



To: Interested Parties
From: Ellie Langford, Opposition Research Director
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Anti-Choice Activists Are Speaking In Code To Hide Kavanaugh's Anti-Choice Views

With seven in ten voters in favor of legal access to abortion, anti-choice leaders are well aware that asking a Supreme Court nominee to openly identify as anti-choice or to commit to overturn and gut Roe v. Wade risks serious public backlash. At the same time, they need to signal to their extreme anti-choice base that they have a nominee who will actively work to undermine abortion access. To avoid these pitfalls, they've trained their followers to recognize "proxy" language, such as "originalist," "textualist," "strict constructionist," "constitutionalist" and "judicial restraint"—as code that signals "anti-choice."

Conservative Leaders Have Acknowledged That Openly Identifying Anti-Choice Judicial Nominees Is Risky

Americans United for Life (AUL) "So Because We Can't Ask And Get Answers To The Question 'Would You Overturn Roe?' The Next Best Proxy Analogue To That Is 'How True Are You To The Document, To The Constitution Itself?'" In a podcast following Justice Kennedy's retirement from the Supreme Court, Americans United for Life chief legal officer Steven Aden said AUL was "looking for" Trump to nominate an "ardent pro-lifer," to fill the vacant seat. Aden also acknowledged that anti-choice activists "can't ask" about a nominee's anti-choice views in public. Instead, he described the "proxy" language AUL would look for:

"The late Justice Antonin Scalia was a devout Catholic, **ardent pro-lifer, and very much a straight constructionist, originalist**, who sought in Constitutional language the original meaning of the framers, not what he would impose on the Constitution or on the people as a matter of his own subjective judgement. That's what we are looking for here. **So because we can't ask and get answers to the question 'Would you overturn Roe?' The next best proxy analogue to that is 'How true are you to the document, to the Constitution itself?** Everyone respects the Constitution, everyone would say that the Constitution ought to be followed, but only **a true originalist, textualist**, would say 'what matters is what the Constitution said in its original obligation, as the framers of the Constitution intended it. Looking for meaning in history, looking for meaning in historical terms. They are not looking to allow the constitutional language to morph into their own subjective judgement of what is good social engineering.'" [Americans United for Life, Help Ensure A Pro-Life Supreme Court Webcast, [7/3/18](#), 28:20]

Susan B. Anthony (SBA) List President Marjorie Dannenfelser Noted How Rarely Politicians Acknowledge "Pro-Life" Judicial Nominees, Saying They "Usually Couch It In Other Words, Like 'Constitutional.'" According to The Washington Post, Dannenfelser "said she couldn't recall a candidate



explicitly stating they would pursue ‘pro-life’ justices.” Instead, she said, “They usually couch it in other words, like ‘constitutional.’” The Daily Beast similarly reported that, “When [Trump] promised he would only nominate ‘pro-life judges,’ Dannenfels’s ears perked up. She said she’s never heard another Republican politician use that phrase. ‘I think they think that it doesn’t sound sophisticated, that **it’s too frank for them,**’ Dannenfels said, of Republicans who are more euphemistic about their judicial philosophies. ‘What has been jarring on the one hand is refreshing on the other, which is that he calls it like he sees it.’” [The Daily Beast, [6/6/16](#); The Washington Post, [6/22/16](#); Twitter, [6/21/16](#)]

Carrie Severino of the Judicial Crisis Network Pointed To Scalia As A Justice Who “Was Pro-Life, But He Would Have Said ‘I’m Not A Pro-Life Judge.’” Judicial Crisis Network’s Carrie Severino answered the question of whether a pro-life judge exists: “Right, [Scalia] was pro-life but he would have said ‘I’m not a pro-life judge.’...So you need judges who are gonna faithfully interpret the Constitution, and that’s a judge, who actually, in many cases, will come out with pro-life results.” [EWTN Pro-Life Weekly, [9/5/17](#), 15:16]

