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# Judicial Courage: Justice Gorsuch Ventures Out on His Own While Preserving Scalia's Principles

*GianCarlo Canaparo*

## KEY TAKEAWAYS

Justice Neil Gorsuch is a principled jurist keenly aware of his responsibility to protect our democratic tradition.

For Gorsuch, like Justice Antonin Scalia before him, constitutional principles trump ugly facts.

He is deeply committed to an originalist view of the Constitution and to upholding that document's protections for individual liberty.

Just over two years ago, Neil Gorsuch took the oath of office as an associate justice on the Supreme Court. In so doing, he filled the seat left empty by the late Justice Antonin Scalia. In his short time on the Court, Gorsuch has already shown himself a fitting replacement for Scalia in more ways than one.

Like Scalia, Gorsuch is a principled jurist keenly aware of his responsibility to protect our democratic tradition. He shares Scalia's concern that unrestrained judicial power is undemocratic, and so he shares Scalia's commitment to interpreting the Constitution according to its text and original meaning rather than his own personal preferences.<sup>1</sup> In his opening statement to the Senate Judiciary Committee, Gorsuch echoed a famous quote by Scalia when he said, "A judge who likes every outcome he reaches is probably a pretty bad judge, stretching for policy results he prefers rather than those the law compels."<sup>2</sup>

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Gorsuch shares another characteristic with Scalia: a commitment to protect the rights of the criminally accused. Scalia earned a reputation as the “best friend” that criminal defendants had on the Court.<sup>3</sup> His Sixth Amendment opinions,<sup>4</sup> in particular, were “pro-defendant.” His majority opinion in *Crawford v. Washington*<sup>5</sup> is probably his most famous. There, Scalia relied on the history of the Confrontation Clause<sup>6</sup> to conclude that any testimonial statements made outside of court by a witness to an alleged crime cannot be used in court against a defendant unless the witness is unavailable and the defendant had a prior chance to cross-examine him.<sup>7</sup>

Less famous, but just as monumental, was Scalia’s majority opinion in *Blakely v. Washington*.<sup>8</sup> There, the Court held that the Sixth Amendment right to a jury trial forbids judges from relying on facts not proved beyond a reasonable doubt to enhance a criminal sentence.<sup>9</sup> At times, Scalia’s opinions favoring criminal defendants surprised and frustrated “law-and-order” conservatives and frequently saw Scalia voting with the Democrat-appointed justices in criminal cases.<sup>10</sup> The facts of those cases were never pleasant—and the defendants never sympathetic.

In *Sykes v. United States*,<sup>11</sup> for example, the defendant had a history of violent armed robberies. His third robbery at gunpoint landed him before the Supreme Court, which considered whether, for the purpose of enhancing his sentence as a violent career criminal, a prior crime of fleeing by car from law enforcement was “a crime of violence” within the meaning of a vague statute. The court held that fleeing by car from arrest was violent and upheld his extended sentence.<sup>12</sup> No doubt law-and-order types supported the decision because it meant a dangerous man would spend many more years in prison than he otherwise would have. But Scalia dissented from the opinion, arguing that the law was so vague it was unconstitutional.<sup>13</sup> Scalia explained that something bigger than keeping a violent man off the streets was at stake. A vague criminal law, he said, “does not give a person of ordinary intelligence fair notice of its reach...and that permits, indeed invites, arbitrary enforcement.”<sup>14</sup>

*Sykes* revealed two things about the late justice: He believed that legal principles transcend the facts of a particular case, and that laws permitting the government to use its most fearsome power—the power to use force against and incarcerate its own citizens—must be precisely and plainly written. Scalia’s commitment to limit the government’s use of its criminal power calls to mind the words of James Madison: “If men were angels, no government would be necessary,” but “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable to the government to control the governed; and in the next place *oblige it to control itself*.”<sup>15</sup>

Since taking his place on the Supreme Court, Gorsuch's opinions show that he has taken up Scalia's banner to protect the rights of the criminally accused. But two things are worth remembering. First, this is not a new development for Gorsuch; it comes as no surprise to those who followed his record on the Tenth Circuit Court of Appeals.<sup>16</sup> And second, Gorsuch does not write in favor of criminal defendants because he affords them special treatment, but because, in his view, a principled approach to the Constitution compels that result.<sup>17</sup> It is that dogged adherence to the text and history of the Constitution that Gorsuch shares with his predecessor and which ultimately makes him a fitting successor.

