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WHY THE CONFIRMATION PROCESS CAN'T BE FIXED†

Stephen L. Carter*

Confirmation battles of recent years have spurred proposals to change our process for replacing Supreme Court Justices. In this article, Professor Stephen L. Carter examines the controversy surrounding the confirmation process and critiques possible reforms. He concludes that the process is sound; what must change is the popular image of the Court as national policymaker.

I. OUR 'BROKEN' CONFIRMATION PROCESS

The title of this lecture is, Why the Confirmation Process Can't Be Fixed. The reference, of course, is to the confirmation process for Supreme Court Justices. Actually, the reference is to both the confirmation process and the nomination process—but that would be a bit wordy for a title. So please, bear in mind that I am referring to both.

Now, in the wake of the bloody battles of the past decade, it seems that nearly everyone believes that the process is broken and should be fixed. There are lots of suggestions on how to do it, and I will talk about some of them shortly. Before I do, however, I should explain that I am a great fan of the adage, “If it ain’t broke, don’t fix it.” The reason the confirmation process can’t be fixed is that it isn’t broken. There is nothing wrong with the confirmation process as such or, for that matter, with the nomination process as such. There is something wrong with the public attitude toward the Supreme Court—and that attitude is what causes all the other problems.

Let me begin by saying what I hope you will be pleased to hear, that although this lecture is about the confirmation process, I assure you that nothing—absolutely nothing—turns on whether you believe, as I do, that Anita Hill was telling the truth, or whether you believe that Clarence Thomas was telling the truth, that neither was, or that both were. Rather, this lecture turns on what you think of the Supreme Court’s role

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in American politics—and what you think is the appropriate role of politics in the making of constitutional law.

I have spent the past decade as what we academics are bold to call a constitutional theorist, and I think it fair to say, in retrospect, that most of that time has been wasted. The goal of constitutional theory is to provide rules for reading the constitutional text, for sorting good interpretations from bad ones. In this sense, it has become apparent that the critics who deem constitutional theory irrelevant are right. Constitutional theory is irrelevant, that is, to constitutional law—and the reason for the irrelevance is that the Constitution itself has become irrelevant to constitutional law.

But, wait, wait—what has all this to do with the confirmation process? Well, perhaps I am getting ahead of my story. Let me slow down and remark upon the recently completed political season, and upon some recent judicial events as well.

In June of 1992, shortly after the Supreme Court decided in Planned Parenthood of South Eastern Pennsylvania v. Casey ¹ that the states may place certain restrictions on the availability of abortion, an angry commentator fired off an op-ed piece in the Wall Street Journal accusing the three Reagan-Bush appointees whose votes decided the case—Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter—of betraying the conservative principles they were put on the Court to uphold.² The problem, it seems, was that they voted merely to narrow the scope of Roe v. Wade ³ rather than to overrule it.

A few days later, Bill Clinton said publicly that he would, if elected, nominate for Justices only those who believe in the fundamental right to privacy,⁴ which was widely understood to be a code word for support for the abortion right. Certainly many Clinton supporters wasted no time in telling their constituents that Roe was hanging by a thread and that a Clinton victory was needed in order to save it—meaning, presumably, that abortion rights supporters, too, should have the right to appoint Justices to uphold the principles of their movement.

The Clinton supporters who called for Justices who would vote their way, like the Bush supporters who felt betrayed when “their” Justices voted with the other side, were all taking the view that a vacancy on the Supreme Court is the moment to use political muscle to alter national policy. Of course, there is hardly any fruitful way to figure out whether a potential nominee will vote the right way except to search through her paper trail, if any, or to inquire directly. Those are the only means to the end of prediction—but the effort at prediction itself is the problem, a trap

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³ 410 U.S. 113 (1973).
of sorts, and it exemplifies all that is wrong with the confirmation process.

The trap is what might be called the search for "prior constitutional commitments." A prior constitutional commitment is what I, as a legal scholar, make when, for example, I write an article in which I argue for the unconstitutionality of the law providing for the judicial appointment of independent counsels, popularly known as special prosecutors—a law upheld by the Supreme Court in *Morrison v. Olson.* Anybody who takes a position on a disputed legal question obviously has a prior commitment on that question. That does not mean that one's mind is closed—it only means that one has a prior opinion. Most lawyers, and certainly most law professors, have plenty of them. In contemporary legal culture, it should hardly be surprising that judicial nominees have them too.

But the prior constitutional commitments I have in mind are not simply those that a potential Justice has previously expressed. They include those that are often extracted in the contentious process of presidential selection of a nominee and senatorial decision to withhold or grant consent. Constitutional commitments are what the President and the Senate are after when they make efforts to get the nominee to give up enough information to enable them—acting in our name, the name of We, the People—to figure out, as it is said, what sort of Justice the candidate is likely to be. And, if you will forgive my cynicism, that essentially means that we need enough information so that we can make educated guesses about how the candidate is likely to vote.

