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PUBLIC OPINION, CULTURAL CHANGE, AND CONSTITUTIONAL ADJUDICATION *Calvin Massey*
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IN MEMORIAM

- JUDGE MELVIN T. BRUNETTI: BRINGING LIFE TO A DEMOCRATIC RULE OF LAW *Christopher D. Sullivan, Eugene S. Litvinoff, and Mark J. Seifert*

NOTES

- AMERICA'S NEW GLASS CEILING: UNPAID INTERNSHIPS, THE FAIR LABOR STANDARDS ACT, AND THE URGENT NEED FOR CHANGE *Jessica L. Curiale*
ORTIZ GOT IT WRONG: WHY THE SEVENTH AMENDMENT DOES NOT PROTECT THE RIGHT TO JURY TRIAL IN CLASS ACTION SUITS UNDER FRCP 23 *Joshua D. Stadler*

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How Senate Confirmation Hearings Should Better Educate Senators and the American Public: The Instructional Necessity of Case-Specific Questioning

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This Article undertakes a systematic rebuttal to the arguments made by Supreme Court nominees and others that Court nominees are constrained, in their Senate hearings on possible confirmation, from expressing their specific views on legal issues and cases of the day. It argues that nominee articulation of such case-specific views is not only permissible, it is necessary for the Senate, and for the country, to learn anything meaningful about the Court, the nominees, the Constitution, and the relationship between them.

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TABLE OF CONTENTS

RODUCTION.....	1408
ASSESSING THE OBJECTIONS TO SPECIFIC, ESPECIALLY CASE-SPECIFIC, INQUIRIES.....	1414
A. LIMITS ON THE FORM OF THE SEMINAR QUESTIONING.....	1419
B. ARE ELECTIONS INHERENTLY DIFFERENT THAN CONFIRMATION HEARINGS?.....	1420
LOGISTICAL CONSTRAINTS ON THE SENATE SEMINAR AND HOW THEY CAN BE OVERCOME.....	1423
A. WHICH SPECIFICS TO ASK ABOUT?.....	1424
B. A TEACHER'S MANUAL: PRACTICAL ADVICE FOR RUNNING THE SENATE SEMINAR.....	1428
1. <i>Recommendation Number One: Pick Your Spots, Rather than Trying To Cover The Entire Field of Constitutional Law</i>	1428
2. <i>Recommendation Number Two: Be Concrete; Examples Will Keep an Audience's Attention</i>	1428
3. <i>Recommendation Number Three: Be a Sharp Questioner, and Be Willing To Wield the Power of the Instructor</i>	1429
4. <i>Recommendation Number Four: Be Flexible and Not Wedded to a Script</i>	1431
WHY THE SOTOMAYOR HEARINGS WOULD, ON BALANCE, HAVE TO RECEIVE A FAILING GRADE.....	1431
CLUSION.....	1433
SCRIPT: THE RECENTLY CONCLUDED HEARINGS FOR JUSTICE KAGAN.....	1434

INTRODUCTION

Civic sophistication and legal literacy in America no doubt should increased. We could quarrel about precisely how much improvement necessary, but the need for substantial progress is readily visible to e who care to look. I have confronted the problem when untering the first-year law students I have taught every year for the decade-and-a-half at various University of California law schools. ents today do not enter law school—even high-quality law schools the University of California, Davis or the University of California, eley—with remotely as good a grounding in the basics of American ry and government as they did in the mid-1990s when I began hing at these two schools. Systematic studies confirm this anecdotal

perception: A United States Department of Education National Assessment of Educational Progress report in 2006 concluded that seventy-five percent of America's students do not receive the level of civics education necessary to maintain a robust democracy.¹ Many other studies make similar findings.²

Just as the inadequacies we currently face have been caused by the gradual and persistent failure or inattention of a variety of institutions—the federal, state, and local governments, the K–12 and higher education communities, the bar and the bench, among others—so too will a comprehensive solution require sustained effort by many. Certainly state and local education professionals, along with civic education organizations that operate both nationally³ and regionally,⁴ will be the most important players. But the federal government, at the highest levels, also has much work to do. The President needs to highlight this problem—along with the deficiencies he regularly identifies in math and science education—in both his public addresses and in the budgets he sends to Congress. And the federal courts need to open up their processes—both literally, by allowing cameras into appellate courtrooms⁵ and figuratively, by writing shorter and more accessible opinions.⁶

1. See ANTHONY D. LUTKUS & ANDREW R. WEISS, NAT'L CTR. FOR EDUC. STATISTICS, THE NATION'S REPORT CARD: CIVICS 2006 (2006), <http://nces.ed.gov/nationsreportcard/pdf/main2006/2007476.pdf>.

2. To be sure, there is credible research suggesting the problem may not be as dire as many suggest. For example, one of my fellow presenters at the Symposium, James Gibson, has done research that seeks to prove that "[e]ven though widely accepted, the image of the American people as ignorant about courts rests upon a remarkably thin layer of empirical evidence," and that "the American people know orders of magnitude more about their Supreme Court than most other studies have documented." James L. Gibson & Gregory A. Caldiera, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 430 (2009). But I would argue that the questions on which Gibson tests the public, while important and interesting, set the legal literacy bar too low. For example, Gibson reports that sixty-eight percent of respondents correctly answered a yes/no question about whether the Supreme Court has ruled on abortion matters, and sixty-six percent correctly answered "yes" to the question whether the Supreme Court has ruled on the voting rights of black Americans. *Id.* at 434. While two-thirds of respondents answering these yes/no questions correctly is, I suppose, better than would be achieved by random guessing (which would yield a fifty percent correct-answer rate), I see this glass as one-third empty rather than two-thirds full. More importantly, knowing that the Court has ruled is just the starting point for informed Americans. Knowing *how* it ruled and *why* it ruled that way ought to be the educational aspiration.

3. One national organization that I have worked with for many years—whose institutional design is creative and, I think, quite pedagogically effective—is the Center for Civic Education. See Center for Civic Education, www.civiced.org (last visited June 24, 2010) (offering a wealth of information for those interested in their work).

4. Operation Protect and Defend, a regional organization with which I have recently become involved, is doing interesting work in high schools in Northern California and the Central Valley, using practicing lawyers and seminal Supreme Court cases to introduce constitutional principles to teenagers.

5. In a recent dustup, the Supreme Court, by a five-to-four vote, blocked the Northern District of California from broadcasting to other federal courthouses the trial over the constitutionality of Proposition 8, California's ban on same-sex marriages. See *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (granting stay of the district court's decision to allow limited broadcasting). This illustrates that

In this Article, I look carefully at another federal body, the United States Senate, and the way it performs one of the most important tasks assigned to it—consideration of United States Supreme Court nominees. If the Senate understood its constitutional prerogatives and discharged its constitutional duties better in this realm, it could perform an invaluable service in teaching all Americans the basics about the most important of legal and civic documents, the United States Constitution.

The Senate confirmation hearings provide a compelling forum for civic and legal education for a number of reasons. First, the hearings are televised and available to be seen and heard rather than just perused on paper, an important feature in an era when video is King and reading of text alone seems to be in decline. And the personal drama and human interest dimensions of the hearings make them much more captivating than written judicial opinions could ever be, even ones that are written to be accessible. Second, because the hearings allow the questioning Senators and the answering nominees to address a handful of constitutional cases and issues at one sitting—and to talk about relationships between these various cases and issues—the hearings can offer far more instruction than could any single judicial opinion or oral argument. Relatedly, written opinions are necessarily and invariably cluttered with hypertechnical content and procedural detail that is of

the Justices have a long way to go in understanding the value of public judicial proceedings. Not only did the Justices reach out to decide a question (whether the Northern District had allowed sufficient time for public comment before changing its local rules to permit broadcast) that did not on its face seem cert-worthy and on which there was no lower court split, the Justices also suggested that nothing is lost when trials are not broadcast. *See id.* at 713 (“While applicants [seeking to block broadcast] have demonstrated the threat of harm they face if trial is broadcast, respondents have not alleged any harm if the trial is not broadcast.”). As my fellow Symposium presenter Bob Egelko pointed out in his remarks, whether or not respondents alleged any harm arising from non-broadcast, certainly media amici did. Bob Egelko, Reporter, S.F. Chronicle, Address at the Hastings Law Journal Symposium: Democracy and the Courts: Judicial Selection, Legal Literacy, and the Role of Public Opinion (Feb. 19, 2010) (on file with Hastings Law Journal).

