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Supreme Court Justices Neil Gorsuch and Brett Kavanaugh Clash Over Federal Regulation and Criminal Justice

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U.S. Supreme Court Justices Neil Gorsuch and Brett Kavanaugh are turning out to be quite different from each other. During the Court's October 2018 term (ending in June 2019), in cases with at least one dissent, Justice Brett Kavanaugh and Justice Neil Gorsuch were on opposite sides 49% of the time. In the October 2019 term, the two Trump-appointed Justices again disagreed in significant cases. The thesis of this Article is that there are themes to the differences between Justice Kavanaugh and Justice Gorsuch that can be discerned from their votes and opinions.

The first theme relates to jurisprudential style. Justice Gorsuch follows the tenets of legal formalism, originalism, and textualism. He is apt to find definite, fixed rules established in the past that he follows to their logical conclusions, regardless of practical consequences or policy considerations. By contrast, Justice Kavanaugh tends to be pragmatic and flexible. Less interested in original intent or logical rigor and more deferential to precedent and convention, he tends to balance competing interests and strives for reasonable solutions that make common sense in the here and now.

The second area of difference lies in the Justices' attitudes toward the federal government. Justice Kavanaugh has a positive view of the federal government and federal power. He resolves ambiguities in favor of giving federal officials reasonable discretion to address contemporary problems and meet the needs of society. In disputes between the federal government and individuals, he is inclined to vote for the government. By contrast, Justice Gorsuch has a skeptical view of the federal government. He prefers to limit the discretion of federal officials through formal rules that establish clear individual rights. In disputes between individuals and the federal government, Justice Gorsuch is more apt to side with the individual.

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The split between Justice Kavanaugh and Justice Gorsuch has enormous potential ramifications because it moderates their collective influence on the Court. In addition, the jurisprudential conflict between the new appointees, as expressed in their opinions, is a fascinating study in how different two Justices appointed by the same President can be.

INTRODUCTION

Confounding expectations,¹ it turns out President Trump's first two appointees to the Supreme Court are quite different from each other.² In their first term together, in cases with at least one dissent, Justice Brett Kavanaugh and Justice Neil Gorsuch were on opposite sides 49% of the time,³ an unusually high rate of disagreement for a pair of new Justices appointed by the same President.⁴ In their second term together, the two Trump-appointed Justices agreed more often, but they still parted company several times,⁵ often in significant cases. For example, Justice Gorsuch and Justice Kavanaugh wrote opinions on opposite sides of the case holding that discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964.⁶

The splits between the two Justices did not track the familiar right-to-left political spectrum. Both Justices were willing to side with the Court's Democratic appointees. For example, in the October 2018 term, Justice Kavanaugh voted with Obama appointee Justice Elena Kagan 70% of the time and 51% of the time in divided cases (just as often as he agreed with Justice Gorsuch).⁷ For his part, in five to four cases in the October 2018 term, Justice Gorsuch voted with Justice Ginsburg 35% of the time and with Justice Sotomayor 35% of the time.⁸

¹ See Jeremy Kidd, *New Metrics and Politics of Judicial Selection*, 70 ALA. L. REV. 785 (2019) (showing quantitative analysis that Justice Gorsuch and Justice Kavanaugh had very similar conservative predictive scores).

² See Adam Liptak & Alicia Parlapiano, *Supreme Court Term Marked by Shifting Alliances and Surprise Votes*, N.Y. TIMES (June 29, 2019), <http://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html> [<http://perma.cc/7NR7-C9VS>] (“[T]he two newest justices are a study in contrasts.”).

³ See Adam Feldman, *Final Stat Pack for October Term 2018*, SCOTUSBLOG (June 28, 2019, 5:59 PM), <http://www.scotusblog.com/2019/06/final-stat-pack-for-october-term-2018/> [<http://perma.cc/P4EH-6UMN>].

⁴ See Robert Barnes, *Trump's Justices Aren't Always on Same Page*, WASH. POST, June 30, 2019, at A1 (“Gorsuch and Kavanaugh have disagreed more often than any pair of new justices chosen by the same president in decades.”).

⁵ See Adam Feldman, *Final Stat Pack for October Term 2019*, SCOTUSBLOG (July 10, 2020, 7:36 PM), <http://www.scotusblog.com/wp-content/uploads/2020/07/Justice-agreement-7.10.20.pdf> [<http://perma.cc/7A57-GL8Y>].

⁶ See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

⁷ See Feldman, *Final Stat Pack for October Term 2018*, supra note 3.

⁸ See *id.*

The thesis of this Article is that there is a pattern to the disagreements between Justice Kavanaugh and Justice Gorsuch that can be discerned from their opinions and is consistent with their differing personal backgrounds. As discussed in detail below, the two Justices have very different attitudes toward the federal government and different jurisprudential philosophies.⁹ Discussed below is a quick preview.

Justice Kavanaugh has lived in the Washington, D.C., area almost all of his life, the exceptions being seven years at Yale for college and law school and a one-year judicial clerkship on the West Coast. He has spent his career in federal service.¹⁰ After clerking for Supreme Court Justice Anthony Kennedy, he became a federal prosecutor in the Whitewater investigation.¹¹ He later served in the George W. Bush White House where he met his wife, who was then a secretary for the President.¹²

Justice Kavanaugh has a positive, insider attitude toward the federal government. He sees it as a force for good. He approaches problems from the perspective of the establishment in his hometown. To facilitate the beneficial use of federal power, Justice Kavanaugh takes a flexible, pragmatic, public policy approach to the judicial role.¹³ He interprets laws in a modern, common-sense way. While cautious about change and sensitive to conservative values, Justice Kavanaugh believes judges should, within reasonable and limited bounds, modernize the law when necessary to further underlying policy goals. Justice Kavanaugh tends to resolve ambiguities in favor of giving federal officials reasonable discretion.¹⁴ He sympathizes with those who exercise federal authority or need the protection of federal power. He has far less sympathy for those subject to federal power.¹⁵

⁹ For a short essay introducing this idea, see Daniel Harris, *New Swing Votes on U.S. Supreme Court*, 114 NW. U.L. REV. ONLINE 258 (2020). The approach follows other scholarship. See, e.g., Joshua B. Fischman & Tonja Jacobi, *Second Dimension Supreme Court*, 57 WM. & MARY L. REV. 1671 (2016) (dividing the Supreme Court Justices into pragmatic and legalistic groups); C. Herman Pritchett, *Divisions Opinion Among Justices U.S. Supreme Court, 1939–41*, 35 AM. POL. SCI. REV. 890, 890 (1941) (finding that Supreme Court Justices “are influenced by biases and philosophies of government, . . . which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law.”).

¹⁰ See MOLLIE HEMINGWAY & CARRIE SEVERINO, JUSTICE ON TRIAL 9, 19 (2019).

¹¹ See Matthew Nussbaum, *Brett Kavanaugh: Who is He? Bio, Facts, Background and Political Views*, POLITICO (July 9, 2018, 2:11 PM), <http://www.politico.com/story/2018/07/09/brett-kavanaugh-who-is-he-bio-facts-background-and-political-views-703346> [http://perma.cc/3TDJ-BDSK].

¹² See *id.* at 18–19.

¹³ See, e.g., *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020).

¹⁴ See, e.g., *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1478 (2020) (Kavanaugh, J., concurring).

¹⁵ See, e.g., *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

Justice Gorsuch is cut from a different cloth. A native of Colorado, his experience with the nation's capital in his early teens was difficult.¹⁶ In 1981, his mother (Anne Gorsuch), after a successful career in Colorado state government,¹⁷ became President Reagan's first Director of the Environmental Protection Agency.¹⁸ In that position, she clashed with the D.C. establishment over her deregulatory efforts.¹⁹ Accused of dismantling her agency and cited for contempt of Congress, Anne Gorsuch was eventually forced from office.²⁰ At his Senate confirmation hearing in 2017, Justice Gorsuch said his mother taught him "that headlines are fleeting—courage lasts."²¹ The subtext was that Justice Gorsuch believes in following principles even if they lead to unpopular conclusions.

For most of his pre-judicial legal career, Justice Gorsuch worked in the private sector.²² After a Supreme Court clerkship for Justice Byron White and Justice Anthony Kennedy, Justice Gorsuch spent about a decade (including eight years as a partner) as a litigator at Kellog Huber, an elite D.C. law firm that represented private parties, often in opposition to the federal government.²³ When George W. Bush was President, Justice Gorsuch spent a year in the Justice Department, working mainly on national security matters,²⁴ before his appointment to the U.S. Court of Appeals for the Tenth Circuit, based in Denver, Colorado, where he served for about a decade prior to joining the Supreme Court.²⁵ It is also worth noting that Justice Gorsuch has a doctorate in moral philosophy from Oxford²⁶ and met his wife when he was a student there.²⁷

¹⁶ See Heather Elliott, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 711 (2019).

¹⁷ See NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 317 (2019).

¹⁸ See *Biography of Anne M. Gorsuch (Burford)*, EPA (May 20, 1981), <http://archive.epa.gov/epa/aboutepa/biography-anne-m-gorsuch-burford.html> [<http://perma.cc/3MYK-6X8B>].

¹⁹ See Brady Dennis & Chris Mooney, *Neil Gorsuch's Mother Once Ran EPA. It Didn't go Well*, WASH. POST (Feb. 1, 2017, 4:33 AM), <http://www.washingtonpost.com/news/energy-environment/wp/2017/02/01/neil-gorsuchs-mother-once-ran-the-epa-it-was-a-disaster/> [<http://perma.cc/XN4N-C92F>].

²⁰ See Elliott, *supra* note 16.

²¹ GORSUCH, *supra* note 17, at 317.

²² See Elliott, *supra* note 16.

²³ See *id.*

²⁴ See *id.*

²⁵ Matt Ford, *Trump Nominates Neil Gorsuch for the U.S. Supreme Court*, ATLANTIC (Jan. 31, 2017), <http://www.theatlantic.com/politics/archive/2017/01/gorsuch-trump-supreme-court/515232/> [<http://perma.cc/M8NF-DQTY>].

²⁶ See Christopher R. Green, *Justice Gorsuch and Moral Reality*, 70 ALA. L. REV. 635, 636 (2019).

²⁷ Joey Bunch, *Louise Gorsuch Goes Down in History, Sharing Marmalade Recipe in Supreme Court Book*, COLO. POLITICS (Dec. 28, 2017), http://www.coloradopolitics.com/news/louise-gorsuch-goes-down-in-history-sharing-marmalade-recipe-in-supreme-court-book/article_c888b00d-d724-5913-8dea-d21bff2da6c2.html [<http://perma.cc/M8ZC-NWBQ>].

Justice Gorsuch has a wary, outsider attitude toward the federal government.²⁸ He fears its unauthorized encroachment on democratic self-governance and the traditional common law.²⁹ He opposes judges or federal agencies updating the law to conform to modern policy or popular sentiment.³⁰ Instead, Justice Gorsuch believes judges must follow the law as it *is*, not as they want it to be.³¹ In his mind, this means reasoning from (his vision of) the basic precepts of the American Republic, the common law, and Western Civilization—such as respect for the individual and the rule of law, as supplemented by duly enacted legal texts construed in accordance with the interpretative tools that judges have used for centuries.³² While this philosophy usually leads to narrowing constructions of federal power, Justice Gorsuch will follow his (often literalist) understanding of the written law to its logical conclusion even if that means an expansion of federal authority.³³

To demonstrate this thesis about the differences between the two Justices, this Article proceeds in six parts plus a conclusion. Part I considers a case in which Justice Kavanaugh and Justice Gorsuch wrote opposing opinions that illustrate their differing attitudes toward the federal government and conflicting jurisprudential approaches. Part II discusses four cases from the October 2018 term in which Justice Kavanaugh voted with Justice Ginsburg in support of federal regulation and Justice Gorsuch was on the other side. Part III discusses four cases from the October 2018 term in which Justice Gorsuch voted with Justice Ginsburg in support of parties opposed to the federal government and Justice Kavanaugh was on the other side. Part IV looks at cases from the October 2018 term in which Justice Gorsuch and Justice Kavanaugh were in agreement. Part V looks at six cases from the Supreme Court's October 2019 term in which Justice Kavanaugh and Justice Gorsuch were on opposite sides and one or both wrote opinions. Part VI makes generalizations comparing the pragmatic insider jurisprudence of Justice Kavanaugh with the formalist outsider approach of Justice Gorsuch. Part VII briefly concludes by considering what the differences between the two Justices might mean for the future of United States law.

²⁸ Daniel Harris, *The New Swing Votes on the U.S. Supreme Court*, 114 NW. L. REV. ONLINE 258, 260 (2020).

²⁹ *Id.*

³⁰ GORSUCH, *supra* note 17, at 10.

³¹ *Id.*

³² *See, e.g.*, *Kisor v. Wilkie*, 139 S.Ct. 2400, 2442 (2019) (Gorsuch J., concurring).

³³ *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

I. THE JURISPRUDENTIAL CONFLICT

The jurisprudential conflict between Justice Gorsuch and Justice Kavanaugh is best illustrated by *United States v. Davis*, a five-to-four decision in which the majority coalition consisted of the Court's four Democratic appointees plus Justice Gorsuch.³⁴ In *Davis*, the defendants "Maurice Davis and Andrew Glover committed a string of gas station robberies in Texas."³⁵ They were caught, prosecuted in federal court, and convicted of violations of the federal Hobbs Act and conspiracy to violate the Hobbs Act.³⁶ Because they used a shotgun to commit their crimes, they were also convicted of carrying or using a firearm to violate the Hobbs Act and using or carrying a firearm in connection with their conspiracy.³⁷ The question before the Supreme Court involved the validity of that last conviction.³⁸

The governing statute, 18 U.S.C. § 924(c), mandated "heightened criminal penalties" for using or carrying a firearm in connection with a federal "crime of violence."³⁹ The term "crime of violence" had alternative definitions set forth in § 924(c)(3).⁴⁰ According to § 924(c)(3)(A), a crime of violence was a felony that had "the use, attempted use, or threatened use of physical force" as one of its elements.⁴¹ Alternatively, § 924(c)(3)(B) defined a "crime of violence" as a felony "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."⁴²

The defendants' convictions for carrying or using a firearm in connection with their Hobbs Act violations were valid under § 924(c)(3)(A) because the use or threatened use of force was an element of the Hobbs Act crime.⁴³ But § 924(c)(3)(A) did not work for the defendants' convictions for carrying or using a firearm in connection with the conspiracy charge because the use or threatened use of force was not an element of conspiracy.⁴⁴ To justify those convictions, the government needed to use § 924(c)(3)(B).⁴⁵

³⁴ *United States v. Davis*, 139 S. Ct. 2319 (2019).

³⁵ *Id.* at 2324.

³⁶ *Id.* at 2324–25.

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.* at 2324.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2324.

⁴³ *Id.* at 2523, 2336.

⁴⁴ *Id.* at 2325.

⁴⁵ *Id.* at 2327.

