

The Golden or Bronze Age of Judicial Selection?

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I. INTRODUCTION

In *The Politics of Early Justice*, Michael Gerhardt and Michael Stein convincingly undercut the conventional wisdom that there was a “golden age” of federal judicial selection in the early 19th century: an era of merit-based, non-partisan nominations and deferential confirmations by the Senate.¹ Their research is laudably thorough and groundbreaking, and it will serve as an important starting point for scholars and policymakers studying the history of federal judicial selection. Now that Gerhardt and Stein have uncovered and organized the comprehensive record of early federal judicial appointments, the question is how to interpret this wealth of new information.

This Essay questions Gerhardt and Stein’s interpretation of the golden age and whether there were meaningful differences in the politics of the nomination and confirmation processes of the antebellum era as compared with the contemporary era. In Part II, I suggest that one hallmark of the contemporary judicial selection process is the intense inquiry into the nominees’ personal lives and ethics (whether through confirmation hearings or the media). Gerhardt and Stein do not find much evidence of these practices in the antebellum era, even though historians have noted the nastiness of that era’s presidential election campaigns. Thus, some aspects of the imagined golden era may be true, while others may not.

Then, the Essay highlights a few of Gerhardt and Stein’s most interesting findings of discontinuity between the antebellum and contemporary eras. While acknowledging the obvious discontinuities, Gerhardt and Stein emphasize the “patterns of practice that are similar to contemporary developments”² and argue that their research shows “surprisingly relative equivalence between the antebellum and contemporary periods.”³ Part III discusses how these findings further undercut the notion that a true golden age existed in judicial selection. This Essay draws from that aspect of their

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1. Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 552 (2014).

2. *Id.* at 554.

3. *Id.* at 604.

research, concluding that the golden age of modern political commentators' imagination was more a judicial "bronze age" before the transportation and communication revolutions.

II. GOLDEN AGE OR NOT? THE DIFFERENCE BETWEEN ANTEBELLUM AND CONTEMPORARY ERA JUDICIAL SELECTION

Before turning to the substantive differences between antebellum and contemporary judicial selection and nomination processes, I first note that there is little support for their claim that legal scholars or historians have marked off a golden age of non-political, merit-based federal judicial selection. I believe they are right that there is a widespread public assumption that judicial appointments were less political earlier in American history, but they do not establish that legal scholars have been propagating the view that antebellum judicial selection was non-political or a "golden era." The authors cite Stephen Carter's *The Confirmation Mess*⁴ and Richard Davis's *Electing Justice*,⁵ but both books chiefly focus on diagnosing and solving present-day problems, not describing the history of federal judicial selection.⁶ The cited portions of Davis's book do not discuss the antebellum years in any depth, nor argue that it was a non-political era. Davis contends simply that federal judicial selection has been more intensely politicized since the 1960s.⁷ Carter also says little about the antebellum era, but rather comments on the easy confirmations of the postbellum era's Supreme Court nominees.⁸ Stein and Gerhardt also cite Benjamin Wittes's *The Confirmation Wars*, but Wittes focuses on the changes over the 20th century.⁹

The most important substantive difference between the antebellum and contemporary judicial selection periods is that the former was more explicitly political, which is a notion explored by historian David Greenberg. Stein and Gerhardt quote Greenberg as an example of a scholar praising the earlier era, but Greenberg's point was making an argument much more similar to their own thesis.¹⁰ Greenberg suggested the antebellum era was commendable for

4. *Id.* at 552 n.1; *see also* STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 3–22 (1994).

5. *Id.* at 552 n.1; *see also* RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 3–13 (2005).

6. *See* Carter, *supra* note 4; Davis, *supra* note 5.

