

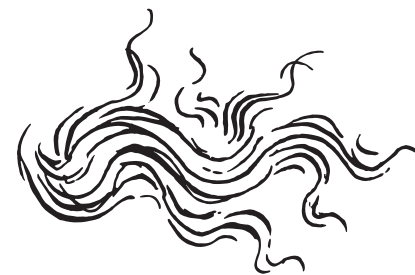
CULTURE AND POLITICS

Liberties



*Accept the truth from
whoever utters it.*

MAIMONIDES



JACK GOLDSMITH

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Earl Warren's retirement in June 1969 ended his run as Chief Justice of the most progressive Supreme Court in American history. Richard Nixon appointed Warren Burger to replace Warren, and Republican presidents selected the next five Justices over the seventeen years that Burger presided as Chief Justice. And yet the Burger Court, while tacking a bit to the right, continued to embrace activist interpretive methodologies and to issue progressive decisions. The most famous example, but a typical one, was its decision in *Roe v. Wade* in 1973. There the Court discerned in the Fourteenth Amendment's due process clause a "right to privacy" — a right that

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appears nowhere in that clause — that gave a pregnant woman the prerogative to abort a fetus until viability. The opinion was written by Harry Blackmun, a Nixon appointee, and joined by Burger and another Nixon appointee, Lewis Powell. In 1983 the title of a book by Vincent Blasi, a professor at Columbia Law School, summed up the state of affairs at the time: *The Burger Court: The Counter-Revolution That Wasn't*.

When I entered Yale Law School in the fall of 1986, the conservative legal movement born in reaction to the Warren and Burger Courts' makeover of American life was in its infancy. In mid-September, the Senate confirmed William Rehnquist, a hard-conservative voice on the Court since 1972, to replace Burger as Chief Justice. That same day it voted 98-0 for Antonin Scalia to replace Rehnquist as an Associate Justice. Scalia was little known outside conservative circles, but he was famous in them for his attacks on jurists who departed from the text of statutes and the Constitution when interpreting them. The Federalist Society, the now-dominant conservative legal organization, had been founded a few years earlier but was still a fledgling force. Conservative ideas were not taken seriously in law schools or the legal culture at the time. Robert Bork, who had left Yale five years earlier, observed that his colleagues found his conservative text-based approach to constitutional interpretation "so passé that it would be intellectually stultifying to debate it."

After Reagan nominated Scalia, Republican presidents chose seven of the next eleven Justices on the Court that is now headed by a George W. Bush nominee, Chief Justice John Roberts. Three of those Justices, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, were chosen by Donald Trump. And yet despite the fact that Republican presidents have appointed fifteen of nineteen Justices since Warren, and

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despite undoubted successes, many conservatives are still waiting for the counterrevolution. *Roe* has not been overruled. The Court has recently recognized new constitutional protections for gay rights, including a right to gay marriage. Affirmative action, another constitutional solecism for conservatives, still lives. And in June 2020, in a case called *Bostock v. Clayton County*, the Court, in an opinion by Gorsuch, ruled that the ban on “sex” discrimination in employment in the Civil Rights Act of 1964 made it unlawful to fire an individual merely for being homosexual or transgender.

Gorsuch reached this conclusion in reliance on “textualism” — the method of statutory interpretation championed by Scalia, and for decades a rallying cry of the legal right alongside originalism. Many conservatives were shocked that a Trump appointee invoked Scalia’s method to recognize categories of discrimination that conservatives have long sought to deny legal recognition. It was especially shocking since textualism seemed to serve the very judicial activism in the recognition of novel rights that it was designed to foreclose. *Bostock* represents “the end of the conservative legal movement, or the conservative legal project, as we know it,” said Senator Josh Hawley, a Yale-trained lawyer and former Supreme Court litigator for conservative social causes, in a fiery speech on the floor of the Senate.

Hawley was exaggerating for political effect. On issues other than the social conservative ones such as abortion and gay rights that he cares most about, the movement has been hugely successful in changing the legal culture and the composition of the federal judiciary, and in moving public law sharply to the right. And that was before Trump replaced the very liberal Ruth Bader Ginsburg with the youthful and very conservative Barrett, four months after Hawley spoke.

The Court’s conservative majority is now larger, younger, and more conservative than it has been in a century, and maybe ever. And yet it remains unclear whether the Court will transform American life as the conservative legal movement hopes, and as progressives dread.



The conservative legal movement developed two methodological responses to the perceived excesses of the Warren and Burger Courts. Both purported to be value-neutral mechanisms that were designed to restrain judges.

