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Hearings on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the U.S.

1. What is Originalism?

Thank you for the opportunity to testify today. This statement is about Judge Gorsuch's judicial philosophy.[1] *Judge Gorsuch is an originalist and a textualist, but what does that mean? The core of originalism is a very simple idea. In constitutional cases, the United States Supreme Court should consider itself bound by the original public meaning of the constitutional text. That simple idea can be broken down into its component parts.*[2]

Like Justice Scalia before him, Judge Gorsuch believes that the meaning of the constitutional text is its public meaning*—the ordinary or plain meaning the words had to the public at the time each provision of the Constitution was framed and ratified.*[3] *If the words employed are technical, the technical meaning must be accessible to the public.*

♦ This Essay is the written statement submitted to the Senate Judiciary with additional footnotes which provide references and clarify the very brief remarks in the text.

[1] This statement was authored before now Justice Gorsuch was confirmed as an Associate Justice of the United States Supreme Court.

[2] The word "originalism" was coined by Paul Brest. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U.L. Rev.* 204 (1980). For a more detailed account of the nature of originalism, see Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory* in G. Huscroft, B.W. Miller (eds), *The Challenge of Originalism: Essays un Constitutional Theory*, Cambridge, 2011. More formally, originalism is a family of constitutional theories, almost all of which affirm two ideas, the Fixation Thesis and the Constraint Principle:

> The Fixation Thesis: The original meaning of the constitutional text is fixed at the time each provision is framed and/or ratified.
>
> The Constraint Principle: Constitutional practice, including the elaboration of constitutional doctrine and the decision of constitutional cases, should be constrained by the original meaning of the constitutional text. At a minimum, constraint requires that constitutional practice be consistent with original meaning (as specified below).

[3] Not all originalists affirm the thesis that the original meaning of the constitutional text is its public meaning. Some originalists believe that the original intentions of the framers provide the meaning of the constitutional text. See L. Alexander, S. Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 *San Diego L. Rev.* 967, 969 (2004) ("Full blooded intentionalists consider all available evidence of the actual author's intended meaning."). Other originalists emphasize the original methods of constitutional interpretation. *See* M.B. Rappaport, J.O. McGinnis, *The Constitution and the Language of the Law* (March 8, 2017), papers.ssrn.com/sol3/papers.cfm?abstract_id=2928936. And still other

The original public meaning of the text is the meaning that the words had then—and not necessarily the meaning that they have today. For example, Article Four of the Constitution refers to "domestic violence" but in the Eighteenth Century that phrase did not refer to spousal abuse. It referred to riots and insurrections within a state. When we interpret Article Four, we should understand the words as they were used at the time the Constitution was written. What is called "linguistic drift" is not a valid method of constitutional amendment.[4]

The Supreme Court today should consider itself bound by the text. The Court does not and should not have the power to amend the text on a case-by-case basis. It should decide constitutional cases in a way that is consistent with the original public meaning of the text.

Originalist judges do not believe that they have the power to impose their own values on the nation by invoking the idea of a "living constitution." Instead, they believe that the proper mechanism for changing the Constitution is by amendment through the process provided in Article Five—as has been done twenty-seven times.

2. Myths about Originalism

The basic idea of originalism is simple and intuitive. We have a written constitution that is the supreme law of the land. Why then would anyone oppose originalism? Some of the reasons for opposition to originalism are based on myths—misrepresentations of the actual practice of originalism by lawyers, judges, and scholars.

a. Myth Number One: Originalists Try to Channel James Madison

Originalism is about the constitutional text. No originalist thinks that we should decide contemporary constitutional bases by asking, "What would James Madison do?" What matters for originalists is what the constitutional text says. When Judge Gorsuch writes an opinion that applies the original public meaning of the constitutional text to a contemporary legal question, he does not need to know anything about the mental states of the Framers regarding that question.

b. Myth Number Two: Originalists Cannot Apply the Constitution to New Circumstances

There was no Internet when the First Amendment was written in 1791. Today, Americans can speak over the Internet. The application of the freedom of speech to a speech broadcast over the Internet is very simple. Speech is speech, whether it is in person, amplified by speakers, or transmitted over the Internet. The Constitution was written in language that can be applied to new circumstances. There was no state of Iowa when the Constitution was ratified, but there was no difficulty in applying the constitutional provision that grants each state two Senators to the new state Iowa.

originalists emphasize the original law. See S. Sachs, *Originalism Without Textualism*, YALE L.J. (forthcoming) papers.ssrn.com/sol3/papers.cfm?abstract_id=2988019.

