ABSTRACT

The Jurisprudence of Justice Neil Gorsuch

Michael Burke Craighead

Director: Steve Block, Ph.D.

Justice Neil Gorsuch is a self-proclaimed originalist and textualist. In many respects, however, Justice Gorsuch represents a new strand of textualism that does not fit nicely within traditional conservative or liberal labels. One has to look no further than *Bostock v. Clayton County* to see how Justice Gorsuch's textualism is distinct from other well-known textualists. An examination of Justice Gorsuch's own understanding of textualism, his approach to government structure and powers, his decisions involving rights and liberties, and his method of statutory interpretation reveals an emphasis on due process that is distinguishable from other Justices on the Court. Justice Gorsuch is unique in how he ties due process to the separation of powers and fair notice. The centrality of the separation of powers to due process is evident in Justice Gorsuch's emphasis on judicial independence, his fight against administrative deference, and his reinvigoration of the nondelegation doctrine. Likewise, he insists on fair notice through his aversion to judicial balancing tests, his requirement that Congress be explicit when it acts, and his rejection of judicial policymaking. These two concepts work together in Justice Gorsuch's jurisprudence to ensure that individual rights are protected and liberty is capable of being exercised. Ultimately, his jurisprudence understands the rule of law as anchored in a robust conception of due process through fair notice and the separation of powers, which makes him unique among the current members of the Court.

APPROVED BY DIRECTOR OF HONORS THESIS:

_____

Dr. Steve Block, Department of Political Science

APPROVED BY THE HONORS PROGRAM:

_____

Dr. Elizabeth Corey, Director

Date: _____

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M. Burke Craighead

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TABLE OF CONTENTS

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CHAPTER ONE

Introduction

Introduction

On June 15, 2020, the Supreme Court of the United States announced its decision in *Bostock v. Clayton County.* In an opinion joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan, Justice Neil Gorsuch explained that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation or gender identity. At the time, I was interning a block away in the United States Senate, where I was working for the Senate Republican Policy Committee. Needless to say, the reaction to the Court's majority opinion among Senate Republicans was one of alarm. One of my state's Senators, Josh Hawley, claimed that the decision represented "the end of the conservative legal movement, or the conservative legal project, as we know it."[1] In his view, "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."[2] Indeed, the decision came as a surprise for many conservative thinkers and politicians who expected the Court to rule the opposite way. Justice Gorsuch's opinion spawned an indignant dissent from Justice Alito, who accused Justice Gorsuch's opinion of being "like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory

[1] Josh Hawley, "Was It All for This? The Failure of the Conservative Legal Movement," *Public Discourse,* June 16, 2020, https://www.thepublicdiscourse.com/2020/06/65043/.

[2] Ibid.

interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."[3] In many respects, *Bostock* represents a major puzzle for textualism. Is it even a textualist opinion or was Justice Gorsuch doing something different? If it is a textualist opinion, what does that mean for the future of textualism? If it is not a textualist opinion, is this a one-off case or a harbinger of something more for Justice Gorsuch? All of these questions deserve answers, especially if, as Justice Kagan has claimed, the Justices "are all textualists now."[4] However, before these questions can be addressed, it is important to take a look at the man responsible for them.

Who Is Neil Gorsuch?

When President Trump nominated Neil McGill Gorsuch to be an Associate Justice of the Supreme Court of the United States and fill the seat of the late Antonin Scalia on January 31, 2017, various comparisons were quick to surround the new nominee. Justice Gorsuch has been called "a New Scalia," someone who has the potential to be "Kennedy's heir," and the Supreme Court's "new conservative anchor" with Justice Thomas.[5] Perhaps the former clerk to Justices Kennedy and White draws so many

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[3] Bostock v. Clayton County, 590 U.S. ___, ___ (2020) (slip op. at 2) (Alito, J., dissenting).

[4] Elena Kagan, "The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes" (Lecture, Harvard University, November 17, 2015).

[5] Alex Swoyer, "The New Scalia: Neil Gorsuch befriends liberal justices while exceeding conservatives' expectations," *Washington Times,* April 7, 2019, https://www.washingtontimes.com/news/2019/apr/7/neil-gorsuch-antonin-scalia-replacement-exceeds-co/; Christian Farias, "Is Neil Gorsuch the New Anthony Kennedy?" *GQ,* June 15, 2020, https://www.gq.com/story/neil-gorsuch-scotus-lgbt-decision; Greg Stohr, "Gorsuch Joins Thomas as Supreme Court's New Conservative Anchor," *Bloomberg,* June 27, 2017, https://www.bloomberg.com/news/articles/2017-06-27/gorsuch-joins-thomas-as-supreme-court-s-new-conservative-anchor.

comparisons to other Justices because he does not fit neatly within a preexisting jurisprudence. His time on the Court of Appeals for the Tenth Circuit strongly suggested that he was an originalist and textualist in the mold of Justice Scalia.[6] Yet, it is hard to imagine Justice Scalia joining Justice Gorsuch's opinion in *Bostock.* So what are we to make of the Coloradan? In truth, it depends on whom you ask. His questions from the bench have been derided as "condescending and stupid," while others have reported that Justice Gorsuch's demeanor on the bench is one of "politeness" toward his colleagues and lawyers.[7] Reviews of his writing have ranged everywhere from "Scalia without the spontaneous wit and charm" to "lively and accessible" with a "consistently courteous and mild" tone.[8] The truth probably lies somewhere in the middle. His writings are typically clear and easy to follow, and while his questions for lawyers are sometimes pointed, they are no more so than Justice Scalia's were. In terms of writing, Justice Scalia is a good point of comparison. While Justice Scalia's opinions were more caustic than Justice Gorsuch's typically are, both have a penchant for pithy phrases. Justice Scalia gave us phrases like "this wolf comes as a wolf," "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad," and "Congress […] does not […] hide

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[6] Adam Liptak, "In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style," *New York Times,* January 31, 2017, https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html.

[7] Simon van Zulyen-Wood, "Little Scalia," *New York Magazine,* May 28, 2018, https://nymag.com/intelligencer/2018/05/how-gorsuch-became-the-second-most-polarizing-man-in-dc.html; Richard Wolf, "Gorsuch fits in on Supreme Court's 'hot bench' on first day on the job," *USA Today,* April 17, 2017, https://www.usatoday.com/story/news/politics/2017/04/17/neil-gorsuch-fits-supreme-court-hot-bench/100565800/.

[8] Van Zulyen-Wood, "Little Scalia"; Liptak, "Echo of Scalia."

elephants in mouseholes."[9] For his part, Justice Gorsuch has already given us, "Even if the Constitution has taken a holiday during the pandemic, it cannot become a sabbatical," "the doctrine emerges maimed and enfeebled—in truth, zombified," and "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them," in his short tenure.[10] Thus, Justice Scalia and Justice Gorsuch are very similar in many respects. However, as *Bostock* makes clear, the two men also have their differences. Neil Gorsuch is not your grandfather's textualist.

The Structure and Argument of this Thesis

Bostock is a great catalyst for examining Justice Gorsuch's jurisprudence. This thesis attempts to understand Justice Gorsuch's jurisprudence in order to explain his opinion in *Bostock.* As such, my discussion of *Bostock* does not come until the very end of this thesis. Along the way, I develop an argument that Justice Gorsuch's jurisprudence ought to be understood as emphasizing due process in a unique way. He ties due process to the separation of powers and fair notice in a manner unlike other Justices. In order to illustrate this conception of due process, I focus primarily on cases and areas of law in which Justice Gorsuch differs substantially from other originalist (or semi-originalist)

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[9] Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgement); Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001).

[10] Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. ___, ___ (2020) (slip op. at 3) (Gorsuch, J., concurring); Kisor v. Wilkie, 588 U.S. ___, ___ (2019) (slip op. at 2) (Gorsuch, J., concurring in judgement); Niz-Chavez v. Garland, 593 U.S. ___, ___ (2021) (slip op. at 16).

Justices.[11] Chapter Two focuses on Justice Gorsuch's own understanding of originalism and textualism: what it means to be a textualist and why judges should be textualists, along with what sets Justice Gorsuch's textualism apart from other textualists. It also looks at his views on the role of judges when it comes to *stare decisis* and precedent. Chapter Three turns to questions involving the structure and powers of government. This entails an exploration of Justice Gorsuch's approach to the nondelegation doctrine, vagueness, and administrative deference. Chapter Four evaluates Justice Gorsuch's jurisprudence when it comes to rights and liberties. This chapter involves a plethora of issues from the Bill of Rights, but the cases examined all reinforce his unique notion of due process. Lastly, Chapter Five turns to statutory interpretation. Within this chapter, I look at general statutory interpretation principles that Justice Gorsuch employs as well as his approach to treaty interpretation before concluding with a discussion about *Bostock.* From all of this, I argue that Justice Gorsuch understands the rule of law as anchored in a robust conception of due process through fair notice and the separation of powers and that his decisions (including *Bostock*) are consistent with this approach.

Finally, it is important to explain that this thesis is not without its limitations. This is an evolving area of law. Justice Gorsuch has only been on the Court for five years at this point, and given his age, he could serve for another thirty. There is always a risk that trying to draw conclusions from what is still a relatively small sample size will lead to errors. After all, Justice Souter voted together with Chief Justice Rehnquist during his

[11] In practice this means focusing primarily on Justices Scalia and Thomas, who are clear-cut originalists, although there are also comparisons to Chief Justice Roberts and Justices Alito and Kavanaugh in certain areas of law. Unfortunately Justice Barrett's tenure, although suggestive of an originalist posture, is still too brief for meaningful comparison.

early tenure on the Court more than Justice Scalia did.[12] In that same vein, because Justice Gorsuch's jurisprudence continues to evolve and become clearer, so does scholarship in this area. Frankly, there is something of a void when it comes to substantive scholarship about his jurisprudence. While this void is slowly being filled, there is not the same degree of research and analysis of Justice Gorsuch's decisions that I hope will exist in twenty years. Furthermore, the Supreme Court's current term is not yet over, which means that Justice Gorsuch still has opinions that will be released this Term after this thesis is submitted. Perhaps Justice Gorsuch will author an opinion this June that wholly undermines the argument presented here. Nevertheless, this thesis is my best attempt at explaining Justice Gorsuch's jurisprudence as it stands now.

With that in mind, I ought to explain the main sources I rely on for this thesis. I primarily draw on Justice Gorsuch's various opinions that he has authored during his tenure on the Supreme Court. In particular, I focus on specific cases that highlight differences between his jurisprudence and that of other conservative Justices. Thus, not every case or area of law which demonstrates his commitment to fair notice and the separation of powers is analyzed here.[13] Of course, there is roughly a decade's worth of opinions from his previous service on the Tenth Circuit. However, these opinions often deal with fairly mundane or (comparatively) easy cases. Thus, most of the opinions that I reference in this thesis from Justice Gorsuch's time on the Tenth Circuit are opinions that

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[12] Robert Smith, "Justice Souter Joins the Rehnquist Court: An Empirical Study of Supreme Court Voting Patterns," *University of Kansas Law Review* 41, no. 1 (Fall 1992): 27.

[13] My hope is that this method saves the reader from a certain degree of repetition. A more comprehensive approach (while possible) would result in a much lengthier thesis without much additional novelty.

he has himself spotlighted in his off the Court writings or speeches. Likewise, I use his outside writings and speeches to supplement my analysis of his opinions authored while on the Court. Ultimately, I hope that this approach is more conducive to understanding Justice Gorsuch's actual jurisprudence. After all, it is one thing to espouse a certain method of constitutional or statutory interpretation in writings and speeches that have no effect on the law; it is another thing to actually follow through on that method in real opinions. If "[o]nly the written word is the law," as Justice Gorsuch has claimed, then only the written opinion is the jurisprudence.[14]

[14] *Bostock,* (slip op. at 2).

CHAPTER TWO

Justice Gorsuch on Originalism, Textualism, and the Role of Judges

Originalism and Textualism

Justice Gorsuch is a self-professed textualist and originalist. In his mind, "[t]extualism and originalism are our history, the mainstream and traditional accounts of the judge's job in our republic."[1] Of course, claiming to be a textualist or originalist means very little if one is doing something totally different from what judges typically consider those interpretive methods to entail. Given that it is quite unlikely that the arch-textualist Justice Scalia would have joined the opinion that Justice Gorsuch authored in *Bostock*, it is important to understand what Justice Gorsuch means by "textualism" and "originalism." It is also necessary to explore the philosophical underpinnings of Justice Gorsuch's textualism and originalism. Essentially, why does Justice Gorsuch maintain that textualism is prescribed and appropriate mode of interpretation for judges within the American constitutional system? In answering this question, I aim to draw out the distinctive features of Justice Gorsuch's textualism. In this section, I thus begin by laying out the definition of and argument for originalism and textualism that he provides in his writings on jurisprudence, which on the surface appear as substantially the same as those of traditional textualists like Justice Scalia. I then turn to the subtle differences between Justice Gorsuch and other textualists, which I contend arise, not from a rejection of any

[1] Neil Gorsuch, *A Republic, if You Can Keep It* (New York: Crown Forum, 2019), 107.

of the premises of originalism, but from Justice Gorsuch's much greater and more rigid adherence to due process, and especially fair notice as an element of due process, as the guiding and overarching principle of his jurisprudence, which in turns leads Justice Gorsuch to give great weight to the literalness of legal texts.

To begin, Justice Gorsuch understands textualism and originalism as tied together with due process in a way that ensures individuals are able to fully exercise their liberty. "Originalism is simply the idea that when interpreting the Constitution, we should look to text and history and how the document was understood at the time of its ratification."[2] He firmly believes that "your constitutional rights should not be subject to judicial revision. They should mean the same today as they did then and they should never be diminished by courts or judges."[3] That is to say, judges cannot reduce the rights and liberties of individuals that the Framers established. He ultimately believes that originalism ensures that our rights remain the same from generation to generation. Likewise, textualism is the statutory counterpart to originalism. It "tasks judges with discerning (only) what an ordinary English speaker would have understood the statutory text to mean at the time of its enactment."[4] Not only does Justice Gorsuch argue that textualism's commands are rooted in the Constitution, but he believes it fosters judicial impartiality. Intrinsically tied to textualism according to Justice Gorsuch are the canons of construction. These canons also promote impartiality because objective rules of grammar and syntax apply evenly to

[2] Gorsuch, *A Republic,* 25.

[3] Ibid.

[4] Gorsuch, *A Republic,* 131.

everyone. At the same time, legislative history is not an appropriate tool for judges.[5] Thus, it should come as no surprise that Justice Gorsuch believes the Court's role "is to interpret the words consistent with there 'ordinary meaning…at the time Congress enacted the statute.'"[6]

Justices Scalia and Thomas share many of these sentiments. Justice Scalia has explained originalism as the view that "the provisions of the Constitution have a fixed meaning, which does not change (except by constitutional amendment): they mean today what they meant when they were adopted, nothing more and nothing less."[7] In different words, this statement essentially espouses the same understanding of originalism as Justice Gorsuch. Justice Thomas is slightly different when it comes to originalism. Although, he too understands the meaning of the Constitution to be fixed, "[r]ather than focusing on the original intent of the Framers, the original understanding of the ratifiers, or the original objective meaning of the Constitution, Justice Thomas appears to look for […] the general original meaning."[8] Whereas Justices Scalia and Gorsuch tend to focus on the original objective (or public) meaning, Justice Thomas "considers a variety of historic sources on point, regardless of what specific type of meaning they might show."[9] To be clear, while there are some differences among these three notable originalists about

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[5] Gorsuch, *A Republic,* 130-132.

[6] Wisconsin Central Ltd. v. United States, 585 U.S. ___, ___ (2018) (slip op. at 2) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

[7] Antonin Scalia, *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law,* ed. Jeffrey Sutton and Edward Whelan (New York: Crown Forum, 2020), 12.

[8] Gregory Maggs, "Which Original Meaning of the Constitution Matters to Justice Thomas?" *New York University Journal of Law and Liberty* 4 (2009): 516.

[9] Ibid.

what sort of original meaning they are seeking, they do agree that the original meaning of the Constitution should control. Much of the same can be said about their understandings of textualism. Both Justice Scalia and Justice Thomas have explained that they "look for meaning in the governing text, ascribe to the text the meaning it has borne since its inception, and rejection judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences."[10] On this much at least, there is little daylight between Justice Gorsuch's understanding of textualism and Justices Scalia's and Thomas's.

Of course, Justice Gorsuch is not an originalist for the sake of being an originalist; judges do not select interpretive methods on a whim. Not all methods of interpretation are created equal, and Justice Gorsuch argues that originalism and textualism are the best methods available to us for interpreting texts. Thus, it is necessary to evaluate the philosophical basis that Justice Gorsuch lays out for originalism and textualism. There are two justifications that he gives for originalism and textualism: the structure of government and the rule of law. Of course, these two notions will play an integral role in due process within the rest of his jurisprudence, so it should come as no surprise that Justice Gorsuch understands them as the philosophical basis of originalism and textualism.

Beginning with the structure of government, Justice Gorsuch argues that originalism and textualism fit within the structure of government established by the Constitution. The implications of this argument are threefold. First, originalism and

[10] Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson West, 2012), xxvii.

textualism are necessary to maintain the separation of powers mandated by the Constitution. Relatedly, they are the only interpretive methods consistent with the proper role of judges within our structure of government. Finally, they promote liberty and democracy in a manner consistent with our structure of government.

The separation of powers justification is perhaps the most prominent in Justice Gorsuch's writing. In his mind, the judicial power is designed to be a "backward-looking authority" which serves as "a means for resolving disputes about what the existing law is," in contrast to the legislative power to prescribe rules that would be generally applicable and govern future conduct.[11] Under our structure of government, judges are not supposed to make laws. This may seem like a basic ninth grade civics lesson, but Justice Gorsuch argues that anything outside of originalism and textualism allows judges to make laws. When judges turn to the intent or the consequences of a law, they stray from neutral principles that are discernible to outsiders. As Justice Gorsuch puts it, "Life tenure makes little sense if judges are supposed to be nothing more than politicians wearing robes" and making policy judgements.[12] A value neutral focus on the text ensures that judges are merely interpreting the law. This limits the nature of judicial power and ensures due process. If judges are tasked with updating the Constitution and statutes to meet current social standards, then individuals can be punished for already completed

[11] Neil Gorsuch, "Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia," *Case Western Reserve Law Review* 66, no. 4 (2016): 910.

[12] Gorsuch, *A Republic,* 123.

conduct, and the lengths that the Framers went to in order to ensure that passing legislation is difficult (bicameralism and presentment) are essentially worthless.[13]

This brings us to the second, related structural justification for originalism and textualism: the role of judges within the structure of the Constitution. In Justice Gorsuch's view, a judge's primary role is to uphold the text of the Constitution, not to reach socially desirable results.[14] Therefore, "it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question […] it never faced."[15] Thus, originalism and textualism preserves the role of judges and the separation of powers by, first, constraining the power of judges to change the law, and second, forcing changes to the law to come through the legislative branch.

This leads directly to the third aspect of Justice Gorsuch's structural justification. Originalism and textualism promote liberty and democracy. Now, it is easy to see how other methods of interpretation could promote liberty; after all, *Lawrence* and *Roe* are decidedly non-originalist opinions that expanded the constitutional conception of liberty. However, Justice Gorsuch conceptualizes liberty in a different way. Liberty is not simply the right to do certain things, it is a broader protection for minorities from the majority through the difficulty of passing laws in our system.[16] In order to protect minority rights and prevent liberty restrictions through over legislating, the Framers made it deliberately

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[13] Gorsuch, "Of Lions," 912.

[14] Gorsuch, *A Republic,* 117.

[15] Henson v. Santander Consumer USA Inc., 582 U.S. ___, ___ (2017) (slip op. at 9).

[16] Gorsuch, *A Republic,* 119-120.

difficult to pass legislation or amend the Constitution, yet non-originalist interpretative methods encroach upon liberty by allowing the circumvention of this rigorous legislative process. This, of course, also undermines the democratic aspect of our government. He argues that when judges venture into making policy decisions that stray from the neutrality of the text, the public becomes "addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda."[17]

As an example, Justice Gorsuch argued in his dissent in *Carpenter v. United States* against the judicially invented "reasonable expectation of privacy test" from *Katz v. United States*. According to him, Justice Harlan II's concurrence in *Katz* (which the Court has since adopted) created two democratic issues by straying from the text of the Fourth Amendment.[18] First, determining which privacy interests society should be willing to recognize is an "exercise of raw political will," which subverts democracy, especially because judges are not politically accountable.[19] Second, it disincentivizes legislatures from addressing issues. They do not have to face the political consequences of an action if a court resolves the issue for them. Not only does this mean that our democracy cannot function the way it was designed, but it also limits the amount of positive law that judges have to guide them in areas like the Fourth Amendment.[20] This creates a positive

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[17] Neil Gorsuch, "Liberals'N'Lawsuits," *National Review,* February 7, 2005, https://www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/

[18] The so-called *Katz* test asks whether society would recognize an expectation of privacy as "reasonable."

[19] Carpenter v. United States, 585 U.S. ___, ___ (2018) (slip op. at 8) (Gorsuch, J., dissenting).

[20] *Carpenter,* (slip op. at 13) (Gorsuch, J., dissenting).

feedback cycle which further pushes judges to invent the law. Thus, there are three interconnected justifications related to the structure of government that Justice Gorsuch provides for originalism and textualism.

Closely related to his separation of powers argument, Justice Gorsuch argues that originalism and textualism are concomitants of the rule of law. According to Justice Gorsuch, originalism and textualism are necessary components of a political system predicated upon a "government of laws and not of men."[21] If individuals cannot rely on a fair reading of the plain text, there simply is no way for individuals to know what is expected of them, and there is nothing to constrain judges from punishing unpopular individuals. Justice Gorsuch argues that bicameralism and presentment are required so that laws are debated in public and the people know the rules by which they must live.[22] Likewise, a textualist approach only looks at what survives this process. In his view, there is simply no way to discern unexpressed intentions of the legislative body. Rather, the law is what is written, not some sort of legislative history or policy considerations by judges. "[T]extualism is about ensuring that our written law is our actual law" because "everyone […] deserves the protections of the written law."[23] He argues that the rule of law requires that individuals are bound by fixed rules in advance and that those rules are applied equally. Interpreting a text according to its original public meaning allows individuals to

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[21] Mass. Const. art. XXX, pt. I.

[22] Given the massive growth of federal laws and regulations since the Great Depression, this process may no longer really be fulfilling the Framers' desired fair notice function, but Justice Gorsuch still thinks it provides more fair notice than judicial decisions unmoored from text.

[23] Gorsuch, *A Republic,* 144.

know what their rights are and hold the government to account.[24] This assurance is tied to the constraint that textualism and originalism place on judges. Justice Gorsuch argues that tethering a text's interpretation to the neutral rules of grammar guarantees greater protections for unpopular minorities. When judges are not limited to the written law, Justice Gorsuch worries that it becomes easier for them reach decisions (whether by unconscious bias or not) that cut against the interests of the politically unpopular or less powerful.[25] If we want to live under the rule of law, then there must be a mechanism to constrain judges from making their own decisions about the "best" outcome. For Justice Gorsuch, this reliance upon the rule of law means that originalism and textualism are the best methods of interpretation.

Following his originalist predecessors, Justice Gorsuch also offers some responses to common arguments against originalism. In response to arguments against originalism, Justice Gorsuch has a number of retorts. Perhaps simplest is his response to the common "dead hand" argument. Briefly, the dead hand argument claims that we should not allow rules written by long dead Framers to govern our conduct when we did not have any voice in their creation. Thus, originalism unjustifiably denies us self-government by enforcing rules of the past that the present generation did not democratically enact. Frankly, the dead hand argument is silly, and Justice Gorsuch certainly thinks so. "The dead hand? Well, the dead hand also wrote the Civil Rights Act of 1964. All law is dead,

[24] Gorsuch, *A Republic,* 124-125.

[25] Gorsuch, *A Republic,* 139.

if you want to call it that. All law is written by people who came before us."[26] That is to say, we abide by plenty of "dead hands" in our lives that we do not take issue with, so there is no reason to cast aside the Constitution, especially when we can change it. Ultimately, Justice Gorsuch argues that the dead hand argument "isn't an attack against *originalism* so much as it is an attack on *written law*."[27]

Relatedly, Justice Gorsuch responds to the argument that originalism is too rigid and that good government requires flexibility. "But when someone tells you this, hold on to your wallet; you're about to be swindled," as he puts it.[28] He argues that this critique of originalism is flawed for a couple of reasons. First, our political branches and democracy are more than able to address new issues with solutions that reflect the popular will. Second, while the meaning of a text is fixed, its applications are not. For instance, the Fourth Amendment applies to cellphone data today. Finally, adding that "flexibility" to meet the evolving needs of our society fairly often just looks like the policy choices of judges. Yet, the People have already decided how to balance certain policy questions (like whether victims of crimes should have to confront their attackers in court). In making confrontation an absolute right, the People have already balanced different interests and made a decision. The People can change that balance if they so choose, but judges cannot.[29]

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[26] Neil Gorsuch, "Neil Gorsuch," interview by Margaret Hoover, *Firing Line with Margaret Hoover,* PBS, February 26, 2021, video, https://www.pbs.org/wnet/firing-line/video/neil-gorsuch-ebtjnk/.

[27] Gorsuch, *A Republic,* 113.

[28] Gorsuch, *A Republic,* 111.

[29] Gorsuch, *A Republic,* 110-116.

Lastly, Justice Gorsuch responds to the argument that originalism and textualism are not as determinative as they seem; different originalists applying the same method can easily arrive at disparate interpretations of the original meaning. Here again, he has a couple of answers. Primarily, he claims that his preferred methods certainly leave less room for disagreement or ambiguity than any sort of purposivist or living constitution approach. While there are admittedly cases where textualists will disagree, textualism narrows the scope of permissible readings and by extension, the scope of disagreements. Secondarily, he argues that most of the "indeterminacy" arguments are conjectured out of nothing to create easy targets for individuals to attack originalism. For example, questions about whether the use of "he" in Article II precludes a female president, are not actually sources of debate among originalists and would be easy to resolve.[30] All in all, Justice Gorsuch refutes most of the primary arguments against originalism and textualism in a convincing manner. Most of his arguments are really fairly simple, but that comes from the fact that he thinks the case for originalism and textualism is itself simple.

In addition to defending originalism and textualism, Justice Gorsuch has also critiqued the common alternative to originalism: living constitutionalism. Living constitutionalism rejects the so-called fixation thesis of originalism and argues that the meaning of the Constitution can change over time. Following Justice Scalia, Justice Gorsuch contends that the principal reason that originalism and textualism are the privileged interpretive methods is not that originalism and textualism perfectly carries out the higher principles that prescribe originalism, but that it does so better than the

[30] Gorsuch, *A Republic,* 112, 114, 136.

alternatives. Understanding why living constitutionalism is relatively weaker than originalism thus points us to the guiding principles that establish the superiority of originalism to other interpretive methods.[31]

Justice Gorsuch makes three main arguments against living constitutionalism. First, he argues that it removes judges from their proper roles. As already discussed, when judges read aspects into the Constitution (or a statute) that are not already present, Justice Gorsuch believes that they undermine predictability within the law, subvert democracy, and violate the separation of powers.[32] Second, judges are not politically accountable and represent a small subsection of the American public, which makes their policy judgements bad reflections of the popular will. That is to say, it makes little sense for "nine lawyers from fancy law schools, with a majority from East Coast urban centers" to make judgement calls about balancing different policy interests.[33] Third, he argues that living constitutionalism is inconsistent because living constitutionalism does not reject original meaning altogether. Sometimes living constitutionalists accept the original public meaning, like the term "domestic Violence" in the Guarantee Clause. Everyone accepts that the term ought to be understood as the Framers' contemporaries would have understood it—as an insurrection. Yet, Justice Gorsuch can think of no reason why we should apply the original public meaning to that portion of the Constitution, but not to,

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[31] Most of Justices Scalia's and Gorsuch's critiques of other interpretive methods have been focused on living constitutionalism because that is the primary strain of thought opposed to originalism. However, many of the criticisms offered also apply to newer interpretive methods, such as common good constitutionalism.

[32] Gorsuch, *A Republic,* 130-139.

[33] Gorsuch, *A Republic,* 134.

say, the Cruel and Unusual Punishments Clause.[34] There is no coherent explanation as to why some text is living and evolving, while other text is static and dead. Ultimately, Justice Gorsuch's arguments against living constitutionalism are counterparts to his arguments for originalism and textualism. Where he thinks one undermines democracy, he thinks the other promotes it. Where one is unpredictable, the other promotes the rule of law. Thus, in many ways, his best argument for originalism is the weakness of living constitutionalism.

Indeed, to end on a note of agreement between the Justice Gorsuch and his predecessor, both have pursued similar strategies with respect to making their case for originalism and textualism. Both freely admit that there will be close cases and points of disagreement among textualists.[35] Likewise, neither one claims that originalism and textualism are without their flaws. As Justice Scalia claimed, "My burden is not to show that originalism is perfect, but merely to show that it beats every other available alternative."[36] Thus, in some respects, Justice Gorsuch and the rest of the "second-generation" originalists who went through law school at the time originalism was first beginning to regain ground in academia still have the same goal as their predecessors: just prove that living constitutionalism is worse.

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[34] Gorsuch, *A Republic,* 119.

[35] Scalia, *Essential Scalia,* 21-22.

[36] Scalia, *Essential Scalia,* 22.

Unique Aspects of Justice Gorsuch's Textualism

Many of these arguments that Justice Gorsuch has offered for originalism and against living constitutionalism coincide with similar arguments that Justice Scalia made. However, Justice Scalia also made some unique arguments and responses on which Justice Gorsuch has not focused too much effort. Looking at these differences is useful because it helps illustrate how the fight over textualism and originalism has shifted since Justice Scalia's rise to prominence in the 1980s. Alongside many of the arguments made by Justice Gorsuch, Justice Scalia also tended to focus on the (in his view) flawed optimism of living constitutionalism. He frequently argued that living constitutionalist simply assume that judicial decisions will push to expand the rights and liberties of individuals. However, he claimed that judicial decisions unencumbered by text could just as easily curtail the rights and liberties of the people.[37] He also took on the argument that judges are not well suited for the historical inquiry that originalism entails. Justice Scalia claimed that all legal thinking involved some historical inquiry into the meaning of words. Furthermore, even living constitutionalism requires some historical thinking. Every legal inquiry must have a starting place, and Justice Scalia argued that the starting place for all judges was history and tradition, even if some of those judges went on to reject that history and tradition.[38] Finally, Justice Scalia was always very careful to differentiate textualism from mere strict constructionism. Justice Scalia called strict

[37] Scalia, *Essential Scalia,* 16.

[38] Scalia, *Essential Scalia,* 20-22.

constructionism, "a degraded form of textualism that brings the whole philosophy into disrepute."[39] Rather, he argued that "[a]dhereing to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyper literal meaning of each word in the text."[40]

Justice Gorsuch's silence on this issue of strict constructionism may also provide a clue as to the nature of Gorsuch's distinctive version of textualism that leads to quite different legal results. It is clear that distinguishing textualism from strict constructionism was an important project to Justice Scalia in a way that is not for Justice Gorsuch. Indeed, Justice Kavanaugh's dissent in *Bostock* accused Justice Gorsuch of a literal reading of the statute instead of a fair one. In this respect, although Justice Gorsuch in many respects places himself in the camp of Justice Scalia and traditional originalism, Justice Kavanaugh's critique that Justice Gorsuch's *Bostock* opinion was what Justice Scalia would have considered far too literal may be for Justice Gorsuch an essential aspect of the demands of textualism, and one that is more plausible and defensible than Justice Scalia would have admitted. Indeed, a greater and more rigid literalism, one that abstracts from or at least places more weight on words and grammar than the historical context in which those words were spoken can perhaps yield applications that were not contemplated by those who ratified the words.

This literalism is directly related to a major difference between the Justice Gorsuch and Justices Scalia and Thomas in this realm about the degree to which they

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[39] Scalia, *Essential Scalia,* 30.

[40] Scalia and Garner, *Reading Law,* 356.

argue originalism produces a static interpretation of the Constitution. Justice Scalia's opinions in *Lawrence v. Texas* and *Obergefell v. Hodges,* along with Justice Thomas's opinion in *Obergefell* illustrate their understanding that "under a static Constitution judges could not" strike down laws that have gone historically unchallenged.[41] Thus, issues like abortion, male-only admissions policies at Virginia Military Institute, and prohibitions against sodomy and same-sex marriage are all easy cases for Justices Scalia and Thomas because such practices were common at the time of the Fourteenth Amendment's ratification and went unchallenged for many years after.[42] On the flip side, Justice Gorsuch has not expressed as static of a reading of the Constitution. While he certainly thinks that historical tradition matters, his reading of sex-based discrimination in *Bostock* suggests that he might have voted with the majority in *Obergefell.* This is a point that I will return to later, but for now, it suffices to say that Justice Gorsuch's understanding of what originalism and textualism is generally fits within the same understanding to which past originalists have adhered. However, that does not mean Justice Gorsuch necessarily applies these ideas in the same way. As *Bostock* will make clear, Justice Gorsuch's textualism in practice is much more focused on plain meaning. His interpretation of statutes relies very little on social context, which sets him apart from other noted originalists.

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[41] Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived,* ed. Christopher Scalia and Edward Whelan (New York: Crown Forum, 2017), 266.

[42] Justice Thomas was technically recused from *United States v. Virginia*, so it is theoretically possible that he would have voted to strike down VMI's male-only policies, but given his equal protection jurisprudence, it seems unlikely.

