

REVIEW ESSAY

MIRED IN THE CONFIRMATION MESS

THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS. By Stephen L. Carter.† New York: Basic Books 1994. Pp. 206. \$21.00.

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Based on the title of Stephen Carter's latest book, *The Confirmation Mess: Cleaning Up the Federal Appointments Process*,¹ one might suppose that Carter thinks that the federal appointment process is in need of major structural reform. As Carter makes clear in the final pages of the book, however, he actually thinks that the process is basically sound.² Although he is quite distressed about the nasty battles that sometimes take place over confirming nominees—what he frequently calls the “blood on the floor”³—he sees no need to change anything structural in order to clean up this messy process. In his view, people's attitudes are all that need to be changed.

If taken to heart by Senators and others in a position to initiate serious reform, *The Confirmation Mess* could make a bad situation even worse. Focusing on the Supreme Court appointment process, I will argue that Carter's approach to that process is fundamentally flawed.

Although *The Confirmation Mess* includes within its scope the broad range of appointments covered by the Constitution's Appointments Clause,⁴ I discuss only its implications for the Supreme Court appointment process for two reasons. First, that process is rather clearly the book's central concern, with much of what Carter has to say being expressly addressed to the nature of

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¹ STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994) [hereinafter cited by page number only].

² See pp. 203-06.

³ See, e.g., pp. 24, 95, 187, 206.

⁴ U.S. CONST. art. II, § 2, cl. 2.

the Court and how its members should be chosen. Second, unlike Carter, I believe that the appointment of Supreme Court Justices is sufficiently different in its implications from other types of appointments—particularly nonjudicial ones—that it is generally unhelpful to try to discuss them in the same breath. In my view, the national importance of the issues decided by the Court, the final and nationwide effect of the Court's decisions, and the Constitution's virtual guarantee of life tenure to the Justices⁵ combine to make the Supreme Court appointment process one most usefully discussed alone.

I. A SYNOPSIS

The Confirmation Mess is not, to say the least, a tightly argued book. In the preface, Carter describes the book as "in the nature of an extended essay, remarking on general themes by using familiar examples."⁶ He then proceeds to implement this style by setting forth his arguments in a distinctly nonlinear way. Arguments are begun, dropped in midstream in favor of lengthy anecdotes or asides, and resumed pages or even chapters later, often with little attention to just where they left off.

Whatever the merits of this mode of argument, one obvious consequence is that it shifts to Carter's would-be critics the burden of setting forth with some clarity the arguments that Carter appears to make. Before explaining why I find *The Confirmation Mess* so troubling, I therefore will try to reconstruct what Carter has to say about the Supreme Court appointment process as fairly and cohesively as I can.

According to Carter, the Supreme Court appointment process will continue to invite "blood on the floor" unless people change their thinking in four principal ways. First and foremost, people must stop thinking about how the nominee, if confirmed, would be apt to vote on issues likely to come before the Court.⁷ People's preoccupation with nominees' likely votes is largely to blame for the

⁵ See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

⁶ P. xi.

⁷ Chapters three through five are devoted primarily to this argument, but the argument is spread virtually across the entirety of the book. In analyzing this argument in Part III, I will expand upon this synopsis of the argument and refer more specifically to relevant passages in the book. In Parts IV and V, I will do the same with regard to the second and third arguments described in this synopsis.

end-justifies-the-means approach often taken to ensure the defeat of a disfavored nominee. Moreover, a nominee's likely votes are no one's business but the nominee's. For people in general, and the President and Senators in particular, to assign importance to a nominee's likely votes is antithetical to the judicial independence that is an essential part of a Supreme Court Justice's role. In exercising their power of judicial review, the Justices must be willing to resist the majority will out of regard for constitutional protections often crafted with racial, religious, and other types of minorities foremost in mind. Yet the likelihood that the Justices will be willing to bear this burden is greatly diminished if the process for appointing them invites the public and the public's elected representatives in the White House and Senate to pass judgment on the acceptability of their likely votes.

Second, people need to develop a more realistic and less grandiose conception of the Court.⁸ People's willingness to engage in mean-spirited, no-holds-barred efforts to keep a nominee off the Court is based in part on a misconception of the Court's importance. People who really want to make things happen would be wise in all respects to stop expending so much energy trying to block the appointments of Supreme Court nominees whom they fear will vote the "wrong" way. Instead, they should channel their energies into the democratic process, taking more time to persuade their fellow citizens of the need for change and availing themselves more fully of other political means of effecting change.

Third, people should become more forgiving of nominees' moral lapses and think more seriously about whether the nominee is truly sorry for any regrettable behavior that has come to light.⁹ The existing confirmation mess, with all its blood on the floor, is partly made possible by a widespread self-righteousness that seems to revel in catching aspirants to high public office in error. Rather than try to place a nominee's past misconduct in perspective, people are only too happy to magnify its importance and seize upon it as a ground for disqualification. This attitude flies in the face of Christian theology, which teaches that any of us is always susceptible to falling into sin. In keeping with the Christian model, people should approach nominees' moral lapses with compassion, not venom, and be ready to extend forgiveness to those who show

⁸ This argument appears in the book primarily on pp. 95, 204-06.

⁹ Carter principally makes this argument on pp. x, 28-31, 144, 183-86.

genuine contrition.

Fourth and lastly, Senators should abandon the "fantastic notion"¹⁰ that Supreme Court nominees deserve a presumption in favor of confirmation.¹¹ Senators should recognize that it is entirely appropriate for them to vote against a nominee not only because of some glaring flaw, but simply because the nominee does not seem sufficiently likely to do a first-rate job. If Senators adopted this view, it would greatly help reduce the blood on the floor, because opponents of a nomination would not need to claim some horrible defect in the nominee in order to prevail.

Absent major structural reform, I seriously doubt that telling Senators not to give Supreme Court nominees a presumption in favor of confirmation is apt to do much to reduce the "blood on the floor." I also see nothing "fantastic" in the fact that nominees are regularly given such a presumption. It is a function of certain realities discussed below.¹² I see no need, however, to pursue here my differences with Carter regarding this proposal, because, as indicated elsewhere, I believe that a recommendation to abandon a presumption for confirmation is defensible for reasons other than those that Carter sets forth.¹³ My disagreements with Carter with regard to his other prescriptions for change are far more deep-rooted, and I will devote my attention to them instead. In Parts II through V, I will attempt to show that all three of Carter's other proposals are unsound. I begin by suggesting in Part II that the problem that prompts Carter to make these proposals—the potential for "blood on the floor"—does not warrant the amount of attention that he gives it.

¹⁰ P. 159.

¹¹ I hesitate to some extent to list this argument as one of Carter's major points. After briefly articulating the argument, *see* p. 159, Carter immediately swings into a 20-page discussion in which he purports to "divide potentially disqualifying factors into five categories and to explain, in each case, why the concern is serious and what it should take to cure the problem." P. 160. Basically, if Carter is really eager to persuade Senators to stop approaching confirmation decisions with a presumption in favor of confirmation, this elaborate discussion and grading of disqualifying factors is difficult to understand. It seems to focus Senators' attention on whether a nominee is sufficiently tarnished to justify their voting against confirmation, rather than sufficiently highly qualified to merit their voting "yes."