The main target of conservative legal jurisprudence was progressive interpretations of the Constitution. The Warren Court (1953-1969) recognized a right to marital privacy, including the right to use contraceptives, in the “penumbras” of the Bill of Rights; up-ended the settled understandings of the Fourth, Fifth, and Sixth Amendments to foster a defendant-friendly revolution in criminal procedure; issued many progressive rulings on race, most notably *Brown v. Board of Education*; practically eliminated prayer in school; and dramatically reorganized redistricting and apportionment rules governing elections under the guise, mainly, of equal protection of the law. The Burger Court (1969-1986) continued the progressive trend. It decided *Roe*, temporarily invalidated the death penalty, blessed affirmative action in education, and practically eliminated structural constitutional limits on congressional power.

Laurence Tribe of Harvard Law School, a progressive icon, captured conventional wisdom in the academy when he justified these and similar decisions on the ground that the Court’s job in constitutional interpretation is to discern

“the contemporary content of freedom, fairness, and fraternity.” As Justice William Brennan, an intellectual leader of the Warren Court, explained, “The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.” The problem with these views, conservatives maintained, was that they had “almost nothing to do with the Constitution and [were] simply a cover for the Supreme Court’s enactment of the political agenda of the American left,” as Lino Graglia of the University of Texas put it.

Originalism was the right’s response. It maintained that Justices should aim to discern the original meaning of provisions of the Constitution (including the amendments) at the time they were adopted. Ideas akin to originalism had informed judicial theory and practice since the founding of the nation, but “originalism” became the organizing term and principle of conservative constitutional interpretation in the 1980s — due primarily to a series of speeches by Attorney General Edwin Meese that drew national news coverage and responses from two sitting Supreme Court Justices; to Scalia’s powerful writings on and off the Court; and to the left’s disparagement of originalism during Bork’s failed confirmation for a slot on the Supreme Court in 1987.

The basic argument for originalism was that the Constitution is a form of law that should be interpreted consistent with its fixed meaning when ratified. Any departure from that fixed meaning is an illegitimate and unconstitutional arrogation of power by the unelected judiciary. “The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else,” Bork maintained. Originalism, conservatives argued, promoted democratic decision-making

by giving priority to the decisions of the polity that ratified the Constitution rather than the preferences of unelected judges. The theory also purported to ensure decisions “would not be tainted by ideological predilection,” as Meese put it, by restraining judges to application of neutral principles traceable to the Constitution itself. Originalism thus rested on two types of argument: a positivist claim about what counted as constitutional law, and a pragmatic institutional claim about securing judicial restraint.

The political and academic left subjected originalism to withering criticism because of its supposedly retrograde implications (which contributed to the sinking of the Bork nomination), and because originalism in its early guise was analytically deficient in a number of ways. Even Scalia acknowledged that originalism is “not without warts,” and he justified it partly on pragmatic grounds as a “lesser evil” to progressive constitutional interpretation.

But originalist judges and scholars developed more sophisticated and defensible accounts in response to the critics. And over the succeeding decades, as the number of conservative judges and scholars committed to the method grew, it became influential in constitutional interpretation. The method has many important variations, and it is not universally applied even by conservative judges. Yet there is no doubt that constitutional interpretation across the run of cases now focuses more on constitutional text and original meaning than it did during the Warren and Burger courts. And in political debate, confirmation hearings, and the legal culture generally, originalism has had an even bigger impact.

Originalism rose to legitimacy for many reasons. It appealed to ordinary intuitions about what lawyers are supposed to do. The widespread academic attacks on it gave it

an implicit legitimization. Progressive scholars failed to generate an equally compelling and accessible justification for their preferred constitutional method, which is often called “living constitutionalism.” Scalia’s brilliantly crafted and forceful originalist opinions often won the argument even when he was in dissent. And a massive conservative juggernaut (about which more in a moment) successfully promoted the doctrine.

Perhaps the best evidence of originalism’s influence is its imitation by progressive scholars. Akhil Amar of Yale Law School deploys ingenious readings of Constitutional text and structure, deeply informed by history, to reach a range of contrarian progressive conclusions about the Constitution, especially the Bill of Rights. Jack Balkin, also of Yale, is even closer to conservative originalism in relying on the original meaning, but he does so at a much higher level of abstraction that allows him to generate progressive interpretations. More generally, courts and scholars across the board now take constitutional history, and especially the history of the adoption of the Constitution and its subsequent amendments, much more seriously than before originalism’s ascendance. Originalism has not won over the courts in all constitutional cases — no legal or interpretative methodology has done that. But today it is a legitimate, widely practiced, and growing form of legal argumentation, a remarkable accomplishment since the 1980s.



