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Carolyn Shapiro
Chicago-Kent College of Law

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WHAT MEMBERS OF CONGRESS SAY ABOUT THE SUPREME COURT AND WHY IT MATTERS

CAROLYN SHAPIRO*

INTRODUCTION

At Justice Neil Gorsuch’s Supreme Court confirmation hearing, Senator Charles Grassley, the Republican chair of the Senate Judiciary Committee, was the first to speak. His statement was a paean to the separation of powers and to the role of the judiciary in our constitutional system of government. Judges, he explained, play a “limited role. . . Judges are not free to re-write statutes to get results they believe are more just. . . [J]udges aren’t free to update the Constitution.”¹ He went on: “And when judges don’t respect this limited power, when they substitute their own policy preferences for those in the legislative branch, they take from the American people the right to govern themselves.”² Grassley did not mention any particular cases or legal issues during his speech. Rather, he confined himself to this general—and on its face, largely uncontroversial—description of the role of the judge, and he praised Gorsuch for understanding that role.

Senator Dianne Feinstein, the ranking Democrat on the Committee, spoke next. In contrast to Grassley, Feinstein used most of her time to talk about specific issues and cases that she was concerned about. She noted the authority that the Supreme Court has over whether women “will continue to have control over [their] own bod[ies],” over voting regulations and campaign finance, over environmental law, over gun regulation, over laws designed to protect workers, and over the continued vitality of *Chevron* deference.³ Towards the end of her remarks, Feinstein spoke a bit about judicial philosophy more broadly, in particular criticizing originalism as a

* Associate Professor of Law and Co-Director of the Institute on the Supreme Court of the United States (ISCOTUS), IIT Chicago-Kent College of Law. I would like to thank Christopher Schmidt for helpful comments, as well as participants in this Symposium. Additional thanks to Patrick Manion for excellent research assistance.

1. *Senate Committee on the Judiciary Hearing on the Nomination of Neil Gorsuch to Be Associate Justice of the U.S. Supreme Court*, FED. NEWS. SERV., Mar. 20, 2017, 2017 WLNR 8698078, at 3 [hereinafter *Gorsuch Hearing*, Mar. 20, 2017].

2. *Id.*

3. *Id.* at 5–7.

method of constitutional interpretation. Originalism, she argued, “ignore[s] the intent of the framers” that the Constitution be “a living document, intended to evolve as our country evolves.”⁴ She went on: “In fact, if we were to dogmatically adhere to originalist interpretations, then we would still have segregated schools and bans on interracial marriage. Women wouldn’t be entitled to equal protection under the law, and government discrimination against LGBT Americans would be permitted.”⁵

It was utterly predictable that Grassley would be supportive of Gorsuch’s nomination and that Feinstein would be skeptical. But there is an additional striking difference between their remarks—and it is a difference that typifies contemporary Republican versus Democratic discussions of the Court. Grassley’s remarks focused explicitly and exclusively on process and on constitutional design.⁶ Feinstein’s primary focus, on the other hand, was on results. Even when she talked about methods of constitutional interpretation and criticized originalism, she did so largely by arguing that a strict originalist approach would lead to unacceptable results.

Put another way, a key difference between Grassley and Feinstein was their use of “process language” to describe the role of the judiciary in general and the Supreme Court in particular. Process language focuses on what judges are supposed to do, how they are supposed to be constrained, and how the constitutional separation of powers is supposed to work. When Grassley said that judges can’t rewrite statutes, he was using process language. When politicians complain about judges imposing their personal views, they are using process language. There is nothing inherently liberal or conservative about process language. Indeed, during the *Lochner* era, the left often emphasized such rhetoric.⁷ In more recent years, however, the left has been relatively tepid about doing so, while such language, including explicit invocations of the Constitution, has become a staple of the political right.

This Article explores the implications of this different use of process language by the right and the left, using the Gorsuch hearing as a focal point. Part I briefly recounts a history of process language in confirmation hearings dating back to 1955. More specifically, this Part explains how and when senators on the political right have used such language during Supreme Court

4. *Id.* at 7.

5. *Id.* at 8.

6. The language he used is of course laden with implicit meaning readily understood by conservatives and liberals alike. See Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICKINSON L. REV. (forthcoming 2018) (manuscript at 66–68); see also *infra* text accompanying notes 15–22.

7. See Catherine Cook, *Legislating from the Bench*, HARV. POL. REV. (Mar. 3, 2009), <http://harvardpolitics.com/online/legislating-from-the-bench/> [<https://perma.cc/CR6K-HSHG>].

confirmation hearings to defend and describe their preferred results, to condemn other outcomes, and to signal substantive positions to political followers.

Part II then turns to Justice Gorsuch's confirmation hearing. This Part first analyzes the discussions of statutory interpretation during that hearing, comparing Democratic rhetoric about Gorsuch—being for the “big guy” over the “little guy”—to the Republican defense of his jurisprudence as being neutral and principled. I argue here that the Democrats could and should have criticized Gorsuch's textualism by focusing both on its selective application and on the ways that it distorts the relationship between the judiciary and the legislature. That approach would have allowed Democrats to couch their concerns not in terms of whether Gorsuch prefers the “big guy” or “the little guy,” but in terms of whether his textualism undermines Congress's own decisions about, for example, protecting workers—speaking directly to process and separation of powers concerns but without abandoning their focus on the important real-world effects of judicial decisions.

Part II then focuses on discussions about constitutional interpretation during the Gorsuch hearing, and it ties those discussions to the political right's claims about the Constitution. Republican senators and the nominee alike promoted an originalist vision that they claim is dictated by fidelity to the Constitution. Democrats pushed back, as they did in the statutory interpretation context, largely by pointing to unappealing decisions that an originalist might reach, but for the most part they did not offer an affirmative alternative. Here, too, I argue that the Democrats should not cede process language but should insist on the political and legal left's vision of the Constitution tied to its text, history, and principles. In conclusion, I argue that Democrats should see the confirmation hearings not only as an opportunity to question the nominee, but also as a chance to articulate their constitutional vision to the American people.

I. THE EDIFICE OF PROCESS

Process language does not have an intrinsic political valence. Legal scholars, commentators, and judges across the political spectrum talk about how the judiciary does and should function in our constitutional democracy.⁸

8. See, e.g., *Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of William P. Marshall, Kenan Professor of Law, University of North Carolina, Chapel Hill), <https://www.judiciary.senate.gov/imo/media/doc/03-23-17%20Marshall%20Testimony.pdf> [<https://perma.cc/UM4E-4KPE>] (critiquing originalism); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (defending the concept of a living constitution); *Hively v. Ivy Tech Cmty. Coll.*

But the political right has, at least in recent decades, used process language more persistently and effectively than has the left, as a history of Supreme Court confirmation hearings demonstrates. And despite its superficial neutrality, process language is often used to implicitly defend (or condemn) not just the methodology, but also the *outcomes*, of some judicial decisions.

