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# Sites of Storytelling: Supreme Court Confirmation Hearings

PATRICK BARRY\*

## INTRODUCTION

Supreme Court confirmation hearings have an interesting biographical feature: before nominees even say a word, many words are said about them. This feature—which has been on prominent display in the confirmation hearings of Judge Brett Kavanaugh—is a product of how each senator on the confirmation committee is allowed to make an opening statement. Some of these statements are, as Robert Bork remembers from his own confirmation hearing, “lavish in their praise,” some are “lavish in their denunciations,” and some are “lavish in their equivocations.”<sup>1</sup> The result is a disorienting kind of biography by committee, one which produces not one all-encompassing narrative—with tensions reconciled, discrepancies explained, and the presentation of a coherent, if complex, portrait of the nominee—but rather several competing biographies, many of which directly war with each other.

For Bork, those competing biographies included a biography by Senator Gordon Humphrey of New Hampshire, in which Bork was hailed as a brilliant constitutional law scholar, a dedicated former Solicitor General, a respected judge, a real “lawyer’s lawyer”—indeed the “best qualified [Supreme Court] nominee in 50 years.”<sup>2</sup> But another Bork biography communicated a much different message: Massachusetts Senator Ted Kennedy characterized Bork as someone who was “hostile to the rule of law,” “publicly itching to overrule” established Supreme Court precedent, and antagonistic to the rights of women and racial minorities.<sup>3</sup> Senator Howard Metzenbaum of Ohio created still another biography. In this telling, Bork was someone who “could weaken, literally with a few years, fundamental constitutional freedoms which the Supreme Court has protected throughout its history.”<sup>4</sup>

By the time this biography by committee had been assembled, the portraits of Bork contradicted each other over and over again. One made Bork out to be the poster boy for judicial restraint; another made him out to be the poster boy for judicial activism.<sup>5</sup> At a certain moment, he was a kind, compassionate man with a wonderful sense of humor; at another, he was a heartless ideologue with attitudes that were at once racist and sexist.<sup>6</sup> Listen for a little while and you’d hear Bork portrayed as a

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1. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 298 (1990).

2. *Hearings on the Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. 1 (1989) [hereinafter, *Bork Hearings*].

3. *Id.* at 17.

4. *Id.* at 28.

5. *Id.* at 128.

6. *Id.* at 126.

selfless public servant; keep listening and you'd learn he sat in the pocket of big business.<sup>7</sup>

In other words, Bork's biography by committee contained two stories: one that made him out to be essentially the best of all judges, and another that made him out to be essentially the worst of all judges.<sup>8</sup> All this of course unfolded before Bork was even allowed to respond with his own autobiographical retort. So, it is no wonder that, while sitting in his nominee chair listening to these competing biographies, Bork felt as if he were listening to the description of "not one person . . . but several," as he later recounted in his post-confirmation memoir *The Tempting of America: The Political Seduction of the Law*.<sup>9</sup>

This experience has repeated itself in virtually every Supreme Court confirmation hearing since confirmation hearings became a regular part of the nomination process in 1955. There is a lot to regret about this. Partisan bickering doesn't need any additional forums nor is the country really at a loss for grandstanding. At the same time, however, the hearings do offer a rare opportunity to study how this very public stage serves as an important site for storytelling about America's highest court, about the people we deem fit to sit there, and about justice more generally.

#### I. EXPECTATIONS

Sites of storytelling are sites that establish, in the words of literary scholars Sidonie Smith and Julia Watson, a set of "expectations about the stories that will be told and be intelligible to others."<sup>10</sup> For example, the expectations about the stories that will be told and be intelligible to others on a personal website, they note, are much different than the expectations about the stories that will be told and be intelligible to others in a courtroom—and confusing these two sites of storytelling "might cause real problems."<sup>11</sup>

What's particularly important about sites of storytelling is that they are at once "occasional" and "locational"; that is, they are at once "specific to an occasion" and also located in "a moment in history."<sup>12</sup> Take a doctor's office. A doctor's office is an "occasional" site of storytelling in the sense that it is a literal place, with walls and insurance forms and people walking around with stethoscopes—all of which shape the stories that are told in the office and are intelligible to others there. It would be odd to tell the story of your battle with high cholesterol in a check-out line at Whole Foods. But it wouldn't be odd to tell this same story in a doctor's office.

