

The New R E P U B L I C

HOW LIBERALS CAN TAKE BACK THE COURT.

Origin Myth

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The last Supreme Court term--with its tide-turning decisions on abortion, race, and campaign finance--has evoked familiar feelings for liberals. Just like the Democratic electoral defeats of the 1980s, not to mention the catastrophes of 1994 and 2000, these losses have triggered despair and introspection. As *The New York Times'* Linda Greenhouse has reported, liberals have begun to question their tactics for combating the conservative judicial revolution; they realize they must now develop "an affirmative message of what the Constitution means" after "playing defense for close to 40 years."

History, fortunately, provides examples that should give liberals heart. Over the course of the past few decades, the Democratic Party has changed its rhetoric and tweaked its positions to improve its chances of winning arguments over national security and social issues--and it needs to now replicate these feats in debates over the Constitution.

Consider a particularly graphic instance of how Republicans have whipped Democrats on this terrain. When John Kerry described the paradigm that would guide his judicial appointments, he spoke of appointing judges who would ensure equal pay for women and protect a woman's right to reproductive choice. That sounded well and good--until George W. Bush portrayed him as betraying the Constitution. Where Kerry wanted to turn the courts into a vehicle for liberal causes, Bush pronounced himself a "strict constructionist," who would appoint judges who "interpret the Constitution," not make laws. It's not hard to see how Bush's arguments tracked the broader Republican case: Unlike the Democratic elites who manipulate the system to their own advantage, conservatives safeguard bedrock American values.

To win these debates in the next election, liberals are going to have to borrow from Justice Antonin Scalia and the conservative lexicon. They should embrace the Constitution without hesitation and promise to appoint judges who will follow the commands of the Constitution. Then they should go after Republicans, hard, for not doing the same. In other words, they should portray themselves as the authentic defenders of the Constitution. It won't be easy, of course, to eradicate old perceptions. But they will have certain advantages in making their case. Namely, when they drape themselves in the Constitution, they will have history on their side.

For more than a decade, conservatives, led by Scalia, have offered a simple and compelling recipe: Follow the text of the Constitution. Where the words of the document are unclear, consult history to determine the original understanding of those words. Apply that original understanding to the facts of the case, and presto: The right result will pop out. As Scalia likes to say, constitutional interpretation should be "easy as pie." The benefits, moreover, carry far beyond individual cases. According to Scalia, this approach ensures that politics never enters constitutional law.

Liberals have long known that Scalia does not always practice what he preaches. In Scalia's hands, the Founding Fathers strangely presaged the present-day Republican Party platform with remarkable precision. But, while liberals have grumbled in classrooms and academic journals about Scalia's flamboyant mix of sanctimony and hypocrisy, he has faced only one real combatant with the intellect and megaphone to give him a fair fight: Justice Stephen Breyer. In his book, *Active Liberty*, Breyer spells out his own approach to judging. He has also engaged in public debates with Justice Scalia about constitutional interpretation.

Breyer is an extremely intelligent, lively, and thoroughly decent man. He is also an excellent and largely non-doctrinaire justice. But even those rooting for Breyer, like us, would have to concede that Scalia has won their public matches.

These triumphs can be attributed, in no small measure, to style. Scalia talks in hard-hitting sound bites, Breyer in erudite paragraphs. While Scalia launches blistering criticisms of Supreme Court liberals, Breyer is calm, restrained, and unwilling to challenge Scalia on his rulings in particular cases.

But, more than anything, Breyer has lost these debates because of the terms upon which they were fought. As Scalia describes his "easy as pie" originalist recipe, you can hear the exasperation pour out of Breyer. Judging is a lot more complicated than that, he sighs. Texts are frequently ambiguous. (When he once began to ruminate on the many possible meanings of the word "other," Scalia interjected that he thought the meaning of "other" was pretty clear.) History is equally malleable. Thus, Breyer explained, he looks to other factors, including the real-world consequences of particular rulings. It is intellectually persuasive, but it also leans into Scalia's counterpunch. Scalia retorts that consequences are in the eye of the judicial beholder and liberal justices tend to bend their evaluations of the "real world" to fit their political preferences.

One can dismiss Scalian logic as simplistic and deeply flawed, but it tends to prevail, as it did in the Senate confirmation hearings for John Roberts and Samuel Alito. While Democratic senators searched for evidence of Roberts's core beliefs, Roberts likened the job of a justice to a baseball umpire, simply calling balls and strikes. Democrats pushed Alito on his willingness to protect the little guy; Alito said he would be happy to rule for the little guy, but only when the little guy had a winning legal position. The conservative nominees looked like they cared about the rule of law. Liberals looked like they cared about bending the law for politically favorable results. The nominees made it seem like following the rule of law was easy--ball or strike. The liberal senators made the whole enterprise seem much more muddled.