There are, to be sure, special due process concerns surrounding the litigants that might counsel against indiscriminate broadcast of all trials. A trial such as that involving Proposition 8, and most appellate hearings, would seem to present strong cases in favor of broadcast, in order to educate the public about the way courts really operate.

6. As for length, consider two recent blockbuster rulings. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the case holding that the Second Amendment contains an individual rights component, was over fifty thousand words, and *Citizens United v. FEC*, 130 S. Ct. 876 (2010), holding that the First Amendment prohibits limitations on political expenditures of domestic corporations, was over sixty thousand words. There are many possible factors that might explain the increased length of Supreme Court opinions in the last generation, including the improvements in word processing systems, the decreased number of cases the Court decides each year, and the increased influence of law clerks (who may be less confident than their bosses and thus feel the need to canvass more tangential issues) in drafting opinions. The fact that the Court may be writing more for lower courts and lawyers than for the American public may also be part of the explanation. Judges and Justices may also benefit from the mystification of the law that longer and more technical opinions tends to perpetuate.

importance only to the parties and lawyers involved in a particular litigation. Third, the hearings occur periodically (and ideally at least once every four to eight years),⁷ and thus provide good opportunities for “refresher” courses, even for those citizens already well versed in law and policy.

The big question is not whether high-quality hearings could accomplish significant education; they could. The real question is whether we can ever have high-quality hearings. On that question, I am much less certain.

The key shortcoming of the hearings that have been taking place in recent decades is that nominees avoid answering—and Senators let nominees get away without answering—specific questions about specific cases in specific areas of the law. But, as with all areas of high school or post-secondary education, true learning and understanding requires some consideration of specifics. Discussions of abstract concepts like “separation of powers,” the “role of individual liberties in society,” or the “proper function of the Judiciary” simply have no meaningful content unless they are applied to particulars. The same can be said for the notions of “respect for states’ rights,” “judicial activism,” “strict construction,” and the like.

Perhaps a few examples can help make the point. Justice Scalia is famously a “textualist” and an “originalist,”⁸ and yet has (openly) ignored the plain text and original history of the Eleventh Amendment in deciding cases about states’ rights.⁹ He has also avoided invoking and discussing the text and history of the Fourteenth Amendment’s Equal Protection Clause in propounding his view that the Constitution is “colorblind” and admits of no race-based affirmative action.¹⁰ These cases would seem to make him a rather more complicated textualist/originalist than might initially be supposed. And the same kind of complexity exists for Justices whose votes differ from Justice Scalia’s;

7. Term limits for Supreme Court Justices would not necessarily require constitutional amendment and could occur like clockwork once every two years. *See* Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 345, 345–60 (Roger C. Cramton & Paul D. Carrington eds., 2006); Thomas W. Merrill, *Internal Dynamics of Term Limits for Justices*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES*, *supra*, at 225, 225.

8. *See* Vikram D. Amar, Morse, *School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 637, 645 (2009) (“Originalism is a term used modernly to describe a particular approach to constitutional (and sometimes statutory) interpretation that seeks to understand and apply the text of the document as ‘intelligent and informed people of the time’ of enactment would have.” (footnote omitted) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 38 (Amy Gutman ed., 1997))).

9. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

10. *See* Amar, *supra* note 8, at 654–58.

Justice Breyer, for example, in his book, *Active Liberty*, extols the virtue of deferring to the deliberate will of elected branches, but curiously never explains how his approach can be harmonized with his actions in the so-called partial-birth abortion cases.¹¹

Indeed, when it comes to general questions about legal philosophies, virtually everyone is in some non-trivial measure a “textualist” in that almost everyone starts the interpretive journey by looking at the text of the Constitution. Similarly, everyone does care to some extent about the “history and intent” behind a constitutional provision,¹² and all persons give at least a little weight to *stare decisis*¹³ and so forth. What matters is how a jurist—or how constitutional interpretation itself—balances all these factors (and others) and resolves conflicts among them. To know something about the Constitution and a nominee’s approach to it, one must get a feel for what combination of methodological ingredients a nominee finds most persuasive in particular settings. This can be seen only in the context of specific past or present controversies. When William Brennan and Antonin Scalia would offer the same basic answer to a Senator’s question about judicial meta-philosophy (as is often true of the questions Senators ask), the question is nigh useless.

The Supreme Court itself has essentially voiced agreement with this idea. In *Republican Party of Minnesota v. White*, the Court struck down a Minnesota law that permitted each state court judicial election candidate to discuss his or her general philosophy of judging but forbade him or her from “announc[ing] his or her views on disputed legal or political issues.”¹⁴ The Court noted that allowing “general” discussions of case law and philosophy while at the same time foreclosing specific statements of specific views of candidates does not provide the public with the relevant information it needs.¹⁵ As Justice Scalia explained for the *White* majority, “like most other philosophical generalities, [general statements of judicial philosophy] ha[ve] little meaningful content for the electorate unless [they are] exemplified by application to a particular issue of

11. Compare STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 2005 (discussing generally the virtue of judicial deference to deliberative majoritarian political processes), with *Stenberg v. Carhart*, 530 U.S. 914, 921–22 (2000) (invalidating, without clear textual warrant and just five years before Justice Breyer’s book was published, a Nebraska law that seemed to be consistent with the national sentiment expressed through deliberative processes).

12. Recently confirmed Associate Justice Elena Kagan made this point during her confirmation hearings in the summer of 2010, in which she observed, perhaps paraphrasing President John F. Kennedy’s famous line about Berlin, “we are all originalists.” See Posting of David Ingram to the BLT: The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html> (June 29, 2010, 9:22 EST).

13. All persons, that is, except perhaps Justice Clarence Thomas. See *Amar, supra* note 8, at 647 (“No member of the Court over the last century has been so open and cavalier about his disdain for the constraining nature of precedent, at least in the constitutional setting.”).

14. 536 U.S. 765, 768 (2002).

15. *Id.* at 772–73.

construction likely to come before a court—for example, whether a particular statute runs afoul of any provision of the Constitution.”¹⁶

As commonsensical as this observation seems to be, not everyone seems to get it. Consider, for example, Chief Justice John Roberts. As Justice Sandra Day O’Connor was preparing for her own confirmation hearings almost three decades ago, a young John Roberts working in the Reagan administration advised her to avoid commenting on specific past Court rulings, and to limit her remarks to matters of general philosophy or methodology. Roberts wrote to then-nominee O’Connor a short memo in 1981, in which he observed, on the usefulness (or, to his mind, lack thereof) of specific case queries by Senators: “If nominees will lie concerning their philosophy they will lie in response to specific questions as well.”¹⁷ Even if this were true, it completely misses the point. The problem with general philosophical questions is not that they will yield lies, but rather that they will yield truths that are too generic and broad to be informative or helpful. We should not (and need not) assume that nominees for the Supreme Court—almost all of whom are going to be very honorable people—will lie under oath before the Senate. The utility of asking specific case queries doesn’t arise from a fear that nominees will lie in response to the general questions. Instead, it comes from the information that only case-specific discussion can produce.

Thus, the only way to become meaningfully educated—whether you are a United States Senator or a United States denizen—on the meaning of the Constitution and a Supreme Court nominee’s approach to deciding constitutional disputes is to dig beneath general labels and examine specific historically important cases, constitutional controversies, and the nominee’s statements and views about them. When I give a constitutional law exam, if I were to allow students to answer a question without requiring them to comment on specific cases, what the cases mean, whether the cases were correctly decided, and why or why not, I would learn nothing from or about the test takers.

Yet this kind of substantive national constitutional seminar in the Senate may not easily happen, because over the years many Senators—even seemingly diligent Senators—reflexively and unwisely seem to have conceded that while it is appropriate to ask a nominee about her general approach to judging and interpretation, it is not permissible to ask for detailed views about actual cases. The record of recent confirmations shows innumerable instances of the Senate allowing the nominees simply not to answer because a question asks for specific views on specific matters. Justice Alito’s refusal to discuss one of the great legal issues of

16. *Id.* at 773.

