How Will Trump’s Supreme Court Remake America?; feature

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Body

In July 2013, Aimee Stephens wrote a letter to her co-workers and her employer at a funeral home in the Detroit area, where she had worked for six years. “What I must tell you is very difficult for me and is taking all the courage I can muster,” she told them. “With the support of my loving wife, I have decided to become the person that my mind already is.” After four years of counseling, Stephens explained that she was transitioning from being a man to being a woman, and so, at the end of an upcoming vacation, she would come back to work as her “true self,” wearing women’s business attire. Stephens’s boss told her that her self-presentation would harm his clients and business, and he fired her.

In October, the Supreme Court heard a lawsuit from Stephens challenging her termination based on Title VII of the 1964 Civil Rights Act, which prohibits employers from discriminating on the basis of “sex.” When members of Congress passed the initial law, and when they later amended it, they didn’t say they were protecting gay or transgender people. The question in front of the court was whether the plain meaning of the word they chose — “sex” — did so anyway. The court also heard the claims of two gay men who were fired from their jobs.

Stephens’s lawyer, David Cole, argued that she was fired because she didn’t conform to her employer’s ideas about gender. Stephens didn’t fulfill an “expectation that applies only to people assigned male sex at birth,” he said, “namely, that they live and identify as a man for their entire lives. That is disparate treatment on the basis of sex.”

Justice Neil Gorsuch, who was appointed to the Supreme Court by President Trump in 2017, asked Cole, who is the national legal director for the A.C.L.U., how judges should now interpret an “old” law, written in a different era. This question is of particular importance to Gorsuch, who says he uses a method called textualism for deciding cases that involve a statute like Title VII. He believes that judges should focus only on the plain meaning of the text. When the court interprets the Constitution, Gorsuch subscribes to a similar (though not identical) theory, originalism, in which judges adhere to the meaning of the Constitution as people understood it when it was ratified. Because they are simply looking at the words before them, which they believe have a single, fixed meaning, judges like Gorsuch say their method allows their decision-making to be “value neutral” — in contrast to judges who consider a law’s purpose or consequences.

Cole responded to Gorsuch: "We are not asking you to apply any meaning of 'sex' other than the one that everybody agrees on as of 1964, which is sex assigned at birth, or as — as they put it, biological sex." He added, "We're not asking you to rewrite it."

"I agree with that," Gorsuch said. "Assume for the moment I'm with you on the textual evidence." If all that mattered to Gorsuch was the text, Stephens and the other plaintiffs might have the fifth vote they needed — along with those of the four liberal justices, Ruth Bader Ginsburg, Elena Kagan, Sonia Sotomayor and Stephen Breyer — to win a huge victory for gay and transgender rights when the justices decide the case by the end of the court's term this June.

In one sense, that result would be a huge surprise. For the first time in generations, the court has a majority of five staunchly conservative justices — Gorsuch, who filled Antonin Scalia's seat; Trump's second appointee, Brett Kavanaugh, who replaced Anthony Kennedy in 2018; Samuel Alito; Clarence Thomas; and Chief Justice John Roberts. Expanding the rights of gay and transgender people would not appear to be on the menu. But if Gorsuch meant what he said about faithfully following the text and agreed with Cole about its meaning, it was hard to see how he could vote against Stephens.

But then Gorsuch pivoted, with a startling question for a strict textualist. "At the end of the day," he asked, should a judge "take into consideration the massive social upheaval that would be entailed in such a decision?"

Cole answered that no evidence suggests an upheaval. A 2016 poll shows that 80 percent of Americans think it's already illegal to fire or refuse to hire someone for being gay, and some lower courts have treated discrimination against transgender people as a violation of Title VII for 20 years.

It was a telling exchange for assessing Gorsuch's commitment to his method of deciding cases, which he has said judges should follow in every instance. Critics have long argued that originalism and textualism are riddled with inconsistencies and can be used to provide a fig leaf for results-oriented judging. In that moment with Cole, Gorsuch seemed caught between the plain meaning of "sex" and a worldview he shares — in other words, between principles and politics.

The line between law and politics has always been blurry, and judges have often professed to sharpen it. Claims of unblinking fidelity to the text have increasingly become the crowning orthodoxy on the right in recent decades. Now Gorsuch and his conservative colleagues have a chance to harness that energy to transform the law. "The Trump vision of the judiciary can be summed up in two words: 'originalism' and 'textualism,'" Donald F. McGahn II, the former White House counsel, who was instrumental in Gorsuch's and Kavanaugh's appointments, said in 2017 at an event for the Federalist Society, a group that has been a juggernaut for propelling the courts to the right. Placing judges on the courts is "the most important thing we've done for the country," Senator Mitch McConnell, the majority leader, said last spring. He earlier promised that Trump judges (192 and counting) will "interpret the plain meaning of our laws and our Constitution according to how they are written."

