



1300 I STREET N.W | SUITE 400 E | WASHINGTON, DC 20005
(202) 216-9309 | WWW.JUDICIALACTIONGROUP.COM

Senator Josh Hawley



Male, Age 40. Born: Springdale, AR. Yale (J.D.) Stanford (B.A.)
2019 – present, United States Senator (Missouri)
2017 – 2019, Attorney General, State of Missouri
2011 – 2016, Associate Professor, University of Missouri School of Law
2014 – 2015, Founder/President, Missouri Liberty Project¹
2011 – 2015, Counsel, Becket Fund for Religious Liberty
2008 – 2011, Attorney, Hogan Lovells US LLP, Washington, D.C.

2007 - 2008; Law Clerk to Chief Justice John Roberts, United States Supreme Court.
2006 - 2007; Law Clerk to Judge Michael W. McConnell, U.S. Court of Appeals (10th Cir.)

In 2013, Hawley Unapologetically Opposed Court Created Rights Through the Sham of Substantive Due Process. He writes:

“My thesis is that Section Five gives *Congress affirmative power to interpret the substance of constitutional rights when it goes about enforcing the Fourteenth Amendment*. And the best way to operationalize this authority and its relationship to judicial review is to borrow the deference framework familiar from *Chevron v. Natural Resources Defense Council*. *In a word, the judiciary is obliged to defer to Congress’s interpretation of rights protected by the Fourteenth Amendment so long as Congress’s interpretation is genuinely reasonable. That deference should obtain even when the Court has already interpreted the right at issue: just as in the administrative law setting, the Court should defer to a reasonable interpretation by Congress, regardless of precedent, when the rights provision is susceptible to more than one legitimate reading.*

“This framework captures both the substance and the limits of the Section Five power, which permits Congress to interpret the Amendment but not to rewrite it by statute. *And it puts the judiciary in its proper, constitutional place. The role the Court has claimed for itself* in the last century as the “supreme expositor” of the Constitution is in fact a constitutional anomaly, and *not a happy one*. The Court’s imperiousness has siphoned authority away from the *political branches*, stifled *public participation* in constitutional politics, and encouraged *political irresponsibility*. *This is not as it should be. It is not as it has to be*. Recovering a properly robust reading of the Section Five power may provide a much-needed *corrective*.”²

Hawley Has a Long-Term Record as a Pro-Life Advocate and Worked at the Becket Fund from 2011-2015.

"I am *100 percent pro-life and have been my whole life* That means I am *opposed to abortion at any stage of pregnancy*, and I am opposed to embryonic stem-cell research. As for my record, as a constitutional lawyer, I have fought to protect the unborn, all the way to the U.S. Supreme Court. The *Hobby Lobby* case, for instance, was at its core a case about the right to life: in that litigation, we defeated the Obama administration's abortion drug mandate."

While Hawley did not actually argue in front of the U.S. Supreme Court, *The Becket Fund for Religious Liberty* told *The Missouri Times* that the firm "*has had incredible success at the Supreme Court, and Josh Hawley has been an integral part of it.*"

"Josh served as co-counsel both in *Hosanna-Tabor v. EEOC* (2012) and *Burwell v. Hobby Lobby* (2014). In both cases, his work and Supreme Court expertise were critical to our success at every stage of the litigation," said Becket.³

In 2014, Hawley Founded a Constitutionally Conservative Organization Dedicated to Defending Religious Freedom, Among Other Causes. After his service at The Becket Fund, Hawley founded the "Missouri Liberty Project" in order to:

"... tackle issues such as government overreach, protecting religious freedom, fighting for Missouri farmers, and opposing political corruption. The organization will work to raise public awareness about these important issues. The group will also conduct public opinion research and participate in significant constitutional litigation."⁴

In 2013, Hawley Explained that Judicial Review is Constitutional, but Judicial Supremacy is Not. He wrote:

The "judicial power" exercised by federal courts in the American regime arises only under and from the Constitution, which means that *courts have power to enforce only what the Constitution says*. There is *no stand-alone power of judicial review*. Courts have the authority to adjudicate "*Cases or Controversies*" and to *apply the Constitution to do so. That is all*. As Chief Justice Marshall explained in *Marbury v. Madison*, courts can invalidate statutes only for this reason: *when the Constitution and a statute both purport to control a case, but announce different rules, the court must apply the Constitution as superior law*.⁵

Hawley Stated in 2012 that the Judiciary is the Most Dangerous Branch. He writes:

"As for the Supreme Court, it too has done the country much good. But for all its proud history, it has proved to be a dangerous institution – the most dangerous, in fact, of any branch of government."⁶