17. Memorandum from John Roberts, Special Assistant to the Attorney Gen., to Sandra Day O’Connor 1 (Sept. 9, 1981), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/026-occonnor-misc/folder026.pdf>.

our day, the constitutional rules surrounding the prosecution of the so-called "War on Terror" is typical. In response to a question asking for his thoughts on the Supreme Court's ruling in *Hamdi v. Rumsfeld*,¹⁸ Alito responded: "The issue presented in *Hamdi* is one that may come before the Court and therefore it would not be appropriate for me to comment on any of the opinions in that case."¹⁹ Other recently confirmed (and some not-so-recently confirmed) Justices have undertaken similar dodges. Justice Sotomayor did so with respect to, among many others, major cases on the Takings Clause,²⁰ presidential power,²¹ the Sentencing Guidelines,²² and the Voting Rights Act.²³ Chief Justice Roberts dodged questions on cases involving the Sentencing Guidelines,²⁴ an individual's constitutional right to bear arms,²⁵ gender-based discrimination,²⁶ affirmative action,²⁷ abortion,²⁸ the death penalty,²⁹ and *Bush v. Gore*.³⁰ Indeed, this pattern of refusal to answer case-specific questions is so pronounced that Justice Ruth Bader Ginsburg could nonchalantly say, of herself and the other eight members of the Court in 2002, that "every Member of this Court declined to furnish such information to the Senate."³¹

But if it is not permissible or tenable to ask a nominee for specific views about specific cases, there is little point in even having a hearing. There may be some entertainment value, but the educational value is miniscule and in some respects negative.

I. ASSESSING THE OBJECTIONS TO SPECIFIC, ESPECIALLY CASE-SPECIFIC, INQUIRIES

The reason almost always offered by nominees to justify a refusal to answer specific case queries is some variant of the idea Justice Alito

18. 542 U.S. 507 (2004).

19. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 784 (2006) [hereinafter *Alito Confirmation Hearing*] (statement of then-Judge Samuel A. Alito, Jr.).

20. *Confirmation Hearing on the Nomination of Sonia Sotomayor To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 81-82 (2009) [hereinafter *Sotomayor Confirmation Hearing*] (statement of then-Judge Sonia Sotomayor).

21. *Id.* at 112.

22. *Id.* at 149.

23. *Id.* at 384.

24. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 582 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of then-Judge John G. Roberts).

25. *See id.* at 594.

26. *See id.* at 608.

27. *See id.* at 606.

28. *See id.* at 575.

29. *See id.* at 585.

30. *See id.* at 579; see also *Bush v. Gore*, 531 U.S. 98 (2000).

31. *Republican Party of Minn. v. White*, 536 U.S. 765, 807 n.1 (2002) (Ginsburg, J., dissenting).

asserted above with respect to *Hamdi*—that for a Supreme Court nominee to comment on the correctness *vel non* of a past Court decision or opinions written within it would be to prejudge the issues presented in that ruling, thus making it hard, if not impossible, for the nominee to participate in future cases, after the hoped-for confirmation, in which those issues might recur. This is, in a word, rubbish.

For starters, let us note the staggering breadth of justification offered. As the Supreme Court has observed in *White*, if we define what is out of bounds by what is "likely to come before the courts," we will have excluded everything, because "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."³²

More importantly, if a nominee violates principles of good judging and judicial ethics by giving his views on a past case that raises recurring issues, why would not the same be true for the sitting Justices themselves who—in written public opinions and dissents—have stated their views in the very same past case? Would anyone seriously contend that these sitting Justices, who have spoken on an issue in a case, are thereby disqualified from participating in another case at a later time that presents the same or similar questions? Is Justice Stevens precluded from hearing any case involving the effect of the Second Amendment on state and local gun regulation because he is on record in the *District of Columbia v. Heller* ruling as believing at that time that the Second Amendment does not protect individuals?³³ Of course not. He is still available and well suited to hear the later case, precisely because he is free to change his mind if he becomes convinced to come out another way. With regard to the Second Amendment, the fact that his mind is not empty does not mean it is not open, and open-mindedness is all that judicial ethics and due process for litigants require. This too was confirmed by the Supreme Court in the *White* ruling, where the majority pointed out that the ABA rules of judicial ethics do not prevent discussion of specific views, but require instead only that a judge's mindset not be fixed or predetermined.³⁴

In response to my argument here, a skeptic might concede that speaking about the rightness or wrongness of particular cases does not make a jurist biased or prejudiced *per se*, but the skeptic might nonetheless suggest that the practice is problematic and thus something

32. *Id.* at 772 (majority opinion) (alteration in original) (quoting Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993)).

33. 128 S. Ct. 2783, 2822 (2008) (Stevens, J., concurring).

34. *White*, 536 U.S. at 773 n.5 (discussing the ABA Model Code of Judicial Conduct, which prohibits only "statements that commit or appear to commit" a candidate, not those which involve discussion of a candidate's tentative views); see also *id.* at 786 (discussing the lack of a national consensus that mere discussion of specific issues is ethically problematic).

to be avoided if possible. The situation of a sitting Justice would be distinguished from that of a nominee, according to this suggestion, because unlike nominees, Justices simply have no way of doing their jobs without voting (and explaining the votes) in cases that come before them.

This counterargument does not move me. Putting aside whether a Justice has to offer explanatory opinions or instead could simply register votes,³⁵ I would argue that just as a sitting Justice has a “job to do” in deciding cases, so too does a nominee have a “job to do” in giving the Senate and the country information about the kind of Justice she will be, so that Senators can do *their* constitutionally assigned job of “[a]dvice and [c]onsent.”³⁶ In what other setting would Americans find it remotely plausible that someone being interviewed for a position could decline to answer questions about how she would have handled real world situations where past employees had done things that either pleased or displeased the ultimate employer (who, in the case of the Supreme Court, would be the American people)?

Moreover, if sitting Justices and judges are justified in talking about the merits of cases only because they *have to* in order to resolve the cases in front of them, how could one ever explain or defend the quite common practice of Justices and judges talking about the merits of cases in *other* settings, such as law review articles and speeches? Many Justices and judges regularly analyze, assess, critique, and speculate on past and future types of cases in their extrajudicial speeches and writings, and these activities are not only permitted, they are, as the Court in *White* reminded, encouraged by the canons of judicial ethics.³⁷

If all this weren't enough, the concessions and exceptions that nominees regularly make to their “it is not appropriate to discuss specific cases” stance completely undermine the coherence of their position. Under-inclusiveness between a purported end and the means employed to promote it often suggests an incoherence or insincerity about the end. The lack of fit between nominees' asserted justifications for not answering and their actual practice is quite striking.

For starters, nominees sometimes do (perhaps when they slip up) comment on past cases that raise issues likely to come before the Court. For example, just a few transcript pages away from where he refused to discuss *Hamdi*, Justice Alito embraced *Miranda v. Arizona*³⁸ (a quite contentious case still being debated in myriad ways) and said that

35. For a good recent survey of reasons why judges should write opinions in the first place and the related question of what precedential effect opinions should have, see Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 18 (2000).

36. U.S. CONST. art. II, § 2.

37. See *White*, 536 U.S. at 779; MODEL CODE OF JUDICIAL CONDUCT CANON 4 (2004) (encouraging teaching, writing, and lecturing on the law).

38. 384 U.S. 436 (1966).

concerns he had about the case earlier in his career had been “allayed” by subsequent developments.³⁹ He also said he agreed with the Court's decision to wade into the political redistricting thicket in *Baker v. Carr*,⁴⁰ a ruling he felt free to weigh in on because he thought “the issue decided in *Baker* is unlikely to come before . . . the Supreme Court.”⁴¹ How does he know what issues will arise over the course of a thirty- or forty-year Supreme Court tenure? Did anyone think in 1976 that the Second Amendment's application to individuals and states would come before the Court in Justice Stevens's career?⁴²

Other Justices are similarly inconsistent in ways that fundamentally undermine their reasons for not answering some questions. Chief Justice Roberts was particularly erratic. For example, he said he would apply⁴³ the three-category test for congressional Commerce Clause power laid out by the Court in *United States v. Lopez*,⁴⁴ even though that framework is surely something in dispute. Indeed, one of the current Justices—Justice Thomas—has eschewed using it in his separate writings in recent Commerce Clause cases.⁴⁵ Chief Justice Roberts also said at numerous points—in response to direct questions about whether he “agreed” with particular decisions—that he had “no quarrel” with them, including the decision in *Mapp v. Ohio* to extend the Fourth Amendment exclusionary rule to states,⁴⁶ and the so-called “intermediate scrutiny” approach to gender discrimination⁴⁷ set forth in *United States v. Virginia*,⁴⁸ as well as the outcomes in *Griswold v. Connecticut*⁴⁹ and *Eisenstadt v. Baird*,⁵⁰ both of which are contentious contraception cases.⁵¹

Why is it acceptable to voice “no quarrel” with some cases (likely to present recurring issues—as the exclusionary rule's application to states and the framework to assess gender-based laws do), but not other cases? Sensing his own inconsistency, Chief Justice Roberts later explained that when he used the phrase “I have no quarrel” with a ruling, it meant only that he viewed that ruling as a true precedent of the Court that may or

39. See *Alito Confirmation Hearing*, *supra* note 19, at 774.

40. 369 U.S. 186 (1962).

