Restoring the Lost Confirmation

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

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

The end result was accurately described by one legal scholar two decades ago: “When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly

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

The conventional wisdom, however, is based upon an incomplete account of how judicial confirmation hearings have devolved. While the platitude that the dysfunctional state of the confirmation process stems from the nomination of Judge Robert Bork is surely true, there is a widespread misunderstanding of what exactly went wrong at the Bork hearings. The core problem is that the types of questions asked by both Democratic and Republican senators — at that hearing and since — are the sorts of questions of concern to “legal realists.” The emphasis is on legal results rather than on legal reasoning, and on cases the Court has decided rather than on clauses of the Constitution. In short, each side is trying to get nominees to tip their hands about how they will rule on issues the senators care about, rather than inquiring into how the nominee reasons about the Constitution.

This emphasis on results rather than reasoning, on cases rather than clauses, is slanted toward “a living constitutionalism.” This realist approach will always yield what Sanford Levinson has called “happy endings.” But the original meaning of the Constitution may sometimes yield “unhappy endings” for one side or the other. The “gravitational force of originalism,” however, prevents nominees from candidly admitting they will—or believe they should—manipulate legal modalities to reach any result they like. Hence the challenge for nominees is how to appear “constrained” by the text of the Constitution, while avoiding alienating supporters and empowering opponents with the suggestion they might rule the wrong way in a future case.

What went wrong for Robert Bork was that his “original intent” approach appeared to threaten too many past “precedents” and future results that the Democratic majority in the Senate cared deeply about. (Had the Republicans enjoyed a majority in the Senate—as they had when Justice Scalia was confirmed overwhelmingly—the hearings might have gone quite differently; to be confirmed, Bork still needed to convince a sufficient number of Democrats.) From that debacle, candidates have learned to adopt three rhetorical “moves” that allow them to skate away from questions about results. These moves have rendered
the confirmation hearing all but pointless. By focusing on the meaning
of the clauses of the Constitution, rather than the cases of the Supreme
Court, however, a handful of senators could steer the hearings toward
the solid ground of legal reasoning rather than the shifting swamps of
legal realism.

Before we proceed further, we should disclose that we are original-
ists, and we would like to see more originalist justices on the Court.
We believe that the current vacuity of the confirmation process enables
“living constitutionalists” to slip through the net and make it to the
Court unscathed. Our objective is, therefore, not neutral between con-
stitutional approaches. But we also believe that a focus on clauses rather
than cases during confirmation hearings would improve the quality and
character of hearings for everyone by moving away from vapid questions
and farcical answers. Living constitutionalists would be perfectly free
to explain and defend their approach to the senators.

Critically, through this refined focus, the senators—and ultimately
the people as sovereigns—can engage in a public dialectic with the
nominees to probe their deepest knowledge of the portions of the
Constitution that do not change with time. Our proposed approach
seeks to restore the lost confirmation, where the focus on the text and
history of our “republican” Constitution—the truly immutable charac-
teristics of our fundamental law—are paramount and timeless. And if
we are right that the original meaning of the Constitution does produce
determinate answers to constitutional controversies, then our approach
will offer useful insights into how a nominee will vote once no longer
constrained by precedents.

CONFIRMATION CONTROVERSIES

While confirmation hearings are relatively recent innovations that have
become contentious only over the past three decades or so, the claim
that Supreme Court nominations used to be nonpolitical and exclusively
about “qualifications” is highly exaggerated. When the polity is divided
over how the Constitution should be interpreted, and the Supreme
Court hangs in the balance, confirmation fights become more intense.

The Constitution does not define how the Senate should exercise its
role of “Advice and Consent” with respect to a president’s nominees.
Rather, Article I, Section 5, allows “[e]ach House [to] determine the
Rules of its Proceedings.” From 1789 to 1816, the Senate as a committee
of the whole voted on each presidential nomination. Starting in 1816, the Senate referred more than two-thirds of presidential nominations of judges to the Senate Judiciary Committee. Since 1868, as a matter of course, all but a handful of judicial nominations have been referred to the committee.

