caused by a divergence of state and national interests dissolved overnight. In the First Congress, for example, many states attempted to "instruct" their Senators on how to vote on specific legislation. Most Senators rejected such efforts. Senator Jacob Read of South Carolina proclaimed that "on great national points, he did not consider himself a Representative from South Carolina, but as a Senator for the Union." 4 ANNALS OF CONG. 20 (1795). See generally The United States Senate 1787-1801, S. DOC. NO. 64, 87th Cong., 1st Sess. 154-172 (1961) (many other examples of Senators disregarding instructions from state legislators). The two Senators from North Carolina "proved themselves out of harmony with the policies of the [state]." *Id.* at 163. Senator John Henry of Maryland "refused to obey instructions from the Maryland Assembly to vote for opening the Senate's doors." *Id.* at 169. Ralph Izard of South Carolina "refused to accept the theory that [he was] subject to instructions from the legislature." *Id.*

Indeed, Congress rejected a constitutional amendment that would have entitled constituents to "instruct" their representatives about how to vote. In those debates, Madison and others made it clear that the Senate's task called for deliberation and that this task was inconsistent with a right to instruct. See Sunstein, *Beyond the Republican Revival* 97 YALE L.J. (forthcoming 1988), who relies on the remarks of Senator Sherman: "The words [of the amendment] are calculated to mislead the people, by conveying an idea that they have a right to control the debates of the Legislature. This cannot be admitted to the just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation. . . ." 1 ANNALS OF CONG. 733-45 (1789); see also the remarks of Thomas Jefferson with respect to the Senate: "I had two things in view: to get the wisest men chosen and to make them perfectly independent when chosen." 1 PAPERS OF THOMAS JEFFERSON 503 (J. Boyd ed. 1953).

These Senators had good reasons for believing their proper outlook to be a national one. In addition to the "intent of the framers" as revealed in the Convention and ratification debates, Senators could point to many structural differences between the Constitution and the Articles of Confederation that would tend to make the Senate a national body. First, Senators were to vote individually, not as a block from each state. Second, Senators were unrecalable. Third, Senators were paid from the national treasury, not those of their home states. See A. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 n.170 (1987).

In guaranteeing that legislation serve the public interest, the Senate was to act as a check against specific tendencies inherent in democratic government, the most threatening of which was instability. The Senate was to remedy this problem (1) to produce a sense of national character, (2) to gain respect from foreign countries, and (3) to introduce predictability into government to prevent cunning individuals from using the political system for personal gain.³³ In addition to these reasons for wanting an element of stability, the framers continually expressed a general concern over the capricious nature of public opinion. The Senate was intended to act as a check against democracy to prevent legislation that everyone would soon realize to be unwise.³⁴ Perhaps more important, the Senate was to become expert at the principles of government and legislation so that it could anticipate the subtle effects—effects the masses could never appreciate—of legislation on larger governmental and societal ends and values.³⁵

Given these specific duties of constitutional interpretation and value protection in legislation,³⁶ the structural differences between the House and Senate take on new meaning. As Justice Story observed in his *Commentaries*, the Senatorial check on unconstitutional legislation coming from the House would not have been nearly as effective had the two bodies been similarly constituted: "If each branch is substantially framed upon the same plan, the advantages of the division are shadowy and imaginative; the visions and speculations of the brain, and not the waking thoughts of statesmen, or patriots. It may be safely asserted, that for all the purposes of liberty, and security, of stable laws, and of solid institutions, of personal rights, and of the protection of property, a single branch is quite as good as two, if their composition is the same, and their spirits and impulses the same."³⁷

The internal structure of the Senate was designed to enable the upper house to perform both its constitutional interpretation and value pronouncement more effectively. Smaller size was intended to make Senatorial proceedings less cumbersome and more deliberative. Longer tenure was provided for two reasons. First, it would enable individual Senators to check unwise or unconstitutional legislation (against the popular will) and still be vindicated by re-election time.³⁸ Second, it would enable Senators

33. See THE FEDERALIST No. 62 (J. Madison).

34. See THE FEDERALIST Nos. 62 & 63; see also 2 J. ELLIOT, *supra* note 29, at 317 (remarks of A. Hamilton).

35. See *infra* notes 73-75, and accompanying text.

36. Of course, legislation is not the only process in which the Senate's structure is valuable. However, when stressing the structural differences between House and Senate, the framers usually illustrated the virtues of the Senate's structure by discussing legislation. See FRAMING, *supra* note 10.

37. 2 J. STORY, *supra* note 25, at 179.

38. See *id.* at 193. ("If public men know, that they may safely wait for the gradual action of a sound public opinion, to decide upon the merit of their actions and measures, before they can be struck down, they will be more ready to assume responsibility, and pretermitt present popularity for future solid reputation.")

to become wise to the principles of government and expert at anticipating the effects of governmental actions on larger societal interests and norms.