Since the 1960s, conservatives have often derided liberal judges as "activists" who bend the law to make big changes. And until his departure in 2018, Justice Kennedy held the Supreme Court's swing vote and (like Sandra Day O'Connor before him) restrained his fellow conservatives by forging a kind of national compromise on abortion rights, marriage equality, gun laws, the regulatory powers of federal agencies and the scope of the death penalty.

But now Gorsuch, along with Thomas and Alito, has become "the leading edge of a second generation of conservatives who are not afraid of exercising judicial authority" — in other words, making decisions that can significantly change the law — said John Yoo, a law professor at the University of California, Berkeley, and a former Thomas clerk. (Yoo helped write memos in George W. Bush's Justice Department that provided justification for the torture of suspects after Sept. 11.) These three justices have shown a "predisposition to swing for the fences," Donald Verrilli, who served as a solicitor general for President Barack Obama, told me.

The more that conservatives on the court want to overturn precedents and strike down laws, the more useful it is for them to claim a coherent philosophy that seems to merely follow the dictates of the Constitution or a statute. Gorsuch is positioning himself to push his colleagues in that direction as the public voice and salesman of

originalism. Thomas, a fellow strict originalist, rarely speaks from the bench. Roberts said at his 2005 confirmation hearings that judges should “call balls and strikes,” but he didn’t explain how. Alito calls himself a “practical originalist,” picking and choosing when to apply the theory. Kavanaugh, whose record on the court is too short to reveal much, suggested in a 2017 lecture that he didn’t have one methodology by saying that “history and tradition” competed for “primacy of place” with factors like liberty and deference to the Legislature. Questions and battles over originalism and textualism will run through almost every major case the justices hear this year and beyond, and they are the key to understanding the Roberts Court.

Originalism may sound like an old concept, but it’s actually a modern creation, one born of political exigencies. It dates to the aftermath of the Supreme Court’s 1973 decision inRoe v. Wade, which recognized a constitutional right to abortion. That ruling was not partisan: Roe was decided by a vote of 7 to 2, with five justices in the majority appointed by Republican presidents and one in dissent appointed by a Democrat. By 1980, however, the Republican Party had become more uniformly conservative, and its leaders determined that opposing abortion was a crucial way to win votes from evangelicals and Roman Catholics. The party promised in its platform that year to appoint judges who would protect “traditional family values and the sanctity of innocent human life.”

But the pledge made it sound as if Republican-appointed judges would pursue a political agenda. Some conservative legal thinkers were uncomfortable with that overt mixing of politics and the law. In 1982, law students started the Federalist Society. The students who founded it instructed other students not to “use the adjective ‘conservative.” Their purpose, they said, was the nonideological and nonpartisan promotion of limited government.

To maintain their distance from politics, they needed another way to talk about abortion. Robert Bork, an early adviser to the Federalist Society and an appeals court judge, had an answer: a return to the framers’ original conception of the Constitution. Bork said Roe erred not because abortion was wrong but because it created a right to privacy that could not “be found in the Constitution by any standard method of interpretation.” In a 1985 speech to the American Bar Association, Attorney General Edwin Meese III gave Bork’s idea a wide audience, calling for judges to follow the “original intention” of the Constitution’s framers.

Every judge begins with the text when interpreting a law, and in some ways, originalism seems like common sense. But used in isolation, it doesn’t reflect how the court has done its work for most of its history. At key moments since the country’s early days, the court has weighed the purpose and consequences of a ruling as much as or more than text.

In a sense, the Constitution invited some license. The document gave specific instructions (“The House of Representatives shall be composed of members chosen every second year”) for the country to follow, but it also provided open-ended principles (“freedom of speech,” “property,” “liberty, “due process”) and left questions unanswered. The Constitution itself provided no method for interpreting it — and at the Supreme Court, constitutional cases were rare, in any event. Almost all of the justices’ work has involved creating legal doctrines, case by case. Their opinions have been full of discussion of their own previous decisions much more than the Constitution. “The precedents shape the text, rather than the other way around,” the University of Chicago law professor David Strauss wrote in The Harvard Law Review in 2015.