That was a problem. Courts and the government construed § 924(c)(3)(B) to require what was called the “categorical approach”—an inquiry into the potential for harm inherent in the category of offense that the defendant committed (e.g., whether wire fraud is the type of crime that has a substantial risk of harm).⁴⁶ In 2018, the Supreme Court held that a virtually identical statutory definition of “crime of violence” also mandated that same categorical approach and it was unconstitutionally vague because it required courts “to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk.”⁴⁷

To get rid of the vagueness problem and thereby save the convictions and the statute, the government asked the Supreme Court to reinterpret § 924(c)(3)(B) so that its definition of a crime of violence would depend on what defendants actually did and not on the hypothetical potential for harm associated with their category of crime.⁴⁸ The Supreme Court, in a five-to-four decision, ruled against the government.⁴⁹ The five Justices in the majority were the Court’s four Democratic appointees plus Justice Gorsuch, who wrote the majority opinion.⁵⁰

Justice Gorsuch began his opinion by making it clear that he did not consider the statute a first draft that the Court could rework, stating: “In our constitutional order, a vague law is no law at all. Only the people’s elected representatives in Congress have the power to write new federal criminal laws.”⁵¹ Justice Gorsuch went on to explain that: “When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.”⁵²

Taking his task as statutory interpretation, not revision, Justice Gorsuch said § 924(c)(3)(B) meant what it appeared to say.⁵³ For purposes of the section, a crime of violence was to be determined using the categorical approach, which involved assessing the potential for harm associated with the abstract category of the defendant’s offense.⁵⁴ Because this inquiry provided “no reliable way to determine which offenses qualify as

⁴⁶ *See id.* at 2326.

⁴⁷ *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1211, 1216 (2018) (internal quotation marks omitted).

⁴⁸ *See Davis*, 139 S. Ct. at 2327.

⁴⁹ *Id.* at 2336.

⁵⁰ *Id.* at 2323.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2323–24.

⁵⁴ *Id.* at 2324.

crimes of violence,” the language was “unconstitutionally vague.”⁵⁵

Justice Gorsuch explained that the government’s alternative reading of the statute could not “be squared with the statute’s text, context, and history.”⁵⁶ Were the Supreme Court to adopt the government’s revised version of the statute, Justice Gorsuch said, the Supreme Court Justices would be “stepping outside [their] role as judges and writing a new law rather than applying the one Congress adopted.”⁵⁷

Justice Gorsuch emphasized that the defendants would still receive substantial prison time because they “did many things that Congress had declared to be crimes” and would “face substantial prison sentences for those offenses.”⁵⁸

Justice Gorsuch also noted that the government’s new reading of Section 924(c)(3)(B) would criminalize some conduct that was not made criminal by the law as it was actually written (such as a defendant’s use of a firearm in connection with an offense that does not normally involve the use of force).⁵⁹ Expanding the statute through interpretation “would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests.”⁶⁰ Therefore, despite the general reluctance of courts to declare Acts of Congress unconstitutional, “a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.”⁶¹

Justice Kavanaugh wrote the dissent, joined in whole by Justices Thomas and Alito and in part by Chief Justice Roberts.⁶² The dissenting opinion, like the majority opinion, began with a discussion of important considerations: “Crime and firearms form a dangerous mix. From the 1960s through the 1980s, violent gun crime was rampant in America.”⁶³ Emphasizing the practical needs of modern American society,⁶⁴ Justice Kavanaugh noted that “The wave of violence destroyed lives and devastated communities, particularly in America’s cities. Between 1963 and 1968, annual murders with firearms rose by a staggering 87 percent, and annual

⁵⁵ *Id.* at 2323–24.

⁵⁶ *Id.* at 2324.

⁵⁷ *Id.* (alteration in original).

⁵⁸ *Id.* at 2333.

⁵⁹ *Id.* at 2332.

⁶⁰ *Id.* at 2332–33.

⁶¹ *Id.* at 2333.

⁶² *Id.* at 2336.

⁶³ *Id.*

⁶⁴ *Id.*

aggravated assaults with firearms increased by more than 230 percent.”⁶⁵

Continuing in a pragmatic vein, Justice Kavanaugh went on to describe how “[f]aced with an onslaught of violent gun crime and its debilitating effects, the American people demanded action.”⁶⁶ Justice Kavanaugh explained that gun control laws, such as 18 U.S.C. § 924(c), were passed in response.⁶⁷ “Over the last 33 years, tens of thousands of § 924(c) cases have been prosecuted in the federal courts. Meanwhile, violent crime with firearms has decreased significantly.”⁶⁸

Justice Kavanaugh then attacked as surprising and extraordinary the Supreme Court’s decision to strike down a key provision of § 924(c)—“a federal law that has been applied so often for so long with so little problem.”⁶⁹ Justice Kavanaugh warned that “[t]he Court’s decision . . . will make it harder to prosecute violent gun crimes in the future.”⁷⁰ Further, he stated “[t]he Court’s decision also will likely mean that thousands of inmates who committed violent gun crimes will be released far earlier than Congress specified when enacting § 924(c). The inmates who will be released . . . are offenders who committed violent crimes with firearms, often brutally violent crimes.”⁷¹

Justice Gorsuch responded to Justice Kavanaugh’s first argument by saying that there was nothing “surprising” or “extraordinary” about striking down a statute when even the government conceded the law would be unconstitutional if it continued to mean what it had meant through thousands of prosecutions.⁷² On the contrary, Justice Gorsuch said, it would be surprising and extraordinary if the Supreme Court could save the statute by suddenly giving it “a new meaning different from the one it has borne for the last three decades.”⁷³

Justice Kavanaugh’s dissent argued that the most sensible approach for a statute such as § 924(c)(3)(B) was to focus on what the defendant had actually done and not to employ the categorical approach of looking at the potential for harm associated with the abstract crime.⁷⁴ Justice Kavanaugh quoted a lower court opinion: “If you were to ask John Q. Public whether a

⁶⁵ *Id.* at 2336 (Kavanaugh, J., dissenting).

⁶⁶ *Id.* at 2337.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 2333 (majority opinion).

⁷³ *Id.*

⁷⁴ *Id.* at 2343 (Kavanaugh, J., dissenting).

particular crime posed a substantial risk of violence, surely he would respond, ‘Well, tell me how it went down—*what happened?*’”⁷⁵ The majority opinion by Justice Gorsuch responded that the language of the statute before the Supreme Court was not “the language posited in the dissent’s push poll. Section 924(c)(3)(B) doesn’t ask about the risk that ‘a particular crime posed’ but about the risk that an ‘offense . . . by its nature, involves.’”⁷⁶

The dissent by Justice Kavanaugh said that it did not matter that the government had for many years taken the position that § 924(c)(3)(B) mandated the (now unconstitutional) categorical approach, noting that the government’s position came “after the courts settled on a categorical approach—at a time when it did not matter for constitutional vagueness purposes”⁷⁷ In response, Justice Gorsuch asked: “Isn’t it at least a little revealing that, when the government had no motive to concoct an alternative reading, even it thought the best reading of § 924(c)(3)(B) demanded categorical analysis?”⁷⁸

The dissent by Justice Kavanaugh noted that the word “offense” in § 924(c)(3) could be read to refer to what the defendant had actually done,⁷⁹ and that “an ambiguous statute must be interpreted, whenever possible, to avoid unconstitutionality.”⁸⁰ Therefore, Justice Kavanaugh said, “it is fairly possible to interpret § 924(c)(3)(B) to focus on the defendant’s actual conduct” and that reading would make the statute constitutional.⁸¹

In response, Justice Gorsuch pointed out that the dissent’s new reading of the law would criminalize conduct that was not criminal under the categorical approach—the interpretation of the law that fit best with the statute’s language and history.⁸² Justice Gorsuch chided the dissent for “not even try[ing] to explain how using the canon to criminalize conduct that *isn’t* criminal under the fairest reading of a statute might be reconciled with traditional principles of fair notice and separation of powers.”⁸³ Justice Gorsuch noted that “the dissent seem[ed] willing to consign thousands of defendants to prison for years . . . because it [was] merely possible Congress might have

⁷⁵ *Id.* (quoting *Ovalles v. United States*, 905 F.3d 1231, 1241 (11th Cir. 2018)).

⁷⁶ *Id.* at 2334 (majority opinion).

⁷⁷ *Id.* at 2355 (Kavanaugh, J., dissenting).

⁷⁸ *Id.* at 2334 (majority opinion).

⁷⁹ *Id.* at 2347–48 (Kavanaugh, J., dissenting).

⁸⁰ *Id.* at 2350.

⁸¹ *Id.* at 2351.

⁸² *Id.* at 2335 (majority opinion).

⁸³ *Id.*

[ordained those penalties].”⁸⁴ Justice Gorsuch concluded: “In our republic, a speculative possibility that a man’s conduct violated the law should never be enough to justify taking his liberty.”⁸⁵

The last section of the dissent returned to the theme that “[t]he Court’s decision means that people who in the future commit violent crimes with firearms may be able to escape conviction under § 924(c).”⁸⁶ After giving an example of a horrible crime that might go unpunished, Justice Kavanaugh argued that “when the consequences [of a statutory interpretation] are this bad,” the Court should “double-check” its legal analysis.⁸⁷ That double-checking, Justice Kavanaugh went on, would show that the statute did not really compel the Court’s decision in *Davis*.⁸⁸ Justice Kavanaugh concluded: “I am not persuaded that the Court can blame this decision on Congress. The Court has a way out, if it wants a way out.”⁸⁹

The majority opinion by Justice Gorsuch addressed the dissent’s public policy arguments by asking: “[W]hat’s the point of all this talk of ‘bad’ consequences if not to suggest that judges should be tempted into reading the law to satisfy their policy goals?”⁹⁰ Justice Gorsuch went on to note the various ways Congress could fix the problem and then concluded: “[T]hese are options that belong to Congress to consider; no matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive.”⁹¹

The *Davis* decision illustrates the philosophical differences between Justice Gorsuch and Justice Kavanaugh. Justice Gorsuch construed the statute based on its text, history, and prior construction. Justice Kavanaugh focused on the general purpose of the statute, common sense, and the practical consequences of alternative interpretations. Justice Gorsuch’s focus was on the rights of the individual; he resolved doubts about the meaning of the law against the government and in favor of liberty. Justice Kavanaugh’s concern was with the welfare of society; he resolved ambiguities in favor of the government and against wrongdoers.

Justice Gorsuch treated the statute’s meaning as objective and fixed; something individuals could ascertain and rely on, not

⁸⁴ *Id.* (internal quotations omitted).

⁸⁵ *Id.*

⁸⁶ *Id.* at 2353 (Kavanaugh, J., dissenting).

⁸⁷ *Id.* at 2355.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 2335 (majority opinion).

⁹¹ *Id.* at 2336.

something government officials could manipulate based on their notions of the best interests of society. Justice Kavanaugh saw the law's meaning as malleable; something the government and the Court could and should alter in order to serve the public interest.

II. JUSTICE KAVANAUGH WITH JUSTICE GINSBURG AGAINST JUSTICE GORSUCH

In cases involving assertions of federal power, Justice Kavanaugh often sided with the Court's liberal Justices and against Justice Gorsuch. This section provides four examples. Two of the cases discussed below involved federal regulation of private business, and two involved constitutional challenges to state actions. In all four cases, Justice Kavanaugh took the side of the parties invoking federal power while Justice Gorsuch sided with parties resisting federal power. Justice Kavanaugh justified his rulings with pragmatic and progressive arguments consistent with the modern norms of Washington, D.C. Justice Gorsuch made a variety of counterarguments in support of local self-governance and the traditional common law.

A. *Apple Inc. v. Pepper*⁹²

Apple Inc., an antitrust case, arose out of Apple's practice of requiring its customers to purchase applications ("app") for Apple devices through the Apple App Store.⁹³ Several customers sued Apple for allegedly using its monopoly power to charge higher prices than Apple customers would otherwise have paid.⁹⁴ The gist of Apple's defense was that it did not set the allegedly unlawful prices.⁹⁵ Although Apple imposed a uniform 30% commission on the developers, Apple argued that it should not be blamed for the prices because the developer of each app ultimately set the price for that app.⁹⁶

The company invoked a 1977 Supreme Court precedent, *Illinois Brick Co. v. Illinois*,⁹⁷ which held that customers who did not purchase directly from the alleged antitrust violator did not have standing to sue that party for damages under the federal antitrust laws. Apple argued that the general principle of *Illinois Brick* should apply because, similar to the facts in that case, the

⁹² *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

⁹³ *Id.* at 1518–19.

⁹⁴ *See id.* at 1518.

⁹⁵ *See id.* at 1519.

⁹⁶ *See id.* at 1519, 1521–22.

⁹⁷ *See id.* at 1519; *see also* *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 728–29 (1977).

consumer plaintiffs were suing a party that did not set the prices that caused the alleged antitrust injury.⁹⁸

The district court agreed with Apple and dismissed the case.⁹⁹ The Court of Appeals reversed, holding that the consumers had standing to sue under *Illinois Brick* because they purchased their apps directly from Apple.¹⁰⁰ The question before the Supreme Court was whether to adopt a broad construction of the Sherman Act and a narrow construction of the *Illinois Brick* exception (as the plaintiffs wanted) or, conversely, a narrow construction of the Sherman Act and a broad construction of the *Illinois Brick* exception, as Apple urged.¹⁰¹

By a five-to-four vote, the Supreme Court sided with the consumer plaintiffs.¹⁰² The majority consisted of the Court's four liberal Justices plus Justice Kavanaugh, who wrote the majority opinion.¹⁰³ The opinion twice emphasized that the Sherman Act should be construed broadly to achieve its purpose of protecting consumers from monopolists.¹⁰⁴ Early on, the opinion noted: "A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim."¹⁰⁵ The opinion went on to say that it would be inconsistent with the statutory scheme to immunize monopolistic retailers from antitrust litigation in the scenario where the retailers have their suppliers set the base prices.¹⁰⁶ "We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent."¹⁰⁷

The opinion by Justice Kavanaugh brushed aside Apple's argument that the proper parties to bring a monopolization claim were the suppliers who dealt directly with Apple, noting: "Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases."¹⁰⁸ Justice Kavanaugh also dismissed Apple's argument about the potential complexity of damage calculations, stating: "*Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated."¹⁰⁹

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 325 (9th Cir. 2017).

¹⁰¹ *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019).

¹⁰² *Id.* at 1519.

¹⁰³ *Id.* at 1515.

¹⁰⁴ *See id.* at 1520, 1525.

¹⁰⁵ *Id.* at 1519.

¹⁰⁶ *See id.* at 1523–24.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1524.

¹⁰⁹ *Id.*

In its close, Justice Kavanaugh's opinion returned to the theme that the Sherman Act should be interpreted consistently with its pro-consumer purposes.¹¹⁰ Justice Kavanaugh said: "The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law."¹¹¹ The opinion went on to note that from the Sherman Act's inception "protecting consumers from monopoly prices' has been 'the central concern of antitrust.'"¹¹²

Justice Gorsuch wrote a dissent, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito.¹¹³ He treated *Illinois Brick* as an application of the general rule that statutory causes of action are "limited to plaintiffs whose injuries are proximately caused by violations of the statute."¹¹⁴ Justice Gorsuch reasoned that *Illinois Brick* rejected a suit by indirect purchasers because the plaintiffs in that case were relying on pass-on theory of damages that was inconsistent with the common law proximate cause rule.¹¹⁵ Justice Gorsuch then criticized the majority for allowing "a pass-on case" based on a formalistic and overly narrow interpretation of *Illinois Brick*.¹¹⁶

The dissent by Justice Gorsuch also noted the practical difficulties of adjudicating the plaintiffs' antitrust claim: "Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower?"¹¹⁷ In addition, Justice Gorsuch criticized Justice Kavanaugh for preferring a broad reading of the Sherman Act to "the well-trodden path of construing the statutory text in light of background common law principles of proximate cause."¹¹⁸

For purposes of this Article, the important takeaway from *Apple Inc.* is how differently Justice Kavanaugh and Justice Gorsuch viewed federal regulation. Justice Kavanaugh favored a liberal construction of the Sherman Act that would ensure that all of the law's regulatory goals could be achieved.¹¹⁹ Justice Gorsuch did not worry about incomplete enforcement.¹²⁰ His

¹¹⁰ *See id.* at 1525.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (Gorsuch, J., dissenting).

