

Restoring the Lost Confirmation

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INTRODUCTION

There is a silver lining to the stormy cloud brewing over Justice Antonin Scalia’s crepe-covered seat. During his speech nominating Judge Merrick Garland to the Supreme Court, President Barack Obama faulted Democrats and Republicans for their prior positions on judges. “[T]here’s been politics involved in nominations in the past” on both sides, Obama observed.¹ He is right. Over the past three decades, presidents and senators from both sides of the aisle have ratcheted up the tension over Supreme Court nominees. And the linchpin of that conflict is what has become an utterly meaningless ritual: the confirmation hearing. But not for the reasons you may think.

The conventional wisdom is that, in their present form, judicial confirmation hearings serve no meaningful purpose.² This is because nominees, who are rationally self-interested in being confirmed, refuse to answer any questions that could jeopardize their prospects. Instead—the theory goes—when asked a controversial question, the nominee filibusters and obfuscates. Candidates of both parties are trained through rigorous “murder boards”³ to provide answers that are designed to shed as little light as possible on how they would behave as judges.

The end result was accurately described by one legal scholar two decades ago: “When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process

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¹ *Transcript: Obama Announces Nomination of Merrick Garland to Supreme Court* (Wash Post, Mar 16, 2016), archived at <http://perma.cc/E599-7HPK>.

² Elena Kagan, Book Review, *Confirmation Messes, Old and New*, 62 U Chi L Rev 919, 920 (1995).

³ Julie Hirschfeld Davis, In ‘Murder Boards,’ Kagan Preps for Hearings: Court Pick Practices Answers, *Poise in Front of Mock Committee Panel* (NBCNews.com, June 22, 2010), archived at <http://perma.cc/MK24-TRSY>.

takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public.”⁴ That scholar was Justice Elena Kagan. Perhaps because of her astute awareness of this phenomenon, to ensure her own confirmation, the former Harvard Law School dean and solicitor general did what they all do: deftly navigated between the straits of Scylla’s vacuity and Charybdis’s farce.

However, the conventional wisdom is based upon an incomplete account of how the hearings have devolved. While we agree that the current dysfunctional state of the confirmation process stems from the failed appointment of Judge Robert Bork to the Supreme Court, there is a widespread misunderstanding of what exactly went wrong at the Bork hearing. We contend that the types of questions asked by both Democratic and Republican senators—at that hearing and since—assume a “legal realist” emphasis on results rather than on legal reasoning. The focus has been on *cases* of the Court rather than on *clauses* of the Constitution. Each side is trying to get nominees to tip their hand on how they will decide cases that each side cares about. But there is a better way.

This Essay proceeds in three parts. First, we identify three distinct “moves” that allow nominees to skate away from questions that might reveal that they would reach the “wrong” results in future cases. Second, we demonstrate how a focus on the meaning of clauses of the Constitution, rather than the cases before the Supreme Court, can fundamentally transform how hearings are conducted. Third, we explain how the gravitational pull of originalism can tug future justices, and ultimately the Supreme Court itself, closer to the original understanding of the Constitution. This approach would improve public confidence in the courts, and encourage presidents to be more mindful of the text of the Constitution, rather than outcomes, when selecting nominees.

Before we proceed further, we will place our cards on the table. We are originalists, and we would like to see more originalist justices on the Court. Our objective is, therefore, not neutral between constitutional approaches. Because of this, we believe the changes we recommend would be salutary for the entire body politic, even if they would make the confirmation of living-constitutionalist judges a bit more challenging.

⁴ Kagan, 62 U Chi L Rev at 920 (cited in note 2).

Our proposed approach seeks to restore the lost confirmation, where the focus on the text and history of our “republican” Constitution—the truly immutable characteristics of our fundamental law—is paramount and timeless. But we believe that even “living constitutionalists” should prefer the meaningful process we describe over the purposeless status quo. After all, very few non-originalists claim that the meaning of the text at the time of its enactment is wholly irrelevant to its meaning today. And the hearings we describe would give living constitutionalist nominees the opportunity to taut their interpretive methodology over that of originalism.