Hawley in 2012: Text, Structure, and History Are the Only Legitimate Guide to Judicial Review. Hawley wrote:

“... [T]ext, structure, and history are not merely one set of tools among others for discerning the Constitution’s meaning. Nor are they, properly speaking, another “theory” of constitutional interpretation, however they might be deployed in various theoretical constructs. *They are rather the source of the judiciary’s authority and the only legitimate guide to judicial review.*

.... “*If the Constitution’s text is the only legitimate source of judicial authority, then judges must stop where the text stops, and ties must go to the legislature.*”⁷

But the remedy to judges’ natural tendency toward activism, as to the broader enfeebling of self-government that Wilkinson laments, is not less fidelity to the commands of the Constitution, but more. We do indeed need judges, as Wilkinson says, committed to the “tired old judicial values of humility and restraint”—and that means judges committed to the project of self-rule and the Constitution that preserves it.⁸

Hawley (2012) Opposes and Exposes Not only Judicial Activism – but Judicial Supremacy.

“Conservatives have long advocated that *judges give the Constitution's text the meaning it bore at the time it was adopted.* That is right as far as it goes, but even this originalism can all too easily fuel judicial imperiousness if it is not informed by the Constitution's overarching — and original — goal: participatory self-government. This means that *even as the Court goes about searching for the Constitution's original meaning, it should bear in mind that it is not the only constitutional interpreter. And its judgments should reflect that reality.*

“To trace one application of this principle, the Court should confine its constitutional decisions to instances in which *the text's original meaning can be clearly determined.* The Constitution is a historical document, and though we know a good deal about the historical context of most of its provisions, the precise meaning of a given clause can, as with many historical documents, be difficult to fix with certainty. *If and when the Constitution is unclear or the evidence for its meaning is unsettled, the Court must refrain from acting. If the Court followed this principle, it would involve itself in far fewer matters than it does now.*

“The Court ought to craft enforcement rules that leave as much discretion as possible to *the branches of government that represent the people.* And it ought to *defer* to the representative branches when they offer substantive interpretations of *constitutional meaning.*”⁹

Hawley’s Constitutional Conservatism is Evident by his Response to Justice Gorsuch’s Activist Bostock Opinion. On June 16, 2020, the day after *Bostock* was decided, Senator Hawley addressed the opinion. The Speech is significant because it addresses the failure of Justice Gorsuch’s nomination and the need to correct the problem with the nomination of a justice to the Supreme Court. Hawley understands the problem, prescribes a solution, and may himself be a part of the solution as a future Justice or Chief Justice of the Supreme Court.

It is best to watch or read the full speech, but below are a few significant excerpts:¹⁰

- “Make no mistake: this decision, this piece of legislation, will have effects that range from employment law to sports to churches. ***There’s only one problem with this piece of legislation: it was issued by a court, not by a legislature.***”
- “It was written by judges, not by the elected representatives of the people. And it did what this Congress has pointedly declined to do for years now, which is to ***change the text and the meaning and the application and the scope of a historic piece of legislation.***”
- “***I say this because if textualism and originalism give you this decision, if you can invoke textualism and originalism in order to reach such a decision - an outcome that fundamentally changes the scope and meaning and application of statutory law - then textualism and originalism and all of those phrases don’t mean much at all.***”
- “[***If we’ve been fighting for originalism and textualism, and this is the result of that, then I have to say it turns out we haven’t been fighting for very much.***”
- “***The legal conservative project has always depended on one group of people in particular in order to carry the weight of the votes to actually support this out in public, to get out there and make it possible electorally. And those are religious conservatives. I am one myself.***”
- “And the reason for that dates back decades now, back to the 1970s. The reason for that is these ***religious conservatives, from different backgrounds, have consistently worked together to seek protection for their right to worship, for their right to freely exercise their faith as the First Amendment guarantees, for the right to gather in their communities, for their right to pursue the way of life that their scriptures variously command and that the Constitution absolutely protects. That’s what they have asked for, that’s what they have sought, all these years.***”
- “Now I will say this in defense of the court: it is difficult to anticipate in one case all future possible implications. ***That’s why courts are supposed to leave legislating to legislators. That’s why Article III does not give the United States Supreme Court or any federal court the power to legislate, but only the judicial power to decide cases and controversies, not to decide policies.***”
- “***If this case makes anything clear, it is that the bargain that has been offered to religious conservatives for years now is a bad one. It’s time to reject it.***”
- “No, I question how we got here. ***I question how judges who hold to this philosophy ended up on that bench. I question the bargain that people of faith have been offered and asked to hold to for all of these years.***”

“And the truth is, to those who have objected to my own questioning of judicial nominees in this body, to those who said I was wrong to question judges who came for the Judiciary

Committee, to those who chided me for asking tough questions even of nominees by a Republican president, for those who said that I was slowing the process down, that I was out of line, for the supposedly conservative groups who threatened to buy television time in my own state to punish me for asking questions about conservative judges, I just have this to say: this is why I asked questions. This is why I won't stop. And I wish some more people would ask some harder questions. Because this outcome is not acceptable. And the bargain which religious conservatives have been offered is not tenable."

