



## ESSAY

## Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism

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### Introduction

Numerous commentators argue that, if confirmed, Justice Neil Gorsuch would follow the late Justice Antonin Scalia's signature methodological contributions: originalism and textualism.<sup>1</sup> Indeed, Judge Gorsuch styles himself as a judge in Justice Scalia's vein. In a tribute to the late Justice, he responded to Justice Scalia's critics by arguing that "an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function."<sup>2</sup>

What do Judge Gorsuch's Tenth Circuit opinions and his academic writing reveal about his approach to originalism and textualism? Judge Gorsuch, like Justice Scalia, is a rigorous textualist. Yet, when a textualist approach fails to clarify ambiguous statutory terms, Judge Gorsuch turns to sources that Justice Scalia decried. Additionally, and like Justice Scalia, Judge Gorsuch looks to the Founding to inform his reading of the Constitution but, perhaps, with a view toward expanding the coverage of constitutional rights. Judge Gorsuch is also skeptical, on originalist grounds, of judicial deference to executive agencies, in effect using Justice Scalia's favored interpretive tool to challenge *Chevron* deference—a rule of law Justice Scalia helped promote.<sup>3</sup>

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1. See, e.g., Michael E. Kenneally et al., *A Principled and Courageous Choice*, U.S. NEWS & WORLD REP. (Feb. 13, 2017, 6:00 AM), <http://www.usnews.com/opinion/articles/2017-02-13/judge-gorsuch-is-the-best-choice-to-fill-scalias-supreme-court-seat>; Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), <https://nyti.ms/2jSVfa9>.
2. Judge Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), in 66 CASE W. RES. L. REV. 905, 909 (2016).
3. See Justice Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, *Duke Law Journal* Administrative Law Lecture (Jan. 24, 1989), in 1989 DUKE L.J. 511, 511-12. *But see* Stephen J. Leacock, *Chevron's Legacy, Justice Scalia's Two Enigmatic Dissents, and*

## I. Originalism and Textualism as Modes of Analysis

In their academic writing, Judge Gorsuch and Justice Scalia demonstrate a commitment to textualism and originalism. Textualists believe judicial interpretation of statutes, rules, and constitutional provisions must follow the text, as written, without recourse to authorial or legislative intent.<sup>4</sup> A textualist, for Judge Gorsuch, should “strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be.”<sup>5</sup> Relatedly, originalist judges interpret ambiguous constitutional provisions in light of their original meanings.<sup>6</sup> Justice Scalia, a pioneer of this method of interpretation, believed that judges should seek the original meaning of the text and not what the Founders intended<sup>7</sup> by relying on accounts that describe the “public understanding” of the meaning of the Constitution.<sup>8</sup>

The theoretical advantage of textualism and originalism is that they are neutral and objective.<sup>9</sup> As Justice Scalia and Bryan Garner argue: “History is a rock-hard science compared to moral philosophy”<sup>10</sup> or, impliedly, any other proposed method which might attempt to divine the original meaning of an ambiguous constitutional provision. Similarly, Judge Gorsuch called the “history test,” as “perceived by its advocates,” a “comparatively objective approach.”<sup>11</sup>

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*His Return to the Fold in City of Arlington, Tex. v. FCC*, 64 CATH. U. L. REV. 133, 157-59 (2014) (reviewing Justice Scalia’s later critiques of *Chevron* deference).

4. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 25-28 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348-49 (2005).

5. Gorsuch, *supra* note 2, at 906.

6. See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 243-45 (2009) (critiquing originalism’s evolution).

7. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997).

8. *Cf.*, e.g., Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 339 (2004).

9. See, e.g., DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 25 (2005) (“The key originalist premise is that (neutral) principle is possible only within the interpretive paradigm of originalism.”); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2072 (2006) (reviewing ADRIAN VERMUELE, JUDGING UNDER UNCERTAINTY (2006)) (questioning whether textualist “opinions might appear more neutral and lawyerly” and the “public might perceive the federal courts to be less political”).

10. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 402 (2012).

11. NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 19 (2006).

And yet Justice Scalia's applied textualism and originalism could deviate from their neutral core. As many commentators note,<sup>12</sup> Justice Scalia's methods managed to bend<sup>13</sup> when confronted with a case where he seemed to desire a certain outcome.<sup>14</sup> *District of Columbia v. Heller*, which Justice Scalia called his "most complete originalist opinion,"<sup>15</sup> is a lightning rod for skeptics of his methods.<sup>16</sup>

Decisions like *Heller* get at the crux of this Essay: What happens when originalist and textual methods fail to provide a clear answer or lead scholars and judges applying them to reach different conclusions? Judge Gorsuch notes that "the very hardest cases" are rare: only a sliver of cases make it before the Supreme Court each year and, of that sliver, a Justice voices dissent in only fifty or so.<sup>17</sup> But, he argues, objectivity in these hard cases is important: "[W]hen judges pull from the same toolbox . . . we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow."<sup>18</sup>

Judge Gorsuch draws our attention to just such a hard case, *Lockhart v. United States*,<sup>19</sup> he speaks approvingly of Justices Sotomayor and Kagan's nuanced debate about a dangling participial phrase.<sup>20</sup> Without commenting on the reasoning, Judge Gorsuch takes delight in the Justices' argument.<sup>21</sup> But, it seems to us, this decision should worry Judge Gorsuch more than please him: the

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12. See, e.g., BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 390-91 (2014).

13. See, e.g., JACK BALKIN, LIVING ORIGINALISM 100-01, 108 (2011) (arguing that Justice Scalia "conflate[d] original meaning with original expected application"—a process which achieves a form of "living constitutionalism"); RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 169 (2006) (noting Justice Scalia's acceptance of incorporation and substantive due process, even though neither could be easily squared with originalism); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1005 (2007) ("We think that while Justice Scalia may have been right on the specific facts of *Hamdan*, his broader claims about Congress's power to strip jurisdiction from the Supreme Court are textually wrong." (citing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006))).

14. MURPHY, *supra* note 12, at 386 ("None of this posed any problem for Scalia, who was by now adept in manipulating his originalist theory to reach the result that he sought.").

15. See *id.* at 390 (quoting Justice Scalia from an interview with NPR's Nina Totenberg).

16. Two of the dissents in that case provide methodologically similar decisions to the majority but reach opposite conclusions. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); *id.* at 681 (2008) (Breyer, J., dissenting); see also MURPHY, *supra* note 12, at 385-93; J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 271 (2009) ("It is hard to look at all this [historical] evidence and come away thinking that one side is clearly right on the law.").

17. Gorsuch, *supra* note 2, at 916-17.

18. *Id.* at 917.

19. 136 S. Ct. 958 (2016).

20. Gorsuch, *supra* note 2, at 907-08.

21. *Id.*

grammatical tools seem to cut both ways. As Joseph Kimble remarked before the Court decided *Lockhart*, “[i]t’s anybody’s guess how” the puzzle of “series qualifier[s]” will “play out in *Lockhart* and beyond.”<sup>22</sup>

## II. Judge Gorsuch and Textualism

### A. Statutory Interpretation

Judge Gorsuch often employs standard textualist approaches to statutory interpretation.<sup>23</sup> Yet, at the same time, his approach to ambiguous statutory terms may hew more closely to Justice Kagan’s or Justice Sotomayor’s reasoning in *Lockhart* than it does to Justice Scalia’s. In *United States v. Hinckley*, Judge Gorsuch interpreted the scope of the Sex Offender Registration and Notification Act.<sup>24</sup> After emphasizing the need to start with the “words Congress has chosen,”<sup>25</sup> Judge Gorsuch concluded the statute was ambiguous as to which category of sex offenders the statute applied to.<sup>26</sup>

Judge Gorsuch dealt with this ambiguity by accounting for the language’s context. He cautioned against ignoring the “reality of ambiguity created by misplaced modifiers,” stating that “the most grammatical readings are not always the only reasonable ones.”<sup>27</sup> Consequently, “judges are not charged with grading Congress’s grammar but with applying laws in conformance with Congress’s manifest purpose.”<sup>28</sup>

Judge Gorsuch cited and discussed *United States v. X-Citement Video, Inc.*, a case in which Chief Justice Rehnquist held that the term “knowingly” did not modify the verbs surrounding it, which would have introduced a scienter requirement Congress could not have intended.<sup>29</sup> Judge Gorsuch’s reliance on *X-Citement*

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22. Joseph Kimble, *The Puzzle of Trailing Modifiers*, MICH. B.J., Jan. 2016, at 38, 40; see also Daisy C. Karlson, *Recent Developments*, 69 ARK. L. REV. 871, 877-79 (2016) (describing the evenly matched textualist interpretations of the majority and dissent in *Lockhart*).

23. See, e.g., *Elwell v. Oklahoma*, 693 F.3d 1303, 1306-09, 1312 (10th Cir. 2012) (applying dictionary definitions and canons of statutory construction to interpret the Americans with Disabilities Act); *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1180-83 (10th Cir. 2011) (interpreting the plain meaning of the Lilly Ledbetter Fair Pay Act along linguistic and grammatical lines).

24. 550 F.3d 926, 940 (10th Cir. 2008) (Gorsuch, J., concurring), *abrogated by* *Reynolds v. United States*, 565 U.S. 432 (2012).