¹² *See infra* part II.B.

¹³ *See* Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 651-53 (1993).

II. BLOOD ON THE FLOOR

Throughout *The Confirmation Mess*, Carter invokes the image of "blood on the floor"¹⁴ and treats the elimination of this unpalatable sight as the ultimate good to which people concerned about the Supreme Court appointment process can aspire.¹⁵ Although Carter deserves credit for a strategically astute choice of imagery—after all, it is pretty hard for anyone to be in favor of something like blood on the floor—his preoccupation with the reality that it represents seems misguided. I question in section A whether the potential for nasty fights over confirming nominees is nearly as serious a problem as Carter suggests. Even more basically, I question in section B whether it is nearly as serious a problem as one that Carter virtually ignores.

A. *Magnitude of the Problem*

In treating the potential for "blood on the floor" as the central problem plaguing the Supreme Court appointment process, Carter expressly or implicitly makes the following assumptions: in light of recent experience, people nominated to the Supreme Court in the foreseeable future bear a serious risk of being subjected to vicious and genuinely irresponsible attacks; it is very unfair to nominees to force them to fend off various untrue allegations if they wish to secure an appointment to the Court; and if the Supreme Court appointment process continues to be as bloody as it has been in recent years, it will soon become impossible to find top quality people willing to accept a nomination to the Court. I suggest below that none of these assumptions is well-founded.

1. Probability of Nasty Attacks

In lamenting the potential for "blood on the floor," Carter repeatedly points to Robert Bork as an example of a nominee who was subjected to an array of mean and reprehensible attacks.¹⁶ Even assuming, for purposes of argument, that those Senators and others who led the opposition to Bork treated him very badly—and I do have some doubts on that score—I question whether Carter is not reading more into the Bork episode than it deserves.

¹⁴ See *supra* note 3 and accompanying text.

¹⁵ See, e.g., pp. 22, 188, 191, 206.

¹⁶ See pp. 45-52, 120-21, 124-33.

First, as I will discuss in Part III,¹⁷ President Reagan's decision to nominate Bork was exceptionally provocative. If the response to it was indeed quite extreme, that hardly implies that the typical nomination should be expected to arouse a highly problematic response.

Second, the way that other recent Supreme Court nominees have been treated offers future nominees little reason to anticipate a barrage of nasty attacks. Most obviously, when Presidents in recent years have put forth nominees with the intent of minimizing controversy and drawing broad Senate support from the start, there has rarely been a drop of blood on the floor to be found. Indeed, President Clinton's nominations of "consensus candidates" Ruth Bader Ginsburg¹⁸ and Stephen Breyer¹⁹ were followed by confirmation processes so tame as to be downright boring.

Even when Presidents recently have selected relatively controversial nominees, the process typically has been quite deferential to the nominee. Though obviously quite a bit more conservative in his leanings than a majority of the Senate would have preferred,²⁰ Reagan nominee Antonin Scalia sailed through his confirmation hearings virtually untouched. His repeated refusals to answer questions that might shed light on his likely votes on the Court²¹—perhaps most eye-opening was his refusal to comment even on the validity of the holding in *Marbury v. Madison*²²—were

¹⁷ See *infra* text accompanying notes 74-79.

¹⁸ See Linda Greenhouse, *The Ginsburg Hearings: An Absence of Suspense Is Welcomed*, N.Y. TIMES, July 25, 1993, § 4, at 3.

¹⁹ See Linda Greenhouse, *Why Breyer's Hearing Was Meant to Be Dull*, N.Y. TIMES, July 17, 1994, § 4, at 4.

²⁰ See David A. Kaplan, *Scalia Was "Worse" than Bork*, N.Y. TIMES, Oct. 19, 1987, at A23.

²¹ See William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109, 138-39, 162 (1987) (discussing Scalia's refusal to answer questions about prior Supreme Court decisions and various constitutional issues).

²² The nominee stated:

As I say, *Marbury v. Madison* [5 U.S. (1 Cranch) 137 (1803)] 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).

rewarded by the Senate with a unanimous affirmative confirmation vote. Similarly, despite a track record on constitutional issues so meager as to give rise to fears that he might be a closet Bork,²³ Bush nominee David Souter encountered little resistance in his ascension to the Court. Prior to his confirmation hearings, some members of the Senate Judiciary Committee publicly urged the importance of pressing the nominee for his views.²⁴ Yet in the hearings themselves, the committee members treated this so-called "stealth candidate"²⁵ with the utmost cordiality and generally were quick to seize on any indications in his testimony that he was not another Bork after all.²⁶

The only nominee of late whose confirmation process compared in fireworks to Bork's was Clarence Thomas, but even Thomas's confirmation process does not give future nominees much cause to fear irresponsible attacks. As I have tried to show in an article on the Thomas appointment,²⁷ although this Bush nominee surely was subjected to strong attacks inside and outside the hearing room, those attacks generally were not irresponsible but highly deserved. Indeed, the attacks made inside the hearing room ought to have been considerably more intense.²⁸

2. Unfairness to Nominees

Although Carter complains most explicitly about mean and vicious attacks on nominees, it appears at times that his concern about "blood on the floor" extends beyond such attacks.²⁹ At the heart of his concern seems to be some sense that it is very unfair to

²³ See Steven A. Holmes, *A Window to Souter's Way of Life*, N.Y. TIMES, Aug. 15, 1990, at A25; Neil A. Lewis, *Souter's Views Trouble Groups Opposed to Bork*, N.Y. TIMES, Sept. 7, 1990, at A14.

²⁴ See Richard A. Berke, *Senators Expect Assent on Souter*, N.Y. TIMES, Sept. 13, 1990, at A18.

²⁵ The press was enamored of the label. See, e.g., David G. Savage, *Abortion Brief Tells Little of Souter*, L.A. TIMES, July 31, 1990, at A14; Tim Smart, *Souter's Opponents Still Don't Have Him in Their Sights*, BUS. WK., Sept. 17, 1990, at 34.

²⁶ See Linda Greenhouse, *Defining Souter, Some*, N.Y. TIMES, Sept. 19, 1990, at A1; Linda Greenhouse, *The "Not Bork" Test*, N.Y. TIMES, Sept. 17, 1990, at A18.

²⁷ See Simson, *supra* note 13, at 619-45.

²⁸ See, e.g., Walter Goodman, *Clear Picture of White Power and Black Achievement*, N.Y. TIMES, Oct. 17, 1991, at A22 ("In their questions to the nominee [in the hearings on Anita Hill's allegations], the Democrats tiptoed around him as if he were an undetonated mine.").

²⁹ See, e.g., pp. 5, 21-22.

nominees to make them fight off untrue allegations, even if those allegations are not made recklessly or with malicious intent.

