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**Supreme Conundrum: A Look into Neil Gorsuch,  
and Why This Particular Supreme Court  
Confirmation Is So Important to the Current Split  
Between Liberal And Conservative Justices**

Alan E Garfield



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**TYPICALLY LIBERAL JUSTICES**

**Ruth Bader Ginsburg:**  
Nominated by President Bill Clinton; took seat Aug. 10, 1993.

**Stephen G. Breyer:**  
Nominated by President Bill Clinton; took seat Aug. 3, 1994.

**Sonia Sotomayor:**  
Nominated by President Barack Obama; took seat Aug. 8, 2009.

**Elena Kagan:**  
Nominated by President Barack Obama; took seat Aug. 7, 2010.

**TYPICALLY CONSERVATIVE JUSTICES**

**John G. Roberts:**  
Nominated by President George W. Bush; took seat Sept. 29, 2005.

**Samuel Alito Jr.:**  
Nominated by President George W. Bush; took seat Jan. 31, 2006.

**Anthony M. Kennedy:**  
Nominated by President Ronald Reagan; took seat Feb. 18, 1988.

**Clarence Thomas:**  
Nominated by President George H.W. Bush; took seat Oct. 23, 1991.



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# SUPREME CONUNDRUM

A LOOK INTO NEIL GORSUCH, AND WHY THIS PARTICULAR SUPREME COURT CONFIRMATION IS SO IMPORTANT TO THE CURRENT SPLIT BETWEEN LIBERAL AND CONSERVATIVE JUSTICES

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Long live the kabuki dance. That's what former Vice President and longtime Senator Joe Biden called the strange ritual of confirmation hearings for Supreme Court nominees. And strange it is. Everyone involved knows the stakes are high. A newly appointed justice may serve on the Supreme Court for decades to come, long after the president who appointed the justice has left office. And, on a Court with just nine justices, only five of whom are needed for a majority, each justice may potentially have a tremendous influence on how the Constitution and federal laws are interpreted. This is especially true when the Court is evenly divided between conservative and liberal justices, as it currently is. Given these high stakes, you would think that senators would want to find out everything they could about a nominee's positions on the highest-profile issues of



**A SEAT AT THE TABLE?**

Neil Gorsuch, left, needs 60 votes to clear a procedural hurdle required of high-court confirmations in the Senate, but Republicans, who hold just 52 seats, may not have the votes in a chamber that is divided along partisan lines. Republicans need eight Democrats to join them in order to end the expected filibuster, or in more technical terms, invoke cloture. If they don't reach 60 votes, they can still get around it by changing the rules and requiring only a simple majority, or 51 votes, to end the debate. Gorsuch was nominated to the position of Associate Justice to the U.S. Supreme Court by President Donald Trump on Feb. 1.

our time: abortion, same-sex marriage, affirmative action, religious liberty, campaign finance. You would think that. And some senators certainly try to get nominees to express their views on controversial precedents like *Roe v. Wade* and *Citizens United v. Federal Election Commission*. But it is virtually guaranteed that the nominees will refuse to discuss any substantive issues other than the most uncontroversial. So, yes, nominees might happily acknowledge that *Brown v. Board of Education* was properly decided, but they won't get near the third rail of *Roe v. Wade*. Nominees typically explain this evasiveness by saying that it would be inappropriate for them to address any substantive legal issues because those issues might come before them while they are sitting on the Court. Their concern is that people will think they could not impartially rule on an issue if they had previously announced their views.

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# Conundrum

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So, for example, when Democratic senators tried to get Neil Gorsuch's opinion on various prominent precedents, he steadfastly refused to answer. "If I were to start telling you which are my favorite precedents or which are my least favorite precedents," he said, "I would be tipping my hand and suggesting to litigants that I've already made up my mind about their cases."

But if nominees refuse to share their opinions on substantive issues, what's the point of confirmation hearings? Won't they become, as Elena Kagan called them in a 1995 article, "a vapid and hollow charade"?

They will. That's why we didn't learn whether Gorsuch would overturn *Roe v. Wade*, but we did learn of his strong opinions on mutton busting – that county fair staple when little kids try to ride on the back of a sheep.

Is it inappropriate for nominees to express their opinions about legal issues that might come before them? Not likely.

Indeed, justices who are already on the Court routinely express their viewpoints on legal issues in their written opinions. These opinions often leave little

doubt as to how they would decide on future cases with similar issues.

For example, more than a decade before the Supreme Court ruled on whether gays and lesbians could marry, Justice Antonin Scalia wrote a dissenting opinion that fully endorsed the government's power to criminalize homosexual sex, which he compared to bestiality and adultery. Given that, do you think anyone was unsure of how he would vote in the same-sex marriage case?

And long ago Scalia made abundantly clear what he thought about the Court's protection of abortion rights: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."

The truth is, litigants often know how Supreme Court justices are likely to rule in their cases. Just think of how many times you've heard court watchers say that the fate of a case depends upon the swing-voting Justice Anthony Kennedy because the remaining eight justices are evenly split along liberal and conservative lines.

So why shouldn't senators hold nominees' feet to the fire? Isn't that why the Constitution gives senators a role in the nomination process – to ensure that anyone appointed to the Court will not be too far out of line with the public's values?

In her 1995 article, Kagan contended

that confirmation hearings should be an "[o]pen exploration of the nominee's substantive views." She said that this was the only way to ensure that senators and their constituents could properly "evaluate whether the nominee possesses the values the Supreme Court most urgently requires."

But Kagan wrote that article long before she herself was nominated to the Supreme Court. And when her turn came, she bobbed and weaved on substantive issues, just like the other nominees.

These nominees had all learned the lesson from the failed Robert Bork nomination in 1987. President Ronald Reagan had nominated Bork, a leading conservative thinker who had taught at Yale Law School and served on a federal court of appeals. The highly confident Bork couldn't restrain himself from expounding on his personal judicial philosophy. The good news, as Kagan noted, is that this "presented to the public a serious discussion of the meaning of the Constitution, the role of the Court, and the views of the nominee."

But then Bork got "borked." The senators voted down his nomination by a vote of 42 to 58. The more people learned of his judicial philosophy, the more they opposed his nomination.

Subsequent nominees have since steered clear of revealing anything about their substantive views. They realized as

Kagan said, that "the safest and surest route to the prize lay in alternating platitudeous statement and judicious silence." Bork served up spicy ribs and curly fries. Those who followed him gave us white bread with mayonnaise.

Still, while we may not know whether Neil Gorsuch would vote to overturn *Roe v. Wade*, we do have a good sense of his overall ideological orientation. We can infer that from the politics of the president who selected him, from the conservative organizations that recommended him, and from the written works he has produced over the years.

The real problem for liberals who are uncomfortable with the direction in which Gorsuch or other Trump nominees might take the Court is that liberals fared miserably in last November's election. That was the time when the public could have punished some of the Republican senators who had supported the stonewalling of President Barack Obama's nominee, Merrick Garland. And that was when the public had an opportunity to elect a president who would choose nominees whose views were in line with public values.

The most important vote happened last fall. That set the stage upon which the current kabuki dance is being performed.

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