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Questioning Justice: Law and Politics in Judicial Confirmation Hearings

INTRODUCTION

Senate confirmation hearings for Supreme Court nominees have in recent years grown increasingly contentious. Nominees have refused to answer questions about their constitutional views on the ground that any such interrogation would compromise the constitutional independence of the judiciary.

This Article offers a structural framework for analyzing the prerogative of senators to question nominees. The Constitution balances competing commitments to self-government and to the rule of law in its design for appointing tenured Article III judges. Senators may accordingly ask questions to obtain information necessary to discharge their democratic responsibilities in confirming nominees, but not in ways that undermine the autonomy of courts. We propose a practice of questioning that is fully consistent with this constitutional balance of values: Senators can ask Supreme Court nominees about how they would have voted in cases that the Supreme Court has already decided. We demonstrate that such questions neither compromise the independence of the judiciary nor politicize the rule of law, but instead serve important structural values. They can help generate the democratic legitimacy necessary for courts to exercise the formidable power of judicial review.

I. CONSTITUTIONAL REQUIREMENTS

Like all constitutional democracies, the United States is committed to both self-government and the rule of law. Our Constitution embraces each of these two distinct aspirations, and it carefully negotiates the complex tension between them.

The Constitution awards federal judges life tenure, with removal only by impeachment. In freeing judges from forms of democratic accountability that constrain the representative branches of government, the Constitution structures courts in ways that enable judicial independence and help establish the autonomy of law from politics. But because in a democracy the legitimacy of law ultimately depends upon the acknowledgment of the people,¹ the Constitution also creates a variety of devices for ensuring that judges endowed for life with Article III power remain connected to the democratically accountable branches of government. The Constitution allocates primary responsibility for organizing the judiciary and enforcing court orders in Congress and the executive branch. The Constitution structures relations between the judiciary and the representative branches of government to accord with a fundamental insight: The rule of law requires legal institutions that have democratic legitimacy.

This insight informs the constitutional appointment process for Supreme Court Justices. Article II provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the [S]upreme Court.”² By requiring Justices to be nominated by a democratically accountable President and confirmed by a democratically accountable Senate, Article II establishes a selection process that underwrites the democratic accountability of constitutional law.³ Article II creates a process for selecting judges that makes it possible for the people to accept the judgments of those charged with interpreting “the fundamental and paramount law of the nation.”⁴

Soon after the Constitution was amended to require the direct election of Senators in 1913, the Senate began voting on nominees in open session,⁵ and since 1939 it has called upon nominees to testify in public confirmation hearings.⁶ In recent times, these hearings have come to play a significant role in building the public confidence that is necessary to sustain judicial

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1. The political crises that can ensue when judicially articulated law fails to find democratic acknowledgement can be seen in the controversies that enveloped the Court’s decision in *Dred Scott* and in the Court’s decisions constraining the New Deal.
 2. U.S. CONST. art. II, § 2.
 3. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001).
 4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
 5. “Until 1929 the practice was to consider all nominations in closed executive session unless the Senate, by a two-thirds vote taken in closed session, ordered the debate to be open.” Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988).
 6. *Id.* at 1158.

independence in a constitutional democracy. There are many reasons for the contemporary prominence of confirmation hearings, including a growing public appreciation of the interpretive discretion of Justices⁷ and an escalating expectation of governmental transparency. Confirmation hearings are now the central forum in which Senators engage the public in the question of whether nominees possess the vision and qualifications necessary to justify investing them with the interpretive autonomy and discretion that judges exercise in our constitutional democracy.

II. CURRENT PRACTICE

A President nominates a candidate to become a Justice because the President believes that the constitutional vision of the nominee is good for the country.⁸ There is now general consensus across the political spectrum, from commentators as distinct as Charles Black and William H. Rehnquist, that the Senate, “which is just as responsible to the electorate, and just as close to the electorate, as is the President,”⁹ is independently obliged to determine whether

7. Most now understand, as William H. Rehnquist once put it, that “the law of the Constitution,” is not “just ‘there,’ waiting to be applied,” but instead depends upon the interpretive engagement of a judge. William H. Rehnquist, *The Making of a Supreme Court Justice*, HARV. L. REC., Oct. 8, 1959, at 7.