7. DAVIS, *supra* note 5, at 10.

8. CARTER, *supra* note 4, at 14.

9. Gerhardt & Stein, *supra* note 1, at 554 n.4; *see also* BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 37–85 (2006). Wittes actually uses the phrase "Golden Age," but in a very different tone, and in reference to the changes from 1930 to the present: "One does not have to buy naively into the notion of a Golden Age to acknowledge how profoundly the current situation differs from the norms of the past." *Id.* at 42. He contrasts the length and tone of hearings from 1930–40s (the supposed "Golden Age") to the 1950–60s and then the 1970s and after. *Id.*

10. *See* David Greenberg, Editorial, *History Betrays GOP Claims in Judicial Battle*, COLUMBUS

being *more explicitly political*: “Unlike in the 19th century, when Senators often admitted to political motives when they opposed a nominee, senators since 1968 typically alight on a kind of cover story, such as Fortas’s outside income, William Rehnquist’s alleged voter intimidation in the 1960s or Clarence Thomas’s reported sexual harassment.”¹¹ Gerhardt and Stein actually bolster Greenberg’s claims—they, too, find more explicitly political, and even policy-based fights, in the antebellum era, but they note no evidence of personal or ethical inquiries, other than an occasional complaint about nepotism or cronyism on the part of the President in choosing the nominee.¹²

Greenberg marks one turning point towards the personal attack mode of judicial nominees with Abe Fortas.¹³ However, an earlier turning point in the tenor of the judicial selection process was the advent and rise of open confirmation hearings occurring in the 1910s and 1920s. The first open confirmation hearing in the Senate was in 1916 for Louis Brandeis’s nomination. One of the definitive scholars of Supreme Court nominations, Henry J. Abraham, sums up the nomination: “The Brandeis confirmation battle still ranks as the most bitter and most intensely fought in the history of the Court, and the delay of more than four months after [President Woodrow] Wilson submitted Brandeis’s name to the Senate . . . is still a record.”¹⁴ Wittes, as well, feels “compelled to conclude that Bork and Thomas had it easy by comparison” and notes that the hearings were “laced with anti-Semitism.”¹⁵ The Senate used the first confirmation hearings in history to parade a line of witnesses who made unsubstantiated insinuations about his character. Nevertheless, Brandeis was confirmed by a vote of 47–22, “with twenty-seven senators not voting.”¹⁶

Wittes and John Anthony Maltese suggest that an additional factor leading to the first open hearings was the 1913 ratification of the Seventeenth Amendment, which required that Senators be elected popularly, rather than appointed by state legislatures.¹⁷ Maltese argues:

With an eye to popular accountability, the Senate voted to open its proceedings on the controversial nominee. Opponents called witnesses whom they hoped would raise doubts about Brandeis’s character and judicial

DISPATCH, May 7, 2005, at 6A.

11. Gerhardt & Stein, *supra* note 1, at 604 n.371 (citing Greenberg, *supra* note 10).

12. *See id.* at 564–604.

13. Greenberg, *supra* note 10.

14. WITTES, *supra* note 9, at 45 (alteration in original) (quoting HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 135 (2007) (internal quotation marks omitted)).

15. *Id.*

16. *Id.* at 47.

17. JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 37 (1995); WITTES, *supra* note 9, at 11–12.

temperament. But Brandeis had widespread popular support, and many senators realized that a vote against Brandeis might hurt them at the polls.¹⁸

Wittes identifies this nomination as a break from the past, illustrating the impact of the Seventeenth Amendment: “While interest groups had played a role in prior nominations, the Brandeis nomination marked a significant procedural step toward the modern system: Popularly elected senators had begun investigating nominees with one eye on their constituents.”¹⁹

Another turning point between the antebellum and contemporary periods occurred in 1925, when Harlan F. Stone was the first nominee to testify in person at his confirmation hearing. Some Senators suggested that Stone was too close to Wall Street and corporate interests, and Stone offered to answer questions before the Judiciary Committee to address those concerns. Nevertheless, the Senate confirmed Stone easily with a 71–6 vote.²⁰ The trend continued during the Great Depression as Hoover’s nominees came under attack. Charles Evans Hughes was attacked by progressives for being too pro-business, and opposed by Southern conservatives for being “too city-bred, too record-prone to support national versus states’ rights when the chips were down.”²¹ Hughes was eventually confirmed as well, but by a closer 52–26 vote.²²

