Confirming Ideology:
The Ideological State Apparatus and "Anti-Ideology Topoi" in Supreme Court Confirmation Literature

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Scholars in fields as diverse as law, communication, and political science argue that the investigation of a Supreme Court nominee's "ideology" is detrimental to the Senate confirmation process and should be tempered, if not removed altogether from the process. We argue that this position is flawed for several reasons. We begin by forwarding a broader understanding of ideology, framing our analysis through the work of Althusser, Eagleton, Žižek, and others, concluding that ideology is a fundamental part of the confirmation process and cannot be eliminated—it can only be masked. In the process, we identify four main "anti-ideology" arguments in the literature: hearings should be objective, they should remain civil, they should focus on qualifications, and they should be productive moments of government accountability. We argue that such scholarly arguments are always-already themselves thoroughly ideological and suggest that these four arguments constitute topoi that might appear in defense of ideology wherever it is challenged.

T he Senate confirmation hearing of Neil Gorsuch—predictably—featured debate by senators and consternation in the media about the judge's conservative ideology, the impact it might have on future Supreme Court rulings, and whether it should even be a topic of consideration. Former Senator Al Franken asserted that the Committee on the Judiciary has "an obligation to fully examine [Gorsuch's] views to make sure they are known to the public" (C-SPAN, 2017). He further argued that because of the judge's conservative ideology, reproductive rights, voting rights, and LGBTQ+ rights will be in danger. Conversely, Senator Orrin Hatch focused on Gorsuch's qualifications and credentials, such as his American Bar Association rating and his "character, temperament, humility and open-mindedness," in the process accusing Democrats who raised questions

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about the political ideology of Gorsuch and its material impact on Americans of turning the process into "an election campaign for political office" (C-SPAN, 2017).

Scholars are similarly divided over the role that ideology and partisan politics should play in Supreme Court confirmations. Some have condemned the hearings for focusing too much on the politics and ideology of nominees, rather than on their judicial qualifications or other criteria (Carter, 1990; Epstein, Lindstädt, Segal, & Westerland, 2006; Nagel, 1990), while others have criticized them for not focusing on ideology *enough*: many scholars have argued that the political views of nominees should be an important consideration for the Senate as it weighs its advice and consent duty, and should be front and center in the process (Goldberg, 2004; Kahn, 1995; Ringhand, 2009; Tribe, 1985).

In this essay, we explore the role of ideology in Supreme Court confirmation hearings by demonstrating how scholarly arguments that recommend the removal of political ideology from the hearing process are always-already *themselves* thoroughly ideological. We thus hope to re-open a discussion of what precisely ideology *means* in this scholarly arena. Within the existing literature, scholarship on Supreme Court confirmation hearings tends to fall into one of two broad categories: one side arguing that ideology (here most often understood as "political position") is a necessary component of the process and should be discussed openly, and another arguing for the removal (or at least the "tempering") of ideology from the process. The latter category, which is the focus of our analysis in this essay, includes four "anti-ideological ideological arguments": (1) objectivity—hearings should be objective investigations, rather than partisan political events; (2) civility—harsh criticism of a nominee, his/her record, or any negative political ramifications amounts to incivility, and should therefore be restrained; (3) professional qualifications and common sense— hearings should focus on qualifications, integrity, work history, and so on; and (4) productivity—following from the first three arguments, hearings are mediated spectacles rather than productive exercises in examining legitimate qualifications

objectively, and the process should be reformed in order to alleviate associated ills. Particular authors may make more than one of these arguments. All of these stifle debate, and if strictly enacted, would mask the overwhelming influence of ideology in the confirmation process.

Each of these four arguments reflects a central concern: *what should the role of ideology be in the confirmation process?* Notably, this question implies that it is possible to avoid ideology in some meaningful and substantive way, as if swerving around a pothole or dodging a parked car in traffic. We argue that this is tantamount to forwarding yet another ideological position—only one that tends to go unnoticed as ideology. Without interrogating the ideology of nominees and the politics of both the Senate and the Court, ideological patterns are simply reproduced within these institutions.

We begin by discussing several significant strands in post-Marxist understandings of ideology, focusing specifically on Louis Althusser's (1971) influential notion of the Ideological State Apparatus (ISA) and the interpellating force of ideology, before turning our attention to more recent additions to the post-Marxist canon on ideology. We then review the literature on Supreme Court confirmation hearings, which is grounded largely in the political science and legal disciplines, concluding with the claim that the four common "anti-ideology" arguments constitute *topoi* that might appear in defense of ideology wherever it is challenged.

