

**“I’M SORRY, I CAN’T ANSWER THAT”:
POSITIVE SCHOLARSHIP AND THE SUPREME COURT
CONFIRMATION PROCESS**

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I. INTRODUCTION

The United States Constitution grants to the Senate the duty to provide its “advice and consent” to the appointment of Supreme Court Justices. Just how senators should exercise that duty, however, is deeply contested. Much of the dispute about the Senate’s role involves the appropriate scope of questions the senators should ask, and what nominees should be expected to answer, at the confirmation hearing held by the Senate Judiciary Committee.¹ Opponents of vigorous senatorial questioning argue that such questioning infringes on the independence of the judiciary; proponents argue that the nominees’ failure to answer probing questions hinders the Senate’s constitutional obligation to meaningfully consent to nominations. Professors Robert Post and Reva Siegel recently have jumped into this dispute by proposing that Supreme Court nominees properly can be expected to answer questions about how they would have voted in cases the Supreme Court has already decided.² This approach, they argue, avoids inappropriately infringing on judicial independence

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1 These two elements of the issue are not symmetrical. There is a certain formalistic consensus that senators *can*, as a separation of powers matter, ask whatever they want. The issue is whether nominees should be expected to answer and whether the refusal to do so constitutes an appropriate basis for denying confirmation. See GEORGE L. WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 158–59 (2005). *But see* John M. Walker, Jr., *Politics and the Confirmation Process: The Importance of Congressional Restraint in Safeguarding Judicial Independence*, 55 SYRACUSE L. REV. 1, 11–12 (2005) (arguing that questioning about specific issues or cases harms the judicial role by contributing to the appearance of the politicization of law).

2 Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, YALE L.J. (THE POCKET PART), Jan. 2006, http://www.thepocketpart.org/2006/01/post_and_siegel.html.

while enhancing the ability of the Senate to meaningfully consent to nominations.

This Article engages positive legal scholarship to support Post and Siegel's conclusion that objections to their proposal are not easily justified by the concerns about judicial independence on which they purport to rest. In doing so, this Article examines the confirmation hearing transcripts of the nine Justices who comprised the final Rehnquist Court. I determine how often these nominees were willing to provide opinions about previously decided Supreme Court cases, for which cases they were willing to provide such opinions, and which cases they refused to discuss, on the basis that doing so would compromise their judicial independence (or impartiality) in future cases.

I find that these nominees, in fact, provided opinions about many previously decided Supreme Court cases, and that there was some surprising variety in the cases on which the Justices, both as a group and as individuals, would and would not opine. I also show that much of this variation cannot be attributed to the distinction drawn by the nominees themselves between the propriety of opining on "settled" versus "unsettled" cases. The actual practice of these recent nominees thus supports Post and Siegel's conclusion that concerns about the decision-making independence of the Justices, even taking the nominees' own views of what that independence requires into account, do not appear to be what is animating objections to their proposal.

I then consider whether those objections are nonetheless justified by concerns that adoption of the Post-Siegel proposal would compromise the institutional independence of the Supreme Court as a court, by effectively conditioning confirmation on the nominees' opinions about specific cases, thus giving the Senate undue influence over a purportedly "co-equal" branch of government. Drawing on both the actual practice of the Rehnquist Court nominees and existing legal and political science scholarship, I argue that these objections also are suspect, in three distinct ways. First, the actual practice of the nominees is not supportable on that basis. Second, existing political science scholarship shows us that adoption of the Post-Siegel plan is unlikely, in any event, to increase the type of "politicization" of the confirmation process that underlies this concern. Third, existing positive legal scholarship seriously casts doubt on the very premise on which the institutional independence objection rests. This scholarship also, however, suggests an alternative vision of judicial independence, one fully compatible with the Post-Siegel proposal, which is itself both normatively desirable and grounded in a more realistic

understanding of the role the Supreme Court actually plays in our governing system.

I thus conclude that the Post-Siegel proposal, if accepted by senators and nominees, has the potential to bring some much needed realism and clarity to the Senate's role in the Supreme Court confirmation process, without posing a significant threat to either the individual decision-making independence of Supreme Court Justices or to the institutional independence of the Supreme Court.

II. THE EXISTING DEBATE AND THE POST-SIEGEL PROPOSAL

A. *Current Approaches*

Most scholars and commentators who have addressed the issue of the appropriate scope of senatorial questioning of Supreme Court nominees have embraced one of three general approaches to such questioning. Advocates of the first, and most constrained, approach argue that senators must limit their questioning solely to issues involving a nominee's "qualifications" or "character."³ Advocates of this approach argue that questioning going beyond this, such as questions involving a nominee's approach to constitutional interpretation, policy preferences, or specific legal opinions, threatens judicial independence.⁴ This perceived threat to judicial independence has two aspects. First, such questions are believed to threaten the individual decision-making independence of the future Justices by creating either an apparent or an actual pre-commitment to decide particular

³ Note that it is quite difficult to define in any absolute way exactly what the necessary qualifications for a Supreme Court Justice should be. See Judith Resnick, *Changing Criteria for Judging Judges*, 84 NW. U. L. REV. 889, 891 (1990) (noting, among other things, that those lawyers who frequently address legal issues in publications may not be the ones best suited for the bench). Advocates of this position, however, are relatively clear that they are referring to a nominee's competence, experience, integrity, and temperament. See WATSON & STOOKEY, *supra* note 1, 72-76 (discussing the primary nominee qualifications and categorizing them as integrity, professional competence, and judicial temperament); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1186-88, 1198-201 (1988) [hereinafter Carter, *The Confirmation Mess*] (suggesting that a candidate's moral character should be considered alongside his professional credentials and intellectual capacity in the nomination process); Donald R. Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 LAW & SOC'Y REV. 927, 928 (1979) (acknowledging that ethical impropriety or the lack of legal ability are accepted grounds for opposing a nomination).

⁴ See, e.g., Stephen Carter, *The Confirmation Mess Revisited*, 84 NW. U. L. REV. 962, 965 (1990) [hereinafter Carter, *The Confirmation Mess Revisited*] (arguing that approving nominees based on questions meant to elicit future voting patterns inappropriately establishes contemporary political judgments as settled constitutional law).

cases particular ways.⁵ This concern is the one raised most frequently by the nominees themselves when they refuse to answer questions on the grounds that doing so would hinder their ability to be impartial when hearing future cases in which similar issues are raised (what I have taken to calling “invoking the privilege to be non-responsive”).

The second perceived threat to judicial independence posed by such questions, at least as seen by proponents of the first approach, is to the institutional independence of the Supreme Court itself. The concern here is that if senators are permitted to ask questions about a nominee’s personal or political policy preferences, opinions about specific legal issues, or preferred methods of constitutional interpretation, a nominee’s agreement with the *Senate’s* preferences in these matters inevitably will become a precondition of the nominee’s confirmation.⁶ This threatens judicial independence, these advocates argue, because it allows the Senate to use the confirmation process to replicate its own policy preferences on the Supreme Court, thereby interfering with the Court’s ability, as a distinct branch of government, to independently determine constitutional meaning.⁷ Consequently, advocates of this approach argue, senatorial questioning must be severely restricted.⁸

⁵ *Id.* But see Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913 (1983) (considering and rejecting this argument). See generally Robert F. Nagel, *Advice, Consent and Influence*, 84 NW. U. L. REV. 858 (1990) (examining the trend towards more active Senate participation in the selection of the judiciary and the forms of questioning most likely to encourage democratic influence over the Supreme Court).

⁶ Carter, *The Confirmation Mess*, *supra* note 3, at 1193.

⁷ Carter, *The Confirmation Mess Revisited*, *supra* note 4, at 965. Professor Carter argues that senatorial considerations of anything other than a nominee’s qualifications and character threaten the independence of the judiciary. Specifically, he argues that senatorial efforts to question a nominee for the purpose of eliciting information about how the nominee will vote in future cases risks “enshrining the politically expedient judgments of a given era as fundamental constitutional law” and threatens the basic ability of the Court to do its job. *Id.* He also rejects questions about a nominee’s “judicial philosophy” on the grounds, discussed below, that such questions are not illuminating in the abstract and that they therefore serve merely as a proxy for questions about particular outcome or policy preferences. Carter, *The Confirmation Mess*, *supra* note 3, at 1190. See also Bruce Fien, *Commentary, A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 673 (1989) (arguing that the Senate is poorly equipped to engage in inquiries of a nominee’s “judicial philosophy”).

