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## PRAGMATISM AND PARITY IN APPOINTMENTS

*Yxta Maya Murray\**

Since the demise of Judge Robert Bork<sup>1</sup> at the hands of the Senate Judiciary Committee, a number of books from both ends of the political spectrum have been written about the judicial selection process and appointments in general. The Clinton Administration has been involved in numerous contentious nominations and has achieved some important successes, inspiring even more contributions to the debate over the proper way to conduct the nomination and confirmation processes.

There has never been an easy consensus on the Executive's and the Legislature's boundaries in this area; the appointment process was born in conflict. The records of the Constitutional Convention do not expose an original intent mandating that either the Senate or the President act in any particular way in their respective appointment roles.<sup>2</sup> Nevertheless, scholars' careful investigations into the Convention reveal that the Framers initially intended to vest sole authority over appointments in Congress.<sup>3</sup> This decision arose from the fears of Benjamin Franklin and others that granting the appointment power to the Executive would result in a monarchy.<sup>4</sup> Alexander Hamilton, supporting a strong executive, helped construct a compromise giving the President the nomination power and the Senate the confirmation powers. This compromise, embodied in Article II, Section II of the Constitution, was not easily attained and was approved only after being defeated twice.<sup>5</sup> Despite these difficulties in allocating the nomination power to the President, Hamilton believed that the compromise ultimately left the Senate with

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1. Robert Bork was nominated by President Ronald Reagan to the Supreme Court in 1987. His nomination was rejected by the Senate. *See infra* text accompanying notes 21, 29, and 30.
2. *See* Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1147 (1988) (remarking that very little was said on the Senate's and the President's roles in appointments).
3. Freund, *supra* note 2, at 1147.
4. JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 18–25 (1953).
5. *See* HARRIS, *supra* note 4, at 18–25 (detailing the Framers' debate over allowing the Senate to have the authority over both nomination and confirmation of appointees or dividing it between the Executive and Legislative branches).

very little power.<sup>6</sup> This resolution was later codified in Article II, Section II, which provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.<sup>7</sup>

It is an ingenious solution that has the ability to guard against favoritism and imperialism, which might arise if appointments were wholly in the hands of the Executive, or copious disintegration, which could happen if we left appointments to the many-handed behemoth of the Senate. The system the Founders handed down leaves room for some healthy debate and interaction between the two strongest branches. It also fosters a balance of input and dissent into the appointment decision. Although we might believe we are now in the midst of a modern appointments crisis, historically, the Senate's refusal to confirm a President's top pick has been sporadic and politically minded.

Although this review will primarily focus on other types of appointment battles, the Senate's practice of dismissing nominees has been most notable in the Supreme Court selection context. The practice began with George Washington's nomination of John Rutledge, which the Senate scuttled because of Rutledge's attack on the Jay Treaty.<sup>8</sup> Some senators felt that Rutledge had displayed an extremist position that conflicted with their vision of an even-keeled Court.<sup>9</sup> Rutledge's views also alienated powerful members of the Federalist party, such as Oliver Ellsworth, who led the opposition to the nomination.<sup>10</sup>

Reflections of this scene have been replayed in various forms throughout the nineteenth and twentieth centuries. In the nineteenth century, the Senate rejected one-fourth of all Supreme Court nomi-

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6. Hamilton wrote in *The Federalist*, "Every advantage to be expected from the power of appointment . . . would, in substance, be derived from the power of *nomination* . . . . There can . . . be no difference between nominating and appointing." HARRIS, *supra* note 4, at 18 (quoting THE FEDERALIST No. 76 (Edward Gaylord Bourne, ed., Tudor Publishing Co., 1937)).

7. U.S. CONST. art. II, § 2, cl. 2.

8. Rutledge's defeat has been thoroughly discussed by prominent legal scholars. See LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 79–80 (1985) (detailing the 14–10 vote against Rutledge after his appointment by Washington).

9. TRIBE, *supra* note 8, at 79.

10. TRIBE, *supra* note 8, at 79.

nees.<sup>11</sup> The Senate rejected Andrew Jackson's first nominee, Roger Taney, because of its negative response to Taney's removal, pursuant to Jackson's order, of all government deposits from the National Bank.<sup>12</sup> Ulysses S. Grant nominated seven individuals to the Supreme Court but saw only three confirmed, even though the Senate majority belonged to Grant's own party.<sup>13</sup> Woodrow Wilson's nomination of Justice Brandeis was also highly contested by the Senate for various reasons, including Brandeis's political ideology, religion, and class.<sup>14</sup>

Some Senators also opposed Herbert Hoover's nomination of Justice Charles Evans Hughes because of their disagreement with his economic views. They assumed that since Hughes had worked for large corporations, he was committed to his clients' philosophies.<sup>15</sup> The attack on Hughes served a symbolic purpose, signifying that Senators were ready and willing to examine a nominee's ideology.<sup>16</sup> The symbolism quickly turned into reality with John J. Parker, whose nomination by Hoover was rejected after the American Federation of Labor and the National Association for the Advancement of Colored People began a sustained opposition, based on impressions of Parker's anti-labor stance

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11. ETHAN BRONNER, *BATTLE FOR JUSTICE* 112 (1989).

12. BRONNER, *supra* note 11, at 112-13.

13. BRONNER, *supra* note 11, at 113.

14. The Senate's opposition to Brandeis is one of the lowest moments in this history. Brandeis, an intelligent and dedicated Justice, was opposed by the Senate because his opponents "regarded him as a dangerous radical and a crusader and hence unfit to sit on the Supreme Court, which they regarded as a bulwark of conservatism." HARRIS, *supra* note 4, at 113.

Senators also opposed Brandeis because of his religion and his class. "The fact that he was a Jew and was an outsider who had become one of the outstanding members of the Boston bar doubtless was a factor in his opposition by the Boston group." HARRIS, *supra* note 4, at 113. The Senators, however, stated different reasons for their opposition. They accused him of being untrustworthy, lacking a judicial temperament, and being guilty of unprofessional conduct. HARRIS, *supra* note 4, at 113. Brandeis was absolved of all accusations, however, and the picture that emerged indicated that he had extremely high ethical standards. HARRIS, *supra* note 4, at 113. See also A. L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964).

15. HARRIS, *supra* note 4, at 125.

16. HARRIS, *supra* note 4, at 127:

The opponents did not hope to defeat the appointment of Hughes, but rather to serve notice that they would scrutinize all appointments to major policy positions and would stand ready to fight the nomination of conservatives. The case is significant because emphasis was placed, not on the ability and qualifications of the nominee, which were conceded, but rather on his economic and political philosophy.

and his disagreement with African-American suffrage.<sup>17</sup> President Richard Nixon's nomination of Clement Haynesworth failed after the Senate Judiciary Committee discovered what it considered "evidence of the nominee's patent insensitivity to some financial and conflict of interest improprieties."<sup>18</sup> Haynesworth was further criticized for taking anti-civil rights positions.<sup>19</sup> The Senate continued to disappoint Nixon when it rejected the nomination of Harrold Carswell after reports surfaced of a racist speech that the nominee had delivered.<sup>20</sup>

According to one current school of thought, however, these examples of Senate dissension are minor compared to Judge Robert Bork's fate and its grievous legacy. Judge Bork, a graduate of the esteemed University of Chicago Law School, professor at Yale University Law School, and prolific legal scholar, was at the center of an egregious example of politicking in the judicial selection process.<sup>21</sup> Some commentators contend that the Senate's rejection of Judge Bork created a bad precedent that Presidents George Bush and Bill Clinton and the Senate of the 1990s latched onto and expanded on with the incidents involving Justice Clarence Thomas,<sup>22</sup> Zoe Baird,<sup>23</sup> Judge Kimba Wood,<sup>24</sup>

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17. "When Parker was defeated, the *Christian Science Monitor* labeled it 'the first national demonstration of the Negro's power since Reconstruction days.'" BRONNER, *supra* note 11, at 115. See also HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 42-3 (1974).
  18. ABRAHAM, *supra* note 17, at 15.
  19. BRONNER, *supra* note 11, at 116.
  20. BRONNER, *supra* note 11, at 117.
  21. BRONNER, *supra* note 11, at 122-23. See also ROBERT BORK, THE TEMPTING OF AMERICA (1990); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, NINTH JUSTICE: THE FIGHT FOR BORK (1990). For a similar but slightly different perspective, see Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (finding that the Bork battle constituted a battle over a method of changing the Constitution that eschewed the traditional role of amendments).
  22. Clarence Thomas was appointed to the Supreme Court in 1991. See *The Thomas Confirmation*, N.Y. TIMES, Oct. 18, 1991, at A12. See also Yxta Maya Murray, *The Cultural Implications of Judicial Selection*, 79 CORNELL L. REV. 374 (1994).
  23. Zoe Baird was nominated by President Bill Clinton for the position of Attorney General in 1993. Her nomination was withdrawn. See generally Paul M. Barrett & David Rogers, *Senate Support for Zoe Baird Is Precarious*, WALL ST. J., Jan. 22, 1993, at A3. See also R. W. Apple, *Case of Double Jeopardy*, N.Y. TIMES, Feb. 6, 1993, at A1.
  24. Judge Kimba Wood was also nominated by President Bill Clinton for the position of Attorney General in 1993. Her nomination was withdrawn. See Michael K. Frisby & Cathy Trost, *Judge Kimba Wood's Forced Withdrawal Leads Many to See a Double Standard for Appointees*, WALL ST. J., Feb. 8, 1993, at A14; Richard L. Berke, *Judge Withdraws from Clinton List for Justice Post*, N.Y. TIMES, Feb. 6, 1993, at A1.

and Lani Guinier,<sup>25</sup> victims of a supposedly overly political appointment scheme.