Post-Marxism, Althusser, and the Inevitability of Ideology

Ideology is an immensely complex and loaded term, one whose history dates back to Enlightenment-era thinkers as diverse as Antoine Destutt de Tracy (the coiner of "ideology" for whom the term meant little more than the "study of ideas") and, later, Marx and Engels, two towering figures who famously tied ideology to class consciousness and the economic relations within market capitalism (Freeden, 2003). Indeed, "ideology" encompasses such a vast range of

meanings, images, and connotations that it is "unworkably broad," in Eagleton's (1991/2007, p. 28) terms, and has been largely abandoned by those on both the political left and right as a term whose pejorative connotations far outweigh its usefulness. (This may help explain the many calls to "remove" ideology from the confirmation process, as though it could be jettisoned like so much useless terminological baggage.) The scholarly literature on confirmation hearings casts ideology in terms of specific beliefs and values, such as political positions and preferences, judicial philosophy, and party affiliation, but this approach barely scratches the surface of contemporary post-Marxist conceptions of the term. It is beyond the scope of this project to engage fully with the rich and complex history of ideology and ideology critique within critical theory, to say nothing of the rather casual ways the term is used by politicians, legal scholars, pundits, and the general public—though we do rehearse several of these uses of the term later in our analysis. In this respect, it is also worth noting that ideology shares some similarities with "rhetoric," itself a largely misused term in casual (i.e., non-scholarly) discussions.

Eagleton (1991/2007) outlines six definitions of ideology that offer a useful starting point for framing the vastly different meanings the term can take in a given context. They are, from the most general to the most precise, as follows: first, ideology can mean "the general material process of production of ideas, beliefs, and values in social life" (p. 28). Eagleton notes that this understanding of ideology is closest to our general understanding of "culture" in that it attempts to encompass virtually all facets of human life (p. 28). Second, Eagleton suggests that we can think of ideology as a "worldview," a kind of "collective symbolic self-expression" that manifests in all sorts of cultural practices and preferences from death and sickness to food and sport (p. 28). The third meaning of ideology has to do with decisions about which values to promote and legitimate within a given societal context—an understanding of ideology that gets us closest to what we may call "political" debate. As Eagleton writes, ideology in this definition can be

viewed as "a discursive field in which self-promoting social powers conflict and collide over questions central to the reproduction of social power as a whole" (p. 29). We will return to this third definition at length in the final section, since we are claiming that the majority of scholarship on the issue of ideology in Supreme Court confirmation hearings is "stuck," as it were, in this third definition of ideology.

A fourth definition builds on the previous one by confining ideological disagreement about social values and the best course of action to a dominant social power—the "ruling" class in a given society who achieve and retain power by rendering their subjects complicit in their own oppression (cf. Gramsci [1935/1971] on hegemony). Eagleton's fifth definition of ideology further specifies that the ruling classes achieve this social power through the deliberate distortion and dissimulation of the "real" material conditions of existence. The sixth and final definition of ideology retains the notion that ideology is false and deceptive, while laying blame not necessarily at the feet of a dominant or ruling class, but in the structure of society and economic relations as a whole—this is the celebrated understanding of "false consciousness" found in traditional Marxism.

Post-Marxist thinkers like Althusser (1971) and Žižek (1989/2009; 1994/2012) depart from this final notion of ideology in viewing it as constitutive of the real. As Žižek (1994/2012) writes, ideology in this view is "the elusive network of implicit, quasi-'spontaneous' presuppositions and attitudes that form an irreducible moment of the reproduction of 'non-ideological' (economic, legal, political, sexual ...) practices" (p. 15). In other words, for post-Marxists like Žižek (1989/2009) and Laclau and Mouffe (1985/2001), ideologies structure our sense of reality through discursive means, which explains their "elusive" nature: we don't usually get to "see" ideology at work because it is so thoroughly embedded in the very words, phrases, and sentences we use to piece together our sense of each other and the sheer contingency of the world we navigate. Of course, this

same feature is precisely what makes ideology work so well. It is, quite simply, "common sense."

Complicating the traditional Marxist view of ideology as a "false consciousness," Althusser (1971) provides a broader and more rigorous view of ideology as functioning behind, under, and through a complicated web of institutions that he famously calls Ideological State Apparatuses (ISAs). ISAs, which include such prosaic and familiar sites as schools, religious institutions, advertising, film, and the family unit, are vital for the reproduction of relations within society—specifically the relations that sustain capitalism, class structures, and "the existing relations of [material] production" (p. 165). Each ISA and the myriad "techniques and knowledges" (p. 132) that constitute it (e.g., the rules of morality, "know how," etiquette, common sense, codes of order, rituals, etc.) relate to and overlap with other ISAs to ultimately sustain and explain society as we understand and experience it. Althusser (1971) writes:

> To put this more scientifically, I shall say that the reproduction of labor power requires not only a reproduction of its skills, but also, at the same time, a reproduction of its submission to the rules of the established order. (p. 132)

Our preoccupation in this argument with Althusser's version of ideology is strategic.