The second conservative focus was the Warren and Burger Courts’ progressive approach to interpreting statutes. This approach tended to de-emphasize the text of the statutes and to be guided instead by Congress’ aims in enacting the statute,

as discerned, for example, in legislative reports, hearings or floor statements, and other forms of “legislative history.” The departures from statutory text almost always served progressive ends.

A classic instance came in 1979 in a case called *United Steelworkers of America v. Weber*, which ruled that affirmative action to favor black employees did not violate the Civil Rights Act’s ban on employment discrimination based on “race.” The Court rejected a “literal construction” of the statute because a ban on affirmative action was “not within its spirit, nor within the intention of its makers,” which was to promote employment among blacks.

Textualism, a cousin of originalism, was a response to cases such as *Weber*. Conservatives — most notably Scalia — argued that the singular “spirit” of a statute was practically impossible to discern, and that often-tendentious legislative reports written by staffers and speeches by individual members of Congress were not reliable guides to such intention. The role of the judge is to interpret the text of the statute — the only words subject to the constitutionally prescribed lawmaking process of bicameral approval and presentment to the president. Except in rare instances, judges who went beyond the text were usurping legislative authority.

This approach sought to ensure judicial restraint and promote democratic decision-making for reasons akin to originalism: by constricting the legitimate sources of interpretive meaning, it curtailed judges’ discretion to import their own values into the statute that Congress enacted, and helped to ensure that the people’s representatives, not unelected judges, made the law. And like originalism, this theory purported to be neutral about ends. The stated aim was not for judges to achieve particular conservative outcomes,

but rather to follow the dictates of Congress in whatever direction that led.

Textualism, like originalism, has been subject to a fierce academic debate during the past few decades. In courts, it has proven even more consequential than originalism. “Scalia’s textualist campaign was tremendously influential,” noted Jonathan Siegel of George Washington University Law School. “He changed the way courts interpret statutes,” and his influence “is visible in virtually every Supreme Court opinion interpreting statutes today.” The *Bostock* decision about sexual orientation and transgender rights was basically a fight over the meaning of Scalia’s undoubtedly victorious textualist legacy. Not every jot and tittle of Scalia’s textualism governs in every Supreme Court statutory decision, but the Court’s approach to statutes now always begins and often ends with statutory text. Few if any methodological victories in the Court have ever been so complete.

As this sketch makes plain, no one is more responsible for the rise of conservative legal thought than Antonin Scalia. His “interpretive theories, communicated in that distinctive, vivid prose, have transformed this country’s legal culture, the very ground of our legal debate,” as Justice Elena Kagan noted in an introductory essay in a volume about Scalia’s legal thought. “They have changed the way all of us (even those who part ways with him at one point or another) think and talk about the law.” And yet the Scalia revolution, as the modern conservative legal movement could aptly be called, did not take place in a vacuum. It was the fruit of a larger political movement that began meekly in the Nixon administration and then caught fire in the Reagan administration. The movement and its associated network had many nodes, but at its center was the Federalist Society.

The Federalist Society began as a response to the ideologically one-sidedness of American law schools like the one I encountered at Yale in the 1980s. (The University of Chicago Law School was an exception to this one-sidedness; it had numerous prominent conservatives on its faculty in the 1980s, including Scalia, who helped the Federalist Society get off the ground.) In 1982, law students at Yale and Chicago convened a conference at Yale as a one-off counterpoint to “law schools and the legal profession [that] are currently strongly dominated by a form of orthodox liberal ideology.”

The conference was a wild success, and demonstrated the appeal of a forum for conservatives to discuss their legal ideas. The students quickly organized, got funding from conservative donors, and began to open chapters in law schools and (for practicing lawyers) in cities around the nation. “Conservative law students alienated in their home institutions, desperate for a collective identity, and eager for collective activity provided a ripe opportunity for organizational entrepreneurship,” the political scientist Steven Teles remarks in his important study of the movement. Almost by accident, they tapped into and helped organize a larger conservative political demand for changes to the federal judiciary.