I. THE CONFIRMATION THREE-STEP

In recent years, to avoid a repeat of the Judge Bork fiasco, executive branch murder boards have carefully prepared nominees to hew to a precise script, involving three distinct intellectual “moves”:

Move One. Profess fealty to the text of the Constitution—and even to its original meaning—but especially to the more general “principles underlying the text.”⁵

Move Two. Profess fealty to stare decisis even when—make that *especially* when—the Court’s precedents have deviated from original meaning in ways that meet with contemporary political approval.⁶

Move Three. When asked to apply any of the Court’s precedents to the current cases or controversies of most concern to the senators, decline to answer on the ground that the case may later come before the Court.⁷

Through this approach, the justice-to-be delicately follows the senators’ lead along the confirmation tightrope—saying just enough to bolster the confidence of senators from the nominating president’s party, while providing as little ammunition as possible to senators from the other party.

⁵ See, for example, Randy E. Barnett, *Underlying Principles*, 24 Const Comm 405, 405, 411–13 (2007) (discussing how Professor Jack Balkin makes this move in the context of his theory on living constitutionalism); Charles W. “Rocky” Rhodes, *Navigating the Path to Supreme Appointment*, 38 Fla St U L Rev 537, 587 (2011).

⁶ See, for example, Rhodes, 38 Fla St U L Rev at 587 (cited in note 5) (arguing that one of the reasons that Kagan was successfully nominated was that “[s]he referred to precedent as an ‘enormously important principle of the legal system’”).

⁷ See, for example, *id.* at 588 (arguing that one of the reasons Justice Clarence Thomas was approved by the Senate was that he refused to answer any questions on *Roe v Wade*, 410 US 113 (1973), because doing so would “compromis[e] his impartiality”).

Confirmations during the post-Bork world have demonstrated several disquieting trends from both Republican and Democratic nominees to the Supreme Court. They all profess fidelity to the text of the Constitution—to the principles it establishes if not to its original meaning—but then all profess fidelity to the precedents that the Senate values. Adhering to *stare decisis* helps both Republican and Democratic nominees avoid awkward questions about areas where the original meaning of the text might lead to unpopular results. When coupled with a refusal to answer questions about any issue that “might come before the Court,” confirmation hearings have been drained of any ability to generate answers that can help senators criticize nominees.⁸

Like the television program *Seinfeld*, the hearings have become a show about nothing. When confronted with uncomfortable questions, the nominees repeat a jurisprudential version of “yada yada.”⁹ But we believe this unfortunate state of affairs is enabled because both Democrats and Republicans have embraced a legal realist approach, if not to the Constitution itself, then to the practice of constitutional law. In essence, both sides believe—or act as if they believe—that the Constitution *is* whatever the Supreme Court says it is. While they are nominees, the Constitution is whatever the Supreme Court has said it was in the past; then, after confirmation, the Constitution is whatever the nominees (now justices) may wish it to be in the future. So senators and nominees opine about two empty concepts.

The first is *stare decisis* or precedent: Will the nominee follow the hallowed case of *United States v. Whatchamacallit* or not? No one thinks justices should follow every precedent, so the crucial issue is picking and choosing which to follow and which to ignore. On the tenth anniversary of his confirmation, Justice Samuel Alito half-jokingly explained that *stare decisis* is “a [L]atin phrase” that means “to leave things decided when it suits our purposes.”¹⁰ Unless they can explain how we know *which precedents to follow and which to reverse*—apart from liking the results—pontification about *stare decisis* is really a show about nothing.

The second empty issue to be discussed is the bugaboo of “judicial activism” and its conjoined twin “judicial restraint,” which

⁸ See *id.* at 562 n 142 (“The uneasy compromise of the Senate Judiciary Committee has been that Senators are free to ask any questions, and the nominee is free to refrain from answering as a result of the impropriety of the question.”).

⁹ Television Broadcast, *Seinfeld*, Season 8, Episode 19: “The Yada Yada” (NBC, Apr 24, 1997).