It wasn’t until Louis Brandeis’s nomination to the Supreme Court in 1916 that the Senate held a hearing. Professor Lucas Powe has offered the now-conventional wisdom that “Brandeis was a spectacularly controversial nomination,” because “he was the first Jew ever to be nominated for the court, and there was blatant anti-Semitism there.” Given the pervasive anti-Semitism of the era, there is no doubt it played a role. But Brandeis’s nomination was controversial largely due to his record as a well-known progressive political and legal activist. He was expected to side with the “progressive” wing of the Court, and thwart the “conservative” justices’ jurisprudence, which was skeptical of legislative restrictions on economic liberties.

In this way, Brandeis’s nomination was a forerunner of the politics of today’s judicial nominations. When the prevailing judicial philosophy of the Court came under political challenge, so too did judicial nominations. Yet, under the Senate practices of the time, the progressive luminary did not even testify in person—his colleagues argued in his defense. He was confirmed four months later. The next judicial confirmation hearing—and the first hearing in which the nominee personally appeared—occurred in 1925. President Calvin Coolidge asked Harlan Fiske Stone, his attorney general, to defend himself against charges concerning the Teapot Dome scandal. Questions were limited to that topic, however, and did not broach Stone’s jurisprudence.

The first justice to answer unrestricted questions was Felix Frankfurter, the third Jewish nominee to the High Court after Brandeis and Benjamin Cardozo. Like Brandeis before him, Frankfurter also faced anti-Semitism. But, also like Brandeis, Frankfurter was well known as a progressive activist. He was also a politico as much as a legal figure, and had been involved in political maneuverings over a number of nominations to the Court in the preceding decades. So it was hardly surprising that his appointment would engender opposition, and that senators would want to publicly question him.

In the two decades following Stone’s confirmation, 11 nominees (including Stone) had public hearings, while five did not. Among those
who had a private hearing was Senator Hugo Black. As a courtesy to their colleague, senators on the Judiciary Committee debated in closed session Black’s membership in the Ku Klux Klan. One week after his confirmation, reporter Ray Sprigle of the Pittsburgh Post-Gazette revealed Black’s KKK cover-up.

But starting with Tom Clark’s confirmation hearing in 1949 and right through to the present, all justices who were ultimately confirmed received a full hearing before the Judiciary Committee. And since Thurgood Marshall’s confirmation in 1967, by a vote of 69 to 11, all confirmation votes were conducted by roll call, rather than a voice vote.

The confirmation process thus evolved throughout the 20th century, growing more public and in many respects more openly contentious and political. But of all the changes wrought in the evolution of the confirmation process, the most significant and damaging has been the thinning of the substantive questions considered by the Senate—a process that has been playing out in public since the confirmation hearings of Judge Robert Bork in 1987.

THE TROUBLE WITH SUBSTANCE

The current dysfunctional state of the confirmation process stems from the hearings following Judge Bork’s nomination—but there is a widespread misunderstanding of why that was the case. In their empirical study of Supreme Court confirmation hearings, Professors Paul Collins and Lori Ringhand explain that “Bork failed to garner Senate confirmation not because he answered too many questions, but because he gave the wrong answers.” In particular, Bork’s intellectual discomfort with the outcomes of certain canonical cases concerning substantive due process, voting rights, and free speech helped to ensure his defeat. (By contrast, Bork accepted the Court’s expansive post-New Deal commerce-clause jurisprudence, regardless of whether it was supported by original intent.)

A colloquy between Judge Bork and Senator Edward Kennedy over *Reynolds v. Sims* illustrates this dynamic. In that case, the Court invalidated Alabama’s apportionment of representation, using the “one person, one vote” principle. The decision, which did not attempt a meaningful discourse on the text or history of the Constitution, included such hortatory statements as this one: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address,
to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”

Judge Bork rejected Reynolds because he saw it as inconsistent with constitutional history. “[A] State should be free to apportion as it sees fit,” Bork told Kennedy, “so long as the apportionment plan has rationality and so long as a majority has a way to change the apportionment whenever it wants to.” He continued by noting that “[t]here is nothing in our constitutional history that suggests one man, one vote is the only proper way of apportioning.” (Indeed, each state has two senators, irrespective of population.) To this, Senator Kennedy responded that “the people of this country, Judge Bork, accept the fundamental principle of one man, one vote even though they are not burdened with a law school education.” If one is to judge “the will of the people” by opinion polls, Kennedy was likely right.