Hoover’s subsequent nominee, John J. Parker, was the first to be defeated in this era. Parker had provoked liberal opposition on two fronts. First, he had upheld an injunction against mine workers who were trying to unionize despite a “yellow dog” contract (a labor contract that prohibited union membership).²³ The American Federation of Labor mobilized to oppose him, and this issue touched a nerve during the depths of the Great Depression. Parker explained, “I followed the law laid down by the Supreme Court,” but this defense offered little solace.²⁴ Second, Parker had campaigned against African American political participation and voting rights when he had run for Governor of North Carolina:

The negro as a class does not desire to enter politics. The Republican Party of North Carolina does not desire him to do so The participation of the negro in politics is a source of evil and danger

18. MALTESE, *supra* note 17, at 52.

19. WITTES, *supra* note 9, at 48.

20. Theodore M. Vestal, *Harlan Fiske Stone: New Deal Prudence*, in 35 LEADERS OF THE PACK: POLLS & CASE STUDIES OF GREAT SUPREME COURT JUSTICES 190, 193 (William D. Pederson & Norman W. Provizer eds., 2003).

21. WITTES, *supra* note 9, at 48–49 (quoting ABRAHAM, *supra* note 14, at 150–51 (internal quotation marks omitted)).

22. *Id.* at 50.

23. *Id.* at 51.

24. *Id.* (citation and internal quotation marks omitted).

to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina.²⁵

The NAACP united with labor groups to oppose Parker's nomination, and they used the confirmation hearings effectively. His nomination was defeated 41–39.²⁶ Later, Parker turned out to be a pro-civil rights judge on the lower federal courts.²⁷

The illustration of Abe Fortas's nomination process offers the final turning point between the antebellum and contemporary periods, which is also one of the most striking differences between the two periods today—the outright personal attacks on judicial nominees. The rise of the confirmation hearings and the public media campaign in the early 20th century eventually evolved into the modern personal investigation. In 1968, Republicans used Abe Fortas's payments for speaking engagements from private businessmen to lead him to withdraw his nomination for Chief Justice, when their opposition was truly based on his liberal voting record.²⁸ Later, Democrats turned the tables on Nixon's nominees, using the hearings process and background investigation to defeat Clement Haynsworth (partly on ethics grounds) and G. Harrold Carswell (more on political grounds for past statements about women and race).²⁹

Democrats argued that Haynsworth had dragged his heels in implementing desegregation, but they also raised questions about his failure to recuse himself from a case in which he had a financial interest, and his purchase of stock in a company with pending litigation before him.³⁰ Haynsworth was the first Supreme Court nominee to be rejected by a Senate vote since Parker. Carswell's nomination, though, turned more on his qualifications. Nixon's main lobbyist conceded that Senators “think [Carswell]'s a boob, a dummy. And what counter is there to that? He is.”³¹ Senator Roman Hruska famously defended Carswell: “[E]ven if he were mediocre, there are lots of mediocre judges and people and lawyers. They're entitled to a little representation, aren't they? We can't have all Brandises, Frankfurters, and Cardozos and stuff like that there.”³² Interestingly, about

25. *Id.* at 52 (citation omitted).

26. Rona Hirsch Mendelsohn, *Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker*, 14 *HOW. L.J.* 105, 137 (1968).

27. WITTES, *supra* note 9, at 52–53.

28. *Id.* at 54–55.

29. *Id.* at 55–57.

30. Stephen L. Wasby & Joel B. Grossman, *Judge Clement F. Haynsworth, Jr.: New Perspective on His Nomination to the Supreme Court*, 1990 *DUKE L.J.* 74, 77.

31. Jonathan Chait, *How the GOP Destroyed its Moderates*, *NEW REPUBLIC* (Oct. 5, 2012), <http://www.newrepublic.com/article/books-and-arts/magazine/108150/the-revolution-eats-its-own>.

32. Bruce H. Kalk, *The Carswell Affair: The Politics of a Supreme Court Nomination in the Nixon Administration*, 42 *AM. J. LEGAL HIST.* 261, 261 (1998) (citation omitted).

five decades after Brandeis's nomination changed the course of judicial confirmations due to anti-Semitism, a conservative, non-Jewish, Midwestern Senator was citing three Jewish Justices as the best legal minds—while rejecting merit as a criterion for judicial selection!

