THE NEUTRALITY THESIS AND THE ROTHSTEIN HEARING

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In 2006, Justice Marshall Rothstein became the first Supreme Court nominee required to answer questions before a committee in Parliament. Many Canadians expressed discomfort with the idea of U.S.-style "confirmation hearings" for potential Supreme Court judges. That discomfort stemmed, in large part, from a perception that such hearings would lead to unwarranted and unseemly intrusions into the lives of candidates. Following the hearing, a number of commentators, as well as the participants themselves, publicly opined that the hearing was a success precisely because it was conducted in a manner which did not politicize the judicial process. We should not agree too quickly. Both the pre-hearing criticisms and the post-hearing talk of success are grounded in the suspect premise that a judge's politics should be off-limits—that they are irrelevant, and that questions directed at the moral and political values of the judge are therefore unnecessary intrusions. Yet judges interpret legal texts and, though it may be true that judges can interpret the law without drawing upon their own political convictions, it is far from obvious. If they cannot, we should not be afraid to make the relevance of a judge's political views plain, and more openly use the appointments process to inquire into the particular approach that a nominee will use when interpreting the law.

This paper argues that, if we accept Ronald Dworkin's criticisms of the U.S. confirmation hearings for Justice Clarence Thomas, we should be concerned at the state of the questioning in the Rothstein hearing. Part I briefly considers the criticisms Dworkin has leveled at "the neutrality thesis" in the context of U.S. confirmation hearings. Parts II to IV examine the extent to which the Rothstein hearings implicitly reflect widespread acceptance of something like the neutrality thesis in Canada. Part II claims that the hearings were designed to test the character of the nominee—specifically, to determine whether Justice Rothstein would allow his personal political opinions to inform his interpretation of legal texts in an impermissible fashion. Part III argues that the hearings spectacularly failed to test his willingness to do so; that, although Justice Rothstein was asked questions that would, if answered, have given us great insights into his approach to legal decision-making, the committee permitted him to provide only superficial responses. Finally, Part IV suggests that the weakness of the appointments process reflects great uncertainty with respect to the extent to which judges should allow their decision-making to be influenced by their individual political convictions.

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PART I: DWORKIN AND THE NEUTRALITY THESIS

Many years ago, while discussing the ultimately successful nomination of Clarence Thomas to the United States Supreme Court, Ronald Dworkin attacked what he described as "the neutrality thesis."[1] According to that thesis, "a Supreme Court justice can reach a decision in a difficult constitutional case by some technical legal method that wholly insulates his decision from his own most basic convictions about political fairness and social justice."[2] It is because the neutrality thesis had such traction during the confirmation hearings of Clarence Thomas, David Souter, and Anthony Kennedy that they were able to avoid answering difficult questions about their political convictions.[3]

Dworkin did not, of course, suggest that judges are free to reach any decision they want in constitutional cases—no one would confuse his theory of law or adjudication with a crude form of American legal realism. As we all know, Dworkin claims that judicial decision-making in "hard cases" is constrained, as a matter of legal practice, by the principles in the legal system.[4] In discovering those principles, and in determining the respective weight they have, judges must interpret the body of rules that comprise the legal system, as seen in its best light.[5] Since reasonable people may disagree about what aims we have and ought to have as a political community, and about what constitutional arrangements we ought to make, it follows that there may be reasonable disagreements about what it means to see the legal system in its best light and, therefore, what is the correct interpretation of the body of rules it contains.[6] The political and constitutional philosophy of judges, then, influences the adjudication of hard cases.[7] Indeed, since Dworkin claims that the method by which judges decide hard cases is reinforced by legal practice, a judge whose adjudication of hard cases is not influenced by her political and constitutional values would necessarily be something of a "rogue judge".

In the end, this is why Dworkin regarded the neutrality thesis as abhorrent: "The thesis does not insist only that a justice can set aside his own party or sectional

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[1] See Ronald Dworkin, "The Thomas Nomination" in *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) 306 at 313 [*FL*].