Debate by debate, conservatives have been persuading the public that they alone are interested in following the Constitution. At one level, this is remarkable. Demonstrating the hypocrisy and activism of conservatives like Scalia ought to be, well, easy as pie. On another level, the conservative success is not hard to understand. Progressives have painted themselves into a corner by running away from the text and history of the Constitution for fear that the original meaning of the Constitution would require the abandonment of progressive causes and principles.

But what if progressives tried another tack? What if they stopped accusing Scalia and his ilk of intellectual simplicity and instead accused them of being unfaithful to the Constitution? Suppose that they pointed out where neither text nor history supports the results conservatives say they support? Suppose they even charged that conservatives ignore the Constitution when it gets in their way? Now that would be a fair fight.

Indeed, there's a nascent movement among progressives to embrace the Constitution rather than run from it. The central theorist of this school--what you might call progressive originalism--is Yale law professor Akhil Reed Amar. Amar is one of his generation's most influential constitutional historians. His works on the Constitution have won acclaim from across the political spectrum, with one prominent conservative law professor calling Amar's recent opus, *America's Constitution: A Biography*, the best book written about the Constitution since *The Federalist Papers*. This conservative acclaim is somewhat surprising, because Amar reveals the Constitution to be a deeply progressive document.

Over the years, conservatives have convinced many liberals--not to mention the public--that the Constitution is a document largely geared towards protecting private property and wealth. Amar demolishes this notion. He explains that our Constitution started out both democratic and inclusive for its time and has remained viable because of constitutional amendments that improved the document.

Amar's most powerful argument is that the post-Civil War amendments fundamentally altered our founding document in ways that have yet to be recognized by the Supreme Court. What may have begun as a document focused on protecting liberty was transformed into a document just as concerned with equality. A federal government that began with powers that were "few and defined" was awarded vast new powers to protect due process and equal protection. Conservatives may not like this, of course, but they should not be able to wish away these changes.

This approach may not sound terribly revolutionary. But once liberals understand that the Constitution is a progressive document, it will transform the way in which they argue. Consider the one big liberal victory last term--the ruling that the Environmental Protection Agency has the authority to combat global warming. Justice Anthony Kennedy joined the Court's liberal wing in that case because of his conclusion, rooted in constitutional history, that states warrant special solicitude when they challenge federal government inaction. It might have been a persuasive point, but it wasn't made in any of

the briefs filed in the case--a symptom of the progressive aversion to this style of argument.

Or take the thorniest of issues--reproductive choice. The fear that a constitutional vision rooted in text and history would mean jettisoning *Roe v. Wade* pushes liberals away from such a vision. But Jack Balkin, also of Yale Law School, advocates a different approach. Balkin was once a critic of originalism, but, in an important article, "Abortion and Original Meaning," Balkin embraces "fidelity to the original meaning of the Constitution," and argues that the text and history of the citizenship clause of the Fourteenth Amendment supports *Roe*. Justice Ruth Bader Ginsburg appears to have picked up this argument in her dissent to the recent partial-birth abortion case. She asserted that the right to reproductive choice is not rooted in a "generalized notion of privacy" but rather in a woman's "equal citizenship stature." What Balkin and Ginsburg realize is that *Roe* will only survive if progressives convince the Court and the public that the right to reproductive choice is rooted in our founding document.

Of course, the Constitution's text and history does not line up perfectly with a progressive agenda. Constitutional text and history, moreover, will not provide precise answers to many questions confronted by courts. But, faced with these complications and uncertainties, progressives would do well to follow Scalia's lead. In public debates over constitutional interpretation, Scalia keeps it simple. Sure, he says, sometimes I have to follow precedent. Sure, he admits, sometimes text and history aren't so clear. But those are details. Don't let them distract you: I like a rock-hard Constitution, plain and simple, and that Constitution binds me as a judge.

That's the way Clinton, Obama, and other Democratic candidates ought to talk about their own constitutional vision. They can eschew terms like originalism, if they don't like its baggage. But they should say something similarly evocative: "I want judges who are accountable to the Constitution, not the Democratic or Republican platform." They should be prepared to explain what they mean by constitutional accountability, and they should provide examples of where conservative judges have violated this mandate. They should talk about the Constitution and its history, but resist the impulse to discuss the hardest cases first and avoid getting bogged down in the details of philosophy. They must recognize that there is a big difference between defending a constitutional vision and deciding a case. The progressive failure to grasp that difference is precisely why they've been losing these battles.

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