
PRACTICE MAKES PRECEDENT[†]

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INTRODUCTION

Professor Josh Chafetz’s superb Essay, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*,¹ calls to mind the historian Carl Becker’s trenchant observation, “history is what the present chooses to remember about the past.”² In law and in life, the present is a relentless quest to define the past.

In his Essay, Chafetz criticizes “charges of unprecedentedness” in Senate contests over judicial appointments that merely serve the “political judgment” of those casting them.³ Chafetz examines the recent history of such contests to “highlight the ways in which any claim of (un)precedentedness involves particular, contestable constructions of the past.”⁴ He illustrates the point by assessing two plausible narratives regarding the Senate’s confirmation of Justice Gorsuch and its rejection of President Obama’s nomination of Judge Garland to the seat vacated as a result of Justice Scalia’s death. Chafetz suggests that, when analyzing these and other narratives involving judicial appointments, people should seek “to construct a narrative of the past”⁵ that “fits the data.”⁶ He concludes that whenever we are “confronted with a claim in constitutional politics that some actor is engaged in unprecedented behavior,” we should ask first, “[u]nder what framing of the past” has that assertion been made, and second, “[d]o we find that framing of the past to be helpful?”⁷

In this Response, I hope to refine the conception of the past — and its connection to the present — that is central to Chafetz’s thesis by

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¹ Josh Chafetz, *The Supreme Court, 2016 Term — Essay: Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017).

² Eric Foner, Opinion, *Confederate Statues and ‘Our’ History*, N.Y. TIMES (Aug. 20, 2017), <https://www.nytimes.com/2017/08/20/opinion/confederate-statues-american-history.html> [https://perma.cc/T8HS-4HMK].

³ Chafetz, *supra* note 1, at 96.

⁴ *Id.* at 97.

⁵ *Id.* at 110.

⁶ *Id.* at 129.

⁷ *Id.* at 132.

offering a nuanced view of the variety of historical practices — the particular form of the past that interests Chafetz — that may constitute “precedent” in constitutional analysis. I then attempt to situate Chafetz’s historical analysis within the larger set of analytical arguments available to those examining constitutional questions.

Put differently, we need to put precedent, in all its different forms, in perspective if we are to genuinely understand its role in constitutional analysis. Precedent alone does not allow us to make judgments about the past. The meanings of historical practices, like the meanings of other kinds of precedents, depend less on the intentions of those who created them than on the normative significance that subsequent authorities try to invest in them. The debate over precedent is therefore more than just intellectual. The frames used have implications for future actions, and we should endeavor, as I believe Chafetz has encouraged, to understand that debates about constitutional precedent involve choices of frames, and that those choices have different ramifications and levels of coherence.

While I agree that people with a stake in confirmation contests are prone to sacrifice intellectual honesty in proclaiming unprecedentedness to gain leverage in those contests, we should be careful not to overstate the “normative work” that the charge of being unprecedented actually does.⁸ Being unprecedented hardly means something is forbidden. There was the first presidential veto, the first impeachment, and the Senate’s first rejection of a Supreme Court nomination, just to name a few.⁹ “Unprecedented” is not always a “dirty word,”¹⁰ and the fact that something is unprecedented is not, in itself, determinative. Sometimes it is accurate, but it is rarely fatal, which suggests that the “normative work” that it does may not amount to much. None of these genuinely unprecedented events broke any patterns, but they might have begun ones, and breaking or beginning patterns might be problematic, but the reasons for that should be explained. As scholars, we aspire to illuminate the patterns of precedent and the connections between precedent and other sources of constitutional meaning that are not grounded in the past. This entails clarifying the scope, credibility, context, persuasiveness, relevance, and consequences of the choices made to construct precedent.¹¹

⁸ *Id.* at 130.

⁹ I have written about each of these in prior works. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2d ed. 2000); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (rev. ed. 2003).

¹⁰ Chafetz, *supra* note 1, at 96.

¹¹ On constitutional construction, see generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

In Part I, I examine the distinctive features of historical practices as precedent. In Part II, I propose a different frame for understanding Judge Garland's rejection and Justice Gorsuch's confirmation — understanding constitutional law as a competition for analogies or metaphors. In the final Part, I call attention to the larger framework in which historical practices are just one of many modalities of constitutional argument. The Garland-Gorsuch fights were not just over constructing precedent. They were part of a series of historical efforts attempting to coordinate multiple modes of constitutional analysis in confirmation conflicts, all driven by interpreters' normative or political agendas. Precedent cannot be understood detached from these efforts.