AUL President Catherine Glenn Foster Described The Code Words She Looks For: “We Shouldn’t Be Picking Someone Because They Say ‘Well I Pledge To Overturn Roe.’ We Should Pick Someone Who Says ‘I’m Gonna Adhere To The Constitution.’” Americans United for Life has repeatedly said they aim to “overturn *Roe v. Wade*” and called the decision “shameful” and “deeply flawed.” After Justice Kennedy’s retirement, the group said it was working toward “confirming a truly pro-life Justice to the Supreme Court.” At the same time, Glenn Foster said: “We shouldn’t be picking someone because they say ‘Well I pledge to overturn Roe.’ We should pick someone who says ‘I’m gonna adhere to the Constitution’ and someone who will see in fact that they are open to reargument of poorly reasoned precedent, and again, are willing to look to the Constitution and really feel that they are required to look to the Constitution as their highest calling and duty, rather than to a poorly reasoned decision from nearly 50 years ago from 1973.” [Americans United for Life, accessed [7/3/18](#); Americans United for Life email, 7/3/18, via NARAL Research Department; Americans United for Life, Help Ensure A Pro-Life Supreme Court Webcast, [7/3/18](#); Americans United for Life, accessed [7/3/18](#)]

Instead, They Have Trained Their Base To Know “Originalist,” “Textualist,” Or “Constitutionalist” Mean “Anti-Choice”

“Originalist” And “Textualist”

Federalist Society: The “Conservative Originalist” View Is That “Both *Griswold* And *Lochner*—And *Roe*, *Lawrence*, And *Obergefell*—Were All Wrongly Decided.” In a 2017 blog post for the Federalist Society, contributor Evan Bernick, a former Koch Associate and Visiting Legal Fellow at the Heritage Foundation, explained the “originalist” viewpoint: “Yet conservative originalists have criticized *Griswold* and subsequent decisions identifying unenumerated ‘fundamental’ rights on similar grounds. Conservative originalist icon Robert Bork urged that burdens on unenumerated rights should not trigger any judicial review at all. Thus, he wrote that because the legislation at issue in *Griswold* did not ‘threaten any [textually] guaranteed freedom,’ it should have been upheld. **According to this view, both *Griswold***



and *Lochner*—and *Roe*, *Lawrence*, and *Obergefell*—were all wrongly decided.” [Federalist Society, [4/18/17](#)]

Heritage Foundation’s Edwin Meese III Described “Promoting Originalism” As Putting “An End To The Fanciful Readings Of The Constitution That Produce Such Decisions As *Roe v. Wade*” And To Roll Back “Abortion On Demand.” Meese was the chairman of Heritage’s Center for Legal and Judicial Studies until his partial retirement in 2013, and remains Heritage’s Ronald Reagan Distinguished Fellow Emeritus. He defined originalism in a detailed 2005 commentary: “In promoting originalism, I was simply following President Reagan’s wishes. In one 1988 speech, he asked judges to put ‘an end to the fanciful readings of the Constitution that produce such decisions as *Roe v. Wade*.’ That 1973 decision was certainly an extreme example of judicial revision of our Constitution. The judges wanted to reach a particular political outcome, so they simply pretended to ground their decision in our founding document. They used a nonconstitutional ‘right to privacy’ to create a ‘right’ to **abortion on demand**.” [Heritage Foundation, [6/6/05](#)]

Former Reagan Nominee Robert Bork For The Heritage Foundation: *Roe v. Wade* Is The “Best Known” Example Of The Type Of Case “Originalism” Opposes. In a 2010 report for the The Heritage Foundation entitled ‘Keeping a Republic: Overcoming the Corrupted Judiciary,’ Bork clearly defined “originalism,” and held up *Roe* as the type of case “originalists” seek to overcome. He said, “There remains the political battle to nominate and confirm justices and judges who spurn activism as illegitimate and will be guided instead by the original understanding of the principles of the Constitution...The appointment of new justices who hold an originalist philosophy is therefore necessary for the preservation of a republican form of government...**The best known, but hardly unique, example is *Roe v. Wade*, which invented a wholly fictitious right to abortion...** *Roe* is the premier example of what we now call judicial activism... ‘Activism’ has a real meaning, and it is an indispensable term in our debates. A judge is an activist when he reaches results or announces principles that cannot plausibly be derived from the actual historic Constitution. The historic Constitution is the set of principles that the ratifiers, who made the Constitution law, understood themselves to be enacting—the original understanding. **That approach is now called ‘originalism,’** and under no other approach can we have any semblance of the rule of law, which means in turn that no other approach is compatible with a republican form of government.” [The Heritage Foundation, Keeping a Republic: Overcoming the Corrupted Judiciary, [2/24/10](#)]

