Book Reviews

Straightening Out *The Confirmation Mess*

The Confirmation Mess: Cleaning Up the Federal Appointments Process. By Stephen L. Carter.* New York: Basic Books, 1994. Pp. xiii, 252. \$21.00.

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INTRODUCTION

Yale Law School Professor Stephen Carter is one of the nation's most celebrated young scholars in the area of constitutional law and social policy, having already published two successful and important popular books in the field: *Reflections of an Affirmative Action Baby*¹ and *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*.² Many people will be drawn to Carter's latest book—as I was—simply to find out what Stephen Carter has to say about another very interesting subject straddling law and politics: the “confirmation mess.” They may be in for something of a letdown. It is difficult to say anything original and insightful about the confirmation process. Stephen Carter hasn't.

That is not all Carter's fault, nor is it necessarily a serious flaw in a book on this subject. Rather, it is a measure of the difficulty of the task. *The Confirmation Mess*³ is a readable and intelligent, if substantively lightweight, lunchroom conversation with Stephen Carter about the problems that have plagued the nomination and confirmation process for high government

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1. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

2. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

3. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994) [hereinafter *CONFIRMATION MESS*].

officials, and especially Supreme Court nominees, in recent years. Much of what Carter says is sensible but a bit treadworn: The confirmation process has spun out of control; we badly abuse nominees for high office (especially Supreme Court nominees); we really should be nicer if we expect good people to sign up for public service; and interest groups and the media engage in much distortion of candidates' records. All of this is true, but it is very much old news.

Carter does not really attempt to provide pathbreaking constitutional analysis so much as to offer his own perspective on a recurrent problem. Carter shouldn't be faulted for putting in his two cents worth, even if much of what he says has been said before by others. It would be unfair to judge this book by a standard it does not try to attain. The more serious problems with *The Confirmation Mess* are Carter's unconvincing analysis of the root causes of the "mess" and his tentative ideas for cleaning it up. The superficial analysis contained in *The Confirmation Mess* stands in marked contrast with the high caliber of Carter's two earlier books, and in even sharper contrast with Carter's more academic writings. One would have hoped that so respected a constitutional scholar of governmental structure and separation-of-powers theory⁴ might have attempted to analyze the confirmation mess within that larger framework. Unlike his work in other fields, however, Carter does not seriously engage, even at the level one would expect for a book aimed at a popular audience, the large body of scholarship that has explored the questions of the proper roles of the President and the Senate in the appointments process and the proper areas of their inquiries into a prospective appointee's substantive views.

Instead, the thesis of *The Confirmation Mess* is simply that the nomination and confirmation process should focus not on petty "disqualifications" (nanny taxes, marijuana smoking, and the like⁵) but on a candidate's "policies and

4. Professor Carter has published a large number of thoughtful, insightful scholarly articles on separation of powers and related subjects. See, e.g., Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986).

Professor Carter has also published a large number of law review commentaries on confirmation issues. See, e.g., Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988); Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962 (1990); Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759 (1991) (book review); Stephen L. Carter, *The Confirmation Mess, Continued*, 62 U. CIN. L. REV. 75 (1993); Stephen L. Carter, *Why the Confirmation Process Can't Be Fixed*, 1993 U. ILL. L. REV. 1. In my judgment, these less scholarly pieces, which form much of the source material for *The Confirmation Mess*, have some of the same shortcomings as the book.

5. Membership in all-White private clubs, however, is a serious matter for Carter, and should be per se disqualifying. CONFIRMATION MESS, *supra* note 3, at 152, 171-72; see also *infra* note 34 (discussing Carter's treatment of issue of racially discriminatory clubs).

qualifications.”⁶ We err in treating high federal office as a reward for having a good résumé—something that the nominee “deserves”⁷—and then searching out scandal as the only available ground for opposition. We make “tiny ethical molehills into vast mountains of outrage, while consigning questions of policy and ability to minor roles.”⁸ We have gone too far, gotten too personal and intrusive and vicious, and lost sight of more important things, such as how well the nominee “will do the job.”⁹

These are fair points, but probe beneath the surface and Carter’s position proves disappointingly superficial in its diagnosis and, consequently, not at all coherent in its prescription. Carter’s two chief proposals will strike the careful reader as disconcertingly discordant with his lament over the “mess” he describes. First, Carter proposes that Senators should refrain from asking questions of judicial candidates about judicial philosophy.¹⁰ Second, Carter argues that the confirmation process should instead focus on questions of a nominee’s moral character, “moral commitments,” and “moral instincts.”¹¹ But would not questions about a nominee’s judicial philosophy and substantive views be precisely the way one would go about trying to obtain insights as to how a prospective appointment would affect important issues of constitutional interpretation and the course of the law? Aren’t such questions appropriate in order to ascertain a candidate’s “policies and qualifications” and how well he or she would “do the job?” And would not inquiries into a candidate’s moral character and “moral instincts” surely degenerate (as they have in the recent past) into a focus on precisely the large or petty “disqualifications” Carter bemoans? Would not this tendency be exacerbated all the more by the (supposed) exclusion from the discussion of all matters of judicial philosophy and substantive views? In making his suggestions for change, Carter thus becomes his own worst enemy, for the approach he defends would magnify the most sordid aspects of the current confirmation mess as he has described it.

In this Review, I will argue that Professor Carter’s analysis of the confirmation problem (as distinct from his largely unexceptionable description of it) is badly confused and ends up getting nearly everything exactly wrong. Part I briefly describes Carter’s project, its modest contribution to the legal literature, and its limitations as a descriptive work. In Part II, I argue that the confirmation mess is not caused, as Carter supposes, by some sort of national

6. CONFIRMATION MESS, *supra* note 3, at 16; see also *id.* at 8–9, 15, 20–22, 24 (citing and condemning examples of focusing on candidate’s “disqualifications” rather than policies and qualifications).

7. *Id.* at 21.

8. *Id.* at 8.

9. *Id.* at 21.

10. Carter apparently thinks that Presidents should not ask questions about judicial philosophy, either, though he is not very clear on this point. See *infra* notes 39–53 and accompanying text.

11. CONFIRMATION MESS, *supra* note 3, at 114, 152; see also *infra* notes 28–36 and accompanying text (discussing Carter’s argument that nominee’s moral character should be important consideration).

hypersensitivity to irrelevancies.¹² Confirmation is ugly because power is at stake and because ideology matters to the exercise of that power. The frantic and occasionally vicious search for evidence of a candidate's "disqualifications" in the form of personal foibles, gross moral improprieties, or perceived character defects is, in large part, a function of the widespread view—a view fervently embraced by Carter—that it is improper or unseemly to inquire into a judicial candidate's substantive legal views. If we forbid direct inquiry into ideology at the appointment stage, we force those who are interested in doing so to wage ideological war by other means—namely, through character assassination, distortion of a nominee's record, and the use of proxy "disqualification" criteria. *That* is the root cause of the confirmation mess.¹³

In Part III, I argue that the way to straighten out the confirmation mess is precisely the opposite of Carter's tentative proposals. Far from forbidding inquiries into judicial philosophy, we should give free rein to ideology in the battle over judicial appointments. The President and the Senate may, and should, undertake full, substantive review of a judicial candidate's legal views. They should decline to nominate, or vote to reject, any nominee who they believe holds substantive views on important legal issues that these political actors think are wrong or otherwise harmful to the nation. This is the approach that best coheres with the text, structure, and logic of the Constitution on appointments matters, as well as the approach most consistent with the constitutional philosophy and expressed views of its principal framers. Indeed, I submit that not only is substantive, democratic review of a nominee's legal views permissible, but that the best way for this to be conducted in a democratic society is through its seemingly most extreme incarnation: the so-called (and, I think, unfairly maligned) ideological "litmus test" case.

Finally, in Part IV, I defend substantive "litmus test" review against the obvious objections made by a number of commentators (including Carter). These include the charges that substantive review at the appointment stage compromises judicial independence, is inconsistent with the role of the judiciary in our constitutional system, and would require a breach of judicial ethics by the nominee. None of these claims is true. The perpetuation of such myths—and *The Confirmation Mess* perpetuates them—is a disservice to our national debate over constitutional interpretation and a major contributor to the confirmation mess we now have.

12. See *supra* text accompanying notes 5–9. See generally CONFIRMATION MESS, *supra* note 3, at 6–22 (discussing national focus on candidates' supposed disqualifications).

13. Like Carter, I will focus chiefly on issues concerning judicial appointments. Appointments to executive branch offices raise some of the same questions, but there are important differences, which I treat separately in the footnotes. See *infra* notes 44, 53.

I. CARTER'S MESS

Part of the difficulty in getting a handle on Carter's thesis stems from the book's organizational problems. The early chapters introduce a number of themes that then compete for attention. Chapters one and two, entitled "The Televised Backyard Fence" and "Of Nannies, Sound Bites, and Confirmation Nonsense," launch Carter's theme of the media's and the public's obsession with the trivial and the titillating. This theme provides the occasion for Carter to comment on the nomination and confirmation process as experienced by Robert Bork, Lani Guinier, Zoë Baird, and Thurgood Marshall (even though not all of that commentary relates to the theme).

The "backyard fence" theme is then seemingly abandoned in chapters three, four, and five, which begin Carter's discussion of the propriety of inquiry into judicial candidates' substantive views on legal issues. Those chapters, too, are interspersed with discussion of particular cases. There is, for example, an extended discussion in chapter five of the Clarence Thomas-Anita Hill spectacle. This topic would seem to go more to Carter's first two chapters on the "backyard fence" but for its relevance to the question of a nominee's "moral" vision, a subject that chapter five somewhat puzzlingly conflates with the question of a nominee's position on *Brown v. Board of Education*.¹⁴

The last two chapters (which are grouped together as a second whole section of the book, much shorter than the first) then focus discussion on possible solutions to the confirmation mess. Chapter six lists and evaluates five categories of potential "disqualifications," returning to matters such as nanny taxes and membership in exclusive clubs and repeating much of the discussion of the first two chapters.¹⁵ Chapter seven ends with a broad-ranging but

14. 347 U.S. 483 (1954). As I will discuss below, Carter opposes case-specific ideological litmus tests for judicial candidates. He makes an exception for *Brown*, however, on the ground that fidelity to *Brown* is a measure of a nominee's indispensable "moral" qualifications. CONFIRMATION MESS, *supra* note 3, at 119–24. Carter apparently distinguishes *Brown* from *Roe v. Wade*, 410 U.S. 113 (1973), on this score on the basis that reasonable people disagree about *Roe* and the morality of abortion, but nobody can disagree with *Brown*. It is questionable whether such a standard provides a principled ground for distinguishing permissible moral/ideological litmus tests from supposedly impermissible ones. Segregation was defended by (otherwise) seemingly respected people prior to *Brown* and afterward. Nor has the *Brown* opinion been exempt from academic criticism. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Conversely, advocates on both sides of the abortion issue often do not regard abortion as something on which reasonable people today may disagree: The other side is morally wrong, no less surely than segregation was and is morally wrong.