Even more important than longer tenure was staggering of terms; it is this structural oddity that allows the Senate as an institution (as contrasted with individual Senators) to effectively guard societal values. Without continuity, the institution of the Senate would be ill-fitted for this job.³⁹ Moreover, staggering was intended to allow more senior Senators to teach younger Senators how to perform their duties effectively.

The higher age requirement was intended to insure that Senators would be wiser and more experienced than House members.⁴⁰ Finally, the unusual qualities of the Senate that were stressed in the rhetoric of ratification campaign—"system", "permanence," "wisdom", "energy," "learning," and "ability"—all comport well with the special functions and duties the framers expected of the upper house.⁴¹

C. Appointment

The constitutional judgment the Senate is called upon to make in the judicial appointment procedure⁴² is broader than in either impeachment or legislation. Here the Senator must not only consider his own substantive visions of constitutional provisions, he must also consider and compare those of the nominees in order to decide, as Professor Laurence Tribe has put it, whether or not "the nominee's conduct would be likely to move constitutional interpretation in a direction that [the Senator thinks] is dangerous to the nation's constitutional welfare."⁴³

Despite recent controversy, text, structure and history all indicate that the Senate was intended to perform *some substantive interpretation* in appointment. As Tribe points out, "the Senatorial role of advice and consent is not to be read out of the Constitution. . . , [as a logical textual matter] an advisor is entitled to take into account all the same considera-

39. For Bickel's emphasis on continuity, see *infra* note 75 and accompanying text: "The Court is seen as a continuum. It is never, like other institutions, renewed at a single stroke . . . [the symbolic function of the Court depends upon] the total impression of continuity personified." A. BICKEL, *supra* note 3, at 32.

40. See, e.g. 1 PAPERS OF THOMAS JEFFERSON, *supra* note 32. While wisdom is difficult to measure objectively, the Senators of the First Congress, were, by all accounts, more experienced than their House counterparts. All but one or two of the 94 Senators who served from 1789-1801 had either participated in the Revolution itself, Congress under the Articles, State constitutional conventions, or the framing and ratification process. See S. DOC. NO. 64, *supra* note 32, at 15. Moreover, while age 30 is only five years older than age 25, most Convention delegates "appear to have anticipated that Senators would generally be for older than the prescribed minimum." *Id.* at 11. The Senators of the 100th Congress are also more "experienced" than their House counterparts. The Senators are older, more educated, and have more legal training than the Representatives. N.Y. Times, Jan. 5, 1987, at A14.

41. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 557 (1969).

42. Although the Constitution gives the Senate a role with respect to both judicial and nonjudicial appointments, this Note focuses on the former.

43. CENTER FOR NATIONAL POLICY, THE SENATE, THE COURTS AND THE CONSTITUTION: A DEBATE 14 (Jan. 1986). (remarks of L. Tribe) [hereinafter DEBATE.]

tions as the advisee".⁴⁴ Indeed, the early drafts in Philadelphia placed the entire appointment power in the Senate, in recognition of this body's deliberative nature.⁴⁵ Moreover, an active role was taken by the Senate in the 19th century. The "rubber stamp" is a recent phenomenon.⁴⁶

Even those who disagree with Tribe, such as Professor McConnell, generally acknowledge that Senators are to inquire into the substantive constitutional views of nominees.⁴⁷ Professor McConnell argues, however, that since the acceptable range of constitutional methodologies is broad, Senators should not be too quick to exclude many constitutional viewpoints. But the only person capable of defining "acceptable constitutional methodology" is the individual Senator himself.⁴⁸ By the terms of the Constitution, he is to ask this question of "constitutional conscience."⁴⁹

D. Amendment

The constitutional judgment the Senate performs in amendment is in some sense the broadest. Here the Senator not only decides what our Constitution means, he must decide what a good Constitution should mean. Policy judgment and constitutional judgment merge. While, by the terms of Article V, the states may force a convention of the People when Congress declines to pass an amendment,⁵⁰ the framers clearly recognized that Congress' role could make a difference. Even with this mechanism, many framers recognized amendment without Congressional agreement to be a difficult procedure.⁵¹ As an historical matter, none of the twenty-six

44. *Id.* at 9. There is an obvious analogy here to the President's role in legislation: Any factors that the House and Senate may legitimately consider in deciding whether to vote for a bill may be equally legitimately considered by the President in deciding whether to sign or veto it.

With respect to nonjudicial appointments, the Senate should once again be seen as an equal partner of the President, but each partner may well be free to consider factors such as a candidate's party affiliation, that seem much less legitimate in the context of judicial appointments.

45. See, e.g., 1 FARRAND RECORDS, *supra* note 10, at 233 (remarks of James Madison).

46. See L. TRIBE, *supra* note 9, at 77-90.

47. DEBATE, *supra* note 43, at 13 (remarks of Prof. McConnell).

48. Chief Justice Rehnquist made essentially this point in his confirmation hearings. See N.Y. Times, Aug. 1, 1986, at 8.