The Federalist Society was and remains, at heart, a debating club. (I was briefly a member in the 1990s, and I informally supervise the local chapter at Harvard Law School.) Its founders believed that the best way to develop and spread conservative ideas was to host intellectual exchanges between conservatives and progressives. The emphasis on argument exemplified the intellectual seriousness of the group, and its confidence that the best way to legitimate its ideas was to see how they stood up to the ones that prevailed in the classroom and the bar. It also, as Teles aptly describes it, “made the organi-

zation open and attractive to outsiders, moderated factional conflict and insularity, and had a tendency to prevent the members' ideas from becoming stale from a lack of challenge." The main factional conflict then and now — and one that has flared up in recent years — is between the deregulatory libertarian wing that was most interested in judicial efforts to reduce the size of government and the social conservative wing that abhorred (and sought to stop and to reverse) judicial recognition of progressive rights such as abortion.

Yet the Federalist Society evolved into much more than a debating society. It quickly became a focal point for conservative networking for political appointments in the federal government and for clerkships in the federal judiciary. Conservative students thronged to its popular annual convention in Washington, D.C. to watch marquee debates and rub elbows with icons in the movement that the Federalist Society helped to form — Supreme Court Justices, prominent lower court judges, Attorneys General and other Cabinet Secretaries, Senators, and other famous lawyers. It is hard to think of a more important annual conservative gathering, except perhaps the Conservative Political Action Conference meeting.

Through these and related mechanisms the Federalist Society flourished in its influence — especially as its student members grew up and began to populate the federal bench through appointments in the George W. Bush administration and especially the Trump administration. It also grew in its attractiveness to young conservatives, especially as a mechanism to advance one's career. There is no formal pipeline between membership in the Federalist Society and law clerk jobs or executive branch appointments. But membership signals a commitment to conservative legal principles to

potential conservative employers and opens many informal channels to them.

Despite its prodigious impact on conservative networking, the Federalist Society has sought to maintain neutrality on legal issues and judicial politics. It accurately claims that it does "not lobby for legislation, take policy positions, or sponsor or endorse nominees and candidates for public service." Its only formal principles are the ones it announces at the outset of every gathering: "that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."

And yet its careful efforts at broad-mindedness and political detachment have not stopped the Federalist Society from growing more political over the years. At its annual conventions the organization has increasingly showed off its connections to, and influence over, the legal decisions of Republican administrations. And while it has always had senior Republican officials speak at its conferences, these speeches have grown to be less about judicial politics and more about just politics. In a self-consciously partisan speech at the annual convention in 2019, for example, Attorney General William Barr was interrupted with extended applause after he claimed that "the Left" is "engaged in a systematic shredding of norms and undermining the rule of law." He added that "so-called progressives treat politics as their religion," are on a "holy mission," and are "willing to use any means necessary to gain momentary advantage in achieving their end, regardless of collateral consequences and the systemic implications."

The Federalist Society has also grown intellectually narrower and more homogenous. When I began teaching a quarter of a century ago, many conservative legal theories

competed for supremacy among Federalist Society members. But in the last decade especially, originalism and textualism have risen to become the society's (and the larger movement's) orthodoxy. "Tonight I can report, a person can be both a committed originalist and textualist and be confirmed to the Supreme Court of the United States," said Justice Gorsuch, seven months after he joined the Court, at the Federalist Society's annual convention. Gorsuch received wild applause for this statement, which everyone in the room understood to be the core of what the Federalist Society is about. He also mocked the Federalist Society's critics, thanked the crowd for its "support and prayers through that process," and vowed to maintain its principles on the Court. *Politico* described the surprisingly political speech as a "victory lap at the Federalist Society dinner."

Gorsuch's pledge of fealty underscored the Federalist Society's astounding impact on the federal bench during the Trump presidency. "We're going to have great judges, conservative, all picked by the Federalist Society," said Trump in 2016. He followed through on that promise by turning over judicial selection to White House Counsel Donald McGahn, a committed Federalist Society member, and Leonard Leo, who for decades served in senior positions in the Society and who remains on its board. Leo took a leave of absence during the George W. Bush administration to help with judges (and was influential in the selection of John Roberts and Samuel Alito), and then did the same during the Trump administration, where he has had an even bigger impact.

The Federalist Society accurately maintains that Leo did this work in his personal capacity. But he was the public face of the Society even if he was formally disconnected from it when he working for the White House, and he drew on his

deep relationship to its members in that process. After Leo introduced Vice President Pence as "one of us" at a Federalist Society event in 2019, Pence at the outset of his speech stated that the Trump administration and the nation owe Leo — whom Pence identified as "the Vice-President of the Federalist Society" — a "debt of gratitude" for his "tireless work," a reference to Leo's judge-picking.