⁸ There seems to be notably less concern about the President’s ability, particularly when senatorial questioning is limited as suggested by advocates of this first approach, to do exactly the same thing. But see Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 556, 566 (1986) (arguing that the power of the President to engage in ideological screening of nominees demands an assertive senatorial role in the process); Carol Rose, *Judicial Selection and the*

A large middle group rejects this strict “qualifications and character only” limitation on senatorial questioning. This group argues that the Senate’s constitutional duty to provide advice and consent to Supreme Court appointments permits—and may even require—the Senate to engage in a *somewhat* more probing examination of Supreme Court nominees.⁹ Holders of this view do, however, agree in part with the first group, in that they accept that asking nominees for opinions about specific cases or legal issues does raise the concerns about judicial independence noted above. They thus attempt to fashion a compromise of sorts, by arguing that senators should not ask about a nominee’s political preferences or seek answers about particular cases or specific legal questions, but that they can and should examine a nominee’s “judicial philosophy” or overall approach to constitutional interpretation.¹⁰

Advocates of this middle-ground approach believe it is best because it protects judicial independence and avoids the improper appearance of judicial bias, while also giving the senators the information necessary for them to fulfill their own constitutional duties. To the extent that there is any current consensus on the appropriate scope of senatorial questioning, it appears to lie here, and recent nominees have been quizzed extensively about their opinions regarding constitutional interpretation, strict-constructionism, “judicial activism,” and the like.¹¹

Scholars and commentators in the final group advocate for a much broader range of senatorial questioning than that advocated by

Mask of Nonpartisanship, 84 NW. U. L. REV. 929, 930 (1990) (suggesting that closer senatorial scrutiny of nominees is warranted where a President selects a candidate with close ideological ties).

- 9 LAWRENCE TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985). See Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No*, 17 GEO. J. LEGAL ETHICS 175, 194 (2004) (contending that the ideological preferences of nominees should be probed, but that this questioning should focus on long-term and systemic issues rather than contentious issues of the moment); Martin H. Redish, *Legal Realism and the Confirmation Process: A Comment on Professor Nagel’s Thesis*, 84 NW. U. L. REV. 886, 888 (1990) (acknowledging that the Senate should be concerned with a nominee’s ideological preferences to ensure the enforcement of counter-majoritarian values); see also Walker, *supra* note 1, at 10 (admitting that, at least in regards to Supreme Court nominees, senators may have cause to inquire about a nominee’s judicial philosophy).
- 10 See, e.g., Goldberg, *supra* note 9, at 200 (“Presidents and Senators should acknowledge that there are varying respectable views about the Court and the Constitution, that it is important to know a nominee’s views, and that those views are not disqualifying unless they are beyond the pale or held with such ferocity that they will override all considerations.”).
- 11 WATSON & STOOKEY, *supra* note 1, at 158–59.

the first or second groups. Proponents of this approach endorse detailed and specific senatorial questioning of a Supreme Court nominee's opinions about precise legal issues or cases.¹² They dismiss claims that such questions intrude on the Supreme Court's institutional independence by arguing that those claims cannot be reconciled with the Senate's textually unrestricted constitutional authority to consent—or not—to Supreme Court appointments.¹³ They also reject the argument offered by proponents of the middle group that the Senate can get meaningful information by limiting its questions to inquiries about the nominee's general approach to constitutional philosophy or interpretation.¹⁴ Nominees' comments regarding their constitutional philosophies or preferred interpretive methodologies, advocates of this approach argue, provide little information about how the nominee will actually decide specific, concrete cases, a problem exacerbated by the fact that, when asked about methods of constitutional interpretation, most Supreme Court nominees say more or less the same thing.¹⁵ A mode of questioning that fails to enable sena-

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- 12 See, e.g., Lively, *supra* note 8 (arguing that aggressive senatorial engagement in the confirmation process is appropriate and necessary); Post & Siegel, *supra* note 2 (arguing that senators should be able to ask Supreme Court nominees how they would have voted in previously decided cases); Rees, *supra* note 5, at 967 (suggesting that the nominee practice of refusing to state specific views on constitutional questions be changed, because those views are relevant to the confirmation votes of senators); Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know?*, 101 HARV. L. REV. 1213 (1988) (supporting aggressive Senate questioning during the confirmation process to build public accountability).
- 13 Post & Siegel, *supra* note 2 (arguing that substantive questioning on constitutional issues by senators during confirmation hearings is precisely the way Article II of the Constitution indicates such hearings should unfold).
- 14 Interestingly, this is a point on which advocates of the first approach, such as Stephen Carter, and advocates of this third approach, such as Grover Rees, tend to agree. See Carter, *The Confirmation Mess*, *supra* note 3, at 1190 (arguing that it can be difficult to assess a nominee's judicial philosophy in any meaningful way without referring to concrete and specific cases); Rees, *supra* note 5, at 962–63 (noting that Justice Harry Blackmun, the author of *Roe v. Wade*, described himself in his confirmation hearings as a “strict constructionist”).
- 15 Rees, *supra* note 5, at 962–63 (pointing out that most nominees to the Supreme Court can be expected to employ very similar, and highly generalized, slogans and phrases regarding their judicial philosophies). This is consistent with my own research in this area. In the course of a different project, my co-authors and I looked at the confirmation transcripts of each of the Justices of the last Rehnquist Natural Court. Among other things, we culled from the transcripts all statements made by the nominees about originalism, original intent, strict construction, the “living constitution,” activism, and the use of precedent, i.e., key words regarding their “judicial philosophies.” As it turns out, the nominees all made similar comments when asked about these things. Students asked to do a blind ranking (meaning they did not know which justice made the statements) of the nominees' relative commitment to the different interpretive methods, as evidenced in

tors to distinguish the probable jurisprudence of Antonin Scalia, Sandra Day O'Connor, and John Paul Stevens, these critics argue, is of little value. To advocates of this final approach, then, the middle-ground position is not so much a compromise as it is a capitulation.

B. *The Post-Siegel Proposal*

Robert Post and Reva Siegel's proposal fits into the last of the approaches articulated above. Post and Siegel posit that Supreme Court nominees can and should be asked how they would have voted in cases that the Supreme Court has already decided.¹⁶ This type of questioning, they argue, forces nominees to explain how their abstract interpretive preferences or constitutional philosophies manifest themselves in concrete cases, thus providing the Senate with crucial information about the constitutional consequences of the pending confirmation.¹⁷ Moreover, they argue that this type of questioning does not threaten either aspect of judicial independence identified above. Specifically, they claim that their proposal does not threaten the impartiality of individual Justices because it does not go beyond revelations made by the actual Justices who decided the prior case—many of whom may still be sitting on the Court and none of whom are perceived therefore as incapable of fairly hearing future cases involving the topics they passed judgment on in previously decided cases.¹⁸ Nor, they claim, does answering such questions threaten the institutional independence of the judiciary, because that independence itself is premised on the consent of the Senate to Supreme Court appointments.¹⁹

Post and Siegel thus address each of the most frequently made arguments against a Supreme Court confirmation process in which nominees are asked about and are expected to provide answers regarding their opinions of previously decided cases. They do not, however, engage empirical or positive legal scholarship in doing so.²⁰ The goal of this Article is to take that next step and explore how this

the transcript excerpts, could not make consistent distinctions between the nominees. Jason J. Czarnezki, William K. Ford & Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. (forthcoming 2008).

16 Post & Siegel, *supra* note 2, at 38.

17 *Id.* at 45.

18 *Id.* at 46–47.

19 *Id.* at 45–46.

20 Post and Siegel note that senators do at times attempt to get this type of information, but that they do so only hesitantly. *Id.* at 43.

scholarship can enhance our evaluation of the Post-Siegel proposal. As noted above, I do so in three ways: by examining the actual practice of recent Supreme Court nominees; by looking to existing political science research to consider the likely consequences of adopting the Post-Siegel proposal; and by culling insights from existing positive legal scholarship to consider reframing the debate about judicial independence itself.