¹⁰ Josh Blackman, *Justice Alito Reflects on His Tenth Anniversary on #SCOTUS*, (Josh Blackman’s Blog, Sept 21, 2015), archived at <http://perma.cc/MU3Z-DXMS>.

today's judicial conservatives have inherited from New Deal progressives.¹¹ But what exactly is "activism"? Is it activism when any popularly enacted law is held unconstitutional? Neither Democrats nor Republicans truly believe this, because they want judges to strike down laws as unconstitutional when doing so leads to the "right result" (but not when it does not).

For Democrats, invalidating the federal partial birth abortion ban is the right result,¹² and for conservatives, invalidating the Affordable Care Act is the right result.¹³ So judicial activism means thwarting the "will of the people" when critics agree with the people, while they complain about the "tyranny of the majority" when they disagree.¹⁴ Once again, this line of questioning leads nowhere and reveals nothing.

We can do better. To restore the lost confirmation hearing, we propose some modest changes in the way that senators ask their questions to nominees.

II. CLAUSES, NOT CASES

Supreme Court confirmation hearings do not have to be about either results or nothing. They could be about clauses, not cases.¹⁵ Instead of asking nominees how they would decide particular cases, senators should ask them to explain what they think the various clauses of the Constitution mean, separate and apart from *any* Supreme Court precedent. (It is too easy merely to cite a case and dodge the difficult question.) Does the Second Amendment protect an individual right to arms? What was the original meaning of the Privileges or Immunities Clause of the Fourteenth

¹¹ See Randy E. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* 158–60 (Broadside 2016) (describing the rise of "judicial activism" from the previous Progressive mantra of "[j]udicial self-restraint").

¹² See, for example, Caroline Burnett, Note, *Dismantling Roe Brick by Brick—The Unconstitutional Purpose behind the Federal Partial-Birth Abortion Act of 2003*, 42 *USF L Rev* 227, 231 (2007) ("[T]he federal ban is unconstitutional because its only purpose is to impose an undue burden on a woman's right to seek an abortion.").

¹³ See, for example, Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 *NYU J L & Liberty* 581, 582 (2010) ("[T]he individual mandate is unconstitutional under . . . the Commerce and Necessary and Proper Clauses and the tax power."). See also Josh Blackman, *Unprecedented: The Constitutional Challenge to Obamacare* 39–44 (Public Affairs 2013) (chronicling the origin of the constitutional challenge to the ACA's individual mandate).

¹⁴ See Randy E. Barnett, *Is the Rehnquist Court an "Activist" Court? The Commerce Clause Cases*, 73 *U Colo L Rev* 1275, 1275–76 (2002) (noting that "'activism' usually refers to an action taken by a court of which the speaker disapproves").

¹⁵ See Randy E. Barnett, *Clauses Not Cases*, 115 *Yale L J F* 24, 24 (2006); Randy E. Barnett and Josh Blackman, *The Next Justices* (Weekly Standard, Sept 14, 2015) archived at <http://perma.cc/8DLP-YL6X>.

Amendment? (Hint: it included an individual right to arms.)¹⁶ Does the Fourteenth Amendment “incorporate” the Bill of Rights and, if so, how and why? Does the Ninth Amendment protect judicially enforceable unenumerated rights? Does the Necessary and Proper Clause delegate unlimited discretion to Congress, or is there room for judicial enforcement? Where in the text of the Constitution is the so-called Spending Power (by which Congress claims the power to spend tax revenue on anything it wants) and does it have any enforceable limits? Again, none of these questions should be answered with citations to the United States Reports.

Senators do not need to ask how the meanings of these clauses should be applied in particular circumstances—those questions will be avoided by Move Three anyway. Just ask about the meaning of the clause itself and how it should be ascertained. Do nominees think they are bound by the original public meaning of the text? Even those who deny this still typically claim that original meaning is one “factor” or a starting point.¹⁷ If so, what other factors do they think a justice should rely on to “interpret” the meaning of the text?