In the 1803 case Marbury v. Madison, the justices filled in a gap about which branch of government should be the final arbiter of the Constitution’s meaning by declaring that it was the courts’ job “to say what the law is.” In 1819, in McCulloch v. Maryland, the court had to decide whether Congress could charter a bank of the United States even though the Constitution did not explicitly say so. The justices took into account the pressing concern of the day — the need for a national army and a bank with branches across the states and territories to pay soldiers — and voted unanimously to broadly interpret Congress’s power to make “necessary” laws to allow for the bank. “Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea,” Chief Justice John Marshall wrote.

Over the years, the justices continued to consider the demands of the moment and their own beliefs about the policies that served the country’s interests. They didn’t follow a single approach or subscribe to a particular theory, as originalists claim to do today. Early on, the court recognized a principle called stare decisis, meaning “to stand by

the things decided," which allowed it to maintain the law's stability. If one ruling proved a mistake, later justices occasionally reversed it, or they more commonly stepped around a decision they didn't like and gradually rerouted.

In the 20th century, the justices continued to weigh the impact their decisions would have, increasingly taking into account science and social science. In 1954, the court made an unusual request for a different kind of briefing: The justices wanted to know about the original intentions of the framers of the 14th Amendment. In Brown v. Board of Education, the landmark challenge to school segregation, the court asked whether Congress and the state legislatures that enacted the amendment in 1868 contemplated an end to segregating public schools when they promised that the states would guarantee "equal protection of the law," as well as "due process" and "liberty." The N.A.A.C.P., which was litigating the case, sent out an emergency telegram to its supporters asking for help responding to the court's request. But in the end, the plaintiffs and their experts could not supply the original-meaning support for desegregation the court was looking for. At the time the 14th Amendment was ratified, its backers denied it would lead to desegregated schools.

After an exhaustive discussion of the history at oral argument, Chief Justice Earl Warren did not pretend otherwise. In the end, his opinion, for a unanimous court, turned on present-day evidence about harm to black children. "We must look to the effect of segregation itself on public education," Warren wrote. "In approaching this problem, we cannot turn the clock back to 1868."

Over the next decade, one justice who joined the unanimous majority in Brown, Hugo Black, spoke up for adhering to text and the Constitution's original meaning. The way to change the Constitution, Black insisted, was to amend it, though in practice he continued to vote with the majority in many Warren Court decisions that expanded the concepts of equal protection and due process. Consistency, even for an early form of textual fidelity, proved difficult.

In 1967, Thurgood Marshall, who led the N.A.A.C.P.'s team of lawyers in Brown, was asked during his confirmation hearings for the Supreme Court whether the court's role should be "simply to ascertain and give effect to the intent of the framers." Marshall said yes, "with the understanding that the Constitution was meant to be a living document."

The idea of an evolving Constitution, built from the language of the framers but not limited to their understanding of it, became a concept associated with liberals. Yet sometimes it has been conservatives who leave the text and the framers behind. In the 1970s, the conservatives on the court began to rule that the First Amendment protected commercial speech, like advertisements, even though it had never been understood that way before. The doctrine remains a tenet of the right.

The repeated lesson, as Strauss argues, is that the Constitution isn't just or even mainly its text. It's the edifice the court has hammered together over the words, adding and renovating over the centuries. The court still spends most of its time and energy on its own precedents. In many important areas — free speech, civil rights, establishment of religion, criminal procedure and punishment — the doctrines the court has developed stray so far from an originalist reading of the text that to return to it would render American law unrecognizable.

In 1987, President Ronald Reagan nominated Bork to the Supreme Court, and his confirmation hearing proved to be the first test of originalism's public acceptability. Bork argued that the Constitution provided not only no basis for the right to privacy in Roe but also no basis for banning literacy tests or poll taxes or for the standard of "one person, one vote." Bork's statements helped persuade Democratic senators to oppose him, sinking his nomination.

A year after Bork's defeat, Justice Antonin Scalia, from his safe perch on the court, offered a more politically palatable version of originalism in a lecture at the University of Cincinnati called "Originalism: the Lesser Evil." The shadow of Bork hung over the conservative legal movement, and Scalia began by admitting that originalism was "not without its warts." Its greatest defect, he said, was that it was so difficult to apply correctly. This required "immersing oneself in the political and intellectual atmosphere of the time." To write an originalist opinion would take significant research "sometimes better suited to the historian than the lawyer."