Some, see e.g. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations* (Book Review) 95 YALE L.J. 1283 (1986), have attacked Tribe's position by arguing that too much ideological scrutiny by the Senate may make a Court less likely to issue unpopular decisions in the future and is therefore not costless. Three things need to be noted with respect to this argument. First, even Friedman acknowledges some substantive inquiry, so this Note's more general point still applies. Second, the insulation of article III judges provided by the Constitution allows Justices to vote freely, even if their unpopular decisions are publicized in confirmation hearings so long as no promises are sought or given. See *infra* note 60. See generally THE FEDERALIST No. 51 (J. Madison). Third, Friedman neglects a cost of too little Senatorial screening—the cost associated with the Senate not developing and implementing its vision of the Constitution, the cost of not being true to the constitutional framework itself.

49. DEBATE, *supra* note 43, at 14 (remarks of L. Tribe).

50. Article V provides for a convention to be formed "on the Application of the Legislatures of two-thirds of the Several States." See also A. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. (forthcoming 1988) (discussing modes of constitutional amendment not specified by Article V).

51. 3 FARRAND RECORDS, *supra* note 10, at 367 (remarks of George Mason).

amendments has ever been ratified without Congress approving it and sending it on to the states. Indeed, Congress has often exercised its constitutional judgment (in spite of pressure) in refusing to send amendments to the states when less than two thirds of the states petitioned. The pro-slavery amendments of the 1850's are early examples; the balanced budget amendment proposal of the 1970's is a recent one. In any event, it is clear that Congress' judgment—including the Senate's—makes a difference in amendment.⁵²

The centrality of the Senate in all of these processes was not lost upon those who opposed ratification. A major objection to the new Constitution was that the Senate was *too* central, that it had *too* much power. As Cincinnatus, one outspoken antifederalist, put it: "I come now to the most exceptionable part of the Constitution — the Senate . . . the same body, the Senate, is vested with legislative, executive and judicial powers."⁵³ Because the Antifederalists did not contemplate such a powerful role for the Senate, they also did not see the need for the structural characteristics of the Senate that the federalists felt would enable it to execute its functions better. The antifederalists wanted less insulation,⁵⁴ and less continuity⁵⁵ in the Senate. Thus, there existed an almost perfect symmetry in viewpoints; the federalists, who won, wanted a powerful, deliberative, energetic upper branch, while the antifederalists wanted merely another representative body.

II. IMPLICATIONS

From this discussion, three kinds of implications follow. First, and simplest, we, as citizens, should realize the power the Senate wields in determining the meaning of the Constitution, and should actively inquire into Senators' substantive visions of constitutional provisions.⁵⁶

52. Indeed, given the fact that courts today invariably look to "legislative history", the Senator's job in amendment is more important now than ever, as he can influence future interpretation of the amendment with remarks about its scope and purpose.

53. ANTIFEDERALIST No. 64, at 189 (Cincinnatus) (Borden ed. 1965).

54. The antifederalists wanted to do this in two ways. First, they wanted a shorter term; second, they wanted state legislatures to be able to recall Senators. See ANTIFEDERALIST No. 65 Cincinnatus).

55. Antifederalists favored limiting Senators to one term, thereby reducing Senatorial continuity. See *id.*

56. Nor are ordinary people incapable of interpreting the Constitution. Jefferson thought people could review the constitutionality of statutes when sitting on juries. Even Hamilton, who abhorred mob behavior, argued that this was true with respect to the First Amendment. People do take account of the constitutional philosophy of a candidate for President, as well as when they elect, or reject, state judges (as Rose Bird's recent experience in California demonstrates). See Brest, *Constitutional Citizenship*, *supra* note 5, at 23 ("I believe that citizen participation in constitutional discourse and decisionmaking is desirable for several reasons. First, it can bring to bear on the decisionmaking process relevant perspectives and information that would otherwise be excluded. Second, it can educate the public about constitutional issues. . . . Third, participation in the basic political decision of one's society is an intrinsic good.") A. Amar, *supra* note 32, at 1500-03 (discussing role of electorate in interpreting First Amendment during election of 1800); A. Amar, *supra* note 50 (discussing role of "We the People" in constitutional amendment).

Second, this richer understanding of the Senate should affect the way Senators view themselves. The Senate was designed to have a large role (1) in passing laws that give effect to the powers in the Constitution (2) in deciding who is fit to implement these laws, and (3) in deciding when these laws are not enough and a change in the charter is needed. *Given the number of ways the Senate was to interpret the Constitution, Senators should not be shy or uncertain about taking their role seriously in any one of them.* This means that Senators should exercise their judgment in appointment, impeachment, legislation and amendment, despite pressures to defer to the constitutional judgment of other bodies, i.e. the President in appointment, the Court in legislation and the states in amendment.⁵⁷

This means, for example, that Senators, (and all of us), should be skeptical about proposals amending the Constitution to move impeachment of judges out of the Senate into an independent body.⁵⁸ This is not to say such proposals are necessarily unwise; it is only to suggest that we be convinced that the reasons the framers gave the job to the Senate in the first place no longer obtain.