8. Thus ex-President William Howard Taft, who knew something about choosing Supreme Court Justices, famously argued in 1920 that the country ought to vote for Warren G. Harding for President because:

Mr. Wilson is in favor of a latitudinarian construction of the Constitution of the United States to weaken the protection it should afford against socialistic raids upon property rights, with the direct and inevitable result of paralyzing the initiative and enterprise of capital necessary to the real progress of all. He has made three appointments to the Supreme Court. He is understood to be greatly disappointed in the attitude of the first of these [James Clark McReynolds] upon such questions. The other two [Louis Dembitz Brandeis and John Hessin Clarke] represent a new school of constitutional construction, which if allowed to prevail will greatly impair our fundamental law. Four of the incumbent Justices are beyond the retiring age of seventy, and the next President will probably be called upon to appoint their successors. . . . Who can be better trusted to do this—Mr. Cox, the party successor of Mr. Wilson, or Mr. Harding the standard bearer of the Republican party?

William Howard Taft, *Mr. Wilson and the Campaign*, 10 YALE REV. 1, 19-20 (1921); see also Edith H. Jones, *Observations on the Status and Impact of the Judicial Confirmation Process*, 39 U. RICH. L. REV. 833, 837 (2005) (“[It was] no secret that President Reagan was seeking judicial nominees who would interpret the Constitution according to its ‘original intent’ rather than as a ‘living document’ that must be updated to modern times.”).

9. Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 660 (1970).

it agrees with the President, or whether in its opinion “the nominee’s views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court.”¹⁰

During the controversial 1987 nomination of Robert H. Bork, it was argued that the Senate ought to pass judgment only on the professional competence of nominees and ought not to consider the substance of their constitutional vision.¹¹ Conservative commentators defended this position as recently as 2001.¹² But in objecting to President Bush’s selection of Harriet Miers, conservatives made clear that they also now believe that Senators should consider a nominee’s constitutional vision in deciding whether to vote for

10. Rehnquist, *supra* note 7; see also ARLEN SPECTER, PASSION FOR TRUTH 328-29 (2000) (“In voting on whether to confirm a nominee, senators should not have to gamble or guess about a candidate’s philosophy but should be able to judge on the basis of the candidate’s expressed views. In Robert Bork’s case, perhaps more than any other, the Senate was able to make an informed decision.”); Black, *supra* note 9, at 663-64 (“In a world that knows that a man’s social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President’s, as a satisfactory basis in itself for a negative vote.”); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1206 (1988) (“The Senate has the duty to reject any nominee whose appointment it believes will not advance the public good as the Senate understands it.”).

11. See, e.g., *The Bork Appointment*, NAT’L REV., July 31, 1987, at 14; *The Bork Fight*, NAT’L REV., Oct. 9, 1987, at 17; Editorial, *Bork: Overqualified?* WALL ST. J., Sept. 15, 1987, at 32; Irving Kristol, *The New Liberal Isolationism*, WALL ST. J., Aug. 11, 1987, at 26; see also 133 CONG. REC. S28703 (1987) (statement of Sen. Grassley); 133 CONG. REC. S28713-14 (1987) (Statement of Sen. Armstrong); Maggie Gallagher, *For Want of a Nail*, NAT’L REV., Nov. 20, 1987, at 32 (noting that the Reagan Administration’s “strategy was to stress Bork’s credentials and downplay politics”). On one account, Bork agreed that inquiry into “judicial philosophy” was a fair subject. Bork was willing, even eager, to discuss his views.” SPECTER, *supra* note 10, at 327. Bork himself, however, later said that if Senators insist upon answers to doctrinal questions “they will effectively compel nominees to make campaign promises or face the possibility of rejection.” ROBERT BORK, THE TEMPTING OF AMERICA 364 (1990).

