REVIEW OF *A REPUBLIC, IF YOU CAN KEEP IT*

1. Judicial philosophy

Within my liberal media bubble, originalism and textualism are typically derided as absurd and dangerous. My main interest in this book is Gorsuch's defense of those philosophies. He defines them as follows:

> Originalists believe that the Constitution should be read in our time the same way it was read when adopted.[1]

> When interpreting statutes, [textualism] tasks judges with discerning (only) what an ordinary English speaker familiar with the law's usages would have understood the statutory text to mean at the time of its enactment.[2]

Gorsuch favors "originalism in the application of the Constitution and textualism in the interpretation of statutes."[3] It seems like originalism allows one's interpretation of the text to be influenced by more contextual information about the writers' intentions than textualism does. I wish Gorsuch had elaborated on why this is seen as more appropriate in the case of the Constitution, since it seems like some of his arguments against using such information to interpret statutes would apply just as well in the case of the Constitution.

Gorsuch believes it's important for judges to follow the law as written even if it leads to a bad outcome in a particular case:

> Indeed, a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels.[4]

I do get the impression, though, that he thinks adhering to originalism will produce **good outcomes** much more reliably than a living-constitutionalist approach will. He even makes the following claim:

> Virtually the entire anticanon of constitutional law we look back upon today with regret came about when judges chose to follow their own impulses rather than follow the Constitution's original meaning. Look, for example, at *Dred Scott* and *Korematsu*. Neither can be defended as correct in light of the Constitution's original meaning; each depended on serious judicial invention by judges who misguidedly thought they were providing a "good" answer to a pressing social problem of the day.[5]

I have no idea whether it's true that most of the past's infamous rulings represent deviations from the Constitution. It seems counterintuitive; why would we expect the Constitution (and its amendments) to be a highly reliable guide to justice?

Perhaps one answer Gorsuch has in mind, since he alludes to the temptation for judges to satisfy the desires of "passing majorities"[6], is that getting something into the Constitution requires a much more serious effort and much broader consensus than getting a judge into office. Constitutional amendments have to be ratified by 3/4 of the states, whereas the power to appoint Supreme Court justices can be won with only a bare majority of electors and without even winning the popular vote. And amendments are more deliberate: you can just not ratify them, but you can't just not elect a President (even if you hate both candidates).

Maybe more importantly, Gorsuch seems to think that pressure to bend the law often comes from **public hatred** for some group/minority. Perhaps these prejudices are less likely to have the broad, stable, and explicit consensus needed to be encoded into the Constitution. The Constitution's accommodation of slavery is an obvious giant counterexample; but it does seem like most of the amendments are about extending more rights to more people, while only a few explicitly exclude some groups from rights that are granted to others.

But surely nobody would claim that our current Constitution is perfect or would give the best outcome in every individual case. For me the question is whether the overall benefits of consistently adhering to originalism can be expected to outweigh the harms it will sometimes cause. (I'm not sure Gorsuch would agree with that framing; for him it might be more a question of duty.) Two benefits the book mentions seem especially important:

1. **Predictability**. The idea of "rule of law" is that you should be able to know what does and doesn't count as breaking the law *before* you find yourself sued or prosecuted for it. That's much more difficult if judges decide cases on the basis of what they personally believe the law *should* be instead of the law as written. (F. A. Hayek wrote a whole book on this topic that I found really thought-provoking: *The Constitution of Liberty*. (It's not about libertarianism.))
2. **Separation of powers**. The judiciary is far less directly answerable to public opinion than the legislature is, in order to help insulate judges from political pressures that would have them apply the law selectively based on the (un)popularity of the parties involved in a given case. But this also means it's very undemocratic for judges to be making policy decisions.

To the latter point, I would add that relying on the Supreme Court to resolve contentious public debates seems to create political incentives that slowly push us to elevate the importance and power of the President. The main example I'm thinking of is abortion. Since the President can have a very long-lasting impact on the Court, once abortion came to be seen as primarily an issue for the Court rather than the legislature or states to decide, abortion became a continual wedge issue in presidential elections and determined the votes of many single-issue voters. But isn't it kind of crazy for the President to have any say at all on the legality of abortion? Is that really the function of that office?