Although I agree with Carter that vicious attacks aimed at distorting the truth are grossly unfair to nominees and have no place in the system, I part ways with him to the extent that he worries about the fairness of subjecting nominees to attacks that may ultimately prove unpersuasive but that are neither malicious nor reckless. Nominees for the Supreme Court seem no less able to take care of themselves than the wide variety of public officials who, in the interest of the "uninhibited, robust, and wide-open"³⁰ debate contemplated by the First Amendment, are obliged to fend off a broad range of defamatory falsehoods.³¹ The confirmation process is the public's and Senate's one opportunity to find out who this person is who is about to be given a lifetime seat on the nation's highest court. Under the circumstances, there seems to be good reason to err in favor of vigorous debate, even though it may prove "vehement, caustic, and sometimes unpleasantly sharp."³² If potential nominees feel that such rough-and-tumble scrutiny is unfair, they are entirely free to protect themselves from it by withdrawing their names from consideration.

3. Quality Control

Carter raises the specter that, if the appointment process stays as bloody as it has been in recent years, good candidates for the Court may begin to withdraw their names from consideration with great frequency and Presidents will be forced to lower their standards significantly to get people willing to be nominees.³³ I seriously doubt that there is any substance to this claim.

As discussed above,³⁴ the process does not seem to be nearly as bloody as Carter assumes. Furthermore, even assuming that the process is somewhat bloodier than I have suggested, the possibility of a lifetime seat on the nation's highest court is a powerful incentive to people asked to be nominees to let the process go forward and endure whatever unpleasantness it may offer. As

³⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³¹ *See id.* at 279-80 (holding that public officials may not recover damages for defamatory falsehoods relating to their official conduct unless they can show that the statements were knowingly false or made with reckless disregard for the truth).

³² *Id.* at 270.

³³ *See pp.* x, 5.

³⁴ *See supra* part II.A.1.

Douglas Ginsburg demonstrated when he agreed to a nomination that President Reagan ultimately felt compelled to withdraw,³⁵ even nominees with something to hide are apt to find a seat on the Court sufficiently tempting to take their chances with the process. Finally, even if the nature of the process leads some people to decline nomination, the pool of people both very willing and able to serve on the Court seems sufficiently large to be in no real danger of being exhausted any time soon. Perhaps I am too easily impressed by people or not impressed enough by what it takes to do a good job on the Court, but I think our nation's courts, the bar, government, and academia offer a wealth of excellent candidates from which to choose.

B. *The Real Confirmation Mess*

Even assuming, for purposes of argument, that "blood on the floor" is somewhat more of a problem than I claim, I cannot imagine that it is even roughly comparable in seriousness to a problem that Carter all but ignores: presidential domination of the appointment process. Carter mentions this problem only once and then only in passing as a theoretical possibility.³⁶ To borrow Carter's sanguinary imagery for a moment, Carter is so preoccupied with cleaning up the blood on the floor that he hasn't bothered to notice that the patient is dying.

As I have argued at length elsewhere,³⁷ the appointment of Clarence Thomas vividly demonstrated that the President's powers of persuasion have become so formidable that, at least for a fairly popular President, the President's power to nominate is now not much less than a power to appoint.³⁸ In light of the available evidence about Thomas at the time that he was confirmed, many of the fifty-two Senators who voted to confirm him must have had grave doubts about his fitness for a seat on the nation's highest court. There were various reasons to question seriously not only his

³⁵ See Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1224-25 (1988) (discussing the withdrawal of the Ginsburg nomination after press reports that the nominee had used marijuana while a law professor).

³⁶ See pp. 13-14.

³⁷ See Simson, *supra* note 13, at 619-49.

³⁸ For discussion of presidential power and the various means of presidential persuasion, see GEORGE C. EDWARDS, III, *PRESIDENTIAL INFLUENCE IN CONGRESS* (1980); BARBARA KELLERMAN, *THE POLITICAL PRESIDENCY* (1984); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* (rev. ed. 1990).

integrity but his legal abilities as well.³⁹ By all indications, however, most, if not almost all, of the Senators who voted for Thomas put aside their doubts about his fitness out of concern for their political futures if they went against the wishes of George Bush.⁴⁰ A very popular President at the time—how quickly things change!—Bush had made clear to the public via the press and to individual Senators by more private means of communication that this was a nomination that he urgently wished to see succeed.⁴¹

Thomas's confirmation in the face of compelling reasons to vote him down was hardly an aberration. On the contrary, it simply demonstrated how far an obvious and unfortunate trend had gone. As evidenced by the difference in rejection rates for Supreme Court nominees before and after 1900, the history of appointments to the Court in this century is one of unprecedented presidential domination of the process. Since 1900, the Senate has rejected only about one Supreme Court nomination out of ten.⁴² Before 1900, the rejection rate was much higher—roughly one out of four.⁴³

Most obviously, Thomas's appointment illustrated how the current system of presidential domination fails to provide enough protection against Supreme Court appointments that are not in the nation's best interests. Too much depends on the President's dedication to the common good. Thomas's appointment also illustrated how the current system jeopardizes the Supreme Court's independence. Presidents are so able to put people to their ideological liking on the Court that the line separating the executive and judicial branches can become dangerously blurred.

³⁹ See Simson, *supra* note 13, at 620-45.

⁴⁰ See *id.* at 645-48.

⁴¹ See Andrew Rosenthal, *Bush Emphasizes He Backs Thomas in Spite of Uproar*, N.Y. TIMES, Oct. 10, 1991, at A1; Andrew Rosenthal, *Thomas's Edge Steady, Vote Due Today*, N.Y. TIMES, Oct. 15, 1991, at A1.

⁴² See Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMMENTARY 283, 323 n.139 (1990) (counting six rejections out of 58 nominations from 1900 to 1989). All four nominations since 1990 have gone through, meaning that in this century six nominations have been rejected out of 62. In calculating the rejection rate, I follow the standard practice of counting as rejections any nominations that are either voted down by the Senate, withdrawn by the President, or not acted on by the Senate. See, e.g., JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 302-03 (1953); Robert B. McKay, *Selection of United States Supreme Court Justices*, 9 U. KAN. L. REV. 109, 130 (1960).

⁴³ See Simson, *supra* note 42, at 324 n.143 (counting 20 rejections out of 83 nominations before 1900).

If the current system is indeed untenable and needs to be replaced with one in which the President and Senate once again have roughly equal say, major structural reform is overdue. I have argued elsewhere that the following reforms would be in order: The proportion of votes necessary for confirmation to the Court should be changed by constitutional amendment from half of the Senate to two-thirds.⁴⁴ Unless and until such an amendment is adopted, the Senate should adopt a rule that it cannot act on a Supreme Court nomination unless two-thirds of the Senate Judiciary Committee votes to approve the nominee.⁴⁵ The Senate Judiciary Committee should stop asking Supreme Court nominees about their views on issues likely to come before the Court and rely instead, for insight into their views, on their prenomination speeches and writings and expert analysis of those speeches and writings.⁴⁶ The Senators on the Judiciary Committee should step aside during Supreme Court confirmation hearings and turn over the questioning to lawyers with substantially greater expertise than the ordinary Senator in constitutional law, superior cross-examination skills, and fewer political inhibitions about asking tough questions that need to be asked.⁴⁷

Seemingly transfixed by the "blood on the floor" but satisfied that it can be cleaned up by other means, Carter declares that there is no need for major structural reform. Indeed, at the close of the book, he invokes the "old saw" that "[i]f it ain't broke, . . . don't

⁴⁴ See Simson, *supra* note 13, at 649-51. Carter discusses the possibility of such an amendment and comes close to advocating its adoption. See pp. 196-98. Ultimately, however, he appears to retreat from doing so. See p. 198 (alluding to "[t]hose most likely to oppose the two-thirds requirement (other than such curmudgeons as I, who worry about whether we should *ever* amend the Constitution)"); p. 206 ("*If it ain't broke*, runs the old saw, *don't fix it* . . . [and] our processes for nominating and confirming Supreme Court Justices and other public officials are not really broken").

