

Jurisprudential Approach of the Six Conservative Justices on the U.S. Supreme Court

Charles D. “Cully” Stimson

KEY TAKEAWAYS

John Roberts, Brett Kavanaugh, and Amy Coney Barrett are institutionalists, sometimes accused of protecting the Supreme Court at the expense of originalism.

Clarence Thomas, Samuel Alito, and Neil Gorsuch are more willing to apply the Constitution as written without regard to political consequences.

These categories are useful, but they are not permanent voting blocs. Cases differ, Justices move, and shared methods can point in unexpected directions.

When Roger invited me to Dartmouth to discuss the philosophical and jurisprudential differences among the Supreme Court’s six conservatives, I said yes before he could finish the sentence. It is timely—and, for those of us who have spent much of our professional lives thinking about the law and the Constitution, irresistible.

Forty years ago, when I was your age and an undergraduate at Kenyon College, this lecture could not honestly have been given. In 1986, there were not six conservative Justices. More important, the vocabulary you now take for granted—originalism, original public meaning, textualism, and text, history, and tradition—had not yet become the common currency of constitutional debate. Conservative and Republican-appointed Justices existed, but the mature, disciplined, institutionally consequential conservative legal movement did not.

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That transformation was neither accidental nor immediate. It was the product of ideas, institutions, litigation, appointments, and principles tested under pressure. The quarterback was Edwin Meese III, President Ronald Reagan's Attorney General, whom I worked for at Heritage for 18 years.

Throughout my talk tonight, I'm going to give you several book recommendations for those who want to dive deeper into this topic. My first recommendation is *The Meese Revolution: The Making of a Constitutional Moment* by Professors Steven Calabresi and Gary Lawson.¹

Each of today's six conservative Justices is an originalist and textualist. To understand where they agree, where they diverge, and why it matters, we must begin with the Constitution's design.

The Intellectual Setting

Early American political thought treated the Constitution as a fixed fundamental law limiting power by separating it horizontally and vertically—even well-intentioned power. Daniel Webster said it was designed “to guard the people against the dangers of good intentions.” Abraham Lincoln made the related point that the American people are the rightful masters of Congress and the courts, not to discard the Constitution, but to remove those who twist it. James Madison, pivotal to the Convention of 1787 and one of the three authors of the *Federalist Papers*, wrote in *Federalist* No. 51: “You must first enable the government to control the governed; and in the next place oblige it to control itself.”²

My second recommendation is Joseph J. Ellis's *The Quartet: Orchestrating the Second American Revolution*.³ The understanding reached in this early period endured for a long time, then eroded during the Progressive Era. Progressives began to see fixed meaning, checks and balances, and Article V's amendment process not as protections but as obstacles to a powerful central government capable of meeting an industrial nation's demands.

Woodrow Wilson—the poster child of the Progressive Era—rejected the Framers' image of a balanced machine. Government, he wrote, “is not a machine, but a living thing.” It answers to Darwin, not Newton: “Living political constitutions must be Darwinian in structure and in practice.”⁴ Wilson's organic metaphor helped justify living constitutionalism—the idea that broad constitutional principles should be applied to contemporary needs rather than constrained by historical understanding.

The Warren Court and, to a significant degree, the Burger Court operated in that climate. In a sense, the Burger Court shows what happens when conservative Justices apply a living Constitution. Progressive lawyers and

academics increasingly treated the Constitution as aspirational principles where judges were free—indeed obligated—to update.

Justice William Brennan said it embodied “human dignity,” which for him required abolishing the death penalty. The Court decided consequential cases involving criminal procedure, religion, speech, privacy, and individual rights by applying evolving values to the controversies of the day. Some decisions remain important. But conservatives objected not only to outcomes; they objected to the method.

In *Griswold v. Connecticut* (1965), Justice William O. Douglas wrote that specific guarantees in the Bill of Rights have “penumbras, formed by emanations from those guarantees that help give them life and substance.”⁵ From those penumbras and emanations, the Court discovered a right of privacy absent from the text.