I. HISTORICAL PRACTICES

The Essay's focus is on a special kind of precedent: historical practices. Historical practices refer to how government has understood and exercised its powers in the past.¹² Courts generally defer to historical practices,¹³ but unilateral actions of the Senate, as on confirmation matters, are more complex. Chafetz's historiography is consistent with the functions of historical practices, but a fuller explication of their nature and influence as precedent will enrich our understanding of their role in confirmation conflicts and constitutional analysis more generally.

For example, historical practices, which the Senate considers to be precedent,¹⁴ function as binding or persuasive authority depending on their context. When an action is binding, its nature and scope are relatively clear. When the Senate failed to take any action on Judge Garland's Supreme Court nomination, that decision had binding effect throughout the constitutional system: It nullified Judge Garland's nomination, which formally lapsed, pursuant to Senate rules, at the end of the legislative session during which it had been made;¹⁵ and it barred Judge Garland's recognition as a Supreme Court Justice. The only way for a Justice to be appointed is through compliance with the conditions set forth in the Appointments Clause¹⁶ or through a recess appointment.¹⁷ Since Judge Garland had not satisfied any of these conditions, he failed to become a Justice, and the Senate's inaction on his nomina-

¹² See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111, 132 (2008).

¹³ See *id.* at 132–33.

¹⁴ See generally *Rules and Procedure*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Rules_and_Procedure_vrd.htm [<https://perma.cc/JR8Q-C5FZ>]; Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 729–32 (2008).

¹⁵ See *STANDING RULES OF THE SENATE*, r. XXXI(6), *reprinted in* S. DOC. NO. 113-18, at 44 (2013).

¹⁶ U.S. CONST. art. II, § 2, cl. 2.

¹⁷ *Id.* cl. 3.

tion had binding authority, at the time it was done, throughout the constitutional system. This outcome was fixed unless Judge Garland later fulfilled the conditions for appointment.

“Precedent” is, however, a capacious term, and its use often raises several questions important to analyzing historical practices as a source of constitutional meaning. How well-settled are those practices? How strong a precedent do they make? Is the precedent binding? If so, on whom? And on what questions and in what way?¹⁸

In the contest over constitutional meaning, not all historical practices are equal. Precedents can differ in terms of their relative strengths. Historical practices weave a tapestry with many different kinds of threads, some stronger than others. Some historical practices are more deeply embedded as precedents than others. Consider, for example, Justice Frankfurter’s concurrence in the *Steel Seizure Case*,¹⁹ in which he claimed that a “systematic, unbroken” line of historical practices, without objection from other branches, deserved judicial deference.²⁰ There, Justice Frankfurter and three other Justices found no such settled practice to support President Truman’s seizure of control over the nation’s steel mills.²¹ The more embedded a historical practice has become, the stronger its claim to constitutionality. Hence, in *Marsh v. Chambers*,²² a majority of the Supreme Court upheld the constitutionality of opening legislative sessions with prayer because the practice was “deeply embedded in the history and tradition of this country.”²³ It is not the purpose of Chafetz’s Essay to answer at what point historical practices become so enduring and uniform that they become synonymous with constitutional meaning, but an examination of historical practices leads to that basic question.

Precedents also differ in whom they bind. For example, the Senate rules clearly are binding within the Senate.²⁴ The deployments of the “constitutional” or “nuclear” option formally imposed a construction of Senate Rule XXII²⁵ disallowing filibusters of *any* judicial nominations unless a majority decided later, pursuant to the rules, to adopt a different

¹⁸ I considered these and many other questions in my examination of the role of precedent in constitutional law. See GERHARDT, *supra* note 12.

¹⁹ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

²⁰ *Id.* at 610 (Frankfurter, J., concurring).

²¹ *Id.* at 611.

²² 463 U.S. 783 (1983).

²³ *Id.* at 786.

²⁴ See STANDING RULES OF THE SENATE, r. V, *reprinted in* S. DOC. NO. 113-18, at 4 (2013).

²⁵ *Id.*, r. XXII(2), at 15–16.

construction of Rule XXII.²⁶ The choices of whether to deploy the nuclear option, first in 2013 to effectively bar filibusters of lower court nominations and then in 2017 to bar filibusters of Supreme Court nominations,²⁷ were discretionary, but each deployment was “authoritative” within the Senate.²⁸ If the Supreme Court were ever to analyze the constitutionality of a Senate rule or practice, such as the filibuster or deployment of the nuclear option, the fact that one is a rule and the other is a practice within the Senate would not bind the Supreme Court’s determination.

In contrast, the Senate’s failure to confirm Judge Garland bound everyone. It was a final action insofar as Judge Garland and every other constitutional actor were concerned. The failure to confirm Judge Garland meant that he was not entitled to take the oath of office for the Supreme Court seat to which he had been nominated, and that no other constitutional actor — certainly not Judge Garland, the President, or the Supreme Court — had the power to act contrary to that final judgment.