¹¹⁴ *Id.* at 1527 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014)).

¹¹⁵ *See id.* at 1525–26.

¹¹⁶ *See id.* at 1526.

¹¹⁷ *Id.* at 1528.

¹¹⁸ *Id.* at 1530.

¹¹⁹ *See id.* at 1525.

¹²⁰ *See id.* at 1525–31.

concern was with the law going too far, so he preferred reading into the statute principles taken from common law traditions to make sure the federal statute limited damages liability to private parties that had actually caused the alleged harm.¹²¹

Justice Kavanaugh wanted to protect society from the machinations of big companies, particularly those companies that violate the spirit of the law in crafty ways and then seek shelter in made-up technical defenses.¹²² He sympathized with those seeking to enforce the law and with the people the statute was intended to protect.¹²³ He had much less concern for the supposed rights of alleged law-breakers.¹²⁴ By contrast, Justice Gorsuch took a skeptical attitude toward law enforcement and its tendency toward mission creep.¹²⁵ His sympathies were with those subject to federal regulation.¹²⁶

B. *Air and Liquid Systems Corp. v. DeVries*¹²⁷

A similar conflict between Justice Kavanaugh and Justice Gorsuch took place in *DeVries*, a case involving the application of federal maritime law to a products liability claim.¹²⁸ Two sailors, John DeVries and Kenneth McAfee, were exposed to asbestos while serving in the U.S. Navy (DeVries in the 1950s and McAfee in the 1980s).¹²⁹ They later developed cancer, allegedly caused by asbestos exposure.¹³⁰ The former sailors did not sue the asbestos manufacturers because those companies were in bankruptcy, and they believed they could not sue the Navy because of a 1950 Supreme Court precedent.¹³¹ Instead, the sailors and their wives filed suit against companies that had supplied the Navy with products such as pumps, blowers, and turbines to which the Navy had later added asbestos.¹³² The theory of liability was that the defendant companies should have warned them about the dangers of asbestos insulation, so that the former sailors would have known to wear respiratory masks and avoid the hazard.¹³³

¹²¹ *See id.* at 1530.

¹²² *See id.* at 1524 (majority opinion).

¹²³ *See id.* at 1524–25.

¹²⁴ *See id.*

¹²⁵ *See id.* at 1525–31 (Gorsuch, J., dissenting).

¹²⁶ *See id.* at 1529–30.

¹²⁷ *See Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

¹²⁸ *Id.* at 991.

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.* at 992 (citing *Feres v. United States*, 340 U.S. 135 (1950)) (concluding “that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service”).

¹³² *See id.*

¹³³ *Id.*

The cases were commenced in state court and later removed to federal court because they fell within the federal maritime jurisdiction.¹³⁴ The district court granted the defendants' motions for summary judgment, relying on the traditional common law "bare-metal" defense, under which product manufacturers have no duty to warn about the dangers of materials that are not in their products at the time of sale.¹³⁵ The U.S. Court of Appeals for the Third Circuit reversed in accordance with a modern products liability rule that requires manufacturers to warn about the dangers of added materials if it is foreseeable that the materials might be added to the product after sale.¹³⁶

On review, the Supreme Court rejected both the "bare-metal" defense followed by the district court and the "foreseeable risk" test of the Court of Appeals.¹³⁷ Instead, the Court adopted a somewhat less plaintiff-friendly, modern rule followed in some jurisdictions under which "a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger."¹³⁸

The majority opinion was written by Justice Kavanaugh and joined by Chief Justice Roberts and the Court's four liberal Justices.¹³⁹ Justice Kavanaugh began by emphasizing that federal courts have great freedom to shape federal maritime law, noting: "When a federal court decides a maritime case, it acts as a federal 'common law court,' much as state courts do in state common-law cases."¹⁴⁰ Justice Kavanaugh went on to emphasize that in formulating maritime law, courts were not bound by what was done in the past, but instead may consider "judicial opinions, legislation, treatises, and scholarly writings."¹⁴¹

Justice Kavanaugh said that while there was a general duty to warn about risks in one's products, there were disagreements among courts as to what that entailed when the risks came from added materials.¹⁴² Some jurisdictions followed the "bare-metal" defense under which there was no duty to warn about the risks of materials added after sale, some jurisdictions went by the

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See id.* (citing *In re Asbestos Prods. Liab. Litig.*, 873 F.3d 232, 240–41 (3d Cir. 2017)).

¹³⁷ *See id.* at 991.

¹³⁸ *Id.*

¹³⁹ *Id.* at 986.

¹⁴⁰ *Id.* at 992 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008)).

¹⁴¹ *Id.*

¹⁴² *See id.* at 993.

foreseeable risk approach, and some courts followed what Justice Kavanaugh described as an intermediate approach.¹⁴³ Justice Kavanaugh decided that the intermediate approach would be the best policy choice, reasoning that the foreseeability test would be too costly and result in “overwarning” users (with an overwhelmingly long list of potential hazards), while the bare-metal defense would not do enough to promote safety.¹⁴⁴

Justice Kavanaugh explained why it was a good idea for the Supreme Court to use its discretion to shape maritime law to provide plaintiffs with more protection than afforded by the traditional common law, noting: “Maritime law has always recognized a ‘special solicitude for the welfare’ of those who undertake to ‘venture upon hazardous and unpredictable sea voyages.’”¹⁴⁵ Justice Kavanaugh went on: “The plaintiffs in this case are the families of veterans who served in the U.S. Navy. Maritime law’s longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances.”¹⁴⁶

Justice Gorsuch wrote the dissent, which was joined by Justice Thomas and Justice Alito.¹⁴⁷ He argued that the traditional common law bare-metal defense was the proper rule whereas the more modern standard adopted by the majority did not enjoy “meaningful roots in the common law.”¹⁴⁸ Justice Gorsuch cited the *Restatement (Third) of Torts* from 1997 for the proposition that “the supplier of a product generally must warn about only those risks associated with the product itself, not those associated with the ‘products and systems into which [it later may be] integrated.’”¹⁴⁹

Justice Gorsuch argued that “the traditional common law rule still makes the most sense today” because “[t]he manufacturer of a product is in the best position to understand and warn users about its risks” and therefore should be the one who has the duty to warn about product hazards.¹⁵⁰ Expanding the duty to warn was not a good idea, Justice Gorsuch explained because “we dilute the incentive of a manufacturer to warn about the dangers of its products when we require other people to share the duty to warn and its corresponding costs.”¹⁵¹

¹⁴³ See *id.* at 993–94.

¹⁴⁴ See *id.* at 994–95.

¹⁴⁵ *Id.* at 995 (quoting *Am. Exp. Lines, Inc. v. Alvez*, 446 U.S. 274, 285 (1980)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 996 (Gorsuch, J., dissenting).

¹⁴⁸ See *id.* at 996–97.

¹⁴⁹ *Id.* at 997.

¹⁵⁰ *Id.*

¹⁵¹ See *id.* at 997–98.

Justice Gorsuch also argued that the traditional common law fit consumer expectations. “A home chef who buys a butcher’s knife may expect to read warnings about the dangers of knives but not about the dangers of undercooked meat. Likewise, a purchaser of gasoline may expect to see warnings at the pump about its flammability but not about the dangers of recklessly driving a car.”¹⁵²

Justice Gorsuch criticized the majority for replacing a clear common law rule with an opaque standard that courts would find hard to administer.¹⁵³ Justice Gorsuch then raised a fairness argument: “Decades ago, the bare metal defendants produced their lawful products and provided all the warnings the law required. Now, they are at risk of being held responsible retrospectively for failing to warn about other people’s products.”¹⁵⁴ He argued that “[i]t is a duty they could not have anticipated then and one they cannot discharge now. They can only pay. Of course, that may be the point.”¹⁵⁵ Justice Gorsuch then went on to argue that the Court might be “motivated by the unfortunate facts of this particular case, where the sailors’ widows appear to have a limited prospect of recovery from the companies that supplied the asbestos (they’ve gone bankrupt) and from the Navy that allegedly directed the use of asbestos (it’s likely immune under our precedents).”¹⁵⁶

Nevertheless, Justice Gorsuch went on, sympathy for the plaintiffs did not justify imposing liability on innocent manufacturers: “how were they supposed to anticipate many decades ago the novel duty to warn placed on them today? People should be able to find the law in the books; they should not find the law coming upon them out of nowhere.”¹⁵⁷

Once again, Justice Kavanaugh sympathized with those seeking to enforce federal law, and those needing the protection of federal law. Justice Gorsuch’s sympathies were with those who needed protection from federal law. Justice Kavanaugh saw the law as something flexible that judges should update for the better protection of the people. Justice Gorsuch saw the law as fixed; something that private parties could count on, not something that could be changed years later so as to punish defendants for conduct that was legal at the time it was done.

Justice Kavanaugh preferred a modern, consumer-protective version of the common law that expanded the scope of corporate

¹⁵² *Id.* at 998.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 999–1000.

¹⁵⁶ *Id.* at 1000.

¹⁵⁷ *Id.*

responsibility, although he was careful to adopt an intermediate step and not the most plaintiff-friendly approach. Justice Gorsuch opted for the traditional common law rule that limited the duty to warn to the party best situated to fulfill that duty, even though that construction of the law meant ruling against sympathetic plaintiffs.

C. *Tennessee Wine and Spirits Retailers Assoc. v. Thomas*¹⁵⁸

In *Tennessee Wine and Spirits*, a Tennessee statute required people applying for a license to operate a retail liquor store to have lived in the state for at least two years prior to their application.¹⁵⁹ Normally, laws that impose durational residency requirements on citizens seeking state benefits are deemed unconstitutional because they violate the free trade and free travel principles of the Dormant Commerce Clause.¹⁶⁰ The question before the Supreme Court in *Tennessee Wine and Spirits* was whether there was an exception to that general rule based on Section 2 of the Twenty-First Amendment.¹⁶¹ Section 2 was enacted as part of the deal that repealed the Eighteenth Amendment (the Prohibition Amendment) and, by its terms, gives states the power to regulate the transportation or importation of liquor.¹⁶²

The Supreme Court struck down the state law by a vote of seven-to-two. The majority opinion by Justice Alito followed modern precedents to construe Section 2 of the Twenty-First Amendment narrowly.¹⁶³ According to the majority, Section 2 authorized states to enact “alcohol-related public health and safety measures” but was “not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages.”¹⁶⁴ The opinion concluded that “[b]ecause Tennessee’s 2-year residency requirement for retail license applicants blatantly favors the State’s residents and has little relationship to public health and safety, it is unconstitutional.”¹⁶⁵

Justice Gorsuch wrote a dissenting opinion that was joined only by Justice Thomas. While agreeing that Section 2 did not give states the power to violate all manner of constitutional rights, Justice Gorsuch argued that the constitutional provision did allow states to escape the free trade principles the Supreme Court

¹⁵⁸ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019).

¹⁵⁹ *Id.* at 2457.

¹⁶⁰ *See id.*

¹⁶¹ *See id.* at 2459.

¹⁶² *Id.*

¹⁶³ *See id.* at 2476.

¹⁶⁴ *Id.* at 2457.

¹⁶⁵ *Id.*

had read into the Dormant Commerce Clause.¹⁶⁶ Invoking history, Justice Gorsuch said that both before the Prohibition Amendment and after its repeal, “one thing has always held true: States may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms.”¹⁶⁷

The bulk of the dissent was spent debating the majority’s take on history and modern precedents under the dormant Commerce Clause and Section 2 of the Twenty-First Amendment.¹⁶⁸ But in its closing paragraph, the dissent spoke to the philosophical issues that prompted Justice Gorsuch to disagree with the majority of the Court.¹⁶⁹ The paragraph began: “As judges, we may be sorely tempted to ‘rationalize’ the law and impose our own free-trade rules for all goods and services in interstate commerce.”¹⁷⁰ That temptation should be resisted, Justice Gorsuch argued, because “real life is not always so tidy and satisfactory, and neither are the democratic compromises we are bound to respect as judges. Like it or not, those who adopted the Twenty-first Amendment took the view that reasonable people can disagree about the costs and benefits of free trade in alcohol.”¹⁷¹ Justice Gorsuch went on: “Under the terms of the compromise they hammered out, the regulation of alcohol wasn’t left to the imagination of a committee of nine sitting in Washington, D.C., but to the judgment of the people themselves and their local elected representatives.”¹⁷²

In a footnote, the majority opinion by Justice Alito addressed this passage in Justice Gorsuch’s dissent, characterizing it as “empty rhetoric” and noting that even the dissent strayed “from a blinkered reading” of Section 2 by conceding that the provision did “not abrogate all previously adopted constitutional provisions, just the dormant Commerce Clause.”¹⁷³

The *Tennessee Wine and Spirits* decision illustrates key differences between Justice Kavanaugh and Justice Gorsuch. Justice Kavanaugh favors national norms over provincial interests. Justice Gorsuch prefers to defend localities from the (supposed) overreach of the federal government. Justice Kavanaugh is happy to be part of the Washington, D.C., consensus. Justice Gorsuch will go out of his way to defy it. He is also willing to use sweeping anti-Washington, D.C., rhetoric, even

¹⁶⁶ *Id.* at 2477. (Gorsuch, J., dissenting).

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 2476–84.

¹⁶⁹ *Id.* at 2484.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 2468 n.15 (majority opinion).

when the logic of that rhetoric might go further than he actually wants to go. It is also worth noting that Justice Gorsuch is sympathetic to state regulation of business; his anti-government sentiment seems to be limited to the federal authorities.

D. *Flowers v. Mississippi*¹⁷⁴

The defendant in *Flowers*, Curtis Flowers, was convicted in Mississippi state court of murdering four people in Winona, Mississippi, in 1996.¹⁷⁵ It was his sixth trial for the crime.¹⁷⁶ The first three trials resulted in convictions that were reversed by the Mississippi Supreme Court because of prosecutorial misconduct.¹⁷⁷ The fourth and fifth trials resulted in hung juries.¹⁷⁸ The question before the Supreme Court was whether, in Flowers' sixth trial, the prosecutor improperly struck Carolyn Wright, a black prospective juror, for racially discriminatory reasons in violation of the Equal Protection Clause as interpreted by the Supreme Court in 1986 in *Batson v. Kentucky*.¹⁷⁹

The Supreme Court reversed the Mississippi Supreme Court and ruled for the defendant by a vote of seven-to-two.¹⁸⁰ The majority opinion by Justice Kavanaugh concluded that “[f]our critical facts, taken together, require reversal.”¹⁸¹ The first fact was that “in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck.”¹⁸² The second critical fact was that in Flowers' sixth trial, the one that had resulted in the conviction under review, “the State exercised peremptory strikes against five of the six black prospective jurors.”¹⁸³ The third fact was that at the sixth trial, “in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors.”¹⁸⁴ The fourth critical fact, according to Justice Kavanaugh, was that “the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.”¹⁸⁵

¹⁷⁴ *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

¹⁷⁵ *Id.* at 2234–35.