While Justice Gorsuch in many respects is carrying out the project of his textualist predecessors, the central argument of this thesis is that Justice Gorsuch's unique contribution to textualist theory is the consistent way in which he anchors textualism in his conception of the rule of law and due process, which are in turn rooted in a robust conception of the separation of powers and fair notice. This conception of the separation of powers and fair notice are the source of his vastly different approach to historical practices as a source of meaning. The emphasis he places on fair notice and the separation of power as the essential elements of his jurisprudence, and thus why he identifies himself as a textualist, is the explanatory principle of his jurisprudence as a whole, including those circumstances in which Justice Gorsuch employs extra-textualist and non-originalist methods of judicial decision-making.

As already discussed, Justice Gorsuch argues that textualism and originalism are the interpretive methods most conducive to ensuring fair notice. Of course, there can be considerable debate about what actually constitutes fair notice. For Justice Gorsuch, the plain meaning of a statute is usually decisive without reference to social context or the actually intended or contemplated applications. For many other originalists, this is not the case. Rather, fair notice requires more than just a literal reading of a text, for we must also understand the backdrop of the text in order to understand the rule it enacts. Putting that issue aside for now, the question remains open: Why does fair notice matter? To answer this question, we must explore how Justice Gorsuch thinks fair notice is tied to the rule of law. Additionally, it is valuable to look at two cases in which Justice Gorsuch raised fair notice concerns about retroactive punishment and the undermining of judicial

fairness. Ultimately, fair notice plays a major role his conception of due process, so it is important to understand why fair notice matters and what it looks like to Justice Gorsuch.

To begin, Justice Gorsuch has been very clear that he thinks textualism and originalism are necessary to ensure fair notice. What is less clear is why fair notice matters. To understand why Justice Gorsuch emphasizes fair notice to such a degree within his conception of due process, we have to understand how fair notice is related to the overarching rule of law. Justice Gorsuch has explained that "fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advanced."[43] In other words, Justice Gorsuch recognizes that from a practical standpoint, no one is going to read every word in the United States Code. However, from a rule of law standpoint, fair notice requirements are still justified. Justice Gorsuch has admitted that Justice Scalia's lecture "The Rule of Law as a Law of Rules" played a foundational role in his thinking about the rule of law.[44] As Justice Scalia explained in that lecture, "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."[45] This seems like a fairly intuitive notion, but it has broad implications for Justice Gorsuch's thinking. "The rule of law demands fair notice of the law," according to Justice

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[43] Wooden v. United States, 595 U.S. ___, ___ (2022) (slip op. at 8) (Gorsuch, J., concurring in judgement).

[44] Gorsuch, *A Republic,* 106.

[45] Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56, no. 4 (Fall 1989): 1179.

Gorsuch.[46] Without fair notice, there cannot be the rule of law because individuals cannot conform their conduct to the law if they do not know what the law is. Justice Gorsuch thinks that this presents two unique problems. The first comes from a lack of judicial fairness and equality. That is to say, without laws (and the right methods to interpret those laws) to constrain judges, judicial proceedings will be inherently unfair and favor one side over the other. The second issue comes through retroactive punishment. If the rules that the government will abide by are not known ahead of time, individuals will be on the hook for conduct they cannot change. He argues that this in particular lends itself to the government punishing disfavored minority groups.[47] All of this boils down to one major concern: no one can hold the government accountable if no one knows the rules ahead of time. If judges allow the political branches to change or invent rules as they go along, there will be no rule of law, and individuals will be the ones who suffer as a result. Two cases highlight these concerns.

First, *Biestek v. Berryhill* illustrates some of Justice Gorsuch's worries about fundamentally unfair judicial proceedings. *Biestek* involved the Social Security Administration's policies about expert testimony during benefit hearings in front of Administrative Law Judges (ALJs) who are technically members of the executive branch. Michael Biestek challenged the policy that allowed expert witnesses to refuse to turn over the data on which they relied to make their claims. After the ALJ in his case ruled against Biestek based on testimony from an expert who refused to disclose the data she was using

[46] Gorsuch, *A Republic,* 124.

[47] Gorsuch, *A Republic,* 124-125.

to make her judgments, the Court ruled that such a practice was permissible.[48] Justice Gorsuch dissented. He argued that when an ALJ bases his or her decision upon a set of undisclosed facts to which only one side of the case is privy, that does not rise to the necessary "substantial evidence" standard required in these types of benefits cases.[49] When judges make decisions without giving both sides equal access to the evidence the judge is using, Justice Gorsuch thinks it undermines the rule of law. Additionally, he thinks that sort of practice eliminates judges as a backstop against arbitrary executive power. "The principle that the government must support it allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decisionmaking."[50] When judges readily accept the government's conclusions without looking at the evidence the government is using to reach those conclusions, Justice Gorsuch thinks that fair notice is non-existent. Without knowing the basis for the government's decisions, individuals have no way to know what the government will do moving forward and they have no way to hold the government accountable. Thus, not only does fair notice implicate judicial fairness for Justice Gorsuch, it also implicates government accountability.

Air and Liquid Systems Corp. v. DeVries sketches out the second issue related to fair notice for Justice Gorsuch: retroactive punishment. When judges and the political branches change or create rules that apply to past conduct, individuals are left out to dry. They cannot change their already completed conduct, and now they can be punished for

[48] Biestek v. Berryhill, 587 U.S. ___, ___ (2019) (slip op. at 2-5).

[49] *Biestek,* (slip op. at 3) (Gorsuch, J., dissenting).

[50] *Biestek,* (slip op. at 9) (Gorsuch, J., dissenting).

actions that were not clearly proscribed at the time. *Air and Liquid Systems* dealt with a somewhat complicated question about who was liable for asbestos caused health problems related to time spent on ships in the U.S. Navy. Air and Liquid Systems Corp. did not produce parts for ships that contained asbestos, but their parts had to be combined with asbestos to function. The DeVries family argued that the company thus had a duty to warn sailors about the dangers of asbestos. Acting in its capacity as a common law court in maritime cases, the Court held that Air and Liquid Systems Corp. was liable for failing to warn sailors about the dangers of asbestos under a new standard that the Court announced in the case.[51] Justice Gorsuch accused the Court's majority of inventing a new standard of tort liability that does not enjoy "meaningful roots in the common law."[52] In his mind, the Court created this new standard for the purpose of achieving certain economic ends, but such a new standard would have negative consequences. First, disregarding the more traditional tort rule would make the liability test more difficult for lower courts to apply; this creates uncertainty because manufacturers will be unsure if they fall within the duty to warn category until they get sued.[53] Obviously, this raises fair notice concerns. Justice Gorsuch thinks that this is the type of uncertainty that the rule of law is designed to prevent, but when fair notice goes out the window, so does the rule of law. Likewise, Justice Gorsuch argues that "[p]eople should be able to find the law in the books; they should not find the law coming upon them out of nowhere."[54] When the

[51] Air and Liquid Systems Corp. v. DeVries, 586 U.S. ___, ___ (2019) (slip op. at 1-2).

[52] *Air and Liquid Systems,* (slip op. at 2) (Gorsuch, J., dissenting).

[53] *Air and Liquid Systems,* (slip op. at 5, 7) (Gorsuch, J., dissenting).

[54] *Air and Liquid Systems,* (slip op. at 8) (Gorsuch, J., dissenting).

government or courts announce a new standard out of nowhere, individuals (or in this case a corporation) can assume liability that they never anticipated. Justice Gorsuch ask the pointed question: "[H]ow were [Air and Liquid Systems] supposed to anticipate many decades ago the novel duty to warn placed on them today?"[55] Here, he thinks that Air and Liquid Systems is being retroactively punished under a new standard that the company had no way on anticipating. When these new standards can come into play at any time without any sort of forewarning, Justice Gorsuch thinks that the rule of law has broken down.

With these cases in mind, it hopefully becomes clearer why Justice Gorsuch cares so much about fair notice and why he thinks it is an essential component of due process. Cases where individuals cannot see the evidence being used to deny them benefits or where courts announce a new rule that places retroactive liability upon individuals all seem to run afoul of our standard conceptions of justice. That is not to say that there are not exceptions to these rules, but generally Justice Gorsuch argues that due process requires fair notice.[56] Essentially, he claims that the rule of law cannot exist without fair notice. In that same vein, due process cannot exist without that rule of law. He thinks that the Anglo-American legal tradition has imparted a unique sense of due process upon our society. "It is a tradition, after all, that rests on fundamental convictions about treating individual persons as ends, not means; the importance of free will and individual liberty,

[55] Ibid.

[56] *Opati v. Sudan* could be construed as an exception because Justice Gorsuch's majority opinion authorized retroactive punitive damages, but that opinion also left open the possibility that the law in question violated the Due Process Clause of the Fifth Amendment or the Ex Post Facto Clause.

not just social consequences and overall utility; and the equality of all human beings."[57] He views the due process through fair notice as the only way to ensure that individuals are treated equally before the law. Without the rule of law to constrain the government ahead of time, there can be no due process. This makes fair notice a necessary, but not sufficient condition for due process.

Exceptions to Justice Gorsuch's Textualism

While Justice Gorsuch undoubtedly aligns textualism with due process and suggests that the casual rejection of textualism undermines due process (as implemented in rigorous adherence to fair notice and the separation of powers), his jurisprudential orientation towards due process is maybe even more clearly apparent from the way some non-textualist elements are incorporated into his jurisprudence. Thus, this section addresses the few contexts in which Justice Gorsuch qualifies his general textualist approach, namely the interpretation of treaties with Native Americans and matters of foreign policy.

There are two areas where Justice Gorsuch has created carveouts of sorts to his general textualist approach. The first is the interpretation of treaties with Native Americans. Granted, Justice Gorsuch's deviation from the typical textualist mode of analysis is not a major one. He has said, "We are charged with adopting the interpretation most consistent with the treaty's original meaning."[58] However, there is an additional

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[57] Gorsuch, *A Republic,* 199.

[58] Washington State Dept. of Licensing v. Cougar Den, Inc., 586 U.S. ___, ___ (2019) (slip op. at 1) (Gorsuch, J., concurring in judgement).

element; Justice Gorsuch does not argue that judges out to look for the original *public* meaning. Instead, judges "must 'give effect to the terms as the Indians themselves would have understood them.'"[59] This requirement derives from the fact that there is a general presumption in favor of resolving ambiguities against the drafter who writes up a treaty or contract. In cases involving treaties with Native Americans, the United States often had complete control of the terms of the agreement. Justice Gorsuch argues that the often coercive nature of these treaties means that an added layer of protection for the tribes is necessary when interpreting these treaties. Additionally, English words were typically translated into the Native Americans' language during negotiations, but the final signed treaties were always in English. This practice led to considerable confusion among Native American tribes about the actual terms of the treaty they were signing. As a result, Justice Gorsuch believes that the tribes should only be held to what they believed were the terms of the treaty at the time of agreement.[60]

The implications of this approach are twofold for Justice Gorsuch's jurisprudence. First, it changes the nature of the legal inquiry when it comes to Native American treaties. Rather than looking to the typical original public meaning, Justice Gorsuch's inquiry is more narrow. Because the focus is on how tribal members would have understood the terms of the treaty, Justice Gorsuch looks to different sources to ascertain the meaning of the terms than he normally would with a basic statute.[61] Second, it places a higher burden

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[59] *Cougar Den,* (slip op. at 2) (Gorsuch, J., concurring in judgement) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 196 (1999)).

[60] *Cougar Den,* (slip op. at 2) (Gorsuch, J., concurring in judgement),

[61] *Cougar Den,* (slip op. at 2-10) (Gorsuch, J., concurring in judgement).

upon the government. In order to succeed, the government must prove that not only the plain text of the treaty cuts its way, but also that tribal signatories understood the text to mean what the government claims. *McGirt v. Oklahoma* illustrates that point. In that case, Justice Gorsuch's majority opinion held that Congress had not been explicit enough to disestablish a Creek Nation reservation established by treaty. Congress established a reservation in Oklahoma for the Creek Nation following the Trail of Tears. The question in *McGirt* was whether the reservation still existed in light of Oklahoma's statehood and subsequent laws involving crimes committed on Native American land. Justice Gorsuch's answer was succinct. "Because Congress has not said otherwise, we hold the government to its word."[62] His approach to Native American treaties suggest that the government must be very clear when it modifies a treaty. While Justice Gorsuch will deviate from the plain text of a treaty for the sake of Native Americans' understanding, he will not imply aspects of a treaty for the sake of the government's reading. "If Congress wishes to withdraw its promises, it must say so."[63]

The second area where Justice Gorsuch applies a modified form of his textualism is foreign policy. Here, Justice Gorsuch's approach suggests that he is willing to acknowledge certain implied aspects of a law in order to avoid encroaching upon the realm of other branches. For instance, in *WesternGeco LLC. v. ION Geophysical Corp.,* Justice Gorsuch disagreed with the majority's reading a patent statute because the majority's reading allowed American courts to entertain claims involving patent

[62] McGirt v. Oklahoma, 591 U.S. ___, ___ (2020) (slip op. at 1).

[63] *McGirt,* (slip op. at 42).

infringement outside of the United States, which he argued would allow foreign courts to exercise jurisdiction over American firms with respect to foreign patent laws.[64] He claimed that "principles of comity counsel against an interpretation of our patent laws that would interfere so dramatically with the rights of other nations to regulate their own economies."[65] Congress could weigh the foreign policy implications of extending patent rights overseas, but courts were not the proper branch for making such decisions, even if there was some textual argument in favor of extending such rights.[66] In general, courts should be hesitant to unsettle foreign policy ground. On the flip side, when Congress does act in the foreign policy realm, Justice Gorsuch's textualism is willing to carry out Congress's goals. *Opati v. Republic of Sudan* involved Congress's attempt to retroactively waive foreign sovereign immunity for certain state sponsors of terrorism. In that case, Justice Gorsuch dismissed Sudan's arguments that Congress must be explicit if it wants to apply punitive damages retroactively. While conceding that retroactive application of the statute could pose some constitutional questions, Justice Gorsuch argued that the text was clear enough to demonstrate that Congress had considered the foreign policy implications of retroactive punitive damages and intended for such damages to be available.[67] Thus, we see a greater degree of deference to the other branches when it comes to foreign policy matters in Justice Gorsuch's jurisprudence than in other areas.

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[64] WesternGeco LLC. v. ION Geophysical Corp., 585 U.S. ___, ___ (2018) (slip op. at 2) (Gorsuch, J., dissenting).

[65] *WesternGeco,* (slip op. at 8) (Gorsuch, J., dissenting).

[66] Ibid.

[67] Opati v. Republic of Sudan, 590 U.S. ___, ___ (2020) (slip op. at 9-11).

All of this has broad implications for Justice Gorsuch's overarching emphasis on due process through the separation of powers and fair notice. To reiterate, it is easy to see how his textualist and originalist approach fits within a conception of due process that relies upon separation of powers. Justice Gorsuch firmly believes that focusing on the text reduces judicial policymaking, reinforces the structural divisions of power within our government, and promotes democracy. His desire to leave policy matters to the political branches would also explain his less strict textual approach in foreign policy cases. Additionally, textualism and originalism seem to be good fits for his emphasis on fair notice. He argues that both methods reduce judicial balancing and ensure that individuals are not subject to the policy preferences of judges. Instead, individuals can rely on the written law, which provides them with true fair notice. Again, this desire for actual fair notice can help explain why Justice Gorsuch places such a heavy burden on the government to be explicit when it modifies treaty provisions with Native Americans, and why he thinks that treaties must be interpreted according the original understanding of the tribes involved. Therefore, Justice Gorsuch's claim to be a textualist and originalist, even with his modifications that exist in practice, is consistent with his conception of due process.

Precedent

Another important aspect of Justice Gorsuch's jurisprudence is his approach to precedent because, in theory at least, a rigid adherence to originalism and textualism, and its orientation to legal text, would preclude the idea that judicial precedent has any

special role. This section evaluates how Justice Gorsuch goes about dealing with *stare decisis* concerns and the role it plays in a judge's job. With that in mind, this section focuses first on the philosophical basis for *stare decisis.* Then, it turns to cases where Justice Gorsuch has voted to overturn precedent. The goal is that this will then allow me to compare his approach to precedent with Justice Thomas's and Justice Kavanaugh's. Finally, this section attempts to explain Justice Gorsuch's understanding of *stare decisis* as it fits within his notion of due process.

Justice Gorsuch, like Justice Scalia before him, has been careful to distinguish textualism and originalism from *stare decisis* concerns. A common criticism of originalism and textualism is that they will lead to a vast purge of past decisions of the Court that rested upon non-originalist or non-textualist grounds. Opponents of originalism and textualism fear that everything from *Roe v. Wade* to *Brown v. Board of Education* will be up for grabs under an originalist approach. However, as Justice Scalia explained, "The chief barrier against such a wrenching purge—by originalism or any other theory of interpretation—is the doctrine of *stare decisis*."[68] Justice Gorsuch echoes this claim. In response to the argument that a decision like *Brown* would be in jeopardy under originalism, he argues that not only can *Brown* be rationalized on originalist grounds but also that "adopting a theory of *interpretation* for unsettled questions and adopting a theory of *precedent* for settled questions are two different things."[69] Thus, Justice Gorsuch's textualism can be divorced from his approach to *stare decisis.* As a

[68] Scalia and Garner, *Reading Law,* 411.

[69] Gorsuch, *A Republic,* 114.

result, his approach to *stare decisis* must be independently justified. After all, "*stare decisis* […] is not a part of textualism. It is an exception to textualism […] born not of logic but of necessity."[70]

With that in mind, we turn to Justice Gorsuch's philosophical basis for *stare decisis.* There are both legal and practical arguments that he (and a cohort of coauthors, including Justice Kavanaugh) has advanced in an attempt to justify the doctrine of *stare decisis.* From a legal standpoint, *stare decisis* is generally required out of respect for due process. The fair notice that Justice Gorsuch thinks is inherent in due process means that courts ought to abide by past rulings for the sake of predictability in the law.[71] From a more practical standpoint, *stare decisis* promotes efficiency. Litigants and the public benefits from predictability in the rules governing their conduct, while judges benefit from the guidance and developmental approach to law that *stare decisis* provides.[72] Ultimately, *stare decisis* aims to ensure consistency; that is to say, parties with the same claims in the same factual situation will be treated equally.[73] Of course, Justice Gorsuch acknowledges that *stare decisis* is not an ironclad commitment. Perfect predictability and fair notice are not possible because judges cannot guarantee litigants that they will never overrule past cases. There are instances when overruling incorrect decisions is the best course of action; one would be hard pressed to defend *Plessy v. Ferguson* on *stare decisis* grounds. Much of the rationale for *stare decisis* rests upon a judge's respect for the

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[70] Scalia and Garner, *Reading Law,* 413-414.

[71] Bryan Garner et al., *The Law of Judicial Precedent* (St. Paul: Thomson Reuters, 2016), 7.

[72] Garner et al., *Judicial Precedent,* 10-11.

[73] Garner et al., *Judicial Precedent,* 21.

wisdom of his or her predecessors. The difficulty then is deciding when to disregard the views of past judges. It is in these instances that a judge's views on *stare decisis* become sharper. Thus, in order to truly understand Justice Gorsuch's approach to precedent, it is informative to look at the decisions in which he voted to overrule past cases.

Gamble v. United States represents the first time in which Justice Gorsuch explicitly laid out his approach to *stare decisis* while on the Supreme Court. *Gamble* involved a question of whether the Court should overturn a line of cases establishing the separate sovereigns exception to the Double Jeopardy Clause.[74] The majority declined to overrule the previous cases primarily because they did not believe the dual-sovereignty doctrine was incorrect. Justices Ginsburg and Gorsuch disagreed. However, simply being incorrectly decided is not enough to overrule a past case. Thus, Justice Gorsuch's dissent, after explaining why the separate sovereign exception was wrong, moved on to the *stare decisis* analysis. He first noted that *stare decisis* is weakest when it comes to constitutional interpretation.[75] Without the occasional rejection of past precedents, we would still be left with *Plessy v. Ferguson* and *Korematsu v. United States*. This much is uncontroversial and generally accepted by all judges. No one is willing to argue for absolutism with respect to precedent. The difficulty is that *stare decisis* is more of an art than a science. Nevertheless, Justice Gorsuch outlined four factors that he thinks should be considered when overturning precedent: quality of reasoning, consistency of the decision, subsequent developments, and reliance interests.[76] In the case of *Gamble,* he

[74] Gamble v. United States, 587 U.S. ___, ___ (2019) (slip op. at 1-2).

[75] *Gamble,* (slip op. at 18) (Gorsuch, J., dissenting).

[76] *Gamble,* (slip op. at 19) (Gorsuch, J., dissenting).

argued that all four factors counsel against retaining the separate sovereigns exception. First, he claimed that the original cases establishing the dual-sovereignty doctrine were poorly reasoned and decided by deeply divided Courts.[77] In his mind, it had developed from mere dicta that had no basis in the English common law that the Fifth Amendment had enshrined.[78] Likewise, incorporation had fundamentally reshaped the Court's double jeopardy jurisprudence, which made the doctrine inconsistent with subsequent developments.[79] In addition, the major expansion of the federal criminal code gave him pause. Because the federal government had duplicate versions of most major state crimes, Justice Gorsuch worried that the risks of double prosecutions are much greater today than they were when the Court developed the doctrine in the mid-nineteenth century. [80] "That leaves reliance," according to him.[81] He rejected the majority's concerns about prosecutors who would face new difficulties and be forced to coordinate efforts between the federal and state levels. As he explained, "Enforcing the Constitution always bears its costs."[82] In his mind, the mere inconvenience that prosecutors might face was drastically outweighed by the threat of unconstitutional prosecutions. Perhaps echoing Justice

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[77] Ultimately, this is where he parted ways with the majority. Both sides believed that their reading of the Double Jeopardy Clause was more consistent with the original meaning of the Fifth Amendment.

[78] *Gamble,* (slip op. at 19-22) (Gorsuch, J., dissenting).

[79] *Gamble,* (slip op. at 22-23) (Gorsuch, J., dissenting).

[80] *Gamble,* (slip op. at 23) (Gorsuch, J., dissenting).

[81] Ibid.

[82] *Gamble,* (slip op. at 24) (Gorsuch, J., dissenting).

Kennedy in *Lawrence,* he concluded his dissent by claiming, "The separate sovereigns exception was wrong when it was invented, and it remains wrong today."[83]

There are many similarities between Justice Gorsuch's opinion in *Gamble* and his opinion in *Kisor v. Wilkie. Kisor* is an interesting case in which the Court was asked to overrule *Auer v. Robbins*, a case involving judicial deference to administrative agencies' interpretation of their own regulations. Like *Gamble,* the majority declined that invitation, although there are two important differences. First, the Court seriously modified and weakened the *Auer* framework.[84] Second, the Court offered two justifications for retaining *Auer.* The first was that *Auer* was correct; the second was *stare decisis*. Only the second justification commanded a majority of the Court.[85] Justice Gorsuch took a number of issues with the Court's *stare decisis* analysis. First, he argued that it made no sense to claim a respect for precedent while also fundamentally recasting how *Auer* functioned.[86] In his mind, this was proof that "everyone recognizes, to one degree or another, that *Auer* cannot stand."[87] Next, he argued (with some novelty) that while *stare decisis* applies to the actual facts in *Auer,* the Court should not afford precedential weight to the interpretive method set forth in *Auer* for future cases. "To the extent that *Auer* purports to dictate" an interpretive method that the Court must apply in

[83] *Gamble,* (slip op. at 25) (Gorsuch, J., dissenting).

[84] *Kisor*, (slip op. at 13-18).

[85] *Kisor,* (slip op. at 25-28).

[86] *Kisor,* (slip op. at 33-34) (Gorsuch, J., dissenting).

[87] *Kisor,* (slip op. at 34) (Gorsuch, J., dissenting).

future cases, it exceeds the bounds of *stare decisis*.[88] That is to say, *stare decisis* does not really apply to *Auer* because "we do not regard statements in our opinions about such generally applicable interpretive methods, like the proper weight to afford historical practice in constitutional cases or legislative history in statutory cases" as entitled to *stare decisis*.[89] Finally, Justice Gorsuch turned to the four factors that he evaluated in *Gamble.* Again, he suggested these factors cut against retaining *Auer.* He expressed concerns about the growth of the administrative state and the workability of the majority new version of *Auer.* [90] Lastly, he examined the reliance interests at stake. There are two intriguing comments of interest here. The first is his suggestion that "this Court has never suggested that the convenience of government officials should count in the balance of *stare decisis*."[91] The second is his claim that getting rid of *Auer* would not cast doubt on those decisions which relied on *Auer's* interpretive method. He argued that those decisions would still possibly receive *stare decisis* effect. "After all, decisions construing particular statutes continue to command respect even when the interpretive methods that led to those constructions fall out of favor."[92] All in all, Justice Gorsuch's analysis in *Kisor* is very similar to *Gamble,* but he adds a couple of elements that shed additional light on his notions concerning precedent.

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[88] *Kisor,* (slip op. at 35) (Gorsuch, J., dissenting).

[89] Ibid.

[90] *Kisor,* (slip op. at 38-40) (Gorsuch, J., dissenting).

[91] *Kisor,* (slip op. at 40) (Gorsuch, J., dissenting).

[92] *Kisor,* (slip op. at 40-41) (Gorsuch, J., dissenting).

Ramos v. Louisiana is a much messier case from a *stare decisis* perspective, although it is also a clearer case in some respects. It is messy because Justice Gorsuch did not want to afford *Apodaca v. Oregon* precedential weight. At the same time, it is clearer because it is a pure *stare decisis* case; neither the majority nor the dissent believed that *Apodaca* was correctly decided.[93] In *Ramos,* a majority of the Court led by Justice Gorsuch overruled *Apodaca* and held that the jury unanimity rule was incorporated against the states. However, there is a wrinkle in Justice Gorsuch's opinion. Before going through the typical *stare decisis* analysis, he argued, joined only by Justices Ginsburg and Breyer, that *Apodaca* was not binding precedent.[94] *Apodaca* was a fractured decision in which four Justices did not believe the Sixth Amendment required jury unanimity at all and four Justices did. Justice Powell's opinion, which courts considered to be the binding aspect of *Apodaca* under the *Marks* rule, espoused a "dual-track" view of incorporation in which the Bill of Rights did not apply in the same way to the States. Thus, he agreed that federal juries required unanimity, but he rejected unanimity requirements for state juries.[95]

Given the divided nature of the *Apodaca* decision, Justice Gorsuch argued that Justice Powell's decision was not entitled to *stare decisis*. Doing so, he claimed, would require the Court "to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already

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[93] Ramos v. Lousiana, 590 U.S. ___, ___ (2020) (slip op. at 21); *Ramos,* (slip op. at 16) (Alito, J., dissenting).

[94] *Ramos,* (slip op. at 16-17) (plurality opinion).

[95] Apodaca v. Oregon, 406 U.S. 356, 374 (1972) (Powell, J., concurring in judgement).

rejected."[96] While six Justices viewed Justice Powell's opinion as precedential under the *Marks* rule, Justice Gorsuch suggested that *Marks* did not apply.[97] As he explained, "[N]o case before has suggested that a single Justice may overrule precedent," which is what accepting Justice Powell's opinion in *Apodaca* would entail.[98] The Court had already rejected the dual-track incorporation approach (as Justice Powell admitted), and Justice Gorsuch did not believe that the Court could be bound by a single Justice's logic when that logic had already been explicitly rejected. "Nine Justice (including Justice Powell) recognized this for what it was; eight called it an error."[99] Furthermore, Justice Gorsuch argued that even if the Court treats Justice Powell's opinion as binding, it still fails the previous *stare decisis* framework that he has laid out. Its reasoning is flawed, and because of its poor reasoning, it is unmoored from prior and subsequent cases.[100] All that leaves is reliance interests, which is where the dissent really rested its argument. Yet, Justice Gorsuch quickly balanced away the reliance interests in *Ramos.* There had been no claim of "prospective economic, regulatory, or social disruption."[101] Rather, the dissent posited two interests: retrial of defendants whose cases are still on direct appeal and finality in criminal judgments.[102] Justice Gorsuch sidestepped these concerns by noting that the

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[96] *Ramos,* (slip op. at 16) (plurality opinion).

[97] *Marks v. United States* explains that the holding of the Court when there is no opinion of the Court is the position taken by the Justices who concurred in judgement on the narrowest grounds.

[98] *Ramos,* (slip op. at 17) (plurality opinion).

[99] *Ramos,* (slip op. at 21).

[100] *Ramos,* (slip op. at 21-22).

[101] *Ramos,* (slip op. at 22).

[102] *Ramos,* (slip op. at 19-21) (Alito, J., dissenting).

Ramos decision was sure to impose costs by forcing Louisiana and Oregon to retry some cases, "[b]ut new rules of criminal procedure usually do," he claimed, while pointing to decisions like *Booker v. United States* and *Crawford v. Washington.*[103]

Next, he argued that the finality concern was a question for another day. Collateral challenges under the new rule would be brought under the *Teague v. Lane* framework. "That litigation is sure to come," but it is a problem for another day.[104] In other words, Justice Gorsuch is not going to consider the possible finality interests because those interests can be addressed in a future case.[105] Finally, Justice Gorsuch suggested that no matter what reliance interests might be present, they were outweighed by the fundamental nature of jury unanimity. As he saw it, "[T]he dissent would have us discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. Whether that slice turns put to be large or small, it cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties."[106] Thus, for Justice Gorsuch reliance interests are much less heightened when constitutional rights are on the line. Indeed, he emphasizes "the reliance interests of the American people" in securing their constitutionally enshrined rights.[107] As he stated in conclusion, "[T]he best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say

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[103] *Ramos,* (slip op. at 23).

[104] *Ramos,* (slip op. at 24) (plurality opinion).

[105] One Term later, in *Edwards v. Vannoy,* the Court ended up rejecting the retroactive application of *Ramos* on collateral review and overruled the relevant portion of the *Teague* framework.

[106] *Ramos,* (slip op. at 25) (plurality opinion).

[107] Ibid.

the same in some others."[108] That is to say, he is unsympathetic to reliance claims that rest on the continued violation of fundamental rights. In his mind, the past violation of rights to secure criminal convictions does not give States a pass to continue those violations. "[I]t is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right," he argued.[109] As such, *Ramos* highlights Justice Gorsuch's unique approach to the *Marks* rule and reliance interests.

We can glean a great deal of information about Justice Gorsuch's approach to precedent from these three cases. First, Justice Gorsuch has a framework for determining when to discard *stare decisis* concerns, but it is not absolute. He is generally inclined to look to a four-factor test when determining whether to overrule a case, but those factors are malleable. Whether or not a decision fits within prior cases or has become unworkable in light of subsequent cases is a somewhat subjective inquiry. However, the most flexible portion of the test is reliance interests. Justice Gorsuch approach to reliance interests suggests a number of things. First, constitutional rights typically outweigh all other reliance interests. *Gamble* and *Ramos* make that clear. Additionally, he seems to subscribe to the view that property reliance interests warrant the greatest weight.[110] On the flip side of that, the government's interests in efficiency are diminished. He also has a tendency to brush aside reliance interests by kicking the consequences down the road, as *Ramos* illustrates. Finally, his reading of *Apodaca* raises some interesting questions. On

[108] *Ramos,* (slip op. at 26) (plurality opinion).

[109] Ibid.

[110] Garner et al., *Judicial Precedent,* 407-409.

the one hand, his theory that a single Justice cannot bind future Courts to an already rejected idea makes sense. On the other hand, it seems to directly contradict *Marks.* Of course, when a decision is badly fractured with no single rationale, "its precedential value may be called into question, and in the view of some, is substantially diminished," but that does not mean it is not a real precedent.[111] *Marks* has certainly been questioned by some, but Justice Gorsuch's opinion in *Ramos* does not suggest a real answer to *Marks*.[112] Nevertheless, it does indicate that Justice Gorsuch does not consider himself bound by opinions that adopt already rejected lines of reasoning. All in all, these three cases reveal a great deal about his approach to *stare decisis,* namely the framework that he uses and his reliance interests calculus.

Justice Gorsuch's approach to precedent differs substantially from his fellow originalist Justice Thomas. In *Gamble,* Justice Thomas laid out his overarching framework for when to overrule precedents. In his view, the Court's emphasis on *stare decisis* "does not comport with our judicial duty under Article III."[113] This makes Justice Thomas's view of *stare decisis* relatively simple. "When faced with a demonstrably erroneous precedent" Justice Thomas claims that the Court "should not follow it."[114] He has argued that while *stare decisis* makes sense in a common law system, the federal system of the United States strips courts of the ability to continue to abide by erroneous

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[111] Garner et al., *Judicial Precedent,* 199.

[112] Richard Re, "Beyond the *Marks* Rule," *Harvard Law Review* 132, no. 7 (May 2019).

[113] *Gamble,* (slip op. at 2) (Thomas, J., concurring).

[114] *Gamble,* (slip op. at 9) (Thomas, J., concurring).

precedents.[115] Thus, his approach to precedent turns wholly upon the soundness of the original decision. If it was correctly decided, retain it; if it was not, overrule it. As a result, he does not have any sort of heightened *stare decisis* considerations for statutes or rules of property unlike other Justices.[116] He simply does not have the same predictability concerns that Justice Gorsuch has when it comes to stability in the law or reliance interests.[117] For Justice Thomas, *stare decisis* is not a necessary exception to originalism and textualism as Justice Scalia suggested. The original meaning of a text should prevail over concerns about stability within the law no matter the circumstances.

Likewise, Justice Kavanaugh has taken a different approach to dealing with *stare decisis*. In *Ramos,* he not only rejected Justice Gorsuch's argument that *Apodaca* was not a binding precedent, but he also laid out his own *stare decisis* framework. While Justice Kavanaugh shares the value of *stare decisis* in promoting stability and a heightened bar for statutory cases or rules of property with Justice Gorsuch, his framework focuses more on real world considerations.[118] Justice Kavanaugh's *stare decisis* inquiry has three main considerations. First, the previous decision must be egregiously wrong.[119] Here, he will look the decision's reasoning and as well as subsequent developments in the law. Second, the decision must cause significant negative consequences.[120] This can involve legal

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[115] *Gamble,* (slip op. at 4-8) (Thomas, J., concurring).

