

In other words, it looks to the clear meaning of the Constitution, what the Founding Fathers meant. They say that over and over again: Just look to the Constitution and read it, and then we will know what we should do. That was in a speech that was given by Edwin Meese, the then-Attorney General in 1985, who explained the Federalist Society's credo.

On its face, it sounds at least arguably defensible that there would be an organization that is so committed to the Constitution that it wants Supreme Court nominees who will follow it as literally as possible. Yet, as Justice William Brennan on the Supreme Court said, if they think they can find in those musty volumes from back in the 18th century all of the answers to all of the questions on the issues we face today—here is what he called it—that is arrogance posing as humility.

Yet that is what they said the Federalist Society was all about. If that were all the Federalist Society were about, then I guess one could argue that they ought to have their day in court, their day in choosing someone for the Supreme Court, but it is more than that. When you look at those who finance the Federalist Society—and it is a short list because they refuse to disclose all their donors—you see the classic names of Republican support: the Koch brothers, the Mercer family, the Richard Mellon Scaife family foundation, the ones who pop up over and over again. Why would these organizations be so determined to pick the next nominee to fill the vacancy on the Supreme Court? It is because there is so much at stake.

In a Judiciary Committee hearing, my colleague SHELDON WHITEHOUSE went through the box score when it came to the Supreme Court and how they ruled when given a choice between special interests and corporate elites versus average workers and consumers and families. As Senator WHITEHOUSE pointed out graphically, in detail, overwhelmingly, this Court has ruled for the special interests. Sixty-nine percent of the Roberts' Court's rulings are in favor of the U.S. Chamber of Commerce's position on issues, according to one study.

Why would a special interest organization like the Federalist Society care? It wants to keep a good thing going, from its point of view. That is why this is a different Supreme Court nominee. I yield the floor.

RECOGNITION OF THE MINORITY LEADER

THE PRESIDING OFFICER (Mr. KENNEDY). The Democratic leader is recognized.

CONGRATULATING THE SENIOR SENATOR FROM ILLINOIS

Mr. SCHUMER. Mr. President, first, I sat at the back of the room to listen to my colleague from Illinois. I know he got up because he wanted very much to respond to the majority leader, and I thought he did a great job. It was a pleasure to listen, as always, to one of the most articulate Members with

whom I have ever served in any legislative body, as well as his having many other good traits.

EQUAL PAY DAY

Mr. President, today is Equal Pay Day. Unlike many holidays on our calendar, Equal Pay Day is not actually a commemoration of some achievement. Equal pay for women is still not close to a reality. Women still make 79 cents for every dollar a man makes in the same position. African-American women are making 64 cents on the dollar. Latina women are making 54 cents on the dollar. That is not right. It is holding the American dream out of reach for too many women in this country. So Equal Pay Day is not a commemoration; it is a reminder that glass ceilings are everywhere and that there are hugely consequential and tangible barriers that women face every single day that men do not.

In 2007, the Supreme Court, in a 5-to-4 decision by the conservative majority in *Ledbetter v. Goodyear*, ruled that Lilly Ledbetter could not pursue her claim that she was entitled to equal pay. The Lilly Ledbetter Fair Pay Act, which reversed this unfair Supreme Court decision, was the first bill President Obama signed into law in 2009.

NOMINATION OF NEIL GORSUCH

Mr. President, this leads me to the Supreme Court. It is just one of so many examples of what is at stake in the nomination of Judge Gorsuch to the Supreme Court, which we now debate here on the floor of the Senate.

I was listening to the majority leader earlier this morning, and I cannot believe he can stand here on the floor of the U.S. Senate and with a straight face say that Democrats are launching the first partisan filibuster of a Supreme Court nominee. What the majority leader did to Merrick Garland by denying him even a hearing and a vote is even worse than a filibuster. For him to accuse Democrats of the first partisan filibuster on the Supreme Court belies the facts, belies the history, belies the basic truth.

My friend Representative ADAM SCHIFF said: "When McConnell deprived President Obama of a vote on Garland, it was a nuclear option. The rest is fallout." Let me repeat that. ADAM SCHIFF put it better than I ever could. "When McConnell deprived President Obama of a vote on Garland, it was a nuclear option. The rest is fallout."