¹⁷⁶ *Id.* at 2235.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁸⁰ *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

¹⁸¹ *Id.* at 2235.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Justice Kavanaugh emphasized the narrow, fact-bound basis of the Court's decision, noting: "We need not and do not decide that any one of those four facts alone would require reversal." He stated ". . . all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not 'motivated in substantial part by discriminatory intent.'"¹⁸⁶

Justice Kavanaugh went on: "In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case."¹⁸⁷

Justice Thomas wrote a dissent. In its first three sections, which Justice Gorsuch joined, Justice Thomas went over the factual record of jury selection for the six trials in detail.¹⁸⁸ Noting that the defendant and the victims came from a small town with connections to many in the jury pool, Justice Thomas discussed the prosecutor's nondiscriminatory reasons for forty of the forty-one peremptory challenges that he used against black prospective jurors.¹⁸⁹ Justice Thomas also noted that the one improper peremptory challenge had been used twenty years earlier in a trial that did not result in the conviction under review.¹⁹⁰

With respect to the most recent trial and the striking of Wright, Justice Thomas noted that, shortly after the murders, Wright was sued by Tardy Furniture, a business that was owned by one of the victims and later, at the time of the suit against Wright, by that victim's son and daughter.¹⁹¹ The store's suit against Wright resulted in a garnishment order against her.¹⁹² Justice Thomas concluded that Wright's potential bias was "obvious," so that it was not unconstitutional racial discrimination for the prosecution to strike her.¹⁹³

Justice Thomas said that the Court should have followed its normal practice of not granting certiorari to review fact-specific cases.¹⁹⁴ He speculated that the Court might have granted review "because the case [had] received a fair amount of media

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 2252–69 (Thomas, J., dissenting). The last section, which Justice Gorsuch did not join, called for overruling *Batson v. Kentucky*. *See id.* at 2269–74.

¹⁸⁹ *See id.* at 2266–69.

¹⁹⁰ *See id.*

¹⁹¹ *Id.* at 2255.

¹⁹² *See id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2254.

attention.”¹⁹⁵ Alternatively, Justice Thomas speculated, the Court might have taken the case for review because it came “from a state court in the South.”¹⁹⁶ Justice Thomas noted that “[t]hese courts are ‘familiar objects of the Court’s scorn,’ especially in cases involving race.”¹⁹⁷

This decision illustrates Justice Kavanaugh’s support for civil rights and willingness to use federal power to hold state governments to national standards. It also shows his pragmatic, fact-bound approach to adjudication. On the other hand, Justice Gorsuch’s willingness to join the portions of Justice Thomas’ dissent that questioned the factual basis of the Court’s decision illustrates that Justice Gorsuch is apt to challenge the dominant narrative and defy Washington, D.C., norms. His opposition is not all that conservative. Justice Gorsuch did not want to overrule the *Batson* precedent and he seems generally supportive of modern civil rights law. But in a factual dispute over the reach of federal law, Justice Gorsuch rejected the views of the D.C. establishment and sided with an object of its scorn.

III. JUSTICE GORSUCH WITH JUSTICE GINSBURG AGAINST JUSTICE KAVANAUGH

Justice Gorsuch’s skepticism about federal power often put him on the same side as Justice Ginsburg and opposite Justice Kavanaugh.¹⁹⁸ This section examines four examples—all with a connecting theme. In each of these cases, Justice Gorsuch opposed the federal government (or, in one case, a party that was acting as the U.S. government’s successor in interest) while Justice Kavanaugh took the side of the federal government (or its successor in interest).¹⁹⁹

A. *Biestek v. Berryhill*²⁰⁰

In *Biestek*, Michael Biestek (a former carpenter suffering from degenerative disc disease, Hepatitis C, and depression) applied for social security disability benefits.²⁰¹ Even though Biestek was no longer able to perform his customary construction work, the Social Security Administration opposed his application on the theory that there were other jobs in the economy he could perform.²⁰²

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (citations omitted).

¹⁹⁸ *See infra*, Part III.A–D.

¹⁹⁹ *See id.*

²⁰⁰ *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019).

²⁰¹ *Id.* at 1152.

²⁰² *Id.* at 1153.

At a hearing before an Administrative Law Judge, a vocational expert hired by the government testified that there were “240,000 bench assembler jobs and 120,000 sorter jobs” available to someone with Biestek’s education and disabilities.²⁰³ On cross-examination, Biestek’s lawyer asked for the data supporting that conclusion.²⁰⁴ The Administrative Law Judge ruled that the supporting data was not necessary and then relied on the expert’s testimony in her decision, which granted Biestek disability benefits beginning in May 2013 (when he turned fifty) but denied prior benefits because of the availability of the other jobs.²⁰⁵

Biestek filed suit in federal court to recover the denied benefits, arguing that because the data supporting the expert’s report had not been disclosed, the decision of the Administrative Law Judge was not supported by substantial evidence and therefore should be overturned.²⁰⁶ The district court rejected this argument, as did the U.S. Court of Appeals for the Sixth Circuit.²⁰⁷ On review, the Supreme Court affirmed by a vote of six-to-three.²⁰⁸

The majority opinion was written by Justice Kagan and joined by Chief Justice Roberts, Justice Thomas, Justice Breyer, Justice Alito, and Justice Kavanaugh. The majority opinion reasoned that the substantial evidence standard is flexible and does not require “a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data.”²⁰⁹ Rather, judicial review of whether an administrative decision was supported by substantial evidence should be “case-by-case” under a standard that “takes into account all features of the vocational expert’s testimony, as well as the rest of the administrative record” and “defers to the presiding ALJ, who has seen the hearing up close.”²¹⁰

The three dissenters were Justice Ginsburg, Justice Sotomayor, and Justice Gorsuch. In his dissent, Justice Gorsuch employed the striking rhetorical device of presenting the case from the plaintiff’s perspective.²¹¹ His opinion began: “Walk for a moment in Michael Biestek’s shoes. As part of your application for disability benefits, you’ve proven that you suffer from serious

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1157.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 1158 (Gorsuch, J., dissenting).

health problems and can't return to your old construction job." The opinion continued, "Like many cases, yours turns on whether a significant number of other jobs remain that someone of your age, education, and experience, and with your physical limitations, could perform."²¹²

The opinion by Justice Gorsuch then went on to describe how the government introduced evidence that there were other jobs available, and how Biestek asked for the supporting data: "[b]ut rather than ordering the data produced, the hearing examiner, herself a Social Security Administration employee, jumps in to say that won't be necessary."²¹³ The narrative concluded then, "Even without the data, the examiner states in her decision on your disability claim, the expert's say-so warrants 'great weight' and is more than enough to evidence to deny your application. Case closed."²¹⁴

Justice Gorsuch reviewed precedents under the substantial evidence standard and then argued: "If clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence, the evidence here shouldn't be either."²¹⁵ Not only was the expert's testimony conclusory, Justice Gorsuch noted, "for all anyone can tell it may have come out of a hat—and, thus, may wind up being clearly mistaken, fake, or speculative evidence too."²¹⁶

In his closing, Justice Gorsuch emphasized the values at stake.²¹⁷ "The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decision[-]making. Without it, people like Mr. Biestek are left to the mercy of a bureaucrat's caprice."²¹⁸

Justice Kavanaugh did not write in this case, but he joined a majority opinion that saw a dispute between the federal government and an individual from the perspective of the government.²¹⁹ Justice Gorsuch, by contrast, saw the same case from the perspective of the individual fighting with the government.²²⁰ For the majority, the federal government was treated as a positive force that should be given substantial

²¹² *Id.*

²¹³ *Id.* at 1158–59.

²¹⁴ *Id.* at 1159.

²¹⁵ *Id.* at 1160.

²¹⁶ *Id.*

²¹⁷ *Id.* at 1162–63.

²¹⁸ *Id.* (citations omitted).

²¹⁹ *Id.* at 1152 (majority opinion).

²²⁰ *Id.* at 1161–63 (Gorsuch, J., dissenting).

leeway to do its good work.²²¹ For Justice Gorsuch, the federal government was an arrogant Leviathan that should be subject to close scrutiny and hemmed in by rules.²²² For the majority, the Social Security Administration hearing examiner was someone whose discretionary judgment deserved deference.²²³ Justice Gorsuch, by contrast, regarded that same discretion as a “bureaucrat’s caprice.”²²⁴

B. *Gamble v. United States*²²⁵

In *Gamble*, Terance Gamble was pulled over by police officer in Mobile, Alabama, for driving a car with a damaged headlight.²²⁶ Smelling marijuana, the officer searched the car and found not only marijuana but also a handgun, which Gamble as an ex-convict was not allowed to possess.²²⁷ Gamble pleaded guilty in state court to drug charges and possessing a gun while a convicted felon in violation of Alabama law.²²⁸ He was sentenced to ten years imprisonment, all but one year of which was suspended.²²⁹ Thinking his state punishment too light, federal authorities indicted Gamble for possession a gun while an ex-convict in violation of federal law and Gamble received nearly three more years in prison.²³⁰

Gamble challenged his federal conviction as violative of the Double Jeopardy Clause of the Fifth Amendment, which provides that “no person may be ‘twice put in jeopardy’ ‘for the same offence.’”²³¹ The lower courts rejected Gamble’s argument, following long-standing Supreme Court precedent that violations of the laws of two different sovereigns are not “the same offence” within the meaning of the Double Jeopardy Clause.²³² The Supreme Court affirmed by a vote of seven-to-two.²³³

The majority opinion by Justice Alito noted the textual basis for the dual-sovereignty doctrine, which allows state and federal prosecution of the same conduct if that conduct separately violates state and federal law.²³⁴ The Fifth Amendment does not

²²¹ *Id.* at 1152 (majority opinion).

²²² *Id.* at 1162–63 (Gorsuch, J., dissenting).

²²³ *Id.* at 1164.

²²⁴ *Id.* at 1163.

²²⁵ *Gamble v. United States*, 139 S. Ct. 1960 (2019).

²²⁶ *Id.* at 1964.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 1989 (Ginsburg, J., dissenting).

²³⁰ *Id.*

²³¹ *Id.* at 1963–64 (majority opinion).

²³² *Id.* at 1964.

²³³ *Id.* at 1960.

²³⁴ *Id.* at 1963–64.

prohibit dual prosecutions for the same conduct.²³⁵ It prohibits dual prosecutions for the same “offence.” Justice Alito’s majority opinion explained: “an ‘offence’ is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two ‘offences.’”²³⁶

The majority opinion went on to argue that the dual-sovereignty rule was also consistent with the ethos of the founding generation.²³⁷ One of the grievances against George III in the Declaration of Independence was that he used acquittals of British troops in English courts to bar their prosecution in the colonies.²³⁸ Justice Alito noted it did not make sense that “the same Founders who quite literally *revolted* against the use of acquittals abroad to bar criminal prosecutions here would soon give us an Amendment allowing foreign acquittals to spare domestic criminals.”²³⁹

The majority opinion reviewed the Supreme Court case law establishing the dual-sovereignty doctrine in the 1840s and then reaffirming the dual-sovereignty doctrine in numerous later decisions.²⁴⁰ Justice Alito went on to argue that the old precedents and treatises that Mr. Gamble cited to support his contrary position were a “muddle” or “spotty” or “equivocal” and therefore not enough to establish that the Framers intended to “bar successive prosecutions under different sovereigns’ laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.”²⁴¹

Justice Thomas wrote a concurring opinion, which said “the historical record [did] not bear out [his] initial skepticism of the dual-sovereignty doctrine.”²⁴² The opinion went on to say that while the case presented “knotty issues about the original meaning of the Fifth Amendment,” it did not appear that the common law had “coalesced” around the defendant’s interpretation of double jeopardy right at the time the Fifth Amendment was ratified.²⁴³

The two dissenters were Justice Ginsburg and Justice Gorsuch. The dissent by Justice Gorsuch began: “A free society does not allow its government to try the same individual for the same crime until it’s happy with the result. Unfortunately, the

²³⁵ *Id.* at 1965.

²³⁶ *Id.*

²³⁷ *Id.* at 1983–84 (Thomas, J., concurring).

²³⁸ *Id.* at 1965–66 (majority opinion).

²³⁹ *Id.* at 1966.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1969.

²⁴² *Id.* at 1980 (Thomas, J., concurring).

²⁴³ *Id.* at 1987.

Court today endorses a colossal exception to this ancient rule against double jeopardy.”²⁴⁴

The next paragraph of the dissent started with a quote from a 1959 dissenting opinion by Justice Hugo Black.²⁴⁵ Justice Gorsuch then stated the same thought in his own words: “Throughout history, people have worried about the vast disparity of power between governments and individuals, the capacity of the state to bring charges repeatedly until it wins the result it wants, and what little would be left of human liberty if that power remained unchecked.”²⁴⁶

The dissent by Justice Gorsuch traced the history of the double jeopardy prohibition, starting with ancient Athens and the Old Testament and then proceeding through the English common law to early American precedents,²⁴⁷ and argued that the term “offense” was and should be understood broadly.²⁴⁸ Justice Gorsuch buttressed this view with common sense, noting that: “Most any ordinary speaker of English would say that Mr. Gamble was tried twice for ‘the same offence,’ precisely what the Fifth Amendment prohibits.”²⁴⁹

Justice Gorsuch went on to argue that early American law was consistent with this understanding of double jeopardy, the Supreme Court’s adoption of the dual-sovereignty doctrine was a mistake, and there was no legitimate reason to perpetuate the error.²⁵⁰ The dissent noted: “In the era when the separate sovereigns exception first emerged, the federal criminal code was new, thin, modest, and restrained. Today, it can make none of those boasts.”²⁵¹ According to some estimates, the dissent observed, “the U.S. Code contains more than 4,500 criminal statutes, not even counting the hundreds of thousands of federal regulations that can trigger criminal penalties.”²⁵² Justice Gorsuch went on: “Still others suggest that ‘[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime.’”²⁵³

In a closing paragraph of his dissent, Justice Gorsuch returned to his main themes. The paragraph began: “Enforcing the Constitution always bears its costs. But when the people

²⁴⁴ *Id.* at 1996 (Gorsuch, J., dissenting).

²⁴⁵ *Id.* (quoting *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting)).

²⁴⁶ *Id.* at 1996.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1997.