We suggest that Althusser's arguments regarding ideology opened up the traditional Marxist-Enlightenment understanding of ideology as false consciousness—a "misrepresentation" of the way things really are—and paved the way for contemporary theorists of ideology from across the theoretical spectrum to explore the way ideology functions within and through specific institutions, as mentioned previously in this section. Contra the work of Foucault (1975/1995) on power/knowledge and its multitudinous networks of control, Žižek (1994/2012) points out the advantages offered by Althusser's conception of ideology as embedded in the mechanisms of the institutions that together make up the ISAs:

> from the very outset, [Althusser] conceives these micro-procedures as parts of the ISA; that is to say, as mechanisms which, in order to be operative, to "seize" the individual, always-already presuppose the massive presence of the state, the transferential relationship of the individual towards state power. (p. 13)

Religion, for instance, offers a nearly-endless array of codes, codicils, and rituals that structure and sustain various dominant modes of social and political life. On a more granular level, advertising and films suggest acceptable and unacceptable social roles for human actors to play in ways that are minute and multiple. Cultural ISAs like sports, social organizations, and even popular literature and the arts function to reproduce dominant or ruling ideologies, too, often by reinforcing class and social distinctions (e.g., low-income Southerners and NASCAR or wealthy Northeasterners and lacrosse) (Bourdieu, 1984/2001).

Ideology for Althusser (1971) functions not only through ISAs such as churches, the education system, the family, and—most importantly for the current essay—the legal and political ISAs, which include the political system and political parties, but it also sustains them. Members of society learn their "natural" roles and relations to each other via the ISAs and the process of interpellation, the mechanism by which individuals are "hailed" by the ISAs, thus recognizing themselves as subjects within the dominant ideology (pp. 172-173). Althusser's famous image is of the person on the street who turns around when s/he hears the police officer yell "Hey, you!" and thus becomes a subject recognizable to and within dominant ideology—and *language*. He also uses the familiar circumstance of answering a knock at the door and hearing "It's me!" from the other side to illustrate how ideology always-already functions within an overall economy of recognition [*reconnaissance*], what he elsewhere refers to as ideology's uncanny ability to produce ideological effects that escape our notice as ideological: "the 'obviousness' that you and I are subjects—and that that does not cause any problems—is an ideological effect, the elementary ideological effect" (Althusser, 1971, p. 172). Crucially, then, the relations expressed through interpellation appear normal and natural; indeed, as noted previously, ideology is most visible

and effective when it presents itself as neutral or even nonexistent, as "natural" as turning abruptly around when we hear a voice on the street or opening our front door when we hear "It's me!"

Althusser provides a specific example concerning schools, which he describes as the dominant ISA, which further illustrates how ideology functions. This example provides a parallel to how ideology functions in confirmation hearings—or at least, how it could function if scholars and other groups who want to reduce or eliminate ideology from the hearings had their way:

> The mechanisms which produce this vital result for the capitalist regime are naturally covered up and concealed by a universally reigning ideology of the School . . . : an ideology which represents the School as a neutral environment purged of ideology. (p. 156)

From Althusser's point of view, confirmation hearings are a site of class struggle. They are ideological micro-exercises performed in the Senate ISA in order to determine what the Supreme Court ISA will become and how it will rule on a myriad of issues.

The various arguments by scholars, senators, nominees and witnesses preferring the elimination or reduction of ideological debate serve to mask ideology—to conceal it through the false appearance of neutrality. Confirmation hearings, they argue, could and should be primarily, or even *solely* about qualifications, personal ethics, and judicial temperament, implying that ideology is a peripheral issue, or worse, that discussing ideology somehow corrupts the confirmation process. Potential rulings and the impact they can and do have on citizens' daily lives (for instance, through rulings that may affect their rights to free speech, their ability to vote without harassment, or a host of other practical matters) is removed from the debate.