Even though my friend the majority leader keeps insisting that there is no principled reason to vote against Judge Gorsuch, we Democrats disagree. First, he has instinctively favored corporate interests over average Americans. Second, he has not shown a scintilla of independence from President Trump. Third, as my colleague from Illinois elaborated, he was handpicked by hard-right special interest groups, not because he called balls and strikes. They would not put all of that effort and money into a caller of balls and strikes. These are ideologues who want

to move America far to the right. He was picked by hard-right special interest groups because his views are outside the mainstream.

According to analyses of his record on the Tenth Circuit, which were conducted by the New York Times and the Washington Post, by experts on the Court, Judge Gorsuch would be one of the most conservative voices ever on the Supreme Court should he achieve that.

The Washington Post:

Gorsuch's actual voting behavior suggests he is to the right of both Alito and Thomas and by a substantial margin. That would make him the most conservative Justice on the Court in recent memory.

That is why the Heritage Foundation and the Federalist Society put Judge Gorsuch on their list for President Trump.

As Emily Bazelon of the New York Times put it in a brilliant article that I would urge all of my colleagues to read:

The reality is that Judge Gorsuch embraces a judicial philosophy that would do nothing less than undermine the structure of modern government—including the rules that keep our water clean, regulate the financial markets and protect workers and consumers.

I ask unanimous consent to have that article printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the New York Times, Apr. 1, 2017]

THE GOVERNMENT GORSUCH WANTS TO UNDO

(By Emily Bazelon and Eric Posner)

At recent Senate hearings to fill the Supreme Court's open seat, Judge Neil Gorsuch came across as a thoroughly bland and non-threatening nominee. The idea was to give as little ammunition as possible to opponents when his nomination comes up this week for a vote, one that Senate Democrats may try to upend with a filibuster.

But the reality is that Judge Gorsuch embraces a judicial philosophy that would do nothing less than undermine the structure of modern government—including the rules that keep our water clean, regulate the financial markets and protect workers and consumers. In strongly opposing the administrative state, Judge Gorsuch is in the company of incendiary figures like the White House adviser Steve Bannon, who has called for its "deconstruction." The Republican-dominated House, too, has passed a bill designed to severely curtail the power of federal agencies.

Businesses have always complained that government regulations increase their costs, and no doubt some regulations are ill-conceived. But a small group of conservative intellectuals have gone much further to argue that the rules that safeguard our welfare and the orderly functioning of the market have been fashioned in a way that's not constitutionally legitimate. This once-fringe cause of the right asserts, as Judge Gorsuch put it in a speech last year, that the administrative state "poses a grave threat to our values of personal liberty."

The 80 years of law that are at stake began with the New Deal. President Franklin D. Roosevelt believed that the Great Depression was caused in part by ruinous competition among companies. In 1933, Congress passed the National Industrial Recovery Act, which

allowed the president to approve “fair competition” standards for different trades and industries. The next year, Roosevelt approved a code for the poultry industry, which, among other things, set a minimum wage and maximum hours for workers, and hygiene requirements for slaughterhouses. Such basic workplace protections and constraints on the free market are now taken for granted.

But in 1935, after a New York City slaughterhouse operator was convicted of violating the poultry code, the Supreme Court called into question the whole approach of the New Deal, by holding that the N.I.R.A. was an “unconstitutional delegation by Congress of a legislative power.” Only Congress can create rules like the poultry code, the justices said. Because Congress did not define “fair competition,” leaving the rule-making to the president, the N.I.R.A. violated the Constitution’s separation of powers.

The court’s ruling in *Schechter Poultry Corp. v. the United States*, along with another case decided the same year, are the only instances in which the Supreme Court has ever struck down a federal statute based on this rationale, known as the “nondelegation doctrine.” *Schechter Poultry’s* stand against executive-branch rule-making proved to be a legal dead end, and for good reason. As the court has recognized over and over, before and since 1935, Congress is a cumbersome body that moves slowly in the best of times, while the economy is an incredibly dynamic system. For the sake of business as well as labor, the updating of regulations can’t wait for Congress to give highly specific and detailed directions.

The New Deal filled the gap by giving policy-making authority to agencies, including the Securities and Exchange Commission, which protects investors, and the National Labor Relations Board, which oversees collective bargaining between unions and employers. Later came other agencies, including the Environmental Protection Agency, the Occupational Safety and Health Administration (which regulates workplace safety) and the Department of Homeland Security. Still other agencies regulate the broadcast spectrum, keep the national parks open, help farmers and assist Americans who are overseas. Administrative agencies coordinated the response to Sept. 11, kept the Ebola outbreak in check and were instrumental to ending the last financial crisis. They regulate the safety of food, drugs, airplanes and nuclear power plants. The administrative state isn’t optional in our complex society. It’s indispensable.

But if the regulatory power of this arm of government is necessary, it also poses a risk that federal agencies, with their large bureaucracies and potential ties to lobbyists, could abuse their power. Congress sought to address that concern in 1946, by passing the Administrative Procedure Act, which ensured a role for the judiciary in overseeing rule-making by agencies.

The system worked well enough for decades, but questions arose when Ronald Reagan came to power promising to deregulate. His E.P.A. sought to weaken a rule, issue by the Carter administration, which called for regulating “stationary sources” of air pollution—a broad wording that is open to interpretation. When President Reagan’s E.P.A. narrowed the definition of what counted as a “stationary source” to allow plants to emit more pollutants, an environmental group challenged the agency. The Supreme Court held in 1984 in *Chevron v. Natural Resources Defense Council* that the E.P.A. (and any agency) could determine the meaning of ambiguous term in the law. The rule came to be known as *Chevron* deference: When Congress uses ambiguous language in a

statute, courts must defer to an agency’s reasonable interpretation of what the words mean.

Chevron was not viewed as a left-leaning decision. The Supreme Court decided in favor of the Reagan administration, after all, voting 6 to 0 (three justices did not take part), and spanning the ideological spectrum. After the conservative icon Justice Antonin Scalia reached the Supreme Court, he declared himself a *Chevron* fan. “In the long run *Chevron* will endure,” Justice Scalia wrote in a 1989 article, “because it more accurately reflects the reality of government, and thus more adequately serves its needs.”

That was then. But the Reagan administration’s effort to cut back on regulation ran out of steam. It turned out that the public often likes regulation—because it keeps the air and water clean, the workplace safe and the financial system in working order. Deregulation of the financial system led to the savings-and-loans crisis of the 1980s and the financial crisis a decade ago, costing taxpayers billions.

Businesses, however, have continued to complain that the federal government regulates too much. In the past 20 years, conservative legal scholars have bolstered the red-tape critique with a constitutional one. They argued that only Congress—not agencies—can create rules. This is *Schechter Poultry* all over again.

And Judge Gorsuch has forcefully joined in. Last year, in a concurring opinion in an immigration case called *Gutierrez-Brizuela v. Lynch*, he attacked *Chevron* deference, writing that the rule “certainly seems to have added prodigious new powers to an already titanic administrative state.” Remarkably, Judge Gorsuch argued that *Chevron*—one of the most frequently cited cases in the legal canon—is illegitimate in part because it is out of step with (you guessed it) *Schechter Poultry*. Never mind that the Supreme Court hasn’t since relied on its 1935 attempt to scuttle the New Deal. Nonetheless, Judge Gorsuch wrote that in light of *Schechter Poultry*, “you might ask how is it that *Chevron*—a rule that invests agencies with pretty unfettered power to regulate a lot more than chicken—can evade the chopping block.”

At his confirmation hearings, Judge Gorsuch hinted that he might vote to overturn *Chevron* without saying so directly, noting that the administrative state existed long before *Chevron* was decided in 1984. The implication is that little would change if courts stopped deferring to the E.P.A.’s or the Department of Labor’s reading of a statute. Judges would interpret the law. Who could object to that?

But here’s the thing: Judge Gorsuch is skeptical that Congress can use broadly written laws to delegate authority to agencies in the first place. That can mean only that at least portions of such statutes—the source of so many regulations that safeguard Americans’ welfare—must be sent back to Congress, to redo or not.

On the current Supreme Court, only Justice Clarence Thomas seeks to strip power from the administrative state by undercutting *Chevron* and even reviving the obsolete and discredited nondelegation doctrine, as he explains in opinions approvingly cited by Judge Gorsuch. But President Trump may well appoint additional justices, and the other conservatives on the court have expressed some uneasiness with *Chevron*, though as yet they are not on board for overturning it. What would happen if agencies could not make rules for the financial industry and for consumer, environmental and workplace protection? Decades of experience in the United States and around the world teach that the administrative state is a nec-

essary part of the modern market economy. With Judge Gorsuch on the Supreme Court, we will be one step closer to testing that premise.