This richer understanding also means, for instance, that *all* Senators should take their 'advice and consent' duty seriously. Although the confirmation hearings of Chief Justice Rehnquist and Justice Scalia in the summer of 1986 reveal that some Senators have awakened to their intended roles, many others resisted any substantive ideological or methodological inquiry.⁵⁹ The Bork confirmation hearings and publicity in the Fall of 1987, should be embraced as an example of the Senate and the citizenry taking its responsibility seriously.⁶⁰ Still, some Senators continue to make the appointment process a political rather than a principled one.⁶¹

57. Indeed, it is telling that the pressure to abdicate Senatorial duties of constitutional interpretation is at its lowest level in impeachment, i.e., when the Senate is acting as a court. This observation confirms the pervasiveness of the *Cooper* way of thinking—that only courts are capable of rendering constitutional judgments.

58. See, e.g., NY Times, Oct. 11, 1986, at A1 (current proposals).

The most recent proposals call for impeachment trials for *federal judges* to be moved from the Senate into an independent body whose members would have to be nominated by the President and confirmed by the Senate.

59. See N.Y. Times Sept. 19, at A24, for background on ideology debate; see also N.Y. Times, Aug. 2, 1986 at 8 (Senator Hatch calling ideological inquiries "just fishing").

60. For scholarly discussions of the Bork episode, see Myers, *Advice and Consent on Trial: The Case of Robert Bork* (1988) (forthcoming) It is interesting that the debate continues to rage over the appropriate level of generality at which Senators should evaluate the substantive constitutional ideas of a nominee. Some have suggested that only inquiries into *general* constitutional methodologies are appropriate; predictions about hypothetical (or not so hypothetical) cases are improper. This distinction is both unworkable and incoherent. The relevant distinction is properly between a prediction, which a Senator is justified in trying to obtain to evaluate the nominee, and a *promise* to vote a certain way, which would compromise the independence of the federal judiciary. Nevertheless, the important point for the purposes of this Note is that more and more people are conceding that some substantive inquiry by the Senate is legitimate, indeed compelled.

61. The vote trading that occurs in the confirmation process raises all the same questions regarding the legitimacy of vote trading in other constitutional decisions, such as those made by the Court. See Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82, 114, (1986); Easterbrook, *Ways of Criticizing the Court* 95 HARV. L. REV. 802, 821-22 (1982). Vote trading with respect to judicial

Legislation also provides many examples. First, Senators should always actively consider the constitutionality of a bill and vote against it if they—in their independent judgment and apart from their prediction that the Court would uphold it—think it unconstitutional.⁶² Recent examples,⁶³ like Gramm-Rudman,⁶⁴ suggest that many Senators do not consider the question, but merely refer it to the courts.⁶⁵

appointments has been a problem for some time. See e.g. A. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 402 (1978) (describing vote trading during Robert Kennedy's tenure as Attorney General).

62. Morgan, Brest and Mikva & Lundy, *supra* note 8, all argue that Congress should consider the constitutionality of legislation. See also Hickock, *supra* note 27. Importantly, since these pieces deal only with legislation, they lump the House and Senate together and do not identify the special role the Senate was to play in constitutional interpretation, a role that is revealed not just by looking at legislation, but rather by examining the entire structure of the Constitution, including the process of impeachment, amendment and appointment. Finally, because these pieces do not examine the Senate in isolation, they do not discover the implications that a reexamination of the Senate has on the Bickel school.

63. This is not to suggest that the abdication of political branches, including the Senate, is peculiar to the 1980's. A 1966 poll revealed that 31% of all Congressmen thought it legitimate to pass constitutional questions along to the courts without considering them. See D. MORGAN, *supra* note 8, at 8. There are plenty of examples in the 1970's as well. Mikva and Lundy, for example, point to four specific legislative issues of 1969-70 to decide that "many members [of both Houses] look on their oath to support the Constitution more as a patriotic gesture than as a serious part of their function." Mikva and Lundy, *supra* note 8, at 497. The Federal Election Campaign amendments of 1973 (parts of which were later struck down by the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976)) provides another example. While the issue of constitutionality was certainly raised in the Senate, it is at least arguable that some Senators did not live up to their oath. Consider Senator Buckley's statements that Senator Kennedy, who had previously argued against the constitutionality of similar restrictions, was now willing to ignore those constitutional problems. 120 CONG. REC. 10557 (1974). See also Hickock, *supra* note 27 (concluding that Congress has often slid by difficult constitutional issues).