Of course, because democratic majoritarianism was the sine qua non of his political and constitutional philosophy, Bork had no problem with the legislative process choosing one person, one vote. He objected to reading that result into the Constitution to make it mandatory in every state. “If the people of this country accept one man, one vote,” Bork said, “that is fine. They can enact it any time they want to. I have no desire to go running around trying to overturn that decision.” Bork added that, as a matter of original meaning, “it does not come out of anything in the Constitution and if the people of the country want it, they can adopt that apportionment any time they want to.”

In this way, the questioning at his confirmation hearings pitted Bork’s originalist decision-making approach against the popular outcomes of certain key cases. Focusing on these results rather than methods, Collins and Ringhand conclude that “Bork’s constitutional choices, articulated by him in his own words at his confirmation hearing, were simply not within the constitutional consensus that the American people in 1987 agreed to be governed by.” In other words, Judge Bork was “Borked” because he professed fidelity to his assessment of the “original intent” of the framers, even when (in his view) that intent conflicted with non-originalist precedents that were highly regarded by Democratic senators.

After Bork’s confirmation vote failed, President Reagan’s next nominee to fill the vacant seat of Justice Louis Powell was Judge Douglas Ginsburg. He soon withdrew his candidacy over allegations that he had smoked marijuana as a faculty member at Harvard Law—a charge
that now seems quaint and, in some circles, may even be a resume enhancement. For his third choice, the president settled on Judge Anthony Kennedy of the Ninth Circuit. Kennedy would not make the same mistakes as Bork. In response to a question from Senator Patrick Leahy about substantive due process—in a preview of things to come—Kennedy said with respect “to the right of privacy, we are very much in a stage of evolution and debate. I think that the public and the legislature have every right to contribute to that debate. The Constitution is made for that kind of debate.”

Indeed, the most striking aspect of Justice Kennedy’s testimony is how similar it sounds to his later opinions in both substance and style. For example, Republican Senator Gordon Humphrey asked about constitutional rights to “private consensual activities.” In an answer that could have been cribbed from his opinion in the Lawrence v. Texas decision years later, Kennedy answered that “[t]here are the whole catalogue of considerations,” including “the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.”

In his confirmation hearings in 1991, Justice Clarence Thomas took a similar tack. When then-senator Joe Biden asked him whether he would apply the “Framers’ notion of original intent of natural law” as a mode of constitutional interpretation, Thomas replied he would “[a]s a part of the inquiry.” However, he stressed that the notion of liberty in 1787 “doesn’t stop there, it is not frozen in time. Our notions of what liberty means evolves with the country, it moves with our history and our tradition.” Further, Thomas explained, the framers of the 14th Amendment in 1866 could not have determined “what the term in its totality would mean for the future,” so “it is one that evolves over time.”

Rather than focusing on the differing substance of the answers given under questioning by Judges Bork, Kennedy, and Thomas, later observers came to believe that Bork’s mistake was being substantive at all. The Bork hearings, then-professor Kagan explained, offered the public “a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee; that discussion at once educated the public and allowed it to determine whether the nominee would move the Court in the proper direction.” (She might have added, so too
did the Kennedy hearings.) By contrast, “subsequent hearings, have presented to the public a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis.”

In truth, however, these questions and answers are not randomly “vapid.” They follow a precise pattern—a pattern that can and should be broken. What may be a “charade” can also be characterized as a ritual—a ritual that must be changed.

**The Three Moves**

To avoid a repeat of the Bork fiasco, more recent nominees—after careful preparation by executive-branch “murder boards”—have hewed to a precise script involving three distinct intellectual “moves.”