Attacks centered on ethics in the late 1960s and 1970s, but grew more personal in the 1980s and 1990s. In an era of confusion or apathy about policy and legal issues, personal and ethical questions proved a more effective way to capture public attention and influence public opinion. The modern media loves a story about sex, race, and corruption, but it has less interest in selling stories about a nominee's legal principles. The intensely personal confirmation process that has been with us for more than a century, since Brandeis's nomination, has grown even more intense in recent years.

Gerhardt and Stein's findings do not show many signs of these tactics. And this is not because the politics of the antebellum era were high-minded, principled, and focused on the big issues. The Early Republic was not a gentle era of campaigning. Partisan newspapers trafficked rumors about infidelity, bastardy, and interracial sex, as exemplified by the presidential elections of 1800, 1828, and 1840. During the 1800 election, Federalists alleged that Jefferson had a sexual relationship with his slaves (this turned out to be true).³³ They also tarred him as “the son of a half-breed Indian squaw, sired by a Virginia mulatto father.”³⁴ He was portrayed as an atheist, who caused “the Bible [to be] cast into a bonfire . . . our wives and daughters the victims of legal prostitution.”³⁵ Meanwhile, Republicans attacked Adams as a “hideous hermaphroditical character which has neither the force and firmness of a man, nor the gentleness and sensibility of a woman.”³⁶

The election of 1828 was also vicious. Andrew Jackson's partisans called John Quincy Adams a pimp.³⁷ One newspaper claimed, “General Jackson's mother was a COMMON PROSTITUTE, brought to this country by the British soldiers. She afterward married a MULATO [sic] MAN, with whom she had several children, of which GENERAL JACKSON IS ONE!!!”³⁸ Adams's supporters called Jackson “a murderer, his mother a prostitute, and his wife

33. See generally ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997) (examining the relationship between Jefferson and Hemings).

34. Peter H. Schuck, Op-Ed., *Attack Ads Have Their Plus Sides*, WASH. POST (Aug. 26, 2014), http://www.washingtonpost.com/opinions/attack-ads-have-their-plus-sides/2014/08/26/c1150cd8-27eb-11e4-958c-268a320a60ce_story.html.

35. JODY C. BAUMGARTNER & PETER L. FRANCIA, CONVENTIONAL WISDOM AND AMERICAN ELECTIONS: EXPLODING MYTHS, EXPLORING MISCONCEPTIONS 86 (2010) (citing KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY 31 (1992)).

36. DAVID MCCOLLOUGH, JOHN ADAMS 537 (2001).

37. LYNN HUDSON PARSONS, THE BIRTH OF MODERN POLITICS: ANDREW JACKSON, JOHN QUINCY ADAMS, AND THE ELECTION OF 1828 144, 150–52 (2009).

38. BAUMGARTNER & FRANCIA, *supra* note 35, at 87 (citing PAUL F. BOLLER, JR., PRESIDENTIAL CAMPAIGNS: FROM GEORGE WASHINGTON TO GEORGE W. BUSH 46 (2004)).

an adulteress.”³⁹ Jackson and his wife Rachel had mistakenly thought that Virginia courts had granted her a divorce in 1791, and they had gotten married before the divorce was finalized. Whigs exploited this mistake, labeling them both adulterers and bigamists. Rachel became more and more depressed, and died a few months after the election. Jackson blamed the Whig campaign against her.⁴⁰

The 1840 campaign between Van Buren and William Henry Harrison was infamous, as well. Democrats portrayed Harrison as an alcoholic, while Whigs alleged that Van Buren’s vice president Richard Johnson had a relationship with an African American woman, which led to him being dropped from the ticket.

