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What Schoolhouse Rock Forgot: The SCOTUS Confirmation Process and the Court's Diffuse Support

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Anyone can be a Supreme Court Justice. Surprisingly, the men who founded the United States of America did not present explicit requirements for age, citizenship, education, or job experience for the job of Supreme Court justices[1]. This fact would prompt an examination of several distinct phenomena related to a central inquiry: how is it that any person can serve on the most important court in the United States? While it is a challenging question, the following examination will cover three key themes of a possible answer. First, it will examine how the nature of the Court's authority empowers the justices who decide cases. Second, the research will present relevant historical information about the confirmation of Supreme Court justices to contextualize itself better. Third, the confirmation process and its criticisms will be presented and evaluated to recognize how nominees become justices on the nation's highest court. By combing these themes together, readers will see that the relationship between the Court and its justices is more complex and more revealing than previously thought.

The three branches of government in the United States of America are each uniquely positioned to exercise their constitutional powers for their citizens. The Supreme Court, in particular, wields authority over some of the nation's most pressing legal concern. This application of power is premised on the assumption that the Court's decisions will produce better and fairer results than would occur otherwise[2]. While public support for the Court has remained steady for the last twenty years, many of us can feel anxious about its authority[3]. The term authority in a discussion about the Court's legitimacy describes a decision-maker with the capacity to change a person's normative obligations[4]. There are many ways to address this anxiety. A legal analysis might conclude that concepts of fairness, sanction, or even equality govern the authority of the law[5]. However, an analysis of the foundational assumptions supporting the Court's authority in political theory reveals that the authority of the Court is accepted because most Americans feel

obliged to support the Constitution and the American Legal System itself[6]. The Court exerts a type of moral authority such that the majority of Americans believe that they should follow the law as interpreted by the justices. This idea of moral authority is crucial here because the Court looks at cases both backward and forward. The justices must interpret what prior authorities have decided and make decisions that must be adhered to in a moral and legal sense by the citizens of the United States[7]. By claiming to make the best judgments morally and practically available, the Court speaks as one voice stating that its decisions are morally binding if not morally correct[8].

Maintaining this moral legitimacy is crucial to the survival of the Supreme Court and the authority of its justices. While diffuse support for the Court has remained relatively constant over the past twenty years, it is essential to acknowledge that the Court's authority becomes more challenging to respect when people do not agree with a decided result. Constitutional law scholar Richard H. Fallon Jr addresses this concern saying,

> " We need to realize that moral legitimacy can exist along a spectrum. Our concern involves a standard with respect to which we can – with ideals in view- make appraisals of more or less. We should also remember that legitimacy is a different standard from correctness. Decisions can be legitimate though mistaken. Finally, we need to recall that appraisals of judicial legitimacy in the Supreme Court can have multiple components."

In his book, Fallon reminds readers that the question of legitimacy is a complex one. The judgments of the Court can be morally challenging insofar as the concept of right and wrong is not always distinct in the decision's outcome. The moral legitimacy upon which the justices rely is subject to many perspectives and based upon principles reasonably acceptable to all. Striking that balance and maintaining that stability is therefore crucial for the justices of the Supreme Court.

After exploring where judicial legitimacy comes from and how the justices use it, one can understand that the justices make their decisions with the power to influence the lives of others in significant ways. This understanding has not been forgotten during confirmations of nominees, yet, Senators' attitudes towards the confirmation process have changed since the country began. Reflecting on the rise of a legal philosophy known as formalism in the 1870s, early Senators accepted the idea that judges were supposed to serve as neutral third-party arbiters whose rulings occurred from a mechanistic style of reasoning. This view, while not eliminating political evaluations of nominees, reduced their frequency significantly[9]. The result was an unprecedented period of cooperation, with only one rejection out of forty-six confirmations between 1894 and 1968[10]. During this period, the Senate viewed political interference in the confirmation process as scornful, preferring to view judicial confirmations as welcome expressions of non-partisanship[11].

This view of judicial nominations began to change in the 1950s following the Supreme Court's decision in Brown v. Board of Education. Previous to the Brown ruling, Supreme Court nominees rarely gave testimony. After Brown, however, every nominee testified before the Senate Judiciary Committee and was asked questions by conservative Southern Democrats about constitutional interpretation and rights-based judicial philosophy[12]. In addition to these developments came Reagan-era efforts to roll back New Deal regulatory powers and liberal holdings from the justiceships of Chief Justice Earl Warren and Chief Justice Warren Burger[13]. These developments also coincided with coexisting developments of increased partisanship along liberal/conservative lines and increased individualism among Senators. These changes increased the factionalism theretofore unseen in the process of judicial confirmations, and as they evolved,

a significant decline in constitutional consensus with a predominant focus of ideology in the confirmation politics followed [14].

As a brief review of the history of confirmation politics demonstrates, the nature of the confirmation process fundamentally shifted from the mechanistic rubber stamp approach of the late 1870s to the more ideological approach of the 1970s. Legal scholars have shown that the nature of confirmation politics emerges from realizations that the Court influences public policy and that a nominee's preferences influence their views on power allocation and policy[15]. Two schools of thought have resulted from this realization, each identifying what they see as issues in the confirmation process in its current form: the legalist school and the politics school.