At the same time, a doctor's office is also "locational" in the sense that it is located in a particular moment in history; a fact that also shapes the stories that are told in the office and are intelligible to others there. The stories told in that doctor's office in 1980, before the discovery of AIDS, will be much different than the stories told in it now. The concept of a "site of storytelling" has this multi-layer structure, or what

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7. *Id.* at 136.

8. *Id.* at 142.

9. BORK, *supra* note 1.

10. SIDONIE SMITH & JULIA WATSON, *READING AUTOBIOGRAPHY: A GUIDE FOR INTERPRETING LIFE NARRATIVE* 69 (2d ed. 2010).

11. *Id.*

12. *Id.*

Smith and Watson call “multi-layer matrices,”<sup>13</sup> that makes it an especially useful tool for analyzing Supreme Court confirmation hearings, which share the characteristic of being at once “occasional” and “locational.”

*A. Occasional*

What makes Supreme Court confirmation hearings occasional are the specifics of the literal place in which the confirmation hearings are held. Every detail matters: from who the committee chairperson is, to who the other senators asking questions are, to whether the audience will include people watching on television. A confirmation hearing led by someone like Senator Strom Thurmond of South Carolina, who followed a more formal question-and-answer approach during his eight years as chairperson,<sup>14</sup> will produce different stories than a confirmation hearing led by someone like then-Senator Joe Biden of Delaware, who followed a much more conversational approach during his own eight-year reign.

For example, Biden began the confirmation hearing of Ruth Bader Ginsburg with a quip about how nice it was to open the *New York Times* that morning and not see any mention of the hearing on the front page, or the second page, or even the third, or fourth, or fifth page. “[This is] the most wonderful thing that has happened to me since I have been chairman of this committee,” Biden said, because it means “thus far [the hearing] has generated so little controversy.”<sup>15</sup>

Senator Thurmond never began any of the hearings he chaired with a quip like that nor did he add in his own wry commentary as each hearing progressed—something Biden often did, even during the most contentious hearings. For example, when nominee Clarence Thomas introduced his family to the committee as his hearings began back in 1991, Biden joked with Thomas’s son Jamal that, “You look so much like your father that probably at a break you would be able to come back in and sit there and answer questions. So, if he is not doing it the way you want it done, you just slide in that chair.”<sup>16</sup> And when, toward the end of Bork’s confirmation

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13. *Id.*

14. See, e.g., *Hearings on the Nomination of Judge Sandra Day O’Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 97th Cong. 57–68 (1982) (Senator Strom Thurmond presented his questions in a way that allowed O’Connor to essentially read her responses, which already seemed prepared); see also *Hearings on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 99th Cong. 31–40 (1987) (Senator Thurmond’s opening questions followed the same format: an introductory statement to contextualize his question—“Judge Scalia, since the announcement of your nomination to be an Associate Justice of the Supreme Court, you have been criticized by some for decisions you have rendered regarding the first amendment and libel”—followed by the question itself: “Would you please give the committee your view as to why your interpretation of the first amendment, with regard to libel, led to this criticism[?]”).

15. *Hearings on the Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary United States*, 103d Cong. 1 (1994).

16. *Hearings on the Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 102d Cong. 107

hearing, Senator Alan Simpson of Wyoming noted that he was glad he never published any of his speeches now that he has seen the negative attention Bork's published speeches received, Biden interjected, "I think you will find that a bunch of [your speeches] are taped, Al. I am finding that out now."<sup>17</sup> The comment, which elicited laughter throughout the hearing room, alluded to plagiarism charges Biden was facing at the time for speeches that would ultimately end Biden's run for the 1988 presidency. Biden's next comment produced even more laughter, as well as a raucous round of applause. "And not all of [those speeches] turn out to be mine either."<sup>18</sup>

This is not to say that the levity Biden brought to the confirmation hearings he chaired changed the outcome of those hearings. Robert Bork may still have gotten "Borked"<sup>19</sup> had Thurmond instead been the committee chair during that hearing; Clarence Thomas may still have been confirmed. But it is to say that the levity Biden brought with him changed the atmosphere of the confirmation hearings he chaired in a way that also changed the stories told there. Similarly, the eventual participation of female senators in the hearings—something that did not happen until Justice Ruth Bader Ginsburg's confirmation hearing in 1993—changed the atmosphere of the hearings in a way that also changed the stories told there.