Douglas could have extended the family-rights cases *Meyer v. Nebraska*⁶ and *Pierce v. Society of Sisters*,⁷ but those cases had been written by the arch-conservative Justice James McReynolds under a theory used against Progressive legislation and the first New Deal. So Douglas reached for penumbras, and *Griswold* became Exhibit A for extra-constitutional excess.

Eight years later, *Roe v. Wade* relied on that newly minted right to privacy—grounded in the Fourteenth Amendment’s Due Process Clause—to create a right capacious enough to include abortion.⁸ The question became less “What does the text mean?” than “What should the text mean in our time?” The result too often resembled policymaking rather than applying law.

To this day, Justice Clarence Thomas keeps a sign in his chambers: “Don’t emanate the penumbras.”

The early conservative answer was judicial restraint: Judges should behave like judges, not legislators, and hesitate before displacing democratic choices. That instinct had wisdom after a Court that sometimes acted like the seniormost house of Congress. But restraint alone was insufficient.

When Congress violates the First Amendment, deference is not meaningful restraint; it is failure to enforce higher law. Conservatives needed a theory that constrained judges while permitting them to enforce the Constitution. Anger at the Warren and Burger Courts could not supply it. Neither could restraint alone.

The Meese Revolution

That was the intellectual setting when Attorney General Meese entered the fray in 1985. He did not invent originalism, but anyone seeking to

understand how it became central to the conservative legal movement—and eventually to Supreme Court argument—must begin with the debate he helped launch.

On July 9, 1985, Meese addressed the American Bar Association in Washington.⁹ Most speeches by Attorneys General disappear into archives. This one did not, because he challenged the legal establishment on a fundamental question: What is the proper source of constitutional meaning?

He began with Thomas Paine’s formulation that in America, “the law is king.” Those four words place Congress, the President, and judges beneath the law. Judicial power is constitutional power; therefore, it too must have a source and a limit.

Meese argued that too many opinions had become “more policy choices than articulations of constitutional principle.” The Court “did not yield a coherent set of decisions” but instead had a “jurisprudence of idiosyncrasy” and “continued to roam at large in a veritable constitutional forest.” His criticism was not simply that the Court was liberal. If judges begin with their own conception of justice or good government and reshape doctrine around it, what constrains them?

Meese proposed a “Jurisprudence of Original Intention,” which “would take seriously the admonition of Justice [Joseph] Story’s friend and colleague, John Marshall, in *Marbury v. Madison* that the Constitution is a limitation on judicial power as well as executive and legislative.” He continued: “It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as *amicus*, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.”

His core principle was memorable: Judges should “judge policies in light of principles, rather than remold principles in light of policies.” Begin with something outside yourself. Begin with the law. Let it constrain what you may do as a judge.

This was also an argument about democracy. The Constitution does not derive authority from judges’ approval; judges derive authority from the constitutional order. Constitutional change remains possible through Article V. Justice Antonin Scalia later put the distinction bluntly: If the Constitution needs updating, amend it; if a statute needs changing, ask Congress. Interpretation and amendment are not the same act.

To the academy and living constitutionalists, this was a radical shift—and a threat. Three months later, Justice Brennan answered at a speech at Georgetown University.¹⁰ He called original intention, in its doctrinaire

form, “little more than arrogance cloaked as humility.” The ultimate question, he said, was what the text means “in our time.” The Constitution’s genius rested not in static meaning from a dead world, but in the adaptability of its great principles to current problems and needs.

Brennan identified difficulties early originalists had to confront, but Meese and later originalists pressed the unanswered question: If constitutional principles adapt to contemporary values, what external legal criterion tells judges which values control? Who identifies them? When does interpretation become revision?

The debate forced refinement. Original intention developed into original public meaning; how constitutional language was publicly understood when adopted. Scalia helped move analysis away from the subjective intentions of particular Framers and toward contemporary dictionaries, state constitutions, the *Federalist* and *Anti-Federalist Papers*, newspapers, pamphlets, and other historical evidence. Recovery can be difficult and contested, but the judge still looks for an answer outside himself.