A. Back to Brown

Process language featured prominently in the confirmation hearings that immediately followed *Brown v. Board of Education*.⁹ It was only after *Brown* that the Senate Judiciary Committee began to hold hearings that included the public testimony of every Supreme Court nominee. Not coincidentally, the chair of the committee was Senator James Eastland of Mississippi, a Southern Democrat and ardent segregationist, as were two other vocal members of the committee—Senators Sam Ervin of North Carolina and John McClellan of Arkansas. These senators dominated the early hearings.¹⁰

The segregationist senators saw the confirmation hearings as a chance to rail against *Brown*. But for the most part, their arguments did not explicitly focus on segregation. Instead, they criticized *Brown* as an example of unelected judges imposing their own views and, in effect, amending the Constitution. As Senator Ervin put it, in *Brown*, the Court improperly failed to “turn[] the clock back to 1868 when the [Fourteenth] Amendment was ratified” to determine the meaning of the Amendment at the time.¹¹ In other words, these senators couched their unhappiness with *Brown*’s holding in a critique of its methodology.

At the same time, these senators “conflated rejection of a judicial activism no nominee could or should defend—the right to change the meaning of the Constitution at whim—with a particular approach to constitutional interpretation—the (purported) originalism promoted by the segregationists.”¹² Senator Eastland, for example, asked Justice Harlan if he “believe[d] the Supreme Court of the United States should change established interpretations

of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc) (in series of opinions, debating appropriate methods of statutory interpretation).

9. 347 U.S. 483 (1954). For a more in-depth discussion of this history, see Shapiro, *supra* note 6, which this Part draws on.

10. See Shapiro, *supra* note 6, at 32 (noting that these three senators, along with Republican segregationist Strom Thurmond, who joined the committee in the mid-1960s, collectively asked seventy percent of all substantive questions during the hearings held between 1955 and 1969).

11. *Nomination of Potter Stewart to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 86th Cong. 128 (1959); *id.* at 125–28.

12. Shapiro, *supra* note 6, at 35.

of the Constitution to accord with the economic, political, or sociological views of those who from time to time constitute the membership of the Court?”¹³ Harlan, of course, said no.¹⁴

But the concerns these senators expressed about the appropriate role of the judiciary cannot be attributed solely, or even largely, to an *abstract* commitment to process, separation of powers, or originalism. As everyone understood, what excited them was that they did not like what the Court was deciding. The results mattered at least as much as the method.¹⁵ At a time when overt racism was beginning to fall out of favor, however, couching the criticism in process language allowed the segregationists to make claims that were facially unobjectionable while still telegraphing their pro-segregation views to their followers.¹⁶

13. *Nomination of John Marshall Harlan, of New York, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 84th Cong. 140 (1955) [hereinafter *Harlan Hearing*].

14. Specifically, Harlan said that he would set aside his “personal predilections so far as it is possible to do so and to decide issues before him according to the law and the facts and the Constitution.” *Id.* at 141; see Shapiro, *supra* note 6, at 35 & n.138 (describing this exchange). The conversation continued when “Eastland responded: ‘Of course, I knew you would answer it that way.’ He then followed with two other questions: Did Justice Harlan believe that the Court could change ‘established interpretations’ of the Constitution, given the difficulty of amending it through the means delineated in, and ‘is the legislative power as effectually denied to the courts of the United States by the Constitution as it is to the Executive?’ As Justice Harlan drily noted about the last question, the question ‘ought to carry its own answer[s].’” *Id.* at 35 n.138. (citation omitted) (quoting *Harlan Hearing*, *supra* note 13, at 141).

15. See PAUL M. COLLINS, JR. & LORI A. RINGHAND, *SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 167–68* (2013) (describing the evolution of discussions of *Brown* during the 1960s). These senators’ criticisms were not limited to *Brown*. As time passed, their focus shifted to other aspects of the Warren Court’s jurisprudence. Here, too, these senators, now often joined by Senator Strom Thurmond of South Carolina, complained about what they called judicial activism, defined by Senator Ervin as being “willing to add to the Constitution things that are not in it, and to subtract from the Constitution things which are in it.” *Nomination of Thurgood Marshall, of New York, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 155–56 (1967). And their critique of the Warren Court continued to include complaints about Justices legislating from the bench, or “rewrit[ing] . . . an act of Congress . . . which clearly violated the constitutional provision vested in the power of the legislating Congress.” *Nomination of Abe Fortas, of Tennessee, to Be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 129 (1968) (statement of Sen. Sam J. Ervin, Jr., Member, S. Comm. on the Judiciary). During the later years of the Warren Court, however, the unhappy senators also complained explicitly about the results and consequences of some rulings. See, e.g., *id.* at 133–34 (Sen. Ervin complaining about cases precluding government discrimination against members of the Communist party and about criminal procedure cases, like *Miranda v. Arizona*, 384 U.S. 436 (1966), that “have seriously handicapped our law enforcement officers in apprehending criminals, and our courts in administering criminal justice in such a fashion as to give to the victims of crime and society the same consideration which it gives to those charged with perpetrating crimes”).

16. Cf. Christopher W. Schmidt, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 297–98 (2014) (describing how Southern resistance to the civil rights movement shifted to facially race-neutral legal tactics because overt racism was no longer a winning political message).

B. Process Language Today

This use of process rhetoric to both mask and signal views about results continues today. Debate about *Roe v. Wade*¹⁷ provides a simple example. While some attacks on *Roe* are explicitly results-oriented—witness the pro-life movement writ large¹⁸—much of the legal right’s criticism of *Roe* focuses on the importance of judges not legislating, allowing the people and their elected representatives to make policy decisions, and not reading into the Constitution things that aren’t there.¹⁹

As a result, process language signals something to politically-engaged followers and observers. When a Republican presidential candidate, for example, promises to appoint Supreme Court Justices who will not “legislate from the bench,” the promise, on its face, appears to be one of principled restraint divorced from any particular outcome. But it is not lost on partisans on both sides that the candidate is promising to appoint someone who will rule against *Roe*.²⁰ Similarly, a Republican presidential candidate can complain that *Obergefell*,²¹ for example, was improper judicial legislation, thus focusing explicitly on process language while signaling his opposition to marriage equality.²²

Process language does not necessarily have to sound like what we hear from the political right, as I will explore further in Part II. But the right’s particular claims of principled restraint and neutrality dominate discussions

17. 410 U.S. 113 (1973).

18. See, e.g., Maria Gallagher, *Roe v. Wade Will Eventually Fall and Unborn Babies Will be Protected from Abortion*, LIFE NEWS.COM (Nov. 10, 2017, 7:16 PM), <http://www.life-news.com/2017/11/10/roe-v-wade-will-eventually-fall-and-unborn-babies-will-be-protected-from-abortion/> [<https://perma.cc/Y4U9-KD5K>].

19. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) (“Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State may permit abortion, nothing in the Constitution dictates that a State must do so.”).

20. Michael C. Dorf, *The Educational Function of Kabuki Confirmation Hearings*, JUSTIA: VERDICT (Mar. 22, 2017), <https://verdict.justia.com/2017/03/22/educational-function-kabuki-confirmation-hearings> [<https://perma.cc/7LV4-GJBF>] (describing Republican debate in which Governor Huckabee complained about Supreme Court Justices who “forgot that ‘the courts cannot legislate’”); Jeffrey Toobin, *In McCain’s Court*, NEW YORKER (May 26, 2008), <https://www.newyorker.com/magazine/2008/05/26/in-mccains-court> [<http://perma.cc/MK3W-8MJT>] (describing John McCain’s 2008 campaign speech on the judiciary); Peter Wallsten, *Abortion Foes Call Bush’s Dred Scott Reference Perfectly Clear*, L.A. TIMES (Oct. 13, 2004), <http://articles.latimes.com/2004/oct/13/nation/na-dred13> [<https://perma.cc/JP46-PLMN>] (describing George W. Bush’s 2004 campaign rhetoric about the Supreme Court).

21. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

22. See, e.g., *Wednesday’s GOP Debate Transcript, Annotated*, WASH. POST (Sept. 16, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/09/16/annotated-transcript-september-16-gop-debate/?utm_term=.e95c5896d0ca [<http://perma.cc/9VYM-FYWB>] (Governor Mike Huckabee complaining that the *Obergefell* majority was improperly legislating).

about the proper approach to judging. Moreover, as I have argued elsewhere, this rhetoric functions as a promise of neutrality that suggests not only that there is only one correct way of engaging in legal and constitutional analysis, but also that this approach necessarily leads to objectively correct and logically deducible outcomes to difficult legal questions.²³

This process language thus has implications not only for particular judicial nominees or for particular cases, but also for the legitimacy of judges and courts that reach results one disagrees with. At its worst, it suggests that judges who do not reach the “correct” results also used the wrong methods and so are lawless or illegitimate.²⁴ As Richard Primus recently noted in his response to a conservative proposal to pack the courts by dramatically increasing the number of federal judges, that proposal

depicts a judiciary that is populated, not by honorable judges who are appointed by Presidents of both parties and who often have good-faith disagreements, but by conservative judges on one hand and, on the other, Democratic-appointed judges who subvert the rule of law. In [this] view, the rule of law itself demands that Democratic appointees not be permitted to exercise judicial power.²⁵

The court-packing proposal Primus is criticizing may be extreme, but it is consistent with the implication that judges who do not reach the “correct” results should not be judges.

Finally, the process language embraced by the right has another important feature. The Constitution itself is at the center of the rhetoric. Look back at Senator Grassley’s statements at the opening of Justice Gorsuch’s hearing. He began by talking explicitly about the Constitution’s design and its “delicate balance of power . . . that ensures that liberty for the people will endure.”²⁶ Judges and justices who do not engage in the proper methodology, then, are worse than lawless—they are undermining the Constitution itself.

23. Shapiro, *supra* note 6, at 29–31.

24. Dorf, *supra* note 20 (noting that Republican candidates for office often describe judicial rulings they dislike as fundamentally illegitimate); Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill 3* (Nw. Univ. Pritzker Sch. of Law Public Law & Legal Theory Series, Working Paper No. 17-24, 2017) (attacking Fourth Circuit for producing “some of the most activist liberal opinions in recent years”); *id.* at 5 (attacking District of Columbia Circuit for its “rubber stamp approval” of administrative action and decision “to facilitate the lawlessness that has characterized the administrative state under Obama’s presidency”); see also Shapiro, *supra* note 6, at 34, 60–68 (describing implications of claiming some legal analysis as neutral and objective).

25. Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV.: BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/> [<https://perma.cc/KUG5-XLEH>] (discussing Calabresi & Hirji, *supra* note 24).

26. *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 2.

The political and legal right has had decades to build this edifice out of process language. But they have been aided by the political left's much less consistent use of such language. Indeed, at the early post-*Brown* hearings, the segregationist senators dominated the hearings while most senators said nothing.²⁷ There was little-to-no discussion of other possible approaches to constitutional interpretation or statutory construction by other members of the Senate Judiciary Committee.²⁸ Even more recently, as evidenced at the Gorsuch hearing, Democrats have approached their discussion of the Court's work with little explicit focus on process and much more on outcomes. But as I will discuss in the next Part, it does not have to be this way. It is both unnecessary and unwise for Democrats to cede so much process language to Republicans.

II. LEGISLATION, CO-EQUAL BRANCHES, AND THE CONSTITUTION

At and before the Gorsuch hearing, one of the key themes the Democrats pushed was that Judge Gorsuch favored “the big guy” over “the little guy.”²⁹ This line of attack was highly problematic—tactically, substantively, and strategically. Tactically, it was problematic in part because as a Court of Appeals judge, Gorsuch sat on more than 2700 cases.³⁰ With such an enormous number of cases, it was easy to find cases where he ruled for “the big

27. Shapiro, *supra* note 6, at 31–38.

28. One brief exception came at the end of Justice Brennan's hearing, when Republican Senator Alexander Wiley objected to Senator Eastland's insistence on originalism. The Constitution “is not a dead instrument. It is meant to keep America alive in the changing world in which we live. . . . [T]he Constitution is the charter of our lives and our privileges and our rights. However, it is not made to be a fetish. It is made to be a vital[,] dynamic thing to preserve those rights.” *Nomination of William Joseph Brennan, Junior, of New Jersey, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 85th Cong. 40 (1957).

29. See, e.g., Matt Flegenheimer, *Democrats Line of Attack on Gorsuch: No Friend of the Little Guy*, N.Y. TIMES (Mar. 13, 2017), https://www.nytimes.com/2017/03/13/us/politics/democrats-judge-gorsuch-confirmation-hearing.html?_r=0 [http://perma.cc/YF2F-4AP4]; *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 45 (statement of Sen. Mazie Hirono, Member, S. Comm. on the Judiciary) (“[A]s I have reviewed your opinions, I have not seen that the rights of minorities are a priority for you. In fact, a pattern jumps out at me[:] you rarely seem to find in favor of the little guy.”); see also, e.g., *id.* at 32 (statement of Sen. Al Franken, Member, S. Comm. on the Judiciary) (expressing fear that Gorsuch would sign onto “decisions that continue to favor powerful corporate interests over the rights of average Americans”); *id.* at 44 (statement of Sen. Hirono) (beginning her statement by noting that the hearing was about “more than considering a nominee for the Supreme Court, it’s about the future of our country. It’s about the tens of millions of people who work hard every day, play by the rules, but don’t get ahead. It’s about the working poor who are one paycheck away from being in the streets.”); *Senate Judiciary Committee—Hearing*, FED. NEWS SERV., Mar. 22, 2017, 2017 WLNR 8947139, at 68 [hereinafter *Gorsuch Hearing*, Mar. 22, 2017] (statement of Sen. Franken) (explaining that Democrats were “trying to really figure out whether we’re going to see a continuation of this pro-corporate bias and of this bias toward big money . . . where the weight shifts against the little guy and for the big guy”).