Leo is merely exemplary of the deep and multifarious conduits between the Federalist Society and the Trump White House. The organization is so constitutive of the conservative legal movement, and has such a strenuous grip on its imagination, that it would have been enormously influential in Trump's judicial selection even if Leo had not been there. And its influence has been historic. In one of the defining accomplishments of his presidency, Trump placed Gorsuch, Kavanaugh, and Barrett on the Supreme Court, and over two hundred judges on the lower courts. The vast majority of these judges are proud long-time members of the Federalist Society who had been nurtured by it and absorbed its values over the course of their careers. These judges are on the whole immensely well-credentialed and qualified — a tribute (among other things) to decades of Federalist Society-facilitated clerkships on the increasingly conservative Federalist Society-influenced Supreme Court.

This success has invited controversy and pushback consonant with the high-stakes battle for control of an unelected judiciary that has steadily expanded its policy-making writ for a century. The Federalist Society that then-Harvard Law School Dean Elena Kagan said she "love[d]" in 2005 for its commitment to debate and its contributions to intellectual diversity is now widely despised on law school campuses and on the political left more generally. Federalist

Society members at many law schools are today often shunned or put down in strident personal terms, inside and especially outside the classroom. They have gotten the message and speak up less often in class than a decade ago on issues such as affirmative action, gay and transgender rights, immigration, and criminal justice. With rare exceptions, top law schools have throughout my lifetime lacked intellectual diversity on a left-right axis in public law, but the attacks there on disfavored conservative positions have never been more open or vicious. The main impact of these attacks is to make law schools even less interesting intellectually, and to drive conservative students deeper into the Federalist Society cocoon.

Outside of law school, the Federalist Society is often subject to stinging political reproach. Typical is a report in May 2020 by three Democratic Senators that described the Federalist Society as “the nerve center for a complex and massively funded GOP apparatus designed to rewrite the law to suit the narrow-minded political orthodoxy of the Federalist Society’s backers.” The Federalist Society is no more narrow-minded or political than the dominant legal establishment institutions it was created to challenge. If anything, it is less so, since it continues to operate more thoroughly in the world of ideas and argumentation than its rivals. But it *is* a political organization, and not just the debating society it holds itself out to be. This is so by default if not by design, since it is the intellectual nerve center of the enormously consequential fight for judicial dominance.

In January 2020, the Judicial Conference of the United States’ Codes of Conduct Committee circulated a proposal to ban federal judges from being members of the Federalist Society or the American Constitution Society (ACS), the progressive organization founded in 2000 as “an explicit

counterpart, and counterweight” to the Federalist Society. ACS never achieved nearly the influence of the Federalist Society, and the proposal clearly sought to hurt the latter. The ostensible reason for the proposed ban was that membership in these groups raises questions about judges’ impartiality. The Committee’s true aim was revealed when it declined to propose a ban on membership in the American Bar Association, a group that, unlike the Federalist Society, is heavily involved in legal advocacy — primarily for progressive causes. The proposal was dropped a few months later. But it, as well as the Senators’ report, are signs of the Federalist Society’s enormous political success.



The conservative legal movement’s original aim was to separate legal interpretation from personal values in the hope of quelling judicial activism. The rising influence of originalism and textualism, many on the right believe, accomplishes this. On this view, Gorsuch’s deployment of textualism to reach a progressive result in *Bostock* is evidence of success, not failure, since it shows that the methodology is value-neutral enough to produce outcomes contrary to a judge’s personal wishes. The same is true, for example, of Justice Scalia’s occasional originalist opinions that expand criminal defendant rights, and of Justice Thomas’ attacks on qualified immunity — a *bête noire* in progressive circles for shielding bad cops from liability — as lacking any basis in Congress’ textual commands. To many conservatives these examples illustrate the integrity of their principles. One rarely sees progressive Justices deploying their favored methodology to reach politically conservative results — especially since most lack constraining methodological commitments.

But despite the packaging, conservative methodologies are not value neutral, and they have not always been deployed consistently or in value-neutral ways. Originalism as understood by most conservatives is oriented toward constitutional meaning in 1789 and the post-Civil War period (when the Reconstruction Amendments passed), and away from the progressive gloss put on constitutional provisions from the 1930s through the 1970s. The politically liberal results produced by originalism are the exception, not the rule. *Bostock* is also an exceptional instance of textualism, which on the whole leads to politically conservative results. One of many examples is the Court's reversal of its prior tolerance of plaintiff's suing for relief under federal law absent explicit congressional authorization — a change that has dramatically curbed the scope of federal rights.