[4] More formally, this is the Fixation Thesis, stated in footnote three, above. For a full defense of the claim that the linguistic meaning (or communicative content) of the constitutional text is fixed, see L.B. Solum, *The Fixation Thesis: The Original Meaning of the Constitutional Text*, 91 NOTRE DAME L. REV. 1, 15 (2015).

c. Myth Number Three: Originalism Would Require that Brown v. Board be Overruled

In fact, there is very good historical evidence that segregation would have been struck down under the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. In fact, Plessy v. Ferguson, *the decision that established the separate-but-equal doctrine, was a living constitutionalist decision, one of many that nullified a now almost forgotten guarantee of equal basic rights.*[5]

d. Myth Number Four: Originalism is Inconsistent with Precedent

In fact, the opposite is the case. The original meaning of the judicial power in Article III is entirely consistent with the ancient doctrine of stare decisis. Judge Gorsuch has consistently displayed a respect for precedent in his judicial career—as did Justice Scalia. It is true that an originalist Supreme Court would gradually move the law away from precedents that are inconsistent with the constitutional text, but great movements of this kind are gradual—and they give the democratic process an opportunity to react.[6]

3. Originalism is in the Mainstream of American Jurisprudence

Is originalism somehow outside the mainstream of American jurisprudence? The answer to that question is an emphatic "no." The idea that judges are bound by the constitutional text is very much in the mainstream of American legal thought.

For most of American history, originalism has been the predominate view of constitutional interpretation. There have been episodes in our history where fidelity to the constitutional text was neglected. One such episode occurred during the Reconstruction period when living constitutionalists of that era undermined important provisions of the Fourteenth Amendment. Another departure from the mainstream occurred during the Warren Court, when the Supreme Court sometimes issued opinions that decided constitutional questions without any reference to the constitutional text. But for most of our nation's history, the Supreme Court has made a good faith effort to follow the constitutional text.[7]

Originalism is in the mainstream for another reason. Originalism can and should be endorsed by both Democrats and Republicans and by progressives and conservatives. This point is especially important to me personally. I am not a conservative or libertarian, but I do believe in originalism. Why is that? It is because I am convinced that giving judges the power to override the Constitution and impose their own vision of constitutional law is

[5] For discussion of the originalist foundations of *Brown v. Board of Education*, see M.W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 *HARV. J. L. & PUB. POL'Y* 457 (1995).

[6] See L.J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 *N.M. L. REV.* 419 (2006).

[7] For a discussion of the transition away from originalism, see H. Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 191 (1997).

dangerous for everyone. If you are a Democrat, you should ask yourself the question: Given that the next Justice will be appointed by a Republican President and confirmed by a Republican Senate, would you prefer an originalist like Judge Gorsuch or would I prefer a conservative Justice who does not believe that she or he is bound by the constitutional text? The alternative to originalism is a Justice who believes that she or he is free to override the constitutional text in the name of her or his own beliefs about what the Constitution should be given changing circumstances and values.

There is a final reason that originalism is in the mainstream. The Supreme Court has never claimed that it has the power to override the original meaning of the constitutional text. There are cases where the Supreme Court has departed from the text, but in those cases, the Court either attempts to disguise the true nature of its decision with an implausible reading of the text, or it simply ignores the text altogether—usually by citing precedent. Indeed, if Judge Gorsuch had come before this Committee and testified that he believed that as a Supreme Court Justice, he would have the power to override the original meaning of the constitutional text, I think it is clear that he would not be confirmed.[8]

4. The Case for Originalism

Originalism is the simple and highly intuitive idea that the Justices of the Supreme Court are bound by the constitutional text. The Justices, like all federal judges and the members of this Senate, take an oath to perform their duties under the Constitution of the United States. There are good reasons for the obligation of constitutional fidelity represented by the oath.[9]

First and foremost is the rule of law. John Adams is famous for insisting on the "rule of law and not of men."[10] *The commitment to the original meaning of the constitutional text is the best way to ensure that the awesome power entrusted to our Supreme Court—the power to have the ultimate say in constitutional cases and declare that statutes passed by Congress are unconstitutional—is the rule of constitutional law and not the rule of the men and women appointed to the Court.*

What is the alternative? Living constitutionalists believe that the Supreme Court has the power to amend the Constitution by judicial fiat. If the constitutional text does not limit that power, what does? You might say that it is precedent, but the Supreme Court has the power to overrule its prior decisions. I have the great privilege of authoring the volume of Moore's Federal Practice that deals with the doctrine of stare decisis. In that capacity, I have read hundreds and hundreds of cases dealing with the role of precedent in the federal courts. My conclusion, and I think fair-minded scholars would agree, is that the Supreme Court has an inconsistent approach to precedent. When a majority of the Court believe that a prior decision is wrong, they have the power to overrule it, and that doctrine of precedent does not prevent them from so doing. Indeed, in recent years, critics of the Court have observed a pattern of what they call "stealth overruling." Even when the Court pretends to

[8] For a discussion of this idea, see W. Baude, *Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349 (2015).