Mr. SCHUMER. There are clearly principled reasons to oppose Judge Gorsuch, and enough of us Democrats have reasons to prevent his nomination from moving forward on Thursday’s cloture vote.

The question is no longer whether Judge Gorsuch will get enough votes on the cloture motion; now the question is, Will the majority leader and our friends on the other side break the rules of the Senate to approve Judge Gorsuch on a majority vote? That question should be the focus of the debate here on the floor, and it should weigh heavily on the conscience of every Senator.

Ultimately, my Republican friends face a simple choice: They can fundamentally alter the rules and traditions of this great body or they can sit down with us Democrats and the President to come up with a mainstream nominee who can earn bipartisan support and pass the Senate.

No one is making our Republican colleagues change the rules. No one is forcing Senator MCCONNELL to change the rules. He is doing it of his own volition, just as he prevented Merrick Garland from getting a vote of his own volition. Senator MCCONNELL and my Republican colleagues are completely free actors in making a choice—a very bad one, in our opinion.

I know my friends on the other side of the aisle are uncomfortable with this choice, so they are scrambling for arguments to justify breaking the rules. Let me go through a few of these justifications and explain why each does not hold up.

First, many of my Republican colleagues will argue that they can break the rules because “Democrats started it in 2013” when we lowered the bar for lower court nominees and Cabinet appointments.

Let’s talk about that. The reason Majority Leader Reid changed the rules was that Republicans had ramped up the use of the filibuster—the very filibuster they now decry—to historic proportions. They filibustered 79 nominees in the first 5 years of Obama’s Presidency. Let’s put that into perspective. Prior to President Obama, there were 68 filibusters on nominations under all of the other Presidents combined, from George Washington to George Bush. We had 79. Our colleagues and Leader MCCONNELL, the filibuster is wrong? There were 79—more than all of the other Presidents put together. The shoe was on a different foot.

They deliberately kept open three seats on the second most important court in the land—the DC Court of Appeals—because it had such influence over decisions made by the government. This is the court, other than the U.S. Supreme Court, that the Federalist Society and the Heritage Foundation hate the most. The deal that a

number of Senators made in 2005 allowed several of the most conservative judges to be confirmed to that court—very conservative people. It left a bad taste in my mouth, and I am sure in my colleagues' and in many others.

But then, when President Obama came in, they insisted on not filling any additional seats on the court—which, of course, would have been Democratic seats—and eventually held open 3 of the 11 seats on that court. They said they would not allow those seats to be filled by President Obama—an eerie precedent, which the majority leader repeated with Merrick Garland. He didn't want the DC Circuit to have Obama-appointed, Democratic-appointed nominees; he didn't want that on the Supreme Court, so he blocked Merrick Garland. He didn't want it on the DC Circuit, so they wouldn't let any of President Obama's nominees come to the floor.

Merrick Garland's nomination was not the first time the majority leader held open a judicial seat because it wasn't the President of his party, and that was not during an election year.

At the time, I spoke with my good friend from Tennessee, Senator ALEXANDER. I asked him to go to Senator MCCONNELL and tell him that the pressure on our side to change these rules—after all of these unprecedented numbers of filibusters—was going to be large. I said to Senator ALEXANDER: Let's try to avoid it. But Senator MCCONNELL and Republicans refused all of our overtures to break the deadlock they imposed.

To be clear, Democrats changed the rules after 1,776 days of obstruction on President Obama's nominees. My Republican friends are contemplating changing the rules after barely more than 70 days of President Trump's administration. We moved to change the rules after 79 cloture motions had to be filed. They are talking about changing the rules after 1 nominee fails to meet the 60-vote threshold.

So, yes, Democrats changed the rules in 2013, but only to surmount an unprecedented slowdown that was crippling the Federal judiciary, and we left the 60-vote threshold intact for the Supreme Court deliberately. We could have changed it. We had free will then, just as Senator MCCONNELL has it now. But we left the 60-vote threshold intact for the Supreme Court because we knew and know—just as our Republican friends know—that the highest Court in the land is different.