The same goes for the introduction of television cameras. That didn't happen until Justice Sandra Day O'Connor's confirmation hearing in 1983. Try to imagine what Justice Clarence Thomas's hearing would have looked like without cameras. It's possible the country would never have met Anita Hill.

### B. Locational

What makes confirmation hearings locational, on the other hand, is that each takes place during a particular moment in history. Among the reasons the confirmation hearings of Justice Thurgood Marshall, the first African American to be nominated to the Supreme Court, produced different stories than the confirmation hearings of Justice Clarence Thomas, the second African American to be nominated to the Supreme Court, is that the confirmation hearings of Thurgood Marshall occurred in 1967, more than a decade before the Supreme Court's decision in *Regents of California v. Bakke*.<sup>20</sup> The confirmation hearings of Justice Clarence Thomas, in contrast, occurred in 1991, more than a decade after the *Bakke* decision.

This decision, which famously struck down a quota-based admission system at the University of California-Davis medical school, helped turn "affirmative action" into a matter for national debate, the terms of which eventually shaped many of the stories told during Thomas's confirmation, particularly given his outspoken stance

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(1993) [hereinafter *Thomas Hearings*].

17. *Bork Hearings*, *supra* note 2, at 669.

18. *Id.*

19. "Borked" has become a colloquialism within the legal community that refers to maligning a person's reputation in order to obstruct his nomination. *See, e.g.*, William Safire, *The Way We Live Now: 5-27-01: On Language; Judge Fights*, N.Y. TIMES MAGAZINE (May 27, 2001), <https://perma.cc/2BKN-RKRH>.

20. 438 U.S. 265 (1978).

against the policy<sup>21</sup>. Supporters of affirmative action believe, Thomas explained in a 1989 speech included in the confirmation hearing record, “that the laws should be read to prohibit only some discrimination and to permit, or even require, other discrimination—the prohibited and permitted types of discrimination to be determined, apparently, by the governing elites.”<sup>22</sup> But “[s]ince the memory of when the governing elites favored discrimination against black people is still so clear in my mind, I prefer not to leave to the elites the discretion to categorize race discrimination into permitted and prohibited classes. All discrimination must be prohibited.”<sup>23</sup>

These kind of statements, coupled with characterizations of Thomas as someone who benefited from affirmative action but now “condemns government efforts to give other people the same chance he had,”<sup>24</sup> led to a concern among various senators that would have been unthinkable during the confirmation of Justice Thurgood Marshall twenty-four years earlier: could this African-American nominee be trusted to protect the rights of African-Americans?

The concern during Marshall’s confirmation was just the opposite. Senators worried whether Marshall could be trusted to protect the rights of white people. “Are you prejudiced against white people of the South?” Committee chairman James Eastland of Mississippi asked Marshall directly.<sup>25</sup> The question was one of many like it during a confirmation hearing that scholars have singled out for its venom and bigotry. Segregationists like Eastland “had recognized the inevitability of a black appointment for some time,” notes Henry Abraham, the leading historian on Supreme Court confirmation hearings, “but they were not about to accept it without

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21. *Thomas Hearings*, *supra* note 16, at 262–63.

22. *Id.* at 41.

23. *Id.*

24. *Id.* at 64 (Statement of Ohio Senator Howard M. Metzenbaum).