30. *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 56 (statement of Judge Neil Gorsuch) (noting that he had sat on more than 2700 cases).

guy”—but also easy to find cases where he ruled for “the little guy”—which of course Gorsuch and his defenders did.³¹ In fact, in one of the cases that Democrats were concerned about for another reason—Judge Gorsuch’s explicit skepticism about *Chevron* deference—the judge ruled against the United States government and in favor of an undocumented immigrant.³²

Substantively the “big-guy/little-guy” message was terrible because all judges sometimes rule for the big guy over the little guy. Sometimes that’s what the law requires.³³ So in this sense, the message the Democrats pushed was the opposite of the Republicans’ process language. This heavy focus on outcomes, especially without a consistent message about process and methodology, played to a caricature of Democrats wanting only results-oriented judging, not being willing to police the boundary between the legislature and

31. See, e.g., *id.* at 50 (statement of Sen. Cory Gardner) (noting a *Denver Post* article in which “a Denver attorney and Democrat” described appearing before Judge Gorsuch in two cases in each of which “he issued a decision that most certainly focused on the little guy”); *id.* at 57 (statement of Judge Gorsuch) (“I’ve decided cases for Native Americans seeking to protect tribal lands, for class actions like one that ensured compensation for victims of large nuclear waste pollution problem produced by corporations in Colorado. I’ve ruled for disabled students, for prisoners, for the accused, for workers alleging civil rights violations, and for undocumented immigrants.”); *Senate Committee on the Judiciary Hearing on the Nomination of Neil Gorsuch to Be Associate Justice of the U.S. Supreme Court*, FED. NEWS SERV., Mar. 21, 2017, 2017 WLNR 8821289, at 53 [hereinafter *Gorsuch Hearing*, Mar. 21, 2017] (statement of Judge Gorsuch) (“And if we’re going to pick and choose cases, out of 2,700, I could point you to so many in which I have found for the plaintiff in an employment action or affirmed a finding of an agency of some sort, for a worker or otherwise.”); *id.* at 81 (statement of Sen. Michael S. Lee, Member, S. Comm. on the Judiciary) (referring to a case in which Judge Gorsuch ruled in favor of a trucker who was fired for refusing to operate a vehicle because of safety concerns).

32. In *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1132 (10th Cir. 2016), Judge Gorsuch wrote a unanimous opinion rejecting a Bureau of Immigration Appeals conclusion that an undocumented immigrant had to spend at least ten years outside the United States before he could ask the Attorney General to grant him legal status. *Id.* at 1144–45. Separately, and only on his own behalf, he wrote a lengthy concurrence calling into question the constitutionality of *Chevron* deference. *Id.* at 1149–58. He wrote: “There’s an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.” *Id.* at 1149. At his hearing, however, Judge Gorsuch explained this concurrence by saying that his “job as a circuit judge is when I see a problem, I tell my bosses about it. Like any good employee.” *Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 87. He refused to say whether he actually agreed with the implications of his *Gutierrez-Brizuela* concurrence. *Id.*

33. See, e.g., Noah Feldman, *Democrats’ Misguided Argument Against Gorsuch*, BLOOMBERG VIEW (Mar. 15, 2017, 7:30 AM), <https://www.bloomberg.com/view/articles/2017-03-15/democrats-misguided-argument-against-gorsuch> [http://perma.cc/M9M8-8366]. Republican senators were eager to make this point during the hearings. See, e.g., *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 14 (statement of Sen. John Cornyn, Member, S. Comm. on the Judiciary) (“[I]f you follow the laws and the facts wherever it [sic] might lead, sometimes it’s for the police, sometimes for a criminal defendant, sometimes it’s for a corporation. Sometimes it’s for an employee. Sometimes it’s for the government. Sometimes it’s against the government.”); *id.* at 19 (statement of Sen. Lee) (predicting that Democrats on the Committee would “pick apart some of your rulings and they’ll try to say that you’re hostile to particular types of claims or to particular plaintiffs”); *id.* at 39 (statement of Sen. Jeff Flake, Member, S. Comm. on the Judiciary) (stating that “[g]ood judges don’t decide cases based on how big the guy is, but based on the law and the facts” and quoting Noah Feldman).

the judiciary, and not caring at all about process values.³⁴ In his opening speech, for example, Senator Orrin Hatch explained that “[a]n impartial judge focuses on the process of interpreting and applying the law according to objective rules. In this way, the law rather than the judge determines the outcome.”³⁵ In contrast, expressly citing the Democrats’ “no friend of the little guy” arguments, he accused Gorsuch’s opponents as seeking “a politicized judiciary.”³⁶ As he explained, “[a] political judge . . . focuses on a desired result and fashions a means of achieving it. In this way, the judge rather than the law often determines the outcome.”³⁷

These arguments demonstrate why the Democratic message was strategically problematic. Republicans were able to continue to signal to their faithful that they were trying to ensure outcomes their base would like but, at the same time, could maintain the claim that Gorsuch’s critics lacked a principled approach to judging.³⁸ And the Democratic failure to engage in process rhetoric was also a strategic missed opportunity. There was virtually no question that they could have asked or statement they could have made that would have led to a different outcome to Judge Gorsuch’s nomination.³⁹ Especially given that reality, they could have and should have taken advantage of the opportunity to present their alternative vision of the Constitution and the role of the judiciary to the American people.⁴⁰

34. Ilya Shapiro, Opinion, *Day One of the Neil Gorsuch Hearings Was Not About Neil Gorsuch*, WASH. EXAMINER (Mar. 21, 2017, 12:30 AM), <http://www.washingtonexaminer.com/day-one-of-the-neil-gorsuch-hearings-was-not-about-neil-gorsuch/article/2617950> [https://perma.cc/XXL9-N3EV] (asserting that the Democrats’ “results-oriented foofaraw was really quite astonishing”); Roger Pilon, Foreword, *Judicial Confirmations and the Rule of Law*, 2016–2017 CATO SUP. CT. REV., at ix, xvi, xviii (describing Democratic senators as being explicitly interested in results instead of law).

35. *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 8.