41. *Alito Confirmation Hearing*, *supra* note 19, at 812.

42. See *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (discussing the application of the Second Amendment to individuals); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

43. *Roberts Confirmation Hearing*, *supra* note 24, at 593.

44. 514 U.S. 549, 559–60 (1995).

45. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

46. *Roberts Confirmation Hearing*, *supra* note 24, at 589; see also *Mapp v. Ohio*, 376 U.S. 643, 660 (1961).

47. *Id.* at 35. Note that this too is an issue over which current Justices, such as Justice Scalia, have disagreed. See, e.g., *United States v. Virginia*, 518 U.S. 515, 575–76 (1996) (Scalia, J., dissenting).

48. 518 U.S. at 553.

49. 381 U.S. 479 (1965).

50. 405 U.S. 438 (1972).

51. *Roberts Confirmation Hearing*, *supra* note 24, at 612.

may not warrant overruling based on the general considerations bearing on *stare decisis*.⁵² In other words, having “no quarrel” with something simply meant he acknowledged its existence—he had no quarrel with the fact that it was in the U.S. Reports. But then why did he choose that phrase only in answering questions about some cases and not others? Surely he has no “quarrel” in this “they exist on the books” sense with *Roe v. Wade*⁵³ or *Grutter v. Bollinger*⁵⁴ or many other cases on which he refused to comment altogether, saying that he could make no statements because the issues in these cases might recur.

Justice Ginsburg was similarly inconsistent; to take but one example, she suggested she believed that the *Lemon v. Kurtzman*⁵⁵ test for Establishment Clause cases was not only the test currently being used, but that as far as she could tell there was no better alternative.⁵⁶ And Justice Sotomayor, who perhaps commented on case specifics the least, nonetheless did so in various settings, including the framework that she “would apply to any new case” under the Clean Water Act.⁵⁷

And most participants seem to concede that nominees can and should talk about *their own past statements and writings* about specific cases (statements they made from the bench or elsewhere) in front of the Senate.⁵⁸ Yet this concession gives away the game; if a nominee can explain, justify, clarify, modify, or disavow what *she* has written about a legal issue in the past without “prejudging” or “committing to a resolution of” that issue in the future, then why can’t the same be said for her view about what *other jurists* have written? Just as then-Associate Justice Rehnquist in his confirmation hearings for Chief Justice in 1986 could have properly—without making any impermissible promises—told Senators that his own particular prior Supreme Court writings accurately reflected his constitutional vision (and no one could really doubt that this would have been proper), so too can nominee John Roberts explain to Senators that he agrees or disagrees with particular opinions of Rehnquist or others.

Similarly devastating is the concession that a nominee’s “general” philosophy is fair grounds for seminar questioning. Why do a nominee’s

52. *Id.* at 574.

53. 410 U.S. 113 (1973).

54. 539 U.S. 306 (2003).

55. 403 U.S. 602 (1971).

56. *Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 103d Cong. 179 (1993)* [hereinafter *Ginsburg Confirmation Hearing*] (statement of then-Judge Ruth Bader Ginsburg).

57. *Sotomayor Confirmation Hearing, supra* note 20, at 437; Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365 (2006).

58. *See, e.g., Ginsburg Confirmation Hearing, supra* note 56, at 184; *see also Sotomayor Confirmation Hearing, supra* note 20, at 337 (directing the Committee to her own past cases that demonstrate her jurisprudential predisposition to defer to Congress in various matters).

statements about a general philosophy not amount to “prejudging” with respect to that philosophy? For example, if a nominee says in response to a query about the use of foreign materials in interpreting the U.S. Constitution that such materials have no legitimate role to play, is she foreclosed from reconsidering that position in the context of a subsequent dispute? If so, then why are questions about these topics permissible and in fact permitted?⁵⁹ The same could be said for discussions during the hearings—in which nominees do regularly engage—about precedent and super precedent and super-duper precedent.⁶⁰ Are these questions improperly asked? If so, why have they been answered? And if they are not improper because the candidate is free later to change her mind, the same lack of commitment applies to views on specific past cases, not just to views on big ideas like the use of foreign materials and the role of *stare decisis*.

A. LIMITS ON THE FORM OF THE SEMINAR QUESTIONING

So it simply cannot be that a nominee’s willingness to answer questions and offer views about past cases is inherently and intractably problematic. But, as in any good seminar, we must pay heed not just to the subject matter of the proceedings, but also the *form* in which we take the matter up. Crucially, the questions by the Senators and the answers by the nominees should be worded carefully so as to avoid any inference or impression that the Senate is seeking—or the nominee is giving in order to get confirmed—promises, or commitments of how she *will* rule in the future. Explicit or even implicit promises about future rulings are out of bounds—such promises, if either sought or offered, would indeed compromise judicial independence and due process of law. Our Constitution sets up three independent branches; the judiciary is not supposed to be bound to do Congress’s or the President’s bidding.

The Supreme Court in *White* already recognized this key distinction—between permissible predictive information on the one hand, and impermissible promises on the other. In striking down the limitation on a candidate’s “announc[ing] his or her views on disputed legal or political issues,” the Court was careful to point out that Minnesota elsewhere prohibited each judicial candidate from making a “pledge” or “promise” to decide a particular issue in a particular way, a prohibition that was not being challenged and as to which the Court did

59. Judge Sotomayor answered such questions. *See Sotomayor Confirmation Hearing, supra* note 20, at 442.

60. *See, e.g., Roberts Confirmation Hearing, supra* note 24, at 614 (indicating that then-Judge Roberts “would of course be guided by [the] very same factors [the Court has identified] in deciding whether to reconsider a precedent of the Court” even though not all the Justices embrace all the factors he mentioned).

not express any skepticism.⁶¹ Indeed, as noted earlier, the Court cited the ABA canon on this "anti-promise" notion, suggesting judicial ethics and due process are served by it.⁶²

The distinction between general philosophy and specific case views offered to refuse to engage in the seminar is, then, incoherent and unworkable (as I intimated a decade-and-a-half ago in my *Yale Law Journal* Note⁶³). Instead, as elaborated here, the relevant distinction is between an informed prediction (which permissibly may be sought and as to which a nominee may change his or her mind without constraint) and a promise (which should not be requested or given).

B. ARE ELECTIONS INHERENTLY DIFFERENT THAN CONFIRMATION HEARINGS?

But does the *White* analytic framework for judicial elections, upon which I am drawing, have applicability outside the election setting to the distinct process of federal judge confirmation hearings? Should *White*'s observations be limited to the context of the case?⁶⁴ Might a nominee's statements in a Senate hearing be more problematic than are similar statements made directly to the public in the form of actual prior opinions, speeches, law review articles, judicial campaign literature, and the like?

I am open to someone making the case, but at present I do not see much force in it. For starters, I should note that the empirical work done after *White* seems to indicate that the fears the dissenters expressed, that discussion by judicial election candidates of specific topics would breed cynicism and distrust of judicial open-mindedness, seem unfounded; if anything, opening the process up to more substantive discussion of judicial policymaking seems to have enhanced the legitimacy of the

61. *Republican Party of Minn. v. White*, 536 U.S. 768, 780 (2002) (noting that the prohibition on "pledges or promises" is not under challenge).

62. *Id.* at 773 n.5.

63. Vik D. Amar, Note, *The Senate and the Constitution*, 97 *YALE L.J.* 1111, 1122 n.60 (1988); see also Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 *YALE L.J.* 549, 572-75 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994)).