25. Senator James Eastland holds the record for longest tenure as chairperson of the Senate Judiciary Committee, having held that position for the twenty-two years spanning from 1956—the year after the court outlawed segregation *de jure* in *Brown v. Board of Education*—until 1978—the year *Regents of University of California v. Bakke* invalidated racial quota systems. Eastland may have also been the most racist chairperson in that committee’s history. See Marjorie Hunter, *James O. Eastland is Dead at 81; Leading Senate Foe of Integration*, N. Y. TIMES. (Feb. 20, 1986), <https://perma.cc/F9QE-UGDA> (quoting Eastland as saying, “If it came to fighting, I’d fight for Mississippi against the United States, even if it meant going out into the streets and shooting Negroes,” in regard to his views on integration in the South). Curiously, this quote seems to have its roots in a 1955 interview William Faulkner gave with British journalist Russell Warren Howe, in which he described the increasing, almost war-like tension over desegregation in the American South this way: “As long as there is a middle road, alright. I’ll be on it. But if it came to fighting, I’d fight for Mississippi against the United States, even if it meant going out into the streets and shooting Negroes.” JOSEPH BLOTNER, *FAULKNER: A BIOGRAPHY* 602 (1974). Regardless of the origins of the quote, the import of its association with Eastland is clear—he was predisposed to be hostile toward Marshall during Marshall’s confirmation hearings, particularly given Marshall’s prominent role in arguing (and winning) *Brown* before the Supreme Court, a holding Eastland later urged Mississippians to disobey. See JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954–1965*, 38 (1987).

a battle.”<sup>26</sup> “The result,” adds Benjamin Wittes in *Confirmation Wars: Preserving Independent Courts in Angry Times*, “was a degrading spectacle of the vestiges of public racism picking at a man (Marshall) who surely ranks as one of the great figures of the twentieth century.”<sup>27</sup>

Yet by the time Thomas was nominated in 1991, this kind of public racism—although still evident in contemporaneous legal events such as the beating of Rodney King—was no longer acceptable during Supreme Court confirmation hearings. This change is perhaps best illustrated by the evolution of Senator Thurmond, one of just two senators to participate both in Marshall’s confirmation hearing in 1967 and in Thomas’s confirmation hearing twenty-four years later. The other senator is Ted Kennedy of Massachusetts.<sup>28</sup>

During Marshall’s confirmation hearing, Thurmond, who had run for president on a pro-segregationist platform in 1956, grilled Marshall with pedantic question after pedantic question in what Wittes has described as a “kind of confirmation-process version of the just-banned literacy tests for voting”<sup>29</sup>:

**Senator THURMOND:** Do you know who drafted the 13th amendment to the U.S. Constitution?

**Judge MARSHALL:** No, sir; I don’t remember. I have looked it up time after time, but I just don’t remember. . . .

**Senator THURMOND:** Why do you think the framer said that if the privileges and immunities clause of the 14th amendment had been in the original Constitution the war of 1860–65 could not have occurred?”

**Judge MARSHALL:** I don’t have the slightest idea.<sup>30</sup>

At one point, Thurmond even asked Marshall, “What constitutional difficulties did Representative John Bingham of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of article IV, section 2 through the necessary and proper clause of article I, section 8?”<sup>31</sup> The question was so convoluted and picayune that Senator Kennedy felt compelled to intervene. He asked Thurmond for “further clarification,” even though Thurmond had already repeated the question verbatim. “I really am confused,” Kennedy said, “as to what actually you are driving at.”<sup>32</sup>

26. HENRY ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 229 (5th ed. 2008).

27. See, e.g., BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 73 (LANHAM: ROWAN AND LITTLEFIELD 2009); STEPHEN CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 6 (1994) (describing the Marshall hearing as the “most vicious confirmation fight in our history”).

28. *Thomas Hearings*, *supra* note 16, at ii.

29. WITTES, *supra* note 27.

30. *Hearings on the Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 90th Cong. 161–64 (1967).

31. *Id.* at 163.

32. *Id.*

Thurmond's questions were designed to make Marshall look ignorant, a particularly demeaning gesture considering Marshall's status at that time as both a former appellate court judge and the current Solicitor General, not to mention Marshall's reputation as perhaps the greatest Supreme Court advocate of his generation.