[9] For a discussion of the normative arguments favoring originalism, see L.B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (unpublished manuscript, March 24, 2017), papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215.

[10] *See* J. Adams, *Novanglus Papers*, Boston Gazette, no. 7 (1774).

adhere to precedent, it can nullify a prior decision by distinguishing it in a way that leaves it without any true precedential force.

If the Justices of the Supreme Court are neither constrained by the constitutional text nor by precedent, then how is the rule of law to be achieved? My day job is as a law professor. In that capacity, I study the constitutional theories that are propounded by my colleagues. One of the most distinguished living constitutionalists is Professor David Strauss of the University of Chicago. Professor Strauss is the leading proponent of what is called "common law constitutionalism"—the view that constitutional law should be made by judges. What I want to call to your attention now is his remarkable candor. Professor Strauss is willing to say things that no one who aspires to judicial office would say in public. Some constitutional amendments are passed to overrule Supreme Court decisions. The two most famous examples are the Eleventh Amendment which limits the ability of citizens to sue states and the Sixteenth Amendment which overruled the Supreme Court's decision invalidating the federal income tax. Professor Strauss believes even those amendments could be overruled by the Supreme Court through a common-law process—although he believes the Court should wait a few years before taking such a radical step.[11] *It is no accident that Professor Strauss wrote a book entitled,* The Living Constitution.[12]

The truth is that if the constitutional text does not bind the Supreme Court, then the Justices are the equivalent of a superlegislature. A committee of nine unelected judges has the power to reshape our Constitution as they see fit.

There is a second reason to prefer originalism over living constitutionalism. That reason is rooted in the idea of democratic legitimacy. Each and every provision of the United States Constitution has been ratified by a supermajoritarian process. The original constitution was ratified by the representatives of "We the People" in convention assembled. Amendments must be proposed by two-thirds of the Senate and the House and ratified by three-fourths of the state legislatures. This supermajoritarian process confers democratic legitimacy on the provisions of the Constitution. It is important to acknowledge that this process has not been perfect. In the late eighteenth century, women, slaves and others did not have the vote. But the democratic legitimacy of the Constitution must be compared to some alternative. The Supreme Court consists of nine women and men. They are not elected. They are appointed for life terms. In theory, they can be impeached by the House and tried by the Senate, but it is difficult to imagine that any Supreme Court Justice would be removed in this way on the basis that their living constitutionalist jurisprudence was out of step with popular opinion.

If we must choose between originalism and a constitutional text that has been ratified by the representatives of "We the People" and a living constitutionalist constitution that is ratified by majority vote of a committee of nine, there is no doubt in my mind about which constitution is the more democratic.

[11] D.A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 *Harv. L. Rev.* 1, 57 (2015) (implicitly rejecting the Constraint Principle by stating that "original understandings are binding for a time but then lose their force").

[12] D.A. Strauss, *The Living Constitution* (2010).

5. Objections to Originalism

My final topic concerns objections to originalism. Let me begin by noting that many of the objections are based on the myths about originalism that I have tried to dispel. Consider some of the remaining objections.

a. The Dead Hand

It is argued that originalism involves the rule of a "dead hand."[13] *Of course, it is true that most of the provisions of the Constitution were framed and ratified long ago. We have an old constitution that has survived the test of time. But is this a reason to reject its authority? Did the members of this august body make a mistake when they swore an oath to support and defend the Constitution? Some of my colleagues in the academy do believe that the Constitution is outmoded and outdated, but I believe they are wrong for two fundamental reasons.*

First, the Constitution is not a code. The Constitution established a basic structure of government—this Senate, the House of Representatives, the President, and the judicial branch. It established procedures for legislation and appointment of judges and executive officials. There have been challenges and even periods of crisis, but the fundamental structure of government has worked well for generations. The Constitution also enshrines fundamental liberties like the Freedom of Speech and the Due Process of Law. Originalists are committed to the proposition that the meaning of these liberties does not change, but that does not mean that their applications must remain frozen in time. The whole point of originalism is to respect the text, and nothing could be less respectful than to refuse to apply the text to new circumstances.

