

How About That 10th Amendment?

Ask Roberts to interpret some key constitutional clauses.

BY RANDY E. BARNETT

John Roberts Jr.'s credentials and legal ability are beyond question. But there is one added qualification a Supreme Court nominee requires: a judicial philosophy of respect for the rule of law provided by the Constitution as written.

No matter how otherwise qualified, if a nominee favors a method of interpretation that calls for a bit of text, a dash of history, a dollop of precedent, and a pinch of pragmatism, he can reach almost any result. We must then fall back on the nominee's political preferences to predict the type of justice he will make. This is a bad idea. Far better to choose candidates whose approach to the text is both constraining and predictable, while independent of ideology.

The best method of constitutional interpretation is based on the proposition that "the meaning of the text remains the same until it is properly changed"—by written amendment, not by judicial fiat. This approach is sometimes called "textualism," sometimes "public meaning" originalism, but labels matter less than the method.

But how does a senator go about discerning a nominee's method of interpretation? Appellate opinions tell us something, but not a great deal, since appellate judges aim to follow Supreme Court opinions. And senators should not ask about the results in particular cases, either real or hypothetical, because this could prejudice and constrain the nominee when he faces an actual case.

There are two legitimate avenues of inquiry that candidates have answered in the past. One is to elicit the nominee's candid description of his methodology. The second, more directed approach is to ask for a candidate's opinions about particular clauses in the Constitution.

Asking about the meaning of the commerce clause and the 10th Amendment will tell us a lot about a candidate's view of federalism—and the role of the judiciary in drawing a line.

Asking about the Ninth Amendment and the privileges or immunities clause of the 14th Amendment will tell us a lot about the candidate's view of liberty—and the role of the judiciary in protecting it from legislative majorities.

Asking about the Second Amendment could be particularly revealing. Ask not what the candidate's view may be on concealed-carry laws or waiting periods. Ask whether the Second Amendment protects the rights of individuals or the collective right of the states to field a militia, or whether the meaning evolves with changing circumstances.

After eliciting an answer on the meaning of the text, senators should follow up with questions about whether putting that meaning into effect is wholly within the realm of legislatures, or whether judges play a role in policing abuses of these provisions. Complete deference to legislative rationales effectively erases provisions from the Constitution no matter what a justice thinks they mean.

So avoid asking about the results of cases and controversies. Ask instead about the meaning of clauses. Only then can we learn, for better or worse, whether an extremely well-credentialed nominee has the added virtue of a judicial philosophy that puts the rule of law provided by our written Constitution ahead of the outcomes he may happen to prefer.

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