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Textualism and Originalism in Constitutional Interpretation

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Supreme Court Justice nominee Neil Gorsuch (right) meets with Sen. Roy Blunt, a Missouri Republican, in Washington on Friday.

In a 2016 lecture at the Case Western Reserve University School of Law, Judge Neil Gorsuch warmly praised former Supreme Court Justice Antonin Scalia's approach to constitutional interpretation. Because President Trump has nominated him to serve on the Supreme Court, it is important to understand the approach Judge Gorsuch favors.

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Justice Scalia maintained that, when a judge interprets a democratically enacted legal text such as a provision of the United States Constitution, the judge should use "textualism" and "originalism" as interpretive guides.

A textualist-originalist judge in the mold of Justice Scalia seeks to apply the "original public meaning" of a constitutional provision. The original public meaning is how a reasonable and reasonably well-informed member of the public alive at the time the provision was enacted

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Textualism-originalism comes in more than one form and flavor

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would have understood it to apply in circumstances like those facing the judge.

A judge applying this method understands the institution of judicial review – our accepted practice of giving judges final say on constitutional meaning – to confer only a backward-looking interpretive power. Constitutional provisions are time-dated; they mean today nothing more or less than what they meant when they became the law of the land.

Proponents of this textualist-originalist approach say that it reinforces our constitutional separation of powers. In Article III of the Constitution, the Founders created a federal judiciary that would pronounce what the law *is* by ascertaining what the law *was* when enacted. And in Article I, the Founders created a legislative body (Congress) to prescribe what the law *will be* in the future. These roles are to be kept separate and distinct.

Proponents also say that this approach reinforces the democratic foundations of our constitutional order. When judges find some law or practice unconstitutional, they halt or delegitimize the work of a politically accountable branch. This is acceptable in a democracy only when the textual basis for the judicial intervention is a superior source of democratically-enacted law (i.e., the Constitution) *understood by its enactors* to mean what the judges say that it means.

If the italicized qualification in the previous sentence is disregarded, proponents say, the practice of judicial review inevitably results in judges prescribing new limitations on government power that have not been authorized by the people. What's more, these new limitations are beyond the power of the people's representatives to change because they are (supposedly) rooted in the Constitution.

This is judicial tyranny, proponents say. The Constitution does not authorize judges to create new constitutional law through the practice of judicial review. Rather, the Constitution authorizes the people to create new constitutional law through the strict amendment processes specified in Article V. The Constitution should not be easy to amend.

Many judges and theorists have strongly challenged Justice Scalia's approach to constitutional interpretation. One such challenge, advanced by prominent constitutional law scholar Ronald Dworkin, is particularly interesting. Dworkin accepted Justice Scalia's textuallst and originalist premises but applied them to reach very different conclusions.

Crucially, Dworkin rejected Justice Scalia's assertion the original public meaning of a constitutional provision must be construed in a time-dated manner. In Dworkin's view, the people of the founding generation would have expected future generations to reinterpret the majestic but (mostly) ambiguous generalities of the Constitution so as to make them their own.

Consider, for example, the Eighth Amendment's ban on "cruel and unusual punishments." Why, Dworkin asked, should we understand the Founders to have banned only punishments thought cruel and unusual in 1791 (when the Eighth Amendment was ratified)? Isn't it more plausible to think that the Founders, who believed in self-governance and abhorred distant and hierarchical power structures, would have wanted future generations to infuse this vague provision with contemporary understandings?

So construed, the Eighth Amendment's ban on "cruel and unusual punishments" does not merely prohibit punishments thought cruel and unusual in 1791; it prohibits punishments thought cruel and unusual *today*. Thus, a principled textualist-originalist judge could plausibly conclude (as the Supreme Court has concluded) that administration of the death penalty for crimes other than murder is now unconstitutional even though, in 1791, the death penalty was regularly imposed for lesser crimes.

Proponents of this type of textualism-originalism say that it is superior to Justice Scalia's approach for at least two reasons.

First, as just explained, it is more faithful to the (likely) original understanding that the Constitution should reflect the American people's contemporary values. Second, and relatedly, it makes the Constitution a "living" Constitution that is more likely to function well in a pluralistic and rapidly changing world.

In a 2015 lecture at Harvard Law School, Supreme Court Justice Elena Kagan paid homage to Justice Scalia by saying "we're all textualists now." As this statement shows, Justice Scalia's textualist-originalist interpretive approach has had a profound impact on American law. And it appears that Judge Gorsuch is prepared to pick up the torch and carry it forward. But it is important to understand that textualism-originalism comes in more than one form and flavor.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)