Yet when the time came two decades later to confirm Thomas—who had been nominated to replace Marshall and to take over as the only African-American justice on the Court—Thurmond showed no signs of his earlier “literacy test” approach. He didn't grill Thomas. He lauded him. According to Thurmond, Thomas possessed “the integrity, intellect, professional competence, and judicial temperament to make an outstanding justice.” Thomas's “personal struggle to overcome difficult circumstances early in his life”—namely, growing up poor and black in segregated Georgia—“is admirable,” Thurmond said, and “[a] review of his background shows he is a man of immense courage who has prevailed over many obstacles to attain remarkable success.”<sup>33</sup>

Thurmond offered these words of praise without any hint of irony about his own role as a pro-segregationist Dixiecrat in creating the “difficult circumstances” Thomas had to overcome, or the “many obstacles” over which Thomas prevailed. He even paid tribute to the “diligent work of individuals such as Justice Thurgood Marshall and others involved in civil rights efforts.”<sup>34</sup>

## II. CONTEXT AND POSSIBILITY

The key point here—and the key help the idea of occasional and locational sites of storytelling can give us—is to call our attention to context and possibility. In the context of 1967, it would not have been possible for Marshall to become the first African-American justice to sit on the Court had his wife, like Thomas's wife, been white. At the time, only twenty percent of Americans approved of interracial marriage, and sixteen states officially banned the practice.<sup>35</sup> Marshall's nomination had already run into problems because of his status as the symbol of integrated classrooms, as Juan Williams recounts in *Thurgood Marshall: American Revolutionary*.<sup>36</sup> His nomination would have been derailed completely had he also been the symbol of integrated bedrooms.

But the context when Thomas was nominated in 1991 was much different. That same year, Spike Lee was able to put images of interracial bedrooms on movie screens across the country through his film *Jungle Fever*; and John Guare was able to put images of interracial bedrooms on Broadway through his play *Six Degrees of Separation*, earning nominations for a Tony Award, a Drama Desk Award, and the

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33. *Thomas Hearings*, *supra* note 16, at 33–34.

34. *Id.* at 32.

35. Gallup Poll testing of American views on interracial marriage shows that approval rates soared from 4% in 1958 to a record 86% in 2011. See Jeffery M. Jones, *Record High 86% Approve of Black-White Marriage*, GALLUP (Sept. 12, 2011), <https://perma.cc/88QY-5Y9C>.

36. JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 3–15 (1998).



Pulitzer Prize in the process.<sup>37</sup> More importantly, *Loving v. Virginia*, the case that ultimately struck down Virginia's Racial Integrity Act—and with it all other state statutes prohibiting interracial marriage—was nearing its twenty-fifth anniversary, with no sign of being overturned.<sup>38</sup>

All of this is to say that in 1991 the confirmation hearing stage was ready for a nominee from an interracial couple in a way that it wasn't in 1967. Similarly, in 1981, when Ronald Regan picked Sandra Day O'Connor to be the first woman justice on the Court, the confirmation hearing stage was ready for a female nominee in a way that it wasn't, in say, 1952, which is the year O'Connor graduated third in her class from Stanford Law School yet could not convince any law firm to hire her as a lawyer. Instead, the only offers she received were for positions as a legal secretary.<sup>39</sup>

To put the point somewhat differently, the stories it was possible to tell about a Supreme Court nominee in 1981 or 1991 were different than the stories it was possible to tell about a Supreme Court nominee in 1952 or 1967. This fact both highlights the changing complexion of the nation's highest court and also raises a corollary question: what stories will it be possible to tell about a Supreme Court nominee in 2027 or in 2037 that it is not possible to tell about a Supreme Court nominee today, in 2017?

