

**WHO WON THE
CULTURE WARS?**
CHRISTOPHER CALDWELL

the weekly

Standard

SEPTEMBER 14, 2015

\$4.95

THE NEXT JUSTICES



**Filling Supreme Court vacancies:
a guide for GOP candidates**

BY RANDY E. BARNETT & JOSH BLACKMAN

Contents

September 14, 2015 • Volume 21, Number 1



- 2 The Scrapbook *Red-light fiasco, the anti-science left, & more*
- 5 Casual *Terry Eastland, gardening by the book*
- 7 Editorials
Hillary Antoinette **BY WILLIAM KRISTOL**
Obama's Victory Is Iran's Victory **BY LEE SMITH**

Articles

- 9 Bye Bye McKinley **BY P.J. O'ROURKE**
A president who deserves to be remembered
- 10 'Growing' in Office **BY FRED BARNES**
How Alaska's governor went from Palin favorite to Obama pal
- 12 Lincoln Who? **BY ETHAN EPSTEIN**
Chafee's minimalist presidential campaign
- 13 Among the Believers **BY PAUL MARSHALL**
A century-old mass organization cultivates an adaptable Islam
- 16 Labor's Wishful Thinking **BY IKE BRANNON**
Unions are no panacea for low-income workers
- 17 Of Course They're Fed Up **BY STEPHEN MOORE**
The left blames economic woes on everything except its hero president
- 19 Immiserating the Poor **BY BLAKE HURST**
More dubious achievements from the EPA



Features

- 22 The Next Justices **BY RANDY E. BARNETT & JOSH BLACKMAN**
A guide for GOP candidates on how to fill Court vacancies
- 26 On the Frontline in Ukraine **BY DOVID MARGOLIN**
A Jewish community hangs on, despite the uncertainty

Books & Arts

- 30 Who Won the Wars? **BY CHRISTOPHER CALDWELL**
It may be too early to say
- 32 Lying for Truth **BY JAMES MATTHEW WILSON**
Wyatt Prunty, poet of the fallen world
- 33 Tennis, Everyone **BY JOSEPH EPSTEIN**
One way of seeing Roger Federer's game
- 36 Smart Power **BY ANNE CONTINETTI**
How and why gifted students are shortchanged
- 37 The Phonespinners **BY TEMMA EHRENFELD**
Are bicycles built for two?
- 38 Attitude Adjustment **BY JOHN PODHORETZ**
The irresistible rise of gangsta rap
- 40 Parody *Caving to Kanye*



The Next Justices

A guide for GOP candidates on how to fill Court vacancies

BY RANDY E. BARNETT
& JOSH BLACKMAN

When Chief Justice John Roberts administers the oath of office to the next president, he will be flanked by three, and almost four, octogenarians: Justices Ruth Bader Ginsburg (83), Antonin Scalia (80), Anthony Kennedy (80), and Stephen Breyer (77). The next president will likely have the opportunity to appoint a replacement for one, two, three, or maybe even four of those justices. These decisions will reshape the Court and how it reads the Constitution for decades to come. Republican presidential candidates will likely pledge to appoint “constitutional conservatives” to the bench—which ought to mean judges who will be constrained by its original meaning. However, GOP presidents have filled 12 out of 18 Supreme Court vacancies over the past half-century, with disappointing results. This track record teaches five important lessons that should guide future nominations.

1. Bruising confirmation battles are worth the political capital for a lifetime appointment

Presidencies last four to eight years. A Supreme Court appointment can last three decades. Long after the names Robert Bork and Douglas Ginsburg faded from the zeitgeist, Anthony Kennedy continues to have an oversized impact on our society. President Reagan initially nominated Bork and then Ginsburg to replace the retiring Justice Lewis Powell in 1987, but after the political process chewed up both nominees, the administration turned to a moderate circuit court judge with a thin public record from Sacramento. Anthony Kennedy was easily confirmed, 97-0.

Randy E. Barnett is the Carmack Waterhouse professor of legal theory at Georgetown University Law Center, where he directs the Georgetown Center for the Constitution. Josh Blackman is a constitutional law professor at the South Texas College of Law, Houston. Both have advised the Rand Paul campaign.

Placating Joe Biden, who chaired the Senate Judiciary Committee, irreparably altered our constitutional order.

President George H.W. Bush made a similar, but even worse choice three years later. Faced with a once-in-a-generation opportunity to replace liberal lion Justice William Brennan and thereby alter the balance of the Court, Bush faltered. Instead of girding for battle and burning the political capital for what would have been a brutal hearing—a preview of what would happen to Clarence Thomas a year later—Bush punted. On the recommendation of Warren Rudman and John Sununu, he quickly selected First Circuit judge David Souter. The “stealth candidate” was easily confirmed by a vote of 90-9. He would become a solid member of the Court’s liberal bloc, retiring six months into the Obama presidency (at the relatively young age of 69), opening his seat for the nomination of Sonia Sotomayor.



