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Victoria F. Nourse
Obama Nominee to the U.S. Court of Appeals, 7th Circuit

Nourse’s Judicial Activism is More Bold and Express
Than That of “Extraordinary Circumstances” Nominee Goodwin Liu

***Action: Call Senator Ron Johnson to Thank Him for His Principled Opposition to
Victoria Nourse and Encourage Him To Maintain His Position***

Nourse – An Advocate for “New Legal Realism” – is Critically Opposed to “Textualism” and “Strict Constructionism.” Nourse believes that there are two primary camps of judicial thought: formalists (textualists) and “new legal realists.”¹ As a new legal realist, Nourse is opposed to the textualists views of Justice Antonin Scalia² and other so-called “formalists”³ whom she criticizes for “often turn[ing] to *textualism and its strict constructionist variant.*” She criticizes textualists for seeking to preserve legislative intent by following legislative texts: “Textualists contend that judges will be restrained from engaging in politicized ‘lawmaking’ by *standing closely to the text.*”⁴

Nourse Praises the Results-Based “Radical Theory of Judging” That Departed From the Text of the Law and Reached Decisions Based on Facts Rather Than Law. Nourse writes: “The old legal realists were enormously successful in positing a *radical theory of judging* as a challenge to formalist [textualist] legal reasoning. This theory’s core claim is that *[legal] doctrine alone cannot determine outcomes and that judges respond (and should respond) to facts and factual contexts.* So, too, each of the varieties of new legal realism builds from this core claim. They do so, however, in new ways because each is responding to a new variant of “formalism” – a “textualist” variant with an instrumentalist rationale that limits the scope of judicial and legislative intervention in the market. (Emphasis added.) (Parenthetical original.)”⁵

Nourse is Opposed to the Individual Right to Bear Arms. In her law review article on so-called “New Legal Realism,” Nourse is highly critical of the Supreme Court’s ruling in *Heller* that upheld the Second Amendment’s textual grant of “the right of the people to keep and bear arms.” Contradicting the text of the Second Amendment, Nourse asserts that the *Heller* Court found “new rights, such as the right to bear arms.”⁶

Nourse Errantly Argues That Judges Can Amend the Text of the Constitution Acting As If Their Own Mini “Constitutional Convention.” In an hour long video-taped speech at Emory University, Nourse addresses what she calls the problem of “the difficulty of a constitutional text that stays the same and a world that changes.” She explains how the constitution can be amended outside of the “arduous” means provided in the constitution.

Nourse states: "... the *constitution changes as the people who constitute the nation change* – as they participate and take control of their government – as they re-constitute themselves. The separation of powers has always been since our founding – the means by which the Constitution may change in practice legitimately short of *the far more arduous and almost impossible amendment process* [as provided at Article V of the text of the Constitution].

"Students of our government tend to think of the separation of powers as an impediment – but this depends upon a conceptual mistake about the nature of constitutional power. In my view, *power is not a question of [written texts] ascription or adjectival function* – it is not about trying to define what is executive or legislative – it is the power of the people who are constituted to act in certain ways. When the people converge through the means of the separation of powers over a long period of time a constitutional convention arises. These *constitutional conventions ... are embodied not in formal amendments but in what Yale's Bill Eskridge has called small "c" constitutionalism [including] court rulings* ... which re-constitute the people and their image of themselves. This kind of small "c" constitutional change is as important, indeed, sometimes *more important than the more traditional kinds of change through the amendment process.*⁷

Nourse's advocacy in favor of judicial usurpation of legislative power – even usurpation of constitutional power – is anti-constitutional. Her view makes a mockery of the constitution and would grant as few as five judges the ability to amend the constitution according to their own political views.

Nourse is Critical of Constitutional Textualism; She Makes the Claim That the Constitution's Grants of Power "Govern No One." Nourse believes: "[t]he standard view of the Constitution - held today by most conventional constitutional law scholars, I would add - is a weak, or qualified, version of the old positivist position. The idea is that the Constitution is a law (albeit a higher one), that law is command, and that command is to be found in the text."⁸ Nourse goes so far as to argue that to remove the "vesting clauses" of the Constitution which divide power between the executive, legislative, and judicial branch would have no impact on the meaning of the Constitution. Nourse specifically references the Article I, Section 1 requirement that "All legislative Power herein granted shall be vested in a Congress of the United States"⁹ and argues that "*[t]hese descriptive words, assumed to be the most important and naturalized text in our Constitution, do nothing in and of themselves. They govern no one.*"¹⁰ Per Nourse, if that the exclusive grant of legislative power to Congress "govern[s] no one" then judges are free to legislate their own policy preferences from the bench.