²⁵⁰ *Id.* at 2008.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* (footnote omitted) (some internal quotation marks omitted).

adopted the Constitution and its Bill of Rights, they thought the liberties promised there worth the costs. It is not for this Court to reassess this judgment to make the prosecutor's job easier."²⁵⁴ Justice Gorsuch went on to explain the importance of the double jeopardy rule: "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"²⁵⁵

Thus, Justice Kavanaugh joined a majority opinion that took the side of law enforcement, the federal government, the welfare of society, and the status quo.²⁵⁶ Justice Gorsuch, by contrast, resolved ambiguities in favor of liberty and against the federal government.²⁵⁷ His overriding concern was with the rights of individuals.²⁵⁸ Moreover, Justice Gorsuch was willing to overturn 170 years of precedent, based on a historical record that even a sympathetic Justice Thomas saw as inconclusive, in order to restrain federal power.²⁵⁹ The opinion illustrates the selectivity of Justice Gorsuch's originalism. He embraces those parts of the past that protect individual liberty from an arbitrary or overzealous federal government. He is not a reactionary, seeking to restore some actual period in the past. His devotion is to an ideal.

As a matter of literary style, it is also worth noting that Justice Alito's majority opinion referred to the defendant as "Gamble"²⁶⁰ (which is normal), while Justice Gorsuch's dissenting opinion referred to the defendant as "Mr. Gamble,"²⁶¹ in much the same way that Justice Gorsuch's dissent in the *Biestek* case referred to the plaintiff as "Mr. Biestek." The addition of the honorific illustrates Justice Gorsuch's tendency to show greater respect for the individual.

C. *United States v. Haymond*²⁶²

In *Haymond*, Andre Haymond was convicted of possessing child pornography in violation of federal law.²⁶³ The statute authorized a punishment of zero to ten years in prison, plus

²⁵⁴ *Id.* at 2009.

²⁵⁵ *Id.* (footnote omitted) (quoting *Bartkus v. Illinois*, 359 U.S. 121, 163 (1959)).

²⁵⁶ *See id.* at 1963 (majority opinion).

²⁵⁷ *Id.* at 2000 (Gorsuch, J., dissenting).

²⁵⁸ *See id.* at 1996.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1964.

²⁶¹ *Id.* at 1997.

²⁶² *United States v. Haymond*, 139 S. Ct. 2369 (2019) (plurality opinion).

²⁶³ *Id.* at 2373.

supervised release for a period of five years to life.²⁶⁴ “Because Mr. Haymond had no criminal history and was working to help support his mother who had suffered a stroke, the judge . . . sentenced him to a prison term of 38 months, followed by 10 years of supervised release.”²⁶⁵

Haymond served his prison term but ran into problems during supervised release.²⁶⁶ An unannounced government search of his computers and cell phone turned up fifty-nine images of what the government claimed to be child pornography. Subsequently, the government initiated supervised release revocation proceedings.²⁶⁷ The district court judge held a hearing without a jury and found that it was more likely than not that Haymond had knowingly downloaded thirteen images of child pornography.²⁶⁸

Normally, revocation of supervised release means that the district court judge has discretion to resentence the defendant to a period of imprisonment within the limits of the original sentencing range.²⁶⁹ But a provision added to the Sentencing Reform Act in 2003 and amended in 2006, 18 U.S.C. § 3583(k), created a special rule.²⁷⁰ Under § 3583(k), if a defendant “on supervised release committed one of several enumerated offenses, including the possession of child pornography, the judge *must* impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant’s initial crime of conviction.”²⁷¹

Because of the statutory provision, the federal district court judge felt bound to sentence Haymond to five more years in prison, but he added that were it not for § 3583(k), he probably would have added a prison term “in the range of two years or less.”²⁷² On appeal, the U.S. Court of Appeals for the Tenth Circuit held that § 3583(k) violated the Sixth Amendment’s guarantee of trial by jury in criminal cases because it mandated a new and higher statutory minimum based on facts that had not been proven to a jury.²⁷³

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 2374.

²⁶⁷ *Id.*

²⁶⁸ *See id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* (using a preponderance of the evidence standard).

²⁷² *Id.* at 2375.

²⁷³ *See id.*

On review, the Supreme Court ruled for Haymond by a vote of five-to-four.²⁷⁴ There were three opinions. Justice Gorsuch wrote a plurality opinion, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan.²⁷⁵ Justice Breyer wrote a solo concurrence.²⁷⁶ Justice Alito wrote a dissent, joined by Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh.²⁷⁷

Justice Gorsuch began the plurality opinion with a statement of first principles: “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protections against arbitrary government.”²⁷⁸ After recounting the background of the case, the plurality opinion returned to this theme. Quoting the papers of John Adams, the opinion said: “Together with the right to vote, those who wrote our Constitution considered the right to trial by jury ‘the heart and lungs . . .’ of our liberties, without which ‘the body must die; . . . the government must become arbitrary.’”²⁷⁹ Justice Gorsuch went on, again relying on the Adams papers: “Just as the right to vote sought to preserve the people’s authority over their government’s executive and legislative functions, the right to a jury trial sought to preserve the people’s authority over its judicial functions.”²⁸⁰ Justice Gorsuch then explained that, to secure this goal, “the Framers adopted the Sixth Amendment’s promise that ‘[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury.’ In the Fifth Amendment, they added that no one may be deprived of liberty without ‘due process of law.’”²⁸¹ He continued, “Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has ‘extend[ed] down centuries.’”²⁸²

Applying these principles, Justice Gorsuch held that § 3583(k) was unconstitutional because it mandated a minimum sentence of five years in prison for Haymond for new misconduct without giving him the right to a jury trial and without requiring the government to prove the charges against him beyond a reasonable doubt.²⁸³ Justice Gorsuch rejected the government’s argument that

²⁷⁴ *Id.* at 2385–86.

²⁷⁵ *See id.* at 2373.

²⁷⁶ *See id.* at 2385 (Breyer, J., concurring).

²⁷⁷ *Id.* at 2386 (Alito, J., dissenting).

²⁷⁸ *Id.* at 2373 (plurality opinion).

²⁷⁹ *Id.* at 2375 (quoting Letter from The Earl of Clarendon to William Pym (Jan. 27, 1766), in 1 PAPERS OF JOHN ADAMS 164, 169 (Robert J. Taylor ed., 1977)).

²⁸⁰ *Id.* (citation omitted).

²⁸¹ *Id.* at 2376 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000)).

²⁸² *Id.*

²⁸³ *See id.* at 2373.

revocation of supervised release under § 3583(k) was not a criminal prosecution within the meaning of the Sixth Amendment.²⁸⁴ Citing precedent, Justice Gorsuch said that “any ‘increase in a defendant’s authorized punishment contingent on the finding of a fact’ requires a jury and proof beyond a reasonable doubt ‘no matter’ what the government chooses to call the exercise.”²⁸⁵

Justice Breyer’s concurrence indicated that he did not believe jury trials were normally required for revocation of supervised release, but that § 3583(k) was an exception because the statute only applied to a discrete set of criminal offenses, took away the judge’s discretion to determine whether supervised release should be revoked, and required a mandatory minimum of five years in prison.²⁸⁶ Justice Alito’s dissent took mild issue with Justice Breyer, saying he was wrong but giving him credit for a narrow opinion that “saved [their] jurisprudence from the consequences of the plurality opinion”²⁸⁷ Justice Alito then trained his heavy artillery on the opinion written by his fellow Republican appointee: “[The 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 *much* broader scope.”²⁸⁸

Justice Alito attacked Justice Gorsuch’s sweeping language about the Sixth Amendment jury trial right because it suggested that jury trials might be required for all supervised release revocation proceedings and not just those under § 3583(k).²⁸⁹ Justice Alito warned that this was impractical.²⁹⁰ In 2018, Justice Alito noted, the “federal district courts completed 1,809 criminal jury trials” and “16,946 revocations of supervised release.”²⁹¹ Justice Alito said there was “simply no way that the federal courts could empanel enough juries to adjudicate all those [supervised release revocations]”²⁹²

Turning to Justice Gorsuch’s legal analysis, Justice Alito dismissed his historical support as irrelevant, noting: “John Adams was not writing about the Sixth Amendment when he made a diary entry in 1771 or when he wrote to William Pym in

²⁸⁴ *See id.*

²⁸⁵ *Id.* at 2379 (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

²⁸⁶ *See id.* at 2385–86 (Breyer, J., concurring).

²⁸⁷ *Id.* at 2386 (Alito, J., dissenting) (alteration in original).

²⁸⁸ *Id.* (alteration in original).

²⁸⁹ *See id.* at 2388.

²⁹⁰ *See id.*

²⁹¹ *Id.*

²⁹² *Id.* (alteration in original).

1766.”²⁹³ Citing the language of the Sixth Amendment and various precedents, Justice Alito argued that a defendant was the “accused” within the meaning of the Sixth Amendment only through the initial prosecution.²⁹⁴ After a judgment of conviction, the defendant became the “convicted,”²⁹⁵ and the “criminal prosecution” for purposes of the Sixth Amendment jury trial right was over.²⁹⁶ Justice Alito buttressed his interpretation with historical practice of parole and probation revocation hearings to conclude that it was “a clear historical fact” that “American juries have simply played ‘no role’ in the administration of previously imposed sentences.”²⁹⁷

Justice Gorsuch responded by taking a broad view of the policies animating the Sixth Amendment, stating: “The Constitution seeks to safeguard the people’s control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt.”²⁹⁸ Justice Gorsuch criticized the dissent for giving the government too much power, noting: “If the government and dissent were correct, Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything.”²⁹⁹

Justice Gorsuch responded to the dissent’s practical objections with the argument that, “like much else in our Constitution, the jury system isn’t designed to promote efficiency but to protect liberty.”³⁰⁰ He went on to quote from William Blackstone’s *Commentaries*, an 18th Century treatise on English law, that threats to the jury trial right would come in the form of subtle machinations and that no matter how “*convenient*” these incursions “may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.”³⁰¹

²⁹³ *Id.* at 2392.

²⁹⁴ *Id.*

²⁹⁵ *See id.*

²⁹⁶ *See id.* at 2393.

²⁹⁷ *Id.* at 2398 (quoting *Oregon v. Ice*, 555 U.S. 160, 168 (2009)).

²⁹⁸ *Id.* at 2380 (plurality opinion).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 2384.

³⁰¹ *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 344 (1769)).

Once again, Justice Gorsuch resolved doubts in favor of liberty and against the federal government. He scoured the treatises of the past, finding support for his understanding of their ideals. He favored the rights of individuals over the supposed welfare of society. Justice Gorsuch sought to protect people like Andre Haymond from the U.S. government. Justice Kavanaugh took the opposing view, joining Justice Alito's defense of federal power and recognizing the practical needs of law enforcement. Unlike Justice Gorsuch, Justice Kavanaugh sought to protect society from people like Andre Haymond.

D. *Washington State Department of Licensing v. Cougar Den, Inc.*³⁰²

Another illustration of Justice Gorsuch and Justice Ginsburg taking the same side, with Justice Kavanaugh opposed, is *Washington State Department of Licensing*. The State of Washington taxed the importation of motor fuel through ground transportation.³⁰³ The question before the Supreme Court was whether an 1855 treaty between the Yakama Nation and the U.S. Government barred the State from imposing that tax on Cougar Den, a company owned by a member of the Yakama Nation and incorporated under Yakama law that trucked motor fuel over public highways to the Yakama reservation.³⁰⁴

In exchange for ten million acres of Yakama land (a quarter of what is now the State of Washington), the 1855 treaty gave members of the Yakama Nation various rights.³⁰⁵ The treaty promised the Yakamas, *inter alia*, “the right, in common with citizens of the United States, to travel upon all public highways.”³⁰⁶ Cougar Den argued that this meant Yakamas could import fuel by highway without being subject to state taxes.³⁰⁷ The State of Washington argued that the treaty simply meant that the State could not discriminate against the Yakamas and that since the motor fuel importation tax applied to all citizens it was proper.³⁰⁸

By a vote of five-to-four, the Supreme Court ruled for Cougar Den.³⁰⁹ The majority coalition consisted of the Court's four liberal Justices and Justice Gorsuch. The plurality opinion by Justice Breyer, joined by Justice Kagan and Justice Sotomayor, was careful to limit its scope to protecting the Yakamas from the

³⁰² Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019).

³⁰³ *Id.* at 1006.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1007.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 1009.

³⁰⁹ *See id.* at 1000.

particular tax at issue and not to impugn State power over the Yakamas in a variety of other circumstances.³¹⁰

Justice Gorsuch wrote a concurring opinion, joined by Justice Ginsburg, that was far more sweeping in its scope.³¹¹ His opinion began by noting that “[t]he Yakamas have lived in the Pacific Northwest for centuries,”³¹² and observed that they gave up ten million acres of their land in exchange for rights under the 1855 treaty with the United States.³¹³ He described the Court’s task as the “modest one” of construing the treaty to adopt “the interpretation most consistent with the treaty’s original meaning.”³¹⁴ That meaning, Justice Gorsuch was careful to emphasize, was not what the government might have understood, but rather what the treaty meant to the Yakamas. Quoting precedent, Justice Gorsuch noted that the Supreme Court “must ‘give effect to the terms as the Indians themselves would have understood them.’”³¹⁵ He explained the basis for this rule: “After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen.”³¹⁶

Focusing on the language of the treaty, Justice Gorsuch acknowledged 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.”³¹⁷ However, he went on to note that the modern understanding of the words did not matter, because that was “not how the Yakamas understood the treaty’s terms”³¹⁸ at the time the 1855 treaty was signed. Citing factual findings from another treaty case, he explained that “[i]n the Yakama language, the phrase ‘in common with’ . . . suggest[ed] public use or general use without restriction.”³¹⁹

Justice Gorsuch argued that this reading of the treaty also made the most sense given the huge amount of land that the Yakamas surrendered pursuant to the deal. He noted that, under the government’s interpretation, the right to travel promised to tribal members under the treaty extended only to “the right to

³¹⁰ *See id.* at 1015 (plurality opinion of Breyer, J.).

³¹¹ *Id.* at 1016. (Gorsuch, J., concurring).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 1017 (quoting *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1265 (E.D. Wash. 1997)) (alteration in original).

venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation.”³²⁰

In his closing summation, Justice Gorsuch put the decision in a larger context, noting that the case really told “an old and familiar story.”³²¹ The federal government took millions of acres of tribal land in exchange for “a handful of modest promises.”³²² Now, he observed, the government was dissatisfied with what it gave up in the deal: “It is a new day, and now it wants more.”³²³ Justice Gorsuch gave the Supreme Court credit for holding the government to the terms of its bargain and further opined: “It is the least we can do.”³²⁴

The main dissent was written by Chief Justice Roberts and joined by Justices Thomas, Alito, and Kavanaugh.³²⁵ Justice Kavanaugh also wrote a separate dissent in which Justice Thomas joined.³²⁶ In that dissent, Justice Kavanaugh interpreted the treaty language using a plain, common sense approach, reasoning that “[t]he treaty’s ‘in common with’ language means what it says. The treaty recognizes tribal members’ right to travel on off-reservation public highways on equal terms with other U.S. citizens.”³²⁷ He noted that the Yakamas had reason to accept this deal because in 1855 the government could have required the Yakamas to obtain special licenses before travelling off-reservation.³²⁸

Justice Kavanaugh conceded that, under this reading, “the treaty as negotiated and written may not have turned out to be a particularly good deal for the Yakamas.”³²⁹ But in his view, that was not a legitimate concern for the Supreme Court because “[a]s a matter of separation of powers, . . . courts are bound by the text of the treaty.”³³⁰ Besides, Justice Kavanaugh noted, Congress later did many things to help the Yakamas.³³¹ Therefore, he concluded, “lament about the terms of the treaty negotiated by the Federal Government and the Tribe in 1855 does not support

³²⁰ *Id.* at 1018.