15. Carter provides a taxonomy of five categories of possible confirmation credentials: (1) traditional résumé qualifications for the job; (2) whether the candidate has or retains the respect of the public; (3) immoral conduct; (4) illegal conduct; and (5) unprofessional conduct. The first two categories are absolute requirements, Carter maintains. With respect to the last three, Carter says that immoral, illegal, or unprofessional conduct should sometimes be disqualifying and sometimes not. It depends on what exactly the person did. CONFIRMATION MESS, *supra* note 3, at 159–86. Carter does not clearly correlate any of these categories with his earlier focus on a candidate's moral character or moral instincts, though it seems that, in application, the second category—whether the candidate retains the respect of the public—has more to do with what Carter means by "moral" credentials than does, say, "immoral conduct."

cursory survey of proposals for structural or institutional reform of the confirmation process.

If all of this seems like a bit of a jumble, that's because it is. Too often, Carter digresses into long discussions of peripheral issues without using these anecdotes and analyses to buttress his main points. Themes are begun, stories are told, then new themes are begun, with new stories told. Old stories and themes are resumed, often in midstream, without a very clear plan or unifying structure that helps the reader to understand the jumping back-and-forth. The book's themes seem more than anything else to be a vehicle for Carter's color commentary on particular nomination controversies: Carter on Robert Bork, Carter on Clarence Thomas, Carter on Lani Guinier, Carter on Zoë Baird.

The book might actually have been better organized along such lines. Such a structure would have done better justice to what the book really seems to be *about*. The illustrations, it seems, are more important to Carter than the points they illustrate. Each of these incidents is, of course, terribly interesting, and Carter's views are definitely worth considering. But the "lessons" of each case seem rather different from each other, resisting characterization into an overarching thesis, especially not the simplistic one that we are too focused on "disqualifications" rather than on qualifications.¹⁶ Instead, the book as written is schizophrenic, trying too hard to render academic and scholarly—to provide a *theory* for—what is essentially a series of musings on a series of controversial appointments.

The book's lack of focus is exacerbated by Carter's personal style: He is moderate in temperament and not given to extreme language. These are not bad qualities. To its credit, *The Confirmation Mess* is, from the perspective of partisan politics, reasonably balanced. Carter, a political liberal, bends over backwards to demonstrate his fair-mindedness and moderation on the question of the ill-treatment of recent nominees. Both Robert Bork and Lani Guinier,

16. The Zoë Baird situation, for example, is quite different from the Bork, Thomas, or Guinier cases. In each of the latter, opposition to the candidate was primarily ideological: Opponents feared the positions or policies that the nominees would advance in office. Nobody opposed Baird's nomination for Attorney General on ideological grounds. On the contrary, Senate conservatives welcomed the nomination of Baird, a relatively non-ideological corporate lawyer, as much better than the more activist liberal names President Clinton had reportedly been considering. In fact, virtually no one in the Washington political class opposed her. Rather, the opposition to Baird was a *cultural* and genuinely popular phenomenon, having as much to do with "lifestyles of the rich and famous" as nonpayment of taxes: A well-to-do, two-lawyer power couple left their young child in the care of an illegal alien while another illegal alien acted as their *chauffeur*. And then they didn't even pay the Social Security withholding. (For a typical media account of the Baird nomination, see Lynne Duke & Barbara Vobejda, *On Justice Nominee, Public Delivered the Opinion*, WASH. POST, Jan. 23, 1993, at A1.) That they had been assured by lawyers and then the politicians that this violation of the law was no big deal only confirmed the popular impression that this was no accidental oversight and that the wealthy and powerful play by different rules and subscribe to different mores than everybody else. This combination of circumstances—no single aspect—was an affront to a broad, non-ideological spectrum of the middle class. This may or may not be a petty "disqualification," but it seems markedly different from the other cases Carter discusses in that the focus on the disqualification in Baird's case does not seem to have been a pretext for ideological opposition.

for example, are victims of a process gone awry. Both are victims of unfair attacks from political opponents. *Both* sides, in short, behave badly.¹⁷

Carter's posture of scholarly neutrality builds up his personal credibility, but at a price in terms of the book's effectiveness. Carter's stance is intelligent, judicious, cautious, moderate, and—the ultimate confirmation credential—not too interesting. But what might work well for a potential judicial candidate works poorly as legal scholarship. As a consequence of attempting to be learned without being controversial, Carter's thesis is not drawn crisply. The reader is left hazy as to what exactly Carter thinks is the root cause of the "mess." Carter discusses many contributing factors, from interest group advocacy to media hysteria, and he offers an informative discussion of each, noting the extent to which each factor can be both harmful to the process but also, and not improperly, a component of it. But Carter never clearly comes to rest on any one factor or group of factors as the principal cause of the problem, aside from unspecific complaints about people's attitudes.¹⁸ The overall result is that the book is unfocused and noncommittal, leaving the reader unclear whether Carter has a *position* here worth writing a whole book about.¹⁹

17. Carter strikes this tone in the first sentence of the preface:

Just about everybody I told I was writing a book that would criticize the confirmation-time treatment of both Robert Bork and Lani Guinier had one of two reactions: "What are you defending *him* for?" or "What are you defending *her* for?" But those reactions are the reason for the book . . .

CONFIRMATION MESS, *supra* note 3, at ix. Carter continues this theme throughout the early chapters, often making use of the Bork-Guinier parallelism. *Id.* at 17, 37–53.

However, Carter is not entirely successful in maintaining a balanced tone. More than occasionally, he strays from his charted course of objectivity and reveals that the victims on the Right had it coming, more so than did the victims on the Left. Robert Bork's record, for example, was the subject of some "startling and uncomfortable lies," but there were "some startling and uncomfortable truths," too. *Id.* at 17; see also *id.* at 48 ("Bork . . . had much to answer for."). On the other hand, Carter asserts, without qualification, that Lani Guinier was "borked," *id.* at 9, and "railroaded," *id.* at 23, 38—no startling and uncomfortable truths here (even though President Clinton seemed to think so, once he finally read her writings), see *infra* note 53 (discussing Clinton's withdrawal of Guinier's nomination). Carter defends Zoë Baird's nanny tax problem without reservation. CONFIRMATION MESS, *supra* note 3, at 25–28. Clarence Thomas is guilty as charged because Carter is a personal friend of Anita Hill and knows that she would never make up such things. *Id.* at 140. Thurgood Marshall, on the other hand, was the victim of "the most vicious confirmation fight in our history" because of his race and his politics, *id.* at 3, notwithstanding the fact that he was incomparably well qualified, *id.* at 128, and "perhaps the most admired human being ever to sit on the Supreme Court," *id.* at 4; see also *id.* at 128 ("one of the greatest individuals ever to sit on the Court"). Likewise, the attacks from the Right on liberal nominees are treated as slightly more dishonorable than the attacks from the Left on conservative nominees. See, e.g., *id.* at 142 ("[T]he right behaves no better than the left, and much of the time it behaves a good deal worse."); *id.* at 131 ("There was much more substance behind the extravagant criticisms of Bork than behind the overheated assaults on Marshall, and the different results in the two cases do much to bear that out . . .").

18. See, e.g., CONFIRMATION MESS, *supra* note 3, at 22 (arguing that we need to "make important changes in our national mood rather than tinker around with the Constitution"); *id.* at 191 ("[A]s long as our national attitude about the Supreme Court holds that only the bottom line matters, the battles over every vacancy are going to stay bloody."); *id.* at 206 (arguing that we need to make numerous "changes in our attitudes").

19. Carter did have positions worth writing about in his two previous books, *Reflections of an Affirmative Action Baby* and *The Culture of Disbelief*, both of which are important contributions to the legal and popular literature in their areas. Regrettably, *The Confirmation Mess* has the feel of a hurried

II. THE REAL WORLD CAUSES OF THE CONFIRMATION MESS

Despite these flaws of design and presentation, *The Confirmation Mess* is persuasive in its ultimate implication that there must be a better way to appoint and confirm judges and high executive branch officials. Carter's lack of a clear diagnosis of the root cause of the current "mess," however, leads to sloppy thinking about what might be appropriate cures. It is this aspect of the book—the part that corresponds to Carter's subtitle, "Cleaning Up the Federal Appointments Process"—that is the most troubling.

Consider first Carter's suggestion that Senators and political interest groups forbear from inquiry into a judicial candidate's judicial philosophy. Why on earth should anyone with a policy interest in who is appointed agree to that? Certainly not because judicial philosophy is irrelevant to how a candidate will behave in office. Ideology matters: Whether a judicial candidate is an originalist, a formalist, a pragmatist, or a judicial activist, her judicial philosophy (and, depending on the candidate's *judicial* philosophy, her *political* philosophy and personal views) on important issues is central to how she will behave as a judge. Judicial philosophy and the outcomes to which it predictably (though not invariably) leads are what animate special interest groups—not nanny taxes, marijuana smoking, or even sexual harassment. Judicial philosophy is the reason why Presidents pick certain candidates.²⁰ Why should it not be open to the Senate to employ the same criteria in exercising its role in the appointments process? Why should interest groups be forbidden from waging a public debate on the same terms?

Carter offers two points in answer, one pragmatic and one of principle. The pragmatic point is that Senators, interest groups, and Presidents are simply not very good at engaging in substantive review of nominees, tending instead to be superficial, reductionist, and outcome focused. The more important point for Carter, though, is that making such inquiries in the first place is improper in principle: Even if politicians and citizens were good at substantive review of a candidate's judicial philosophy, they should not engage in the enterprise because doing so is contrary to the Constitution's vision of an independent judiciary.

afterthought—a publisher's suggestion that Carter collect some of his law review commentaries on confirmation over the years and stitch them together into a book, capitalizing on the deserved success of *The Culture of Disbelief*.