Like this: Alito, 2006

In 2005, President George W. Bush initially nominated Harriet Miers to replace the retiring Justice Sandra Day O’Connor. Miers was viewed as an easy

appointment, as her selection was supported by both Harry Reid and Chuck Schumer—which should have been a sign that something was amiss. Only after Miers withdrew, in the face of conservative and libertarian opposition, did the president nominate the far more controversial (and better qualified) Samuel Alito. He was confirmed by a 58-42 vote.

Whatever political capital was gained or sought in 1987, 1990, and 2005 by appointing a less-contentious nominee to avoid a bruising political fight is entirely dwarfed by the impact a justice has on our legal order over three decades. The appointment of a justice should be viewed on the same plane as a president’s “signature” legislative achievements. After the enactment of the Affordable Care Act, President Obama’s most enduring political legacy may well be his appointments of Justices Sonia Sotomayor and Elena Kagan. Obamacare can still be repealed. These appointments are for life.

But what if a contentious nomination fails? Try again. For better or worse, the Senate can mount only so much resistance. The inconvenience of one or more terms at the Supreme Court with fewer than nine justices—even

NEWS.COM

through an intervening midterm election—pales in comparison with the repercussions of making a bad selection. It's worth the fight, and worth the wait. And this fight may become much easier. Traditionally, presidents had to ensure their judicial nominees would meet a 60-vote threshold to overcome a filibuster. However, in 2013, Senator Harry Reid triggered the so-called nuclear option, which eliminated the filibuster for the appointment of lower court judges, but preserved it for the Supreme Court. It is delusional to imagine that the Democrats will stick with this limit if they retake the Senate and have the opportunity to confirm the next justice. Senate Republicans are fools if they unilaterally preserve the filibuster only for justices. Republican candidates need to make their views on this clear.

2. Paper trails are an asset, not a disqualification

In November 2005, shortly after President Bush nominated Samuel Alito, the *New York Observer* published a timely, and timeless, article about “The Little Supremes.” This cohort of “earnest, platinum-résumé’d law geeks” have their eyes set on “the Big Bench,” so they keep “tidy lives because they think they might someday face a confirmation hearing.” One of the interview subjects recognized that “it is an unfortunate reality today that to be a judge, you cannot hold vehement opinions prior to the nomination and confirmation process. You can’t be opinionated. You can’t hold views and be loud and outspoken about them.” This perverse philosophy needs to be abandoned for the next Supreme Court nomination.

Stanford law professor Pamela Karlan was viewed by many on the left as a dream candidate for the Supreme Court. However, in light of her well-documented record of supporting various hot-button liberal causes, she was never even nominated for the Ninth Circuit Court of Appeals. Karlan was the antithesis of the “Little Supreme.” But did she regret it? Not at all: “Would I like to be on the Supreme Court?” she asked rhetorically. “You bet I would. But not enough to have trimmed my sails for half a lifetime.” We are not suggesting that Karlan should be a Supreme Court nominee, but she exposed the truth about SCOTUS-wannabes who “trim their sails” and limit their potential based on a fear of a future confirmation hearing: Such persons lack the character a justice needs.

Karlan explained this with her characteristic forcefulness: “Courage is a muscle. You develop courage by exercising it. Sitting on the fence is not practice for standing up.” Imagine what it takes to live your whole professional

and personal life as a “justice-in waiting.” These SCOTUS-wannabes spend their careers seeking the approval of others, in the hopes that one day they will be nominated because of their friendships across the political spectrum. Then, unimpeded by anything controversial in their records, they can sail through a confirmation hearing. These are the exact sort of people who will be cowed by the Beltway social pressures and the *New York Times* editorial page. Such willfully “stealth candidates” should be disqualified from consideration for the Supreme Court—the position in Washington most vulnerable to these influences.

When such people become justices, defending the Court as an institution will trump defending the Constitution. They will look to John Marshall, not James Madison, for guidance. Justices take an oath not to the Supreme Court, but to the Constitution. We need jurists who are fearlessly committed to the rule of law, reputation be damned. Former governor and now presidential candidate Jeb Bush, perhaps more than any other candidate, has

acknowledged this in recent remarks: “Today in America, the minute you have a record, you’re subject to attack. But that’s the best way to prove that someone has a consistency in their view of, in terms of judicial philosophy.” Bush is exactly right. Paper trails are an asset, not a disqualification.