Move one is to profess fealty to the text of the Constitution—and to its original meaning—but especially to the more general “principles” underlying the text. Move two is to profess fealty to *stare decisis*, a commitment to legal precedent, even when—that especially when—the Court’s precedents have deviated from original meaning in ways that meet with contemporary political approval. Move three requires that, when asked to apply any of the Court’s precedents to the current cases or controversies of most concern to the senators, the nominee must decline to answer on the ground that the case may later come before the Court.

Through this approach, the justice-to-be delicately follows the committee’s lead along the confirmation tight rope, saying just enough to bolster the confidence of senators from the nominating president’s party, while providing as little ammunition as possible to senators from the other party. Justices have been perfecting this balance for three decades now, but recent confirmation hearings have been master classes in how to give answers while revealing nothing.

For instance, in 2010, Solicitor General Elena Kagan proudly testified that “we are all originalists,” but cabined that proclamation to “very specific rules” in the Constitution, such as the requirement that a senator must be 30 years old. But for (virtually) all other provisions, the framers “laid down broad principles,” and those “general provisions of the Constitution…could be applied to new conditions, to new circumstances, to changes in the world.” Through the application of these principles “to new facts and new circumstances and new situations,”
Kagan explained, “development of our constitutional law does indeed occur.” Yet, she still rejected the notion of a “living Constitution,” because “people associate with it a kind of loosey-goosey style of interpretation in which anything goes, in which there are no constraints, in which judges can import their own personal views and preferences.” This is what we call move one: profess fealty to the text—and even the original meaning—of the Constitution.

Senator Orrin Hatch of Utah asked Kagan her opinion about *Citizens United v. FEC* (a case she had argued as solicitor general, and lost). She replied, “I do think *Citizens United* is settled law going forward. There’s no question that it’s precedent, that it’s entitled to all the weight that precedent usually gets.” This is what we call move two: profess fealty to *stare decisis*. Of course, this only means something if justices (as opposed to inferior court judges) are actually constrained to follow the previous decisions of the Court, which they aren’t. But if one confines the “meaning” of “the Constitution” to what the Court has ruled, this statement was entirely accurate.

Less than two years later, Justice Kagan joined Justice Breyer’s dissent in *American Tradition Partnership v. Bullock*, which treated *Citizens United* as unsettled law: “I disagree with the Court’s holding,” in *Citizens United*, Breyer wrote, “for the reasons expressed in Justice Stevens’ dissent in that case.” Breyer added that he, and by extension his three colleagues who joined his dissent, “would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case.” Justice Kagan and her three colleagues now await a fifth vote to reverse a Supreme Court precedent she testified was “settled.”

In 2009, when she was nominated for solicitor general, Senator John Cornyn of Texas asked Kagan in a questionnaire, “Do you believe that there is a federal constitutional right to same-sex marriage?” Kagan replied, without any qualifications, “There is no federal constitutional right to same-sex marriage” (emphasis ours). When pressed by Senator Jon Kyl on that statement, Kagan reverted to move two: “I was absolutely saying that I understood the state of the law and that I accepted the state of the law.” In other words, she asserted that the Constitution in 2009 did not protect a right to same-sex marriage, because the Supreme Court had not yet so held. True to her Clintonian roots, she suggested that the answer depends on what the meaning of the word “is” is.
One year later during her confirmation hearing to become associate justice, however, Kagan ducked a question about same-sex marriage. She told Senator Chuck Grassley of Iowa, “[T]here is, of course, a case coming down the road and I want to be extremely careful about this question and not to in any way prejudge any case that might come before me.” And this is move three: Decline to answer anything that can be construed as a comment on a pending case. And then, a mere five years later, with her vote, the “state of the law” with respect to same-sex marriage changed. In 2015, Kagan joined a 5-4 majority opinion in Obergefell v. Hodges, finding that the Constitution now protects a right to same-sex marriage.

Move three, often referred to as the “Ginsburg rule,” was pioneered by then-judge Ruth Bader Ginsburg, who steadfastly refused to answer any questions that she viewed might disqualify her from deciding future cases. During then-judge John Roberts’s confirmation hearing, Senator Chuck Schumer of New York chastised his invocation of the Ginsburg rule. “It seems you cite it when you don’t want to answer something,” Schumer observed, “but a few times here, when [Judge] Ginsburg had actually answered those specific questions, you didn’t want to answer them, and you ignored the precedent.”