III. ACTUAL PRACTICE AND THE DECISION-MAKING INDEPENDENCE OF THE INDIVIDUAL JUSTICES OBJECTION

To determine the extent to which Supreme Court nominees already provide the type of responses sought by the Post-Siegel proposal, I examined the Senate confirmation hearing transcripts of the nine Justices who sat on the most recent Rehnquist Natural Court (those Justices sitting from 1994 to 2005).²¹ Coders identified all instances in which a Supreme Court case was named by a senator or by the nominee.²² If the nominee in such instances provided a current expression of opinion about the named case, the nominee's response was coded based on whether the nominee expressed agreement with the case, disagreement with the case, or a mixed/uncertain opinion of the case. Those responses were then further coded to distinguish cases in which nominees expressed only general agreement or disagreement from those in which the nominee offered a firm, unambiguous endorsement or rejection of the holding of the named case. Instances in which a nominee specifically refused to provide a current opinion about a named case on the basis that answering would be inappropriate because the issue presented was likely to come before the Court and speaking to the issue would therefore create the appearance of bias or impropriety in those future cases (invoking the privilege to be non-responsive) also were coded. The coding thus captures all situations in which a nominee either provided an opinion

21 These Justices are the late Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Chief Justice Rehnquist's Associate Justice confirmation transcript was not examined, nor was the second segment of Justice Thomas's hearing (addressing accusations that Justice Thomas sexually harassed a former employee).

22 This coding methodology does not, and does not purport to, capture all legal opinions given by nominees at their confirmation hearings. Discussions of law not undertaken in the context of a named case are not included here.

about a previously decided Supreme Court case, or, alternatively, refused to do so for the reasons discussed by Post and Siegel.²³

Table 1 below shows the cases on which the nominees as a group most frequently gave general opinions, most frequently gave firm opinions, and most frequently invoked the privilege to be non-responsive (the number of times the indicated response was given by a nominee is shown in parentheses):

TABLE 1

MOST FREQUENT RESPONSES: ALL NOMINEES

General Opinion Most Frequently Given	Firm Opinion Most Frequently Given	Privilege Most Frequently Invoked
Brown (16)	Brown (11)	Roe (34)
Marbury (11)	Marbury (8)	Marbury (8)
Dred Scott (8)	Dred Scott (7)	McCardle (7)
Plessy (7)	Eisenstadt (6)	Rust (6)
Lochner (7)	Lochner (6)	Griswold (5)
Eisenstadt (6)	Plessy (6)	Casey (4)

Obviously, the Rehnquist Court nominees were willing to provide even firm opinions about a great number of previously decided Supreme Court cases. To this extent, then, these nominees were already complying with the Post-Siegel proposal. They also, however, invoked the privilege in numerous cases, and did so quite selectively: that most of the nominees are willing to endorse *Brown v. Board of Education*,²⁴ and refuse to opine on *Roe v. Wade*,²⁵ will come as no surprise to anyone familiar with the confirmation process.

23 Note that this is not exactly the same information sought under the Post-Siegel approach. Post and Siegel frame their inquiry as one of how the nominee would have voted on previously decided cases. Post & Siegel, *supra* note 2, at 38. The responses set forth below, particularly in relation to the nominees' statements of general agreement or disagreement with named cases, are in some instances a bit less precise than that. For example, in some of the situations reflected below, the nominee expressed an opinion of the outcome in a named case without elaborating (or being asked to elaborate) on the legal reasoning used by the Court to reach that outcome. The responses counted below thus may be in some instances less informative than would be the responses sought by Post and Siegel.

24 347 U.S. 483 (1954).

25 410 U.S. 113 (1973).

At first glance, in fact, the nominees' actual practices appear to be consistent with the statement they themselves tend to make when invoking the privilege: that they will discuss "settled" cases but are unwilling to discuss "unsettled" cases because such cases raise issues that are likely to come before the Court in the future.²⁶ This distinction (assuming nominees can accurately guess what will and will not come before the Court in the future)²⁷ could justify a distinction between the nominees' treatment of settled and unsettled cases. If an issue is in fact unlikely to be before the Court in the future, then the nominees' discussion of the issue poses little risk to his or her future impartiality in similar cases.

A closer look at the responses, however, complicates this. This is most notable in regard to *Marbury*, which is in the somewhat odd position of coming in second in each of the response type categories delineated above. When asked about *Marbury*, Justices Kennedy, Souter, Ginsburg, and Breyer were willing to provide firm opinions about the case.²⁸ Justice Scalia, however (much to the astonishment of Senator Arlen Specter), felt that doing so would harm his ability to be impar-

26 Whether this distinction is itself defensible is discussed below. I conclude that it is not.

27 This assumption is itself questionable. While not captured by the above case-focused data, there are several instances in the transcripts where the nominees readily opine on a body of law they may consider "settled" that turns out not to be. Justices Scalia and Thomas, for example, both stated at their confirmation hearings that Congress was the appropriate body to enforce the limits of congressional power under the Commerce Clause—an issue that was in fact revisited by the Rehnquist Court. *Nomination of Antonin Scalia to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 2 (1986) [hereinafter *Scalia Transcript*]; *Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 1 (1991) [hereinafter *Thomas Transcript*]. All citations to the Justices' transcripts are to the transcripts published by the United States Senate and made available on its webpage at http://www.Senate.gov/pagelayout/reference/one_item_and_teasers/Supreme_Court_Nomination_Hearings.htm. Moreover, is it really inconceivable, in our post-9/11 world, that the Court could be asked to reexamine cases such as *Abrams v. United States*, 250 U.S. 616 (1919), *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *Gitlow v. New York*, 268 U.S. 652 (1925), *United States v. Nixon*, 418 U.S. 683 (1974), *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952), and even *Korematsu v. United States*, 321 U.S. 760 (1944)—all cases on which at least some of the Rehnquist Court nominees were willing to provide firm opinions?

28 *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 93 (1987) [hereinafter *Kennedy Transcript*]; *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 63 (1990) [hereinafter *Souter Transcript*]; *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 188 (1993) [hereinafter *Ginsburg Transcript*]; *Nomination of Stephen G. Breyer to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103rd Cong. 380 (1994) [hereinafter *Breyer Transcript*].

tial in future cases and refused—twice—to provide an opinion about that case.²⁹ Justice Rehnquist's treatment of the case was even more confounding. In discussing the relationship between *Marbury* and *Ex Parte McCordle* (involving Congress's authority under the Exceptions Clause to restrict the Supreme Court's appellate jurisdiction),³⁰ Justice Rehnquist was willing to agree that *Marbury* meant that the Supreme Court could not be stripped of jurisdiction over First Amendment questions³¹ but then invoked the privilege when asked about the removal of the Court's jurisdiction over other constitutional questions.³² This type of variance between the Justices is difficult to explain in terms of a distinction between "settled" and "unsettled" cases—*Marbury* was no more or less settled in 1986 when Justice Scalia was confirmed than it was in 1994 when Justice Breyer was confirmed; nor is the meaning of the Exceptions Clause more settled in regard to First Amendment questions than it is in regard to Fifth, Sixth or Fourteenth Amendment questions.

This problem is even more apparent when we look beyond the list of cases most frequently responded-to to the longer list of all named cases to which the nominees gave opinions. The Rehnquist Court nominees gave general opinions on 179 different cases and firm opinions on 92 cases. They invoked the privilege to not respond in regard to 134 cases. Within the larger pool of named cases there were numerous inconsistencies between the nominees. Justice Breyer invoked the privilege in regard to *Sherbert v. Verner*,³³ which involved the Free Exercise Clause, whereas Justice Thomas expressed sympathy with the case's holding and methodology.³⁴ Justices Souter and Rehnquist were both asked directly whether they agreed with the ma-

29 *Scalia Transcript*, *supra* note 27, at 33, 83.

30 *Ex Parte McCordle*, 73 U.S. 318 (1867).

31 *Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 319 (1986) [hereinafter *Rehnquist Transcript*].

32 *Id.* at 187–89, 319–20, 349. Justices Stevens, O'Connor, and Thomas neither offered an opinion about *Marbury* nor refused to do so on the grounds entailed in the privilege. This does not mean they were not asked about the case, rather only that their response did not fit any of the categories examined here. In most situations, that means the nominee offered a description rather than an opinion of the named case and the questioning senator did not push for a more responsive answer.

33 374 U.S. 398 (1963).

34 *Breyer Transcript*, *supra* note 28, at 153 (stating that he should "exercise caution" as to questions about *Sherbert* because they would likely be before the Supreme Court); *Thomas Transcript*, *supra* note 27 at 136 (disagreeing with the Court's move away from *Sherbert* in *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)).

majority or the dissent in *Baker v. Carr*.³⁵ Justice Souter acknowledged the dissent's persuasive power but nonetheless stated that he believed the majority opinion was correct.³⁶ Justice Rehnquist, on the other hand, invoked the privilege and did not answer the question.³⁷ Justice Souter and Justice Thomas likewise treated identical cases differently. Justice Thomas six times said he did not "quarrel" with the result reached in *Eisenstadt v. Baird*,³⁸ an early privacy case, while Justice Souter invoked the privilege to avoid giving any opinion on that very case.³⁹ Those Justices also differed in their approaches to a second early privacy case, *Moore v. City of East Cleveland*.⁴⁰ When asked about that case, Justice Thomas twice expressed general agreement, while Justice Souter again invoked the privilege.⁴¹

The selectivity apparent in the records of individual Justices themselves is even more startling. Table 2 below illustrates how many times each nominee responded to a named case in each of the indicated ways⁴²:

35 369 U.S. 186 (1962) (finding questions of legislative districting justiciable and thus opening the door to the "one person, one vote" rule, over a strong dissent by Justice Harlan).