The legalist school advances criticisms of the judicial process that seek a return to the period of harmony which existed in the first half of the twentieth century. They advocate for a greater emphasis on the justice's professional credentials, the exclusion of outside interest groups, less examination of judicial ideology from a politico constitutional perspective, and decreased media coverage of the confirmations. By encouraging these solutions, the legalists appear to scorn most outside influence on the confirmation process as detrimental to its legitimacy. They desire a removal of politics from the process and characterize the conflict as harmful[16]. Unfortunately, these criticisms and the solutions that accompany them seem to lack the foresight that any changes in the process would require. It remains to be seen if it is possible to eliminate conflict by eliminating media access to government proceedings and excluding outside interest groups from participation in judicial confirmation. Further, as political scientists, George Watson and John Stookey put it, "In the midst of fundamental disagreements over the direction the nation should go, this democratic system struggles to find a compromise that can permit the nation to move forward in a way that is at least tolerable to most if not exactly desirable. Public debate becomes

more critical in order to find the most acceptable solution for the situation at hand[17].” Additionally, there is nothing in the Constitution to suggest that the Supreme Court is anything less than a political body. By arguing that the Senate should engage in less ideological examination of nominees, the legalist school misunderstands the role of the Senate in the confirmation process. By ignoring the role ideology plays on the court, Senators would be ill-prepared to learn what is necessary before making an informed decision on the Court.

The politics school argues that a more active role for the Senate is the solution to the issues in the confirmation process. Their concern is that Senators are frequently unable to give informed consent due to their inability to extract the candidate's views on legal issues. Further, the politics school emphasizes the President’s ability to choose any nominee, giving him an influence on constitutional law matched only by the Court itself. The politics school argues for a more robust check on the power of the executive branch. The need for more vigorous checks and balances is essential because the President can control the most critical part of the process himself – choosing a qualified nominee. The solutions the politics school presents are more institutional. Suggested reforms include the use of special counsel during nominations, the use of a two-thirds vote requirement for a nominee’s confirmation, and the requirement of nominees to give more candid testimony during confirmation[18]. Each of these solutions demonstrates that the politics school believes that change for the confirmation process can come from within the process itself.

The issue with many of these solutions, however, is that they are difficult to implement. The solutions lack the appropriate incentives for Senatorial acceptance. For example, using a special counsel would take away air-time for Senators on the judiciary committee and eliminate their opportunity to let their voices be heard. Further, the lawyers nominated by the President to serve on the Court are capable of circumventing attempts to ascertain politico-legal beliefs. What

these solutions might advocate for correctly is a more significant burden of proof on the president. Creating a more substantial legislative check on the executive might encourage the kind of debate the Framers envisioned between the branches of government. The result could be a more robust confirmation process that allows senators to give informed consent for judicial nominees.

If any person can be a Supreme Court Justice, any person would have a lot to consider before making a choice to serve on the nation's highest court. In fact, it may well be that even if one's dream is not to serve on the Supreme Court, they might still want to consider the position of its justices. With no indications that the country is becoming less polarized, the public can look to the Supreme Court for changes of public policy in the political landscape. However, with neither the power of the sword nor the purse, the Supreme Court is empowered to do little on its own besides rendering decisions [19]. The survival of the Court may ultimately rest, therefore, on the moral authority of the Court, a complicated history between the Senate and the Court, and a confirmation process that is far from perfect. Knowing these elements in any discussion of the Court can empower more thoughtful considerations of what is sure to be a dynamic landscape of political thought in the coming decades.

[1] https://www.thoughtco.com/what-are-the-requirements-to-become-a-supreme-court-justice-104780
[2] Fallon, Richard H. LAW AND LEGITIMACY IN THE SUPREME COURT. Harvard University Press, 2018. pp. 10
[3] https://news.gallup.comAt/poll/4732/Supreme-Court.aspx
[4] H.L.A. Hart "Commands and Authoritative Legal Reasons," in *Essays on Bentham: Studies in Jurisprudence and Political Theory*, 243
[5] M.D.A. Freeman, Lloyd's Introduction to Jurisprudence. Sweet and Maxwell, London, 9th ed., xlii + 1526 pp.
[6] Fallon., 9
[7] Ibid., 10
[8] Gardner, John, "How Law Claims, What Law Claims" *Law as a Leap of Faith* 125, 139-145 (2012).
[9] Richard D. Friedman, "Transformation in Senate Response," 42-48
[10] Lee Epstein et al. Supreme Court Compendium, table 4-13, 322-28, at 326
[11] Friedman, 42-48
[12] D. Grier Stephenson Jr., *Campaigns and the Court*, 172
[13] Herman Schwartz, *Packing the Courts*, 7, 39-40, 196-198
[14] Comiskey, Charles M. Seeking Justices: The Judging of Supreme Court Nominees. University Press of Kansas, 8 (2004).
[15] Segal and Spaeth, *Attitudinal Model*, 300
[16] Examples of Legalist school literature include Richard D. Friedman, "Tribal Myths"; Max Lerner, "Has Senate Gone Too Far?"; Norman Vierra and Leonard V. Gross, "Appointments Clause"; Eugene W. Hichkok Jr., "Senate"; Bruce Fein, "Court of Mediocrity"; and the remarks of Michael McConnell in Stephanie B. Goldberg, "What's the Alternative?"
[17] George L. Watson and John A. Stookey, *Shaping America*, 220-221
[18] Examples of Politics school literature includes Elena Kagan, "Confirmation Messes"; David Strauss and Cass R. Sunstein, " The Senate on the Constitution"; Laurence H. Tribe, *God Save This Honorable Court;* Nina Totenberg, "Confirmation Process"; Grover Rees III, "Questions for Supreme Court Nominees"; Stuart Taylor Jr., "Senate Should Claim Full Parity"; Ginsburg Report, 40; and, concerning some issues, Gary J. Simson, "Thomas's Supreme Unfitfulness."
[19] Hamilton, Alexander *Federalist No. 78*