The idea, for example, that it would someday be possible to tell the story of a gay nominee would have been incredible when the Court decided *Bowers v. Hardwick* in 1984.<sup>40</sup> In that case, the Court upheld the constitutionality of sodomy laws in Georgia that were essentially a stand-in for prohibitions against homosexuality. But now, thirty-three years after *Bowers*, and with the Supreme Court having just issued an at once practical and symbolic victory for gay rights in *Obergefell v. Hodges*,<sup>41</sup> the idea that someday it would be possible to tell the story of a gay nominee no longer seems incredible. In some ways, it seems inevitable, especially given that seven openly gay nominees (beginning with Judge Deborah Batts in 1994) have already been confirmed to federal district courts—the make-up of lower courts often being a good harbinger of the eventual make-up of the Supreme Court. Women were judges on lower courts before Sandra Day O'Connor became the first woman on the Supreme Court; African Americans were judges on lower courts before Thurgood Marshall became the first African American on the Supreme Court; and Hispanics were judges on lower courts before Sonia Sotomayor became the first Hispanic on the Supreme Court.

Yet it is important not to focus exclusively on typically progressive stories such as those attached to pioneering women and minorities when considering the stories it will be possible to tell about Supreme Court nominees in the future. In fact, one of the most dramatic changes to Supreme Court confirmation hearings in recent years

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37. *From the Vault: "Six Degrees of Separation" by John Gaure, Starring Stockard Channing*, SIGNATURE (Mar. 22, 2013), <https://perma.cc/6PRE-W6PX>.

38. 388 U.S. 1 (1967).

39. *Justice Sandra Day O'Connor*, PBS NEWS HOUR (Mar. 9, 2007), <https://perma.cc/DU8K-V6LU>.

40. 478 U.S. 186 (1984).

41. 135 S. Ct. 2584 (2015) (holding that same-sex couples have a constitutional fundamental right to marry that states and the federal government may not infringe).

has been to the kind of conservative story that is now possible to tell—namely, the story of the “originalist.”

### III. ORIGINALISTS

Even the justice best known for being an “originalist,” Antonin Scalia, was not described as one when he appeared for confirmation in 1986. Instead, attention focused on his Italian-American background and his winning personality. “What a political symbol,” reads an issue of the *New Republic* in the weeks leading up to Scalia’s hearing, quoting a White House official. “[Scalia] would be the first Italian-Catholic on the Court. He’s got nine kids. . . . He’s warm and friendly. Everybody likes him. He’s a brilliant conservative. What more could you want?”<sup>42</sup>

The reason Scalia was not then labeled an “originalist” is that “originalist” was not yet in the popular lexicon when Scalia was confirmed. The term had only been introduced to the legal academy in 1982 through the efforts of the newly formed Federalist Society, and it had only been introduced to the legal profession more generally through a 1985 speech to the American Bar Association by then Attorney General Edwin Meese III, a little less than twelve months before Scalia was nominated.<sup>43</sup>

But by the time George W. Bush was elected in 2000, “originalist” had become a kind of Supreme Court archetype—so much so that when reports circulated that Bush would nominate a justice “in the mold of Scalia or Thomas,” nobody thought that meant Bush would nominate a Justice who was Italian-American or a Justice who was African-American. Everyone knew that Bush would nominate a Justice who shared Scalia’s and Thomas’s (and Meese’s) conservative orthodoxy.

Or at least everyone thought they knew this. Then, however, Bush nominated Harriet Miers, a wildcard nominee whose close friendship with Bush and lack of judicial experience sparked fervent criticism. “[N]ominating a constitutional tabula rasa to sit on what is America’s constitutional court,” remarked columnist Charles Krauthammer in the *Washington Post*, “is an exercise of regal authority with the arbitrariness of a king giving his favorite general a particularly plush dukedom.”<sup>44</sup> Miers’s nomination followed Bush’s successful appointment of Chief Justice John Roberts, who remembers being inspired by Meese’s speech while working in the Department of Justice during the administration of President Ronald Reagan.<sup>45</sup>

The strong negative reaction to Miers’s nomination, which ultimately led Miers to withdraw her name from consideration, highlights a final point worth considering about confirmation hearings as a site of storytelling: just as there are certain stories

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42. Fred Barnes, *Reagan’s Full Court Press: How the Supreme Court is Going to be Reorganized*, *NEW REPUBLIC*, June 10, 1985, at 16; ABRAHAM, *supra* note 26, at 276–278; ABRAHAM, *supra* note 26, at 276–278.

