The Mirage of Originalism

Charles Lavine, chair of the New York State Assembly Judiciary Committee, critiques the rise of originalism and its influence on Supreme Court decisions.

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By Charles Lavine

Captain Renault: What in heaven's name brought you to Casablanca?

Rick: My health. I came for the waters.

Captain Renault: The waters? What waters? We're in the desert.

Rick: I was misinformed.

—Casablanca, 1942.

Inscribed at the entrance of the National September 11 Memorial & Museum in Lower Manhattan are Virgil's poignant words: "No day shall erase you from the memory of time." Americans remember that day. No great nation forgets its past, whether that past is painful or comforting. We study the lessons of our history as we strive to become a more perfect union. History, truth and American democracy are inextricably intertwined.

That belief, however, stands in stark contrast to the view expressed by Attorney General William Barr during a May 7, 2020, response to a journalist's question about how history would judge him for dismissing the criminal case against President Donald J. Trump's former national security advisor Michael Flynn: "History is written by the winners, so it largely depends on who's writing the history."

Flynn had pleaded guilty to the felony of willfully and knowingly making false statements to the FBI about his conversations with a Russian spy. Trump pardoned Flynn on November 25, 2020. His 22-day tenure as national security advisor is the shortest in history.

The corruption of truth is relevant to our consideration of how the judicial theory of originalism has impaired the ability of American law to protect our people from the clear and present danger of gun violence.

It is relevant as well in the context of cynical contemporary efforts to whitewash America's history for crass partisan advantage.

Originalism

Professor Erwin Chemerinsky, distinguished Dean of the University of California Berkeley Law School, is a foremost voice warning of Originalism's threat to American Democracy: "Despite [so-called] originalists pretending that their theory was ordained at the founding, Chemerinsky traces originalism to a 1971 law review article written by Robert Bork, who in 1987 would suffer a humiliating rejection as a nominee to the Supreme Court. But Bork, who died in 2012, may have had the last laugh. In his article, he argued that the Supreme Court should protect only those rights that are explicitly stated in the Constitution or were clearly intended by its drafters. 'The judge must stick close to the text and the history, and their fair implications, and not construct new rights,' Bork wrote. He argued that the court was wrong to protect a right of privacy—including a right to purchase and use contraceptives—because these rights are not mentioned in the Constitution and, according to him, were not intended by the Framers." Stephen Rohde, review of Erwin Chemerinsky's "Worse Than Nothing: The Dangerous Fallacy of Originalism," Los Angeles Review of Books, November 23, 2022.

Dean Chemerinsky is accurate in stating that the concept of "originalism" lacks historical roots and is of recent manufacture.

In his classic 1971 book "The Rights of Americans, What They Are-What They Should Be," legendary New York University Law School Professor Norman Dorsen dealt with every then significant constitutional issue. Neither the word 'originalism" nor any even remotely oblique reference to it is mentioned.

Black's Law Dictionary dates 1980 as the year of the theory's origin.

"Justice Antonin Scalia would become the primary exponent of originalism during his three decades on the court. In case after case, he claimed that originalism ensured 'a rock-solid, unchanging Constitution.' When non-originalists argued that the Constitution was a 'living' document to be interpreted according to evolving standards of decency and justice, Scalia was fond of responding that the Constitution is 'dead, dead, dead.' Chiding his critics for not having their own theory, he boasted that at least originalism was a theory of interpretation. In response, Chemerinsky titled his book 'Worse than Nothing." Rohde, ibid.

The Guns of Originalism

"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." United States Constitution, Amendment II. Scalia's 2008 opinion in District of Columbia v. Heller held that the Second Amendment protects an individual right to possess a firearm unconnected in any way with service in a militia, overruling long-standing legal precedent. While determining that a firearm could be possessed for traditionally lawful purposes, such as self-defense within the home, Scalia did explicitly rule that the Second Amendment right was not unlimited.

Scalia's opinion is full of historic references attempting to bolster his determination that contemporary considerations rendered insignificant the Amendment's inclusion of language providing "A well-regulated Militia, being necessary to the security of a free State."

The self-proclaimed textualist and originalist reasoned that present day "Logic demands that there be a link between the stated purpose and the command." Finding none, Scalia writes that "It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified; to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution." He then referenced "the historical reality that the Second Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors."

While he concluded that there was no longer a contemporary need for any such linkage, he repeatedly emphasized that the right to keep and bear arms was not limitless.