Scalia was candid about the difficulty of applying originalism in every case. "In its undiluted form, at least," he wrote, "it is medicine that seems too strong to swallow." Almost every originalist, Scalia said, recognized that the theory could be superseded by the court's general rule of respect for its own past decisions, or precedents. Scalia also

acknowledged that there were things the Constitution permitted at the founding that he couldn't imagine allowing today — for example, a law allowing for whipping or branding as a criminal punishment. "In a crunch," he admitted, "I may prove a fainthearted originalist." How would originalism stop judges from imposing their own values if they could be selective about applying it? Scalia simply promised such cases would rarely arise.

Scalia had already altered the definition of originalism. He said in a speech two years earlier that originalism should not focus on the intent of the framers, who disagreed among themselves. Instead, the theory should rest on the Constitution's original public meaning: the understanding of the text by ordinary citizens at the time, revealed through research into founding-era sources. In practice, originalism has slid between these definitions ever since.

Despite Scalia's efforts, originalism remained politically tainted by the memory of Bork. Clarence Thomas steered clear of the subject at his Supreme Court confirmation hearings in 1991. "Our notions of what liberty means evolves with the country," he said in a discussion of the 14th Amendment. "I don't think that they could have determined in 1866 what the term in its totality would mean for the future."

It appears in retrospect that Thomas was obscuring his views in order to win Senate votes. On the court, he became the justice most determined to use originalism to rip up whole fields of American law, especially to reduce the scope of federal regulation. "When faced with a demonstrably erroneous precedent, my rule is simple," he wrote last June in a solo concurrence — a separate opinion agreeing with a judgment — in Gamble v. United States. "We should not follow it." He has written solo opinions at a higher rate than any other sitting justice. When Scalia was alive, he painted Thomas as an extremist. Comparing himself with Thomas at a talk at a synagogue 15 years ago, according to the New Yorker writer Jeffrey Toobin, Scalia cracked: "I am an originalist, but I am not a nut."

But over time, positions Thomas once floated from the margins of conservative thought have moved into its mainstream. "Justice Thomas has been throwing out revolutionary concepts for a long time now," Yoo, his former clerk, said. "He was interested in being proved right by history, or by the court 20 or 40 years into the future. Now you could say his influence is reaching its height." Trump officials have expressed their appreciation for Thomas, with McGahn calling his recent opinions a "driving intellectual force." The administration has successfully nominated more than 10 of his former clerks, the highest total for any justice, to the federal bench.

In 2012, what was once Thomas's radical originalist rationale for curtailing Congress's powers to pass laws based on the Constitution's Commerce Clause almost became the basis for striking down the Affordable Care Act. He first argued this position in the 1995 case United States v. Lopez, saying that when the Constitution was written, "commerce" referred only to "selling, buying and bartering, as well as transporting for these purposes." This led to the extraordinary suggestion that the Supreme Court had been wrong to uphold the entire social safety net of the New Deal, because it involved "substantial effects" on commerce among the states. Seventeen years later, in the Affordable Care Act challenge, all five conservative justices embraced this thinking, finding that Congress had indeed exceeded its commerce powers. Only Roberts's defection from the conservative majority, in concluding that the individual mandate was permitted by Congress's power to tax, saved the health care law.

Thomas, who declined to talk to me, moves back and forth between different forms of originalism, sometimes focusing on the intention of the framers and sometimes on the 18th-century meaning of the words, according to Ralph Rossum, a government professor at Claremont McKenna College, in his otherwise sympathetic book, "Understanding Clarence Thomas." Sometimes, Thomas ignores originalism altogether. For example, he provided no evidence that the First Amendment's original meaning supported his position in a 1996 concurrence in which he argued that limiting the political donations of corporations violated their free-speech rights. The conservative majority embraced that argument 14 years later in Citizens United v. F.E.C. to strike down limits on corporate campaign donations.

In his 2019 book, "The Enigma of Clarence Thomas," the political scientist Corey Robin traces Thomas's version of originalism to his code of self-reliance. Thomas called his memoirs "My Grandfather's Son," writing with reverence about his grandfather's achievement of lifting the family out of poverty by starting a fuel-delivery service in Georgia despite the barriers of Jim Crow. In college, Thomas was a black nationalist who followed Malcolm X, signing his letters "Power to the People." But after law school, he became a free-market conservative. Criticizing President

Franklin D. Roosevelt and other New Deal liberals in a 1987 speech for the Pacific Research Institute, a think tank, Thomas said: “These critics of ‘the rich’ really do mean to destroy people like my grandfather.” His opinions often align with his belief that the unfettered market, not government efforts to redistribute wealth or ameliorate discrimination, is “the guarantor of precisely the kind of freedom upon which the black community depended,” as Robin writes.