Stephen L. Carter, a professor at Yale Law School, joined the fray, writing a book aimed at “cleaning up” the confirmation process. Professor Carter’s *The Confirmation Mess*<sup>26</sup> has two major foci. First, he examines the appointment process’s eschewal of “decency,” evidenced by the abundance of mudslinging that can erupt during the Senate hearings. Second, he writes about judicial independence, which he believes is compromised by judicial nominees’ subjection to Senate interrogations designed to unearth their “judicial philosophy.”<sup>27</sup>

This review uses Carter’s two foci as a springboard for analyzing the Article II, Section II appointment process. First, Carter’s discussion of indecency in modern appointments may be a valuable theoretical insight into the process instead of a mere sociological observation. “Indecency” in appointments, or what is known as “borking” in Carter parlance, may also be a symptom of race and gender bias in the administration of the Article II, Section II power. To ameliorate the effects of this bias, I suggest the incorporation of pragmatism (a thread of philosophical and legal thought) and parity concepts into the existing appointments theories that have been advanced by scholars such as Carter, Laurence Tribe, and Judge Bork.

Second, I critique Carter’s prediction that a “politicized” judicial selection process—one in which Senators ask candidates questions about their ideologies—will hamper judicial independence. After looking at the safeguards in the Constitution and the history of ideological examinations in judicial selection, I conclude that judicial independence is not threatened by these investigations. Instead, I posit that the harmful instances of politicking in appointments often center on race and gender politics, which lead to the prejudicial treatment of nonmajority candidates. I return to the discussion of pragmatism and parity, and using these concepts as guidelines, I attempt to develop tools for constructing a better appointment process.

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25. Lani Guinier was nominated by President Bill Clinton to head the Justice Department’s Civil Rights Division in 1993. Her nomination was withdrawn. See Neil A. Lewis, *Aides Say Clinton Will Drop Nominee for Post on Rights*, N.Y. TIMES, June 3, 1993, at A1.

26. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994).

27. CARTER, *supra* note 26, *passim*.

## I. CARTER'S ATTACK ON "INDECENCY"

Carter articulates the basic moral proposition that histrionic personal attacks on nominees are needless and unfair.<sup>28</sup> To illustrate his argument, Carter points to Senator Edward Kennedy's startling speech, given on the day that Judge Bork was nominated by President Reagan, which depicted a harrowing vision of "Robert Bork's America."<sup>29</sup> It was an ugly stab that painted Bork to be a resurrectionist of deadly "back-alley" abortions and American apartheid.<sup>30</sup> More recent examples of this type of appointment posturing are Senator Robert Dole's and Senator Alan Simpson's attacks on Lani Guinier, in which they announced that Guinier is hostile to the fundamental precepts of democracy, is an advocate of quotas, and is a "reverse" racist.<sup>31</sup>

This venom is not new in the appointment game. As Carter points out, Justice Thurgood Marshall was the subject of racist maneuvering in his Senate hearings when Senator Strom Thurmond gave him a pop quiz on constitutional minutiae.<sup>32</sup> Another example was recounted by Joseph P. Harris in his seminal book *The Advice and Consent of the Senate*, in which he details accusations against Justice Louis Brandeis that were motivated by anti-Semitism.<sup>33</sup>

Still, Carter is correct when he argues that the ugliness seems more intense today, and is facilitated by a wealth of alliterative or lascivious digs: we have been fed images of Lani Guinier as the "Quota Queen,"<sup>34</sup> Kimba Wood as the Playboy Bunny,<sup>35</sup> Roberta Achtenberg as that "damn lesbian,"<sup>36</sup> and, of course, Justice Thomas as the tormenter of

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28. CARTER, *supra* note 26, *passim*.

29. See Kirk Victor, *Drawing Lightning*, 37 NAT. JOURNAL 2254, 2255 (1987).

30. In full, Senator Kennedy posited that "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of the government and the doors of the federal courts would be shut on the fingers of millions of citizens." Victor, *supra* note 29, at 2255.

31. See Neil A. Lewis, *Clinton Faces Battle over a Civil Rights Nominee*, N.Y. TIMES, May 21, 1993, at B9.

32. CARTER, *supra* note 26, at 75-76.

33. See HARRIS, *supra* note 4.

34. See Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12.

35. See Berke, *supra* note 24, at A1, A7.

36. Roberta Achtenberg was appointed assistant secretary for fair housing at the Department of Housing and Urban Development in 1993. See Al Kamen, *Helms on Nominee: "She's a Damn Lesbian"*, WASH. POST, May 7, 1993, at A21.

Anita Hill and avid consumer of pornography.<sup>37</sup> Once the critic concludes that the rhetoric swirling around nominees is getting too nasty, what is the next step? Professor Carter laments the current ethos of “borking”—a pithy derivative nickname for smearing a candidate—but his essay’s focus on decency does not harness any theoretical insights into where Article II, Section II has come from and what its future is. Instead, the passages in *The Confirmation Mess* on decency and borking recommend public persuasion more than constitutional exegesis.

Carter attempts to woo us away from “leaving blood on the floor” and tries to encourage us to think about public service as a calling, not as a reward for good behavior.<sup>38</sup> To this end, he suggests that we grade nominees using a continuum of flaws, some of which may be “curable,” such as unprofessional, illegal, and immoral conduct,<sup>39</sup> and others that are usually not curable, such as a loss of public respect or a lack of qualifications.<sup>40</sup> For example, Zoe Baird was guilty of illegal conduct, suffered a loss of public respect, and was rejected by President Clinton;<sup>41</sup> on the other hand, Justice Thomas was allegedly guilty of immoral and unprofessional conduct but was saved by President Bush.<sup>42</sup> Carter also analyzes various reparative procedural possibilities, such as having the nominee testify far in advance of other witnesses, forbidding interest groups from testifying, precluding the nominee from testifying, excluding television cameras from the hearings, closing the hearings, and not having hearings at all.<sup>43</sup> He also suggests a constitutional amendment that would impose a supermajority voting threshold on the Senate.<sup>44</sup> In the end, he concludes that implementing most of these proposals would be useless. He indicates that other options, such as implementing term limits for Justices and creating judicial elections, may be somewhat more fruitful. He finds that the “problem” with appointments, however, lies in a societal, and thus, Senatorial, propensity for mudslinging and overly politicizing the process.<sup>45</sup>

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37. See William Boot, *The Clarence Thomas Hearings*, 30 COLUM. JOURNALISM REV. 25 (1992).

38. CARTER, *supra* note 26, at 206.

39. CARTER, *supra* note 26, at 169–77.

40. CARTER, *supra* note 26, at 161–71.

41. CARTER, *supra* note 26, at 26, 161–71.

42. CARTER, *supra* note 26, at 178.

43. CARTER, *supra* note 26, at 191–95.

44. CARTER, *supra* note 26, at 196.

45. See CARTER, *supra* note 26, at 196–202, 204.



Carter's categories of nominees' flaws are interesting and have the advantage of neatly categorizing the recent appointment disasters that we have witnessed; his recital of various "modest proposals" also jars us into reassessing the procedural status quo. Ultimately, he rejects concrete reparations and instead tries to fix the public ethos. However, as legal scholars, we might hope that we can do more with Carter's observations to improve the appointment process than make optimistic stabs at changing the irascible and media-driven mutability of public opinion.