36 *Souter Transcript, supra* note 28, at 304 ("[W]ithout underestimating the power of [Justice Harlan's] argument . . . ultimately I would have had to have rejected it.").

37 *Rehnquist Transcript, supra* note 31, at 363 ("If you ask me whether I subscribe to the [Baker] principle now . . . I do not think I can answer that.").

38 405 U.S. 438 (1972).

39 *Thomas Transcript, supra* note 27, at 278–79, 336; *Souter Transcript, supra* note 28, at 57 (answering the question by saying that "without specifically affirming or denying the wisdom of *Eisenstadt* . . . I would express it without getting myself into the position of endorsing the specifics of the case[s] . . .").

40 431 U.S. 494 (1977).

41 *Thomas Transcript, supra* note 27, at 130 (explaining that "I think—and I think the Supreme Court's rulings in the privacy area support—that the notion of family is one of the most personal and private relationships that we have in our country" and noting that, had he been aware that *Moore* was explicitly criticized in a report issued by his department, he would have "expressed [his] concerns" before finalizing the report); *Souter Transcript, supra* note 28, at 58 ("[W]ith respect to *Moore* . . . I am going to ask you excuse me from specifically endorsing the particular result.").

42 Note that because this project does not capture the number of times each nominee is asked to provide an opinion about a named case, the information presented here should not be used to compare the nominees' relative responsiveness. Rather, the information should only be used to compare the individual nominee's willingness to address certain cases but not others. This denominator figure—the number of times a nominee is asked to provide opinions about cases—is necessary to make meaningful comparisons about the relative responsiveness of nominees. For example, a nominee who provided five firm opinions but was only asked for six could be considered more responsive than a nominee who provided 30 firm opinions but was asked for 500. Capturing the correct denominator is difficult, however, because senators frequently structure their questions in such a way so as to leave the nominee free to offer an opinion on a named case or not, as the

TABLE 2

RESPONSE TYPES: INDIVIDUAL NOMINEES

Nominee	# of Cases on Which General Opinion Was Given	# of Cases on Which Firm Opinion Was Given	# of Cases on Which Privilege Was Invoked
Stevens	4	1	0
Rehnquist, CJ	10	3	13
O'Connor	6	0	5
Scalia	2	0	6
Kennedy	26	14	5
Souter	22	10	4
Thomas	17	12	9
Ginsburg	28	14	23
Breyer	14	7	16

Plainly, the Rehnquist Court nominees were highly selective with regard to when they would and would not offer opinions about previously decided Supreme Court cases.⁴³ Once again, however, not all of this selectivity can be explained by resort to a simple division between settled and unsettled cases. Although the quantity of the information represented in Table 2 makes it impractical to provide

nominee prefers. It is inaccurate in such situations to say that the nominee is refusing to answer a question or is being truly non-responsive.

43 The information shown above in regard to Justice Stevens, O'Connor, Scalia, and, to a lesser extent, Chief Justice Rehnquist could support the common assumption that there is some sort of "Bork-effect" apparent in the nomination process: each of these nominees faced fewer questions about constitutional cases than did the nominees, starting with Justice Kennedy, nominated after Robert Bork. What effect, if any, that the failed Bork nomination had on subsequent nominations is far from a settled question, however. See, e.g., Frank Guliuzza III et al., *The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria*, 56 J. POL. 773 (1994) (arguing that confirmation criteria for post-Bork judicial nominees has not changed quantifiably or substantively). An alternative explanation for the difference in questioning of post-Bork nominees, particularly in regard to Justices O'Connor and Scalia, may be the extraordinarily uncontentious nature of their appointments. This is discussed in Part IV.B *infra*. See also *Breyer Transcript*, *supra* note 28, at 381 (statement of Sen. Arlen Specter, Member, S. Comm. on the Judiciary) (contending that nominees answer as many questions as they think they have to in order to receive confirmation). Because their nominations ranked so low on the likely controversy scale, these nominees were in the enviable position of being highly confirmable without saying much of anything.

here the case names for each of the individual nominee's responses, a few examples will illustrate the point. Justice Breyer, for example, provided at least a generally favorable opinion about *Lemon v. Kurtzman*,⁴⁴ but then invoked the privilege to avoid discussing *Sherbert* and *Employment Division v. Smith*⁴⁵—all cases involving the very unsettled religion clauses of the First Amendment.⁴⁶ Justice Rehnquist, as noted above, was willing to say that *Marbury* means the Supreme Court cannot be stripped of jurisdiction to hear First Amendment cases, but then invoked the privilege when asked about its application in other constitutional cases. Justice Thomas, while famously refusing to answer any questions about *Roe*, nonetheless did opine on some cases involving very “unsettled” doctrines, including *Heart of Atlanta Motel, Inc. v. United States*,⁴⁷ *Sherbert*, and *Thornburg v. Gingles*.⁴⁸ In short, while all of the nominees who were asked were willing to embrace *Brown* and unwilling to discuss *Roe*, the territory between these two iconic cases was uncharted at best.

The point here is not to question the motivations or intentions of the nominees themselves, or to understate the subtleties of the exchanges between the nominees and the senators. Even a casual reading of the transcripts evidences the seemingly unlimited number of ways the senators can pose their questions and the ongoing efforts made by the nominees in answering them to balance the senators' desire for information with what the nominees' appear to see as a genuine duty to not comment on certain cases. The point, rather, is that the disparity in the nominees' actual responses undermines the validity of the claim that the refusal to comment on certain cases is in fact necessary to *preserve judicial independence or impartiality*. It is simply difficult to understand why, in those terms, Justices Kennedy, Souter, Ginsburg, and Breyer can offer opinions of *Marbury* but Justice Scalia cannot; why Justice Souter can tell us how he would have voted in *Baker v. Carr*, but Justice Rehnquist must avoid doing so; or why Justice Breyer can discuss *Lemon* but not *Sherbert*.⁴⁹

44 411 U.S. 192 (1973).

45 494 U.S. 872 (1990).

46 *Breyer Transcript*, *supra* note 28, at 153, 224.

47 379 U.S. 241 (1964). See *Thomas Transcript*, *supra* note 27, at 373–74 (expressing general approval of the scope of congressional power under the Interstate Commerce Clause as articulated in that case).

48 478 U.S. 30 (1986). *Thomas Transcript*, *supra* note 27, at 134, 136, 446.

49 It may be that the principle being advanced by actual practice is that the nominee him or herself is entitled to decide whether discussing a particular case threatens future impartiality. While such a principle may itself advance some aspect of judicial independence, it is difficult to connect with the impartiality concerns actually articulated, particularly the

Moreover, even if the nominees' distinction between settled and unsettled cases were applied consistently, it is far from clear that the distinction itself is supportable. As noted above, the basis of this concern, as most frequently explained by the nominees themselves, is that opining on unsettled cases risks their future impartiality because such cases raise issues likely to come before the Court in the future. The difficulty with this position is that saying a case is settled is simply not the same thing as saying that the case does not raise issues likely to come before the Court in the future.⁵⁰

This is true even of our most enduring opinions. Consider *Brown*—surely among the most settled of our settled cases, and one on which all of the nominees who were asked were willing to opine. *Brown* rests on the finding that state-sanctioned discrimination on the basis of race violates the Equal Protection Clause. While no litigant is likely to ask the Court to overturn *Brown* anytime in the foreseeable future, cases pushing the scope of that premise, such as the use of race in public law school admissions, obviously are among the most controversial faced by the Court today. Even the specific question presented in *Brown*—the use of race in primary school student placements—has recently re-arisen on the Court's docket.⁵¹ Surely such issues are no *less* related to the central holding in *Brown* than issues of abortion and sexual autonomy are to the central holding in *Griswold* (protecting the right of married adults to use contraception). Indeed, that central holding of *Griswold* arguably is less likely to come back before the Court than the precise prohibition on state-supported single race schooling struck down in *Brown*. Simply put, both “settled” and “unsettled” cases often involve issues that will themselves come before the Court in the future. The nominees' relative willingness to opine on settled cases while avoiding offering opin-

concern about the *appearance* of impartiality, which presumably would be the same for each Justice regardless of his or her subjective impressions of propriety.