### **“Vague laws invite arbitrary power.”<sup>18</sup>**

When it comes to criminal statutes, Gorsuch, like Scalia before him, demands clarity. As Scalia did in *Sykes* (and several other cases),<sup>19</sup> Gorsuch has now twice voted with the Democrat-appointed justices to strike down as vague two statutes that purported to define “crimes of violence.”

The first case, *Sessions v. Dimaya*,<sup>20</sup> involved an immigration statute that virtually guaranteed that any alien convicted of a “crime of violence” would be deported.<sup>21</sup> The statute included in its definition of crime of violence any offense “that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”<sup>22</sup> Writing for the majority, Justice Elena Kagan explained that in deciding whether a crime falls within that definition, the Court takes a “categorical approach” and looks at whether the statutory elements of the crime “require (or entail) the creation of such a risk in each case that the crime covers.”<sup>23</sup> The Court does not look at the particular facts of the underlying conviction.<sup>24</sup>

The Court struck down the law based on the void-for-vagueness doctrine.<sup>25</sup> That doctrine “guarantees that ordinary people have ‘fair notice’ of the conduct a statute proscribes.”<sup>26</sup> It requires that Congress clearly explain what conduct is prohibited, and forbids Congress from forcing the courts to fill in the blanks.<sup>27</sup>

The Court directly applied (and quoted extensively from) Scalia’s reasoning in *Johnson v. United States*<sup>28</sup> to find the law unconstitutionally vague. Like the law in *Johnson*, the law in *Dimaya* had two fatal flaws. First, it created “grave uncertainty about how to estimate the risk posed by crime” because ‘it tied the judicial assessment of risk’ to a hypothesis about the crimes ‘ordinary case.’”<sup>29</sup> And second, the law did not explain what level of risk was “substantial.”<sup>30</sup> As such, it violated the void-for-vagueness doctrine and had to be struck down.

Gorsuch concurred in the opinion but wrote separately to examine whether the void-for-vagueness doctrine “can fairly claim roots in the Constitution as originally understood.”<sup>31</sup> He began his analysis by looking at the Fifth and Fourteenth Amendments’ guarantee against the government taking “life, liberty, or property, without due process of law”<sup>32</sup> from which the void-for-vagueness doctrine is derived.” Reviewing historical sources, he concluded that “[p]erhaps the most basic of due process’s customary protections is the demand of fair notice.”<sup>33</sup> If the law fails to supply fair notice, “so much else of the Constitution risks becoming only a ‘parchment barrier’ against arbitrary power.”<sup>34</sup>

But due process, he concluded, is not the only constitutional requirement supporting the void-for-vagueness doctrine. As Kagan acknowledged in the majority opinion,<sup>35</sup> Gorsuch reasoned that the separation of powers was equally responsible for the doctrine.<sup>36</sup> Legislators, he explained, “may not ‘abdicate their responsibilities for setting the standards of the criminal law.’”<sup>37</sup> After all, “[u]nder the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives.”<sup>38</sup>

As *Sykes* revealed some of Scalia’s priorities, *Dimaya* reveals one of Gorsuch’s: a desire to protect representative democracy and an awareness that judicial power can, if carelessly wielded, undermine self-rule. Gorsuch ends his opinion by attempting to limit its scope. The void-for-vagueness doctrine, he says, is only procedural; it imposes no substantive requirements on the law.<sup>39</sup> It requires legislatures “to act with enough clarity that reasonable people can know what is required of them,” but it “does not forbid the legislature from acting toward any end it wishes.”<sup>40</sup>

Gorsuch took another opportunity to hold Congress to account for a vague law just one year after *Dimaya*. In *United States v. Davis*,<sup>41</sup> Gorsuch wrote for a majority (again, composed of himself and the Democrat-appointed justices) to strike down another law that used an almost identical definition of “crime of violence.”

The case presented a slightly different question, though. The government, knowing that *Johnson* and *Dimaya* spelled doom for its defense of the law, changed tactics. Instead of arguing that the law was not vague, the government argued that the law required the Court to look at the actual facts of the underlying crime rather than taking a categorical approach.<sup>42</sup>

Showing, once again, that he does not want the Court to interfere with the democratic process, Gorsuch refused to read the law to require a case-specific approach. The law’s text, context, and history plainly revealed that

Congress intended the courts to take a categorical approach.<sup>43</sup> As such, the court could not simply rewrite it. There are many ways Congress could fix the problem, Gorsuch explained, like writing statutes that plainly mandate a case-specific approach, or retaining the categorical approach while avoiding vagueness.<sup>44</sup> But “no matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive.”<sup>45</sup>