"So, I would just say, it's not time for religious conservatives to shut up. No, we've done that for too long. No, it's time for religious conservatives to stand up and to speak out."

- *"It's time for religious conservatives to take the lead rather than being pushed to the back.*

"And because I'm confident that people of faith, of goodwill, all across this country are ready to do that, and want to do that, and have something to offer this country—and every person in this country, whatever their background or income or race or religion—because of that, I'm confident in the future. But I'm also confident that the old ways will not do."

"So, let this be a departure. Let this be a new beginning, let this be the start of something better."¹¹

Hawley: Abortion is Not a Right. He has stated unequivocally:

"Abortion is not a right It is a violent act against the defenseless. It violates every principle of morality and should be barred by American law."

*"My view is that *Roe v. Wade* had no basis in law or fact,"¹²*

Hawley in 2012: *Roe* is Not Mandated by the Constitution and is an Intrusion by the Court into Politics.

*"The Court's shift from enforcing structure to protecting rights, and *undefined rights* at that, has accelerated its *intrusion into constitutional politics*. Its decision in *Roe v. Wade* has been the most spectacular example of this change, though one could just as well cite its earlier judgment in *Lochner v. New York* (striking down limits on the working day) or in *Adkins v. Children's Hospital* (invalidating a minimum-wage law). In each of these cases [including *Roe*], *the Court imposed as a matter of law an interpretation of constitutional principle that was not clearly mandated by the Constitution, to the detriment of the people's authority to apply constitutional principles themselves.*"¹³*

Hawley (2012) on Religious Freedom: the Supreme Court Should have Deferred to Congress' Proper Understanding of the Constitution in the "Religious Freedom Restoration Act."

Hawley wrote:

“In 1990, for instance, the Supreme Court held that laws that burden a person's free exercise of religion are constitutionally permissible so long as the law in question is "neutral" and "generally applicable" — that is, so long as it applies to everyone and not just a disfavored religious group. Congress responded three years later with the Religious Freedom Restoration Act, which adopted an appreciably more exacting test for government actions that interfere with religion. But in the 1997 case *City of Boerne v. Flores*, the Supreme Court struck down the act's application to the states, arguing that ***only the Court had the authority to interpret the Constitution***. In its opinion, which centered around a discussion of the 14th Amendment, the Court held that ***Congress was not entitled to its own understanding of the amendment's enforceability against the states if the Court had a conflicting understanding of its own***.

“Were the Court more willing to recognize ***the people's right to interpret the Constitution***, it might have decided otherwise. Of course, Congress cannot be permitted to rewrite the Constitution or to interpret its provisions to mean whatever it likes. But ***when, as in the religious-freedom case, the people's elected representatives express a considered judgment as to what the text means, the Court should not simply demand that Congress agree with the Court's judgment***. On the contrary, it should ask ***whether Congress's judgment is reasonable — or fairly possible — in light of constitutional text and original meaning***. If it is, ***the people's interpretation should prevail. Congress and the people, after all, are entitled to interpret the Constitution themselves***.”

“[Judicial] independence can breed in its beneficiaries a certain over-estimation of the Court's importance as well as an ***over-confidence in the justices' capacity to get constitutional questions right***. With time, an individual justice may come to believe that, though interpretive questions are generally hard and should be left whenever possible to the political sphere, he can ***personally be trusted to decide correctly. Multiply this mentality by nine, and it becomes a formula for judicial aggression***.”¹⁴

In 2012, Hawley Publicly Disagreed with Chief Justice Roberts' Activist Opinion in the ObamaCare Case. Hawley wrote:

“... [T]he Supreme Court concluded that ***Obamacare's individual mandate was not constitutional as an exercise of Congress's power over commerce, but was perfectly valid as a tax***.