20. Of course, sometimes Presidents pick candidates based on political considerations such as geography, race, gender, political debt, or desire to avoid controversy. These factors have little to do with a nominee's judicial philosophy or substantive views. Nonetheless, even when these political considerations are primary, Presidents consider ideology as a way of choosing among candidates within these categories. Indeed, that factor defines the pool from which political choices are picked. President Bush nominated Judge Clarence Thomas, not Judge Leon Higginbotham. President Clinton named Judge Ruth Bader Ginsburg, not Judge Edith Jones.

I will have more to say about both of these points—each of which I think is seriously mistaken—in Parts III and IV below.²¹ My point here is that Carter's answers, even if correct, are simply irrelevant. How people and institutions ought to behave is a different question from how they in fact behave and what can be done about it. Whether or not politicians and citizens ought to engage in evaluation of judicial candidates' likely votes and ought to support or oppose them on the basis of these predictions, the stubborn fact is that people *do* make these evaluations. Moreover, it is sensible for them to do so, given that courts exercise substantial, important governmental power. The stakes are high. Who is appointed has critical consequences for public policy. It is true that predicting future judicial performance is an imperfect science and that life tenure notoriously frustrates some expectations, but not so much so as to make it irrational for people to make these judgments. I know that a Justice Bork yields, over a range of time and a span of issues, substantially different results than a Justice Tribe, or even a Justice Anthony Kennedy. Everybody else knows it, too, or they wouldn't have fought Bork's nomination so hard.²²

Carter concedes these points. Strangely, however, he does not let them affect his position. In the face of this perceived knowledge about likely judicial outcomes, how can one reasonably *expect* interest groups to refrain from fighting for what is important to them or expect Presidents and Senators to ignore the same considerations? Certainly the fighting creates its own set of problems. But it is no diagnosis of the problem to say that the problem would not exist if people held different beliefs and attitudes about the way judges are chosen, the proper bounds of decorum, judicial independence, and the proper judicial role in society. They hold the beliefs that they hold, and it is not unreasonable for them to do so. Rather, what is unreasonable is to expect them not to act to further their sense of self- or public interest. Carter's approach is reminiscent of the old joke: "Doctor," says the patient, lifting his arm, "it hurts when I do this." "Well, then, don't do that!" the doctor replies.

The framers of the Constitution had a more realistic approach. They believed in the importance of civic virtue, but they also recognized human nature and the inevitability of faction and so sought to design a system that

21. See *infra* notes 54–61 and accompanying text (defending legitimacy of litmus test questions and politicians' tendency to view matters of judicial philosophy in simplified terms and with eye toward outcomes in concrete issue cases); *infra* notes 38–53 and accompanying text (defending substantive ideological review as justified under constitutional principles of separation of powers and checks and balances).

22. Professor David Bryden has made this point well:

The cliché about how difficult it is to predict judicial behavior, while it contains an element of truth, is seriously misleading. . . . Nominees with Bork's strong ideological credentials—William O. Douglas or the present chief justice, for instance—do not disappoint well-informed expectations. They aren't wholly predictable, but they are predictable enough to justify giving decisive weight to their attitudes toward "today's issues," if one has strong opinions about those issues.

David P. Bryden, *How to Select a Supreme Court Justice: The Case of Robert Bork*, 57 AM. SCHOLAR 201, 206 (1988).

would economize on virtue. In James Madison's famous words in *The Federalist* No. 51, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."²³ Since neither is the case, Madison championed the policy of "supplying, by opposite and rival interests, the defect of better motives."²⁴

Madison was writing about separation of powers generally, but the point is fully applicable to the judicial appointments process. One cannot stop people from being partisan, or even unreasonable, and it is probably pointless to try. In fact, it might even be *wrong* to try. But one *can* establish structures and procedures that channel that partisan energy into less destructive avenues, and even exploit that energy to create a workable balance that enhances liberty. That is the political theory of *The Federalist*—and of the Constitution. As I will develop in more detail below, the structure of the judicial appointments process reflects this *Federalist* vision of channeling partisan energy into a system of checks and balances that harnesses that energy for productive purposes—checking rival interests and rival factions—and dissipates its otherwise potentially destructive effects.²⁵

All of this suggests that it is fruitless (and, worse, probably counterproductive) to try to enforce Carter's prescription that Senators refrain from asking questions concerning "judicial philosophy"—what amounts to a "don't ask, don't tell" policy with respect to the very issues that people are, with good reason, most concerned about when it comes to lifetime appointments to the federal judiciary. People will seek other ways of fighting their ideological wars. The first step of this covert operation is to invade the nominee's personal privacy, looking for clues to judicial philosophy in minutiae of personal behavior.²⁶ The second step is to exaggerate what evidence there is, once one has formed an initial impression, and use it to attempt to persuade others of the soundness or unsoundness of the nominee's views. The less actual information is available, the more exaggeration and distortion become salient tools of pseudo-analysis. The third step is for Senators to pose rhetorical questions to the candidate at public hearings, in either fawningly approving or snidely cynical ways, in an attempt to support or embarrass the candidate in that forum. The inexorable pressure to find and

23. THE FEDERALIST No. 51, at 262 (James Madison) (Garry Wills ed., 1982).

24. *Id.* at 263.

25. See *infra* text accompanying notes 38–53.

26. During the nomination and confirmation of Justice David Souter, clues about Souter's judicial philosophy were sought (aside from in his opinions as a New Hampshire state court judge) in his lawn-mowing habits, house organization, and relatively few dates while a student at Harvard. For an example of such media scrutiny, see Ruth Marcus & Joe Picharallo, *Seeking Out the Essential David Souter: Bookish, Insular Justice-Designate to Face Senate Panel This Week*, WASH. POST, Sept. 9, 1990, at A1. Carter relates the story of reporters' inquiries into Robert Bork's video rentals. CONFIRMATION MESS, *supra* note 3, at 6.

exploit usable personal information to support or oppose a candidacy, once more probative information has been ruled out-of-bounds, is the source of the "obsession-with-trivialities" and "distortion-of-candidates'-records" features of the confirmation mess. It is caused less by meanness or pettiness (though there is plenty of that, too) than by the closing off of saner outlets for exploring and expressing honest differences.

Thus, the reality—reflected in current practice—is that if one denies the legitimacy of inquiry into ideology as a consideration in whether a judicial candidate should be nominated or confirmed, the ideological battle invariably will be driven underground into even less forthright, more sinister avenues: Those who oppose a candidate's substantive views but feel that they cannot be perceived as opposing a candidate solely on such grounds must seek to transform their attack on a candidate's *views* into an attack on the candidate's *character*. Ad hominem personal vilification becomes the currency of exchange in a battle that is actually about judicial philosophy or substantive views. Because Robert Bork, a highly qualified, experienced, intelligent jurist, cannot be rejected simply because his views are "too conservative" to suit the Senators' (or the nation's) tastes, he must be caricatured as a monster who likes back-alley abortions, would personally order an end to birth control, and winks at Fourth Amendment violations by the police. Because Lani Guinier, an iconoclastic academic theorist of creative approaches to the problem of minority representation and voting, cannot be rejected simply because her views are "too liberal" to suit the Senators' (or the nation's) tastes, she must be portrayed as a "Quota Queen" who would foment racial divisiveness and turn our nation into another Bosnia. Yet the Bork and Guinier cases are two of Carter's leading exhibits as to what constitutes "The Confirmation Mess."²⁷

This suggests the errors in the second half of Carter's prescription: his defense of a searching inquiry into a prospective nominee's moral character and instincts, *rather than* any inquiry into judicial philosophy. "The issue, finally," writes Carter, "is not what sort of theory the nominee happens to indulge but what sort of person the nominee happens to be. . . . [T]he nominee ought to be . . . an individual whose personal moral decisions seem generally

27. Carter's discussion of the campaigns against Bork and Guinier notes the tendency to cast ideological objections in moral terms: A nominee's views are not simply erroneous, but evidence of a positively wicked heart and a diabolically evil mind. CONFIRMATION MESS, *supra* note 3, at 119–28. The assumption of the adversaries seems to be that mere disagreement with a nominee's views is not a sufficient ground for opposing confirmation. The nominee must be made to appear a bad person. Wrongheaded views are not disqualifying, but being a despicable person is (even if the only evidence of this is the nominee's wrongheaded views). Carter laments that confirmation battles are fought on such terms, yet agrees that mere disagreement with a nominee's views ought not to be a sufficient ground for rejection. He fails to realize how the two phenomena are related.

If ideology is explicitly made fair game, as I suggest below, *see infra* notes 54–61 and accompanying text, that does not necessarily prevent the debate from being waged on simplistic or distorted terms. But the availability of more complete and relevant information does serve as a constraint on what charges and distractions a nominee's opponents are likely to get away with and reduces the tendency to read video rental and lawn-mowing habits like sheep entrails, for omens.

sound.”²⁸ Thus, he concludes, “the political task in the real world of real interpretive problems is to people the bench not with Justices holding the right constitutional theories but with Justices possessing the right moral instincts.”²⁹

This section of the book is among the scariest and most poorly reasoned of Carter’s entire project. Its numerous references to Carter’s vision of the “morally upright Justice,”³⁰ “the morally superior individual,”³¹ the “morally superior jurist,”³² and the need to assure these qualities through a detailed inquiry into a nominee’s “entire moral universe”³³ leave the reader with an unmistakable impression of a “*moral*” litmus test defined by Carter’s views of what is right, superior, and just (or those of whoever would be directing the moral inquisition). Needless to say, not everyone will agree with Carter’s ordering of moral truths.

Moreover, while “moral character” is doubtless relevant, at a certain level, to one’s fitness for high public office, Carter seems not to recognize how close such an inquiry comes to, and invariably degenerates into, sanctioning the very character assassination he condemns as the most lamentable and indecent feature of the current confirmation mess. Placed in the hands of politicians and interest groups, no one is safe from Carter’s Moral Rack. Look for dirt long enough, and you will find it. Look for foibles hard enough, and you will unearth many an irrelevant triviality and engage in a great deal of offensive intrusion into personal privacy as well.³⁴

28. CONFIRMATION MESS, *supra* note 3, at 151–52.

29. *Id.* at 152.