**“[T]oday’s Court invokes federalism not to protect individual liberty but to threaten it.”**

In *Gamble v. United States*,<sup>46</sup> Gorsuch struck out alone to argue that a historical understanding of the Constitution’s prohibition on double jeopardy<sup>47</sup> forbids the federal government from convicting someone of a federal crime after a state has convicted him of a state crime based on the same underlying conduct.<sup>48</sup>

At issue in *Gamble* was the long-standing “dual sovereignty” doctrine, which provides that a crime under a state’s law is not the “same offence” as a crime under federal law even if they are identical or arise out the same conduct.<sup>49</sup> The defendant there pleaded guilty to an Alabama state offense of being an ex-felon in possession of a firearm.<sup>50</sup> The federal government then indicted him for the same conduct under a materially identical federal law.<sup>51</sup> Gamble moved to dismiss the federal indictment, claiming that the indictment was for the “same offence” and thus violated double jeopardy.<sup>52</sup> A majority of the Supreme Court, in an opinion by Justice Samuel Alito, rejected his argument, holding that an “offence” is defined by law, each law is defined by a sovereign, and the state and federal governments are separate sovereigns.<sup>53</sup>

Gorsuch dissented. After conducting an exhaustive review of historical sources, he concluded that “offense” meant “transgression.”<sup>54</sup> And “transgression” referred to the underlying conduct, not a violation of a specific law defined by the sovereign.<sup>55</sup> Thus, where there was one underlying criminal act, the defendant could be prosecuted only once.<sup>56</sup> After all, he explained, “if double jeopardy prevents *one* government from prosecuting a defendant multiple times for the same offense under the banner of separate statutory labels, on what account can it make a difference when *many* governments collectively seek to do the same thing?”<sup>57</sup> Justice Clarence Thomas, in his separate concurring opinion, called Gorsuch’s historical analysis “admirable,” but he could not agree with Gorsuch because he was not satisfied that Gorsuch’s historical sources were as conclusive as Gorsuch claimed.<sup>58</sup>

If Gorsuch is correct that the historical record is unequivocal, then *Gamble* shows us that he is deeply committed to an originalist view of the Constitution, again, even if it means a criminal defendant will benefit.<sup>59</sup> But if Thomas is correct that the historical record was not so clear, we learn something even more interesting about Gorsuch. When the historical record does not compel a particular result, his instinct is to decide the case in a way that favors individual liberty.

The last few paragraphs of Gorsuch's opinion in *Gamble* support this speculation. There, he argues, essentially as a matter of policy, that the separate sovereigns doctrine endangers individual liberty in the modern era. He explains that when the doctrine first emerged, the federal criminal law was "new, thin, modest, and restrained."<sup>60</sup> But today, federal criminal law duplicates almost every state crime and contains more than 4,500 criminal statutes and "hundreds of thousands" of federal regulations.<sup>61</sup> If, long ago, the Court could trust "the benevolent spirit" of prosecutors, "it's unclear how [it] still might."<sup>62</sup> He concluded:

Enforcing the Constitution always bears its costs. But when the people adopted the Constitution and its Bill of Rights, they thought the liberties promised there worth the costs.... When governments may unleash all their might in multiple prosecutions against an individual, exhausting themselves only when those who hold the reins of power are content with the result, it is "the poor and the weak," and the unpopular and controversial, who suffer first—and there is nothing to stop them from being the last.<sup>63</sup>

Ultimately, regardless whether Gorsuch or Thomas is right about the clarity of the historical record, Gorsuch's opinion reveals that he sees the Constitution as protecting our tradition of individual liberty, and he is unwilling to trust the government's benevolence when deciding whether it should have a power that allows it to intrude on that liberty.

**"The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."**

In *Gundy v. United States*,<sup>64</sup> Gorsuch showed that his liberty-focused approach does not waiver or weaken—even when it is applied to some of the least sympathetic members of society. There, in a case very similar to one Gorsuch confronted while still a judge on a Tenth Circuit,<sup>65</sup> the Court considered whether Congress had unconstitutionally delegated its legislative

authority to the attorney general to decide whether and how to interpret the Sex Offender Registration and Notification Act of 2006 (SORNA).<sup>66</sup> SORNA created a uniform sex-offender registry and required all convicted sex offenders to register in every jurisdiction where they live, work, or go to school.<sup>67</sup> Failure to register under SORNA is a separate criminal offense.<sup>68</sup>

SORNA did not, however, say whether sex offenders who were convicted before its enactment were covered by it.<sup>69</sup> Instead, it delegated to the attorney general the authority to make that determination.<sup>70</sup> The petitioner, a pre-SORNA sex offender who was convicted for not registering under that law, argued that law was an unconstitutional delegation of Congress' law-making authority.<sup>71</sup>

A plurality of the Court consisting of Justices Kagan, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor<sup>72</sup> upheld SORNA's delegation by essentially writing into it a requirement that the attorney general must apply the law to pre-SORNA offenders "as soon as feasible."<sup>73</sup> But no such requirement appeared in the text of the statute.<sup>74</sup> They were joined by Justice Alito, who concurred in the judgment but indicated a willingness to reconsider the Court's approach to the so-called non-delegation doctrine in a future case.