64. It is true, of course, that *White* involved a law that prohibited judicial candidates from speaking their minds, rather than a rule that would require judicial candidates to open up. It is also true that the majority in *White* did not say that Minnesota's legitimate objectives were not furthered at all by the prohibition on issue-specific comments. Nonetheless, by debunking the state's interests and showing they are not very weighty, *White* devastates the nominees' arguments that they have strong reasons for doing what they do, especially in light of the Senate's and the public's need to know what judicial attitudes will be added to the Court by a new member. In this way, Justice Ginsburg's dissent in *White*, suggesting that the majority's reasoning casts doubt on the legitimacy of the evasive practice of Court nominees, was correct. See 536 U.S. at 807 n.1 (Ginsburg, J., dissenting).

judicial branch post-*White*. And citizens seem to express a desire for more of that kind of specific information.⁶⁵

Moreover, because a federal nominee can carefully qualify her statements to the Senate—and make clear she is not making any promises—more easily than she can in other settings, answering the Senate's questions creates less risk of improper appearances than do statements made in other settings. Thirty-second campaign ads on TV allow for less detail, nuance, and sophistication than do five-minute oral-exam style answers in the Senate Judiciary Committee meeting room. On top of all that, consider Article III's guarantee of life tenure.⁶⁶ Because of this unique judicial job security in the federal system (and it is interesting that no states embrace it entirely) any "deals" in the federal arena are much less enforceable than they would be in states where judges must stand for reconfirmation elections and/or are susceptible to the recall device. Thus, the Senate is a place where it is less, not more, problematic for a nominee to state his views without appearing to be making deals.

Remember too that, given media coverage, the public is given ample opportunity to understand well that Supreme Court nominees are picked by Presidents based on specific things they have done (and the views those things represent) in their lives prior to the moment of their nomination. Because of this societal recognition, nobody would think the Senate is extracting any untoward bargains when it asks a nominee to share preconceived views that likely accounted for the nominee having been picked in the first place.

The Court's analysis in *White* was itself keenly attentive to these issues of public perception that go beyond any actual impropriety.⁶⁷ In discussing both the problem of judicial "partiality" and the appearance of

65. See generally James L. Gibson, "New-Style" Judicial Campaigns and the Legitimacy of State High Courts, 71 *J. POL.* 1285 (2009) (providing empirical support for the idea that the legitimacy of state courts does not drop when candidates for judicial election discuss specific legal issues during the campaign, and that the electorate wants such information). Professor Gibson's data might even suggest that "commitments" or promises by judicial candidates do not undermine legitimacy, but he acknowledges that his research might not answer that question, since the queries of respondents concerning candidate promises were phrased not in terms of promises on specific issues but rather promises simply to abide by the will of the people. See *id.* at 1291 n.16. I would add that even if legitimacy in the eyes of the public is unaffected by candidate promises, the due process rights of future litigants are.

66. U.S. CONST. art. III, § 1.

67. For example, as Justice Scalia pointed out, since judges and judicial candidates state their substantive views on legal issues all the time, in a variety of settings, before they are formally candidates, the public understands that no expression of views by someone prior to his taking the bench involves problematic commitments. *White*, 536 U.S. at 779-80 (discussing the innocuous nature of nonpromissory statements, likening them to earlier views expressed by sitting jurists). Indeed, note that even the dissenters in *White* thought it might be permissible and beneficial for a candidate for high judicial office to state his or her specific views, the bigger dispute in *White* was over the use of issue-specific commentary in an election of a trial court judge. See *id.* at 799 n.2. (Stevens, J., dissenting).

partiality, the *White* Court highlighted the importance of the separate provision in Minnesota law (echoing the ABA's national standards) prohibiting any statements that either "commit or appear to commit" a candidate to any position.⁶⁸ In light of this prohibition, the Court said, the State's separate additional ban on candidates announcing their current views about contested legal or political matters did not do very much in accomplishing Minnesota's asserted interest in avoiding an appearance of impropriety.⁶⁹

The *White* Court also drew another distinction designed to avoid improper appearances—a distinction between *issues* and *parties*. A judge is not "partial" just because he has preconceived leanings about legal issues (so long as he will read the briefs with an open mind). His subsequent decisions will be problematic only if he has, or has expressed, preconceived leanings in favor of or against particular parties.⁷⁰ Thus, so long as a judge applies his legal views—even long-held and long-expressed legal views—evenhandedly to all parties (and avoids talking about actual parties likely to come before him), he is not doing anything that suggests an appearance of impropriety, let alone any actual impropriety. As the *White* Court observed:

Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."⁷¹

Not everyone seems to be convinced that public perceptions of impropriety can be avoided if case-specific queries are permitted. Again, a young John Roberts sounded a discordant note in this regard in the memo to nominee Sandra Day O'Connor, described above.⁷² In particular, Roberts rejected the crucial idea offered here (and embraced by the Court in *White*) that answers to specific case questions are okay so long as they don't take the form of promises or pledges.⁷³ According to Roberts, even if a promise is disclaimed, "[t]he appearance of impropriety remains."⁷⁴

While attentiveness to appearances is appropriate and perhaps required, an extreme and excessive fear that some people might misunderstand the nature of a proceeding—and see an illicit deal where none exists—simply cannot justify the Senate's abdication of its "advice and consent" duties. Some people *might* think a nominee's simply

68. *Id.* at 770, 773 n.5 (majority opinion).

69. *See id.* at 780.

70. *See id.* at 775–77.

71. *Id.* at 778 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.)).

72. *See* Memorandum from John Roberts, *supra* note 17.

73. *Id.*

74. *Id.*

showing up to a Senate hearing constitutes an improper promise by the nominee to later rule as the Senate wishes. The question is not what someone out there might think—the question is what reasonable, well-informed people would understand.

Consider, in this regard, another opinion written by Justice Scalia—his in-chambers opinion last decade in *Cheney v. United States District Court*, where he explained his decision not to recuse himself in that case,⁷⁵ notwithstanding the flack over his famous "duck hunting" trip.⁷⁶ In particular, in *Cheney*, Justice Scalia reminded us all that judicial ethics decisions—such as what judges should say in public and when they should hear cases, and so forth—should be based on an assumption that the public knows the true facts, not some stylized version of the facts.⁷⁷

In the context of Supreme Court nominations, this means we should assume the public knows that Senators are careful to disclaim seeking promises, that Article III's grant of lifetime tenure to federal judges makes promises almost impossible to enforce and thus unlikely to be made, and that Presidents pick nominees based on predictions of how the nominees will likely vote in specific cases. Once a member of the public understands all of this, careful senatorial questioning of a nominee about his views of past cases raises no appearance of impropriety.

Justice Scalia's *Cheney* opinion also illustrates a central theme of this Article—that the government must do a good job of educating the public, so that laypeople do not labor under misconceptions, and that the remedy for remotely possible appearances of impropriety is often not reduced participation by officials, but rather more education by officials.

II. LOGISTICAL CONSTRAINTS ON THE SENATE SEMINAR AND HOW THEY CAN BE OVERCOME

Like all other well-run seminars, the Senate confirmation hearings need to take account of the logistical constraints imposed by the format of the meetings. Students in my class sometimes say, when called upon, that they do not know or remember enough of the detail to meaningfully answer my query. Similarly, sometimes a Supreme Court nominee might say in response to a request that he offer views on a prior Supreme Court ruling something like: "I haven't read all the briefs in the case about which you ask, so I'm not sure which result makes the most sense."

This might be a fair response, just as my students' pleas of temporary ignorance are sometimes perfectly understandable. What I tell my students is that I will ask them the question again tomorrow.

75. 541 U.S. 913 (2004) (mem.).

76. For one of the many news/editorial accounts of the duck hunting trip and the ethical issues it raised in the minds of many Americans, see David G. Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES, Jan. 17, 2004, at A1.

77. 541 U.S. at 923–24.

when they have given it some thought. And what the Senate should tell an unprepared nominee is that he may get back to them in a few weeks with a five-page memo outlining which opinions he found persuasive after having had a chance to read the briefs and the oral argument transcripts (the way real Justices have to do when they vote on a case only a few weeks after having read the briefs). If, instead, the nominee offers something like: "I can't be sure how I would vote until I know that the outcome of a real world case actually turns on my vote," the comeback ought to be: "We're not asking you to analyze an abstract hypothetical—the fact that there's a published Supreme Court opinion on the merits means there was a concrete and ripe controversy here. And to the extent that your sense today about how you would have voted is imperfect because your views won't count in the actual ruling in that case, we will take it for whatever it might be worth."

To be sure, a written response by the nominee is less instructive than an "oral exam" answer for the viewing American public, but the Fourth Estate and the army of bloggers can do a good job excerpting, dissecting, and characterizing the nominee's effort when it has been turned in a few weeks later.