Literature Review: The Case Against "Ideology"[2]

To be sure, there are quite a few scholars who argue for the inclusion of ideological discussion in confirmation hearings, such as Monaghan (1988), Ringhand (2009), and Totenberg (1988), all of whom argue that ideology should be front and center so that senators and the public can fully evaluate the type of justice a nominee would be. A significant group of scholars have found outcomes positively associated with the partisan, spectacular nature of the hearings, including Caldeira and Smith (1996), who argue that because the confirmation process has become more like a political campaign, citizens have become more involved and may actually exert some influence on the outcome (see also Gimpel & Wolpert, 1995; Kastellec, Lax, & Phillips, 2010; Overby, Henschen, Strauss, & Walsh, 1994; Overby, Henschen, Walsh, & Strauss, 1992).

Even so, calls to ameliorate partisanship and/or to diminish the examination of a nominee's judicial philosophy and its corresponding political ramifications are many. Given our understanding of ideology as outlined previously, we contend that these arguments against ideology *are themselves* ideological. Such scholarly arguments typically fall into one or more categories: they consist of calls for objectivity, civility, common sense, and productivity.

Objectivity vs. Partisanship

Several authors have pointed to an increase in the role of partisanship and judicial philosophy over time, including Epstein et al. (2006), who identify the beginnings of this trend in the appointments of the Warren Court in the 1950s (see also Paolino, 1995). Cameron, Kastellec, and Park (2013) trace increasing

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[2] As noted previously, the term "ideology" is used offhandedly by politicians, pundits, and the public to mean a variety of things. Similarly, it tends to be loosely defined—if at all— by scholars of law and political science as roughly synonymous with judicial philosophy or a set of political positions (conservative, liberal, etc.)—both of which have taken-for-granted meanings that are typically not elaborated upon. In this section of the essay, we necessarily use the term "ideology" in diverse ways as we review its many different uses in the extant literature.

contentiousness as far back as 1937, identifying increasing partisan polarization in the senate and the nomination of more ideologically extreme judges as two of the main culprits. Many have argued that the 1987 Robert Bork hearing was a watershed moment where ideology overtook issues of competence and integrity (Farganis & Wedeking, 2011; Howard, 2015), and as resembling "a political campaign" (Gimpel & Wolpert, 1996, p. 164; see also Davis, 2005; Guliuzza, Reagan, & Barrett, 1994; Howard, 2015).

Generally, such descriptions tend to condemn—sometimes implicitly, often overtly—the ideological or political bent of confirmation hearings, arguing that such emphasis is antithetical to the traditional description of the Supreme Court as objective and above political concerns (Baird & Gangl, 2006; Caldeira & Gibson, 1992; Gibson & Caldeira, 2009; Gibson, Caldeira, & Spence, 2003). Several scholars (Bartels & Johnston, 2011; Bybee, 2011; Caldeira & Smith, 1996; Sinozich, 2017) note that there is a schism in the public mind that leads to a legitimacy problem for the Court: those who view the Court as a political body prefer justices to be chosen on the basis of ideology, while those who view it as a non-partisan, non-ideological body find politically charged confirmation hearings to be damaging to the legitimacy of the Court. To maintain legitimacy, the argument goes, the Court must project an image of impartiality and adherence to legal principle above all else, and politically charged hearings damage this image.

Following this line of reasoning—when one characterizes the ideal role of the Court as impartial and apolitical—the partisan relationship of the president to the senate has a greater impact on the process than is desired. Unsurprisingly, several studies have found that the party of the nominating president and partisan makeup of the senate are closely related to successful confirmation (Gimpel & Wolpert, 1995; see also Goldman, 1991; Johnson & Roberts, 2004; Segal, Cameron & Cover, 1992; Strauss & Sunstein, 1992). Thus, political ideology is implied by the party affiliation of the president and is a major factor in deciding who is nominated and who ultimately gets confirmed. By creating a politically charged

process, some argue, this relationship results in a threat to judicial independence (Carter, 1990; Nagel, 1990).

Characterizing the Court as apolitical and criticizing the partisan character of the hearing process is problematic for many reasons, not the least of which is the fact that even if they were "objective" and nonpartisan, justices are ultimately nominated by presidents with clear political agendas. Hall (2012) and Strauss (2009) both note that presidents intentionally appoint justices who appear to share their political ideology in order to ensure the success of their own partisan goals. Furthermore, justices' records do indicate ideological leanings, and there is evidence that these change over time—what Epstein, Martin, Quinn, and Segal (2007) call "ideological drift."

