TIME

Why Liberal Justices Need to Start Thinking Like Conservatives

Brett Kavanaugh thumbs through a pocket-sized copy of the U.S. Constitution as he testifies during his Supreme Court confirmation hearing on Capitol Hill on Sept. 5, 2018 in Washington, D.C. Chip Somodevilla—Getty Images

BY **AKHIL REED AMAR** JUNE 30, 2022 8:00 AM EDT

IDEAS

Akhil Reed Amar teaches constitutional law at Yale University. He is the author of The Words That Made Us: America's Constitutional Conversation, 1760-1840.

When the Supreme Court released its usual end-of-term rush of decisions last week, America experienced nothing less than a constitutional earthquake, a massive jolt caused by deep shifts in the tectonic plates of American jurisprudence.

On Monday, Chief Justice John Roberts, writing for all six of the Court's Republican appointees, ruled that religious schools must receive equal treatment in any school voucher system that a state might choose to create. On Wednesday, Justice Clarence Thomas, writing for the same six, struck down New York's efforts to minimize concealed guns in public places. Then came Friday, when Justice Samuel Alito, writing for five Justices (all Republicans except Roberts) jettisoned a half-century of abortion jurisprudence and explicitly overruled the landmark cases of *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (2012). What on earth is the Court doing?

In a word: Originalism. Originalism is a profound and principled constitutional theory, available to liberals and conservatives alike, that prioritizes the Constitution's text and original history over even seemingly "settled" precedent. And after decades of doctrinal drift on America's highest court, originalism is now openly ascendant.

Read More: *The Fight Over Abortion Has Only Just Begun*

The three new blockbuster opinions came from the Court's three senior-most Republican appointees, with decisive backing from their more junior fellows, all self-described originalists nurtured from youth in the bosom of the originalism-focused Federalist Society: Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. In all three cases, the Court's old guard Democrats —Stephen Breyer, Sonia Sotomayor, and Elena Kagan—howled in dissent. In all three, the Court repudiated doctrines that appeared solid a generation ago.

America has been here at least three times before—in 1937, 1954, and 1963. In each of these previous turning points, new blood on the Court prompted big changes. Each prior revolution tossed overboard landmark rulings that had once seemed settled precedent, as the new Court condemned the old conclusions as egregious misreadings of constitutional text and history. But all three prior revolutions involved liberal, not conservative, originalism. And in that history lies a way forward for today's liberal jurists—if they can bring themselves to see it.

In 1937, as in last week's abortion ruling in *Dobbs v. Jackson Women's Health Organization*, the new Court eradicated putative constitutional rights rooted in a half-century of prior precedent. Back then, the supposed rights involved powerful men's private property; in *Dobbs*, the contested right implicated less powerful women's private lives. Both times, the Court's new blood said that the supposed rights in question—whether to enforce harsh contracts or to end pregnancies—lacked solid foundations in the Constitution's text and original understanding. In 1937, the old legal order was epitomized by *Lochner v. New York* (1905), in which the Court struck down an eminently reasonable maximum-hour employment law as violative of a sweatshop owner's right to drive a hard bargain with his workers. *Lochner* and other cases like it deployed

a dubious doctrine, known to lawyers as "substantive due process," that gave judges vast discretion to ignore laws they simply didn't like on substantive policy grounds. The new blood rightly viewed this amorphous and anti-textual concept with great suspicion. *Roe* carelessly revived the "substantive due process" idea in the context of women's reproductive rights, and the Court's new blood has now reacted just as the Court's new blood reacted in the late 1930s, by loudly denouncing this amorphous blob. Thus, *Roe* has now become the new *Lochner*.