⁴⁵ See Simson, *supra* note 13, at 651.

⁴⁶ See *id.* at 653-56. In light of Carter's claim that Senators should not assign importance to nominees' likely votes, one might have expected that he would propose significant limits on the proper scope of questioning. He does not do so, however, apparently out of concern that such a change in settled practice might prove disruptive. See pp. 193-94 (rejecting a proposal that nominees not testify, because "at this point in our history, this change would cause more problems than it would solve [T]he people of the United States understandably want what passes for exposure (bits and pieces on the television news) to the individuals who might be wielding [the Court's] power").

⁴⁷ See Simson, *supra* note 13, at 656-58.

fix it"⁴⁸ and assures us that "despite all the worry about blood on the floor and smears and sound bites, our processes for nominating and confirming Supreme Court Justices and other public officials are not really broken."⁴⁹ So doing, he lends legitimacy to, and helps perpetuate, a fundamentally unsound status quo.⁵⁰

III. CONSIDERATION OF NOMINEES' LIKELY VOTES

Over the years there has been lively debate as to whether the President alone may legitimately give weight to how someone is apt to vote on important issues if appointed to the Court or whether Senators legitimately may do so as well.⁵¹ Carter takes the rather distinctive position that neither the Senate *nor* the President has any business thinking about a possible or actual⁵² nominee's likely votes.⁵³ In doing so, he maintains that consideration of nominees' likely votes is inconsistent with judicial independence and much to blame for all the "blood on the floor." After briefly setting forth two arguments in favor of presidential and senatorial consideration of nominees' likely votes, I will suggest that Carter's two objections to considering likely votes do not cast serious doubt on either the logic or legitimacy of doing so.

⁴⁸ P. 206 (italics omitted).

⁴⁹ *Id.*

⁵⁰ The timing of Carter's contribution to maintaining the status quo perhaps could not be worse. See Gary J. Simson, *Better Way to Choose Supremes*, NAT'L L.J., Mar. 21, 1994, at A19 (suggesting that President Clinton's generally nonconfrontational approach to appointments makes it substantially easier than usual for Senators to vote to adopt reforms designed to redress the imbalance of power between the President and Senate in the Supreme Court appointment process).

⁵¹ For commentary urging the former point of view, see Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989); Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283 (1986); A. Mitchell McConnell, Jr., *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 KY. L.J. 7 (1970). For commentary arguing the latter position, see LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985); Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); Simson, *supra* note 42.

⁵² This qualification, "possible or actual," should be understood as implicit in the discussion below when I refer to "nominee" or "nominees," unless it is clear from context that I am referring only to actual nominees.

⁵³ Carter probably states his position most clearly on pp. 146-47.

*A. The Case for Considering Likely Votes**1. An Appointment Decision's Likely Effects*

The outcomes of cases decided by the Court cannot help but turn significantly on who is sitting on the Court. As Justice O'Connor once remarked, the Court's business basically consists of issues about which one can "write persuasively on either side."⁵⁴ Moreover, the Justices' different decisions as to which side of the issue to take is significantly influenced by their different political and social philosophies and attitudes about the role of courts.⁵⁵

Under the circumstances, it would seem only natural and logical for the President and Senate—the people who determine the composition of the Court—to try to put individuals on the Court who, in their view, would have a very positive influence on the outcome of cases of substantial national importance. In short, the President in selecting a nominee would give serious thought to how the nominee would be apt to vote, and the Senate in deciding whether to confirm the nominee would give the matter serious attention as well.⁵⁶

Of course, the President and Senate would only sensibly also want to consider other important implications of whatever appointment they might make. In particular, they almost certainly would want to think carefully about an appointment's probable effect on both public confidence in the Court and the fairness and efficiency of the Court's decision-making process.⁵⁷ In addition, in deciding how much weight to give to a nominee's likely votes, the President and Senate logically would want to discount for the uncertainties of predicting what issues of major importance are apt to arise during the nominee's years on the Court and how the nominee would be

⁵⁴ *In Search of the Constitution: Justice Sandra Day O'Connor* (PBS television broadcast, July 1987) (interview by Bill Moyers). To similar effect, see Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1725-29 (1988).

⁵⁵ See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 161-66 (1960); Schauer, *supra* note 54, at 1729-31.

⁵⁶ See Simson, *supra* note 42, at 289. As to how such consideration might proceed, see *id.* at 290-96.

⁵⁷ See *id.* at 289-90. For detailed discussion of these two factors, see *id.* at 296-300.

apt to vote on them.⁵⁸ All in all, however, a President and Senate intent on making a sound appointment decision would seem obliged to give a nominee's likely votes on issues of substantial national significance an important place in their decision.⁵⁹

2. The Countermajoritarian Difficulty

Attention to what Alexander Bickel called the "counter-majoritarian difficulty"⁶⁰ also militates in favor of presidential and senatorial consideration of nominees' likely votes. In a democratic society, important questions of legitimacy and stability arise when the Court—a group of unelected, essentially life-tenured judges—invalidates acts of the people's elected representatives that enjoy strong popular support.⁶¹ If the President and Senate—officials chosen by, and directly accountable to, the people—give substantial weight in appointment decisions to nominees' likely votes, the likelihood of a serious disparity between the will of the majority and the way in which the Court generally exercises its judicial review authority is significantly reduced.⁶²

This argument does not assume that Presidents and Senators are expected to decide who to put on the Court based on who seems most likely to reach results agreeable to a majority of the people. As discussed below,⁶³ presidential or senatorial reliance on such a criterion is difficult to defend. Rather, the argument only assumes that because the President and Senate are elected by the people and accountable to the people at the polls for their judicial appointments, they generally would be slow to appoint individuals to the Court who typically would exercise their judicial review authority in a way that varies dramatically from the wishes of the majority.⁶⁴

⁵⁸ See *id.* at 290, 294-95; see also *id.* at 304-05 (discussing the significance of the ideological balance of the Court to the weight to be assigned to a nominee's likely votes).

⁵⁹ For further discussion of the weight to be assigned to this factor relative to others, see *id.* at 300-06.

⁶⁰ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

⁶¹ See *id.* at 16-23.

⁶² See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283-86 (1957); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 9-11 (1968).

⁶³ See *infra* part III.B.1.

⁶⁴ On the importance in this regard of presidential and senatorial consideration of nominees' likely votes, see Simson, *supra* note 42, at 314-15.

B. Carter's Case Against Considering Likely Votes

In arguing against considering nominees' likely votes, Carter rests upon two arguments as to why such consideration is harmful. Before turning to these arguments, I underline that Carter fails to grapple with either of the arguments outlined above regarding the benefits of considering likely votes. He proceeds seemingly oblivious to the countermajoritarian difficulty. "Why in the world should anyone who believes in the Constitution," Carter rhetorically asks, "believe that elected officials should try to check the Court?"⁶⁵ In addition, he basically ignores the logic of allowing the President and Senate to consider in advance one of the most important effects that their appointments decisions will have.