50 Justice Scalia has pointed out this difficulty and used it to explain his refusal to opine about even the most settled cases. See, e.g., *Scalia Transcript*, *supra* note 27, at 33, 83–84. Justice Scalia's confirmation, however, was one of the least contested of those examined here (see *infra* Part IV.B), which certainly made it easier for him to take this more consistent approach.

51 See, e.g., *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (June 4, 2007) (holding that a school's use of race in its student assignment plan was not narrowly tailored so as to achieve a compelling government interest); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 05-908 (June 4, 2007) (same).

ions on unsettled ones thus does not appear justified by concerns about their ability to be impartial in future cases.⁵²

IV. POSITIVE LEGAL SCHOLARSHIP AND THE INSTITUTIONAL INDEPENDENCE OBJECTION

As shown above, concerns about the individual decision-making independence or impartiality of the future Justices do not appear to explain either the actual practice of the Rehnquist Court nominees, or those nominees' efforts to treat settled cases differently than unsettled cases. This supports Post and Siegel's conclusion that perhaps these concerns are not what is animating opposition to the type of senatorial questioning endorsed in their proposal. Such opposition could, however, be better grounded in concerns about the institutional independence of the Supreme Court itself.

As noted above, the essence of this objection is that vigorous questioning of Supreme Court nominees infringes upon the independence of the Court as a whole, allowing the Senate to impose its policy preferences on the Court. Such questioning is seen as infusing the majoritarianism of the elected branches of government into the purportedly counter-majoritarian Supreme Court, thereby interfering with the ability of the Court to "do its job"—to interpret the Constitution strictly in accordance with the Justices' best understanding of what the law requires, without that interpretation being shaped by the policy preferences of the other branches.⁵³ As discussed below, the premise on which this objection rests—that this is in fact the Supreme Court's "job"—is contestable. Even on its own terms, however, this objection rests on dubious grounds, in that it does not explain the nominees' efforts to distinguish settled from unsettled cases, and it does not appear to be justified by what existing political science scholarship tells us about when and why Supreme Court confirmations become "politicized" in this way.

A. "Settled" Versus "Unsettled" Cases

The institutional independence objection does not appear to justify the nominees' actual practice of responding to questions about

52 Post and Siegel's observation that sitting Justices are not considered insufficiently impartial despite the fact that they repeatedly hear cases in which issues are raised that they themselves had addressed in prior cases of course also rebuts this claim; my findings here merely supplement their work in that sense.

53 Carter, *The Confirmation Mess*, *supra* note 3, at 1193.

some cases but not others or their efforts to distinguish their responses to questions about settled cases from their responses to questions about unsettled cases. If judicial independence requires that the Supreme Court interpret the Constitution as it and it alone sees fit, then requiring nominees to embrace even settled cases before being confirmed should be considered unacceptable. Indeed, allowing nominees to affirm the holdings of settled cases *on the grounds that they are settled* undercuts the very notion of judicial independence on which the underlying objection purportedly rests, which necessarily includes the freedom to overturn even the most sacrosanct case if the Court believes, in its sole judgment, that doing so is constitutionally required.

When viewed in this light, the practice of most of the Rehnquist Court nominees of willingly providing opinions about canonical cases such as *Brown* and *Lochner*, while simultaneously avoiding revealing opinions about controversial cases such as *Roe* and *Griswold*, makes little sense, at least as a matter of judicial independence. If the institutional independence of the judiciary requires that the Supreme Court be as free to overturn *Brown* as *Roe*, in accordance with its—and only its—constitutional vision, then conditioning confirmations on an affirmation of *Brown* hinders that independence as much as would conditioning confirmations on endorsement of the “correct” (as seen by the senators) result in *Roe*.⁵⁴ After all, as Robert Nagel has noted, “one reason for asking about a settled case is to ensure that it *remains* settled.”⁵⁵ Thus, acknowledging that it is acceptable for the Senate to ensure judicial fidelity to *any* previously decided case (which current practice seems to condone) belies the logic of the judicial independence objection itself, by necessarily accepting that it is appropriate for the Senate to use Supreme Court confirmation hearings, at least to *some* extent, to define the acceptable parameters of constitutional meaning.⁵⁶ Likewise, nominees who agree to answer questions about cases on the basis that they are settled rather than unsettled are doing exactly what the independence objectors object to: signaling to the

54 Professor Randy Barnett, arguing in response to the Post-Siegel proposal, has made this point. Forcing nominees to endorse the established cannon, he argues, gives the Senate just as much control over the Court as would forcing them to take a position in controversial cases. Randy E. Barnett, *Clauses Not Cases*, YALE L.J. (THE POCKET PART), Jan. 2006, <http://thepocketpart.org/2006/01/barnett.html>. Justice Scalia also made this point repeatedly during his confirmation hearing. *Scalia Transcript*, *supra* note 27, at 33, 84–87.

55 Nagel, *supra* note 5, at 866 (emphasis added).

56 I argue in Part IV.C *infra* that perhaps the Senate should have exactly this role.

Senate that the *nominee* sees the issue raised in the cases as settled and has no intention of revisiting it.

B. The "Politicization" of the Supreme Court

Opponents of the type of senatorial questioning endorsed by Post and Siegel also object that such questioning threatens the institutional independence of the Supreme Court by excessively politicizing the confirmation process and thereby leading to an expectation—perhaps even on the part of the Justices themselves—that their role is to further the constitutional or political visions of the senators that confirmed them rather than to develop and implement their own independent vision.⁵⁷ The concern in relation to the Post-Siegel proposal is that allowing nominees to answer questions about how they would have voted in previously decided Supreme Court cases—particularly highly controversial cases—would dramatically increase the risk of this type of politicization of the Court.⁵⁸ This concern is understandable: it is not unreasonable to suspect that a confirmation process in which Supreme Court nominees readily supply opinions about *Brown* will look very different than one in which they are expected to offer opinions about *Roe*. Drawing on the rich political science work in this area, however, I suggest that this concern may be overstated.⁵⁹

Political scientists have long studied the Supreme Court confirmation process. Their work illustrates that few Supreme Court nominations are controversial, and that those that are become so for highly predictable reasons. Those reasons, however, do not appear to be re-

57 MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* 146 (2004).

58 Post and Siegel themselves acknowledge this possibility but accept it as either a necessary evil or a potentially useful educative opportunity. Post & Siegel, *supra* note 2, at 50–51.

59 While I do not develop the point here, it also is worth considering whether “the public” has or needs unrealistic ideas about the allegedly apolitical nature of the Supreme Court. See Terri Jennings Peretti, *Does Judicial Independence Exist?: The Lessons in Social Science Research*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 121 (Stephen B. Burbank & Barry Friedman eds., 2002) (critiquing the idea that Americans strongly believe in judicial independence or that judges are “impartial decision makers guided by principle”); see also Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 *NW. U. L. REV.* 985, 1019–20 (1990) (finding little correlation between public support for the Supreme Court and the Bork hearing); Benjamin I. Page, *Comment: The Rejection of Bork Preserved the Court's Limited Popular Constituencies*, 84 *NW. U. L. REV.* 1024, 1027–29 (1990) (showing that the politicization of the Robert Bork nomination did not result in reduced public support for the Supreme Court); Rose, *supra* note 8, at 929 (describing the Bork nomination as the “fig leaf” falling).

lated to the types of questions asked or answered at the nominees' confirmation hearings. Rather, the confirmation hearings become contentious only when certain, and usually rare, conditions are present. Specifically, the political science work in this area shows that nominations become contested when weak presidents nominate candidates who are perceived as unqualified or who are ideologically distant from the confirming Senate (or, in most cases, both); or when the Supreme Court seat being filled is seen as a "swing" or otherwise critical one.⁶⁰ The more of these factors that are present in a given nomination environment, the more likely the nomination is to be contested.⁶¹ If these factors are not present, however, the nomination is highly *unlikely* to be contested, despite the obvious fact that at least some of the confirming senators are likely to be deeply opposed to the President's chosen nominee. In such cases, the senators in the ideological minority in the Senate do not fight the nomination and lose; *they simply do not fight*, presumably making the strategic choice to expend their political capital elsewhere.