64. Consider, for example, the remarks of Senator Exon on February 7, 1986, regarding Gramm-Rudman: "I remember this Senator stood on the floor and cautioned and warned and pleaded, as a man who does not claim to be an expert on constitutional law, that it seems to me that the U.S. Senate, supposedly the most deliberative body in the world, was just brushing aside all constitutional questions. When it was brought up, it was kind of no, no; you must not talk about those kinds of things and get in the way of the political document that Gramm-Rudman will eventually come to be known as. That political document had to be forced through by various people with various reasons, most of which this Senator simply did not understand." 132 CONG. REC. S1212-13 (daily ed. Feb. 7, 1986).

65. While at first it might seem legitimate for Senators to refer the "close calls" to the Court without deciding the issue for themselves, it is precisely these kind of questions that the Constitution contemplated would be deliberated on by *all decisionmakers*. Indeed, the Constitution's bias against enactment of any bill that *one* branch thinks unconstitutional is turned on its head when the Senate refers these "close calls." Traditionally, the Court resolves these "close calls" in favor of Congressional power, thereby creating a tendency in *favor* of this kind of legislation, not *against* it. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 524 (1985) (upholding federal statute against Tenth Amendment challenge largely because Congress is presumed to have independently interpreted constitutional rights of states in drafting statute). Many have pointed to institutional expertise as a justification for the *Cooper* school. For a discussion, and a rejection, of this institutional expertise justification, see Brest, *supra* note 5. First, Senators can develop visions of the Constitution without too much additional cost. Second, even if the Court is much better at deciding these questions, this argument fails. If we were choosing *one* body to interpret the Constitution and minimize the sum of error costs (i.e. costs of upholding unconstitutional legislation and costs of striking down constitutional legislation), we might very well choose the institution with the most expertise. But the Constitution is not neutral as between these two types of costs. By setting up successive screens, the Constitution effectively favors the narrowest reading of federal power that any one branch might have. For this reason, each branch must follow its own constitutional interpretation.

The words of Hamilton's *The Federalist* No. 73 are instructive: "The oftener the measure is

The situation is somewhat different where the courts have already struck down legislation a Senator believes is constitutional.⁶⁶ The foregoing discussion points up the problems with the *Cooper* perspective; and yet most would agree that it would be a waste of resources for the legislature to continue to pass, and the executive to continue to enforce, legislation that will not be applied by the judiciary. Serious due process questions might also be raised if laws were enforced against individuals if these laws had no plausible chance of being upheld by the courts. Due process scrutiny by the Courts requires at least rationality on the part of the legislators. It could hardly be rational (or fair to defendants) for Congressmen to vote for bills they knew would not be upheld.⁶⁷ Therefore, a Senator should have a plausible reason to believe a law of this kind will be upheld before voting for it. This could happen in at least three ways. First, a change over time may give the Senator reason to believe the law will be better received.⁶⁸ Second, a change in judicial personnel may lead to the same conclusion. Finally, a court that was unwilling to uphold the statute before may no longer have jurisdiction to review it.

Indeed, in deciding whether or not any "jurisdiction stripping" of the Supreme Court is permissible, a Senator should not rely in the *Cooper* perspective, as that would be circular. Unfortunately, many Senators do precisely this.⁶⁹ Instead, as always, the Senator *should* look to the text and structure of the Constitution—especially article III⁷⁰—to decide which cases must be heard by the Court, which by federal courts and which by neither.⁷¹

brought under examination, the greater the diversity of situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable, that culpable views of any kind should infect all the parts of the government, at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." THE FEDERALIST NO. 73, at 443-44 (A. Hamilton) (C. Rossiter ed. 1961).

66. For a discussion of this asymmetry, see Brest, *Congress as Constitutional Decisionmaker*, *supra* note 5, at 74. Attorney General Meese, *supra* note 6, erroneously collapses this situation with the one discussed above.

67. See Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

68. Of course, if a law were struck down twice in a relatively short period of time, it would be hard for Senators to pass the plausibility standard. See Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) ("[W]hen that chance [for Supreme Court reversal] has been exploited and has ran its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation? The answer here, it seems to me, must be affirmative, both as the necessary implication of our constitutional tradition and to avoid the greater evils that will otherwise ensue").

69. See, e.g., *Hearings Before the Committee on the Judiciary of the United States Senate on the Nomination of W.H. Rehnquist to be Chief Justice of the United States*, 99th Cong., 2nd Sess. 40-41 (1986) (remarks of Sen. Specter).

70. This is not to say that some jurisdiction-stripping bills may not be unconstitutional because of other constitutional provisions. See Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARVARD C.R.-C.L. L. REV. 129 (1981).

71. Of course, the federal courts would have to concur in the constitutionality of any jurisdiction-stripping bill to give it effect if we are to avert a major constitutional crisis. As Tribe, *id.* at 133,

Once we realize that the Court *may* not have to hear every constitutional case, and we also realize that different districts or Circuits may interpret constitutional provisions differently, the importance of Senators exercising their own interpretation of constitutional provisions in legislation increases, (whether or not they agreed with the "stripping" bill) since they may no longer have the Court to lean on.