43. See Stephen G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 *HARV. J.L. & PUB. POL’Y* 875 (2008).

44. See Charles Krauthammer, *Withdraw This Nominee*, *WASH. POST* (Oct. 4, 2005), <https://perma.cc/5CN3-E3AZ>; ABRAHAM, *supra* note 26, at 319–24.

45. Lynnette Clemetson, *Meese’s Influence Looms in Today’s Judicial Wars*, *N. Y. TIMES* (Aug. 17, 2005), <https://perma.cc/KQ4R-RKXB>; see also JEFFERY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 22 (2012).

it was not possible to tell about Supreme Court nominees in the past that will be possible to tell about Supreme Court nominees in the future, there are perhaps certain stories that it will not be possible to tell about Supreme Court nominees in the future that it *was* possible to tell about them in the past.

#### IV. EVOLVING POSSIBILITIES

Former Chief Justice Earl Warren was, in many ways, “a constitutional *tabula rasa*” when he was nominated to the Court in 1953 by President Dwight Eisenhower. Like Miers, Warren had no judicial experience at the time of his nomination, a trait actually true of over one-third of the 111 justices ever to sit on the Court, including such revered justices as Louis Brandeis, Robert Jackson, Joseph Story, Felix Frankfurter, and William Rehnquist.<sup>46</sup> Like Miers, Warren had never argued a case before the Supreme Court. And finally, like Miers, Warren had spent much of his legal career in electoral politics. First, he was elected to be a District Attorney in California. Next, he was elected to be the Attorney General of California. And then, he was elected Governor of California, a position that, by giving him the chance to “deliver” California to Eisenhower in the 1952 election, catapulted Warren to the top of Eisenhower’s list when the position of Chief Justice opened up during Eisenhower’s first months in office.<sup>47</sup> In short, Eisenhower giving Warren the center seat on the Supreme Court can be seen as a very Miers-like move: “a king giving his favorite general”—or in this case his favorite governor—“a particularly plush dukedom.”<sup>48</sup>

Yet Warren was confirmed quickly and smoothly, and he is now considered by many scholars to be one of the greatest justices in history.<sup>49</sup> Miers, on the other hand, was never even given a confirmation hearing, a fact multiple senators complained about when Samuel Alito was given one instead.<sup>50</sup>

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46. Tom Curry, *For Court Clout, No Judicial Experience Needed*, NBC NEWS (Aug. 5, 2010), <https://perma.cc/92JS-QGAV>.

47. PETER IRONS, *PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED AMERICA* 393 (2006) (“In choosing Earl Warren to replace [Fred] Vinson as Chief Justice, Eisenhower paid a large political debt to the California governor, who had swung his state’s delegates behind Ike at a crucial point in the 1952 GOP convention.”).

48. ABRAHAM, *supra* note 26, at 320.

49. For a summary of how Supreme Court justices have been rated by scholars, see ABRAHAM, *supra* note 26, at app. A 373–76. Eisenhower, of course, would likely disagree with Warren’s “Great” rating, having reportedly referenced Warren and William Brennan—another Eisenhower appointee—when asked whether he made any mistakes as president. “Yes, two,” Eisenhower replied, “and they both are sitting on the Supreme Court.” IRONS, *supra* note 47, at 345.

50. See, e.g., *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 769 (2006) (noting Pennsylvania Senator Arlen Specter comment that: “[A]s I have said before, Ms. Miers was run out of town on a rail. The nomination was decided in the radio talk shows, TV talk shows, on the op-ed pages, and not by the Committee, which is what the Constitution says should be done. The Senate should make the

Perhaps an even better parallel exists between Miers and O'Connor, who Miers was nominated to replace. Both O'Connor, an Arizonan, and Miers, a Texan, grew up in states underrepresented on the Supreme Court. Both O'Connor and Miers were committed public servants. Both, too, were considered pragmatic conservatives without strong ideological commitments, a fact that cost each of them supporters in the Republican party; pragmatic conservatives, the fear was, might not necessarily overturn *Roe v. Wade*.<sup>51</sup> Finally, neither O'Connor nor Miers had any experience as a federal judge.<sup>52</sup>