“That conclusion is troubling, to say the least. ... Roberts endorsed may not be binding in future cases. Meanwhile, the rest of Roberts's opinion, joined by the Court's four more liberal justices, suggested that most any regulation Congress might wish to enact could simply be re-characterized as a tax – and be constitutionally sound as a result. Conservatives are right to be deeply worried.”¹⁵

Hawley clerked for Chief Justice Roberts. Given Roberts' record since 2012 and most recently, the association would be concerning were it not for the fact that Hawley was hired before Roberts' completed his first full-term on the Supreme Court – at a time when constitutional conservatives were still optimistic about Roberts' tenure.¹⁶

Hawley Has Paid the Price for His Dedicated Work for Constitutionally Strong Judicial Nominees and Against Weak Ones. During the confirmation process of Neomi Rao to the D.C. Circuit Court, Hawley received criticism for asking serious questions about her thoughts on so-called “substantive due process.” He said:

This week I’ve *drawn fire from various quarters of the Washington establishment for daring to ask a simple question: whether a judicial nominee will follow what the Constitution says, not what they want it to say.* You wouldn’t think that would be controversial but, well, it’s Washington. And I’ve got some news for Washington: I’m going to keep asking.

President Trump was elected thanks to his pledge to *put judges on the bench who respect life and won’t make stuff up in the Constitution.* He has kept his word. I made the same commitment to the people of Missouri, and I’m going to keep my word too. That means vetting judicial nominees carefully to ensure they are qualified and ready to sit on the most important courts of our country.

I’ve been a judicial clerk at the U.S. Supreme Court, litigated there and in many other courts, and proudly served as Missouri’s attorney general. *I know what a strong constitutional judge should do and say,* and I’m not going to let other people, and certainly not the Washington establishment, do my thinking for me.

So, I will be asking every appellate court nominee where he or she stands on the Constitution, and especially on the doctrine called “*substantive due process.*” That strange phrase stands for a dangerous doctrine in constitutional law that has allowed power-hungry judges to *invent new “implied rights” out of thin air and usurp the will of We the People.* It’s the doctrine used to justify *Roe v. Wade* and all manner of other judicial adventurism.

I want to know where nominees stand on this made-up doctrine. And I’m not going to vote for any nominee who would expand it. Lower-court judges are of course bound by Supreme Court precedents, including the bad ones. They don’t have any choice. But *anybody willing to expand substantive due process won’t have my support for the federal bench.*

As someone who believes deeply in the right to life and the equal dignity of every person, including the unborn, confirming judges who will resist the siren song of judicial lawmaking is especially important. All too often, lower courts have used substantive due process to stop states and local governments from protecting the unborn, even when Supreme Court case law would allow it.

This is wrong. This is activism. *We need judges who will protect states’ ability to look out for the unborn to the maximum extent possible under current Supreme Court precedents.* That is part and parcel of being a rule of law judge. Americans who cherish every fundamental freedom in our nation should agree.

The people of Missouri sent me here to ask tough questions, challenge conventional wisdom, and fight for what our state believes. *We've been burned too often. For every Justice Clarence Thomas, there has been a Justice David Souter or Harry Blackmun. And every time, D.C. insiders have said, "Trust us."*

Missouri is called the Show-Me State because we Missourians are famous for wanting the facts. When the D.C. insiders say "trust us," my response is always going to be: "Show me." *Show me how this nominee will uphold the Constitution. That's my job, and that's what I will do.*¹⁷

Hawley Worked to Ensure that Rao Would not Employ the Unconstitutional Practice of Legislating from the Bench through "Substantive Due Process." After Rao's confirmation hearing, written questions, and a private meeting, Hawley followed up further by letter regarding her: (1) position on "the use of outside sources in interpreting statutes and the Constitution," (2) "views on whether the Constitution confers substantive constitutional rights to dignity and whether those rights trump democratically passed laws," and (3) writing that *Casey* "linked reproductive choices with the essential nature of the individual and emphasized the importance of the freedom to make such choices without compulsion from the state."¹⁸

Senator Hawley Led on the Nomination of One of President Trump's Most Constitutionally Conservative Judicial Nominees: Judge Sarah Pitlyk. Pitlyk said that her nomination process began when she "received an email from Senator Josh Hawley's office on January 29, 2019," after which she "spoke with Senator Hawley and two staffers."¹⁹

Hawley Led the Senate to Oppose and Stop the Judicial Confirmation of Bogren Who Sided with the LGBT Agenda over Religious Liberty. Before Hawley's work, Michael Bogren was cruising toward confirmation. However, after Hawley questioned and opposed Bogren, he was forced to withdraw. It was reported in June 2019:

Last month, freshman Republican Sen. Josh Hawley of Missouri grilled Bogren over his handling of the case, which concerned the City of Lansing's attempts to bar Steve and Bridget Tennes, owners of Country Mill Farms in Charlotte, from its local farmers' market due to the *Christian family farm's refusal to host same-sex "weddings."*

Representing the city's efforts to keep the family out, Bogren wrote a brief in 2017 arguing that "discriminatory conduct" being "based on sincerely held religious beliefs does not insulate that conduct from anti-discrimination laws," noting that members of the Nation of Islam or *Ku Klux Klan* who opposed interracial marriage "would not be able to ... avoid the anti-discrimination provisions of federal, state and local laws that apply to public accommodations if interracial couples were refused service."

