

What Gorsuch Has in Common With Liberals

March 18, 2017

Opinion



Cardboard cutouts of the Supreme Court nominee Judge Neil M. Gorsuch at the Conservative Political Action Conference last month. Al Drago/The New York Times

NEW HAVEN — The Supreme Court nominee Judge [Neil M. Gorsuch](#) describes himself as a constitutional “originalist.” But originalism, which we are likely to hear a lot about during his confirmation hearings this week, comes in several flavors and is more complicated than the conversation about Judge Gorsuch or the Supreme Court would suggest.

Originalists believe that faithful constitutional interpreters must build on the solid bedrock of the Constitution's text, as that text was originally understood when drafted and ratified. For example, what did the Article III words "judicial power" mean in 1787-88? What did ratifiers of the 14th Amendment in 1866-68 understand themselves as doing when declaring that states must honor the basic "privileges" and "immunities" of American citizens?

Justice Antonin Scalia, whose seat Judge Gorsuch seeks to fill, described himself as an originalist and championed originalism on the court. Justice Clarence Thomas is also a professed originalist, as was President Ronald Reagan's Supreme Court nominee Robert Bork.

But not all conservatives are originalists, nor are all originalists conservative. Most jurists, most of the time, follow modern judicial precedents rather than pondering first principles of constitutional text and history. Practical considerations also factor into most jurists' decision making. Originalists are no different in this regard, but they are more apt to dwell on first principles of text and original meaning and to discard precedents violating these first principles.

The Warren court at its best was an originalist court, albeit a liberal originalist court. It overturned many precedents and rightly so. [Plessy v. Ferguson](#) flouted the Constitution's explicit promises of racial equality; pre-Warren cases slighted the Constitution's repeated affirmations of a "right to vote"; early-20th-century precedents ignored basic rights guaranteed by the 14th Amendment as plainly understood in the 1860s; and pre-Warren jurisprudence also undermined bedrock constitutional rights of political expression. So argued the 20th century's greatest originalist and the Warren court's driving force — the crusading liberal justice Hugo Black, appointed by President Franklin D. Roosevelt. Today, some of the best originalist work

either comes from avowed liberals or supports various liberal outcomes.

One rising group of liberal originalist lawyers, the [Constitutional Accountability Center](#), where I serve on the board of directors, has been particularly effective in bringing liberal originalist scholarship to judicial attention. This month, Justice Anthony M. Kennedy and four liberal colleagues strengthened rules against racial animus in jury deliberations. Justice Kennedy's opinion for the court squarely relied on a C.A.C. amicus brief and the historical scholarship it showcased, by [James Forman Jr.](#), a professor at Yale Law School.

As this recent case, [Pena-Rodriguez v. Colorado](#), illustrates, originalists must honor not just the original understanding of words ratified in 1787-88, but also the letter and spirit of language added by later generations of amenders. In Justice Kennedy's words, the "imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments."

This willingness to give due weight to the original vision of amending generations — Reconstruction Republicans in the 1860s, woman suffrage advocates and other Progressive Era crusaders in the 1910s, civil rights reformers in the 1960s — is what separates true originalists from false prophets. Justice Scalia, alas, frequently failed this test, especially in cases involving women's equality and other birthright-equality claims.

Too often, Justice Scalia stopped reading. He failed to read the Constitution's text all the way to the end — to give due weight to its transformative amendments added by post-founding reformers. And he failed to read modern originalist scholarship that has conclusively disproved many of the historical canards that were prominent in the 1950s when he attended law school.

Consider, for example, the extraordinary body of work of [Steven G. Calabresi](#), who co-founded the [Federalist Society](#) in the early 1980s and then clerked for Judge Bork and Justice Scalia. Professor Calabresi is perhaps America's pre-eminent conservative originalist. He has shown that the 14th Amendment was plainly intended to apply the Bill of Rights to the states; that women's equality was a central theme of that amendment, as originally understood; and that originalism in fact supports a right of same-sex marriage. The scandal is not that Justice Scalia thought otherwise; it is that he never engaged Professor Calabresi's powerful originalist evidence or even showed awareness of his landmark work or of other evidence offered by other leading originalist scholars.

Done right, originalism is enormously time-consuming. It is unrealistic to expect justices themselves to be accomplished legal historians. But it is not unfair to expect self-described originalist jurists to read originalist literature when brought to their attention by scholars and organizations across the political spectrum.

By all accounts, Judge Gorsuch, who has sat on the United States Court of Appeals for the 10th Circuit since 2006, is a brainy and principled jurist. His embrace of originalism is honorable and admirable, placing him alongside giants such as Chief Justice John Marshall, Justice Joseph Story, President Abraham Lincoln and Justice Hugo Black — originalists all. But Judge Gorsuch is not a constitutional historian, nor should he try to play one on TV during his confirmation hearings.

Instead, he should show backbone and humility, by championing the best jurisprudential ideas of his mentor, Justice Scalia, while conceding that the justice was an imperfect preacher and practitioner of originalism. Judge Gorsuch should stress that he knows how much he does not (yet) know and that he is willing to learn by hitting the legal-history books and amicus briefs

in the years ahead. And if he follows through on this commitment, history may one day judge this judge as among the best of the century.