A second negative outcome associated with ideology and partisanship involves the ways in which senators approach their own roles within the process. One common complaint is that senators use the hearings for their own political purposes rather than to thoroughly investigate the nominee's qualifications, judicial philosophy, and so on (Bartels & Johnston, 2011; Batta, Collins, Miles, & Ringhand, 2012; DeGregorio, 1992; Fjelstad, 2010). For instance, Bybee (2011) characterizes senators' questions during the Kagan hearing as "efforts to score political points and placate key partisan constituencies" (p. 151). Similarly, Vaglica (2012) argues that senators appear to use their time to "procure more votes" for their own reelection, leading to question and answer exchanges that sound more like partisan talking points, thus devaluing the hearings as a whole (p. 1805).

In a broader sense, appeals to objectivity are ideological in that they suggest a socio-political reality where subjectivity—political or otherwise—can in fact be avoided. Things *just are*, and we ought to focus on *what they are*, rather than *how they might be.* The basic premises that underpin American politics and culture at large go unexamined and un-critiqued. Essentially, scholarly arguments

urging objectivity reinforce the status quo by removing agency from the hearing process.

Civility

The past several decades have seen repeated calls for civility in public discourse, and a second anti-ideology argument is grounded in the notion that civil discourse is critical to the functioning of politics generally, and the confirmation process specifically. In politics generally, and related to the argument against partisanship, researchers have found increasing polarization along party and ideological lines (Fleisher & Bond 2004; McCarty, Poole, & Rosenthal 2006; Poole & Rosenthal 2001), and have described this partisan polarization as one aspect of the incivility that mars our political discourse (Benson 1996; Darr 2011; Evans & Oleszek 1998; Heflin 1997; Ivie 2008). Given this broader context, it should be no surprise that the civility of confirmation hearings regularly comes into question. As Benson (2011) observes, "civility is always at risk when we talk about things that matter" (p. 27).

While the vast majority of scholarly literature on civility focuses on broader contexts, scholars have found negative outcomes associated with incivility in confirmation hearings, including Schraufnagel (2005), who shows that increased incivility leads to longer confirmation hearings, and Carter (1998), who argues against partisan standards and their attendant incivility, suggesting that "moral instincts" should be the focus of hearings (p. 1199). Regardless, this literature is grounded in the premise that civility is vital to Western democracy as it encourages—indeed, requires—respect for others, involvement by diverse parties, and a focus on rational debate (see Jamieson, 1997; Langett, 2013; Loomis, 2000; Mingus & Horiuchi, 2012; Nilsen, 2008; Rood, 2013). For instance, Bone, Griffin, and Scholz (2008) contend that when engaging in civil rhetoric, we "cannot pretend . . . that others are unworthy or without voice" (448). Similarly, Hollihan (2009) observes that political campaigns and general discussion of

politics have become less civil and more polarized, and that this negativity has "actively discouraged political participation and confidence in governmental institutions" (p. 311). More specifically, Nilsen (2008) laments the way in which disrespectful language permeates our political discourse:

> It is discouraging that after a presidential debate what gets quoted are the *zingers*. The "winners" are not the ones who make the most thoughtful suggestions but the ones who interrupt others, talk the loudest, make the quickest comebacks or insults, and compete to keep the attention on themselves. (p. 65)

As an anti-ideology argument, appeals to civility can serve to stifle conversation of crucial issues and marginalize the voices of those who oppose the status quo. Lozano-Reich and Cloud (2009), for example, argue that "the appeal to civility has historically been a form of gender discipline" and call for "an uncivil tongue to challenge oppressive discourses" (p. 221). Elsewhere, Cloud (2015) argues that the condemnation of incivility can be used to "actively exclude" voices that take a "counterhegemonic" stance (p. 15). Insofar as civility constitutes a set of norms that guide and restrict behavior, she argues that those who appeal to civility "are essentially disciplining ourselves and fostering the illusion of a satisfactory status quo in which behaving according to the rules serves the interests of everyone alike" (p. 16). In the context of confirmation hearings, Darr (2007) argues that an excessive focus on civility during confirmation hearings "provides a ready-made excuse for avoiding what might be important topics" (p. 71) and can "cripple the argumentative process" (p. 72).

Common Sense and Professional Qualifications

Another anti-ideology argument involves the perceived dichotomy between professional qualifications and ideology. This position asserts that the professional qualifications of the candidate are the most important site of inquiry, rather than judicial philosophy or partisan politics. It appears in several forms, and typically prioritizes the nominee's experience, ethics, character, and competence over ideology. While few, if any, scholars argue that the sole criterion

of confirmation should be professional qualifications, several emphasize its importance, and a common argument by senators is that such qualifications—not ideology—should be the primary focus of hearings.

