

Hearing Questions for Judge Neil Gorsuch Prepared by Ilya Shapiro, Cato Institute

Constitutional Structure

1. The first sections of Articles I, II, and III, respectively, are known as the “vesting” clauses, laying out the distinct roles of each branch of government. What do you think each clause means, and why is this important to protecting people’s individual rights? What basis do independent federal agencies have in the Constitution?
2. The administrative state often consists of agencies’ combining of legislative, executive, and judicial powers. To what extent is that unavoidable given the scope of modern government—and what about independent agencies that in theory aren’t part of any branch?—and how should judges should check the bureaucracy?
3. Under Article I, Section 8, Congress may “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common defense and general Welfare of the United States.” Is this General Welfare Clause a grant of power or a limitation?
4. Congress justifies much of the legislation it enacts today (if at all) by invoking the power to regulate interstate commerce. Some would say that the scope of this Commerce Clause has grown to the point where it constitutes a federal police power. What is the original meaning of this clause and what are some judicially enforceable limits on it?
5. The Commerce Clause grants the power “to regulate commerce . . . among the several states.” Does the word “regulate” encompass all government interventions in the marketplace, or only a more limited set of interventions to make commerce “regular”? What do you believe was the purpose of granting Congress this power? Does it affect only goods crossing state lines, or a broader set of activities?
6. Like Justice Scalia, your jurisprudence doesn’t recognize a “dormant” Commerce Clause such that states can’t pass laws that burden interstate commerce. How do you reconcile this reading with the historical fact that one of the main reasons for moving to the Constitution from the Articles of Confederation, to stop inter-state trade wars and other protectionism?
7. Do you believe the original meaning of the Necessary and Proper Clause allows the federal government to enact legislation if it is not directly tied to an enumerated power in the Constitution? Relatedly, in *Gonzalez v. Raich*—regarding federal regulation of homegrown and consumed marijuana, essentially affirming *Wickard v. Filburn*—do you agree with the majority, Justice Scalia’s concurrence, or the dissenting justices?
8. What do you think the original meaning of the Contracts Clause is? How should judges enforce this prohibition on states’ interference with private contractual relationships?

First Amendment

9. The Supreme Court's Establishment Clause jurisprudence seems hopelessly muddled. For example, the outside display of an old Ten Commandments monument is constitutional, while the inside display of a newer monument is not. What do you think the standard for determining Establishment Clause violations should be? Must there be coercion of a sort?
10. The First Amendment protects not only the freedom of speech, but freedom of the press and the right to peaceably assemble and to petition the government. There seems to be an awful lot of overlap there; were the Framers using a belt-and-suspenders approach or is there something that the last three clauses protect that the Free Speech Clause doesn't?
11. Under what circumstances do you think the forced disclosure of information about donors to political campaigns, charities, or other noncommercial causes can pass constitutional muster? Presumably, disclosure chills donations to some extent; what government interest overcomes that First Amendment harm? Does it depend on the colorable expectation of threats or harassment against these donors?

Second Amendment

12. Does the Second Amendment protect the right to carry arms or just to keep them at home? How would you analyze whether a given restriction on this right is constitutional?

Third Amendment

13. Is a police officer a "soldier"? Can you imagine a scenario beyond the forced bivouacking of troops where the Third Amendment becomes relevant?

Fourth Amendment

14. What do you think about the "third party doctrine," whereby people relinquish any expectation of privacy in information they voluntarily give to banks, phone companies, internet service providers, and others?
15. Is the "reasonable expectation of privacy" test under *Katz v. United States* still practicable given conditions of modern technology? What would you think of a test that asks if the government's actions are reasonable in discovering items that an individual has taken physical and technological pains to shield?

Fifth Amendment

16. What do you think of *Kelo v. City of New London*? Does the Constitution ever allow the forced transfer of property from one private party to another?
17. How should courts evaluate scenarios where government regulations lower but don't completely extinguish the value of a property?