12. In 2001 hearings on the confirmation process, Senator Orrin Hatch urged:

The shift of power in the Senate has focused a great deal of attention on the Judiciary Committee and how it will handle the confirmation of President Bush’s judicial nominees. I hope that this heightened focus proves to be unwarranted, and that the new Democratic majority will fairly treat President Bush’s nominees to our federal courts. In particular, fair treatment includes maintaining the Committee’s long-standing policy against injecting political ideology into the judicial confirmation process and, thus, into the federal judiciary.

Should Ideology Matter? Judicial Confirmations 2001: Hearing Before the S. Subcomm. on Administrative Oversight and the Courts, 107th Cong. (2001) (statement of Sen. Orrin Hatch); see also *The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. (2001) (statements of C. Boyden Gray and Clint Bolick, Litigation Director, Institute for Justice).

confirmation.¹³ Conservatives urged senators “to ask—and to require Miers to answer, as a condition of confirmation—direct questions about her judicial philosophy and its application to concrete constitutional issues.”¹⁴ Liberals had made an analogous demand in the context of John Roberts’s nomination.¹⁵

Direct and probing questions about constitutional philosophy are potentially controversial, however, because Americans believe that law ought to be separate from politics. Requiring nominees to explain in detail their constitutional commitments can seem “embarrassing”¹⁶ or “inappropriate”¹⁷ if senatorial questioning appears to threaten the independent prerogative of the Court to interpret the law. Although senators have interrogated nominees about their substantive views whenever they have perceived that the consequences for important constitutional doctrine were sufficiently serious, such questioning has also been tentative and controversial. Ambiguity about

13. An editorial in the *National Review* called for Miers’s withdrawal on the ground that the country would benefit from a nomination hearing in which there was a clear debate about the direction of the courts. Complaining that “even if [Miers] does not become a Blackmun, her record strongly suggests she will be an O’Connor—a-split-the-difference judge,” the editors of the *National Review* urged:

“The president trusts her,” is not a good enough argument. The president has trusted a lot of people, some of whom have worked out fine, others less so. To which category will Harriet Miers belong? It is possible that the confirmation hearings will shed light on that question. But we doubt it, given the ease with which nominees can sidestep searching questions. What, then, should be done? . . . The prudent course is for Miers to withdraw her own nomination in the interests of the president she loyally serves. The president could then start over. *Both he and his party would probably benefit from having the clear fight over the direction of the courts that only a new nominee would allow.*

Editorial, *Start Over*, NAT’L REV. ONLINE, Oct. 14, 2005, <http://www.nationalreview.com/editorial/editors200510141544.asp> (emphasis added).

14. Michael Stokes Paulsen & John Yoo, *Make Miers Pass A ‘Litmus Test,’* L.A. TIMES, Oct. 18, 2005, at B11 (“Republicans should test Miers’ core legal principles. And if she fails the test, or refuses to take it, they can vote against her.”).
15. See, e.g., People For the American Way, *Twenty Questions Any Supreme Court Nominee Should Answer*, http://www.savethecourt.org/site/c.mwK0JbNTJrF/b.983525/k.53BA-/20_Questions_for_a_Nominee.htm (last visited June 9, 2006).
16. *Nomination of Felix Frankfurter: Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 126 (1939) (statement of Felix Frankfurter) [hereinafter *Frankfurter Hearings*]; *Nomination of John Marshall Harlan: Hearings Before the S. Comm. on the Judiciary*, 84th Cong. 174 (1955) (statement of Sen. Harley M. Kilgore); *id.* at 176 (statement of Sen. Herman Welker).
17. *Nomination of John Marshall Harlan: Hearings Before the S. Comm. on the Judiciary*, 84th Cong. 138 (1955) (statement of John Marshall Harlan) (“[I]t would be inappropriate for me to comment upon cases that may come before me, and to express my views on issues that may come before me.”).

the appropriate constitutional reach of senatorial questioning has undermined its force and authority.