36. *Id.*

37. *Id.*; see also *id.* at 28–29 (statement of Sen. Ted Cruz, Member, S. Comm. on the Judiciary) (“Some people view the court as a hyper powerful political branch. When they grow frustrated with the legislative process and the will of the people, they turn to the courts to try to see their preferred policies enacted. For conservatives, we understand the opposite is true. We read the Constitution and see that it imbues the federal judiciary with a much more modest role than the left embraces. Judges are not supposed to make law. They are supposed to faithfully apply it.”). The same argument was made outside the hearing room. See, e.g., Pilon, *supra* note 34, at x.

38. See, e.g., *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 29 (statement of Sen. Cruz) (arguing that had Barack Obama or Hillary Clinton appointed Justice Scalia’s successor, “Scalia’s legacy would have been in grave danger” and there would have been a “new activist Supreme Court”).

39. See Will Baude, *A Note on Why Judicial Nominees Do Not Answer More Questions*, WASH. POST.: VOLOKH CONSPIRACY (Mar. 21, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/21/a-note-on-why-judicial-nominees-do-not-answer-more-questions/?utm_term=.3fa450fec5d0 [http://perma.cc/L68D-9LRN].

40. Cf. Dorf, *supra* note 20 (arguing that one benefit of confirmation hearings, including the Gorsuch hearings, is that a member of the public watching them “might learn that there is a robust debate about how to interpret the Constitution and federal statutes”); Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 466 (noting that the hearings’ “educational function may

A. Making Statutes Constitutional

Nowhere was the dichotomy between Democratic and Republican rhetoric starker than in discussions of the courts' role in statutory interpretation. Republican senators and Judge Gorsuch embraced textualism, explaining it as required by their commitment to the constitutionally-mandated separation of powers and by democratic values. Senator Lee, for example, read what he said as an op-ed encouraging confirmation: "Judge Gorsuch's opinions reflect the principle Justice Scalia spent his career defending. That in a democracy, the people[']s elected representatives, not judges[,] get to decide what the laws should be—what laws we should have."⁴¹

Senator Cornyn followed suit. "Well what sort of escapes me is if people who argue somehow that judges aren't bound by the text of the statute," he said, "it is the text of a statute that Congress votes on. So how in the world, if it's something else other than the text, that ought to direct the outcome, how can anybody have that kind of fair notice that we depend on . . . ?"⁴² Judge Gorsuch himself made similar statements. In his opening statement, for example, he explained that "it's for this body, the people[']s representatives, to make new laws, for the executive to ensure those laws are faithfully executed, and for neutral and independent judges to apply the law in the people[']s disputes."⁴³

All of these arguments, whether made by Republican senators or by Judge Gorsuch himself, incorporate a claim of fidelity to the Constitution into the discussion of how statutes should be interpreted and applied. Democrats could have and should have similarly focused their own statutory arguments more robustly on process rhetoric and constitutional questions. And they could have done so while maintaining focus on the consequences of court decisions for real people. More specifically, Democrats could have pointed out more aggressively than they did that some uses of textualism can actually undermine Congress's lawmaking authority, especially when it seems to mask a judge's own ideological agenda.

be paramount"); *see also* Shapiro, *supra* note 6, at 68–71 (arguing for using the hearings to promote the idea that deciding difficult legal questions is not an objective or neutral enterprise).

41. *Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 76.

42. *Id.* at 68. There are numerous other examples. *See, e.g., Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 44 (statement of Sen. Thom Tillis, Member, S. Comm. on the Judiciary) ("The activists are us. We get elected. We go out to the people, we convince them we want to make changes, we pass laws. Your job is to interpret them as a judge. And I believe that you [told] me that you fully understood that your role fell squarely within Article [III] and then mine fell squarely within Article [I], and you saw the very bright line between the two. . . . [Y]our quote was, 'It is for Congress and not the courts to write new laws. It is the role of judges to apply, not alter, the work of the people's representatives.'"); *id.* at 28–29 (statement of Sen. Cruz).

43. *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 56.

This missed opportunity was exemplified by the repeated discussions of *TransAm Trucking, Inc. v. Administrative Review Board, U.S. Department of Labor*,⁴⁴ better known as the “frozen trucker case.” *TransAm*, a case from Judge Gorsuch’s tenure on the Tenth Circuit, was a *cause celebre* for Democrats during the hearing.⁴⁵ The facts were compelling. A trucker, Alphonse Maddin, employed by TransAm, was driving through Illinois in subzero temperatures when the brakes on the trailer he was pulling froze. He reported the problem to TransAm and, following the company’s instructions, waited for repair assistance for more than two hours. Unfortunately, the truck’s heater was broken; he began feeling numb and was having difficulty breathing. Concerned for his safety, Maddin called his supervisor, who told him either to wait or to drive the truck with its full trailer. But Maddin believed that he was at risk of freezing if he stayed in the truck and he believed that driving the full trailer with its frozen brakes would be dangerous. He unhooked his cab and drove away, leaving the trailer and its cargo behind, against the orders of his supervisor. TransAm fired him.

The issue in the case was whether Maddin had been unlawfully fired under the federal Surface Transportation Assistance Act (STAA). The Tenth Circuit held, in a 2–1 opinion, that the relevant federal agency properly found that Maddin should not have been fired. Specifically, the court invoked a provision of the STAA that “makes it unlawful for an employer to discharge an employee who ‘refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition.’”⁴⁶ Judge Gorsuch dissented.

The disagreement between the *TransAm* majority and Judge Gorsuch turned on the word “operate.” TransAm argued that Maddin had not “refused to operate” the truck because he had, in fact, driven the cab away. The majority concluded, however, that the word readily carried a meaning consistent with a variety of different ways an employee might use a vehicle.⁴⁷ The court observed that its reading was consistent with the express statutory purpose,

44. 833 F.3d 1206 (10th Cir. 2016).

45. See, e.g., *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 45 (statement of Sen. Hirono) (discussing *TransAm*).