Scalia, who died in 2016, may not have anticipated the complications that would arise in Justice Clarence Thomas' 2022 decision in New York State Rifle & Pistol Assn v. Bruen requiring courts to determine whether modern firearms regulations are consistent with not only the Second Amendment's text as understood by the drafters, but consistent as well with what he deigned to be the Amendment's historical understanding.

Bruen reinforced Heller's establishment of an individual's right to possess a firearm entirely unrelated from anything at all having to do with "a well-regulated Militia."

Challenged Second Amendment regulations are now arguably unconstitutional unless they have a historical precedent or a "relevantly similar" historic analogue at the time of the adoption of the Constitution and Bill of Rights or at the time of the adoption of the Civil Rights Amendments between 1865 and 1870.

Some may consider Bruen as foreclosing any possible interpretation of the Second Amendment's prefatory clause as somehow limiting firearm possession and as turbocharging Heller's decree that gun ownership is a separate, seemingly unconstrained individual right that must recognized and protected.

We are left to wonder whether Bruen effectively undermines Scalia's ruling in Heller that the Second Amendment has its limitations.

There is no small amount of irony in that inquiry. Scalia died in 2016, six years before Bruen was issued.

Though we will never know how Scalia might have decided Bruen, I had the opportunity to attend a conference at Hofstra University School of Law several years ago at which Leon Friedman, a highly respected professor of American Constitutional law and a friend of Scalia, spoke about a conversation he had with the Supreme Court Justice after Heller was decided in 2008.

Friedman asked if Scalia feared that his opinion would open the floodgates to more gun violence. Responding with a warm smile and one of his favorite quips, Scalia said: "Leon, I am a constitutionalist and an originalist, I am not a nut!"

Notwithstanding Scalia's wry sense of humor, Bruen now presents a daunting challenge, perhaps even a possibly impossible challenge, for legislatures struggling to regulate firearm possession to protect the lives and safety of their citizens.

With that in mind, efforts to regulate firearms for the purpose of public safety, technological advancement, or rising rates of gun violence are arguably outside the scope of the test Bruen established.

Bruen overturned New York's Sullivan Act of 1911, which criminalized possession of a handgun in public without a permit. The Sullivan Act gave the state discretion to issue open carry permits based on the totality of the circumstances for each individual application. Declaring the Sullivan Act unconstitutional, the Supreme Court overturned over a century of administrative practice and jurisprudence.

Other firearm regulations passed in the years after the Sullivan Act could now be subject to Bruen attacks. Laws like The National Firearms Act of 1934, which included significant regulation on civilian ownership of automatic weapons, the 1986 Firearm Owners' Protection Act, banning ownership of automatic weapons built after its enactment, and the Gun Control Act of 1968, which required that firearms had to be serialized for the purposes of aiding law enforcement to investigate crimes.

Each of those laws were passed to regulate firearms for the purpose of public safety. 1934 was the era of Bonnie and Clyde and Al Capone and technological advancement of weapons. A widely viewed photo of the day depicted Clyde Barrow holding his Browning Automatic Rifle. The widespread utilization of Uzi sub machine guns by drug cartels in the 1980's and the rising rates of gun violence resulted in the law requiring serialization of firearms.

While we do not know if any of those long-standing laws will be overturned, it is obvious that the high court is attempting to significantly restrict the legislative actions that states can take to regulate the proliferation of firearms.

Those of us who battle to protect the public from gun violence in the legislative arena must now confront a newly established set of Supreme Court manufactured high hurdles.

This gives me great concern. The Scott J. Beigel Unfinished Receiver Law makes ghost or homemade guns illegal in New York. I wrote that bill and am truly proud that Governor Kathy Hochul signed it into law. It is named to honor the hero teacher who sacrificed his own life to protect the lives of his students at Marjory Stoneman High School in Parkland, Florida in 2018. Linda Beigel Schulman, Scott's mother, is a leading national advocate for gun safety. She is a dear friend. This is for me a personal matter.

Because homemade firearms were not unlawful in either 1791 or in Post Civil War America, I fear that someone could challenge that law on Bruen grounds.

New legislation will have to be done in small steps. The sweeping regulations found in laws like the Sullivan Act have clearly fallen out of the Supreme Court's favor. This means that new regulations will need to be much more narrowly drawn to escape being overturned. It also paints legislatures into a corner. There is now only a very narrow window of history to which we can look to find analogous firearm regulations, and those regulations were intended to cover antique firearms like flintlock pistols and muskets. While regulations existed in some then contemporary context, it will be very challenging to identify those that could have potential utility, especially when the historical regulation was targeted at weapons that could only be discharged at no more than 4 rounds a minute.

It will be an entirely separate challenge to persuade a right-wing Supreme Court majority of the accuracy of any such historic research.

Peculiar Symmetry

The intersectionality of two components may help to account for originalism's devotion to the new found expansion of gun rights.

In 2010, Columbia Law Professor Jamal Greene published "Guns, Originalism, and Cultural Cognition" in the Journal of Constitutional Law, Vol. 13.2 Dec. 2010, 511: "When the Supreme Court held in District of Columbia v. Heller that the Second Amendment protects an individual right to carry a handgun for self defense, the longstanding marriage between guns and originalism was finally consummated. The majority's unapologetic devotion to originalism has been well-documented. On its face, Justice Scalia's opinion for the Court rests on a contested assumption about interpretation that he has spent much of his public life defending: namely, that the original meaning of constitutional text controls modern interpretation, even if that meaning has come unmoored for the purpose behind codification or is inconsistent with contemporary public values. Since the Second Amendment declares its ends in the preamble—'A well-regulated militia, being necessary to the security of a free State'—the Heller Court's disregard of purpose in favor of original meaning could not have been more transparent." (512).

Greene "argues that originalism's stubborn hold on pro-gun rights arguments may not be direct, but may instead result in part from a shared cultural orientation between originalist and gun rights proponents. That is, the appeal of deploying originalist arguments to establish a right to carry a gun may not derive from an independently persuasive account of the history of the Second Amendment. Rather, I suggest, the appeal of originalist arguments in this context, derives in part from the shared cultural values of those to whom both originalist and gun rights arguments appeal. The cultural orientation that predicts attitudes in favor of gun rights significantly overlaps with the one that predicts attitudes in favor of originalism. The complex political process through which both gun rights and originalism have been pitched to the American public over the last quarter century has accordingly availed itself of a bond between the two sets of ideas that resists empirical deconstruction. Originalism is the preferred methodology, not because it supplies the best arguments, a priori, in favor of constitutional gun rights, but because it supplies the most resonant interpretive language through which gun rights proponents discuss the Constitution." (514).

While Professor Greene's thesis is fascinating and eminently reasonable, there may yet be another more venal rationale for originalism's popularity with some of our Supreme Court Justices.

The Supreme Court's originalist cohort is composed of Chief Justice John G. Roberts and Associate Justices Clarence Thomas, Samuel A. Alito, Jr., Neil M. Gorsuch, Brett M. Kavanaugh, and Amy Coney Barrett. The five associate justices are either current or former members of the Federalist Society. The Chief Justice denies ever having been an actual member but does concede that he once served on the steering committee of the Washington, D.C., chapter.

According to the Federalist Society's website, it was founded in 1982 by "conservatives and libertarians dedicated to reforming the current legal order. We are committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."

"What the law is, not what it should be," is a cliche for the right's grievance and revulsion of the Warren Court's perceived expansion of the rights of Americans.

Nor should it come as an epiphany that the Federalist Society and the theory of originalism were both conceived in the early 1980's, their midwife being rightist outrage over the Warren Court. Conservatives in the 1960's had produced thousands of "Impeach Earl Warren" bumper stickers. Arizona Senator and 1960 Republican presidential candidate Barry Goldwater continually hectored that the Supreme Court had usurped too much power. Limiting the Court's authority with the expectation of reversing the vexing recognition of rights became the lifeblood of the conservative movement.

In 2019, the Washington Post published an expose on Leonard Leo, a long-time conservative activist, the former Vice-President of and current member of the board of directors of the Federalist Society.

Leo is a prodigious fundraiser for right wing causes. Leo counselled Justice Thomas during his confirmation hearings in 1991 and Justices Roberts and Alito in 2005. He worked closely with President Trump to appoint Justices Gorsuch, Kavanaugh and Amy Coney Barrett. Leo and his colleagues have provided millions for nonprofits from contributors not legally required to disclose their identities. The Post wrote that "Between 2014 and 2017 alone, they collected more than $250 million in such donations, sometimes known as 'dark money.'" America Engaged is described by the Post as being one of Leo's groups: "In 2017, America Engaged passed on almost $1 million to the lobbying arm of the National Rifle Association. That same year, the NRA announced a $1 million ad campaign in support of Gorsuch. The ads targeted lawmakers in Montana, Indiana, Missouri and North Dakota who had supported Obama's calls for gun control. 'Your freedom is on the line,' the ads stated."

To be sure, there may be some internal "shared cultural orientation between originalists and gun rights proponents." It is, however, difficult to imagine that the millions that flow to the Federalist Society because of its relationship with the NRA play no role whatsoever in the philosophical underpinnings of the conservative justices who serve because they owe their positions in no small measure to the Society.

Questioned in 2016 about the type of people he would appoint to the Supreme Court, Trump stated, "We're going to have great judges, conservative, all picked by the Federalist Society." (Detroit Legal News Aug. 29, 2025). That remark must have brought smiles to Mr. Leo and the members of the Federalist Society.

Trump's candid admission is not referenced to in any way attack the integrity of the Supreme Court's rightist jurists. One would, however, need to be utterly naïve and uncritical to assume that our sophisticated justices do not know which side their bread is buttered on.

Originalism's Original Sin

When I practiced law, I was once was appointed to advise, not represent, a man charged with a very serious crime who had determined that it was imperative for him to be his own lawyer at trial. He had decided to testify on his own behalf.

The trial judge ruled that the defendant would have to ask himself questions on direct examination and then respond with answers.

Preparing him to testify, I suggested he begin by describing his background, then relate his family, social and employment history before explaining to the jurors why he was innocent.

Taking the witness stand in a hushed courtroom, he breathed a deep sigh and then asked: “John Doe, how did you get in all this trouble in the first place?”

When we talk about the problematic legacy of Heller and Bruen, the answer to how we got into all this trouble in the first place is readily apparent, every bit as obvious as the proverbial elephant in the room and that elephant is the myth of “Originalism.”

Having become a fad in the 1980’s, originalism’s original sin is that it is a contrived, artificial, fake and anti-historic manipulation manufactured to unnecessarily constrain the viability of our American Constitution.

The founders intended the Constitution to be living and organic. It embodied their aspirational philosophy and their hope for America’s future.

Contrary to Justice Scalia’s quip that the Constitution is “dead, dead, dead,” the Constitution’s drafters were not about to “mutually pledge to each other” their “Lives… Fortunes, and…sacred Honor” to write a simple last will and testament. To their credit, they capitalized the words ‘Lives, Fortunes and Honor.’

Originalism goes hand in hand with fundamentalism. Everything is either black or white. There is no gray, there is no nuance. It is a perversion of constitutional history, not just the history of the United States Constitution, but of the noble reasons for having constitutions, both written and unwritten, in the first place.

Our Constitution is a product of both English Common Law, which included considerations of natural law and equity and of the values of the Enlightenment which elevated science and reason over superstition and ignorance with the goal of advancing individual dignity.

I Was Misinformed

Legal scholars and leading historians have sharply criticized Justice Thomas’ selective use of gun regulation history as a basis for his decision in Bruen.

The following are only a few of the noted legal scholars who reject Bruen’s historic analysis: University of California Berkeley School of Law Dean Erwin Chemerinsky; Eric J. Segall, Ashe Family Chair Professor of Law at Georgia State University College of Law; Jacob D. Charles, Associate Professor of Law, Pepperdine University Caruso School of Law & Affiliated Scholar, Duke Center for Firearms Law, Duke University School of Law; Jamal Greene, Dwight Professor of Law at Columbia Law School; and, Noah Feldman, Felix Frankfurter Professor of Law at Harvard Law School and President of the Harvard Society of Fellows.

Many leading historians share the view that Thomas’ analysis of American history is partisan and distorted. Among them are Saul Cornell, Paul and Diane Guenther Chair in American History at

Fordham University and Director of the Second Amendment Research Center at the John Glenn Institute; Robert Spitzer, Political Science Professor Emeritus of the State University of New York at Cortland, visiting Professor at Cornell University and William and Mary Affiliated Scholar; Brian DeLay, Assistant Professor of History at the University of California, Berkeley; and, Jonathan Gienapp, Professor of History and Law at Stanford University.

It is highly unusual for so many learned voices to stand together to speak out against an abuse of the authority of our currently composed Supreme Court.

Americans have lost faith in the Roberts Court. According to the Pew Research Center, favorable views of the Court are at a 30-year low. The Gallup poll notes that 56% of Americans disapprove of the Court and only 39% approve. The Court is seen as a rubber stamp for and protector of an unpopular president.

It comes as no surprise that the Supreme Court Justices of 30 years ago were not indebted to the Federalist Society, the NRA or any other right-wing entity.