[116] *Gamble,* (slip op. at 14) (Thomas, J., concurring).

[117] *Gamble,* (slip op. at 15) (Thomas, J., concurring).

[118] *Ramos,* (slip op. at 2, 4) (Kavanaugh, J., concurring in part).

[119] *Ramos,* (slip op. at 7) (Kavanaugh, J., concurring in part).

[120] *Ramos,* (slip op. at 8) (Kavanaugh, J., concurring in part).

consequences like workability issues and confusion among lower courts, but the main focus is on real world effects on citizens. Finally, overruling the decision should not unduly disturb reliance interests.[121] This entails surveying the reliance interests that have developed outside of the legal world and considering the age of those reliance interests. All of this suggests a couple of things. First, Justice Kavanaugh is less concerned with necessarily getting the law right as he is with the practical implications of overruling a decision. Additionally, his framework seems to present a higher bar for overruling a case because it focuses less on the actual rationale and it demands that the rationale be egregiously wrong. Finally, unlike Justice Gorsuch, he does not seem to view fundamental rights as a sort of trump card for reliance interests. His reliance interest calculus in *Ramos* and other cases reflect a respect for fundamental rights but not to the overriding degree of Justice Gorsuch.

Taken as a whole, it becomes clear how Justice Gorsuch's approach to precedent fits within his conception of due process. Because due process is partially rooted in fair notice for Justice Gorsuch, *stare decisis* plays an important role. He sees it as a mechanism for ensuring stability and predictability in the law, which is essential to fair notice. In that same vein, *stare decisis* constrains judges by ensuring that (unlike Justice Thomas's view) judges do not overrule past cases solely because they believe those cases to be wrongly decided. At the same time, he focuses less on reliance interests and practical consequences than Justice Kavanaugh when it comes to precedents involving rights. Justice Gorsuch certainly seems to have an overriding concern about enforcing

[121] Ibid.

rights even at the expense of other reliance interests. This too can be rooted in his sense of the separation of powers and fair notice. Within our system of government, he suggests that judges are responsible for ensuring that the rights of individuals are protected against infringement from other parts of government. He also believes that people are entitled to the actual rights written in the Constitution. Thus, fair notice and the separation of powers means that judges should not continue to cast aside the rights of the People in the name of *stare decisis.* It is in this that Justice Gorsuch's approach to precedent becomes tied to the due process considerations that emanate throughout his jurisprudence.

CHAPTER THREE

Justice Gorsuch on the Structure and Powers of Government

Justice Gorsuch's Emphasis on the Structure of Government

A large part of Justice Gorsuch's jurisprudence relies upon the separation of powers. As a result, the structure of government is of a great deal of importance to him. This section explores why he emphasizes the structure of government to the degree that he does. Beginning with an analysis of Justice Gorsuch's insistence that our government is structured to promote liberty, I then turn to the importance of the judiciary as neutral arbiters within his jurisprudence. Finally, my focus shifts to what this emphasis on the structure of government means for his jurisprudential project and how he hopes to reinvigorate the public's respect for the separation of powers.

Justice Gorsuch argues that there are a number of key elements within the structure of our government. These elements taken together suggest that the design of our government is to promote liberty. The first crucial aspect is that it is a government of limited powers. As he explains, "[W]ithout limits on the powers of government, the promises of individual rights contained in [the amendments to the Constitution] are just that: promises."[1] In his mind, the Bill of Rights and subsequent amendments are all certainly important aspects of the Constitution, but they are worth very little without a structure of government designed to ensure the enforcement of the limits on government

[1] Gorsuch, *A Republic,* 9.

contained in the Constitution's rights provisions. According to him, "the surest protections of human freedom and the rule of law come not from written assurances of liberty but from sound structures."[2] That is to say, if liberty and other guarantees are the goal, it is not enough to promise them to the People. The government must be set up in such a way that liberty can flourish. Connected to the government's limited powers is the difficulty of passing laws. Justice Gorsuch argues that the government can restrict liberty through its laws, but the Framers set up an inherently difficult process for legislating in order to ensure that the federal government did not grow too large or interfere too much with the lives of individuals.[3] He wants to emphasize that the difficulty in getting things done in Congress is a feature, not a bug, of our system of government. What may seem like legislative gridlock is actually a protection of liberty.[4]

Additionally, the division of powers within our government aims to promote liberty. The Constitution vests lawmaking power in only one branch, and it vests it in the branch that is subject to different electoral constituencies. For Justice Gorsuch, this feature's purpose is to protect minority rights and clarify accountability.[5] This means that widespread social consensus is necessary for legislation, and it means that government officials are accountable for actions that restrict liberty. Without this clear accountability, Justice Gorsuch thinks that it becomes difficult for the People to know how to rein in the

[2] Ibid.

[3] Ibid.

[4] Gorsuch, *A Republic,* 40.

[5] Gundy v. United States, 588 U.S. ___, ___ (2019) (slip op. at 7-8) (Gorsuch, J., dissenting).

government the next time an election rolls around.[6] Thus, the difficult process for creating new laws and the division of powers within our government all suggest to Justice Gorsuch that the Framers were attempting to protect individual liberty when they structured our government. Moreover, respect for that structure is necessary for the continued protection of liberty.

It is clear that Justice Gorsuch places a lot of value on liberty in his jurisprudence. He has been frequently described as a "maverick conservative with a libertarian streak."[7] Yet, is he really a libertarian? The answer perhaps turns on how one defines libertarianism. Justice Gorsuch certainly values liberty, but he thinks that our constitutional structure necessarily is designed to promote it. It is not something that judges have to actively seek out to promote directly. As a result, Justice Gorsuch does not really offer a defense of liberty for its own sake, and he has offered a number of arguments against libertarianism in some contexts.[8] Rather, his opinions often seem libertarian because of his view of the structure of government. As we will see, a fairly strict view of what powers Congress may delegate leads to a lot of laws that restrict liberty being called into question. However, it is not Justice Gorsuch's desire to strike down these laws for the sake of liberty. Instead, he thinks that the Constitution and his duty as a judge compels him. Ultimately, Justice Gorsuch argues that even if granting

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[6] *Gundy,* (slip op. at 8-9) (Gorsuch, J., dissenting).

[7] David Savage, "On an often unpredictable Supreme Court, Justice Gorsuch is the latest wild card," *Los Angeles Times,* July 12, 2019, https://www.latimes.com/politics/la-na-pol-gorsuch-supreme-court-conservative-20190712-story.html.

[8] Neil Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton: Princeton University Press, 2006), 153-156.

legislative power to Congress does not itself protect liberty, it is still a decision that deserves respect. It is the "people's sovereign choice to vest the legislative power in Congress alone."[9] As a result, courts must respect that choice until the People change it. Even if judges believe there is a better way to promote liberty or efficiency or some other good, our structure of government is entitled to respect merely on the grounds that is an expression of the People's will—regardless of what outcomes it produces. The liberty interests of Justice Gorsuch's jurisprudence are informed by his view of our structure of government; unlike libertarian legal scholars such as Randy Barnett, his views on governmental structure are not dictated by his preference for liberty. That is to say, his oftentimes libertarian decisions are a result of his understanding of the separation of powers, not the other way around. The tail does not wag the dog.

Within this conception of governmental structure, the value of the judiciary as a neutral arbiter has a special importance for Justice Gorsuch. He argues that a neutral, independent judiciary is necessary "to guarantee that all persons, regardless of their popularity or prestige, would enjoy the benefits of the laws."[10] To this end, protecting the independent judgement of judges is a point of emphasis for Justice Gorsuch. He provides a number of reasons why our structure compels (and needs) neutral judges. First, the judicial power which the Constitution vests in the judiciary necessarily "calls for neutral arbiters, not elected representatives," because electoral politics compromises the neutrality of representatives.[11] Relatedly, independent judges are necessary to

[9] *Gundy,* (slip op. at 9) (Gorsuch, J., dissenting).

[10] Gorsuch, *A Republic,* 9.

[11] Gorsuch, "Of Lions," 910.

counterbalance the other branches. When the judiciary cedes its power of judgement to other branches, the structure begins to break down.[12] This creates a whole host of problems. There is the issue of fairness. The purpose of the judicial branch is to guarantee "parties would receive a fair hearing before an impartial judge."[13] Justice Gorsuch does not think that is possible when judges sacrifice their independence and defer to other branches. He argues that this will eventually lead to the diminution of rights at the hands of the political branches. Perhaps his best explanation of the problems of relinquishing the right to an independent judgement from a neutral judge to the other branches comes in an obscure patent case:

> Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn't about protecting judicial authority for its own sake. It's about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing.[14]

Justice Gorsuch recognizes that judges are not perfect and their judgments are sometimes flawed. Nevertheless, he thinks that an independent judgement from a neutral judge is a much better alternative than deferring to a political decision from an agency or allowing the executive branch to determine the scope of your rights.[15] In his conception of the

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[12] Gorsuch, "Of Lions," 912.

[13] *Kisor,* (slip op. at 28) (Gorsuch, J., concurring in judgement).

[14] Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S. ___, ___ (2018) (slip op. at 12) (Gorsuch, J., dissenting).

[15] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring); *Oil States,* (slip op. at 1-2) (Gorsuch, J., dissenting).

government's structure, judges provide an assurance of fairness and a check against the political branches through their independence and neutrality.

All of this focus on government structure matters for Justice Gorsuch's jurisprudence because of the central role that the separation of powers plays in his conception of due process. On this point he has been quite explicit: "[T]he separation of powers […] is *itself* part of the process that is due under our Constitution."[16] Each branch has a distinct role to play given the overarching structure, and there are reasons for that role. When branches exceed the bounds of their power is when Justice Gorsuch believes that due process concerns arise. When judges exercise legislative powers, fair notice problems arise, creating due process issues because individuals are not fairly warned of the law.[17] Likewise, when the executive branch exercises judicial powers, due process problems arise because the independent judgement of the judiciary designed to protect minority rights fades away.[18] When the executive branch takes on legislative powers, due process concerns again turn up because individuals can be prosecuted for conduct they were not warned was prohibited.[19] Going on with different combinations would perhaps belabor the point, but the essence is this: Justice Gorsuch recognizes that the structure of government plays an indispensable role in both the separation of powers and fair notice.

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[16] United States v. Arthrex, Inc., 594 U.S. ___, ___ (2021) (slip op. at 10) (Gorsuch, J., concurring in part and dissenting in part).

[17] United States v. Games-Perez, 667 F.3d 1136, 1145 (10th Circuit 2012) (Gorsuch, J., concurring in judgement); see also United States v. Games-Perez, 695 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., dissenting from the denial of rehearing en banc).

[18] *Oil States,* (slip op. at 2-3) (Gorsuch, J., dissenting).

[19] United States v. Nichols, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

Given all of this, it is unsurprising why Justice Gorsuch so desperately wants to reinvigorate the public's respect for the structure of our government. As he himself admits, "[T]he value of the separation of powers isn't always as obvious as the value of other sorts of constitutional protections."[20] He recognizes that many people today find the process of legislating to be too slow or cumbersome. However, he believes that forgetting about or discarding the separation of powers produces results where "those who suffer first may be the unpopular and least among us […] But they are not likely to be the last."[21] Arguably, the structure of government may not be as fun or as sexy as the Bill of Rights. Cases about flag burning or the death penalty are going to pique the interest of the public more than cases about the constitutionality of the Office of Independent Counsel. Yet, Justice Gorsuch thinks that such a state of affairs is a shame. He has lamented on a number of occasions about the lack of civic education that the American public receives, and he has expressly claimed to make civics one of the focuses of all of his public appearances.[22] Additionally, he is concerned that when judges do not respect the separation of powers and simply do Congress's job for them, it reduces Congress's willingness to legislate. It allows Congress to pass on the responsibility for solving problems to the judiciary, which drastically reduces accountability. As he explained, "[T]he more we assume their duties the less incentive they have to discharge them."[23]

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[20] Gorsuch, *A Republic,* 45.

[21] Gorsuch, *A Republic,* 46.

[22] Gorsuch, *A Republic,* 21.

[23] Democratic National Committee v. Wisconsin State Legislature, 592 U.S. ___, ___ (2020) (slip op. at 4) (Gorsuch, J., concurring).

Thus, both on and off the bench Justice Gorsuch has sought to remind everyone of the importance of understanding and appreciating the structure of our government. His opinions have attempted to change certain elements of the Court's separation of powers jurisprudence, while his speeches and writings off the Court have attempted to illustrate the practical implications of our government's structure. In the end, he is blunt about the necessity of this project. "It's the separation of powers that keeps us free."[24]

The Separation of Powers and Nondelegation

Justice Gorsuch's jurisprudence rests upon an idea of due process that is partially rooted in the separation of powers. He argues that "respect for the separation of powers implies originalism in the application of the Constitution and textualism in the application of statutes."[25] In his mind, the separation of powers demands originalism, and originalism in turn demands a robust conception of the separation of powers. This section explores Justice Gorsuch's understanding of the separation of powers with a special concentration on the nondelegation doctrine. It begins with a look at Justice Gorsuch's refusal to allow the judicial branch take on the role of amending laws in *Jesner v. Arab Bank, PLC.* Next, it shifts to the nondelegation doctrine and Justice Gorsuch's approach to *Gundy v. United States.* Through all of this, I hope to illustrate how Gorsuch has tried to emphasize the importance of a robust separation of powers doctrine as it is tied to due process.

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[24] Gorsuch, "Neil Gorsuch," video.

[25] Gorsuch, *A Republic,* 10.

Justice Gorsuch has made it clear in his writings off the Court that judges should apply the law, not make it. But does he practice what he preaches? *Jesner v. Arab Bank, PLC* helps answer this question. *Jesner* involves the Alien Tort Statute, a mysterious provision of the Judiciary Act of 1789 which gives district courts original jurisdiction over aliens for torts committed in violation of the law of nations. The ATS, as it is commonly known, was largely forgotten about until the 1980s when it was seemingly rediscovered during litigation in the Second Circuit.[26] Since then, the Supreme Court has struggled to define the scope of the succinctly worded ATS. In *Jesner,* the petitioners were asking the Court to determine whether liability under the ATS extended to foreign corporate defendants. Ultimately, the Court determined that the ATS is merely a jurisdictional statute, and it resisted calls for it to create a cause of action to allow foreign corporations to be sued under the law.[27] Justice Gorsuch agreed with a good portion of the Court's decision but wrote separately to explain his underlying rationale for the decision. In his view, this case was a simple one "because the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches."[28] He argued that the Court, aided by lower courts, had gone too far in creating an expansive reading of permissible suits under the ATS. As he summarized, "A statute that creates no new causes of action…creates no new causes of action."[29] The ATS does not permit judges to exercise their view on whether or not a cause of action for a particular claim

[26] Jesner v. Arab Bank, PLC, 584 U.S. ___, ___ (2018) (slip op. at 8-10).

[27] *Jesner,* (slip op at 27) (plurality opinion).

[28] *Jesner,* (slip op. at 1) (Gorsuch, J., concurring in part and concurring in judgement).

[29] *Jesner,* (slip op. at 3) (Gorsuch, J., concurring in part and concurring in judgement).

would be a good idea. It only gives judges jurisdiction over causes of action created by Congress. This is especially true in the foreign policy arena where Justice Gorsuch does not think judges have the expertise or accountability to be making decisions with sensitive international implications. There are certainly a number of opinions that highlight Justice Gorsuch's strong sense that it is not the Court's job to add elements to already existing laws; what is unique about *Jesner* is the fact that the Court has previously created private causes of action when statutes did not provide for them.[30] Now, most of these creations occurred during the Warren and Burger Courts (the most famous example being *Bivens v. Six Unknown Named Agents*), but even within the ATS context, the Court as recently as 2004 recognized the possibility of new, implied causes of action in *Sosa v. Alvarez-Machain.* Justice Gorsuch rejected such a possibility. "Adopting new causes of action […] is not appropriate 'for federal tribunals' mindful of the limits of their constitutional authority."[31] There is a clear line in cases like these between what courts may do and what is left to Congress. Justice Gorsuch is unwilling to step across that boundary even in areas where the Court has historically blurred the line between the judicial and legislative functions. He has a firm view of the separation of powers, and he is reluctant to soften it because of the importance he thinks it has for due process.

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[30] For other examples of Justice Gorsuch's refusal to make decisions that he thinks should be left to Congress, see *Henson v. Santander Consumer USA Inc., Perry v. Merit Systems Protection Bd.,* and *Artis v. District of Columbia.*

[31] *Jesner,* (slip op. at 3) (Gorsuch, J., concurring in part and concurring in judgement) (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001)).

With that introduction, we arrive at what Justice Gorsuch sees as the perhaps the most serious threat to the separation of powers: the delegation of powers from one branch to another. His magnum opus on the separation of powers is his dissent in *Gundy v. United States*, a case that turns on the nondelegation doctrine. *Gundy* contained a question of whether the Sex Offender Registration and Notification Act (SORNA) violated the nondelegation doctrine by delegating to the Attorney General the authority to "specify the applicability" of SORNA to offenders who were convicted before SORNA became law.[32] Herman Gundy argued that such statutory language unconstitutionally allowed the Attorney General to exercise legislative power. Under Gundy's reading of the statute, the Attorney General could decide to apply all, some, or none of SORNA's requirements to all, some, or none of prior offenders. This constituted an unconstitutional delegation. The Court, applying its traditional nondelegation precedents, disagreed.[33] The Court's precedents only require that Congress provide an "intelligible principle" to guide the other branches. To this end, nondelegation questions often turn into statutory interpretation questions. Here, the Court had already encountered the text that Mr. Gundy was challenging in *Reynolds v. United States.* In that case, the Court held that SORNA's structure and intent limited the actual flexibility the Attorney General had in deciding how to apply SORNA to pre-Act offenders. The *Reynolds* Court read SORNA as requiring all pre-Act offenders to be subject to the complete regulations of SORNA, and merely granting the Attorney General the license to determine when those offenders

[32] *Gundy,,* (slip op. at 3) (plurality opinion).

[33] *Gundy,,* (slip op. at 4-6) (plurality opinion).

would be subject to SORNA's requirements.[34] Relying on this reading of SORNA, the *Gundy* plurality found this case to be an easy one. There was no real delegation issue because SORNA did not actually give the Attorney General that much unchecked power to make the law. Congress laid out a clear principle (prior offenders should be subject to the entirety of SORNA), and the Attorney General only got to determine when those requirements kicked in. As such, the Court upheld the constitutionality of SORNA.[35]

Justice Gorsuch took a very different approach in *Gundy.* Indeed, his thirty-three page dissent only spends fifteen speaking specifically about SORNA. The rest of the dissent is a broader criticism of the state of the nondelegation doctrine and Justice Gorsuch's suggestions for its reformulation. His opinion in *Gundy* is a tour de force that is hard to do justice to because of the sheer number of quotable lines. Nor is this Justice Gorsuch's first time to argue that SORNA violates the nondelegation doctrine. While on the Tenth Circuit, he authored an influential opinion in a case that presented the same question in which he laid the groundwork for questioning SORNA's constitutionality.[36] His overarching concern in *Gundy* is the fear that the Court's nondelegation doctrine has become so permissive that the separation of powers does not mean much anymore. He began with a recounting of the purposes of the separation of powers. He argued that the Framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty. An 'excess of law-making' was, in their words,

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[34] Reynolds v. United States, 565 U.S. 432, 442-445 (2012).

[35] Justice Alito provided a fifth vote to affirm Mr. Gundy's conviction, although he did not join Justice Kagan's plurality opinion, and he suggested that he would be willing to reconsider the Court's approach to nondelegation in the future.

[36] *Nichols*, 668-669 (10th Cir.) (Gorsuch, J., dissenting from the denial of rehearing en banc).

one of 'the diseases to which our governments are most liable.'"[37] In order to prevent this excessive promulgation of new laws, the Framers limited who could legislate. They vested that power in only one branch, and they sought to ensure that Congress could not pass off its duties to another branch.[38] Having affirmed that it is important to guard the separation of powers, Justice Gorsuch turned to the more difficult question: How does the Court decide when something crosses the line? He contended that there are three areas where some delegation is permissible. First, it has long been established that Congress can let another branch "fill up the details" of a policy decision. This involves things like designing tax stamps for margarine or adopting use regulations designed to prevent destruction of public forests. The important thing is that Congress puts forth precise and definite guidance by which courts can judge whether the branch with delegated power is following Congress's guidance.[39] Second, Congress can make a rule dependent on executive fact-finding. For instance, Congress can make trade policy dependent upon the President's assessment of the trade policy of other countries.[40] Finally, Congress can assign non-legislative duties to the executive and judicial branch when the constitutional structure already suggests those branches have power to carry out those duties. This involves things like statutes giving the executive branch wide discretion over foreign policy questions.[41] What Justice Gorsuch wants to do away with is the intelligible

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[37] *Gundy,* (slip op. at 6) (Gorsuch, J., dissenting) (quoting *The Federalist No. 62*, 378).

[38] *Gundy,* (slip op. at 6-8) (Gorsuch, J., dissenting).

[39] *Gundy,* (slip op. at 10-11) (Gorsuch, J., dissenting).

[40] *Gundy,* (slip op. at 11) (Gorsuch, J., dissenting).

[41] *Gundy,* (slip op. at 12) (Gorsuch, J., dissenting).

principle standard. He argued that it came into existence almost by accident. When it was first introduced, "[n]o one at the time thought the phrase meant to effect some revolution in this Court's understanding of the Constitution."[42] Over time, however, this intelligible principle standard became more and more prominent and easier and easier to satisfy. "This mutated version […] has no basis in the original meaning of the Constitution, in history, or even in the decision from which was plucked."[43] In his mind, the real intelligible principle doctrine only allows the executive branch to make factual findings. The policy judgements themselves must be from Congress.[44] While the Court has sometimes attempted to curtail delegation through other means, whether that be the "major questions" or "void for vagueness" doctrines, Justice Gorsuch explained that it is time for the Court to finally put a stop to "the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority."[45] From here, Justice Gorsuch finally turned to how these principles apply to SORNA itself. In truth, much of this portion of the opinion is dedicated to fighting *Reynolds.* He claimed, "If the separation of power means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people."[46] Yet, as the plurality points out, *Reynolds* had determined that

[42] *Gundy,* (slip op. at 15) (Gorsuch, J., dissenting).

[43] *Gundy,* (slip op. at 17) (Gorsuch, J., dissenting).

[44] *Gundy,* (slip op. at 20) (Gorsuch, J., dissenting).

[45] *Gundy,* (slip op. at 22) (Gorsuch, J., dissenting).

[46] *Gundy,* (slip op. at 25) (Gorsuch, J., dissenting).

Congress had not given the Attorney General a blank check.[47] Arguably, this case boiled down to a dispute over just how much power SORNA gave the Attorney General. Justice Gorsuch read the statute's delegation fairly broadly; the *Gundy* plurality and the *Reynolds* majority read it more narrowly to avoid a nondelegation question. The larger implication of this case, of course, is not whether the specific section of SORNA is unconstitutional, but whether the Court will, in some future case, accept Justice Gorsuch's invitation to reimagine the nondelegation doctrine.

Justice Gorsuch's understanding of the separation of powers and his attempt to revive the nondelegation doctrine has encountered both support and resistance. The most prominent criticism is the notion that there is simply not a manageable test for determining what sorts of delegation are permissible and what sorts are not. Even Justice Scalia eventually conceded that "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."[48] In essence, nondelegation is a political question for Justice Scalia. Justice Gorsuch does not seem to agree. He feels that "when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed."[49] That is to say, courts can find a standard (even if it is one of degree) to determine when delegation crosses a line. Justice Gorsuch, of course, proposed his own three category standard in *Gundy,* yet some scholars have urged the Court to adopt a

[47] *Gundy,* (slip op. at 15) (plurality opinion).

[48] Scalia, *Essential Scalia,* 43-44.

[49] *Gundy,* (slip op. at 9) (Gorsuch, J., dissenting).

different one. The most prominent of these is the suggestion that the Court should import a private-law background to the nondelegation doctrine.[50] This view contends that the original meaning of the Constitution only requires that Congress decided questions involving an "important subject" while retaining the ability to delegate matters of "less interest."[51] To determine the bounds of these terms, courts should look to what sorts of decisions agents could delegate in fiduciary agreements in a private-law context.[52] This is certainly an interesting proposal, and one that its proponents think could be added to Justice Gorsuch's existing framework.[53] The more intriguing question, however, is whether or not Justice Gorsuch actually understands the nondelegation doctrine properly. This has been the subject of much debate. On one side, there is a plethora of scholars who suggest that the Framers intended to allow for fairly substantial delegation.[54] In fact, they argue, the First Congress passed a number of laws that would flunk Justice Gorsuch's nondelegation framework.[55] These scholars have looked to a number of different historical sources to make the argument that originalists are attempting to revive a doctrine that never really existed. They suggest that the "nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an

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[50] Gary Lawson, "Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation," *American Enterprise Institute* (Forthcoming): 14-16.

[51] Lawson, "Mr. Gorsuch," 22.

[52] Lawson, "Mr. Gorsuch," 29.

[53] Lawson, "Mr. Gorsuch," 8.

[54] Julian Mortenson and Nicholas Bagley, "Delegation at the Founding," *Columbia Law Review* 121, no. 2 (March 2021): 279-282.

[55] Christine Chabot, "The Lost History of Delegation at the Founding," *Georgia Law Review* (Forthcoming): 3.

originalist or you can be committed to the nondelegation doctrine. But you can't be both."[56] There are two lines of attack that scholars have pursued to support this claim. One is the notion that the theoretical political and legal literature that existed during the Framing's generation would not have instilled a general attitude against delegation.[57] That is to say, none of the works of political theory that the Framers were exposed to would have created the sort of implicit original public meaning that would suggest strong nondelegation principles. Second is the claim that the First Congress passed a number of laws that would seemingly violate nondelegation principles. The prime example of this is the degree of latitude Congress gave to the Treasury Department to borrow money; in today's terms, Madison and other Framers in Congress at the time gave the executive branch the freedom to borrow and spend over one trillion dollars as it saw fit.[58] Other examples like the granting of patent rights and the establishment of certain real estate taxes follow.[59]

Gundy was what sparked this scholarship, so Justice Gorsuch has not had a chance to respond, but a number of other scholars have defended his view of the nondelegation doctrine. On the first charge, they suggest that John Locke (who was, of course, incredibly influential with the Framers) should be read as espousing a nondelegation view.[60] They also offer a number of other statements and suggestions by

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[56] Mortenson and Bagley, "Delegation," 282.

[57] Mortenson and Bagley, "Delegation," 289-291.

[58] Chabot, "Lost History," 4.

[59] Chabot, "Lost History," 15, 33.

[60] Ilan Wurman, "Nondelegation at the Founding," *Yale Law Journal* 130, no. 6 (April 2021): 1519.

the Framers (including a proposed amendment by James Madison that would have enshrined a principle of nondelegation in the Constitution) that illustrate that the Framers had a clear conception of nondelegation principles.[61] Other historical pre-ratification practices that scholars opposed to the nondelegation doctrine have cited also seemingly cut against their position or are at least ambiguous.[62] This leaves only the post-ratification argument that the First Congress approved of delegation. Here, the historical record is again not as clear as Justice Gorsuch's opponents would make it seem. While the First Congress passed legislation that may very well fail Justice Gorsuch's nondelegation test, the First Congress also expressly declined to approve of legislation that members argued would unconstitutionally delegate legislative power.[63] Although the First Congress may have violated the nondelegation doctrine *sub silentio,* when the issue came to the forefront, the First Congress voted down constitutionally suspect bills. *Gundy* has spurred a great deal of new research into the original meaning of the nondelegation doctrine, and it will be interesting to see what the Court does with these new, competing views in future cases.

Finally, there is one other argument that is leveled at Justice Gorsuch's nondelegation jurisprudence. There is a major concern that such a strict view of the separation of powers would wreak havoc on the contemporary administrative state. Now, Justice Gorsuch has disclaimed the idea that "enforcing the Constitution's demands spell

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[61] Wurman, "Nondelegation," 1503-1505.

[62] Aaron Gordon, "Nondelegation," *New York University Journal of Law and Liberty* 12, no. 3 (2019): 737-744.

[63] Gordon, "Nondelegation," 744-746.

doom for what some call the 'administrative state.'"[64] Nevertheless, scholars on both sides of the debate over nondelegation have suggested that "Justice Gorsuch's claim [about the administrative state and the scope of the government] is simply not correct."[65] In their view, "constitutional doubt about [administrative] rulemaking can instill judges with a sense that our entire modern regulatory state is suspect," which threatens to topple the whole system, leaving the government unable to address the issues that Congress does not have the time or manpower to fix.[66] Even if the nondelegation doctrine does not itself undermine the administrative state, it will certainly raise questions about the propriety of other aspects of the regulatory state—*Chevron* deference and the "major questions" doctrine will undoubtedly see a flux in their importance.[67] Of course, this may not be any cause for alarm of Justice Gorsuch. He has not been a friend to administrative deference, and it seems unlikely that he would mourn a major reduction in the size and scope of the administrative state. Regardless of whether a revival of the nondelegation doctrine would itself shake administrative agencies to their core, it would certainly reshape other areas of law that impact the so-called fourth branch. In sum, Justice Gorsuch's view of the nondelegation doctrine has its critics and its supporters regarding both the propriety of the doctrine itself and the potential effects of the doctrine.

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[64] *Gundy,* (slip op. at 26) (Gorsuch, J., dissenting).

[65] Lawson, "Mr. Gorsuch," 8.

[66] Nicholas Parrillo, "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s," *Yale Law Journal* 130, no. 6 (April 2021): 1297.

[67] Ibid.

While one can debate the merits of Justice Gorsuch's view of the separation of powers and the nondelegation doctrine, it does fit squarely within his jurisprudence. Despite Justice Scalia's worries that courts cannot resolve the delegation issue, Justice Gorsuch seems willing to try. He clearly argues that the nondelegation doctrine is crucial to ensuring the separation of powers and fair notice necessary for due process. In this respect, it also becomes evident how the separation of powers and fair notice are intertwined and rely on each other as opposed to being independent aspects of due process. The separation of powers helps guarantee that only one branch makes laws, which means that individuals have a better idea of what the rules governing them actually are. As Justice Gorsuch explained, "Restricting the task of legislating to one branch characterized by difficult and deliberative processes was also designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules."[68] Likewise, fair notice reinforces the separation of powers by dissuading judges from accepting executive or judicial lawmaking. He believes that nondelegation is an important requirement in preserving these two aspects of due process. When Congress delegates lawmaking authority to the executive branch, the separation of powers is undermined, which reduces deliberation and protection for minority rights. Such delegation also undermines fair notice because the executive branch can change the laws and policies at a whim.[69] Not only does the nondelegation doctrine have these theoretical implications for Justice Gorsuch's jurisprudence, but he thinks there are also

[68] *Gundy,* (slip op. at 8) (Gorsuch, J., dissenting).

[69] Ostensibly, many executive decisions are subject to the Administrative Procedure Act, but the APA still allows for generally quicker policy changes than passing a new law in Congress.

real world consequences. Taking SORNA as an example, he admits that "those affected are some of the least popular among us," but he wonders "if a single executive branch official can write laws restricting the liberty of this group of persons, what does it mean for the next?"[70] He recognizes that his more constrictive nondelegation doctrine would perhaps reduce efficiency by forcing more decisions in the "detailed and arduous processes for new legislation," but he considers the Article I processes to be "bulwarks of liberty."[71] In his view, the practical efficiency concerns are a worthy tradeoff for practical protections for liberty.

Vagueness Doctrine

Related to the separation of powers, fair notice, and due process concerns inherent in the nondelegation doctrine is the "void for vagueness" doctrine. This doctrine allows courts to "treat the law as a nullity and invite Congress to try again" when a vague law confronts them.[72] Justice Gorsuch argues that this doctrine is rooted in the separation of powers and fair notice requirements of due process. This section explores those claims through two cases: *Sessions v. Dimaya* and *United States v. Davis*. It looks first at how the vagueness doctrine is tied to the separation of powers. Then, it turns to the role of fair notice in the vagueness doctrine. Finally, I evaluate Justice Gorsuch's response to those who have questioned the propriety of the vagueness doctrine, namely Justice Thomas.

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[70] *Gundy,* (slip op. at 1) (Gorsuch, J., dissenting).

[71] *Gundy,* (slip op. at 7) (Gorsuch, J., dissenting).

[72] United States v. Davis*,* 588 U.S. ___, ___ (2019) (slip op. at 1).

Both *Sessions v. Dimaya* and *United States v. Davis* involved the Court striking down residual clauses as unconstitutionally vague. Both cases asked the Court to interpret the term "crime of violence" in separate statutes, one in the immigration context and one in the criminal context. Both cases where precipitated by the Court's decision in *Johnson v. United States* which struck down similar language in the Armed Career Criminal Act on vagueness grounds. Both cases follow fairly easily from the logic of *Johnson*. As such, the actual reasoning as applied to the statutory language is not particularly important or novel. What is important is the robust defense and justification of the vagueness doctrine that Justice Gorsuch provided over the course of his majority opinion in *Davis* and concurring opinion in *Dimaya.*

The first justification that Justice Gorsuch gives for the vagueness doctrine is the separation of powers. He argued in *Dimaya* that vague laws transfer legislative power in two ways. First, by "leaving to judges the power to decide" what falls within the terms of a vague statute, they assume a legislative role.[73] Judges become proxy legislators by determining what conduct should or should not be punished without a clear statutory command to guide them. Second, "[v]ague laws also threaten to transfer legislative power to police and prosecutors, leaving them the job of shaping a vague statute's contours through their enforcement decisions."[74] All of this creates many of the same problems delegation creates—the restriction of liberty and a loss of accountability. This undermining of the separation of powers again strikes at the "democratic self-governance

[73] Sessions v. Dimaya*,* 584 U.S. ___, ___ (2018) (slip op. at 8) (Gorsuch, J., concurring in part and concurring in judgement).