46. *TransAm Trucking, Inc.*, 833 F.3d at 1211 (quoting 49 U.S.C. § 31105(a)(1)(B)(ii) (2015))

47. The court explained that “the refusal-to-operate provision could cover a situation in which an employee refuses to use his vehicle in the manner directed by his employer even if that refusal results in the employee driving the vehicle.” *Id.* at 1211–12. For example, “an employee who partially unloads an overweight trailer in direct contravention of his employer’s instruction to continue pulling the overweight trailer on the public roadways, has refused to operate the vehicle for purposes of the STAA even if the employee completes the trip after unloading the trailer.” *Id.* at 1212 (citing *Beveridge v. Waste Stream Evtl., Inc.*, ARB No. 97-137, ALJ No. 97-STA-15, 1997 WL 806522, at *1 (ARB Dec. 23, 1997)).

which Congress had included in the law itself, to “promote the safe operation of commercial motor vehicles,” “to minimize dangers to the health of operators of commercial motor vehicles,” and “to ensure increased compliance with traffic laws and with . . . commercial motor vehicle safety and health regulations and standards.”⁴⁸ And it pointed to “a dictionary definition of the word ‘operate’ . . . [as] mean[ing] to ‘control the functioning of.’”⁴⁹ The court concluded that “[t]his definition clearly encompasses activities other than driving.”⁵⁰

In dissent, Judge Gorsuch argued that the statute necessarily carried a different meaning. The dictionary definition he relied on defined “operate” as “[t]o cause or actuate the working of; to work (a machine, etc.).”⁵¹ Thus, he concluded, because Maddin had driven the cab away, he had operated it, instead of refusing to operate it, and was thus unprotected by the statute. In addition, because Judge Gorsuch found the word “operate” to be plain and unambiguous, he declined to look to statutory purpose, which he described as an “ephemeral and generic” concern for “health and safety.”⁵² He did not address the more specific concerns related to truck drivers that Congress included in the statute itself.

Finally, Judge Gorsuch noted that even were the statutory purpose clear, it was a mistake to assume that Congress intended to pursue that purpose to its “absolute and seemingly logical ends.”⁵³ Legislating involves compromise and negotiation, he said, and “it is our obligation to enforce the terms of that compromise as expressed in the law itself, not to use the law as a sort of springboard to combat all perceived evils lurking in the neighborhood.”⁵⁴ He went on to speculate about various explanations for Congress’s failure to address Mr. Maddin’s circumstances:

Maybe Congress found it easier to agree that an employee has a right to sit still in response to his employer’s order to operate an unsafe vehicle rather than try to agree on a code detailing when and how an employee can operate a vehicle in a way he thinks safe and appropriate but his employer does not. Maybe Congress would not have been able to agree to the

48. *Id.* (quoting 49 U.S.C. § 31131(a)).

49. *Id.* at 1212 n.4 (quoting *Operate*, OXFORD DICTIONARIES PRO, http://www.oxforddictionaries.com/us/definition/american_english/operate [<http://perma.cc/Z9KP-SLE5>]).

50. *Id.*

51. *Id.* at 1216 (Gorsuch, J., dissenting) (quoting 10 THE OXFORD ENGLISH DICTIONARY 848 (2d ed. 1989)).

52. *Id.* at 1217. An additional underlying disagreement between the majority and Judge Gorsuch was whether the administrative agency was entitled to any deference in interpreting the statute. *Id.* at 1212 (majority opinion); *id.* at 1216 (Gorsuch, J., dissenting).

53. *Id.* at 1217.

54. *Id.*

latter sort of code at all. Or maybe it just found the problem too time consuming and other matters more pressing. Or maybe it just didn't think about the problem at all.⁵⁵

The main Democratic message about this case was that it was a prime example of Gorsuch's disregard for "the little guy."⁵⁶ This intense focus almost exclusively on the outcome of the case, however, served to reinforce the Republicans' process language. Republicans could shake their heads sadly at Mr. Maddin's plight while arguing that Judge Gorsuch's unwillingness to be swayed by the sad facts of the case demonstrated his unwavering commitment to the rule of law, the proper role of the judge, and the constitutionally required separation of powers.⁵⁷

There are other ways the Democrats could have talked about *TransAm* that are just as process-oriented as the approach taken by the Republicans, while also acknowledging the real-world consequences of the decision. Rather than argue primarily that Gorsuch's dissent was callous, the Democrats could and should have argued, like the majority in that case, that it was wrong on its own terms. As Justice Scalia himself explained, textualism is not the same thing as "strict constructionism."⁵⁸ The appropriate reading of a statute is not necessarily the one that reads the language as narrowly as possible.

Statutory purpose and textual context matter. Here, *the statute itself contained a congressional statement of purpose*. And that statement was not the "ephemeral and generic" desire to protect health and safety that Judge Gorsuch dismissed as, essentially, the justification for all statutes and thus not useful. Rather, Congress articulated a specific purpose to protect the health and safety of particular workers in a particular industry with particular dangers—and to preserve the safety of the roadways. Indeed, some senators noted this. Senator Hirono, for example, briefly pointed to this flaw in Judge

55. *Id.*

56. See, e.g., *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 42 (statement of Sen. Richard Blumenthal, Member, S. Comm. on the Judiciary) (noting his concern about what Gorsuch's opinion in *TransAm* meant for his approach to "broader issues . . . in worker's safety and consumer protection"); *Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 102 (statement of Sen. Franken) (insisting that Gorsuch address what he would have done in the position of the trucker); *Gorsuch Hearing*, Mar. 22, 2017, *supra* note 29, at 28 (statement of Sen. Dick Durbin, Member, S. Comm. on the Judiciary).

57. See, e.g., *Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 80 (statement of Sen. Lee) (praising Judge Gorsuch for recognizing that he was "bound by the law" even where he might conclude that "the law is an ass"); *id.* at 169 (statement of Sen. Tillis) ("[Y]ou are not here to have heart. You [are] here to judge the law, you're here to judge the Constitution, and I appreciate that about you because I suspect you've got a really big heart.").

58. Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *The Tanner Lectures on Human Values at Princeton University* 98 (Mar. 8 & 9, 1995), https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf [<https://perma.cc/RBX6-W8FT>] ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.").

Gorsuch's *TransAm* dissent. She argued that Gorsuch had "fixated on the plain meaning of the word operate despite choosing a definition out of context and using it odds with the clear purpose of the statute."⁵⁹

Ignoring the "clear purpose of the statute" should be understood to raise just as many constitutional concerns as does "rewriting" it, and that is an argument Democrats should have pushed. As Senator Hirono explained, "if judges are gonna work this hard to strain the . . . text of a law to undermine the purpose, which was for . . . safety . . . that makes it pretty tough for any laws that Congress passes or will pass to really be effective in protecting American workers."⁶⁰ If the judiciary's job is to defer to Congress's decisions about "what the laws should be—what laws we should have,"⁶¹ then it is important for courts to try to give effect to those decisions.⁶² Unearthing a dictionary definition that allows for a particularly crabbed reading of the STAA is not consistent with that role.

This argument also directly responds to the notion that Gorsuch's dissent was respectful of separation of powers and the judicial role. Indeed, the Democrats could have explained in more detail that his approach would have undermined the law Congress passed, and his hypothesizing about what might have happened during its enactment should not have superseded the statutory purpose that Congress included in the law itself.