Four decades later, originalism, textualism, original public meaning, and text-history-tradition tests have moved from radical concepts into the mainstream. Success, however, exposed a new problem. Originalism and textualism are not mathematical algorithms. Judges may agree that text, history, and precedent matter yet disagree about what each requires, how much weight precedent deserves, and what to do when a precedent conflicts with the Constitution.

That is where the differences among today’s six originalists become fascinating. Sarah Isgur’s witty *Last Branch Standing*,¹¹ my next recommendation, suggests that we should see not a 6–3 Court but a 3–3–3 Court.

John Roberts, Brett Kavanaugh, and Amy Coney Barrett are “the deciders”: institutionalists whom critics accuse of sometimes subordinating originalism to protecting the Court amid political controversy. Thomas, Samuel Alito, and Neil Gorsuch are “the conservative honey badgers,” more willing to apply the Constitution as written without regard to political consequences. The final three—Elena Kagan, Sonia Sotomayor, and Ketanji Brown Jackson—are the liberals on the court.

The categories are useful, but they are not permanent voting blocs. Cases differ, Justices move, and shared methods can point in unexpected directions.

Last term illustrates why simple labels mislead. The Court decided 61 cases. Of those, 43.9 percent were unanimous and 10.6 percent were 8–1; only 10.6 percent were 5–4 and 28.8 percent were 6–3. Roberts and Kavanaugh were in the majority 95 percent of the time, Barrett 92 percent, Gorsuch

86 percent, and Thomas and Alito 83 percent. Even Justice Jackson, at the bottom, was in the majority 67 percent of the time. Only one in five cases divided 6–3 along ideological lines.

The Institutionalists

Chief Justice Roberts. John Roberts is not merely one of nine Justices; as Chief Justice of the United States, he heads a co-equal branch. His concern for institutional credibility, precedent, continuity, and the scope of judicial intervention is unusually visible.

June Medical Services v. Russo is a clear example.¹² Four years earlier, Roberts had dissented when the Court invalidated a Texas abortion law in *Whole Woman's Health v. Hellerstedt*.¹³ When *June Medical* presented a materially similar Louisiana law, Roberts still believed the earlier case wrong, but it was now precedent. He supplied the decisive vote to invalidate the Louisiana law, separating two questions: What would I have decided initially, and what should I do after the Supreme Court has decided it? Precedent matters precisely when a judge thinks it wrong, both for predictability and for public confidence that the Court is doing law rather than voting on policy.

Two years later, *Dobbs v. Jackson Women's Health Organization* presented the issue from the other direction. Roberts concluded Mississippi's 15-week law could stand but declined to overrule *Roe* and *Casey* entirely. He wrote:

We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." ... In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*.¹⁴

He continued: "Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense." But his bottom line was clear:

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them.¹⁵

Justice Alito, by contrast, concluded that once the constitutional foundation failed, the precedent question could not be avoided. The dispute was not whether Mississippi's law survived but how much the Court had to decide, what it could leave for another day, and what precedent requires when the Court believes an earlier decision wrong. Alito wrote that "Roe was egregiously wrong from the start."¹⁶

Professor Josh Blackman has argued that Roberts's institutionalism does not always produce minimalism, particularly in separation-of-powers cases. Concern for the Court may lead him toward a narrow decision in one case and a broader one in another. The revealing question is not whether Roberts is simply cautious, but what he believes the Court, as an institution, is entitled—and required—to do.

Justice Kavanaugh. Brett Kavanaugh describes himself as a modern original-public-meaning originalist—what he calls constitutional textualism. The Constitution's words matter because it is law, not aspiration, and the inquiry differs from reconstructing individual Framers' private intentions.

