Justice Gorsuch is wrong — 'originalist' judges make stuff up too

BY KIM WEHLE

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Supreme Court Justice Neil Gorsuch is out with a new book, in which he reportedly endorses what's known as an "originalist" reading of the Constitution. According to a review in the Los Angeles Times, Gorsuch rejects what he claims to have learned in law school — "'the Constitution is a "living" document,' and judges were supposed to decide cases by updating the law to reflect the more enlightened views of today." Instead, he was "won over" by the views of the late Justice Antonin Scalia, who "argued judges should not act as politicians by changing the law in the guise of interpreting it."

Accordingly, Gorsuch reportedly tells his law clerks: "'Rule No. 1: Don't make stuff up,'" and "'when people beg, and say, 'Oh, the consequences are so important,' and when they say, 'You're a terrible, terrible, terrible person if you don't,' just refer back to Rule No. 1. And we'll be fine.'"

Here's the problem: The implicit suggestion that the law and the Constitution are black and white — and that all that honorable judges need to do is apply its plain language and move on — is a myth.

Members of the public who haven't been to law school erroneously glean from this false dichotomy that there are "bad" judges who legislate from the bench by interpreting ambiguous text to serve their (mostly progressive) ideological goals. This would suggest "good" judges stay in their lane and eschew (mostly conservative) politics because all they are doing is restating the obvious and leaving it to Congress to actually make policy.

This false dichotomy is a problem because well-meaning people cast votes in elections on the assumption that their preferred candidates will only put the "good" judges on the Supreme Court.

Much of the law — like the Constitution — is grey. As I tell my law students, if the answers to legal questions were black and white, people could simply Google them. Nobody would pay lawyers hundreds of dollars an hour to simply read the plain words of legal text. The reality is that lawyers are hired to wrestle with ambiguity and argue for one interpretation over another. This is also why we have 5-to-4 decisions on the Supreme Court in cases involving the meaning of constitutional or statutory text. Words are often ambiguous.

The Constitution is old, too. Ratified in 1788, it's been amended 27 times, but not enough to set in stone all of the many nuances that its day-to-day application requires in modern life.

The Supreme Court resolves those nuances, and when it does, that resolution essentially becomes the law of the land. If the court decides to take up a question of the Constitution's meaning, the court's decision will operate as the practical equivalent of amending the Constitution — without the required two-thirds vote of Congress and ratification by three-quarters of the states. This is true, regardless of whether the decision captured a "conservative" or "progressive" majority. Critics can assail the justices for "act[ing] as politicians by changing the law under the guise of interpretation"—but it's an inevitable part of the job of judging.

The Constitution is not alone in this regard. For centuries, people have debated the meaning of religious texts. People interpret poetry and fiction, too. We interpret emails and texts from friends, families and co-workers every day, often misconstruing the meaning of plain language in ways that the sender did not intend. Inescapably, a reader's subjective points of view affect how ambiguities in language are construed.

When it comes to ambiguities in the Constitution or in legislation, a perfectly legitimate and honorable approach to interpretation is to start with the text's plain language. A judge might then look at dictionary definitions — which are not uniform and vary over time. One judge might believe that the definition in 1788 of the word "search" for purposes of the Fourth Amendment, for example, is preferable to that of a modern-day dictionary. Others might disagree and look to dictionary.com.

Some judges might look to the contemporaneous writings of the framers of the Constitution — writings that didn't make it into the Constitution's actual text — for interpretive guideposts.

Across the ideological spectrum, judges also routinely look to the goals and objectives of the Constitution itself in construing its ambiguous language. The Fourth Amendment's ban on warrantless searches was meant to protect one's privacy in the home from government intrusion. With that backdrop, a reader of the Constitution might legitimately conclude that the police's use of a thermal imaging device to monitor radiating heat from a person's home — and thus to detect marijuana growing inside — requires a warrant. In a 5-to-4 decisionwritten by Scalia, the court deemed this activity a search — even though nobody in 1791 had thermal imaging technology.

In short, the framers of the Fourth Amendment could not have "plainly" intended that modern-day result by virtue of the "plain" language of that constitutional amendment. The result by the majority, instead, required that the justices balance competing arguments, consider various guideposts to interpretation and make a call.

The problem with originalism as framed by Gorsuch's "don't make stuff up" rule is that, by claiming there is only one viable construction of language in the Constitution, it allows judges to disguise their true motives by slapping on an originalist label. If the language is clear, the theory goes, there's no room for a judge to impose his

subjective or political point of view, let alone invoke any compassion for the people affected by the case. Apply the plain language and move on.

The alternative approach to legal interpretation — which some people call "functionalism" or "purposivism" — has judges put their policy goals on the table for the rest of us to see and evaluate.

Recall that a search is about constraining overbearing government power to snoop on people. We can debate whether the warrantless use of a thermal heating device achieves that objective, but in any event, it helps if judges explain the function — or goal — of their inquiry and analysis. To suggest that Scalia wasn't making new law in deciding that use of a thermal heating device is a search is misguided — and misleading. It's easy to come up with loads of examples of "lawmaking" by the Supreme Court on both ends of the ideological and political spectrum.

Judges judge, after all. It's the reality of the job.

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This is the 11th piece in a series by Wehle on understanding the Constitution. Read her analysis on constitutional literacy, constitutional rights, the country's crisis of compassion, war power, the Supreme Court, presidential power, the presumption of innocence, the power of regulations, role of independent agencies and pardon power.