Justice Gorsuch, joined by Chief Justice John Roberts and Justice Thomas, dissented. The first paragraph of his dissent reveals how a case that, to most, appears to involve a dry matter of statutory interpretation governing sex offender registration, to Justice Gorsuch, involves an dire threat to personal liberty for all Americans:

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?<sup>75</sup>

Gorsuch describes SORNA's registration requirement as a "law restricting liberty," and the sex offenders it governs as a "group of persons." To him, the fact that SORNA's registration requirement is good policy governing bad people is no excuse for its unconstitutional delegation.

He explains that "[i]t would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in society."<sup>76</sup> But more is at stake than the liberty of sex offenders because "the rule that prevents

Congress from giving the executive carte blanche to write laws for sex offenders is the same rule that protects everyone else.”<sup>77</sup> To hold otherwise, he concludes, “would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.”<sup>78</sup>

**“Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty.”**

Gorsuch’s plurality opinion, joined by Justices Kagan, Ginsburg, and Sotomayor, in *United States v. Haymond*,<sup>79</sup> takes his defense of personal liberty even further, showing that Gorsuch reads the Constitution’s express protections of liberty in absolute terms.

In that case, the defendant, Haymond, was convicted by a jury of possessing child pornography and sentenced to 38 months in prison, followed by 10 years of supervised release.<sup>80</sup> While on supervised release, the government searched his computer and found images that appeared to be child pornography.<sup>81</sup> Accordingly, the government moved to revoke Haymond’s supervised release and secure an additional prison sentence.<sup>82</sup> After a hearing, the judge found that Haymond knowingly possessed some of those images and, pursuant to a federal statute, imposed a new mandatory five-year minimum sentence.<sup>83</sup> On appeal, the Tenth Circuit found the federal statute unconstitutional because the new five-year sentence, which was higher than the sentence for the original conviction, was based on facts found by a judge (not a jury) by a preponderance of the evidence.<sup>84</sup>

Writing for a plurality,<sup>85</sup> Gorsuch also held the statute unconstitutional. He adhered strictly to the texts of the Sixth Amendment<sup>86</sup> (right to jury trial) and Fifth Amendment<sup>87</sup> (right to due process), concluding that those two amendments “ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt.”<sup>88</sup> In other words, “a jury must find *all* of the facts necessary to authorize a judicial punishment.”<sup>89</sup> To allow a judge to impose a new sentence based on newly found facts utilizing a preponderance-of-the-evidence standard “exemplifies the ‘Framers’ fears that the jury right could be lost not only by gross denial, but by erosion.”<sup>90</sup>

Alito dissented, joined by the other Republican-appointed justices, arguing that Gorsuch’s opinion “sports rhetoric with potentially revolutionary implications.”<sup>91</sup> He argued that Gorsuch “strongly suggest[s] that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding.”<sup>92</sup> If so, “the whole concept of supervised release will

come crashing down.”<sup>93</sup> Alito accused Gorsuch of writing a “carefully crafted opinion” with a “thinly veiled” strategy that lacks any “clear ground for limiting the rationale of the opinion so that it does not lead to that result.”<sup>94</sup>

No doubt, “law and order” types will share Alito’s concerns. Especially given that people who view child pornography, like Haymond, are far from sympathetic and often seen as incurable.<sup>95</sup> But as with the cases discussed above, *Haymond* shows that for Gorsuch, like Scalia before him, Constitutional principles trump ugly facts.

### **“There is another way.”**

So far, we have seen that Gorsuch shares principles and approaches with his predecessor, Justice Scalia. But Gorsuch is very much his own justice. Perhaps no opinion better illustrates this than his dissent in *Carpenter v. United States*.<sup>96</sup> There, he struck out alone to argue in favor of fundamentally restructuring the court’s Fourth Amendment jurisprudence to bring it back into line with the Amendment’s text.