³²¹ *Id.* at 1021.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 1021 (Roberts, C.J., dissenting).

³²⁶ *Id.* at 1026 (Kavanaugh, J., dissenting).

³²⁷ *Id.*

³²⁸ *Id.* at 1027.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at 1028.

the Judiciary (as opposed to Congress and the President) rewriting the law in 2019.”³³²

Once again, Justice Gorsuch leaned to the side of the individual and the group, while Justice Kavanaugh leaned toward the federal government. Justice Gorsuch was interested in what the treaty meant to those subject to federal power, while Justice Kavanaugh looked at the treaty language from a perspective sympathetic to the government. Justice Gorsuch resolved doubts against the federal government, while Justice Kavanaugh resolved ambiguities in its favor. Justice Gorsuch saw the federal government as the Yakamas’ exploiter; Justice Kavanaugh saw it as their benefactor.

IV. JUSTICE KAVANAUGH AND JUSTICE GORSUCH, TOGETHER

To balance this discussion of the differences in judicial philosophy between Justice Kavanaugh and Justice Gorsuch, it is informative to examine cases in which the two Justices’ views were aligned. Indeed, there exist many cases in which Justice Kavanaugh and Justice Gorsuch are in substantial agreement.³³³ However, even where the Justices agree in the judgment, their reasoning often differs greatly.³³⁴ Justice Kavanaugh tries to express his views in a pragmatic, limited, moderate way that the D.C. community would likely find acceptable. Justice Gorsuch, by contrast, expresses his opinions in terms perhaps more pleasing to an intellectually conservative audience.

A. Limiting Federal Power

Justice Kavanaugh often agrees with Justice Gorsuch that particular applications of federal power are inappropriate. For example, in *Iancu v. Brunetti*,³³⁵ a six-to-three decision, both Justice Kavanaugh and Justice Gorsuch joined an opinion by Justice Kagan holding that a provision of the Lanham Act denying trademark status to marks that were “immoral or scandalous” violated the First Amendment. In *Dutra Group v. Batterton*,³³⁶ another six-to-three opinion, Justice Kavanaugh and Justice Gorsuch joined an opinion by Justice Alito holding that punitive damages were not available on an unseaworthiness claim brought under federal maritime law. In *Rucho v. Common*

³³² *Id.*

³³³ See *infra*, Part IV.A–C.

³³⁴ Compare *Am. Legion v. Am. Humanist Ass’n*, 139 S.Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring) with *id.* at 2103 (Gorsuch, J. concurring).

³³⁵ 139 S. Ct. 2294, 2297 (2019).

³³⁶ 139 S. Ct. 2275 (2019).

Cause,³³⁷ a five-to-four case, both Justices joined an opinion by Chief Justice Roberts holding that federal courts should not attempt to adjudicate partisan gerrymandering claims.

In *Virginia Uranium, Inc. v. Warren*,³³⁸ Justice Kavanaugh joined a plurality opinion by Justice Gorsuch that held that a Virginia statute that banned the mining of uranium was not implicitly preempted by the federal Atomic Energy Act when the federal statute deliberately left the regulation of uranium mining to the States.³³⁹ The key reasoning of the opinion was that the Supreme Court was not free “to extend a federal statute to a sphere Congress was well aware of but chose to leave alone.”³⁴⁰ Justice Gorsuch went on to explain: “Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to ‘a constitutional text or a federal statute’ that does the displacing or conflicts with state law.”³⁴¹ Despite his demonstrated sympathy toward federal power,³⁴² Justice Kavanaugh joined this rationale in the context of a State law prohibiting uranium mining.³⁴³

B. Abortion and the Death Penalty

The two Justices do not differ significantly on hot-button social issues, such as abortion and the death penalty. For example, in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*,³⁴⁴ the Supreme Court denied certiorari review of a Court of Appeals decision that struck down an Indiana law prohibiting abortion clinics from knowingly providing sex-, race-, or disability-selective abortions.³⁴⁵ Both Justice Kavanaugh and Justice Gorsuch joined the decision, which was based on the absence of any disagreement among the circuit courts of appeal on the issue.³⁴⁶

In *June Medical Services, L.L.C. v. Gee*,³⁴⁷ the Supreme Court voted five-to-four to block implementation of a Louisiana statute that required doctors performing abortions to have admitting privileges at nearby hospitals.³⁴⁸ Justice Kavanaugh dissented, joined by Justice

³³⁷ 139 S. Ct. 2484 (2019).

³³⁸ 139 S. Ct. 1894 (2019).

³³⁹ *Id.* at 1900.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 1901.

³⁴² *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369 (2019).

³⁴³ 139 S. Ct. 1894 (2019).

³⁴⁴ 139 S. Ct. 1780 (2019).

³⁴⁵ *Id.* at 1781.

³⁴⁶ *See id.* at 1783–93 (Thomas, J., concurring).

³⁴⁷ 139 S. Ct. 663 (2019).

³⁴⁸ *Id.*

Thomas, Justice Alito and Justice Gorsuch.³⁴⁹ The dissent, however, was very narrow.³⁵⁰ Justice Kavanaugh noted that the decision of the Court of Appeals for the Fifth Circuit upholding the challenged law had predicted that the doctors who performed abortions would all be able to obtain the needed admitting privileges.³⁵¹ The dissent also noted that the Louisiana law had a “45-day regulatory transition” period in which the law would not be enforced while the doctors sought admitting privileges.³⁵² Therefore, Justice Kavanaugh concluded, he would deny the plaintiffs’ request to stay implementation of the law “without prejudice to the plaintiffs’ ability to bring a . . . motion for preliminary injunction at the conclusion of the 45-day regulatory transition period if the Fifth Circuit’s factual prediction about the doctors’ ability to obtain admitting privileges proves to be inaccurate.”³⁵³

In *Bucklew v. Precythe*,³⁵⁴ a five-to-four decision, the Supreme Court set forth the standard for adjudicating challenges to a particular mode of execution (e.g. lethal injection) based on the prisoner’s particular medical condition.³⁵⁵ The majority opinion by Justice Gorsuch struck a conservative tone, flatly asserting: “The Constitution allows capital punishment.”³⁵⁶ Justice Kavanaugh added a short concurring opinion that highlighted the liberal aspects of Justice Gorsuch’s opinion.³⁵⁷

C. Differences in Agreement

Sometimes, the daylight between Justice Kavanaugh and Justice Gorsuch is evident even when they are in agreement as to the result. For example, in *Kisor v. Wilkie*,³⁵⁸ the Veteran’s Administration denied retroactive disability benefits to a Vietnam veteran suffering from post-traumatic stress disorder based on the agency’s interpretation of its own regulation.³⁵⁹ Justice Gorsuch wrote an opinion that argued that federal courts should not defer to agency interpretations of agency regulations, except to the extent that deference was warranted by genuine technical expertise.³⁶⁰ Justice Gorsuch reasoned that

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ 139 S. Ct. 1112 (2019).

³⁵⁵ *Id.* at 1120–21.

³⁵⁶ *Id.* at 1122.

³⁵⁷ *Id.* at 1135–36 (Kavanaugh, J., concurring).

³⁵⁸ 139 S. Ct. 2400 (2019).

³⁵⁹ *Id.* at 2405.

³⁶⁰ *Id.* at 2442–43.

“foundational principles” of constitutional law³⁶¹ precluded deference to bureaucrats and required courts to utilize instead “the traditional tools of interpretation judges have employed for centuries to elucidate the law’s original public meaning.”³⁶² Justice Kavanaugh wrote a short opinion that concurred with Justice Gorsuch but used a modern, common sense analogy, noting: “Umpires in games at Wrigley Field do not defer to the Cubs manager’s in-game interpretation of Wrigley’s ground rules.”³⁶³

Another good example of how the two Justices’ reasoning can diverge, even when agreeing as to the result, is *American Legion v. American Humanist Ass’n*,³⁶⁴ a seven-to-two decision, that rejected an Establishment Clause challenge to the Bladensburg Peace Cross, a 94-year-old memorial raised on public land to honor World War I casualties.³⁶⁵ Justice Kavanaugh’s concurring opinion set forth a complex multi-element standard for courts to use in determining when government practices would “ordinarily” survive Establishment Clause challenge.³⁶⁶ Justice Kavanaugh then applied that standard to conclude the war memorial did not violate the Constitution because it was not coercive and was rooted in history and tradition.³⁶⁷ He professed “deep respect for the plaintiffs’ sincere objections to seeing the cross on public land”³⁶⁸ and further recognized a supporting amicus group’s “sense of distress and alienation.”³⁶⁹ Rather than endorse an Establishment Clause action, he instead suggested other methods by which these groups could secure removal of the cross.³⁷⁰

In contrast, Justice Gorsuch’s opinion bordered on dismissive. In concurrence, he wrote: “The American Humanist Association wants a federal court to order the destruction of a 94-year-old war memorial because its members are offended.”³⁷¹ Justice Gorsuch agreed the memorial was constitutional, but went one step further in noting that he would dismiss the case for lack of standing

³⁶¹ See *id.* at 2437–39 (Gorsuch, J., concurring).

³⁶² *Id.* at 2442.

³⁶³ *Id.* at 2448 (Kavanaugh, J., concurring).

³⁶⁴ 139 S. Ct. 2067 (2019).

³⁶⁵ *Id.* at 2074.

³⁶⁶ *Id.* at 2092–93.

³⁶⁷ *Id.* at 2093 (Kavanaugh, J., concurring).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 2094.

³⁷¹ *Id.* at 2098 (Gorsuch, J., concurring).

without reaching the merits.³⁷² He explained: “This ‘offended observer’ theory of standing has no basis in law.”³⁷³

Justice Gorsuch considered the policy implications of the plaintiffs’ argument: “If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary’s limited constitutional mandate and infringing on powers committed to other branches of government.”³⁷⁴ Justice Gorsuch went on: “Courts would start to look more like legislatures, responding to social pressures rather than remedying concrete harms, in the process supplanting the right of the people and their elected representatives to govern themselves.”³⁷⁵

Justice Gorsuch also disagreed with the implication in the Court’s opinion that the Bladensburg Peace Cross might have survived constitutional scrutiny only because it was old.³⁷⁶ He explained that what matters when assessing a monument or practice “isn’t its age but its compliance with ageless principles. The Constitution’s meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation’s traditions is just as permissible whether undertaken today or 94 years ago.”³⁷⁷

Allowing litigation by offended observers, Justice Gorsuch argued, courted disaster: “what about the display of the Ten Commandments on the frieze in our own courtroom or on the doors leading into it? Or the statutes of Moses and the Apostle Paul next door in the Library of Congress?”³⁷⁸ It would be better, Justice Gorsuch said, simply to deny standing to offended observers so that lower court judges “may dispose of cases like these on a motion to dismiss rather than enmeshing themselves for years in intractable disputes sure to generate more heat than light.”³⁷⁹

Also instructive is *Manhattan Community Access Corporation v. Halleck*,³⁸⁰ a five-to-four decision holding that a private company operating a public access channel was not a State actor for purposes of federal court regulation under the Fourteenth Amendment.³⁸¹ Justice Kavanaugh wrote the

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* at 2099.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 2102.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 2103.

³⁷⁹ *Id.*

³⁸⁰ 139 S. Ct. 1921 (2019).

³⁸¹ *Id.* at 1926.

majority opinion, which Justice Gorsuch joined. In the opinion's closing section, Justice Kavanaugh discussed the philosophy behind the decision, but in a way that put distance between himself and that philosophy.³⁸² Justice Kavanaugh noted: "It is sometimes said that the bigger the government, the smaller the individual."³⁸³

Justice Kavanaugh went on to apply that principle in *Halleck*, stating: "Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise. We decline to do so in this case."³⁸⁴ Had Justice Gorsuch penned the opinion, its language would likely have been less diplomatic and far more emphatic.

V. DISAGREEMENTS IN THE OCTOBER 2019 TERM

Justice Gorsuch and Justice Kavanaugh continued to disagree in significant ways during the Supreme Court's October 2019 term (ending in July 2020). Consider the six cases below, in which the two Justices took opposite sides and one or both penned opinions.

A. *County Of Maui v. Hawaii Wildlife Fund*³⁸⁵

The Clean Water Act prohibits the "addition" of any pollutant from a "point source" to "navigable waters" without an appropriate permit from the Environmental Protection Agency.³⁸⁶ In *County of Maui*, the Supreme Court considered whether this permitting requirement applied to pollutants that travelled from a point source to navigable waters through the medium of ground water.³⁸⁷ By a six-to-three vote, the Court rejected the alternative answers of always and never, holding instead that a permit was required "if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters."³⁸⁸ In an opinion by Justice Breyer, the Court went on to hold that in making this determination, courts should consider a variety of factors, such as the distance between the point source and the navigable waters and the time it takes the pollutant to travel that distance.³⁸⁹

³⁸² *Id.* at 1934.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

³⁸⁶ *Id.* at 1468 (referring to 33 U.S.C. §§ 1311(a), 1362(12)(A)).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 1476.

Justice Kavanaugh wrote a concurring opinion that defended the Court's pragmatic, middle ground approach. He noted that a flexible standard was needed to prevent evasion of the statutory purpose.³⁹⁰ He further observed that the Court's opinion improved the law: "Although the statutory text does not supply a bright-line test, the Court's emphasis on time and distance will help guide application of the statutory standard going forward."³⁹¹

Justice Gorsuch joined a dissenting opinion by Justice Thomas, which took a formalistic approach. Justice Thomas said that he "would hold that a permit is required only when a point source discharges pollutants directly into navigable waters."³⁹² Justice Thomas argued that his approach was true to the statutory text (in particular, the words "addition," "from," and "to"),³⁹³ whereas the majority opinion departed from the text in favor of "an open-ended inquiry into congressional intent and practical considerations."³⁹⁴

This case illustrates the jurisprudential divide between the two Justices. Justice Kavanaugh prefers pragmatic standards that give federal courts and agencies reasonable discretion to balance opposing considerations and reach common sense solutions to practical problems. By contrast, Justice Gorsuch prefers formal rules derived from statutory texts that establish clear rights for private parties and restrict the discretion of courts and officials.

B. *Atlantic Richfield Co. v. Christian*³⁹⁵

Over the course of almost a century, Anaconda Copper Mining Company, a smelting operator in Montana, caused massive arsenic and lead pollution over a three hundred square mile area.³⁹⁶ To remedy the pollution, a group of homeowners in Montana sued Atlantic Richfield (Anaconda's corporate successor) in state court under state law, demanding that the company pay to have their land restored to its original, unpolluted condition.³⁹⁷ Because Atlantic Richfield had been working with the Environmental Protection Agency for thirty-five years on efforts to clear up pollution in the area pursuant to the federal Superfund

³⁹⁰ *Id.* at 1478 (Kavanaugh, J., concurring).

³⁹¹ *Id.* at 1479. (Thomas, J., dissenting).

³⁹² *Id.*

³⁹³ *See id.* at 1479–80.

³⁹⁴ *Id.* at 1479.