In 1954, *Brown v. Board of Education* likewise said that an old precedent-setting case was egregiously wrong; this time, it was *Plessy v. Ferguson* (1896). Once again, originalism provided the best justification for the Court's doctrinal about-face, though then-Chief Justice Earl Warren's opinion muted this fact, which became clear only in retrospect. *Brown* was right for the simple reason that the text and history of the Fourteenth Amendment promised racial equality, and Jim Crow was not truly equal. In last week's school case, *Carson v. Makin*, America's current Chief Justice subtly channeled his 1950s predecessor by once again proclaiming the idea of educational equality—this time, the equal rights of religious parents and religious schools. As did Warren in *Brown*, Roberts in *Carson* muted some of the best originalist evidence that supported his ruling, but his bottom line was emphatic: If a private secular school gets a voucher, so must a private religious school that is identical in all other respects. What 1954 was for race equality in education, 2022 is for religious equality in education. *Carson* is the new *Brown*.

Read more: *The Supreme Court Just Expanded Gun Rights. Here's What That Means*

Finally, in 1963, the Warren Court switched into high gear after Justice Felix Frankfurter left after a stroke. Now, the Roberts Court is shifting into high gear after Justice Ruth Bader Ginsburg's death. Beginning in 1963, the Warren Court dramatically expanded rights under the First, Fourth, Fifth, and Sixth Amendments—involving expression rights, search-and-seizure rights, and fair trial rights, among other things. In last week's gun case, *New York Rifle v. Bruen*, the Roberts Court likewise dramatically expanded rights under the Second Amendment, involving the right to keep and bear arms, broadly construed. *Bruen* is the new *Gideon* (1963), the new *Miranda* (1966).

In hindsight, the lead architect of the judicial revolutions of 1937, 1954, and 1963 was a liberal originalist who stood like Martin Luther on the rock of constitutional text and history. This jurist led the Court to discard precedent after precedent because, he insisted, the old decisions were egregiously wrong on originalist grounds.

The most important judicial originalist in modern American history was thus not a conservative—not Robert Bork, not Antonin Scalia, not Clarence Thomas, not Samuel Alito. Rather it was Hugo Black, Franklin Roosevelt's first appointee (in 1937), who became the driving intellectual force of the Warren Court from 1953 to 1969 and left the bench shortly thereafter. Black brilliantly understood the legal, political, and rhetorical power of the Constitution's text and history. He knew how to sing the song of America's origins and amendments. The Constitution's text and background history really did offer

strong protections of political expression by government critics ("Congress shall make *no law* abridging the freedom of speech, or of the press"); the right to vote (a textual refrain that repeatedly recurs in post-Founding Amendments); and jury trials of and for ordinary folk. Black insisted that these and countless other constitutional rights meant what they said, and that judges had to enforce them robustly.

Whether consciously or not, today's Federalist Society conservatives are building on Franklin Roosevelt's first and best judicial pick. It is customary in most circles to refer to the Court's junior Republican trio—Gorsuch, Kavanaugh, and Barrett—as Trump appointees, but in truth they are Federalist Society appointees, carefully groomed and vetted by this extraordinarily influential organization. Trump himself knows nothing about law and was indeed the most lawless president in American history. To him, law is simply an obstacle or a weapon. But most good lawyers and judges see law as a guide, a lens, a tool, an instrument for justice and community. The Federalist Society is part of this grand legal tradition and it has long championed originalism as the best way for judges and others to do constitutional law.

Meanwhile, the Court's liberals are eschewing originalism, and they are losing badly. They are prioritizing not constitutional text, not its adjacent history, but rather existing Supreme Court precedent.

Read more: *Inside the Original* Roe v. Wade *Supreme Court Leak, 49 Years Before the Alito Bombshell*

But purely precedent-based argumentation is misguided. For starters, each justice swears an oath to the Constitution, not to the Court's caselaw. And the Constitution's text could not be more clear: It, and not judicial precedent, is "the supreme law of the land"—no ifs, ands, or buts. Moreover, precedent itself authorizes deviation from egregiously wrong precedent. That is the lesson of 1937, 1954, and 1963—precedents on precedent, so to speak. A dissenter can of course invoke precedent, but the shelf life of a purely precedent-based dissent is shorter than that of a head of lettuce. Once a Court majority hands down its ruling, that ruling itself becomes a new precedent, and a precedent-worshipping dissenter must now change her tune in the next case. But an originalist dissenter need not fold her tent. The text says what it says and the history means what it means today, tomorrow, and forever. Most of Black's biggest triumphs late in his judicial career began as dissents in his early days.