A. WHICH SPECIFICS TO ASK ABOUT?

Each time I teach a course, I must spend some time assembling a syllabus. Often I can borrow extensively from the syllabus I used when I last taught that same or a similar course. Sometimes I can draw from syllabi that my colleagues throughout the country have recently used in their similar courses. The same techniques are available to a Senator looking to examine nominees about the Constitution and their understandings of it. There are some cases about which discussion should recur across many confirmation hearings for years if not decades. And there are likely to be cases decided since the last confirmation hearing was held that should be included in the new "discuss list,"⁷⁸ either to supplement or to replace earlier content. And Senators should consult each other and should consult constitutional analysts throughout the country as they assemble the materials and questions for each confirmation hearing iteration. For me, the criteria for being considered on the hearing syllabus include: (1) the presence of at least one major contested constitutional question whose resolution has significant real-world and symbolic implications even today; (2) a dispute in which

78. I use the term "discuss list" in a conscious attempt to refer to the setting in which that term is most commonly used. At the Supreme Court, the "discuss list" is "a list of cases, circulated by the Chief Justice [with prior input from his fellow Justices] shortly before a scheduled conference, that are considered worthy enough to take the time of the Justices at the conference for discussion and voting." ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, & KENNETH GELLER, *SUPREME COURT PRACTICE* 13 (8th ed. 2002).

various Justices seem to use different methodological tools to resolve the controversy, such that the opinions shed light on the key differences in interpretive approaches various Justices employ; (3) the presence of a passionate dissent so that the nominee can be asked to explain which opinion(s) she finds most convincing and why; (4) straightforward but well-developed factual records, so that nominees cannot avoid addressing the case by asking for more facts not discernible; and (5) significant documented reaction to the ruling by other branches of government and by the academy, offering a variety of critiques and defenses of the various opinions.

Although there are probably a few dozen or so cases likely to appear on many informed constitutional scholars' list of top cases that warrant discussion, my own current short list might include the following ten telling decisions (presented in no particular order):

First, *Grutter v. Bollinger*.⁷⁹ In this case, Justice O'Connor (who has since been replaced by Samuel Alito) wrote for a bare five-member majority to permit the University of Michigan Law School to use the minority race of certain underrepresented applicant groups as a flexible plus-factor in the admissions process in order to assemble a diverse student body against a challenge brought under the Equal Protection Clause of the Fourteenth Amendment.⁸⁰ To agree with the four dissenters is to condemn virtually all race-based programs by both public and (since federal statutes track constitutional standards) private universities. It is also to downplay or override the reliance that thousands of schools had placed on Justice Powell's opinion in *Regents of the University of California v. Bakke* twenty-five years earlier, which had embraced careful race-based diversity plans.⁸¹ *Grutter* can be usefully compared to, among other things, the *Gratz v. Bollinger* companion case, in which the court invalidated the undergraduate university's admissions program as making use of race too inflexibly and mechanically.⁸²

Second, *District of Columbia v. Heller*.⁸³ In this blockbuster ruling, the Court held five-to-four that the Second Amendment does indeed protect individual gun ownership against unreasonable regulation, and that a total ban on handguns cannot be justified under the Amendment.⁸⁴ Among other things, *Heller* contains involved and intriguing discussion of the role that original intent does or ought to play in constitutional

79. 539 U.S. 306 (2003).

80. *Id.* at 310, 343.

81. 438 U.S. 265 (1978).

82. 539 U.S. 244, 275–76 (2003).

83. 128 S. Ct. 2783 (2008).

84. *Id.* at 2787, 2822.

interpretation, the best ways to discern the relevant intent, and what default rules ought to apply when intent is not clear.⁸⁵

Third, *Citizens United v. FEC*.⁸⁶ In this recent case, the Court, by a sharply divided vote, held that the First Amendment does not permit government to ban corporations (and presumably labor unions as well) from expending money on political advertising in direct support or opposition to candidates for elective office.⁸⁷ The decision overruled two Supreme Court cases of the past two decades,⁸⁸ upset almost a century of federal statutory restrictions,⁸⁹ and sets the stage for campaign spending of uncertain dimensions. The case features interesting discussions of the extent to which corporations ought to enjoy constitutional rights, the relevance of originalism in the First Amendment context, and the threshold for overruling twenty-year-old Supreme Court precedent that itself had recently been reaffirmed.⁹⁰

Fourth, *Boumediene v. Bush*.⁹¹ In the most divisive of the so-called "War on Terror" cases, Justice Kennedy and four other Justices extended the protections of habeas corpus to the detainees at the U.S. Naval facility in Guantanamo, Cuba and declared unconstitutional Congress's efforts to deprive the federal courts of habeas jurisdiction in these matters.⁹² Among other things, *Boumediene* tests understandings of the scope of executive power, even when the President seems to be backed by Congress.

Fifth, *Nevada Department of Human Resources v. Hibbs*.⁹³ In this case, Justice O'Connor joined five others to allow damage suits against states under the Family and Medical Leave Act (FMLA).⁹⁴ The Court held that the FMLA's authorization of such suits was a valid exercise of Congress's Fourteenth Amendment power to remedy gender inequality.⁹⁵ *Hibbs* is in great tension with earlier Rehnquist Court rulings sharply limiting Congress's Fourteenth Amendment authority—indeed, to my mind, it effectively guts *Board of Trustees of the University of Alabama v. Garrett*.⁹⁶ *Hibbs* is particularly intriguing and a good case to discuss because it lies at the intersection of the "new federalism" and women's rights.

85. *See id.*

86. 130 S. Ct. 876 (2010).

87. *Id.* at 886, 917.

88. *Id.* at 882.

89. *Id.*

90. *See id.*

91. 128 S. Ct. 2229 (2008).

92. *Id.* at 2262, 2274–75.

93. 538 U.S. 721 (2003).

94. *Id.* at 723, 740; *see* Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006).

95. *Id.* at 740.

96. 531 U.S. 356 (2001).

Sixth, *Atkins v. Virginia*.⁹⁷ Here, a six-Justice majority (including O'Connor) held that execution of mentally-retarded criminals violates the Eighth Amendment's ban on cruel and unusual punishment.⁹⁸ The various opinions address how fixed in time the meaning of the Constitution is, how legitimate it is for Justices to independently assess the proportionality of punishments, and how relevant foreign legal norms are to domestic constitutional rights.⁹⁹

Seventh, *McCreary County v. ACLU*.¹⁰⁰ Justice O'Connor joined four others to strike down Kentucky's display of the Ten Commandments in its courthouses.¹⁰¹ To embrace Justice Scalia's dissent is to abandon any requirement of government "neutrality" toward religion, and to permit significant government promotion of Christian monotheism.

Eighth, *Seminole Tribe v. Florida*.¹⁰² In this seemingly technical Eleventh Amendment dispute about whether States can be sued in federal courts, Justice O'Connor joined four others to rein in Congressional power and to protect state prerogatives—even though the text of the Constitution would indicate otherwise.¹⁰³ The case thus tests, among other things, how committed we are to textualism as a consistent methodology.

Ninth, *Lawrence v. Texas*.¹⁰⁴ In this important ruling, Justice Kennedy led a five-to-four majority to strike down a law in Texas making it a crime to engage in same-sex sexual conduct.¹⁰⁵ The decision overruled the 1986 case of *Bowers v. Hardwick*,¹⁰⁶ shed light on the constitutional protections of intimate sexual decisionmaking, and has potentially significant ramifications for the debate over the constitutionality of same-sex marriage bans.

And lastly, *Gonzales v. Carhart*.¹⁰⁷ A five-to-four Court, per Justice Kennedy, upheld a federal ban on a controversial late-term abortion procedure just a few years after the Court had struck down a very similar ban imposed by the State of Nebraska.¹⁰⁸ The case permits exploration of, among other things, the importance of candor by the Court when it is abandoning its past rulings, and the extent to which the Justices' own

97. 536 U.S. 304 (2002).

98. *Id.* at 305, 321.

99. *Id.*

100. 545 U.S. 844 (2005).

101. *Id.* at 848, 881.

102. 517 U.S. 44 (1996).

103. *See id.* at 46, 72–73 (discussing Articles I and III and the Eleventh Amendment).

104. 539 U.S. 558 (2003).

105. *Id.* at 561, 578–79.

106. 478 U.S. 186 (1986).