[2] *Ibid.*

[3] *Ibid.* at 307.

[4] See Ronald Dworkin, "Model of Rules I" in *Taking Rights Seriously*, rev. ed. (Cambridge: Harvard University Press, 1978) [*TRS*].

[5] *Ibid.*

[6] Though, recently, Dworkin has gone to some lengths to show that the extent of genuine disagreement in the United States is not as great as frequently supposed: see *Is Democracy Possible Here?* (Princeton: Princeton University Press, 2006).

[7] On the distinction between political principle, which may properly be considered by judges deciding hard cases, and political policy, which may not, see Ronald Dworkin, "Political Judges and the Rule of Law" in *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 9.

allegiances, or his own self-interest, in reaching his decisions, as of course he can and must. It also insists that justices can reach decisions uninfluenced by their own convictions about fundamental issues of political and constitutional philosophy."[8] The neutrality thesis requires us to take seriously, as candidates for the bench, only those who have no political or constitutional philosophy, or who pretend that their philosophy will have no bearing on the way they resolve hard cases. But, if we accept Dworkin's claims as to how the legal community's archetype of the model judge (Hercules) goes about settling hard cases, such "neutral" judges are necessarily on the fringes of the legal community.[9] The neutrality thesis, far from entailing a rejection of judicial activism, involves a radical re-conceptualization of the judicial role.

We need not accept Dworkin's views about legal practice—whether or not we confine them to the American context—to think that the judicial appointments process can have an impact on how legal practice is perceived. If Dworkin is right, Justice Thomas cast himself (whether intentionally or not) as a deviant judge during the confirmation hearings—as what Becker would call an "outsider" vis-à-vis the legal community.[10] But whether or not his conduct was deviant, millions of Americans watching the hearings would surely have gotten the impression that the ability to completely suspend political judgments while hearing constitutional cases, or to refuse to make political judgments altogether, is a virtue prized in judges.

Nearly 20 years have passed since Justice Thomas's confirmation, and in that time it has become apparent that he holds many political convictions which do indeed affect his understanding of the *Constitution*. This is especially clear since the recent publication of his autobiography and the interviews he has given to publicize it.[11] His strong views on the unconstitutionality of affirmative action programs, for example, appear driven by a conviction that those programs undermine the dignity and worth of the people they are meant to help, by a rugged individualism that denies that individual human dignity can be advanced or preserved except through the hard work of the individual herself.[12] The mere fact that Justice Thomas has political views which influence his opinions does not (if Dworkin is right about legal practice) necessarily make him a "rogue judge". The confirmation process, though, by denying that Justice Thomas's political values could play any part in the determination of hard cases, foreclosed meaningful debate concerning how those values would or should influence his decisions (i.e. whether he would follow principle or engage in

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[8] *FL, supra* note 1 at 313.

[9] See *TRS, supra* note 4 at c. 4.

[10] Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: Free Press, 1963).

[11] See Clarence Thomas, *My Grandfather's Son: A Memoir* (New York: Harper, 2007). Notably, Justice Thomas gave a widely remarked-upon television interview on *60 Minutes*.

[12] Thus, compare passages from the Thomas autobiography, *ibid.* at (*inter alia*) 74-75, 86-87, and 99-100, with his concurring opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

brute partisanship).[13] It deprived the American public of the information they needed to determine whether Justice Thomas had the proper character for a high court judge.

PART II: THE CHARACTER OF JUDGES

On the first day of the hearings for Justice Rothstein, Peter Hogg made a number of remarks designed to "guide" the process.[14] He stated, "The purpose of this new process is to make appointments to the Court more open, and to promote public knowledge of the judges of the Court."[15] That comment, merely by suggesting that the public ought to want to learn more about individual judges, presupposes that we should seek out candidates for judicial office who have a particular character—that it takes a certain kind of person to occupy the role of the judge. To some extent, that is uncontroversial. When Professor Hogg provided his list of six qualities that the nominations committee should try to find in Justice Rothstein, most fit rather comfortably with our preconceptions about what a good judge "looks like":

1. He must be able to resolve difficult legal issues, not just by virtue of technical legal skills, but also with wisdom, fairness and compassion.