Hawley argued that the remarks demonstrated "*impermissible hostility*" toward religious beliefs; Bogren defended his remarks as simply explaining that a religious motivation is immaterial to whether an act is discriminatory, and argued he had been duty-bound to zealously defend his client's (the city's) position.

“The fact that you stand by these comments is extraordinary to me,” Hawley said. After the freshman Republican’s questioning, numerous conservative groups rallied to oppose Bogren’s confirmation. *Longtime conservative leaders including Attorney General Edwin Meese, Tony Perkins, Gary Bauer, Penny Nance, and Dr. James Dobson signed an open letter declaring that Bogren’s “suspect judicial philosophy as it relates to America’s First Freedom renders him unqualified for this position.”*

...

Late Tuesday, Bogren requested that the White House withdraw his nomination, the Detroit News reports. He declined to comment publicly on the matter.²⁰

Hawley’s Constitutional Conservatism is Born from His Faith as an Evangelical Christian.

Coming from the chambers of the Supreme Court where the justices are all either Catholic or Jewish, Hawley is also a rarity: *He and his family attend an Evangelical Presbyterian Church.* He grew up Methodist but said he doesn’t feel a denominational identity is primary.

“We look more for, what is the congregation that is vibrant, that is preaching the Scripture,” he said.

Hawley said he felt the Supreme Court was “very welcoming,” even though he and his wife were among the few evangelicals.

“In general evangelicals are underrepresented in the law, and certainly in the practice of constitutional law,” he said. “We need more evangelicals to enter that field and to pursue *constitutional law in its dimensions.*”²¹

Hawley has a Biblical Worldview as a Result of Giving his “Life to Christ as a Young Man.”

Hawley wrote:

“From a young age, *my faith and my church have been beacons of hope and direction in my life, something that I still carry today. I gave my life to Christ as a young man, and it has guided me in everything I do.* I have had the privilege of both leading bible studies since I was a young man, and of mentoring young people in their faith life.

“My wife Erin and I have also worked hard to ensure our children grow up secure in their faith, which is why *we actively participate in our church.* We know firsthand that an active faith life is the bedrock of a healthy family.

“I also understand that *one’s faith should not exist solely within the walls of a church.* That’s why I always have been a *vigorous defender of religious liberty,* both before and within an elected office. I was one of the lead attorneys in two major Supreme Court cases involving religious freedom, winning both. I fought to protect the rights of churches from government interference in the Hosanna-Tabor Case, and in the landmark Hobby Lobby

case, I successfully argued for the rights of privately-owned businesses to run their companies according to their own morals.”

Hawley on How Religious Faith Has Shaped our Society:

“We are a *unique nation with a unique history and a unique purpose in the world.*

That *history began 2000 years ago, when the proud traditions of the self-governing city-states met the radical claims of a Jewish rabbi, who taught that the call of God comes to every person, and the power of God can work through each, so that every human being has dignity, and standing, and can change the world*

We must join together to renew the bonds of family life, to honor the claims of kinship and the covenant of marriage. Marriage should be prized in our national policy, not penalized. And from taxes to healthcare, families should get the support and pride of place they deserve.

To rebuild our common purpose, we must protect our communities of faith. Because *religious faith has fueled our history and shaped our aspirations and bettered our society.*

It is not the role of government to promote Christianity or any religion. But let us be clear: our government should not hinder or diminish religious expression. We need strong religious communities, active in civic life, protecting the vulnerable, defending the weak. Because these communities have helped make us who we are as a people.”²²

¹ The founding press release of the “Missouri Liberty Project” states: “I’ve talked to people from all across Missouri, and what they tell me over and over is that they believe our Constitution is under threat,” Hawley said. “Federal overreach is threatening our way of life by undermining everything from free enterprise and agriculture to religious liberty. And there’s a growing sense that our democracy – at both the state and federal level – just isn’t working right. The worst part is, most Missourians don’t believe they can do anything about it. We are launching Missouri Liberty Project to give ordinary Missourians a chance to make [a] difference, to have a voice, and to take part in some of the most important constitutional cases in the country.” Press release: Josh Hawley Launches Missouri Liberty Project, March 16, 2014, The Missouri Times; available at: <https://themissouritimes.com/press-release-josh-hawley-launches-missouri-liberty-project/>

² Joshua Hawley “An Affirmative Power to Interpret: Congress and Section 5 of the 14th Amendment,” Oct. 1, 2013; available at: <https://lawliberty.org/forum/an-affirmative-power-to-interpret-congressional-power-and-section-5-of-the-14th-amendment/> (emphasis added).