Overall, originalism makes a lot of sense to me, though I'd like to read more rebuttals before I'd hold that opinion too strongly. Also, I think there must at *least* theoretically be cases where the outcome prescribed by originalism would just be too horrible to justify via the sorts of arguments mentioned here. For example, suppose you're a judge on a case like *Dred Scott* and (contra Gorsuch) you think the Constitution really does support the case's original, evil outcome. Are you seriously going to say: *sorry, my hands are tied, Black people can't have rights*? How would you live with yourself? And of course the same concern, that the stakes may just be too high to trust the decision to originalism, may apply to stuff like abortion and LGBTQ rights.

2. Goodreads reviews, reviewed

After reading the book, I read/skimmed all 139 reviews of it currently on Goodreads. Most reviewers seem to be conservatives—or at least, very few gave any indication of being liberals.

A couple conservative reviewers (Patrick O'Hannigan, Steve Hemmeke) complained about the pro-LGBTQ opinion Gorsuch wrote in *Bostock v. Clayton County*. I think the ruling is (some) evidence that Gorsuch **sincerely believes** in the textualist judicial philosophy he expounds in this book and is willing to follow it wherever he thinks it leads, rather than just being a Republican shill.

A presumably-liberal lawyer (Libba) wrote a moderately positive review expressing respect for Gorsuch despite not agreeing with originalism/textualism. Another presumed-liberal (Jim Robles) expressed sadness that the left "have lost the Supreme Court for a generation" but sees Gorsuch as "a decent thoughtful man" and seems relatively happy with his appointment. That's my *prima facie*

takeaway from the book too: Gorsuch comes across as principled and his arguments make a lot of sense. Of course, you can make a compelling argument for anything, the question is how well it holds up to counterarguments. Another reviewer (Ethan Berman) criticizes the book for "failing to even fathom why a judge would approach a case with a living constitution or consequentialist approach"; I don't know if this is a flaw in the book itself, but I do think it would be important to hear the arguments against originalism/textualism directly from their supporters before assuming that Gorsuch's arguments are decisive.

There are very few negative reviews, and they're short on substantive criticism. One (Ben) says there's "[h]ypocrisy on every page" but does not provide a specific example. Two of the high-profile decisions I'm familiar with, *Bostock* and *Dobbs*, both seem very much in line with originalist/textualist reasoning, even though my feelings about the outcomes are very different in the two cases (*Bostock* is wonderful, *Dobbs* is tragic). One of the main arguments of this book is that judges should follow the law as it is written even when doing so has bad consequences. So to show that Gorsuch's rulings are ***hypocritical***, it's not enough to gesture vaguely at a multi-year period and say *that was bad, right??* I want specific allegations, like this St. Andrews Law Review article's claim that originalism was used in *Dobbs* but abandoned in the contemporaneous 2nd Amendment case *New York v. Bruen*. (I haven't looked into the latter case enough to evaluate this.)

Since the book is several years old, it's not surprising that few reviews mention the executive immunity case *Trump v. United States*, but at least one (Braden Boardman) does mention it as an example of a ruling that makes some of the book seem "hollow or naive".

A lot of the book consists of **excerpts from legal opinions** Gorsuch wrote, and some reviewers found that uninteresting or unhelpful. Another (Matt) thinks the book "isn't really relevant anymore" and says: "If you're gonna take the time and energy reading about legal decisions to get a sense of Gorsuch, just read his legal decisions." In preparing to write this review, I tried to do exactly that: read a bunch of Supreme Court decisions that Gorsuch was involved in. Having not done so before, I quickly realized I'd underestimated how time-consuming that could be: each case report is basically a book (especially when you include the concurrences and dissents), and of course they're filled with very technical legal discussions. So I reduced my goal from "a bunch" to "a few" and did a lot of skimming. In general, reading the opinions and dissents made me less inclined to view the justices as partisan hacks, less confident in my ability to evaluate them, and more inclined to view the disputes as complicated.

One reviewer (another Ben) says "[s]ome parts … reeked with corniness", which is a bit harsh, but the **autobiographical content** of the book definitely feels curated to be an uplifting bit of Americana as opposed to a raw look at messy realities of life. Another (Gregg) said it "came across as a confirmation tell-all"; I worry they may have read a different book, because this one seemed pretty tame to me.

A couple reviewers (Ron Me, Wesley Pratt) say the book is ghostwritten, with the former finding it suspicious that two **other authors** are listed on the cover but not in the book. But in fact those authors are also mentioned in the acknowledgments as "collaborators, former clerks, and friends", and they were interviewed at SCOTUSBlog, where the interviewer notes:

> Of all the books written by Supreme Court justices published while they were on the bench – some 350-plus such works – this may be the first one credited to former law clerks "with" a sitting justice. Typically, such collaborations are tucked away on the acknowledgements page, so it must have been a great honor when the justice extended this rare courtesy.