2. He must have the energy and discipline to diligently study the materials that are filed in every appeal.

3. He must be able to maintain an open mind on every appeal until he has read all the pertinent material and heard from counsel on both sides.

4. He must always treat the counsel and the litigants who appear before him with patience and courtesy.

5. He must be able to write opinions that are well written and well reasoned.

6. He must be able to work cooperatively with his eight colleagues to help produce agreement on unanimous or majority decisions, and to do his share of the writing.[16]

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[13] Interestingly, Dworkin has recently claimed that Justice Thomas is part of "an unbreakable phalanx bent on remaking constitutional law by overruling, most often by stealth, the central constitutional doctrines that generations of past justices, conservative as well as liberal, had constructed." See Ronald Dworkin, "The Supreme Court Phalanx" *New York Review of Books* (30 August 2007) at 92. He continued, "It would be a mistake to suppose that this right-wing phalanx is guided in its zeal by some very conservative judicial or political ideology of principle. It seems guided by no judicial or political principle at all, but only by partisan, cultural, and perhaps religious allegiance." These claims may or may not be true (though Dworkin presents a strong case). That is beside the point, which is that the confirmation process did nothing that could have prevented a rogue judge from being elevated to the bench. It was incapable of doing so because the process was tainted by a widely-accepted conception of judging as fundamentally apolitical.

[14] The remarks can be found in the Appendix of Peter W. Hogg, "Appointment of Justice Marshall Rothstein to the Supreme Court of Canada" (2006) 44 Osgoode Hall L.J. 527 [Hogg].

[15] *Ibid.* at 537.

[16] *Ibid.* at 538.

In much the same way as a good gardener must have a green thumb, a good carpenter must have a keen eye, and a good surgeon must have a steady hand, Professor Hogg claimed that a good judge must have (among others) the virtues of patience, courtesy, discipline, reason, diligence, and eloquence. To succeed well in the challenge of judging, he implied, a judge must be a certain kind of person and the nominations committee should attempt to ensure that Justice Rothstein is that kind of person.[17] This may be uncontroversial enough insofar as Professor Hogg appeals to a politically and morally thin conception of the sort of person the committee should seek out: people with wildly divergent political and moral opinions may nevertheless share the six qualities noted above. Many would find it unsettling, however, if one were to suggest that a judge should have a particular set of political and moral values. This is not just because a thick conception of the judicial character would seem to rule out cultural diversity within the judicial community. It is also, surely, because many think that a good judge does not decide cases on the basis of her own political convictions, or that good judges, in Professor Hogg's words (words frequently echoed by Justice Rothstein as he answered questions put to him during the parliamentary hearing), "decide cases by finding the facts that are relevant and applying the law to those facts."[18] That way of describing the judicial act gives the impression that judging is essentially mechanical—that good judges are simply technocrats whose political and moral sensibilities are irrelevant.

Yet Professor Hogg also suggested that judges should have certain moral virtues—i.e. the virtues of fairness and compassion—and that these are *judicial* virtues insofar as they are used "to resolve difficult legal issues."[19] The character traits of fairness and compassion, of course, are themselves exceedingly thin: "fairness" is not a freestanding moral and political test, but an empty vessel into which one can pour any political or moral test one chooses. [20] We should not, though, infer that the first point on Professor Hogg's checklist is altogether meaningless. Whatever moral baggage one brings to the word "fairness", it must contain *something*. As soon as we say that hard cases cannot be settled simply through the deployment of a legal technique, but must also be settled through some quality of fairness possessed by the judge, we seem committed to saying that the judge's political sensibilities matter to our assessment of her as a judge. The question is: to what *extent* do they matter? This is no arid academic question—it cuts to the heart of why there is greater demand for transparency and accountability in the judicial appointments process in the first place. Members of Parliament, as well as members of the wider community, are concerned at what they perceive as judicial activism or policy-making. The public hearings for Justice Rothstein were designed to review the extent to which he had what Prime Minister Harper described as a

[17] I deliberately use the language Ronald Dworkin employs in *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000) at ch. 6.

