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The Ideal Trump Supreme Court Pick: An Originalist Who Isn't A Fan Of Stare Decisis

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Following Donald Trump's election, disappointed Democrats fired off salvoes of red hot rhetoric. Among them was Senator Jeff Merkley of Oregon. He was upset that the empty seat on the Supreme Court would not now be filled by a "liberal," as he and many others had assumed. Merkley railed that the seat had been "stolen" by the delaying tactics of the Republican controlled Senate.

Merkley's rant, including the almost inevitable swipe at the Koch brothers (who were not Trump supporters by the way) is the kind of silly stuff that angry people are prone to uttering. It's simply not true that the Senate has a legal obligation to vote on every nominee for the Court and the fact that Judge Merrick Garland was not voted on in no way (as Merkley declares) "delegitimizes any nominee that Trump might put forward."

Cato Institute legal scholar Roger Pilon states the law plainly, writing here, "If the Senate fails to act, it simply falls to the Senate in the next Congress to take up the matter."

That is precisely what will happen early next year. Earlier this year, Trump released a list of eleven potential Supreme Court nominees, later adding ten more names. He has said he will definitely choose his first nominee from those individuals. They are all known as conservative in outlook, but the vetting should go much deeper into their judicial philosophy.

In his November 17th *Wall Street Journal article*, Georgetown University law professor Randy Barnett points out that there should be two crucial desiderata for Trump's Supreme Court nominations. One is whether the individual adheres to an Originalist view of the Constitution. That is to say, trying to find the meaning of our basic law by asking what the drafters of the articles and amendments intended.

That is the most obvious fault line between "liberal" and "conservative" jurists. The former often ignore original intent in favor of a "living Constitution" approach that yields the results they favor. All of the people on Trump's announced list are there because they have shown their preference for Originalism.

But Originalism shouldn't be enough, Barnett argues. Trump's team should also look for a nominee who isn't wedded to the legal concept known as *stare decisis,* which means "let the decision stand." Judges who follow that maxim are not inclined to overturn precedents. While there is much to be said for *stare decisis* in most fields of the law – stability and predictability are important after all – that isn't the case when it comes to constitutional rights. Erroneous decisions of the past should be reexamined whenever called into question.

Judges who blindly adhere to *stare decisis* help to cement in place the vast federal administrative and regulatory state that often sacrifices individual rights on the altar of collectivist and authoritarian policies.

Professor Barnett points to a case he was personally involved with, *Gonzalez v. Raich,* to show that harm that's done when justices (even those who are Originalists) choose to decide on the basis of *stare decisis.* That case involved the right of a person suffering from cancer to use marijuana grown specifically for her. The federal government wanted to prevent such use and rooted its argument in a 1942 decision (*Wickard v. Filburn*) involving the government's power to keep a farmer from growing "too much" wheat on his own land for his own use.

The Court in *Wickard* approved of that appalling extension of federal power. If anyone had thought to ask the Constitution's drafters if "regulating interstate commerce" meant that farmers could be told how much of any crop they could grow, the response would have been something like, "You've got to be kidding – we want to protect people against such governmental meddling in their affairs."

In a 6-3 decision, the Court in *Raich* held in favor of the government on the grounds that the precedent set in*Wickard* settled the matter. If a farmer was not allowed to grow wheat for his own consumption, neither was a cancer patient allowed to have others grow marijuana for her consumption. Justice Scalia voted with the majority. Only Justice Thomas argued that it was time to reverse *Wickard*and restore a bit of freedom to Americans.

Barnett observes, "Stare decisis has the unfortunate effect of grandfathering in hundreds of judicial decisions, like *Wickard,* that have interpreted federal powers well beyond what can be supported by the Constitution's original meaning."

He's right. Here are some other Supreme Court decisions that should not dictate the outcomes of future cases raising the same issues.

In *Kelo v. New London*, the Court gave local officials the green light to use eminent domain to take private property, not for any *public use,* but merely for whatever they deem a "public purpose." (I strongly recommend Professor Ilya Somin's book book on that case, The *Grasping Hand,* which I wrote about here.) The next time an eminent domain case reaches the Court, we should hope for a majority that's willing to overrule *Kelo* and restore the protective power of the Fifth Amendment.

In *Bennis v. Michigan,* the Court puts its stamp of approval on civil asset forfeiture. A great deal of misery would have been avoided if the Court had ruled that it's a violation of due process for government to take property from people who have not even been charged with, much less convicted of, any crime. The next civil asset forfeiture case that comes before the Court should

lead to the overruling of *Bennis* –but that won't happen unless we have enough justices who have the nerve to overrule bad precedents.

Going back further, many aspects of the federal leviathan are rooted in Court decisions from the New Deal era. For example, the National Labor Relations Act would have been declared unconstitutional had it not been for FDR's threat to pack the Supreme Court. After that threat, however, a majority obligingly approved the NLRA in the *Jones & Laughlin Steel* case. If a worker were to challenge, say, the NLRA's prohibition against individual bargaining in a business where a union has been federally certified, the justices should not feel bound to uphold it on the basis of *stare decisis.*

Undoubtedly, if the Court were to overrule any of its many precedents favoring government power, people like Senator Merkley would bitterly complain that it was undercutting its legitimacy. And again he'd be wrong. The duty of the Supreme Court is to uphold the Constitution and the rights it guarantees. In the past, it has often failed to do that, but if new justices restore its focus by insisting on original intent and striking down precedents that deprive people of their rights, the nation will be much better off.