For example, Epstein, et al. (2006) point out that "virtually every contemporary study of confirmation politics . . . has pointed to the explanatory power of ethics, competence, and integrity on the one hand, and politics, philosophy, and ideology on the other" (p. 302). Similarly, Carter (1998) argues that the Senate is torn between those two poles, finding itself "trapped between the notion that it should act to enforce a set of professional standards . . . and the idea that it should inquire deeply into the substantive judicial philosophy of each nominee" (p. 1185). Both of these perspectives position qualifications and ideology as polar opposites.

Coming closest to advocating for qualifications as opposed to ideology, Carter (1998), arguing that neither the "job qualifications" nor the "partisan" standards are appropriate, suggests that "moral instincts" should be the focus of hearings. He rejects ideology as a standard, and while claiming to focus on a "higher ground" than either partisanship or mere professionalism (p. 1185), he ultimately argues for an examination of character, aimed at determining whether a nominee is "morally upright" (p. 1200). In essence, he argues for "moral" qualifications rather than ideology. Similarly, Araujo (2017) argues that "it is both proper and necessary to examine a judicial candidate's qualities to determine whether he or she will become a virtuous judge" (p. 313).

To some extent, the public appears to agree that hearings should focus on professional qualifications and character over ideology. For instance, in an examination of public opinion toward Justice Samuel Alito, Gibson and Caldeira (2009) find that the primary criterion used by the public when evaluating nominees is "whether the nominee has the characteristics of a good judge" (p. 153). Similarly, Baird and Gangl (2006) report that the public reacts more

favorably toward the Court when media reports frame its decisions as adhering to strict legal guidelines rather than as politically motivated.

Senators—no doubt sensitive to this dynamic—often argue that professional qualifications and character should be the primary focus of confirmation hearings. For example, Darr (2007) notes that it is typical for the party of the nominating president to respond to criticisms of the nominee's judicial philosophy by arguing that competence—not the nominee's ideology—is the proper standard. At least one nominee made this argument as well: Kahn (1995), in a direct response to statements made by Robert Bork in which Bork decried the role of judicial ideology in his failed confirmation, asserts that "professional criteria—intelligence, experience, temperament—are presumably the criteria Bork believes are legitimate" (p. 36).

The privileging of professional qualifications and moral virtue (whatever that might mean) suggests to us the notion of common sense. One does not need a law degree to determine if a nominee has "good morals" or possesses "high ethical standards." One need simply apply common sense to the nominee's professional and personal background (qualifications, ethics, etc.) to determine if they will be a competent justice. Ideology has nothing to do with character, so it should be set aside.

Productivity vs. the Mediated Spectacle

A fourth anti-ideology argument appears in the form of criticism of the spectacular nature of the hearings. Because of the partisanship and incivility of the process, these scholars argue, confirmation hearings have become spectacles of dysfunctional government, where they should be moments of transparency and accountability. DeGregorio (1992), for instance, characterizes confirmation hearings as "interbranch warfare" (p. 971), while Brust (2009) calls them a "Kabuki dance" (p. 39). Fifteen years before becoming a Supreme Court justice herself, Elana Kagan called confirmation hearings a "vapid and hollow charade"

(Kagan, 1995, p. 941). Many others have found the partisan, uncivil, and mediated nature of the hearings to be harmful to our politics in many ways, arguing (or at least implying) that change is needed and that ideology should be curtailed as it is a major part of the problem.

For instance, Carter (1994) posits that the partisan and uncivil approach has functioned to transform "an inside-the-Beltway ritual into a full-blown national extravaganza" (p. 17). Others have maintained that recent confirmation hearings resemble political campaigns (Howard, 2015) or "show trial[s]" (Fjelstad, 2010). Fjelstad, for instance, argues that "the hearings have become a political spectacle in which certain nominees are presented as prospective celebrities" (p. 10). The Bork and Thomas hearings in particular have been criticized for the extensive lobbying campaigns conducted by groups both for and against the nominees, previously unseen levels of political advertising, and extensive media coverage (Frankovic & Gelb, 1992; Gimpel & Wolpert, 1996; Mansbridge & Tate, 1992; Palley & Palley 1992; Sinclair 1992).

In addition to its similarity to a political campaign, many have looked at the Bork hearing as a watershed moment where ideology overtook questions of competence, experience, and integrity (Davis, 2005; Epstein et al., 2006). Scholars have drawn a link between Bork's failure to be confirmed and his extreme conservative ideology (Comiskey, 2006; Howard, 2015; Maltese, 1995; Moraski & Shipan, 1999; see also Rohde & Shepsle, 2007). Having seen what happens to blatantly ideological candidates, they argue, presidents may instead nominate "safe" or noncontroversial judges. Comiskey (2006), for instance, argues that the spectacle of ideology leads to inferior nominees and less-than-stellar justices. In this view, political controversy—or overt ideological debate—is ultimately harmful to the effective functioning of the Court. As Gimpel and Wolpert (1996) put it, "information and political controversy go hand in hand, suggesting that the nominees confirmed most easily are the ones about which (1) citizens know nothing or (2) there is nothing to know" (p. 82).