One important step is to categorize the different aspects of the appointment process in order to distinguish its social and political elements from those elements that relate more directly to the law and the Constitution. This requires us to acknowledge the distinction between political action groups and members of the Senate, as Carter does not do fully enough. There has been a consistent rise in the involvement of public interest groups in the appointment process,<sup>46</sup> a phenomenon that has probably influenced the vivid Senate reactions to various candidates.<sup>47</sup> Carter focuses on public interest groups and public opinion in general when he analyzes the various appointment battles.<sup>48</sup> However, public opinion—a "national mood"—cannot be regulated. Instead, the citizenry's approach to nominees is subject to the forces that exist in the marketplace of ideas, and therein may lie the power and the function of Carter's book. Yet for the legal scholar, an even more interesting approach may exist in the examination of the Senators who participate in appointments, since they are the players who trigger the history and power of Article II, Section II.

Appointment theory, mostly concerning judicial appointments, has already been disseminated by legal scholars, including Carter. Laurence Tribe wrote *God Save This Honorable Court*,<sup>49</sup> Judge Bork published *The Tempting of America*<sup>50</sup> after his defeat, and the *Harvard Law Review* issued a 1988 symposium on judicial appointments with contributions

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46. See William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1 (1990).

47. CARTER, *supra* note 26, at 98.

48. CARTER, *supra* note 26, at 98; see also CARTER, *supra* note 26, at 13 (discussing the "mood of the nation"); CARTER, *supra* note 26, at 204 (positing that "the true solution to the Supreme Court confirmation mess lies in our ability to develop a public rhetoric about the Constitution that does not treat the Court as though the results it reaches are all that matters").

49. TRIBE, *supra* note 8.

50. BORK, *supra* note 21.

from Professor Carter as well as Professors Bruce Ackerman and Henry Paul Monaghan.<sup>51</sup> Carter's dissertation on borking can expand existing theories on appointments beyond the confines of the judiciary if we examine it in light of jurisprudential principles—that is, if we see how Carter's cogent descriptions apply the legal theory. First, in Part A, I examine how borking, or indecency, in recent appointment battles has often been the product of race, gender, or sexual orientation bias. Next, in Part B, I discuss the concepts of parity and pragmatism. Finally, in Part C, I apply these concepts to the appointment process and examine how they may explain and aid the process as it now exists.

### *A. Dissecting Recent Appointment Battles*

Recent appointment conflicts involving Lani Guinier, Kimba Wood, Zoe Baird, and Roberta Achtenberg can be analyzed using race and gender as a lens, implementing the tools constructed by critical race and feminist theorists.<sup>52</sup> When we analyze these episodes by looking at comments, responses, and communications, we can see that as applied to these women, the appointment process was not a neutral device gleaned from the Constitution, but was rather a process informed and shaped by perceptions of race and gender.

Lani Guinier's appointment battle was disturbing because of the virulence with which her scholarly articles on repairing racial voting disadvantages were attacked, the ease with which she was labeled a lover of quotas—tagged by the *Wall Street Journal* with the handy appellation "Quota Queen"<sup>53</sup>—and the blatancy with which she was charged by Senator Allen Simpson as being a reverse racist.<sup>54</sup> Guinier attributes the vehemence of this opposition to majority America's own racism,<sup>55</sup> and

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51. *ESSAYS ON THE SUPREME COURT APPOINTMENT PROCESS*, 101 HARV. L. REV. 1146 (1988).

52. I have already propounded ideas about race and gender meaning in the judicial selection process and have dissected the Clarence Thomas hearings. See Murray, *supra* note 22.

53. Bolick, *supra* note 34, at A12.

54. See Lewis, *supra* note 31, at B9.

55. Guinier notes,

My nomination became an unfortunate metaphor for the state of race relations in America. My nomination suggested that as a country, we are in a state of denial about issues of race and racism. The censorship imposed against me points to a denial of serious public debate or discussion about racial fairness and justice in a true democracy. For many politicians and

indeed, the mischaracterization of her work on race and voting seems to verify this conclusion.

When withdrawing Guinier's nomination, President Clinton appeared to be responding to or agreeing with the interpretation that Guinier's suggested methods for fixing voting channels that are broken by racism were extreme, race-obsessed routes to racial equality that threatened the pristine notions of democracy, neutrality, and egalitarianism which we consider to be the foundations of our political system.<sup>56</sup> However, when Guinier's most contested methods of repair—cumulative voting and supermajority rules—are analyzed, nothing emerges as particularly race-conscious, except for her reputed expectation that these methods could have the effect of a “black veto” in certain circumstances.<sup>57</sup> Still, it is unclear whether cumulative voting or supermajority rules would necessarily have a particular propensity for fostering black vetoes, since these devices, which Guinier suggests implementing only in the face of egregious examples of racist blockage of minority votes,<sup>58</sup> do not dole out extra votes to citizens based on their racial heritage.<sup>59</sup> Instead, they give greater power to the votes of any particular group regardless of its racial composition.<sup>60</sup>

policymakers, the remedy for racism is simply to stop talking about race.

Sentences, words, even phrases separated by paragraphs in my law review articles were served up to demonstrate that I was violating the rules. Because I talked openly about existing racial divisions, I was branded “race obsessed.” Because I explored innovative ways to remedy racism, I was branded “antidemocratic.” It did not matter that I had suggested race-neutral election rules, such as cumulative voting, as an alternative to remedy racial discrimination. It did not matter that I never advocated quotas. I became the Quota Queen.

LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 19 (1994).

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

57. See CARTER, *supra* note 26 at 41 n.\*.

58. Guinier states,

I discuss supermajority rules as a judicial remedy only in cases where the court finds proof of consistent and deeply engrained polarization. . . . [S]ome apparently fear that remedies for extreme voting abuses, remedies like cumulative voting or the Mobile supermajority [after the supermajority voting scheme approved by the Reagan and Bush administrations in Mobile, Alabama], constitute ‘quotas’—racial preferences to ensure minority rule.

GUINIER, *supra* note 55, at 17.

59. See GUINIER, *supra* note 55, at 19 (arguing that these measures are race neutral).

60. As Carter notes,

[I]n one of her articles she suggests the replacement of at-large elections for say, a county board of commissions (in which the majority gets all of

One could argue that Bork's work was similarly mischaracterized, and thus conclude that there was nothing racially compelling about Guinier's early defeat. And indeed, there may be a parallel between the way that Senator Kennedy accused Bork of being a racist and Senator Simpson's characterization of Guinier. Yet the virulence that met Guinier's accounts of racism in the voting process, and the seeming myopia that characterized the interpretations of her law review articles, signalled that part of the ruckus was about Guinier's open revelation that racism still exists in this country. The readiness of certain Senators to levy charges of reverse racism, while it is easily argued that Guinier's theories are devoid of such racism, reveals an antagonism toward creative and hopefully effective racial reparation on the part of the Article II, Section II players and thus within the appointment process itself.

Similarly, the nomination of Zoe Baird and the near nomination of Judge Kimba Wood for the position of Attorney General were disturbing because these women's demise seemed inextricably linked to their gender. Their elevations to that position were thwarted by their child care problems: they had hired undocumented workers to baby sit for their children and had defaulted on Social Security taxes,<sup>61</sup> something that had never stymied the successes of the (male) Attorney General nominees who preceded them. Indeed, presumptions about motherhood and women's roles in child care characterized the Senate hearings. For example, Senator Orrin Hatch put a significant emphasis on Zoe Baird's status as a mother. While he was discussing "equal opportunity for individuals," Hatch abruptly began "commend[ing]" Baird for being "willing to serve in the government."<sup>62</sup> He said:

[T]here are a lot of people who just don't want to go through the pain of the extra effort, because anybody who works in this position as Attorney General knows that it isn't a nine-to-five

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its candidates through, every time) with a cumulative voting system, in which each voter gets as many votes as there are slots up for election. It is easily demonstrated that minority voters will have greatly enhanced opportunities to have their interests supported. This enhancement is not a special gift to voters who are people of color: cumulative voting could enhance the strength of anybody who represents a substantial but unrepresented constituency, from the Christian Coalition to the Green Party.

CARTER, *supra* note 26, at 39.