Oh, I know all the arguments. It is said, for example, that we are not really trying to get commitments about votes, we are just trying to learn about judicial philosophy. But I am not quite sure what judicial philosophy is, and I doubt that either the President or the Senators either know or really care. Indeed, so slippery and elusive a concept is judicial philosophy that defining it at all is, as Harold Schoenberg wrote of playing chess against former world champion Tigran Petrosian, "like trying to put handcuffs on an eel."

Besides, even if one concedes what I do not—that judicial philosophy is simply an elegant but inaccurate way of referring to constitutional theory—I do not think that many Americans care deeply about the judicial philosophies of individuals who are to sit on the courts. I think most Americans care instead about concrete results. The questions from the members of the Senate Judiciary Committee tend to illustrate this proposition. Let me read you a typical exchange, without mentioning the name of the nominee or the questioner, quoting now from the transcript of the Judiciary Committee's hearings after the nominee declined to express an opinion on whether *Roe v. Wade* was rightly or wrongly decided:

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SENATOR: Do you subscribe to the philosophy expressed in the majority of the *Roe* opinion?
NOMINEE: I would say again, I respectfully state to you, Senator, that this is certainly a case that is on its way to the Supreme Court right now.
SENATOR: But it is already ruled on. This is the ruling of the Court.
NOMINEE: But there are other cases. The *Roe* case is not the end. . . .
SENATOR: . . . I am not talking about [those cases]. I am asking you now about the Constitution. . . .
NOMINEE: I cannot comment on what is coming up to the Court.
SENATOR: But this has already been there.
NOMINEE: But there are hundreds of other ones on the way that are variations of this.
SENATOR: Of course there are, but this is specific and has been done.
NOMINEE: Well, Senator, I respectfully say that it would be improper for me to tell you and the committee or anybody else how I intend to vote.
SENATOR: It is not improper, may I say, for me to weigh your reluctance to answer . . .
[Portion of colloquy omitted.]
NOMINEE: [A]s I say, I can't comment, because it is coming back up.
SENATOR: I have to wonder, from your refusal to answer, if you mean the negative.
NOMINEE: Well, that is up to you, sir. But I have never been dishonest in my life.

The questions this nominee was called upon to answer were not about judicial philosophy, still less about constitutional theory. They were in no sense abstract. They represented an effort to get at concrete results—to extract a prior constitutional commitment. Many people, in and out of the academy, might argue that a nominee who would not give these answers is being evasive and should not be confirmed. In fact, at the time of the nomination in question, many people did.

Actually, the truth is, that I am the one who is being evasive. In fact, I lied. This is indeed a real transcript, but I have made minor changes. The confirmation hearings in question took place twenty-five years ago, and the questions were not about *Roe v. Wade* but about *Miranda v. Arizona*. The question about philosophy did not really ask about the right to privacy but about the right to assistance of counsel. In every other respect, I have quoted the transcript correctly. Consequently, readers who believe that the nominee is being evasive and should

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not be confirmed, if that judgment is a principled one, should not change their minds when they learn that the Senator asking the questions was named McClellan and the nominee refusing to answer them was named Thurgood Marshall.7

I use the Marshall confirmation as an example for a reason. Only two members of the Senate Judiciary Committee in 1967 are still members today: Edward Kennedy and Strom Thurmond. In 1967, debating the Marshall nomination, Thurmond was the one who insisted that the Senate had an obligation to inquire into the nominee’s judicial philosophy, and Kennedy was the one who said, almost in so many words, that judicial philosophy was none of the Senate’s business.8 In recent years, of course, their positions have been reversed,9 as though neither of them thought that either stand was one of principle. As should by now be clear, I think Kennedy was right in 1967 that the Senate should not be in the business of assessing judicial philosophy and Thurmond was wrong. Which means that I think Edward Kennedy was wrong in 1987 and in 1992—although it sticks in my throat—Strom Thurmond was right. The Senate should not inquire into the substantive legal positions of the nomi-


8. Thurmond said in 1967: “Several Senators have indicated that they do not believe it to be within the purview of . . . the U.S. Senate to question the philosophy of an appointee to the highest court in the land. I do not accept this theory as valid . . . .” 113 Cong. Rec. 24, 648 (1967) (remarks of Senator Thurmond). Kennedy said in 1967: “[I]t is not our responsibility to test out the nominee’s particular philosophy, whether we agree or disagree, but his own good judgement . . . .” 7 Hearings, supra note 7, at 179.

9. Thurmond then said in 1986:

The CHAIRMAN [Senator Thurmond]. . . . Now I want to make this statement: Any question that is asked about decisions of the Court, if you prefer not to answer them, if you will say so.

Judge SCALIA. No; I do not—

The CHAIRMAN. Anything that may come before the Court, I do not want you to feel obligation to answer.