1. Judicial Independence

According to Carter, the consideration of nominees' likely votes is at odds with the Court's role of standing firm against the will of the majority when constitutional principles so demand. As Carter sees it, the consideration of nominees' likely votes gives rise to a "worrisome paradox":⁶⁶

On the one hand, the courts exist at least in part to limit majority sway. On the other hand, the courts are to be peopled with judges selected at least in part because their constitutional judgments are consistent with those of the very majority whose authority they supposedly limit.⁶⁷

The source of this "paradox," however, is not the consideration of nominees' likely votes. Instead, it is a dubious assumption that Carter makes about the form that such consideration would take.

Carter tacitly assumes that, in considering nominees' likely votes, the President and Senate necessarily would look for nominees who would be apt to vote on constitutional issues in the way that the majority of the electorate would prefer. If most people dislike the restraints on government that a particular constitutional provision has been interpreted to impose, then, under Carter's thinking, a President and Senate attentive to nominees' likely votes would be sure to screen for nominees who would read the provision to produce the results that most people would like. Indeed, under

⁶⁵ P. 87.

⁶⁶ *Id.*

⁶⁷ *Id.*

Carter's thinking, a President and Senate mindful of nominees' likely votes could be expected to seek out nominees who would essentially read provisions out of the Constitution if doing so would reflect the majority will.

In the past, some Presidents and Senators may well have taken nominees' likely votes into account in the way that Carter assumes. I am confident, however, that many have deviated quite substantially from this referendum-style approach.⁶⁸ Moreover, I am even more confident that, in keeping with their constitutional duties, Presidents and Senators should be expected to reject such an approach.

The Constitution was intended to provide guidance not only to the courts, but to the executive and legislative branches as well.⁶⁹ This seems apparent from particular provisions, such as the First Amendment,⁷⁰ that are specifically addressed to the Congress or President. It is also the only sensible reading of the oath-of-office provision, which requires the President and members of Congress, no less than the judiciary, to take an oath to "support the Constitution."⁷¹ At a minimum, this provision would seem to demand that, in exercising the authority of their offices, the people's elected representatives in Congress and the White House seek to honor the values that, in their best judgment, the Constitution enshrines.

From this perspective, the President and Senate, in considering a nominee's likely votes on constitutional issues, would be remiss in gauging a nominee's desirability based on how closely the nominee's likely votes conform to what most people would like to see. Instead, the President and Senate would be expected to focus on how closely those likely votes conform to what, in their best judgment, the Constitution has to say on the matters in question. Whatever the precise contours of a Senator's or President's obligation to reflect on constitutional meaning may be, the endeavor in which he or she

⁶⁸ Among other things, a great deal of what Senators ask and say in confirmation hearings plainly presupposes a contrary approach. See generally Ross, *supra* note 21 (discussing the kinds of questions that Senators typically ask). Broad adherence to the type of approach that Carter assumes to be prevalent is also belied by the way in which Senators ordinarily discuss the appointment process when they write about it. See, e.g., PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* (1992); Charles McC. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200 (1987).

⁶⁹ I draw heavily in this paragraph on Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-89 (1975).

⁷⁰ U.S. CONST. amend. I ("Congress shall make no law . . .") (emphasis added).

⁷¹ U.S. CONST. art. VI, cl. 3.

should be engaged is radically different from the one envisioned by Carter when Carter discusses consideration of nominees' likely votes.⁷²

In short, whether he realizes it or not, Carter predicates his judicial independence objection to presidential and senatorial consideration of nominees' likely votes on the assumption that such consideration means seeking nominees who will vote in a way that mirrors the majority's wishes, however heedless of constitutional values such wishes may be. The validity of this assumption is highly questionable, and Carter's judicial independence objection is unpersuasive as a result.

2. "Blood on the Floor" Revisited

Carter's argument against considering nominees' likely votes because it leads to so much "blood on the floor" is no more persuasive. Basically, in and of itself, presidential and senatorial consideration of nominees' likely votes does not lead to the fighting over appointments that Carter is so eager to avoid. It only leads to such fighting when combined with presidential domination of the appointment process—a domination that, as discussed above,⁷³ warrants elimination and that Carter essentially ignores.

The history of the Bork nomination illustrates the point. Carter repeatedly criticizes the often vehement and sometimes distorted attacks made on Robert Bork when Bork was nominated to the Court. "I do not share all of Bork's constitutional vision," Carter writes, "[but at] the same time, I do believe, quite strongly, in accuracy, fairness, and simple decency."⁷⁴ If only it were as simple as that! Carter's perspective on the Bork nomination is much like that of the basketball referee who turns around too late to see a punch thrown and then ejects the player who hits back.

By any measure, President Reagan's nomination of Bork was a solid right to the jaw of the liberals and even centrists in the Senate. Whether or not Bork was "outside the mainstream"—a charge that was leveled against Bork and that Carter takes pains to dispute⁷⁵—Bork was on record as questioning the validity of a host of major Supreme Court precedents that many Senators held dear.⁷⁶

⁷² Cf. Brest, *supra* note 69 (discussing the nature of a legislator's obligation to interpret the Constitution in deciding whether to support proposed legislation).

⁷³ See *supra* part II.B.

⁷⁴ P. 126.

⁷⁵ Pp. 127-33.

⁷⁶ For an enumeration and discussion of Bork's various prenomination statements

Moreover, he seemed likely in both the short and long run to exercise an unusually large influence on the outcome of important cases. The seat that he would fill—Justice Powell's—was one that in recent years had provided the decisive fifth vote in an array of important cases; and whoever filled the seat appeared likely to determine the fate of *Roe v. Wade*,⁷⁷ as well as the direction of the Court in other areas such as affirmative action and separation of church and state.⁷⁸ In addition, as Bruce Ackerman once observed about Bork, "[i]n contrast to the normal nominee, here was a man whose public record suggested that he might possess both the transformative vision *and* legal ability needed to spearhead a radical judicial break with the past."⁷⁹

In nominating someone so apt to stir up controversy and so lacking in broad-based support, Reagan banked on Presidents' extraordinary ability in this century to make their Supreme Court nominations stick. In fighting back with sharp attacks that did not always portray Bork and his record in the fairest light, the opposition similarly assumed that unless Bork could be made to seem genuinely dangerous, history left little doubt that the President would have his way.

If Carter is so distressed about the potential in the current appointment process for "blood on the floor," he would do far better to focus his energies on devising means of redressing the unhealthy imbalance of power in the process, rather than on attacking the eminently sensible practice of considering likely votes. If the Senate is made more of an equal partner with the President in the process, there is every reason to hope that Presidents will not be as provocative as Reagan was in his nomination of Bork and that Senators and members of the public will not respond as fiercely as some did to Bork.

(written and oral) criticizing Supreme Court precedent, see *Nomination of [Judge] Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 5, at 6180-6285 (1987) (Senate Judiciary Committee report on the nomination); Stephen Gillers, *The Compelling Case Against Robert H. Bork*, 9 CARDOZO L. REV. 33 (1987).