[74] Ibid.

it aims to protect."[75] Justice Gorsuch has suggested that judges, police, and prosecutors are simply not as capable of fulling the ends of democratic governance because they are not as directly tied to the people. Of course, striking down a law because it is vague may seem to be a rather radical solution. Yet, Justice Gorsuch argued that "[r]espect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law," give an arbitrary construction to a statute not dictated by its text.[76] In his mind, it would be worse for courts to assign some meaning that was not prescribed by the People to laws than to simply declare that there is no law. He claimed that "a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty."[77] Thus, Justice Gorsuch understands the vagueness doctrine as a mechanism for avoiding de facto delegation of lawmaking power to the judicial and executive branches.

Justice Gorsuch also explains how the vagueness doctrine is tied to fair notice. Vague laws do not provide individuals with any sort of notice of what the law prohibits. This runs counter to due process for Justice Gorsuch. "Perhaps the most basic of due process's customary protections is the demand of fair notice."[78] Individuals must be aware of what the law commands. However, as he pointed out with the separation of powers concerns, a vague law leaves it up to judges and prosecutors to decide what falls within its confines. The result is that individuals may not know they have violated the law

[75] *Davis,* (slip op. at 5).

[76] *Davis,* (slip op. at 18-19).

[77] *Davis,* (slip op. at 23).

[78] *Dimaya,* (slip op. at 3) (Gorsuch, J., concurring in part and concurring in judgement).

until they are being prosecuted for it. Not only that, but "[m]any of the Constitution's other provisions presuppose and depend on the existence of reasonably clear laws."[79] Justice Gorsuch claimed that many of the criminal protections enshrined in the Bill of Rights become meaningless if laws can be so broad and vague as to encompass almost anything. After all, what good is it to be informed of the accusation against you if the accusation is so ambiguous that you are unsure what part of your conduct is at issue?[80] Justice Gorsuch thinks that the Constitution's demands of due process requires that laws provide individuals with fair notice. When laws fail to do that due to their vague nature, they become unconstitutional.

Related to Justice Gorsuch's understanding of the vagueness doctrine is his broad application of the rule of lenity. In his view, lenity is required when interpreting vague or ambiguous criminal laws because it "works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws."[81] Just like the vagueness doctrine, he ties the rule of lenity to both fair notice and the separation of powers. Lenity seeks "to ensure that the government may not inflict punishment on individuals without fear notice and the assent of the people's representatives."[82] In truth, the rule of lenity might just be a subset of the vagueness doctrine for Justice Gorsuch. At

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[79] *Dimaya,* (slip op. at 7) (Gorsuch, J., concurring in part and concurring in judgement).

[80] Ibid.

[81] *Wooden,* (slip op. at 7) (Gorsuch, J., concurring in judgment).

[82] *Wooden,* (slip op. at 10) (Gorsuch, J., concurring in judgment).

the very least, he clearly situates the two next to each other in terms of purposes and applications.[83]

Justice Gorsuch's conception of the vagueness doctrine is not without its critics, however. Perhaps surprisingly, his biggest critic is Justice Thomas, who argued in *Dimaya* that there was no vagueness doctrine included within the original public meaning of the Constitution.[84] Justice Thomas's survey of the historical evidence at the Founding suggests that Americans would not have originally understood the Due Process Clause of the Fifth Amendment as permitting courts to rule vague laws unconstitutional. English courts would narrowly construe vague laws in accord with the rule lenity, but they would not strike them down at common law.[85] He claimed that the vagueness doctrine was a modern invention that grew out of the substantive due process framework.[86] Justice Gorsuch contested this. "I am persuaded instead that void for vagueness doctrine […] serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution."[87] First, he argued, Blackstone and other scholars suggest the existence of a vagueness doctrine in the common law. While he conceded that early cases spoke of construing vague laws strictly, the results were the same.[88] Judges refused to apply vague laws; they did not

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[83] *Wooden,* (slip op. at 14) (Gorsuch, J., concurring in judgment).

[84] *Dimaya,* (slip op. at 2) (Thomas, J., dissenting).

[85] *Dimaya,* (slip op. at 4-5) (Thomas, J., dissenting).

[86] *Dimaya,* (slip op. at 6) (Thomas, J., dissenting).

[87] *Dimaya,* (slip op. at 2) (Gorsuch, J., concurring in part and concurring in judgement).

[88] *Dimaya,* (slip op. at 6-7) (Gorsuch, J., concurring in part and concurring in judgement).

attempt to interpret them. The Framers may have had a semantic difference with the modern vagueness doctrine, but the meaning is the same today. He also argued that the vagueness doctrine reflected a procedural aspect of due process, not substantive.[89] Legislatures may still act toward the ends they wish to, but they just must do so with sufficient clarity. Another related criticism leveled at Justice Gorsuch's approach to vagueness is that he is wrong to ground the doctrine in the Due Process Clauses of the Fifth and Fourteenth Amendments. This argument contends that the Framers had a much narrower conception of "life, liberty, and property" than modern judges accept.[90] The Framers would not have recognized deportation as an infringement of any sort of liberty right. Rather, admission to the United States was a privilege that the political branches could take away because they "enjoyed unilateral authority" over such privileges.[91] Thus, the Due Process Clauses cannot encompass all that Justice Gorsuch wants them to contain. The vagueness doctrine might apply in purely criminal cases under this view, but it should not apply in immigration cases and other sorts of administrative or civil punishments. Again, Justice Gorsuch disputes this claim. First, the notion that deportation proceeding were not subject to due process because admission to the United States was merely a privilege was heavily contested by the Framers themselves and the subject of a good deal of debate during the early Republic.[92] Second, he thinks that it makes little

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[89] *Dimaya,* (slip op. at 18) (Gorsuch, J., concurring in part and concurring in judgement).

[90] Caleb Nelson, "Adjudication in the Political Branches," *Columbia Law Review* 107, no. 3 (April 2007): 566-568.

[91] Nelson, "Adjudication," 571.

[92] *Dimaya,* (slip op. at 12-13) (Gorsuch, J., concurring in part and concurring in judgement).

sense to exclude noncriminal proceedings from due process requirements when "so many civil laws today impose so many similarly severe sanctions."[93] Given the growth and power of civil penalties, he believes that due process should govern those proceedings as well.

All of this leads to the conclusion that "a vague law is no law at all."[94] Justice Gorsuch is concerned that vague laws fundamentally undermine due process "by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up."[95] Because of this possibility, the exercise of the vagueness doctrine is constitutionally sound and grounded in the Due Process Clauses. It is also an excellent example of how Justice Gorsuch's jurisprudence connects the separation of powers and fair notice to formulate his understanding of due process. "Vague laws invite arbitrary power," he has claimed.[96] This sort of arbitrary power runs contrary to how he conceives as due process. Given the due process commands present within the Constitution and the common law, Justice Gorsuch argues that the vagueness doctrine is a necessary tool for judges in order to preserve fair notice and the separation of powers. In his mind, "where uncertainty exists, the law gives way to liberty."[97]

Administrative Deference

[93] *Dimaya,* (slip op. at 15) (Gorsuch, J., concurring in part and concurring in judgement).

[94] *Davis,* (slip op at 1).

[95] *Dimaya,* (slip op. at 1) (Gorsuch, J., concurring in part and concurring in judgement).

[96] Ibid.

[97] *Wooden,* (slip op. at 7) (Gorsuch, J., concurring in judgment).

Justice Gorsuch does not hold the administrative state in high regard, and as a result, he has a degree of contempt for judicial deference to administrative interpretations of statutes and regulations. This section examines why he thinks that administrative deference undermines the role of judges as neutral arbiters. I first look at Justice Gorsuch's disagreement with *Chevron* deference. Next, I turn to his attempt to do away with *Auer* deference in *Kisor v. Wilkie.* Through this, it becomes clear that Justice Gorsuch understands administrative deference as a violation of both the separation of powers and fair notice. Thus, in his mind, administrative deference undermines the promise of due process.

In many respects, administrative deference functions as a form of delegation. It is essentially the judicial branch ceding its job of interpreting the law to the executive branch. Nevertheless, administrative deference is a distinct area of law for Justice Gorsuch because here the Court has given away its own power, not simply acquiesced as Congress gave away its own power. There are many different types of administrative deference, but the two that have drawn Justice Gorsuch's ire are *Chevron* and *Auer.*[98] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* lays out the test for when agency interpretations of statutes receive deference:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute [. . .] Rather, if the statute is silent or

[98] Of course, other forms of deference like *Skidmore, Brand X, Beth Israel,* and the major questions doctrine are all tied in some ways to *Chevron* and *Auer.*

> ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[99]

Citing *Chevron*, Justice Scalia built off previous administrative deference cases like *Bowles v. Seminole Rock & Sand Co.* in *Auer v. Robbins* to extend the same line of inquiry to agencies' interpretations of their own regulations.[100] That is to say, when an agency regulation is ambiguous, *Auer* deference suggests that courts should defer to the agency's interpretation of that regulation. All of this is problematic for Justice Gorsuch.

Justice Gorsuch takes issue with *Chevron* deference for a number of reasons. First, administrative deference eliminates the fair notice benefits of written law. As he explained, "Under our deference doctrines, it's not enough anymore to look to the statute books and the decisions of courts interpreting them. You *also* have to worry that a completely contrary and binding rule lies buried in the appendix to an agency's guidance manual."[101] This concern is echoed throughout his opinions involving *Chevron* deference. He has argued that independent judicial review of agency interpretations is necessary to "limit the ability of an agency to alter and amend existing law."[102] That is to say, substantial deference to agencies when it comes to statutory interpretation means that those agencies can change the law when they feel like it. Judicial interpretations are subject to *stare decisis,* but Justice Gorsuch fears that agencies can and will alter the meaning of statutes willy-nilly under *Chevron.* Relatedly, Justice Gorsuch also derides

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[99] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984).

[100] Auer v. Robbins, 519 U.S. 452, 457 (1997).

[101] Gorsuch, *A Republic,* 66.

[102] *Gutierrez-Brizuela*, 1158 (Gorsuch, J., concurring).

Chevron for substituting the neutral judgements of the judiciary with politically motivated judgements from the executive. The Framers were clear that a neutral, independent judiciary was crucial to protecting disfavored groups. When their fate instead rests in the hands of the executive branch and its interpretation of the law, there is an increased risk that the politically weak will suffer.[103] Parties in a proceeding cannot change their conduct, but the executive branch can change its interpretation of the law, which raises equal protection issues because it permits the government to pick winners and losers by changing what the law means.[104] Justice Gorsuch sees this sort of arbitrary government as running contrary to the original protections of the Constitution and infringing upon the separation of powers. By shifting the ability to say what the law is from the judiciary to the executive, not only is there a potential for the politically powerful to recast the law to their benefit, but there is little recourse for those who are harmed. Finally, Justice Gorsuch also rejects the justification that *Chevron* works in the public interest. While he concedes that agencies do often times have a level of expertise in a certain area or the interest of the public at heart, he does not think that is enough to sustain a continued reliance on *Chevron.* There are two main reasons why he is wary of this line of argument. First, he has suggested that "our traditional rules of […] interpretation" are have been designed over the course of centuries for the sake of "promoting the public interest."[105] The principles that guide judges in statutory

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[103] Gorsuch, *A Republic,* 67-68.

[104] *Gutierrez-Brizuela*, 1158 (Gorsuch, J., concurring).

[105] Scenic America, Inc. v. Department of Transportation, 583 U.S. ___, ___ (2017) (slip op. at 3) (Gorsuch, J., respecting the denial of certiorari).

interpretation are supposed to benefit everyone and provide neutrality. There is no need for agencies to take up that mantle on their own. Second, agencies may often act not in accord with the public interest but in accord with their bosses' political interest. Political actors will be tempted to avoid acting in the public interests when he knows "exactly whose ox will be gored by his decision."[106] The independent judiciary was designed by the Framers to avoid this temptation. While there may be plenty of times when the executive branch steers clear of this risk, Justice Gorsuch thinks that *Chevron* tempts fate. Thus, he rejects its role in statutory interpretation.

Additionally, Justice Gorsuch has gone out of his way to curtail and critique *Chevron.* He is extremely recalcitrant to accept an agency's argument that a statute is ambiguous and therefore triggers *Chevron.* When agencies suggest that a statute is ambiguous and warrants deference, Justice Gorsuch typically thinks that "after applying traditional tools of interpretation […] we are left with no uncertainty that could warrant deference."[107] In fact, there has not been a single instance during his tenure in which he has voted to embrace an agency's view that a statute is ambiguous enough to trigger *Chevron.* Generally, the usual tools of a judge will be enough to clear up any uncertainty about a text, which makes it unnecessary to defer to agencies. While he clearly wants to overrule *Chevron,* he thinks that limiting its scope and applicability are the next best alternative. He has consistently attempted to whittle away at the doctrine by limiting

[106] Gorsuch, *A Republic,* 67.

[107] SAS Institute v. Iancu, 584 U.S. ___, ___ (2018) (slip op. at 12).

ambiguities with the traditional mechanisms of statutory construction.[108] That being said, Justice Gorsuch is like a dog with a bone when it comes to critiquing *Chevron*; he simply never passes up an opportunity to criticize it. For instance, despite the fact that a party in one case "devoted scarcely any of its briefing to *Chevron*" and the Court did not even mention that argument in its opinion, Justice Gorsuch managed to squeeze a criticism into his dissent.[109] Characterizing the criticism of *Chevron* as "mounting," Justice Gorsuch approvingly claimed that "[i]nstead of throwing up our hands and letting an interested party—the federal government's executive branch, no less—dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute, the Court today buckles down to its job of saying what the law is."[110] All of this and more in a case that did not really turn on the applicability of *Chevron.* Likewise, his opinion in *Scenic America, Inc. v. Department of Transportation,* he includes a critique of *Chevron* even though that case involved agency interpretations of contracts, not statutes.[111] The point of all of this is to say that Justice Gorsuch cares deeply about this issue. It is not a minor problem that the Court can work around; it cuts into the heart of due process.

For all of Justice Gorsuch's criticism of *Chevron* deference, there are many who remain supportive of the doctrine. Justice Scalia for one, not only endorsed *Chevron* in

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[108] Kristin Hickman, "To Repudiate or Merely Curtail? Justice Gorsuch and *Chevron* Deference," *Alabama Law Review* 70, no. 3 (2019): 736.

[109] BNSF R. Co. v. Loos, 586 U.S. ___, ___ (2019) (slip op. at 9) (Gorsuch, J., dissenting).

[110] Ibid.

[111] *Scenic America*, (slip op. at 2-3) (Gorsuch, J., respecting the denial of certiorari).

his opinion in *Auer,* but he offered a number of arguments in favor of *Chevron* deference. First, he claimed, "*Chevron* is unquestionably better than what proceeded it."[112] In his view, *Chevron* set a clear rule for guiding Congress when it came to legislating. Congress would know who would construe ambiguities and could choose to be clearer as it saw fit. Of course, Justice Gorsuch argues that the true precursor to *Chevron* (before the Court ventured down the deference path) was just the independent judgement of judges and Congress should not be in the practice of delegating its authority to agencies. Second, Justice Scalia contended that *Chevron* was an easy to apply, clear cut rule. He argued that this was an area of law where it was best to "just have an easily administrable rule and be done with it."[113] As far back as 1989, Justice Scalia predicted that *Chevron* would survive both because it represents a predictable rule that is easy to follow and because it reflects the reality of modern government.[114] Justice Gorsuch is far more skeptical of *Chevron's* practical benefits. Arguably, large scale abdication of judicial duties would make governance easier. However, the loss of the independent judiciary is too steep a price to pay for making the lives of executive and legislative branch officials easier in his mind.[115] All of this has led to the suggestion that "[p]erhaps nowhere does Justice Gorsuch depart as far from Justice Scalia as in the context of administrative law."[116] However, others have also offered defenses of *Chevron.* Namely, scholars have suggested that the

[112] Scalia, *Essential Scalia,* 289.

[113] Scalia, *Essential Scalia,* 297.

[114] Scalia, *Essential Scalia,* 292.

[115] Heather Elliot, "Gorsuch v. The Administrative State," *Alabama Law Review* 70, no. 3 (2019): 719.

[116] Elliot, "Gorsuch v. The Administrative State," 704.

Constitution permits Congress to delegate the power to reasonably interpret statutory ambiguities. In other words, in the same way that Congress can currently delegate certain policy decisions expressly to an agency, they can also implicitly delegate decisions by using imprecise language.[117] Thus, *Chevron* should not be understood as some sort of abdication of Article III duty, but as a permissible delegation of legislative power that would survive under the "intelligible principle" doctrine. Of course, this argument does little to comfort Justice Gorsuch given his animosity toward the current state of the Court's nondelegation doctrine. In his mind, understanding *Chevron* in this way trades an Article III concern for an Article I concern. Giving agencies this sort of power to say what purposefully ambiguous statutes mean also runs counter to Justice Gorsuch's desire that Congress make laws clearer in the name of fair notice. Even proponents of *Chevron* have admitted that the doctrine could be modified in the name of the rule of law and accountability.[118] Understanding *Chevron* as an implicit policy delegation incentives ambiguous statutes, which undercuts fair notice and allows agencies to work around the traditional requirements of administrative law.[119] While these arguments might persuade some, Justice Gorsuch remains unconvinced and unwilling to leave *Chevron* on the books.

Justice Gorsuch offered similar arguments against *Auer* deference in *Kisor v. Wilkie.* This case squarely presented the question of whether or not to overturn *Auer,* so it

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[117] Jonathan Siegel, "The Constitutional Case for *Chevron* Deference," *Vanderbilt Law Review* 71, no. 3 (2018): 961.

[118] Kristin Hickman and Aaron Nielson, "The Future of *Chevron* Deference," *Duke Law Journal* 70 no. 5 (February 2021): 1019.

[119] Hickman and Nielson, "Future of *Chevron,*" 1021.

provided a straightforward chance for Justice Gorsuch to present his arguments against *Auer. Kisor* is also useful because many of the arguments that Justice Gorsuch fleshed out more fully in this case also apply to *Chevron.* In *Kisor,* he made four main arguments in an attempt to persuade a future Court to "find the nerve it lacks today and inter *Auer* at last."[120] The first is that *Auer* is "little more than an accident"—a doctrinal aberration that exists only because of a series of small mistakes.[121] There is no real historical basis for *Auer.* Instead, the traditional form of deference employed by the Court when it came to agency interpretations of their regulations was *Skidmore* deference.[122] Under *Skidmore,* courts are still able to defer to agencies when the agency interpretation is persuasive (like when the agency is a clear expert compared to judges), but they do not have to defer automatically as with *Auer.*[123] Further contesting the historical basis for *Auer,* Justice Gorsuch argued that even the traditionally recognized starting point for *Auer—Seminole Rock*—was not actually quite the development that *Auer*'s latter supporters thought it was. Rather, "readers at the time didn't perceive *Seminole Rock*'s dictum as changing anything."[124] *Seminole Rock*'s level of deference was an outlier at best, and dicta at worst. Yet, courts slowly adopted more and more of *Seminole Rock's* reasoning, and citations to it became more frequently until the Court arrived at *Auer.* As Justice Gorsuch put it,

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[120] *Kisor,* (slip op. at 3) (Gorsuch, J., concurring in judgement).

[121] Ibid.

[122] *Kisor,* (slip op. at 4-6) (Gorsuch, J., concurring in judgement).

[123] *Kisor,* (slip op. at 32-33) (Gorsuch, J., concurring in judgement).

[124] *Kisor,* (slip op. at 7) (Gorsuch, J., concurring in judgement).

"*Auer* represents the apotheosis of this line of cases."[125] In his view, the Court that decided *Seminole Rock* (and certainly the Framers) would be shocked to see how *Auer* operated today. The *Seminole Rock* Court did not think they were transforming administrative deference, and reading *Auer* as having a long, prestigious heritage in American law ignores its almost aleatoric origin. Second, Justice Gorsuch believed that it is difficult to "square the *Auer* doctrine with the APA [Administrative Procedures Act]."[126] In some respects, it is not even necessary to reach the question of *Auer*'s constitutionality because it runs counter to Congress's law governing administrative rule-making. Not only does the APA require courts to determine the meaning of agency rules, but it includes judicial deference requirements throughout. For Justice Gorsuch, this illustrated that Congress knew how to require deference when it wanted courts to defer to agencies. Yet, where Congress did not require deference, courts have a duty to follow the commands of the APA and determine the meaning of agency rules, not leave it up to the agencies themselves.[127] *Auer* not only violates the courts duties to the APA, but it also allows agencies to get around APA requirements. *Auer* "supplies agencies with a shortcut around the APA's required procedures for issuing and amending substantive rules" by allowing agencies to merely change their interpretation of an existing rule instead of issuing a new rule.[128] Under the APA, repealing an old rule and implementing a new one is a long, often arduous process. With *Auer,* however, agencies can simply

[125] *Kisor,* (slip op. at 9) (Gorsuch, J., concurring in judgement).

[126] *Kisor,* (slip op. at 13) (Gorsuch, J., concurring in judgement).

[127] *Kisor,* (slip op. at 13-15) (Gorsuch, J., concurring in judgement).

[128] *Kisor,* (slip op. at 18) (Gorsuch, J., concurring in judgement).

instantaneously change their interpretation of an existing rule, skirting the APA's process for creating new rules. All of this suggests that *Auer* violates both the judiciary's duties under the APA, and it helps facilitates agencies' avoidance of the APA's requirements. Third, Justice Gorsuch argued that *Auer* "sits uneasily with the Constitution."[129] Allowing executive branch officials to interpret the meaning of agency rules that carry the force of law runs counter to Article III and the guarantee of a neutral judiciary. Unlike judges, executive officials are not designed to be impartial. They are supposed to be responsive to the will of the public. *Auer* violates the separation of powers by permitting the executive branch not only to create and execute but also interpret rules that carry the weight of law. As Justice Gorsuch framed it, "*Auer* thus means that […] the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised."[130] In the same way that delegating the ability to make laws to agencies is problematic from a constitutional standpoint, so is delegating the authority to interpret laws. Fourth and finally, Justice Gorsuch contended that the policy arguments offered by Justice Kagan in defense of *Auer* "are not just unpersuasive, they are troubling."[131] Of course, "even the most sensible policy argument would not empower us to ignore the plain language of the APA or the demands of the Constitution," but even then, *Auer* creates policy problems that outweigh its benefits.[132] By deferring to political actors, *Auer* risks "turning judges into rubber stamps for

[129] *Kisor,* (slip op. at 22) (Gorsuch, J., concurring in judgement).

[130] *Kisor,* (slip op. at 25) (Gorsuch, J., concurring in judgement).

[131] *Kisor,* (slip op. at 29) (Gorsuch, J., concurring in judgement).

[132] Ibid.

politicians," something that the shift away from "open-ended policy appeals and speculation about legislative intentions" and back toward "the law's original public meaning" was supposed to avoid.[133] Additionally, *Auer* does not produce consistency and reliability. Agencies are free to amend their interpretations at any time, which not only undermines fair notice, but it adds uncertainty into the law. "Consistency, uniformity, and stability in the law are hardly among *Auer*'s crowing achievements."[134] As a result, *Auer* is not workable. Not only can agencies create major shifts in the law, but there are even debates about when *Auer* applies, which only adds to the confusion. Finally, the Justice Gorsuch worried that the immense growth of the administrative state since *Seminole Rock* has created additional problems. The Code of Federal Regulations is nearly four times the length of the U.S. Code, which Justice Gorsuch argued presents a much greater risk that citizens will be affected (and therefore potentially harmed) by *Auer*'s denial of an impartial judgement.[135] Thus, while Justice Gorsuch was glad that the majority narrowed the scope of *Auer,* leaving it "riddled with holes," he would have cast aside the doctrine entirely.[136]

All of that being said, *Auer* still has its supporters. A majority of the Court declined to overrule *Auer* in *Kisor*, albeit only on *stare decisis* grounds. Of course, even Justice Scalia came to eventually renounce his opinion in *Auer*, saying, "*Auer* is not a

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[133] *Kisor,* (slip op. at 32) (Gorsuch, J., concurring in judgement).

[134] *Kisor,* (slip op. at 33) (Gorsuch, J., concurring in judgement) (internal quotation marks omitted).

[135] *Kisor,* (slip op. at 39-40) (Gorsuch, J., concurring in judgement).

[136] *Kisor,* (slip op. at 41) (Gorsuch, J., concurring in judgement).

logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power."[137] Nevertheless, there are still a number of arguments that exist in favor of *Auer* on its merits as opposed to mere *stare decisis.* The first is that *Auer* recognizes the fact that agencies who author regulations "will often have direct insight into what that rule was intended to mean."[138] On its face, this argument makes a good deal of sense. If you want to know what the original meaning of a text was, why not ask its author? Justice Gorsuch thinks there are a couple of reasons to avoid such a practice. First, "if the rule of law means anything, it means that we are governed by the public meaning of the words found in statutes and regulations, not by their authors' private intentions."[139] But even then, "*Auer* tells courts that they must defer to the agency's *current* view" of what a regulation means, regardless of whether that reflects that actual views of its authors.[140] Therefore, even if judges were seeking the original intent behind a rule, *Auer* would fall short for Justice Gorsuch because it asks courts to defer to an agency's contemporary views of the regulation, not its original. Second, and perhaps more persuasively, Justice Kagan argued in *Kisor* that *Auer* simply recognizes the fact that agencies have more expertise in some areas than judges. As Justice Breyer put it at oral argument, "[T]he Court deferred to the understanding of the FDA that a particular compound should be treated as a single new active moiety, which consists of a previously approved moiety,

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[137] Decker v. Northwest Environmental Defense Center, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part).

[138] *Kisor,* (slip op. at 8) (plurality opinion).

[139] *Kisor,* (slip op. at 29) (Gorsuch, J., concurring in judgement).

[140] *Kisor,* (slip op. at 30) (Gorsuch, J., concurring in judgement).

joined by a non-ester covalent bond to a lysine group. Do you know how much I know about that?"[141] Justice Gorsuch did not bite on this argument either. He contended that a return to *Skidmore* deference could still resolve that issue. Judges could still defer when the agency has clear expertise, but they would not automatically have to defer. Additionally, the Constitution and APA do not permit judges to sacrifice their independent judgement for the sake of agency expertise. Article III and the APA guarantee individuals a neutral judgement from an independent branch, so those requirements foreclose *Auer* regardless of the potential policy benefits of agency expertise.[142] Finally, Justice Kagan and others have suggested that if *Auer* is so egregious, Congress could always pass legislation to prevent courts from employing it.[143] Not only does this argument have some serious practical questions associated with it, but Justice Gorsuch doubted whether Congress could constitutionally mandate the level of deference agencies receive.[144] Even then, Justice Gorsuch firmly believes that the Court has a responsibility to identify constitutional violations when it sees them. The Court should not be reliant on Congress to fix mistakes of the Court's own invention. As a result, Justice Gorsuch remains unpersuaded of *Auer*'s legitimacy despite these arguments.

Unsurprisingly, many of the Justice Gorsuch's issues with administrative deference boil down to his view that it runs contrary to certain essential elements of due

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[141] *Kisor,* Transcript of Oral Argument, 10.

[142] *Kisor,* (slip op. at 31-32) (Gorsuch, J., concurring in judgement).

[143] *Kisor,* (slip op. at 26-27); Christopher Atmar, "See You Later…"*Auer*"-Gator: Time to End Judicial Deference to Agency Interpretations of their own Materials," *Houston Law Review* 55, no. 5 (Spring 2018):1154.

[144] Atmar, "See You Later," 1154-1155; *Kisor,* (slip op. at 36) (Gorsuch, J., concurring in judgement).

process: the separation of powers and fair notice. Beginning with the separation of powers, it is fairly clear cut how administrative deference cuts against Justice Gorsuch's conception of the judicial power. By handing off judicial power from an independent branch to a politically accountable branch, Justice Gorsuch fears that the politically popular may do well, but the less popular or well-connected will suffer. In his mind, those are the individuals for whom the Constitution's protections are designed. Without a recognition that of the dangers of administrative deference individuals are "left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge. The rule of law begins to bleed into the rule of men."[145] Justice Gorsuch cares a great deal about judicial independence, and his understanding of due process makes him unwilling to cede that independence to the executive branch. Even then however, there are further separation of powers problems with *Auer,* which has been described as "the most egregious" violator of the separation of powers when it comes to deference doctrines.[146] Not only is the agency taking on the rule of interpreting a text, but the agency is the author of the text. It "has performed the functions of the legislature (in promulgating a regulation), the judiciary (in interpreting the regulation), and the executive (in enforcing the regulation)."[147] *Auer* allows agencies to play judge, jury, executioner, and Congressman. Furthermore, on the issue of fair notice, administrative deference stands in

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[145] *Kisor,* (slip op. at 23) (Gorsuch, J., concurring in judgement).

[146] Nicholas Bednar and Barbara Marchevsky, "Deferring to the Rule of Law: A Comparative Look at the United States Deference Doctrines," *University of Memphis Law Review* 47, no. 4 (2017): 1067.

[147] Ibid.

contrast to Justice Gorsuch's notion of due process. As he explained, "[T]he doctrine only matters when a court would conclude that the agency's interpretation is not the best or fairest reading of the regulation."[148] That is to say, administrative deference only matters when a neutral judge would come to a different conclusion about the text at issue. Not only does this possibility of less than optimal interpretations of texts raise fair notice problems, but administrative deference also allows for agencies to change their interpretation. Though the Court has limited this practice to some extent, in some instances, administrative deference allows agencies to change their interpretation in response to litigation, permitting them to pick winners and losers. Individuals cannot go back in time to change their conduct, but agencies can go back to change the governing law.[149] Relatedly, *Auer* subverts typically notice and comment procedures which are designed to provide notice to the public of a new regulation. As previously discussed, it is often much easier to change the interpretation if an existing rule than to promulgate a new one. The problem though is that notice and comment procedures associated with a new rule exist so that the public has fair warning of new regulations and an opportunity to voice its opinion about such a regulation.[150] Thus, fair notice concerns also raise serious due process challenges for administrative deference.

These due process concerns emanate through Justice Gorsuch's approach to administrative deference. There are certainly policy benefits from deference, but "this

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[148] *Kisor,* (slip op. at 9) (Gorsuch, J., concurring in judgement).

[149] Gorsuch, *A Republic,* 66-72.

[150] Jonathan Adler, "*Auer* Evasions," *Georgetown Journal of Law and Public Policy* 16, no. 1 (2018):17.

Court has never suggested that the convenience of government official should count in the balance […] when weighed against the interests of citizens in a fair hearing before an independent judge and a stable and knowable set of laws."[151] Thus, he is quick to brush aside any potential benefits that might accrue from administrative deference. Yet, Justice Gorsuch is also keen to highlight what he sees as the practical problems with administrative deference. As he pointed out in *Mathis v. Shulkin* agency interpretations are often designed to make life easier for the agency, not to benefit the public. In *Mathis,* this meant a presumption that made it harder for veterans to challenge a benefits determination from the Department of Veterans Affairs. As Justice Gorsuch asked, "[H]ow is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interest of those the law says the agency is supposed to serve?"[152] In his view, administrative deference not only creates legal issue with respect to due process, but those legal issues also spill over into real-world problems that can sometimes negatively impact the very people agencies are supposed to protect. The future of administrative deference is still very much up in the air. The Court has made numerous revisions to *Chevron* and *Auer* since their inceptions, and Justice Barrett's arrival at the Court promises the possibility of more.[153] As Justice Gorsuch prophesied at the conclusion of his opinion in *Kisor,* "[W]hatever happens, this case hardly promises to be

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[151] *Kisor,* (slip op. at 40) (Gorsuch, J., concurring in judgement).

[152] Mathis v. Shulkin, 582 U.S. ___, ___ (2017) (slip op. at 1) (Gorsuch, J., dissenting from denial of certiorari).

[153] Hickman, "To Repudiate," 751-754.

this Court's last word on" these issues.[154] One thing is for certain, Justice Gorsuch's fight against administrative deference is unlikely to cease anytime soon.

[154] *Kisor,* (slip op. at 42) (Gorsuch, J., concurring in judgement).

CHAPTER FOUR

Justice Gorsuch on Rights and Liberties

Justice Gorsuch's Commitment to Rights

Justice Gorsuch's commitment to due process via fair notice and the separation of powers leads him to generally reject judicial balancing tests for rights analysis. Time and time again, he has rejected functionalist approaches to rights and liberties in favor of bright-line rules. Starting with the separation of powers, unclear balancing tests amount to judicial policymaking for Justice Gorsuch. When judges can factor in whatever interests they like, he believes that allows them to tip the scales in favor of their preferred outcomes. This undermines the entire point of judicial neutrality and brings judges into the legislative realm. He has claimed that it is "[t]he existence of an administrable legal test even lies at the heart of what makes a case justiciable."[1] Without "an administrable legal rule to follow, a neutral principle, something outside themselves to guide their decision," judges will be forced to rely on their own personal policy judgements in assessing whether someone's rights are outweighed by social welfare concerns.[2]

Relatedly, balancing test offer little guidance for litigants according to Justice Gorsuch. "Multi-factor balancing tests […] have supplied notoriously little guidance" to

[1] June Medical Services L.LC. v. Russo, 591 U.S. ___, ___ (2020) (slip op. at 16) (Gorsuch, J., dissenting).