Nomination of Judge Antonin Scalia: Hearings Before the Comm. on the Judiciary, United States Senate, on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States, 99th Cong., 2d Sess. 34 (1986) (testimony of Hon. Antonin Scalia, Judge, U.S. Court of Appeals for the D.C. Circuit), reprinted in 13 Hearings, supra note 7, at 128. Kennedy asked in 1986: “Do you expect to overrule the Roe v. Wade Supreme Court decision if you are confirmed?” Judge Scalia answered: “Senator, I do not think it would be proper for me to answer that question.” 13 Hearings, supra note 7, at 131. Kennedy stated in 1987: “President Reagan has every right to take Mr. Bork’s reactionary ideology into account in making the nomination, and the Senate has every right to take that ideology into account in acting on the nomination.” Nomination of Robert H. Bork: Hearings Before the Comm. on the Judiciary, United States Senate, on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, 100th Cong., 1st Sess. 34 (1987) (opening statement of Senator Kennedy), reprinted in 14 Hearings, supra note 7, at 214.
nee, and the effort to ferret out what we call judicial philosophy is rarely anything but a smoke screen for precisely that inquiry.

The problem is not simply in the Senate or in the questions that nominees are asked. It is not simply in the Presidency and the effort to pack the Court with people who will vote the President's way. It is a problem generally with the notion that what we need to know about the nominee is how she will cast her vote. And that problem arises because nobody seems to believe anymore that the exercise in which the Justices engage is really "judging." We have all been seduced instead into the vision of the Justices as creators of policy—as social engineers, if you will. And if they create policy, we naturally want to know, before granting them life tenure, precisely what policies they are likely to create.

One might envision a world in which the need to discover what policies potential Justices are likely to create seems less pressing than in the world we have. Such a world would better match what is often derided as the high-school civics vision of judicial reasoning: that the judges make up their minds only after they have heard the arguments, and that they rely on the authority of something outside of themselves, something that the public at large agrees to accept as sovereign. In other writing, I have defended this view as less simplistic than scholars tend to treat it and, indeed, as perhaps the only plausible ground for obedience. 10

I will not labor here the reasons for my preference. I will note, however, that in the world that I describe, there would be no reason—or, at least, no justification—for trying to figure out where potential Justices might stand on the most potent political issues of the day. Were fealty to something that might reasonably be called the Constitution become the touchstone of judicial review rather than an afterthought, we might better understand the folly of trying to create a Supreme Court full of Justices who have already made up their minds on the questions most likely to be divisive.

Of course, to express views of this nature in contemporary constitutional debate is to become something of a dinosaur. But if one is going to be a dinosaur, one wants at least to be in good company, the company, for example, of Thurgood Marshall, who declined to answer any questions on his substantive views. And, for those with a different set of judicial preferences than mine, it is also the company of Felix Frankfurter, who declined an invitation to testify before the Judiciary Committee, on the ground that anything he would say might compromise his ability to serve as a fair-minded jurist. (Later, under political pressure, Frankfurter changed his mind, which started us, perhaps, in exactly the wrong direction.) And then there are, of course, the well-known words of Presi-

dent Lincoln, who said, on the subject of the appointment of Salmon P. Chase: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it."\footnote{11}

Unfortunately, we reject this wisdom. We turn it on its head. We pretend that we do not want to know the view of potential Justices on disputed legal issues, but this is just one of the many ways in which we lie to ourselves about the standards to which we hold those in public service. We say instead that we want to know about the nominee's judicial philosophy or constitutional theory—but that just isn't so. When supporters of recent nominees applauded them because they were going to interpret the law rather than make it, the words were no more than a code for votes in concrete cases, particularly in the areas of privacy, civil rights, and criminal justice. When opponents warned that the same recent nominees displayed cramped and narrow readings of the Constitution, they were really warning that particular rights—that is, the results in particular cases—hung in the balance.

Not only do we want to know how the nominees will vote—we then distort this information in ridiculous ways. Take the case of Robert Bork. Bork's views and mine are not very similar, although I suspect I have more sympathy for his approach than do most academic constitutionalists. Still, whether one thinks he would have been a brilliant Justice or an utter disaster (or, as some have suggested, both), one cannot but cringe at the "anything goes" nature of the arguments against him.

Take a single example. Much was made, by the press and by Bork's opponents, of his testimony in support of the Human Life Bill,\footnote{12} a 1981 effort to overturn by statute the Supreme Court's decision in \textit{Roe v. Wade}. The Human Life Bill, which died in committee, raised fascinating structural legal issues. It also was widely viewed as patently unconstitutional. Because the great majority of academic lawyers who testified on the bill opposed it, one could cite his testimony—many did—as demonstrating that he was outside the mainstream. The only trouble was, Bork never testified in support of the Bill. In fact, he testified against it.

But suppose he \textit{had} testified in favor of the Human Life Bill. What would that have taught us about his judicial philosophy? Probably almost nothing. Scholars might have learned something from reading Bork's argument—but for the general public, the information content about what kind of judge Bork would be is quite small, other than a general sense that he must be hostile to abortion rights. Perhaps, as a judge, he \textit{would} be hostile to abortion rights. But if that is what the public needs to know then it is foolish to camouflage it in the guise of an inquiry into judicial philosophy. It is simply an inquiry into how he would vote.