Second, the Constitution can be amended. And it has been. Twenty-seven times. Our Constitution is properly changed through the amendment process when the American people form a consensus that change is necessary and desirable. The Constitution of 1789 was improved by the passage of the Bill of Rights. The great evil of slavery was cured by the Thirteenth Amendment. The Fourteenth Amendment provided a great charter of liberty and equality, not just for the former slaves, but for all Americans. The right to vote was extended to women by the Nineteenth Amendment and to all citizens of the age of eighteen and over by the Twenty-Sixth Amendment. Constitutional amendment is not easy; it requires a consensus of most Americans. But it is not impossible.

In this regard, it is important to remember that living constitutionalism undermines the lawful process of constitutional amendment. These days if a social movement is seeking constitutional change, they have two alternatives. They can marshal their forces for a constitutional amendment; that is a hard road. Or they can attempt to eke out five votes from the Supreme Court, the easy path. It is hardly surprising that many choose the easy path over the hard road. But in this case, the hard road is also the high road. Constitutional change through the amendment process enables "We the People" to overcome the dead hand of the past through the rule of law.

[13] For a discussion of the dead hand objection, see M.W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *GEO. WASH. L. REV.* 1127 (1998).

b. Law Office History

Another objection to originalism is based on the idea that the Supreme Court is simply not capable of discovering the original public meaning of the constitutional text.[14] *And even if they were capable of that task in theory, they will fail in practice because their ideological preferences overcome the search for historical truth.*

The first aspect of this objection is simply false. The constitutional text is old, but it is not the Rosetta Stone. Lawyers, judges, and scholars can work together to unearth the evidence of original meaning in the hard cases. And there are many easy cases, in which the original meaning is clear to any fair-minded reader who consults the historical record.

The second aspect of the objection goes to the virtue and integrity of the Justices. It is true that neither originalism nor any other constitutional theory can work if the Justices are corrupted by ideology. For originalism to work in practice, the President must nominate and the Senate must confirm Justices with the virtue of judicial integrity. They must be willing to subordinate their own political and ideological preferences to the law. They must set aside their preconceptions and desires and engage in a search for truth—with a willingness to reach outcomes as judges that would necessarily agree if they were lawmakers.

In this regard, I take comfort from what I have read about Judge Gorsuch's reputation for integrity. The job of this committee should be to examine the record carefully. If you believe that Judge Gorsuch has the virtue of judicial integrity and that he is committed to the principle that the Supreme Court is bound by the Constitution, then I believe that your duty is to vote for the nomination.

c. Taking Sides

Recent discussions of the nomination of Judge Gorsuch suggest another objection to originalism. If Judge Gorsuch is committed to the law—to the original public meaning of the constitutional text and the plain meaning of federal statutes—then he may rule against persons and groups about whom we care very much. One version of this objection is based on the idea that judges should favor the little guy (or gal), the common man (or woman) against big corporations or big government. The core idea is that judges should "take sides" and favor some groups over others.

I understand this objection. I have great sympathy for the plight of Americans who struggle against poverty, bias, discrimination, and oppression. I favor legislation that attacks injustice and prejudice. But I cannot endorse the idea that the Supreme Court should take sides, if by that, you mean that the Court should bend or break the constitutional text in order to favor one group over another. Taking sides is a "two-sided coin"—if you will excuse the pun. There is no guarantee that a Supreme Court armed with the awesome power of overriding the constitutional text will take "the right side." More fundamentally, taking sides is dangerous, because it threatens the rule of law in a fundamental way.

If there is any lesson from the history of the judicial nomination and confirmation process over the past few decades, it is that there is a grave risk of the politicization of the judicial selection process. This Committee knows far better than I do that neither side of the

[14] For a discussion of originalist methodology, see L.B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017).

ISSN: 2037-6677

aisle is blameless in this process. There has been a downward spiral of politicization, a process of escalating tit for tat that threatens the integrity and fundamental fairness of the great constitutional duty of the Senate to give advice and consent.

I cannot say what might stop the politicization of the court, but I do know this. The idea that we should select Supreme Court Justices because of what side they will take can only make the problem worse. Once we start selecting Supreme Court Justices explicitly based on ideology, it will become progressively more difficult to select women and men of integrity who respect the rule of law.

And this leads me back to originalism. The whole idea of the originalist project is to take politics and ideology out of law. Democrats and Republicans, progressives and conservatives, liberals and libertarians—we should all agree that Supreme Court Justices should be selected for their dedication to the rule of law. For this reason, I support the confirmation of Judge Gorsuch for the office of Associate Justice of the United States Supreme Court.