Indeed, employing the three moves to avoid Senate scrutiny is certainly not limited to Democratic nominees. The 2006 confirmation hearing for then-judge Samuel Alito illustrates how move two also helps Republican-nominated justices avoid taking a politically unpopular stance. When asked about the holdings of Griswold v. Connecticut and Eisenstadt v. Baird—which protect a constitutional right to contraceptives—Alito embraced them both, invoking the “Liberty Clauses of the Due Process Clause of the Fifth Amendment and the 14th Amendment” without any reservations. Alito added that “I think it is well accepted that [the 14th Amendment] has a substantive component, and that that component includes aspects of privacy that have constitutional protection.”

No doubt Judge Alito, and his advisers in the executive branch, had studied Justice Kennedy’s handling of the same issue. Justice Alito’s embrace of these precedents did not survive. Ten years later in his dissent in Obergefell v. Hodges, he affirmatively rejected the sort of “distinctively postmodern” conception of liberty adopted in Griswold and Eisenstadt. Citing Washington v. Glucksberg, a case that sought to ground substantive due process in history and limit its scope, Alito wrote that “[t]o prevent
five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that ‘liberty’ under the Due Process Clause should be understood to protect only those rights that are “deeply rooted in this Nation’s history and tradition.” During his hearing, Alito did not even mention the word “originalism.” But his embrace of *stare decisis* was enough to survive the confirmation gauntlet.

**RESTORING MEANINGFUL CONFIRMATIONS**

Senate confirmation hearings in the post-Bork era demonstrate several disquieting trends. Republican and Democratic nominees alike have all professed fidelity to the text of the Constitution—to the principles it establishes if not to its original meaning—but in the same breath professed a greater fidelity to the precedents that the Senate values. Adhering to *stare decisis* helps both Republican and Democratic nominees avoid awkward questions about areas where the Constitution’s original meaning might lead to unpopular results. When coupled with a refusal to answer questions about any issue that might “come before the Court,” confirmation hearings have been drained of any ability to generate answers that could help either side to fairly assess, let alone oppose, the nominees of the other party.

This unfortunate state of affairs is made possible by both Democrats and Republicans unreflectively embracing a “legal realist” approach, if not to the Constitution itself then to the practice of constitutional law. In essence, both sides believe—or act as if they believe—that the Constitution is only what the Supreme Court says it is. As nominees, the Constitution is whatever the Supreme Court has said it was in the past; then, after confirmation, the Constitution is whatever they may wish it to be in the future.

Today, we live in a legal world in which many progressives and conservatives—Democrats and Republicans alike—share the legal realists’ preoccupation with the “just” results that accord with one’s political convictions. So justices must be chosen who will reach the politically “correct” results or be opposed because they will reach the “wrong” results. Judicial confirmation hearings are thereby turned into a game of “gotcha.” Questioners try to trip up the other side’s nominees, and nominees quite properly refuse to reveal the only thing their inquisitors on both sides truly care about: how they would rule in particular cases that are likely to come before the Court. But postures must be assumed
and questions must be asked, so senators and nominees opine about two empty concepts.

The first is *stare decisis*. Both sides want the justice-to-be to respect only the precedents that lead to the results they like. No one thinks the Court should follow every precedent, so the crucial issue is picking and choosing which to follow and which to ignore. But how do they choose? Unless they can explain how they know which precedents to follow and which to reverse—apart from liking the results—all pontificating about *stare decisis* is really a show about nothing.

The second empty issue to be discussed is “judicial activism” and its conjoined twin, “judicial restraint.” Today’s judicial conservatives have inherited this bugaboo from New Deal progressives. But what exactly is “activism”? Is it activism when any popularly enacted law is held unconstitutional? Neither Democrats nor Republicans truly believe this, since they want judges to strike down laws as unconstitutional when doing so leads to the “right result.” So judicial activism means thwarting the “will of the people” when critics agree with the people, while complaining about the “tyranny of the majority” when they disagree.