The uncertainty of the practice was well illustrated when, during the bitter controversy over the school desegregation decisions, Senator John McClellan pressed Potter Stewart on whether he agreed “with the view, the reasoning and logic applied, . . . and the philosophy expressed by the Supreme Court in arriving at its decision in the case of *Brown vs. Board of Education*.”¹⁸ Senator Thomas Hennings intervened at that juncture to object that “I do not think it proper to inquire of a nominee for this court or any other his opinion as to any of the decisions or the reasoning upon decision which have heretofore be handed down . . . [I]t does violence to my sense, to my concept of what the judiciary is.”¹⁹ Senator Sam Ervin rose to the defense of McClellan, arguing that if he could not ask questions designed to elicit Stewart’s “attitude . . . towards the Constitution, or what his philosophy is,” then “I don’t see why the Constitution was so foolish as to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate. . . . I intend to ask questions of that kind. I don’t think I would be faithful to my country if I didn’t do it.”²⁰

As Stewart’s dilemma makes clear, it is often to the strategic interest of nominees to avoid explicit statements that will entangle them in controversial Supreme Court decisions.²¹ By appealing to the autonomy of law as a reason to refuse to answer direct and detailed questions about the content of their constitutional commitments, nominees have exacerbated senatorial discomfort. During her confirmation hearing, Sandra Day O’Connor articulated this appeal in a particularly forceful and successful way:

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18. *Nomination of Potter Stewart to be Associate Justice of the Supreme Court of the United States: Hearing Held Before the S. Comm. on the Judiciary*, 86th Cong. 36 (1959). McClellan, who “wholly” disagreed with *Brown*, insisted that “to perform my duty here I have a right to know . . . before I vote for confirmation, or not, what is the judgment and view of the applicant who seeks to serve” on the Court. *Id.* at 40.
 19. *Id.* at 41-42. Senator Hennings explained, “It seems to me that it is not fair to send a man out with any question in his mind as to whether he has made a commitment before this Committee of agreement or disagreement and thus shackle and trammel his free exercise of his own intellect, of his own power to determine and to decide cases that come before him.” *Id.* at 41. Senator John Carroll also thought the question “an invasion of the functions of the associate justice.” *Id.* at 43.
 20. *Id.* at 43-44. Ervin eventually voted against Stewart. For a discussion of how questions about *Brown* influenced confirmation hearings, see Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000).
 21. Rehnquist, for example, changed his view of Senate questioning after he himself was nominated to the Chief Justiceship. Compare SPECTER, *supra* note 10, at 317, with Rehnquist, *supra* note 7.

There is . . . a limitation on my responses which I am compelled to recognize. I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter.²²

Because almost any constitutional issue “may come before the Court,” O’Connor drew a line that would effectively nullify the capacity of the Senate to acquire useful information about a nominee’s constitutional commitments. O’Connor’s reservations would deny the Senate material of central importance to its constitutional deliberations, undermining the democratic design and function of confirmation hearings. The refusal of nominees to discuss their constitutional views is especially disturbing in the context of “stealth” candidates, who have been nominated because their constitutional commitments are literally unknown to the Senate and the American people.²³

III. PROPOSAL

In the balance of this Article we propose and defend a method of questioning that will enable the Senate to evaluate the constitutional commitments of nominees while preserving the independent integrity of the law. We argue, in brief, that senators can with confidence and authority ask nominees to explain the grounds on which they would have voted in past decisions of the Supreme Court.²⁴ Such questions serve the democratic design

22. *Nomination of Sandra Day O’Connor: Hearings Before the S. Comm. on the Judiciary on the Nomination of Judge Sandra Day O’Connor of Arizona To Serve as an Associate Justice of the Supreme Court of the United States*, 97th Cong. 57-58 (1981) (statement of Sandra Day O’Connor).