Charles Cameron, Albert Cover, and Jeffrey Segal have studied this phenomena extensively and have built a model that predicts the number of senatorial "no" votes a nominee will generate based on three factors: the strength of the nominating president; the perceived qualification of the nominee; and the distance between the ideology of the confirming Senate and the nominee's perceived ide-

60 LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 92–115 (2005); Charles M. Cameron, Albert D. Cover & Jeffrey A. Segal, *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 AM. POL. SCI. REV. 525 (1990) (modeling the number of senatorial "no" votes a Supreme Court nominee is likely to receive based on the perceived qualifications of the nominee, the strength of the nominating president, and the ideological distance between the nominee and the confirming Senate); P. S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. POL. 793 (1993) (discussing the relatively high failure rate of "critical" or swing nominees who are perceived as likely to change the ideological balance on the reconfigured Court); *see also* JOHN MALTESE, *THE SELLING OF SUPREME COURT NOMINATIONS* 4–5 (1995) (noting the high failure rate of Supreme Court appointments made by unelected Presidents); WATSON & STOOKEY, *supra* note 1, at 51–56 (discussing the effect of presidential strength and inter-branch conflict on Supreme Court nominations).

61 Cameron, Cover & Segal, *supra* note 60, at 528; Ruckman, *supra* note 60, at 794.

ology.⁶² This model has proven quite robust in predicting the extent of Senate opposition to recent Supreme Court nominees⁶³:

TABLE 3⁶⁴

Nominee	Presidential Strength (Sen. Control)	Perceived Qualification (0 to 1) ⁶⁵	Perceived Ideology (0 to 1) ⁶⁶	Predicted "No" Votes	Actual "No" Votes
Stevens	Weak (D)	0.96	0.25	0	0
O'Connor	Strong (R)	1	0.48	0	0
Rehnquist, CJ	Strong (R)	0.40	0.05	35	33
Scalia	Strong (R)	1	0	0	0
Bork	Weak (D)	0.79	0.10	38	58
Kennedy	Weak (D)	0.89	0.37	0	0
Souter	Weak (D)	0.77	0.33	14	9
Thomas	Weak (D)	0.41	0.16	56	48
Ginsburg	Strong (D)	1	0.68	0	3
Breyer	Strong (D)	0.55	0.48	0	9

Consider this model in relation to the difference between Justice Scalia's extraordinarily smooth confirmation and the contentious and ultimately unsuccessful nomination of Robert Bork. These two nominations, made just a year apart by the same President (President

62 The strength of the President is based on the President's year in office and whether the President's party controls the Senate. The nominee's perceived qualifications and perceived ideology are based on editorials from major newspapers written at the time of the nomination. Cameron, Cover & Segal, *supra* note 60.

63 Cameron, Cover, and Segal applied their model to all nominees since Earl Warren. In almost all cases, the model proved to be highly accurate. The exceptions were nominations apparently tainted by race-related opposition (which the modelers acknowledged the model fails to capture), Robert Bork (probably for reasons discussed in note 78 *infra*), and Abe Fortas's elevation to Chief Justice (a nomination which may have suffered for reasons similar to Robert Bork's, and which in all likelihood also was tainted by bigotry). For a description of the model and its predictions, see Cameron, Cover & Segal, *supra* note 60, at 532 (evaluating all nominees through Kennedy). See also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 216 (2002) (presenting a similar model that evaluates Justices Thomas, Ginsburg and Breyer as well). For a discussion of the Fortas nomination, see Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 95 NW. U. L. REV. 935, 949-50 (1990).

64 The information in this table is taken from SEGAL & SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED*, *supra* note 63, at 216.

65 A score of 1 indicates the nominee is perceived as highly qualified.

66 A score of 1 indicates the nominee is perceived as liberal.

Reagan), are frequently held up as evidence of what some see as the disastrous consequences of allowing senatorial questions to politicize the confirmation process.⁶⁷ Justice Scalia, who was asked very few difficult or “political” questions and answered even fewer, breezed through the confirmation hearings and was approved by the Senate by a 98 to 0 vote.⁶⁸ Robert Bork, in contrast, was asked—and answered—numerous difficult and probing questions. His hearing was contentious and political in every sense of the word, and his nomination failed by a Senate vote of 42 to 58.⁶⁹ This has led many commentators to conclude that the politicization of the Bork hearings resulted in the failure of his nomination. The political science work discussed above, however, suggests that this conclusion confuses cause and effect: perhaps the Bork nomination did not fail because it became politicized, but rather it became politicized *because* the environment was *already* one in which the nomination was likely to fail, thus presenting the relatively rare situation in which it was worthwhile for the Senators to vigorously fight a Supreme Court nomination.

A closer look at the contextual environment of the Scalia and Bork nominations supports this interpretation. While Justice Scalia and Robert Bork were, at the time of their respective confirmation hearings, perceived as roughly equivalent in terms of both their qualifications for the Court and their ideological inclinations,⁷⁰ virtually nothing else about the environment in which the nominations occurred was the same. Justice Scalia was nominated in June of 1986 and confirmed in September of that same year.⁷¹ The Republicans held majority control of the Senate, President Reagan was in the second year of his second term, and his administration was not yet embroiled in what would become the Iran-Contra scandal.⁷² Under such

67 Martin Shapiro discusses this idea in the context of the influence of interest groups on the confirmation process. See Shapiro, *supra* note 63 (arguing that special interest groups have little effect on Supreme Court appointments).

68 LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 290 (1994).

69 *Id.*

70 Scalia actually was perceived as slightly more conservative and slightly more qualified than Bork. Cameron, Cover & Segal, *supra* note 60, at 530.

71 EPSTEIN, SEGAL, SPAETH & WALKER, *supra* note 68. For Justice Scalia's perceived qualification score (which was the highest possible), see Cameron, Cover & Segal, *supra* note 60, at 530.

72 See Symposium, Foreword, *Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts*, 43 U. MIAMI L. REV. 1, 1 (1988) (summarizing the political climate at the time of the Iran-Contra affair); John Corry, *Hearings in Congress*, N.Y. TIMES, May 12, 1987, at C18 (reporting on the congressional hearings into the Iran-Contra affair).

circumstances, the models developed in the political science work discussed above predict that Justice Scalia would be easily confirmed, as he was.⁷³

One year later, when Robert Bork was nominated, things had changed. President Reagan was approaching his final year in office and was ineligible for reelection. The Iran-Contra hearings had been playing on televisions across the country all summer, and President Reagan's popularity numbers were at a four-year low.⁷⁴ The Democratic Party had taken control of the Senate in the intervening mid-term elections.⁷⁵ Perhaps as importantly, Judge Bork would be replacing Justice Lewis Powell on the Supreme Court. Justice Powell at that time was seen as the critical (or swing) vote on an evenly divided Supreme Court: Justices White, Rehnquist, O'Connor, and Scalia were seen as reliably conservative votes, while Justices Brennan, Marshall, Blackmun, and Stevens were viewed as reliable liberals.⁷⁶ Replacing Justice Powell with Robert Bork was thus perceived as a move that would have shifted the Court as a whole sharply to the right. Justice Scalia's confirmation, in contrast, had no such undercurrent. Justice Scalia was replacing the conservative Justice Rehnquist at the associate justice position, while Justice Rehnquist himself was replacing the conservative Chief Justice Warren Burger.⁷⁷ Under these quite different circumstances, it is perhaps less surprising that Justice Scalia sailed through the confirmation process while Robert Bork sank.⁷⁸

Thinking of the dynamics of Supreme Court confirmation hearings in this type of contextual, environment-driven way has important

73 The model developed by Cameron, Cover, and Segal predicted that Scalia would be unanimously confirmed. Cameron, Cover & Segal, *supra* note 60, at 526.

74 E.J. Dionne, Jr., *Poll Shows Reagan Approval Rating at 4-Year Low*, N.Y. TIMES, March 3, 1987, at A1.

75 Paul Taylor, *Senate to Have 55 Democrats; Party Gains in House, Loses 8 Governorships to the GOP*, WASH. POST, Nov. 6, 1986, at A1.

76 EPSTEIN & SEGAL, *supra* note 58, at 111 (stating that Justice Powell was considered the Court's center).

77 *Id.*; see also EPSTEIN, SEGAL, SPAETH & WALKER, *supra* note 68, at 280.

