



## Day 2: Tendentious progsplaining of originalism proves unsuccessful tactic for derailing Neil Gorsuch

Ilya Shapiro

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If Monday's hearing was about the Democratic senators' telegraphing their lines of attack on Judge Neil Gorsuch, Tuesday's was about how those messages weren't reaching their target—assuming that target was building political opposition to the nomination. Different senators tried different tones—strident (Dianne Feinstein, D-CA), bumbling (Pat Leahy (D-VT), condescending (Dick Durbin, D-IL), angry (Sheldon Whitehouse, D-RI), prosecutorial (Amy Klobuchar, D-MN), absurdist (Al Franken, D-MN), alarmist (Chris Coons, D-DE), workmanlike (Richard Blumenthal, D-CT), and redundant (Mazie Hirono, D-HI)—and all failed to slow down the Gorsuch Express.

But speaking of telegraphs, trains, and other old machines, several senators, notably Feinstein and Klobuchar, tried to hoist Gorsuch on his originalist petard. They did so by implying—and sometimes saying outright—that "no originalists need apply" because that would mean segregation, female ineligibility for public office, the end of any rights for "LGBT . . . Q . . . individuals" (as Durbin put it), and much else that wasn't even bad enough for "Robert Bork's America."

So of course a philosophy grounded in the meaning of the Constitution at a time when telegraphs and trains didn't exist, let alone iPhones and airplanes, is obsolete.\* For Gaiasake, the Second Amendment only protects muskets, amirite?

This is just the latest in a bizarre trend of non-originalists' trying to explain ("progsplain"?) to originalists what they purport to stand for. This isn't the place to go into it, but suffice it to say, a power to "regulate interstate commerce" is readily transferable to the world of modern telecommunications and travel—and for similar reasons that power shouldn't extend to marijuana plants grown for personal consumption (or even local sale) or, say, health insurance contracts.

Originalism simply isn't an inquiry into what James Madison thought about violent video games or whether Thomas Jefferson would've attached GPS devices onto his slaves, mkay?

Even beyond that bizarre line, and the repeated attempts to get Gorsuch to denounce Donald Trump—"bad president, or worst president?" as Senator Stephen Colbert would ask—were the nonsensical invocations of *Citizens United* and *Chevron*. Whitehouse banged on about "dark money." As if the *New York Times* article describing the groups behind the pro-Gorsuch campaign didn't name names and link to a list of Federalist Society donors (including me; I admit, I'm a card-carrying member of that "far-right extremist" organization).

Franken later argued that cutting back on *Chevron*—the 1984 case that stands for judicial deference to administrative agencies—would mean that senators and judges would set environmental and consumer-product-safety standards. It would actually mean that Congress has to be more specific with its legislation, so bureaucratic experts only make scientific determinations, not legal ones. And I didn't realize that Stuart Smalley was so concerned about making sure that Scott Pruitt gets to implement his full agenda at the EPA.

It was left to Ted Cruz (R-TX) and Ben Sasse (R-NE) to educate the public and draw Gorsuch out of his shell. Tales of mutton-busting and Little League umpiring—as well as the return of the "black robe"—provided some welcome levity to what I'm sure is becoming a frustrating effort to derail a first-class jurist.

\* Actually, proper originalism is done with respect to "the right time," meaning when the relevant provision was ratified, so 1789 for Article I, 1868 for the Fourteenth Amendment, 1967 for the Twenty-Fifth Amendment, etc. Technological development is irrelevant regardless.

*Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute*