

JUDICIAL CONFIRMATION THROUGH THE LENS OF  
CONSTITUTIONAL INTERPRETIVE THEORY

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INTRODUCTION

The vacancy on the Supreme Court left by Justice Antonin Scalia's death loomed large throughout the bitter and divisive 2016 presidential election. Once it became clear that Republican senators would not act on President Obama's nomination of D.C. Circuit Judge Merrick Garland, all eyes turned to the two presidential nominees for an indication of what the new Court would look like.<sup>1</sup> Mere hours after the election was called for President Donald Trump, news articles began to hypothesize about what this might mean for the future of the Supreme Court.<sup>2</sup> And with an aging Court, there is a strong possibility that the new President will have additional opportunities to nominate more Justices.<sup>3</sup>

During the campaign, Trump promised to appoint a Supreme Court Justice "in the mold of" Justice Scalia.<sup>4</sup> As proof of this

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<sup>1</sup> See Adam Liptak, *What the Trump Presidency Means for the Supreme Court*, N.Y. TIMES (Nov. 9, 2016), [https://www.nytimes.com/2016/11/10/us/politics/trump-supreme-court.html?\\_r=0](https://www.nytimes.com/2016/11/10/us/politics/trump-supreme-court.html?_r=0).

<sup>2</sup> See, e.g., Matt Ford, *What Lies Ahead for the Supreme Court in a Trump Administration?*, ATLANTIC (Nov. 10, 2016), <http://www.theatlantic.com/politics/archive/2016/11/trump-scotus/507212/> (hypothesizing that the next Justice would be a substitute for Antonin Scalia); Liptak, *supra* note 1 (speculating about a conservative nominee); Jeff John Roberts, *Trump and the Supreme Court: 5 Big Questions*, FORTUNE (Nov. 10, 2016), <http://fortune.com/2016/11/10/trump-supreme-court/> (proposing five questions that should be asked regarding the future of the Supreme Court); David G. Savage, *Trump's Victory Ensures a Conservative Majority on the Supreme Court*, L.A. TIMES (Nov. 9, 2016), <http://www.latimes.com/nation/la-na-trump-supreme-court-20161109-story.html> (hypothesizing that Republicans would maintain control of the Senate); Joseph P. Williams, *Who Will Donald Trump Nominate to the Supreme Court?*, U.S. NEWS (Nov. 11, 2016), <http://www.usnews.com/news/politics/articles/2016-11-11/who-will-donald-trump-nominate-to-the-supreme-court> (hypothesizing the return of a 5-4 conservative majority to the Court).

<sup>3</sup> See Liptak, *supra* note 1.

<sup>4</sup> See Lawrence Hurley & Steve Holland, *Trump's Conservative Supreme Court Nominee Gorsuch Seen in the Mold of Scalia*, AOL NEWS (Feb. 1, 2017), <https://www.aol.com/article/>

intent, Trump circulated a list of twenty-one potential nominees, each of whom are known proponents of originalism, as, of course, was Scalia.<sup>5</sup> In selecting federal Court of Appeals for the Tenth Circuit Judge Neil Gorsuch, Trump followed through on his promise.<sup>6</sup> The focus then shifted to the Senate to begin the confirmation process—a process that purports to ensure that the candidate is qualified for the position.<sup>7</sup> What it means to be “qualified,” however, is a matter of much debate, as is the usefulness of the confirmation process itself in ascertaining anything substantive about the nominee.

Indeed, much has been said regarding the current confirmation process and its shortcomings. Scholars have written books and articles decrying the muckraking, the threat to judicial independence, and the lack of substantive answers.<sup>8</sup> While some have suggested possible reforms, no solution seems to have taken hold. And while the faults of the system have never been as glaring as they were in 1987 at Robert Bork’s confirmation hearing,<sup>9</sup> critics are still dissatisfied.<sup>10</sup>

This article is not an attempt to add to the vast literature listing the problems with the process and proffering innovative, but largely unimplemented, solutions. Instead, this article looks to the role of theories of constitutional interpretation in the confirmation process.

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news/2017/02/01/trumps-conservative-supreme-court-nominee-gorsuch-seen-in-the-m/21704722/.

<sup>5</sup> See Richard Wolf, *Trump’s 21 Potential Court Nominees are Overwhelmingly White, Male and From Red States*, USA TODAY (Dec. 1, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/12/01/donald-trump-supreme-court-21-nominees-list-nomination/93964888/> (discussing the conservative persuasion of Trump’s list of potential nominees); *Originalism: A Primer on Scalia’s Constitutional Philosophy*, NPR (Feb. 14, 2016), <http://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy> [hereinafter *Originalism*].

<sup>6</sup> See Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>.

<sup>7</sup> See *Nominations*, U.S. SENATE, [https://www.senate.gov/general/search/search\\_cfm.cfm?q=brock+confirmation+hearing&site=default\\_collection&num=10&filter=0](https://www.senate.gov/general/search/search_cfm.cfm?q=brock+confirmation+hearing&site=default_collection&num=10&filter=0) (last visited Mar. 26, 2017).

<sup>8</sup> See, e.g., Evan Osnos, *Senate Republicans Gut the Confirmation Process*, NEW YORKER (Jan. 10, 2017), <http://www.newyorker.com/news/daily-comment/senate-republicans-gut-the-confirmation-process> (discussing successive confirmation hearings).

<sup>9</sup> See Nina Totenberg, *Robert Bork’s Supreme Court Nomination ‘Changed Everything, Maybe Forever’*, NPR, <http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever> (last visited Mar. 26, 2017).

<sup>10</sup> See David S. Cohen, *Why Neil Gorsuch’s Confirmation Hearings Were a Waste of Time*, ROLLING STONE (Mar. 24, 2017), <http://www.rollingstone.com/politics/features/why-neil-gorsuchs-confirmation-hearings-were-a-waste-of-time-w473556>.

Since the confirmation hearings are viewed as the opportunity for the Senate to determine whether the candidate has the requisite qualifications for the job,<sup>11</sup> it seems that it would first be necessary to determine the precise role of the nominee if confirmed. How can the Senate determine whether a nominee will serve well in the position of a Supreme Court Justice if there is no agreement on what it would mean to serve well? Of course, there is no such consensus at this time. Members of the Senate, members of the judiciary, and members of the legal academy have divergent ideas on the proper role of a Justice, especially in interpreting the Constitution. Although there are many divergent theories of constitutional interpretation, this article considers three theories that differ significantly in their views of the judiciary's role and considers how adopting each theory might affect the confirmation process.

Originalists, like Justice Scalia and newly-confirmed Justice Gorsuch, generally believe that determining the meaning of the Constitution involves delving into the historical understanding of the document at the time of the founding.<sup>12</sup> As originalism's popularity has expanded, several branches of the theory have developed, but all are rooted in the idea that the meaning of the Constitution's words do not change over time.<sup>13</sup> They must mean the same thing today as they did when the document was written.<sup>14</sup> This theory views the judiciary as having an active role in policing constitutional boundaries, but also purports to remove politics from constitutional interpretation—because the judges are bound by historical meaning, they may not import their own political views into their decision-making.<sup>15</sup> A second theory of interpretation assigns the judiciary a much more modest role when it comes to constitutional interpretation. Thayerism, named after legal scholar James Bradley Thayer, assumes that the legislative branch takes seriously its role to ensure that the laws it passes do not run afoul of the Constitution.<sup>16</sup> Based on such an assumption, the Thayerian viewpoint defers to congressional determinations unless they are

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<sup>11</sup> See *Nominations*, *supra* note 7.

<sup>12</sup> See *Originalism*, *supra* note 5.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*; Jedediah Purdy, *Scalia's Contradictory Originalism*, NEW YORKER (Feb. 16, 2016), <http://www.newyorker.com/news/news-desk/scalias-contradictory-originalism>.

<sup>16</sup> See ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 144, 146 (2011); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

clearly incorrect.<sup>17</sup> Thus, the judiciary functions as a backstop, but the Supreme Court need not be involved in resolving close questions of constitutional meaning.<sup>18</sup> A third theory, common law constitutionalism, is a type of living constitutionalism that rejects originalism's emphasis on the meaning of the Constitution's text at the time of the founding, and instead asserts that the Constitution is interpreted in a manner familiar from common law judging.<sup>19</sup> The text of the Constitution serves as a necessary and valuable focal point, but the meaning of that text and its applications evolve over time through judicial precedent.<sup>20</sup> Interpretations that have persisted over the course of many years are respected and generally followed due to the accumulated wisdom they represent.<sup>21</sup> But longstanding interpretations can also be rejected or narrowed where the traditions on which they are based are deemed morally unacceptable or inappropriate.<sup>22</sup>

Surprisingly, although each of these theories have well-developed arguments regarding interpretations, their adherents generally have not focused on the confirmation process or explored what effect the adoption of their particular theory of constitutional interpretation might have on that process. Indeed, only originalist jurists and scholars have attempted to examine the reason for the current confirmation mess in part by drawing on their interpretive theory. Justice Scalia claimed that the politicization of the confirmation process is due to the fact that the judiciary does not regard itself as being constrained by the original meaning of the text of the Constitution:

The American people have been converted to belief in The Living Constitution, a "morphing" document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process

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<sup>17</sup> See Thayer, *supra* note 16, at 144 (1893).

<sup>18</sup> See VERMEULE, *supra* note 16, 144 (2011); Thayer, *supra* note 16, at 129, 144.

<sup>19</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996).

<sup>20</sup> See *id.* at 892, 895–96.

<sup>21</sup> See *id.* at 892.

<sup>22</sup> See *id.* at 894.

will see to that.<sup>23</sup>

More recent commentary by originalist professors Randy Barnett and Josh Blackman claims that the current process is “dysfunctional” because “the types of questions asked by both Democratic and Republican senators . . . assume a ‘legal realist’ emphasis on results rather than on legal reasoning.”<sup>24</sup> Thayer, by contrast, spent no time discussing the confirmation process, perhaps because he did not view its role as important.<sup>25</sup> Indeed, at the time of Thayer’s writings, the confirmation process looked vastly different than it does today, not simply because there was no broadcasting of the process, but also because open floor debate on federal court nominations in the Senate did not occur until 1929, nominees did not testify regularly in their confirmation hearings until 1955, and interest groups were not embedded in the process until Nixon came into office.<sup>26</sup> Yet even neo-Thayerians like Adrian Vermeule spend little time discussing the implications of the interpretive theory for the confirmation process.<sup>27</sup> Finally, while adherents to common law constitutionalism like David Strauss have written about the confirmation process independently,<sup>28</sup> there has been no work tying it back to common law constitutionalism and drawing implications therefrom.

This article ascertains what effect accepting a given theory of constitutional interpretation might have on the confirmation

<sup>23</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 47 (1997).

<sup>24</sup> Randy E. Barnett & Josh Blackman, *Restoring the Lost Confirmation*, 83 U. CHI. L. REV. ONLINE 18, 19 (2016).

<sup>25</sup> See generally Thayer, *supra* note 16 (providing Thayer’s discussion of the confirmation process).

<sup>26</sup> See JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 36–37, 89, 109 (1995); see generally Thayer, *supra* note 16 (describing the confirmation process at the time of Thayer’s writing).