Nourse Advocates a "New Legal Realism" in Which "The Power of Globalization on All of Our Lives is Recognized." Nourse writes: "new legal realism, in its various forms, holds out hope for a legal theory and scholarly and policy agendas that more adequately respond to a world in which politics is possible even if imperfect, in which judges do not feign restraint while recognizing the inevitable risk of partial judgment, in which markets are no longer assumed to self-regulate, and in which the power of *globalization on all of our lives is recognized.*"¹¹ In reference to "globalization" Nourse explains her assumption that there are "*new global and transnational institutions from above – in sum, the new world order before us.*" In a supporting footnote Nourse approvingly quotes that: "State law, including the frame of state constitutional law, is increasingly rivaled by law otherwise spatially extended, including *sub-state law, regional supranational law, transnational domain-specific private ordering, hybrid public-private ordering* and, increasingly, *new forms of global legal regime* that neither claim universality nor obviously emanate from *nor respect the aggregative sovereign will.*"¹²

Nourse Wrote the Unconstitutional Violence Against Women Act (“VAWA”) and Compares Senators Who Opposed Her to People Who “Support Lynching.”

This Act was overturned by the Supreme Court in *U.S. v. Morrison*¹³ because the Constitution does not provide Congress with the authority to enact the civil remedy provision under the Commerce Clause (Article I) or the Enforcement Clause (Fourteenth Amendment).¹⁴ Nourse’s personal position is blatantly apparent in her legal analysis when she overstates the case against her political opponents, comparing Senate opposition to VAWA to support for lynching. She states: “[just as it is] *difficult to believe any Senator could support lynching, it is difficult to believe they could oppose the Violence Against Women Act.*”¹⁵ Accordingly, it is reasonable to question whether Nourse possesses the requisite temperament to serve as a federal appellate jurist.

Nourse Discounts The Existence and Influence of Natural Law and Fundamental Rights.

The United States Declaration of Independence explicitly states that we have been “endowed by Our creator with certain unalienable rights,”¹⁶ yet Victoria Nourse has stated that “Real life, and reading hundreds of cases, have taught me that *the natural in the law is quite unnatural*, quite ‘*made*’ in the image of *human relations*, and that this is not simply a theoretical trope, that this ‘madness’ is quite real and demonstrable.”¹⁷

Victoria Nourse Describes Herself as a Zealot and Feminist.

Nourse calls herself an “accidental feminist,”¹⁸ and looks up to feminist extremist such as Martha Fineman as role models.¹⁹ Fineman believes that caregiving and emotional nurturing are “gendered” activities that cause women to be undervalued.²⁰ Nourse has written extensively as a proponent of this type of feminism; she co-authored the book “Cases and Materials on Feminist Jurisprudence: Taking Women Seriously”²¹ and has authored numerous other books, law review articles, speeches, media statements on the same subject.²²

¹ In a law review article on “New Legal Realism,” Nourse argues: (1) “... the new realism rejects formalism [textualism] and finds that rationalism is not enough ...” (2) “t[he new legal realists’ primary target is the first view of formalism [textualism] embedded in neoclassical law and economics.” and (3) “***There are several factors that we believe suggest that new legal realism has a much better shot at responding to our new world order – the facts on the ground – than its competitor, the new formalism [textualism].***” Victoria Nourse & Gregory Shaffer, *Varities of New Legal Realism: Can A New World Order Prompt a New Legal Theory*, 95 *CORNELL L. REV.* 61, at 95, 97, and 127 respectively (2009).

Perhaps Nourse’s, most demagogic attack on “textualism” and “formalism” states:

In sum, *new legal realists generally oppose a neo-formalist conception of judging* that is blind to real-life behavior and to the institutional implications of judicial decision making. Concepts (such as the rational actor, efficiency, and public choice in neoclassical law and economics, or the competing concepts that new legal realism puts forward, such as behavioralism, factual and social contextualization, and institutional choice) confer theoretical structure on judicial practice and shape what courts do through doctrine. Neoclassical law and economics produced powerful concepts that had tremendous effects on what courts do, including through judicial doctrine and interpretive method, helping to give rise to a *new textualism*. *New legal realists challenge those concepts and put forth competing ones. Textualism, new realists contend, is insufficient for judging*, both descriptively (judges always bring some concepts to bear, and these concepts

shape the categories that doctrine uses), institutionally (the nature of judging tends to transform nonjudicial ideals into judicial ideals), and normatively (the choice of categories and law's coercive force have real consequences for people).

Id. at 107-08. (Emphasis added.) (Parentheticals original.)

² Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt a New Legal Theory*," 95. *CORNELL L. REV.* 61, at 97 (2009).

³ Nourse disapprovingly categorizes textualism as "formalism" and says that it has "two variants: (i) a descriptive and prescriptive theory of law based on a complex of rationally organized principles that can and should be deductively applied to any set of facts; and (ii) a view of law as rule-bound, under which judges apply rules to facts as part of a rule-of-law system regardless of consequences in particular cases."

Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt a New Legal Theory*," 95. *CORNELL L. REV.* 61, at 97 (2009).

⁴ *Id.* at 102. (Emphasis added.)

⁵ *Id.* at 101. (Emphasis added.)

⁶ *Id.* at 128, and footnote 288 (2009), discussing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008).

