OPINION COMMENTARY Follow

Somewhere, Robert Bork Is Smiling

Originalism kept him off the Supreme Court. Now it's the guiding philosophy of a majority of justices.

By Randy E. Barnett

July 10, 2024 at 4:24 pm ET

ILLUSTRATION: DAVID KLEIN

Robert Bork's 1987 nomination to the Supreme Court was defeated because of his commitment to originalism. For 30 years thereafter, no Republican nominee to the court called himself an originalist, although Justices Antonin Scalia and Clarence Thomas embraced the term after joining the high court.

But 30 years after Bork was borked, Neil Gorsuch was nominated to succeed Justice Scalia. He broke the taboo, confessing during his confirmation hearings that he is an originalist. Around the same time, Justice Samuel Alito described himself as a "practical originalist." Later, Brett Kavanaugh and Amy Coney Barrett identified as originalists at their confirmation hearings without qualification, bringing the number of self-identified originalists to five. Even Ketanji Brown Jackson described her approach to judging in unmistakably originalist terms. All these justices acknowledged that the text of the Constitution was binding on them and the meaning of the Constitution remained the same until it was changed by amendment.

This transformation had deep intellectual and political roots. Academics developed a defensible theory of originalism, and a movement to put originalists on the court culminated in Donald Trump's 2016 promise to do so—a promise he honored with the help of White House counsel Don McGahn.

How originalist is the court in practice? Sometimes it has reached results that are consistent with the original meaning of the text without using explicitly originalist reasoning. Justice Alito's opinion in *Dobbs v. Jackson Women's Health Organization* (2022) used the Court's "substantive due process" doctrine to reach an arguably originalist result but failed to consider the original meaning of "due process of law" or "privileges or immunities of citizens of the United States." Only Justice Thomas, in a concurrence, wanted to do that.

The term that just ended included one case that represents an unqualified triumph for originalism. In *Consumer Financial Protection Bureau v. Community Financial Services Assn. of America,* Justice Thomas's opinion for a 7-2 majority explicitly turned on the original meaning of "appropriations" in the Appropriations Clause. "An appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes," he wrote. "The statute that provides the Bureau's funding meets these requirements. We therefore conclude that the Bureau's funding mechanism does not violate the Appropriations Clause." For an originalist, it doesn't get any better than this. Justices Alito and Gorsuch dissented, but also in originalist terms. Only Justice Elena

Kagan declined to join an opinion employing originalist reasoning.

In contrast, in *Department of State v. Muñoz,* Justice Barrett used the same substantive due process analysis that Justice Alito had used in *Dobbs* to find that a citizen had no constitutional "right to bring her noncitizen spouse to the United States." To recognize an "unenumerated constitutional right," Justice Barrett concluded, the litigant "must show that the asserted right is 'deeply rooted in this Nation's history and tradition.' " As with *Dobbs,* the outcome might have been consistent with originalism, but the reasoning wasn't. And, in his majority opinion in *U.S. v. Trump*, Chief Justice John Roberts offered little, if any, originalist justification for the recognition of a president's immunity for criminal prosecution after leaving office. Whatever one thinks of the outcome, this was disappointing.

Still, in other cases, several justices reaffirmed their commitment to originalism in concurring opinions. In *U.S. v. Rahimi,* which upheld the application of a ban on firearms ownership to a man who was subject to a domestic-violence restraining order, Justices Kavanaugh and Barrett objected to the nascent push to have "history and tradition" replace the original meaning of the text as the ultimate touchstone of constitutionality.

"For an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law," Justice Barrett wrote. "Evidence of 'tradition' unmoored from original meaning is not binding law." Likewise, in her concurrence in *Vidal v. Elster,* a free-speech case involving trademarks, she rejected a sole reliance on the existence of a "common-law tradition" or a "historical analogue." "The views of preceding generations can persuade, and, in the realm of *stare decisis,* even bind," she opined. "But tradition is not an end in itself."

In his *Rahimi* concurrence, Justice Kavanaugh added that traditional practice also plays a role to the degree that constitutional language is vague or uncertain at the margin. He then described in some detail "how courts apply pre-ratification history, post-ratification history, and precedent when analyzing vague constitutional text."

The biggest challenge to restoring the original meaning of the text are stare decisis, the

doctrine by which justices are bound by precedent, and the fear that adopting original meaning would require wholesale disruption of existing programs and institutions. *Loper Bright Enterprises v. Raimondo*—the case that overturned *Chevron,* which required judges to defer to bureaucrats' interpretations of ambiguous statutes—provided promising answers to each concern.

In his concurring opinion, Justice Gorsuch limited the scope of stare decisis: "When judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop. A later court assessing a past decision must therefore appreciate the possibility that different facts and different legal arguments may dictate a different outcome." According to this approach, precedents in which originalist arguments weren't presented don't bar the court from adopting originalist arguments to reach a different result.

But this limitation of stare decisis needs to be combined with a point Chief Justice Roberts made in the majority opinion: "We do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology." This principle allows original meaning to be applied prospectively rather than retrospectively, leaving existing programs in place and thus avoiding a disruptive originalist "big bang."

Had you told me when I was a law student reading Warren and Burger Court "living constitutionalist" opinions that there would be Supreme Court opinions like these in my lifetime, I would have asked what you were smoking. The originalists on the court don't always agree on what originalism requires. But they are feeling their way through this thicket, case by case. In the process, they are educating each other and the nonoriginalist justices, and engaging in a dialogue with legal academics as well as with the American public.

Mr. Barnett teaches constitutional law at the Georgetown University Law Center, where he directs the Georgetown Center for the Constitution. He is author of "A Life for Liberty: The Making of an American Originalist."

Appeared in the July 11, 2024, print edition as 'Somewhere, Robert Bork Is Smiling'.