³⁹⁵ *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020).

³⁹⁶ *Id.* at 1345.

³⁹⁷ *Id.*

statute,³⁹⁸ the company argued that the state courts did not have jurisdiction to hear the case and that any restoration remedy required the approval of the federal Environmental Protection Agency (“EPA”).³⁹⁹

In an opinion by Chief Justice Roberts in which Justice Kavanaugh joined, the Supreme Court held that the plaintiffs could proceed with their state court suit but needed approval of the EPA for their restoration remedy.⁴⁰⁰ As a technical matter, the Court reasoned that the plaintiffs were “potentially responsible parties” within the meaning of the Superfund statute and therefore subject to EPA jurisdiction.⁴⁰¹ As a practical matter, the Court said that EPA supervision of private litigation was needed to facilitate settlements with polluters by protecting settling parties from third party claims.⁴⁰²

Justice Gorsuch, joined by Justice Thomas, dissented from the holding that the homeowners needed EPA approval. Citing a provision of the Superfund law that expressly preserved state law remedies, Justice Gorsuch argued that everything in the federal law “seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land.”⁴⁰³ After arguing that the statutory language about potentially responsible parties did not support the Court’s conclusion,⁴⁰⁴ Justice Gorsuch challenged the policy arguments in Chief Justice Roberts’ opinion. Justice Gorsuch said: “Maybe paternalistic central planning cannot tolerate parallel state law efforts to restore state lands. But maybe, too, good government and environmental protection would be better served if state law remedies proceeded alongside federal efforts.”⁴⁰⁵ Having posed the question, Justice Gorsuch said that Congress made the policy decision when it chose to preserve state law remedies in general, while specifically allowing the federal government to seek injunctive relief if private or state cleanup efforts really do interfere with federal interests.⁴⁰⁶ Justice Gorsuch concluded: “Atlantic Richfield would have us turn this system upside down, recasting the statute’s presumption in favor of cooperative federalism into a presumption of federal absolutism.”⁴⁰⁷

³⁹⁸ 42 U.S.C. § 9601 et seq.

³⁹⁹ See *Atl. Richfield Co.*, 140 S. Ct. at 1345.

⁴⁰⁰ *Id.* at 1350.

⁴⁰¹ See *id.* at 1353–54.

⁴⁰² See *id.* at 1354–55.

⁴⁰³ *Id.* at 1363 (Gorsuch, J., concurring in part and dissenting in part).

⁴⁰⁴ See *id.* at 1365–66.

⁴⁰⁵ *Id.* at 1366.

⁴⁰⁶ *Id.* at 1367.

⁴⁰⁷ *Id.*

Once again, Justice Kavanaugh is apt to read statutes as conferring discretion on federal officials to do what they may need to do in order to accomplish their missions. Justice Gorsuch sees those same laws as preserving traditional individual rights and protecting private citizens from the will of bureaucrats.

C. *Thryv, Inc. v. Click-To-Call Techs., LP*⁴⁰⁸

A federal statute gives the U.S. Patent and Trademark Office authority to consider challenges to previously issued patents and, if the agency deems proper, to revoke the challenged patents.⁴⁰⁹ The statute further provides that these proceedings may not be instituted more than a year after suit against the requesting party for a patent infringement,⁴¹⁰ but also provides that the agency's decision to institute a proceeding is "final and nonappealable."⁴¹¹

In *Thryv, Inc.*, the Patent Office instituted a challenge proceeding more than a year after the requesting party was sued for infringement and then went on to rule for the challenger.⁴¹² By a seven-to-two vote, the Supreme Court held that Patent Office's decision to institute proceedings in apparent violation of the statutory deadline was not subject to judicial review.⁴¹³ The Court reasoned that Congress intended to immunize such agency decisions concerning challenge proceedings in order to achieve important goals, such as promoting efficiency, avoiding costly litigation and making patent revocation decisions effective more quickly.⁴¹⁴

Justice Kavanaugh joined the majority opinion by Justice Ginsburg. Justice Gorsuch dissented, joined only by Justice Sotomayor. In the opening paragraph of his dissent, Justice Gorsuch made his objections clear: "Today the Court takes a flawed premise—that the Constitution permits a politically guided agency to revoke an inventor's property right in an issued patent—and bends it further, allowing the agency's decision to stand immune from judicial review."⁴¹⁵ The dissent continued: "Most remarkably, the Court denies judicial review even though the government now concedes that the patent owner is *right* and this entire exercise in property-taking-by-bureaucracy was forbidden by

408 140 S. Ct. 1367 (2020).

409 *See* 35 U.S.C. § 314.

410 *See* 35 U.S.C. § 314(b).

411 35 U.S.C. § 314(d).

412 *See Thryv*, 140 S. Ct. at 1370.

413 *See id.*

414 *See id.* at 1374–75.

415 *Id.* at 1378 (Gorsuch, J., dissenting).

law.”⁴¹⁶ Justice Gorsuch argued that the relevant statute did not require this result, and therefore the Court should not have taken yet “another step down the road of ceding core judicial powers to agency officials and leaving the disposition of private rights to bureaucratic mercy.”⁴¹⁷

Justice Gorsuch went on to criticize what he perceived to be the Court giving unreviewable discretion to the politically-appointed head of the Patent Office. “No one can doubt that this regime favors those with political clout, the powerful and the popular. . . . Rather than securing incentives to invent, the regime creates incentives to curry favor with officials in Washington.”⁴¹⁸ Justice Gorsuch concluded: “Nothing in the statute commands this result, and nothing in the Constitution permits it.”⁴¹⁹

The *Thryv, Inc.* dissent provides a telling glimpse of the rationale underlying Justice Gorsuch’s jurisprudence. He thinks courts should prevent lawless federal bureaucrats from imposing upon individuals’ rights. Justice Kavanaugh, by contrast, has a much more positive view of the federal government and does not mind when Congress makes agency decisions unreviewable in order to promote efficiency.

D. *Barr v. American Association of Political Consultants, Inc.*⁴²⁰

In 1991, Congress passed the Telephone Consumer Protection Act, which prohibited (absent emergency or prior express consent) automated calls to cellphones. In 2015, Congress amended the statute to permit automated calls (also known as robocalls) to collect debts owed to or guaranteed by the United States.⁴²¹ In *Barr*, an opinion written by Justice Kavanaugh, the Supreme Court held by a vote of six-to-three that the amended law violated the First Amendment because it regulated speech on the basis of content.⁴²² The Court went on (by a vote of seven-to-two) to correct the constitutional infirmity by eliminating the 2015 amendment and restoring the general ban on robocalls to cellphones.⁴²³ Justice Gorsuch agreed that the amended law was unconstitutional, but said the proper remedy was to grant the plaintiffs an injunction against the ban’s enforcement, rather than to sever the statute.⁴²⁴

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 1388.

⁴¹⁹ *Id.* at 1389.

⁴²⁰ 140 S. Ct. 2335 (2020).

⁴²¹ *See* 47 U.S.C. § 227(b)(1)(A)(iii).

⁴²² *See Barr*, 140 S. Ct. at 2344.

⁴²³ *Id.* at 2342–44.

⁴²⁴ *See id.* at 2363–67 (Gorsuch, J., concurring in part and dissenting in part).

Barr further demonstrates how the two Justices diverge in their attitudes toward precedent. Justice Kavanaugh followed prior decisions holding that the Supreme Court should try to limit its remedy by striking down only the unconstitutional portions of a statute and saving as much of the law as possible.⁴²⁵ Justice Gorsuch preferred to reason from first principles, taking the position that the Court should simply enjoin enforcement of an unconstitutional statute, arguing that the Court's practice of severing the unconstitutional portions and preserving the rest amounted to impermissible judicial rewriting of the law.⁴²⁶ Justice Kavanaugh responded to this critique by noting that Justice Gorsuch's approach was a "wolf in sheep's clothing" that "would disrespect the democratic process, through which the people's representatives" expressed their will.⁴²⁷ Justice Kavanaugh preferred the approach dictated by the Court's precedents; to try to salvage as much of the statute as possible was, he wrote, "constitutional, stable, predictable, and commonsensical."⁴²⁸

The two Justices valued the competing interests of the parties differently. Justice Gorsuch expressed distaste that the Court would outlaw private speech—namely, robocalls to cellphones to collect debts owed to the government—when Congress had expressly made that speech lawful.⁴²⁹ For Justice Kavanaugh, protecting people from unwanted robocalls was the top priority: "Justice Gorsuch's remedy would end up harming . . . the tens of millions of consumers who would be bombarded every day with nonstop robocalls notwithstanding Congress's clear prohibition of those robocalls."⁴³⁰ Justice Gorsuch responded: "Having to tolerate unwanted speech imposes no cognizable constitutional injury on anyone; it is life under the First Amendment, which is almost always invoked to protect speech some would rather not hear."⁴³¹

As evidenced in *Barr*, Justice Kavanaugh prefers to follow precedent and preserve common sense federal regulations that protect the community from harm. This case provides yet another example of how both Justices differ in opinion. Justice Gorsuch prefers to reason from first principles and protect liberty.

⁴²⁵ See *id.* at 2350–51.

⁴²⁶ See *id.* at 2365 (Gorsuch, J., concurring in part and dissenting in part).

⁴²⁷ *Id.* at 2356 (majority opinion).

⁴²⁸ *Id.*

⁴²⁹ See *id.* at 2365–66 (Gorsuch, J., concurring in part and dissenting in part).

⁴³⁰ *Id.* at 2356 (majority opinion).

⁴³¹ *Id.* at 2366–67 (Gorsuch, J., concurring in part and dissenting in part).

E. *McGirt v. Oklahoma*⁴³²

In 1997, Jimcy McGirt, an enrolled member of the Seminole Nation, was convicted in Oklahoma state court of sexual assaults on his wife's four-year old granddaughter and sentenced to 1,000 years plus life in prison.⁴³³ In post-conviction proceedings, McGirt challenged the State's jurisdiction to prosecute him, and therefore his resulting conviction, on the ground that his crime took place on a Creek Reservation and, according to the federal Major Crimes Act, "[a]ny Indian who commits" certain enumerated offenses "within Indian country" may only be prosecuted in federal court.⁴³⁴ The key issue in the case was whether the land that McGirt claimed to be a Creek Reservation—an area that had been promised to the Creek Nation by the federal government in the 1830s⁴³⁵ and spanned three million acres, including most of the city of Tulsa⁴³⁶—was in fact still a Creek Reservation or whether the reservation status had been effectively abolished by Congress in a series of statutes enacted between 1890 and 1910.⁴³⁷

The Supreme Court ruled in favor of McGirt by a vote of five-to-four, the majority consisting of Justice Gorsuch plus the Court's four Democratic appointees.⁴³⁸ Justice Gorsuch wrote the opinion for the Court.⁴³⁹ The majority held that, while Congress had the power to break the federal government's promise to the Creeks, Congress had never expressly and formally done so. Therefore, the land in question remained a Creek Reservation, even though the State of Oklahoma had been exercising criminal jurisdiction over the area and treating the reservation as extinguished for more than one hundred years.⁴⁴⁰

Justice Gorsuch's opinion for the Court began: "On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever."⁴⁴¹ The opinion acknowledged that Congress had the power to break that promise, but said the repudiation had to be express, not simply inferred from a pattern of encroachment

⁴³² 140 S. Ct. 2452 (2020).

⁴³³ *Id.* at 2482 (Roberts, C.J., dissenting).

⁴³⁴ 18 U.S.C. § 1153(a).

⁴³⁵ *See McGirt*, 140 S. Ct. at 2459.

⁴³⁶ *Id.* at 2482 (Roberts, C.J., dissenting).

⁴³⁷ *See id.* at 2464, 2466 (majority opinion).

⁴³⁸ *See id.* at 2458.

⁴³⁹ *See id.*

⁴⁴⁰ *See id.* at 2481–82.

⁴⁴¹ *Id.* at 2459.

on tribal rights: “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.”⁴⁴²

The opinion went on to review the language of the federal statutes regarding the Creeks enacted between 1890 and 1910 and found that none of them, in so many words, abolished the Creek Reservation.⁴⁴³ In these circumstances, Justice Gorsuch said, arguments based on contemporaneous understanding of the laws were irrelevant: “There is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms.”⁴⁴⁴ It was similarly irrelevant, Justice Gorsuch wrote, that the State of Oklahoma had, in fact, been exercising criminal jurisdiction over the land in question for more than a century and that allowing the status quo to continue would have practical advantages.⁴⁴⁵ Allowing State practice to overcome the written law, Justice Gorsuch said, “would be the rule of the strong, not the rule of law.”⁴⁴⁶

Justice Gorsuch reiterated that sentiment at the conclusion of the majority opinion: “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.”⁴⁴⁷ He stated, “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.”⁴⁴⁸

Justice Kavanaugh, along with Justice Alito and Justice Thomas, joined the dissent by Chief Justice Roberts. That opinion began by noting that the majority’s reasoning meant not only a rediscovered reservation for the Creeks, but also rediscovered reservations for other tribes in Oklahoma.⁴⁴⁹ The dissent observed: “The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%-15% of whom are Indians.”⁴⁵⁰

The dissent pointed out the majority opinion would hobble the State’s ability to prosecute serious crimes in a vast area, possibly invalidate decades of past convictions, and profoundly destabilize the governance of eastern Oklahoma.⁴⁵¹ The opinion

⁴⁴² *Id.* at 2462.

⁴⁴³ *See id.* at 2463–66.

⁴⁴⁴ *Id.* at 2469.

⁴⁴⁵ *See id.* at 2471, 2474.

⁴⁴⁶ *Id.* at 2474.

⁴⁴⁷ *Id.* at 2482.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 2482 (Roberts, C.J., dissenting).

⁴⁵¹ *See id.*

went on to say that none of this disruption was warranted. “What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation. Congress disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century.”⁴⁵²

Chief Justice Roberts described the relevant Congressional action as follows:

What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation’s title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress’s intent to terminate the reservation and create a new State in its place.⁴⁵³

The dissent accused the majority of taking a “blinker approach” that considered each statute in isolation and “nitpick[ed] discrete aspects of Congress’s disestablishment effort while ignoring the full picture our precedents require us to honor.”⁴⁵⁴ That approach was inconsistent, Chief Justice Roberts said, with the Supreme Court’s numerous reservation disestablishment precedents that required the Court to consider, along with the statutory texts, “the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there.”⁴⁵⁵

Thus, Chief Justice Roberts said, the majority was wrong to focus on statutory text alone. “Every single one of our disestablishment cases has considered extratextual sources, and in doing so, none has required the identification of ambiguity in a particular term. That is because . . . we have expressly held that the appropriate inquiry does not focus on the statutory text alone.”⁴⁵⁶ The Chief Justice went on: “there is no ‘magic words’ requirement for disestablishment.”⁴⁵⁷ He reasoned: “In this area, ‘we are not free to say to Congress: ‘We see what you are driving at, but you have not said it, and therefore we shall go on as before.’”⁴⁵⁸

⁴⁵² *Id.*

⁴⁵³ *Id.* at 2490.

⁴⁵⁴ *Id.* at 2494.

⁴⁵⁵ *Id.* at 2485.

⁴⁵⁶ *Id.* at 2487.