25. *Id.*

26. *Id.*

27. *Id.* at 942.

28. *Id.*

29. 513 U.S. 64, 68-69 (1994); see *Hinckley*, 550 F.3d at 942-43 (citing *X-Citement Video*, 513 U.S. at 68-70).

*Video*<sup>30</sup> stands in stark contrast to Justice Scalia, who dissented in that case, arguing the majority had “contradict[ed] the plain import of what Congress has specifically prescribed regarding criminal intent.”<sup>31</sup>

Judge Gorsuch then turned to “traditional tools of statutory interpretation in an effort to discern Congress’s meaning,”<sup>32</sup> including legislative history—a striking departure from Justice Scalia’s textualism. Judge Gorsuch noted that the statute’s title can “shed light on Congress’s *intention*” and, in this case, “makes Congress’s *purpose* blindingly clear.”<sup>33</sup> He also cited statements by the sponsors’ “consistent[] and emphatic[]” statements to determine what was “intended by the authors” of the statute.<sup>34</sup> The Supreme Court abrogated *Hinckley* in *Reynolds v. United States*.<sup>35</sup> Notably, Justice Scalia dissented in *Reynolds*, writing that he would have resolved the case through a purely textualist approach to the words “authority” and “specify.”<sup>36</sup>

## B. Textualism and Constitutional Interpretation

Judge Gorsuch has joined Justice Scalia in applying his textualist approach to constitutional interpretation. Justice Scalia critiqued the dormant Commerce Clause because it was implied, not written.<sup>37</sup> Similarly, as Eric Citron notes, Judge Gorsuch’s opinions “reveal a measure of distrust” toward the dormant Commerce Clause—an unwritten constitutional principle taken as implied by Congress’s power to regular interstate commerce.<sup>38</sup> In *Energy and Environment Legal Institute v. Epel*, Judge Gorsuch noted, “[d]etractors find dormant commerce clause doctrine absent from the Constitution’s text and incompatible with its structure.”<sup>39</sup>

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30. *Hinckley*, 550 F.3d at 943 (Gorsuch, J., concurring) (“[W]hen presented with a statute with a potential misplaced modifier or clause that might apply to more than just one antecedent, we must consult the surrounding context and structure before reflexively enforcing any construction of the statute.”).

31. *X-Citement Video*, 513 U.S. at 81 (Scalia, J., dissenting).

32. *Hinckley*, 550 F.3d at 946 (Gorsuch, J., concurring).

33. *Id.* (emphases added).

34. *Id.* at 947 & n.7.

35. 565 U.S. 432, 435 (2012).

36. *Id.* at 448-49 (Scalia, J., dissenting).

37. *See* *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) (“The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause.”).

38. Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch>.

39. 793 F.3d 1169, 1171 (10th Cir.) (holding a statute not to violate the doctrine), *cert. denied*, 136 S. Ct. 595 (2015).

### C. Stare Decisis

Judge Gorsuch, again recalling Justice Scalia, appears willing to favor stare decisis over textualism. In *United States v. Games-Perez*,<sup>40</sup> Judge Gorsuch, concurring in the judgment, lamented this as a case where “[o]ur duty to follow precedent sometimes requires us to make mistakes” and lodged a textualist critique against controlling precedent.<sup>41</sup> He concluded by expressing frustration with courts that he believed usurped the place of Congress, yet he still upheld precedent.<sup>42</sup>

This deference to precedent—in particular, to Tenth Circuit precedent, which Judge Gorsuch could work to revise—in the face of reasonable textualist critique could indicate how seriously Judge Gorsuch takes stare decisis. Like Justice Scalia—who noted the lack of textual or originalist foundations for substantive due process yet did not attempt to disturb it<sup>43</sup>—Judge Gorsuch might sublimate frustrations about aspects of settled law so as to not upset established doctrine. Yet, at the same time, Judge Gorsuch’s willingness to air these grievances may signal a desire to shake things up.

## III. Judge Gorsuch and Originalism

### A. Individual Rights

Judge Gorsuch has had less opportunity on the Tenth Circuit to apply originalism to interpreting the Constitution than textualism to interpreting statutes, but his academic writing reveals an interest in, and enthusiasm for, searching historical inquiry. In *The Future of Assisted Suicide and Euthanasia*, Judge Gorsuch sketches an answer to how he might decide originalist questions, at least in the context of substantive due process. Recognizing the “warts” of a history test, Judge Gorsuch limns assisted suicide justifications by “examin[ing] as broad a historical record as possible, consulting the ancients as well as more directly relevant English, colonial, and American history.”<sup>44</sup> Judge Gorsuch does not limit his inquiry to the Founding, but pursues evidence from leading moral theorists, as well as evolving criminal and social sanctions of suicide.<sup>45</sup>

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40. 667 F.3d 1136 (10th Cir. 2012).