The third set of implications has to do with the Court's understanding of its own role. A recognition by the Court that other bodies do and should interpret the Constitution may lead the Court to be more receptive to arguments that certain constitutional questions, like impeachment, are committed to other branches.⁷²

Much more important, followers of the Bickel school are forced to reexamine their premises. In his classic *Least Dangerous Branch*, Bickel searches for, and finds, a justification for judicial review:

The point of departure is a truism; perhaps it even rises to the unassailability of a platitude. It is that many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law. But such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application. And it remains to ask which institution of our government . . . should be the pronouncer and guardian of such values Initially, great reliance for principled decision was placed in the Senators and the President, who have more extended terms of office and were meant to be elected only indirectly. Yet the Senate and the President were conceived as less closely tied to, not as divorced from, electoral responsibility and the political marketplace. And so even then, the need might have been felt for an institution [the Court] which stands

points out, a court must always take jurisdiction to decide if it has, or has improperly been denied, jurisdiction.

72. See *United States v. Nixon*, 418 U.S. 683, 703 (1974) for logic that reflects the current judicial stance toward such arguments.

In *Nixon*, Chief Justice Burger noted that "[t]he President's counsel [read] the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many decisions of this court, however, unequivocally reaffirmed the holding of [*Marbury v. Madison*] that 'it is emphatically the province and duty of the judicial department to say what the law is.'" *Id.* at 703. As some observers have noted, this 'however' does not make sense. As Professor Gunther has remarked, "there is nothing in *Marbury v. Madison* that precludes a constitutional interpretation which gives final authority to another branch." Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 *UCLA L. Rev.* 30 (1974).

altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned only with principle.⁷³

Compare this with the following passage on the Senate from Madison's 63rd Federalist:

The objects of government may be divided into two general classes: the one depending on measures which have singly and immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country needs no explanation. And yet it is evident that an assembly elected for so short a term [the House] as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years . . . The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.⁷⁴

The parallelism between these two passages is striking. Bickel and Madison assign similar functions to different bodies. Moreover, the structural characteristics that Bickel uses to justify his decision—i.e. insulation and continuity⁷⁵—apply to the Senate as well, in some sense with more force.

While the Court is more insulated, it is at least arguable that too much insulation is bad; it divorces the governmental body from the people who have to abide by the values being pronounced. Indeed, as we saw in the value-laden interpretation in impeachment, (and to some extent, appointment), the framers decided against complete insulation.

Similarly, while the Court historically may appear to be the most continuous body, the Senate is the only institution that cannot—short of amendment—“turn over” at one time. The President does, the House conceivably could, and the Court effectively could as well, if the political branches “packed it” (as FDR tried to do) to render the votes of the current Justices all but meaningless. There is absolutely no constitutional guarantee that the Court's decisions have continuity if the political

73. A. BICKEL, *supra* note 3, at 24-25.

74. THE FEDERALIST No. 63, at 383-84 (J. Madison) (C. Rossiter 1961).

75. For Bickel's reliance on these two structural principles, see A. BICKEL, *supra* note 3, at 26, 31-32.

branches don't acquiesce.⁷⁶ The Senate, by contrast, can never turn over at once because of staggered elections.

If Bickel's premise is ahistorical, it remains to ask whether his result is wrong.⁷⁷ Professor Sunstein has recently argued that the democratization of the Senate (through the 17th amendment) and the President—coupled with technological changes that make it easier for private interest groups to monitor and exert influence upon legislators has prevented the political branches from virtuously performing their deliberative roles as Madison envisioned they would. Given this, Sunstein says, it is not unexpected or wrong that the Court should accept a more active role, perhaps assuming some of the functions of other governmental bodies.⁷⁸

At the outset, it must be noted that Sunstein, and others who urge the Court to take an active role in this regard,⁷⁹ are trying to use the Court to make the legislative bodies more deliberative.⁸⁰ They, unlike Bickel, do not advocate the Court supplanting *considered public-regarding legislative decisions* that happen to conflict with the Court's sense of what is good for society in the long run. Nevertheless, the observation Sunstein makes regarding historical developments could be employed to justify a Bickelian usurpation of the Senatorial role.

A few points need to be made about this argument.⁸¹ First, with respect

76. Bickel also emphasizes the "leisure", "training" and "learning" that judges have that makes them good guardians for society's values. It is interesting to note that those qualities are remarkably similar to those that the ratifying conventions used to describe Senators. See A. BICKEL, *supra* note 3, at 25.

77. Bickel himself as much as admits he is not concerned with the historical validity of his argument when he says: "We cannot know whether our legislatures are what they are because we have judicial review [in the Bickel sense] or whether we have judicial review and consider it necessary because legislatures are what they are." A. BICKEL, *supra* note 3, at 25. Because Bickelian judicial review involves usurpation of a function the framers gave to the Senate, we must answer Bickel's unanswerable question.

78. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985).