In *Carpenter*, the Court considered whether the Fourth Amendment’s search and seizure clause<sup>97</sup> requires the government to get a search warrant to access cell phone records that track the user’s past movements.<sup>98</sup> For the longest time,<sup>99</sup> the Supreme Court has held that the Fourth Amendment protects a person’s “reasonable expectation of privacy,” where what is reasonable is determined by society.<sup>100</sup> Advances in technology—like cellphone positioning technology—have made this test difficult to apply and increasingly ungrounded in the constitutional text and history.<sup>101</sup> To assist itself with these increasingly complicated cases, the Court has created certain bright-line rules in specific situations. One of those rules, called the “third-party doctrine,” was implicated in *Carpenter*.<sup>102</sup>

The third-party doctrine holds that a person “has no legitimate expectation of privacy in information he voluntarily turns over to third parties... even if the information is revealed on the assumption that it will be used only for a limited purpose.”<sup>103</sup> As a result, the government typically does not need a warrant to collect information held by third parties.<sup>104</sup>

The third-party doctrine seemed to compel a government victory in *Carpenter* because the cellphone tracking information was kept by a third party, the defendant’s wireless carrier.<sup>105</sup> But, as so often happens in Fourth Amendment cases, the Court realized that its old bright-line rule led to an uncomfortable result when applied to new technology.<sup>106</sup> So the majority chose to blur the bright-line, holding that because of cellphone tracking technology’s “depth, breadth, and comprehensive reach, and the

inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.”<sup>107</sup>

Gorsuch dissented.<sup>108</sup> To him, the third-party doctrine is, and always was, a bad approach. “What’s left of the Fourth Amendment,” he wondered, when “[t]oday we use the Internet to do most everything”? The assumption that there is no reasonable expectation of privacy in materials handed over to third parties is unbelievable in the information age where “even our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed—now reside on third party servers.”<sup>109</sup>

But, for Gorsuch, abandoning the third-party doctrine for the old “reasonable expectation of privacy” test was not a good approach, either.<sup>110</sup> That test (which comes from Justice John Marshall Harlan’s concurrence in *Katz*<sup>111</sup>), Gorsuch explained, is fundamentally divorced from the constitutional text. A person’s right to Fourth Amendment protection does not “depend on whether a judge happens to agree that your subjective expectation of privacy is a ‘reasonable’ one.”<sup>112</sup> By its plain terms, the amendment “grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.”<sup>113</sup> The *Katz* approach, he continued, has given the lower courts nothing but “amorphous balancing tests,” “incommensurable principles,” and “a few illustrative examples that seem little more than the product of judicial intuition.”<sup>114</sup>

So Gorsuch offered another way—what he called the “traditional approach.”<sup>115</sup> The traditional approach “asked if a house, paper, or effect was *yours* under the law. No more was needed to trigger the Fourth Amendment.”<sup>116</sup> This approach, he explained, has several advantages over *Katz*.<sup>117</sup> For one, it is based on positive legal rights instead of “the biases or personal policy preference” of judges.<sup>118</sup> For another, it “carves out significant room for legislative participation in the Fourth Amendment context,’ too, by asking judges to consult what the people’s representatives have to say about their rights.”<sup>119</sup> And finally, it avoids the third-party doctrine’s most absurd implications in the digital age.<sup>120</sup>

So how would this positive-law-based approach work? When a search targets a house, paper, or effect that is plainly “yours,” the answer is easy; the Fourth Amendment applies. But, Gorsuch asked, “what kind of legal interest is sufficient to make something *yours*...[a]nd what source of law determines that?”<sup>121</sup> Gorsuch admitted that more work needed to be done to satisfactorily answer these questions, but he provided five signposts, derived principally from historical examples, to guide the construction of this traditional approach.

1. “[T]he fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them.”<sup>122</sup>
2. “[C]omplete ownership or exclusive control” is unlikely to be a necessary prerequisite to assert a Fourth Amendment right.<sup>123</sup> Consider, for example, people who share a rented house; they lack complete control or ownership, but have historically had Fourth Amendment rights with respect to their homes.<sup>124</sup>
3. Positive law can “help provide detailed guidance on evolving technologies without resort to judicial intuition.”<sup>125</sup> Both state and federal law often create rights in tangible and intangible things that “may provide a sounder basis for judicial decisionmaking than judicial guesswork.”<sup>126</sup>
4. The Constitution provides a “floor” against legislative attempts to circumvent a person’s Fourth Amendment rights.<sup>127</sup> For instance, legislatures “cannot pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause.”<sup>128</sup>
5. “[T]his constitutional floor may, in some instances, bar efforts to circumvent the Fourth Amendment’s protection through the use of subpoenas.”<sup>129</sup> After all, Gorsuch argued, “[n]o one thinks the government can evade *Jackson’s*<sup>130</sup> prohibition on opening sealed letters without a warrant simply by issuing a subpoena to a postmaster for ‘all letters sent by John Smith’ or, worse, ‘all letters sent by John Smith concerning a particular transaction.’”<sup>131</sup>