Would it be unfair to ask nominees to the Supreme Court what they believe the Constitution means and why they believe it? We admit this would be challenging for anyone, including us. But why should we not expect judicial nominees to have studied the Constitution *before* they are given lifetime tenure to interpret and apply the Constitution? And repeating the catechism of previous Supreme Court decisions is not the same thing as opining on the meaning of the Constitution *itself*. Unless you assume, of course, that the Constitution really *is* what the Supreme Court says it is and nothing more. As justices, they will get to vote whether they think these previously decided cases were *rightly* decided. Their knowledge and perspective on this history is essential to understand before the Senate elevates them to the high court.

Inquiring into clauses, not cases, would also require senators to learn about the original meaning of the Constitution. Beyond hearing the nominee’s answers, it would be enlightening to hear what the members of the Judiciary Committee think about these

¹⁶ Josh Blackman and Ilya Shapiro, *Keeping Pandora’s Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms in to the States*, 8 Georgetown J L & Pub Pol 1, 51–54 (2010).

¹⁷ See, for example, Rhodes, 38 Fla St U L Rev at 587 (cited in note 5) (describing Justice Kagan’s judicial philosophy as articulated during her nomination hearing).

topics. This would be a public service that would improve the process by which justices are appointed. Such a hearing would not only be entertaining, it would be informative and educational. After all, it would be about the meaning of the Constitution, which is to say that, unlike *Seinfeld*, it would be about something.

III. CONFIRMING ORIGINALISM'S GRAVITATIONAL PULL

The benefits of a confirmation hearing about clauses, not cases, are manifold. First, it would eliminate the ritual of nominees pledging their fidelity to inherently inconsistent precedents and doctrines. Second, the nominee would provide the senators, and ultimately the American people—the true sovereigns¹⁸—with a high profile dialectic on the text and history of our Constitution. In truth, this was why Judge Bork's nomination hearings were so riveting. Above all else, an originalist confirmation hearing would restore an eroded faith in the judiciary. The nominees would make clear to the American people that they are indeed deciding cases based on our most fundamental laws, rather than on the personal policy preferences of nine lawyers in Washington, DC.

We harbor no illusions that the members of the Senate Judiciary Committee all possess the sufficient knowledge to meaningfully engage in this line of questioning, beyond reading prepared questions from staffers. But we do not need a cadre of originalist senators. The beauty of our reform is that no rules need be changed; no bipartisan agreement need be reached; and even the Republicans on the Senate Judiciary Committee need not all be of the same mind. For this approach to restore the lost confirmation hearing, we need only a senator or two to focus their limited time on originalism. And we have full confidence that the Judiciary Committee counsel on both sides are quite capable of generating useful questions for the nominees. After all, it was a few well-chosen questions from Senate Democrats that elicited the highly revealing answers by Bork on the meaning of the Ninth Amendment.

Imagine if a handful of senators grilled the next nominee on questions of original meaning, and he or she proved utterly incapable of answering their questions, beyond perfunctory platitudes. Whenever the nominee reverted to discussing case law, the senator would interrupt and say, "Judge, I am not interested in

¹⁸ See Randy E. Barnett, *We the People: Each and Every One*, 123 *Yale L J* 2576, 2597–99 (2014) (discussing "We the People" as individuals and the conception of "individual popular sovereignty" that results).

what is in the United States Reports. Once confirmed, you can change that. I want you to discuss matters you cannot change, like the Federalist and Anti-Federalist papers, Blackstone's Commentaries, the records of the Constitutional Convention, records of the ratification of the Fourteenth Amendment, and other contemporaneous sources." Any effort to shift back to citing cases should be swiftly halted. With such a rough going, the tenor of the debate would *immediately* change. These questions are especially critical given that the next nominee will fill the seat of Justice Scalia, who ought to be canonized as the patron saint of originalism on the Court.

Unlike the sort of gotcha questions that have marked recent hearings, these originalist questions are entirely fair game. Even the most otherwise qualified candidate would be embarrassed by a lack of knowledge of the meaning of particular clauses. What he or she believes that meaning to be would reveal to the American people how he or she will go about making decisions once no longer controlled by *stare decisis*. The inquiring senators would make the seminal point that the Constitution is not just what five justices say it is—the Supreme Court does not have a monopoly on interpreting the Constitution.