79. See, e.g., Macey, *Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). While Sunstein wants the Court to declare unconstitutional, and thus refuse to apply, laws which are not the product of a deliberative public-regarding process but rather the result of a deal between competing private interest groups—Macey's approach is slightly different. He wants courts to give full meaning to the public-regarding rhetoric that accompanies passage of a law in order to make the legislature explicit when it wants its 'deals' enforced by courts. See also Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988) (summarizing civic virtue literature and collecting sources).

80. In addition to using courts in this way, the civic virtue writers, including Sunstein, favor structural reforms which would insulate federal legislatures from the electorate. See Fitts, *supra* note 79, at 1592; see also *infra* note 83 and accompanying text.

81. There is one other way to reconcile Bickel's message regarding the Court's mission with the text, structure and history of the Constitution. Since the ability of the Senate to oversee the wisdom of state legislation is somewhat constrained, see *supra* note 15, a Bickelian role for the Court—preserving societal (though not necessarily constitutional in the narrow sense) values—seems more appropriate when the Court is reviewing state legislation. The separation-of-powers concern that is implicated when the Court usurps Senatorial functions does not come into the picture.

If we were to modify Bickel's remarks this way (limiting their scope to review of state legislation), the resulting conception of federal courts is more historically defensible. Although many people today believe that states were not viewed as threatening in 1789, this is plainly not true. See A. Amar, *supra* note 12, at 247 n.134; A. Amar, *supra* note 32, at 1440-41 and sources cited therein. Madison, in

to the Senate at least, procedural changes in election, i.e. the Seventeenth Amendment,⁸² cannot *on their own* justify Senatorial abdication or judicial usurpation of Senatorial functions. Election by state legislatures was not justified in 1787 as a way of getting better Senators. This is not to say that such arguments were not advanced in Philadelphia or in the ratification process. Even the 62nd Federalist remarks that the selection of Senators by state legislatures has the advantage of "favoring a select appointment." These arguments, however, were infrequent and secondary. Indeed, what is most startling about the election procedure of Senators is that it was hardly discussed and justified at all. Madison, in the 62nd Federalist, comments that it is "unnecessary to dilate on the appointment of Senators by the state legislatures." As Farrand keenly observed, the method of election was tied to the "Compromise" of equal suffrage and was never challenged because it was a political concession.⁸³

Moreover, and more important, to the extent that election by state legislatures was intended to produce "better" men in the Senate, the Seventeenth Amendment reflected a reversal in this thinking.⁸⁴ The Progressives

particular, was very wary of the damage states could inflict by legislation, and sought repeatedly to provide the legislature of the federal government a power "to negative all laws passed by the several states. . . . contravening the [Constitution]. I FARRAND RECORDS, *supra* note 10, at 21 (remarks of J. Madison).

Interestingly, at one point Madison, recognizing the political difficulty of giving this power to the whole legislature, attempted to give to the *Senate alone* the power to veto any state legislation on the grounds that it was *unconstitutional* or *unwise*. *Id.* at 293. This attempt once again reinforces the notion that the Senate was central in these two realms.

In a sense, then, the Bickelian argument can be read as giving to the federal government (through the federal courts) a power that Madison wanted to give to the political branches all along. This way of reading Bickel, however, is not without its problems. We must remember that all of Madison's proposals in this regard were ultimately rejected by the Convention. Instead, the only review of state legislation was that provided by the federal courts, and there is no indication that this review was intended to be extra-constitutional in the Bickelian sense. It is quite possible the framers didn't want a federal body reviewing the wisdom of all state legislation. While it is true that the Thirteenth, Fourteenth and (to some extent) Seventeenth Amendments all reflect a changing attitude regarding states vis a vis the federal government, there is nothing to suggest that these amendments were intended to give to the Court what Madison could not give to Congress. Indeed, if the 14th amendment vindicated Madison's vision in this regard, it did so with section five, which *enables Congress* to act. (Although no one has ever suggested that section five enables Congress to invalidate state legislation directly, it would be an interesting argument).

Nevertheless, many people have argued that the Court should view federal and state legislation in different lights. See, e.g., J.B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, in LEGAL ESSAYS (1908). Perhaps the Court is more deferential to acts of Congress. No federal law was struck down on free speech grounds, for example, until 1965. *Lamont v. Postmaster Gen. of the United States* 381 U.S. 301 (1965). Whether this "deference" was due to a recognition of the Senate's role in federal legislation (which is not guaranteed by the Constitution with respect to state laws) or something else, is unknowable.

The narrow point is this: Bickel did not distinguish between state and federal legislation. Moreover, to do so on his behalf is not without its problems.