Thomas’s main innovation has been to deploy originalism to loose the government’s reins over the market. One advantage of originalism is that it allows conservative judges to justify sweeping away American legal traditions, like the broad power of Congress to regulate. “You have to claim to be going back to first principles,” David Strauss says. “Otherwise, it’s just that you don’t like the legal order we have.”

In December, the Supreme Court heard a challenge to a New York gun-control law based on the Second Amendment. It was the latest step in an originalist quest that Thomas helped start in the 1990s to use the Constitution to strike down gun laws.

At the time, the Supreme Court’s last word on the Second Amendment dated from 1939, when the justices found unanimously that the right to bear arms applied only to weapons with a reasonable relationship to a militia. In the 1980s, originalists like Bork agreed that the Second Amendment didn’t give individuals a right to bear arms. But over the next decade, gun rights became a newly invigorating issue for Republicans, fueled by the National Rifle Association — and like abortion before it, that position, too, benefited from an originalist justification. After a few law professors — some of them liberals — began to argue that the Second Amendment had been misunderstood, Thomas referred to their work in a footnote in the unrelated 1997 case Printz v. United States. “A growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the amendment’s text suggests, a personal right,” Thomas wrote, though he acknowledged that there was significant scholarship on the other side of the debate.

Thomas’s footnote served as an invitation for lawsuits challenging local gun-control laws, and in 2007, the justices agreed to hear a Second Amendment challenge to a District of Columbia regulation that effectively barred the personal ownership of handguns. The plaintiff was Dick Heller, a police officer who couldn’t obtain a license from the District of Columbia to keep a weapon at home.

With Heller on the court’s docket, historians saw a rare chance to influence one of the biggest cases of the decade. A group of founding-era scholars led by Jack Rakove, a Stanford historian, concluded that the law professors Thomas cited were wrong: The Second Amendment was not about self-defense. “The right to keep and bear arms became an issue in 1787-88 only because the Constitution proposed significant changes in the governance of the militia,” they wrote in an amicus brief. The Federalists wanted Congress to determine exactly what kind of militia the nation should have. A few Anti-Federalists did refer to the personal use of guns. But the debate always focused on the role of the militia, not a personal right of self-defense. The Federalists won the debate and wrote the Second Amendment.

When the Supreme Court issued its decision in Heller in 2008, for the first time in its history, the conservative majority, including Thomas, ruled that the Second Amendment protected an “inherent right of self-defense.” Scalia wrote the opinion, relying heavily on the 18th- and early-19th-century dictionary definitions of “keep,” “bear” and “arms,” which could refer to the personal use of ordinary weapons. Scalia also picked out a few Anti-Federalist quotes that supported his position. For the most part, he bypassed the Federalist sources that Rakove and his colleagues believed held the key.

To Rakove, Scalia’s analysis was indefensibly incomplete. The founding was “a period of great political creativity,” Rakove told me. As concepts shifted, words took on new shades of meaning. The context matters for accurately understanding the language. “Even if you have the best dictionaries from 1720 to 1790, you still want to think about what the specific nature of the revolutionary-era controversy and experience added.”

Even some conservative scholars found Scalia’s treatment of the historical sources wanting. Steven Calabresi, a law professor at Northwestern who clerked for both Scalia and Bork and helped found the Federalist Society,

looked at all the early state constitutions and found that Scalia had cited the ones that included a personal right to bear arms without acknowledging that a majority of the constitutions did not. "Scalia was better at arguing that people should do originalist history than actually doing it," Calabresi says.

In Heller, Scalia also dropped his originalist analysis in the crucial passage of the opinion that explained how the court's decision would affect modern gun laws. Almost surely to win the vote of Justice Kennedy, which he needed for a majority, Scalia wrote that the court's ruling did not "cast doubt" on prohibitions on the possession of firearms by felons and the mentally ill, laws that forbid carrying firearms in "sensitive places" and laws "imposing conditions and qualifications" on gun buyers. Many of these laws were modern-day; Scalia gave no historical support for letting them stand.

After striking down one more handgun ban in Chicago in 2010, the court stopped taking Second Amendment cases. As long as Kennedy remained on the court, legislatures could respond to public outcry over gun violence with increasing restrictions on firearms. It was a compromise that Thomas rejected with mounting frustration, accusing his colleagues, in a dissent in 2015, of "relegating the Second Amendment to a second-class right."

The dynamic changed with Gorsuch's arrival after Trump's election. He moved into chambers near Thomas, who invited him over for barbecue and regularly pops into his office to talk, people who know them told me. Gorsuch soon joined Thomas in scolding the rest of the court for rejecting a challenge to California's ban on carrying concealed weapons. Last year, with Kavanaugh installed in place of Kennedy, the court finally accepted a case about a New York City ban on transporting licensed handguns anywhere except to approved gun ranges.