61. Barrett & Rogers, *supra* note 23, at A3. See also Apple, *supra* note 23, at A1.

62. *Nomination of Zoe E. Baird as Attorney General: Hearing Before the Senate Judiciary Committee*, FED. NEWS SERV., Jan. 19, 1993 [hereinafter *Hearing*] (testimony of Sen. Orrin Hatch (R-Utah)).

job. It is a very, very difficult job. You are the mother of a three-year-old child.<sup>63</sup>

Hatch's reference to Baird's "three-year-old child" and his reminder that being an Attorney General is not a "nine-to-five job" seems fatuous, and it strains the mind to imagine a similar discussion taking place between the Senator and former Attorney General Barr.<sup>64</sup>

In the end, being mothers did not help Baird and Judge Wood at all. Instead, expectations that women are responsible for primary child care<sup>65</sup> and the readiness to dig into women's personal lives focused the inquiry on Baird's and Wood's child care arrangements, which became the linchpins of their failures.<sup>66</sup> Rebellions against Baird's high pay and class, due to her lucrative private sector position, also secured her dismissal.<sup>67</sup> But rich men have been nominated to high government

63. *Hearing, supra* note 62.

64. Hatch's exposition on motherhood and career dedication seems in line with Professor Deborah Rhode's observation that "women 'can't make it' by conventional standards, or are less committed to doing so." Deborah Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1222 (1988).

65. Zillah Eisenstein notes,

[T]he model of woman as exclusively wife and mother was preferred to the model of woman as family member and wage earner. Thus day care is something needed by wage-earning mothers, not wage-earning fathers. Care of the children and the responsibilities of the home remain in large part women's concerns.

ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* 130 (1988). Juliet Schor posits,

To some extent, women have been able to substitute commercial services for their own labor, using their newly earned paychecks to pay the bill. . . . For both two-earner families and single mothers, the reduction in women's time at home has led to a painful cutback in 'household services.' Children are left in the care of others or even by themselves. . . . Unless husbands are willing and able to pick up the slack, these changes are virtually inevitable: employed women just do not have the time. Their work-loads have already climbed above virtually all other groups.

JULIET B. SCHOR, *THE OVERWORKED AMERICAN* 37 (1991) (footnote omitted).

66. Professor Mary Frances Berry wrote in the *New York Times* that Baird's nomination "ran into difficulty because women still accept principal responsibility for child care. How children are cared for seems natural to ask of a woman and not a man." Mary F. Berry, *The Father's Hour*, N.Y. TIMES, Feb. 10, 1993, at A23. See also Anthony Lewis, *If It Were Mr. Baird*, N.Y. TIMES, Jan. 25, 1993, at A17; Catherine S. Manegold, *Women Are Frustrated by Failed Nominations*, N.Y. TIMES, Feb. 7, 1993, at A22.

67. "Mr. Clinton finally realized he had to drop Ms. Baird only after a public outcry against the easy law-breaking of someone so wealthy." *The Lesson of Zoe Baird*, N.Y. TIMES, Jan. 23, 1993, at A20 .

positions before, and their opportunities were not stifled because of public anger about their wealth and ability to obtain paid nannies.<sup>68</sup>

This analysis of Baird's nomination may be rebutted by the fact that Baird broke social security and immigration laws, a flaw that indicated that she may be particularly unsuited to a position in which she would be responsible for the enforcement of the very laws she violated. However, the strength of the motherhood and child care themes, and their use to undermine powerful women, was also evident in Judge Wood's experience with the appointment process. Judge Wood was refused a nomination by the President, after a very public name floating, even though she was not guilty of breaking any laws.<sup>69</sup> It is also worth noting that the Clinton Administration forged a policy of letting nominees "cure" their previous wrongs by paying taxes and penalties,<sup>70</sup> just in time to accommodate new male nominees such as Judge Stephen Breyer and others.<sup>71</sup>

Judge Wood's treatment was even more obviously informed by gender bias than Baird's, since the fact that Baird did break the law gave plausibility to her episode. Despite the fact that Wood was not a law-breaker, she was dismissed because of bad "appearances" resulting from her hiring of an illegal alien (Wood was not breaking any laws at the time of that particular hiring)<sup>72</sup> and also from the revelation that she had spent five days training to be a croupier at the Playboy Club in 1966 while she was at the London School of Economics.<sup>73</sup> The *New York Times* reported that White House officials "feared that that might become the source of jokes" and that they "backed down" from the Wood nomination after Senator Joseph Biden and others expressed disapproval.<sup>74</sup> The White House was not only concerned about finding instances of illegality, but also focused on anything that could raise any appearance of impropriety, telling reporters that it wanted "squeaky clean" candidates.<sup>75</sup> One can only marvel that Judge Wood was rejected because of a sullied reputation, while her nominating President had

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68. See Lewis, *supra* note 66, at A17; Manegold, *supra* note 66, at A22.

69. See Frisby & Trost, *supra* note 24, at A14.

70. See CARTER, *supra* note 26, at 28, n.\*.

71. Mary Deibel, *Clinton Court Pick Is Senate Favorite*, S.F. EXAM., May 15, 1994, at A1.

72. Berke, *supra* note 24, at A1, A8.

73. Berke, *supra* note 24, at A1, A8.

74. Berke, *supra* note 24, at A1, A8.

75. Berke, *supra* note 24, at A8.

admitted inchoately to infidelity and drug use,<sup>76</sup> a Supreme Court Justice had been confirmed after a convincing accusation of pornography consumption and sexual harassment,<sup>77</sup> and some commentators appeared to believe that male government officials would not be reproached for their attendance at the very establishment at which Judge Wood had worked two decades before.<sup>78</sup>

Roberta Achtenberg's nomination, the only successful one in this group, is one of the most obvious examples of prejudice. Achtenberg, President Clinton's nominee for a supervisory position in the Department of Housing and Urban Development, was called a "damn lesbian" by Senator Jesse Helms, who proceeded to detail his exposure to, and perceptions of, Achtenberg's openly gay lifestyle.<sup>79</sup> Making Achtenberg's sexual orientation an issue at her hearings was inappropriate because it was motivated purely by bias toward a specific group. It was additionally inappropriate because her sexual orientation was not relevant to the task she was being called on to perform.

### *B. Introducing Pragmatism and Parity into Theories about Appointments*

Carter bemoans the presence of borking in appointments because it is nasty. He notes how members of the Senate (and the public) were not very nice to Bork during his hearings,<sup>80</sup> and how Guinier was cruelly

76. See John Hanchette, *A Look at Clinton's Problems*, Gannett News Serv., Apr. 27, 1992, available in LEXIS, News Library, Curnws File; Charles Krauthammer, *The Press Confronts Its Power*, WASH. POST, Jan. 31, 1992, at A19.

77. See Boot, *supra* note 37; Murray, *supra* note 22.

78. Law Professor Mary Jo Ester, for example, queried "I'd like to know how many of the men at the White House have never stepped foot in a Playboy Club." Frisby & Trost, *supra* note 24, at A14. See generally Anthony Lewis, *It's Gender, Stupid*, N.Y. TIMES, Feb. 8, 1993, at A17 ("[L]et us now question every male nominee for a top legal job about whether he was ever in a Playboy Club, or saw a pornographic movie."); Anna Quindlen, *Justice Is Blind*, N.Y. TIMES, Feb. 7, 1993, at A16 ("Maybe it is better that she not work with people who further justified their decision to cut her loose by adding their cheap-shot concerns that she had once spent five days training as a Playboy bunny . . . a lifetime ago, around the time the young Bill Clinton was smoking dope at Oxford.")

79. Kamen, *supra* note 36, at A21. See also Ernie Freda, *Gay Debate Fails to Derail Achtenberg*, ATLANTA J., May 25, 1993, at A8; Clifford Krauss, *Housing Nominee Is Attacked*, N.Y. TIMES, May 21, 1993, at A12.

80. CARTER, *supra* note 26, at 126-27. Indeed, aside from Kennedy's speech, one member of the Senate tried, unsuccessfully, to imply that Bork was a money-grubbing pseudo-intellectual. It was then revealed that Bork had taken high-paying legal

labeled the "Quota Queen."<sup>81</sup> His method of reparation is, as stated above, to influence public opinion, develop various categories of nominee flaws, and make suggestions aimed at changing the procedure of the hearings and voting thresholds. However, Carter's suggestions and methods are unsatisfactory because they do not address the nagging evidence of bias that even he acknowledges at certain times.<sup>82</sup> If the borking in these battles is examined in light of some of the theoretical tools that have been developed by legal scholars, then we may place these disturbing incidents within the parameters of constitutional exegesis.