3. Reject clichéd calls for ‘judicial restraint’

However, Bush faltered on how to read a judge’s record. He explained that, as president, he would appoint justices with “a proven record of judicial restraint” and a “proven record of not legislating from the bench.” These are clichéd talking points that didn’t work 20 years ago, and don’t mean what he thinks they mean.

Compare the two nominees of Bush’s brother. In *National Federation of Independent Business v. Sebelius*, Chief Justice Roberts found that Obamacare’s individual mandate exceeded Congress’s powers under the commerce clause. But he didn’t stop there. After finding the law Congress wrote was unconstitutional, the chief justice then employed a “saving construction” to rewrite the mandate so he could uphold it as a tax. This he did in the name of judicial restraint and deference to Congress. In contrast, in his dissent, Justice Alito agreed that Congress lacked the authority to enact the mandate. However, unlike the chief, Alito rejected calls for a saving construction. He would have invalidated Obamacare in its entirety.

Despite his insisting to the contrary, it was the chief justice who rejected judicial restraint by rewriting the unconstitutional law so he could uphold it. It was the chief



Not that: Souter, 1990

justice who quite literally drafted a new statute “from the bench.” In contrast, Justice Alito ruled based on his reading of the Constitution, and would have invalidated the law Congress wrote. “Judicial restraint” and “deference to the legislature” are easily manipulable concepts that distract attention from what really should matter to any constitutionally conservative voter or president: Who has the fortitude to follow the Constitution wherever it may lead and let the chips fall where they may? Any judicial nominee can claim he or she will be “restrained” or “deferential” but what exactly do they think “restrains” them? The popularly elected Congress, or the popularly enacted Constitution? Invocations of “restraint” and “deference” are designed to avoid this crucial issue. The same goes for deference to the executive and its administrative agencies.

Presidential candidates should reject the vapid labels of “restraint” and “legislating from the bench” and focus instead on what a prospective nominee’s proven track record and paper trail (see above) say about his or her constitutional philosophy. The heart of the inquiry should be whether the nominee is willing to engage and enforce the Constitution against the other branches, not whether they can parrot clichés about “strict constructionism” or “calling balls and strikes” during a confirmation hearing.

4. Focus on the Constitution, not issues du jour

Administrations understandably try to discern how a nominee would likely vote on the specific issues that matter most to the president. However, this focus is myopic. If you had been told in 2008 that the Supreme Court would soon be called upon to decide whether Congress could compel millions of Americans to buy health insurance, you would have chuckled. If you had been told in 2000 that the Supreme Court would hear a series of cases over the next decade deciding whether the president had the power to detain suspected terrorists in Guantánamo Bay, Cuba, you would have laughed. If you had been told two years earlier that a disputed presidential election in Florida would be appealed to the Supreme Court, you wouldn’t have believed it. Focusing narrowly on a few “litmus test” issues of the president and his political supporters disregards the broader constitutional framework that preserves federalism, the separation of powers, and the protection of individual rights.

More practically, zeroing in on a single issue, whether it is abortion, the war on terror, or same-sex marriage, has proved to be a miserable predictor of future judicial behavior. Nominees, who deftly refuse to answer questions about specific cases, have become adept at dodging these popular topics. Presidents should not pigeonhole appointments based on the issue du jour, but instead

focus on broader constitutional philosophy. After all, that’s what the Founders (and authors of the Fourteenth Amendment) did when they gave us a republican Constitution that would still work more than 200 years later. Provided, as Benjamin Franklin famously said, that we “can keep it.”

What is the constitutional philosophy on which Republican presidents should focus? In a word, it is “originalism.” In a phrase, it is: “Adhering to the original meaning of the text of the Constitution—each and every word.” Only persons with a demonstrated commitment to, and understanding of, the original meaning of the text of the Constitution should be chosen for a lifetime appointment to the Supreme Court and, for that matter, to lower courts too. Only a person who evidences in his or her professional life and personal interviews the character it takes to uphold the Constitution, even when a majority of the law professoriate, or the general public, protests. And only a person who understands there is a huge difference between what the Constitution commands and what past Supreme Court “precedents” have said. A proper nominee, in short, will be someone who grasps that judges take an oath to the text of our Constitution, not the text of fallible justices.

5. Focus on clauses, not cases

Which brings us to our fifth and final guideline, one that applies to the presidents who are asked to nominate judges as well as to the senators who confirm them. In their White House interviews and Senate confirmation hearings, judicial nominees consistently refuse to opine about the correctness of particular Supreme Court decisions. And typically, they pledge their fealty to following precedent.

Therefore presidents (and senators) should focus their attention on the meaning of clauses of the Constitution, rather than the outcome of particular cases. Judicial nominees will always refuse to comment on the latter, and you can’t make them. It is much harder for them to decline to comment on the former. Knowing how a person interprets a particular clause, even in the abstract, would reveal at least as much about constitutional philosophy. And it wouldn’t take many clauses to appreciate where a prospective candidate stood. Asking them about the commerce clause or the “public use” requirement of the takings clause would tell us a whole lot.