The Senate’s confirmation of Justice Gorsuch, however, bound everyone but Justice Gorsuch. It was a prerequisite for his appointment to the Supreme Court. Once confirmed, as the Supreme Court declared in *Marbury v. Madison*,²⁹ his appointment vested, and all that remained for then-Judge Gorsuch to become a Justice was taking the oath of office. He could have chosen to forego taking the oath and thus to turn down the office. Once Justice Gorsuch took the oath, he clearly had all the powers (and protections) accorded to Justices of the Supreme Court under Article III of the Constitution, which were all denied to Judge Garland.

Yet some precedents can differ in the degree to which they bind other arguably similar matters, particularly in the future. Like the Senate’s failure to confirm Roger Taney as Treasury Secretary and then later as Associate Justice,³⁰ the Senate’s actions on Judge Garland and Justice Gorsuch could each be persuasive authority in the future of the federal appointments process, depending on how subsequent authorities construe their significance. Judge Garland’s rejection did not bind the President’s or Senate’s discretion in later proceedings any more than Roger Taney’s rejections as Treasury Secretary and as Associate Justice bound the President’s choice to nominate him or the Senate’s discretion on whether to confirm him as Chief Justice. President Trump was free to

²⁶ See generally Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205 (2004).

²⁷ See Chafetz, *supra* note 1, at 104–09.

²⁸ *Id.* at 105.

²⁹ 5 U.S. (1 Cranch) 137 (1803).

³⁰ See Chafetz, *supra* note 1, at 120–21.

nominate someone other than Judge Garland to the Court's open seat.³¹ Had Hillary Clinton won the 2016 presidential election, she would have had the same freedom.

There remain questions about the future significance of the Senate's actions on Judge Garland and Justice Gorsuch. Those actions' persuasive authority as precedents is Chafetz's principal concern. His concern is largely not with what happened in the past. We know what happened. We know what people said and did. His major concern, to which I turn in the next Part, has to do with the meaning that people give these events.

II. METAPHORS AND THE GARLAND-GORSUCH FIGHTS

The real importance of the battles over Judge Garland's and Justice Gorsuch's respective appointments is best understood as an example of the "choice between competing analogies"³² or metaphors. The competition to shape the narrative on Judge Garland's rejection and Justice Gorsuch's confirmation is a case in point.

The dominant narrative on these events became the one that Chafetz finds most persuasive — that the Senate's failure to act on Judge Garland's nomination and its confirmation of Justice Gorsuch were "part of the broader current of interbranch politics, and the determinants of the success or failure of a President's nominees will not be so dissimilar from the determinants of the success or failure of other parts of her agenda."³³ On this narrative, Supreme Court nominations' success depends on Presidents' strengths and popularity, and President Obama's popularity, according to Chafetz, had sharply declined by the time of Judge Garland's nomination. This decline boded disaster, thus making Obama a weaker President in the context of judicial appointments.³⁴ For Chafetz, this narrative tells a "persuasive story,"³⁵ because it "fits the data."³⁶

I prefer, however, the metaphor of *America's Got Talent* to explain the Garland-Gorsuch battles: both nominees were talented, but the

³¹ There is an interesting question about the extent to which President Trump was bound by his own past actions, particularly his vowing as a presidential candidate to pick his Supreme Court nominee from a list of candidates he published during the campaign. See Joseph P. Williams, *Trump: Next Supreme Court Nominee Will Come from Conservative List*, U.S. NEWS & WORLD REP. (May 1, 2017), <https://www.usnews.com/news/politics/articles/2017-05-01/trump-next-supreme-court-nominee-will-come-from-conservative-list>. Though the promise was not legally binding, President Trump clearly felt politically — if not also morally — obliged to follow through on his promise. He found his promise, in other words, to be very persuasive authority.

³² Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 38 (1967).

³³ Chafetz, *supra* note 1, at 127.

³⁴ *Id.*

³⁵ *Id.* at 131.