82. The 17th Amendment provides that Senators from each state shall be elected "by the people thereof."

83. FRAMING, *supra* note 10, at 111-12.

84. See, e.g. H.R. REP. NO. 368, Minority Report 52d Cong., 1st Sess. 3 (1892), (arguing that the ability of the people to govern without filtering has been "tried, tested and found not wanting."). See generally Brooks, *supra* note 7, at 200-05 (documenting the progressives' rejection of the notion that indirect election produces better men.)

who pushed for direct election did so in large part because of the corruption they perceived in local and state governmental machines.⁸⁵ Finally, the membership in the Senate did not change very much after passage of the amendment.⁸⁶

If the type of Senator did not change because of the amendment, we still must determine whether a Senator's outlook was altered. On the one hand, if state legislatures have a more coherent vision of a state's interests than the citizens do, direct election may make it easier for a Senator to consider the interests of the union, not just those of his state.⁸⁷ It is precisely for this reason that many framers, especially James Wilson, favored direct election from the outset.⁸⁸ After all, the insulation of the longer term was retained. And, as discussed earlier, complete insulation was never the object. On the other hand, to the extent that state legislatures are more far-sighted than the populace, direct election may make it harder for the Senate to "check the popular passion."⁸⁹ That is, to the extent that election by state governments made it harder for citizens to monitor Senators, the ability of the Senate to perform its 'checking' function is reduced by direct election.

These two offsetting effects, however, don't seem to warrant, by themselves, a radical reworking of the Senate's function. An argument can be made, however, picking up on Sunstein's observations, that direct election may exacerbate the already troubling problem of private interest group pressure. By requiring Senatorial candidates to raise large amounts of money to campaign for many votes, the Seventeenth Amendment may facilitate private interest group access to the federal government. If this is indeed empirically the case, it is a somewhat ironic outcome,⁹⁰ given that

85. See L. LITWACK, *THE UNITED STATES: A WORLD POWER* 476-77 (1976); R. HOFSTADTER *THE AGE OF REFORM* 255 (1955); White, *Changes in Democratic Government*, reprinted in *PROGRESSIVISM* 19 (1971 D. Kennedy Ed.). See also H.R. REP. NO. 125, 57th Cong., 1st Sess. 4 (1902) (calling legislative election "one of the most potent powers through which corporate influence now holds its sway"); S. REP. NO. 530, 54th Cong., 1st. Sess. 6 (1896) (direct election "tends to render impossible the use of improper methods to influence Senatorial elections").

It is somewhat ironic that in 1913, indirect election was viewed as a process that enabled corrupt state governments to taint senators. In arguing for senatorial recall in 1787, New York antifederalists argued that without state legislative removability *Senators* would corrupt the state legislatures.

86. See J. WILSON, *AMERICAN GOVERNMENT* 265 (1980).

87. See *supra*, text accompanying notes 28-31. See also Brooks, *supra* note 7, at 201-10 (arguing that whatever voice states' interests had in the Senate in 1787, after 1913 the states interest were much more easily sacrificed to those of the union); Baird, *supra* note 7 (making same argument).

88. See *supra* notes 30-37 and accompanying text.

89. See *supra* notes 30-37 and accompanying text.

90. Alexis de Tocqueville thought just the opposite was true:

When the public is supreme, there is no man who does not feel the value of public good-will, or who does not endeavour to court it by drawing to himself the esteem and affection of those amongst whom he is to live. . . . Under a free government, as most public offices are elective, the men whose elevated minds or aspiring hopes are too closely circumscribed in private life, constantly feel that they cannot do without the population which surrounds them. Men learn at such times to think of their fellow-men from ambitious motives, and they frequently find it, in a manner, their interest to be forgetful of self."

A. de Tocqueville, *Democracy in America*, in J. MILL, *POLITICS AND SOCIETY* 186, 222-23 (G.

the Progressives of 1913 were reacting *against* the private interest group dominance in the state government. Whether or not the interest group problem is worse because of direct election depends upon our vision of state governments—whether they are better or worse (or equal to) than the citizens in this respect. While much work has been done in the field of private interest group politics in the last 25 years, much more must still be done. A few preliminary observations are in order here. It is not clear why other solutions, less radical than Senatorial abdication or judicial usurpation of Senatorial functions, would not work better to alleviate the private interest group problem. For instance, a constitutional amendment limiting campaign expenditures, or limiting Senators to one six-year term, would appear to be more attractive.⁹¹ Moreover, political scientists have argued that the special interest group problem can be diminished by strengthening the two-party system and its leadership.⁹² Referring Senatorial functions to less able (in the eyes of the framers at least) bodies is no less of an ‘amendment.’ It is incumbent on those who would have the Senate abdicate its duties, or have the Court or the Executive usurp them, to prove that this is the only, or the best, route to take.

Williams ed. 1976).

91. While Sunstein has not explicitly made these two proposals, commentators have attributed these kinds of reforms to the Sunstein school. See Fitts, *supra* note 79, at 1587.

92. See Fitts, *supra* note 79, at 1604. (“Since parties must attract diffuse majority support for controlling Congress, they serve to generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually—or organizationally—powerful.”) It is interesting to note that the reforms suggested by political scientists, according at least to Fitts, are in a great deal of tension with the reforms put forth by the civic virtue camp led by Sunstein. Both sets of reforms, however, should be explored before we give up on the Senate.