[2] *June Medical,* (slip op. at 18) (Gorsuch, J., dissenting).

judges or litigants when attempting to resolve cases.[3] The more concrete course for Justice Gorsuch is to enforce the guarantees of the Bill of Rights as they were originally understood. He sees no reason for judges to reevaluate on the basis of efficiency or social welfare the choices made by the Framers. Until the People decide to change the liberties guaranteed within the Constitution, he argues that judges cannot diminish the meaning of the guarantees of the Bill of Rights without significantly undermining the fair notice value of the text of the Constitution. As a result of these concerns, Justice Gorsuch typically exhibits a fairly firm commitment to the protection of rights and liberties enshrined within the Constitution.[4]

First Amendment

The Religion Clauses of the First Amendment present a tale of two cities for Justice Gorsuch. On the one hand, he endorses a rather robust conception of the Free Exercise Clause, while on the other, he has a constricted view of the Establishment Clause. However, his view of the Establishment Clause is widely aligned with other conservative Justices. Thus, this section focuses on the Free Exercise Clause. This section first examines Justice Gorsuch's approach to free exercise in *Trinity Lutheran Church of Columbia, Inc. v. Comer* and in *Espinoza v. Montana Dept. of Revenue,* specifically

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[3] *Wooden,* (slip op. at 2) (Gorsuch, J., concurring in judgment).

[4] The two primary exceptions to this rule are the Establishment Clause and the Cruel and Unusual Punishments Clause. However, his narrower reading of the Establishment Clause is primarily rooted in his view of third-party standing. His narrow view of the Cruel and Unusual Punishments Clause is grounded in his understanding of the original meaning of the Eighth Amendment. For more on both of these areas, see *American Legion v. American Humanist Assn,* (Gorsuch, J., concurring in judgement) and *Bucklew v. Precythe*.

looking at his rejection of the use/status distinction employed by the Court to reconcile its decision with precedent. To reinforce the extent to which he views the Free Exercise Clause expansively, I then turn to the early COVID free exercise cases. Finally, I look at the intersection of free exercise and equal protection in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *Fulton v. Philadelphia.* His critique of the *Smith* framework provides an opportunity to discuss a difference in how Justice Scalia and Justice Gorsuch conceptualize the rule of law. Through all of this, I hope to illustrate Justice Gorsuch's aversion to judicial balancing tests within his jurisprudence and his overarching approach to the Free Exercise Clause.

Justice Gorsuch's jurisprudence embraces an expansive reading of the Free Exercise Clause. One characteristic of this jurisprudence that makes it more expansive than many of the current members of the Court is his rejection of the use/status distinction that has played an animating role in many of the Court's more recent free exercise cases. In *Trinity Lutheran Church of Columbia, Inc., v. Comer*, a majority of the Court held that Missouri violated the Free Exercise Clause by denying Trinity Lutheran's grant application solely on the basis of its religious status.[5] However, as Justice Gorsuch explained, "I harbor doubts about the stability of such a line."[6] In his mind, there was no meaningful difference between use and status in the text of the First Amendment. The text guarantees free exercise, not just free beliefs or status. Such a distinction proves unworkable for Justice Gorsuch because it can prove malleable and blurry, allowing

[5] Trinity Lutheran Church of Columbia, Inc. v. Comer*,* 582 U.S. ___, ___ (2017) (slip op. at 14, n. 3) (plurality opinion).

[6] *Trinity Lutheran,* (slip op. at 1) (Gorsuch, J., concurring in part).

judges to substitute their own preferences.[7] Much in the same way that Justice Gorsuch prefers to avoid balancing tests because they present a similar problem of predictability and consistency, he wants to avoid rules that can be transformed based on the eye of the beholder. Similarly, he did not think that such a distinction is enough to distinguish *Locke v. Davey*, which was Missouri's principal defense.[8] While he was willing to admit that there might be an independent historical tradition incorporated into the First Amendment against using public funds to train clergy, he did not think that the status/use distinction was the proper rationale for explaining why *Locke* did not control in *Trinity Lutheran.* Justice Gorsuch echoed these concerns in *Espinoza v. Montana Dept. of Revenue.* Relying on *Trinity Lutheran,* the majority employed the status/use distinction to find that Montana had to offer school tuition vouchers to secular schools if it offered them to nonsecular schools.[9] Again, Justice Gorsuch explained, "I was not sure about characterizing the State's discrimination in *Trinity Lutheran* as focused only on religious status, and I am even less sure about characterizing the State's discrimination here that way."[10] Nevertheless, "it is not as if the First Amendment cares."[11] The Free Exercise Clause protects the right to religious action (or use), not just the right to religious beliefs (or status). He argued that the use/status distinction presents an opportunity for manipulation by judges and politicians. If discrimination based on religious use is not protected, then it

[7] *Trinity Lutheran,* (slip op. at 1-2) (Gorsuch, J., concurring in part).

[8] *Trinity Lutheran,* (slip op. at 2) (Gorsuch, J., concurring in part).

[9] Espinoza v. Montana Dept. of Revenue, 591 U.S. ___, ___ (2020) (slip op. at 9-10).

[10] *Espinoza,* (slip op. at 2) (Gorsuch, J., concurring).

[11] *Espinoza,* (slip op. at 3) (Gorsuch, J., concurring).

becomes very easy to work around the Free Exercise Clause. "The right to *be* religious without the right to *do* religious things would hardly amount to a right at all."[12] Thus, Justice Gorsuch favors a bright-line rule that would not turn on use versus status. Instead, all forms of religious discrimination would be evaluated under the same standard. Obviously, this form of evaluation would also expand the scope of the Free Exercise Clause. Justice Gorsuch suggests that such an approach shows greater fidelity to the text of the First Amendment and would prove more workable than the current distinction. In the end, his approach is simple. "Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same."[13]

Nor is this sort of approach a new development in his thinking. He has rejected similar distinctions in his scholarly work before he became a judge. In his book, *The Future of Assisted Suicide and Euthanasia,* he criticized the act/omission distinction that many scholars have used to justify a right to refuse care but not a right to assisted suicide. In his view, such a distinction "is readily manipulable."[14] After all, removing a feeding tube is both an omission of medical care and an act of ensuring that the patient will die. Such a distinction leaves too much room for judges to import their personal views, which makes things messy for Justice Gorsuch. There are almost endless hypotheticals that one can conjure up that show the difficulty with such a distinction. Is it an act or an omission to sit on the beach to wait for a rising tide to drown you?[15] Are you acting or merely

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[12] *Espinoza,* (slip op. at 6) (Gorsuch, J., concurring).

[13] *Espinoza,* (slip op. at 8) (Gorsuch, J., concurring).

[14] Gorsuch, *Future of Assisted Suicide,* 50.

[15] Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 296 (1990) (Scalia, J., concurring).

omitting if you choose not to feed an unwanted infant?[16] These questions do not have easy answers. Likewise, Justice Gorsuch has suggested that the status/use "blurs in much the same way the line between acts and omissions can blur when stared at too long."[17] Thus, his critique of the status/use distinction is informed by his view of the act/omission distinction. In his mind, both admit of too much wiggle room for judges to draw the line where it suits their personal views. He argues that a clearer standard is necessary in the free exercise arena. His clearer standard, however, entails a much broader conception of the Free Exercise Clause.

The early COVID free exercise cases reinforce this broad understanding of the Free Exercise Clause. These cases not only showcase Justice Gorsuch's expansive reading of the Free Exercise Clause, but they also highlight his approach to the *Employment Div., Ore. Dept. of Human Res. v. Smith* framework. With one exception, these cases all involved capacity limits (and often other sorts of restrictions) on houses of worship. The house of worship cases are a play in three acts of sorts for Justice Gorsuch. These three cases are also perhaps the cases in which Justice Gorsuch is most blunt but also most candid about his views. Take the first act for example: *Calvary Chapel, Dayton Valley v. Sisolak.* In this case, a five-member majority allowed Nevada to continue to place fifty-person occupancy limits on churches while casinos were permitted to operate at fifty percent capacity. Justice Gorsuch's dissent took a mere paragraph to resolve the issue. "This is a simple case," according to him because "there is no world in which the

[16] Gorsuch, *Future of Assisted Suicide,* 51.

[17] *Trinity Lutheran,* (slip op. at 1) (Gorsuch, J., concurring in part).

Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[18] While Justice Gorsuch did not prevail on the outcome of the case, he did articulate a view (along with Justice Kavanaugh) that would become increasingly important in future cases. This view, which is most commonly known as the "most favored nation" approach to free exercise and *Smith* suggests that laws that include any sort of exception must grant those same exceptions to religious activity.[19] So for example, if a city allows restaurants to operate at fifty percent capacity during a pandemic, it cannot require churches to operate at ten percent, even though churches and restaurants perform very different functions. This approach would drastically limit the scope of *Smith.* Requiring religious rights "to be treated like the most favored analogous secular conduct" would make it much harder for governments to satisfy *Smith*'s general applicability requirement.[20] This view of free exercise came into sharper focus in the Court's next act.

Roman Catholic Diocese of Brooklyn v. Cuomo again involved a challenge to occupancy limits put in place on houses of worship that did not apply to most businesses. Here, the Court reversed positions (following the replacement of Justice Ginsburg with Justice Barrett) and granted relief to the religious groups challenging the executive

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[18] Calvary Chapel, Dayton Valley v. Sisolak, 591 U.S. ___, ___ (2020) (slip op. at 1) (Gorsuch, J., dissenting).

[19] The term "most favored nation" originated in international trade agreements. Imagine the United States has bestowed most favored nation status on the United Kingdom and imposes a ten percent tariff on cars from the UK. If the US lowers tariffs on cars imported from France to five percent, the tariff rate on cars from the UK also drops to five percent because of its most favored nation status. Essentially, the status is designed to prevent trade partners from negotiating future deals with other countries that undercut their already existing deals.

[20] Douglas Laycock and Steven Collis, "Generally Applicable Law and the Free Exercise of Religion," *Nebraska Law Review* 95, no. 1 (2016): 22-23.

orders.[21] Concurring, Justice Gorsuch made two important arguments. First, he took issue with how some lower courts (and Chief Justice Roberts) had interpreted *Jacobson v. Massachusetts.* The Chief Justice had suggested that *Jacobson,* which dealt with a substantive due process challenge to a smallpox vaccine mandate, instructs courts to defer to executive officials in times of a still developing pandemic.[22] Justice Gorsuch argued that such a proposition was wrong. "*Jacobson* hardly supports cutting the Constitution loose during a pandemic" because the Court decided that case before the creation of the modern tiers of scrutiny. Jacobson was not alleging a free exercise violation, and the bodily intrusion at issue in *Jacobson* was avoidable through a series of exemptions or fines.[23] In contrast, the restrictions in *Roman Catholic Diocese* were broad, unavoidable, and Governor Cuomo claimed the power to institute them at will and for however long he deemed necessary. This sort of arbitrary power seemed especially dangerous to Justice Gorsuch. He found it quite suspicious that the Governor's public health decisions "so perfectly align with secular convenience."[24] Thus, we arrive at the second main argument he made in *Roman Catholic Diocese*: a fuller argument for the most favored nation theory of free exercise. As he explained, "It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores

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[21] *Roman Catholic Diocese,* (slip op. at 1) (per curiam).

[22] South Bay United Pentecostal Church v. Newsom, 590 U.S. ___, ___ (2020) (slip op. at 2) (Roberts, C.J., concurring).

[23] *Roman Catholic Diocese,* (slip op. at 3) (Gorsuch, J., concurring).

[24] *Roman Catholic Diocese,* (slip op. at 2) (Gorsuch, J., concurring).

and bike shops but shutter churches, synagogues and mosques."[25] In other words, governments cannot get around *Smith* by declaring some actions and businesses "essential" and some "nonessential" and then claiming that the rules are generally applicable to nonessential entities. If the government permits liquor stores to operate at full capacity, it must permit houses of worship to do the same, regardless of which one it deems more important. Nor do exceptional circumstances like a pandemic permit governments to temporarily tinker with these rules. As Justice Gorsuch said, "Government is not free to disregard the First Amendment in times of crisis."[26]

Justice Gorsuch's concern that the Court was watering down constitutional protections during the pandemic became the central theme in the third act of his COVID pandemic cases. *South Bay United Pentecostal Church v. Newsom II* was not a complete victory for Justice Gorsuch. He would have lifted all of the restrictions that California had placed on houses of worship, but the Court only removed some of them.[27] In this case, Justice Gorsuch once again endorsed a most favored nation approach to free exercise.[28] He also expressed impatience with the fact that Court was still having to intervene in these cases. "Government actors have been moving the goalposts on pandemic-related sacrifices for months," he explained.[29] His frustration with California's treatment of religious activity was evident in his claim that "[i]t has never been enough

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[25] *Roman Catholic Diocese,* (slip op. at 7) (Gorsuch, J., concurring).

[26] *Roman Catholic Diocese,* (slip op. at 1) (Gorsuch, J., concurring).

[27] South Bay United Pentecostal Church v. Newsom, 592 U.S. ___, ___ (2021) (slip op. at 1) (Roberts, C.J., concurring).

[28] *South Bay II,* (slip op. at 4) (statement of Gorsuch, J.).

[29] *South Bay II,* (slip op. at 6) (statement of Gorsuch, J.).

for the State to insist on deference or demand that individual rights give way to collective interests."[30] He feared that courts were ignoring individual rights in the name of collective safety despite the fact that it is individual rights that the Constitution protects. Again, these sorts of restrictions not only run afoul of the Free Exercise Clause for Justice Gorsuch, but they also raise serious questions about unchecked executive power during times of crisis. His views of this issue are clear. "Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution."[31] Thus, *South Bay II* illustrates his belief that the Free Exercise Clause demands adherence under all circumstances, even when the government has other pressing concerns.

Of course, there is also something of an epilogue to this three act play. In *Tandon v. Newsom,* a majority of the Court endorsed a most favored nation approach to the Free Exercise Clause for the first time, which, in theory, drastically curtails *Smith*'s reach.[32] In doing so, the Court adopted much of Justice Gorsuch's reasoning from *Roman Catholic Diocese* and *South Bay II.*[33] Yet, just as soon as it seemed the Court had finally embraced Justice Gorsuch's view, it cast further doubt over the state of its free exercise jurisprudence. Two months after *Tandon,* the Court decided *Fulton v. Philadelphia* without mention of the most favored nation theory. Not only did the Court decline to overrule *Smith,* only Justice Gorsuch cited *Tandon.* So what does this mean for the future Justice Gorsuch's theory of the Free Exercise Clause? In truth, it is still unclear. *Tandon*

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[30] *South Bay II,* (slip op. at 2) (statement of Gorsuch, J.).

[31] Ibid.

[32] Tandon v. Newsom, 593 U.S. ___, ___ (2021) (slip op. at 1) (per curiam).

[33] *Tandon,* (slip op. at 2-3) (per curiam).

may have been an anomaly, or perhaps the Justices in *Fulton* were so focused in the debate over *Smith* that they felt no need to discuss an additional theory. What is clear, however, is that Justice Gorsuch understands the Free Exercise Clause as broad and inflexible. It does not permit governments to treat religious activity worse than secular activity even in times of crisis and chaos.

This brings us to the one exception to these COVID free exercise cases: *Danville Christian Academy, Inc. v. Beshear.* Here, it was a private, Christian school, instead of a house of worship, challenging an executive order that prevented gathering in-person. The Court rejected the school's challenge because the executive order was set to expire weeks later before the next semester began.[34] Justice Gorsuch took issue with the Court's timeline rationale, but more importantly, he explained his view of the merits of the case. Here, he claimed that *Smith* did not apply because the petitioners had presented a free exercise claim and a claim involving another right. As he explained, "[E]ven neutral and generally applicable laws are subject to strict scrutiny where (as here) a plaintiff presents a 'hybrid' claim."[35] The fact that Danville Christian Academy pressed a free exercise claim coupled with an educational claim meant that *Smith* did not apply. Now, the hybrid rights distinction in *Smith* has garnered a fair deal of criticism from scholars and judges who have suggested that it has no real constitutional basis. In their view, either a constitutional violation exists or it does not. Litigants cannot press two *almost* constitutional violations and have that amount to a real violation. "[I]n law as in

[34] Danville Christian Academy, Inc. v. Beshear, 592 U.S. ___, ___ (2020) (slip op. at 1) (Alito, J., dissenting).

[35] *Danville Christian Academy,* (slip op. at 2) (Gorusch, J., dissenting).

mathematics zero plus zero equals zero."[36] Nevertheless, others have argued that the hybrid rights theory in *Smith,* whatever its merits, exists as an avenue for widening religious liberty protections. While the hybrid rights theory may not have a sound constitutional grounding, opponents of *Smith* see it as a way to get around *Smith.*[37] Justice Gorsuch seems to be doing the same thing here. While he clearly has doubts about the *Smith* framework, here he employs it to his advantage to demonstrate that strict scrutiny should apply. Again, subjecting this order to strict scrutiny represents a broad reading of the Free Exercise Clause typical of Justice Gorsuch's jurisprudence. Thus, all of the COVID shadow docket free exercise cases confirm what the merits cases already told us: Justice Gorsuch understands the Free Exercise Clause as a broad protection. As such, he sees no reason for a status/use distinction, and he applies *Smith* very narrowly.

Justice Gorsuch's approach to *Smith* in the COVID cases also reflects his approach to *Smith* in cases that deal with free exercise and anti-discrimination. Once again, he views *Smith* fairly narrowly and therefore hard to satisfy. As a result, most anti-discrimination laws that burden religious beliefs will be subject to strict scrutiny. The Court has addressed two such instances of this during his tenure. Both times, religion prevailed over the anti-discrimination policies, but both times, Justice Gorsuch would have gone further. This collision of free exercise and equal protection principles first occurred in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission.* The Court decided this case on fairly narrow grounds. The Colorado Civil Rights Commission failed

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[36] Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001).

[37] Ryan Rummage, "In Combination: Using Hybrid Rights to Expand Religious Liberty," *Emory Law Journal* 64, no. 4 (2015): 1200.

to show the required neutrality toward the owner of Masterpiece Cakeshop, Jack Phillips.[38] Justice Gorsuch fully agreed that the Commission acted with hostility toward Mr. Phillips's religious beliefs.[39] He also went on to question some of his colleagues' analysis of the level of generality that applies in these sorts of cases. In contrast to Justices Ginsburg and Kagan, Justice Gorsuch suggested that *Smith* means "the government must apply the *same* level of generality across cases."[40] That is to say, Mr. Phillips's cake cannot be evaluated as a wedding cake while other cakes are evaluated as cakes conveying a message about same sex marriage. He argued that doing so would encourage government officials and judges to tamper with their analysis by changing the level of generality. Much in the same way that he argued the status/use distinction could be manipulated to fit a judge's preferred outcome, he worried that tinkering with the scale on which judges apply *Smith* would turn them into policymakers. His jurisprudence seeks to reduce the amount of leeway judges have to allow their personal views to slip into the analysis, and *Masterpiece* reflects this.

Turning to *Fulton,* Justice Gorsuch would again have embraced a more expansive view of religious liberty than the majority did. While the Court agreed that Philadelphia's exemptions policy meant that its non-discrimination requirement was not generally applicable, it declined to overrule *Smith.*[41] Justice Gorsuch agreed that "[e]xceptions for

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[38] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. ___, ___ (2018) (slip op. at 12-16).

[39] *Masterpiece,* (slip op. at 5-6) (Gorsuch, J., concurring).

[40] *Masterpiece,* (slip op. at 11) (Gorsuch, J., concurring).

[41] Fulton v. Philadephia, 593 U.S. ___, ___ (2021) (slip op. at 6-7).

one means strict scrutiny for all."[42] However, he would have gone on to overrule *Smith* once and for all. While he did not admit to necessarily having a new framework to fully replace *Smith,* he argued that "the Court should overrule it now, set us back on the correct course, and address each case as it comes."[43] This would expand free exercise rights beyond their current state, representing a much broader conception of the Free Exercise Clause than a majority of the Court is currently willing to embrace. Thus, from these cases, his broad reading of the Free Exercise Clause remains apparent, even in the face of countervailing anti-discrimination considerations.

Justice Gorsuch's displeasure with *Smith* was evident even before he formally advocated its overruling in *Fulton.* In *Masterpiece,* he acknowledged that "*Smith* remains controversial in many quarters."[44] In *Danville Christian Academy*, he claimed that "*Smith*'s rules […] have long proved perplexing."[45] As a result, it is somewhat unsurprising that he outright said that "*Smith* committed a constitutional error" in *Fulton.*[46] The doctrine must fall, in his view, because "*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice."[47] Justice Alito authored a long opinion concurring in judgement in *Fulton* that outlined how *Smith* departed from prior precedent and the

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[42] *Fulton,* (slip op. at 7) (Gorsuch, J., concurring in judgement).

[43] *Fulton,* (slip op. at 10) (Gorsuch, J., concurring in judgement).

[44] *Masterpiece,* (slip op. at 1) (Gorsuch, J., concurring).

[45] *Danville Christian Academy,* (slip op. at 2) (Gorsuch, J., dissenting).

[46] *Fulton,* (slip op. at 10) (Gorsuch, J., concurring in judgement).

[47] *Fulton,* (slip op. at 1) (Gorsuch, J., concurring in judgement).

original meaning of the Constitution, which Justice Gorsuch joined. Justice Gorsuch's opinion focused more on the workability problems with *Smith* and what a post-*Smith* future would look like. With respect to workability, he argued that "judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced."[48] In essence, he thinks the wide range of ways that judges have applied *Smith* undercuts due process considerations. There is simply not a balanced, principled way for judges to apply *Smith,* which means that individuals do not know what the Free Exercise Clause actually protects. So what does he propose in place of *Smith*? Justice Gorsuch does not say directly, nor does he think it matters right now. The time has come to disregard *Smith,* whatever the consequences may be. "To be sure, anytime this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise."[49] These questions do not all have to be answered right now. Most likely, overruling *Smith* would mean strict scrutiny would usually apply in free exercise cases, but he does not propose a "grand unified theory" to control future cases.[50] Instead, he suggested that the Court take each future case on its own. Of course, the Court did not take him up on this suggestion. It retained *Smith*, although some Justices expressed an openness to taking another look at it in a future case.[51] This did not prevent Justice Gorsuch from still offering a narrow reading of *Smith* in light of *Fulton.* In his first free exercise opinion after *Fulton,* he was quick to point out that strict scrutiny under

[48] *Fulton,* (slip op. at 9) (Gorsuch, J., concurring in judgement).

[49] *Fulton,* (slip op. at 10) (Gorsuch, J., concurring in judgement).

[50] Ibid.

[51] *Fulton,* (slip op. at 1) (Barrett, J., concurring).

Fulton requires the government to offer up a compelling interest in not granting specific exemptions. For instance, in a case dealing with wastewater regulations in an Amish community, he argued that "the County and courts below erred by treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community."[52] In his opinion, while *Fulton* did not overrule *Smith,* it did narrow it and place a greater burden on governments. "It is the government's burden to show" that alternatives and exemptions will not work, "not the Amish's to show it will."[53] Moving forward, Justice Gorsuch will likely continue his push to reduce the scope and effect of *Smith* to the point where the vast majority of free exercise cases are evaluated under strict scrutiny. Despite his disappointment that the Court did not overrule *Smith, Fulton* makes that goal easier to achieve.

Justice Gorsuch's distaste for *Smith* is particularly interesting considering Justice Scalia's goal in *Smith* was to ensure the rule of law. As he put it, "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs […]—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense."[54] In other words, Justice Scalia was worried that the Free Exercise Clause would make it impossible for laws to be evenly and fairly enforced. There would be consistent challenges to general laws in the name of religious beliefs. On its face, this seems like a compelling argument. After all,

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[52] Mast v. Fillmore County, 594 U.S. ___, ___ (2021) (slip op. at 4) (Gorsuch, J., concurring).

[53] *Mast,* (slip op. at 6) (Gorsuch, J., concurring).

[54] Employment Div., Ore. Dept. of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

the rule of law does not mean much if everyone can exempt themselves from laws with which they disagree. Justice Gorsuch, however, sees things differently. For him, the rule of law means, first and foremost, giving full effect to the text of the Constitution. Thus, the guarantees of the Bill of Rights must be respected, regardless of their potential effect on other laws. Respect for the rule of law means that judges cannot modify the rights guaranteed to citizens in the name of pragmatic considerations. Because Justice Gorsuch believes that *Smith* defies the original meaning of the Free Exercise Clause, he thinks that it actually undermines the rule of law. Likewise, the workability issues and confusion surrounding *Smith* further defeats any stabilizing effect it might have for the rule of law. Ultimately, Justice Gorsuch believes that *Smith* sacrifices higher order rule of law principles in the name of practical rule of law concerns.

Fourth Amendment

The Fourth Amendment provides a useful catalyst for exploring Justice Gorsuch's originalism and the fair notice concerns that he has with judicial balancing tests. In determining the meaning of both "searches" and "seizures," he focuses on the historical rights associated with the terms and rejects modern doctrines that he sees as unworkable judicial inventions. This section looks first at Justice Gorsuch's dissent in *Carpenter v. United States.* I focus primarily on his rejection of the *Katz v. United States* framework before turning to his proposed property rights foundation for Fourth Amendment protections.[55] This also offers an opportunity to contrast his views with Justice

[55] In referring to *Katz* and its framework, I am actually referring to Justice Harlan II's concurring opinion that was later endorsed by the Court in *Smith v. Maryland.*

Kennedy's. Next, this section traces Justice Gorsuch's historical and ordinary meaning of "seizure" in *Torres v. Madrid*, along with the workability issues that he predicts with the rule the majority announced in that case, despite the majority's heavy reliance on a prior Justice Scalia opinion. All told, these Fourth Amendment cases highlight two things. One, Justice Gorsuch's Fourth Amendment jurisprudence is firmly rooted in the common law that was incorporated into the Fourth Amendment at the Framing, and two, Justice Gorsuch is no fan of some of the more modern Fourth Amendment doctrines that force judges to balance often intangible interests.

Justice Gorsuch's dissent in *Carpenter v. United States* offers a well thought out critique of *Katz* and the third-party doctrine as well as an interesting proposal for a new Fourth Amendment framework. However, to understand that framework and its originalist origins, one must first understand why Justice Gorsuch rejects *Katz* and its progeny. There appears to be two fundamental flaws that he finds with *Katz.* First, *Katz* is hard to square "with the text and original understanding of the Fourth Amendment."[56] As Justice Gorsuch understands the Fourth Amendment, its protections do not turn on "expectations of privacy." Rather, it categorically protects certain things (your person, house, papers, and effects) regardless of privacy expectations.[57] What the text suggests, history confirms. *Katz* has no historical foundation in constitutional law. The Fourth Amendment was a response to three major common law cases according to Justice Gorsuch. These cases convinced the Framers of the necessity of restrictions on searches,

[56] *Carpenter,* (slip op. at 5-6) (Gorsuch, J., dissenting).

[57] *Carpenter,* (slip op. at 6) (Gorsuch, J., dissenting).

but they did not choose "to protect privacy in some ethereal way dependent on judicial intuitions. They chose instead to protect privacy in particular places and things."[58] The common law and original meaning of the Fourth Amendment thus offer no support for the *Katz* concurrence's central thesis. Simply put, *Katz* is a departure from the original meaning of the Fourth Amendment. This first concern informs the second. Without any historical or textual grounding, Justice Gorsuch argued that *Katz* had become an amorphous framework that was incapable of principled application. The first problem confronting the *Katz* test is the fact that it is still unclear what the test is even asking. Justice Gorsuch claimed uncertainty over whether *Katz* is an empirical inquiry or a normative one.[59]

Even putting that issue aside, he worried that neither inquiry is one that judges are best suited for. "Politically insulated judges come armed with only the attorneys' briefs, a few law clerks, and their own idiosyncratic experiences," making them "hardly the representative group" that should be making empirical or normative judgements about what constitutes a reasonable expectation of privacy.[60] Balancing privacy interests with law enforcement concerns turns judges into policymakers. "Deciding what privacy interests *should* be recognized often calls for a pure policy choice, many times between incommensurable goods," according to Justice Gorsuch.[61] Of course, he does not want to undersell the mental ability of judges. He admitted that there may be circumstances

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[58] *Carpenter,* (slip op. at 7) (Gorsuch, J., dissenting).

[59] Ibid.

[60] Ibid.

[61] *Carpenter,* (slip op. at 8) (Gorsuch, J., dissenting).

where judges are able to look to positive law or precedent to discern societal norms. Nevertheless, these cases will be few and far between, which highlights the fact that *Katz* lacks any meaningful restraint on judges.[62] For Justice Gorsuch, these problems are the reason why *Katz* has led to seemingly unpredictable results. Hovering a helicopter over someone's backyard or rummaging through their trash on the curb seem like invasions of privacy, yet the Court has held that such acts are constitutional. As Justice Gorsuch put it, "Try that one out on your neighbors."[63] Perhaps most worrying for him in the line of *Katz* progeny is the third-party doctrine, which the Court outlined in *United States v. Miller* and *Smith v. Maryland.* However, it is these cases that Justice Kennedy relied heavily upon in his dissent.[64] These cases allow the government to search information that is disclosed to a third-party. Bank, medical, and phone records are all fair game without needing a warrant. Here, there is not even a balancing test like *Katz*; the third-party doctrine is a categorical rule. Using *Katz,* the Court developed the third-party doctrine on the presumption that individuals did not reasonably expect privacy in situations where they handed over information to someone else. Yet, as Justice Gorsuch explained, that proposition seems fairly dubious.[65] After all, we would find it reasonable to expect Google not to hand our emails over to the police without a warrant. In Justice Gorsuch's opinion, "the Court has never offered a persuasive justification" for the third-party

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[62] *Carpenter,* (slip op. at 8-9) (Gorsuch, J., dissenting).

[63] *Carpenter,* (slip op. at 9) (Gorsuch, J., dissenting).

[64] *Carpenter,* (slip op. at 8) (Kennedy, J., dissenting).

[65] *Carpenter,* (slip op. at 3) (Gorsuch, J., dissenting).

doctrine.[66] There is a clear distinction between consenting to give a third-party access to one's private papers and consenting to give the government access to those papers. Ultimately, he argued that the third-party doctrine culminated in a "doubtful application of *Katz* that lets the government reach almost whatever it wants."[67] Not only do *Katz* and the third-party doctrine lack a solid foundation in the original meaning of the Fourth Amendment, they seem to pose serious due process problems.

So if *Katz, Miller,* and *Smith* are all so flawed, what does Justice Gorsuch suggest in their place? His new framework rests on the Court's recognition in *Florida v. Jardines* that there are traditional protections inherent in the Fourth Amendment outside of *Katz.* Justice Gorsuch wants to return to these traditional protections via a Fourth Amendment jurisprudence rooted in property rights and positive law.[68] Where Justice Kennedy believed that the *Carpenter* majority was too loose with the *Katz* analysis, Justice Gorsuch wants to toss out the entire line of cases. Under his approach, Fourth Amendment scrutiny does not turn on whether you have a "reasonable expectation of privacy," but rather whether the items being searched are *yours.*[69] Justice Gorsuch admitted, and scholars have noted, that "his opinion left open important questions" because his framework is not fully fleshed out yet.[70] Nevertheless, he did outline some key points for this new approach to the Fourth Amendment. First, just because a third

[66] Ibid.

[67] *Carpenter,* (slip op. at 5) (Gorsuch, J., dissenting).

[68] *Carpenter,* (slip op. at 13) (Gorsuch, J., dissenting).

[69] *Carpenter,* (slip op. at 12-13) (Gorsuch, J., dissenting).

[70] Nicholas Kahn-Fogel, "Property, Privacy, and Justice Gorsuch's Expansive Fourth Amendment Originalism," *Harvard Journal of Law and Public Policy* 43, no. 2 (Spring 2020): 429.

party has access to or possesses your papers or effects does not rule out Fourth Amendment protections or an interest you have in them. Rather, he argued that we ought to view it like this: "Entrusting your stuff to others is a *bailment.*"[71] The bailor entrusts the bailee to hold the property for certain purposes, and the bailee has an obligation to keep the item safe. Thus, when I hand over my keys to a valet, I do not consent to government searches (contrary to what the third-party doctrine might suggest), nor do I give the valet permission to take my car on a Ferris Bueller style joyride. Justice Gorsuch thinks these longstanding property principles can help judges resolve modern data problems too. Treating electronic data, like email, as a bailment with Fourth Amendment protections makes more sense than allowing the government to search it without a warrant. Just as we would not expect the government to search the physical mail that we hand over to the mailman, Justice Gorsuch suggested that the same level of protection ought to apply to the mail we hand over to Google.[72] Additionally, he proffered that exclusive or complete ownership is not necessary to establish Fourth Amendment protections. He argued that such a rule is derived from the common law and ordinary usage.[73] Individuals speak of an apartment they are renting as *their house* despite the fact that they do not have full ownership of the property. Justice Gorsuch contended that Fourth Amendment protections under his theory would encompass these common usages. Finally, Justice Gorsuch noted the importance of positive law in addressing Fourth Amendment issues. It "may help provide detailed guidance on evolving technologies

[71] *Carpenter,* (slip op. at 14) (Gorsuch, J., dissenting).

[72] *Carpenter,* (slip op. at 15) (Gorsuch, J., dissenting).

[73] *Carpenter,* (slip op. at 16) (Gorsuch, J., dissenting).

without resort to judicial intuition."[74] While the Fourth Amendment sets a floor that positive law cannot erode, many states offer additional protection beyond the Fourth Amendment, especially in data privacy cases. Justice Gorsuch is of the persuasion that these laws can either resolve many of these cases or help judges understand when data is your papers or effects.[75] Ultimately, this framework is rooted in the common law and historical practices present at the Framing. Additionally, Justice Gorsuch thinks that it avoids some of the major fair notice problems present in *Katz*'s balancing test. At the same time, his emphasis on positive law helps reduce some of the separation of powers concerns that *Katz* presents. All of this means that this approach is more in line with his traditional conception of due process. He aims to make the Fourth Amendment's protections clearer and less subjective, and he thinks that this approach would do just that.

