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How a Hillary Clinton Presidency Would Affect the Supreme Court

Conservatives would suffer losses, but the notion that she would permanently vanquish originalism doesn't withstand scrutiny.

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Should the fate of the Supreme Court cause conservatives to support Donald Trump? That's the message touted by a number of commentators on the right, who insist that judicial appointments are the stakes that matter most in the 2016 election.

To evaluate that position, I've scrutinized the arguments of its most formidable proponent, law professor Hugh Hewitt, who has made his case in columns and on talk radio, where he has fleshed out his argument in debates with #NeverTrump conservatives. (On October 8, Hewitt called on Trump to step down from the ticket, declaring that he cannot win, but he hasn't repudiated his arguments about the court.)

One of those debates was particularly clarifying for anyone trying to understand the logic that separates conservatives on opposite sides of the Trump question. Tom Nichols teaches national-security affairs at the Naval War College. He has voted for every Republican presidential candidate going back to Ronald Reagan. He is voting for Hillary Clinton because he believes that Trump is "a fundamentally unstable person," and that it would be dangerous to make him commander in chief. "I cannot entrust the Oval Office to somebody that I think has some serious emotional problems," he told Hewitt, "and who does not take the time to learn. He is not just untutored in important affairs of state, but is willfully ignorant."

Nuclear weapons were his biggest concern.

"I wrote a book about nuclear weapons," Nichols said. "Every president who gets his briefings changes if they are a normal human being. I don't believe that Trump is a normal human being. He's already promised that he would order the U.S. military to commit war crimes. When challenged, he said they'll do it, believe me. They'll do it. And then he had to walk it back. This is not a stable person. And just as you think that I'm brushing away the damage that will be done to the Supreme Court, I think like a lot of people who have come to accept the necessity of

Donald Trump, you sort of waive away his behavior like it's kind of the adolescent hijinks of a poorly-behaved 12-year-old. And I think that that's really dangerous."

Hewitt's response illustrated just how much he cares about the Supreme Court. While he avowed, "I am comfortable with the constitutional structure we have around command and control," implying Trump would be stopped before launching an ill-advised nuclear strike—in fact, that is not at all clear—the talk-radio host acknowledged Trump's unnerving ignorance about national-security policy. Hewitt noted that he himself had exposed Trump's weaknesses in past interviews. "I am the guy who asked him Quds/Kurds. I'm the guy who asked him Hezbollah/Hamas. I'm the guy that asked him nuclear triad, to release his taxes. I get it more than anyone," he said. "But," Hewitt continued, "I also understand that the Supreme Court is the headwaters of American constitutionalism, the rule of law."

Thus the disagreement between the two men.

The war professor insisted that voters should stop the candidate who poses the highest risk of nuclear catastrophe. The law professor countered that voters should stop the candidate who presents the highest risk of bad Supreme Court nominees.

Supreme Court nominations are obviously important.

But to justify ordering priorities as he does, Hewitt is forced to argue that the next one or two appointments to SCOTUS are significantly higher stakes than is typical. In his telling, "confirmation of even one Hillary Clinton nominee to the Supreme Court will turn the court in a hard left, almost certainly irreversible direction." On another occasion, he declared to John Podhoretz, "The originalist project, a.k.a. a federal government of limited and enumerated powers, is indeed on the cliff."

There are a lot of ways that Hewitt's argument could fail. If Hewitt underestimates the threat posed by Trump, his argument fails. If Hewitt is mistaken in assuming that Trump will appoint originalist judges, it fails. If he is mistaken in thinking than any Supreme Court majority is permanent or irreversible, it fails. And I've argued in prior articles that his argument *does fail* on all those grounds.

For fully fleshed out versions of those arguments, see "Why Trusting Donald Trump on Judges Is Folly" and "Donald Trump Makes Fools Of Those Who Trust His Word."

Still, it is useful to understand why Hewitt and some others are more scared of Clinton-appointed judges than an erratic, easily goaded demagogue with a nuclear arsenal. So I read all of the specific Supreme Court cases that Hewitt has cited to support his contention that even one Clinton nominee "will turn the court in a hard left, almost certainly irreversible direction" and ruin originalism forever.

The exercise underscored the ways in which the direction of the Supreme Court is a high-stakes feature of the political process, and confirmed some undeniable ways that conservatives are likely to be disappointed if more liberals join the court. But a close look at the cases Hewitt cites

also reveals another way that his "vote Trump for the sake of judges" argument fails. The numerous Supreme Court cases that Hewitt cites simply don't support his larger argument that a Clinton victory "will turn the court in a hard left, almost certainly irreversible direction."

Hewitt's characterization of the SCOTUS stakes is significantly exaggerated.

Thus, the most formidable case that Trump skeptics should support him for judges fails in yet another way. But don't take my word for it. Let's go through all the cases.

In addition to rereading them myself, I consulted with Ilya Somin, an originalist law professor at George Mason University and an adjunct scholar at the Cato Institute. Somin is a staunch proponent of the very originalist project Hewitt wants to save, and has concluded that a Trump victory would harm it more than help it. Although he bears no responsibility for my write-up, we spoke about the consequences of each case. I've quoted his expert analysis alongside my layman's thoughts below.

Michigan v. EPA

On June 29, 2015, Justice Scalia published the majority opinion in a 5 to 4 case that divided the Supreme Court's conservatives and liberals. It concerned the Clean Air Act, a law that directs the Environmental Protection Agency to regulate power plants that emit pollutants if the EPA finds a regulation to be "appropriate and necessary."

At issue was what that standard means. Could the EPA regulate a plant that emitted pollutants without weighing whether the regulation's benefits exceeded its costs?

The conservative majority said no:

> One would not say that it is even rational, never mind "appropriate," to impose billions of in costs in return for a few dollars in health or environmental benefits. EPA's interpretation precludes the Agency from considering any type of cost— including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that technologies needed to eliminate these emissions do even more damage to human health, it would still deem regulation appropriate. EPA refused to consider whether the costs of its decision outweighed the benefits. The Agency gave cost no thought… it considered cost irrelevant to its initial decision to regulate.

Concurring with the majority, Justice Thomas wrote that Scalia's opinion "demonstrates why EPA's interpretation deserves no deference under our precedents." He added, "its request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."

Justice Kagan wrote the dissent for the liberal justices. In essence, she argued that the EPA *did too* consider the costs of its actions when formulating its regulatory scheme:

The Environmental Protection Agency placed emissions limits on coal and oil power plants following a lengthy regulatory process during which the Agency carefully considered costs. At the outset, EPA determined that regulating plants' emissions of hazardous air pollutants is "appropriate and necessary" given the harm they cause, and explained that it would take costs into account in developing suitable emissions standards. Next, EPA divided power plants into groups based on technological and other characteristics bearing significantly on their cost structures. It required plants in each group to match the emissions levels already achieved by the best performing members of the same group—benchmarks necessarily reflecting those plants' own cost analyses.

EPA then adopted a host of measures designed to make compliance with its proposed emissions limits less costly for plants that needed to catch up with their cleaner peers. And with only one narrow exception, EPA decided not to impose any more stringent standards (beyond what some plants had already achieved on their own) because it found that doing so would not be cost-effective. After all that, EPA conducted a formal cost-benefit study which found that the quantifiable benefits of its regulation would exceed the costs up to nine times over—by as much as $80 billion each year. Those benefits include as many as 11,000 fewer premature deaths annually, along with a far greater number of avoided illnesses.

Despite that exhaustive consideration of costs, the Court strikes down EPA's rule on the ground that the Agency "unreasonably . . . deemed cost irrelevant."

On the majority's theory, the rule is invalid because EPA did not explicitly analyze costs at the very first stage of the regulatory process, when making its "appropriate and necessary" finding. And that is so even though EPA later took costs into account again and again and . . . so on. The majority thinks entirely immaterial, and so entirely ignores, all the subsequent times and ways EPA considered costs in deciding what any regulation would look like. That is a peculiarly blinkered way for a court to assess the lawfulness of an agency's rulemaking. I agree with the majority—let there be no doubt about this—that EPA's power plant regulation would be unreasonable if "the Agency gave cost no thought at all."

But that is just not what happened here.

This strikes me as a very weak example for Hewitt. The stakes at the Supreme Court can be very high. In some cases, jurisprudence can prevent Congress from addressing a given subject. If the court found an absolute constitutional right to abortion, for example, legislators couldn't regulate the procedure even at the latest stages. Other Supreme Court decisions are irreversible in effect if not in theory. That is, once gay marriage was declared legal, prompting millions of couples to marry, it became highly unlikely that a future Court would come along and reverse itself, because to do so would take away something that people already have.

Neither factor holds here. Had the liberals won the case, ratifying the EPA's interpretation of existing statute, Congress could have voted the next day to change its instructions to the bureaucracy, mandating that its regulators consider costs in whatever way Congress wants. Alternatively, a future president could direct the bureaucracy to change course. And the relative deference that the bureaucracy pays to the legislature isn't something that will ever be effectively

locked in. Conservatives may prefer the existing decision and be averse to seeing it overturned. But even if it was overturned, the matter would not be permanently settled any more than it is now, and Congress or a conservative president could check any excesses that flowed from the liberal precedent for as long as it was in place.

What's more, reading the majority opinion and the dissent, it seems fantastical to characterize the latter's position as "hard left," especially with so many conservatives justices hellbent on giving the national-security bureaucracy broad deference.

Rapanos v. United States

This case involves a part of the Clean Water Act that makes it illegal to discharge dredged or fill material into "navigable waters" without a permit. It defines "navigable waters" as "the waters of the United States, including the territorial seas." Federal authorities brought charges against someone for discharging material into ditches and man-made drains that eventually emptied into navigable waters.

Did the feds have jurisdiction?

The four conservatives said no, "navigable waters" does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Otherwise the feds could regulate everything.

The four liberals dissented. Come on, they said, we're talking about wetlands adjacent to navigable waters, not a drainage ditch. "The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow," Justice Stevens wrote. "The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States,'" he reasoned, "is a quintessential example of the Executive's reasonable interpretation of a statutory provision."

Justice Kennedy split the difference:

> ...in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. Because neither the plurality nor the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary.

Again, even if we presume that the conservatives have this case right on the merits, and that a future liberal court would side with Stevens, any Congress could compel the EPA to operate under a narrower interpretation, as could any president who wanted to force the issue. It is hard to see how such a hypothetical decision would be a permanent victory for anyone, let alone a permanent victory for "the hard left." Hewitt characterized the stake of these last two cases as

“losing control of the agencies.” But Congress will always retain the power to defund any agency.

What’s more, “these are both statutory cases,” Somin said of Hewitt’s first two examples, “and they both have very little to do with originalism, in part precisely because they are statutory cases. Anything that's statutory is much less likely to be reversed. And anything that's statutory is not irreversible, both because Congress can change it at any time and because in some cases, depending on the grounds, even the executive can change it. I'm frankly surprised that he's citing these two cases, because they're not constitutional, they're not likely to be reversed, and if they do get reversed, it is not at all likely that the effect would be somehow permanent.” Somin added, “Historically a lot of conservative judges have been in favor of deference to administrative agencies. That is slowly changing, but even if Trump were to appoint a conventionally conservative justice there's no guarantee that it would be someone who wouldn't show deference to administrative agencies.”

Gonzales v. Carhart

This case was about the Partial-Birth Abortion Ban of 2003, a law that forbade one method of terminating a pregnancy that is only used in second and third trimester abortions. In a 5-to-4 decision, a conservative majority upheld the law, though Scalia and Thomas hinted in a concurrence that they weren’t sure the federal government has jurisdiction under the commerce clause to regulate abortion.

Justice Ginsberg’s dissent is a fair proxy for how the case might come out with a Clinton appointee on the court. “Today’s decision is alarming … It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists,” she writes. “It blurs the line, firmly drawn in *Casey*, between pre-viability and post-viability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health. I dissent from the Court’s disposition. Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman’s health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman’s reproductive choices.”

It’s easy for me to imagine a future court striking down the Partial-Birth Abortion Ban of 2003. Doing so would affect a tiny percentage of total abortions in the United States, especially because there is another method of late-term abortion that the law does not cover. On the other hand, critics of the procedure find it especially gruesome and abhorrent. Of course, a more liberal SCOTUS would be a setback for the larger effort among abortion opponents to strike down *Roe v. Wade* and persuade majorities to ban the procedure, though that is unlikely in any case.

Will Donald Trump appoint pro-life judges? Figures far more conservative than him have failed to do so, and before seeking power, he favored legal late-term abortions:

It is still reasonable for anti-abortion activists to surmise that he is likelier than Clinton to help them on the issue. But I again fail to see how Clinton would affect this issue in an irreversible

way. Abortion is already legal and widespread. Why should pro-lifers have hope for their agenda today, but feel they've suffered an irreversible setback if Clinton wins? Future SCOTUS appointments will bear on abortion. This fight has lasted decades. Barring some new technology that transforms the entire debate, it is likely to persist for decades more. And for the record, the opposition to the pro-life position isn't just coming from the "hard left."

Says Somin, "for those of us who care about federalism and federal government power, this statute is extremely dubious in terms of its justification under the commerce clause. Indeed, Justice Thomas said so in his concurring opinion in Gonzalez. He intimated that if the plaintiffs had raised the commerce clause issue, he might have voted for them on that basis. So I think this statute is unconstitutional, though not for the reasons the Supreme Court actually gave. That said, if you're a really strong pro-life person you might say it's very important to keep this back."

United States v. Texas

The question in this case: Did President Obama act lawfully when giving the executive order that created the Deferred Action for Parents of Americans program, a step that would have delayed the deportation of millions of illegal immigrants?

My instinct is to say no.

Prior to the 2014 midterms, Obama himself avowed that the Constitution did not empower him to do exactly what he later did on immigration policy. "I am president, I am not king," he told Univision. "I can't do these things just by myself. We have a system of government that requires the Congress to work with the executive branch to make it happen." Months later he acted unilaterally anyway.

Texas challenged his executive order. A lower court blocked it. The case made it to the Supreme Court, where the justices split four to four (with Scalia already dead).

The lower court's injunction stood.

Personally, I don't want to see the people affected by this matter deported. Still, in my estimation, a court with a Hillary Clinton appointee would've pushed this case from a legally correct outcome to a legally incorrect outcome that would set a wrongheaded precedent. I've been writing about executive overreach since the Bush administration, and I concur with Hewitt that this was an attempt at it. Were immigration the only issue that touches on executive power the upshot would be clear. Where we part ways is the assumption that a conservative court will do more than a liberal court to rein in what Gene Healy calls *The Cult of the Presidency*.

Which Supreme Court trajectory would do more to keep the president within the constitutional bounds of his or her office is truly impossible to predict. It turns on factors like whether executive power is invoked by a Republican or a Democratic president, whether it would advance liberal or conservative ends, and whether the decision pertains to foreign or domestic policy. What's more, it depends on the particular justices that are involved. For example, Antonin Scalia and Clarence Thomas often voted together. But when deciding *Hamdi vs.*

Rumsfeld, which determined whether the federal courts would review habeas corpus petitions filed by War on Terror detainees, Scalia believed that the court did too little to rein in the Bush administration when it ruled that U.S. citizens must have some due process rights, whereas Thomas, alone among the jurists, was content to let the executive branch indefinitely detain U.S. citizens without judicial second-guessing.

I don't know whether a Trump or Clinton appointee would do more or less to rein in executive power. But given how many extra-constitutional measures Trump has proposed—a federal stop-and-frisk policy, killing the family members of terrorists, torture that goes beyond waterboarding, religious tests for entering the country, and others besides—it is absurd to justify a vote for him on the grounds that he is clearly more likely than his opponent to keep the executive within lawful bounds.

Somin disagrees with both Hewitt and me about the outcome in the immigration case.

"I'm with the administration on that one—I think real originalists should be with me on that rather than with Texas," he explained. "The federal statute that Obama is choosing to under-enforce is dubious from an originalist point of view. Congress, under an original meaning of the Constitution, has no general power to exclude immigrants."

As well, "originalists tend to be in favor of the unitary executive, which means that the executive should have complete authority over their subordinates, including law enforcement," he said. "The only way for the executive to exercise that authority effectively, in the modern state, is to issue generalized orders about in which situations to enforce laws. Such discretion is inevitable because we have vastly more federal laws and vastly more people violating federal laws than we can possibly enforce. So if you believe in the unitary executive, you should support constitutional doctrine that allows the executive to issue systematic instruction, not just case by case ones. And if you believe in the original meaning of the scope of federal power, you should be against the doctrine, which does have precedent going back 100 years or more, that Congress has a generalized power to exclude immigrants, for much the same reason that you should be against the view that Congress has generalized power to exclude anything that might move intrastate. The two arguments are non-originalist and have a very similar structure."

District of Columbia v. Heller

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This case affirmed that the amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." It argues that "the Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms."

Here is the beginning of Stevens's dissent:

The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right. Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does*encompass the right to use weapons for certain military purposes.

Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States* v. *Miller* provide a clear answer to that question.

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

The case was a victory for gun-rights advocates and will thwart some attempts at gun control. It's easy to see why many conservatives don't want it overturned. But it is hard to understand why Hewitt believes both that the 2008 gun-rights victory was so provisional that it will almost certainly be overturned if one or two liberals are appointed to the court … and that, in contrast, such a liberal victory overturning the precedent, which didn't exist until a few years ago, would be irreversible.

The same logic would seem to apply to another gun case, *McDonald v. City of Chicago*, which affirmed in 2010 that the Second Amendment applies to the states.

Somin agrees with Hewitt and me that Heller is good law, but argues that its importance is being overstated:

I am a strong supporter of *Heller*. But I also think it is a decision that has had very little effect and does not seem likely to have more effect in the near to medium term future. *Heller* and *MacDonald* between them struck down only the most extreme forms of gun control, completely forbidding people to own guns in the home, which happens in very few jurisdictions. And the text of *Heller* is riddled with exceptions. Lower courts hearing cases since then have really taken up those exceptions and run with them. From the standpoint of 90 to 95 percent of what's politically feasible in terms of gun control, *Heller* has very little effect on it.

It still does matter because there's a chance the court could build on*Heller* in the future, 30 years from now, and make it stronger, so I'm not going to say that overruling it doesn't matter. But it matters a lot less than perhaps Hewitt thinks it does. And I'm not convinced it really would be overruled, partly because the court hesitates to overrule precedent when they can get around it.

Here, what I think they would be more likely to do in a future case is to say there is an individual right but it just doesn't encompass whatever is being challenged. That would make the right pretty hollow. But it already is hollow the way that it is being interpreted now. So I think it is more likely that a new Democratic nominee would interpret *Heller* narrowly rather than overrule it.

Somin adds that Trump has embraced the position that anyone who is on the no-fly list should lose the right to own a gun. Since that list is assembled in secret using opaque criteria, a court case upholding it would set a worrying precedent for gun rights, indeed. "If you think that is constitutional," Somin says, "you will accept virtually any other form of gun control that is actually likely to be enacted. That constraint is so ridiculous and dubious that if you think it's justified you'll probably go along with anything else except complete confiscation." Still, he said, from his libertarian originalist viewpoint, it is "a bit more likely on average" that a Trump appointee will be better than a Clinton appointee on the right to bear arms.

Citizens United

Should citizens critical of a political candidate be allowed to make and air a movie opposing him or her? And should they be allowed to advertise that movie on television, even if they've adopted the structure of a non-for-profit corporation to do so?

Somin and I say yes. Most Democrats and some Republicans say no.

"Yes, that will probably be overruled. You know who wants to overrule *Citizens United*? A certain Mr. Donald Trump. He has said several times that he supports getting rid of it," Somin said. "It would be a bad thing if it were overruled. And it's a highly vulnerable decision. It's very unpopular with the public. Before *Citizens United*, there was more campaign finance regulation than is just. There was a threat of more being done. On the other hand, it's not like the First Amendment was fully gutted or the republic wasn't functioning. The real harm, if it were overturned, would be to open the door to harmful campaign finance legislation in the future that would go beyond some of the stuff in McCain-Feingold and the like. So long as we have divided government, that sort of legislation is unlikely to pass. But I agree. *Citizens United* is highly likely to be overruled. It is more likely with Hillary Clinton than with Donald Trump but with Trump, he's shown he's against the decision."

Burwell v. Hobby Lobby

In the words of the Supreme Court, the Religious Freedom Restoration Act of 1993, also known as RFRA, prohibits the government "from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Hobby Lobby, a chain of craft stores organized as a "closely held for-profit corporation," argued that an interpretation of Obamacare unduly burdened its free exercise of religion by forcing it to pay for contraceptive care for its employees.

The Supreme Court agreed.

It found that "the owners of three closely held for-profit corporations have sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point."

And in a 5 to 4 decision, the court ruled both that closely held corporations can seek protection under RFRA, and that the governmental mandate is not the least restrictive means of furthering its interest in guaranteeing access to contraceptive care.

Says Somin, "This is another statutory case. Again, because it's a statutory case, it is less likely to be overruled, and if it is overruled it doesn't matter as much. And the range of people in businesses affected by this decision is actually pretty narrow."

Stepping back, it's worth pointing out that those who want to protect the rights of religious minorities in the United States should be wary of electing a candidate like Trump who has made restricting the rights of a particular religious group, Muslims, a central part of his campaign. It is easy to imagine a trajectory in which the rights of all religious groups are constrained because Trump succeeds in passing a law targeting Muslims that the Supreme Court signs off on, perhaps after a terrorist attack. Certainly no candidate seems as likely to attempt to impose a religious test in public life, or to appoint justices sympathetic to such an effort.

The Federalism Revival

After former Chief Justice William H. Rehnquist died, Ilya Somin summed up his legacy in a piece at the Cato Institute. "From the 1930s until 1995, the Supreme Court implausibly held that the constitutional provision granting Congress the power to 'regulate Commerce… among the several States' gave the federal government virtually unlimited power to regulate anything that might conceivably have even a slight impact on commerce," he explained. "This dubious conclusion flew in the face of both constitutional text and common sense."

Rehnquist, he wrote, "amended this decades-old judicial error."

In *United States v. Lopez*, Alfonso Lopez Jr., a 12th grader in San Antonio, Texas, was arrested for bringing an unloaded gun to school. He was charged with violating the Gun Free School Zones Act of 1990, but argued that he should get off because the law was unconstitutional: the part of the Constitution that allows Congress to regulate interstate commerce hardly covered prohibiting guns near schools.

The Rehnquist court agreed. It struck down the law and limited the federal laws that the commerce clause could be used to justify for the first time since the New Deal.

In a case that set a similar precedent, *United States v. Morrison*, the Supreme Court struck down parts of the Violence Against Women Act because, it reasoned, gender-motivated violence does not fall under the purview of interstate commerce, and is therefore a matter that is properly legislated by state and local governments. In Hewitt's telling, these cases "saved federalism," and federalism will be lost if they are overturned. This is peculiar, in that he believes limits on the commerce clause were resurrected circa 1995 after more than 60 years of near death … but that Clinton's appointees would strike a permanent blow against them.

In Somin's estimation, "Liberal appointees would tend to interpret those cases narrowly rather than overturn them. You saw a preview in Ginsburg's concurring opinion in the individual mandate case and what Stevens did in *Gonzalez v. Raich*."

Stepping back, the larger cause of states being allowed to make policy doesn't align neatly with ideological factions. If one wants states to be allowed to make their own immigration, drug, or assisted suicide policies, for example, a Democratic president would seem somewhat likelier to be friendly to local experiments than a Republican president. That calculus reverses itself for a host of other issues.

Conclusions

I don't think Trump's promise to appoint originalist judges can be trusted. Beyond his general untrustworthiness—see his shabby treatment of ex-wives, various business partners, contractors, and creditors—the agenda he has set forth for America is too antithetical to originalism in too many ways to count on judicial appointees who would strike down his own actions as president. Plus, the last weeks of his campaign have shown his contempt for the Republican establishment. It is increasingly hard to imagine that, if elected, he would appoint the sorts of judges that Senate Republicans would prefer or feel bound by any promise to them. And say that Hewitt could choose the judges in a Trump administration. Even then, his argument for supporting someone as irresponsible and unqualified as Trump—because otherwise his opponent will permanently and irreversibly destroy originalism—fails on its own terms, based on the cases Hewitt cited.

Conservatives will certainly suffer losses under a Clinton court. But Hewitt's apocalyptic predictions, made in service of convincing people who are deeply uncomfortable with Trump to support him anyway, significantly overstate the importance of statutory cases, invokes decisions that divide staunch originalists as if they are a clear blow against the judicial philosophy, treats some prospective decisions as irreversible when they could easily go the other way under a future court, and ignores the larger context of how Trump would undermine the originalist project.

Says Somin of those broader worries:

> Though Trump is indeed ignorant about the Constitution, ignorance does not imply indifference. To the contrary, he has a wide-ranging repressive agenda that would undermine the Constitution at many points… For many years, Trump has sought to undermine freedom of speech (in order to shut down his critics) and constitutional property rights (in order to empower government to seize property for transfer to influential developers, including himself). He also wants to gut

constitutional constraints on executive power, in numerous areas – going even farther in that respect than Bush and Obama. Much of this is a result of his deep authoritarian streak, exemplified by his longstanding admiration for brutal tactics of foreign strongmen like Vladimir Putin and the Chinese communists who perpetrated the Tiananmen Square massacre.

The list of unconstitutional policies promoted by Trump increases almost daily. Just in the last two weeks, he has advocated gutting the Sixth Amendment rights of terrorism suspects (including even US citizens with no known connections to foreign terrorist groups) and outlined a maternity leave policy that includes unconstitutional sex discrimination.

Given these types of commitments, it seems likely that Trump will seek to appoint judges who will allow him to do what he wants in all these areas, not originalists or limited government conservatives who might rein them in. No president wants judges who will stand in the way of his preferred policies. It is highly unlikely that Trump will prove an exception to that pattern. It would be a mistake to expect GOP senators to stop Trump from appointing the types of judges he prefers. Few senators are profiles in courage, and it is rare for them to oppose major parts of the agenda of a president of their own party – especially not after he has won what would be a major, unexpected political victory for them.

Even worse than Trump's immediate agenda is his potential long-term impact on the Republican Party and its judicial philosophy. Trump seeks to transform the GOP into into a European-style big-government nationalist party... such a party would have little use for originalism, free markets, property rights, or constitutional constraints on government power, more generally.

The argument that conservatives reluctant to vote for Trump should hold their noses, for the sake of judicial appointments, has an air of plausibility in the abstract.

But a close analysis of actual cases shows that four years of Hillary Clinton will no more permanently or irreversibly change the Supreme Court than did 8 years of Ronald Reagan or Barack Obama—and that a Trump victory would as likely mean setbacks for originalism than advances for the judicial philosophy, given undeniable aspects of the erratic billionaire's agenda. Conservatives who care about the Supreme Court should not hold their noses and vote for this egregiously unfit candidate. Indeed, a Trump loss may be their best chance to successfully fight another day.