When last week's liberals tried to make arguments from constitutional text and history, they often stumbled. For example, in *Dobbs* they repeatedly and passionately invoked women's "liberty." But the Constitution's text protects "liberty" in a clause that promises fair procedures such as impartial judges and juries—"due process"—and nothing more. Textually and historically, this is not a Liberty Clause as such. Nor is it a Property Clause, despite *Lochner*'s strained efforts to make it so. Rather, it is exactly what it says it is—a procedural Due Process Clause. A jurist steeped in arcane judicial precedent may have difficulty even seeing this basic point, but it is blindingly clear for a true originalist, who begins by focusing like a laser on the terse text itself: "Nor shall any state deprive any person of life, liberty, or property without due process of law."

In *Carson*, Justice Sotomayor opened her dissent by invoking "the wall of

separation between church and state that the Framers fought to build." This was lovely rhetoric but sloppy analysis. The "wall of separation" metaphor is not in the Constitution and our best constitutional scholars have proved that the Founding history of church and state is far more complex than this simple metaphor suggests. Most important of all, *Carson* involved a state—Maine—and not the federal government. The key amendment was thus not the First Amendment, which explicitly speaks of "Congress" and was adopted in 1791, but the Fourteenth Amendment, which limits "state" governments and was ratified in 1868. That amendment says nothing about religious "establishment" as such, but does expressly stress the "equal" status of various races and religions. Sotomayor wasn't even looking at the right century or the right text! In *Bruen*, the New York gun control case, Justice Thomas's ambitious originalist opinion for the Court took special care to highlight the possible difference between the understanding of American rights in 1791 and in 1868, yet Sotomayor and her fellow dissenters in *Carson* completely missed the memo.

The *Dobbs* liberals grumbled that originalism privileges white male history from long ago. But surely the Constitution's text binds us, no? And how can judges faithfully enforce the text without paying at least some attention its enactment context and pondering the reasons why Americans in years past put certain words in the document? In her 2010 confirmation hearings, liberal Justice Elena Kagan explicitly said, "we are all originalists."

As Justice Black brilliantly showed throughout his career, there are often compelling originalist arguments to be made for liberal outcomes. And some liberal originalists working in today's law schools are making them. For example, they have emphasized the relevance of the Thirteenth Amendment to the abortion debate. Enslaved women were forced to reproduce against their will and modern abortion laws are likewise conscripting unwilling women into, quite literally, forced labor.

There are plausible counterarguments to this and other liberal originalist ideas; but unless liberals on the Court learn (or relearn) how to do originalism, they will lose many winnable cases. Perhaps conservative originalists on the Court will swat away even compelling liberal originalist ideas, but we will never know unless liberals on the Court put these ideas in play. Even if liberal originalist arguments fail to prevail immediately, they will leave a trail of dissent that will be a godsend to future jurists, unlike precedent-based dissents good for one day only.

Read more: *What Ketanji Brown Jackson Could Bring to the Supreme Court*

In the modern NBA, no team can consistently win without the ability to sink three-pointers. What is true of today's basketball court is also true of today's Supreme Court: the game is changing and new skills are now required. The Federalist Society is the judicial equivalent of the Golden State Warriors.

Beginning at noon today, when Ketanji Brown Jackson takes her oath of office to replace retiring Stephen Breyer, there will be fresh talent on the Court. In the years ahead, Justice Jackson and the Court's other liberals will need to hit the history books hard and practice their outside shots. Only if this happens will they have a fighting chance in the new era that has dawned.

CONTACT US AT LETTERS@TIME.COM**.**

TIME Ideas hosts the world's leading voices, providing commentary on events in news, society, and culture. We welcome outside contributions. Opinions expressed do not necessarily reflect the views of TIME editors.