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PERSPECTIVE

## Gorsuch filibuster would be a mistake

By Tony Francois

In a recent column, Dean Erwin Chemerinsky of the UC Irvine School of Law argues that Democrats in the United States Senate should attempt to filibuster the nomination of Neil Gorsuch to the Supreme Court. Even if they fail they should try because Gorsuch, he argues, is out of the judicial mainstream as an originalist who would turn back constitutional liberties to 1787.

This is wrong for three reasons. First, Gorsuch will not move the needle on any of the real issues about which Chemerinsky warns. Second, it is false that originalism as out of the judicial mainstream or a return to colonial American culture. And third, progressives should support Gorsuch's constitutional bent for limiting the abuse of executive power.

The first point is simple. The confirmation of Gorsuch to the Supreme Court will maintain rather than alter the status quo on the hot button issues that Chemerinsky's column lists. Gorsuch would replace the late Justice Antonin Scalia on the court; he would not (and perhaps could not) move the court to the right. Senate Democrats will not change the composition of the court by allowing an up or down vote on Gorsuch.

Chemerinsky's broadside against originalism requires a more detailed rebuttal. Originalism is simply a type of textualism, under which the words and phrases of a statute are the primary means of interpreting its meaning, as opposed to general purposes or desired results. As Justice Elena Kagan recently said in a lecture at Harvard Law School, "we are all textualists now." She is correct: It is the commonplace method of interpreting regulations, statutes and the Constitution by all sitting

members of the Supreme Court, and almost all lower federal judges I have encountered during my practice. Textualism is as mainstream as it gets. This contrasts with the methodology of the federal courts in the 1970s and even into the 1980s, which tended to focus either on the aspirational purposes of a statute, or the desirability of particular interpretive results, and then interpret its specific text (regardless of its evident meaning) in the broadest way necessary to advance the purpose or desired results. This sea change in methodology, from purpose and results to text, is thanks mostly to the late Scalia, as Kagan acknowledges in the aforementioned Harvard lecture.

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Textualism must rely on some benchmark for determining what words and phrases mean in contracts, patents, judicial opinions, statutes, regulations, treaties and the Constitution. Originalism (what words and phrases meant at the time they were incorporated into the law) is a logical and reasonable choice for this benchmark. It is false to call it "out of the mainstream." Instead, it is one of the basic approaches to textualism in use today. It is the consistent methodology of three of the eight sitting justices of the Supreme Court, and used to varying degrees by the others, depending on the type of case they are dealing with. It is also the method of statutory interpretation common to all twenty judges (Gorsuch among them) on then-presidential candidate Donald Trump's published short list of potential nominees to the Supreme Court. The growth and

influence of the Federalist Society over the last few decades is due in large part to its promotion of originalist textualism. Originalism may not be the only way that judges and law professors read legal texts these days, but it is about as mainstream as it gets.

Originalism, as Gorsuch describes it, envisions a modest purpose in interpreting statutes and the Constitution. The judge's role is different from that of a legislator. The legislator should be responsive to the needs of the times, and should be accountable to the voters who experience the needs and priorities of the times. Aside from constitutional constraints, the Congress is not bound by the past or the original interests and concerns of the founding generation. It can and should be focused on the present and be forward looking. It has the sole responsibility, under Article I of the Constitution, to make the laws.

Federal judges, on the other hand, answer to no electorate and sit for life. Their role is not to decide what the law should be, but to interpret what it is (i.e. what Congress has made it). The judicial function, understood this way, is one of the first principles of the rule of law. Citizens must be able to know what the law requires of them. These requirements are unknowable if judges reinterpret existing law to achieve their view of what it should be, instead of limiting their inquiry to what it is.

Chemerinsky's further assertion about originalism, that confirmation of Gorsuch will return America to the sexist patriarchy of the founding generation, is absurd. The notion that originalist judges would hold women ineligible to be elected president because the Constitution uses "he" is a pathetic straw argument. And arguing that this is what the framers of the Constitution intended

misses the entire point of textualism: It is the objectively discernable words of the text, not the subjective, variable and frequently unknowable intent of the authors of the text, which comprises the law. Gorsuch would not decide this question (presuming anyone would bring such a ridiculous case) by wondering what Alexander Hamilton would have thought of a woman president. Nor would any originalist textualist. Rather, the once commonplace use of male pronouns to encompass both male and female would easily turn aside such a baseless challenge to our first woman president.

Finally, Chemerinsky fails to acknowledge Gorsuch's defense of the constitutional role of the judiciary in checking arbitrary and abusive executive power. Gorsuch's concurring opinion in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), argues cogently that presidents and their bureaucrats (immigration officials, no less) should be subject to independent judicial oversight when applying federal statutes, instead of dictating to judges what the law allows them to do. That sounds like something Senate Democrats should agree with, not oppose.

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