\footnote{11} Gorge S. Boutwell, \textit{Reminiscences of Sixty Years in Public Affairs} 29 (1902).
The marketing of candidates, by their supporters and their opponents, is not really aimed at anything else. To continue with the same example, Robert Bork was accused by his critics of favoring whatever he questioned the judicial power to oppose. Because he thought *Roe v. Wade* was wrong, he must favor forcing women into back-alley abortions. Because he questioned *Miranda v. Arizona*, he obviously thought the police should beat suspects into confessing. Because he challenged the constitutionality of parts of the Voting Rights Act, he plainly preferred a whites-only franchise. In each case, the criticism was marketed as a prediction of concrete results—not judicial philosophy.

These particular anti-Bork arguments seemed rather silly at the time. One might have thought, by this late date in our constitutional history, that we would have gained an appreciation for the distinction between the making of public policy and the making of constitutional law. But evidently not. Against such confusion, to paraphrase Schiller, the gods themselves rail in vain.

II. *O*R *I*S *I*T *B*ROKEN?

The confusion may be more apparent than real. Perhaps what seems to be confusion actually reflects something fundamental in the American character. Perhaps most Americans do not draw the distinction I have proposed because they do not believe it is real—that is, if an American citizen supports a woman's right to choose abortion, then, ipso facto, that citizen believes the right to be one that the Constitution should be read to protect. After all, the mere fact that a handful of scholars who ruminate on these matters in the old fashion believe that the distinction is real does not mean that anybody else is obliged to think so.

In the past, I have considered it no more than a bit of adolescent silliness for organizations that measure public opinion to conduct surveys in which they ask a cross-section of the public whether this decision or that one should be overturned, and then solemnly reporting the results, as though they have some legal significance, as though the Supreme Court should pay attention to this sentiment—withstanding that the respondents are not lawyers, that only a tiny fraction of them are likely to have glanced at the Constitution, and that virtually none of them will ever have read the decision in question.

Of course, we survey lawyers too—goodness knows why. I was intrigued to read recently that the House of Delegates of the American Bar Association voted to put the organization on record in favor of a woman’s fundamental constitutional right to choose an abortion. In his book on abortion, Laurence Tribe cites an earlier, similar vote as evidence that the legal community stands behind *Roe v. Wade.*

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interpretation might be correct (although the ABA's stubborn refusal to poll its members gives one pause), but one must ask what absolute significance it possesses. Certainly it indicates that the leadership of the ABA believes that the right to choose an abortion is a good thing. Perhaps it is. But just as in the case of the lay public, there is no immediate reason to suppose that the House of Delegates was reaching a legal conclusion as against a conclusion on correct policy.

But maybe surveys of this kind are not quite as silly as I generally suppose. The idea that constitutional law is in some important sense governed by the constitutional text is not one that has much academic currency, and it may not have much political currency either. Everyone talks about updating the document to reflect our values. The argument is nearly always disingenuous, unless one means by our values "mine and those of my friends"—for if one sincerely believes in a Constitution that incorporates the values of an evolving American public, then one must want a Constitution that allows organized classroom prayer in the public schools, fewer rights for criminal defendants, and punishment for those who desecrate the American flag. Not too long ago, we had Presidents who ran successfully for office on platforms promising approximately these things. They were accused, with reason, of seeking to politicize the appointment of Justices. Today we are told by the same critics that the new administration has an obligation to make appointments that will restore the "balance"—that is, to appoint Justices whose votes will cancel out the votes of the last five appointees. But changing the set of values that one believes the document should reflect provides no defense against this accusation; indeed, to the extent that one selects values without basis in either the original understanding or the public will (and I am no fan of the second), one is simply trying, perhaps for reasons of efficiency, to use the judiciary to enforce elite values in the name of constitutional law.

It is easy to see why this approach is appealing: one can envision seats on the Supreme Court as a costless political largess, distributed in accordance with the interests of one's political followers. As for those of us who believe in trying to preserve the autonomy of the law by stressing interpretive rules that make it more difficult for judges to vote the will of the ideological movements that led to their ascension, well, as I have already noted, we are regarded by left and right alike as dinosaurs, politically out of step, theoretically naive. Indeed, an important strain of contemporary constitutional theory holds that no distinction is possible, that legal arguments and policy arguments are both bootstraps for political results. I do not accept this view, for reasons I have discussed elsewhere and will not labor here.14 However, because the view is dominant, and because both the lay public and the leadership of the bar seems to think the view correct, it is worth taking time to tease out its implications for the role of the Supreme Court and the way we choose our Justices.

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With this in mind, let us return for a moment to the vote by the American Bar Association's House of Delegates to put the group on record as supporting reproductive choice. There is a sense in which it makes no difference whether the House of Delegates was reaching a policy or theoretical conclusion. To understand why this is so, take the case of an individual who, studying the House of Delegates vote, comes to the conclusion that a mainstream lawyer is one who believes the right to abortion to be constitutionally protected. Because we have established that candidates from outside the mainstream are not entitled to sit on the Supreme Court, this newly persuaded individual will naturally want to know what each nominee's position on abortion is.