Such a theory of the Fourth Amendment would likely reshape much of the Court's jurisprudence in this area if a majority of the Court ever adopted it. Justice Gorsuch's framework would spell the end for the third-party doctrine, while also expanding the reach of Fourth Amendment protections. The Court has previously explained that there are common law protections within the Fourth Amendment beyond *Katz*'s reach. However, this has been limited primarily to the trespass doctrine. Justice Gorsuch's approach would be more expansive; "whatever ambiguities exist in Justice Gorsuch's dissent, it is certain that his property model would be more expansive than the pre-*Katz*

[74] *Carpenter,* (slip op. at 17) (Gorsuch, J., dissenting).

[75] *Carpenter,* (slip op. at 17-19) (Gorsuch, J., dissenting).

trespass test that the Court rehabilitated in 2012."[76] Importantly, contra Justice Thomas, Justice Gorsuch does not reason that modern data is protected under the Fourth Amendment by way of analogy. Instead, he "posited that this digital information held by cellular carriers might simply *be* the customer's papers or effects."[77] Again, this is an expansive reading of the Fourth Amendment. Not only is this reading already wide-ranging on its own, but it lends itself to the possibility of future enlargement. Already, scholars have suggested that "Justice Gorsuch's property-based Fourth Amendment approach cannot fully accommodate digital property unless adequately supplemented by contract law."[78] That is to say, his approach incorporating traditional property principles can and should incorporate traditional contract principles as well. This is especially true because "[t]he importance of contracts in shaping property interests is amplified in the digital age, where most third parties mentioned by Justice Gorsuch are acting because of a contract."[79] As such, Justice Gorsuch's new Fourth Amendment theory is far from complete, but it does represent a shift away from *Katz* and toward an expansion of Fourth Amendment protections, with the possibility of even greater expansion.

With all of this out of the way, Justice Gorsuch finally gets around to dealing with the merits of *Carpenter.* He disagreed with the majority's "decision to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that

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[76] Kahn-Fogel, "Property," 429.

[77] Kahn-Fogel, "Property," 443.

[78] Chris Machold, "Could Justice Gorsuch's Libertarian Fourth Amendment Be the Future of Digital Privacy? A 'Moderate' Contracts Approach to Protecting Defendants After Carpenter," *University of California, Davis Law Review* 53, no. 3 (February 2020): 1667-1668.

[79] Machold, "'Moderate' Contracts Approach," 1670.

seems to be only *Katz*-squared."[80] In his view, the Court's conclusion that the government's collection of Mr. Carpenter's cell-site location data over the course of 127 days crossed a line might very well be correct. However, he criticized the majority for offering little guidance to lower courts. He alleged that the Court offered only vague principles of needing to limit "arbitrary power" and the necessity of obstacles to "permeating police surveillance," while saying that seven days of surveillance was too much but providing no reason for that number.[81] The Court's opinion was doomed to only add further confusion to the *Katz* framework. All that being said, he conceded that "a person's cell-site data could qualify as *his* papers or effects."[82] The problem was that Mr. Carpenter had only pursued a *Katz* based argument in the court below. Justice Gorsuch expressed disappointment and frustration at this. In fact, he admitted that he cast his vote "reluctantly" because litigants have been on notice for years that there is more to the Fourth Amendment than *Katz,* but they continue to fail to preserve such arguments, dampening "the development of a sound or fully protective Fourth Amendment jurisprudence."[83]

Like *Carpenter,* Justice Gorsuch's dissent in *Torres v. Madrid* reflects a rejection of hard to apply, invented rules in favor of what he views as the traditional, historically rooted rule. The question in *Torres* was simple: Does the shooting of a fleeing suspect

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[80] *Carpenter,* (slip op. at 20) (Gorsuch, J., dissenting).

[81] *Carpenter,* (slip op. at 10) (Gorsuch, J., dissenting).

[82] *Carpenter,* (slip op. at 20) (Gorsuch, J., dissenting).

[83] *Carpenter,* (slip op. at 21) (Gorsuch, J., dissenting).

constitute a seizure even if the police do not apprehend the suspect until the next day?[84] The majority answered yes. In its view, the common law rule was clear—"the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee."[85] And a common law arrest translates into a seizure for Fourth Amendment purposes, so the mere application of force with an intent to restrain constitutes a seizure. Justice Gorsuch accused the majority of upending the Court's prior approach to seizures. "Until today, a Fourth Amendment 'seizure' has required taking possession of someone or something. To reach its contrary judgement, the majority must conflate a seizure with its attempt and confuse an arrest with a battery."[86] The first problem that Justice Gorsuch argued that the majority's reading ran into was a textual one. Not only did contemporary ordinary usage and dictionaries suggest that seizures require possession, but the majority creates a disparity within the text. No one disputes that houses, papers, and effects require actual possession to constitute a seizure, yet the majority's reading applies a different standard to the term "person." Justice Gorsuch argued that the text of the Fourth Amendment suggested a parity among those four terms by using them in succession, not a disparity.[87] Beyond the text, Justice Gorsuch took issue with the common law support the majority offered. He agreed that a common law arrest was a seizure, but he disputed the majority's analysis of what constituted a common law arrest. Relying on Blackstone and others, Justice Gorsuch contended that a common law arrest required possession.

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[84] Torres v. Madrid, 592 U.S. ___, ___ (2021) (slip op. at 1).

[85] *Torres,* (slip op. at 5).

[86] *Torres,* (slip op. at 1) (Gorsuch, J., dissenting).

[87] *Torres,* (slip op. at 7) (Gorsuch, J., dissenting).

While common law battery could be triggered by a mere touch, arrest could not.[88] This placed him opposite Justice Scalia on this issue.[89] He also strenuously objected to the one common law foundation that the Court's (and Justice Scalia's) rule did have. The majority had placed a great deal of weight on the practice of civil debt collection arrests. For this specific subset of cases, the common law treated the home as an absolute refuge for debtors; law enforcement could not force their way into a home to haul someone off to debtors prison. There was an exception, however. Law enforcement could enter the home if they had already arrested the debtor and then the debtor fled into the home. Thus, Justice Gorsuch conceded that, for a short while, a mere touch rule for arrests developed in this particular area of cases. However, this rule developed only as a way to work around other common law rules, and there is no evidence that the Framers understood the Fourth Amendment to incorporate such a rule.[90] In his view, there simply was not enough of a common law tradition to support Justice Scalia's absolute statement that mere touch constituted an arrest. Before moving on to the workability problems that he thought the Court's rule presented, Justice Gorsuch fired off one last parting shot and word of warning:

> The common law offers a vast legal library. Like any other, it must be used thoughtfully. We have no business wandering about and randomly grabbing volumes off the shelf, plucking out passages we like, scratch out bits we don't, all before pasting our own new pastiche into the U.S. Reports. That does not respect legal history; it rewrites it.[91]

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[88] *Torres,* (slip op. at 11-14, 20) (Gorsuch, J., dissenting).

[89] California v. Hodari D., 499 U.S. 621, 624 (1991).

[90] *Torres,* (slip op. at 14-16) (Gorsuch, J., dissenting).

[91] *Torres,* (slip op. at 21) (Gorsuch, J., dissenting).

While the majority argued that any other standard for a seizure would prove impossible to apply in practice, Justice Gorsuch believed that the majority's rule would create a myriad of issues. Not only will a different standard of seizure apply for people compared to objects, but the majority cannot explain when a touch occurs and when it does not. A bullet counts as touching, but what about pepper spray? Does a flash-bang grenade with only its light and noise count? What about if a police officer shoots at a car driver and the bullets miss, but glass shards from the windshield cut the driver? Justice Gorsuch contended that the majority's rule might seem clear cut at first blush, but a little digging reveals a framework that gives judges too much leeway to decided when seizure actually occurs because it is unmoored from the traditional possession rule.[92] What initially seems like an easy to apply standard only increases confusion around this issue and leads to greater judicial policymaking. As such, Justice Gorsuch saw no textual, historical, or practical reason to adopt the majority's reading of "seizure."

Justice Gorsuch's Fourth Amendment jurisprudence mirrors his overarching approach to the law. He exhibits a strong commitment to the original meaning of the Fourth Amendment and its text. As such, he argues that the Court should be applying a framework in both searches and seizures that is rooted in the common law. He thinks that this provides for a clearer Fourth Amendment approach, which helps resolve some of the fair notice issues present in the Court's current approaches. Individuals will not have to rely on a judge's conception of a "reasonable expectation of privacy." Rather, they will know which rules of property govern their Fourth Amendment rights. Police officers will

[92] *Torres,* (slip op. at 23) (Gorsuch, J., dissenting).

not have to guess as to how much contact triggers a Fourth Amendment seizure. They will know that there is a possession requirement. All of this, Justice Gorsuch thinks, will make the law clearer. Additionally, he thinks this would more accurately comport with the separation of powers. For instance, moving away from the *Katz* test would mean that judges are not asked to make difficult balancing decisions that they are not well equipped to make. Embracing a possession requirement in the term seizure would mean that judges can avoid difficult questions about how much contact is enough to trigger an arrest. Therefore, while he may have been on the losing side in *Carpenter* and *Torres,* Justice Gorsuch's principles remained consistent. He continues to favor traditional rules over judicially invented ones, and he seeks to reduce the discretion of judges by establishing clearer principles in Fourth Amendment cases.

Sixth Amendment

Perhaps nowhere is procedural due process more evident or important than in trial proceedings. There are many aspects of trials whose rigidity reduces the likelihood of securing a conviction and increases the chances that guilty men walk free. Justice Gorsuch, however, embraces the rigidity of these rules, which he sees as required by the original public meaning of the Sixth Amendment. He vehemently rejects more functional approaches to trial procedures that proponents suggest would improve the efficiency of trials. He believes that due process takes on a heightened importance when a loss of liberty is on the line. Like Justice Scalia, many have suggested that Justice Gorsuch's approach to due process "often leads him to rule in favor of criminal defendants based on

the original meaning of constitutional trial guarantees."[93] Of course, that does not always translate to victory for defendants; he is just as suspicious of new innovations that benefit defendants as he is of innovations that benefit prosecutors. This section explores Justice Gorsuch's approach to the Sixth Amendment's guarantee of jury trial in three respects, and how it frequently puts him at odds with Justice Alito. First up is the jury right for penalties outside of imprisonment, which Justice Gorsuch analyzes in *Hester v. United States* and *A Republic, If You Can Keep It.* Next is *United States v. Haymond*, which involves the right to a jury in post-conviction proceedings. Finally, there is *Ramos v. Louisiana* and the question of jury unanimity. These areas of law highlight how Justice Gorsuch ties due process to fair notice and the emphasis he places on securing rights above reliance interests.

Justice Gorsuch clearly values the right to a jury very highly. To begin, he has suggested that a jury right is triggered even when a loss of liberty is not on the line. Even criminal restitution payments are enough to warrant a jury trial in his view. The Court's precedents like *Apprendi v. New Jersey* and *Southern Union Co. v. United States* require a jury to find facts necessary for a prison sentence or a government fine. With the increased role that criminal restitution payments play in today's criminal justice system, Justice Gorsuch has argued that there is no reason for the same jury right not to apply. After all, why should it matter if you are paying money to your alleged victims rather than the government? To him, there is no meaningful difference between a restitution payment

[93] Michael McConnell, "Neil Gorsuch: An Eloquent Intellectual," *Hoover Institution*, February 6, 2017, https://www.hoover.org/research/neil-gorsuch-eloquent-intellectual.

and a fine.[94] As Justice Gorsuch explained in *Hester v. United States,* the original public meaning of the Sixth Amendment encompasses restitution payments because they are a "criminal prosecution." In fact, restitution payments at the common law were subject to jury trials.[95] With such an established tradition, Justice Gorsuch returned to a frequent proposition of his: rights established at the Framing cannot be reduced today. As he said, "[I]t's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption."[96] And while Justice Gorsuch certainly believes that rights present at the Framing must mean at least as much today, the right to a jury seems to have a special place in his heart off the bench as well. He has characterized juries as "the most democratic participants" in our judicial system.[97] He sees jury service on par with voting when it comes to its importance for our democracy. For Justice Gorsuch, twelve ordinary people typically without legal training working together to come to the right conclusion represents some of what is best about our participatory system of government.[98] As a result, it is unsurprising that he would prize the Sixth Amendment's jury guarantee. During his time on the Tenth Circuit, he advocated for an expansion of jury rights, particularly in civil settings. He recognizes that certain default rules about jury right waivers exist in the name of efficiency, but he argues that "we should be encouraging jury trials," not attempting to churn through cases as

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[94] Hester v. United States, 586 U.S. ___, ___ (2019) (slip op. at 3) (Gorsuch, J., dissenting).

[95] *Hester,* (slip op. at 3-4) (Gorsuch, J., dissenting).

[96] *Hester,* (slip op. at 4) (Gorsuch, J., dissenting).

[97] Gorsuch, *A Republic,* 243.

[98] Ibid.

quickly as possible.[99] All in all, his dissent in *Hester* is consistent with the importance he attaches to jury trials. Even though jury trials for criminal restitution payments would be less efficient, he values due process considerations about functionality.

Interestingly, the only other opinion that *Hester*'s denied certiorari petition garnered was a concurrence from Justice Alito. In it, he staked out a position completely antipodal to Justice Gorsuch. Instead of calling for an expansion of Sixth Amendment jury rights, he questioned the legitimacy of two core Sixth Amendment cases, *Apprendi* and *Booker v. United States.*[100] When it comes to the Sixth Amendment, Justice Alito is the Tonya Harding to Justice Gorsuch's Nancy Kerrigan. In every single Sixth Amendment jury rights opinion that Justice Gorsuch has authored since arriving at the Supreme Court, Justice Alito has written an opinion taking the opposite position. Perhaps this should be of little surprise; Justice Gorsuch's emphasis on due process often leads to favorable results for criminal defendants, while Justice Alito is regarded as "probably the most pro-prosecution member of a pro-prosecution court."[101] Nevertheless, this is an area of law that once again highlights Justice Gorsuch's differences with some of his conservative colleagues.

Putting aside debates over jury rights prior to conviction, Justice Gorsuch also recognizes that Sixth Amendment rights exist in post-conviction proceedings as well. Many Americans might be surprised to learn that federal parole does not currently exist

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[99] Gorsuch, *A Republic,* 268.

[100] *Hester,* (slip op. at 1) (Alito, J., concurring).

[101] Linda Greenhouse, "It's All Right With Sam," *New York Times,* January 7, 2015, https://www.nytimes.com/2015/01/08/opinion/its-all-right-with-samuel-alito.html.

and has not existed for almost the past forty years. The parole system was replaced in 1984 with a new system of supervised release, which differs in two key ways from parole. First, supervised release is designed to occur after the completion of a sentence; it does not replace part of the sentence as parole does. Second, if an individual violated the conditions of his parole, he could only return to prison for the remainder of his original sentence. Under supervised release, a violation can land a defendant in prison beyond the terms of his original sentence.[102] These key differences came to the forefront during *United States v. Haymond.* In that case, Mr. Haymond was originally sentenced to thirty-eight months in prison followed by ten years of supervised release. During that supervised release, the government found child pornography on Mr. Haymond's phone and computer. A judge, using a preponderance of the evidence standard, found that Mr. Haymond knowingly possessed child pornography, which required him to sentence Mr. Haymond to a minimum of five years in prison.[103] Mr. Haymond argued that under the Sixth Amendment a jury, not a judge, must find that he possessed child pornography beyond a reasonable doubt, not just a preponderance of the evidence. Justice Gorsuch's opinion agreed with him, but it also delineated Justice Gorsuch's Sixth Amendment jurisprudence more clearly. With that in mind, there are two essential elements of his opinion. The first is a reiteration of the broader principles that govern his approach to the jury right. He begins with the wide reaching proposition that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty."[104] From here, he moves

[102] United States v. Haymond, 588 U.S. ___, ___ (2019) (slip op. at 17) (plurality opinion).

[103] *Haymond,* (slip op. at 2-4) (plurality opinion).

[104] *Haymond,* (slip op. at 1) (plurality opinion).

into a discussion of purposes of a jury. While the right to vote ensured democratic participation in the government's executive and legislative branches, "the right to a jury trial sought to preserve the people's authority over its judicial functions."[105] Not only do juries tie the judicial power to the populace, but they also act as a check on judges when it comes to the power to punish. He clarified, "A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct."[106] In other words, juries serve a democratic function in an otherwise undemocratic branch. Judges do not gain their authority to restrict liberty without the People's say so. Infringements upon jury rights not only harm defendants, but they also divest the People "of their constitutional authority to set the metes and bounds of judicially administered criminal punishments."[107] For Justice Gorsuch there is a strong presumption in favor of a jury right whenever an individual's liberty is at risk, even if it is a revocation of supervised release. Therefore, the second important element of Justice Gorsuch's opinion is how these broad due process principles apply to post-conviction proceedings. Justice Gorsuch argued that, unlike parole revocation, supervised release revocations like Mr. Haymond's that increase the mandatory minimum prison term must comport with the Sixth Amendment.[108] Any other position would create a host of problems according to Justice Gorsuch. The government could force anyone to serve a life term of supervised release for even small crimes and then send them back to prison without a jury trial.

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[105] *Haymond,* (slip op. at 5) (plurality opinion).

[106] *Haymond,* (slip op. at 6) (plurality opinion).

[107] *Haymond,* (slip op. at 11) (plurality opinion).

[108] *Haymond,* (slip op. at 12-13) (plurality opinion).

There is no limiting principle for the dissent's position. The dissent and government even conceded that there would be no jury right for a defendant on supervised release facing the death penalty.[109] In contrast, Justice Gorsuch thought that there was a way to draw the line with respect to his position. The Sixth Amendment does not require a jury to find facts related to adjustments of confinement, such as the reduction of privileges for violating prison rules, but the government cannot "send a free man back to prison for years based on judge-found facts."[110] Because Mr. Haymond faced spending five additional years in prison based on a judge's findings compared to his original term of thirty-eight months based on jury deliberations, Justice Gorsuch ruled that he was entitled to Sixth Amendment protections. Dissenting, Justice Alito did not mince words: "[T]he plurality opinion […] is not based on the original meaning of the Sixth Amendment, is irreconcilable with precedent, and sports rhetoric with potentially revolutionary implications. The plurality opinion appears to have been carefully crafted for the purpose of laying the groundwork for later decisions of a *much* broader scope."[111] Much of Justice Alito's opinion critiqued the plurality for threatening to bring the entire system of supervised release down by requiring jury trials for all supervised release revocations. In essence, Justice Gorsuch's approach would cause the system to become widely inefficient.[112] Yet, this criticism only highlights the emphasis Justice Gorsuch places on rights above reliance interests and efficiency. As he explained, "[L]ike much else in our

[109] *Haymond,* (slip op. at 14) (plurality opinion).

[110] *Haymond,* (slip op. at 18) (plurality opinion).

[111] *Haymond,* (slip op. at 1) (Alito, J., dissenting).

[112] *Haymond,* (slip op. at 2-9) (Alito, J., dissenting).

Constitution, the jury system isn't designed to promote efficiency but to protect liberty."[113] Due process requires respect for the Sixth Amendment's jury guarantee, and complaints about the potential social costs appear to hold little sway over him.

This theme of prioritizing due process rights over efficiency and reliance interests was once again on display in *Ramos v. Louisiana.* Much of this ground has been covered already when we looked at how Justice Gorsuch treats reliance interests in his *stare decisis* analysis. What is of interest here is Justice Gorsuch's determination that the original public meaning of the Sixth Amendment incorporates a jury unanimity requirement. He began by suggesting in *Ramos* that the "text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial."[114] Without some requirements, juries could simply be one or two individuals rubber-stamping government prosecutions, which he argued surely was not what the Framers envisioned. To determine which requirements are implicit within the Sixth Amendment, he turned to the common law. By the time of the Framing, jury unanimity had been a staple of English law for four hundred years and was no longer seriously contested. Indeed, early American courts and jurists fully embraced the unanimity requirement.[115] What history suggests, precedent confirms. Over the course of one hundred and twenty years, the Court reaffirmed the necessity of unanimity in an unbroken line of cases. That trend was upended, however, by *Apodaca,* where Justice Powell argued that the Sixth Amendment, while mandating

[113] *Haymond,* (slip op. at 21) (plurality opinion).

[114] *Ramos,* (slip op. at 4).

[115] *Ramos,* (slip op. at 4-6).

unanimity for federal juries did not apply in the same way to states. Unwilling to defend that reasoning, Louisiana argued that the unanimity requirement was mere dicta. Pointing to the Senate drafting history of the Sixth Amendment, Louisiana noted that a unanimity requirement was actually removed. Justice Gorsuch was hesitant to give much weight to legislative history, saying that "this snippet of drafting history could just as easily support the opposite inference" that a unanimity requirement was a surplusage because it was already inherent in the phrase "impartial jury."[116] Justice Gorsuch contended that "rather than dwelling on the text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified."[117] If history does not back its position, Louisiana suggested that modern consideration do. In its view, non-unanimous juries serve an important function in reducing hung juries and the amount of time it takes for trials to conclude. In fact, that position is the one that seemingly prevailed in *Apodaca.* Justice Gorsuch vehemently rejected such a functionalist assessment:

> When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain. With humility, we much accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.[118]

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[116] *Ramos,* (slip op. at 12).

[117] Ibid.

[118] *Ramos,* (slip op. at 15).

In no uncertain terms, he made it clear that the text of the Sixth Amendment means what it says, and he was unwilling to modify its protections solely because we might have come to think of unanimity as outdated or unwarranted. As previously noted, Justice Alito worried in his dissent about the number of retrials Louisiana (and Oregon) might have to undertake. Yet, once again constitutional rights and due process considerations outweigh these concerns about efficiency and reliance interests. According to Justice Gorsuch, judges have no authority to modify the protection delineated in the Constitution because of practical considerations. Fair notice and the separation of powers demands that judges enforce the rights enshrined in the Constitution until Congress and the States choose to change them.

Trial procedures are one area of law where it is fairly easy to see the importance of due process. Fair notice, Justice Gorsuch thinks, requires judges to enforce what the Constitution says, not what might make the most practical sense today. With respect to the Sixth Amendment, he argues that the plain meaning of the text of the Jury Clause protects jury rights even in restitution or post-conviction proceedings. His originalism also clearly incorporates background common law rules that were present at the time of the Framing. Thus, the right to a jury also includes an implicit right to a unanimous jury. While some may cast Justice Gorsuch as a pro-defendant judge because his decisions in these areas often benefit criminal defendants, he seems less concerned with who benefits from his decisions and more concerned with ensuring the preservation of traditional rights and due process.

CHAPTER FIVE

Justice Gorsuch on Statutory Interpretation

Justice Gorsuch's Approach to Interpreting Statutes

This section has two main focuses. The first is a general overview of Justice Gorsuch's approach to textualism and how that plays out across a number of cases. The second is how Justice Gorsuch deals with severability in statutes. Within the first area of focus, I look at how Justice Gorsuch arrives at the meaning of words in *Wisconsin Central Ltd. v. United States* and *New Prime Inc. v. Oliveira.* Next, I shift to his rejection of policy considerations in *Epic Systems Corp. v. Lewis.* Following that there is a portion of this section that looks at Justice Gorsuch's desire for Congress to be explicit, which brings us back to causes of action. Finally, this section evaluates Justice Gorsuch's growing doubts about the Court's modern severability doctrine in *Barr v. AAPC, United States v. Arthrex, Inc.*, and *Collins v. Yellen.* Both of these areas reflect his emphasis on fair notice through clarity in Congress legislation and also the separation of powers by refusing to do Congress's work for it. These cases also provide a useful guidepost for the subsequent analysis of his approach to treaty interpretation and the *Bostock* decision. Through all of this, I hope to illustrate how Gorsuch approaches statutory interpretation and why he does so. It also provides a valuable comparison point to help us determine if *Bostock* was out of the ordinary for him.

We have already seen why Justice Gorsuch argues that textualism respects the separation of powers and fair notice principles that he thinks are essential for due process. His textualism proffers to task judges with the job of determining and applying the original public meaning of a statute. However, there is still the question of what exactly constitutes the original public meaning and how judges are supposed to arrive at it. Two cases outline quite well how exactly Justice Gorsuch goes about determining the original public meaning of a statute's terms. The first, *Wisconsin Central Ltd. v. United States*, involved everyone's favorite dinner party conversation topic—railroad tax law. At issue was the meaning of term "compensation" which was defined as only "any form of money renumeration."[1] The IRS attempted to tax stock options that Wisconsin Central provided to employees as a form of "compensation." Wisconsin Central and some of their employees disagreed, arguing that stock options are not a form of "money renumeration."[2] To resolve this dispute, Justice Gorsuch turned to dictionaries that were present at the time of the Railroad Retirement Tax Act. He surveyed definitions from *Webster's New International Dictionary,* the *Oxford English Dictionary,* and *Black's Law Dictionary.* All three of these sources suggested that stock options do not count as money.[3] Furthermore, common parlance confirms the traditional definition of money. We do not speak of the value of goods in terms of stock. While stock options can be converted into money, they are not themselves money. Justice Gorsuch also looked to contemporaneous statutes and their language. For instance, the same Congress that

[1] *Wisconsin Central,* (slip op. at 2).

[2] Ibid.

[3] *Wisconsin Central,* (slip op. at 2-3).

passed the Railroad Retirement Tax Act also passed the Federal Insurance Contribution Act which used the term "all renumeration" instead of "money renumeration." Justice Gorsuch explained that different words ought to be interpreted to mean different things. Congress's "choice to use the narrower term in the context of railroad pensions alone requires respect, not disregard."[4] Thus, Justice Gorsuch concluded that the public meaning of "money renumeration" at the time the statute was enacted did not include stock options. The dissent and federal government argued that not taxing stock options as compensation would leave a gaping hole for tax evasion, but Justice Gorsuch did not factor that into his analysis. Those practical concerns are Congress's realm; textualism merely requires judges to apply the statute as it would have been understood at the time of enactment. Once again defending this approach, he explained, "Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost."[5] It is fairly easy to see how this approach to interpretation is consistent with his overall jurisprudence. There are fair notice concerns in his analysis; he argued that individuals must be able to rely on the original meaning of a law until Congress makes it clear that the law has been changed. Likewise, there are separation of powers concerns; his interpretation refuses to update a statute simply because it may have become outdated or problematic. Yet he wants to be clear that this approach to statutory interpretation does not leave us stuck in time. He claimed, "While every statute's *meaning* is fixed at the

[4] *Wisconsin Central,* (slip op. at 4).

[5] *Wisconsin Central,* (slip op. at 9).

time of enactment, new *applications* may arise in light of changes in the world."[6] Thus, nothing in *Wisconsin Central* suggests that his statutory interpretation is particularly unique or groundbreaking. Rather, he relies on traditional due process principles to explain why he is looking at the original meaning of a phrase while also ignoring the potential policy difficulties created.

Of course, *Wisconsin Central* was a fairly straightforward case because the term "money" carries the same meaning today that it did in the 1930s. But what happens when the contemporary meaning does not mirror the original meaning? *New Prime Inc. v. Oliveira* answers that question. There the Court was asked whether independent contractors fell within the scope of the term "contracts of employment" for the purposes of the Federal Arbitration Act. While today we would not generally consider independent contractors to be employees, the Court held that the original, 1925 public meaning of the phrase encompassed all agreements for work, not just modern employer-employee relationships.[7] Once again, Justice Gorsuch turned to dictionaries contemporaneous with the statute that the Court was interpreting. These dictionaries suggested that "employment" was synonymous with "work" at the time of the FAA. Likewise, contemporaneous state and federal court cases treated what we would consider independent contractor agreements as "contracts of employment."[8] Falling back on the intent of the FAA, New Prime suggested that Congress enacted the statute to protect against judicial hostility towards arbitration. Thus, the Congress that enacted the FAA

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[6] *Wisconsin Central,* (slip op. at 9-10).

[7] New Prime Inc. v. Oliveira, 586 U.S. ___, ___ (2019) (slip op. at 7).

[8] *New Prime,* (slip op. at 8).

would have wanted to compel arbitration for independent contractors, even if they did not use the correct language. Justice Gorsuch rejected such a proposition, saying that allowing courts to ignore aspects of a text in the name of congressional intent would obfuscate the "legislative compromises essential to a law's passage and, in that way, thwart rather than honor" congressional intent.[9] As result, *New Prime* highlights a couple of things that are of note about Justice Gorsuch's textualism. First, he is more than willing to apply a text to situations that really did not exist when the text was authored. Independent contractors were not a large-scale phenomenon when the FAA came into existence, yet Justice Gorsuch was unafraid to say that its text covered them. Second, he is unpersuaded by arguments that Congress would or would not have intended a certain result. In his view, respect for the separation of powers and fair notice means that judges should focus on the language that Congress actually passed, not how Congress might have wanted individual cases to be resolved. The rule of law requires equal language to apply equally; judges cannot ignore the text for a certain group of people because Congress might not have been thinking about that particular situation when it passed the law in question.

This question of congressional intent is also tied to one of policy. Rightly or wrongly, most parties before the Court argue that the sky is going to fall if the Court rules against them. Case in point: the respondents in *Epic Systems Corp. v. Lewis* argued that it was necessary for employees and labor unions to sue collectively even if the terms of their contracts called for individual arbitration. Without the ability to sue collectively,

[9] *New Prime,* (slip op. at 14).

employer-employee would favor employers too much by forcing individuals to bear the brunt of individual arbitration.[10] In other words, it is fairly easy for a company like Amazon to bury a single employee in arbitration, but it is less easy for Amazon to bury 1,000 employees in a class action lawsuit. *Epic Systems* is a complicated case. In short, Mr. Lewis and others attempted to collectively sue Epic Systems for violating aspects of the Fair Labor Standards Act. Unfortunately for them, Epic Systems argued that the Federal Arbitration Act compelled courts to enforce the individual arbitration agreement of their employment contract. In response, Mr. Lewis invoked the National Labor Relations Act, claiming that it superseded the FAA. What we wind up with from Mr. Lewis is a complex argument where the NLRA assigns procedures for the FLSA that overrides the commands of the FAA. Justice Gorsuch characterized the respondents' position as "a sort of interpretive triple bank shot," which should make one "raise a judicial eyebrow."[11] The actual textual argument itself is not particularly relevant here because, in truth, the respondents' position really boiled down to claim that class action suits must be permitted even in the face of the FAA in order for the NLRA and FLSA to function. Justice Gorsuch acknowledged that "[a]s a matter of policy these questions are surely debatable. But as a matter of law the answer is clear."[12] Regardless of the policy implications, Justice Gorsuch was unwilling to accept that the NLRA silently repealed aspects of the FAA. Nor was he willing to even accept that it conflicted with the FAA. He claimed, "It is this Court's job duty to interpret Congress's statutes as a harmonious

[10] Epic Systems Corp. v. Lewis, 584 U.S. ___, ___ (2018) (slip op. at 24).

[11] *Epic Systems,* (slip op. at 15).

[12] *Epic Systems,* (slip op. at 2).

whole rather than at war with one another."[13] This duty holds for him regardless of the policy implications. Given his fair notice inclinations, it is understandable that he would disavow the idea that one statute impliedly repeals parts of another. Just as importantly, he also disavowed the respondents' argument that the NLRA and FAA conflict. Under his reading, the NLRA does not affect the FAA when it comes to individual arbitration. Rather, the respondents (and dissent) were attempting to read a conflict into existence in order to make a policy argument. Justice Gorsuch castigated such efforts:

> Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law should be. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.[14]

Justice Gorsuch would leave it to Congress to make decisions about what is best for the economy. Until Congress acts, he would continue to apply the law in the policy direction it had chosen. In response, the dissent invoked everyone's favorite specter—*Lochner*—to argue that this willingness to disregard the practical effects of his decision would return labor unions to the "yellow dog" contract era.[15] Justice Gorsuch's response was concise: "This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That,* we had always understood, was *Lochner*'s sin."[16] This

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[13] Ibid.

[14] *Epic Systems,* (slip op. at 10)

[15] *Epic Systems,* (slip op. at 30) (Ginsburg, J., dissenting).

[16] *Epic Systems,* (slip op. at 25).

response is consistent with the rest of his jurisprudence. Rejecting policy considerations is required by textualism because it upends fair notice and it requires judges to take on a role given to Congress. Due process, therefore, counsels against policy considerations in judicial decisions for Justice Gorsuch. His jurisprudence rejects policy arguments not because he is heartless, but because due process and the rule of law do not permit judges to take them into account. Policy arguments should be aimed at the political branches, not courts.

As *Epic Systems* suggests, Justice Gorsuch typically expects Congress to be clear when it undertakes a major action. Whether it is repealing part of a previous statute, preempting state law, or creating a new cause of action, he wants Congress to be explicit about what it is doing. By extension, if Congress is not explicit, he tends to presume that it is not doing whatever one party suggested Congress intended to do. In *Virginia Uranium, Inc. v. Warren,* Justice Gorsuch made it clear that in the "field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write."[17] For him, fair notice demands that Congress say what it means. Not only does this give litigants (and States) adequate information about what is and is not permissible, but it retains an element of political accountability. In other words, Justice Gorsuch is unwilling to allow legislators to pass vague or unclear laws in hopes that judges will pick up on their hints, but legislators will be spared the political repercussions. He fears that "legislators might seek to pass laws that tiptoe" around sensitive issues "and hope that judges—facing no possibility of electoral consequences

[17] Virginia Uranium, Inc. v. Warren, 587 U.S. ___, ___ (2019) (slip op. at 1) (plurality opinion).

themselves—will deliver the final push."[18] As a result, he is reluctant to infer that Congress made major changes to an area of law without an express indication from Congress itself.