The rise of originalism and textualism is one reason why the recognition of new constitutional and statutory rights has slowed in recent decades (the Court's recognition of a robust Second Amendment right to bear arms is an exception), and why American public law generally has moved sharply to the right. On issues ranging from voting rights to structural federalism to free speech and religion to many issues of court access, the Court has curtailed or reversed Warren and Burger Court precedents, and not always through close adherence to originalism or textualism. The Court has also grown aggressively pro-business across a wide range of issues in ways that are often disconnected from judicial philosophy.

As conservatives' power on the Court has grown, judicial restraint — the original justification for originalism and textualism — has diminished. Many conservatives now abjure the deference to democratic enactments that was once the hallmark of conservative legal philosophy, and argue

for a more assertive stance to strike down modern state and federal laws based on distant understandings of constitutional meaning. They are also more inclined to reject progressive precedents that conflict with the originalist Constitution. Justice Thomas is a leading proponent of this view on the Supreme Court. As he explained in 2019 in *Gamble v. United States*: “When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.”

In many contexts, however, conservative disrespect for precedent is not based on a return to original meaning. A good example is the conservative turn on the First Amendment. In 1971, Bork stated the traditional conservative position in a famous article that argued that the First Amendment should be narrowly construed to protect only political speech. When the Court, in 1976, recognized First Amendment protections for “commercial speech,” Rehnquist was the lone dissent. Yet in recent decades conservatives have embraced the view that Bork and Rehnquist rejected. They have repurposed the First Amendment as a libertarian sword to strike down all manner of disfavored laws, ranging from business regulations to campaign finance restrictions.

An extraordinary decision in this vein came in 2018, when the conservative majority overruled a four-decade precedent to rule that the First Amendment prohibited the state from forcing public sector workers to pay for union activity when they did not join the union — a long-standard labor practice. The majority, in an opinion by Justice Samuel Alito, barely glanced at the original understanding of the First Amendment. Justice Kagan in dissent charged it with “weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.” It was a fair critique.

But the main targets of conservative libertarian activism are the federal agencies that, with little concrete guidance from Congress, control policymaking in the United States. “The greatest threat to the rule of law in our modern society is the ever-expanding regulatory state, and the most effective bulwark against that threat is a strong judiciary,” Donald McGahn, the Trump White House judge-picker, told the Federalist Society in 2017. Conservative scholars and judges have in the last decade developed new arguments for achieving this end, including imaginative uses of the First Amendment. But none is more remarkable, or revealing, than their flip on an obscure but consequential doctrine about judicial deference to agency rulemaking.

At the dawn of the movement, in the 1980s, the then-very-progressive District of Columbia Circuit — the federal appellate court charged with reviewing most agency decisions — regularly invalidated Ronald Reagan’s deregulatory efforts. As a law professor, Scalia had criticized the D.C. Circuit for imposing its values on agencies in defiance of what Congress had prescribed. During his tenure on the D.C. Circuit from 1982 to 1986, Scalia witnessed this trend up close, viewed it as illegitimate, and deployed several tools to fight it. The main one he settled on was the *Chevron* doctrine, which took its name from a Supreme Court case in 1984 about the scope of the Environmental Protection Agency’s regulatory power over air pollution. Scalia was not on the Court when that case was decided, and the case was not a big deal when it was announced. But when Scalia joined the Court in 1986, he became its main intellectual champion and began to develop and deploy the *Chevron* doctrine aggressively.

The *Chevron* doctrine requires courts to accept reasonable agency interpretations of statutes that they are charged

with administering. It makes it harder to second-guess agency rules — progressive or conservative — except in cases where they defy clear statutory directives. Scalia argued that this deference comported with Congress’ wishes, acknowledged agency expertise, constrained judges, and promoted accountable decision-making, since agencies were part of an executive branch headed by an elected official, the president, while courts were unelected. The doctrine also dovetailed with conservatives’ infatuation with executive power in the 1980s. (Before then conservatives for six decades had been skeptics of broad executive power, but that is another story.) During Scalia’s time on the Court, the *Chevron* doctrine became “a central pillar of the modern administrative state,” as Michael McConnell of Stanford Law School has observed.

But then something unexpected happened. About a decade ago, the conservative legal movement started to flip on *Chevron* and related doctrines of administrative deference. Several factors led to the flip. The conservative view of *Chevron* had, remarkably, discounted a statutory requirement that courts reviewing agency decisions “decide all relevant questions of law [and] interpret constitutional and statutory provisions,” which some argued — the point remains contested — rules out deference to agencies on many legal questions. Administrative agencies began to use the cover of *Chevron* deference to make administrative rules that to conservatives seemed to depart more and more from the authorizing statutes for agencies.