[18] Hogg, *supra* note 14 at 537.

[19] *Ibid.*

[20] See Bernard Williams, *Ethics and the Limits of Philosophy* (New York: Routledge, 2006).

"judicial temperament", i.e. an inclination to apply rather than invent the law.[21]

If the new appointments process was supposed to generate greater transparency and accountability, the public ought to have been able to scrutinize more than the nominee's work ethic and intelligence. (To a degree, the public are probably willing to take such qualities for granted in someone nominated to a high court post.) People want to know whether the nominee's political values will affect the decisions she makes and, if so, what values she possesses. Ultimately, the judicial appointments process deployed for Justice Rothstein yielded few insights into that question. That is, perhaps, unsurprising given the discomfort expressed by the legal profession at the idea that a judicial candidate should be required to answer questions about her political values. As Professor Hogg observed:

> The process is not without controversy. Everyone would agree in principle that important public decisions be open and public. But there are those—many of them in the legal profession—who fear that a parliamentary review of judicial appointments carries more risk than benefit. *The critics argue that an open process will tend to politicize the judiciary, and publicly embarrass the distinguished people who are nominated for appointment.*[22]

Justice Rothstein later indicated that he shared the concern that the nomination hearing had the potential to embarrass him.[23] The criticism Professor Hogg describes, of course, assumes that politics do not necessarily suffuse the judicial role, and that the public's discovery that judges have political and moral viewpoints of their own will tend to embarrass them. If Professor Hogg is correct in implying that judges must have some moral compass to inform their decision-making, though, there is nothing inherently embarrassing in revealing that a judge has one. It would only become embarrassing if, having exposed the nominee's politics for all to see, the candidate was unable to explain how the decision-making process minimized or negated their influence on the result she reached in actual cases. Reviewing the transcript of the hearing, one gets the impression that neither Justice Rothstein, nor those questioning him, felt confident saying that a good judge's political convictions could play any role whatsoever in the adjudicative process. This would explain why Justice Rothstein was never pushed to say anything about his own politics, and why he was never required to clarify his approach to "hard cases".

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[21] See Janice Tibbetts, "Manitoba Jurist Favoured for Top Court Nomination: Candidate to be Named Tomorrow" *National Post* (22 February 2006) A6.

[22] Hogg, *supra* note 14 at 537 [emphasis added].

[23] Parliament of Canada, *Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada* (27 February 2006), online: <http://www.justice.gc.ca/en/news/sp/2006/doc_31772_1.html> at 1430 [Rothstein Hearing]. ("The concern is that we could degenerate the process—perhaps not today, but at some point—into one that degrades or humiliates a judge, as has been seen sometimes elsewhere. I'm sensitive to that.")

PART III: AVOIDING POLITICAL QUESTIONS

A number of parliamentarians prefaced their questions for Justice Rothstein by observing that the process was designed to help Canadians get to know him as an individual, and to help them better understand the process of judging.[24] With respect to the first aim, the process was something of a success: those not already familiar with Justice Rothstein came away from the hearings with much more biographical information about him than they had before the hearings began. It is even fair to say that we know somewhat more about Justice Rothstein as a person—we now know (if there was ever any doubt) that he is (among other things) a hard-working, thoughtful, and collegial individual.