Additionally, several have associated extensive focus on ideology to a lack of nominee responsiveness. Bybee (2011), for instance, laments nominees' tendency to avoid questions and their reliance on "highly coached remarks" (p. 152), while Farganis and Wedeking (2011) find a decline in the candor of nominees over time. Moreover, they argue that Bork's failed confirmation was largely due to his "lengthy and candid answers" about his controversial judicial philosophy and not just his conservativism *per se*: this has led to subsequent nominees becoming more careful about the ways in which they discuss their own viewpoints (p. 526). Similarly, Ross (1987) argues that because of the spectacular nature of the confirmation process, little information is gained regarding how nominees will act as justices: "the time is too short and the occasion is too partisan to permit a thorough explanation of complex issues" (p. 173). So as the spectacle has become amplified, the open and honest answering of questions has decreased.[3]

Several scholars (Farganis & Wedeking, 2011; Fjelstad, 2010; Howard, 2015; Masugi, 1992) blame the perception that nominees are less than fully candid on senators and the questions they ask: hostile questioning by senators looking to score political points with their constituents leads to the impression that confirmation hearings are purely partisan campaign-like events, and nominees respond accordingly (Bates, 2003; Masugi, 1992). Simply put, these studies suggest that nominees want to be confirmed and will answer strategically in order to ensure that they are. Transparency and accountability become secondary concerns during what amounts to a televised political campaign.

In sum, this strain of argument asserts that the confirmation process has become a national political spectacle, comparable to everything from a political campaign to a show trial to a charade. The argument here is that the mass media and our "society of the spectacle" (DeBord, 1967/1994) have elevated the visibility of and controversy surrounding the confirmation process by creating a

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[3] See Batta et al. (2012) for a refutation of this hypothesis.

national political spectacle unlike any the framers of our Constitution could likely have imagined. There are several culprits, including the mass media, increased partisanship, and incivility, with harms including lack of nominee responsiveness and perhaps the confirmation of "inferior" justices. This anti-ideology argument rests on the notion that the hearings could be productive in terms of transparency and accountability if only ideology and its undesirable consequences could be removed. When ideology overtook competence and ethics (the Bork hearings), the candidness of answers and—perhaps—the quality of justices began to decrease. In other words, "without ideology," we would have better hearings and better justices. With ideology, confirmation hearings are little more than political theatre.

The Topoi of Anti-Ideological Ideological Argument

We have identified four arguments in the literature suggesting that the role of ideology should be tempered in Supreme Court confirmation hearings. Each of these "anti-ideology arguments"—appeals to objectivity, civility, common sense, and productivity—are thoroughly ideological in and of themselves and are therefore problematic on several levels. Most obviously, each suggests that some other value is more important, and each is therefore by nature an ideological argument.

For instance, the appeal to objectivity assumes that significant decisions by and affecting the body politic can be made with little or no partisan political bias. It downplays the importance of competing interests and the immense significance of the competition for socio-political power. More broadly, it reinforces one of ideology's primary qualities: it masks itself as natural and inevitable. If power relations go unexamined—by, for example, striving to remain "neutral"—the status quo will remain. Things *just are*, and they will remain so.

The appeal to civility similarly restricts the critique of ideology. When a senator questions the ethics of a nominee—for example, by questioning the

nominee's participation in a fraternity with alleged sexist or racist beliefs—another might appeal to civility, arguing that such criticism is a character attack or is disrespectful to the nominee.[4] This strongly suggests that raising any issue of ethics or character is potentially inappropriate, and restricts not only what is considered fitting for examination, but limits the ability to critique power generally: those with power can easily push aside criticisms of how that power is exercised as "uncivil."

The appeal to professional qualifications and common sense perhaps most clearly sets aside ideology as irrelevant and unworthy of examination. It risks turning confirmation hearings into caricatured job interviews, where the nominee's resume is the only essential area of inquiry. In contrast to the appeal to civility, the appeal to common sense takes questions of morals and ethics as fundamentally important—it is common sense, after all, to evaluate whether or not a prospective employee is honest and of high moral fiber. This, however, serves to distort the power of the nominee to affect change that will have an impact on potentially every American—in the common-sense interview metaphor, the senator has the power, and the job of the nominee is to show that she or he is qualified. In any case, the appeal to common sense is an ideological argument that explicitly limits or erases the possibility of examining how the Court perpetuates, challenges, or upends societal norms.