30. *Id.* at 153.

31. *Id.*

32. *Id.*

33. *Id.* at 151.

34. Carter’s focus on a candidate’s “moral character” may, when push comes to shove, be merely a disguised form of ideological inquiry after all. Part of Carter’s test of character is a candidate’s commitment to certain prior decisions and principles. Especially important for Carter is a commitment to *Brown* and basic principles of racial justice and equality. This is an ideological litmus test of sorts, albeit one that does not ask as much of a candidate as more particularized ideological tests.

The problem with casting such an inquiry as one into “character” is three-fold. First, it is misleading. It conflates categories of personal moral fitness (whatever that is thought to entail) with a candidate’s substantive views. If the latter are important and relevant, surely it is better to address them in a straightforward manner.

Second, it invites the waging of ideological warfare on personal terms—precisely what Carter says he wants to avoid. For those whose sense of what is within “the mainstream” of acceptable views is less generous than Carter’s, the tendency is to cast a candidate’s perceived outlier views as making him or her a “monster” or a “radical.” This is exactly what Carter criticizes with respect to the attacks on Bork and Guinier, yet he implicitly legitimizes the enterprise—at least on some issues, and at least to some extent.

The third problem is the nearly inevitable tendency of such inquiries to degenerate into obsession with personal foibles, or at least to create a severe line-drawing quandary in distinguishing trivial foibles from culpable evils. A good example is Carter’s discussion of the problems of a candidate’s membership in private clubs with a history, practice, or pattern of racial exclusion. *See id.* at 171–72. To what extent is imputation of the taint of a club’s discriminatory practices to a particular individual the equivalent of faulting someone for hiring an illegal alien and failing to withhold Social Security taxes? Carter sees the former as clearly immoral and disqualifying, and the latter as not. I agree with Carter’s judgment as to the relative moral seriousness of these two offenses. But I wonder if that is not attributable to the fact that we share similar world-views and elite positions. More to the point, it is not clear why either of these “character” questions should be disqualifying. They do not bear directly on a candidate’s “policies and

The sexual harassment allegations levelled against Clarence Thomas are deeply disturbing and, of course, much more serious than things like nanny taxes or marijuana smoking as a college student. But the allegations are disturbing in two diametrically opposite ways: It would indeed be distressing to have on the Supreme Court a person who behaved in such ways with respect to a subordinate (just as it would be distressing to have such a person in the White House or the Senate). It would be even worse to have on the Court a person who lied under oath about such allegations. But it is equally distressing to think that a person's reputation or opportunity to hold judicial office may be irreparably destroyed by untrue allegations of personal impropriety.

The truth of the allegations against Thomas remains and probably always will remain a debated issue. It seems clear, however, that Anita Hill was pushed forward by interest groups opposed to the nominee chiefly on substantive grounds and that it was this ideological animus that led opponents of Thomas to thrust Hill, apparently unwillingly, into the fray.³⁵ Can anyone seriously doubt that the second, sensational round of the Thomas hearings would never have occurred if opponents of Thomas had had the votes to defeat Thomas because enough Senators either disliked or were uneasy about his substantive views (or purported lack thereof) on the major constitutional issues of the day?

The Thomas hearings provide a perfect illustration of what can happen if above-ground ideological debate is constricted and the battle over a nomination is driven underground. If ever the confirmation process was a mess, it was in the handling of the Clarence Thomas appointment, from start to finish. Yet under Carter's prescription, it would seem that the Bush administration and its nominee were right in principle to attempt to stonewall the Senators' inquiries into Thomas's judicial philosophy. Worse yet, under Carter's approach to a nominee's moral character, the public airing of Anita Hill's charges and the frantic mini-trial in which advocates on both sides recklessly impugned Thomas's and Hill's characters becomes the model for ideological warfare waged on personal terms.

Surely Carter does not really mean this. But these consequences seem to follow—if not logically, at least *in practice*—from the principles Carter urges as the appropriate guidelines for judicial confirmation proceedings. Carter's prescriptions are simply not appropriate ones for redressing the problems he has identified. He is right that there must be a better way. But the better route lies in exactly the opposite direction.

qualifications" in the sense in which Carter elsewhere uses those terms. Moreover, because people differ on issues of moral propriety, the temptation is to use such points as fodder for waging disguised ideological war on a candidate.

35. Even Carter, who believes Hill told "the unvarnished truth," *id.* at 184, recognizes this. *Id.* at 138–39.

III. STRAIGHTENING OUT THE CONFIRMATION MESS: THE CONSTITUTIONAL CASE FOR SUBSTANTIVE DEMOCRATIC REVIEW AND IDEOLOGICAL LITMUS TESTS

Writing of the now infamous exchange between Clarence Thomas and Senator Patrick Leahy over whether Thomas had ever discussed or debated *Roe*, Carter says:

[T]he argument over what Thomas actually said, for all its bitterness, masked a tougher question, for what all too few people discussed, even at the time, is why exactly Thomas's view on the *legal* correctness of *Roe v. Wade* was anybody's business but his own. Or why he had to have a view at all.³⁶

With all due respect, Carter's question is not tough at all: The reason Thomas's thoughts on *Roe* (or lack thereof) were "anybody's business but his own" was that Thomas was seeking to become an Associate Justice of the United States Supreme Court. In this position, Thomas would exercise substantial government power over precisely this issue (and many others). Under our Constitution, no one is entitled to hold such a position and exercise such power without going through the Constitution's prescribed political process of appointment: nomination by the President and confirmation by the Senate. This political process is an up-front "check" on the important governing power of the Supreme Court. A candidate's views of the "*legal* correctness" of a fault-line case like *Roe* are highly probative of her judicial philosophy generally, and a candidate's judicial philosophy is at the core of what Presidents and Senators inevitably and properly consider in deciding whether to make an appointment.

My counter-thesis to Carter's can be simply stated: The confirmation mess can be most easily and constructively cleaned up by explicitly acknowledging the propriety of allowing considerations of judicial or political philosophy to influence a President's choice of nominees and the Senate's decision whether or not to confirm that choice. Not only is this a constitutionally appropriate inquiry, but acknowledging the propriety of substantive democratic review of judicial nominees' legal and policy views might well have the beneficial side effect of channeling into such potentially productive civic inquiries the energy that is currently misdirected into character assassination. My counter-thesis has a corollary that corresponds to Carter's second prescription: Absent clear, uncontroverted evidence of gross personal impropriety in matters of public or fiduciary trust, we should focus on judicial philosophy, not private morality. We emphatically should *not* focus, as Carter would, on "what sort of person

36. *Id.* at 84 (footnote omitted).

the nominee happens to be”—especially not in the sense of evaluating whether a nominee has, in Carter’s chilling turn of phrase, “the right moral instincts.”³⁷

I make no claim that my view is original. The basic constitutional justification for substantive review of judicial candidates’ legal views was laid out in these same pages a quarter century ago in a simple and elegant eight-page essay by Professor Charles Lund Black, Jr.³⁸ Professor Black’s thesis was that

a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee’s views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court.³⁹

Black’s constitutional argument was that, as a matter of text, original understanding (relying here chiefly on *The Federalist Papers*), historical practice, and, most tellingly, constitutional structure and relationship (a classic Black insight),⁴⁰ there is no sound reason for the Senate to be *any less free* than the President to consider a prospective appointee’s judicial philosophy and entire world-view⁴¹ before granting its assent to a nomination. Black assumed that Presidents considered such things, so that the only real question was the propriety of the Senate’s considering the same things. Black then proceeded to demonstrate how the words “advice and consent” permit consideration of the same factors as may be considered by the person making the nomination for which advice and consent is sought;⁴² how the relevant passages of *The Federalist* are consistent with a view of the Senate as serving a real “checking”

37. *Id.* at 152; see also *supra* text accompanying notes 28–34 (analyzing confirmation criterion of “moral character”).

38. See Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970). The best full-length article on the subject in recent years is Grover J. Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983), which elaborates on the position of Professor Black. I am indebted to Rees’s many fine insights, which have influenced my thinking on this issue. Another source of valuable insights, taking a variation of the Charles Black position, is Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858 (1990).

39. Black, *supra* note 38, at 657.

40. See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

41. Black emphasized that a judge’s judicial work is necessarily and undeniably “influenced and formed by his whole lifeworld, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time.” Black, *supra* note 38, at 657–58. Black thus would extend substantive ideological review beyond a candidate’s stated “judicial philosophy” and include consideration of his substantive political, policy, and personal views, on the premise that the latter necessarily influence the former. I take up the issue of the appropriate scope of substantive review presently. See *infra* text accompanying notes 54–61.

42. Black, *supra* note 38, at 658–59.

function;⁴³ and how the structure and relationship of the three independent branches make it strikingly inappropriate to adopt a rule of strict deference to the President's nominations of persons to serve in the judiciary (as opposed to persons nominated to subordinate executive branch posts, for which a rule of deference might be more appropriate).⁴⁴ Black thus concluded:

To me, there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote.⁴⁵

Time and experience have not improved on Professor Black's basic insights. I offer but two small expansions on his themes, by way of counterpoint to Carter.

First, I would more explicitly ground this approach in a broader constitutional theory of structural separation of powers into independent branches of government, each with autonomous power to check and balance the others.⁴⁶ The most singular structural feature of the Constitution, the architectural feature at the very core of its design, is the coordinacy and independence of the legislative, executive, and judicial branches, one from the other. None of the branches is bound by the views of any of the others, and

43. *Id.* at 661–62.

44. *Id.* at 659–60. With respect to cabinet posts, there is a clear structural reason for a Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him. These are his people; they are to work with him. Wisdom and fairness would give him great latitude, if strict constitutional obligation would not.

Just the reverse, just exactly the reverse, is true of the judiciary. The judges are *not* the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less.

Id. at 660.

45. *Id.* at 663–64.