<sup>27</sup> See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 260 (2006). Vermeule does mention that systemic decision costs are associated with different interpretive theories and states: “[T]he greater the constitutional authority of the judges, the higher the stakes of selection to judicial office[,] . . . and the more interest groups and others invest in the struggle over judicial selection and confirmation.” *Id.*

<sup>28</sup> See, e.g., David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1491 (1992) (advocating for a greater, independent role for the Senate in the confirmation process). Bruce Ackerman, who may also be categorized as a proponent of common law constitutionalism, has written on Bork’s confirmation and on Supreme Court appointments, but has not considered the confirmation process generally. See, e.g., Bruce Ackerman, *Robert Bork’s Grand Inquisition*, 99 YALE L.J. 1419, 1421–22 (1990) (book review) (considering the errors in Bork’s argument); see also Bruce A. Ackerman, *Essays on the Supreme Court Appointment Process: Transformative Appointments*, 101 HARV. L. REV. 1164, 1165 (1988) (discussing a fusion of the classic model and modern practices for reform).

process. In other words, this article considers what the confirmation process would look like under various theories of constitutional interpretation. It should be noted at the outset that constitutional interpretation is not the sole role of a Supreme Court Justice, meaning that considerations outside theories of constitutional interpretation are certainly relevant to the confirmation process. However, it is also certainly the case that concerns over constitutional interpretation make up the majority of the confirmation process. There are several potential reasons for this. Most obvious, the Supreme Court has the final say on the Constitution's interpretation.<sup>29</sup> Congress cannot override the Court's decision as it can in cases involving statutory interpretation, for example.<sup>30</sup> Moreover, questions of constitutional interpretation are often the most partisan and polarizing.<sup>31</sup> It is hard to imagine senators becoming incensed over the Supreme Court's interpretation of Federal Rule of Civil Procedure 23 and its effect on the viability of class actions in the same way that they now debate the propriety of the Court's interpretation of substantive due process or the First Amendment. In addition, the theory of constitutional interpretation that a given person accepts is likely to be correlated with their views on other legal matters as well.<sup>32</sup> It can therefore be seen as something of a proxy for the way a nominee views his or her role as a judge, writ large. For all of these reasons, limiting the scope of this article to the way in which theories of constitutional interpretation affect the confirmation process should not result in an overly narrow view of the process.

This article proceeds in four parts. Part I provides a brief overview of the common criticisms of the confirmation process and various proposals for how problems might be remedied. Part II then highlights three different theories of constitutional interpretation—originalism, Thayerism, and common law constitutionalism—and attempts to examine how a confirmation process might look under each system. Part III turns back to the current system, and, armed with the predictions of how the different theories might play out,

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<sup>29</sup> See Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 46 WAYNE L. REV. 1305, 1311 (2000).

<sup>30</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

<sup>31</sup> See Jocelyn Kiley, *Americans Divided on How the Supreme Court Should Interpret the Constitution*, PEW RES. CENTER (July 31, 2014), <http://www.pewresearch.org/fact-tank/2014/07/31/americans-divided-on-how-the-supreme-court-should-interpret-the-constitution/>.

<sup>32</sup> See Ari Shapiro, *Conservatives Have 'Originalism'; Liberals Have . . . ?*, NPR (June 23, 2009), <http://www.npr.org/templates/story/story.php?storyId=105439966>.

endeavors to map the different theories onto the current process in hopes of revealing the kind of theory to which we currently subscribe—at least in the view of the Senate participants. Part IV determines, however, that the lack of consensus among members of the Senate and potential nominees leads to a confirmation process that is not completely true to any one of the theories, but that follows common law constitutionalism most closely.

## I. THE CURRENT CONFIRMATION PROCESS

Before launching into possible theories of what a confirmation process could look like under specific modes of interpretation, it is helpful to get an idea of the status of our current system. The claim that the current judicial confirmation process is in serious need of reform has been made multiple times in multiple ways by multiple people over the past few decades.<sup>33</sup> Commentators point out problems in the focus on ideology,<sup>34</sup> the lack of focus on credentials,<sup>35</sup> the nominees' refusal to answer substantive questions,<sup>36</sup> and the interminable search for dirty laundry to air.<sup>37</sup> Indeed, the Senate itself has recognized that the system is not functioning in the way that it should.<sup>38</sup> In 2001, the United States Senate Subcommittee on Administrative Oversight and the Courts held a hearing on the judicial nomination and confirmation process in order to discuss the issues and present possible solutions.<sup>39</sup> Senator Chuck Schumer noted in his introductory remarks that the

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<sup>33</sup> See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 159, 206 (1994) (discussing a perspective shift towards nominees to fix the confirmation process); John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 186, 187 (2003) (regarding delays in the confirmation process); Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 871 (2005) (exploring the role that ideology plays in judicial selection).

<sup>34</sup> See Goldman, *supra* note 33, at 878–79 (explaining the history of the use of ideology in the vetting process for judicial candidates).

<sup>35</sup> See CARTER, *supra* note 33, at 161 (“[S]eats on the Court should be reserved for those who have spent many years as appellate judges in the federal system or on the highest court of a state with a heavy and diversified work load.”).

<sup>36</sup> See Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935–36 (1995) (encouraging evaluation that looks at the substantive views of candidates).

<sup>37</sup> See, e.g., CARTER, *supra* note 33, at 6–7 (describing the search into various nominees' pasts to dig up bad behavior, from smoking marijuana to hiring illegal immigrants as nannies).

<sup>38</sup> See Cornyn, *supra* note 33, at 183–84.

<sup>39</sup> See *The Judicial Nomination and Confirmation Process: Hearings Before the U.S. S. Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary*, 107th Cong. 111 (2001) [hereinafter *Judicial Nomination and Confirmation Process Hearings*] (statement of Sen. Charles E. Schumer, Chairman, Subcomm. on Admin. Oversight and the Courts).

“system is on the verge of being broken and needs fixing. The Founders, from Federalists like Hamilton to Democrats like Madison and Jefferson, would be shocked if they saw what was happening today.”<sup>40</sup>

The Senate heard from prominent constitutional law theorists who gave their views concerning what reform was needed and what the goal of the process should be. Professor Cass Sunstein argued that what is needed in the confirmation process “is not a litmus test or an exclusion of people with particular points of view, but respect for intellectual diversity,” along with “a deferential judiciary that is humble and cautious and respectful of the prerogatives of the democratic branches of Government.”<sup>41</sup> Professor Laurence Tribe claimed that nominees should be open to discussing how they might go about considering overruling past Presidents, as it “doesn’t follow that you compromise your independence or your integrity by sharing your thought process.”<sup>42</sup> And Professor Mark Tushnet stated that “[n]omination contests have focused on whatever seemed relevant at the time: the nominee’s ideology, the nominee’s performance in executive office pursuing policies with which the Senate didn’t agree, whether the nomination would have particularly dramatic effects on the overall direction of the Court, the nominee’s background,” and claimed that “that is precisely the way the system of ambition countering ambition should work.”<sup>43</sup>

While the goal of these hearings was “to clean up what has all too accurately been called the ‘confirmation mess,’”<sup>44</sup> it’s not clear that any meaningful improvements occurred. Scholarship and news reports since the hearings continue to lament the process and call for reform.<sup>45</sup> What the hearings did show is that there are disparate

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<sup>40</sup> *Id.* at 113 (statement of Sen. Charles E. Schumer, Chairman, Subcomm. on Admin. Oversight and the Courts).

<sup>41</sup> *Id.* at 60 (statement of Cass Sunstein, Professor, University of Chicago Law School).

<sup>42</sup> *Id.* at 40 (statement of Laurence Tribe, Professor, Harvard Law School).

<sup>43</sup> *Id.* at 199 (statement of Mark Tushnet, Professor, Georgetown University Law Center).

<sup>44</sup> *Id.* at 111 (statement of Sen. Charles E. Schumer, Chairman, Subcomm. on Admin. Oversight and the Courts).

<sup>45</sup> See, e.g., Cornyn, *supra* note 33, at 183 (“The judicial confirmation process is badly broken.”); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 38 (2006) (discussing the problems with the current practice of judicial candidates sidestepping political questions); Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 383–86 (explaining the prevailing view that the judicial confirmation system is broken and providing empirical data showing trends in the likelihood of confirmation, among other things); Linda Greenhouse, *Rock Bottom*, N.Y. TIMES: OPINIONATOR (Dec. 14, 2011), <https://opinionator.blogs.nytimes.com/2011/12/14/rock-bottom/> (discussing the then-recent filibuster defeat of a nominee to the D.C. Circuit and the problems with the process).

views as to what the actual problems of the system are. Laid out below are two of the most common critiques.

A. *The Search to Disqualify*

In his book on the subject, Stephen L. Carter argues “that the greatest problem with our approach to the confirmation process is the tendency to search for disqualifying factors.”<sup>46</sup> He claims that this is the result of the “fantastic notion” that nominees are somehow entitled to a presumption in favor of confirmation that can only be overcome by sufficient evidence of characteristics that make eligibility questionable.<sup>47</sup> Of course, if this is seen as the only reasonable way to bar a candidate from confirmation, the result will be an unfortunate search for these characteristics and much prying into the candidate’s past in order to find the “smoking guns.”<sup>48</sup> Recent confirmation hearings have shown that this search goes beyond even a thorough background check into past illegal or immoral activity.<sup>49</sup> Indeed, during Justice Clarence Thomas’s judicial confirmation hearings, some reported seeing “advertisements . . . taken out in newspapers asking for harmful material.”<sup>50</sup> And, lest one think that this is an isolated incident based on a racist desire to keep a black man from the Supreme Court, in another recent confirmation process, a friend of Carter’s “reports receiving a rather sobering telephone call from opponents of a . . . judicial nominee, asking, in so many words, if he was aware of any dirt.”<sup>51</sup> When such vigorous campaigns are undertaken, some kind of scandalous material is often volunteered.<sup>52</sup> Thus, Justice Thomas’s confirmation hearing was focused in large part on the allegations that he sexually harassed Anita Hill, despite his

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<sup>46</sup> See CARTER, *supra* note 33, at 159.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* at 7 (“That is very much our modern approach: we presume the nominees to be entitled to confirmation absent smoking guns, and then we look for the smoke in order to disqualify them.”).

<sup>49</sup> See *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearings Before the U.S. S. Comm. on the Judiciary*, 111th Cong. 11 (2010) [hereinafter *The Nomination of Elena Kagan*] (statement of Sen. Dianne Feinstein) (“Over the past few weeks there has been a drift net out trying to find some disqualifying fact or factor in your record.”).

<sup>50</sup> CARTER, *supra* note 33, at 135.

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., *The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the U.S. S. Comm. on the Judiciary*, 102nd Cong. 157 (1991) [hereinafter *The Nomination of Judge Clarence Thomas*] (statement of Hon. Clarence Thomas, nominated to be an Associate Justice of the Supreme Court of the United States).

protests that this was “a case in which this sleaze, this dirt was searched for by staffers of members of this committee, was then leaked to the media, and this committee and this body validated it and displayed it.”<sup>53</sup>

The problem with this focus on disqualification, according to Carter, is both that it presumes that without a problematic past, the candidate is entitled to confirmation, and that it takes away from the discussion of issues that are perhaps more relevant to the qualifications of the candidate.<sup>54</sup> Carter suggests, for example, that more time should be spent determining what intellectual and professional qualifications ought to be considered necessary for the job.<sup>55</sup> The problem is that “[w]e as a nation, like the Senate as a body, share no consensus on what qualifications a nominee ought to have, for the Supreme Court or for anything else.”<sup>56</sup> Thus, instead of arguing about whether a candidate is qualified for the position, the discourse focuses upon whether the nominee may be disqualified.

### B. Questioning Substance

Beyond the focus on the possible sordid pasts of candidates, many commentators have also argued about whether and when nominees should be asked about their substantive views on constitutional law.<sup>57</sup> Those who claim that these kinds of questions should be off-limits mainly base this argument on the idea that answering such questions would create issues with supposed independence of the judicial branch.<sup>58</sup> The idea is that such a line of questioning is problematic because “appointing Justices who make up their minds about how to vote before they hear any arguments rather than after is a threat to judicial independence.”<sup>59</sup> While scholars may debate

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<sup>53</sup> *Id.*

<sup>54</sup> See CARTER, *supra* note 33, at 159–60 (“[W]e must learn to balance the wrong that an individual might have done against the good service that he or she might bring to the nation.”); see also Kagan, *supra* note 36, at 924 (“No one can remember the portion of the hearings devoted to Justice Thomas’s legal views.”).

<sup>55</sup> See CARTER, *supra* note 33, at 161.

<sup>56</sup> *Id.* at 162.

<sup>57</sup> See, e.g., *id.* at 152 (“[The goal in confirming judicial nominees should be to fill] the bench not with Justices holding the right constitutional theories but with Justices possessing the right moral instincts.”); Post & Siegel, *supra* note 45, at 44–45 (proposing that nominees may be asked about how they would have decided past cases, but not about how they might decide future cases); Kagan, *supra* note 36, at 920 (arguing that recent judicial confirmation hearings focus too little on the nominee’s legal views).