Two theories will aid our critical investigation of Article II, Section II and its recent applications. The first is pragmatism, a branch of philosophical thought that has been embraced by some in the legal academy. Pragmatism in legal scholarship depends on a non-foundationalist world view.<sup>83</sup> It is an approach that eschews a monolithic, overarching theory of legal interpretation. Instead, it depends on experience, contextuality, dialogue, and a sense of community<sup>84</sup> to solve problems in an incremental<sup>85</sup> way that promotes "human flourishing."<sup>86</sup> Pragmatism can be seen as an alternative to "foundational," generalized theories about the law,

positions to pay for the high medical bills that stemmed from his wife's battle with cancer. BRONNER, *supra* note 11, at 263. In addition, many needless jibes were made about Bork's personal appearance. See PAUL SIMON, *ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES* 64 (1992). See also CARTER, *supra* note 26, at 128.

81. Indeed, in Carter's introduction to Lani Guinier's *THE TYRANNY OF THE MAJORITY*, he posits that "Quota Queen" was a sexist and racist dig: "Perhaps a white woman would have been awarded the same crown, but it is easy to harbor doubts. The term *quota queen* resonates mellifluously with *welfare queen*, a phrase never, in my experience, applied to recipients of public assistance who are white." GUINIER, *supra* note 55, at xix.
82. GUINIER, *supra* note 55, at xix. See also CARTER, *supra* note 26, at 139 ("[T]he glee with which too many Thomas opponents (particularly white ones) greeted the revelation of Hill's charges was not merely dismaying—it was actually quite frightening.").
83. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1376–77 (1988).
84. See Farber, *supra* note 83, at 1337. See also Farber, *supra*, at 1337–46, (citing JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927); JOHN DEWEY, *EXPERIENCE AND NATURE* 410 (2d ed. 1929); and WILLIAM JAMES, *PRAGMATISM* 104 (1975)).
85. See Farber, *supra* note 83, at 1343.
86. See Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 693–701 (1985). See also Farber, *supra* note 83, at 1347.



such as Robert Bork's "original understanding" foundation for legal exegesis,<sup>87</sup> or John Hart Ely's representation-reinforcing theory of judicial review.<sup>88</sup> Instead of applying one principle to all dilemmas, pragmatism embraces a whole host of analytical tools to reach just solutions.

In addition, pragmatism may be considered an alternative to conceptually consistent strivings for "ideal justice."<sup>89</sup> Pragmatism, an approach that aspires in part to "piecemeal, temporary solutions,"<sup>90</sup> is a replacement for grand, sweeping theory, which, although it makes stabs at the "best world,"<sup>91</sup> cannot reach this goal on account of existing societal inequities such as racism, sexism, and classism. This phenomenon has been deemed the "double bind,"<sup>92</sup> and can arise when we try to apply grand theory to social justice problems. One example of this dilemma is the "difference" model of gender equity,<sup>93</sup> which has the advantage of recognizing any genetically inherent or socially carved distinctions between the sexes, but also has the disadvantage of reinforcing women's status as "other."<sup>94</sup> Pragmatism attempts to forge a more

87. See BORK, *supra* note 21, at 161, 167.

88. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

89. See Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990).

90. Radin, *supra* note 89, at 1701.

91. Radin, *supra* note 89, at 1701.

92. Radin states:

To generalize a bit, it seems that there are two ways to think about justice. One is to think about justice in an ideal world, the best world that we can now conceive. The other is to think about nonideal justice: given where we now find ourselves, what is the better decision? In making this decision, we think about what action can bring us closer to ideal justice. . . . In making our decisions of nonideal justice, we must also realize that these decisions will help reconstitute our ideals. . . . The double bind, then, is a problem involving nonideal justice, and I think its only solution can be pragmatic. There is no general solution; there are only piecemeal, temporary solutions.

Radin, *supra* note 89, at 1700-01.

93. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (describing gender-based differences in moral decision making). The difference model strives for gender equity through emphasizing the differences between the sexes.

94. If, for example, we emphasize the difference of women, then they are necessarily different from the male model. The alternative to the difference model for gender equity is the "sameness" model, which attempts to achieve gender parity by according both sexes exactly the same treatment. One problem with the sameness theory is that male dominance has made women different from men. See CATHARINE A.

productive route than the foundational approach by using all of the tools—smart ideas and philosophies, experience, community consensus, minority input, and the immediate context—to develop the tailored and just process necessary to solve a particular problem.<sup>95</sup>

The second factor to consider in the appointment context as it is described in Carter's discussion of borking is parity, the concept of equality that fuels not only legal scholarship but also much of political and social discourse. In this review, the attempt to introduce parity concepts into appointment theory will focus on scholarship that is devoted to eradicating race and gender discrimination. The goal of undermining these types of prejudice is well documented in the forms of feminist legal theory, critical legal studies, and critical race theory. These schools of thought are primarily concerned with critiquing the rule of law from new perspectives, and with developing ingenious devices such as the sameness/difference dichotomy, the "indeterminacy" critique,<sup>96</sup> and the use of narrative<sup>97</sup> to introduce broader concepts of social justice into the legal realm. Parity, as noted by Professor Margaret Jane Radin,<sup>98</sup> is closely linked to pragmatism, since pragmatism is one method of making a functional, productive application of these devices to the real, hegemonic world.

Some argue that this can be a difficult and even wayward approach to interpreting the rule of law. Although theoretically, and even practically, pragmatism and its relationship to parity can produce a happy jurisprudential exegesis and resolution of social and legal ills by using a wide array of concepts, some scholars have worried that parity-pragmatism can also collapse into the purely "political," in the opportunistic,

MACKINNON, *FEMINISM UNMODIFIED* 32–34 (1987) (discussing the dominance-created conundrum of the sameness/difference debate).

95. See Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1915 (1987) ("[W]e are situated in a nonideal world of ignorance, greed, and violence; of poverty, racism, and sexism. In spite of our ideals, justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us.")
96. The indeterminacy critique contends that law is variable and inconsistent. See Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1445 (1990) ("[W]e have an increasing array of indeterminacy and 'law is politics' arguments that attempt to expose the constructed and contingent nature of law itself and, thus, to challenge the legitimacy of its current manifestations.")
97. Some critical race scholars use biographical stories to underscore the effects of law's power on the lives of women and people of color. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).
98. See Radin, *supra* note 89. Parity is my own term, not Radin's.

undisciplined, myopic sense of the word.<sup>99</sup> The conceptual tools of parity and pragmatism together may, however, be useful in interpreting and cleaning up the appointment process in a way not anticipated by Carter.

### *C. Applying Pragmatism and Parity to Appointments*

The previous dissections of recent appointment battles serve as a continuum of evidence that the Article II, Section II process is suffering from bias, which precludes its most efficient and just administration, and also prevents its players from effectively fulfilling their leadership and representational roles. But remedies are hard to come by and difficult to construct, in part because the prejudice evident in the process often must be diagnosed and analyzed so carefully. While the prejudice against lesbians in Achtenberg's case is obvious, the indicia of bias in the Guinier, Baird, and Wood incidents are not always so evident, because the bias is so deeply ingrained that it is difficult to name. Yet it is still necessary to extract the influence of bias from such an important government function. The concepts of pragmatism and parity can help achieve this end.

As Professor Radin notes, finding solutions to specific problems of prejudice is a frustrating job when "current social conditions" constitute "oppressive circumstances."<sup>100</sup> This situation results in the double bind, an occurrence that Radin illustrates with a variety of specific examples. For example, she posits that there is no perfect solution to the problem raised by a society that permits "commodification"—the "buying and selling of sexual and reproductive activities."<sup>101</sup> On the one hand, allowing women to sell themselves threatens their autonomy and personhood, because women are then denied their integrity and treated as objects.<sup>102</sup> On the other hand, enforced noncommodification poses its own threats, since we may be denying women one of their rare routes to indepen-

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99. See RONALD DWORKIN, *LAW'S EMPIRE* 95, 151 (1986). Dworkin notes the weakness of an approach which rejects precedent in favor of "contemporary virtue[s]." DWORKIN, *supra*, at 15. He counsels against the pitfalls of "[a]ctivism [which] is a virulent form of legal pragmatism." DWORKIN, *supra*, at 378, *questioned in* Farber, *supra* note 83, at 1344–48.

100. Radin, *supra* note 89, at 1700.

101. Radin, *supra* note 89, at 1699.

102. Radin, *supra* note 89, at 1699–1700.

dence.<sup>103</sup> Similar double binds can be seen in a variety of different contexts, such as special treatment versus equal treatment,<sup>104</sup> affirmative action,<sup>105</sup> and rape.<sup>106</sup> The double bind illustrates an intractable problem. Because of the way society is constructed, we need to take certain steps to protect the weak, but even those protective measures will have their (perhaps intolerable) cost. The situation that arises in the Article II, Section II context is a variant of the special treatment/equal treatment scenario, and the pragmatist can see the concomitant double bind.