However, Gerhardt and Stein did not find the same kind of ruthless personal attacks in the judicial selection process, and there are several possible explanations for this result. While there were certainly newspapers available if partisans wanted to make those attacks, perhaps those attacks were effective only in elections. It may simply have taken too long for newspapers to shape public opinion during the appointment process for them to serve as an effective tool in that context. Moreover, federal judicial appointments were not as significant to the parties or to the public before the rise of judicial review and federal power. And perhaps without confirmation hearings, there was a less focused forum for these kinds of investigations and dramatic direct questioning. Further, it’s possible that the antebellum political parties and the partisan media had neither the resources nor the interest in attacking judicial nominees. Finally, maybe in the antebellum era, it was simply inappropriate to make such attacks on judicial appointees, to investigate the candidates’ personal lives and their professional practices.

Whatever the cause, there appears to be a major difference between antebellum federal judicial selection and contemporary judicial selection, and that difference casts a golden glow upon the past. Even if it was partisan and political, antebellum judicial politics was not personal, and there is nothing wrong with contemporary observers citing past American practice in critiques of the present. Instead of contrasting a golden age with our “political” age, we should contrast the explicitly political closed-door age with today’s personal media-frenzy age.

III. A BRONZE AGE OR A STONE AGE IN JUDICIAL SELECTION?

Gerhardt and Stein’s research highlighted some interesting findings of discontinuity between the antebellum and contemporary judicial selection eras. Most remarkably, they found that 21 nominees to the federal bench were confirmed by the Senate, but then declined the appointment anyway. This

39. Bob Schieffer, *Nasty Campaign Ads an American Tradition*, CBS NEWS (Aug. 19, 2012, 2:07 PM), <http://www.cbsnews.com/news/nasty-campaign-ads-an-american-tradition/>.

40. BAUMGARTNER & FRANCIA, *supra* note 35, at 87–88.

particular finding in itself underscores several problems of the supposed golden era of the federal judiciary: relatively low pay, low prestige, and relatively little power compared to the state bench. George Washington lamented that the judiciary's low status was a danger to the Republic.⁴¹ Moreover, the federal "bench" was a misnomer, because federal judges did not really have just one bench in one location. District judges had to travel extensively to hear cases, and Supreme Court Justices rode circuit far from Washington, D.C., in bumpy horse-drawn carriages through snow, rain, heat, or gloom of night.⁴² Essentially, members of the federal judiciary were like federal postal workers in black robes.

Those occupational hazards explain why a lawyer or state judge might decline an appointment. Gerhardt and Stein found that Presidents treated Senate confirmation as an extra boost to an offer of an appointment. Instead of the modern practice of Presidents asking enthusiastic potential nominees of their interest, vetting them, and then nominating them for Senate advice and consent, antebellum Presidents nominated potential candidates and the Senate confirmed before getting the nominee's consent! And a non-trivial number refused. All the way up to the 1840s, some lawyers were nominated without any notice, and they declined the nomination.⁴³

These antebellum period rejections—by the nominee, not by the Senate—were the result of the federal bench's relative lack of appeal, and also reflected the pre-modern state of American communication and transportation. Historians have identified a "communication revolution" and a "transportation revolution" between the 1820s and the Civil War.⁴⁴ Without a national railroad or telegraphs, it was difficult to communicate fast enough with potential nominees. Those challenges flipped the nomination process: candidates were confirmed before they even knew they were nominated. Perhaps Presidents knew that a lawyer would be more likely to accept a nomination if it already came with the confirmation. The antebellum federal judiciary could be called a pre-communication, pre-transportation, pre-modern judiciary. Maybe not a golden age, maybe not a stone age, but perhaps more of a bronze age. And that bronze age could be confused for gold when we contrast its open and honest partisan conflicts with our contemporary judicial politics of personal attacks masking those partisan conflicts.

41. See Gerhardt & Stein, *supra* note 1, at 567.

42. *Id.* at 570, 577, 615 (noting the candidates, including Thomas Bee, who rejected their nominations based on the bench's obligation to ride circuit).

43. *Id.* at 594–97 (indicating the candidates nominated without their knowledge).

44. See generally DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 (2009); BILL KOVARIK, REVOLUTIONS IN COMMUNICATION: MEDIA HISTORY FROM GUTENBERG TO THE DIGITAL AGE (2011); 4 GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION, 1815–1860 (1951).