It was no accident that the conservative turn picked up steam during the Obama administration, which promulgated legally super-aggressive regulations such as net neutrality, the Clean Power Plan (an ambitious environmental initiative), university sexual assault rules, and the implementation rules

for Obamacare and Dodd-Frank. For conservatives encountering such rules that seemed to rest on doubtful congressional premises, agency deference seemed lawless. And so they reversed course. Scalia appeared to be backing away from the doctrine at the end of his life. And most younger conservative jurists — including Gorsuch, Kavanaugh, and many conservative legal scholars — are deeply skeptical of *Chevron*. Court watchers predict that the Supreme Court will overturn or weaken *Chevron* in the next few years.



For many religious conservatives, the conservative legal movement's extraordinary accomplishments are belied by the movement's failure to reverse *Roe*, to prevent the rise of constitutional and statutory gay and transgender rights, and to give sure protection to religious freedom in the face of these judicially developed rights. This was the thrust of Senator Hawley's complaint after *Bostock*. Social conservatives, he argued, had for decades gone along with the Republican Party's neo-liberal agenda on trade and taxes in exchange for the promise of "pro-Constitution, religious liberty judges" — a shorthand for judges who will vote the right way on religious social issues.

And yet since the Reagan administration, religious conservatives have watched as Republican appointees refused to embrace the social conservative agenda. Two Reagan appointees, Sandra Day O'Connor and Anthony Kennedy, and one George H.W. Bush appointee, David Souter, refused to overturn *Roe* when that issue was teed up in 1992, on the grounds of "institutional integrity" and respect for precedent. Kennedy — Reagan's appointee after the Bork nomination failed — was

also the architect of the Court's gay rights jurisprudence, which culminated in his opinion in 2015, joined by the Court's four liberals, to recognize a constitutional right to gay marriage. More recent conservative appointees seemed to continue this trend. Gorsuch wrote *Bostock* and Roberts joined it. A few weeks after *Bostock*, Roberts shocked conservatives when he joined the Court's four liberal justices to invalidate a Louisiana abortion restriction. Roberts also voted with the liberal wing in the summer of 2020 to deny churches exemptions from state restrictions on worship during the pandemic.

Religious conservatives are embittered that, despite the other successes in the conservative legal movement, and despite Republicans appointing over 79% of the Justices since Warren retired, they cannot find five Justices to embrace their agenda. Hawley attributed the failure to originalism and textualism which, he claimed, produce results that are "the opposite of what we thought we were fighting for." (In 2014, one of the founders of the Federalist Society, Steven Calabresi, argued that the original meaning of the Fourteenth Amendment guarantees a right to same-sex marriage.) Others, such as Adrian Vermeule of Harvard Law School, argue that ostensibly conservative Justices are "educated urban professionals" whose commitments to liberalism dominate their conservative sentiments. Another argument is that the elite press, controlled by progressives, draws conservative Justices leftward through manipulated news coverage. Ed Whelan, a former Scalia law clerk and the president of the Ethics and Public Policy Center, speculates that the type of judicial candidates who have the best chances of being nominated and confirmed — ones good at "charming senators, trotting out a list of liberal friends and admirers, and neutralizing a leftist media" — are ones that are least likely to overrule *Roe*.

Ruth Marcus' book on the Brett Kavanaugh confirmation hearings, *Supreme Ambition*, contains a different explanation that has infuriated religious conservatives, and that was at the base of Hawley's critique of the bad bargain they made with the Republican Party. At the first White House meeting on who should replace Scalia after he died — a deliberation that ended in the selection of Gorsuch, who wrote *Bostock* — White House Chief of Staff Reince Priebus noted that major Republican donors cared little about abortion and same-sex marriage but a lot about chopping down the regulatory state. White House Counsel McGahn, in Marcus' paraphrase, added that conservatives' "emphasis on social conservatism and its associated hot-button issues ended with Scalia," and that now judge-selection is "all about regulatory relief." McGahn stated that on that criterion, Scalia himself "wouldn't make the cut."

Episodes such as these — which confirm religious conservatives' suspicions about the priorities of the Republican elite — have led to a growing split within the conservative legal movement. One intellectual leader on the social conservative side is Vermeule, who argues that "originalism has now outlived its utility, and has become an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation." He believes that reversing the progressive moral agenda in the Court cannot be achieved by faux-value-neutral methodologies, but rather requires an overtly "moral reading" of the Constitution and laws to advance a conservative social vision that he calls "Common Good constitutionalism." Vermeule also points out that originalism is, ironically, untrue to the Founding since it ignores the classical legal tradition (including natural law) that the Founders' embraced in creating the Constitution and understanding its terms. Many of my most conservative

students and advisees, at law schools around the country, are increasingly disillusioned with originalism and are energized by Vermeule's critique of it, and his approach to constitutional interpretation. And yet originalism remains dominant.