46. Black's structural argument was that, (1) because the judiciary is an independent branch, and (2) because the Senate is independent of the President, it is appropriate for the Senate to check the President on judicial appointments matters by exercising unrestrained substantive judgment as to the desirability of appointing a particular person. *Id.* at 658–60. It would seem to follow from the same premises that the independence of the political branches not only from each other but also from the judiciary makes it likewise appropriate for *the President and Senate* to check the judiciary by exercising their respective (and sometimes conflicting) unrestrained substantive judgments as to the desirability of appointing a particular person. Black assumed that Presidents do this anyway. His specific proposition was that the Senate may do what the President does. *Id.* at 658. By implication, however, his structural argument also supports the proposition that it is proper for the President to take full account of a prospective appointee's substantive views in the first place. *See id.* ("The factors I contend are for the Senator's weighing are factors that go into composing the quality of a judge.")

none can of right impose its views on the others. At the same time, each appropriately exercises checks on the others, as the others exercise checks on it. Thus, all actors in our constitutional system have a legitimate role in interpreting that fundamental document and in seeking to advance their interpretation of the Constitution—and their visions of substantive justice and sound policy under that Constitution—through the exercise of their governmental functions.⁴⁷

The propriety of substantive ideological review of judicial candidates is grounded in these basic structural postulates of the Constitution. The appointments process is part of the Framers' independence-plus-mutual-checking arrangement. Within the overarching framework of separated, independent branches, Article II of the Constitution has explicitly provided for a political appointments process for judges who, *once appointed*, become to a very large degree independent of the political branches in both the exercise of their powers and their accountability for the exercise of such powers. The political branches have many checks on each other (legislation, veto, override, administration, impeachment) but are, by design, granted very little control over the day-to-day operations of the judicial branch and no control over the judges' livelihoods. This is part of the judiciary's necessary independence.⁴⁸ But the political branches do exercise direct control over appointments to the judicial branch.⁴⁹ The President and the Senate, through their shared pre-clearance power over judicial appointments, enjoy—to borrow Madison's words—a “partial agency” in and “controul” over the acts of the judiciary.⁵⁰ Moreover, the political branches' judgments in making such appointments are completely independent of the judgment of the judicial branch. Since independence and coordinacy mean that no branch is bound by the views of any of the others, it is entirely appropriate for the political branches to employ

47. I have developed this proposition at length in previous work. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

48. See generally THE FEDERALIST No. 78 (Alexander Hamilton) (describing necessity of tenure and salary protections for members of weakest and “least dangerous” branch).

49. The Appointments Clause provides that the President shall nominate, and with the advice and consent of the Senate appoint, *inter alia*,

Judges of the supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

This language might mistakenly be read to authorize Congress to vest the appointment of lower federal court judges in the President alone, in the Supreme Court (or, for that matter, some other lower court), or in a department head (say, the Attorney General), on the theory that lower court judges are “inferior Officers.” The mistake here is to assume that an “inferior court” as Article III uses that term is staffed with “inferior Officers” in the Article II sense of the term. Article II jurisprudence makes clear that all life-tenured federal judges are “principal” officers, requiring presidential nomination and Senate confirmation. See Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 275 n.103 (1992).

50. THE FEDERALIST No. 47, at 245 (James Madison) (Garry Wills ed., 1982) (emphasis omitted).

their constitutional powers over judicial appointments to attempt to change (or to preserve) the decisions made by the judiciary. Likewise, if the President's and the Senate's views should differ in their goals or criteria with respect to judicial appointments—as frequently happens, especially in situations, like the present, where the Presidency and the Senate are held by different political parties—neither is bound to defer to the views of the other. Presidents are constitutionally free to choose judges on the basis of judicial or political philosophy. Senators can and should act to block the President's nomination of persons who they conclude would advance an interpretive agenda that they think unsound or otherwise harmful to the nation.⁵¹

Moreover, given their oaths to support the Constitution, both the President and the Senate arguably have the constitutional *duty* to consider whether a given nominee will seek to interpret or administer the law in accordance with the President's and Senate's respective views as to "what the law is."⁵² These views may well clash, but the clash of competing visions as to the direction the law should take is an appropriate part of constitutional democracy. Because appointments matter greatly in the ongoing controversy over constitutional meaning, it is appropriate that the clash of competing visions concerning that meaning be central to the confirmation process. And because courts' exercise of the power of constitutional interpretation has enormous consequences for our constitutional democracy, it is vitally important that substantive democratic review of prospective appointees—embracing the competing viewpoints of competing institutions—take place.⁵³

51. This mutual-checking arrangement harmonizes nicely with *The Federalist* No. 51's assessment of the usefulness of separation of powers as a check both on the concentration of power and the potentially corrosive effect of faction. As argued above, people will be partisan and even unreasonable if they are determined to be so, and the increased power of the judiciary in current times increases the incentives to be that way. The political theory of *The Federalist* is that it is better to channel that negative energy into productive endeavors—to harness faction to serve the purposes of the system via the structural arrangement of separation of powers.

52. See Paulsen, *supra* note 47, at 257–62.

53. The separation-of-powers considerations that support independent substantive review of judicial nominees' legal views are far less relevant to nominees for executive branch positions. See Black, *supra* note 38, at 660. Carter questions the tradition of deference to the President's choice of subordinates, CONFIRMATION MESS, *supra* note 3, at 31–37, but there is strong constitutional and practical support for the intuition that the President is entitled to broad deference in naming his own team. As long as Congress has vested the appointment of some executive branch officers in the President alone, the notion of a unitary executive contemplated by Article II of the Constitution, see generally Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–68, 1175–85 (1992) (defending unitary executive model), suggests that the President may delegate certain tasks to whichever subordinate he or she pleases.

Moreover, where a President is genuinely committed to the choice of a particular person to serve in the executive branch, there is a certain pointlessness to opposing a President's cabinet and subcabinet appointees (other than the humiliation or intimidation value, or the political value). For example, Assistant Attorney General William Bradford Reynolds, snubbed by the Senate for promotion to Associate Attorney General in 1985 because of his policies as Assistant Attorney General for Civil Rights, was named Counselor to the Attorney General (a position not requiring Senate confirmation) and exercised powers at least as broad as those he would have had by virtue of the formal office. Howard Kurtz, *Reynolds Promoted Despite Rebuff; Civil Rights Chief Will Also Be Counselor to the Attorney General*, WASH. POST, May 19, 1987, at A17; Ruth Marcus, *Meese Aides Stayed Close to Inquiry After Its Shift to Criminal*

My second expansion upon Professor Black's approach concerns what the "substance" should be in "substantive democratic review" of judicial candidates: What things should we look at? I would describe the relevant "substance" of democratic review of judicial candidates as the judicial philosophy of a candidate and how that philosophy would influence the candidate's decisions in particular cases—a scope of inquiry permitting review of both a candidate's methodology and the outcomes she would reach.

This is a step beyond Black, or at least a step in the direction of specific litmus test questions as an appropriate *means* of inquiring into a candidate's judicial philosophy or policies. I submit that the best way to evaluate a judicial candidate's judicial philosophy is to see how the candidate would apply it to real issues in dispute. The best such issues are ones that remain hotly contested, precisely because (1) they serve sharply to distinguish between different approaches to the judicial task and—more pointedly—(2) they are the issues that people care about at the time of appointment. Such issues tend to make otherwise abstruse questions of judicial philosophy concrete and accessible to popular understanding, a result consistent with the public and designedly political nature of the appointments process.

Thus, the questions that Senators put to Clarence Thomas (and others before and since) about *Roe v. Wade* and a constitutional right to privacy are not only *an* appropriate area of inquiry; in many ways they are the *most* appropriate line of inquiry imaginable in today's constitutional world. They tell us the most, at an accessible and intelligible level, about a candidate's judicial philosophy.⁵⁴

Division; Iran-Contra Deposition Shows Justice Department Power Struggle, WASH. POST, Aug. 3, 1987, at A3. Similarly, if President Clinton had really wanted Lani Guinier to supervise civil rights enforcement policies, he could have appointed her to the White House staff or made her Special Counsel to the Attorney General. (He could even have given her the honorific title of "Quota Queen" if he wanted to make a point of the thing.) Clinton has actually done this with other controversial appointments. See, e.g., Thomas W. Lippman, *Halperin Says No to Renomination for Defense Post; Inman Had Questioned the Need for New Peace-Keeping Position*, WASH. POST, Jan. 11, 1994, at A17. (Morton Halperin served at the Pentagon as a "consultant" to Undersecretary Frank Wisner, while Halperin's nomination for Assistant Secretary of Defense for Democracy and Peacekeeping was pending. The nomination ultimately failed of confirmation.)

This highlights an important feature of the Guinier nomination that Carter disregards: President Clinton withdrew the Guinier nomination on the stated ground that the furor over her nomination had caused him actually to read her academic writings and that, after reading them, he was persuaded that her views were not in accord with his own. Clinton stated that he would not have nominated Guinier if he had known of her expressed academic views before naming her, and therefore withdrew Guinier's nomination over her objection. *Text of President Clinton's Comments on Withdrawal of Guinier Nomination*, WASH. POST, June 4, 1993, at A10. In the Guinier case, then, senatorial (and media) scrutiny of Guinier's legal views served the salutary purpose of forcing the President (apparently for the first time) to consider whether his nominee's views were consistent with his own policies. In the end, even if Guinier's views were caricatured by her opponents, she was not, as Carter contends, "borked," CONFIRMATION MESS, *supra* note 3, at 9; see also *id.* at 23, 38 ("railroaded"), because her nomination was not defeated on the basis of a distortion of her views. President Clinton read Guinier's writings and presumably gave her articles a fair, undistorted reading. If President Clinton is to be believed on this matter (and one may concede some doubt on this score), Guinier's nomination was withdrawn because her views were not consistent with his own.

54. There is an interesting ambiguity here as to whether one should be concerned with, for example, a nominee's personal views about abortion (that is, the underlying substantive policy question) or only her

Consider the virtues of *Roe* as a litmus test question. The issues presented by that famous/infamous case create a near-perfect test of constitutional judicial philosophy in a number of respects. A candidate's answer to the abortion/*Roe* question tells us much about her approach to legal interpretation generally. Does she believe in an "open-ended" approach to legal interpretation, or an originalist or textualist approach? What is the proper role of judges (as opposed to the political branches) in creating new substantive rights? In advancing a particular vision of substantive justice? Notwithstanding a candidate's views on *Roe* as an original matter, what are her views concerning the doctrine of *stare decisis* and its role in constitutional interpretation? Likewise, the inability to answer or to talk intelligently about *Roe* should tell us something important about the candidate's qualifications for a high judicial appointment.⁵⁵ Or, to put the question in terms of outcomes: Should the courts resolve the issue of abortion and, if so, what should that resolution be? Will the nominee recognize a substantive constitutional right to abortion?