How exactly should we advise the Article II, Section II players? If we emphasize the difference of white women, people of color, and sexual minorities in the appointment process, then we will face one set of negative consequences. That is, if we follow the difference model and propose a rule that consistently requires the President or members of the Senate Judiciary Committee to be “sensitive,” in one form or another, when a non-majority person is being considered, we could be thwarting the very goal of parity that we seek to achieve. For example, if we had officials always consult race, gender, disability, or sexual orientation experts during the nomination and the hearings, the practice would have two unpropitious results. First, no President would want to nominate anyone who is different, since the nomination would carry intimidating political meaning. Second, we would be setting a precedent which implies that nominees other than white men are less resilient and powerful—thus *de facto* categorically diminishing their authority and autonomy in the process. Moreover, the uniform application of a sameness model—the one to which the Senate is probably trying to adhere in the name of “fairness”—would also not work because it would leave us with the status quo.

Pragmatism and parity together can provide a flexible tool for ameliorating bias in the process without evoking the stigma that may

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103. See Radin, *supra* note 89, at 1700.

104. Radin notes that special treatment of pregnant women, for example, may result in an employer disincentive to hire women, but equal treatment may cost women their jobs. Radin, *supra* note 89, at 1701.

105. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); Radin, *supra* note 89, at 1702.

106. Radin, *supra* note 89, at 1702. For example, critics of sexual conduct codes on college campuses, which are drafted to protect women from sexual assault, emphasize the danger of codes which “‘expand the definition of rape to include [lack of] explicit consent. Because the implication is that women are too gullible or too weak, or too innocent, too fragile to communicate on a very basic level.’” Deborah Sullivan, *Date Rape Allegation Ignites a Furor at Pomona College*, L.A. TIMES, May 21, 1994, at B1, B2 (quoting author Katie Roiphe) (alteration in original).

attach to consistent special treatment, and can avoid the pitfalls of consistent "equal" treatment. This approach acknowledges that each situation may call for a different method of salvage and repair. For example, equal treatment was called for in the Bork and Guinier cases; Guinier should have received a similar opportunity to be heard. On the other hand, hearings and discourse on harmful sexual misconduct and the use of pornography were warranted in the case of Clarence Thomas because his behavior was related to the victimization of Anita Hill, but discussion about private, consensual sexual activity was not appropriate or even relevant in the case of Roberta Achtenberg and should have been met by an educational hearing. In addition, even if President Reagan was justified in having his aides ask nominee Judge Douglas Ginsburg to withdraw because his candidacy seemed hypocritical in light of the President's "war on drugs,"<sup>107</sup> Baird and Wood still deserved fair hearings because the basis for their rejections were steeped in preconceptions about gender roles.

This approach does not have appointment results as its main concern. Rather, it is focused on the appointment process and its flaws, and on a panoply of procedural and other devices that may be helpful in ameliorating the effects of bias.<sup>108</sup> These devices are manifold: beyond the inquiry methodology that I discuss above, there are procedural factors that can be used depending on the specific situation, such as special hearings, burdens of proof and persuasion,<sup>109</sup> the decision of whether to have open sessions, the introduction of expert testimony, and the decision of whether to introduce rules of evidence, such as relevance. Uniformly applied procedural rules, such as the ones Carter discusses

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107. Judge Ginsburg withdrew his nomination after he admitted that he had smoked marijuana, since the confession made his appointment seem inconsistent with Reagan's anti-drug efforts. See Aric Press, *Pot and Politics*, NEWSWEEK, Nov. 16, 1987, at 46.

108. See Farber, *supra* note 83, at 1342 & n.56 ("Pragmatism has several advantages as an approach to constitutional law. First, pragmatism responds to our sense that some constitutional problems are simply *hard* and unresponsive to any preset formula; it may take all of our intelligence and creativity to devise an acceptable solution. . . . Pragmatism also allows judges to use every available intellectual tool to solve constitutional problems.").

109. A special burden of proof was suggested by Senator John Danforth, although many think wrongfully so, in the Anita Hill/Clarence Thomas hearings. He proposed that the burden be on Hill, in the name of "decency and fairness." See CLARENCE THOMAS: CONFRONTING THE FUTURE 151 (1992) (citing Senator John Danforth, Address to the U.S. Senate (Oct. 14, 1991)). Although I think that this would have been an erroneous allocation of a burden of proof, the idea is an intriguing one and could be used productively.

and dismisses, will have less efficacy in the appointment process than a flexible posture that uses all the tools available. Moreover, a grand theory that always requires equal treatment or special treatment may work inequitable hardships depending on the circumstances.

A pragmatic approach to appointments has its obvious dangers, which are in line with Ronald Dworkin's observation that pragmatism will not work as a basis for judicial review because it can become a vehicle for undisciplined and opportunistic decisionmaking.<sup>110</sup> For our purposes, the dangers of pragmatism can be seen in the image of the racist or sexist "pragmatic" Senator, who uses flexibility to help obstruct the progress of a nonmajority nominee. The virtues of pragmatism and parity in appointments will not be fully realized until there is greater diversity, or at least empathy, in the Senate Judiciary Committee and other influential government bodies that have input in the appointment process. But Article II, Section II players do realize that voters are responsive to evidence of bias in appointments.<sup>111</sup> At least with an eye toward parity and an acknowledgment that the appointment process can have cultural—race and gender—meaning,<sup>112</sup> a creative, pragmatic approach can help avoid the double bind that exists in the binary difference/sameness approach, and can conjure new appointments models around the issues of politics and social justice that crop up in each new nomination battle.

Having expanded on Carter's observation of borking through the use of the twin concepts of pragmatism and parity, I now turn to Carter's second emphasis, the judicial selection process and its threat to judicial independence.

## II. APPOINTMENTS AND JUDICIAL INDEPENDENCE

Carter is concerned with the "politicization" of the judicial selection process. Around the time that the Senate rejected Judge Bork because of his ideology, a group of well-regarded commentators, including Carter, responded to the Senate's seemingly new practice of asking judicial nominees ideological questions and basing their confirmation votes on

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110. DWORKIN, *supra* note 99, at 95, 151.

111. See Manegold, *supra* note 66, at A22. See also Gwen Ifill, *Female Lawmakers Wrestle with New Public Attitude on 'Women's' Issues*, N.Y. TIMES, Nov. 18, 1991, at B7; *Primary Factor: Power of Women in Politics*, L.A. TIMES, June 4, 1992, at B6.

112. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

political considerations.<sup>113</sup> One group of scholars, spearheaded by Laurence Tribe and his book *God Save This Honorable Court*, considered this practice valuable, reasoning that the Senate could responsibly fulfill its role only by making a "thorough examination of the nominee's basic outlook and ideas about the law."<sup>114</sup> Others, such as Bork, believed that ideological investigations were questionable policy because they result in less qualified appointments.<sup>115</sup> In the midst of this flurry of commentary, Carter published his article *The Confirmation Mess*,<sup>116</sup> in which he warned that ideological litmus tests would impair judicial independence.

In his book, Carter expands on his *Harvard Law Review* article, detailing the ways he believes that the Senate's ideological investigations threaten judicial independence. There are various facets to his argument. First, he contends that a paradox exists in a politicized judicial appointment, since "[o]n the one hand, the courts exist at least in part to limit majority sway. On the other, the courts are to be peopled with judges selected at least in part because their constitutional judgments are consistent with those of the very majority whose authority they supposedly limit."<sup>117</sup> The politicized appointment, he finds, is "at least a *little* peculiar" because the Senators attempt to provide a "democratic check" through the scrutiny of judicial philosophy at the hearings, and then later the expectation arises that the Court should "not be responsive to political pressure or public protest."<sup>118</sup>

Carter worries that active ideological examinations, especially those that examine specifics,<sup>119</sup> threaten independence because they may pressure candidates to make promises about future decisions, and they generally produce the appearance of partiality in nominees since they will be "known to have made up their minds before they hear arguments

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113. Bork's nomination was rejected in 1987. See *supra* note 1. Laurence Tribe's book, *GOD SAVE THIS HONORABLE COURT*, *supra* note 8, was issued in 1985. Bork's book, *THE TEMPTING OF AMERICA*, *supra* note 21, was issued in 1990. The *Harvard Law Review*, *supra* note 51, issued a symposium on judicial selection in 1988.