<sup>58</sup> See CARTER, *supra* note 33, at 56.

<sup>59</sup> *Id.*

the merits of such lines of questioning,<sup>60</sup> the vast majority of senators actually involved in the process seem to view the use of questions regarding the beliefs of the candidates on specific issues as extremely relevant to the process.<sup>61</sup> The candidates themselves, on the other hand, are much more concerned with judicial independence than those questioning them.<sup>62</sup> Thus, the confirmation turns into a game of evasion, in which the senators attempt to elicit some kind of concrete response and the nominee parries the questions, citing concerns about independence. The remarks of former Justice Sandra Day O'Connor in her opening statement during her confirmation hearing is representative of the normal response:

There is . . . a limitation on my responses which I am compelled to recognize. I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Suprem[e] Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter.<sup>63</sup>

Justice Elena Kagan wrote an article prior to her nomination to the bench regarding the confirmation process, in which she critiqued the current confirmation process as lacking in substance and argued that:

[T]he Senate's consideration of a nominee . . . ought to focus on substantive issues; the Senate ought to view the hearings as an opportunity to gain knowledge and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct. . . . Open

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<sup>60</sup> Compare *Judicial Nomination and Confirmation Process Hearings*, *supra* note 39, at 201 (statement of Mark Tushnet, Professor, Georgetown University Law Center) (arguing that a focus on the nominee's ideology and substantive viewpoints is relevant in the confirmation process), *with id.* at 60 (statement of Cass R. Sunstein, Professor, University of Chicago Law School) (stating that the intellectual strength of a candidate should be the focus, rather than a litmus test to determine the candidate's vote in possible cases).

<sup>61</sup> See CARTER, *supra* note 33, at 56 ("The practice of asking nominees about controversial cases is supported by nearly everyone involved in the process.")

<sup>62</sup> See, e.g., *infra* notes 62–67.

<sup>63</sup> *Nomination of Sandra Day O'Connor: Hearings Before the U.S. S. Comm. on the Judiciary*, 97th Cong. 57–58 (1981) (statement of Hon. Sandra Day O'Connor, nominated to be an Associate Justice of the Supreme Court of the United States).

exploration of the nominee's substantive views, that is, enables senators and their constituents to engage in a focused discussion of constitutional values, to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires.<sup>64</sup>

This article, of course, came up many times in Justice Kagan's confirmation hearings and while she stood behind the basic point of her argument, she did admit to changing her mind with regard to some of her claims.<sup>65</sup> She explained that she thought she had "skewed" the balance too far towards answering questions regarding certain positions that may be implicated in future cases.<sup>66</sup> Thus, throughout her confirmation hearings, Justice Kagan avoided answering any question that might have caused her to "grade" the Court's past cases; responded to questionable inquiries evasively, declining to agree that she merits being labeled a "progressive;"<sup>67</sup> and answered questions regarding the direction she would move the Court with vague generalizations.<sup>68</sup> These kinds of responses are the norm in most recent confirmations. As Professor Geoffrey Stone puts it, "[t]he prevailing assumption is that the process has become so polarized and so politicized that nominees feel they must mask their views from members of the Senate in a way that makes informed consideration impossible."<sup>69</sup> And as the Senate has not declined to confirm a nominee based on a lack of substantive answers, there is little incentive for a nominee to volunteer any potentially controversial responses.

### *C. Proposals for Cleaning Up the Mess*

With some differing views on the root of the problem, there are also a variety of views on what the best solution might be. Carter advocates lines of questioning that will help the Senate determine "what sort of person the nominee happens to be"<sup>70</sup> and whether he

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<sup>64</sup> Kagan, *supra* note 36, at 935.

<sup>65</sup> See *The Nomination of Elena Kagan*, *supra* note 49, at 64 (statement of Hon. Elena Kagan, nominated to be an Associate Justice of the Supreme Court of the United States).

<sup>66</sup> See *id.*

<sup>67</sup> See *id.* at 70 ("I honestly do not know what that label means.").

<sup>68</sup> See *id.* at 80 ("[A]ll I can say . . . is that I will try to decide each case that comes before me as fairly and objectively as I can. I cannot tell you I will move the Court in a particular way on a particular issue.").

<sup>69</sup> Stone, *supra* note 45, at 381.

<sup>70</sup> CARTER, *supra* note 33, at 151.

or she “possess[es] the right moral instincts.”<sup>71</sup> Carter also lists five categories of characteristics that might be uncovered in a candidate and what kind of an impact these characteristics should have on the decision whether to confirm. He concludes that a lack of qualifications (in his view, a lack of experience as an appellate judge in the federal system or on the highest state court) should be absolutely disqualifying, regardless of other good characteristics the nominee might possess.<sup>72</sup> Loss of public respect should be disqualifying, unless the President is willing to expend his own “political capital” to make a case for the nominee.<sup>73</sup> Immoral conduct (including the allegations regarding Justice Thomas and Anita Hill) should be rarely curable, though perhaps may be overcome by “[a]n exceptionally able public servant.”<sup>74</sup> Illegal conduct should be occasionally curable, depending on whether the law violated “is related to the task for which the individual has been nominated, whether those violations are consequential or inconsequential, how those who violate the laws in question are generally treated . . . and whether the nominee has made appropriate amends for the illegality.”<sup>75</sup> Finally, unprofessional or unethical conduct should be most easily cured, though that is not to say the cure should be easy.<sup>76</sup>

The problem with Carter’s categories, as noted by Professor David Strauss, is that this solution leads to exactly the kind of muckraking that Carter condemns when discussing Justice Thomas’s confirmation.<sup>77</sup> Justice Kagan’s article (written prior to her nomination) also critiques Carter’s proposal of focusing on moral instincts, writing: “What makes the Richard Posner different from the Stephen Breyer different from the Laurence Tribe is not moral character or behavior, in the sense meant by Carter.”<sup>78</sup> Instead, Kagan argues that the differences come from “divergent understandings of the values embodied in the Constitution and the proper role of judges in giving effect to those values.”<sup>79</sup>

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<sup>71</sup> *Id.* at 152.

<sup>72</sup> *See id.* at 161.

<sup>73</sup> *See id.* at 166, 168.

<sup>74</sup> *Id.* at 168, 171.

<sup>75</sup> *Id.* at 173.

<sup>76</sup> *See id.* at 175.

<sup>77</sup> *See* David Strauss, *Whose Confirmation Mess?*, AM. PROSPECT, June 1994, <http://prospect.org/article/whose-confirmation-mess> (reviewing CARTER, *supra* note 33) (“[Carter’s cure] could be worse than the disease. [Hearings like Justice Thomas] are hardly a model of the kind of thing we want in the future.”).

<sup>78</sup> Kagan, *supra* note 36, at 933.

<sup>79</sup> *Id.* at 933–34.

If Justice Kagan's critique is correct, then what becomes important are the different theories of judicial decision-making. In order to determine what questions judicial nominees should be asked, it is necessary to determine what role the judiciary should play in resolving constitutional questions. The next Part turns to the explanation of three different theories of constitutional interpretation and the types of questions that might be helpful under each theory.

## II. THEORIES OF CONSTITUTIONAL INTERPRETATION AS APPLIED TO CONFIRMATION HEARINGS

While there is a plethora of theories of constitutional interpretation, this Part selects three influential and distinctive theories and discusses how the judicial confirmation process might look under each one. This Part begins with a general overview of originalism, then proposes the relevant considerations under that theory. It then moves on to Thayerism and common law constitutionalism with the same basic structure.

### A. *Originalism*

#### 1. Background Originalist Principles

The originalist school of interpretation is often associated with Justices Antonin Scalia and Clarence Thomas, and now with Justice Gorsuch. Although originalism can refer to a variety of distinct but related theories, "the predominant originalist theory"<sup>80</sup> is defined by a belief that courts should enforce the Constitution as it was understood at the founding—its original public meaning—rather than how it has developed since that time.<sup>81</sup>

According to originalism's advocates, the primary benefit of such an interpretive approach to the Constitution is that it places certain constraints on the judiciary. As Justice Scalia has said:

[O]riginalism does not invite [a judge] to make the law what he thinks it should be, nor does it permit him to distort

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<sup>80</sup> John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U.L. REV. 751, 761 (2009). Other branches of originalism include original intent, which looks to the intent of the author, and original methods originalism, which interprets the Constitution "using the interpretive methods that the constitutional enactors would have deemed applicable to it." *Id.* at 751.

<sup>81</sup> See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519 (2003).

history with impunity. . . . All of this cannot be said of the constitutional consequentialists. If ideological judging is the malady, the avowed application of such personal preferences will surely hasten the patient's demise, and the use of history is far closer to being the cure than being the disease.<sup>82</sup>

Originalism is thus a neutral principle that aims to remove personal ideology and politics from the judicial decision-making process. In what has been called "the founding document of contemporary originalism,"<sup>83</sup> then-Professor Robert Bork decried the "lack of theory" present in constitutional law, the result being "that courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes."<sup>84</sup> Bork and others like him balked at the notion that the Justices could be entitled to make significant policy choices, given the undemocratic means by which they are selected and the unaccountability that comes along with life tenure.<sup>85</sup> Justice Scalia similarly viewed originalism as the alternative to an unconstrained judiciary, which he considered to be making subjective decisions "not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean."<sup>86</sup> Originalists thus view fidelity to original public meaning as providing a concrete baseline by which to judge the correctness of future decisions.<sup>87</sup> "Originalism . . . holds that judges engaged in judicial review must respect earlier political settlements as concretely as they can, without making those settlements so abstract as to be easily manipulable."<sup>88</sup>

As originalist theory has spread, different offshoots and understandings of the theory have developed. Some have spoken of "semantic originalism,"<sup>89</sup> others of "inclusive" originalism,<sup>90</sup> and still

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<sup>82</sup> Mary Wood, *Scalia Defends Originalism as Best Methodology for Judging Law*, U. VA. SCH. L. (Apr. 20, 2010), [http://content.law.virginia.edu/news/2010\\_spr/scalia.htm](http://content.law.virginia.edu/news/2010_spr/scalia.htm).

<sup>83</sup> John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 83 n.1 (2003).

<sup>84</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

<sup>85</sup> See, e.g., John Yoo, *Taming Judicial Activism: Judge Robert Bork's Coercing Virtue*, 80 U. CHI. L. REV. DIALOGUE 257, 259 (2013).

<sup>86</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

<sup>87</sup> See Harrison, *supra* note 83, at 87.

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., Lawrence B. Solum, *Semantic Originalism* 2 (Ill. Pub. Law & Legal Theory Research Papers Series No. 07-24, 2008).

<sup>90</sup> See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352

others of “framework originalism.”<sup>91</sup> Despite the various and sometimes significant differences between these originalists, Professor Lawrence Solum argues that originalists generally agree on two separate ideas: fixation and constraint.<sup>92</sup> What Solum calls the “fixation thesis” asserts that the meaning of the constitutional text is “*fixed* or determined at the time each provision of the [C]onstitution was framed and ratified.”<sup>93</sup> The “constraint principle” maintains that “constitutional actors should be constrained by the fixed communicative content of the text.”<sup>94</sup>

Originalism is, of course, a controversial theory of interpretation and has many critics. Professor Mitchell Berman counters the idea that the original public meaning should be treated as binding, asserting that the primary value of the text need not be the fixation of the meaning at the time the Constitution was ratified.<sup>95</sup> Instead, the value comes from the fact “that [its terms] are universally known, readily available to the average citizen [who can be mobilized to employ those terms in political debate].”<sup>96</sup> Berman also claims that the idea of using the original understanding of the Constitution or a statutory text does not pass its own test, in that the original understanding may be that the text was intended to have an evolving character.<sup>97</sup> If there are many provisions that fall into this category, then the benefits that originalists claim their theory bestows, like constraining judicial subjectivity and thereby promoting predictability, and stability, are not likely to be attained.<sup>98</sup> Professor Adam Samaha also questions the ability of originalism to constrain the judiciary in any unique way, and notes that “[o]ther interpretive methods might perform similarly. It is unclear why honest attention to reams of judicial precedent is less constraining and less verifiable than honest attention to historical understandings.”<sup>99</sup>

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(2015).