Supreme Court confirmation hearings do not have to be about either results or nothing. They could be about clauses not cases, about reasoning not results. This reality could be achieved through some modest changes in the way that senators ask their questions. Instead of asking nominees how they would decide particular cases, senators should ask them to explain what they think the various clauses of the Constitution mean, separate and apart from any Supreme Court precedent (it is too easy to merely cite a case and dodge the difficult question).

The questions may be straightforward: Does the original meaning of the Second Amendment protect an individual right to arms? What was the original meaning of the Privileges or Immunities Clause of the 14th Amendment? (Hint: It included an individual right to arms.) Did the 14th Amendment “incorporate” the Bill of Rights and, if so, how and why? Does the Necessary and Proper Clause delegate unlimited authority to Congress so long as the exercise is “convenient” for the legislature? Does the Ninth Amendment protect judicially enforceable unenumerated rights? Where in the text of the Constitution is the so-called Spending Power (by which Congress claims the power to spend tax revenue on anything it wants), and does it have any enforceable limits? None of these questions should be answered by referring to a specific case.
Additionally, senators need not ask how the meaning of these clauses should be applied in particular circumstances — those questions will be avoided by move three anyway. They should simply ask about the meaning itself and how it should be ascertained. Do nominees think they are bound by the original public meaning of the text? Even those who deny this still typically claim that original meaning is a “factor” or starting point. If so, what other factors do they think a justice should rely on to “interpret” the meaning of the text?

Senators should even ask questions that today seem completely resolved, for this provides a window into the judge’s philosophy. For example, a senator could ask whether “We the People” in the Constitution originally included free blacks and slaves. Abolitionists like Lysander Spooner and Frederick Douglass contended that it did, and Chief Justice Roger Taney denied that in *Dred Scott v. Sandford*. The answer to this question will tell us far more about a nominee’s approach to constitutional interpretation than routine questions about *Dred Scott* and *Brown v. Board of Education*. Given that this is hardly a case that will come before them, on what grounds could nominees refuse to answer such questions?

Would it be unfair to ask nominees to the Supreme Court what they believe the Constitution means and why they believe it? Such questions would certainly be challenging. But why should we not expect judicial nominees to have studied the Constitution *before* they are given lifetime tenure to interpret and apply it? And repeating the catechism of previous Supreme Court decisions is not the same thing as opining on the meaning of the Constitution itself — unless you assume, of course, that the Constitution really *is* only what the Supreme Court says it is and nothing more. If confirmed, nominees will get to vote whether they think these previously decided cases were rightly decided. It is essential to understand their knowledge and perspective on this history before the Senate elevates them to the High Court.

Inquiring into clauses not cases would also require senators to learn about the original meaning of the Constitution. Beyond hearing the nominee’s answers, it would be enlightening to hear what the members of the Judiciary Committee think about these topics. Such a hearing would not only be entertaining, but would also be informative and educational.
originalism’s gravitational pull

The benefits of such an originalist confirmation hearing are manifold. First, it would eliminate the ritual of nominees pledging their fidelity to inherently inconsistent precedents and doctrines. Second, the nominee would provide the senators, and ultimately the American people—the true sovereigns—with a high-profile dialectic on the text and history of our Constitution. In truth, this was why the Bork nomination hearings were so riveting. The colloquy between Judge Bork and the senators was truly about something. Third, it would provide the senators with a meaningful line of questions that would probe nominees’ judicial philosophy and provide a preview of how they would rule once confirmed.

We harbor no illusions that members of the Senate Judiciary Committee all possess sufficient knowledge to meaningfully engage in this line of questions, beyond reading prepared questions from staffers. The problem with pre-programed lines of questions is that savvy nominees can easily throw the senator off with a discourse on a related topic, and never actually get back to the question—Chief Justice Roberts and Justice Kagan did this masterfully.

But we don’t need a cadre of originalist senators. The beauty of this approach is that no rules need be changed; no bipartisan agreement need be reached; and the Republicans on the Senate Judiciary Committee need not even all be of the same mind. For this approach to restore the lost confirmation hearing, we need only a senator or two to focus their limited time on originalism. And we have full confidence that the Judiciary Committee counsels on both sides are quite capable of generating useful questions for the nominees.