Eighth Amendment

18. Is corporal punishment (flogging, whipping, etc.) “cruel or unusual punishment”? Does it matter whether these were common when the Eighth Amendment was enacted?

Ninth Amendment

19. Why was the Ninth Amendment enacted? How should courts enforce it?
20. The Ninth Amendment specifies that the Bill of Rights doesn’t provide an exhaustive list of rights that “We the People” have. What are some of these unenumerated rights and how are judges to determine whether an asserted right is constitutionally protected?

Thirteenth Amendment

21. Does the word “slavery” encompass more than the chattel slavery that existed in the Antebellum South? Can the Thirteenth Amendment be asserted against any practice other than forced servitude?

Fourteenth Amendment

22. How should judges enforce rights protected by the Fourteenth Amendment? Did this amendment truly “incorporate” the Bill of Rights or does it protect both more and less than the rights enumerated there?
23. Does the “Equal Protection” Clause proscribe discrimination on the basis of religion? On the basis of sexual orientation? On the basis of political affiliation? How are courts supposed to determine what a protected class is?
24. How should judges evaluate the scope of rights protected under the Due Process Clause?
25. What rights does the Privileges or Immunities Clause protect and what role should it play in areas now dominated by the Due Process and Equal Protection Clauses?
26. Lawsuits under the Fourteenth Amendment often turn on whether the level of judicial scrutiny is “strict,” “intermediate,” or “rational basis.” What do you think of this rubric? Does it concern you that this methodology places a “presumption of constitutionality” on any law that doesn’t implicate a so-called “fundamental” right?
27. Is there a constitutional right to get out of bed on the right side of bed? To wear a red hat? (No relation to MAGA hats.) To run a lemonade stand on your own property?

Criminal Law

28. Why should the courts have a lower expectation of police knowing what the law is than citizens as qualified immunity assumes?

29. What should judges do in light of this rhetorical question [you posed in 2006](#): “What happens to individual freedom and equality when the criminal law comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?”
30. In 2013, you said [the following](#): “There are so many crimes cowled in the numbing fine print of [the Federal Register] that scholars actually debate their number.” How can this be reconciled with James Madison in Federalist 62: “It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read”? Is fixing this a job for judges, legislators, or both?
31. What is your view of the role of the Rule of Lenity? Would you apply it where a criminal defendant is charged with a statute whose constitutionality is unclear?
32. Do you think judges should more strictly review laws and regulations that bear criminal penalties? In what circumstances does the Constitution allow criminal punishments where there is no intention or knowledge of wrongdoing?

General

33. In [a 2005 article](#), you suggested that judges should only strike down laws in “extraordinary” circumstances, implying that merely “ordinary” or potentially contestable constitutional violations may be judicially condoned. In the same article, you praised New Deal-era liberals’ “judicial restraint and deference to the right of Congress to experiment with economic and social policy.” Liberal jurists of that period advocated near-total abdication of judicial enforcement of limits on federal power. Their position was badly misguided, and utterly at odds with the originalist approach to constitutional interpretation that you have advocated elsewhere. Please explain this apparent conflict.
34. You’ve stated in the past that you interpret the Constitution according to its original public meaning. What factors do you look to in ascertaining that? In situations where the original public meaning is unclear, what interpretive methods will you rely on?
35. At what point should original meaning give way to the force of precedent? Justice Scalia was a strong believer in stare decisis, while Justice Thomas applies the doctrine more narrowly. How would you describe your views in comparison?
36. Considering how few cases the Supreme Court now hears each term, there are undoubtedly many important, well-pled cases that are turned down. Should the Court hear more cases, as it did when you were a clerk? What criteria do you intend to use in deciding which cases should be granted cert?
37. In light of your remarks that only a “bad judge” likes every result he reaches, describe a case where you ruled against your policy preferences. Conversely, in cases where you rule in line with your personal views, how do you know that your motivations are pure?
38. Who’s your favorite Founder and why?