All of this to say that a traditional, positive-law-based approach, properly formulated, would be superior to the Court’s current whack-a-mole approach, which “fail[s] to vindicate the full protections of the Fourth Amendment.”<sup>132</sup>

Gorsuch acknowledged that the record in *Carpenter* did not include any evidence that would allow him to apply a traditional approach in the case, but he speculated that “cell-site data could qualify as [the defendant’s] papers or effects under existing law.”<sup>133</sup> After all, federal law gives cellular customers “substantial legal interests” in that information.<sup>134</sup>

No other justice joined Gorsuch’s opinion. It remains to be seen if, like Scalia eventually did in *Johnson*,<sup>135</sup> Gorsuch brings other justices around. But *Carpenter* shows that Gorsuch is perfectly comfortable striking out

alone, even to reinvent an enormous field of jurisprudence, if he thinks the court has diverted from the constitutional text.

## Conclusion

Over these last two terms, Justice Neil Gorsuch has proved himself a fitting replacement for the late Justice Antonin Scalia. The two have much in common: a devotion to the Constitution’s text, a belief that legal principles trump facts, and a commitment to protect the rights of even the least sympathetic criminal defendants. But Gorsuch’s uniqueness, too—his confident independence and liberty-centric focus—proves that he is the right justice for that seat.

In his testimony before the Senate Judiciary Committee, Gorsuch thanked his mentor, Justice Byron White, because he “modeled for me judicial courage.”<sup>136</sup> Gorsuch, it seems, has taken White’s lesson to heart.

**GianCarlo Canaparo** is Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.

## Endnotes

1. See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the Sen. Comm. on the Judiciary*, 115th Cong. 67 (2017) (statement of Hon. Neil M. Gorsuch) (hereinafter “Gorsuch Testimony”) (“If judges were just secret legislators, declaring not what the law is but what they would like it to be, the very idea of a government by the people and for the people would be at risk.”).
2. *Id.*; cf. Justice Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 Yale L.J. 1600, 1601 (2017) (quoting Scalia as saying “the judge who always likes the results he reaches is a bad judge.”).
3. See, e.g., David Stras, Orin Kerr, Rachel Barkow, Stephanos Bibas, and Paul J. Larkin Jr., *Justice Scalia and the Criminal Law*, 86 U. Cin. L. Rev. 743, 758 (2018).
4. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).
5. 541 U.S. 36 (2004).
6. U.S. CONST. amend. VI (protecting the right “to be confronted with the witnesses against him”).
7. 514 U.S. at 53–55.
8. 542 U.S. 296 (2004).
9. *Id.* at 303.
10. See Hon. David Stras, et al., *Justice Scalia and the Criminal Law*, 86 U. Cin. L. Rev. 743 (2018); see also Craig Trainor, *Antonin Scalia, Defender of the Rights of the Accused*, Wash. Exam., Sept. 24, 2018, <https://www.washingtonexaminer.com/weekly-standard/antonin-scalia-defender-of-the-rights-of-the-accused>.
11. 564 U.S. 1 (2011).
12. *Id.* at 16.
13. *Id.* at 32–35.
14. *Id.* at 34 (internal quotations omitted).
15. THE FEDERALIST No. 51, p. 349 (James Madison) (J. Cooke ed. 1961) (emphasis added).
16. See, e.g., *United States v. Carlsson*, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J., dissenting) (arguing that law enforcement authorities violate the Fourth Amendment’s protections against unreasonable searches and seizures when they ignore “No Trespassing” signs and approach a dwelling without a warrant); *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016) (holding that the Fourth Amendment prohibits warrantless searches of e-mails conducted by private entities at the behest of law enforcement); *United States v. Krueger*, 809 F.3d 1109, 1117 (10th Cir. 2015) (Gorsuch, J., concurring) (concluding that officers violated the Fourth Amendment when they searched a suspect’s home with an unlawfully issued warrant); *United States v. Nichols*, 784 F.3d 666, 667 (10th Cir. 2015) (Gorsuch, J., dissenting) (dissenting from denial of *en banc* review and arguing that the Sex Offender Registration and Notification Act violated the nondelegation doctrine because Congress impermissibly delegated to the Attorney General legislative authority); *United States v. Baldwin*, 745 F.3d 1027 (10th Cir. 2014) (questioning, in *dicta*, whether Congress can constitutionally delegate the power to write criminal offenses to unelected executive agency bureaucrats); *United States v. Games-Perez*, 667 F.3d 1136, 1143 (10th Cir. 2012) (Gorsuch, J., concurring) (concurring on the grounds that precedent compelled the result, but explaining that the precedent—which interpreted the crime of being a felon in possession of a firearm as requiring only proof that the defendant knew he possessed a firearm and not that he knew he was a felon—was incorrect as a matter of statutory interpretation).
17. See Gorsuch Testimony *supra* note 1 (“My decisions have never reflected a judgment about the people before me, only a judgment about the law and the facts at issue in each particular case”).
18. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). Headers, here and *infra*, are taken from Gorsuch opinions, respectively: *Gamble v. United States*, 139 S.Ct. 1960, 2000 (2019) (Gorsuch, J., dissenting); *Gundy v. United States*, 139 S.Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *United States v. Haymond*, 139 S.Ct. 2369, 2373 (2019); *Carpenter v. United States*, 138 S.Ct. 2206, 2267 (2018) (Gorsuch, J., dissenting).
19. See *Johnson v. United States*, 135 S. Ct. 2551, 2555–57 (2015); *James v. United States*, 550 U.S. 192, 228–32 (2007) (Scalia, J., dissenting). These cases are noteworthy because in *Johnson*, Scalia finally convinced a majority of the court to join with the reasoning he set out in his dissenting opinions in *James* and, more fully, *Sykes*.
20. 138 S. Ct. 1204 (2018).
21. *Id.* at 1210.
22. *Id.* at 1211.