41. *Id.* at 1142-43 (Gorsuch, J., concurring in the judgment).

42. *See id.* at 1145-46.

43. *See, e.g.,* *Chavez v. Martinez*, 538 U.S. 760, 780-83 (2003) (Scalia, J., concurring in part in the judgment); ROSSUM, *supra* note 13, at 169.

44. GORSUCH, *supra* note 11, at 22.

45. Noah Feldman argues that Judge Gorsuch will not be an originalist because he does not emphasize the Framers’ intent in his discussion of assisted suicide. Noah Feldman, *Scalia’s Replacement Won’t Be Quite So Originalist*, BLOOMBERG VIEW (Jan. 29, 2017, 11:00 AM EST), <http://bv.ms/2jscChj>. We, however, do not find the absence of originalist arguments

In his judicial opinions, Judge Gorsuch has also looked—albeit not exclusively—to the Founding to determine the scope and application of constitutional rights. In *United States v. Ackerman*, Judge Gorsuch addressed whether the Fourth Amendment proscribed a search by a nongovernmental organization working on behalf of a law enforcement agency.<sup>46</sup> Judge Gorsuch determined that the private organization in this case was a governmental entity but, even if it were not, its searches did not necessarily “escape the Fourth Amendment’s ambit,” articulating the agency principle, “a rule of law the founders knew, understood, and undoubtedly relied upon.”<sup>47</sup>

Likewise, in *United States v. Carlross*, the Tenth Circuit considered whether police officers violated the Fourth Amendment when they knocked on the defendant’s door despite posted “No Trespassing” signs.<sup>48</sup> Judge Gorsuch dissented, charging that the Government’s position that its agents had a free-floating right to enter a homeowner’s property to engage in a “knock and talk” was “difficult to reconcile with the Constitution of the founders’ design.”<sup>49</sup> He did this, he claimed, to defend the Fourth Amendment, which provides “ancient protections.”<sup>50</sup>

#### B. Separation of Powers

As David Feder notes, Judge Gorsuch draws on originalism to lambast *Chevron* deference.<sup>51</sup> In a series of concurrences and articles, Judge Gorsuch has argued that *Chevron* contravenes “the Constitution of the framers’ design.”<sup>52</sup> In his tribute to Justice Scalia, Judge Gorsuch argued that judicial deference to administrative agencies runs against the “liberty-protecting qualities of the separation of powers” that motivated the Founders.<sup>53</sup> He cited the case of Alfonzo De Niz Robles, a Mexican citizen, who was caught up in a lengthy series of decisions and appeals after immigration authorities apprehended him. His case eventually made its way to the Tenth Circuit.<sup>54</sup> Judge Gorsuch, describing

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necessarily indicative of his failure to be an originalist. Moreover, he *does* explore Founding-era opinions toward suicide to cement his argument.

46. 831 F.3d 1292, 1294-95 (10th Cir. 2016).

47. *Id.* at 1300-01.

48. 818 F.3d 988, 990 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016).

49. *Id.* at 1005-06 (Gorsuch, J., dissenting).

50. *Id.* at 1011.

51. David Feder, *The Administrative Law Originalism of Neil Gorsuch*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 21, 2016), <http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch>.

52. *See, e.g.,* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

53. Gorsuch, *supra* note 2, at 914 (decrying the use of *Chevron* deference in an immigration law case).

54. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167-68 (10th Cir. 2015).

this judicial-executive-legislative process, stated that “what happened here might be enough to make James Madison’s head spin.”<sup>55</sup>

Justice Scalia famously endorsed *Chevron* as reflective of “the reality of government” and authorized by Congress.<sup>56</sup> Judge Gorsuch’s critique, by contrast, is a formalistic reading of the Founders’ intent.

### **Conclusion**

Parsing Judge Gorsuch’s writing to gain insight into his future jurisprudence feels like peering into a scrying glass. Our sources are few and inconsistent; his opinions are bound by the facts and politics of the cases before him. Yet these pieces provide a glimpse into the kind of Justice we might expect. Judge Gorsuch, like Justice Scalia, is a textualist and originalist. He also appears to feel bound by *stare decisis* and the rule of settled law, hesitant to disrupt precedent in “wrongly” decided cases. But at the same time, where Justice Scalia applied strict textualism, Judge Gorsuch may be more flexible. His willingness to evaluate legislative history, to explore alternative rationales, and to reach across the aisle may unite disparate parts of the Court.

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55. Gorsuch, *supra* note 2, at 915.

56. *See* Scalia, *supra* note 3, at 516-17, 521.