114. TRIBE, *supra* note 8, at 93. See also Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1206 (1988).

115. BORK, *supra* note 21, at 347 ("A president who wants to avoid a battle like mine, and most presidents would prefer to, is likely to nominate men and women who have not written much, and certainly nothing that could be regarded as controversial by left-leaning senators and groups.").

116. Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

117. CARTER, *supra* note 26, at 87.

118. CARTER, *supra* note 26, at 91.

119. CARTER, *supra* note 26, at 97-98.

rather than after."<sup>120</sup> In addition, Carter is concerned that the recent increased emphasis on asking nominees to discuss their ideological stances is inconsistent with our past respect for nominee reticence, and may also decrease the quality of judges that we put on the bench. To illustrate this, he recounts the hearings of Justice Thurgood Marshall, who refused to delineate his specific views on *Miranda v. Arizona*,<sup>121</sup> and posits that such an approach today could earn a nominee a reputation for evasiveness, hurting his chances for confirmation.<sup>122</sup>

Carter raises two other concerns. He contends that the focus on ideology is a ragged attempt at court packing with current, popular values in mind, and that this threatens the integrity and consistency of constitutional principles.<sup>123</sup> Moreover, he regards with suspicion an ideological test that monitors whether a nominee conforms to a more or less universal moral consensus, such as the desegregation principle set forth in *Brown v. Board of Education*.<sup>124</sup> He notes, "The fact that it is as easy to form consensus around an evil principle as around a good one is at best a reminder of the importance of skepticism of claims that because a moral consensus exists, the consensus is probably good."<sup>125</sup> He also wonders if such a consensus is nothing but an illusion—that "consensus" can only be in the eye of the beholder.<sup>126</sup>

120. CARTER, *supra* note 26, at 97.

121. 384 U.S. 436 (1966).

122. CARTER, *supra* note 26, at 62.

123. Carter notes,

Everyone talks about *updating* the document to reflect *our* values. . . . But changing the set of values that one believes the document should reflect [only results in] . . . us[ing] the judiciary to enforce elite values in the name of constitutional law. It is easy to see why this approach is appealing: one can envision seats on the Supreme Court as a costless political largess, distributed in accordance with the interests of one's political followers.

CARTER, *supra* note 26, at 91–92.

124. 347 U.S. 483 (1954). Carter believes that most, if not all nominees have adopted the desegregation principle, and that in this day and age, no segregationist would have any hope of success in the appointments game. He writes,

Everyone is required to accept it. Devotees of the original understanding, to be taken seriously, must argue that the *Brown* Court rediscovered what the authors of the Fourteenth Amendment expected—even though most historians think it plain that the Reconstruction Congress that adopted the amendment had no intention of authorizing courts to undo segregated schools.

CARTER, *supra* note 26, at 121.

125. CARTER, *supra* note 26, at 123.

126. CARTER, *supra* note 26, at 123.



Beyond the procedural suggestions noted above—judicial term limits, manipulation of timing for testimony, and constitutional alteration of voting thresholds—Carter makes substantive suggestions for changing dialogue between the judicial nominee and the Senate. He states that the Senate’s responsibility in the hearings is “giv[ing] voice to the deepest values and aspirations of the American people while at the same time not compromising the necessary independence of the Justices.”<sup>127</sup> To this end, he suggests eschewing specific questions about case law and political posture in favor of “get[ting] a sense of the whole person, an impression partaking not only of the nominee’s public legal arguments but of her entire moral universe.”<sup>128</sup> This involves the Senate ensuring that “[f]irst, the nominee [is] . . . a person for whom moral choices occasion deep and sustained reflection.”<sup>129</sup> Second, the Senate should ensure that the nominee is “an individual whose personal moral decisions seem generally sound.”<sup>130</sup>

Carter suggests several areas of inquiry that could provide such a window into the nominee’s soul. For example, he posits that the Senate could determine whether the nominee belongs to any club with exclusionary policies, has violated marital vows, has voted Republican, has used marijuana, or has had an abortion.<sup>131</sup> He acknowledges that these lines of questioning threaten the wall between the public and private domains and may even be politically risky.<sup>132</sup> Nevertheless, he believes that “[n]one of these queries can be dismissed as entirely irrelevant, unless one wants to suppose a theory of human motivation that rigorously separates the moral premises for actions on the two sides of the wall,” and that the Senate should probably be trusted with drawing the appropriate lines.<sup>133</sup>

127. CARTER, *supra* note 26, at 150.

128. CARTER, *supra* note 26, at 151.

129. CARTER, *supra* note 26, at 152.

130. CARTER, *supra* note 26, at 152.

131. CARTER, *supra* note 26, at 154.

132. CARTER, *supra* note 26, at 153–54.

133. Carter writes,

Relevance . . . is not the same as propriety, and the question is who will decide what lines of relevant inquiry are nevertheless inappropriate. Perhaps the Senate is too risky a place to lodge the power of decision. And yet, if members of the Senate who must reach a moral judgment on the nominee are not to be trusted to draw a line between what may legitimately be considered and what may not, then it is not easy to see why they ought to be trusted with any other aspect of the confirmation decision.

CARTER, *supra* note 26, at 154.

It is hard to resolve Professor Carter's worries about Senate hearings' effect on judicial independence. It seems that the Framers settled the issue of judicial independence when they gave federal judges life tenure and provided that their salaries could not be diminished.<sup>134</sup> In addition, the practice of considering ideology during the confirmation process is not new,<sup>135</sup> and has even received support from Supreme Court nominees and Justices.<sup>136</sup> Also, ideological questioning does not really elicit promises of future conduct, but rather seems to be a sporadically effective attempt to get a pulse of the nominee's standpoint. As a general rule, nominees will either steadfastly refuse to answer any ideological questions<sup>137</sup> or articulate their positions on some issues and

134. The Constitution states,

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

135. See *supra* text accompanying notes 15–20.

136. See *infra* note 137 (discussing Frankfurter). See also CARTER, *supra* note 26, at 58 (“Robert Bork . . . insists to this day that it was proper to engage in a colloquy about what was termed his judicial philosophy.”); William H. Rehnquist, *The Making of a Supreme Court Justice* 29 HARV. L. REC. 7 (1959) (asserting that the Senate should “restor[e] its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him”).

137. This was the case with Justice John Marshall Harlan, see CARTER, *supra* note 26, at 58, and Justice Felix Frankfurter, who initially refused even to attend the hearings. At Frankfurter's hearing, he contended that it is “improper for a nominee no less than a member of the Court to express his personal views on controversial [political] issues before the Court.” HARRIS, *supra* note 4, at 310. It should also be remembered, however, that after Frankfurter had spent some time on the bench, he approved of the rigorous scrutiny that Justice Hughes received after his nomination, stating,

It is because the Supreme Court wields the power that it wields, that appointment to the Court is a matter of general public concern and not merely a question for the profession. In good truth the Supreme Court is the Constitution. Therefore, the most relevant things about an appointee are his breadth of vision, his imagination, his capacity for disinterested judgment, his power to discover and to suppress his prejudices. . . . In theory, judges wield the people's power. Through effective exertion of public opinion, the people should determine to whom that power is entrusted.

FELIX FRANKFURTER, *The Appointment of a Justice*, in FELIX FRANKFURTER ON THE SUPREME COURT 211, 216–17 (P. Kurland ed., 1970).

remain reticent on others.<sup>138</sup> Since this reticence has never been punished by a failure to confirm, a fact which even Carter acknowledges,<sup>139</sup> there seems to be slim danger of binding the future Justice to any political promises. In any event, even if the Senate were to coax out some sort of "promise," the future Justice has sufficient autonomy, and presumably sufficient intelligence, not to apply blindly positions she discussed at the hearings to any set of facts with which she comes in contact.

One possible factor indicates that Senate investigations into ideology could threaten independence: *lower* court judges may be influenced by the hearings. That is, ambitious judges, who aspire to a seat on the high court, may take their cue from the hearings and shape their jurisprudence accordingly.<sup>140</sup> However, if a lower court judge has a propensity to be so influenced, the hearings alone probably do not threaten independence in this regard. The malleable judge is probably responsive to the overall political Zeitgeist that helps one type of candidate be noticed, and not just to particularized ideological issue spotting that she anticipates will be crucial at possible future hearings.