Unlike with lower courts, Justices on the Supreme Court don't simply apply precedents of a higher court; they set the precedents. They have the ultimate authority under our constitutional government to interpret the law. Justices on the Supreme Court should be mainstream enough to garner substantial bipartisan support; hence, why we didn't change the rules; hence, why we believe in the 60-vote threshold; and hence, why 55 or 60 percent of all Americans agree with the 60-vote threshold,

according to the most recent polls. To me, and I think to most of my friends on the Republican side, that is not a good enough reason to escalate the argument and break the rules for the Supreme Court.

Second, as I have mentioned, I have heard my Republican friends complain that Democrats are conducting the first partisan filibuster of a Supreme Court nominee in history, so that is the reason they can justify breaking the rules because Democrats are the ones taking it to a new level. Again, I have just two words for my Republican friends: Merrick Garland. The Republican majority conducted the first partisan filibuster of a Supreme Court pick when their members refused to have hearings for Merrick Garland.

In fact, what the Republicans did was worse than a filibuster. The fact is, the Republicans blocked Merrick Garland using the most unprecedented of maneuvers. Now we are likely to block Judge Gorsuch because we are insisting on a bar of 60 votes.

We think a 60-vote bar is far more in keeping with tradition than what the Republicans did to Merrick Garland. We don't think the two are equivalent. Nonetheless, in the history of the Scalia vacancy, both sides have lost. We didn't get Merrick Garland; they are not getting 60 votes on Judge Gorsuch.

So we are back to square one right now, and the Republicans have total freedom of choice in this situation.

Finally, Republicans have started to argue that because Democrats will not confirm Judge Gorsuch, we will not confirm anyone nominated by President Trump, so they have to break the rules right now. That is an easy one. I am the Democratic leader. I can tell you myself that there are mainstream Republican nominees who could earn adequate Democratic support.

And just look at recent history. Justices Roberts and Alito, two conservative judges who many of us on the Democratic side probably don't agree with, both earned over 60 votes. They got Democratic votes. While there was a cloture vote on Justice Alito, he was able to earn enough bipartisan support that cloture was invoked with over 70 votes. He got only 58 when we voted for him, but the key vote was the cloture vote.

Let's have the President consult Members of both parties—he didn't with Gorsuch—and try to come up with a consensus nominee who could meet a 60-vote threshold. That is what President Clinton did with my friend, the Senator from Utah, in selecting Justices Ginsberg and Breyer. It is what President Obama did with Merrick Garland.

Of course, we realize a nominee selected this way would not agree with many of our views. That is true. But President Trump was elected President, and he is entitled by the Constitution to nominate. But Judge Gorsuch is so far out of the main-

stream that the Washington Post said his voting record would place him to the right of Justice Thomas. He was selected by the Heritage Foundation and the Federalist Society without an iota of input from the Senate.

There is a better way to do this. I know it sometimes may seem like a foreign concept in our hyperpolarized politics these days, but there is always the option of actually consulting Democrats on a nominee and discussing a way forward that both parties can live with. We are willing to meet anywhere, anytime.

So my friends on the other side can dredge up these old wounds and shopworn talking points if they choose. If Republicans want to conduct a partisan, "they started it" exercise, I am sure we could trace this all the way back to the Hamilton-Burr duel. But at the end of the day, they have to confront a simple choice: Are they willing to break the rules of the Senate or can they work with us on a way forward? I, for one, hope we can find a way to compromise. Judge Gorsuch was not a compromise. He was solely chosen without any consultation. So it is not that there is a Merrick equivalency.

My friend the majority leader said: "I think we can stipulate that in the Senate it takes 60 votes on controversial matters." If anything is a controversial, important matter, it is a selection for the Supreme Court, and Senator MCCONNELL has repeatedly stood for the rightness of 60 votes on important and controversial issues.

If Senator MCCONNELL wants to change his view on the 60 votes all of a sudden and Republicans decide to go along with him, it will not be because Democrats started it, because that is not true. It will not be because Democrats will not confirm any President Trump-nominated Justice, because that is not true. It will be because they choose to do so, and they will have to bear the unfortunate consequences.

Mr. President, I yield the floor.

Mr. DURBIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mrs. CAPITO. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MINERS PROTECTION ACT

Mrs. CAPITO. Mr. President, I rise today, as I have on a number of occasions in the past, to express the urgent need for action to protect the retirement security of our Nation's coal miners. Because of bankruptcies that have decimated the coal industry, we have lost over 22,000 jobs in our State, but more than 22,000 retired coal miners and their spouses are at risk of losing their healthcare benefits at the end of April.