23. *Id.*
24. *Id.*
25. *Id.* at 1212, 1223.
26. *Id.* at 1212 (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)).
27. *Id.*
28. 135 S. Ct. 2551.
29. *Dimaya*, 138 S.Ct. at 1213 (quoting *Johnson*, 135 S.Ct. at 2557).
30. *Id.* at 1214.
31. *Id.* at 1224 (Gorsuch, J., concurring).
32. U.S. CONST. amends. V, XIV.
33. *Dimaya*, 138 S.Ct. at 1225 (Gorsuch, J., concurring).
34. *Id.* at 1227 (quoting *The Federalist No. 48*, p. 308 (C. Rossiter ed. 1961) (J. Madison)).
35. *Id.* at 1212 (“[T]he doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.”).
36. *Id.* at 1227 (Gorsuch, J., concurring).
37. *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).
38. *Id.* at 1228.
39. *Id.* at 1233.
40. *Id.* It is worth noting that Justice Thomas, joined by Justices Kennedy and Alito, was not convinced by Gorsuch’s attempt to declare the void-for-vagueness doctrine purely procedural. See *id.* at 1245 (Thomas, J., dissenting). Thomas’ argument that “the vagueness doctrine provides courts with ‘open-ended authority to oversee legislative choices’” is compelling. See *id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 374 (1983) (White, J., dissenting)). After all, “vagueness” is itself, at least in difficult cases, a vague term. And in difficult cases where reasonable minds might disagree about whether a law is vague, the line between the procedural and the substantive cannot be clearly defined. As was the case in *Dimaya*, one judge might say a law is so unclear that no reasonable person could understand it, but another judge might say that it is not that vague. Both determinations could be within the bounds of reason, and therefore, it is impossible to say whether a decision to strike it down was purely procedural. In support of his argument, Thomas provides several examples where the Supreme Court used the void-for-vagueness doctrine to reach substantive ends. See *id.* (citing cases).
41. 139 S.Ct. 2319 (2019).
42. Davis, 139 S.Ct. at 2327.
43. *Id.* at 2329–32.
44. *Id.* at 2336.
45. *Id.*
46. *Gamble v. United States*, 139 S.Ct. 1960, 2000 (2019) (Gorsuch, J., dissenting).
47. U.S. CONST. amend. V (“nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”).
48. Justice Ginsburg reached the same conclusion, but for different reasons. She concluded that the state and federal governments are “kindred systems” and, therefore, are one sovereign for the purposes of double jeopardy. *Gamble*, 139 S.Ct. at 1990 (Ginsburg, J., dissenting).
49. *Gamble*, 130 S.Ct. at 1964.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1965.
54. *Id.* at 1997 (Gorsuch, J., dissenting).
55. *Id.* 1997–98
56. *Id.* at 1998.
57. *Id.* (emphasis in original).
58. *Id.* at 1987 (Thomas, J., concurring).