³ Dustin Siggins, “Missouri AG candidate blasts GOP opponent on abortion: he’s ‘multiple choice,’” Feb. 11, 2016, LifeSiteNews; available at <https://www.lifesitenews.com/news/missouri-ag-candidate-blasts-opponent-multiple-choice-on-life-issues> (emphasis added).

⁴ Press release: Josh Hawley Launches Missouri Liberty Project, March 16, 2014, The Missouri Times; available at: <https://themissouritimes.com/press-release-josh-hawley-launches-missouri-liberty-project/>

⁵ Joshua Hawley “An Affirmative Power to Interpret: Congress and Section 5 of the 14th Amendment,” Oct. 1, 2013; available at: <https://lawliberty.org/forum/an-affirmative-power-to-interpret-congressional-power-and-section-5-of-the-14th-amendment/> (emphasis added).

⁶ Joshua D. Hawley, The Most Dangerous Branch, 44 National Affairs 29 at 42 (2012); available at <https://www.nationalaffairs.com/publications/detail/the-most-dangerous-branch> (emphasis added).

⁷ Joshua Hawley “Cosmic Restraint” July 2, 2012; available at <https://lawliberty.org/book-review/cosmic-restraint/> (emphasis added.)

⁸ Joshua Hawley “Cosmic Restraint” July 2, 2012; available at <https://lawliberty.org/book-review/cosmic-restraint/> (emphasis added.)

⁹ Joshua D. Hawley, The Most Dangerous Branch, 44 National Affairs 29 at 39 (2012); available at <https://www.nationalaffairs.com/publications/detail/the-most-dangerous-branch> (emphasis added).

¹⁰ Josh Hawley, Speech on Senate Floor, June 16, 2020 (emphasis added); a transcript is available at: <https://www.thepublicdiscourse.com/2020/06/65043/> and a video at: https://www.youtube.com/watch?v=hrKb_OuEy2k&feature=youtu.be. The following is a full transcript of the speech:

I rise today to offer a few thoughts about the Bostock case handed down by the Supreme Court yesterday. I have it here. I have now had the chance to read the case, the decision by the majority of the court, and the two dissenting opinions, and I have to say I agree with the news reports that have said that this is truly a seismic decision. It is truly a historic decision.

It is truly a historic piece of legislation.

This piece of legislation changes the scope of the 1964 Civil Rights Act. It changes the meaning of the 1964 Civil Rights Act. It changes the text of the 1964 Civil Rights Act. In fact, you might well argue it is one of the most significant and far-reaching updates to that historic piece of legislation since it was adopted all of those years ago.

Make no mistake: this decision, this piece of legislation, will have effects that range from employment law to sports to churches. There’s only one problem with this piece of legislation: it was issued by a court, not by a legislature.

It was written by judges, not by the elected representatives of the people. And it did what this Congress has pointedly declined to do for years now, which is to change the text and the meaning and the application and the scope of a historic piece of legislation.

I think it’s significant for another reason, as well.

This decision, and the majority who wrote it, represents the end of something. It represents the end of the conservative legal movement, or the conservative legal project, as we know it. After Bostock, that effort, as it has existed up to now, is over. I say this because if textualism and originalism give you this decision, if you can invoke textualism and originalism in order to reach such a decision - an outcome that fundamentally changes the scope and meaning and application of statutory law - then textualism and originalism and all of those phrases don’t mean much at all.

And if those are the things that we’ve been fighting for - it’s what I thought we had been fighting for, those of us who call ourselves legal conservatives - if we’ve been fighting for originalism and textualism, and this is the result of that, then I have to say it turns out we haven’t been fighting for very much.

Or maybe we’ve been fighting for quite a lot, but it’s been exactly the opposite of what we thought we were fighting for.

Now, this is a very significant decision and it marks a turning point for every conservative. And it marks a turning point for the legal conservative movement.

The legal conservative project has always depended on one group of people in particular in order to carry the weight of the votes to actually support this out in public, to get out there and make it possible electorally. And those are religious conservatives. I am one myself. Evangelicals, conservative Catholics, conservative Jews: let's be honest, they're the ones who have been the core of the legal conservative effort.