The final "anti-ideology" argument in the literature posits that the incorporation of ideology—ironically—limits the possibility for meaningful transparency and accountability in government. The hearings, so the argument goes, are not productive public examinations of the nation's values and future directions; they are spectacles of dysfunctional government, where partisan politics and incivility run rampant. The mediated spectacle has created an

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[4] This was the case in the confirmation hearing for Samuel Alito, who belonged to the "Concerned Alumni of Princeton," which was accused of supporting segregation (*Confirmation Hearing*, 2006).

environment in which nominees are less likely to be open and honest, and in which senators use their time to make what amount to political stump speeches. Similar to the argument for objectivity, this argument positions partisan rhetoric as a distraction, and like the appeal to civility, it aims to shut down conversation rather than to fully engage in the struggle for political power that is the Supreme Court confirmation hearing.

In a general sense, to argue that ideology *should* be taken out of confirmation hearings is to argue that ideology *could* be taken out of confirmation hearings. But as Althusser (1971), Eagleton (1991/2007), Žižek (1994/2012) and others have theorized, ideology is not avoidable. It is pervasive and persistent, so the notion that it can be "removed" is erroneous. Scholars who present the moderation of ideology as a goal serve only to mask its role, specifically within the political and legal ISA. This position implies that the Court is an institution that reinforces precedent in an objective manner, implying that the status quo and the dominant ideology of State power over the individual is natural and immutable. The Senate is positioned as an institution in which technocrats and career politicians make "objective" decisions about judicial expertise and professionalism, interpellating the public as passive observers of the mechanisms of government. Without discussion of political ideology—specifically as it relates to how citizens will be affected by potential Court decisions—elitism and class hierarchy are reinforced. Moreover, the appeal to objectivity assumes that partisan political goals can be ignored, and the appeal to civility attempts to silence those who would argue otherwise. Ironically, appeals to focus on "common sense" job qualifications position the "experts"—primarily senators and the Justices themselves—as the only qualified participants in the discourse.

Additionally, and perhaps even more surprisingly, the scholarly literature on confirmation hearings, as we suggested previously, is "stuck" on Eagleton's (1991/2007) third formulation of ideology: this literature narrowly conceptualizes ideology as "a discursive field" where the powerful "conflict and

collide" over questions of social power (p. 29). In other words, the confirmation literature narrowly understands ideology as a set of political positions or a judicial bias somewhere on the traditional liberal-conservative political continuum. But as we have discussed—and as recent seismic shifts to the political landscape suggest—ideology is a much more complex phenomenon. As Žižek (1994/2012) notes, ideology is elusive, implicitly reproducing economic, legal, political, and other practices mostly without our knowledge or approval: it hides in plain sight. For Althusser, this takes place in the ISA—within the very structures of the Senate and the Supreme Court. Attempts to jettison ideological debate or depoliticize a supposedly neutral space serve only to re-inscribe a dominant ideology—one all the more dominant insofar as it seems neutral and even "common sense." The scholarship on confirmation hearings would be well-served to incorporate a more robust understanding of ideology that would complicate our understanding of the confirmation process and of the ways in which power operates within these institutions.

Finally, there are implications for our argument beyond the scholarship in question and even beyond confirmation hearings. We close by suggesting that these anti-ideological arguments take place in other contexts—or Ideological State Apparatuses—as well. Calls for objectivity and civility in particular are common across the social landscape, as are appeals to common sense: *be fair, be courteous, keep it simple, and don't "act up."* The argument that ideology takes away from productivity can also be found in a variety of contexts, which suggests an effective approach to decision making must avoid ideology in the name of predetermined parameters of progress: *remain focused—be pragmatic.* These four arguments essentially constitute *topoi* that might appear wherever ideology is brought into the open: *be objective, be civil, use common sense, and stay on track.* All of these topoi work to discipline those who, in Cloud's words, would articulate a "counterhegemonic cause" (2015, p. 15), and we would expect to see such arguments wherever conflict arises over dominant values or where

oppressive power is questioned, including in the workplace, in political campaigns, and in social movement contexts. These *topoi*, we submit, illustrate specific instruments of hegemony (see Eagleton, 1991/2007; Gramsci, 1935/1971). Whether scholars or average citizens, those who use these topoi as arguments—even with the best of intentions—serve to mask the power of ideology and diminish the possibility of productive ideological critique.

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