³⁶ *Id.* at 129.

show's judges simply liked Justice Gorsuch better. This metaphor suggests that at bottom, American politics is not that different from American reality television: preferences and tastes will dictate the winners and losers. The fact that we have a former reality television star in the Oval Office is a reminder that what we see on television might not differ much, if at all, from reality. It reminds us how much playing to an audience matters in our lives and politics, and how political or constitutional conflicts play out in the media. Thus, in the contemporary fight to control the Supreme Court, the judges themselves become the "contestants"; the senators become the judges; the contestants tailor their performances to suit the judges; the senators proclaim to the audience their reasons for voting one way or another; and at the end the audience, the public, shouts its approval or disapproval of the final vote. The outcome is either popular or unpopular, but the judges' rulings are (usually) final. If this metaphor has appeal, it raises the question why we need a more complex explanation of these confirmation contests beyond stating that the Senate expressed its preference. If we accept the simplest explanation as the best one, then it seems that any other account, including Chafetz's preferred explanation, has the burden of proving itself not only plausible, but also more plausible than the *America's Got Talent* metaphor.

The competition among different narratives on the Garland-Gorsuch contests shows how there are seemingly endless levels of generality and specificity with which to view historical events. Any number of frames or narratives can fit the facts. If more than one frame can explain the facts, how do we choose among them? How do we choose the most persuasive, or the simplest, or is the simplest explanation the most persuasive? Initially, Senate leaders defended obstructing Judge Garland's nomination based on a Senate tradition of inaction on Supreme Court nominations during presidential elections.³⁷ There were a number of scholars, including me, who questioned the accuracy of that narrative, but that narrative can be made to fit the facts, not just now but in the future, for the simple reason that it is undeniable that the obstruction of Judge Garland's nomination occurred in a presidential election year. If there were any doubt about whether there was a precedent, at least in the modern era, of the Senate's blocking of a Supreme Court nomination because it was a presidential election year, there certainly is one now.

Yet, regardless of whether one prefers Chafetz's narrative or my proffered one of *America's Got Talent*, neither is complete. The nuances of context challenge the explanatory power of the competing narratives. First, I am not persuaded that Supreme Court nominations are like other legislative business. The political and constitutional stakes are much

³⁷ See Michael Gerhardt, *Getting the Senate's Responsibilities on Supreme Court Nominations Right*, SCOTUSBLOG (Mar. 9, 2016, 11:10 AM), <http://www.scotusblog.com/2016/03/getting-the-senates-responsibilities-on-supreme-court-nominations-right/> [<https://perma.cc/D6M7-TEC7>].

higher with a Supreme Court nominee than a policy dispute, since a Court appointment could last for decades and therefore typically much longer than the resolution of a particular legislative initiative, and since overturning constitutional judgments of the Court, once made, is more difficult than enacting new legislation.³⁸

It is hard to imagine a bigger obstacle to Judge Garland's success than the fact that Republicans controlled the Senate — or that it was Justice Scalia, the Court's most impassioned conservative, who had died. Justice Scalia's death introduced the possibility for there to be, for the first time in nearly five decades, a majority of Justices appointed by Democratic presidents. That prospect was lost on no one, especially Republican senators for whom control of the Supreme Court is of paramount importance.³⁹ The salience of its having been Justice Scalia's seat was evident on the evening of Justice Gorsuch's nomination: the President explicitly likened him to Justice Scalia, the late Justice's widow was present, and the nominee praised Justice Scalia as a model.⁴⁰ (The fact that the President staged this event more elaborately than other presidents have done in recent years underscores how important this nomination was to the President.) No narrative on the two nominations can be complete, much less persuasive, without accounting for the singular importance of the Supreme Court to Republican voters and the prospect of the Supreme Court's losing the ideological balance it had at the time of Justice Scalia's death.

Second, charging unprecedentedness might be overstated and diverting. I agree that the term should not be tossed around recklessly, but I think a bigger problem is the fact that, as Chafetz seems to acknowledge at the end of his Essay,⁴¹ precedent abounds. Disproving whether something is unprecedented is easier than trying to show that the precedent claimed as a basis for some action was not on point. Precedent is routinely manipulated in constitutional debates; that is the nature of precedent. One advocate's manipulation of precedent is another's principled basis for action.

Making recourse to precedent is, however, not simply, as Chafetz suggests, an undertaking "to engage in a creative act of interpretation."⁴² The relevance of precedent depends on the facts, and not all facts are

³⁸ On the stakes involved in fights over Supreme Court nominations, see, for example, Russell Berman, *Why the Supreme Court Matters More to Republicans than Trump*, THE ATLANTIC (Oct. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/10/why-the-supreme-court-matters-more-to-republicans-than-trump/504038/> [<https://perma.cc/W9PS-FGH4>].

³⁹ See *id.*

⁴⁰ See Michael Gerhardt, *The Gorsuch Nomination: What's Next*, SCOTUSBLOG (Feb. 7, 2017, 4:08 PM), <http://www.scotusblog.com/2017/02/gorsuch-nomination-whats-next/> [<https://perma.cc/2SXQ-355L>].

⁴¹ See Chafetz, *supra* note 1, at 130.