Another element accounting for the lack of faith in the Roberts Court is that Heller and Bruen's casuistry have led Americans to believe they are helpless to stanch the carnage of gun violence. Despite conservative Supreme Court nominees promising to abide by precedent during Senate hearings, in 2022 they overruled national abortion rights in Dobbs v. Jackson. Never before in American history had any Supreme Court gutted a fundamental constitutional right.

American democracy must be predicated on truthful evaluations of our history. Originalism's rigidity and its idolatry of form over substance lends itself to cynical gamesmanship.

Originalists believe that if something isn't explicitly written in the constitution, it isn't allowed. The irony is that originalism is entirely non-original. Our founders risked their lives and devoted great intensity and effort in drafting our Constitution. Had they even the slightest inclination to restrict Americans solely to the specifically enumerated rights, they were certainly skilled enough wordsmiths to have made that obvious.

Had that been their intent, they would never have wasted their time writing and enacting the Ninth and Tenth Amendments:

- "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Amendment IX.
- "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Amendment X.

Much like Casablanca's Rick Blaine, the Supreme Court's conservative majority was "misinformed." There are no originalist waters to be found in our nation's capital.

Let us now consider how the fraudulent historic reasoning in Bruen plays out in the larger context involving the current misrepresentation and manipulation of American history.

The Whitewash

“To abandon facts is to abandon freedom. If nothing is true, then no one can criticize power, because there is no basis upon which to do so. If nothing is true, then all is spectacle. The biggest wallet pays for the most blinding lights.” Timothy Snyder, On Tyranny.

On Aug. 19, 2025, President Donald Trump wrote on Truth Social that, “The Smithsonian is OUT OF CONTROL, where everything discussed is how horrible our Country is, how bad Slavery was.”

That comment is deeply painful to every American of good faith. It is shameful that any American would express such sentiment, let alone our president.

Whitewash is an interesting word. Merriam-Webster online tells us it has several meanings. It can mean “to whiten with whitewash,” as in painting a fence, reminiscent of Mark Twain’s “The Adventures of Tom Sawyer.”

There are, however, more malevolent definitions: “To gloss over or cover up something such as a record of criminal behavior; to exonerate someone by means of a perfunctory investigation or through biased presentation of data; to alter something in a way that favors, features, or caters to white people; such as to portray the past in a way that increases the prominence, relevance, or impact of white people and minimizes that of nonwhite people;” and finally “to alter an original story by casting a white performer in a role based on a nonwhite person or fictional character.” Trump and his followers are now engaged in a full-fledged effort to “whitewash” our nation’s history.

Produced in the spring of 1863, one of America’s most famous photographs is attributed to McPherson & Oliver. It is known as “The Scourged Back” and depicts a man likely named Peter Gordon. It was taken in a Union military camp along the Mississippi River, to which the enslaved man had taken refuge. The profile of his face projects dignity, strength and resolve. His back is a mass of vicious scars as punishment imposed for having escaped from his slaveholder. The photo bears stark witness to slavery’s devastation, awful terror and gut-wrenching horror. On March 27, 2025, Trump issued “Executive Order 14253—Restoring Truth and Sanity to American History.” It mandates that the United States Department of the Interior remove material that “inappropriately disparages Americans past or living (including persons living in colonial times) and “instead focus on the greatness of the achievements and progress of the American people.”

Pursuant to Trump’s order, the New York Times reported that the National Park Service was directed to remove material related to slavery and Native Americans, including Peter Gordon’s photo.

Workers at the Manassas National Battlefield Park in Virginia were ordered to remove a sign that noted the mirage of the Confederacy's prejudicial "Lost Cause" folklore, falsely claiming that state's rights and not slavery was responsible for the "war of northern aggression."

Trump's Order empowers an authoritarian movement recently ignited in state governments. Florida in 2023 pushed for changes in education courses to teach "how slaves developed skills which, in some instances, could be applied for their own personal benefit." Governor Ron DeSantis opined, "I think that they're probably going to show some of the folks that eventually parlayed, you know, being a blacksmith, into doing things later in life."

Nor is Florida alone in censoring the teaching of history. It has been joined by Alabama, Arkansas, Georgia, Idaho, Iowa, Kentucky, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Utah and Virginia.

Harvard Professor and Pulitzer Prize winner Annette Gordon-Reed, who serves as president of the Organization of American Historians, observed: It's an attempt to play down or downplay what happened in the United States with slavery…This is a whitewashing of history."
Trump's Executive Order was the subject of a Sept. 19, 2025 editorial in the South Dakota Standard: "Trump supporters are encouraged to note any exhibit, placard or display that they believe presents a less-than positive narrative. The Smithsonian exhibit that deals with Trump's two impeachments during his first term has been taken down and will be substantially rewritten. The National Museum of African American History and Culture, which is a fairly recent addition to the Smithsonian complex, could be reduced to a few exhibits that display anodyne platitudes. Future historians who are looking for primary source material about slavery, Japanese internment camps during World War II, or the devastation of Native villages in Dakota Territory may have a more difficult search in the future. It's probably true that most American historians have a politically progressive bias.

Ideally, our universities should allow a robust debate among various ideological perspectives. David Blight, who is a Pulitzer Prize-winning professor of American history at Yale University, has characterized Trump's executive order as "nothing less than a declaration of political war on the historians' profession, our training and integrity."

There was nothing good about slavery, which perpetuated a cruel economic system in which white slaveholders mortgaged and sold their own children. There is no honor in slavery's history. Attacking America's struggle for civil rights and equality may be pleasing to a MAGA base, but it rejects our nation's solemn obligation to teach our children the truth. Without the truth, our struggle to establish a more perfect union and our ability to remain, as Lincoln put it, "earth's last best hope" is in mortal peril.

Just as Trump tries to rewrite history, the champions of the theory of originalism engage in that same sleight of hand in a blatantly partisan effort to manipulate the past to falsely promote their political ideology.

Every American of good faith must anticipate more Supreme Court rulings undermining democracy.

Supreme Court Justice Clarence Thomas delivered alarming remarks at the Catholic University of America's Columbus School of Law in Washington D.C. on September 25, 2025. Thomas asserted that settled legal precedent, the doctrine of stare decisis, is not to be taken as the "gospel," being "something somebody dreamt up and others went along with."

William Shakespeare long ago wrote: "What's past is prologue." Thomas' determined disregard for the time-honored adherence to precedent is not to be taken lightly.

At their Senate confirmation hearings, Justices John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett each said that they would respect the principles of stare decisis and precedent.

That measure of respect proved to be insufficient to dissuade them in 2022 from deciding Dobbs v. Jackson, overturning the half century old case of Roe v. Wade, rejecting abortion rights for Americans.

The American Bar Association defines the rule of stare decisis as "a Latin term that means 'let the decision stand' or 'to stand by things decided'—is a foundational concept in the American legal system. To put it simply, stare decisis holds that courts and judges should honor 'precedent'—or the decisions, rulings and opinions from prior cases. Respect for precedence gives the law consistency and makes interpretations of the law more predictable—and less seemingly random."

Promoting consistency, reliability and regularity, the rule of stare decisis is a guardrail prohibiting judges using their immense power in an arbitrary and capricious manner. It is a rampart protecting the integrity of our courts. It inspires public trust in our judicial system. Anyone finding themselves in a court of law, thanks to stare decisis, can expect to be treated equally with anyone else when judges apply the law to the facts of their case.
There is now evident danger that the Roberts court will continue to jettison precedent that does not meet its ideological and political standards, sowing the seeds of needless chaos and confusion.

The founders who wrote our Constitution were appalled that England had governed arbitrarily and capriciously, with the Declaration of Independence containing a litany of "a history of injuries and usurpations" designed to visit "an absolute Tyranny over these states."
With public faith in our Supreme Court enduring a 30-year drought, judicial attempts to attack adherence to precedent presents an imminent threat to democracy.

I'd Hammer Out Danger

“Who controls the past controls the future. Who controls the present controls the past.” — George Orwell, 1984.

The Roberts court culled our history to justify its rejection of the Second Amendment’s introductory clause.

President Trump’s policy to “erase…from the memory of time” historic material that “inappropriately disparages past or living (including persons living in colonial times) and instead focus on the greatness and achievements and progress of the American people” is simply a construct that corrupts and perverts our history.

Americans of good faith will challenge the administration’s attempts to move our nation towards an autocracy.

That battle will take place in the polling booth and in the courts.

Our Constitution, which is the heart and soul of our Democracy, is in mortal danger when our American judicial system is presided over by originalists.

Our founders wanted the Constitution to be living and organic, perpetuating their aspirational philosophy and their hope for America’s future.

Contrary to Justice Scalia’s quip that the Constitution is “dead, dead, dead,” the founders were not about to “mutually pledge to each other” their “Lives…Fortunes, and…sacred Honor” drafting a simple last will and testament.

If our Constitution is indeed “dead, dead, dead,” then it is time to write America’s obituary. No American of good faith is prepared to let that happen.

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