Now suppose the President nominates a candidate who has written the following sentence in a major article: "It is ridiculous to claim that the right to privacy has anything to do with abortion, and the Court's reasoning to the contrary in Roe v. Wade is simply a travesty." On its face, given the ABA's position, this sounds like a fairly easy case for rejection of the nominee.

But suppose that the next sentence of the same article reads this way: "However, because only women and not men are burdened by restrictions on reproductive freedom, I would hold such limits unconstitutional on the ground that they violate the Equal Protection Clause." And suppose the argument finally concludes: "I therefore believe Roe to be rightly decided, even if very poorly reasoned."

Now, would an individual persuaded by the position of the House of Delegates object to this nominee? Would pro-choice organizations? or pro-choice Senators? Of course not—because the nominee plans to vote the right way, to preserve the abortion right. And the goal of the House of Delegates vote, like the goal of screening judicial nominees for their positions on abortion, is to protect the right itself, not to perpetuate a particular line of reasoning as the correct way to reach the result.

What this hypothetical teaches—if, as I suspect, it reaches a correct conclusion—is that the affection in the legal community for the abortion right has nothing to do with law as such. It is a policy preference, not a legal preference. It is not, in other words, an argument rooted in a consideration of the relevant constitutional language and precedent, because, if the hypothetical is correct, the constitutional language and precedent do not really matter. The result does.

In short, lawyers are likely to prove little better than lay people in distinguishing between policy choices and theories of adjudication. What matters, when the House of Delegates takes a position like the one it has, is the bottom line—not how the Court reaches its decisions but what decisions the Court reaches. Virtually all the players—and I most emphatically have in mind the opponents as well as the supporters of abortion rights—care only about concrete results. And the point of the game is to get the results you want.
That, at bottom, is the reason that our battles over confirmation of Supreme Court nominees leave so much blood on the floor: so much is seen to be at stake! When a new Justice is selected, what hangs in the balance is nothing so arcane as the correct approach to interpretation. What hangs in the balance, rather, is the list of rights to be protected or unprotected, depending on one's preference. The public—and, evidently, the House of Delegates—does not particularly care how the nominee will reach her results. The public cares only about what results the nominee will reach. And as long as that is our national attitude about the Supreme Court—as long as all that matters is the bottom line—the battles over every vacancy are going to stay bloody. Which is, in a nutshell, why the confirmation process can't be fixed.

III. WHY SUGGESTED REPAIRS WON'T WORK

Let me try to demonstrate the point by running through a series of proposals for reforming the process that have popped up over the last year or so—that is, since the Thomas hearings. I will try to convince you that each would inevitably fail, and that the reasons for the predicted failure coincide with my principal thesis.

1. The nominee testifies immediately upon nomination, and others testify months later. This proposal, which arose in the summer of 1991, would accomplish nothing, except to force a poorly prepared nominee to go before the television cameras and undergo close Senate scrutiny, and then to give opponents several months to pick apart the transcript.

2. Only those with personal knowledge of the nominee are allowed to testify—that is, no “groups.” This proposal would also accomplish nothing. The interest groups that battle so titanically on either side of these nominations are symptoms; they are not the problem. That is, the reason there are interest groups is that so much is at stake. The problem is what is at stake, not who gets involved in the fighting.

   Besides, even if it were true that the groups are themselves a problem, banning their testimony would make no difference. The testimony is not the problem either and, indeed, with some notable exceptions, the hearings themselves are conducted with considerable decorum. Far more important is the carnival atmosphere outside the hearing rooms: the silly press conferences, the ridiculously overblown claims by supporters and opponents, and the media's absurd penchant to reduce complex issues to sound bites and applause lines.

3. The nominee does not testify. I am no great fan of requiring nominees to testify, but at this point in our history, this change would cause more problems than it would solve. The Court is a powerful entity in our politics and recognized by the public as such; the people of the United States understandably want what passes for exposure (television) to the individuals who might be wielding that power. I would prefer a less powerful Court, or at least one less central to the making of public
policy, but that is not the Court we have, and we should make no pre­tense to the contrary.

4. **No television cameras at the hearings.** I strongly believe that the presence of television cameras makes everyone behave worse, yet the problem remains that the main damage that is done is not through the televising of the hearings, but through the televising of the charges and counter-charges. No rule about coverage of the hearings would alter that.

Besides, as long as the Court exercises as much power as it does, the public understandably would not (if you will pardon the expression) sit still while the plug is pulled.

5. **No public hearings.** See number 4. And also consider the conspiracy theories. Opponents would be certain that a deal was being struck behind closed doors; supporters would insist that their candidate was being trashed in secret.

6. **No hearings.** Yeah, right.

In sum, the reason none of these proposals would make any difference is that none of them reduces the stakes that all sides will have in each nomination. In consequence, they aim at the wrong villains. As long as the stakes remain as high as they are, the nomination and confirmation of Supreme Court Justices will remain a mess.