23. A nominee like Felix Frankfurter may well assert that it is “improper for a nominee no less than for a member of the Court to express his personal views on controversial political issues affecting the Court,” because Frankfurter could with good reason also inform the Senate that “[m]y attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible.” *Frankfurter Hearings*, *supra* note 16, at 107-08 (statement of Felix Frankfurter). Stealth nominees like Miers, by contrast, cannot offer the Senate an equivalent bargain. Their attitude and outlook on “relevant matters” is obscure and indecipherable, and no doubt they have in part been nominated *because of* that fact.

24. Others have proposed that Senators question judicial nominees about how they might have voted in prior Supreme Court decisions, although no one has, to our knowledge, defended this method of questioning by invoking the Constitution’s dual commitment to self-

of the confirmation process by revealing the operational content of nominees' constitutional commitments. Asking nominees to disclose how they would have decided well-known Supreme Court cases prevents nominees from explaining their constitutional commitments in terms of abstract principles like "liberty" or "equality," whose practical significance in particular cases and contested areas of constitutional law is unknown. The goal would be to sustain a colloquy capable of adequately informing a senatorial vote on whether to invest a nominee with the independent authority to interpret the Constitution.

We emphasize at the outset that the purpose of such questions is *not* to bind future interpretive judgments of nominees. To the contrary, it is precisely because the Senate must decide whether to vest nominees with the discretion and authority to interpret the Constitution that the Senate may need nominees to explain their constitutional philosophies. The Senate should expressly affirm that its questions are solely for the purpose of clarifying a nominee's constitutional philosophy, and that a nominee's answers would not be construed as any kind of promise or guarantee of how the nominee would vote in future cases. When undertaken in this spirit and subject to this express understanding, the colloquy we propose should not compromise the independence of the Court, but instead should contribute to the democratic legitimacy that is its necessary precondition. In the remainder of this Article, we answer four prominent "rule of law" objections that have been raised against the kinds of questions that we advocate.

A. The Separation of Powers Objection

The idea that it would be inconsistent with "what the judiciary is" for nominees to be asked and to answer questions about their views of the law ultimately rests on a view of separation of powers. All agree that judges must be free to exercise independent judgment. It would be inconsistent with the rule of law for Congress to dictate to courts how individual cases should be decided or how they should interpret the Constitution. But it is Article II itself that requires Supreme Court Justices to pass through the gateway of nomination and confirmation. It is therefore no violation of separation of powers for President Eisenhower in his appointments to have "clearly and undeniably attempted to influence the Supreme Court in the direction of

government and the rule of law in matters concerning the structure of the judiciary. See Walter Dellinger, *Fair Questions for Roberts*, WASH. POST., July 27, 2005, at A21; Paulsen & Yoo, *supra* note 14; Vikram David Amar, *It's the Specifics, Stupid . . . : A Commentary on the Kind of Substantive Questions the Senate Can and Should Pose to Supreme Court Nominees*, FINDLAW'S WRIT, Aug. 4, 2005, <http://writ.news.findlaw.com/amar/20050804.html>.

entrenching *Brown v. Board of Education* and enforcing its terms.”²⁵ And it would have been no violation of separation of powers if the Senate had refused to confirm any nominee who did not wish to uphold *Brown*. To the contrary, this is precisely how the structure of Article II was designed to work.

B. The Due Process Objection

In her confirmation hearings, Justice O’Connor refused to answer questions about “specific Supreme Court decisions presenting issues which may well come before the Court again” because she believed that it would be unfair to future litigants if she were forced to prejudge questions of law that might arise. This objection ultimately sounds in the values of due process of law, because everyone agrees that judges must consider cases without prejudgment and in an open-minded way. These values, however, are not impaired by the kinds of questions we propose.