In short, if I were permitted to ask only one question, the answer to which would yield the maximum possible salient information about a nominee's overall judicial philosophy and outlook, I would ask, "What do you think of *Roe*?" It is mildly astonishing that nearly everybody today—including Carter—thinks that this question is a shockingly inappropriate litmus test. The idea of litmus paper, of course, is to provide a quick, easy, and clear indication of certain properties of the matter being tested. Isn't that exactly what the confirmation process should do?⁵⁶

jurisprudential views about *Roe v. Wade*. To the extent one thinks that a judge's personal values should be relevant to her interpretation of the law—or, as a legal realist, recognizes that they often are—an inquiry into these values would seem an essential part of substantive ideological review of a candidate. See Black, *supra* note 38, at 657–58 (embracing this position). The question then is, "What is your position on abortion?" To the extent one thinks that a judge's personal values are irrelevant, the inquiry should be focused more on questions of jurisprudential method. The question then is, "What do you think of *Roe*?" The former question goes to substantive political views, the latter to a candidate's (purported) rules of legal interpretation. As Grover Rees has well put it: "If a judge is expected to do justice, his selectors will want to know what he means by justice; if he is supposed to play by the rules, they will want to know what he thinks the rules are." Rees, *supra* note 38, at 932.

In practice, whether the "judicial philosophy" question is most appropriately put to the candidate in substantive policy terms or in methodological terms will depend on the stance adopted by the judicial candidate herself. The candidate can always answer an inappropriately phrased question by saying "my personal policy views are irrelevant to my legal interpretations" or, conversely, "outcomes, not false pretenses of neutral methodology, are what count." But in principle, neither way of putting the question (or of answering it) is illegitimate. To be safe, one must ask both questions.

55. A full decade before Clarence Thomas's famous exchange with Senator Leahy, Professor Sanford Levinson offered a prophetic critique of Thomas's statements: "*Roe v. Wade* was undoubtedly the most important constitutional decision of the past decade. . . . Not to have views on *Roe v. Wade* is equivalent to not having views on the nature of the Constitution itself or on the nature of the Supreme Court's role in a constitutional system." Sanford Levinson, *Should Supreme Court Nominees Have Opinions?*, 233 NATION 375, 375 (1981).

56. The idea of substantive ideological review—even to the point of litmus tests—has been defended by other commentators as well. See WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 235–36 (1987); Nagel, *supra* note 38, at 860; Rees, *supra* note 38, at 961–62.

The fact that Presidents and Senators may lack the specialized legal training and background of judicial candidates⁵⁷—or that they may speak in terms of how a judicial philosophy would affect *outcomes* in important controversies rather than in terms of three-pronged tests or tiers of scrutiny—are not reasons to deny the legitimate constitutional role of the political branches in seeking to advance their views of how the nation's fundamental law should be interpreted. Indeed, the politician's tendency to reduce and simplify issues to their barest elements, sometimes to a degree annoying to law professors and judges, may be a valuable asset. It is an elitist, legal academic's view of constitutional law to say that Ronald Reagan's or Joe Biden's crude intuitions about constitutional interpretation should play no role in judicial appointments merely because those intuitions are not expressed with the level of sophistication (or in the jargon) that law school professors think desirable. To the contrary, there is a strong argument to be made that the constitutional discourse of a Reagan or a Biden is more "intelligible" to the nation than that of a Robert Bork or a Laurence Tribe, and certainly more intelligible than the discourse of the current Supreme Court.⁵⁸

That the focus of substantive review will often be on likely outcomes on particular issues (a reality Carter laments at length⁵⁹), rather than on questions of interpretive method, is not a defect in this approach. Such a focus merely reflects the specific level at which (most of) the general public thinks (most of the time) that constitutional theory and judicial philosophy are *relevant*: results. The public is interested in how a decisional philosophy makes a difference in the here and now. In fact, to a significant degree, the public can do without the decisional philosophy part; as long as folks know how real-world results are affected, they have all the "judicial philosophy" they need.

Professor Laurence Tribe's influential 1985 book on the nomination and confirmation of Supreme Court Justices, *God Save This Honorable Court*, sets forth an explicit pro-abortion litmus test: "[N]ominees who would overrule *Roe* simply because . . . the Bill of Rights does not *explicitly* set forth a woman's substantive right to control her own body, should not receive a confirmation vote from any Senator who has regard for the Constitution as preserving a public system of private rights." LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 98–99 (1985). Of course, one could as easily advance an anti-abortion litmus test: Nominees who would find in the Constitution a substantive right to abortion, or who would adhere to *Roe* notwithstanding the lack of such a right in the Constitution, should not receive a confirmation vote from any Senator who has regard for the Constitution's text, original meaning, and commitment to democratic principles of representative government. Both such tests provide that a nominee should be rejected on the ground that the tester considers a particular substantive interpretation of the Constitution (and the interpretive approach it represents) to be unacceptable.

57. Typically, however, Presidents and Senators have access to staffs with legal training and expertise, and are able to draw on their specialized competence. Presidents and Senators are necessarily generalists, but that argument does not mean that they ought not to exercise their authority with respect to the wide array of matters falling within the scope of their duties. See Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 388–89 (1994).

58. *Id.* at 389; see also JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 19–20 (1992); Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 157–58 (1994); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 177–82 (1985).

59. See CONFIRMATION MESS, *supra* note 3, at 86–99.

Law professors may sneer that this perspective is sorely short-term and lacking in vision. I'm not so sure. Certainly, it is a very practical perspective: If one has strong views about today's legal issues, it makes sense to inquire about how a nominee's judicial philosophy would affect rulings on those issues. Moreover, to the extent that results and method are seen as interrelated, one may make educated guesses about future decisions on unforeseen issues based on how a nominee answers litmus test questions about today's issues. It is hard to say that such predictions are any less reliable than predictions based on extrapolation from general statements of judicial philosophy. How a prospective judge resolves today's issues might well be a more reliable predictor of how she will resolve tomorrow's issues, because of the focus on *applied* judicial philosophy, rather than abstract theory.⁶⁰ Thus, to the extent that the appointments process is, by the Constitution's design, a public and political process, litmus test substantive democratic review of judicial candidates is a logical, constitutional, and appropriate consequence.⁶¹

IV. THE UNEASY CASE AGAINST SUBSTANTIVE IDEOLOGICAL REVIEW

The prospect of open, substantive ideological review of judicial candidates always raises two objections: (1) that it would require a judge to commit herself to voting certain ways in cases that may come before her, compromising both judicial independence and judicial ethics; and (2) that it would turn judicial appointments into political campaigns. At various points, Carter offers variations of one sort or another on these themes. In doing so, he repeats all the standard clichés. There are serious and powerful answers to these objections, however, and it should be incumbent on Carter—and any defender of the status quo consensus—to counter them.

A. *False and True "Judicial Independence"*

The short answer to the first objection is that serious pre-appointment discussion of judicial philosophy simply does not compromise the constitutional independence of life-tenured judges, *once they have been confirmed and appointed*. Carter (in company with many others) makes a fetish of "judicial independence" out of all proportion to what is warranted by the Constitution itself. The Constitution provides for a pre-appointment political process, consisting of nomination and confirmation, of judges, and for

60. Moreover, the way in which today's legal issues are resolved often has a substantial impact on the way tomorrow's are framed and resolved.

61. Early in the book, Carter laments the lack of a "public political vocabulary" in which "We the People" may "make our voices heard" in the confirmation process. CONFIRMATION MESS, *supra* note 3, at 11. Yet when it comes to allowing the voice of the people to be heard in any substantive way, Carter prefers silence.

insulation from the political process after the commission is in hand. "Judicial independence" under the Constitution consists of tenure during "good behavior" (life tenure) and a guarantee that a judge's salary will never be reduced.⁶² But that is it. To transform post-appointment independence (tenure and salary protections) into a prohibition on pre-appointment inquiry by the political branches is to deny the process of selection established by the Constitution. Nothing in Article III (or any other constitutional provision) prohibits the political branches from applying what criteria they will in making the political decision whether or not to nominate and confirm a candidate for a federal judgeship.

Carter's conception of "judicial independence" is rooted in the classic Bickelian view of the judicial enterprise as being anti-democratic. That, according to Carter, is the Court's constitutional *role*.⁶³ Any action seeking to impose "democratic checkery"⁶⁴ on the Court is thus an illegitimate assault on the judiciary—an incursion on separation of powers. For Carter, although the political branches possess the raw constitutional power to engage in substantive review and to make predictions about how a prospective appointee will vote, they ought not to do so. "Why in the world should anyone who believes in the Constitution believe that elected officials should try to check the Court?" Carter asks. "The institution of judicial review exists precisely to thwart, not to further, the self-interested programs of temporary majorities."⁶⁵

This view seems not to be very well thought out, especially not for a serious separation-of-powers scholar. If the judiciary's role, by virtue of the powers it has been given, is to be countermajoritarian, then the political branches' role in judicial appointments, by virtue of the powers *they* have been given in this regard, is necessarily to be *counter*-countermajoritarian. To paraphrase Carter: Why in the world should anyone who believes in the Constitution believe that elected officials should *not* try to check the Court?

62. See *infra* notes 66–72 and accompanying text.

63. CONFIRMATION MESS, *supra* note 3, at 19 ("True, judicial independence from the control of popular majorities is a threat to democracy. It is supposed to be."); *id.* at 86 ("[F]rustrating the popular will is precisely what the courts are often *for*."); cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed., Yale Univ. Press 1986) (1962) (speaking of "counter-majoritarian" role of Supreme Court).

The Bickel-Carter view is itself a dubious formulation of the proper "role" of the Court. The better conception is that the Court is bound to enforce the law and that this requires it to give effect to the fundamental law of the written Constitution in preference to a legislative act departing from it. This is the straightforward reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–79 (1803), and of *The Federalist* No. 78. I don't think of this as countermajoritarian (and neither did John Marshall in *Marbury* nor Alexander Hamilton in *The Federalist* No. 78), but rather as requiring legislative agents to act in conformity with their delegated powers. In a sense, it simply vindicates a different kind of majority. See GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 131–36 (1981).

64. The phrase is from one of Carter's chapter titles—"Of Judicial Philosophy and Democratic Checkery." CONFIRMATION MESS, *supra* note 3, at 85.