**IV. Why 'Democratic Checks' Should Be Few**

So, what do we have? We have a Supreme Court to which it is evidently appropriate to appoint Justices on the basis of their votes—not in the abstract sense of coming to grips with their personal constitutional universes, which is by itself sufficiently controversial, but in the concrete sense of trying to ensure that one knows in advance just what they are going to do with the tremendous power that we allow them to exercise.

Still, when people talk about a “democratic check” on the Supreme Court, it is not easy to take the talk seriously. Some of us in the academy still teach our students that standing against the forces of popular democracy is one of the things that judicial review is for. It is awkward, then, to suppose that the Court should reflect in any important sense the constitutional vision (or, perhaps, the right-preferences) of the general public.

Besides, I think it unlikely that many of the pundits and politicians who talk about a Court reflecting the values of the American people seriously want that. Usually, what they want instead is a Court reflecting their own values—that is, they want Justices who can be trusted to vote the right way.

In recent years, I have read any number of arguments to the effect that the Court should reflect the views of the American people on the abortion issue. The arguments are usually based on shaky interpretations of the polling data, because, in truth, neither side in the polarized
abortion debate much likes the polling data. Although the media offers the impression that people are either pro-life or pro-choice, and those twain don’t meet, the truth, consistent now for two decades, is that fewer than one in three Americans think abortion should be an unfettered choice and fewer than one in five think it should be banned in all circumstances. The silent majority is solidly where it often is—in the middle, strongly supporting some restrictions (e.g., waiting periods, parental notification) and just as strongly opposing others (e.g., abortions only to save the life of the mother).15 Given the result in \textit{Casey}, then, the Supreme Court is already, right now, taking a position consonant with the will of the public. One might not like that result, and one might lobby (improperly) for the appointment of Justices who will change it to one more firmly pro-choice or pro-life; but the argument that the reason for the change is to let the will of the people be done is simply false.

Besides, if we really want a Court that reflects “our” values, there are some cases on which the Justices are more plainly out of step. Perhaps the single most unpopular series of Supreme Court decisions—by a huge margin—are those that prohibit organized classroom prayer in the public schools. I happen to think those cases rightly decided, but that puts me in a clear minority. In 1985, Gallup reported that some \textit{eighty-one percent} of those who were aware of the decisions favored a constitutional amendment overturning them.16 (Lest one challenge the data on the ground that people are unlikely to be aware unless they care, eighty-two percent were aware of the decisions.) Support has fallen but is still of landslide proportions: in 1992, a Gallup survey indicated that sixty-two percent of registered voters favored the constitutional amendment.17 Should the Senate and the President therefore have tried in 1985 when a vacancy arose (for which the nominee turned out to be a gentleman named Bork) to ensure that these broadly shared values of the American people were reflected in the Court? Should President Clinton, when the next vacancy arises, do the same? One would assume so, if the far weaker and shifting pluralities on either side of the abortion controversy deserve not only to be heard but to be recognized by having, in effect, their own seats on the Court, and if, as we are not supposing, the role of the confirmation process is to guarantee that the Court will be staffed with jurists who will give voice to the most fundamental aspirations of the American people.

One might object, of course, that the relevant voices are those of the downtrodden, those society has ignored. A fine idea—except that support for organized classroom prayer is negatively correlated with both


education and income. The poor want it. So do the people who are not members of what used to be called the power elite. So do people of color. Both the black and the Hispanic communities tend to support organized classroom prayer in far greater proportions than white people do. Women, if they are the relevant downtrodden group, tend to support it more than men; in fact, all of these putatively oppressed groups, including women, are (in most surveys) more supportive of classroom prayer than they are of unfettered abortion.\(^{18}\)

But all of that is in some sense still prologue. The wheel of history has turned. The Democrats have won the White House and, if comments of many Clinton supporters are accepted at face value, they believe they have a mandate to pack the Court, as a way of “balancing” the Republican court packing. Although I am a Democrat from way back and no great fan of the recent work of the Supreme Court, I do not actually share this view; but then, as I said, I am a dinosaur. It will be interesting, though, to see whether the Republicans, as the opposition party for the first time since the late seventies, will claim that the President has no right to nominate to the Court individuals who will vote the party line. Given recent history, it is hard to find any ground on which the Republicans can safely make such an assertion.

V. MODEST PROPOSALS FOR REPAIR

A natural answer to this, once one moves beyond the various false consciousness claims that are available to get one, rather incoherently, out of tight analytical squeezes, is that the Court is not supposed to be sensitive to political pressures of this kind; which is another way of saying that the Justices should not care what the public, or any subset of the public, thinks of their handiwork.

But it is at least a little peculiar that we are told that scrutiny of “judicial philosophy” is crucial in order to provide a democratic check on the Justices, but, at the same time, that the Court should not be responsive to political pressure or public protest. Simply to assert that there should be a democratic check on the Court gives no information on what the check should be. Allowing public referenda on the Court’s decisions would be a check, too—but I doubt that many people would feel particularly comfortable with it. Certainly I doubt that many activists involved in the more controversial issues that the Court decides would really want to put their positions, in all of their stark simplicity, to a

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18. Lest one be deceived into thinking that I have the calculus backward—that the relevant downtrodden when one discusses public school classroom prayer are those who, for whatever reason, oppose it, as I do—two points should be made. First, because support for school prayer is broader outside than inside the legal community, it seems unlikely that the voices of those who oppose it are not given adequate weight in the judicial process. Second, the definition of downtrodden, to make this move, would become tautological: the putative downtrodden turn out to be those who support whatever decision the Court has made, the putative downtrodders to be those who oppose it.
national vote. Still, if a democratic check is truly needed, consideration of a handful of modest proposals might be in order.