⁷⁷ 410 U.S. 113 (1973).

⁷⁸ See Ronald M. Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101, 102 (1987); Stuart Taylor, Jr., *Powell Leaves High Court; Took Key Role on Abortion and on Affirmative Action*, N.Y. TIMES, June 27, 1987, at 1.

⁷⁹ Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1168 (1988).

C. Carter's Moral Vision Test

The difficulties inherent in Carter's position on consideration of nominees' likely votes become even more apparent when his argument that the President and Senate should seriously consider nominees' "moral vision"⁸⁰ is taken into account. Although Carter maintains that it is wrong to consider how a nominee is apt to vote on legal issues, he argues that it is essential to inquire into a nominee's position on issues that were once legal issues but that, with the emergence of a "broad national consensus" as to their proper resolution, have undergone a "transformation" into moral issues.⁸¹

Thus, for example, it is right according to Carter to examine a nominee's position on *Brown v. Board of Education*⁸² but wrong to examine his or her position on *Roe v. Wade*,⁸³ because "there is broad national consensus on segregation that simply does not exist on abortion."⁸⁴ While the validity of *Brown* has become a moral question, the validity of *Roe* remains merely a legal one. In Carter's view, nominees who do not share the societal consensus on those legal issues that have attained moral stature can fairly be labeled "outside the mainstream" and rejected on that ground.⁸⁵ Carter concedes that the "contours of the legal mainstream are unclear," but assures us, while citing only *Brown*, that the concept is not unmanageable and that there are "a handful of precedents [that] are clearly and firmly untouchable."⁸⁶

I fully sympathize with Carter's desire to rescue *Brown* from his broad-based arguments against considering nominees' likely votes. The legal/legal-turned-moral distinction that he develops, however, is simply not up to the task. First, if, as Carter maintains, considering nominees' likely votes is bad because it tends to screen out independent-minded people who, as judges, would stand up to the majority will, it is unclear why it is any better to consider likely votes on his so-called "moral" issues than on "legal" ones. Indeed, it may well be worse. After all, if what we really want are independent-minded judges, the last people we ought to be screening out would

⁸⁰ P. 120.

⁸¹ P. 119.

⁸² 347 U.S. 483 (1954).

⁸³ 410 U.S. 113 (1973).

⁸⁴ P. 119.

⁸⁵ Pp. 120-21.

⁸⁶ P. 121.

seem to be ones holding truly distinctive—i.e., “outside the mainstream”—views.

Second, although Carter maintains that his legal/legal-turned-moral distinction is not unmanageable, there is every reason to believe that it is. His ability to cite only *Brown* as an example of a legal-turned-moral issue hardly inspires confidence in this regard. Moreover, the “broad national consensus” standard that he appears to suggest as a criterion for distinguishing legal from legal-turned-moral issues is amorphous at best.

Lastly, and most basically, even assuming, for purposes of argument, that Carter provides a reasonably manageable way of separating legal from legal-turned-moral issues, he fails to show why inquiring into nominees’ views on legal-turned-moral issues is a materially different endeavor than inquiring into nominees’ likely votes. If, as Carter maintains, the latter type of inquiry is “litmus testing”⁸⁷ and should be banned, it is not apparent why the former type does not deserve the same label and fate. Surely the distinction between the two kinds of inquiries can’t be that *everyone* agrees on the right answer to legal-turned-moral issues, because if that were so, there would be no need to ask nominees about such issues in the first place.

As a final point about Carter’s moral vision test, I note that the distinction that Carter attempts to draw is rather ironic in light of his frequently expressed aversion to “blood on the floor.” In essence, the only objection to a nominee’s views that Carter allows is that the nominee is “outside the mainstream.” As a practical matter, this means that Senators and members of the public who oppose a nominee for his or her likely votes can never express their opposition in moderate terms. Instead, they are forced to make the more extravagant and often exaggerated claim that the nominee is outside the mainstream—basically, beyond the pale—thereby causing a lot more blood to spill.

IV. REASSESSING THE STAKES

According to Carter, one reason why Supreme Court confirmation battles get so nasty is that people tend to exaggerate what is really at stake.⁸⁸ In his view, people would do a lot less fighting over nominees if they would simply see the Court in proper

⁸⁷ P. 72.

⁸⁸ See pp. 95, 204-06.

perspective. They should recognize that the Court has much less power than the political branches to effect major national change, and based on this recognition, they should “surrender the bold and exciting image of the Supreme Court as national policymaker.”⁸⁹ They should “recapture in its stead the more mundane and lawyerly image of the Supreme Court as—dare I say it?—a court.”⁹⁰

Carter briefly recounts the story of how in 1811 two men nominated by President Madison to fill a Supreme Court vacancy declined to serve after being confirmed.⁹¹ The process would be so much less bloody, Carter suggests, if only people would adopt the realistic attitude of these two Madison nominees and “learn once more to treat the role of Justice as simply a job. Not a prize, but a job—a job not everybody wants.”⁹²

Well, maybe to Carter a seat on the Supreme Court is “simply a job,” but from where I sit, it is one hell of a job, and I have difficulty understanding why people should believe anything else. In light of the nature of the issues that come before the Court, the nationwide effect of the Court’s decisions, and the long tenures of most Justices, seats on the Court seem to deserve all the fuss that people often make about them. Carter’s claim to the contrary may accurately reflect the Court that he would like to see, but it bears little relationship to the Court that actually is.

Carter’s anecdote about the two Madison nominees is intriguing, but hardly offers significant support for his view of the Court. On the contrary, it exemplifies the rather brief-like manner in which he often uses facts and constructs arguments in the book. First of all, even if the anecdote might be thought to establish that the Court was not a very interesting place to be in 1811, that does not tell us much about the intrinsic worth of a seat on the Court today. A great deal has happened since 1811 to make the Court more of a force on the national scene—in particular, the adoption of the post-Civil War amendments⁹³ and the resulting enormous expansion of the Court’s authority to invalidate state and local laws.⁹⁴

Furthermore, fully told, the story of the two Madison nominees does not even support the proposition that the Court was a

⁸⁹ Pp. 205-06.

⁹⁰ P. 206.

⁹¹ See p. 205.

⁹² *Id.*

⁹³ See U.S. CONST. amends. XIII, XIV, XV.

⁹⁴ See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 331-50 (4th ed. 1991) (providing an overview of constitutional protection of individual rights).

relatively mundane place in 1811. Since Carter relies on Charles Warren's renowned Supreme Court history in recounting this story⁹⁵ and even refers the reader in his endnotes to Warren's history for a fuller account,⁹⁶ it seems only appropriate to begin with Warren's observation that at the time of this vacancy,

the Federal Judiciary had become a live issue in connection with problems of the day. It was seen that the status and rights of a United States Bank in Georgia, the rights of land claimants in Kentucky and Virginia, the regulation of commerce through embargoes, non-intercourse laws, steamboat monopolies, and many other questions on which political antagonisms were arising—all might be brought before the Court for final decision.⁹⁷

The notion that the two nominees viewed a seat on the Court as "simply a job" is also belied by the nominees' stated reasons for declining their appointments to the Court. Carter tells the reader nothing about the nominees' reasons and invites the reader to assume that they made these decisions because they viewed the Court as a rather uninteresting place to be. However, Levi Lincoln offered a very credible explanation of an entirely different sort when he wrote to Madison, first declining Madison's offer to nominate him and then refusing the appointment after Madison had nominated him nonetheless. According to Lincoln, he would have loved to sit on the Court, but he felt compelled not to accept a seat because of his advanced years and eyesight so bad that he was almost blind.⁹⁸

By the same token, in refusing his appointment, John Quincy Adams offered a highly credible explanation also at odds with the one that Carter implies existed. Adams, who was nominated while abroad as Minister to Russia, wrote to Madison that he felt obliged to decline because he was "conscious of too little law" and "too much of a political partisan."⁹⁹ Quite clearly, this son of a President had his sights set on the Presidency—an office that he attained

⁹⁵ See p. 205.