Finally, the politicization of the appointment process, on the part of both the Legislative and Executive players, probably can be better understood as a sort of ebb and flow rather than as the misadventure of modern Senate appointment politics.<sup>141</sup> Some have attributed the ideo-

Other nominees besides Justice Marshall were known as being "evasive," such as then-Judges Souter and Kennedy. See Donald J. Devine, *Reform the Judicial Nomination Process Now*, THE HERITAGE LECTURES, Nov. 12, 1991 ("Thomas was schooled by a team of Washington insider lobbyists to 'learn' from the Kennedy and Souter successes to be evasive in his answers to questions.").

138. Such was the case both with Justice Thomas and Justice Ginsburg. See *Remarks by Senator Joseph Lieberman (D-Ct.) During Floor Debate Regarding Nomination of Clarence Thomas to the Supreme Court*, FED. NEWS SERV., Oct. 4, 1991 ("I must say that I found Judge Thomas' testimony . . . unsatisfying . . . because he appeared almost casually willing at times to express opinions on some very current and complex issues of constitutional law . . . and reluctant to express any thoughts on others."). Lieberman concluded that this was a product of the process "as it has evolved since the Bork nomination," but as is evidenced by the Harlan and Frankfurter hearings, nominee reticence in hearings has a long history. See also *Judge Ginsburg Gives Little Away at Hearings*, NAT. L.J., Aug. 2, 1993, at 5.
139. CARTER, *supra* note 26, at 59 ("[T]he Senate has never rejected a nominee for failing to answer its questions.").
140. See BORK, *supra* note 21, at 347 ("It is quite conceivable that some lower court judges may be affected in the decisions they make and in the opinions they write.").
141. It is difficult to pinpoint the precise reasons some nominations, such as Bork's, have created a strong backlash and others have not, since a whole host of factors may play into the calculation. For example, the Senate did not react with equal force to Justice

logical emphasis to the Senate's periodic "muscle-flexings,"<sup>142</sup> and Senate ideological emphasis may also be a balanced response to increased Presidential attention to politics in appointments.<sup>143</sup> Carter's theory on modern judicial selection thus overstates the process's threat to judicial independence. Therefore, looking for solutions to the politicization problem will not be the right avenue for reparation.

Carter does pose suggestions for repairing the process; they do not, however, hold much promise for remedying the politicization of the Senate hearings. Carter's suggestion that the Senate look to the nominee's entire "moral universe" is disquietly ambiguous, and such an inquiry will not preclude the ideological emphases that Carter so wants to avoid. If we ask the Senate to investigate a nominee's moral vision, that line of inquiry will inevitably collapse into an ideological investigation as well, since so much of ideology—for example, one's views on abortion, defendants' rights, homosexuality, and even one's theories on the role of the Court<sup>144</sup>—stems from one's "moral universe." These are the very types of inquiries that Carter criticizes as threatening judicial independence.

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Scalia's incisive and sometimes razor-edged conservatism, Justice Kennedy's initial apparent similarities to Bork's ideology, and Thomas's "natural law" theory. Its relative indifference may depend on several elements. For one, "[t]he fight over the Rehnquist nomination [to Chief Justice] deflected attention from Antonin Scalia's nomination. . . . Similarly, the struggle over the Bork nomination in 1987 probably explains why public interest groups took little interest in the nomination of Anthony Kennedy." Ross, *supra* note 46, at 23.

142. John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 875 (1991). Ely posits that the "Senate may fall into a pattern of 'flexing its muscles' by rejecting two candidates every few vacancies." Ely, *supra*, at 875.
143. Thus, the rejection of Bork may be seen as a balanced response to President Reagan's goal of staffing the judiciary with ideological allies. The Reagan Administration appeared to try to alter the political and cultural landscape on issues such as abortion and defendants' rights through judicial nominations. See HERMAN SCHWARTZ, *PACKING THE COURTS* 62 (1988). Its efforts have been cited as reaching beyond past Administrations' efforts to seat ideologically palatable candidates in its attempt to re-create a conservative constitutional landscape that "is a return not just to the pre-Warren Court years but to the era of . . . Calvin Coolidge." SCHWARTZ, *supra*, at 43.
144. See, e.g., ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 327–28 (1987) ("As conscientious, open-minded judges, we have to reason it out as far as we can, and then decide intuitively where to strike the balance between the values of representative self-government and State autonomy, on the one side, and, on the other side, the values of national protection for individual human rights."). See also BORK, *supra* note 21, at 18 ("The Court of each era is likely to choose different provisions of the Constitution or different formulations of invented rights as the vehicles for its revisory efforts. . . . [T]he rhetoric employed will often disclose what values are popular with the elites to which the Court responds.").

This flaw is best seen in Carter's observation that a Senator may ask a nominee whether she has had an abortion to determine her "moral universe."<sup>145</sup> Whether the nominee has had an abortion may indicate that she has certain political views about the topic that could influence her posture on the bench. Moreover, asking a nominee about past drug use also does not pose a clean morality/ideology dichotomy, because one's personal feelings about recreational drug use and the "war on drugs" may inform ideas on defendants' rights.

Carter's comfort level with thorough investigations into morality also invokes the pragmatism/parity discussion above. Abortion is a well-known appointment litmus test, which can have different significance depending on the presiding administration.<sup>146</sup> Making this type of personal inquiry opens the door, however, to gender bias in the proceedings, since it would single out women for moral condemnation and intrude on their reproductive and sexual privacy. To illustrate this point further, Carter's model would permit active inquiries into Judge Kimba Wood's past experience with the Playboy Club in the name of determining her "moral universe," with the public response as the only rein. Although public response can be an effective tool to stem bias in government,<sup>147</sup> we want a tighter and more immediate mechanism for attenuating prejudice in the appointment process.

### CONCLUSION

The appointment process is an interpretive device of culture, values, the Constitution, and their intersection, as much as it is a means of staffing high-level government positions.<sup>148</sup> Some primary blockages exist where sexism and racism arise within the process, sully this interpretive practice with destructive and unproductive prejudice. Still, Carter's intuition that morality should be investigated is supported by historical

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145. CARTER, *supra* note 26, at 153-54.

146. President Reagan, for example, ruled out several Republican women as judicial nominees because of their ambiguous views on abortion. See SCHWARTZ, *supra* note 143, at 87. On the other hand, President Clinton seemed drawn to nominees who viewed abortion as a woman's right to choose. See James A. Finefrock, *Right Down the Middle*, S.F. EXAM., May 19, 1994, at A20.

147. See *supra* note 111.

148. This is not a new observation. See HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 152-53 (1990); Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

practice: morality, as well as competence and ideology, are factors that the Executive and the Senate traditionally examine when deciding on appointments.

The question to which we then return is how to administer this process while avoiding the pitfalls evident in the Guinier, Baird, Wood, Achtenberg, and Thomas incidents. The first step is to acknowledge that morality, competence, and ideology are necessary areas of inquiry; the second is the concomitant understanding that the procedures and substantive questions enlisted to uncover the necessary information can have cultural significance. Thus enter the twin concepts of parity and pragmatism, which provide an ethos aimed at limiting bias and a mechanism for applying that ethos.

Specifically, we can develop a formula that calls for equal treatment in the Bork and Guinier cases, since we find that ideology is a proper and relevant area of inquiry, and that parity requires equal opportunities to be heard. In the Thomas and Achtenberg cases, we see that morality is an appropriate focus of investigation, but that it operates in very different and complex ways in both incidents. Thus, a focus on Thomas's alleged statements to Hill about his private consumption of pornography was necessary and relevant, since it showed whether Thomas harmed another person, and it told us whether Thomas was fit for a position which would involve making decisions about sexual harassment. It was inappropriate, however, to make Achtenberg's sexual orientation an issue. It was motivated purely by bias toward lesbians and thus was not purely a morality inquiry; also, her sexual orientation was not relevant to performing the job for which she was nominated. Different treatment was also appropriate in the Ginsburg and Baird/Wood cases, since evidence of illegal drug use may have been inconsistent with Reagan's drug war, while inquiries into Baird's and Wood's allegedly illegal childcare practices stemmed in part from traditional assumptions about women's roles.

This review strives for a recognition of the cultural factors that operate in appointments and the need for certain types of information to determine a candidate's fitness for the position in question. There is no exact science at work, and the evocation of pragmatic theory underscores that recognition. Part of the trouble with appointments is that Article II, Section II is changing with the times, and the clashes we have seen are symptoms of that change. Politics is a messy business, and the legal theory that we develop to explain and direct its predominant role in federal appointments cannot immediately clean up the process. The

theory and suggestions constructed here, however, may help develop guideposts for a more productive and enlightened appointment process in the future. ❧