Modest Proposal 1: Term Limits

It would be easier to support the view that each political generation should have the chance to enshrine its programs as fundamental constitutional law if the Justices served limited terms—say, for example, twelve years, which I believe is the figure once proposed by a certain William Rehnquist.

When I speak of limited terms, I do not mean that the Justices should be eligible to succeed themselves, to sit for what we might call reconfirmation. That possibility, it should be unnecessary to note, would enact a terrible threat to judicial independence. (We have, of course, some recent experience with reeligibility at the state level, and much of it is horrendous.) No, when I refer to term limits, I mean the real thing—you put in your twelve years, and you are gone, to private law practice or academia or politics or a speaking tour—even to a lower federal court. (Indeed, one possibility would be to rotate the Justices from lower federal court posts, with the understanding at each elevation that the judge ultimately would return.) The point would be that no jurist could twice serve on the Supreme Court.

Indeed, it strikes me as a curiosity—does it strike you that way, too?—that with so many people shouting about term limits for the Congress, where, barring overdrafts, incumbents seem to endure forever, nobody has the courage to point to the strangest incumbency that we have. Absent voluntary retirements, we return upwards of 90% of the Congress year after year—but we return 100% of the Justices year after year. Once a Justice, always a Justice. One can at least hypothesize the defeat of an incumbent member of the Congress. Supreme Court Justices, wielding far greater power per member, are simply there, year after year after year. Perhaps term limits would do the Court some good. Certainly term limits are sensible if we are to go on picking the Justices the way that we do.

After all, if the Justices served for limited terms, it would be far easier for passing political majorities to enshrine their views as fundamental law. One would not need to engage in the extended and unseemly deathwatch to which various interest groups now subject the Court—*which one will die first? will we be in power? whom can we appoint?* It hardly seems fair, if the political majority really has the right to pack the Court, to say that the only ones that get Justices of their own are those who happen to be in power when a vacancy happens to occur. Much fairer, surely, to give everybody a chance. That is, much fairer if we truly intend to go on picking Justices the way that we do, trying to craft a Court full of people whose minds are already made up.

But—must we go on picking Justices the way that we do? Maybe
not. If we really want a democratic check—if we really think the Court should reflect the fundamental values of the American people—why not let the people choose? Let us now travel down that road for a few minutes and see how the scenery looks.

Modest Proposal 2: Judicial Elections

In an electoral democracy, when one speaks of letting the people choose, one is of course speaking of election. The matter of what elections might look like—while still preserving the bedrock principle of judicial independence—is what leads to my next set of modest proposals. I will mention here two general models, one of them drawn from the experiences of the states, one of them rather uniquely federal.

Modest Proposal 2a: Contested Elections

First, drawing on the tradition in many states, vacancies on the Supreme Court could be filled through contested elections. That is, when a vacancy occurs, each party could nominate a candidate, who would, after a suitable interval, stand for election before the national voting public. Perhaps there would be third-party candidates as well. Press conferences would be held, television commercials would run. I imagine that quotes from old opinions (if the candidate is a judge) or from old articles (if the candidate is a scholar) would be splashed misleadingly across the front pages of the nation's newspapers or edited down to tightly deceptive sound bites. ("Candidate for high court once questioned right to private property. Details at 11.") There would be attack ads, and bumper stickers, perhaps even a debate or two. In short, up until the time of the vote itself, things would be pretty much as they are now.

But the vote is where things would be different: Sooner or later, We, the People, would have to make a choice. I suppose we might try the simple popular vote, but that would run contrary to deep-seated American traditions. There is no national question that is decided by a national majority vote. So, very likely, we would have to trot out the strange but magnificently agonizing state-by-state calculus that we use when selections are made by what we are pleased to call the "electoral college." There are quadrennial demands for reform or abolition of the college, but they never come to much. The mechanism is cumbersome, but we get by with it for mere Presidents; very likely, we would get by with it for Justices of the Supreme Court as well.

Modest Proposal 2b: Referenda

If you dislike the idea of contested elections, there is a second possibility as well: referendum. This is the way it would work: When a vacancy occurred, the President would nominate a candidate who, instead of facing a candidate from the other party, would face only the voters, who would be entitled to cast a Yes or a No. The election would not be
contested. Either the voters would endorse—that is, confirm—the nominee, or the President would be forced to go back and start anew with another candidate.

We would still have the press conferences and the attack ads and all the rest, so democracy would continue to receive its due. But there would be only a single candidate.