Democrats also could have more explicitly and persistently used the *Trans-Am* case as an example of how textualism can be a smokescreen, conscious or not, for a judge imposing his own ideology. Senator Hirono again pointed the way, arguing that Judge Gorsuch had gone to "great lengths to disagree with [his] colleagues on the Tenth Circuit so that [he] can explain . . . some obscure or novel[] . . . interpretation of a particular word in [a] statu[te]," putting "ideology over common sense."⁶³

59. *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 45. Senator Hirono's statement, however, came in the middle of a much longer discussion about Gorsuch's mistreatment of the "little guy." *Id.* at 45–46; *see also Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 53 (statement of Sen. Durbin) ("We had a pretty clear legislative intent for a driver who feels he's endangering his life perhaps, and you dismiss it.").

60. *See, e.g., Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 157.

61. *Id.* at 76 (statement of Sen. Lee).

62. Justice Breyer has made this argument explicitly and in some detail, arguing that judges should focus on purpose and consequences in statutory interpretation. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 88–105 (2010) [hereinafter BREYER, DEMOCRACY]; *id.* at 102 ("A court that looks to purposes is a court that works as a partner with Congress.").

63. *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 45.

These critiques of textualism are hardly new. Moreover, as critics of textualism argue, it is very hard to pass a law, so the kind of “statutory dialogue” between courts and the legislature that Gorsuch praised⁶⁴ is unrealistic in all but the most high-profile of cases, and Congress can’t realistically write detailed codes that account for every conceivable factual circumstance. As a result, the courts can permanently hobble a law by misreading it. And turning law into a game of “gotcha” undermines democratic accountability.⁶⁵ My point here is not to rehash these arguments about textualism, but to suggest that they can, and should, play an important role in the rhetoric surrounding confirmation hearings.

Indeed, it is notable just how little time senators of either party spent during the Gorsuch hearing attempting to defend Congress’s authority. When Democratic senators raised concerns about *Shelby County v. Holder*, in which the Roberts Court rejected Congress’s factual determinations as insufficient to support the application of section 5 of the Voting Rights Act to certain jurisdictions,⁶⁶ they appropriately focused on the admittedly profound results and impact of that decision.⁶⁷ But they did not also emphasize that the *Shelby County* majority exhibited no deference for congressional factfinding and policy judgments about how to enforce constitutional rights.⁶⁸ In contrast, during Chief Justice Roberts’s confirmation hearing, two *Republican* senators complained that the Rehnquist Court had rejected Congress’s decision, on the basis of an extensive factual record, to abrogate states’ Eleventh Amendment immunity under the Americans with Disabilities Act.⁶⁹

Separation of powers is not intrinsically a liberal or a conservative idea. Democrats should not fail to respond when nominees or Republican senators claim that only one particular approach to statutory interpretation properly respects that principle, and they should explicitly resist the suggestion that only the conservative approaches (and results) are consistent with the rule of

64. *Id.* at 56.

65. *Cf.* BREYER, *DEMOCRACY*, *supra* note 62, at 94–96.

66. 570 U.S. 529 (2013).

67. *See Gorsuch Hearing*, Mar. 22, 2017, *supra* note 29, at 100–01, 142–43 (statement of Sen. Hirono); *id.* at 128–29 (statement of Sen. Franken).

68. Senator Franken did complain about some of Justice Scalia’s comments about Congress during oral argument, saying that they exhibited “a contempt for Congress” and “a willingness to engage in . . . judicial activism.” *Id.* at 128.

69. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 217–21 (statement of Sen. Mike DeWine, Member, S. Comm. on the Judiciary); *id.* at 355–56 (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary).

law.⁷⁰ More specifically, Democrats should ground their arguments about the role of judges and courts in the Constitution's implicit promise of a functional and responsive government.⁷¹ The Constitution belongs to us all, and as the next subpart also explores, Democrats should insist on that.

B. The Shared Narrative of the Constitution

During Justice Gorsuch's hearing, the nominee and Republican senators defended originalism as the only legitimate method of constitutional interpretation. Specifically, they argued that the role of the judiciary is to identify and remain true to the original public meaning of the document and amendments.⁷² But of course originalism has been extensively criticized as, for example, inconsistent with the Framers' intent, as fatally indeterminate, and as allowing judges to mask the inevitable value-laden judgments they make behind ostensibly neutral rhetoric; there are other principled approaches to interpreting and applying the Constitution.⁷³

As with textualism and statutory interpretation, it is not my goal to rehash these arguments here. But also as with statutory interpretation, the Democratic responses to the Republicans' originalist claims during the Gorsuch hearing often missed opportunities to claim their own fidelity to the rule of law and the Constitution. Democratic senators' questions and statements tended to focus on case law and outcomes, asking whether, for example, Judge Gorsuch agreed with the outcome in seminal cases like *Brown v. Board of Education*, but without explicitly tying those cases to the Constitution itself. And again, this approach unnecessarily ceded the rhetoric of both judicial process and constitutional fidelity to the political right.

One example of this pattern is found in Senator Blumenthal's extended attempt to get Judge Gorsuch to say whether he thought that a number of key cases, including *Brown*, *Griswold v. Connecticut*,⁷⁴ *Loving v. Virginia*,⁷⁵ and

70. See Calabresi & Hirji, *supra* note 24; Primus, *supra* note 25.

71. BREYER, *DEMOCRACY*, *supra* note 62, at xii (explaining the Framers' vision of a "workable democracy").

72. See, e.g., *Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 88–89 (statement of Judge Gorsuch); *Gorsuch Hearing*, Mar. 22, 2017, *supra* note 29, at 72–73 (statements of Sen. Ben Sasse, Member, S. Comm. on the Judiciary, and Judge Gorsuch).

73. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239 (2009); STRAUSS, *supra* note 8, at 7–31; BREYER, *DEMOCRACY*, *supra* note 62, at 76–79.

74. 381 U.S. 479 (1965).

75. 388 U.S. 1 (1967).

Lawrence v. Texas,⁷⁶ were rightly decided.⁷⁷ Even as to *Brown*, Judge Gorsuch resisted answering directly, insisting repeatedly that the cases were precedents of the United States Supreme Court. But throughout the discussion, Senator Blumenthal made no assertions about *why* the Constitution required the results in those cases. Blumenthal probably assumed that most Americans, and certainly most Democrats, agree with the outcomes of those cases—but explaining why they are required by the Constitution – and why some originalists might say otherwise—would have added rhetorical and political heft to his argument.