⁴² *Id.* at 96.

equal. As lawyers, we consider which facts are significant and why. John Adams famously warned that facts are “stubborn things,”⁴³ while Daniel Patrick Moynihan cautioned further that “everyone is entitled to his own opinion but not his own facts.”⁴⁴ Narratives should fit the facts, but the facts cannot be made up. This is reality television, after all, in which there might be editing — *that* is the creative exercise — of the facts. The facts can be taken out of context (which could happen in editing or the construction of a precedent), but the facts, if not the context, can be verified.

Much of the debate on and about the Gorsuch-Garland contests is about which facts mattered and how much and why they mattered. For example, it is a fact that Republicans controlled the Senate in these contests, and that clearly mattered a lot. My research, for example, suggests that, contrary to Chafetz’s assertion, President Obama’s popularity was not declining at the time he nominated Judge Garland to the Court.⁴⁵ I do not think it strengthens the narrative on these events to talk about the President as either strong or weak. Those are characterizations, which miss or at least obscure the point. I think it would be more illuminating to examine the relevance (and extent) of the public’s support for the President or the nominee during the Garland contests and how hedged in the President felt that he was in choosing a nominee for the open seat.

When we examine the contexts in which Judge Garland and then Judge Gorsuch were nominated, the composition of the Senate was critical, perhaps determinative, to the outcomes of each contest, especially given how important the Supreme Court is to Republican leaders and voters.⁴⁶ Divided government, coupled with the salience of controlling the Court’s future direction, explains these contests more persuasively, at least to me, than characterizing President Obama as weak or strong and lumping the nomination together with the other legislative battles during President Obama’s tenure.

We have not yet considered, however, how much Judge Garland impacted his own chances for confirmation. Was Judge Garland just another judicial nominee rejected by the Senate in the ongoing confirmation battles, or is it possible that President Obama made a mistake in nominating Judge Garland? Was there a different nominee who might have energized liberal interest groups or Democratic voters more than

⁴³ 3 LEGAL PAPERS OF JOHN ADAMS 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

⁴⁴ George F. Will, Opinion, *The Wisdom of Pat Moynihan*, WASH. POST (Oct. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100105262.html> [https://perma.cc/WLD4-YVXM] (quoting Moynihan).

⁴⁵ See *Presidential Approval Ratings — Barack Obama*, GALLUP NEWS (Jan. 2017), <http://www.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx> [https://perma.cc/Y95L-H3KS].

⁴⁶ See *supra* note 38 and accompanying text.

did Judge Garland? Could President Obama have made any nomination the Senate would have confirmed? Chafetz's preferred narrative suggests the answer is no. If he is right, then the key factors almost certainly would have been the relationship between the President and the Senate, their relative popularity, the proximity of the presidential election, the relative importance of a Court appointment to their respective constituencies, and the composition of the Senate. Yet even if these questions require too much conjecture, it is not too early to say that, in either Chafetz's or my preferred narrative, nominating Judge Garland was quixotic. As a friend of mine suggested, it is hard to imagine people going to the barricades to protest the mistreatment of the Chairman of the Harvard Board of Overseers. The Republican strategy might have been a long shot, but it had little if any downside, given that even if Hillary Clinton had won the election, Republicans had still lost the Justice whose jurisprudence and combativeness they most liked on the Supreme Court. If Republicans retained control of the Senate, they could stall filling the seat. If they lost control of the Senate, they had delayed a change in the Court's composition for at least a year. It did not matter if a Democratic majority someday used their obstruction as a precedent; they had the power to act now, and holding onto the seat was a promising campaign issue.⁴⁷ Judge Garland's chances were never good.

The significance of adding yet another factor to this analysis merits consideration, too. Race might have played a significant role in these contests. The first African American President in American history, Barack Obama, faced obstruction from his first days in office as a result of the pledge of then-Senate Minority Leader Mitch McConnell from Kentucky to block anything President Obama did in order to ensure he was a "one-term president."⁴⁸ This was not the typical interbranch politics. After Republicans took over the majority in the Senate, Senator McConnell and his coalition continued their opposition, which extended into President Obama's second term. In crime dramas on television and in real life, we often ask, "who benefits?" With the obstruction extending to Judge Garland's nomination, that is easy to answer: we know that the Republicans benefitted, and so too did their presidential nominee. The obstruction handed President Trump a major issue — filling the Supreme Court seat — that energized his base. They would not have liked to see President Obama, whose legitimacy they had questioned

⁴⁷ Reid J. Epstein, *Donald Trump Says Supreme Court Fears Will Keep Republicans Loyal*, WALL STREET J.: WASH. WIRE (Aug. 2, 2016, 1:26 PM), <https://blogs.wsj.com/washwire/2016/08/02/donald-trump-says-supreme-court-fears-will-keep-republicans-loyal/> [<https://perma.cc/Q2MD-2B6D>].

