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Clauses Not Cases

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In Questioning Justice, Robert Post and Reva Siegel make three claims. First, that the Constitution authorizes the Senate to rest its judgment, in part, on the constitutional philosophy of nominees to the Supreme Court; second, that this practice is justified on grounds of democratic legitimacy; and third, that it is best implemented by asking nominees “to explain the grounds on which they would have voted in past decisions of the Supreme Court.” I agree entirely with the first and, to my mind, most important of these propositions.¹ I disagree, however, that either the Constitution as a whole or this particular practice is best justified on grounds of democratic legitimacy, or that their proposal is the best way to assess the philosophy of nominees.

Like them, I view the inquiry into constitutional philosophy to be grounded in the positive law established by this written Constitution that allocates to the Senate the power to consent to judicial appointments. But I view the legitimacy of any existing Constitution by which laws are coercively imposed on nonconsenting persons to rest, in part, on the whether such a constitutional order ensures that these laws do not violate the background natural rights retained by the people.² When a written Constitution meets this standard, seeing that it is properly respected by the Supreme Court requires

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¹. I was on record about constitutional philosophy as a qualification for a Justice of the Supreme Court in the context of the Miers nomination, see Randy E. Barnett, Cronyism, WALL ST. J., Oct. 5, 2005, at A26, and even before in the context of the Roberts nomination, see Randy E. Barnett, William Rehnquist, WALL ST. J., Sept. 6, 2005, at A28.

that the President nominate, and the Senate confirm, only those who understand, appreciate, and share this commitment to uphold the Constitution as written.

A commitment to respect the Constitution is a matter of judicial character or virtue that goes beyond the credentials that measure pure ability. If senators are to assess judicial attitude as well as ability, then they must, as Post and Siegel correctly observe, “acquire [the] useful information about a nominee’s constitutional commitments” that is needed to make such an assessment. Hence, in an example of what Cass Sunstein has called an “incompletely theorized agreement,” we three agree, albeit for different underlying reasons, that the Senate ought “to evaluate the constitutional commitments of nominees, while preserving the independent integrity of the law.” Where I disagree is how such information ought to be obtained. Post and Siegel propose that Senators “ask nominees to explain the grounds on which they would have voted in past decisions of the Supreme Court.” I have serious doubts about the fairness and accuracy of their approach.

First, an inquiry into cases would risk turning hearings into a trial by ordeal or, if that metaphor seems exaggerated, then an oral examination. Unless there was a very limited set of canonical cases agreed upon in advance, it would leave candidates open for ambushes that expose their understandable lack of knowledge about any number of cases. While each senator need only ask about just one or two cases, the candidate would have to take all comers or look evasive or uninformed. I doubt whether many constitutional law professors would be able to pass this sort of oral exam, but I am certain that even a very able nominee would likely be unfairly tripped up by such a process.

Second, if we are to maintain our incompletely theorized agreement that such inquiries are proper, whatever method is adopted to ferret out constitutional philosophy should not favor any particular philosophy. Asking about a set of canonical cases is biased towards a “result-oriented jurisprudence” advocated by some, but rejected by others and perhaps even by most. Why? Because a catechism that singles out particular beloved or despised cases would effectively require candidates to pledge their fealty to the results of the approved cases and their abhorrence of the despised ones. Even grounding the “right result” on alternative grounds—the favorite pastime of con law professors—could easily be characterized unfairly as a lack of proper enthusiasm for the approved results, as was alleged about Robert Bork. Regardless of the proffered justification, such a “test” would rest largely, if not entirely, on reaching the results deemed correct, thereby effectively requiring a

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“just so” constitutional philosophy that somehow manages to reach all the right results.

This suggests a third problem. Such an inquiry privileges the status quo. It takes as normatively given what Jack Balkin has called “the canon” and “anti-canon.” But what makes “the canon” at any particular period a canon is solely the prevailing attitude for or against some cases. Post and Siegel seem implicitly to realize this when they refer to nominees “disclos[ing] their present understanding of the law” — as though whatever canonical cases are presently the law should all be accepted as equally binding.

Of course, their proposal would allow candidates to reject canonical or accept anticanonical cases and take their chances, but given that the canon is, by definition, widely accepted, any such course would be perilous for any nominee. All can be expected to retreat to conventionally popular answers. So what? Because it is a Constitution they are expounding — I have always wanted to say that — not a set of canonical results. If applied faithfully in the past, their procedure would likely have screened any nominee who questioned the Supreme Court’s extant interpretation of the Fugitive Slave Clause in Prigg v. Pennsylvania or its constitutional acceptance of Jim Crow in Plessy v. Ferguson. If you don’t like these examples, just think of any well-established precedent we now think was wrongly decided. At one time it was canonical.

Indeed, it appears that privileging the status quo is inherent in Post and Siegel’s account of legitimacy. Holding prospective justices to conditions of “democratic accountability” seems to require their adherence to results in cases that a majority of the public currently like or their rejection of cases that are currently unpopular.

Happily, there is a better way of ferreting out a nominee’s constitutional philosophy for all to see: Ask nominees about particular clauses rather than cases. Knowing how they interpret a particular clause, even in the abstract, would reveal at least as much about their constitutional philosophy. The advantages of this approach are several. First, the Constitution is much briefer than “the canon.” Even without a very hard-to-obtain prior agreement, predicting which clauses will be asked about is much easier to predict, thereby reducing the likelihood of unfair surprise.

Second, senators would need only inquire about a few clauses for all sides to learn a great deal about a nominee’s approach to constitutional interpretation. Consider the Second Amendment. Does a nominee rely on its

5. 41 U.S. 539 (1842).
6. 163 U.S. 537 (1896).
original meaning (and is the nominee aware of controversies about its meaning) or does the nominee think its meaning evolves or has been superseded by modern developments? Is its meaning one of general principle or is it historically limited to particular practices in effect at the time of its enactment? Does the existence of an individual right to keep and bear arms preclude all reasonable regulations? Does it apply to the states? Why or why not? Answers to these questions are likely to cohere with how a nominee evaluates other clauses.

Because there is so little Supreme Court case law about the Second Amendment, questions about this clause would tell us little about a nominee’s stance towards precedent, which I think makes this topic all the more appealing. A candidate’s view of the proper role of precedent could be gleaned by asking about other clauses. Of course, examining the meaning of the Second Amendment would be more abstract than asking whether a ban on so-called assault weapons was constitutional. But that is its principal advantage.

Asking for untutored opinions about even canonical cases is worse than misleading; it undercuts the proper humility we want nominees to bring to judging. Particular applications of constitutional clauses are highly fact-dependent and real Justices inevitably rely on the advocates before them to reach a considered judgment. Unless Post and Siegel expect nominees to study all the pleadings in canonical cases, nominees will lack the crucial information on which judges do and should rely, which is yet another reason why their approach is impractical and potentially inaccurate. But all nominees should bring to the Court their prior understanding of the meaning of the clauses they are pledged to uphold, subject of course to revisions in their views of constitutional meaning resulting from arguments by advocates before them. Even if asking about clauses will not always get Post and Siegel all they want to know about a candidate’s constitutional philosophy, it would get what they need.

Let me briefly consider two likely rejoinders. Would not observers be able to extrapolate some particular results from opinions of clauses? If applying meaning to facts yields results, as it should, the answer has to be yes. Then why not ask about results directly? Because doing so will be a much more factually complex inquiry than is reasonably expected of nominees (or of senators for that matter) and is likely to feed an explicitly results-oriented constitutional philosophy. It would also tend to bind nominees to future decisions to a greater degree than a clause-bound examination. On the other hand, the fact that one can extrapolate some results from an inquiry into particular clauses would permit those who are results-oriented in their approach to the Constitution to use a clause-bound method to gain the information they value and to make their results-oriented objections without, however, unduly privileging their method above all others.
Would not an inquiry into the meaning of clauses also privilege the status quo by holding nominees to the current interpretation of clauses? To some extent it would, but this is because the positive law of the Constitution leaves judicial selection to the President and confirmation to the Senate, and both are sensitive to majority opinion. So again, it is a matter of degree. Exploring the more abstract meaning of clauses would allow more room for justices to admit, after assuming the bench, that current case law is mistaken in some respect than would a confirmation-hearing catechism of the canon. As evidenced by the questioning of Robert Bork about the Ninth Amendment, I also think that a discussion of the meaning of clauses in the abstract would better enlighten the public on what all agree is relevant to judicial decisions: the meaning of the Constitution itself.

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