⁹⁶ See p. 243 n.16.

⁹⁷ 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 400-01 (rev. ed. 1926).

⁹⁸ See 1 *id.* at 409-10 (summarizing Lincoln's letters); see also HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 88 (2d ed. 1985) (commenting that "Lincoln, now in effect facing blindness, felt he had to persist in his decision—much as he would have relished becoming a thorn in [Chief Justice] Marshall's side").

⁹⁹ 1 WARREN, *supra* note 97, at 415 (quoting Adams's letter to Madison).

in 1825—and was oriented far more to politics than to law.¹⁰⁰ The fact that he was willing to pass up a seat on the Court in order to keep working toward securing a seat in the White House makes clear that he did not regard being a Justice as the equal, at least for him, of being President. It hardly suggests, however, that he saw a seat on the Court as “simply a job.” Indeed, an individual as politically astute as Adams could not have helped but recognize what has become even more apparent today: that, Carter’s rather puzzling claim to the contrary notwithstanding, the Court is an extremely important and influential place to be.

V. FORGIVENESS

In the abstract, being more forgiving of Supreme Court nominees’ moral lapses may not sound like a bad idea. I suggest below, however, that at least in Carter’s hands, it becomes one. As Carter would apply it, this idea would pose a serious threat both to the Court’s ability to deliver fair and impartial justice and to public confidence in the Court. In addition, Carter’s reliance on religious argument to support infusing the process with more forgiveness gives rise to independent objections based on the proper relationship between church and state. Finally, Carter’s tacit assumption that simply urging Senators and others to be more forgiving of nominees’ lapses is apt to make them so is based upon a view of the Supreme Court appointment process that is fundamentally incomplete.

A. *A Telling Illustration*

In discussing the need for more forgiveness in the Supreme Court appointment process, Carter devotes a great deal of attention to Clarence Thomas and the allegations of sexual harassment leveled against him by Anita Hill. Carter, who characterizes himself as “a personal friend [of Hill’s] of long standing,”¹⁰¹ makes clear that in his view “Anita Hill told the unvarnished truth and Clarence Thomas lied when he denied her charges.”¹⁰² Carter expresses regret, however, that Thomas did not admit his wrongdoing and try to convince the Senate and the general public to forgive and forget. As Carter explains:

¹⁰⁰ See ABRAHAM, *supra* note 98, at 88.

¹⁰¹ P. 140.

¹⁰² P. 184.

I would genuinely rather live in a world in which a Thomas who found himself able to say "Yes, it happened, and I am terribly sorry, but it was a long time ago in a difficult time and I am a different man" might have found an audience willing to listen.¹⁰³

To put it mildly, I would genuinely rather not. If Thomas had acknowledged that he did what Anita Hill alleged, I would hope—apology or no apology—that the nomination would have been dead then and there.

With the functioning of our nation's highest court and the public's confidence in that court at stake, some things in a nominee's past have got to be seen as simply beyond the pale, as indicative of too much of a risk to reasonably bear. Although there obviously can be close questions in this regard, it is beyond my comprehension that the behavior in which Thomas allegedly engaged might have presented one.

According to Hill, Thomas, over a lengthy period of time, addressed a host of highly offensive and very degrading sexual remarks to her while she was in his employ.¹⁰⁴ Moreover, while allegedly subjecting Hill to this humiliation, Thomas occupied positions of public trust—assistant secretary for civil rights in the Department of Education, and chairman of the Equal Employment Opportunity Commission¹⁰⁵—in which he reasonably would have been expected to serve as the paragon of the fair, nondiscriminatory employer.

If Thomas had admitted that Hill's allegations were true, I believe that it would have been utterly irresponsible for the President not to withdraw the nomination and for every Senator not to make clear his or her intention to vote against confirmation. If Anita Hill would have had it in her heart to forgive an apologetic Thomas, more power to her; and I would hope that various people, including the President and individual Senators, would have reached out to him on a personal level to offer comfort and moral support.

¹⁰³ *Id.*; see also p. 144 ("Had Thomas's supporters (and Thomas himself) been willing to concede the substance of Hill's charges, and had the concession been handled in a conciliatory and apologetic way, they might have had the opportunity to conduct a national seminar on repentance, contrition, and forgiveness.").

¹⁰⁴ See *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., pt. 4, at 36-38 (1991) (testimony on Oct. 11, 1991 of Anita F. Hill); Richard L. Berke, *Thomas Accuser Tells Hearing of Obscene Talk and Advances; Judge Complains of "Lynching."* N.Y. TIMES, Oct. 12, 1991, at 1.

¹⁰⁵ See *Excerpts from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14 (listing Thomas's prior positions).

In their capacities as the public's elected representatives charged with ensuring the quality and integrity of the Court, however, the President and Senate should have been unwilling to bear the substantial risk that someone who had engaged in the course of behavior that Hill described would not display the fair-mindedness, empathy, balanced judgment, and other habits of mind that are so important to the proper functioning of the Court. Perhaps even more obviously, the President and Senate should have been unwilling to bear the risk that the appointment of someone with this lurid past would seriously undermine public confidence in the Court.¹⁰⁶

B. *Religious Underpinnings*

The concept of forgiveness that Carter would introduce into the appointment process is highly problematic not only in and of itself, but also because of the type of justification that he offers in its behalf. According to Carter:

Christian theology teaches that human sin is a consequence of our freedom—and that the burden of sin is too great for us to lift alone. In the Christian vision, redemption is possible only through God. The reason Christian theologians write of guilt as “threatening” is that the believer always feels the need to justify himself or herself before God, which is, for the sinful, impossible to do. But sin is ever-present in human existence, which means that the fear of God is also ever-present, which is why human beings are in constant need of God’s forgiveness.

One need not be a Christian—or even believe in God—to see the radical possibilities of this model. If the capacity to do wrong is ever-present, then we must accept that any one of us (not merely those nominated for judicial or executive posts) may, at any moment, fall into sin. If that is so, we surely have a larger obligation toward the wrongdoer—the sinner—than a simple condemnation and, in the case of a confirmation fight, a negative vote. In particular, recognizing our shared sinfulness, we might instead have the moral obligation to listen for the possibility of genuine contrition, which might in turn demand of us a degree of forgiveness.¹⁰⁷

¹⁰⁶ For the view that public confidence is particularly vital for the Court, see Simson, *supra* note 13, at 627 & n.32.