65. *Id.* at 87.

The political process of appointment exists precisely to thwart, not to further, “judicial independence” in the broad sense of the term that Carter employs.

The reason that the political branches exercise control over the Court in our constitutional republic is because they can: They have been given the constitutional power to do so. To ask them to refrain from using it is a little like asking the President not to exercise his independent judgment in deciding whether to veto a bill on the theory that that would be an improper interference with Congress’s legislative power. True, the Constitution doesn’t say that the President *must* exercise independent judgment in deciding whether to veto a bill, but wouldn’t it be a little silly if he didn’t do so? We wouldn’t think such a President high minded in his commitment to preserving the constitutional autonomy of the legislative branch. We’d think he was a sap. It thus seems inescapable that the political branches are constitutionally authorized to exercise independent substantive judgment in deciding whether or not to nominate and confirm a judicial appointee, according to whatever criteria they see fit, and that this exercise does not, without more, compromise “judicial independence” in any appropriate *constitutional* sense of that term.

It is one thing for Presidents and Senators to make their decisions based on their ideological judgments about how a given nominee is likely to do the job of a judge. It is another to put the screws on the nominee to get the information necessary to make those judgments. Is asking the candidate substantive questions, including litmus test questions about particular issues and cases, meaningfully different from, or simply a logical extension of, the permissibility of substantive ideological review? Doesn’t requiring a satisfactory answer as a condition of nomination or confirmation put the judicial candidate in a horrible box? Wouldn’t it compromise judicial independence to require the prospective judge to answer such questions?⁶⁶

There are two legitimate concerns operating here. One is the “unseemliness” of it all—a point I take up presently. The other concern is that the political branches not use the pre-appointment nomination/confirmation process to extract commitments that compromise post-appointment judicial independence. The point of life tenure and salary guarantees is to insulate sitting judges from *any longer* being subjected to political pressure or control, so that they may truly exercise independent judgment when deciding cases. To exact a promise from a nominee as to how she would vote on future cases or issues is to leverage the pre-appointment political process forward in time, past

66. Carter spends a great deal of time discussing this problem. See *id.* at 54–84. His basic view is that it is impossible, in this day and age, for nominees to refuse to appear before the Senate Judiciary Committee for confirmation hearings, but that they dare not answer tough substantive questions directly, lest they be borked. *Id.* at 82 (“But practice teaches us that if the nominees want to be confirmed, they have no choice but to refuse to answer.”); *id.* at 80 (“[F]uture nominees would be crazy to pass up any opportunity to temporize, distract, and evade.”). Consequently, the nominees “dance.” *Id.* at 58–59.

the point of the vesting of the judicial commission, and to attempt thereby to “control” how a sitting judge decides cases. That is improper, and no judicial candidate of character could properly agree to such a process or make such commitments. But those (like Carter) who are fond of invoking “judicial independence” make an equal and opposite mistake: To bar inquiry into a nominee’s substantive views is to attempt to leverage post-appointment judicial independence *backward* in time, prior to the vesting of the commission, and thereby to limit how the President and the Senate may exercise *their* respective constitutional powers with respect to appointments. That, I submit, is just as improper. The no-inquiry view of Carter and others fetishizes judicial independence, as if it were the only structural principle contained in the Constitution. It is not; it is but a piece of the fabric of separation of powers and cannot be ripped from that fabric without creating the near absurdity (in a democratic republic) of an essentially uncheckable governing board, the members of which the people dare not ask in advance how they will govern.

Considered as a whole, the Constitution’s appointment-confirmation-independence architecture suggests a simple, bright-line boundary on inquiry into a judicial nominee’s views and likely votes. The political branches may demand information necessary to enable them to make informed *predictions*, but they may not extract *promises* or *pledges*. A nominee may answer any and all substantive questions, but always with the reservation of the right to change her mind and always with the caveat that, though she has preliminary views, any particular case must be decided on the basis of its facts and in light of the legal arguments presented. A nominee’s statements concerning her judicial philosophy or even her preliminary views on a particular case or matter—such as in response to a litmus test question—do not literally bind her subsequent decisions on the bench and should not be regarded as compromising judicial independence. Statements of opinion about particular cases are just that—statements of opinion. So long as such statements do not constitute a commitment or *promise* as to how a judge will decide any given case (or category of cases), they do not “com-promise” true judicial independence. They reveal much about a prospective appointee’s mental processes, general approach to law, and even the outcomes that are likely to result as a consequence. All of that is to the good. In short, a candidate may answer virtually *anything* but must make clear that in doing so she has not prejudged (and is thus not “prejudiced” with respect to) any particular case.⁶⁷

67. From the perspective of litigants, a firm prior commitment to rule a particular way on a particular case or issue might also pose serious due process concerns. In the main, however, a litigant’s due process right to a fair hearing requires a “neutral” *fact-finder*, who will apply equal justice *under the law*. A litigant should have no expectation that a judge’s view of *the law* is unformed, or “neutral,” only that it is *correct*. To be sure, different judges will differ as to the “correct” interpretation of the law, but there is no due process right to a judge who holds no substantive views on legal questions.

For example, suppose a candidate says the following, in response to the classic litmus test question of *Roe*:

Senator, let me first say that any view I express in my capacity as a nominee is subject to reconsideration after appointment, in an actual case in which the issue is briefed and argued. In my view, any other position would be inconsistent with the independence of the judiciary under Article III. Moreover, any other position would constitute prejudging a particular case or issue. I would not decide any case until after having given full consideration to the facts and legal arguments presented by the parties.

That said, I currently hold considered and definite views on a number of legal issues, including *Roe v. Wade*. Subject to the qualifications just given, it is my considered view at present, based upon all the arguments that I have heard and considered to date, that *Roe v. Wade* was wrongly decided and should be overruled, and that the doctrine of stare decisis poses no proper barrier to such an outcome.

This answer satisfies the bright line separating expression of present opinion from commitment to reach a certain result in a particular case; it therefore satisfies all constitutional requirements concerning judicial independence, while simultaneously providing valuable information about a candidate's substantive views and judicial philosophy.⁶⁸

Statements of this kind are common in judicial confirmation hearings. This hypothetical answer to the *Roe* question is no different in principle from agreeing that *Brown v. Board of Education* was correctly decided or that any other decision is "settled." (Or, as Clarence Thomas frequently put it, "I have no quarrel with that decision."⁶⁹) All such statements take a position as to the correctness of an earlier decision. The fact that certain legal issues are regarded

68. It also satisfies all requirements of judicial ethics codes, at least to the extent that those codes are not themselves unconstitutional. The various state codes of judicial conduct, patterned after American Bar Association models, if stretched so far as to constrain questions and answers about judicial philosophy that stop short of promises as to how a judge would rule, would be in serious tension with the role the Constitution sets up for the participation of popular institutions in judicial appointment—and would almost certainly violate the First Amendment, to boot. See *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 227–31 (7th Cir. 1993) (holding that state judicial conduct rule prohibiting judicial candidates from announcing views on disputed legal or political issues violated First Amendment); cf. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 141–44 (3d Cir. 1991) (construing state judicial conduct rule that prohibited judicial candidates from announcing views on disputed legal or political issues narrowly, to avoid First Amendment violation).

Professor Carter notes the inconsistency in having rigorous enforcement of the ethics codes' restrictions on judicial candidate speech and at the same time demanding that candidates answer questions in judicial confirmation hearings. Carter would resolve the inconsistency by urging that confirmation hearings adopt the (constitutionally dubious) standards of the canons. See CONFIRMATION MESS, *supra* note 3, at 96–98.

69. See, e.g., 1 *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 203, 265, 414 (1991).

in a given era as more controversial than others does not establish the propriety of rendering an opinion concerning one but not another. Candidates notoriously duck the controversial, hot-button questions. But it is disingenuous in the extreme (or extremely sloppy thinking) for them to say that they may not answer controversial questions but may answer substantive questions on other points. One might refuse to answer all substantive questions (as Antonin Scalia did⁷⁰) or agree to answer all substantive questions (as Robert Bork did), but the mugwump position that has become common in recent years lacks a principled rationale.⁷¹

In Carter's view, however, to ask a nominee to express her opinion on a case like *Roe v. Wade*—and to expect real answers—is to require that judges be closed-minded before they can be confirmed.⁷² But one need not have an empty head to have an open mind. If so, ignorance (or willful, studied “ignorance”) with respect to deeply controversial legal questions becomes our leading credential in selecting federal judges. No one really believes that a Supreme Court nominee doesn't have at least some tentative view on cases like *Roe v. Wade*, anyway. Why indulge the charade? A nominee doesn't become any *less* closed minded by refusing to discuss the extent to which her views are already well formed by prior thought, and the discussion is of potentially enormous value to a deliberative constitutional process of appointment and confirmation—the process seemingly contemplated by the Constitution's political mechanism for selection of judges.

70. Then-Judge Scalia refused even to answer a question concerning whether he thought *Marbury v. Madison* was settled law:

As I say, *Marbury v. Madison* is one of the pillars of the Constitution. To the extent that you think a nominee would be so foolish, or so extreme as to kick over one of the pillars of the Constitution, I suppose you should not confirm him. But I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison*.

Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 33 (1986). Carter seems to have misread the Scalia experience (perhaps because he was relying on a secondary source at this point): He states that Scalia “was asked several quite general questions about constitutional interpretation, but only a little about cases likely to arise.” CONFIRMATION MESS, *supra* note 3, at 79. The real point is that Scalia refused to answer even general questions about substance. Consequently, nobody got anywhere near the neighborhood of a specific answer on a current issue.

I will discuss below why a potentially controversial nominee such as Scalia might well choose to adopt such a posture as a tactical, political matter. See *infra* text accompanying notes 74–76. As a constitutional matter, however, the Senate is entitled to insist on answers short of pledges and reasonably may refuse to confirm a nominee who declines to answer substantive questions.

71. Carter notes how several recent nominees to the Supreme Court have agreed to discuss some substantive legal issues, but not others. See CONFIRMATION MESS, *supra* note 3, at 54–55 (noting that Ruth Bader Ginsburg was willing to discuss abortion, equal protection, and government funding of arts, but not death penalty); *id.* at 59 (noting that Clarence Thomas was willing to discuss affirmative action, but not abortion).