Yet his method does not stop there. He ties *stare decisis* to stability, predictability, reliance, impartiality, and judicial independence and has argued that precedent is constitutionally required. Asked what a judge should do when confronting a Supreme Court precedent from which he previously dissented, Kavanaugh answered that the ordinary course is to follow it—perhaps especially after losing. The law does not reset to zero every morning.

Bostock v. Clayton County shows another aspect of his method.¹⁷ Kavanaugh and Gorsuch both claimed textualist ground in construing Title VII's prohibition on discrimination "because of sex." Gorsuch concluded the text covered discrimination against gay and transgender employees: If changing an employee's sex changes the employment decision, sex necessarily plays a role, regardless of what the 1964 Congress anticipated.

Kavanaugh distinguished literal meaning from ordinary meaning. Courts should not disassemble a statutory phrase, consult individual definitions, and mechanically reassemble it; they should ask how the whole phrase was ordinarily understood. In his view, ordinary usage treated sex discrimination and sexual-orientation discrimination as distinct concepts.

He connected that linguistic conclusion to separation of powers. His dissent began: "Like many cases in this Court, this case boils down to one fundamental question: Who decides?" He answered: "Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court."¹⁸ He later wrote: "[W]e are judges, not Members of Congress. And in Alexander

Hamilton's words, federal judges exercise 'neither Force nor Will, but merely judgment.'... Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result."¹⁹

Gorsuch accepted that premise but rejected its application: Congress did not need to amend a law whose enacted words already resolved the case. This is a genuine jurisprudential disagreement. Is fidelity principally about semantic consequences, or does the ordinary meaning of a phrase as a whole control? Textualism supplies the starting point, not a mechanical finish line.

Justice Barrett. Amy Coney Barrett offers a third variation. My next recommendation is her *Listening to the Law: Reflections on the Court and Constitution*.²⁰

At the ceremony announcing her nomination, Barrett said of Justice Scalia that "[h]is judicial philosophy is mine, too."²¹ But she does not merely reproduce Scalia. She begins with the Constitution as a legal text whose provisions retain the meaning they had when adopted.

Originalism does not require mind-reading, guarantee easy answers, or prevent judicial error.

Her deeper conception of judging resists pressure from two directions: outside expectations from political constituencies, friends, critics, and the public and inside temptation to make law conform to the judge's own preferences. The judge must listen to law rather than master it.

That explains *Fulton v. City of Philadelphia*.²² The Court unanimously ruled for Catholic Social Services, but Thomas, Alito, and Gorsuch were prepared to reconsider and overrule *Employment Division v. Smith*.²³

Barrett was not ready without confronting the first sentence of her concurrence: "Yet what should replace *Smith*?" She found serious textual and structural arguments against *Smith*, yet resisted replacing one categorical rule with another before addressing the alternatives:

I am skeptical about swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Should there be a distinction between indirect and direct burdens on religious exercise? What forms of scrutiny should apply? And if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?²⁴

This is more than caution. Barrett asks whether an existing rule is wrong, what principle authorizes its replacement, what the new rule is, and whether the present case requires that move.

Scalia's originalism was often a theory of dissent—ironically, not in *Smith*, which he wrote. Using originalism to show why non-originalist decisions are wrong is easier than using it to govern, with concrete legal consequences. Barrett accordingly proceeds carefully.

Her reliance on history poses a similar question. Scholars describe growing use of post-ratification practice—what one writer calls “living traditionalism.” If meaning is fixed at ratification, what work does a practice from fifty, seventy-five, or one hundred years later perform? Later history may confirm an earlier understanding, reveal a settled interpretation, or carry force through precedent. But the judge must explain the bridge from evidence to conclusion. The question is not merely whether history exists, but what it proves.

Roberts, Kavanaugh, and Barrett thus form a recognizable institutionalist grouping without sharing an identical methodology. Roberts emphasizes the Court and the scope of judicial action. Kavanaugh foregrounds precedent, stability, reliance, and continuity. Barrett probes the steps connecting text, history, precedent, and doctrine.