<sup>91</sup> See, e.g., Jack M. Balkin, *Original Ideas on Originalism: Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009).

<sup>92</sup> See LAWRENCE B. SOLUM, GEO. U. L. CTR., WHAT IS ORIGINALISM? THE EVOLUTION OF CONTEMPORARY ORIGINALIST THEORY 29, 32 (2011), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub>.

<sup>93</sup> *Id.* at 29.

<sup>94</sup> Lawrence Solum, *Dorf on Public Meaning Originalism: Clarifying the Nature of the Debate*, LEGAL THEORY BLOG (Oct. 26, 2015), <http://lsolum.typepad.com/legaltheory/2015/10/dorf-on-semantic-originalism-clarifying-the-nature-of-the-debate.html>.

<sup>95</sup> See Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8, 62 (2009).

<sup>96</sup> *Id.* at 62 (alterations in original).

<sup>97</sup> See *id.* at 30.

<sup>98</sup> See *id.* at 31.

<sup>99</sup> Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1347

## 2. Relevant Confirmation Process Questions under an Originalist System

If we were to live in a wholly originalist system, what judicial qualities would be desirable? The originalist viewpoint posits a fairly involved role for the judiciary (particularly as compared to Thayerism, described below). As the constitutional arbiter in an originalist approach, judges are tasked with delving into the history of the Constitution<sup>100</sup> and one would therefore expect the confirmation process to focus heavily on the nominee's experience with such historical research and the methods he or she would utilize.

First, in evaluating a nominee in an originalist system, it would be quite relevant to know which tools the nominee would use in determining the original meaning of the Constitution's text. In interpreting the Constitution, for example, the *Federalist Papers* are widely accepted and used,<sup>101</sup> even though they were written as propaganda tools and not clearly accepted by the state ratifying conventions that actually gave the Constitution its full force.<sup>102</sup> Thus, they are not necessarily the best tool for identifying the original meaning of the Constitution as viewed by the ratifying states, though they are useful in determining what those who wrote them believed. Yet, the information available from ratifying conventions is scarce, making it unclear what documents an originalist would turn to when a provision is vague on its own (as is often the case).<sup>103</sup> Nominees could be expected to identify sources they consider both sufficiently contemporaneous and authoritative.<sup>104</sup> Moreover, it would be important to know the candidate's views on whether and when judicial precedent can overturn the original public meaning of the text. Justice Scalia, for example, was known as a fairly strict adherent to originalism, but has also considered himself bound by precedent that he did not

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(2008).

<sup>100</sup> See Wood, *supra* note 82.

<sup>101</sup> See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682 n.26 (1952); *Marbury v. Madison*, 5 U.S. 137, 147–48, 151 (1803).

<sup>102</sup> See Vasani Kesavan & Michael Stokes Paulson, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1153–54, 1158 (2003) (explaining the problems with relying on the *Federalist Papers* for determining the original meaning of the Constitution, as they were written as a piece of political advocacy and were published after several states had already ratified the Constitution).

<sup>103</sup> See *id.* at 1164.

<sup>104</sup> See *id.* at 1165, 1187.

necessarily agree with.<sup>105</sup> Thus, in *McDonald v. City of Chicago*,<sup>106</sup> he concurred with the opinion incorporating the Second Amendment through the Due Process Clause of the Fourteenth Amendment, “[d]espite [his] misgivings about substantive due process as an original matter,” finding incorporation to be “both long established and narrowly limited.”<sup>107</sup> Justice Thomas, by contrast, refused to recognize incorporation through that clause, instead concurring separately to contend that originalist principles apply the right to the states through the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>108</sup> It would therefore be pertinent to determine the nominee’s views of the relevant weights of the two considerations.

As far as qualifications go, Justice Scalia has stated:

Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, . . . the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material. . . . And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.<sup>109</sup>

In light of the arduous task originalism imposes on the judge, one of the most important factors that might come into play in choosing a nominee is the candidate’s background in historical research. Indeed, a familiarity with this kind of endeavor could be even more valuable than any background in judging. This suggests that nominees may be drawn from altogether the wrong pool of candidates, and indeed, it suggests that Senators may not be equipped to adequately evaluate the nominee.<sup>110</sup>

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<sup>105</sup> See, e.g., *Am. Trucking Ass’ns, Inc. v. Smith*, 496 U.S. 167, 204 (1990) (Scalia, J., concurring) (“Given my disagreement with this Court’s ‘negative’ Commerce Clause jurisprudence, the only thing that could possibly lead me to such a conclusion would be *Scheiner’s* status as precedent.”).

<sup>106</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>107</sup> *Id.* at 791 (Scalia, J., concurring) (citation omitted).

<sup>108</sup> See *id.* at 806 (Thomas, J., concurring).

<sup>109</sup> Scalia, *supra* note 86, at 856–57.

<sup>110</sup> Professor Samaha, however, might disagree with the desirability of well-seasoned historians as judges. His critique of originalism ends with a suggestion that perhaps originalism is not all bad, given that it could act as a kind of randomization tool in

Finally, morality would not seem to play much of a role in originalist judging, except insofar as concerns the judge's honesty in performing the historical research with which he is tasked.<sup>111</sup> That said, morality would remain a relevant consideration in the confirmation process because of its role in maintaining the legitimacy of the judicial branch.<sup>112</sup> This would be true in any theory of constitutional interpretation, though perhaps the more power the judiciary possesses, the greater the relevance of the judicial actor's perceived morality. Where the Court exercises greater authority, it is more likely to conflict with other governmental branches, and will therefore need to rely on its own legitimacy in order to ensure enforcement of its decrees. As Justice Frankfurter explained in his dissenting opinion in *Baker v. Carr*<sup>113</sup>: "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."<sup>114</sup> Thus, because the Court is deciding questions with far-reaching implications and because the Court does not have the necessary enforcement authority, its power is dependent upon the public perception of the Court as a legitimate institution.<sup>115</sup> One might therefore assume that there is a certain level of morality and respectability that will always serve as a baseline in appointing someone to the highest Court in the country. However, there is also some amount of institutional legitimacy that would come from the credentials of the judge as a respected historian rather than as a morally or politically revered individual.<sup>116</sup> The legitimacy of the

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determining the outcome of close cases. Samaha notes that "[p]rofessional excellence is unnecessary if the goal is convenient and detached dispute resolution in close cases, and originalism better tracks the virtues of randomization if it is economical and unsophisticated." Samaha, *supra* note 99, at 1360. Thus, under Samaha's view, perhaps nominees are being pulled from exactly the right pool of candidates to implement originalism as it should be. Samaha's approach to originalism is, of course, unorthodox, and it would be surprising if the purpose of the Senate in not pulling candidates with historical backgrounds were to randomize the process of judging.

<sup>111</sup> See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 757 (1995); Lawrence B. Solum, *The New Originalism in Constitutional Law: Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458–59 (2013).

<sup>112</sup> See William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1440 (2005).

<sup>113</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>114</sup> *Id.* at 267 (Frankfurter, J., dissenting).

<sup>115</sup> See Christopher H. Schroeder, *Some Notes on a Principled Pragmatism*, 95 CAL. L. REV. 1703, 1718–19 (2007); see also Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 240–41 (2011) ("[S]ociological legitimacy is . . . necessary for the Court's proper function.").

<sup>116</sup> See Solum, *supra* note 111, at 479, 480.

judgments could be called into question by professional legal historians, who could be called upon to comment on whether the judge was getting things right or was instead attempting to alter history to comply with his own views. Assuming that this kind of fact-checking would be a sufficient check on the Court's historical analysis, the nominee's personal code of beliefs or conduct beyond the baseline level of acceptability would not make much of a difference in the confirmation process. To the extent there are cases in which the Court's judgment of the relevant history differs from that of other professional historians, moral credibility will once again prove necessary to sustain the institutional legitimacy of the Court.

### *B. Thayerism*

#### 1. Background Thayerian Principles

In his influential article, "The Origin and Scope of the American Doctrine of Constitutional Law," James Bradley Thayer presented a theory of judicial decision-making that advocated almost complete deference to the legislature.<sup>117</sup> In an oft-quoted passage from the paper, Thayer states that the judiciary "can only disregard [legislative acts] when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question."<sup>118</sup> This argument is based on the idea that the Constitution expressly gives to the legislature the responsibility to determine the constitutionality of their own acts since "they cannot act without making it."<sup>119</sup> Even beyond this, Thayer argued that "the [C]onstitutions not merely [entrust] to the legislatures a preliminary determination of the question, but they contemplate that this determination may be the final one; for they secure no revision of it."<sup>120</sup> Thus, when cases arising under congressional legislation come before the Supreme Court and the Court is asked to pass upon the constitutionality of the legislation, Thayer argues that the Court's views on the matter do not deserve any more weight than the views of the legislature;

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<sup>117</sup> See Thayer, *supra* note 16, at 129.

<sup>118</sup> *Id.* at 144.

<sup>119</sup> *Id.* at 135; *but see* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution."); Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

<sup>120</sup> Thayer, *supra* note 16, at 135.

and indeed, they deserve less because the Constitution delegates the legislative power to Congress.

Of course, in order for Thayer's argument to be persuasive, one would have to assume that Congress takes seriously the role of determining whether the laws it is enacting are constitutional. Professor Tushnet suggests that this assumption might now be a faulty one. According to Tushnet, "because legislatures have mistakenly come to rely on judicial review to correct their 'legal' errors and have abandoned concern for 'questions of justice and right,' they actually make such judgments less often than they should."<sup>121</sup> Congress's obligation to make these determinations must be enforced in some way, but, as Tushnet explains, relying on the courts alone may be insufficient. Not every statute is subjected to judicial review and courts themselves may not always review the statutes appropriately. "The defense of constitutional limitations thus demands a sturdier reed, which can be provided, as Thayer constructed the argument, only by insisting on greater *legislative* responsibility. That could be accomplished by 'impressing upon our people' a sense of responsibility for enforcing such limitations through the political process."<sup>122</sup>

Thus, Professor Tushnet argues that Thayer was focused perhaps more on reforming the political response to the legislature than the work of judges through judicial review.<sup>123</sup> If the general public were mobilized against a legislature that shirked its duties to pass constitutionally valid legislation, then the need for a stricter judicial review would lessen.<sup>124</sup>

Though Thayer wrote his paper in the late nineteenth century, his ideas have been carried forward to modern times.<sup>125</sup> Professor Adrian Vermeule is one of the most ardent supporters of modern or neo-Thayerism.<sup>126</sup> While Thayer focused his writings on the suggestion that judges only invalidate legislative acts when there is a clear error, Vermeule attempts to clarify when a clear error may arise.<sup>127</sup> He suggests that "judges should (1) follow the clear and

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<sup>121</sup> Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 24 (1993).

<sup>122</sup> *Id.* (emphasis added).

<sup>123</sup> *See id.* at 24–25 ("By proceeding in this way Thayer sought to make political opposition to reform legislation more effective.").

<sup>124</sup> *See id.* at 25.

<sup>125</sup> *See* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 522 (2012); *see, e.g.,* VERMEULE, *supra* note 16, at 1.

<sup>126</sup> *See* VERMEULE, *supra* note 16, at 1.