72. *Id.* at x–xi.

B. *Judicial Appointment as Political Campaign*

The other objection to substantive democratic review is that it turns judicial selections into political campaigns. The short answer is that judicial appointments *already are* political campaigns, the intensity of the campaign varying with the nature of the office and the identity of the nominee. This may be unavoidable. It also may be appropriate, if the terms on which the campaign is waged concern competing visions within the polity as to how the people's Constitution should be interpreted. As noted above, acknowledging the legitimacy of such a debate may go a long way toward having it waged on those terms, rather than on the basis of sound bites and personal smears.

But sadly, it is argued, it is simply not possible to have the campaign waged on such lofty terms as a debate over constitutional meaning. It inevitably will degenerate into constitutional sloganeering and mudslinging, just as our other political campaigns have degenerated. After Bork, what candidate in his right mind would take the "what you see is what you get" approach of freewheeling, honest, substantive discussion of constitutional issues before the Senate Judiciary Committee while being crucified by thirty-second commercials and grandstanding Senators offering loaded rhetorical questions? Besides, it's downright demeaning. Even if not unethical, it sure feels *unseemly* for a prospective judge to subject herself to such a process.

There is much to this, and a nominee might just refuse to play.⁷³ This was done successfully as recently as 1986, when the usually playful (and potentially controversial) Antonin Scalia stonewalled the Senate Judiciary Committee and received unanimous confirmation.⁷⁴ In the world after Bork, however, this may no longer be possible. A candidate who, quite reasonably, refuses to play will likely encounter a Senate that, quite reasonably, refuses to confirm.⁷⁵ A Supreme Court nominee who wishes to maintain his or her dignity must be either cream-of-wheat bland or smart enough to just say "no" to the nomination in the first place. The alternative is the bob-and-weave approach exemplified by David Souter and poorly replicated by Clarence Thomas. Surely this approach is equally humiliating, and a game that can only be played by persons who should not be our first choices for such important positions: those who have had professional legal careers of twenty or thirty years without making a single controversial statement or thinking about the most hotly debated constitutional issues of our time (and who are not about to

73. Cf. Rees, *supra* note 38, at 948 (arguing that even though Senators have duty to base their vote at least partly on nominee's views and therefore also must familiarize themselves with those views, "[i]t does not follow that the nominee has a constitutional obligation to assist the Senator in his quest").

74. See *supra* note 70.

75. In this regard, Carter quotes Senator Arlen Specter as stating that the Senate Judiciary Committee might one day "rear up on its hind legs" and refuse to confirm a nominee who refuses to answer questions about constitutional law issues. CONFIRMATION MESS, *supra* note 3, at 54.

start now) or who simply have no qualms about being mildly duplicitous about their own views.⁷⁶

There is another alternative, which I offer only somewhat in the spirit of a Swiftian modest proposal. This alternative is suitable for the next candidate in the Bork-like position of having a controversial paper trail of either ideological or provocative, idiosyncratic views and who consequently faces a difficult confirmation process in a potentially hostile or divided Senate. (For example, I think of a Laurence Tribe or a Bruce Ackerman nominated during the 104th Congress, or a Richard Posner nominated anytime.) To such a person, I ask the following: Why *not* wage a "campaign," but on your own terms? Rather than playing defense under hot TV lights in front of the experienced grandstanders on the Senate Judiciary Committee armed with questions from staffers, why not give a series of speeches in controlled, familiar situations with more favorable audiences? For an academic, that might mean speeches at law schools, with students asking the questions and the media present only as onlookers. For sitting judges and practitioners, it might mean similar talks in front of bar groups or service clubs. It might mean arranging "softball" interviews, exclusive interviews, "town meetings" about the Constitution, or doing the Larry King show. The candidate could address the issues, present his or her judicial philosophy, decorously attack his or her detractors, and better control the terms of the debate. In short, nominees for the Supreme Court could do the sorts of things that political candidates do, with

76. Would such an unabashedly political process of substantive review produce a Supreme Court of nothing but Bland Breyers or Stealthy Souters, with no Scurrilous Scalias to make life more interesting? I am not sure either that this would be the case or that such a result would necessarily be bad. In the first place, the increased focus on judicial appointments has produced such choices in any event. Second, it is not the case that jurists like Breyer or Souter are non-ideological. To the contrary, they have quite distinctive views. The present approach does not necessarily assure centrist or non-ideological jurists, but rather ones whose views are more easily disguised or denied. Third, if the process were more openly ideological, with no stigma attached to negative votes based simply on disagreement with a nominee's substantive views, it is less likely that confirmation battles involving controversial nominees would be so bitterly personal. Freed of the false constraints of pseudo-decorum, promoters of a controversial candidate might push more aggressively for the candidate on the basis of the substantive desirability of her judicial views. Frankly political figures such as Senators and Representatives might be chosen more frequently (as they were in earlier years). Selection of career politicians might even produce a more ideologically sharpened Court. Finally, it is not clear why it would be a bad thing to have a system that pushed toward greater ideological consensus on the Court. My own best guess is that nominees will tend to be more "centrist" in times of divided government and more "ideological" in times when the presidency and the Senate are held by the same party.

Another objection to open, ideological review is that it might tend to undermine norms of judicial restraint, *after* a nominee is confirmed. The argument here is that candid legal realism at the appointment stage may serve implicitly to legitimate or even authorize the type of behavior legal realism describes: Frankly ideological candidates who survive frankly ideological scrutiny will feel justified in being frankly ideological on the bench. As noted, however, it seems more likely that ideological review will produce centrist, consensus candidates in periods of centrist or divided government and more ideological candidates when a political consensus has united in support of particular ideological principles. In each case, I submit that there is nothing wrong with a confirmed appointee's acting consistently with her previously expressed views, which formed the basis on which she was nominated and confirmed. If an activist era produces an activist nominee who then becomes a judicial activist, the system has merely matched performance to expectations.

adaptations appropriate to the differences in the office sought, and, because this campaign results in a plebiscite, without the need to raise money to outspend an opponent.⁷⁷

It might be objected that all of this is so dreadfully *unseemly*. Compared to the present confirmation mess, however, it is hard to credit such a complaint. Rather, the idea of such a "campaign" is simply *unfamiliar*; it is not typical of the way in which judicial nomination and confirmation have always been conducted, at least in the world before Bork. But such an approach may well be the wave of the future. It used to be thought unseemly for presidential candidates to campaign, too. As recently as 1896, William McKinley "stood" for President on his front porch. Perhaps fifty to seventy years from now, subsequent generations will regard our squeamishness as quaint, and more than a little bit amusing, considering the important governmental power exercised by courts.

Would the Senate sit still for a nominee refusing to show up for a confirmation hearing and choosing instead to discuss ideology in another forum (rather than be grilled in a public hearing)? Maybe, maybe not. So long as egos were appropriately stroked with the customary personal visits and Senators were permitted to ask their private substantive questions in these private sessions (no reporters, no aides, no handlers), how could they object that they hadn't had a chance to make fair inquiry and satisfy their personal concerns? All that they wouldn't have a chance to do is to make speeches for or against the candidate (whether or not phrased in the form of a question) to cameras, with the nominee forced to sit and listen and respond as courteously and obsequiously as possible to everything from shallow flattery to rank distortions and lies. Let the Senators make their speeches on the Senate floor, without the candidate's presence used to create a larger media audience.

Professor Carter quickly dismisses the idea of the nominee's not testifying,⁷⁸ but in light of the mess as it stands, who is to say that a strong-willed candidate, supported by a strong President, might not convince a sympathetic Senate Judiciary Committee to allow him or her to "campaign" in his or her own way? Who is to say that such an approach might not be better than either the present confirmation mess or Stephen Carter's variation on it?⁷⁹

77. See Bryden, *supra* note 22, at 209–10 (discussing other differences between two-person electoral contest and judging judicial candidate in isolation).

78. CONFIRMATION MESS, *supra* note 3, at 193–94.

79. Carter counters pleas for increased public, political participation in judicial selection by arguing that, if majoritarian pressure is such a good thing, then we should go all the way and elect judges outright. *Id.* at 201–03. This suggestion is meant as a *reductio ad absurdum*, but the ploy does not quite work. In the first place, the *reductio* is not that absurd. Many states elect judges, and while one can find many faults in these systems, it is not at all clear that election *per se*—as opposed to denial of life tenure and the consequent need to seek reelection—compromises true judicial independence-of-decision.

Of course, that is not the system we have at the federal level, and no such change is needed. The Constitution has prescribed a particular one-step-removed political process for judicial appointments. It is

V. CONCLUSION

Carter's book ends with the odd conclusion that, because nothing is really wrong with the nomination and confirmation process, no reforms are necessary. The problem, rather, lies in our *attitudes*.⁸⁰ In a sense, Carter is right: The Constitution's prescribed mode of appointment of federal judges is not itself in need of repair. Properly understood, it is a consistent part of the Constitution's separation of powers and system of interlocking checks and balances on each branch's exercise of its powers. Moreover, it is an appropriate mechanism for giving expression to the competing voices that inevitably seek to influence who will be appointed to these positions of governmental power.

Carter is wrong, however—badly wrong—in thinking that a mere change in attitudes can cure what ails the confirmation process. So long as the courts wield enormous power, it is implausible, as well as wrong in principle, to insist that the people develop an attitude of respectful indifference to how and by whom that power is exercised. Such misdirected efforts at quasi-deifying the courts have transformed legitimate and important ideological debate about the meaning of the Constitution and the role of courts into personal vendettas, alternately vicious and petty. Carter wishes these symptoms would go away and suggests that we accomplish this by subscribing yet more strongly to a mythology that is, in large measure, the very cause of these symptoms. Carter's sentiment may be noble, but his simplistic and misdirected analysis of the underlying problem makes *The Confirmation Mess* part of the problem, not its solution.

not thereby any the less a political process involving political actors. Rather, it is a *refined* political process, in the Madisonian, *Federalist* No. 10 sense of having one set of popularly selected officials choose another set, in order better to select persons who will perform a specialized, unique function. One can support this refined (one might almost say rarified) selection process—requiring the proposal of the President of the United States and the endorsement of the United States Senate—and one may acknowledge and embrace the essentially public and political character of that process, without thereby saying that judges should be popularly elected directly by the people.

80. *Id.* at 204–06.