In refusing to answer Senate questions, O’Connor necessarily assumed that judges could not be “open-minded” if they had previously expressed views about the substance of the law relevant to deciding a case. But this assumption is hard to reconcile with ordinary judicial practice. Once O’Connor had co-authored an opinion about the nature of the constitutional right to an abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁶ she was not thereafter disqualified from participating in future cases involving abortion because that she has “prejudged” the relevant law.

From the perspective of a litigant seeking vindication of a right to an abortion, and who is concerned about the prejudgment of her case, there is no pertinent difference between being judged by Justice O’Connor, who has expressed in an authoritative opinion her view of the merits of *Casey*, and by a new Justice who has in a confirmation hearing recounted how he would have voted in *Casey* had he been on the Court at the time.²⁷ Nominees who explain the grounds on which they would have voted in an already decided case do not

25. Michael A. Kahn, *Shattering the Myth About President Eisenhower’s Supreme Court Appointments*, 22 PRESIDENTIAL STUD. Q. 47, 50 (1992); see Snyder, *supra* note 20, at 399-400.

26. 505 U.S. 833, 843 (1992) (joint opinion of O’Connor, Kennedy, and Souter, J.J.).

27. In the pungent words of (then) Justice Rehnquist, “It would be not merely unusual, but extraordinary,” if nominees to the Court “had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 777-78 (2002).

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prejudge future cases any more than do judges who write or join opinions in actual cases.

C. The Appearance of Impropriety Objection

In preparing O'Connor for her confirmation hearings, (now) Chief Justice John Roberts strongly urged that the

proposition that the only way Senators can ascertain a nominee's views is through questions on specific cases should be rejected. The suggestion that a simple understanding that no promise is intended when a nominee answers a specific question will completely remove the disqualification problem is absurd. The appearance of impropriety remains.²⁸

The idea of an "appearance of impropriety" is inherently vague, so it is important to offer some precise account of the exact impropriety that is feared. Apparently the impropriety is that for a nominee

to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.²⁹

Questions about past Supreme Court decisions do not ask nominees to represent how they will decide future cases, but rather to disclose their present understanding of the law. It is ultimately circular to argue that answering such questions might nevertheless create the "appearance of impropriety" by inviting a promise to decide future cases in a certain way. The issue turns on the social meaning that should be attributed to a colloquy of this kind. We believe that the structure of Article II suggests that such a colloquy, whether

28. Memorandum from John Roberts, Special Assistant to the Attorney Gen., to Sandra Day O'Connor (Sept. 9, 1981), <http://www.archives.gov/news/john-roberts/accession-60-88-0498/026-oconnor-misc/folder026.pdf>. According to Roberts, O'Connor's "approach was to avoid giving specific responses to any direct questions on legal issues likely to come before the Court, but demonstrating in the response a firm command of the subject area and awareness of the relevant precedents and arguments." Memorandum from John Roberts, Special Assistant to the Attorney Gen., to Kenneth W. Starr, Counselor to the Attorney Gen. (Sept. 17, 1981), <http://www.archives.gov/news/john-roberts/accession-60-88-0498/027-kws-oconnor/folder027.pdf>.

29. *Laird*, 409 U.S. at 836 n.5 (mem.) (Rehnquist, J.).

regarded from the point of view of nominees, or the Senate, should not be understood to implicate any such promise.

From the perspective of nominees, confirmation hearings are like job interviews. Nominees may wish to trim their views to avoid antagonizing senators, but this is ultimately a matter of the honor and integrity of particular candidates. They can misrepresent their substantive constitutional views just as they can misrepresent other aspects of their record. But the questions we propose probe only the present constitutional convictions of nominees, and seek to ascertain their practical significance with respect to particular patterns of facts (whose constitutional significance has already been closely analyzed). Nominees are not asked to explain how they would respond to different hypothetical fact patterns, nor to pledge to adhere to their present views when responding to new arguments or changing circumstances.