⁷ A video of the speech is available at: http://www.youtube.com/watch?v=C0MaIh_-qLc, and the following is a full transcription of the portion quoted above:

"... the constitution changes as the people who constitute the nation change – as they participate and take control of their government – as they re-constitute themselves. The separation of powers has always been since our founding – the means by which the Constitution may change in practice legitimately short of the far more arduous and almost impossible amendment process. Students of our government tend to think of the separation of powers as an impediment – but this depends upon a conceptual mistake about the nature of constitutional power. In my view, power is not a question of [written texts] ascription or adjectival function – it is not about trying to define what is executive or legislative – it is the power of the people who are constituted to act in certain ways. When the people converge through the means of the separation of powers over a long period of time a constitutional convention arises. These constitutional conventions require massive consensus across the departments and vast amounts of popular will. They are embodied not in formal amendments but in what Yale's Bill Eskridge has called small "c" constitutionalism, executive orders, and statutes, and court rulings, like *Brown v. Board of Education*, the Americans with Disabilities Act, the Civil Rights Act, which re-constitute the people and their image of themselves. This kind of small "c" constitutional change is as important, indeed, sometimes more important than the more traditional kinds of change through the amendment process. Such change is legitimate because it is carried on through the deliberate dialogues set out by the Separation of Powers. It is nevertheless an active process – one step forward – one back as the departments compete for power. But as the dynamic departmental dance proceeds – oscillating between states and nations, presidents and congress, the people and their temporary sovereigns – some conventions rigidify so strongly – that their absence becomes unthinkable."

⁸ Victoria Nourse, "Law's Constitution: A Relational Critique," 17 *Wis. Women's L.J.* 23 at 31-32 (Spring 2002). The full text of the cited quote is as follows:

“The standard view of the Constitution - held today by most conventional constitutional law scholars, I would add - is a weak, or qualified, version of the old positivist position. The idea is that the Constitution is a law (albeit a higher one), that law is command, and that command is to be found in the text. Indeed, the dominant approach toward constitutional interpretation today is known as textualism - a view so dominant that it has become standard even among those who purport to find it far too constraining.

Now let us consider what this view does to the most basic of constitutional principles - its structure. The standard constitutional law approach is to view structure as a set of legal commands drawn from the text - particular texts known as the vesting clauses. The vesting clauses describe our government using three of the Constitution's most prominent yet opaque terms: the "executive," "legislative," and "judicial" powers. These words are thought, in turn, to be the beginning and the end of the matter; because power is naturalized as force, these texts are thought to be about as "natural" as the Constitution gets. They are so natural, they appear incapable of definition and at the same time self-executing. To paraphrase Justice Scalia: executive power is executive power is executive power.

Now, perform with me an intellectual experiment. Take these words - the words that seem so naturally descriptive of our Constitution's structure (the terms "executive," "judicial," and "legislative" power). Now, cut them out of the Constitution, wipe them out, eliminate them. Throw away the vesting clauses if you will. You may strike all these terms and not much will happen. The Congress will still meet, the people will still vote, the Supreme Court will still decide cases, and the federal government will still be supreme. In short, we will still have a government. These descriptive words, assumed to be the most important and naturalized text in our Constitution, do nothing in and of themselves. They govern no one.

(Internal footnotes omitted.)

⁹ *Id.* at 31, footnote 30.

¹⁰ *Id.* at 32.

¹¹ Victoria Nourse & Gregory Shaffer, *Varities of New Legal Realism: Can A New World Order Prompt a New Legal Theory*,” 95. *CORNELL L. REV.* 61, at 129 (2009).

¹² *Id.* at 129, and footnote 290 (2009).

¹³ *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁴ *Id.*

¹⁵ Victoria Nourse, *Political Education and the Self-Transcending Constitution*, June 2009; video available at: http://www.youtube.com/watch?v=C0Malh_-qLc (See 9:36 mark of video.)

¹⁶ United States Declaration of Independence. Also, William Blackstone stated in his *Commentary on Law* that natural law is “the law of nature, which, being coeval with mankind, and dictated by God himself”

¹⁷ Victoria Nourse, “Law’s Constitution: A Relational Critique,” 17 *Wis. Women’s L.J.* 23 at 24 (Spring 2002). (Emphasis added.)

¹⁸ Nourse also refers to herself as an “accidental zealot.” Victoria Nourse, *Political Education and the Self-Transcending Constitution*, June 2009; video available at: http://www.youtube.com/watch?v=C0Malh_-qLc (See 27:50 mark of video.)

¹⁹ Victoria Nourse, *Political Education and the Self-Transcending Constitution*, June 2009; video available at: http://www.youtube.com/watch?v=C0Malh_-qLc (See 15:30 mark of video.)

²⁰ Eleanor Willemsen and Michael Willemsen, *A Review of Martha Fineman's The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies: She Threw Out the Baby with the Old Feminism*, Santa Clara University; available at: <http://www.scu.edu/ethics/publications/other/lawreview/fineman.html>

²¹ Mary E. Becker, Cynthia Grant Bowman, Victoria F. Nourse, and Kimberly A. Yurack, “Cases and Materials on Feminist Jurisprudence: Taking Women Seriously,” 3rd Edition (2006).

²² Nourse response to Senate Questionnaire at 7-24 generally; available at: <http://judiciary.senate.gov/nominations/112thCongressJudicialNominations/upload/VictoriaNourse-PublicQuestionnaireUpdate.pdf>