107. 550 U.S. 124 (2007).

108. *Id.* at 130, 168.

attitudes about the psychological effects abortion procedures may have on women who receive them should factor into due process analysis.

B. A TEACHER'S MANUAL: PRACTICAL ADVICE FOR RUNNING THE SENATE SEMINAR

1. Recommendation Number One: Pick Your Spots, Rather than Trying To Cover The Entire Field of Constitutional Law

New teachers of constitutional law often bite off more than anyone could chew. Even with a prolonged hearing, Senators could not come close to examining every important area of constitutional law. Major law school constitutional law textbooks today are literally hefty (often weighing over seven pounds) and lengthy (averaging over one thousand pages, though the one I co-author has considerably more than that).¹⁰⁹ Discussing all the material in any one of them, even in a cursory manner, would take three full semesters, rather than three weeks. Moreover, even these constitutional casebooks are limited in certain ways. They barely touch on the so-called "criminal procedure" aspects of the Constitution—for example, the guarantees of the Fourth and Sixth Amendments, and the Fifth Amendment's privilege against compelled self-incrimination and freedom from double jeopardy. Yet these guarantees and privileges make up a good part of the Supreme Court's docket.

And that docket, of course, is not confined to constitutional interpretation: Important and vexing statutory interpretation questions invariably arise in the high Court, demanding that the Court give meaning to seminal congressional statutes, such as various civil rights acts and environmental laws. For these reasons, Senators must invariably pick just a few areas of law to explore with the nominee, in the hopes that this (hopefully well-chosen) sampling will give a general sense of the nominee's approach to Supreme Court judging.

2. Recommendation Number Two: Be Concrete; Examples Will Keep an Audience's Attention

The temporal brevity of the hearings is not the only constraint on the Senate. Perhaps more important is the attention span of the seminar audience—the American public, to whom the Senate should be trying to provide information, and from whom the Senate should then be looking for feedback. Good teachers know the strengths and weaknesses of their students, and the Senate's audience has a limited attention span. For this reason, Senators need, in addition to picking the areas of law upon which they will focus, to be concrete in their presentation.

¹⁰⁹. See JONATHAN D. VARAT, WILLIAM COHEN & VIKRAM D. AMAR, CONSTITUTIONAL LAW: CASES AND MATERIALS (13th ed. 2009).

Constitutional law doctrine from the Court contains a lot of abstract ideas; it asks questions such as whether a regulation of expression is "narrowly tailored" to its objectives, whether a statute dealing with race is "necessary to accomplish a compelling interest," and whether a Congressional imposition on the States is sufficiently "congruen[t] and proportional[]" to the misdeeds in which States are allegedly engaged.¹¹⁰ But there is simply no way non-lawyers are going to slog through this kind of jargon and theoretical complexity.

Thus, if Senators of both parties want the American public to understand what judicial "conservatism" or judicial "liberalism" means in their daily lives—and that ought to be the goal—then the Committee's questioning must focus on specific factual contexts in which the various legal tests get applied. When asking about federal powers, for example, the Committee should not query the nominee about why the "economic nature of the regulated activity" (an abstraction the Court often focuses on)¹¹¹ should be so important. Instead, the Committee should ask the nominee why some specific national problems—like pollution or the preservation of endangered species—might, or might not, be able to have national solutions.

Or suppose Senators want to ask about the Fourth Amendment. They shouldn't simply ask the nominee what he thinks "unreasonable searches and seizures" means. Instead, they should ask him why he thinks arresting a Texas soccer mom in a pickup truck for a seat belt violation (the facts of a recent Supreme Court case¹¹²) was, or was not, a reasonable seizure of her person.

3. Recommendation Number Three: Be a Sharp Questioner, and Be Willing To Wield the Power of the Instructor

Everyone who has ever seen the movie *The Paper Chase*¹¹³ knows that, done well, the process of teaching by questioning is quite powerful. In light of the reality that nominees will attempt to evade questions, smart Senators should try to explore a nominee's views about past cases in a way that is most likely to yield some non-evasive answers. For example, a question to the nominee asking whether he thinks *Roe v. Wade* should be overruled (which I continue to think is a fair question) is simply not going to be answered in this day and age, unless the nominee's name is Robert Bork (whom I respected for his general forthrightness during his hearing). So if the Senate is going to ask about privacy cases, better to do so without posing only the "ultimate" question.

¹¹⁰. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹¹¹. See, e.g., *United States v. Morrison*, 529 U.S. 598, 610 (2000).

¹¹². *Atwater v. City of Lago Vista*, 532 U.S. 318, 323–24 (2001).

¹¹³. *THE PAPER CHASE* (Twentieth Century Fox 1973).

Thus, when the nominee declines to express his views on the legitimacy of *Roe*, ask him the following: "Many critics of *Roe v. Wade* seem to think that *Griswold v. Connecticut* (involving married couples' access to contraception) was correctly decided. What do you think about the distinction between a right to privacy that covers contraception, and one that covers a right to abortion?"

Similarly, asking a nominee about whether he thinks the Michigan Law School case¹¹⁴ upholding some limited race-based affirmative action was correctly decided is unlikely to yield a straightforward answer. But how about the following: "What evidence are you aware of that suggests that the Framers of the Fourteenth Amendment intended to foreclose race-based affirmative action, and didn't they themselves engage in some of it?" Questions like these are *about* cases, but they are not styled directly in terms of case outcomes. Therefore, they might be more likely to be answered.

Often, as in the classroom, a little force by the questioner is called for. So when a nominee, asked to weigh in on particular areas of law in which the Court has spoken, responds by saying either that the question would be too abstract to yield a meaningful answer, or that it would be too specific for him or her to be able to answer and yet still be open-minded when the issue comes before her on the Court, the reply needs to be unflinching and direct: "Then why, precisely, may sitting Justices, who've obviously shared their current thinking in the course of authoring majority opinions, concurrences, and dissents, continue to hear cases involving the same recurring issues?"

Sharp, pointed rejoinders may be the only way to sufficiently cajole the nominee into either answering the question or suffering the public-image consequences of failing to answer. Just as a good Socratic law school professor must sometimes exert pressure on students whose individual participation in the dialogue is necessary for the benefit of all, so too must Senators be willing to turn the heat up a bit on nominees. Of course, as in the classroom, the rules should be the same for all persons in the hot seat—men and women, Democrats and Republicans.

And if nominees persist in refusing to participate in the discussion, they should either get a failing grade (as in a "no" vote on the Senate floor for insufficient classroom participation), or at the very least an "incomplete" grade—which would take the form of a filibuster. Although the use of filibusters by the Senate is controversial these days, and perhaps particularly with respect to judicial nominees, I can think of no better justification for delaying a floor vote than the fact that the nominee has simply not provided enough information on which an informed Senate vote can be cast. Such a rationale invokes the best and

114. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

most principled justification for the existence of the filibuster device itself: the desire for a more meaningful and informational process.

4. Recommendation Number Four: Be Flexible and Not Wedded to a Script

In many areas of legal practice, the question-and-answer sessions that most effectively yield information tend to be ones where the questioner is not tied to any set of pre-written queries, but rather can use impromptu follow-up questions to pursue interesting leads created by answers to prior questions. This is true of depositions and of live in-court cross examination, of appellate oral arguments, and of well-run Socratic classrooms; it should be true of Senate hearings as well.

Of course, this kind of flexibility requires that the questioners really know their stuff and are comfortable in going "off script." Taking on a jurist as smart and experienced as then-Judge Alito head-to-head is surely a daunting task. Judge Alito surely has every incentive to avoid giving information that might be contentious—indeed, if I were advising him, I would encourage him to say as little as possible. But what is good for him might not be good for the Senate or for the country. And no one said that running this seminar for the American people was going to be easy.

III. WHY THE SOTOMAYOR HEARINGS WOULD, ON BALANCE, HAVE TO RECEIVE A FAILING GRADE

The Senate seminar in 2009 was quite unhelpful. Perhaps most vexingly, then-Judge Sotomayor (like other nominees before her) was able to avoid talking meaningfully about her current views on most of the major constitutional questions of the day.

Again, I fully understand why Justice Sotomayor did what was in her best interests (and what I would have advised her to do, if I had been among those giving her personal advice): say as little of substance as possible. And Senators, too, may have done what's in their best interests—coming off as senatorial on TV and not boring the American people with meaningful discussion of constitutional doctrine. But as I suggested above, what is in the interests of the nominee and the Senators may not be in the best interests of the American public. The only way to truly get a sense of the kind of Justice someone will be is to ask questions regarding her views of past controversial (often divided) cases from the Court itself.