<sup>127</sup> *See id.; cf.* Thayer, *supra* note 16, at 144 (exemplifying Thayer's original work, to be contrasted with Vermeule's modern approach).

specific meaning of legal texts, where those texts have clear and specific meanings; and (2) defer to the interpretations offered by legislatures and agencies, where legal texts lack clear and specific meanings.”<sup>128</sup> As applied to constitutional interpretation, this means that when clear and specific constitutional texts are implicated, the Court may feel free to interpret and determine a relevant statute’s constitutionality. Examples of clear constitutional texts include “the qualifications for federal office[,] . . . the rules governing appointment of federal administrative officials[,] . . . and the rules governing congressional procedure, statutory enactment and constitutional amendment, and life tenure and salary protection for judges.”<sup>129</sup> When the Constitution is vague, uncertain, or aspirational, however, the Court should not attempt to make any kind of determination, but instead should defer to Congress. Examples of these (much more numerous) kinds of provisions include:

[T]he clauses vesting “legislative,” “executive,” and “judicial” power in the branches of the national government; the vaguer grants of power to the national government, such as the power to regulate “commerce” among the several states; and the “majestic generalities” of the Bill of Rights, especially including the First Amendment’s guarantee of “the freedom of speech” and the Fourteenth Amendment’s guarantees of “life, liberty and property” . . . and the “equal protection of the laws.”<sup>130</sup>

For Vermeule, Thayerism is supported by a cost-benefit analysis of aggressive judicial review, which shows that the marginal benefits that may be gained are “entirely speculative, while the decision costs and the costs of legal uncertainty that are created by layering judicial review on top of legislative action are substantial and quite definite.”<sup>131</sup> Vermeule further argues that there is no real backing for the idea that the judiciary is superior at interpreting and updating the Constitution. Indeed, he claims that “the more straightforward assumption is that legislators have systematically better access to changing public values than do courts.”<sup>132</sup> While many claim that judicial independence and political insulation make judicial review of constitutional questions desirable, Vermeule

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<sup>128</sup> VERMEULE, *supra* note 16, at 1.

<sup>129</sup> *Id.* at 270.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 273.

<sup>132</sup> *Id.* at 274.

points out that this “frees judges to do anything they want, within broad limits, and there is no guarantee that what they do will correspond to any account of what makes for good constitutional updating.”<sup>133</sup> Moreover, the political insulation also insulates the judicial branch from much awareness of the desires and beliefs of the nation, which Vermeule views as a detriment to the ability to interpret the Constitution in accordance with changing times and norms.<sup>134</sup>

Thus, Thayerism—whether from Thayer’s original viewpoint or Vermeule’s modernization—focuses not on how the judiciary should interpret the Constitution, but on the prior question, that is, whether and when the judiciary should be involved in constitutional interpretation at all. Either through references to constitutional text, democratic principles, or cost-benefit analysis, Thayer and Vermeule conclude that the legislative branch is usually the one that should be making constitutional determinations, while the judiciary’s role is one of deference absent violation of clear constitutional commands.

## 2. Relevant Questions under a Thayerian System

Unlike originalism and common law constitutionalism, Thayerism posits a fairly limited role for judges in constitutional interpretation.<sup>135</sup> In light of that role, it is not altogether clear what the Senate should be looking for during the confirmation process. Indeed, Vermeule notes that one of the added costs of a more aggressive, non-Thayerian judicial review is that “a large additional increment must be spent on fighting over the high-stakes selection of powerful constitutional judges.”<sup>136</sup> It seems fairly intuitive that as the role of the judiciary itself grows in importance, the importance of the confirmation process would likewise increase. Nevertheless, the judiciary still plays some role, even if only a minimal one, and there are therefore some important issues that would become relevant in the confirmation process.

Perhaps the most important determination under a Thayerian system would be which provisions of the Constitution the nominee found to be clear and which he or she found to be vague or requiring

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<sup>133</sup> *Id.* at 279.

<sup>134</sup> *See id.*

<sup>135</sup> *See* Posner, *supra* note 125, at 522; Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 54–55 (2009).

<sup>136</sup> VERMEULE, *supra* note 16, at 275.

deference.<sup>137</sup> While it seems likely that most would agree with Vermeule's characterization of the clear provisions,<sup>138</sup> it seems quite possible that there would be disagreement on whether additional provisions could be added to that category and whether those that Vermeule considers vague<sup>139</sup> are always indeterminate enough to merit complete deference. One need look no further than Supreme Court precedent regarding the political question doctrine to see that reasonable people may differ in what they view as being clearly determined by the Constitution.<sup>140</sup> Those who argue against the substantive questioning of judicial nominees now might similarly argue that asking these kinds of questions might be too telling of how the nominee would decide cases.<sup>141</sup> Questions might therefore focus on how a nominee would determine whether a constitutional provision is clear rather than the nominee's view of the clarity of any particular provision.

Intellectual qualifications also would not seem to be as relevant under a Thayerian system. If the only constitutional interpretation judges are being asked to participate in is regarding the provisions that are clear,<sup>142</sup> it would seem likely that this would not take much skill. Moreover, if the provisions are actually clear, and if Congress takes seriously its responsibility to pass legislation that is within constitutional bounds,<sup>143</sup> it seems unlikely that the judiciary will be doing much constitutional interpretation at all. Thus, the focus under this theory would seem to be on finding rational people who understand the difference between either a clear error and an area of ambiguity or a clear constitutional provision and a provision requiring deference.<sup>144</sup>

Finally, morality would remain an issue only insofar as it shows that the nominee is willing to abide by the correct theory of interpretation and be a somewhat respectable public figure. Under

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<sup>137</sup> See Solum, *supra* note 111, at 473.

<sup>138</sup> See VERMEULE, *supra* note 16, at 1.

<sup>139</sup> See *id.*

<sup>140</sup> See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 996–97 (1979); *id.* at 998 (Powell, J., concurring); *id.* at 1006 (Blackmun, J., dissenting).

<sup>141</sup> See *Judicial Nomination and Confirmation Process Hearings*, *supra* note 39, at 60 (statement of Cass R. Sunstein, Professor, University of Chicago Law School), 201 (statement of Mark Tushnet, Professor, Georgetown University Law Center).

<sup>142</sup> See Solum, *supra* note 111, at 473.

<sup>143</sup> See, e.g., Tushnet, *supra* note 121, at 24–25.

<sup>144</sup> Of course, in this case, the confirmation process may well focus more on the Supreme Court's role in areas other than constitutional interpretation. If the Court's role in constitutional interpretation were circumscribed to the extent it would be under the Thayerian approach, then perhaps the Court's other roles would seem more important to senators making confirmation decisions.

Justice Frankfurter's explanation of the necessity of public confidence in the courts,<sup>145</sup> the baseline level of morality would need to be met.<sup>146</sup> And perhaps part of the institutional legitimacy of the courts comes from knowing when to decide a case and when to leave it to the other branches of the government. Yet, under a Thayerian system, there would likely be less need for the sociological legitimacy of the judiciary because the judiciary will have less of a role in deciding major questions and then enforcing those decisions. Of course, the Senate will still want to ensure that the nominees are respectable individuals, if only because the Senate's own public image would be on the line. But, any problems that might arise if a less-moral person were confirmed to the Court would be limited by the curbed powers of the Court.

### C. Common Law Constitutionalism

#### 1. Background Common Law Constitutionalist Principles

Of the three theories discussed, Professor David Strauss's common law constitutionalism is likely the most descriptively accurate of the majority of our current system. As the name of the theory suggests, Strauss claims that "our written [C]onstitution has, by now, become part of an evolutionary common law system, and the common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law."<sup>147</sup>

There are two main components of Strauss's theory. The first of these he calls "traditionalism," which is the idea that "the Constitution should be followed because its provisions reflect judgments that have been accepted by many generations in a variety of circumstances."<sup>148</sup> Under this view, precedent is valuable because it is "the accumulated wisdom of many generations" that has withstood the test of time in different circumstances.<sup>149</sup> Thus, the traditionalist argument for upholding the Constitution today has nothing to do with the fact that framers—who lived centuries ago and could not have foreseen the current world and its problems—have authority over us today, but instead bases

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<sup>145</sup> See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

<sup>146</sup> See Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1656–57 (2007).

<sup>147</sup> Strauss, *supra* note 19, at 885.

<sup>148</sup> *Id.* at 891.

<sup>149</sup> *Id.* at 891–92.

adherence on the fact that the Constitution has been reaffirmed by later generations.<sup>150</sup> Because our generation is not “so much more able than previous generations,” we should rely on the accumulated wisdom and preserve that which all others have likewise supported.<sup>151</sup>

The idea of traditionalism, however, is not a pure deference to the views of earlier generations.<sup>152</sup> It permits the rejection of precedent when it is deemed morally wrong.<sup>153</sup> Indeed, Strauss argues that the ability to recognize mistakes in precedent is one area in which the common law approach sets itself apart from other interpretive theories.<sup>154</sup> There is a general recognition that “maintaining continuity with the past” is an important part of constitutional law, but “[n]early everyone also recognizes that sometimes we must depart from the teachings of the past because we think they are not just or do not serve human needs.”<sup>155</sup> Drawing from common law interpretive methods gives us guidance on how to weigh the competing values of continuity and morality, freed from the idea that there is some intrinsic value to adhering to past judgments that are morally incorrect.<sup>156</sup>

The second tenet of the theory Strauss calls “conventionalism,” which is “a generalization of the notion that it is more important that some things be settled than that they be settled right.”<sup>157</sup> This component of the theory is necessary because it is clear that the text of the Constitution is regarded as far more binding than ordinary common law precedent.<sup>158</sup> Conventionalism thus provides the reasoning behind the fact that the Constitution has become a focal point of the U.S. legal system: “[O]ur culture has given it a salience that makes it the natural choice when cooperation is valuable. But its salience and general acceptability, rather than its authority or optimality, are the most important reasons for accepting it.”<sup>159</sup> Thus, common law constitutionalism differentiates between two kinds of constitutional provisions: those in which common law interpretation is valuable, in that the meaning of the provisions can

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<sup>150</sup> *Id.* at 892.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 893–94.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 888.

<sup>155</sup> *Id.* at 895.

<sup>156</sup> *See id.* at 895–96.

<sup>157</sup> *Id.* at 907.

<sup>158</sup> *Id.* at 906.

<sup>159</sup> *Id.* at 911.

change over time and be interpreted as would common law;<sup>160</sup> and those in which having a settled rule is more valuable than having a rule that might shift with changing times and preferences.<sup>161</sup>

While an obvious critique of this theory would be that it opens the door to judicial alteration and perhaps manipulation of the Constitution, Strauss argues that his theory actually provides a greater restraint on the judiciary than theories that rely on the text alone.<sup>162</sup> This is because “[a] judge who conscientiously tries to follow precedent is significantly limited in what she can do. But a judge who acknowledges only the text of the Constitution as a limit can, so to speak, go to town.”<sup>163</sup>

There are, of course, additional criticisms of the common law interpretive theory. Adrian Vermeule has found fault with the idea of traditionalism—that precedent contains “latent wisdom” upon which current generations can draw—in particular.<sup>164</sup> He claims that some might follow the line of precedent in order to save on decision costs rather than because they have exercised their independent judgment and determined that it is correct.<sup>165</sup> If this is the case, “then the informational value of the line of precedent or tradition is lower to that extent; there are fewer independent minds contributing to the collective wisdom.”<sup>166</sup> Moreover, Vermeule claims that if latent wisdom deserves more respect, then this actually points toward the Thayerian model of deference to legislatures because of the legislatures’ “numerosity[,] . . . voting practices, and . . . powerful tools for acquiring information.”<sup>167</sup>

## 2. Relevant Questions under a Common Law Constitutionalism Theory

The common law constitutionalism theory of interpretation is perhaps the theory under which the judiciary has the greatest amount of power.<sup>168</sup> It is up to the judiciary to determine whether a

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<sup>160</sup> See *id.* at 882–83.

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at 927.

<sup>163</sup> *Id.* at 926.

<sup>164</sup> See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1482–83 (2007).

<sup>165</sup> See *id.* at 1488.

<sup>166</sup> *Id.* at 1498.

<sup>167</sup> *Id.* at 1507.

<sup>168</sup> While Strauss would argue that originalism gives judges just as much—if not more—power as common law constitutionalism, originalists likely would not admit to this, as they claim that they are bound to the text and its original public meaning. See, e.g., Scalia, *supra* note 86, at 852.

particular provision of the Constitution is one that should simply be settled or one in which moral judgments should be given more weight.<sup>169</sup> It is up to the judiciary to determine whether mistakes in precedent have been made and whether to overturn these errors in prior judgment.<sup>170</sup> Because of this, the judicial confirmation process would arguably be more important than under prior theories.