Yet although the story of a conservative, female, pragmatist, with Western roots and without much judicial experience, was a confirmable story when O'Connor was nominated in 1981, it was no longer a confirmable story by the time Miers was nominated in 2001. One big reason was O'Connor herself: when given the chance in *Casey* to overturn *Roe*, O'Connor did not, much to the dismay of pro-life advocates.<sup>53</sup>

Another way to put this point is to ask two questions: First, if Sandra Day O'Connor were nominated to the Supreme Court in 2005 instead of in 1981, would her nomination have been ultimately successful? Second, if Harriet Miers were nominated to be on the Supreme Court in 1981 instead of in 2001, would her nomination have been ultimately unsuccessful?

It is plausible that the answer to both of these questions is "No." That seems odd, given that O'Connor became an American hero—the legal commentator Jeffrey Toobin has even called her “the most important woman in American history”<sup>54</sup>—and

decision and it ought to have a hearing in this Committee.”); *id.* at 36 (statement by New York Senator Charles Schumer: “Harriet Miers’s nomination was blocked by a cadre of conservative critics who undermined her at every turn. She didn’t get to explain her judicial philosophy, she didn’t get to testify at the hearing, and she did not get the up-or-down vote on the Senate floor that her critics are now demanding that you receive. Why? For the simple reason that those critics couldn’t be sure that her judicial philosophy squared with their extreme political agenda. They seem to be very sure of you. The same critics who called the President on the carpet for naming Harriet Miers have rolled out the red carpet for you, Judge Alito. We would be remiss if we didn’t explore why.”); *id.* at 639 (statement by Vermont Senator Patrick Leahy: “[I]t has been pointed out you are to replace Justice Sandra Day O’Connor. Actually, initially Chief Justice Roberts was nominated for that. Then Harriet Miers was nominated. The President was forced by concerns within his own party to withdraw her, then nominated you very quickly after you had been—well, you had been interviewed once at the beginning of his term, but then you were interviewed again by Vice President Cheney and Karl Rove, Scooter Libby, I think a few others. And that is why I worry.”).

51. O’Connor did, in fact decline to overturn *Roe v. Wade*, which established a fundamental right to an abortion. 410 U.S. 113 (1973). In *Planned Parenthood v. Casey*, O’Connor joined the plurality that declined to overrule *Roe* and instead laid out a lengthy explanation of why this was not an appropriate occasion to disregard *stare descisis*. 505 U.S. 833 (1992) (plurality opinion creating a new test to apply *Roe*).

52. See *Sandra Day O’Connor*, OYEZ, <https://perma.cc/Z2Q8-R9HF>; See *Harriet E. Miers Profile*, WASH. POST (Oct. 27, 2005, 9:03 AM), <https://perma.cc/4WC7-F6ZR>.

53. For an account of O’Connor’s jurisprudential approach to abortion, see JOAN BISKUPIC, *SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* 216–34, 265–77 (2005).

54. JEFFERY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 251

given that Miers, in contrast, became a punch-line. But just as some new stories have been added to Supreme Court confirmation hearings, some old stories have been foreclosed. In 1921, former President William Howard Taft became Chief Justice William Howard Taft, a transition unlikely to be repeated in the future. President Barack Obama's retirement plans do not seem to include donning judicial robes.<sup>55</sup>

All of these changes provide a great opportunity to chart the different cultural moments that produced them, to see how the stories told at different Supreme Court confirmation hearings offer not just "an index of [their] time"<sup>56</sup>—as Hermione Lee suggests all autobiographical and biographical stories do—but also an index for the kind of stories we, as Americans, tell about the complexion of our country's highest court, and so also the complexion, more broadly, of justice in America.

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(2007).

55. Jeffery Toobin, *The Obama Brief*, NEW YORKER (Oct. 27, 2014), <https://perma.cc/SL33-G25B>.

56. HERMIONE LEE, *BIOGRAPHY: A VERY SHORT INTRODUCTION* 26 (2009).