⁴⁸ Andy Barr, *The GOP's No-Compromise Pledge*, POLITICO (Oct. 28, 2010, 8:09 AM), <http://www.politico.com/story/2010/10/the-gops-no-compromise-pledge-044311> [<https://perma.cc/UB3C-KBUT>].

from the outset of his presidency, get a victory like filling Justice Scalia's seat.⁴⁹ When President Trump was faulted for not having more roundly condemned the white supremacist marchers who created havoc in Charlottesville, Virginia during the summer of 2017,⁵⁰ it was hard to miss that his reluctance enabled him to avoid offending this part of his base. It is possible that, with time, we might better understand the extent to which Judge Garland's nomination was collateral damage in an effort to hurt the legacy of a President whom many people did not want to see in the White House. In the meantime, we know that the Justice who did get confirmed, Justice Gorsuch, is likely to further please the President's base, including the white supremacists the President was reluctant to offend, when affirmative action comes back before the Court and he casts a vote against it as expected.⁵¹

Third, neither Chafetz's nor my narrative fully explains Judge Garland's rejection and Justice Gorsuch's confirmation within the context of confirmation battles in recent years. Was Judge Garland's rejection payback? Do Judge Garland's rejection and Justice Gorsuch's confirmation signify that only nominees who commit to following original meaning, as did Justice Gorsuch, will be confirmed by the Senate? Do these events bury or undo the precedent set by the Senate's rejection of the nomination of the eminently qualified Judge Robert Bork based on his expressed commitment to a judicial philosophy that threatened many of the Supreme Court's landmark decisions?⁵²

These unanswered questions all go to the "normative work" that these events as precedents will do. That undertaking is manifest through the "framing" that people choose to explain the precedential value of these events.⁵³ The fact that the Garland-Gorsuch contests could be used to "answer" so many questions (or in the language of

⁴⁹ Indeed, one should recall that President Trump, one of the beneficiaries of the obstruction, kept pushing for years the lie that President Obama was not born in the United States. See Michael Barbaro, *Donald Trump Clung to "Birther" Lie for Years, and Still Isn't Apologetic*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html> [<https://perma.cc/WG7J-EMUM>].

⁵⁰ William Saletan, *What Trump Supporters Really Believe*, SLATE (Aug. 29, 2017, 11:51 AM), http://www.slate.com/articles/news_and_politics/politics/2017/08/trump_s_bigoted_base_by_the_numbers.html [<https://perma.cc/H936-FXNG>].

⁵¹ I do not mean to suggest that opposing the constitutionality of affirmative action is done merely to appease racists. Of course, there are, and have long been, principled arguments to be made against the constitutionality of such measures. My point instead is that one political benefit to the President of the nomination of Justice Gorsuch might be his nomination's appeal, on issues involving race, to the part of his base that holds racist views against minorities.

⁵² See, e.g., Matt Flegenheimer, *The Roots of the Battle over Neil Gorsuch: 'They Started It.'* N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/supreme-court-neil-gorsuch-senate.html> [<https://perma.cc/9TWP-FGFQ>]; Lily Rothman, *How Robert Bork Helped Make Neil Gorsuch's Supreme Court Confirmation Possible*, TIME (Apr. 7, 2017), <http://time.com/4730055/neil-gorsuch-confirmation-robert-bork-history/> [<https://perma.cc/2RQQ-9QRP>].

⁵³ Chafetz, *supra* note 1, at 131.

Chafetz's article, to "set" so many precedents) is the reason that the framings of the incidents moving forward may prove to be as sharply contested as the nominations themselves. The meaning of Judge Garland's rejection or Justice Gorsuch's confirmation will be determined less by the senators in the majority who made these events happen than by future senators who will be asked to construe them. Those future senators will make the critical determinations about the significance of these constitutional events. The Supreme Court has been the ultimate spoils in confirmation battles. Political leaders construct it, just as they shape the arguments — and precedents — they use to their advantage in confirmation battles.