And the reason for that dates back decades now, back to the 1970s. The reason for that is these religious conservatives, from different backgrounds, have consistently worked together to seek protection for their right to worship, for their right to freely exercise their faith as the First Amendment guarantees, for the right to gather in their communities, for their right to pursue the way of life that their scriptures variously command and that the Constitution absolutely protects. That's what they have asked for, that's what they have sought, all these years.

But, as to those religious conservatives, how do they fare in yesterday's decision? What will this rewrite of Title VII mean for churches? What will it mean for religious schools? What will it mean for religious charities?

Well, in the many pages of its opinion—thirty-three pages, to be exact—the majority does finally get around to saying something about religious liberty. On one page. What does it say? Here's the substance of the court's analysis: "How the doctrines protecting religious liberty interact with Title VII," as reinterpreted now by the court, "are questions for future cases."

I'll say that again. "How the doctrines protecting religious liberty interact with Title VII are questions for future cases."

Oh, no doubt they are. Huge questions. And we eagerly await the decisions of our super-legislators across the street in the Supreme Court building, there at 1 First Street, to see how they will legislate on this question. What will become of church hiring liberty? What will become of the policies of religious schools? What will become of the fate of religious charities? Who knows? Who's to say? They're questions for future cases.

Now I will say this in defense of the court: it is difficult to anticipate in one case all future possible implications. That's why courts are supposed to leave legislating to legislators. That's why Article III does not give the United States Supreme Court or any federal court the power to legislate, but only the judicial power to decide cases and controversies, not to decide policies. But I will also say this: that everybody knows, every honest person knows, that the laws in this country today are made almost entirely by unelected bureaucrats and courts. They're not made by this body.

Why not? Because this body doesn't want to make law. That's why not.

That's because in order to make law, you have to take a vote. In order to vote, you have to be on the record. And to be on the record is to be held accountable. That's what this body fears above all else. This body is terrified of being held accountable for anything on any subject.

So can we be so surprised that where the legislature fears to tread, where the Article I body—this body—that is charged by the Constitution for legislating, refuses to do its job, courts rush in and bureaucrats, too?

Are they accountable to the people? No, not at all.

Do we have any recourse? Not really.

Now what must we do? Well, now we must wait to see what the super-legislators will say about our rights in future cases.

If this case makes anything clear, it is that the bargain that has been offered to religious conservatives for years now is a bad one. It's time to reject it.

The bargain has never been explicitly articulated, but religious conservatives know what it is. The bargain is that you go along with the party establishment, you support their policies and priorities—or at least keep your mouth shut about it—and, in return, the establishment will put some judges on the bench who supposedly will protect your constitutional rights to freedom of worship, to freedom of exercise. That’s what we’ve been told for years now.

We were told that we’re supposed to shut up while the party establishment focuses more on cutting taxes and handing out favors for corporations, multinational corporations who don’t share our values, who will not stand up for American principles, who were only too happy to ship American jobs overseas. But we’re supposed to say nothing about that. We’re supposed to keep our mouths shut because maybe we’ll get a judge out of the deal. That was the implicit bargain.

We’re supposed to keep our mouths shut while the party establishment opens borders, while the party establishment pursues ruinous trade policies.

We’re supposed to keep our mouths shut while those at the upper end of the income bracket get all of the attention. While working families and college students and those who don’t want to go to college but can’t get a good job, while they get what? What attention?

Workers? Children? What about parents looking for help with the cost of raising children? Looking for help with the culture in which they have to raise children? Looking for help with the communities, rebuilding the communities in which they must carry out their family life?

What about college students trying to find an education that isn’t ruinously expensive and then figure out some way to pay back that enormous debt? What about those who don’t have a college degree and don’t want one, but would like to get a good job? What about them?

No, we’re supposed to stay quiet about all of that, and more, because there may be pro-Constitution, religious liberty judges. Except for that there aren’t. Except for that these judges don’t follow the Constitution. Except for these judges invoke “textualism” and “originalism” in order to reach their preferred outcome.

Now I want to be clear, I am not personally criticizing any justice who joined the majority opinion or wrote it. I believe one hundred percent that the justices—the justice—who principally authored this opinion, Justice Gorsuch, and those who joined him are sincere and who were writing to the best of their ability, reasoning to the best of their ability. And the opinion is, whatever else you might say about it, is not sloppily reasoned. No, I think that they were doing what they thought was best and using all of the skills and gifts that they had.

No, I question how we got here. I question how judges who hold to this philosophy ended up on that bench. I question the bargain that people of faith have been offered and asked to hold to for all of these years.