These same fair notice and accountability concerns echo throughout his approach to private causes of action for statutory claims. He argues that Article III courts have no jurisdiction over private claims when the statute does not create a private cause of action. He explicated his thinking on this subject in *Nestle USA, Inc. v. Doe.* In that case, Justice Gorsuch rejected the claims of former child slaves from Mali who sued Nestle under the Alien Tort Statute because the ATS "nowhere deputizes the Judiciary to create new causes of action."[19] Yet, even if there is not an explicit textual basis for creating causes of action under the ATS, why should that limit judges? After all, the Court has previously created new causes of action under the theory "*ubi jus ibi remedium*."[20] And creating a cause of action for preventing and punishing child slavery seems about as good a reason to permit a new cause of action as any. Here, however, Justice Gorsuch tied his refusal to the separation of powers, saying, "But the power to create a cause of action is in every meaningful sense the power to enact a new law that assigns new rights and new legally enforceable duties."[21] It is Congress's job to create causes of action, and until Congress clearly does so, the Court should not act, no matter how egregious the conduct at issue

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[18] *McGirt,* (slip op. at 7).

[19] Nestle USA, Inc. v. Doe, 593 U.S. ___, ___ (2021) (slip op. at 4) (Gorsuch, J., concurring).

[20] "For the violation of every right, there must be a remedy." For a greater exploration of this notion, both in theory and in practice, see *Bivens v. Six Unknown Fed. Narcotics Agents.*

[21] *Nestle,* (slip op. at 5) (Gorsuch, J., concurring).

may be. To act otherwise would be to assume a legislative power. Beyond the separation of powers, Justice Gorsuch once again justifies his insistence that Congress be explicit by turning to fair notice and political accountability. Requiring Congress to be clear about topics like this one "would afford everyone interested in these matters clear guidance about whom they should lobby for new laws. […] And it would clarify where accountability lies when a new cause of action is either created or refused: With the people's elected representatives."[22] In the end, his desire that Congress be clear when it acts and not leave tricky questions for judges to fill in is rooted in his notion of due process. Wanting Congress to be explicit makes sense from both a separation of powers standpoint—because it ensures that Congress is the one legislating—and from a fair notice standpoint—because individuals can reliably base their actions off the written text alone. In addition to this, there is a valuable political accountability benefit that comes from the public and Congress recognizing that the Court is not inclined to act on issues where Congress has been silent or unclear.

Much of what has been said so far should not come as a surprise. These decisions fit within the core tenets of textualism, and they reflect Justice Gorsuch's conception of due process. One area, however, has created some divisions among the Court's conservatives and divided textualists on questions of historical practice and future implications: severability. Severability is, at its core, the question of what to do with a portion of a law when the Court finds it unconstitutional. In some instances, Congress includes a severability or inseverability clause, which makes it clear that the

[22] *Nestle,* (slip op. at 7) (Gorsuch, J., concurring).

unconstitutionality of one provision does or does not doom the rest of the law. Sometimes, however, Congress fails to include either. In those instances, the "Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute."[23] Justice Gorsuch has questioned this presumption in three key cases. Rather than "sever" the unconstitutional provision from the rest of the text, Justice Gorsuch has offered a new remedy. Understanding this disagreement with the modern severance doctrine and his proposed solution can tell us a great deal about his approach to statutory interpretation.

Justice Gorsuch has explained his views on severability in three cases: *Barr v. American Assn. of Political Consultants, United States v. Arthrex, Inc.,* and *Collins v. Yellen.* In each of these cases, Justice Gorsuch agreed with the Court's majority on the merits of the claim but disagreed with the remedy the Court adopted. In *AAPC,* the Court severed the government-debt exception from the Telephone Consumer Protection Act. In *Arthrex,* the Court severed the portion of the American Invents Act that prevented the Director of the Patent and Trademark Office from unilaterally reviewing the decisions of the Patent Trial and Appeal Board. Finally, in *Collins,* the Court eliminated the "for-cause" removal restrictions in the Housing and Economic Recovery Act that protected the Director of the Federal Housing Finance Agency. In all three of these opinions, which were authored by three different Justices, the Court followed its traditional presumption of severability. It zeroed in on what it thought to be the portion of the law that offended the Constitution and declared that portion alone a nullity. Justice Gorsuch would have

[23] Barr v. American Assn. of Political Consultants, 591 U.S. ___, ___ (2020) (slip op. at 14) (plurality opinion).

charted a different path. In *AAPC,* he would have held "that the plaintiffs are entitled to an injunction preventing [the TCPA's] enforcement against them," but he would not have gone any further.[24] Likewise, in *Arthrex,* he argued that the appropriate remedy would be to decline "to enforce the statute in the case […] at hand," and instead proceed by "'setting aside' the PTAB decision in this case."[25] Continuing this trend, in *Collins,* he would have simply vacated the decision of the unconstitutionally appointed Director.[26] For each of these cases, this would have resulted in a much more case-specific remedy, rather than the more sweeping result of the majority. However, it would also have resulted in the winning party actually receiving the relief it wanted, rather than the relief the Court granted.

Of course, Justice Gorsuch's approach to the severance doctrine in these cases was not just because he felt inclined to grant the winning parties the full relief they requested. Rather, it was grounded in the flaws he sees with the Court's contemporary severability approach. The main issue he takes with the severance doctrine is the fact that he views it as the judicial rewriting of laws. He explained, "I am doubtful of our authority to rewrite the law in this way."[27] "This assertion of power strikes me as raising serious separation of powers questions."[28] When the Court decides which portions of a law survive and which portions do not, they assume a role properly assigned to Congress.

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[24] *AAPC,* (slip op. at 5) (Gorsuch, J., concurring in judgement in part and dissenting in part).

[25] *Arthrex,* (slip op. at 6) (Gorsuch, J., concurring in part and dissenting in part).

[26] Collins v. Yellen, 594 U.S. ___, ___ (2021) (slip op. at 1-2) (Gorsuch, J., concurring in part).

[27] *AAPC,* (slip op. at 5) (Gorsuch, J., concurring in judgement in part and dissenting in part).

[28] *AAPC,* (slip op. at 6) (Gorsuch, J., concurring in judgement in part and dissenting in part).

Essentially, Justice Gorsuch accuses the Court's severance doctrine of attempting to guess what Congress would have wanted if it knew that the portion of the law in question was unconstitutional. However, "any claim about 'congressional intent' divorced from enacted statutory text is an appeal to mysticism," according to him.[29] In other words, under the guise of "severance," judges get to carry out their own policy preferences. Take *Arthrex* for example. The Court determined that in the face of unconstitutional prohibitions on the Director's review power of PTAB decisions, Congress would have preferred that Director be able to review and reverse PTAB judgements. Yet, as Justice Gorsuch pointed out, the structure of the America Invents Act was designed to promote independence for PTAB judges from the politically appointed Director. As a result, it is just as easy to reason that Congress would have not created the PTAB if it knew that a political appointee would have absolute review power; it might have just stuck with the old system of having politically neutral judges evaluate patent revocation claims.[30] In attempting to discern what a past Congress would have done, Justice Gorsuch claims that the "crystal ball ends up being more of a mirror," meaning that judges determine that Congress would have come up with the solution that the judges themselves favor.[31] Just as he rejects appeals to policy on questions that a future Congress has not yet addressed, he rejects the same for a past Congress. "Asking what a past Congress would have done if confronted with a contingency it never addressed calls for raw speculation. Speculation that, under traditional principles of judicial remedies, statutory interpretation, and the

[29] *Arthrex,* (slip op. at 7-8) (Gorsuch, J., concurring in part and dissenting in part).

[30] *Arthrex,* (slip op. at 8) (Gorsuch, J., concurring in part and dissenting in part).

[31] Ibid.

separation of powers, a court of law has no authority to undertake."[32] Not only does the severance doctrine raise serious separation of powers and fair notice problems, it is also just bad statutory interpretation according to Justice Gorsuch. In fact, it "is not statutory interpretation; it is statutory reinvention."[33] In no other area of law does the statutory interpretation delve so far into hypotheticals and stray so far from the text. For the severance doctrine, the departure from the text goes so far as to make it an exercise of political will, not judicial interpretation.

While Justice Gorsuch's case-by-case injunction/vacatur based approach to dealing with unconstitutional actions is what he believes to be "the traditional remedy for proven violations of legal rights," it is not without its problems or critics.[34] As Justice Kavanaugh pointed out in *AAPC,* the presumption of severability is firmly rooted in history. Chief Justice Marshall did not strike down the whole of the Judiciary Act of 1789 in deciding *Marbury v. Madison.*[35] Time and time again the Court has employed the severability doctrine in a manner consistent with Article III power. Additionally, he argued that severance comports with the separation of powers by ensuring that the Court does not undo Congress's work unnecessarily and wreak broad policy havoc.[36] While Justice Gorsuch seems to cloak his approach in judicial modesty, in truth, it would often

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[32] *Arthrex,* (slip op. at 9) (Gorsuch, J., concurring in part and dissenting in part).

[33] *Collins,* (slip op. at 5) (Gorsuch, J., concurring in part).

[34] *AAPC,* (slip op. at 5) (Gorsuch, J., concurring in judgement in part and dissenting in part).

[35] *AAPC,* (slip op. at 14) (plurality opinion).

[36] *AAPC,* (slip op. at 15) (plurality opinion).

mean using a bulldozer rather than a scalpel for curing constitutional issues.[37] There are serious reliance interests at stake if the Court were to scrap its current severability doctrine. "Severability is not an isolated precedent, but rather is an oft-applied jurisprudential doctrine […] And it is clear that legislatures rely" on the doctrine.[38] In essence, legislatures have legislated against a backdrop presumption of severability for decades or even centuries, so the Court would be wise to consider the potential effect on all of those laws before it pulls the rug out on severability. As *Texas v. California* from last Term exhibits, various novel theories like "standing through inseverability" and "implicit repeal through inseverability" would come into play if the Court does away with its traditional conception of severability. To do away with a presumption of severability would require the Court to ignore or run over a number of textual clues in many statutes.[39] A weaker conception of severability also creates serious and challenging questions about just how many dominoes fall when a provision becomes unconstitutional. It is one thing to strike down a free-standing statute at-large, like the Affordable Care Act. At least there it is fairly clear to see where to last domino falls. What to do, however, when an unconstitutional provision inhabits the U.S. Code? Does the entire title fall? Or just the chapter? Or perhaps just the section? Justice Gorsuch does not have a great answer for many of these arguments. While his pushback against the severance doctrine

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[37] Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. ___, ___ (2020) (slip op. at 35) (plurality opinion).

[38] Gregory Hilbert, "Let Sleeping Dogs Lie: Defending Severability After *Murphy, Collins,* and *Seila Law,*" *Case Western Reserve Law Review* 71, no. 1 (2020): 315.

[39] Abbe Gluck, "Reading the ACA's Findings: Textualism, Severability and the ACA's Return to the Court,"*Yale Law Journal Forum* 130 (2020): 135.

fits nicely within his jurisprudence, it presents a number of practical problems that he still has not fully worked out.

Ultimately, Justice Gorsuch's approach to statutory interpretation and, more specifically, severability fits his due process-centric jurisprudence. His emphasis on fair notice leads him to stick closely to the text of a statute, focusing on the meaning of words as they would have been publicly understood at the time of enactment. As *New Prime* illustrates, he argues that words retain their original meaning in statutory interpretation, even if the meaning has since changed. In his mind, this best serves fair notice. Likewise, he expects Congress to be clear when it acts, so that the public can actually understand what it is doing. On the separation of powers front, Justice Gorsuch firmly rejects policy appeals in statutory interpretation. It is Congress's job to consider policy outcomes, while the Court's job is merely to apply the law. In the same vein, severability is problematic because it forces the Court to make policy judgements. Judges have to guess at what Congress would have considered the next best policy, and Justice Gorsuch thinks that this ends up looking a lot like judges substituting their own policy preferences for Congress's. Part of his effort in statutory interpretation is to force Congress to do its job. As he explained, "By once again purporting to do Congress's job, we discourage the people's representatives from taking up for themselves the task of consulting their oaths, grappling with constitutional problems, and specifying a solution in statutory text."[40] Justice Gorsuch wants the public to stop looking to the Court to affect the policy changes the public wants to see, and he wants Congress to stop looking to the Court to affect the

[40] *Collins,* (slip op. at 6) (Gorsuch, J., concurring in part).

policy changes that it cannot pass. In other words, Justice Gorsuch is trying to tell Congress that the Court is not going to do Congress's dirty work for it. If Congress enacts a poorly written law, the Court is not going to save Congress. Fair notice and the separation of powers demands that the Court look at the text of a law—not legislative intent, not policy arguments, and not what Congress might have preferred to do.

Treaty Interpretation

Native American treaty interpretation functions in a very similar way to statutory interpretation for Justice Gorsuch, albeit with a small difference. In interpreting treaties, there is a presumption in favor of understanding the treaties as the Native Americans who signed the treaty would have understood it. He has argued that judges "must 'give effect to the terms as the Indians themselves would have understood them.'"[41] As a result, Justice Gorsuch typically stands apart from his other conservative colleagues in cases dealing with Native American treaty rights. As one reporter explained, "The [C]ourt's only Western justice has a firm grasp on American Indian law and an obvious empathy for tribes and their members."[42] This section focuses on how that difference plays out in practice. In doing so, it looks at two main cases: *Washington State Dept. of Licensing v. Cougar Den, Inc.* and *McGirt v. Oklahoma*, both of which involved Justice Gorsuch siding with Justices Ginsburg, Breyer, Sotomayor, and Kagan in favor of the claims of the Native American tribes.

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[41] *Cougar Den,* (slip op. at 2) (Gorsuch, J., concurring in judgement) (quoting *Mille Lacs* at 196).

[42] Mark Stern, "Why Gorsuch Keeps Joining the Liberals to Affirm Tribal Rights," *Slate,* May 20, 2019, https://slate.com/news-and-politics/2019/05/neil-gorsuch-supreme-court-tribal-rights-sonia-sotomayor.html.

Of these two cases, *Cougar Den* is by far the less controversial. *Cougar Den* involved a question of whether Washington could impose a fuel tax that it imposed on all other fuel importers in the state on members of the Yakama Nation.[43] Cougar Den, Inc., which imports fuel and is owned by a member of the Yakama Nation, argued that Washington's attempt to tax it violated an 1855 treaty that granted the Yakama the "right, in common with citizens of the United States, to travel upon all public highways."[44] Now, on first glance, it does not seem immediately clear how a tax on importing fuel infringes upon the right to travel on public highways in the same way as other American citizens. Yet both the plurality and Justice Gorsuch agreed that the treaty language would have been understood to extend beyond mere anti-discrimination principles.[45] Justice Gorsuch conceded that "[t]o some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else."[46] However, because that is not how the Yakamas would have understood it in 1855, our modern understanding plays no role here. According to Justice Gorsuch, there is a clear historical record that in 1855 the Yakamas believed that they were signing a treaty that preserved their preexisting right to transport goods using public roads.[47] Given the fact that this treaty was drafted by the United States who held considerable power in the negotiations in a language the Yakamas could not read, the Court has a duty to interpret

[43] *Cougar Den,* (slip op. at 2) (plurality opinion).

[44] 12 Stat. 951, 953.

[45] *Cougar Den,* (slip op. at 12-14) (plurality opinion); *Cougar Den,* (slip op. at 2-3) (Gorsuch, J., concurring in judgement).

[46] *Cougar Den,* (slip op. at 2) (Gorsuch, J., concurring in judgement).

[47] *Cougar Den,* (slip op. at 4) (Gorsuch, J., concurring in judgement).

the treaty how the Yakamas understood it.[48] As such, this was a fairly cut and dry case for Justice Gorsuch. At the very end of his opinion, Justice Gorsuch made a remark that seemed to signal a great deal of sympathy for the position of Native Americans with respect to treaties. He explained:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The States is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.[49]

In some respects, this might be just be an example of nice, but ultimately empty, rhetoric. However, the other, more prominent treaty case that the Court has decided during Justice Gorsuch's tenure affirms the notion that Justice Gorsuch truly is concerned with the inequities in treaty negotiations between the United States and Native Americans.

The importance and immediate impact of *McGirt v. Oklahoma* is evidenced by the fact that Oklahoma asked the Court to overrule it just one year later.[50] Oklahoma's Attorney General claimed, "No recent decision of this Court has had a more immediate and destabilizing effect on life in an American State."[51] That is quite the bold statement for a case that was decided during the same term as *Bostock, Ramos,* and *Espinoza*, all of which had fairly enormous immediate consequences. Yet, the statement also points to just

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[48] *Cougar Den,* (slip op. at 2) (Gorsuch, J., concurring in judgement).

[49] *Cougar Den,* (slip op. at 11) (Gorsuch, J., concurring in judgement).

[50] Chris Casteel, "Oklahoma attorney general urges Supreme Court to overturn McGirt," *Oklahoman,* August 6, 2021, https://www.oklahoman.com/story/news/local/oklahoma-city/2021/08/06/oklahoma-attorney-general-urges-us-supreme-court-overrule-mcgirt/5514873001/.

[51] Ibid.

how disruptive *McGirt* was. As a result of the decision, Oklahoma lost the ability to prosecute Native Americans on a large portion of northeastern Oklahoma, including most of Tulsa, despite having done just that for much of the past century. The dissent characterized the decision as one that would "profoundly destabilized the governance of eastern Oklahoma."[52] In light of all of this, Justice Gorsuch suggested that the case was actually rather easy; Congress established the Creek reservation and "[b]ecause Congress has not said otherwise, we hold the government to its word."[53]

The central question in *McGirt* was whether the Creek reservation that had been established in 1833 after the Trail of Tears had been disestablished. Jimcy McGirt, a member of the Seminole Nation, was convicted in an Oklahoma state court of a number of serious crimes that took place on the land given to Creek in 1833. So why does it matter whether the reservation still existed? Essentially, the Major Crimes Act gives "exclusive jurisdiction" to the United States over "[a]ny Indian who commits" crimes such as the one Mr. McGirt committed within "the Indian country."[54] All of this means that if the Creek reservation still exists, the state of Oklahoma could not prosecute Mr. McGirt. Of course, this was not an uncommon occurrence. For the better part of the last century, Oklahoma had been prosecuting crimes committed by Native Americans on the Creek reservation. Thus, the stakes for the case were high. The Court's recognition that the Creek reservation had not been disestablished jeopardized decades of prosecutions, but in Justice Gorsuch's view "something we will not and may never do" is "to defer to

[52] *McGirt,* (slip op. at 1) (Roberts, C.J., dissenting).

[53] *McGirt,* (slip op. at 1).

[54] 18 U.S.C. §1153(a).

[Oklahoma's] usual practices *instead of* federal law."[55] Congress had established a reservation and never clearly disestablished it.

To arrive at this conclusion, Justice Gorsuch rejected a number of arguments that Oklahoma made claiming that Congress had disestablished the Creek reservation. Justice Gorsuch conceded that it is "clear that Congress has since broken more than a few of its promises to the Tribe."[56] Nevertheless, he explained, "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress."[57] It is not the role of courts under our system of government to adjust reservation boundaries. In this case, as in others, there was nothing stopping Congress from disestablishing the Creek reservation. "History shows that Congress knows how to withdraw a reservation when it can muster the will."[58] Congress might have taken a number of steps to prepare the reservation for disestablishment, but it never actually took the final step according to Justice Gorsuch. Yes, Congress transferred the reservation lands from a community title to individual plots, but that is just a first step toward disestablishment, and "to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination."[59] Next, and perhaps most importantly, Oklahoma argued that even if Congress had not affirmatively disestablished the Creek reservation, everyone believed that they had and decades of practice had implicitly

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[55] *McGirt,* (slip op. at 35).

[56] *McGirt,* (slip op. at 6).

[57] *McGirt,* (slip op. at 7).

[58] *McGirt,* (slip op. at 8).

[59] *McGirt,* (slip op. at 12).

disestablished the reservation. Oklahoma found little sympathy for these arguments from Justice Gorsuch. He explained that courts should not "favor contemporaneous or later practices *instead of* the laws Congress passed."[60] To do so "would be the rule of the strong, not the rule of law."[61] Just because white settlers in Oklahoma mistakenly defied the United States's treaty terms with the Creek does not change the clear language of those treaties. Indeed, throughout the *McGirt* opinion, Justice Gorsuch expressed clear sympathy for the plight of the Creek Nation. His opinion highlighted time and time again how the promises given to the Creek have been broken, and he characterized Oklahoma's argument as an attempt to "treat Native American claims of statutory right as less valuable than others."[62] Following the pattern from his *Cougar Den* opinion, *McGirt* concluded with a fairly poignant passage that sums up Justice Gorsuch's approach to Native American law fairly nicely:

> [M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.[63]

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[60] *McGirt,* (slip op. at 18).

[61] *McGirt,* (slip op. at 28).

[62] *McGirt,* (slip op. at 21).

[63] *McGirt,* (slip op. at 42).

Thus, in some ways, Justice Gorsuch's elevation to the Supreme Court should be cause for optimism among Native American tribes.[64] His approach to textualism and sympathy for Native Americans appears to buck the more traditional model of Republican-appointed judges over the last thirty years.[65]

There are two pertinent aspects of Justice Gorsuch's jurisprudence that we can distill from his opinion in *McGirt.* Both of these elements have appeared in prior cases, and it should come as no surprise that they reappear here. First, Justice Gorsuch is unwilling to fill in the gaps for Congress. He wants Congress to be explicit when it acts. It is not enough for Congress to take a couple of steps that perhaps in sum add up to disestablishment. Chief Justice Roberts's dissent is fairly compelling on the point that Congress likely wanted to disestablish the Creek reservation and undertook a number of steps toward this goal. However, taking us to the edge of disestablishment is not enough for Justice Gorsuch. For him, the Court will not "lightly infer such a breach once Congress has established a reservation."[66] In other words, given the nature of treaties between the United States and Native American tribes, there is a high bar for disestablishment, and that bar can only be satisfied by Congress explicitly eliminating the reservation. In fact, *McGirt* contains one of Justice Gorsuch's clearest statements of his desire for Congress to be clear when it acts:

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[64] Justice Gorsuch has provided a critical fifth vote in favor of the tribes three times in his career so far. All three times he was joined by the four more liberal Justices. As a result, Justice Barrett's replacement of Justice Ginsburg may mean that Justice Gorsuch's vote only adds a fourth vote to the dissent in the future.

[65] Grant Christensen, "Predicting Supreme Court Behavior in Indian Law Cases," *Michigan Journal of Race and Law* 26, no. 1 (Fall 2020): 73-74.

[66] *McGirt,* (slip op. at 7).

> Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives. […] So it's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.[67]

Obviously, this passage is framed around Native American treaties, but the underlying sentiment applies fairly consistently across Justice Gorsuch's jurisprudence. Time and again, he refuses to bend the law in order to accomplish what seems to be the goal of Congress. Second, Justice Gorsuch brushes aside concerns about reliance interests and the practical impact of his decision. Oklahoma, the United States as *amicus curiae,* and the dissent argued that ruling in favor of Mr. McGirt would disrupt decades of practice. Nevertheless, Justice Gorsuch remained unmoved, claiming that "the magnitude of the legal wrong is no reason to perpetuate it."[68] To be sure, Justice Gorsuch pointed to some ways that the Creek Nation and Oklahoma could mitigate possible disruption, but it was not an overwhelming concern for him. In fact, he provided *Ramos* as an example of the unimportance of reliance interests. There, he argued, the threat of having to retry a large number of convictions was not enough to overcome *stare decisis,* so that concern holds even less water in this case where it is just treaty interpretation with no prior precedents to bind the Court.[69] Again, he summarized his overarching position quite succinctly in

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[67] *McGirt,* (slip op. at 7-8).

[68] *McGirt,* (slip op. at 38).

[69] *McGirt,* (slip op. at 39).

McGirt: "dire warnings are just that, and not a license for us to disregard the law."[70] Thus, Justice Gorsuch's approach to Native American treaties departs slightly from his usual form of textualism (and it clearly differentiates him from the other conservatives on the Court), but many of the central elements of his jurisprudence remain unchanged in this context.

Bostock v. Clayton County

Much of the impetus for this thesis rests on *Bostock v. Clayton County.* Prior to this decision, much of the legal world saw Justice Gorsuch as a traditional, conservative textualist. His application of textualism in this case sent shockwaves through the conservative legal movement. Chief Justice Roberts's decision to side with the liberals could be explained away—many conservative thinkers already doubted his commitment to conservative results—but this was a decision by the heir to Justice Scalia purporting to use the very framework to which Justice Scalia dedicated his life. Yet here the method of interpretation that conservative legal thinkers had hailed as the one true faith was being used to justify the most important LGBTQ rights decision since *Obergefell v. Hodges.* *Bostock* triggered a cascade of questions along the same lines of those mentioned in the introduction to this thesis. Namely, is this even a textualist opinion, and if so, what does that mean for the future of textualism? I contend that *Bostock* is, in fact, both consistent with textualism and Justice Gorsuch's overarching jurisprudence.

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[70] *McGirt,* (slip op. at 41).

This section proceeds in five parts. First, it examines Justice Gorsuch's reasoning in *Bostock* to illustrate how he reaches his conclusion. Next, it turns to the dissents' reasoning and how Justice Gorsuch responds to Justices Alito and Kavanaugh. Then, it looks at various critiques authors outside the Court have lobbed at the *Bostock* decision. These critiques range everywhere from arguments that *Bostock* did not go far enough to arguments that textualism as a whole ought to be abandoned. Following this, there is a discussion of how *Bostock* could be seen as a departure from Justice Gorsuch's jurisprudence. After all, *Bostock* raises serious fair notice and separation of powers concerns. Nevertheless, the final portion of this section explains why *Bostock* is consistent with Justice Gorsuch's conception of due process. It looks at elements of the decision that are found throughout his other decisions, and it explains why *Bostock* does not mean that conservative legal scholars should give up on textualism…or Justice Gorsuch.

To begin, *Bostock v. Clayton County* is actually the name given to three consolidated cases: *Bostock v. Clayton County, Altitude Express, Inc. v. Zarda,* and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC.* Two of the cases (*Bostock* and *Altitude Express*) asked the Court whether Title VII of Civil Rights Act of 1964 prohibits an employer from firing an employee because of the employee's sexual orientation. The third (*R.G. & G.R. Harris Funeral Homes*) asked the Court whether the same provision of law prohibited the firing of an employee based on transgender status. For the purposes of these cases, the three employers all agreed that they fired their respective employees

for being gay or transgender.[71] Justice Gorsuch, writing for himself and five other members of the Court, held that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[72]

Justice Gorsuch offered two main arguments in support of his conclusion. He began, characteristically, with the text of Title VII. First, he explained that the term "sex" in 1964 meant essentially the same thing it means today—one's status as male or female per one's reproductive biology. The employees contended that even in 1964, "sex" had a broader meaning than that, but according to Justice Gorsuch, even under a narrower definition of sex the case came out the same.[73] More important is Title VII's prohibition of discrimination "because of" sex. The use of this language means that it incorporates the traditional but-for causation standard. Justice Gorsuch characterized this standard as an inquiry where all we have to do is "change one thing at a time and see if the outcome changes."[74] The importance of but-for causation is that employers cannot point to some other factor that also contributed to the firing of an employee to avoid liability; if sex played a role, Title VII's standard is satisfied.[75] Next, Justice Gorsuch turned to the term "individual." "The consequences of the law's focus on individuals rather than groups are

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[71] *Bostock,* (slip op. at 4).

[72] *Bostock,* (slip op. at 2).

[73] *Bostock,* (slip op. at 5).

[74] Ibid.

[75] *Bostock,* (slip op. at 6).

anything but academic," according to him.[76] Rather, the use of "individual" ensures that employers cannot refute a Title VII claim by arguing that they discriminate against men and women because of sex equally. The law protects individuals. Discriminating against both men and women doubles liability—it does not eliminate it. From the statute's plain language, Justice Gorsuch arrived at the bottom-line conclusion that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."[77] To this end, he claimed that "homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."[78] A simple thought experiment hopefully clarifies his reasoning in practice. Imagine you have an employee whom you find out is married to a man. If that employee is a woman, she would be allowed to keep her job. If that employee is a man, he would be fired. Yes, you may be firing based on sexual orientation, but in doing so, you are treating male and female employees differently.[79] Sex, therefore, plays a role in the decision (even if it is not the only factor). Additionally, because Title VII protects each individual, it is

[76] *Bostock,* (slip op. at 8).

[77] *Bostock,* (slip op. at 12).

[78] *Bostock,* (slip op. at 10).

[79] Obviously, the thought experiment works the same way if the sexes are flipped.

not enough to argue that you would fire the female employee if she was married to a woman.

The second main argument that Justice Gorsuch made rests on the Court's prior Title VII cases. He turned first to *Phillips v. Martin Marietta Corp.*, where the Court held that the employer's policy of not hiring women who had young children even though men with children the same age could be hired violated Title VII. Similar to *Bostock,* the employer argued that the company did not discriminate because of sex, but rather because of the women's status as mothers. Nevertheless, according to Justice Gorsuch and the Court in *Phillips*, sex played a role in that decision, even if there were other factors at play, which is enough to trigger Title VII.[80] Next, Justice Gorsuch looked at *Los Angeles Dept. of Water and Power v. Manhart*, where female employees were required to contribute more to their pension plan than male employees because females statistically live longer than males. Again, Justice Gorsuch pointed out, the Court rejected this policy because Title VII protects individuals rather than groups. While the policy may have been "evenhanded at the group level" it was "discriminatory at the level of individuals."[81] Finally, in *Oncale v. Sundowner Offshore Services, Inc.,* Justice Gorsuch argued that the Court recognized that Title VII covered acts of discrimination—like a male employee who was sexually harassed by other male employees—that might fall outside of the scope of the original evil Congress had been attempting to eliminate.[82] Thus, Justice Gorsuch argued that his reading of Title VII broke no new ground. Instead, it was supported by

[80] *Bostock,* (slip op. at 13).

[81] Ibid.

[82] *Bostock,* (slip op. at 14).

previous cases that came to the same conclusions the Court had arrived at in this case: "An employer who fires an individual merely for being gay or transgender defies the law."[83]

"There is only one word for what the Court has done today: legislation" or at least that is what Justice Alito claimed in the opening line of his dissent.[84] Justices Alito's and Kavanaugh's dissents differed in tone, but not in their staunch criticism of Justice Gorsuch's opinion. Regardless of whether or not they are right on the merits, both dissents are well-written and make some forceful points. In fact, Justice Gorsuch spent eighteen of his thirty-three pages responding to the dissents. The first major argument that the dissents grabbed ahold of is the notion that "Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase."[85] In other words, the dissents were willing to concede that perhaps in a strictly literal sense discrimination on the basis of sexual orientation or gender identity might be discrimination on the basis of sex, but no one would say to a friend that they were fired because of their sex if they had been fired for their sexual orientation.[86] However, Justice Gorsuch argued that this missed the point of the inquiry because "these conversational conventions do not control Title

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[83] *Bostock,* (slip op. at 33).

[84] *Bostock,* (slip op. at 1) (Alito, J., dissenting).

[85] *Bostock,* (slip op. at 11) (Kavanaugh, J., dissenting); see also *Bostock,* (slip op. at 24) (Alito, J., dissenting).

[86] Justice Kavanaugh also made a compelling argument about the importance of avoiding literalism in the name of the rule of law and fair notice. Given the fundamental nature of fair notice for Justice Gorsuch's jurisprudence, I take up this topic later on in the discussion of whether *Bostock* is consistent with Justice Gorsuch's jurisprudence.

VII's legal analysis, which simply asks whether sex was a but-for cause."[87] "You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law," according to him.[88] Just as the women fired in *Phillips* would likely say that they were fired for being mothers, not because of their sex, but-for causation here is more expansive than our everyday usage of the term "sex."

The next argument that Justice Alito seized upon is one that fights the thought experiment offered earlier. There are two ways to approach this argument. The first is to say that the thought experiment proffers the wrong comparison. Instead of comparing a man who is fired for being married to another man with a woman who is not fired for being married to a man, we should be comparing him to a woman who would also be fired for being married to a partner of the same sex.[89] Under this comparison, women and men are treated equally, or so the reasoning goes. The second approach contends that it is not even necessary to know the sex of an employee in order to discriminate against them on the basis of sexual orientation or gender identity. For instance, a job application could have a box to check if you are transgender without having a box for what your sex is. From this, employers could refuse to hire transgender individuals without ever knowing what their sex is.[90] Justice Gorsuch's explained his response to these arguments fairly quickly. On the first front, he returned to the tried-and-true ground of *Phillips* and

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[87] *Bostock,* (slip op. at 16).

[88] *Bostock,* (slip op. at 17).

[89] *Bostock,* (slip op. at 16-17) (Alito, J., dissenting).

[90] *Bostock,* (slip op. at 9) (Alito, J., dissenting).

Manhart to reiterate that Title VII protects individuals, not groups. Firing all gay employees regardless of sex might treat groups equally, but not individuals.[91] On the second front, he decided to enter the fray with his own new hypothetical. Imagine, he suggested, a box on a job application that must be checked if you are black or Catholic. Surely just because the employer does not know which of these categories you fall into it would not help the employer avoid Title VII liability. The same principle applies here.[92] "Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicants' sex."[93] In other words, the concepts are so intertwined that they cannot be separated even if one is unknown.

The dissents then pivoted to a debate that goes to the heart of whether *Bostock* is a textualist opinion: original public meaning. Again, in an attempted pincer movement, the arguments proceed along two major lines: historical evidence from 1964 and subsequent developments in the law. Justices Alito and Kavanaugh both pointed to a plethora of historical evidence to suggest that neither Congress nor the public at the time of Title VII's enactment in 1964 thought that it protected sexual orientation or gender identity.[94] Indeed, Justice Gorsuch did not seem to really contest this argument, admitting that "we

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[91] *Bostock,* (slip op. at 17).

[92] To be completely honest, Justice Alito might have the better of Justice Gorsuch here. It is not immediately clear that the "black or Catholic" box works in the same way that a "homosexual" or "transgender" box would because being both black or Catholic would be protected under Title VII. At best, it seems that Justice Gorsuch's point is somewhat ancillary. For an interesting exchange on this point, see *Bostock,* Transcript of Oral Argument, 69-70.