The Conservative “Honey Badgers”

Thomas, Alito, and Gorsuch do not simply disregard precedent or consequences. The distinction is comparative weight. When precedent conflicts with their best reading of text and history, they have shown greater willingness to reopen the foundation.

Justice Thomas. *Mahanoy Area School District v. B.L.* provides a vivid example.²⁵ A student who failed to make varsity cheerleading and a private softball team, but was offered junior-varsity cheerleading, posted on Snapchat: “F*** school f*** softball f*** cheer f*** everything.” The school suspended her from the team for a year. Eight Justices sided with the student; Thomas dissented alone.

The revealing point is where he began. While the majority developed principles for off-campus speech, Thomas examined schools’ historical authority over students around the Fourteenth Amendment’s ratification. He argued that schools then could discipline comparable conduct and faulted the majority for failing to tether its approach to something stable.

That is Thomas’s instinct.

When modern doctrine rests on premises inconsistent with text or history, he asks whether the Court should keep building on it at all. A precedent's age does not establish legitimacy. Before asking how to apply a doctrine, he asks where it came from.

My next recommendation is his memoir, *My Grandfather's Son*.²⁶

My principal takeaway from the book is that Justice Clarence Thomas's life—and, in turn, his jurisprudence—is unlike that of any modern Justice, and perhaps any Justice in the Court's history.

From the beginning, he was an outsider: born into poverty and segregation in a small Georgia community; reared by an exacting, devoutly Catholic grandfather; estranged for a time from the Church; drawn into the fervor of black radicalism; and ultimately returned, by conviction rather than convenience, to conservatism and the Catholic faith.

Along the way, he endured the scorn of leading black liberal intellectuals, who branded him a traitor to his race because he refused to surrender his independent judgment to their ideological demands.

No other Justice has brought to the Court quite this formation of intellect, faith, character, and moral resolve. It is therefore unsurprising that Justice Thomas is most fully himself when he stands alone.

Justice Clarence Thomas's concurrence in *Students for Fair Admissions v. Harvard College* is majestic—an originalist *tour de force* and utter perfection.²⁷ With historical clarity and constitutional conviction, Thomas traces the promise of racial equality from the Thirteenth Amendment through the Civil Rights Act of 1866 and the Fourteenth Amendment.

Those enactments, he explains, marked America's second founding and established a rule at once simple and profound: every citizen, regardless of color, stands equal before the law.

Thomas places the Court's decision within the long, uneven struggle to honor that command.

The Court betrayed it in *Plessy*,²⁸ restored it in *Brown*,²⁹ and compromised it in *Grutter*³⁰ by allowing universities to sort applicants by race in pursuit of diversity. But the Constitution does not permit government to cure one racial wrong by committing another. Racial discrimination remains unconstitutional whether imposed with hostile motives or benevolent aspirations.

The concurrence's power lies in its union of text, history, and moral lucidity.

Thomas demonstrates that the Reconstruction Amendments were designed to extinguish legal distinctions based on race—not merely to rearrange their beneficiaries. The Constitution is color-blind because equality before the law admits neither favored races nor disfavored ones.

After a regrettable constitutional interregnum, the Court finally returned to first principles: race-conscious admissions cannot survive genuine strict scrutiny, and the promise of equal citizenship belongs to every American.

Justice Thomas is conservative, certainly—but more important, he is the most original, independent-minded, and intellectually fearless conservative jurist of his generation.

That singular formation explains my overriding impression of Justice Thomas: he stands apart from his colleagues in the purity of his originalism and in his willingness to follow the Constitution's original public meaning wherever it leads, without trimming principle to accommodate precedent, fashion, or institutional comfort. His separate writings in the Commerce Clause cases are illustrative.

He appears uniquely prepared to reconsider the entire doctrinal project that took root in *Wickard v. Filburn*³¹ and to examine, from first principles, whether the Court's modern Commerce Clause jurisprudence can be reconciled with the Constitution's text, structure, and original allocation of sovereign authority.