This brings us, finally, to the confirmation of Amy Coney Barrett to replace Ruth Bader Ginsburg. Senate Republicans pushed Barrett through on a short fuse in an election year just four years after they delayed Barack Obama's election-year selection of Merrick Garland to replace Scalia, and then confirmed Gorsuch after Trump won. These hardball tactics to gain control of the Court enraged Democrats, but they were perfectly legitimate from a constitutional perspective and not terribly surprising. Since the stakes have grown so large, the judicial confirmation process has suffered a three-decade downward spiral of diminishing restraint by both sides: Democrats' unprecedented attacks on Bork, which killed his nomination, followed by their unprecedented filibuster of many of George W. Bush's appellate court nominees and their elimination of the filibuster for Barack Obama's appellate court nominees—actions that Republicans reciprocated by eliminating the filibuster for Supreme Court nominees beginning with Gorsuch, before their maneuvers to put Kavanaugh and Barrett on the Court. Norms have been rendered ineffective in this context because the exercise of hard constitutional power promises huge short-term victories.

It is unclear how Barrett will impact the Court. She is a brilliant jurist who clerked for Justice Scalia and she acknowledges that Scalia's "judicial philosophy is mine, too." Social conservatives are hopeful that regardless of judicial philos-

ophy, Barrett is one of their own and will vote their way. They have had this hope before, of course, and have been disappointed. But Barrett's elevation gives the conservative legal movement a 6-3 majority on the Court for the first time, which means that in every case it can absorb a defection and still win.

This historical conservative dominance on the Supreme Court has led many progressives to propose dramatic reforms to regain control of the judiciary, including stripping the Court of jurisdiction over cases that might lead to conservative rulings, or "packing" the Court with Justices to give liberals a majority. Conservative charges that these lawful tactics would violate norms ring hollow in light of the tit-for-tat pattern of events related to judicial politics since the 1980s. But for the foreseeable future, conservatives need not worry. Joe Biden has held his cards closely on the judicial makeover project. And the project is dead on arrival in the Senate in light of the Republicans' strong performance in the recent Senatorial elections, and of the opposition of Senator Joe Manchin of West Virginia, a moderate Democrat, to court-packing and to the elimination of the Senate's 60-vote threshold to break a filibuster. For at least two years, and almost certainly longer, Democrats lack the votes to diminish conservative judicial power through structural reform.

Still, it would be premature for social conservatives to celebrate revolutionary judicial victories on the issues that they care about most. The recognition of gay and transgender rights is practically complete and—unlike abortion rights—is not really legally contested. The most that social conservatives can hope for is that the Court will recognize religious accommodations to the enforcement of these rights. Affirmative action may be on the chopping block, but the practice

is deeply entrenched socially, and colleges and other recipients of public funding have developed imaginative ways to use facially neutral identity proxies to achieve preferred outcomes. And *Roe* will be much harder to kill than many conservatives believe. Roberts has noticeably shied away from overruling the nearly five-decade-old decision. And whatever her first-order views on abortion rights may be, Barrett has staked out what the Princeton political scientist Keith Whittington calls a "moderate" position on overruling decisions and "has urged giving precedents more weight than some originalists would prefer." The likely course on *Roe* is a narrowing of the abortion right but not an elimination of it.

Whatever happens, the Court is destined to become a more politicized and controversial institution. When all is said and done, the Court has only itself to blame. Beginning in the 1960s it reached far beyond its proper jurisdiction to grab enormous control over public policy away from democratic institutions, which sparked a conservative counterrevolution in the 1980s that has now won power and on many issues is doing the same thing in the other direction. It is a sign of advanced constitutional decay that so many important decisions in our democracy are made by five or six unelected Justices, and that confirmation battles have become the most consequential political episodes in the nation after presidential elections.



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*I, like the more honest of my
race, give a strange thanks.
I give the strange and bitter and
yet ennobling thanks for the
monumental groaning and
soldering of two great worlds,
like the halves of a fruit seamed
by its own bitter juice, that
exiled from your own Edens you
have placed me in the wonder
of another, and that was
my inheritance and your gift.*

DEREK WALCOTT