Or consider the Second Amendment. Before the *Heller* and *McDonald* cases were decided, did a prospective judicial nominee rely on its original meaning (and was he or she aware of controversies about its meaning) or did the nominee think its meaning evolves or had been superseded

by modern developments? Is its meaning one of general principle or is it historically limited to particular practices in effect at the time of its enactment? Does it apply to the states? Why or why not? Going forward, does an individual right to keep and bear arms preclude all reasonable regulations? If not, must courts scrutinize such laws to ensure they are truly reasonable? Answers to these questions are likely to cohere with how a nominee evaluates other clauses far more than asking them whether they agree with *Heller* or *McDonald*. Indeed, less than a year after then-judge Sotomayor testified that *Heller* was “settled law,” she voted in *McDonald* to jettison the precedent.

And, to return to the previous guideline, would questions about “judicial restraint” and “deference” have revealed anything meaningful about a candidate’s stance on the Second Amendment? Of course, examining the meaning of the Second Amendment would be more abstract than asking, say, whether a ban on so-called assault weapons was constitutional. But that is its principal advantage. You don’t need to anticipate all the cases that might arise in the future to discover if a prospective nominee is a constitutional conservative. But you can’t take the nominee’s word for it. By following our second guideline, a president would limit him or herself to candidates

who have a record on the meaning of these clauses.

And prospective nominees should also be grilled on their willingness to reverse previous decisions that are inconsistent with the original meaning of the Constitution. “*Stare decisis*” is the dodge most used by nominees who don’t want to say how they read the text of the Constitution. (Sotomayor testifying that *Heller* was “settled law and Elena Kagan’s assertion that *Heller* was “the law going forward” are typical examples.) After probing how he or she interprets a few particularly salient clauses, asking whether a prospective nominee feels more “restrained” by clauses or by cases will best reveal whether or not he or she is a true constitutional conservative.

We need Supreme Court justices—along with all other constitutional actors—to have the character and courage to follow the original meaning of the Constitution even when doing so is at odds with the political wind or previous Supreme Court rulings. By adhering to these five guidelines, a president is much more likely to identify justices who are sincere and stalwart constitutional conservatives. All the Republican presidential aspirants should take heed, and primary voters should demand that they do. ♦

Honoring the American Workforce

By Thomas J. Donohue
President and CEO
U.S. Chamber of Commerce

Labor Day is a small but meaningful way to acknowledge the immeasurable contributions of the American workforce. The ideas, talents, work ethic, and sheer industry of our nation’s workers power our economy, drive innovation, and help keep America the land of opportunity. So U.S. employers are committed to ensuring that employees are fulfilled in their work, earn competitive wages, can provide for their families, and have the resources and support to lead healthy and comfortable lives—all 365 days a year.

Last year, U.S. private- and public-sector employers spent roughly \$9.3 trillion on total compensation, including approximately \$7.5 trillion on direct wages and salaries and \$1.8 trillion on employee benefits. In 2013, some 149 million Americans received employer-sponsored health insurance from the private sector. Employees received an average of \$11,204 in health care benefits last

year. And among employers of 500 or more that provided workplace wellness programs, 56% offered financial incentives to encourage employees to lead healthier lifestyles.

Businesses help workers save and plan for the future. Private employers spent \$222.5 billion on retirement income benefits in 2014, including popular defined contribution plans and profit-sharing structures. Life insurance is also offered to more than half of all employees in private industry, enabling them to protect their families in the event of tragedy.

Many employees also receive benefits that help them pursue outside interests and advance their education. More than three-fourths of employees, including part-time workers, receive paid vacation. And in 2015, according to a survey of human resources professionals, 56% of employers have made undergraduate educational assistance available, and 52% have helped employees pay for graduate school.

The strong relationship between the business community and the workforce

is built on trust, support, and mutual benefit. It is overwhelmingly achieved without the involvement of intermediaries, such as organized labor—which is evident by the dramatic decline in private-sector unionization. Above all, it is made possible because of our free enterprise system.

When businesses have the ability to compete, grow, and succeed, the benefits are shared broadly—jobs are created, incomes rise, and opportunities expand. We’ve seen the alternative top-down, big government approach, and all it has delivered is the weakest economic recovery since World War II, a sharp decline in new business creation, and millions of Americans who are unemployed, underemployed, or have given up looking for work.

The best way we can honor American workers is to support a robust free enterprise system that lifts the economy for everyone.



U.S. CHAMBER OF COMMERCE
www.uschamber.com/abovethefold