From the perspective of the Senate, questions about specific Supreme Court decisions should be designed to learn the present constitutional commitments of nominees, not to bind their future judgments. 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. The questions we propose help create the democratic support necessary to sustain this freedom, and thereby underwrite, rather than compromise, judicial independence. The only pledge about future conduct that the country exacts from nominees is to uphold the Constitution as they understand it.

It is also relevant to note that the Court itself has explicitly held that the appearance of impropriety could not justify a Minnesota canon of judicial ethics “prohibiting candidates for judicial election from announcing their views on disputed legal and political issues,”³⁰ in part because statements of such views by candidates could not plausibly be understood as equivalent to “promises” about future decisions.³¹

30. *White*, 536 U.S. at 788.

31. “The proposition that judges feel significantly greater compulsion, or appear to feel significantly greater compulsion, to maintain consistency with nonpromissory statements made during a judicial campaign than with such statements made before or after the campaign is not self-evidently true. It seems to us quite likely, in fact, that in many cases the opposite is true. We doubt, for example, that a mere statement of position enunciated during the pendency of an election will be regarded by a judge as more binding—or as more likely to subject him to popular disfavor if reconsidered—than a carefully considered holding that the judge set forth in an earlier opinion denying some individual’s claim to justice.”

Id. at 782-83. For a discussion, see Laurence H. Tribe, Keynote Address to the Third National Convention of the American Constitution Society (July 30, 2005) (transcript available at <http://www.acslaw.org/pdf/tribetranscript.pdf>).

D. The Politicization of the Judiciary Objection

A final objection to our proposal is that it would blur the ideological separation between law and politics. After her own confirmation as a circuit court judge, Ruth Bader Ginsburg articulated this objection to a proposed line of senatorial inquiry that would require nominees to reveal their beliefs on “important issues of social policy.”³² She argued that such questions would constitute improper “attempts to politicize the judiciary.”³³ In essence, Ginsburg claimed that the “high esteem”³⁴ of Article III judges should depend upon the apolitical values of professional competence and craft. She cited with approval a 1980 resolution of the House of Delegates of the American Bar Association responding to a plank in the Republican Party’s platform advocating “the appointment of judges . . . who respect traditional family values and the sanctity of innocent human life.”³⁵ The ABA condemned the Republican Party’s deviation “from the selection of judges on the basis of merit by superimposing a test of the candidate’s ‘particular political or ideological philosophies.’”³⁶

The values of professional competence and craft no doubt are and should remain significant dimensions of a nominee’s qualifications. Their importance was evident during Roberts’s confirmation hearings. The question, however, is whether these values alone are sufficient for Senate confirmation. Ginsburg apparently believed that democratic approval of nominees ought to depend upon whether nominees demonstrate “integrity, experience, and temperament,”³⁷ rather than upon the specific content of their constitutional vision. But few now believe that differences over matters of controversial constitutional law, such as abortion or affirmative action, are due primarily to differences of professional competence. Interested members of the public understand full well that such differences flow from deep divisions in constitutional philosophy.

32. Ruth Bader Ginsburg, *Inviting Judicial Activism: A “Liberal” or “Conservative” Technique?*, 15 GA. L. REV. 539, 553 (1981).

33. *Id.*

34. *Id.* at 554.

35. Plank on the Judiciary, 1980 Republican Party Platform, *reprinted in* 38 CONG. Q. 2030, 2046 (1980).

36. Ginsburg, *supra* note 32, at 556 (quoting William Reese Smith, Jr., *Involving the Judiciary in Political Campaigns*, 66 A.B.A. J. 1318, 1318 (1980)); *see also* Linda Greenhouse, *Bar Panel Opposes G.O.P.’s Plank for Judges Who Support Abortion*, N.Y. TIMES, Aug. 8, 1980, at A20.