78 The Cameron-Cover-Segal model predicted that Robert Bork would receive a high number—38—of negative senatorial votes, but it did not predict that his nomination would actually fail. Their model, however, does not take into account the "critical nominee" work done later by P. S. Ruckman, Jr. Ruckman's work, which shows an astonishingly high 42 percent failure rate for "critical nominees," specifically addresses the Cameron-Cover-Segal model and claims that controlling for this higher failure rate among critical nominees improves the predictability of that model. Ruckman, *supra* note 60, at 798, 802; see also David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option*, 15 J. CONTEMP. LEGAL ISSUES 51, 81, 87 (2006) (suggesting that a nominee's potential to upset the ideological status quo is a significant factor behind opposition in the nomination process).

consequences when evaluating the likely effects of adopting the Post-Siegel proposal. Obviously, the Senate is willing to use its power over Supreme Court confirmations to derail the appointment of nominees who are unpalatable to the Senate, either because of the nominee's personal ideology or because of the position the nominee will occupy on the reconfigured Court. However, the political science work discussed above indicates that the Senate only has the *political* power (or perhaps incentive) to do so when a certain cluster of factors—a weak President, an unqualified nominee, an ideologically hostile Senate, or a critical nomination—is present. If this work is correct, the political dynamics of confirmation themselves ensure that, regardless of whether the Post-Siegel proposal is adopted, politicized nominations are likely to be the exception, not the rule.⁷⁹

Of course, it is not impossible that adoption of the Post-Siegel proposal could itself politicize more nominations by altering these underlying political dynamics. For example, a minority party in the Senate could see greater political value in fighting a nominee who is forced to affirmatively state her approval (or disapproval) of *Roe* than in fighting one who is merely *suspected* of having a particular opinion on that case.⁸⁰ Again, however, the actual practice of the Rehnquist Court nominees shows that this may be unlikely.

Consider the nomination and confirmation of Justice Ginsburg. Justice Ginsburg, like almost all the Rehnquist Court nominees, was grilled extensively about abortion at her confirmation hearings.⁸¹ Eventually, in response to a series of questions about *Roe* and *Casey*, Justice Ginsburg said this:

The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.⁸²

This response seems as much an affirmation of the core holding of *Roe* as any that would be given under the Post-Siegel proposal. Yet it did not generate a storm of controversy, nor did it instigate a rebel-

79 Indeed, Cameron, Cover, and Segal pose their research question as an effort to determine why a majority of nominations remain essentially noncontroversial. Cameron, Cover & Segal, *supra* note 60, at 526 (citing Songer, *supra* note 3).

80 See COMISKEY, *supra* note 57, at 146 (considering possible consequences of Supreme Court judicial nominees' engaging in more candid testimony).

81 Justice Stevens, nominated and confirmed just two years after *Roe v. Wade* was decided, was the only one of the Justices examined here *not* asked a single question about that case.

82 *Ginsburg Transcript*, *supra* note 28, at 207 (statement of Justice Ginsburg).

lion of pro-life senators against her nomination: Justice Ginsburg was confirmed by the Senate by a vote of 96 to 3.⁸³ Why? Almost certainly because of the underlying political dynamics of her confirmation: she was appointed by a President in his first few years of office,⁸⁴ she was perceived as highly qualified,⁸⁵ and she was joining a court in which her vote on abortion issues was unlikely to be decisive.⁸⁶ While less quantifiable, it also seems likely that the Republican senators viewed her as more acceptable overall than other likely Clinton nominations, and that they were hesitant to vote against what would be only the second woman to sit on the High Court. These types of political considerations seem unlikely to change merely because nominees are expected to address abortion and other controversial issues in a slightly different diction.⁸⁷

This (tentative) conclusion is bolstered by a closer look at the type of responses the questions proposed by Post and Siegel are likely to generate. Post and Siegel are very careful to emphasize that the purpose of their proposal is to better inform the Senate regarding how a nominee's abstract constitutional philosophies or interpretive preferences are likely to be operationalized in concrete cases.⁸⁸ As such, they specifically advise senators and nominees that their questions and answers about previously decided cases must be carefully phrased to avoid the appearance that they are asking for or providing commitments to adjudicate future cases in particular ways.⁸⁹ Asking for or

83 EPSTEIN, SEGAL, SPAETH & WALKER, *supra* note 68, at 290.

84 Ginsburg was confirmed in June of 1993, less than one year after President Clinton was elected to his first term in office.

85 SEGAL & SPAETH, *supra* note 63, at 205 (noting that Ginsburg received a qualifications score of 1.00 out of 1.00 based on an analysis of newspaper editorials written about her during the confirmation process).

86 *Planned Parenthood v. Casey* had been decided the previous year (in June of 1992). That case made it clear that the Court, as comprised, contained five Justices—Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter—who were unwilling to overturn the central holding in *Roe*. Because Justice Ginsburg was a replacement for Justice Byron White, her vote was not critical on that issue.

87 Which is not to say that certain nominees confirmed in compliance with the Post-Siegel proposal will not become embroiled in controversies about particular cases—of course they will. As noted above, some nominations have always been more controversial than others, and that is also unlikely to change merely because the Post-Siegel proposal is adopted. The point is that those nominations were going to be controversial regardless.

88 Post & Siegel, *supra* note 2, at 48.

89 *Id.* (noting that Senators should phrase their questions in such a way as to understand where the nominee currently stands on constitutional questions).

receiving such commitments would, Post and Siegel assume, be improper.⁹⁰

The likely result of this caution is that nominees following the Post-Siegel approach will carefully couch their answers in terms of the facts presented in the case being discussed, while repeatedly emphasizing that facts and circumstances change, and that they will of course keep an open mind in future cases. Thus, rather than saying simply, "Yes, I believe *Roe* was properly decided and would have voted with the majority in that case," a nominee operating under the Post-Siegel approach would be more likely to say something like this:

I am inclined to think I would have voted with the majority in *Roe v. Wade*, but that of course should not be taken as indicating how I would vote in a future case raising similar issues. Because of *Roe*, we now have years of experience with the legal and social consequences of legalized abortion; we have reams of scholarship examining the original understanding of the constitutional provisions on which that decision was based; we have a much richer understanding of the values at stake and of people's attachment to those values; and we have a deeper appreciation for our own capacity to adjudicate such cases and the extent to which society structures its expectations around such decisions. Any new case, therefore, obviously would have to be evaluated on its own terms, in light of these and other changed circumstances.

Whatever the value of such an answer may be to the senators, it seems unlikely that such heavily qualified responses, perfectly appropriate under the Post-Siegel proposal, could serve as the rallying cry necessary to change the underlying political dynamics of the confirmation process discussed above.⁹¹

90 *Id.* ("All agree that the judiciary should be independent and that, if confirmed, a nominee should be free to make legal judgments in ways that escape congressional control.").

91 Consider also a second example. Potter Stewart, nominated in 1959, was pressed hard by Southern senators for an opinion on *Brown v. Board of Education*. He eventually provided one, saying, "I would not like you to vote for me on the assumption . . . that I am dedicated to the cause of overturning that decision. Because I am not." *Brown* was surely as hotly contested in 1959 as *Roe* is today. See LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 89 (1985) (noting also that Stewart's confirmation was briefly delayed by a group of Southern senators who were troubled by Stewart's statement on *Brown*). Yet Stewart, like Justice Ginsburg, was confirmed, with just 17 negative votes. EPSTEIN, SEGAL, SPAETH & WALKER, *supra* note 68, at 289. Scenarios such as this—not just the looming shadow of *Roe*—must inform these discussions.

C. *Institutional Independence and Positive Legal Scholarship*

The analysis presented to this point supports the Post-Siegel proposal by illustrating that the refusal of Supreme Court nominees to opine on previously decided cases does not appear in practice to be based on any consistently applied principle regarding judicial independence or impartiality. It also illustrates that there is less difference between the Post-Siegel proposal and current practice than is perhaps assumed, and that adopting the Post-Siegel plan seems unlikely to significantly increase the risk of excessive politicization of the judiciary. The discussion so far has not, however, directly addressed the normative argument presented by opponents of vigorous senatorial questioning; namely, that allowing Supreme Court nominees to answer questions about previously decided cases does in fact threaten the institutional independence of the Supreme Court and simply should not be permitted. In this view, current practice stands as disturbing evidence of the scope of the problem, not a reason to be less skeptical of permitting more such questions in the future.⁹² This part of the Article addresses that objection. It is beyond the scope of this project to fully engage in this ongoing normative debate, and I do not attempt to do so here. Rather, my purpose is to explore the role that existing positive legal scholarship can play in informing that debate and in evaluating its relevance to the Post-Siegel proposal.

As several scholars have noted, the debate about the institutional independence of the Supreme Court often seems hopelessly disconnected from the insights empirical research has generated about the actual operation of the Court.⁹³ Most obvious is the observation that if an independent judiciary requires a nomination and confirmation process divorced from senatorial (or presidential)⁹⁴ consideration of the likely voting behavior of the proposed Justice, then we do not, and probably have never had, an independent judiciary.⁹⁵ This alone

92 Note this was in part Randy Barnett's point. See Barnett, *supra* note 54, at 66.

93 See, e.g., Peretti, *supra* note 59, at 103, 121 (criticizing the paucity of empirical research used to inform the debate on judicial independence).