3. Other reviews, reviewed

Finding critical reviews from other sources was not easy either. L. Ali Khan's review in *New York Journal of Books* does make an impassioned plea to reject the book's legal philosophy:

> The argument that "I personally don't like it, but I'm compelled by law to do it" is unavailable to the Supreme Court Justices. If the founders wrote a racist legal text, do not follow them unless you agree with them.

…but doesn't respond to the actual arguments the book gives for adopting such a follow-the-law-wherever-it-leads approach. Khan says he does not mean "to discredit the author's enchantment with originalism or textualism, but to argue against enshrining the supremacy of certain legal methods and throwing away the others as intellectually deficient." It's not obvious to me how any judge could really view textualism as valid *without* implicitly seeing other approaches as less valid, though. Isn't the whole point of textualism a refusal to let any consideration other than the meaning of the text, including how good or bad the outcome is, influence the ruling?

Jeffrey M. Winn's review in *New York Law Journal* gives a little bit of flavor as to how—contrary to what the book might lead you to fear—**living-constitution** approaches need not involve judges arbitrarily exercising power in accordance with their personal values. For this he references a biography of Wiley Rutledge:

> As a Supreme Court justice, Rutledge "felt free to deal with clashing values in concrete cases by applying his own vision of how constitutional principles best resolved the claims of everyone affected." To reach a decision that was "constitutionally legitimate," Rutledge believed that the opinion elaborating the decision "had to satisfy a test of coherence in addressing text and precedent that would lead even detractors to acknowledge that the ruling, if not on balance persuasive, had integrity."

Winn says that "on the subject of originalism, the book lacks balance" and "never discusses a single case in which originalism was manipulated by activist justices to achieve certain conservative policy outcomes". Winn gives the 2nd Amendment case *District of Columbia v. Heller* as such an example.

Heller also comes up in a review by Orrin Judd as an example of politically-motivated deviation from originalism:

> …the Heller ruling that invented the right of individuals to keep handguns… represented a radical departure from two hundred years of American jurisprudence. This is kind of the right's version of the left's Roe v. Wade, a desired decision unmoored from the Constitution and republic liberty. Each side likes to imagine existential threats that flow from allowing laws they don't like to stand and to see themselves as entitled to legislate from the bench to vindicate rights they wish were in the Constitution…

In a review for *Inside sources*, Christian Mammen talks about some of the difficulties textualists face in determining the **"original and ordinary public meaning"** of a text, and pushes back a bit against Gorsuch's insistence that value judgments are never an acceptable way of resolving ambiguities.

Mammen also notes that in the 2017-2018 term, Gorsuch:

> …emerged as the new swing vote on the Supreme Court. Of the 20 cases that were decided by a 5-4 vote, Gorsuch was in the majority on 13 of them, more than any other justice, and only half the time with the conservative bloc.

John J. Magyar in *Modern Law Review* offers a little commentary on disagreements among the Court's textualist justices, along with an interesting discussion of **gerrymandering**:

> The textualist view of election district gerrymandering is significant, in light of the textualists' reliance on democratic fidelity for the legitimacy of the law. The reason why the legislature is entitled to make laws and judges have no power to adjust them, even by way of clear improvement, is because judges are not directly accountable to the people through elections. Gorsuch reiterates this position when criticising agency deference: 'What about the democratic accountability of those who make the laws? Under the Constitution, the answer is supposed to be pretty clear. Congress makes the laws and you are free to vote your representative in or out at regular intervals' (64). As a consequence, one might expect textualist judges to regard gerrymandering by administrative officials as unconstitutional. They do not. The matter came to the fore in *Rucho v Common Cause* … where the Supreme Court ruled that allegations of partisan gerrymandering were political and therefore nonjusticiable (see (2019) 133 Harv L Rev 252 for incisive commentary). With Chief Justice Roberts writing for the Court, the decision split along party lines: Gorsuch, Thomas and Kavanaugh JJ concurred, and the liberal justices concurred in their dissent. The rather surprising outcome is that extreme partisan gerrymandering is permissible under a textualist reading of the Constitution.

1. Neil Gorsuch, *A Republic, If You Can Keep It* (Erscheinungsort nicht ermittelbar: The Crown Publishing Group, 2019), 110.
2. Ibid., 131.
3. Ibid., 10.
4. Ibid., 225.
5. Ibid., 115.
6. Ibid.

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