Sojourners Reported That Conservatives Believe “An Originalist Would Find No ‘right To Abortion’ In The Constitution.” In Christian news outlet Sojourners, Family Research Council’s Travis Weber described Gorsuch’s judicial philosophy: “On the one hand, we do have a lot of confidence in his judicial philosophy of originalism, and trust he is going to apply that.” Sojourners noted that Weber, “**like other conservatives, believes an originalist would find no ‘right to an abortion’ in the Constitution.**” [Sojourners, [3/29/17](#)]

Priests For Life’s Frank Pavone Said That Originalist Philosophy “Means That Decisions Like *Roe* Will Be Invalidated.” Sojourners also wrote, “The Rev. Frank Pavone, leader of Priests for Life and a prominent Trump supporter, took a similar approach. Referring to Gorsuch’s statements on precedent, Pavone wrote in an email that ‘while it can sound like this means [Gorsuch] would uphold *Roe*, it doesn’t.’ The nominee was simply refusing to be pinned down, Pavone wrote, and his originalist philosophy still



stands: 'If, in fact, the Court is not supposed to make law, that means that decisions like Roe will be invalidated, and the people will again be empowered to protect their unborn children.'" [Sojourners, [3/29/17](#)]

"Constitutionalist," Or Loyal To The Constitution "As Written"

Concerned Women For America: If A Nominee Is A "Constitutionalist," Then "You Can Say He Is Pro-life." A blog post for the Concerned Women for America's Legislative Action Committee equated constitutionalism with being "pro-life," saying: "Judge Neil Gorsuch, President Donald Trump's choice to replace the beloved Justice Antonin Scalia, has shown himself to be such a judge. In that sense, **you can say he is 'pro-life,' for he is a constitutionalist.** A constitutional judge resists the considerable social, political, and economic pressures that come when dealing with the issue of abortion and stays true to the principle of judicial restraint. All indications are that Judge Gorsuch is just such a judge." [Concerned Women For America, [2/8/17](#)]

Susan B. Anthony List's Marjorie Dannenfelser Explained That "Constitutional" Was Typically Code For "Pro-Life" In Supreme Court Nominations. According to The Washington Post, Marjorie Dannenfelser, president of the Susan B. Anthony List "said she couldn't recall a candidate explicitly stating they would pursue 'pro-life' justices. 'They usually couch it in other words, like "constitutional,'" she said." According to The Daily Beast, "When [Trump] promised he would only nominate 'pro-life judges,' Dannenfelser's ears perked up. She said she's never heard another Republican politician use that phrase. 'I think they think that it doesn't sound sophisticated, that it's too frank for them,' Dannenfelser said, of Republicans who are more euphemistic about their judicial philosophies. 'What has been jarring on the one hand is refreshing on the other, which is that [Trump] calls it like he sees it.'" [The Daily Beast, [6/6/16](#); The Washington Post, [6/22/16](#); Twitter, [6/21/16](#)]

AUL's Catherine Glenn Foster Criticized Justice Kennedy For Having "Not Adhered To Conservative, Constitutionalist Principles When It Comes To The Issue Of Abortion." Foster argued that Justice Anthony Kennedy had "not adhered to conservative, constitutionalist principles when it comes to the issue of abortion." She said AUL is looking for a replacement who is "originalist [and] textualist," someone "who would recognize that when it comes to flawed precedent...there should be room and space for re-argument." [The Atlantic, [6/28/18](#)]

AUL Staff Counsel Deanna Wallace Defined *Roe v. Wade* As A "Case Study" In "Flawed" Precedent. "*Roe v. Wade* is a case study in judicial overreach, and it is important that the conversation surrounding this controversial case includes the many legal, medical, and scientific truths that have been long ignored by a Court determined to legislate from the bench... But the truth is that the shaky legal foundation upon which abortion rests has been crumbling for years... "The discussion today reminds us once again, that ***Roe v. Wade* is not settled law.**" [Americans United for Life, [3/21/17](#)]

Dannenfelser Also Argued That Supporting *Roe* Means "Misinterpreting The Constitution." When President Obama was considering nominees for a Supreme Court vacancy in 2010, Newsmax reported



that, “Dannenfelser says that if Obama chooses someone who backs the *Roe v. Wade* decision, he’ll be misinterpreting the constitution.” [Newsmax, [4/27/10](#)]