94 Lively, *supra* note 8.

95 MALTESE, *supra* note 60, at 33 (showing influence of political and policy preferences on Supreme Court nominations extending back to and continuing from George Washington's failed nomination of John Rutledge to be Chief Justice, noting that more than one in four Supreme Court nominations made in the nineteenth century failed, mostly for reasons unrelated to a lack of qualifications, and citing a letter from Thomas Jefferson to then-President James Madison urging Madison to use his Supreme Court appointments to ensure a Republican majority on that Court); see also HENRY J. ABRAHAM, JUSTICES AND

should encourage a serious rethinking of how we view the relationship between judicial independence and the Supreme Court confirmation process. I propose, however, that the problem lies deeper, in how we think of the role of the Supreme Court itself.

Much of the criticism of vigorous questioning of Supreme Court nominees rests on the perception that such questioning intrudes on the future Justices' ability to perform what these critics believe is the essential role of the Supreme Court: to interpret and apply the Constitution according to uniquely legal modes of reasoning, free from the majoritarian influences felt by the other branches of government.⁹⁶ It is, in this view, emphatically the duty of Justices of the Supreme Court to interpret the constitution as *they*—not the President who nominated them, the Senate that confirmed them, or the public to whom those actors answer—think best.⁹⁷ Allowing the Senate to use a nominee's endorsement or rejection of particular cases as a "litmus test" in the confirmation process would, in this view, necessarily interfere with that duty by allowing the Senate to impose its own view of constitutional meaning on the Supreme Court. It would, as Professor Carter has contended, hand judicial review over to the very majoritarianism it was intended to check.⁹⁸

The difficulty with this from the perspective of a positive legal scholar is that this vision of the Supreme Court as a countermajoritarian body developing constitutional rules in accordance with uniquely legal modes of reasoning is—as Professor Carter pointedly acknowledges⁹⁹—almost entirely repudiated by what we know about how the Supreme Court actually functions. As several scholars have exhaustively demonstrated, the Supreme Court has, throughout our history, rarely behaved in a seriously countermajoritarian way.¹⁰⁰ Po-

PRESIDENTS (3d ed. 1992) (providing a historical account of the reasons for Justices' appointments); TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 85 (1999) (discussing the persuasive influence of ideological and political preferences in Presidents' Supreme Court nominations); Lively, *supra* note 8 (tracing the history of partisan and policy-based struggles over the Supreme Court); Peretti, *supra* note 59, at 106–09 (summarizing extensive literature tracing the role of partisanship and policy preferences in senatorial consideration of Supreme Court nominations).

96 Carter, *The Confirmation Mess Revisited*, *supra* note 4, at 962–63; see also D.W. NEUBAUER, JUDICIAL PROCESS: LAW, COURTS AND POLITICS IN THE UNITED STATES (2d ed. 1997) (discussing a model of the U.S. court system as one that is insulated from public influence).

97 Carter, *The Confirmation Mess*, *supra* note 3, at 1193.

98 *Id.*

99 *Id.* at 1190–91, 1201.

100 For the seminal argument to this effect, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279–95 (1957). More recent work includes GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING*

litical science scholarship, in turn, provides ample evidence that Supreme Court decision making does not rest on purely legal (even if disputed) modes of reasoning. Rather, this scholarship shows that Supreme Court Justices' non-legal political preferences play, at a minimum, *some* role in how they exercise the discretion left to them by interpretive methodologies and other legal rules.¹⁰¹

While it is possible that concern about judicial independence is grounded in a desire to protect a constitutional function that our Court has rarely, if ever, in fact played, it seems at least somewhat unlikely that such long-lasting concerns would grow from such infertile soil. Taking the positive and political science scholarship in this area seriously thus requires us to entertain the possibility that judicial independence, at least in our system, is serving some function *other* than that of isolating the Supreme Court in order to ensure that its Justices are able to exercise their duty to use apolitical modes of legal reasoning to find and apply countermajoritarian constitutional rules.

Positive legal scholars are beginning to work toward a better understanding of the function of judicial independence within our system by offering alternative explanations of the role the Supreme Court itself actually plays in that system.¹⁰² The key point is that this scholarship invites us to rethink the very purpose of the confirmation hearing process: If the confirmation process need not be structured to protect an apparently inaccurate view of the institutional function of the Supreme Court, how *should* that process be structured?

The Post-Siegel proposal offers a useful framework through which to consider that question.¹⁰³ By stripping away the image of the Supreme Court as a necessarily countermajoritarian institution, we can envision the confirmation hearing process as an appropriate, long-term, democratic check on the Court: a mechanism through which our society, through its elected representatives, marks for the Court the boundary at which the legally permissible meets the politically

ABOUT SOCIAL CHANGE? (1991) and Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580–81 (1993).

101 SEGAL & SPAETH, *supra* note 63; see also DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY 155 (2002) (arguing that all known methods of constitutional interpretation leave ample room for the exercise of judicial discretion).

102 See, e.g., Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1295 (2004) (arguing that the Supreme Court's unique role is to facilitate a national dialogue about constitutional meaning).

103 For a thorough examination of the interconnectedness of judicial independence and judicial accountability, see *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Stephen B. Burbank & Barry Friedman eds., 2002).

unacceptable.¹⁰⁴ Beyond that point, Justices are told, you may not go. Probing confirmation questions and answers such as those proposed by Post and Siegel thus become one way in which our legal system identifies and conveys our society's understanding of the substantive commitments—the constitutional commitments—it expects the Supreme Court to respect. Confirmation hearings in this scenario are not sterile exercises that must be conducted with great restraint in order to protect a judicial function that may not exist. Rather, they become exactly what Justice Scalia once bemoaned that they were turning into: mini-constitutional conventions, rich and lively debates through which the deepest values of our society are gradually absorbed into its fundamental law.¹⁰⁵

The question of whether our confirmation hearings do in fact play this role is worthy of further exploration, as is the question of how, if that role is deemed desirable, the confirmation process might be better designed to enhance its effectiveness.¹⁰⁶ The salient point, for present purposes, is merely that this type of work has the potential to help frame the discussion about judicial independence and senate confirmation hearings in a way that could be both normatively desirable *and* consistent with what positive legal scholarship teaches us about how the Supreme Court actually works.

V. CONCLUSION

The current confusion about the appropriate scope of senatorial questioning in Supreme Court confirmation hearings is unfortunate. It renders the senators tentative and hesitant in their questioning,

104 See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 974–76 (2002) (noting that judicial independence in our system is balanced with judicial accountability by placing relatively unaccountable judges within a highly politically accountable judiciary).

105 See COMISKEY, *supra* note 57, at 27. This does not, as Professor Carter fears, merge the judicial function into the political function, for the simple reason that Supreme Court nominations do not occur all at one time; they are staggered, usually at two- to three-year intervals. This staggering means that, at any given point in time, the Court as a whole will be comprised of Justices nominated by different presidents and confirmed by different Senates, all with shifting partisan preferences and policy priorities. This helps to ensure that the decisions of the Court do indeed reflect the long-term constitutional commitments of the people rather than the short-term passions of the moment. Friedman, *supra* note 102, at 1274–75.

106 I hope to expand the dataset on which this Article is developed to examine this question by, among other things, comparing statements made by nominees at their confirmation hearings with their subsequent performance on the bench. Using empirical and positive scholarship in this way to build better institutional designs may be one area in which such scholarship can have the most impact. See Friedman, *supra* note 100.

undermining their ability to confidently play a meaningful constitutional role in the confirmation process.¹⁰⁷ As Justice Thomas, speaking from a different perspective, has noted, it also encourages nominees to be less than forthcoming about their true positions.¹⁰⁸ The positive legal scholarship examined here illustrates that the Post-Siegel proposal, if embraced by senators and nominees, has the potential to bring some much needed clarity to the confirmation process, to do so without posing a significant threat to either the individual decision-making independence of Supreme Court Justices or to the institutional independence of the Supreme Court, and to do so in a way that is compatible with a realistic vision of the role the Supreme Court plays in our governing scheme. As such, the proposal clearly warrants further consideration.

107 Post & Siegel, *supra* note 2, at 42–43.

108 JOHN C. DANFORTH, RESURRECTION: THE CONFIRMATION OF CLARENCE THOMAS 27 (1994).