Before the justices heard the case, New York lifted the ban and asked the court to dismiss it. To the liberal justices, the grounds for a dismissal were clear. Roberts also seemed open to dismissing the case. But at the argument in December, Gorsuch took up the cause of trying to keep the case alive. The court will decide whether to rule on the merits in the next few months — and whether to make this case its vehicle for expanding gun rights.

Whatever the court does with the New York case, it has surfaced a new challenge for Scalia's originalist claims about the Second Amendment. Two years ago, Brigham Young University introduced a database of more than 120,000 texts from the late 18th century. Previously, originalists in search of the meaning of words during the founding era looked through newspaper archives and other old records. The B.Y.U. database made it possible to comprehensively assess how people at the time used the words "bear arms."

For originalists, the new tool is "a paradigm-shifting technology," two members of the Federalist Society, the law professor Josh Blackman and the Stanford law fellow James C. Phillips, wrote in The Harvard Law Review's blog in August 2018. It also means that cherry-picking the historical record to establish a dubious "original" meaning would be harder to conceal. "We can do empirics," says Alison LaCroix, a historian and law professor at the University of Chicago. "There's a data set."

Blackman and Phillips conducted a review of the database and found that the dominant use of "bear arms" at the time of the country's founding related to the militia. (Even so, they didn't conclude that Scalia got Heller wrong.) LaCroix and three linguists submitted a brief to the court last fall, in the New York case, with studies they had each done. One found that references in the database "to hunting or personal self-defense" for the phrase "bear arms" were "not just rare, they are almost nonexistent." The phrase "keep arms," the brief stated, was also used "almost exclusively in a military context."

The findings confirm what Rakove and his fellow historians showed about the era's political history. But this time, the analysis played by the rules of the game as Scalia defined them, by looking narrowly at the original public meaning of the text. "I don't care how big a fan of Justice Scalia you are," Phillips told me. "At some point, you run up against the data."

In previous decades, it was Scalia who sold originalism to the public with brash confidence. "You would have to be an idiot," he said, to conceive of the Constitution as a "living organism." Scalia died in 2016, and now Gorsuch is remaking the role in his own image. In a best-selling book published in September, "A Republic, If You Can Keep

It,” Gorsuch lays out his judicial philosophy. He says judges should not “interpret legal texts to produce the best outcome for society,” because that’s the job of legislatures.

On an evening that month, a few hundred people gathered at the Richard Nixon Presidential Library in Yorba Linda, Calif., to hear him speak about his ideas. Gorsuch was on a book tour that included an hourlong special for Fox News, interviews with print reporters (though he declined my request to speak to him) and a later appearance on “Fox & Friends.”

At the library, the crowd, dressed in pastels, filed past elderly docents and into a replica of the East Room of the White House. The audience members settled into their seats and then burst into applause when the silver-haired justice strode into the room. Sitting near a portrait of George Washington, he warmed up the crowd. “It’s really nice being west of the Mississippi,” he said with a grin, winning a roar of anti-Washington approval. He told a story about his milkman making a delivery to his home outside Boulder, Colo., where he and his wife and two daughters lived before he joined the Supreme Court. In his book, Gorsuch describes it as “our home on the prairie” and includes pictures of horses, dogs and chicks.

In fact, his house in Colorado was a gated estate that was sold for $1.5 million in 2017. When he lived there, he drove a gold Mercedes convertible to work at the federal courthouse in Denver. In the early 1990s, Gorsuch met his wife, Louise, at Oxford, where she was a champion equestrian and he studied legal philosophy after graduating from Harvard Law School.

A former colleague says that Gorsuch urged his clerks to make money in the private sector before they went on the bench, the path he took himself as a corporate lawyer. In the 2000s, Gorsuch represented Philip Anschutz, the oil-and-gas mogul, who has invested in a vast array of businesses and conservative publications, including The Washington Examiner. Anschutz played a role in elevating Gorsuch’s legal career. In 2006, after George W. Bush was re-elected president, Anschutz lobbied for Gorsuch’s appointment to the U.S. Court of Appeals for the 10th Circuit. He then gave Gorsuch a speaking spot at an annual dove-hunting retreat he ran for prominent conservatives.