Perhaps Justice Gorsuch might join him in that undertaking. But Justice Thomas has already demonstrated the rare judicial courage to ask the antecedent question others avoid: not how far an erroneous doctrine may extend, but whether its premises are sound at all.

Were a majority of the Court willing to follow his lead, the result would be nothing less than a constitutional restoration—one that would reestablish the federal government as a government of limited and enumerated powers and renew the States' rightful place in our constitutional order.

Justice Alito. Justice Alito's *Dobbs* majority opinion sharply contrasts with the Chief's concurrence. Roberts asked whether the Court could uphold Mississippi's law without completely overruling *Roe* and *Casey*. Alito concluded it could not preserve precedents that were "egregiously wrong from the start" merely to produce a narrower opinion. Roberts emphasized the scope of intervention; Alito emphasized the duty to confront constitutional error. Roberts concurred only in the judgment; Alito wrote for the five-Justice majority.

My next recommendation is *So Ordered: An Originalist's View of the Constitution, the Court, and Our Country* by Samuel A. Alito.³²

In his new book, Alito calls himself a "working judicial originalist," obliged to decide real cases within an inherited legal system, respect precedent, persuade colleagues, and reckon with consequences for litigants. Using a highway with seven exits, he identifies wrong turns: timidity masquerading as restraint; insisting every constitutional rule appear in black and white;

abstraction detached from public meaning at ratification; antiquarian hunts for obscure relics; originalist window dressing attached to non-originalist doctrine; and the claim that the Constitution secretly incorporated Locke or another favored philosopher.

For Alito, originalism begins with text but recognizes structure, necessary implications, and the understanding of informed citizens—not merely discoveries by specialists armed with the judicial equivalent of a pith helmet and trowel.

Chapter Two turns to textualism. Alito honors Scalia for ending the “before Scalia” or “BS” era, when judges elevated committee reports, floor statements, generalized purposes, and policy instincts above enacted words. *Overton Park* reduced text to a fallback when legislative history failed; *Griggs* relegated Title VII’s words to a footnote while purpose did the work.

Alito recalls the conveniently manufactured Senate colloquy and Professor Robert Blakey’s immortal declaration, “I am the legislative history of RICO.” Scalia’s corrective was bracingly simple: the text is the law.

Scalia revived canons, sharpened oral argument, cleared judicial prose of professional fog, and demanded rigor even from friends, as his fierce criticism of Alito’s opinion in *Hein v. Freedom From Religion Foundation* illustrates.³³ The story honors both: Scalia attacked arguments, not personalities; Alito’s measured recollection distinguishes principled disagreement from disrespect.

Alito’s deeper point is that Scalia’s triumph must not become “hypertextualism”—a wooden method mistaking dictionary entries for meaning and treating context as illicit. Judges are Congress’s faithful agents. Fidelity requires recovering the public meaning communicated by enacted words in linguistic and historical context: not divining hidden motives, but not pretending words stand like tin soldiers in isolation.

His examples involving breakfast, banks, and irony show why semantic meaning alone is insufficient. Context clarifies ambiguity, supplies what speakers reasonably leave unstated, and may show that literal words communicate something different from their bare formulation. This is not purposivism but Scalia’s “objectified intent”: what a reasonable reader, familiar with usage and circumstances, would understand the statute to convey. Canons such as *noscitur a sociis*, *expressio unius*, and *eiusdem generis* depend on contextual inferences.

Alito presses the point in criticizing *Bostock*. He argues that the majority detached “because of sex” from its 1964 public meaning and dismissed ordinary contextual evidence. His Italian-restaurant hypothetical exposes an

agent who obeys literal wording while knowingly defeating the principal's communicated instruction.

"Objective intent" admittedly raises hard questions about which historical evidence counts and when context becomes a back door for preference. But that difficulty does not defeat Alito's warning: Scalia's revolution was never a suicide pact with literalism. Proper textualism binds judges to enacted law, ordinary language, institutional limits, and democratic accountability—neither licensing improvisation nor rewarding studied obtuseness.