Notably, however, the process told us nothing about Justice Rothstein's political and moral values. He had an opportunity to say something about them on a number of occasions, but each time said little that was remotely revealing. When, for example, Réal Ménard asked Justice Rothstein whether the *British North America Act* represents "a pact between two nations" or "a British piece of legislation drafted and enacted by a dominion comprised of four equal provinces", he responded only that Canada is a "diverse country" that can "deal with the various strains that occur from time to time."[25] In other words, he avoided answering the question altogether. When asked whether the lives of some citizens would be improved if the *Canadian Human Rights Act* included "social circumstances" as an enumerated ground of discrimination, Justice Rothstein responded that it was for the legislature to decide whether the Act should be amended, but that the Court would address poverty issues as they arose. Both statements are, of course, true. They answer questions, though, that were never asked. Mr. Ménard asked for Justice Rothstein's opinions as an informed citizen; he did not ask whether the Supreme Court should read social circumstances into the *Canadian Human Rights Act* (as the Court read "sexual orientation" into the *Alberta Human Rights Act* in *Vriend*).[26] Even if that was the question Mr. Ménard meant to ask, it is not clear that Justice Rothstein satisfactorily answered it, since he did not explain how he could square his comments with *Vriend* or, alternatively, why *Vriend* was wrongly decided.

In fairness, Justice Rothstein did weigh in on two policy issues—supporting greater legal aid and opposing the presence of television cameras in the courtroom—taking both stances on the basis of how legal aid and a media presence in the courtroom affect the act of judging.[27] His position on cameras in the courtroom was plainly not driven by any strong conviction; he blithely accepted that, as a Supreme Court judge, he would be filmed in court, and did not appear particularly bothered by that fact. His position on legal aid was more forceful, but he accepted that legal aid coverage was a matter of policy best left to the legislature. He did not explain why

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[24] See e.g. Carole Freeman's remarks: "The purpose of this hearing is to give the public an opportunity to get to know you a little better." *Ibid.* at 1430.

[25] *Ibid.* at 1400.

[26] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[27] Rothstein Hearing, *supra* note 23 at 1534-5.

his political convictions about legal aid did not translate into the position that Canadians are entitled to a certain amount of legal aid coverage as a matter of law.[28]

These moments in the hearings pointed to a more glaring deficiency in the proceedings. Given that they were ostensibly designed, in part, to help Canadians learn more about the act of judging, there was a remarkable failure to push Justice Rothstein to say anything about how judges go about interpreting the broad, open-ended rules that typify not just the provisions in the *Charter* but many ordinary statutes.[29] Some of his interlocutors attempted to draw him out on that point. Joe Comartin, for example, asked a question that cut to the heart of the proceedings:

> In terms of making decisions that may not be in keeping with your personal position on an issue but are in keeping with *stare decisis*, do you have rules of thumb? Do you have techniques as to how you sort out what may be your own personal viewpoint, biases, or whatever, versus where the law says you should be going?[30]

This is, surely, what Canadians most want to know about judging: to what extent do one's personal opinions intrude upon the adjudicative process? And, again to be fair, Justice Rothstein actually seemed game to answer. He began:

> When you say "personal biases", I take it to mean that you wish you could come to a certain decision, but the law doesn't allow you to get there. . . . Sometimes that occurs in the trial court. Sometimes you'll see a very sympathetic situation and you'll find you really want to do something for the litigant, and you do it. Then the other party appeals, and the appeal court tells you that you were wrong. After that happens a few times, you tend to become more aware of and sensitive to the legal side of the issue, and you tend to have to follow the law. That's our system.[31]

This was certainly an intriguing comment about the trial courts. (One wonders if the Supreme Court will think about these remarks the next time it claims that there is no constitutional right to an appeal.)[32] But, at that moment, the Chair cut off Justice Rothstein mid-answer. We were, perhaps for that reason, deprived of a chance to hear how an *appellate judge* can clearly distinguish "the legal side of the issue" from her individual opinions concerning how that issue should be resolved.