Why don't Senators teach themselves and the American public better? I am not sure. Perhaps some don't feel qualified to engage in substantive discussion with nominees, although good support staff could help here (as it does in other classroom settings). Some Senate traditions, like the filibuster, can be explained by personal selfishness. Individual Senators—both in the majority and minority parties—are reluctant to

tinker with the senatorial system of personal privileges and procedural courtesies, of which the filibuster is but a part, because that system gives Senators great power to pursue pet projects and extract earmarks for their home states. Blowing up the filibuster might also mean blowing up all the unjustified and extravagant personal perks that make being a Senator so enjoyable. It is unclear to me why similar incentives should operate to deter Senators from being active and forceful questioners. Indeed, Senators who do undertake meaningful questioning, and who make nominees who refuse to answer look silly based on the rejoinders to the nominees' justifications for refusing to answer, discussed earlier, might themselves be able to make legitimate use of the filibuster to force nominees to be more forthcoming. If ever there were a justification for blocking a floor vote, it would be that the nominee simply has not given the Senate the information on which a vote could meaningfully be held.

Whatever the reasons for Senate disinclination to substantively engage the nominees, things have to change or the hearings are at best a waste of time. Indeed, the hearings for Justice Sotomayor may represent something worse than simply an educational opportunity lost. In one important respect, the hearings affirmatively misinformed the American people. I speak here of the dominant theme of then-Judge Sotomayor's testimony—from her opening statement, right through to the end—the theme that “[t]he task of a [federal] judge is not to make law, it is to apply the law.”¹¹⁵

However nice this sounds, it simply is not true. As my colleague Erwin Chemerinsky put it: “Every first-year law student knows that judges make law.”¹¹⁶ State court judges make new law in the areas of contract, tort and property law, among others. The Supreme Court fashions law in virtually all of its rulings. To see this clearly, consider two of the most contentious decisions from last Term—the New Haven firefighters case¹¹⁷ (featured so prominently in the Sotomayor hearings¹¹⁸), and the challenge to the federal Voting Rights Act.¹¹⁹ In both cases, the Court read a landmark federal statute in a particular way, likely influenced by the Court's plausible—but by no means necessarily correct—understanding of the Amendments to the United States Constitution adopted after the Civil War. In neither case could one argue with a straight face that the majority's reading of the law was undeniably compelled by the text of the statute or the words and history of the Constitution. Both cases were classic judgment calls, in which the

115. See, e.g., *Sotomayor Confirmation Hearing*, *supra* note 20, at 59.

116. Posting of Erwin Chemerinsky to Opinion L.A., <http://opinion.latimes.com/opinionla/2009/07/sotomayor-hearings-day-two-dust-up.html> (July 14, 2009, 19:02 PST).

117. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

118. See, e.g., *Sotomayor Confirmation Hearing*, *supra* note 20, at 64–65.

119. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

judgment of conservative jurists carried the day. My point here is not that the Court was wrong in the way it resolved these cases (although I do have my doubts);¹²⁰ my point is simply that their resolution broke new legal ground and “made”—in every meaningful sense—new law and policy.

Why is it bad to deny that judges make law? Even if the idea that judges don't make law is untrue, can it be characterized as a “white lie” that makes us all feel better about government? I do not think so, because denying that judges make law derails us from educating people about what we *should* be discussing: the ways in which legitimate judge-made policy *differs* from the kinds of policy decisions elected legislators and presidents fashion.

CONCLUSION

Federal judicial policymaking, when done right, is interstitial—that is, it is accomplished within the boundaries of statutory and constitutional parameters. It is also incremental—attendant to the size and speed of trends and currents in American law, history, economics, and sociology. It is entirely transparent and explained in a published format that responds thoroughly to arguments on the other side. Finally, it is not particularly concerned with the next electoral cycle—even as it is properly aware of longer-term American attitudes and is responsive to whether, a generation after a ruling, its leadership has been followed or rejected. These and other features distinguish judicial lawmaking from the more freewheeling and sometimes populist actions of the elected branches.

Ironically, by misleadingly suggesting that judges do not and ought not to make policy, and by saying these things because of concerns about the immediate perceptions of voters in the next election, recent Supreme Court confirmation hearings might undermine, rather than support, the idea that judges can be, and are in fact, different from other politicians.

120. On *Northwest Austin*, see Vikram David Amar & Alan Brownstein, *When Avoiding Federal Questions Shouldn't Evade Federal Review: Michigan v. Long Meets, and Trumps, Ashwander v. TVA*, 12 GREEN BAG 2D 381, 389–90 (2009).

POSTSCRIPT: THE RECENTLY-CONCLUDED HEARINGS FOR JUSTICE KAGAN

As this piece was going to print, the hearings for Elena Kagan were taking place in the Senate. As was the case with other recent nominees, she was charming and intelligent, but for the most part not forthcoming in her specific views of important issues of the day. As was the case with other recent nominees, she had nothing to gain and potentially everything to lose by actually saying much that was educational. And as was the case with other nominees, the Senate let her get away with it.

The Kagan hearings, which will be pored over carefully in the coming months and years, were (at least at first blush) particularly disappointing to me for two reasons. First, Justice Kagan did not have much of a track record, as either a lower court judge or a prolific academic writer, so that in the absence of a meaningful hearing, the Senate was put in the unfair position of having to vote based on gut instincts and trust (or distrust) in the President, rather than on specific probative information about the kind of constitutional vision she likely will bring to the Court that could have been unearthed in a better hearing process.

And second, in a 1995 *University of Chicago Law Review* Book Review,¹²¹ Justice Kagan powerfully criticized a book written by Yale Law professor Stephen Carter, in which Professor Carter essentially argued that the Senate should avoid asking specific and substantive questions about a nominee's constitutional vision, but should instead largely satisfy itself with an inquiry into the nominee's qualifications, temperament, and character.

Disagreeing sharply with Carter's view, Justice Kagan labeled the current state of affairs—in which nominees avoid answering specific questions (“stonewall[ing]” is the term she uses) about specific constitutional controversies of our era—a “mess.”¹²² She characterized the modern confirmation process as lacking in “seriousness and substance,”¹²³ and as an exercise that “takes on an air of vacuity and farce.”¹²⁴ Kagan observed that without specific questions and meaningful answers, the Senate isn't doing its job and the country can't learn what it needs to know; general discussions of philosophies simply are not revealing enough. Nominee “comments on particular issues” are necessary.¹²⁵

121. Elena Kagan, *Review: Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)).

122. *Id.* at 920.

123. *Id.*

124. *Id.*

125. *Id.* at 936.

Kagan criticized the Senate for not putting more pressure on the nominees, and, importantly, she pointed out (albeit without great elaboration) that recent nominees' reasons for refusing to answer specific questions—that answers would compromise judicial independence—were hogwash (an “especial red herring” she termed it).¹²⁶ If this reason for clamming up were right, she correctly observed, then “Justice Scalia [would be] in a permanent state of recusal, given that in the corpus of his judicial opinions he has stated unequivocal views on every subject of any importance.”¹²⁷

As I suggested above, and in earlier writings,¹²⁸ as long as judicial promises or guarantees are not in play, judicial independence is respected. For me (and apparently for Professor but not Justice Kagan), a specific question by the Senate is fair game so long as it does not seek a promise or a commitment from the nominee, in form or effect, as to how s/he would rule if confirmed. So I laud Justice Kagan for the views she expressed in this fifteen-year-old Book Review.

It is a shame that she abandoned these views in her hearings (and even suggested that she now thinks she was wrong in 1995, an apparent change of mind that did not seem altogether sincere so much as pragmatic). And it is a shame that the Senate let her get away with it. Various Senators did, of course, mention the views she articulated in 1995, but none took her to task for explaining why she wasn't correct in her (admittedly underdeveloped) argument there. For example, no Senator ever asked her why, if she was wrong in 1995 and right in 2010 about not being able to discuss things that might come before the Court, recusal for Justice Scalia and other sitting Justices is not required based on their past, judicial statements.

Another teachable moment lost. It is a good thing for them that the Senators don't need passing course credit in this seminar to remain enrolled in their jobs.

126. *Id.* at 938.

127. *Id.*

128. See *supra* note 63 and accompanying text.