At the Nixon library, Gorsuch advertised his support for diversity. Singling out three of his law clerks, Gorsuch described them as a descendant of Mexican immigrants and Holocaust survivors, a first-generation Chinese-American and the first Native American to ever clerk on the Supreme Court. He praised his appeals court, the 10th Circuit, for being “as diverse a court on any metric you wish to consider as any court in the country.” In fact, judges on the 10th Circuit are overwhelmingly white and male. Gorsuch went on to ask his audience if they had heard people say originalism “leads to conservative results.” The crowd murmured, and Gorsuch jutted his chin. “Rubbish,” he said.

In his book, Gorsuch asks rhetorically if there’s any reason to “only sometimes adhere” to the original meaning of the Constitution, and he answers: “For my part, I can think of none.” This is a significant shift. In contrast to Scalia’s confession of fainthearted originalism (which Scalia himself repudiated in 2013), Gorsuch professes to be absolutist on the matter. He argues that to make an exception would be to fall into a trap: “The more leeway a judge is given, the more likely the judge will engage, consciously or not, in motivated reasoning or bias in reaching a result.”

The challenge, then, is to stick with the theory, even if it leads to a result you don’t like. But rather than facing up to archaic and politically inconvenient results that originalism can dictate, Gorsuch tends to wave them away. In his book, he addresses the charge that an originalist reading of the Constitution could prevent a woman from becoming president. Article II of the Constitution, after all, calls the chief executive “he.” But Gorsuch says it’s “nonsense” to think the plain meaning of the text restricts the presidency to men, because “‘he’ served as a standard pronoun of indefinite gender” when the Constitution was written and ratified.

Some scholars are skeptical of Gorsuch’s reading of Article II. In the revolutionary era and after, the plain meaning of “he,” in context, was understood to refer only to men. At the time, the use of “he” would have given states, if they wanted it, a basis for blocking women from appearing on the presidential ballot, Akhil Amar, a professor at Yale Law

School, told me. "The framers' Constitution allowed states to bar women (and many men) from voting and holding office — and originalism ties its meaning now to that world," Reva Siegel, also a Yale law professor, says.

Last June, Gorsuch issued his most significant originalist opinion to date, in Gundy v. United States, a case dealing with Congress's power to broadly delegate policymaking authority to federal agencies. In a dissent, Gorsuch picked up on a solo concurrence Thomas wrote in 2015 and argued that the interpretation of the Constitution that has allowed Congress to do this — in regulating everything from air and water quality to banking and food safety — is "at war with its text and history."

Gorsuch said the problem mostly came from a line of cases in the 1940s, following the New Deal expansion of government. He presented his view, which is known as the "nondelegation doctrine," as the proper original understanding of the constitutional separation of powers between the legislative and executive branches.

But a body of scholarship discussed in an amicus brief in Gundy belies Gorsuch's interpretation. For example, a 2017 review of every relevant court challenge before 1940 showed that Congress has delegated policymaking authority to the executive branch since the founding era. One of the review's authors, the Princeton politics professor Keith Whittington, is a member of the Federalist Society. He and Jason Iuliano, a law professor at Villanova University, concluded that "the nondelegation doctrine never actually constrained expansive delegations of power."

Gorsuch ignored that research, citing only a minority of scholars who agree with him. "I admire Justice Gorsuch's writing," Cass Sunstein, a Harvard law professor and former Obama-administration official, told me. "But his discussion in Gundy isn't close to historical standards. There's a ton of terrific work on the nondelegation doctrine, and he cites none of it. Then there is some not-terrific material, which he does cite."

In February, Nicholas Bagley and Julian Mortenson, law professors at the University of Michigan, released a new review based on thousands of pages of documents from the early Congresses. "There was no free-standing non-delegation doctrine at the founding," they concluded, "and the question isn't close." Nonetheless, the issue will probably arise again. The court was short a justice in Gundy, because Kavanaugh hadn't been confirmed, and Gorsuch didn't win a majority. But last November, Kavanaugh praised Gorsuch's Gundy opinion, sending a signal to lawyers to bring a new case.

Perhaps the most significant case on the court's docket this year is about the subject that gave rise to originalism in the first place: abortion. On March 4, the court will hear June Medical Services v. Russo, a challenge to a Louisiana law requiring abortion providers to obtain admitting privileges to local hospitals. There are only three clinics left in the state, and if the law takes effect, two of them say they will close, because no local hospital will grant them admitting privileges. That would leave only one provider in a state with nearly one million women of reproductive age.

In 2016, Kennedy and the court's four liberals struck down an identical Texas provision, based on a scientific consensus that the requirement isn't medically necessary and ultimately harms women by preventing them from accessing a safe procedure. The only thing that has changed in the four years since the Texas decision is the court's composition. The new case could be a means for the conservatives to begin dismantling the constitutional protections for abortion that the court has built, brick by contested brick, over decades of decisions that began with Roe v. Wade.