Or consider Senator Klobuchar’s questions to Judge Gorsuch about originalism. She began by pressing him on whether he agreed with Chief Justice Marshall in *McCulloch v. Maryland* that the Constitution must “be adapted to the various crises of human affairs.”⁷⁸ Judge Gorsuch explained that in his view, “the Constitution doesn’t change, the world around us changes and we have to understand the Constitution and apply it in light of our current circumstances.”⁷⁹ Senator Klobuchar went on to ask him a series of questions about issues in which the language and original meaning of the Constitution would lead to results that most Americans would consider bizarre—whether the Air Force is constitutional, for example, or whether a woman can be President.⁸⁰ Although Judge Gorsuch was often very cagey about answering questions about particular issues—witness his refusal to respond directly to Senator Blumenthal—he did acknowledge that a woman can be President and he said that “the generals of the Air Force can rest easy.”⁸¹

Senator Klobuchar’s point was an important one about what she called “selective originalism.”⁸² Sometimes judges who claim to be originalists insist on the original public meaning of the language of the Constitution, but sometimes they do not.⁸³ The point would have been stronger, however, if she or other Democrats had more forcefully made claims about how judges *should* interpret and apply the Constitution, and why the questions she asked Judge Gorsuch demonstrate the limits of originalism.

76. 539 U.S. 558 (2003).

77. See *Gorsuch Hearing*, Mar. 22, 2017, *supra* note 29, at 88–93.

78. *Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 88.

79. *Id.*

80. *Id.* at 88–90.

81. *Id.* at 89.

82. *Id.* at 90.

83. *Id.* *Brown* itself is an excellent example of this reality. Segregated schools were common and uncontroversial when the Fourteenth Amendment was enacted. See STRAUSS, *supra* note 8, at 12, 78 (explaining this history).

A final example comes from one of Senator Feinstein's question to Judge Gorsuch. She asked him if he "agree[d] with Justice Scalia's statements that . . . originalism means there is no protection for women or gays or lesbians under the Equal Protection Clause because this was not the intent or understanding of those who drafted the 14th Amendment in 1868?"⁸⁴ Judge Gorsuch responded by saying that the language of the clause controls and that the intentions of the drafters "matter[] not a whit" because "[t]he law they drafted promises equal protection of the laws to all persons."⁸⁵ And he added that this promise "is maybe the most radical guarantee in all of the Constitution and maybe in all of human history."⁸⁶

Gorsuch's claim here is one that Democrats should have embraced and expanded on; it articulates a vision of the Constitution that they can and do champion.⁸⁷ The rest of Senator Feinstein's questions in this exchange, however, focused largely on her concerns about how Gorsuch would rule on abortion rights and, to a lesser extent, the right to refuse medical treatment.⁸⁸ These are important issues. But they returned to a focus largely on results. Senator Feinstein did not talk explicitly about what the Constitution itself requires, about its decidedly imperfect but aspirational origins, or about its ongoing evolution.

The Democrats could and should have pressed a vision that portrays the Constitution as an aspirational and inspirational document that was deeply flawed not only as originally drafted, but also as originally applied.⁸⁹ They can and should insist on constitutional commitments to equality and liberty, tying them directly to the cases, like *Brown*, *Griswold*, *Loving*, and *Lawrence*, as well as *Roe* and *Obergefell*, about which Judge Gorsuch demurred.⁹⁰ Democrats can also point to other important constitutional values—in particular to the Constitution's creation and preservation of a national polity and to its commitments about how to resolve political disagreements without violence. And they can articulate principled and constrained

84. *Gorsuch Hearing*, Mar. 22, 2017, *supra* note 29, at 10.

85. *Id.*

86. *Id.* at 11.

87. See, e.g., *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 2–3 (2010) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary) (describing aspirational and imperfect nature of Constitution and its historical development).

88. *Gorsuch Hearing*, Mar. 22, 2017, *supra* note 29, at 11–13.

89. See, e.g., BREYER, *DEMOCRACY*, *supra* note 62, at 32–48 (discussing *Dred Scott*).

90. See, e.g., *Gorsuch Hearing*, Mar. 21, 2017, *supra* note 31, at 107 (Justice Gorsuch demurring on *Roe* in colloquy with Sen. Franken); *id.* at 163 (demurring on *Obergefell* in colloquy with Sen. Hirono); *Gorsuch Hearing*, Mar. 22, 2017, *supra* note 29, at 76–81 (in colloquy with Sen. Coons, demurring on all cases noted and other cases discussed earlier in this Article).

approaches to constitutional interpretation that are animated by these values and commitments and consistent with the rule of law.⁹¹ That's process language, and it appropriately refuses to concede either the rhetoric or reality of constitutional fidelity to the political right.

CONCLUSION

Commitment to the rule of law and to the Constitution are potent themes in Supreme Court confirmation hearings. And there is reason to believe both that the American people pay attention to the hearings and that they share those commitments.⁹² But as the Gorsuch hearing illustrates, Democrats have recently allowed Republicans to suggest, and sometimes to say explicitly, that only the right has a principled approach to constitutional decisionmaking.

This is a dangerous mistake. Americans may understand and accept that Supreme Court Justices exercise discretion, and even that this discretion is informed by ideology, but they also appropriately expect that discretion to be exercised in a principled manner.⁹³ Democratic senators should therefore be prepared to discuss the many principled objections and alternatives to the textualism and originalism often claimed by the right. Democrats should reject the notion that only one approach is consistent with the rule of law. And they should do this even (or especially) when, as with Justice Gorsuch, Senate confirmation is inevitable.

The hearings are a chance to speak to the American people about the Constitution. And Democrats should not underestimate the importance of the

91. See, e.g., *id.* at 80–87 (setting forth Justice Breyer's "pragmatic approach"); STRAUSS, *supra* note 8, at 33–49 (explaining common law constitutionalism).

92. In a study of the Alito hearings, 51.9 percent of survey respondents followed the Alito confirmation process "either very or somewhat closely" and only 22.2 percent said that "they paid relatively little attention to the process." JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 71 (2009); see also Shapiro, *supra* note 6, at 64–65 (discussing Gibson and Caldeira's study).

93. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 *LAW & SOC'Y REV.* 195, 214 (2011) (finding, in a national representative survey, that "the American people seem to accept that judicial decisionmaking can be discretionary and grounded in ideologies, but also principled and sincere"). Even more recently, Gibson and another co-author have found that Americans' views of the Supreme Court are negatively affected by what they perceive as the politicization of the Court, which is distinct from the appropriate role of principled discretion. See also James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 *J. EMPIRICAL LEGAL STUD.* 592, 612–13 (2017) (finding that Americans distinguish between principled discretion and appropriate politicization); Shapiro, *supra* note 6, at 64–66 (discussing Gibson and co-authors' findings and implications).

Constitution itself as a political and cultural symbol.⁹⁴ Indeed, they should embrace their commitment to what Senator Coons called “our nation’s secular scripture.”⁹⁵ No less than the political right, the left has a story to tell about the Constitution. And at this time of political polarization, trying to find at least a partially shared story, with the Constitution at the center, may be necessary for the ongoing vitality of our imperfect and deeply aspirational democratic enterprise.

94. Cf. Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 533–39 (2011) (describing centrality of the Constitution to the Tea Party’s rise).

95. *Gorsuch Hearing*, Mar. 20, 2017, *supra* note 1, at 37.