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[28] This is not to say that Canadians are entitled to a certain amount of legal aid coverage, only to say that Justice Rothstein did not explain the discontinuity between his personal views and his legal opinions. See *R. v. Prosper*, [1994] 3 S.C.R. 236; *British Columbia (A.G.) v. Christie*, [2007] 1 S.C.R. 873.

[29] Rothstein Hearing, *supra* note 23. See the comments of the Chair at 1625.

[30] *Ibid.* at 1414.

[31] *Ibid.* at 1415.

[32] As it did, for example, in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at para. 136.

One can only speculate that we were deprived of such an opportunity by the Chair's intervention, because Justice Rothstein was given an opportunity later in the proceedings to develop his answer but did not do so. Diane Ablonczy asked whether Justice Rothstein thought that a judge should have the temperament to "apply [the law] in a way that uses common sense and discretion, but without being inventive."[33] The reply was not especially enlightening: "[Judges] should apply the law, they shouldn't depart from the law, they shouldn't be inventing their own laws, and they should use common sense and discretion. Those are all aspects of a judicial temperament that I think are appropriate."[34] To the layperson, this comment will seem impossibly cryptic. How and why should a judge use "common sense and discretion", if she should not "invent" the law? Why believe that judges are constrained at all in their decision-making if they think themselves free to refer to "common sense"—another empty concept—when deciding cases? There is room for skepticism. This is especially (though not exclusively) true when the Supreme Court is called upon to apply open-ended sections of the *Charter*.[35] Indeed, Professor Hogg suggested at one point in the hearings that a revamped appointments process was more appropriate in Canada than in other Commonwealth countries precisely because it has an entrenched bill of rights that empowers the Supreme Court to strike down legislation.[36] Justice Rothstein, by contrast, obliquely acknowledged that the temptation to impose one's personal viewpoint upon the rest of the country might be greater in *Charter* cases, but denied that the judicial role itself was different in *Charter* cases, as opposed to other kinds of cases:

> How does [the *Charter*] affect judicial philosophy? I think I have to say this. The judge is there to hear the facts, to try to understand and interpret the law, and to apply the law to the facts of the case, and if he or she is hearing a *Charter* case involving a challenge to legislation, it is the same process. So I think judges have to be disciplined to do just that: to look at the law, to look at the facts, and to apply them.

Earlier, he had remarked: "What I would say is this: when judges apply the *Charter*, the most important thing is that they conduct a thorough and rigorous analysis according to the principles that have been established over the last twenty years or so as to how to go about dealing with a *Charter* challenge."[37] He did not say how those principles were discovered (or created); nor did he acknowledge that the principles contained in Supreme Court precedents may be only slightly less open-ended than the sections of the *Charter* themselves.

The origin of principles outside the constitutional context emerged as an issue in a question by Daniel Petit, who referred to the Supreme Court's decisions in

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[33] Rothstein Hearing, *supra* note 23 at 1419.

[34] *Ibid.*

[35] See Jacob Ziegel, "A New Era in the Selection of Supreme Court Judges?" (2006) 44 Osgoode Hall L.J. 547 at 551.

[36] Rothstein Hearing, *supra* note 23 at 1405.

[37] *Ibid.* at 1420.

Labaye and *Kouri* and asked how and why the Court used a "community standard of tolerance" to decide them.[38] This was an excellent chance for Justice Rothstein to explain to ordinary Canadians how the Court approaches the interpretation of non-constitutional legal rules (like those found in the *Criminal Code*). Instead, the nominee simply corrected Mr. Petit, observing that the majority relied on a harm-based test, and not a tolerance-based test.[39] That is true, but it skirts the issue Petit tried to raise: where do these tests come from, and how do judges find them when they are not to be found in the express language of the statute? To the layperson, these tests may well appear to have been plucked from the ether, used to give effect to one or another political perspective. In a follow-up to Petit's question, Mr. Ménard expressed this very concern.[40] Replying to Mr. Ménard, Justice Rothstein stated:

> I'm not sure I would be comfortable thinking that judges should be advancing the law with a social agenda in mind. It seems to me that the social agenda is the agenda for Parliament, and where Parliament wants to advance the law in social terms, that's its job; that's your job. The court's job is really to take what you say about social issues, try to interpret it as best we can, and apply it to the facts. Where a social issue arises in a *Charter* context, we have to assess the law in terms of what the *Charter* requires, and then we do that.[41]

Again, there is nothing in this answer to alert ordinary Canadians to the manner by which judicial interpretation is constrained—whether adjudicating in a constitutional or non-constitutional case. (This is important when we consider that, in our culture, "interpret" can easily be regarded as a euphemism for "make up" or "invent".)

PART IV: NEUTRALITY, EH?

It is somewhat jarring that, when asked what Canadians might have learned from the process, Justice Rothstein speculated that, *if he was asked something about the nature of the work that judges do*, the public might learn something about adjudication.[42] That was a startling statement, since he was asked on several occasions about the method that judges employ when making legal decisions. Admittedly, the questions were often inelegantly phrased (and even confused). They were, however, asked. At one point, Justice Rothstein was even asked how legislators might go about drafting statutes more clearly—a delicate way of asking how judges come to understand that a statute means one thing rather than something

[38] *R. v. Labaye*, [2005] 3 S.C.R. 728; *R. v. Kouri*, [2005] 3 S.C.R. 789; Rothstein Hearing, *supra* note 23 at 1529-30.

[39] *Ibid.* at 1530.

[40] *Ibid.* at 1540.

[41] *Ibid.* at 1540.

[42] *Ibid.* at 1444.

else.[43] Shockingly (coming from a person who is a professional reader of texts), he responded by suggesting that legislators have a special expertise that judges lack insofar as the drafting of statutes are concerned.[44] That is particularly odd, given the significance Justice Rothstein placed on the text of statutes and constitutional provisions.[45]

In short, we came away from the Rothstein hearings with no more information about his political values or judicial philosophy than we accumulated about Clarence Thomas during his confirmation hearings in the United States. The proceedings were kinder, gentler, and more succinct, but they were just as (if not more) vacuous. We learned virtually nothing about Justice Rothstein's political convictions. To the average Canadian tuning into CPAC, this nominee to the Supreme Court of Canada might well have had none. Since he was not pushed to share them with us, we have no clear sense that he is self-aware enough to recognize them. This lack of disclosure, moreover, made it all but impossible to ask probing questions about how and the extent to which Justice Rothstein can interpret and apply the law in a way that conflicts with his political values. We were left with little more than vague assurances that he did not believe that judges should simply impose their politics upon the rest of Canada.

Lorne Neudorf has advanced a few theories to explain why the process was so anemic. First, the committee was convened too hastily to prepare probing questions for Justice Rothstein.[46] Second, the committee "lacked parliamentary privilege and remained legally exposed for defamatory comments or questions."[47] Third, Justice Rothstein was selected from a shortlist created by a non-partisan committee. His embarrassment would reflect badly upon both parties.[48] Finally, the committee could neither confirm nor reject Justice Rothstein's appointment, and so there was little incentive for the committee members to scrutinize him more closely.[49] In the future, Neudorf claims, these factors may not exist; the next Supreme Court nominee may be pressured to explain herself and her judicial philosophy in more depth.[50] He raises this point to argue that the process may compromise judicial independence.[51] Without addressing that claim, we might observe that the members of the committee were perfectly capable of formulating questions that cut to the issue of whether and

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[43] *Ibid.* at 1420.

[44] *Ibid.* at 1420.

[45] *Ibid.* See his own comments at 1515, and those of Mr. Ménard at 1540.