The Federalist Society’s Leonard Leo: Trump’s Judicial Picks Signal A “Fundamental Transformation Of The Federal Bench” Because They Will “Enforce The Constitution As It’s Written.” In a June 24 appearance on Fox News Sunday, Leo said: “The job of a judge is to enforce the Constitution as it’s written... This is really at the core of [Trump’s] legacy. **You’re dealing with fundamental transformation in the federal bench.** It’s about as inspiring and motivating as anything has been in my professional life. It’s like nothing I’ve ever experienced, Chris. It’s really incredible.” [Real Clear Politics, [6/24/18](#)]

Americans United For Life Hoped Trump’s Supreme Court Nominee Would Be A “Constitutional Conservative” Who “Will Overturn Roe.” AUL tweeted: “We urge President Trump to nominate a jurist in the mold of Justice Neil Gorsuch, a strong constitutional conservative! #SCOTUS.” The President of AUL, Catherine Glenn Foster, said, “we at AUL do hope that the next Supreme Court Justice will overturn *Roe*. [Twitter, [7/2/18](#); Americans United for Life, Help Ensure A Pro-Life Supreme Court Webcast, [7/3/18](#), 14:30]

Liberty Counsel Chairman Mat Staver Discussed Trump’s Potential Supreme Court Nominees: “If You Have A Person Who Is A Pro-life Justice, That’s A Person Who’s Not Going To Be An Activist Justice Or Judge... They’re Pro-life In The Sense Of They Know That The Constitution Has No Basis For Abortion.” Staver said. “If they’re not going to be activist on the pro-life, they’re not going to be activist on the issue same-sex marriage because that’s an even further deviation from the Constitution beyond belief...I’ve been pleased with his position on appointing pro-life judges and justices and vetting them through the Heritage Foundation and the Federalist Society. That’s a big deal... That’s a huge deal, not just on the issue of life, but across the board. You get the justice or judge that has a judicial philosophy to interpret the Constitution, rather than to create a brand new Constitution.” Staver also said, “If you nominate someone to the Supreme Court that has a judicial philosophy, not that they’re political pro-life vs. pro-abortion, but that they’re pro-life in the sense of they know that the Constitution has no basis for abortion. That means that someone is viewing the Constitution based upon the written text.” [WND, [11/14/16](#), LifeSite News, [11/18/16](#)]

Students for Life President Kristan Hawkins Called For Supreme Court Justices Who Would “Uphold The Constitution, Which Has No Right To Abortion Written In It” Hawkins said, “It is essential to vote pro-life first in order to elect the right leaders who will place justices on the Supreme Court who uphold the Constitution, which has no right to abortion written in it. There is no greater issue than the protection of life, from conception to natural death. If a leader doesn’t believe in protecting this foundational right, what will his/her other policies look like?” [America Magazine, [1/20/16](#)]

AUL’s President Catherine Glenn Foster Said “We Shouldn’t Be Picking Someone Because They Say ‘Well I Pledge To Overturn Roe.’ We Should Pick Someone Who Says ‘I’m Gonna Adhere To The Constitution.’” In full, she said: “With all of this said though, this process should not be politicized, and usually it is, it should not be. We shouldn’t be picking someone because they say ‘Well I pledge to overturn *Roe*’. We should pick someone who says ‘I’m gonna adhere to the Constitution’ and someone



who will see in fact that they are open to reargument of poorly reasoned precedent, and again, are willing to look to the Constitution and really feel that they are required to look to the Constitution as their highest calling and duty, rather than to a poorly reasoned decision from nearly 50 years ago from 1973, that was propped up on the reliance interest simply because it was an old decision and we can do better than that. We have core principles that guide us, that's what we need to be turning back to." [Help Ensure A Pro-Life Supreme Court Webcast, [7/3/18](#), starts at 19:50]

"Judicial Restraint" And Avoiding "Concocted" Rights

Anti-choice and conservative leaders have used "judicial restraint" to refer to the type of anti-choice judicial philosophy they support, as opposed to "judicial activism," which they use to refer to pro-choice rulings.