It is therefore challenging work to find an appropriate frame in such contested territory, where rhetoric can easily get overheated. Chafetz reasonably suggests that analysts can ground themselves by asking first, "Under what framing of the past? And the second question should then be: Do we find that framing of the past to be helpful?"⁵⁴ Following the suggestion of Professor Martha Minow, I would ask a third question, taken from the television show *Sesame Street*, "[w]hich one of these things is not like the others?"⁵⁵ This question requires that we identify the ways in which one thing is like or unlike another. That question takes us back to the competition among analogies or metaphors. Finding the most apt precedent, or at least ruling out which precedents are not pertinent, is a classic inquiry in legal argumentation, for reasoning by analogy is basic to legal reasoning.⁵⁶ In the Garland-Gorsuch contests, all the players were trying to find the right "precedent," that is, to show which earlier precedent most strengthened their case — or which dispute the current one most closely resembled. While I argued that these contests deviated from the patterns of conduct that the Senate had followed in Supreme Court confirmation proceedings since the beginning of the twentieth century (and thus this is why I thought, as a normative matter, it mattered that Justice Fortas got a hearing and Judge Garland did not),⁵⁷ I take Chafetz's point that in the frame of confirmation battles, inaction was hardly unprecedented. Our friendly dialogue is part of an ongoing conversation to find the precedents these contests most closely resemble.

That back and forth is basic to historiography. I agree that all of us should do our best to develop narratives that fit the facts, but the construction of such narratives requires more than just knowing the facts and more than arguing about precedent. It requires, as the next Part suggests, developing a coherent and persuasive coordination of all the

⁵⁴ *Id.* at 132.

⁵⁵ MARTHA MINOW, MAKING ALL THE DIFFERENCE 1 (1990).

⁵⁶ See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1948).

⁵⁷ See *supra* note 37 and accompanying text.

different modalities of constitutional argumentation, of which the past is only one.

III. THE BIGGER PICTURE

In constitutional analysis, the past is important, but it is not the whole picture. Precedent is the most common mode of constitutional discourse, but a wide range of other arguments are made based on other modes, including text, original meaning, structure, moral reasoning, ethos or national identity, and pragmatism or consequences.⁵⁸

The combatants in the Garland-Gorsuch fights did not just use the past to serve their normative ends. They made arguments based on other modalities, too. For example, Professor Kim Roosevelt and I argued, while the resistance within the Senate to do nothing on Judge Garland's nomination dug in, that the text of the Constitution's Appointments Clause did not create exceptions for presidential election years.⁵⁹ The clause, on our view, set forth the process for appointing justices that applied throughout a President's entire tenure and included no exceptions at any time, including presidential election years.⁶⁰ A response based on text was that the Appointments Clause vested the final authority over confirmation to the Senate's "advice and consent," and it was, as Republican Senate leaders argued, the Senate's "advice" that the vacancy was going to be held for the next President to fill and therefore the Senate withheld its "consent."⁶¹ This is a perfectly credible textual argument, which reinforced the arguments based on structure — that the Senate has an independent voice on appointments and its discretion includes the choice not to act — and precedent — that past Senates have opted to nullify Supreme Court nominations by doing nothing. One could counter with the pragmatic argument that failing to fill the open seat damaged the Court as an institution. Republican senators responded that there was little if any damage done to the Court.⁶² Still other arguments were made that it was "Justice Scalia's seat" at stake and so Republicans were entitled to fill it with someone like Justice

⁵⁸ See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

⁵⁹ Michael Gerhardt & Kermit Roosevelt, Opinion, *Here's What's Wrong with Pat Toomey's Opposition to Merrick Garland*, PENNLIVE.COM (May 4, 2016, 8:08 PM), http://www.pennlive.com/opinion/2016/05/heres_whats_wrong_with_pat_too.html [https://perma.cc/8EMN-6R76].

⁶⁰ *Id.*

⁶¹ Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About a Principle, Not a Person'*, NPR (Mar. 16, 2016, 12:31 PM), <http://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person> [https://perma.cc/Z3HZ-4X7H].

⁶² See Chuck Grassley, Opinion, *Sky Won't Fall with One Less Justice*, DES MOINES REG. (Apr. 10, 2016, 7:00 PM), <http://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2016/04/10/grassley-sky-wont-fall-one-less-justice/82794878/> [https://perma.cc/9LFA-7TLT].

Scalia⁶³ — to which one could respond that, when Congress created the seat, it did not condition its being filled only by a Republican appointee or someone with the same judicial philosophy as Justice Scalia. The back and forth did not end with Justice Gorsuch's confirmation, which resulted in conservatives exulting and liberals charging that Republicans had stolen Judge Garland's seat.⁶⁴ In fitting narratives to the facts, we should remain mindful that in order to be complete the narratives should be analyzing how the facts fit into all the modalities.

Chafetz of course appreciates this bigger picture, but I am not convinced that a "broad temporal and substantive frame" is necessary to "situate the events of recent years,"⁶⁵ nor convinced by Chafetz's assertion that political actors have incentives to use "narrower frame[s]"⁶⁶ in describing their opponents while historians and other purportedly impartial observers can achieve greater understanding of political events by examining them "at a high level of generality."⁶⁷ He might be describing patterns of conduct he has observed, but I perceive that political actors will use whatever frame, general or narrow, that best serves their political purposes.

