

CAPITAL GAZETTE

The end game of this election started with originalism and the Supreme Court

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Perry Weed

President Donald Trump took the recommendation of the Federalist Society to nominate federal Judge Amy Coney Barrett to the U.S. Supreme Court.

The Federalist Society is a lobbying group supported by wealthy conservatives and business interests. In recent years it has vetted possible appointees to the Supreme Court. It certified now Justice Barrett to Trump as having an originalist-textualist mindset. She is part of the conservative legal movement.

In the Rose Garden ceremony following her selection, Barrett proudly invoked the “incalculable influence” of her “mentor” Justice Antonin Scalia for whom she served as a law clerk. Adding “His judicial philosophy is mine.”

Supreme Court Justice Antonin Scalia and Ed Meese, President Donald Reagan’s attorney general, popularized originalism — the concept that the constitutionally correct interpretation should be based on what the founders intended. And, later, textualism, that is that the text meant what it meant when written — guided only by the general notions of “strict construction,” “judicial restraint” and “deference” to guide conservative judge-makers. (Ilya Shapiro of the Cato Institute, in *Supreme Disorder*, 2020, p. 122).

Although some states have begun to reopen and traveling is picking up, some medical experts are still cautioning against unnecessary air travel, which means 2020 could be the year...

Richard Posner, a judge on the U.S. Seventh Circuit for more than 35 years, has become the most cited legal scholar of all time. Posner argues that Scalia was stuck in the past, paying obeisance to out-of-date traditions. As U.S. Sen. Angus King asks, since the founders didn’t envision airplanes — is the Air Force unconstitutional?

Scalia’s adherence to originalism was the mechanism he used to justify his conservative conclusions. His cardinal sin was his disingenuous allegiance to this rigid conception of the law.

Posner, appointed by Reagan, was a pragmatist on the bench, seeking first to find a sensible solution to the question at hand. He characterized Scalia as “hyper-conservative” and lambasted his unwavering originalist jurisprudence.

Our founders were concerned over the scope and power of the federal judiciary. That branch would be comprised of unelected, politically insulated judges that would be appointed for life.

The words on the Jefferson Memorial tell us that “institutions must advance also to keep pace with the times.” Jefferson, citing new discoveries and changes in manners and opinions, wrote that our “laws and institutions must go hand in hand with the progress of the human mind.”

Alexander Hamilton claimed that the judiciary would be the weakest branch of the U.S. government. But with a growingly dysfunctional Congress in recent years, the conservative judicial movement, relying on originality and textualism has engaged in lawmaking — on guns (*District of Columbia v. Heller*), on presidential elections (*Bush v. Gore*), on corporate personhood (*Citizens United v. FEC*), and in other consequential decisions.

Republican Sen. Mitch McConnell, controlling the Republican-majority Senate, has demonstrated how it works. Refuse for eight years to work with President Barack Obama. Freeze the law-making capacity of Congress. Strive for conservative-dominated courts — and eventually a Republican-dominated Supreme Court — to weigh in on and eventually shape the developing national issues.

The Supreme Court has surrendered its legitimacy as the arbiter of the nation’s most important Constitutional disputes. It is now all about raw political power — not principle.

This is no longer a secret agenda. Republicans now look to the Supreme Court to repeal of the Affordable Care Act and *Roe v. Wade*. Trump, who took an oath to “preserve, protect and defend the Constitution of the United States” now expects the court’s favorable help in deciding the outcome of the current election — and he has said so!