Roe was rooted in a 1965 precedent, Griswold v. Connecticut. In Griswold, the court derived a right to privacy for marital relations from what it confusingly called "penumbras, formed by emanations" in the Bill of Rights and the 14th Amendment, striking down a law that banned the use of birth control, including for married couples. Justice Hugo Black, the stickler for the text of the era, dissented. "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions," Black wrote.

The critique sank in. When Justice Harry Blackmun wrote the majority opinion in Roe, he refashioned a right to privacy "founded in the 14th Amendment's concept of personal liberty and restrictions upon state action" that was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

Later, the Supreme Court established other underpinnings for the right to access abortion. In the 1992 case Planned Parenthood v. Casey, three justices appointed by Republican presidents — Kennedy, Sandra Day O’Connor and David Souter — devised a compromise that allowed the states to regulate Roe, but only if they did not impose an “undue burden” on women seeking abortions. Returning to the 14th Amendment, the justices wrote: “The controlling word in the cases before us is ‘liberty.'” The court invoked gender equality, saying that the right to decide whether and when to have a child is essential to a woman’s ability “to participate equally in the economic and social life of the nation.” As Linda Greenhouse and Reva Siegel wrote in the 2019 book “Reproductive Rights and Justice Stories,” “Respect for the equal citizenship of women appears centrally in the opinion.” It took 20 years, and perhaps a female justice, but the court saw a direct connection between reproductive freedom and equality. The current conservative majority, however, may undo it.

Some liberals have tried to find common ground with conservatives by blurring the boundaries between originalism and an evolving understanding of the Constitution’s open-ended principles. Justice Elena Kagan promoted this approach to constitutional interpretation at her Senate confirmation hearings in 2010. “Sometimes they laid down very specific rules,” she said of the framers. “Sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do.” Kagan ended with a line that drained originalism of its standard meaning: “In that sense, we are all originalists.”

Perhaps Kagan sought to disarm her partisan critics in the Senate. Gorsuch and Kavanaugh may have seen the same benefit when they followed her lead at their own confirmation hearings. “I am with Justice Kagan on this,” Gorsuch said at his 2017 hearing, when asked for his views on originalism. Kavanaugh repeated the refrain when it was his turn to testify: “As Justice Kagan said, we’re all originalists now.”

But now that Gorsuch and Kavanaugh are on the court and the conservatives are firmly in control, it’s hard to see why they would go along with a liberal effort to co-opt originalism. Kennedy, hardly an originalist, floated a version of this in his 2015 majority opinion recognizing a right to marriage equality for gay couples in the case Obergefell v. Hodges. The framers “entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning,” he wrote. The conservatives on the court at the time recoiled, arguing in dissent that the court’s decision had “nothing to do with” the Constitution. Outside the court, social conservatives warned that an ideologically neutral originalism would be useless. “One might say that originalism has become a Unitarian Church for the legal profession,” Michael Greve, a professor at the Antonin Scalia Law School at George Mason University, wrote in an essay last July. “Anybody is welcome, provided you believe there is one Constitution.”

The left also has something to lose if it makes support for originalism, and textualism, sound like a single widely shared view, when in fact the conservatives’ conception of these theories remains very different from theirs. More than a decade ago, Justice Stephen Breyer debated Scalia in a hotel ballroom in Washington. He spoke on behalf of an approach to judging that went back to Marbury and McCulloch: reading laws and the Constitution in context to weigh their underlying purpose and the consequences of interpreting them one way or another. Breyer continues to argue urgently for this position. Last term, he wrote two solo dissents — not his usual practice — to warn against what he sees as a words-on-the-page capitulation. He is concerned that rather than challenging a method that produces constitutional law that few people would want, liberals are uncritically helping to normalize it and teach it to the next generation of the legal profession. “I don’t want textualism to take over the law schools, and I fear it is,” he told me this fall. “The purpose of the law is to work, to work for the people.”

Emily Bazelon is a staff writer for the magazine and the author of “Charged,” which is a 2020 finalist for The Los Angeles Times Book Prize in the current-interest category and the Helen Bernstein Book Award for Excellence in Journalism from the New York Public Library.

Sources for photographs in top video: Thomas, Roberts and Gorsuch from Mandel Ngan/Agence France-Presse, via Getty Images; Alito and Kavanaugh from Chip Somodevilla/Getty Images

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