In the final analysis, a narrative should, to repeat Chafetz's basic point, fit the facts. The facts should not be fit into broader or narrower lenses; they give rise to whatever inferences they raise. It is, however, not necessary to agree with Chafetz on the patterns of political discourse in order to agree with his final point that, in examining the past, we should be "asking about legislative obstruction and about the relative balance of power between the President and the Senate in getting nominees confirmed — [and how] to think through how specific procedural tools and mechanisms are used to achieve the ends of the political actors."⁶⁸ These questions do not just lead us to the past; they lead us to consider how to coordinate multiple modes of constitutional argumentation to explain constitutional conflicts like those that put Justice Gorsuch on but kept Judge Garland off the Supreme Court.

⁶³ Jay Sekulow, Opinion, *Trump Taps Gorsuch: Why the 'Scalia' Seat on the Supreme Court Matters*, FOX NEWS (Jan. 31, 2017), <http://www.foxnews.com/opinion/2017/01/31/trump-taps-gorsuch-why-scalia-seat-on-supreme-court-matters.html> [https://perma.cc/9P65-MS82].

⁶⁴ Andrew Kugle, *Liberals Decry 'Stolen Seat' as Gorsuch Officially Sworn in as Supreme Court Justice*, WASH. FREE BEACON (Apr. 10, 2017, 12:17 PM), <http://freebeacon.com/politics/liberals-tweet-stolen-seat-gorsuch-officially-sworn-supreme-court/> [https://perma.cc/SY4Q-G4RE].

⁶⁵ Chafetz, *supra* note 1, at 131.

⁶⁶ *Id.* at 132.

⁶⁷ *Id.* at 131.

⁶⁸ *Id.*

IV. CONCLUSION

Josh Chafetz's thoughtful discussion of precedent opens a special kind of Pandora's box, unleashing seemingly chaotic uses of the past in constitutional argumentation, which he has expertly brought to heel. Searching for the connections between the past and present is a challenging quest that is reminiscent of William Faulkner's great adage that "[t]he past is never dead. It's not even past."⁶⁹ Chafetz shows how present agendas skew our understanding and use of the past. He delivers a searing critique of politically driven descriptions of some current conflicts over judicial appointments as "unprecedented" and urges us to upgrade our constitutional argumentation by asking what framing we are using to understand the past and to what extent that framing helps us. The discipline he urges that we use in talking about the past is not confined to confirmation contests — or to past congressional practices. We should bring that discipline to other modes of constitutional argument and ask what frame we are using and to what extent was the framing useful. I think it will help our analysis further to also ask which earlier practices the current dispute most closely resembles. And when we talk about precedent or historical practices, we should be clear about what we mean by these terms.

Fitting narratives to facts — and not facts to narratives — as Chafetz suggests is difficult at best. Many plausible narratives can be fit to the facts, which begs the question, how do political authorities choose among them? Narratives, especially those spun by political leaders to further their agendas, are prone to overstatement (as is perhaps true of my own). For example, it is unclear how much of a problem charging unprecedentedness has become in constitutional discourse, how often that is done or how much damage that it actually does. At some point, every constitutional endeavor ever undertaken was unprecedented, so the charge has not had much effect, at least that I can see. At the same time, the pressure to simplify, rather than complicate, the narrative in politics is intense. Analogizing confirmation contests to reality television helps to illuminate how much the combatants want simple, appealing stories or narratives to further their causes. The former reality television star who is now President appreciates that the simpler the narrative, the better its appeal. Twitter, the President's social media of choice, is ideally suited to simple narratives. We can and should insist that the combatants in confirmation conflicts use the past in honest ways, but we should not have any illusions about their receptivity to such admonitions.

The use of precedent is, at least in my judgment, an even bigger challenge than charging unprecedentedness, given how easy it is both to substantiate whether something is unprecedented and to manipulate

⁶⁹ WILLIAM FAULKNER, REQUIEM FOR A NUN 73 (1951).

precedent. As we try to fit narratives to facts, we should remain mindful that facts differ in their significance, which can complicate a narrative.

The quest for those of us who speak truth to power is to model how we wish others to use the past. In that quest, we aspire to develop more persuasive, intellectually honest arguments about historical practices in constitutional law. If Professor Chafetz is not unprecedented in his efforts to upgrade the quality and integrity of our constitutional discourse, he is, at the very least, an exemplary model of constitutional analysis to follow.