Should Democrats filibuster Gorsuch?

Neil Gorsuch likely is every bit as conservative as Robert Bork, who was rightly rejected by the Senate in 1987 for having views outside of the judicial mainstream. If Robert Bork had been confirmed rather than Anthony Kennedy, there is no doubt that Roe v. Wade would have been overruled, affirmative action would have been ended, and there would be no constitutional right to marriage equality.

The case for rejecting Gorsuch as likewise being out of the judicial mainstream is compelling. But the key difference is that the Senate that rejected Bork had a Democratic majority and it now has a Republican majority. Realistically, the only way the Democrats can stop Gorsuch is with a filibuster and there is no point in filibustering Gorsuch unless the Democrats are willing to continue to block all nominees that are far right of center. Also, there is the possibility that a Democratic filibuster would trigger the Republicans changing the Senate’s rules to eliminate the filibuster for Supreme Court nominations, something President Donald Trump already has urged.

Gorsuch, like Bork and Antonin Scalia, says that he is an "originalist," which means that he believes that the meaning of a constitutional provision is fixed at the time that it was enacted and can be changed only through the amendment process. Gorsuch has said: "Judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."

Robert Bork’s nomination for the Supreme Court was rejected by the Senate precisely because of such originalist views. An originalist rejects constitutional protection for privacy, including for reproductive autonomy, rejects constitutional protection for marriage equality for gays and lesbians, and even rejects protecting women from discrimination under equal protection because none of these were intended by the framers of the Constitution. All of these were Scalia’s positions.
Originalism is a terrible approach to constitutional interpretation and if followed would radically change constitutional law. The original understanding of the Constitution is unknowable and even if it could be known, should not be binding today. Under an originalist philosophy, it would be unconstitutional to elect a woman as president or vice president because the Constitution refers to these officeholders as "he" and the framers unquestionably intended that they would be male. Under originalism, Brown v. Board of Education was wrongly decided because the same Congress that ratified the Fourteenth Amendment also voted to segregate the District of Columbia public schools.

The Supreme Court never has followed an originalist philosophy. Long ago, Chief Justice John Marshall reminded us that "we must never forget that it is a Constitution we are expounding," a Constitution "meant to be adapted and endure for ages to come." Throughout American history, the Supreme Court has regarded the Constitution as a living document, which is the only way a country can be governed in the 21st century under a charter written in the 18th century for an agrarian, slave society.

Gorsuch's opinions on the 10th U.S. Circuit Court of Appeals show him to be a consistently conservative judge. Like Scalia, he has rejected the idea of a separation of church and state. In a number of cases, he approved religious symbols on government property. One notable area where his record is very troubling is in the ability of people to use their religion as a basis for inflicting injuries on others. Gorsuch wrote an opinion expressing the view that it violated the Religious Freedom Restoration Act to force an employer, who opposes contraception on religious grounds, to provide insurance coverage for contraceptives to women employees. Ultimately, the Supreme Court agreed with Gorsuch, in a sharply divided 5-4 ruling that split exactly along ideological lines.

Similarly, Gorsuch said that it violated the Religious Freedom Restoration Act to require not-for-profits institutions affiliated with religions to notify their insurance carriers if they did not want to provide insurance coverage for contraceptives. Even though there would be no cost whatsoever to the employer, Gorsuch believed that this was a substantial burden on religious freedom because it would trigger the insurance company providing contraceptives and make the employer "complicit." The current Supreme Court is split 4-4 on this.

These cases also can be seen as reflecting a hostility to protecting reproductive rights. That also was evident in a dissent he wrote last year to the denial of en banc review of a ruling that found it illegal for the state of Utah to defund Planned Parenthood.
Confirming Gorsuch will mean a staunch conservative justice in that seat on the Supreme Court for decades to come as he is only 49 years old. I would like to see the Democrats filibuster Gorsuch and all Trump nominees until he picks a moderate. In deciding whether to filibuster, Democrats should remember that there were 48 votes against Clarence Thomas and 42 votes against Samuel Alito. They could have been blocked by filibusters and it was a huge mistake that the Democrats did not do so. It is possible the Republicans will respond by eliminating the filibuster, but the Democrats are no worse off then than not filibustering because either way Gorsuch would end up on the Supreme Court.

It is impossible to put aside that the Republicans stole this seat on the Supreme Court by their unprecedented blocking of Chief Judge Merrick Garland. The difference between Garland and Gorsuch is stark and will tip the court's ideological balance for years to come. The Democrats should do whatever they can, even if ultimately fails, to keep someone with Gorsuch's ideology from being on the Supreme Court.