[93] *Bostock,* (slip op. at 19).

[94] *Bostock,* (slip op. at 25-35, 40-42) (Alito, J., dissenting); *Bostock,* (slip op. at 13) (Kavanaugh, J., dissenting).

must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally."[95] But why does all of this matter? Because, according to the patron saint of textualism, laws "mean what they conveyed to reasonable people at the time."[96] Justice Gorsuch's response, however, is that the debate is not about what Title VII means, but the result it produces. The real thrust of the dissents' historical arguments is that "because few in 1964 expected today's *result,* we should not dare to admit that it follows ineluctably from the statutory text."[97] Returning once more to *Oncale,* Justice Gorsuch explained that just because Congress and the public did not expect the law's application to a certain group, the plain language of the text does not change. He claimed, "[A]pplying protective laws to groups that were politically unpopular at the time of the law's passage […] often may be seen as unexpected. But to refuse enforcement just because of that […] would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."[98] In essence, Justice Gorsuch accused the dissenters of focusing in actuality on the original *intent* of the law, not the original *meaning.*[99]

According to the dissents, if the evidence from 1964 is not enough, the subsequent history of Title VII confirms that it does not protect sexual orientation or

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[95] *Bostock,* (slip op. at 25).

[96] Scalia and Gardner, *Reading Law,* 16.

[97] *Bostock,* (slip op. at 26).

[98] *Bostock,* (slip op. at 27-28).

[99] Ironically, it appears the original intent of the addition of the term "sex" to Title VII was to kill the bill. See *Bostock,* (slip op. at 41) (Alito, J., dissenting).

gender identity. In what Justice Gorsuch characterized as the "cannon of donut holes," the dissents suggested that if Congress meant to cover sexual orientation or gender identity, it would have said so.[100] Justice Kavanaugh, in particular, pointed out that every federal (and very nearly every state) statute and executive order since the Civil Rights Act of 1964 that included protections for sexual orientation had included both the terms "sex" and "sexual orientation," which suggests that Congress and the public did not understand "sex" to cover sexual orientation; likewise, he noted that the Court's own gay rights cases, like *Obergefell* and *Lawrence*, had never treated sexual orientation the same as sex.[101] In his view, *Obergefell* would have been a much easier case if the Court could have treated it as routine sex-based discrimination. Further on the judicial front, Justice Kavanaugh highlighted the fact that until the last couple of years, lower federal courts had unanimously rejected the idea that Title VII protected gender identity or sexual orientation.[102] All of this, the dissents argued, reinforced the fact that the original public meaning of Title VII did not encompass sexual orientation or gender identity. In response, Justice Gorsuch made a couple of points. As to why Congress has included "sexual orientation" in some laws, but not others, he claimed, "All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a

[100] *Bostock,* (slip op. at 19).

[101] *Bostock,* (slip op. at 13-21) (Kavanaugh, J., dissenting).

[102] *Bostock,* (slip op. at 21-22) (Kavanaugh, J., dissenting).

different and earlier Congress did adopt."[103] Perhaps the reason Congress has never amended Title VII to include sexual orientation or gender identity was because it believed Title VII already covered those terms. Likewise, while judges may not have immediately recognized the true breadth of Title VII, that is not an anomaly. Justice Gorsuch detailed a long history of judges who initially rejected Title VII claims for acts that would eventually be recognized as violations of Title VII's protections, such as refusing to hire only women with young children.[104] Thus, for Justice Gorsuch, none of the post-enactment history of Title VII is enough to overcome its plain text.

Finally, the dissent seems to fall back on policy arguments. Admittedly, recognizing that Title VII covers sexual orientation and gender identity is a seismic shift in Title VII law and a host of other legislation that uses identical or similar language. In fact, Justice Alito cataloged over one hundred federal statutes to which *Bostock*'s reasoning might apply.[105] Yet, Justice Gorsuch was quick to downplay these concerns. In response to the famous line from *Whitman v. American Trucking Assns., Inc.* that "Congress […] does not […] hide elephants in mouseholes," Justice Gorsuch was candid.[106] He explained:

> We can't deny that today's holding […] is an elephant. But where's the mousehole? Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on

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[103] *Bostock,* (slip op. at 20) (quoting Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633, 650 (1990)).

[104] *Bostock,* (slip op. at 29-30).

[105] *Bostock,* (slip op. at 44, 66-81) (Alito, J., dissenting).

[106] *Whitman,* 468.

> the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries—virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.[107]

Furthermore, Justice Gorsuch minimized many of the concerns the dissents presented regarding future questions of law. He made it very clear that questions about other laws involving sex-based discrimination and even other applications of Title VII to things like bathrooms and locker rooms were not before the Court.[108] He was also quick to point out that the First Amendment would still protect Americans who have religious objections to homosexuality, and he even suggested that the Religious Freedom Restoration Act might supersede Title VII if necessary.[109] Again though, he reiterated that none of those questions were before the Court in *Bostock.* For now, it was enough to abide by the plain meaning of the text to resolve the case.

Of course, Justices Thomas, Alito, and Kavanaugh were not the only ones who thought that Justice Gorsuch's opinion was flawed. Critiques from academia were soon quick to roll in (and *Bostock* continues to be a ripe field for law professors seeking tenure). The dissents in *Bostock* did a good job of encapsulating the arguments from those who thought that Justice Gorsuch was simply misapplying the tools of textualism, so the main external critiques we will focus on are those from the more liberal side of things who felt that the outcome of *Bostock* was good, but the reasoning was flawed. Then, we

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[107] *Bostock,* (slip op. at 30).

[108] *Bostock,* (slip op. at 31).

[109] *Bostock,* (slip op. at 12).

will explore the idea floated by some conservative thinkers that perhaps the problem is not that Justice Gorsuch used a flawed version of textualism but that textualism itself is flawed.

One of the major complaints levied against the *Bostock* opinion was that it did not go far enough. For example, Professor Kreis argued, "The Court missed an opportunity to draw a direct line through misogyny, homophobia, and transphobia, exposing the common denominator of gender stereotypes that bind all three forms of sex discrimination."[110] According to him, Title VII incorporates an anti-stereotyping principle on which the Court should have focused more attention. In his view, this would have led to a more expansive reading and application of Title VII, thereby incorporating greater protections for members of the LGBTQ community.[111] Nor would such a move have broken new ground. Kreis details a long line of cases that suggest that the "unlawful use of these sex stereotypes has been long recognized in the statutory anti-discrimination context and in constitutional law, with courts blocking laws, policies, and practices that harm women because of gender role expectations."[112] Similarly, Professor Desai criticized the *Bostock* opinion for considering whether "discrimination" had actually occurred. In his view, this framed Title VII in the wrong light: "Title VII is not an anti-discrimination statute, at least not as we ordinarily conceive the concept of

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[110] Anthony Kreis, "Unlawful Genders," *Law and Contemporary Problems* (Forthcoming): 4.

[111] Kreis, "Unlawful Genders," 24-25.

[112] Kreis, "Unlawful Genders," 25.

'discrimination.'"[113] All that should have been needed to resolve the debate in *Bostock* is the term "discharge." By bringing the word "discriminate" into the argument, Desai claimed that all three opinions muddied the meaning of Title VII.[114] As a result, "all three of the opinions in Bostock misread Title VII's language," which will force future litigants to prove that their employer made an unjust distinction that amounts to discrimination, instead of just proving that they were fired for their protected status.[115] In sum, some scholars in the wake of *Bostock* applauded the decision, but worried it did not go far enough.

The next major complaint against the *Bostock* opinion was the heavy emphasis it placed on textualism. There are two major strands of argument that are worth touching upon. The first is that the text of Title VII is not sufficient to reach the result that Justice Gorsuch reached. To be clear, this criticism is distinct from the conservative critique that the Court reached the wrong conclusion. Rather, this criticism suggests that the Court ought to have considered other factors in reaching its conclusion. In his aptly titled paper, "Text is Not Enough," Professor Desai argued that the *Bostock* conclusion made sense from a common law, multi-modal perspective. He claimed that "choosing between the majority and the dissents required common-law thinking."[116] In other words, both readings of the text in *Bostock* were plausible, and both sides offer compelling

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[113] Anuj Desai, "Is Title VII an 'Anti-Discrimination' Law?," *University of Colorado Law Review* (Forthcoming): 1.

[114] Desai, "Title VII," 5.

[115] Desai, "Title VII," 6.

[116] Anuj Desai, "Text is Not Enough," *University of Colorado Law Review* (Forthcoming): 8.

hypotheticals that seem to support their position; the deciding factor, therefore, "requires deciding about the appropriateness of particular analogies, the bread-and-butter of the common law."[117] By attempting to frame *Bostock* as mere textualist decision, the Court was dishonest about what it was actually doing. Professor Spindelman made a similar argument, claiming that the true justification for *Bostock* was not in Title VII's text, but in the normative ideals of legal justice that the Court has developed in the sphere of LGBTQ rights.[118] In short, the Court has over the course of the last twenty years developed a certain normative stance that cuts in favor of expanding LGBTQ rights in the name of dignity and equality. While Justice Gorsuch's opinion lacked the "kind of inflated pseudo-philosophic pontification that [Justice] Kennedy favored," it still reflects a background value judgement that the Court has made.[119] As Professor Spindelman explained, "[T]he Court's constitutional pro-LGBT rights jurisprudence provides positive-law content to the rule-of-law norm of legal justice that structures the Court's *Bostock* opinion, yielding a ruling advancing a rule-of-law ideal of legal justice that governmental actors, including courts, must heed in the full run of cases involving LGBT rights—even where, as in *Bostock* itself, no formal claim of constitutional right is involved."[120] All of which seems to be a fancy (perhaps convoluted) way of saying that the Court's development of a pro-LGBTQ jurisprudence in the constitutional arena

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[117] Desai, "Text is Not Enough," 20.

[118] Marc Spindelman, "*Bostock*'s Paradox: Textualism, Legal Justice, and the Constitution," *Buffalo Law Review* 69 no. 3 (May 2021): 557-558.

[119] Nelson Lund, "Unleashed and Unbound: Living Textualism in *Bostock v. Clayton County*," *The Federalist Society Review* 21 (2020): 158.

[120] Spindelman, "*Bostock*'s Paradox," 560.

spilled over into the statutory interpretation arena in *Bostock.* Thus, while *Bostock* purports to be a textualist opinion, there are plenty of scholars who have suggested more is going on behind the scenes in the Court's reasoning than Justice Gorsuch lets on in his opinion.

The second strand of argument related to the concerns about textualism is a worry about the so-called "triumph of textualism," particularly Justice Gorsuch's textualism.[121] The first alleged problem Justice Gorsuch's textualist treatment of "because of." "*Bostock* at once enshrined a formalistic approach to disparate-treatment law and set up anyone who seeks to implement that approach in a coherent way for failure."[122] By focusing on "but-for" causation, Professor Eidelson argued that Court's opinion was too formulaic. Yes, the formula worked out in favor of Mr. Bostock in this case, but he worried that Justice Gorsuch's emphasis on the text alone would forever reshape Title VII's disparate-treatment analysis. "*Bostock* will orient disparate-treatment law for years to come, so it matters a great deal how courts and commentators come to understand the course that it set," according to him.[123] Indeed, one of the major concerns about *Bostock*'s almost formulaic adherence to the literal text of Title VII is how to reconcile its reasoning with prior cases that authorized race and sex based preferences in hiring.[124] *Bostock* "lays the groundwork for the Court to" reverse those lines of cases and return to the plain meaning

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[121] Jonathan Skrmetti, "The triumph of textualism: 'Only the written word is the law,'" *SCOTUSblog,* June 15, 2020, https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/.

[122] Benjamin Eidelson, "Dimensional Disparate Treatment," *Southern California Law Review* (Forthcoming): 2.

[123] Eidelson, "Dimensional Disparate Treatment," 59.

[124] Lund, "Unleashed and Unbound," 163-165.

of Title VII.[125] On a broader, but related, note, some more liberal commentators worried that *Bostock* would lend credibility to Justice Gorsuch's version of textualism. The main worry is that Justice Gorsuch's "textualism repeatedly results in a crabbed, formalistic, and narrow reading of the text that heightens the evidentiary burden of a plaintiff who has been wronged."[126] In essence, we should not just be worried about a very formalistic reading of Title VII because that formalism may spill over to other civil rights statutes as well. This concern is, of course, rooted in a presumption that Justice Gorsuch's textualism is "bad" for rights. While there may be some cases, like *Bostock*, where his focus on the plain meaning of the text actually seems to expand the scope of a civil rights law, there seems to be some consensus among those concerned about textualism's ascendancy that his textualism will more often than not "severely restrict [a] statute's remedial scope."[127] In truth, this boils down to an overarching complaint against textualism, not so much an argument against Justice Gorsuch's opinion in *Bostock.* The real concern is that textualism is becoming dominant in statutory interpretation.

Of course, liberal scholars were not the only ones who had worries about textualism following *Bostock.* Many conservative scholars proposed that it was time for the conservative legal movement to reevaluate the validity of textualism. As Josh Hammer, a leading proponent of this idea, put it, "The time has indeed come for those in America's modern legal conservative movement to engage in sober, contemplative self-

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[125] Lund, "Unleashed and Unbound," 159.

[126] Elena Schiefele, "When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn't Be So Quick to Praise *Bostock*," *Washington and Lee Law Review* 78, no. 3 (Summer 2021): 1108.

[127] Schiefele, "Statutory Interpretation," 1156.

reflection—to reassess our first principles, retire our outmoded bromides, and rebalance prudence and dogma anew to reach a jurisprudence that actually serves our substantive goals."[128] The most prominent theory that has developed post-*Bostock* is known as "common good originalism" (Hammer's term) or "common good constitutionalism" (Professor Vermeule's term). Both Hammer and Professor Vermeule have argued that originalism and textualism were necessary features in the 1970s and 1980s as the conservative legal movement struggled to combat the impact of the Warren and Burger Courts; now, however, with the conservative legal movement ascendant, it is time to adopt a new approach—one that does not have to pretend to be neutral. To quote Professor Vermeule:

> This approach should take as its starting point substantive moral principles that conduce to the common good, principles that officials (including, but by no means limited to, judges) should read into the majestic generalities and ambiguities of the written Constitution. These principles include respect for the authority of rule and of rulers; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and workers' unions, trade associations, and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to "legislate morality"—indeed, a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority. Such principles promote the common good and make for a just and well-ordered society.[129]

In other words, common good constitutionalism would cast aside fidelity to the original meaning of a text in the name of the common good of society. According to its

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[128] Josh Hammer, "Common Good Originalism: Our Tradition and Our Path Forward," *Harvard Journal of Law and Public Policy* 44, no. 3 (Summer 2021): 920.

[129] Adrian Vermeule, "Beyond Originalism," *The Atlantic,* March 31, 2020. https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

proponents, this jurisprudence is actually more faithful to the original constitutional philosophy of the Framers. The Framers, early American jurists, and their English common-law forefathers were not philosophically neutral in their aims; rather, they acted toward ends that were designed to benefit the whole of society.[130] However, there is another dimension to this argument. Up until the Rehnquist Court (and even after that), the liberal legal movement was fairly successful in leaving its philosophical imprint on the law. In response to this, textualism was supposed to eliminate a judge's philosophical leanings from his or her decision making. Yet, as Professor Bradley said, "The solution to bad philosophy is sometimes better philosophy, not no philosophy at all."[131] In essence, part of the argument for common good constitutionalism seems to fall along the lines of "well, liberal judges decided cases based on their personal philosophies when they had a majority on the Court, so now that we have a strong majority, conservative judges should look to their own personal philosophies too." The debate over common good constitutionalism could probably fill another thesis, and it does not seem as though Justice Gorsuch has been swayed by the arguments for it, but it is important to note that *Bostock* really was a major factor that brought common good constitutionalism into the mainstream for debate.

There is a lot we could make of these criticisms. That being said, in some ways, the criticism leveled at Justice Gorsuch's opinion are not that unique or fatal. For every major decision there will be those who think the Court should have gone farther. There

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[130] Hammer, "Common Good Originalism," 927-942.

[131] Gerald Bradley, "Moral Truth and Constitutional Conservatism," *Louisiana Law Review* 81, no.4 (Summer 2021): 1326-1327.

will be those who think textualism is flawed even when textualist judges reach "good" decisions. And as long as there are six conservative Justices on the Court, there will be those who advocate for even more conservative jurisprudential theories. However, these critiques do not tell us much about whether *Bostock* was consistent with Justice Gorsuch's jurisprudence. We can debate whether *Bostock* was correctly decided until the cows come home, but for the purposes of this thesis, the bigger question is whether *Bostock* is an outlier. Throughout this thesis I have argued that there are two key elements of Justice Gorsuch's jurisprudence: the separation of powers and fair notice. Yet, for all the emphasis he places on these two concepts, *Bostock* could easily be seen as a direct contradiction of those crucial principles.

Beginning with the separation of powers, the decision in *Bostock* could be construed as an endorsement of the idea that "courts should 'update' old statutes so that they better reflect the current values of society."[132] Indeed, both dissents criticized the Court for legislating from the bench. As Justice Kavanaugh characterized it, *Bostock* "boils down to one fundamental question: Who decides?"[133] Justice Alito was even more direct, saying, "There is only one word for what the Court has done today: legislation."[134] In his view, if Congress wanted to protect sexual orientation and gender identity, it should have said so. After all, Congress has had plenty of opportunities to do just that.[135] This

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[132] *Bostock,* (slip op. at 3) (Alito, J., dissenting).

[133] *Bostock,* (slip op. at 1) (Kavanaugh, J., dissenting).

[134] *Bostock,* (slip op. at 1) (Alito, J., dissenting).

[135] *Bostock,* (slip op. at 2) (Alito, J., dissenting); *Bostock,* (slip op. at 2) (Kavanaugh, J., dissenting)

was not an issue that was off of Congress's radar. There have been numerous attempts to amend Title VII over the years, but each time Congress has failed to do just that despite including protections for things like sexual orientation in other legislation. For the dissents, it seems strange that Congress would attempt to and fail to pass an amendment to Title VII to do something that Title VII already does. Plenty of scholars have also suggested that Justice Gorsuch's opinion in *Bostock* "not only violates [Article] III, but [Article] I of the Constitution. Indeed, such a violation would undermine Congress's role in deliberation and legislation."[136] While the dissents were quick to point out the importance of the separation of powers and the dire consequences of failing to abide by those principles, Justice Gorsuch has made similar warnings about the importance of the separation of powers. Ultimately, whether or not Justice Gorsuch legislated from the bench depends on whether or not you believe "Title VII, in its current form, fails to protect such individuals from discrimination and employment termination based on their choice of gender."[137] If you disagree with Justice Gorsuch's statutory interpretation in *Bostock,* then it does look a lot like judicial policymaking.

Turning to fair notice, *Bostock* seems to cut against an important aspect of textualism that Justice Gorsuch has been keen to emphasize. Justice Kavanaugh, in particular, excoriated the majority opinion for taking a "literalist approach" that ignored the ordinary meaning of the term "sex" in favor of more formalistic approach.[138] Ignoring

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[136] Lee Francis, "Remembering Congress and the Separation-of-Powers: The Case Against 'Judicial Updating' of Title VII of the Civil Rights Act of 1964," *Southern University Journal of Race, Gender, and Poverty* 12, no.1 (2021): 39.

[137] Francis, "Remembering Congress," 2.

[138] *Bostock,* (slip op. at 5) (Kavanaugh, J., dissenting).

the ordinary meaning deprives the public of fair notice. "Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning."[139] The fair notice concerns in *Bostock* were reinforced by historical practice. Justice Gorsuch's opinion suggested that for roughly fifty years judges (and most of the public) had been reading Title VII incorrectly. It certainly seems unfair to the employers to hold them liable for conduct that they could have reasonably understood as not violating Title VII. Additionally, Justice Gorsuch's reading of Title VII seems to run counter to his request that Congress be clear and explicit when it acts. To be sure, he argued that there is no rule suggesting that "Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates an exception," but given all that we know about Justice Gorsuch, it seems like he would be more demanding before inferring a fundamental expansion of Title VII. Again, much of this problem is rooted in the statutory interpretation question itself. The majority believed that sexual orientation and gender identity were fairly included within the phrase "because of sex." The dissents did not. Altogether, however, *Bostock* ought to raise some eyebrows with respect to Justice Gorsuch. At least on the surface, it appears that many of the principles he has claimed are central to our legal order were cast aside in this case.

Thus far, I have discussed a great deal of criticism that has been leveled at Justice Gorsuch for his *Bostock* opinion. If you were to read just the last fifteen pages, you might believe that *Bostock* was an outlier with respect to Justice Gorsuch's jurisprudence, if not

[139] *Bostock,* (slip op. at 7) (Kavanaugh, J., dissenting).

a total abandonment of the pillars of his judicial philosophy. Nevertheless, many of the elements present in *Bostock* are actually present throughout Justice Gorsuch's jurisprudence. To be sure, *Bostock* does illustrate that "Justice Gorsuch's […] textualism focuses more narrowly on the statutory text than Justice Scalia's […] textualism," but just because Justice Scalia might have decided the case differently does not mean that *Bostock* is inconsistent with Justice Gorsuch's approach to textualism.[140] As the saying goes, Justice Scalia is not walking through that door. Thus, it is all the more important to explain why *Bostock* is consistent with fair notice and the separation of powers. If Justice Gorsuch is the new face of textualism, it would be nice if *Bostock* were not a jagged scar across that face.

In truth, Justice Gorsuch's best defense in the face of both separation of powers and fair notice concerns is the plain text of Title VII. According to him, the language of Title VII is straightforward and unambiguous, and "when the meaning of a statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."[141] This pretty quickly resolves the separation of powers concern. Yes, the dissents in *Bostock* characterized it as undemocratic policymaking, but this is a common theme across decisions of all stripes. Critics of *Roe, Lopez, Citizens United, Obergefell,* and *Shelby County* have all argued that the Court was making decisions that the public had rejected. In *Roe* and *Obegefell,* the Court stripped from the public the ability to make

[140] Schiefele, "Statutory Interpretation," 1111.

[141] *Bostock,* (slip op. at 24).

decisions about certain aspects of abortion and marriage. In *Lopez, Citizens United,* and *Shelby County,* the Court struck down democratically enacted policies. However, the majorities for those decision only thought they were giving effect to what was fairly included within the words of the text they were interpreting. Justice Gorsuch believed the text of Title VII included protections for sexual orientation and gender identity; therefore, the respect for the structure of our government and our democracy required the Court to effectuate that language. The dissents believed the text did not clearly include those protections; therefore, extending Title VII to cover sexual orientation and gender identity violated the democratic process. Even as he "usurps the role of Congress," Justice Gorsuch continues to stress the importance of the separation of powers.[142] For him, the separation of powers concerns cut both ways: "the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them."[143] To refuse to apply the plain language would violate the separation of powers. As such, Justice Gorsuch views *Bostock* as consistent with the role of judges and the rule of law.

Fair notice is a trickier subject. Part of the problem with fair notice in *Bostock* goes to the heart of a tension inherent within textualism. Namely, why is original public meaning key? Perhaps original public meaning has some value in terms of democratic norms, but if anything, focusing on the original public meaning almost seems to reduce the fair notice value of textualism. After all, "[t]here is no normative gauge for determining the time and expense a person ought to spend learning her legal obligations

[142] *Bostock,* (slip op. at 5) (Kavanaugh, J., dissenting).

[143] *Bostock,* (slip op. at 31).

or the amount of skill she is expected to possess. And fair notice is not necessarily impaired by recourse to extratextual sources so long as the rules of interpretation tell officials and citizens which materials to consult and which approach to adopt when reading law."[144] The meaning of the term "sex" has not changed since 1964, but if I am not a lawyer, how am I supposed to know that "because of" implies but-for causation? Likewise, Title VII's language may mean pretty much the same thing today as it did at its enactment, but what about laws like the one at issue in *New Prime*, where the plain meaning today does not align? Not everyone has their 1916 edition of *Webster's Collegiate Dictionary* at an arm's reach all the time. This gives rise to a fundamental problem: "perhaps we have too quickly rejected the position we can call *contemporary meaning textualism*."[145] If the point of textualism is for the current public to know what the law requires of them, should we not rely on the current meaning of words? For Justice Gorsuch, *Bostock* does not even implicate this question. The plain meaning of the terms at issue have not changed. What has changed are the "expected applications" of the statute.[146] Of course, the whole point of fair notice is that the public will know how the law will be applied. The point of this detour into the weeds of textualism and original public meaning is this: fair notice is not a simple concept. We do not come to the law *tabula rasa*, nor is the law always just what is written on the page. Rather, there is precedent, history, and custom which all affect how we understand the law. As a result, it

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[144] Benjamin Chen, "Textualism as Fair Notice?," *Washington Law Review* (Forthcoming): 1.

[145] Frederick Schauer, "Unoriginal Textualism," *George Washington Law Review* (Forthcoming): 6.

[146] *Bostock,* (slip op. at 26).

is fairly easy to see how one could arrive at the conclusion that Title VII does not protect sexual orientation or gender identity, at least at first glance.

Some of these problems may be impossible to overcome regardless of the interpretive method that a judge employs, but Justice Gorsuch does his best in *Bostock* and other cases to minimize the role that social context plays in determining original public meaning. It is in this way that Justice Gorsuch's textualism departs perhaps most starkly from Justice Scalia's (and the dissenters' in *Bostock*). While Justice Scalia was insistent that the text controls, he also recognized that "most communications involve not only bare semantic content—acontextual utterance meaning—but also pragmatic (in the technical sense) or contextual enrichments or other modifications that depend on more particular contexts."[147] In *Bostock*, Justice Gorsuch argued that the plain language of the statute was clear, so the context of its enactment and subsequent usage was not an issue the Court needed to consider. Justice Kavanaugh calls this literalism, but this really is not an outlier in Justice Gorsuch's jurisprudence. In other cases he has consistently downplayed the importance of practices, customs, and expectations at the time of a statute's enactment. To be sure, he has conceded that "[i]f during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment."[148] However, this relies upon there actually being an ambiguity within the text. In *Bostock,* there is not one. When

[147] Schauer, "Unoriginal Textualism," 24.

[148] *McGirt,* (slip op. at 18).

that is the case, "There is no need to consult extratextual sources when the meaning of statute's terms is clear. Nor may extratextual sources overcome those terms."[149] The context surrounding Title VII's enactment only muddies an already clear statutory meaning for Justice Gorsuch. Thus, fair notice demands that the Court simply apply the plain meaning of the text. Relatedly, Justice Gorsuch also downplayed reliance interest and the practical effects of *Bostock* in his opinion. Again, this is something we have seen him do time and time again. What matters most is applying what he believes to be the true meaning of the text. Whether it is *Ramos, Gamble*, or *McGirt,* Justice Gorsuch has shown a consistent willingness to downplay reliance interests and kick any possible consequences down the road. Thus, it is no surprise that he emphasized in *Bostock* the fact that many of the controversial questions about the scope of Title VII's reach were not before the Court and the fact that there may be workarounds (like RFRA) to some of the potential problems created by *Bostock.* While Justice Scalia may not have reached the same result in *Bostock,* many of the elements of the *Bostock* opinion are present throughout Justice Gorsuch's jurisprudence.

Bostock may not have resulted in the outcome many conservative commentators wanted. Indeed, many will never be convinced that *Bostock* was a legitimate application of textualism. Nevertheless, Justice Gorsuch applied what he read to be the plain meaning of the statute. *Bostock* does not represent a fundamental shift in his jurisprudence, nor is it a one-off outlier. Instead, it is consistent with his overarching jurisprudence. By following the plain language of Title VII to its natural conclusion, Justice Gorsuch still

[149] *McGirt,* (slip op. at 20).

emphasizes the separation of powers and fair notice. Textualism is not going to produce conservative results every time, and neither is Justice Gorsuch. While *Bostock* may have been a disappointment for some, Justice Gorsuch's opinion is not a reason to doubt textualism or Justice Gorsuch.

CHAPTER SIX

Conclusion

In the mind of some, Justice Gorsuch "has big ambitions;" he wants "intellectual leadership of the conservative legal movement."[1] That may be true, and he may very well gain that mantle. As such, understanding his jurisprudence is a worthwhile inquiry. Throughout this thesis, I have argued that Justice Gorsuch's jurisprudence uniquely emphasizes due process and its relationship with the separation of powers and fair notice. To this end, he has repeatedly reaffirmed the importance of judicial independence, attacked administrative deference, and attempted to revive the nondelegation doctrine in the name of the separation of powers. Additionally, his preference for clear-cut rules, aversion to judicial policymaking, and requirement that Congress be explicit reinforces the fair notice element of due process. In his view, when the rule of law is rooted in this conception of due process, individual rights and liberties are protected.

Justice Gorsuch is a committed textualist and originalist. According to him, these approaches to interpreting statutes and the Constitution provide both fair notice and respect for the separation of powers. However, as *Bostock* illustrates, Justice Gorsuch's textualism is much more literal. He primarily focuses on the plain meaning of the text and usually gives fairly short shrift to intentions or context. This sets him apart from other well-known textualists such as Justice Scalia or Thomas. That being said, many of the

[1] Noah Feldman, "Neil Gorsuch is Channeling the Ghost of Scalia," *Bloomberg*, September 26, 2021. https://www.bloomberg.com/opinion/articles/2021-09-26/supreme-court-justice-neil-gorsuch-wants-scalia-style-conservative-leadership.

arguments that Justice Gorsuch utilizes to defend textualism echo similar arguments that Justice Scalia developed. With respect to precedent, Justice Gorsuch tends to focus on making sure the law is correct and minimize reliance interests, especially when it comes to individual rights. Once again, this highlights his emphasis on the rule of law over policy considerations.

These fundamental ideas about due process are evident throughout Justice Gorsuch's jurisprudence. One of the main areas is decisions involving the structure and powers of government. As already mentioned, Justice Gorsuch argues that the separation of powers is an essential aspect of due process, and as a result, his writings tend to emphasize that idea. There are a couple of major areas where Justice Gorsuch has been particularly vocal about the importance of the separation of powers. The first is the nondelegation doctrine. According to him, this doctrine is essential to prevent the blurring of lines between the powers of the three branches. Likewise, his crusade against *Chevron* and *Auer* deference reflects a view that administrative deference fundamentally undermines due process by eroding the separation of powers and fair notice. The same due process rationale applies to his willingness (contra Justice Thomas) to employ the vagueness doctrine. All in all, Justice Gorsuch's jurisprudence with respect to the structures and powers of government illustrates nicely how the separation of powers and fair notice are intertwined. The two rely on each other, and together they form the basis for the rule of law.

Turning to rights and liberties, Justice Gorsuch once again demonstrates a commitment to due process tethered to the separation of powers and fair notice. In this

area, he shows a clear disdain for judicial balancing tests and other judicial innovations that seem to restrict liberties to a greater degree than during the Framing. In his view, amorphous, unclear standards undermine fair notice and allow judges to import their personal policy preferences into cases. Additionally, he consistently prioritizes the enforcement of due process guarantees over reliance interests or practical concerns. In the end, understanding rights and liberties as the Framers understood them matters a great deal to Justice Gorsuch. Fair notice demands that judges give effect to the guarantees of our Constitution while the separation of powers means that judges should not expand or constrict liberties by balancing them with policy concerns.

Finally, these same due process concerns play out with respect to statutory interpretation. Justice Gorsuch overwhelmingly relies on original public meaning with respect to statutory interpretation, which again is designed to promote fair notice and the separation of powers. He also rejects contemporary severance theory, which he sees as conflicting with the separation of powers. When interpreting treaties, Justice Gorsuch focuses on how Native Americans would have understood the treaty, and as *McGirt* demonstrates, he is unwilling to amend the terms of a treaty without an express action by Congress, regardless of the practical implications. Finally, despite suggestions to the contrary, *Bostock* is a textualist decision that fits within Justice Gorsuch's jurisprudence. The central takeaway from *Bostock* seems to be this: when the plain meaning of the text is clear, the Court's inquiry is at an end. It is not necessary to dive deeper into social context or legislative intent. The rule of law demands that courts apply the law as written

even when it has unforeseen or inconvenient results. This is a fundamental proposition within Justice Gorsuch's jurisprudence, and his opinion in *Bostock* reflects this notion.

I mentioned during the introduction to this thesis that my place in history has hamstrung some aspects of my analysis. Indeed, major changes are just around the corner for the Court. The Court is poised to release major decisions regarding abortion, gun rights, and more before the end of the Term. There is also Justice Breyer's imminent retirement which will reshape the Court. Finally, the Court's conservative majority continues to jostle for leadership of the next generation of conservative lawyers and jurists. Justice Gorsuch has clearly made himself a contender for that role, but other Justices, such as Justice Barrett, also act as a "credible, competing heir to Scalia."[2] Perhaps in thirty years it will seem obvious to us that Justice Gorsuch's jurisprudence was destined to become the dominant strand of conservative legal thought, or perhaps we will believe that his conception of due process was doomed from the start. Regardless, I do fundamentally disagree with Justice Gorsuch on one point. During his confirmation hearing, he responded to a Senator's question by claiming, "I have no illusions that I will be remembered for very long […] That is as it should be."[3] I might be biased from a year's worth of work on this thesis, but I doubt legal scholars will forget Justice Gorsuch anytime soon.

There is a tendency in popular parlance to group the Justices together by political party—a presumption that all the conservative or liberal Justices are the same. Often it is

[2] Ibid.

[3] Gorsuch, *A Republic,* 323.

convenient to compare Justices to their predecessors in an attempt to explain their jurisprudence. Yet, as Justice Gorsuch has made clear, Justices do not always fit neatly into boxes. He is not the next Justice Scalia, Kennedy, or Thomas. Neil Gorsuch is his own man.

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