37. William Reese Smith, Jr., *Involving the Judiciary in Political Campaigns*, 66 A.B.A. J. 1318, 1318 (1980).

Conservatives and liberals have developed distinct frameworks for expressing these divisions. During the Miers nomination, conservatives demanded a candidate they believed would interpret the Constitution based on its original intent.³⁸ Although conservatives denounced the living Constitution and judges who legislated from the bench, they nevertheless employed the language of constitutional restoration to demand change in the prevailing interpretation of the Constitution.³⁹ They used the language of originalism and constitutional fidelity to sketch the profile of a judge who knew how to construe the Constitution in ways that accorded with contemporary conservative sensibilities in questions concerning religion, the family, race, and the scope of federal power.⁴⁰

In recent years liberals have been more uncertain about how to speak of judicial nominations in politics. Twenty-two liberals voted against Roberts's confirmation, reasoning that they would not entrust Roberts with Article III power because in too many important questions he did not share the constitutional vision of the nation. But many liberals seek to defend the Warren Court by appealing to the independent professional expertise of judges, and this has made them genuinely ambivalent about requiring nominees to disclose their constitutional vision or making the Senate's confirmation vote openly depend on judgments about whether a nominee's constitutional philosophy is "harmful to the country."⁴¹ In a time of conservative dominance, many liberals seem to believe that disinterested professional expertise may be the best they can hope for.

We recognize that the questions we propose will force substantive constitutional differences into the open, and that they thus carry the potential to deepen national divisions about the meaning of the Constitution. Ginsburg's objection ultimately rests on the hope that these divisions can be ameliorated if public debate is restricted to a relatively anodyne discussion about norms of professional competence. But if intense divisions already exist, and if they

38. See, e.g., Press Release, Sam Brownback, U.S. Sen., Brownback Comments on Miers Nomination (Oct. 4, 2005), <http://brownback.senate.gov/pressapp/record.cfm?id=246818> ("I look forward to learning at her confirmation hearing whether she possesses a firm commitment to the Framers' Constitution and to the rule of law. . . . I am hopeful that Ms. Miers will be, as President Bush promised, a qualified nominee in the mold of Justices Scalia and Thomas who will strictly interpret the law and will not create law.")

39. As Eagle Forum founder Phyllis Schlafly put it, "I think President Bush has made a good start in replacing supremacist judges with judges who support the Constitution. . . . I don't care whether he chooses a man or a woman. We want people who believe in the Constitution the way it was written." Andrew Becker, *Women, Minority Advocacy Groups Express Disappointment in Pick*, DALLAS MORNING NEWS, July 20, 2005.

40. See *supra* note 13.

41. Rehnquist, *supra* note 7, at 10.

already influence all aspects of the confirmation process, deflecting the focus of confirmation hearings away from the substantive constitutional views of nominees may allow Justices to be appointed who will move the Court in contentious ways that have not received democratic warrant and review. If these new directions are controversial enough, the nation will come to regret the Senate's failure to exercise its Article II authority to protect the Constitution from Justices who will estrange the people from their Court.⁴²

In such circumstances, the best hope of maintaining the democratic legitimacy of our constitutional law may lie in the extension of democratic scrutiny, rather than in its diminishment. The potential politicization of the judiciary feared by Ginsburg must be weighed against the possibility that nondemocratically sanctioned appointments may alienate the people from their own constitutional law. It must also be weighed against the possibility that vigorous Senate confirmation hearings that directly address and debate contested issues of substantive constitutional law may stimulate popular engagement with the meaning of our Constitution, which we hope all agree would be a positive democratic good. The Constitution balances competing commitments to self-government and to the rule of law in its design for appointing tenured Article III judges; this balance between self-governance and the rule of law is well served by a confirmation process that encourages popular debate about the Constitution in circumstances that maintain respect for the independence of the judicial branch.

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42. Other advanced constitutional democracies, like Germany, insure against this possibility with constitutional designs that condition appointment to a constitutional court of last resort upon the receipt of sufficiently widespread approval as would be required to amend the Constitution itself. For a proposal that the United States adopt a "supermajority rule" for the confirmation of Justices, see Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 637-39 (2005).