Perhaps the most important information the Senate would be concerned with under this theory is the circumstances under which the nominee would consider overturning a precedent. The common law constitutionalist recognizes that mistakes happen and permits the overturning of precedent in these situations, but each candidate would obviously have different views on what constitutes a mistake and when the desirability of consistency in precedent can and should outweigh what may now be regarded as an error in judgment.<sup>171</sup> For example, a nominee may view a certain precedent as mistaken when it conflicts with their views of what morality demands. Senators would then be interested in hearing about whether the nominee perceives such a divergence in certain areas, how the nominee determines what morality requires, and whether conflicts between perceptions of morality and the law always necessitate a change in the law. Asking these kinds of questions may trouble those who are concerned with judicial independence. The line of questioning could easily (and would likely) target certain precedents that members of the Senate may believe to be mistakes, in hopes of filling the bench with those who share that belief and can then overrule the precedent. Indeed, confirmation hearings since *Roe v. Wade*,<sup>172</sup> have often brought up the case and, if not the candidate's views on overturning it, surely his or her views on what its holding implies.<sup>173</sup> Nevertheless, a more general line of questioning regarding what circumstances the nominee might consider when deciding whether to overrule a line of precedent would be instructive and less problematic for judicial independence.

As for the qualifications of the nominee, because common law constitutionalism views constitutional interpretation in a way similar to that of common law interpretation, this is a theory under which judicial experience would be particularly relevant. Not only

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<sup>169</sup> See Strauss, *supra* note 19, at 882.

<sup>170</sup> See *id.* at 883, 895–96.

<sup>171</sup> See *id.* at 895–96, 934–35.

<sup>172</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>173</sup> See, e.g., *The Nomination of Elena Kagan*, *supra* note 49, at 262 (statement of Sen. Lindsey Graham) (questioning then-Solicitor General Kagan as to the state of the law after *Roe v. Wade* and *Planned Parenthood v. Casey*).

is common law judging a skill that benefits from experience, but a record of prior decisions would give the Senate valuable insight into how the nominee has proceeded in deciding cases and what information he or she takes into account.<sup>174</sup> Because of this, a nominee with judging experience who has a body of work that can be reviewed may be subject to less intensive questioning during the confirmation process, as the prior work can speak for itself in some respects.<sup>175</sup>

Unlike the other two theories discussed, the morality of the nominees themselves would be a relevant factor for the Senate's consideration. Strauss notes that "[m]oral judgments—judgments about fairness, good policy, or social utility—have always played a role in the common law, and have generally been recognized as a legitimate part of common law judging."<sup>176</sup> This makes sense, in that the judges have the ability to overturn morally incorrect precedent, which requires a moral determination.<sup>177</sup> Thus, the Senate would need to confirm that the morals of the nominee line up with the morals of the country—or at least with their own morals. Insofar as a nominee's own moral conduct can be viewed as an indicator of their views as to what morality requires, this may entail some amount of digging into past personal conduct—perhaps more than under prior theories. Moreover, because the judge's own personal morality is a part of the decision-making process, Justice Frankfurter's concerns with sociological legitimacy<sup>178</sup> are more pressing. The judiciary has more power to make and overturn controversial decisions. In order for those decisions to have any real effect, the other branches of government and the American people must have some amount of respect for the members of the judiciary.

### III. COMPARING THE CURRENT CONFIRMATION PROCESS TO THE THEORETICAL PROCESSES

Having explored the general characteristics that might be important under three different theories of constitutional interpretation, the next step is to compare what might be expected

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<sup>174</sup> See *id.* at 30 (statement of Sen. John Cornyn) (noting that then-Solicitor General Kagan's lack of judicial experience made it difficult to evaluate her potential performance as a judge).

<sup>175</sup> See, e.g., *id.*

<sup>176</sup> Strauss, *supra* note 19, at 900.

<sup>177</sup> See *id.* at 882.

<sup>178</sup> See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *supra* notes 145–46.

under each of the theories to what we actually see in our present system and what that might tell us about the most prevalent theory of constitutional interpretation, at least as perceived by the senators involved in the confirmation process. Although the senators often give indications of their own views as to the proper method of constitutional interpretation, they are also aware that the nominee may not share those views, and thus they rationally raise questions that would be relevant under whatever theory they believe the nominee may espouse. Analyzing these questions can thus shed some light on the senator's own views, as well as the way the Senate views the nominee.

#### A. *The Candidate's Politics*

First, while much of our current confirmation process seems focused on getting at the nominee's political viewpoints, often by asking about past controversial Supreme Court decisions, none of the three theories are centrally focused on the political beliefs of the candidates. There is, of course, the assumption that the President will nominate someone whose views approximate his own, but rather than understanding that and setting it to one side, the confirmation process today is in large part used to determine exactly how far to the left or right the candidate sits. In Justice Kagan's confirmation hearing, for example, then-Senator Jeff Sessions repeatedly asked the then-Solicitor General Kagan if she would accept the characterization of her views as progressive—and Justice Kagan repeatedly avoided answering the question, suggesting that she viewed an affirmative answer as something that would harm her chances of being confirmed.<sup>179</sup>

In a Thayerian system, these kinds of questions would be absolutely irrelevant. In such a system, the political beliefs of the candidate would have no role to play, as the Court only decides clear questions, or only overturns statutes in clear cases.<sup>180</sup> Thus, any ambiguous case in which political leanings may tend to get in the way would be treated with complete deference to the legislature.<sup>181</sup> So long as the nominee understood his or her role in the process, it would not make any difference whether he or she held the same

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<sup>179</sup> See *The Nomination of Elena Kagan*, *supra* note 49, at 70 (question of Sen. Jeff Sessions) (“No, but I am asking, do you agree with the characterization that you are a legal progressive?”).

<sup>180</sup> See, e.g., Thayer, *supra* note 16, at 144.

<sup>181</sup> See *id.*

political leanings as the majority of the Senate or even the majority of the country.<sup>182</sup>

In an originalist system, it may seem at first glance that politics would likewise be of minimal importance. While it is true that the major names associated with this viewpoint are mostly conservative (e.g., Justice Scalia, Justice Thomas, Judge Easterbrook), there are liberals who support originalist interpretations as well. Professor Jack Balkin, for example, is engaged in an effort to show that “[o]riginal meaning originalism and living constitutionalism are compatible positions.”<sup>183</sup>

While other originalists argue that Professor Balkin’s theory is not actually consistent with originalism,<sup>184</sup> his arguments do raise the possibility that the theory of originalism is broad enough to include both liberal and conservative viewpoints. Moreover, because the cornerstone of the theory is history and original meaning, the assumption is generally that political ideology would have little role to play. Indeed, Justice Scalia has asserted that the reason the current system is so politicized is because it is not originalist.<sup>185</sup>

<sup>182</sup> See *id.* at 135.

<sup>183</sup> See Balkin, *supra* note 91, at 549; see also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007) [hereinafter Balkin, *Abortion*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 427–28 (2007) [hereinafter Balkin, *Original Meaning*]. Professor Balkin subscribes to a view of originalism that he terms “framework originalism,” which:

[V]iews the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction. . . . Later generations have a lot to do to build up and implement the Constitution, but when they do so they must always remain faithful to the basic framework.

Balkin, *supra* note 91, at 550. Professor Balkin asserts that the original meaning of the Constitution alone will not be sufficient to decide many cases that will arise under it, and therefore, additions to the theory of interpretation are necessary. See *id.* at 551. Thus, joining originalism with living constitutionalism basically means that “fidelity to *original meaning* does not require fidelity to *original expected application*,” and that the application of the original meaning is to be done through living constitutionalism. *Id.* at 552 (emphasis added). That is, where there are constitutional terms that are intentionally vague or abstract, the specifications of those terms are meant to be worked out by later generations, which is consistent with living constitutionalism.<sup>183</sup> See Balkin, *Original Meaning*, *supra*, at 456–57.

<sup>184</sup> See, e.g., Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 687 (2009) (“Professor Balkin’s originalism . . . errs in so far as it substitutes the rule of engaged social movements for the rule of law.”); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 381 (2007) (“[I]t is a little difficult to see what is left of a recognizable originalism, not to mention the amendment process, if social movements have such substantial discretion to apply constitutional provisions as they see fit.”).

<sup>185</sup> See SCALIA, *supra* note 23, at 47.

Nevertheless, it is not necessarily the case that a historically based theory of interpreting the Constitution will remove any hint of political ideology from the process. One need look no further than the Supreme Court's decision in *District of Columbia v. Heller*<sup>186</sup> to find an example. In that case, both the majority and the dissent looked to historical sources in attempting to determine the original intent of the framers of the Second Amendment, yet came to vastly different results.<sup>187</sup> And there is no reason to think that *Heller* is an isolated case; originalist scholarship reveals many instances in which there is contradictory evidence of originalist meaning, or a dearth of evidence altogether.<sup>188</sup> And even historical analysis requires certain theoretical assumptions.

In order to decide what kind of evidence to consult, it is necessary to have in mind an idea of the nature and scope of the Constitution, or what constitutes it. Furthermore, the purpose of constitutional history, like any other historical inquiry, may involve normative concerns raising questions of political theory and moral philosophy. Concerned as it is with knowledge of past decisions and actions that may have a direct bearing on questions of policy, constitutional history may be more subject to normative-theoretical demands than scholarship in fields that have less immediate practical import.<sup>189</sup>

Historical analysis thus leaves room for normative judgments. There are both liberal and conservative legal historians and “[a] glance at recent legal historiography suggests that liberal scholars, no less than other historians, have been theoretically inclined in the sense of joining history with normative philosophical considerations to help solve current problems.”<sup>190</sup> It is therefore unlikely that adopting originalism as a theory of constitutional interpretation will remove political ideology from the confirmation process altogether. Instead, it may make the calculus more difficult in determining where exactly ideology can come into play in historical analysis—a

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<sup>186</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>187</sup> See, e.g., *id.* at 603–04 (citations omitted); *id.* at 637 (Stevens, J., dissenting) (citations omitted).

<sup>188</sup> Compare Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 598 (2013) (arguing that originalist principles support the Supreme Court decision in *Bolling v. Sharpe*); with Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 232–33 (1980) (arguing that *Bolling* cannot be justified on originalist grounds).

<sup>189</sup> Herman Belz, *History, Theory, and the Constitution*, 11 CONST. COMMENT. 45, 49 (1994).

<sup>190</sup> *Id.* at 53.

discernment that it is unlikely that senators who are largely lacking in any historical training will be able to make.<sup>191</sup>

Common law constitutionalism would likely be the theory in which political leanings would play the largest and most overt role. Judges are tasked with shaping precedent and this is the theory under which the judiciary has the greatest amount of power; thus, the viewpoints of the nominee are arguably more important. Nevertheless, the Court is still bound by precedent, meaning that interpretations may not be based completely on politics. Even so, this is the theory in which politics may matter the most because there is—at least in theory—more room for interpretation of the text and precedent along with changing circumstances. Moreover, when it comes to correcting mistakes in precedents that are out of line with what is morally required, a nominee's political views may be seen as a proxy for moral beliefs, and an indicator of the kinds of precedents the nominee would be willing to revisit.

### *B. Past Professional Performance and Intellectual Qualifications*

Questions regarding actions taken in previous professional capacities have always been a part of judicial confirmation hearings,<sup>192</sup> and rightly so. Under any one of the three theories of judicial decision-making discussed above, it is important that the candidate perform the job to which he or she has been appointed. Thus, Senators Patrick Leahy and Jeff Sessions' round of questions directed at Justice Kagan regarding her actions as Dean of Harvard Law School in dealing with military recruiters and the "Don't Ask, Don't Tell" policy was completely appropriate.<sup>193</sup> Not only did the questioning involve her decisions in a professional capacity, but it also implicated her interpretation of the law at the time when the Third Circuit had ruled "Don't Ask, Don't Tell" unconstitutional.<sup>194</sup>

The Senate also appears to be concerned with the professional qualifications and credentials of the nominee, though they do not see a lack of judicial experience as an automatic disqualifier<sup>195</sup>

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<sup>191</sup> It is necessary to discover at which point politics enters into the equation because when applying a historical analysis, a judge is likely to state things in a formalist way that is unrevealing of any ambiguity.

<sup>192</sup> See, e.g., *The Nomination of Elena Kagan*, *supra* note 49, at 6 (statement of Sen. Jeff Sessions).