And the truth is, to those who have objected to my own questioning of judicial nominees in this body, to those who said I was wrong to question judges who came for the Judiciary Committee, to those who chided me for asking tough questions even of nominees by a Republican president, for those who said that I was slowing the process down, that I was out of line, for the supposedly conservative groups who threatened to buy television time in my own state to punish me for asking questions about conservative judges, I just have this to say: this is why I asked questions. This is why I won’t stop. And I wish some more people would ask some harder questions. Because this outcome is not acceptable. And the bargain which religious conservatives have been offered is not tenable.

So, I would just say, it’s not time for religious conservatives to shut up. No, we’ve done that for too long. No, it’s time for religious conservatives to stand up and to speak out.

It's time for religious conservatives to bring forward the best of our ideas on every policy affecting this nation. We should be out in the forefront leading on economics, on trade, on race, on class, on every subject that matters for what our founders called the "general welfare;" because we have a lot to offer, not just to protect our own rights, but for the good of all of our fellow citizens; because as religious believers, we know that serving our fellow citizens—of whatever their religious faith, whatever their commitments may be—serving them, aiding them, working for them, is one of the signature ways that we show a love of neighbor. It's time for religious conservatives to do that.

It's time for religious conservatives to take the lead rather than being pushed to the back.

It's time for religious conservatives to stand up and speak out rather than being told to sit down and shut up.

And because I'm confident that people of faith, of goodwill, all across this country are ready to do that, and want to do that, and have something to offer this country—and every person in this country, whatever their background or income or race or religion—because of that, I'm confident in the future. But I'm also confident that the old ways will not do.

So, let this be a departure. Let this be a new beginning, let this be the start of something better.

¹¹ Josh Hawley, Speech on Senate Floor, June 16, 2020 (emphasis added); a transcript is available at: <https://www.thepublicdiscourse.com/2020/06/65043/>

¹² Dustin Siggins, "Missouri AG candidate blasts GOP opponent on abortion: he's 'multiple choice,'" Feb. 11, 2016, LifeSiteNews; available at <https://www.lifesitenews.com/news/missouri-ag-candidate-blasts-opponent-multiple-choice-on-life-issues> (emphasis added).

¹³ Joshua D. Hawley, *The Most Dangerous Branch*, 44 National Affairs 29 at 38-39 (2012); available at <https://www.nationalaffairs.com/publications/detail/the-most-dangerous-branch> (emphasis added).

¹⁴ Joshua D. Hawley, *The Most Dangerous Branch*, 44 National Affairs 29 at 40-41 (2012); available at <https://www.nationalaffairs.com/publications/detail/the-most-dangerous-branch> (emphasis added).

¹⁵ Joshua D. Hawley, *The Most Dangerous Branch*, 44 National Affairs 29 (2012); available at <https://www.nationalaffairs.com/publications/detail/the-most-dangerous-branch> (emphasis added).

¹⁶ Chief Justice John Roberts was confirmed September 29, 2005 and although he was a bit of a stealth nominee, there were hopes that Roberts would be a constitutionally faithful Chief Justice. Roberts served about half of the 2005-2006 term and likely hired Josh Hawley during the 2006-2007. In any event, Hawley served as a law clerk to Chief Justice Roberts from 2007-2008 when conservative constitutionalists remained optimistic about the tenure of Chief Justice.

¹⁷ Josh Hawley, "Why I Won't Stop Asking Judicial Nominees If They Will Follow The Constitution" Feb. 27, 2019 (emphasis added); see at <https://www.hawley.senate.gov/node/184> and <https://thefederalist.com/2019/02/27/wont-stop-asking-judicial-nominees-will-follow-constitution/>

¹⁸ Letter from Senator Hawley to Neomi Rao, Feb. 26, 2019; available at <https://www.hawley.senate.gov/senator-hawley-sends-letter-neomi-rao-outlining-questions-about-judicial-philosophy>

¹⁹ Sarah Pitlyk, "Answers to the Senate Judiciary Committee, Questionnaire for Judicial Nominees," available at: https://www.judiciary.senate.gov/download/sarah-pitlyk-sjq_-public&download=1

²⁰ Calvin Freiburger, "Trump judicial pick who went after Christian farm for 'discrimination' withdraws nomination," June 12, 2019, LifeSiteNews.com; available at <https://www.lifesitenews.com/news/trump-judicial-pick-who-went-after-christian-farm-for-discrimination-withdraws-nomination>

²¹ Emily Belz, “Missouri AG contender has deep religious liberty legal roots,” August 6, 2016, World (emphasis added); available at https://world.wng.org/2016/08/missouri_ag_contender_has_deep_religious_liberty_legal_roots

²² Josh Hawley, “Speech at the National Conservatism Conference,” July 18, 2019 (emphasis added); available at <https://www.hawley.senate.gov/senator-josh-hawleys-speech-national-conservatism-conference>