As happened after the failed Bork nomination, if a hypothetical nonoriginalist nominee is sunk—or even wounded—by his or her lack of familiarity with the meaning of the Constitution's text, all future nominees would seek to avoid that embarrassment. The executive branch lawyers managing the nomination would insist that nominees become versed in the sort of originalist questions our hypothetical nominee stumbled on. And maybe the lawyers will learn something in the process—that originalism is not as indeterminate as the professoriate would suggest. Many cases can be resolved by relying on this methodology. Further, original meaning is often consistent with the outcomes of many of the canonical cases, such as *Brown v Board of Education of Topeka*.¹⁹ Democratic senators, who may subscribe to a living constitutionalist view of the law, may start to research progressive approaches to originalism, such as that of Professor Jack Balkin,²⁰

¹⁹ 347 US 483 (1954). See Barnett, *Our Republican Constitution* at 120–23, 160–63 (cited in note 11) (discussing why *Plessy v Ferguson*, 163 US 537 (1896), was wrong on originalist grounds, and how *Brown* represented the redemption of our republican Constitution).

²⁰ See generally Jack M. Balkin, *Living Originalism* (Belknap 2011). Professor Balkin has argued that the Constitution is “an initial framework for governance that sets politics in motion, [] that Americans must fill out over time through constitutional construction”). *Id.* at 3.

to ask more informed questions. Even if the senators cannot agree on the result, an agreement on the framework would be a monumental shift forward.

We believe it is reasonable to expect our hypothetical nominee's confirmation hearing to become a "teaching moment" that would influence a Justice's jurisprudence once confirmed. Plus, the executive branch attorneys selecting nominees will begin to inquire at the vetting stages about originalism—lest they avoid an embarrassing moment—forcing the short listers to discuss this methodology.

Who knows? Lower court judges who seek elevation to the Supreme Court may even write originalist opinions as an audition for the big show. (This sort of historical education cannot be crammed into murder board sessions; it takes a lifetime of study.) And if we dream big, we can even imagine constitutional law professors teaching future judges something about the Constitution's original meaning. (Oh well, we can dream.)

Above all, such hearings would demonstrate the gravitational force of originalism: even where a nonoriginalist precedent exists, the tug of the original Constitution exudes an undeniable and irresistible force on our body politic.²¹ No nominee would be confirmable who expressly denied the relevance of the questions being asked. For example, during Justice William Brennan's confirmation hearing in 1956, he wisely declined to answer a question about whether "the Constitution and amendments thereto have a fixed and definite meaning when they are adopted."²² Even "five-finger" Brennan could not bring himself to say in his confirmation hearing what he would practice from the bench. Five decades later, taking the wiser tack, Justice Kagan proudly proclaimed that "we are all originalists."²³

No candidate would be deemed qualified who was unable to answer questions like these. With the information revealed by such hearings, senators would be in a position to vote, as they did

²¹ Randy Barnett, *The Gravitational Force of Originalism*, 82 *Fordham L Rev* 411, 421 (2013) ("[O]riginalism has a kind of gravitational force that affects legal doctrine in significant ways.") (quotation marks omitted); Josh Blackman, *Back to the Future of Originalism*, 16 *Chapman L Rev* 325, 326 (2013) ("Even when originalism is not at the forefront, this jurisprudence exudes a gravitational pull that tugs at the Constitution, and prevents it from drifting too far away [from] its original meaning.") (emphasis omitted).

²² *Nomination of William Joseph Brennan, Jr.: Hearings before the Committee on the Judiciary United States Senate*, 85th Cong, 1st Sess 36 (1957).

²³ *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on the Judiciary United States Senate*, 111th Cong, 2d Sess 62 (2010).

with Bork, based on whether or not they agreed with the judicial philosophy of a nominee. If a nominee replies that these historical sources are not relevant, or not worth studying, then that is an entirely justifiable ground for voting *no*. But if future nominees affirm their relevance, they will be affirming the value of original meaning.

Now that would be something.