[46] Lorne B. Neudorf, "Independence and the Public Process: Evolution or Erosion?" (2007) 70 Sask. L. Rev. 53 at 87 [Neudorf].

[47] *Ibid.*

[48] *Ibid.* at 85-86.

[49] *Ibid.* at 86.

[50] See Hogg, *supra* note 14 at 531-32 ("It is true that in 2006 the stars were particularly well aligned for a peaceful hearing...").

[51] Neudorf, *supra* note 48 at 85-87.

how Justice Rothstein interprets legal texts.[52] They posed such questions several times. They simply chose not to require anything more than superficial answers. Furthermore, if we are to take seriously the expressed intention of a number of committee members to educate Canadians about the nature of judging, they had all the incentive they needed to inquire in more depth.

Neudorf's second and third points are the most telling, because they return us to the observation Professor Hogg made in his introductory remarks (i.e. that members of the legal profession feared the hearing could embarrass Justice Rothstein and politicize the judiciary). If the committee avoided raising the nominee's personal politics out of concern that doing so could defame the nominee or embarrass either political party (or both), the implication is that a good judge's political values are irrelevant—or relevant in only narrowly circumscribed (if poorly defined) ways. The fear of a defamation suit, in turn, would reflect the concern that, by asking difficult questions of a nominee, the committee might reveal (or imply) that her personal politics play a much more substantial role than they (or the public or both) think appropriate. And so the committee opted not to delve too deeply into the role of politics in adjudication.

By taking this approach, the committee quietly endorsed the neutrality thesis, acting as though a judge's political stances self-evidently have no bearing on adjudication, even in constitutional cases. Perhaps the neutrality thesis is correct. It has intuitive appeal for many politicians and legal professionals. We may, however, be inclined to think that a judge's political persuasion invariably plays some sort of role when she undertakes the interpretation of legal texts. If so, we will also be inclined to think—like Ronald Dworkin—that an appointments process is necessarily and deeply flawed insofar as it fails to scrutinize the way in which a particular candidate would rely upon her political convictions while discharging her judicial responsibilities. That kind of flawed process does not only fail as a vetting mechanism; if we believe that interpretation of rules devised through political machinery necessarily involves some appeal to the interpreter's own political sensibilities, we will also conclude that the Rothstein hearings positively misled Canadians about the nature of the judicial function.

CONCLUSION

Recalling the Rothstein hearings, Professor Hogg remarked: "[T]he hearing established that Canadian parliamentarians can conduct a civil hearing that poses no danger of politicizing the judiciary or of embarrassing the nominee."[53] He also suggested that the hearing had helped people learn more about how judges "try to reach decisions that are faithful to the law and to the facts", and that it would serve as "a useful antidote to the vague charges of judicial activism that float around after

[52] Hogg, *supra* note 14 at 532.

[53] *Ibid.* at 531.

unpopular decisions."[54] The first claim is, for what it is worth, correct. Until the legal profession comes to a firm view that judicial decisions can be reached without some recourse to personal politics, though, we should hesitate to say that judicial appointments hearings should avoid raising "political questions".

The second claim is, with respect, mysterious. Confirmation-style hearings *can* be educational: Dworkin, reflecting on the Bork hearings, believed that they effectively became a public referendum on a particular approach to constitutional interpretation.[55] They were instructive, though, because the candidate was required to reveal something about his method for resolving constitutional rights cases—i.e. his brand of originalism—and this gave the public an opportunity to think about how judges should decide politically charged cases. Justice Rothstein, by contrast, was not required to explain how he reaches one interpretation rather than another. The public learned that judges interpret legal texts, but they learned little or nothing about how interpretations can be determined by something other than the whims of individual judges. In the absence of more information on that point, charges of judicial activism will continue unabated.

[54] *Ibid.* at 533-34.

[55] See Dworkin, "What Bork's Defeat Meant" in *FL*, *supra* note 1 at 276.