<sup>193</sup> See *id.* at 66–67, 71 (statements of Sen. Patrick J. Leahy, Chairman, Comm. on the Judiciary and Sen. Jeff Sessions).

<sup>194</sup> See *id.* at 71 (statements of Sen. Jeff Sessions and Hon. Elena Kagan).

<sup>195</sup> See, e.g., *id.* at 10 (statement of Sen. Orrin G. Hatch) ("I have never considered the lack of judicial experience to be an automatic disqualifier for a judicial nominee.").

(which could potentially be expected in common law constitutionalism), nor do they focus on a background in historical analysis (which would likely be expected in originalism).

Historically, there has also been a focus on ensuring that the nominee's intellect is up to par. Though in many cases senators have uniformly agreed that the candidate is qualified on that front, in other cases, a lack of adequate intelligence has been viewed as disqualifying. For example, Harriet Miers withdrew her nomination to the Supreme Court after being faced with skepticism even among the conservative supporters of the President who nominated her.<sup>196</sup> Republican Senator Norm Coleman was quoted saying that he needed "a better feel for her intellectual capacity and judicial philosophy, [and] core competence issues."<sup>197</sup> Judge G. Harrold Carswell was similarly rejected by the Senate, at least in part because he was viewed as a mediocre judge, with a fifty-eight percent reversal rate.<sup>198</sup> In an attempt to defend Judge Carswell, Senator Roman Hruska remarked: "There are a lot of mediocre judges and people and lawyers, . . . [t]hey are entitled to a little representation, aren't they? We can't have all Brandeises, Frankfurters and Cardozos."<sup>199</sup> This response was met with much criticism<sup>200</sup> and soon thereafter Judge Carswell's nomination was defeated.<sup>201</sup>

The focus on intellectual competence is intuitively unsurprising—appointing someone to be a Justice on the highest Court in the land is something that seems rightly reserved for the intellectually elite.<sup>202</sup> Nevertheless, under a Thayerian system, mediocrity would

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<sup>196</sup> See Michael A. Fletcher & Charles Babington, *Miers, Under Fire from Right, Withdrawn as Court Nominee*, WASH. POST (Oct. 28, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102700547.html>.

<sup>197</sup> David D. Kirkpatrick, *Senators in G.O.P. Voice New Doubt on Court Choice*, N.Y. TIMES (Oct. 26, 2005), <http://www.nytimes.com/2005/10/26/us/front%20page/senators-in-gop-voice-new-doubt-on-court-choice.html>.

<sup>198</sup> See Tanya N. Ballard, *Supreme Court Nominees Who Were Not Confirmed*, WASH. POST (Oct. 27, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102701005.html>. Indeed, the nominee's reversal rate remains a relevant factor for the Senate, as it is one of the questions asked in the Senate's Questionnaire. See, e.g., S. COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT 35, [https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJC%20\(Public\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJC%20(Public).pdf) (last visited May 27, 2017) [hereinafter QUESTIONNAIRE].

<sup>199</sup> *The Supreme Court: A Seat for Mediocrity?*, TIME (Mar. 30, 1970), <http://content.time.com/time/magazine/article/0,9171,942208,00.html>.

<sup>200</sup> See, e.g., Art Buchwald, *Support Your Mediocre Judge*, YOUNGSTOWN DAILY VINDICATOR, Mar. 26, 1970, at 31.

<sup>201</sup> See Ballard, *supra* note 198.

<sup>202</sup> Indeed, even Trump, with his anti-elitism focus, chose to nominate an undeniably and quintessentially elite candidate. See generally QUESTIONNAIRE, *supra* note 198 (providing

not necessarily be a disqualifying factor, as being able to defer to the judgments of a legislature is not an incredibly challenging task.<sup>203</sup> It is possible, however, that the other tasks of a Justice outside of interpreting the Constitution may call for more skill, and perhaps therein lies the reason for the intelligence requirements.<sup>204</sup>

The focus on intellect is more easily squared with theories of originalism and common law constitutionalism. An originalist needs to be able to intelligently look to history of the Constitution, interpreting and evaluating historical records.<sup>205</sup> A common law constitutionalist needs to have the necessary foresight to shape and develop the law in a way that will lead to the desirable result and the legal skill to interpret and integrate voluminous precedents.<sup>206</sup> Both obviously require skill and expertise and the focus on intellect is therefore unsurprising.

### C. *Morality*

Concerns with the morality of the nominees should also be less important than they are currently, were we in a purely originalist or Thayerian system. Under either theory, so long as the nominee upholds a minimum standard of professionalism, personal missteps should not affect his or her ability to either defer to the legislature or perform the proper historical analysis to determine original public meaning of the Constitution.

The nomination of Judge Douglas Ginsburg is a ready example of an instance in which moral concerns played a larger role than might be expected under anything other than a common law constitutionalist system. Judge Ginsburg asked President Reagan to withdraw his nomination to the Supreme Court a mere nine days after he was selected to fill the seat due to disclosures that revealed that he had smoked marijuana several times as a student and as a professor.<sup>207</sup> Following the revelation, various members of the

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now-Justice Gorsuch's completed nominee questionnaire).

<sup>203</sup> See Posner, *supra* note 125, at 538.

<sup>204</sup> See *id.* at 539.

<sup>205</sup> See Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POLY & L. 239, 253–54 (2006).

<sup>206</sup> See Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 182 (2009).

<sup>207</sup> See Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES (Nov 8, 1987), <http://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html?pagewanted=all>.

Reagan Administration reportedly viewed the cause as “no longer winnable,” thus highlighting the importance the Senate placed on the morality of the nominees.<sup>208</sup> Episodes like this make the confirmation process look decidedly different from what one would expect under a Thayerian or originalist system.<sup>209</sup>

This is not to say that morality and personal characteristics would play absolutely no role at all in the confirmation process under either of these systems. Certainly in either instance, the nominee would need to exhibit a certain amount of modesty, so that the Senate would not be concerned with the possibility of the nominee imposing his or her own beliefs on the law instead of deferring or instead of properly conducting the historical analysis.<sup>210</sup> Nonetheless, there would, perhaps, be less of a focus on digging as deep into the past of the candidates as possible for the purpose of unearthing something that will disqualify the candidate.

Under a theory of common law constitutionalism, however, Professor Strauss himself makes clear that moral judgments are important, as the judge will be asked to interpret provisions in light of moral standards like justice, fairness, and good policy.<sup>211</sup> Thus, were we in a system of common law constitutional interpretation, the Senate would want to determine whether the nominee’s moral standards are in line with those of the majority of the country so that the nominee could then move the law in the proper direction.<sup>212</sup>

Moreover, in a common law constitutionalist system, collegiality and a willingness to narrow opinions to find common ground would

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<sup>208</sup> See *id.*

<sup>209</sup> Indeed, one might question whether the morality of the candidate is given too much weight even under a common law constitutionalist system. The idea that morality is important seems to equate the morality of a candidate to the ability to exercise moral reasoning. This is the view that Lawrence Kohlberg espoused in his study of moral development. See Lawrence Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347, 396–97 (David A. Goslin ed., 1969) (“[Maturity of moral judgment] can be a quite powerful and meaningful predictor of action.”). Several other theorists debate this conclusion, however, noting that many other factors outside of formal reasoning can influence action. See Carl I. Malinowski & Charles P. Smith, *Moral Reasoning and Moral Conduct: An Investigation Prompted by Kohlberg’s Theory*, 49 J. PERSONALITY & SOC. PSYCH. 1016, 1017–18 (1985) (summarizing several views countering Kohlberg’s theory). If it is possible to reason morally without behaving morally, then the necessity of nominating and confirming those with clean moral records may be diminished significantly. Nevertheless, there may also be value in appointing upstanding members of society to these highly valued positions, if only to give the overall impression that poor behavior is not rewarded.

<sup>210</sup> See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearings Before the U.S. S. Comm. on the Judiciary*, 109th Cong. 121–22 (2005) [hereinafter *Confirmation Hearing of John G. Roberts*].

<sup>211</sup> See Strauss, *supra* note 19, at 900.

<sup>212</sup> See Spiropoulos, *supra* note 206, at 182.

be more important than under the other two systems. Common law constitutional judging assumes disagreement among the Justices on the Court because it does not assume a “correct” answer to the constitutional questions.<sup>213</sup> There will be different views on the direction in which the law should be heading and disagreement on the best way to get there.<sup>214</sup> Under Thayerism or originalism, by contrast, it is assumed that there is a right answer, making teamwork less important and the ability to find the right answer the most sought-after quality.<sup>215</sup>

#### *D. Senator Speechifying*

One aspect of the confirmation process that has not yet been accounted for under any of the three systems is the time that the involved senators spend expounding upon their own views of the judiciary and issues that may face the Court.<sup>216</sup> Indeed, the majority of the lengthy transcripts of each confirmation hearing are not questions and answers, but instead are prepared remarks by each of the senators.<sup>217</sup> For example, the transcript of Justice Kagan’s Supreme Court confirmation hearing shows that the nominee did not utter a word until page fifty-five.<sup>218</sup> Furthermore, even in the portions of the confirmation hearings dedicated to questioning the nominee, the senators often find ways to express their own views within the query.<sup>219</sup>

Under a Thayerian system, senator speechifying may be understood as an opportunity for the senators to let the nominee know the views to which they will be deferring.<sup>220</sup> Because it is not necessary for the nominee to hold any particular views regarding the proper interpretation of any constitutional provision that is unclear, questions to that end may not be very useful. The time may indeed be better spent focusing on the views of the people with

<sup>213</sup> See Strauss, *supra* note 19, at 907.

<sup>214</sup> See *id.*

<sup>215</sup> See David A. Strauss, *The Living Constitution*, RECORD: ALUMNI MAG., Fall 2010, <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss>.

<sup>216</sup> See, e.g., *The Nomination of Elena Kagan*, *supra* note 49, at 3–4 (statement of Sen. Patrick J. Leahy, Chairman, Comm. on the Judiciary) (discussing the “jarring” decisions of *Bush v. Gore* and *Citizens United* and the effect they had on the credibility of the Court).

<sup>217</sup> See, e.g., *id.*

<sup>218</sup> See *id.* at 55.

<sup>219</sup> See, e.g., *id.* at 174, 175 (statement of Sen. Tom Coburn) (“I’ve never walked away from my conservative positions. I don’t apologize for my social conservatism or my fiscal conservatism. . . . [Y]ou have a very different belief system than most of the people who come from where I come from. . . . Do you have a comment about what I’ve said?”).

<sup>220</sup> See Posner, *supra* note 125, at 537.

the authority on the issues.

Under an originalist system, the phenomenon is more difficult to explain. The candidate should put no weight on what any particular senator believes the Constitution means, unless perhaps that senator is a historian speaking with reference to original public meaning. Because the senators are not elected based on any expertise in historical analysis,<sup>221</sup> their views are likely to be wholly irrelevant.

Under common law constitutionalism, this can be seen as a way for the senators to express to the judges their views of the direction in which the Court should move the law. Since a common law constitutionalist Court has more power to change the course of the law, the senators, in their role as elected representatives of the general public, may be attempting to show the nominee where the moral compass of the country lies.<sup>222</sup> Nevertheless, it still seems that in this case, there would be more of a focus on what the nominee believes and little need to hear from the individual senators.<sup>223</sup> As the senators reveal their own views, it seems a bit like they are giving the nominee what they believe to be the “right answer” to the questions they pose. Of course, the right answer for one senator is undoubtedly the wrong answer for another, so it is unlikely that the nominee would reaffirm what the senator asking the question has said simply in order to agree. Even if the nominee did so, there would not seem to be anything holding him or her to that answer once appointed a member of the Court.

Perhaps a more likely account of the senators’ lengthy remarks is that they are not directed at the nominee at all. At times, in fact, the senators appear to be speaking to the public watching the confirmation process, educating them on the role of the Supreme Court, the status of the law, the various methods of interpretation, or recent Supreme Court cases and the impact they might have on daily life.<sup>224</sup>

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<sup>221</sup> See Peter Baker, *100 Ways to Become a Senator*, N.Y. TIMES (Jan. 3, 2009), [http://www.nytimes.com/2009/01/04/weekinreview/04baker.html?\\_r=0](http://www.nytimes.com/2009/01/04/weekinreview/04baker.html?_r=0).