¹⁰⁷ Pp. 183-84.

Perhaps "[o]ne need not be a Christian" to see the possibilities of this model, but I seriously question whether one need not be a Christian to find this appeal to Christian theology at all persuasive. More basically, I seriously question whether appeals of this sort to religious doctrine are not undesirable as a highly divisive force. In a nation with a wide array of religions and many people adhering to no religion at all, it is reasonable to assume that public debate about the proper structure of government or the types of laws that government should make is most productive when not framed in a way that invites agreement or disagreement based on one's religious beliefs. The above Christian model may be so appealing to Carter that he cannot imagine that using it as an argument for more forgiveness in the appointment process could possibly be divisive and counterproductive to his cause. For many non-Christians, however, his invocation of Christian theology cannot help but be off-putting and serve as a distraction from, and impediment to, reasoned analysis of the matter at hand.

Although Carter's reliance on religious doctrine is obviously not an Establishment Clause¹⁰⁸ violation per se—Carter may be influential, but he is certainly not the state—a good argument can be made that he fails to honor the spirit of the Clause. A number of the Court's Establishment Clause decisions have expressed concern about the potential for "political divisiveness" from certain laws;¹⁰⁹ and as discussed above, some concern about political divisiveness is also in order here. In addition, Carter's reliance on Christian doctrine is in tension with the view, held by various scholars¹¹⁰ and implicit to some extent in the Court's case law, that the Establishment Clause was intended to ensure that laws are adopted for secular, rather than religious, reasons. The Court has only gone so far as to hold that a law is invalid if adopted entirely, or almost

¹⁰⁸ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

¹⁰⁹ See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 414 (1985); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 795-98 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 622-25 (1971); see also Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) ("While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall.").

¹¹⁰ See, e.g., Ira C. Lupo, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987); William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770.

entirely, for nonsecular reasons.¹¹¹ As I have argued elsewhere, however, the logic behind this holding seems best understood as requiring the invalidation of any law that would not have been adopted but for the consideration of one or more nonsecular purposes.¹¹² Under this view of Establishment Clause constraints, which also draws support from the prevailing Court doctrine on the constitutional significance of a law's nonsecular effects,¹¹³ respect for the principles behind the Clause counsels against the type of argument that Carter makes for more forgiveness in the appointment process. If legislators should not be shaping legislation or governmental processes to conform to the dictates of one or another religion, then Carter and others should not be pressing upon them religious reasons to act.

I recognize that the role of religious argument in politics and lawmaking is a complicated matter on which others, including Carter in *The Culture of Disbelief*,¹¹⁴ have written extensively,¹¹⁵ and I will not attempt here to spell out fully the details of, and reasons for, my position. For now, suffice it to say that although Carter's injection of religion into the appointment-process debate may be in keeping with his defense of religious argument in *The Culture of Disbelief*, it in my view detracts from the appeal of a proposal about forgiveness that is not very appealing to begin with.

C. Carter's Proposal in Perspective

Perhaps the most significant difficulty with Carter's plea for more forgiveness in the Supreme Court appointment process is that it seems essentially beside the point. Like his argument against considering nominees' likely votes based on the potential for "blood on the floor,"¹¹⁶ it fails to come to grips with the reality of presidential domination of the process and the pervasive effects of that domination on the entire process.

Viewed in isolation, various Senators' or interested citizens' emphasis on certain moral lapses in a nominee's past may seem

¹¹¹ See Simson, *supra* note 110, at 909 & n.24.

¹¹² See *id.* at 908-11.

¹¹³ See *id.* at 917-23.

¹¹⁴ STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

¹¹⁵ See, e.g., KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); MICHAEL J. PERRY, *LOVE AND POWER* (1991); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747 (1993).

¹¹⁶ See *supra* part III.B.2.

terribly hard-hearted and unfair. Their approach seems much less unforgiving and unreasonable, however, when viewed in the context of a process in which the deck is so heavily stacked in favor of confirming any nominee whom the President wishes to choose. In this presidentially dominated process, it is a sad truth, but a truth nonetheless, that often the only realistic way of trying to defeat a nominee who one genuinely believes would be a poor appointment to the Court is to harp on past behavior that might give the public pause.

In short, I agree that it would be desirable to have a process in which a nominee's past moral lapses are not seized upon in an unforgiving way, but rather viewed as fairly and objectively as possible in terms of what they currently suggest about the nominee's fitness for the Court. I disagree, however, that simply urging more forgiveness is a realistic means to this end. Rather than urge more forgiveness, Carter would do far better to propose structural reforms that, by redressing the imbalance of power in the process, would remove the incentive for unforgiving attacks.

VI. SCHOLARSHIP AS RISK TAKING

In one portion of the book,¹¹⁷ Carter argues that the attacks on Lani Guinier's scholarship that led to the withdrawal of her nomination to head the Justice Department's civil rights division¹¹⁸ were based on an unfair conception of the goals of legal scholarship. He discusses why many of Guinier's published ideas are controversial and why he finds some unpersuasive. He maintains, however, that her writings fall well within the time-honored tradition of scholarship as risk taking and therefore could not be fairly held against her.

I confess that if I ever find myself in the predicament that Lani Guinier was in, I hope Stephen Carter won't rush forward to defend *me*. I come away from his defense of Guinier somewhat shaken in my belief that the opposition to her was terribly unfair. For present purposes, however, my concern is not the unhelpfulness of Carter's defense of Guinier but the view of scholarship on which it is based. In short, his view of scholarship strikes me as problematic in a way that goes to the heart of my criticisms of the book.

¹¹⁷ See pp. 37-44.

¹¹⁸ See Neil A. Lewis, *Clinton Abandons His Nominee for Rights Post Amid Opposition*, N.Y. TIMES, June 4, 1993, at A1.

According to Carter:

Scholarship—the writing that academics do—is part of a conversation. One puts forth ideas, generates a response, rethinks, and presses on again. The best scholarship is well informed and fair, of course, but it is also imaginative and ground-breaking—and it usually takes risks. In the academic world, we insist that risk taking is what we want to reward. But if scholars with ambitions to public service (there are probably too many) learn from the Guinier episode that anything they write, no matter how preliminary, will later be adjudged a statement of visceral moral commitment, the degree of willingness to take risks will naturally be less.¹¹⁹

I would be the last to deny that risk taking is an important part of the scholarly endeavor. Law, no less than other disciplines, is always in need of fresh ideas and challenges to established ways of thinking. I believe, however, that Carter at least implicitly assigns an importance to risk taking that it should not bear. Particularly when writing about issues of great and immediate societal significance, such as reform of the Supreme Court appointment process, legal scholars would appear to have more of an obligation than Carter seems to assume to examine their own ideas critically and to think through competing arguments with care. Like it or not—and I don't know of any academics who don't like it—their ideas just might be taken seriously and put into action, with important practical effects.

I respect and admire Carter's willingness in this book, as in his others,¹²⁰ to speak his mind on controversial themes and to take positions with which others might strongly disagree. Has he, however, with this book moved forward the debate on how to improve the Supreme Court appointment process? In my judgment, he has not.

¹¹⁹ P. 38.

¹²⁰ See CARTER, *supra* note 114; STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