Of course, with either one of these proposals for election, there is the problem of *when*—that is, how lengthy a campaign would be needed and when the vote should take place. The most convenient time, obviously, would be the next general federal election. In ordinary course, that would mean a wait of no more than two years to fill any particular seat, and the Court could probably survive that period with eight or seven Justices. If, however, one wanted to wait for a presidential election year, to make the Supreme Court nominee in effect a part of the ticket, one would have to be prepared now and then to wait four years—which seems a bit unseemly.

Waiting for the next presidential election would, however, have certain salutary effects. Chief among them is this: Because, as matters now stand, the presidential candidates run on platforms promising to put people of particular views on the Court, my proposal does them one better. There is no need to fuss around with hypothetical nominees when we could have instead an actual nominee on the ticket. No more of this "Clinton might put X on the Supreme Court" nonsense—under this proposal, we would know precisely who the presidential candidate sought to put on the Court, at least if lucky enough to have a vacancy occur prior to the election.

Think about it. President Bush's two nominations to the Supreme Court were David Souter and Clarence Thomas. Both were confirmed. Either or both might turn out to be outstanding, although early returns are mixed. But, if the vacancies created by the retirements of Justices Brennan and Marshall could not have been filled between elections, but had to be filled instead as part of the balloting at the presidential election in November of 1992, would Bush have chosen Souter and Thomas as, in effect, additional running mates? Maybe so—but, certainly, the political calculations involved would have been marvelously different.

This system would lead, however, to a practical problem. What about an election like 1980? As you may recall, Jimmy Carter was the only President in our history to serve a full four-year term and not have the opportunity to nominate any Justices. (I note in passing that Carter did appoint over forty percent of the lower court judges serving as of the end of 1980, a rate that compares quite favorably with Ronald Reagan's appointment of roughly fifty percent of the lower court judges serving as of the end of 1988.)

But back to the 1980 election. Because there had been no vacancies during the preceding four years, candidates Jimmy Carter and Ronald
Reagan would have had the advantage—or, perhaps, the disadvantage—of running without any Supreme Court nominees on their tickets.

Perhaps one could simply put it down to the luck of the draw; after all, history teaches that few presidential elections are likely to follow four-year periods in which no vacancies have occurred on the Supreme Court. But if the idea of allowing some candidates to run without Court nominees on their tickets seems troubling, there is a remedy. Each party could nominate, along with a potential President and a potential Vice President...a potential Justice, perhaps to be called the Justice-in-Waiting. Perhaps even two or three, in rank order.

The role of the Justice-in-Waiting would be exactly what the name implies—to wait. The Justice-in-Waiting would, if elected, receive as a matter of right (none of this Marbury v. Madison nonsense about delivery of a commission) the next spot on the Court, unless no vacancy occurred over the next four years—the term of office of the Justice-in-Waiting—in which case a new Justice-in-Waiting would be elected. Of course, in order to need a new Justice-in-Waiting, one would need a gap of eight years between vacancies—four years before the first election, then four years of a presidential term—and that has never occurred in 200 years of American judicial history. (The longest run of years without a vacancy, which has occurred only once, is six.)

VI. CONCLUSION: IF IT AIN'T BROKE . . .

Now, of course, one might object that all this talk of election constitutes a threat to judicial independence. I would respond that it is not much different from what we do now. If you do not like my modest proposal, then you must not believe that potential Justices should be screened for their fidelity to "our" values. In that case, I am with you—and I hope that you are with me in wishing that we could stop treating the Court as though fidelity to "our" values is what matters.

Here, as so often, one finally longs for the good old days. I have in mind the era when President James Madison, for political reasons, desperately sought a New Englander to replace Justice Cushing. As Professor Charles Warren narrates the tale,\(^{19}\) the following events then transpired: First, Madison found Levi Lincoln and nominated him, without first advising him that he was the candidate. The Senate swiftly confirmed. But when Lincoln at last discovered what had been going on in the nation's capital, he...declined to serve.

So Madison, working hard, sent up the name of John Quincy Adams, and Adams was swiftly confirmed, but when he learned of all of this, Adams said...no thanks.

A third nominee was rejected by the Senate, on the ground that he

\(^{19}\) 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 400-15 (1924).
had, as a government lawyer, enforced a law that the Senate majority didn't like.

Which left for us, and for the nation's history, the happy circumstance of Madison's fourth nominee, Joseph Story, who was confirmed—and who, as Professor Paul Freund reminds us, then proceeded, during his three decades on the Court, to vote against everything that Madison, who nominated him, and Madison's Senate, which confirmed him, held dear and true. All that hard work, Madison must have groaned, just to produce a traitor. But that, it seems to me, is the Supreme Court confirmation process at its best, a process that will work only when we learn once more to treat the role of Justice as simply a job. Not a prize, but a job—a job not everybody wants—and a job that, if done well, will mean working without a scintilla of loyalty to movement or cause.

And it can work that way again if we surrender the bold and exciting image of the Supreme Court as national policymaker and recapture in its stead the less flashy but more lawyerly image of the Supreme Court as—dare I say it?—a court.

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