<sup>222</sup> See, e.g., *The Nomination of Elena Kagan*, *supra* note 49, at 136 (statement of Sen. Arlen Specter) (“[T]he American people responded on a poll to *Citizens United* and [eighty-five] percent thought it was a terrible decision. [Ninety-five] percent thought that corporations paid contributions to influence legislators.”).

<sup>223</sup> See Paul E. Vaglica, Note, *Step Aside, Mr. Senator: A Request for Members of the Senate Judiciary Committee to Give up Their Mics*, 87 IND. L.J. 1791, 1792 (2012).

<sup>224</sup> See *Nomination of Elena Kagan*, *supra* note 49, at 37 (statement of Sen. Ben Cardin) (“Are you a consumer? Do you buy products for your family? If so, the Supreme Court, in *Leegin*, yet another 5-4 split case, should be of concern to you. Here, the Court ignored longstanding precedent to protect big business to perpetuate price fixing. It was a ruling that

A more skeptical account of the pontificating senators is simply that they are capitalizing on an opportunity to speak to their constituents and various interest groups sure to be paying more attention to the confirmation processes than they would to everyday C-SPAN coverage. Indeed, statements of Senator John Cornyn in a speech he gave to the Federalist Society support this view. There, Senator Cornyn noted: “[I]t is no coincidence that confirmation hearings became a regular part of the process around the same time that television became a regular part of our lives. They provide a good deal of free television time for us senators.”<sup>225</sup> Senator Cornyn went on to argue that the confirmation process today has “strayed very far from the original understanding of [the Senate’s] role,”<sup>226</sup> and that the confirmation hearing itself is unnecessary under an originalist theory, especially in its focus on ideology.<sup>227</sup> Thus, it is possible that the senatorial speeches have little to do with theories of constitutional interpretation at all and are the simple utilization of an opportunity for exposure. In that case, perhaps the majority of the confirmation process will remain the same regardless of the theory of constitutional interpretation, simply because of the publicly televised nature of the process and the incentives that it gives to the senators.

#### IV. THE LACK OF CONSENSUS

The previous two Parts show that our current confirmation process does not map onto any one of the three interpretive theories with any exactness. One would expect additional, different, or greater emphasis on some points and less emphasis on others than we presently see. This is likely due to the fact that there is no single interpretive theory accepted by the country as a whole, or

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put consumers at risk.”); *id.* at 38 (“I welcome the American public to these hearings, as we open a window to the Supreme Court and shine a light on the critical role the Constitution and the rule of law plays in our lives.”); *id.* at 48 (statement of Sen. Al Franken) (“[T]hese hearings are also a learning experience for the people of Minnesota and for every American. . . . And I think part of my job is to continue that learning experience for the American people.”); *id.* at 136 (statement of Sen. Arlen Specter) (“If the people of this country knew that the [C]ourt was deciding all of the cutting edge questions, a woman’s right to choose, who lands death penalty cases for juveniles, who dies, affirmative action, who gets into college, freedom of speech and religion . . . .”); *id.* at 177 (statement of Sen. Coburn) (“What does the high bar [for the Court to overturn precedent] mean to the average person watching this hearing today?”).

<sup>225</sup> Sen. John Cornyn, U.S. Senator, The Judicial Confirmations Process, Address at the Federalist Society National Lawyer’s Convention (Nov. 10, 2005).

<sup>226</sup> *Id.*

<sup>227</sup> *See id.*

even by the Senate as a whole. Questions throughout the confirmation process come from senators with varied conceptions of what the role of the judiciary is or should be, and because of that they ask varied questions.<sup>228</sup> Moreover, the line of questioning in which the senators are engaged differs based on whether they perceive the nominee to share their own political viewpoints.<sup>229</sup>

These kinds of patterns can be seen when looking at the kinds of questions the same senators have asked different judicial nominees over time. Senator Orrin Hatch, for example, would likely be associated with an originalist viewpoint. In Justice Ruth Bader Ginsburg's confirmation hearing, he asked the then-judge what she thought of the statement that "[t]he only legitimate way for a judge to go about defining the law is by attempting to discern what those who made the law intended," and then went on to state his own view that "so long as the judge's or Justice's starting point is the original meaning of the text, then it seems to me that judge is seeking to fulfill his or her constitutional duty."<sup>230</sup> Nonetheless, in confirmation hearings for both Justices Ginsburg and Kagan, Senator Hatch also spent a good portion of his time questioning the nominees regarding their own personal viewpoints of precedent, not simply whether they regarded the precedent as binding.<sup>231</sup> The nominees' own personal beliefs would be of little consequence if Senator Hatch believed that the judiciary operated under a completely originalist system, wherein a judge's own viewpoint does not come into the calculation at all. Thus, by asking these questions, it seems that Senator Hatch either recognizes that that is not the system under which we now live, or at least thinks that the candidates he is questioning hold different views of the proper role of the judiciary in interpreting the Constitution. It would therefore be rational for the senators to question the candidate concerning

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<sup>228</sup> See Lori A. Ringhand & Paul M. Collins, Jr., *May it Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939-2009*, 60 AM. U. L. REV. 589, 622 (2011).

<sup>229</sup> See, e.g., *id.* at 625.

<sup>230</sup> *Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings Before the U.S. S. Comm. on the Judiciary*, 103d Cong. 127 (1993) [hereinafter *Nomination of Ruth Bader Ginsburg*] (statement of Sen. Orrin G. Hatch); see also *Confirmation Hearing of John G. Roberts*, *supra* note 210, at 310 (statement of Sen. Orrin G. Hatch) ("[W]hat assurance can you give the Committee that you will fairly interpret the civil rights laws, including critical statutes such as Title IX, fully and fairly, consistent with the purposes Congress intended in passing these laws?" (emphasis added)).

<sup>231</sup> See, e.g., *Nomination of Ruth Bader Ginsburg*, *supra* note 230, at 263-64 (statement of Sen. Orrin G. Hatch) (questioning then-Judge Ginsburg regarding the death penalty); *Nomination of Elena Kagan*, *supra* note 49, at 85 (statement of Sen. Orrin G. Hatch) (questioning Justice Kagan regarding campaign finance).

things that would be relevant under several different theories of constitutional interpretation, or perhaps under the theory that the senator believes comports most readily with the nominee's views.

Another example of senators asking particular types of questions comes from Senator Patrick Leahy. While he spent much time questioning the candidates about their past writings and expressed viewpoints,<sup>232</sup> he also focused his questions on whether the nominees considered specific cases to be good law and binding precedent.<sup>233</sup> Indeed, in the confirmation hearings for Justice Ginsburg, Senator Leahy spent some time talking with then-Judge Ginsburg regarding the topic of when precedent could be deconstructed.<sup>234</sup> Thus, at least in these confirmation hearings, Senator Leahy seemed less concerned than Senator Hatch about the nominee's own views and more concerned with what the nominee viewed as binding precedent and how she would deal with that.<sup>235</sup> This may be due to the fact that Senator Leahy views the Court as more bound by precedent than does Senator Hatch, or it may be that Senator Leahy is less concerned than Senator Hatch is with the personal viewpoints of the nominees discussed herein.<sup>236</sup>

Missing from the lines of questioning of these two senators (and of the other senators involved in the confirmation hearings), however, are questions that would be expected under a purely originalist system. There is no emphasis on historical analysis abilities or even about the correct sources to turn to when attempting to interpret various provisions.<sup>237</sup> There are mentions of original

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<sup>232</sup> See, e.g., *Nomination of Elena Kagan*, *supra* note 49, at 64 (statement of Sen. Patrick J. Leahy, Chairman, Comm. on the Judiciary) (questioning then-Solicitor General Kagan about the cases she argued before the Supreme Court); *Confirmation of John G. Roberts*, *supra* note 210, at 155–56 (statement of Sen. Patrick J. Leahy) (questioning then-Judge Roberts about a *Duke Law Journal* article he wrote regarding standing).

<sup>233</sup> See, e.g., *Nomination of Ruth Bader Ginsburg*, *supra* note 230, at 179 (statement of Sen. Patrick J. Leahy) (questioning then-Judge Ginsburg about whether she considers the *Lemon v. Kurtzman* test good law today); *Confirmation Hearing of John G. Roberts*, *supra* note 210, at 153 (statement of Sen. Patrick J. Leahy) (questioning then-Judge Roberts about whether he considers *Youngstown Sheet & Tube Co. v. Sawyer* good law).

<sup>234</sup> See *Nomination of Ruth Bader Ginsberg*, *supra* note 230, at 179 (statement of Sen. Patrick J. Leahy) (“[Y]ou had said that before a judge or Justice . . . ‘deconstructs[]’ . . . an established test, he or she should ask[:] Well, what is the alternative?”).

<sup>235</sup> Compare *supra* text accompanying notes 230–31 (citing examples of Senator Hatch questioning nominees on their own viewpoints on certain issues), with *supra* text accompanying notes 232–34 (citing examples of Senator Leahy questioning nominees on specific cases).

<sup>236</sup> See, e.g., Press Release, Senator Patrick Leahy, Statement on the Nomination of Judge Neil Gorsuch to the Supreme Court of the United States (Jan. 31, 2017), <https://www.leahy.senate.gov/press/statement-on-the-nomination-of-judge-neil-gorsuch-to-the-supreme-court-of-the-united-states>.

<sup>237</sup> See, e.g., *supra* notes 229, 235 and accompanying text.

intent and original meaning,<sup>238</sup> but these are not by any means the focus of the confirmation hearings.

The process is also out of line with a Thayerian system. It is an arduous and lengthy affair that seems far more intensive than would be necessary if the judge's role were really as deferential as Thayer would have it be. Moreover, there is not much mention of deferring to congressional interpretations of the Constitution. Indeed, even when it seems clear that a nominee would not consider his role to be one of pure deference, this does not necessarily result in disqualification from consideration.<sup>239</sup>

It seems that the process is most aligned with a theory of common law constitutionalism, perhaps because that is the theory in which a wide variety of questions are relevant because the role of the judge is larger and the opportunity for interpretation is broader. Questions concerning morality, politics, professionalism, as well as a record of past decision-making are all important under common law constitutionalism and these are all parts of the current confirmation process. Under this theory, then, it seems that the confirmation process is not such a mess after all. Perhaps this is why, in response to Carter's book, Professor Strauss questions the argument that the process is actually broken, saying that even the most ill-regarded confirmation hearing (that of Robert Bork) was not bad when "[c]ompared to the distortions, oversimplifications, and mudslinging of presidential campaigns."<sup>240</sup> The hearings include "extensive substantive discussions about the Constitution," and "[t]he nation focused on the issue over a sustained period."<sup>241</sup> Indeed, perhaps under this theory, the process looks precisely the way it should.

## CONCLUSION

Many bemoan the state of the confirmation process and scholars continue to put forth articles containing suggestions of how to better

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<sup>238</sup> See, e.g., *supra* note 230 and accompanying text.

<sup>239</sup> In Chief Justice John Roberts's confirmation hearing, for example, Senator Kennedy posed questions about then-Judge Robert's writings disapproving of the Voting Rights Act. Senator Kennedy noted that "both the House and the Senate had the extensive hearings . . . [and] considered detail-specific testimony from affected voters throughout the country," but that Roberts had "dismissed the work of Congress out of hand." *Confirmation Hearing of John G. Roberts, supra* note 210, at 171. The Chief Justice was, of course, confirmed. See David Welna, *John G. Roberts Sworn in as 17th Chief Justice*, NPR (Sept. 29, 2005), <http://www.npr.org/templates/story/story.php?storyId=4929621>.

<sup>240</sup> Strauss, *supra* note 77.

<sup>241</sup> *Id.*

the process and figure out what it is lacking. This article has endeavored to examine what the confirmation process might look like under three different theories of constitutional interpretation, but it seems that unless and until the country is united under a common theory of constitutional interpretation with a specified and agreed-upon role for judges, there will always be some who view the process as “lacking.” If nominees are not measured by an appreciable standard, it will always be difficult to determine what questions should be asked, what characteristics should be relevant, and what inquiries should be off the table.