59. According to Gorsuch, the likely reason that the federal government prosecuted Gamble after the state prosecuted him was because it was unhappy with his lenient sentence. *Id.* at 1997 (Gorsuch, J., dissenting).
60. *Id.* at 2008.
61. *Id.* (citing Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715 (2013)).
62. *Id.*
63. *Id.* at 2009 (internal quotations omitted) (quoting Bartkus v. People of State of Ill., 359 U.S. 121, 163 (1959) (Black, J., dissenting)).
64. Gundy v. United States, 139 S.Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).
65. See United States v. Nichols, 784 F.3d 666, 667 (10th Cir. 2015) (Gorsuch, J., dissenting).
66. Gundy, 139 S.Ct. at 2121.
67. *Id.* at 2122.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. Justice Brett Kavanaugh took no part in the case, most likely because the Court held oral arguments before he was sworn in as a justice.
73. Gundy, 139 S.Ct. at 2123.
74. *Id.* at 2131 (Gorsuch, J., dissenting) (“Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General.”).
75. *Id.*
76. *Id.* at 2144.
77. *Id.*
78. *Id.* at 2144–45 (citing The Federalist No. 47, p. 302 (C. Rossiter ed. 1961) (J. Madison)).
79. United States v. Haymond, 139 S.Ct. 2369, 2373 (2019).
80. *Id.* at 2373.
81. *Id.* at 2374.
82. *Id.*
83. *Id.*
84. *Id.* at 2375.
85. Justice Breyer agreed that the law was unconstitutional, but could not join Gorsuch’s more sweeping conclusions. *Id.* at 2385 (Breyer, J., concurring).
86. U.S. CONST., amend. VI.
87. U.S. CONST., amend. V.
88. *Haymond*, 139 S.Ct. at 2376.
89. *Id.* at 2381.
90. *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000)).
91. *Id.* at 2386 (Alito, J., dissenting).
92. *Id.* at 2387.
93. *Id.* at 2388.
94. *Id.* at 2387–88.
95. See, e.g., Laure van Es, *Virtual Child Pornography as Potential Remedy Against Child Sexual Abuse*, MaRBle Research Papers Vol. 6, 167 (“Experts suggest that impulse control is the highest [treatment] achievable and pedophilia cannot be cured.”).
96. Carpenter v. United States, 138 S.Ct. 2206, 2267 (2018) (Gorsuch, J., dissenting).
97. U.S. CONST., amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).
98. *Id.* at 2211.

99. Billy Joel, *The Longest Time, on An Innocent Man* (Columbia 1983). To be more specific, the Supreme Court adopted this privacy-focused approach in 1967 in *Katz v. United States*, 389 U.S. 347 (1967). The now all-important phrase “reasonable expectation of privacy” was coined by Justice Harlan in his concurrence in *Katz*. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).
100. Carpenter, 138 S.Ct. at 2213; see also *Katz*, 389 U.S. at 360 (Harlan, J., concurring).
101. See generally *Leading Cases*, 115 Harv. L. Rev. 346, 352 (2001).
102. See Carpenter, 138 S.Ct. at 2216.
103. *Id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 743 (1979) and *United States v. Miller*, 425 U.S. 435, 443 (1976)) (internal quotations omitted).
104. *Id.*
105. *Id.*
106. *Id.* at 2217 (“After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements.”).
107. *Id.* at 2223.
108. *Id.* at 2261 (Gorsuch, J., dissenting).
109. *Id.* at 2262 (“But no one believes that, if they ever did.”).
110. *Id.* at 2264–67.
111. 389 U.S. at 360 (Harlan, J., concurring).
112. Carpenter, 138 S.Ct. at 2264 (Gorsuch, J., dissenting).
113. *Id.*
114. *Id.* at 2267.
115. *Id.* at 2268.
116. *Id.*
117. *Id.*
118. *Id.* (quoting Pettys, *Judicial Decision in Constitutional Cases*, 26 J.L. & Pol. 123, 127 (2011)).
119. *Id.* (quoting William Baude, James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1852 (2016)).
120. *Id.*
121. *Id.* (emphasis in original).
122. *Id.*
123. *Id.* at 2269.
124. *Id.* at 2269–70 (citing cases).
125. *Id.* at 2270.
126. *Id.*
127. *Id.* at 2270–71.
128. *Id.*
129. *Id.* at 2271.
130. *Ex parte Jackson*, 96 U.S. 727 (1877) (holding that the Fourth Amendment applies to letters held by a mail carrier).
131. Carpenter, 138 S.Ct. at 2271 (Gorsuch, J., concurring).
132. Carpenter, 138 S.Ct. at 2272 (Gorsuch, J., concurring).
133. *Id.*
134. *Id.*
135. *Johnson v. United States*, 135 S. Ct. 2551 (2015).
136. Gorsuch Testimony, *supra* note 1.