Justice Gorsuch. That brings us to Neil Gorsuch and two more recommendations: *A Republic, If You Can Keep It* and *Over Ruled: The Human Toll of Too Much Law*.³⁴

Bostock shows why "conservative" tells us little about jurisprudence. Gorsuch did not argue that the outcome was socially desirable; he argued that Congress's words required it. Method is most revealing when it constrains a judge despite political reaction.

At the National Constitution Center, Gorsuch observed that originalism has a "terrible name," while living constitutionalism "sounds kinda nice." Yet he declined to enlist unreservedly in either camp, offering "enduring constitutionalism."³⁵

Read together, his opinions in *Bostock*, *United States v. Vaello Madero*,³⁶ and *McGirt v. Oklahoma*³⁷ reveal a coherent method: Enduring Constitutionalism paired with Enduring Textualism. The governing words endure and must be applied as written, even when the result confounds political expectations.

His willingness to side with marginalized litigants is neither ideological apostasy nor accident. It follows from taking text seriously when it places a thumb on the scale for someone government, fashion, or institutional power would rather ignore.

Professors William Baude and Dan Epps captured this on the *Divided Argument* podcast, observing that Gorsuch defends "some" little guys when they are "being crushed or someone's trying to crush the little guy." Baude put it precisely: "[a] little guy with a technical legal argument on his side."³⁸ The modifier matters. Sympathy does not carry the case; law does. When the ostensibly powerless litigant has the stronger legal argument, Gorsuch follows the law to its destination—even when the political gallery expected another route and the consequences are substantial.

What Constrains the Judge?

That returns us to Ed Meese. The most interesting consequence of originalism is not uniformity; it produced none. Meese elevated a question that

remains central to American constitutional debate: What constrains the judge? Brennan offered one answer, but for Meese and later originalists, it left the central problem unresolved: If constitutional principles adapt to contemporary values, what external legal criterion identifies which values control?

The challenge is not unique to the left. Some critics of originalism on the right, including advocates of common-good constitutionalism, urge judges and officials to interpret law through substantive principles of the common good. But if living constitutionalism is objectionable because it lets judges translate their values into constitutional law, substituting conservative values for progressive ones does not solve the methodological problem.

Constitutional methodology means little if it constrains only opponents. A method earns its keep when it constrains your own side. That is why *Bostock* belongs in this story. Whatever one thinks of the outcome, Gorsuch's opinion shows how interpretive method can lead a Justice to a politically unexpected result. Kavanaugh's dissent shows something equally important: The label "textualist" does not settle every interpretive question. Judges must still explain what textualism requires.

The arguments following Meese became more sophisticated than either his speech or Brennan's reply. Original intention became original public meaning. Critics forced originalists to refine their use of history. Originalists forced critics to explain the limits of interpretation. Eventually, judges formed by the same movement began arguing with one another over the answers.

That is a far more useful way to read the Court than counting six conservatives and three liberals. Headlines tell you who won. Someone supplies the vote count. Someone else names each appointing President.

Those facts tell you the score. They do not tell you the method.

Forty years ago, Ed Meese asked, in substance: What constrains the judge? The easy test of the rule of law is when law produces the answer we wanted. The hard test is when it points elsewhere.

So, when the next Supreme Court decision reaches your phone, do not stop at the vote count or the appointing President. Ask what sources the Justice treated as authoritative. Ask what the text contributed. Ask what history established. Ask what happened to precedent. Ask whether the real disagreement concerned the law's meaning, the method for discovering it, or how much the Court needed to decide.

And ask: Would this method still constrain the judge if it produced a result the judge personally disliked? If you can answer that question, you are no longer merely following the Supreme Court. You are beginning to understand it.

Charles D. “Cully” Stimson is Acting Director of the Legal Policy Center and Senior Legal Fellow, National Security, at The Heritage Foundation. This Heritage *Lecture* is slightly adapted from an address delivered before the undergraduate chapter of the Federalist Society at Dartmouth College on September 29, 2026.

Endnotes

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