ADF Argued For Judges Who Practice "Judicial Restraint" By Opposing "Concocted," "New" Or "Manufactured" Rights, Such As Those Established In *Roe v. Wade*. In a blog post, ADF senior counsel and director of strategic engagement Jordan Lorence argued that: "Judicial activism,' correctly defined is when a court makes up a new right that doesn't exist in the Constitution, and then strikes down a law based on that concocted 'right,' or ignores a provision of the Constitution that clearly applies to the case before the court, and then imposes its public policy preference through the judicial decision. For example, in *Roe v. Wade* the Supreme Court manufactured a 'right to abortion' by cobbling together bits and pieces of various constitutional provisions, and then claiming that 'emanations from the penumbras' of these provisions can be fused together into a 'right of privacy' that covers abortion, and struck down Texas' law regulating abortion." In the piece, ADF argued in favor of "judicial restraint." [Alliance Defending Freedom, [5/4/10](#)]

AUL Senior Counsel Clarke Forsythe Called For Justices Who Practice "Judicial Restraint" Instead Of Supporting "Tragic Decisions Like *Roe V. Wade*." In 2017, Forsythe discussed the Gorsuch nomination, saying "[Gorsuch] is committed to interpreting the Constitution as written and not legislating from the bench, a dangerous practice that leads to tragic decisions like *Roe v. Wade*. Judge Gorsuch has demonstrated a commitment to constitutional originalism, the separation of governmental powers, and principles of judicial restraint. When *Roe v. Wade* was arbitrarily decided by the Supreme Court, without medical evidence or a trial court record of thorough debate, abortion on demand was created out of thin air, based on judicial preferences. It was a sweeping act of judicial overreach and a premier example of what legislating from the bench looks like. A judiciary committed to interpreting—not creating law—is key for respecting the voice of the people through their elected officials." [LifeNews, [3/15/17](#)]

AUL Argued That The Current Supreme Court Vacancy Was A "Once-In-A-Lifetime Chance To Shift The Court Back To A Pro-life Majority That Will Be Committed To The Constitution And Refuse To Use It As A Means Of Social Engineering." In a promotional email, AUL wrote: "Wednesday's announcement by Justice Anthony Kennedy that he is retiring from the Supreme Court offers what is likely to be a once-in-a-lifetime chance to shift the Court back to a pro-life majority that will be committed to the Constitution and refuse to use it as a means of social engineering. Forty-five years ago, *Roe v. Wade* imposed abortion on demand on the whole country; more than sixty million American



lives have been lost to abortion since, and countless women harmed. ... Yet in 1992, the Court elected to prop up the core holding of *Roe* based on the misguided notion that women 'rely' on abortion in order to succeed in their education, careers, and families.." [AUL Teleconference Confirmation Email, [7/3/18](#)]

AUL President Catherine Glenn Foster Said “The Problem With That Is That *Roe* Is Really The Quintessential Example Of Judicial Activism. A True Constitutionalist Has To Recognize That The Original Meaning Of The Constitution, Not *Stare Decisis*, Should Be Their First Loyalties.” In the July 3 “Help Ensure A Pro-Life Supreme Court Webcast,” Foster said: “Now you may have heard from Senator Collins and others that they would be against anyone who would say that they would overturn *Roe v. Wade*. The problem with that is that ***Roe* is really the quintessential example of judicial activism**. It’s criticized on the left as well as on the right so a true constitutionalist has to recognize that the original meaning of the constitution, not *stare decisis*, should be their first loyalties. So we at AUL do hope that the next Supreme Court Justice will overturn *Roe*.” [Help Ensure A Pro-Life Supreme Court Webcast, [7/3/18](#), starts at 16:20]

Concerned Women For America Praised Scalia For Being A “Proponent of Judicial Restraint And Constitutionalism” And Claimed “Abortion Is Nowhere To Be Found In The Constitution.”

Concerned Women for America wrote, “Justice Scalia was the most important proponent of judicial restraint and constitutionalism. He advocated respect for the text of the Constitution and restraint in those areas where the Constitution is silent. On the other side, the liberal Justices believe in a ‘living, breathing’ Constitution that they can manipulate to fit their policy preferences. Therefore, even when abortion is nowhere to be found in the Constitution, they are free to read it into the Constitution because they feel really, really passionate about it.” [Concerned Women For America, [5/25/16](#)]