Imagine if a handful of senators—perhaps Ted Cruz of Texas or Mike Lee of Utah, both former Supreme Court clerks—grilled Chief Judge Garland on the questions we asked above. Garland—whose two-decade record on the bench shows absolutely no affinity for originalism—may prove utterly incapable of answering their questions, beyond perfunctory platitudes. Whenever Garland reverts to discussing case law, the senator might interrupt and say, “I am not interested in precedents. Once confirmed you can change all that. I want you to discuss matters you cannot change, like the Federalist and Anti-Federalist Papers, Blackstone’s Commentaries, the records of the Constitutional Convention, records of the ratification of the 14th Amendment, and
other contemporaneous sources.” Any effort to shift back to citing cases should be swiftly halted. With such a rough going, the tenor of the debate would immediately change. These questions are especially critical given that the next nominee will fill the seat of Antonin Scalia, who ought to be canonized as the patron saint of originalism.

Unlike the “gotcha” questions that have marked recent hearings, these originalist questions are entirely fair game. Even the most qualified candidate could be embarrassed. His lack of preparation might reveal to the American people something meaningful about how he would go about making decisions once no longer controlled by stare decisis. The inquiring senators would make the seminal point that the Constitution is not just what five justices say it is—the Supreme Court does not have a monopoly on interpreting the document. If a nominee replies that these historical sources are not relevant, or not worthy of study (as federal court of appeals Judge Richard Posner recently asserted), then that is an entirely justifiable ground for voting against his confirmation.

As happened after the failed Bork nomination, if a hypothetical Judge Garland is sunk—or even wounded—by his lack of familiarity with the meaning of the Constitution’s text, all future nominees would seek to avoid the same embarrassment. The executive-branch lawyers managing the nomination would insist that the nominees become versed in the sort of originalist questions that our hypothetical Garland stumbled on. And maybe Senate lawyers will learn something in the process: that originalism is not as indeterminate as the professoriate would suggest, that more cases could be resolved by relying on this methodology, and that original meaning is often consistent with the outcomes of many of the canonical cases, such as Brown v. Board of Education.

Perhaps such an episode can become a “teaching moment” that would influence the judge’s jurisprudence once confirmed. Plus, the executive-branch attorneys selecting nominees will begin to inquire at the vetting stages about originalism—lest they avoid an embarrassing hypothetical-Garland moment. Who knows? Judges who seek elevation to the Supreme Court may even write originalist opinions as an audition for the big show. (This sort of historical education cannot be crammed into murder-board sessions; it takes a lifetime of study.) And if we dream big, we can even imagine law-school courses in constitutional law that actually teach law students and future judges something about the Constitution’s original meaning. (Oh well, we can dream.)
We don’t pretend all these results would follow such a change of hearing tactics, but the single act of a nominee embarrassing himself before the Senate Judiciary Committee will trickle down for generations to come to the so-called “Little Supremes” — that is, those who position themselves for future elevation. Even if only a few Republican senators do what is needed to restore the lost confirmation hearings by grilling a nominee on the text and history of the Constitution, Democrats just might respond in kind with a blend of left-of-center originalism. In this manner, a dialogue could begin. Senators and judges from across the jurisprudential spectrum on the biggest jurisprudential stage — the confirmation hearing — will engage and contest the original meaning of the Constitution. No longer would the hearings be reduced to vacuity and farce. No longer would they be dull. They all could be as riveting as the Bork hearings were.

Above all, such hearings would demonstrate the gravitational pull of originalism: Even where a non-originalist precedent exists, the tug of the original Constitution exudes an undeniable and irresistible force on our body politic. No nominee would be confirmable who expressly denied the relevance of the questions being asked. No candidate would be deemed qualified who was unable to answer them.

With the information revealed by such hearings, senators would be in a position to vote, as they did with Robert Bork, based on whether they agreed with the judicial philosophy of a nominee. In this way, restoring the lost confirmation hearings would go a long way to reviving the structural features of our republican Constitution.