⁴⁵⁷ *Id.* at 2489.

⁴⁵⁸ *Id.* (citations omitted).

Chief Justice Roberts responded to the majority's argument that supposedly drastic consequences do not justify disregarding the law by pointing out that "when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our precedents demand we consider—they are reason to think the Court may have taken a wrong turn in its analysis."⁴⁵⁹

Chief Justice Roberts concluded: "As the Creek, the State of Oklahoma, the United States, and our judicial predecessors have long agreed, Congress disestablished any Creek reservation more than 100 years ago. Oklahoma therefore had jurisdiction to prosecute *McGirt*."⁴⁶⁰

The *McGirt* case illustrates how Justice Gorsuch prefers to reason from first principles rather than precedent, following his reading of a text to its logical conclusion without regard to practical consequences, and justifying his formalistic approach as required by the rule of law. Justice Kavanaugh's decision to join the dissent demonstrates that Justice Kavanaugh is less swayed by statutory texts and more inclined to look to legislative purpose, follow precedent, and aim for a common sense, minimally-disruptive result.

F. *Bostock v. Clayton County*⁴⁶¹

In *Bostock*, the Supreme Court held by a vote of six-to-three that discrimination based on sexual orientation or transgender status constituted discrimination "because of sex" prohibited by Title VII of the Civil Rights Act of 1964.⁴⁶² The majority opinion by Justice Gorsuch stated its rationale in its opening paragraph: "An 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."⁴⁶³

To justify this conclusion, Justice Gorsuch eschewed precedents, policy analysis, and popular understandings of what Title VII meant.⁴⁶⁴ Instead, he treated the question as a logic puzzle.⁴⁶⁵ His opinion posed the hypothetical of an employer with a male employee and a female employee, both of whom were

⁴⁵⁹ *Id.* at 2502.

⁴⁶⁰ *Id.*

⁴⁶¹ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

⁴⁶² *See id.* at 1736–37; 42 U.S.C. § 2000e-2(a)(1).

⁴⁶³ *Bostock*, 140 S. Ct. at 1737.

⁴⁶⁴ *See id.* at 1738–42.

⁴⁶⁵ *See id.* at 1750–54.

attracted to men.⁴⁶⁶ Suppose the employer were to fire the male employee for being attracted to men when the employer would not fire the female employee for being attracted to men.⁴⁶⁷ As a matter of common parlance, that would be called discrimination based on sexual orientation.⁴⁶⁸ But, as a matter of formal logic, it would also be discrimination against the male employee because of his sex, in addition to his sexual orientation, and therefore prohibited by Title VII. As Justice Gorsuch explained, in answering his hypothetical: “If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.”⁴⁶⁹

Justice Gorsuch went on to apply this logic to discrimination against transgender individuals in a hypothetical involving an employer who fired a transgender person who identified as a male at birth but who now identified as a female: “If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”⁴⁷⁰ He continued, “Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.”⁴⁷¹

Justice Gorsuch brushed aside the argument that Congress was not contemplating discrimination based on sexual orientation or transgender status when it enacted Title VII.⁴⁷² He instead placed value upon the meaning of the words that Congress enacted, not what they might have been thinking.⁴⁷³ As he put it: “the limits of the drafters’ imagination supply no reason to ignore the law’s demands.”⁴⁷⁴ Justice Gorsuch went on: “When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”⁴⁷⁵

Justice Gorsuch expanded on this idea later in his opinion, rejecting the argument that given popular attitudes in 1964 Congress could not have really intended to prohibit

⁴⁶⁶ *Id.* at 1741.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 1741–42.

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 1741.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 1737.

⁴⁷⁵ *Id.*

discrimination against homosexuals.⁴⁷⁶ He explained that to refuse to enforce the letter of the law for the benefit of a group of people who “happened to be unpopular at the time of the law’s passage, would not only require us to abandon our role as interpreters of statutes; it 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.”⁴⁷⁷

Justice Gorsuch then invoked the tenets of legal formalism to justify the Court’s expansive interpretation of Title VII by stating, “. . . [O]ur role is limited to applying the law’s demands as faithfully as we can in the cases that come before us. . . . And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.”⁴⁷⁸

Justice Gorsuch explained that courts are bound to follow statutory texts whichever way they lead, regardless of what Congress may have had in mind, noting: “Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.”⁴⁷⁹

Justice Alito wrote a dissent, joined by Justice Thomas, accusing the majority of writing “legislation” in the guise of a judicial opinion.⁴⁸⁰ Justice Alito declared: “A more brazen abuse of our authority to interpret statutes is hard to recall.”⁴⁸¹ He continued: “The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is . . . the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.”⁴⁸²

Justice Alito went on to criticize the majority’s opinion for focusing on a literal and logical meaning of the phrase “because of sex” rather than considering what the words meant to the drafters and their original audience.⁴⁸³ His dissent said: “Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization.”⁴⁸⁴ Rather: “Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must

⁴⁷⁶ *Id.* at 1752.

⁴⁷⁷ *Id.* at 1751.

⁴⁷⁸ *Id.* at 1753.

⁴⁷⁹ *Id.* at 1754.

⁴⁸⁰ *See id.* at 1754 (Alito, J., dissenting).

⁴⁸¹ *Id.* at 1755.

⁴⁸² *Id.* at 1755–56.

⁴⁸³ *Id.* at 1756–67.

⁴⁸⁴ *Id.* at 1767.

therefore be interpreted as they were understood by that community at that time.”⁴⁸⁵ If the Court followed this method of construing statutes, Justice Alito concluded, “[t]he answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.”⁴⁸⁶

Justice Kavanaugh wrote a separate dissent and saw the case as presenting the practical, legal process question of whether the Court should extend Title VII’s prohibition against sex discrimination to discrimination based on sexual orientation.⁴⁸⁷ Starting from the premise that there is a difference between discrimination based on sex and discrimination based on sexual orientation.⁴⁸⁸ Justice Kavanaugh’s dissent began: “Like many cases in this Court, this case boils down to one fundamental question: Who decides?”⁴⁸⁹ He opined: “The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution’s separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.”⁴⁹⁰

Justice Kavanaugh made it plain that, if the decision were his, he would probably vote to amend the law.⁴⁹¹ “The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans ‘cannot be treated as social outcasts or as inferior in dignity and worth.’”⁴⁹² But public policy alone, Justice Kavanaugh said, was not sufficient to justify a momentous changing of the law by the Court: “Under the Constitution’s separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result.”⁴⁹³ And interpreting the Civil Rights Act of 1964 based on the common sense meaning of its words, Justice Kavanaugh said: “Title VII does not prohibit employment discrimination because of sexual orientation.”⁴⁹⁴

Justice Kavanaugh went on to reject the majority’s logical, literalist interpretation of the statute in favor of a common-sense

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *See id.* at 1822–37 (Kavanaugh, J., dissenting).

⁴⁸⁸ *Id.* at 1824.

⁴⁸⁹ *Id.* at 1822.

⁴⁹⁰ *Id.*

⁴⁹¹ *See id.* at 1837.

⁴⁹² *Id.* at 1823.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

approach.⁴⁹⁵ According to Justice Kavanaugh, “courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.”⁴⁹⁶ Justice Kavanaugh explained: “Citizens and legislators must be able to ascertain the law by reading the words of the statute. 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.”⁴⁹⁷

In support of common sense interpretation of statutory words, Justice Kavanaugh cited numerous precedents that, he said, “exemplify a deeply rooted principle: When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning.”⁴⁹⁸ Similarly, Justice Kavanaugh noted, the Court’s precedents made it clear that courts should follow “the ordinary meaning *of a phrase*, rather than the meaning of words in the phrase.”⁴⁹⁹ He recalled: “In the words of Learned Hand: ‘a sterile literalism . . . loses sight of the forest for the trees.’ The full body of a text contains implications that can alter the literal meaning of individual words.”⁵⁰⁰ In other words, Justice Kavanaugh said: “Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does.”⁵⁰¹ Justice Kavanaugh concluded: “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.”⁵⁰²

Justice Kavanaugh then applied this standard to the issue at hand: Does the ordinary meaning of the phrase “discriminate because of sex” necessarily “encompass discrimination because of sexual orientation? The answer is plainly no.”⁵⁰³ Rather, in Justice Kavanaugh’s view: “Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.”⁵⁰⁴

495 *See id.* at 1825.

496 *Id.*

497 *Id.*

498 *Id.* at 1826.

499 *Id.* at 1826–27.

500 *Id.* at 1827.

501 *Id.*

502 *Id.* at 1828.

503 *Id.*

504 *Id.*

Justice Kavanaugh observed that many federal statutes prohibit sex discrimination *per se*, while many other statutes prohibit discrimination based on sexual orientation, implying that Congress saw a distinction between the two.⁵⁰⁵ “To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.”⁵⁰⁶ “In short,” Justice Kavanaugh concluded, “an extensive body of federal law both reflects and reinforces the widespread understanding that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.”⁵⁰⁷

At the close of his dissent, Justice Kavanaugh described the majority opinion as an act of “judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law.”⁵⁰⁸ Taking a more conciliatory tone than Justice Alito, Justice Kavanaugh went on “to acknowledge the important victory achieved today by gay and lesbian Americans.”⁵⁰⁹ “They have advanced powerful policy arguments and can take pride in today’s result. Under the Constitution’s separation of powers, however, I believe that it was Congress’s role, not this Court’s, to amend Title VII.”⁵¹⁰

The *Bostock* case provides yet another telling glimpse of the jurisprudential divide between the Justices. Justice Gorsuch interprets texts formally and literally, without regard to precedents, practical consequences, or what the drafters may have intended. He takes pride in following the written law, as he understands it, to its logical conclusion. Justice Kavanaugh reads statutes in a practical, common sense way. His goal is to give legal language the meaning intended by its drafters, understood by ordinary audiences, and generally accepted by policymakers. He eschews literalism and logical formalism.

VI. PRAGMATIC INSIDER VERSUS FORMALIST OUTSIDER

In July 2019, Justice Ginsburg described the Supreme Court as “the most collegial place” she ever worked.⁵¹¹ In that same talk, she described her “newest colleagues” as “very decent and very smart

⁵⁰⁵ *Id.* at n.66.

⁵⁰⁶ *Id.* at 1829.

⁵⁰⁷ *Id.* at 1830.

⁵⁰⁸ *Id.* at 1836.

⁵⁰⁹ *Id.* at 1837.

⁵¹⁰ *Id.*

⁵¹¹ Robert Barnes, *Ginsburg Gently Pushes Back at Criticism of the Supreme Court and Her Fellow Justices*, WASH. POST, July 26, 2019, at A2.

individuals.”⁵¹² Justice Ginsburg had reasons to be pleased. Contrary to expectations, Justice Gorsuch and Justice Kavanaugh provided Justice Ginsburg with key votes in important cases.

It is also noteworthy that (in divided cases) the two Justices’ support for Justice Ginsburg’s majorities rarely came together; it was almost always one or the other.⁵¹³ That is because, despite attending the same high school and clerking together for the same Supreme Court Justice,⁵¹⁴ Justice Kavanaugh and Justice Gorsuch represent two different brands of conservative judicial philosophy.⁵¹⁵ What is more, their differences run orthogonal to the familiar fault line between liberals and conservatives. One Justice is a pragmatic insider, while the other is a formalist outsider.

A. The Pragmatic Insider

A native of the Washington D.C. area, who returned to the locale after college and law school at Yale and a one-year judicial clerkship on the West Coast,⁵¹⁶ Justice Kavanaugh seems imbued with the ideals of his hometown. He sees the U.S. government as a force for good with a moral obligation to make the world a better place. He has a positive, insider view of the federal government and federal power.

A veteran of the George W. Bush White House who has spent his career in federal service,⁵¹⁷ Justice Kavanaugh is sensitive to the practical needs of the federal government. He tends to resolve ambiguities in its favor and in favor of facilitating enforcement of federal law. He sympathizes with those who exercise federal power as well as those who need its protection. He has much less concern for those who are subject to federal power and still less for those who violate federal law.

Justice Kavanaugh is also sensitive to the moral sentiments of his hometown. When he can go along with those feelings (such as by holding that a Mississippi prosecutor engaged in racial

⁵¹² *Id.*

⁵¹³ *See infra*, Part VI.A–B.

⁵¹⁴ Apparently, the two got along well when they clerked together for Justice Kennedy. In 2017, then-Judge Kavanaugh said of his former co-clerk: “He’s just an easy guy to get along with. He doesn’t have sharp elbows.” Adam Liptak and Nicholas Fandos, *How Gorsuch the Clerk Met Kennedy the Justice: A Tale of Luck*, N.Y. TIMES (March 3, 2017), <https://www.nytimes.com/2017/03/03/us/politics/neil-gorsuch-anthony-kennedy-supreme-court.html> [<http://perma.cc/2ZNW-FDLX>].

⁵¹⁵ For an informative discussion of the opposing brands, *see* Margaret H. Lemos, *Book Review, The Politics of Statutory Construction*, 89 NOTRE DAME L. REV. 849 (2013).

⁵¹⁶ *See generally* CNN Editorial Research, *Brett Kavanaugh Fast Facts*, CNN, <http://www.cnn.com/2018/07/16/us/brett-kavanaugh-fast-facts/index.html> [<http://perma.cc/T7QG-PE2L>] (last updated Mar. 5, 2020, 5:54 PM).

⁵¹⁷ *Id.*

discrimination),⁵¹⁸ he is happy to do so. When he goes against a significant number of local opinion leaders (such as by rejecting a constitutional challenge to the Bladensburg Peace Cross),⁵¹⁹ he does so with apologies, expressions of respect for the losing plaintiffs, and overtures that he might be open to similar claims in the future. While he may reject particular federal interventions as unwise, he makes it clear he understands the moral imperative of federal oversight to ensure human rights and justice.

Justice Kavanaugh subscribes to the public policy approach to jurisprudence that is dominant in Washington D.C. and the legal academy.⁵²⁰ He believes judges make law and sees that exercise as a pragmatic process for the protection and improvement of society. He thinks judges should update the law as needed to advance the policies behind modern statutes and decisions.⁵²¹ He believes laws should be construed flexibly based on practical needs, within the bounds of ordinary, common sense understanding.⁵²² In his opening remarks at his confirmation hearing, he told the Senate Judiciary Committee that “[i]n deciding cases, a judge must always keep in mind what Alexander Hamilton said in Federalist 83: ‘the rules of legal interpretation are rules of common sense.’”⁵²³

At the same time, Justice Kavanaugh is a careful, prudential conservative. He worries about the practical consequences of his decisions far more than he cares about their theoretical provenance. He is wary of disrupting the status quo. He likes to follow precedent and stay close to consensus. His writing style, consistent with these values, is solid, conventional, institutional, careful, qualified and matter-of-fact.⁵²⁴ His opinions take the tone of reasonable policy decisions rather than logical arguments.

Justice Kavanaugh is deferential to his colleagues, Congress, and the Executive Branch. He takes pains to avoid offending the conservative or liberal establishments. While sympathetic to the general idea of federal oversight, he is open to arguments that

⁵¹⁸ See *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

⁵¹⁹ See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

⁵²⁰ See generally STEPHEN B. PRESSER, *LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW* (2017).

⁵²¹ For academic support of this approach, see Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699 (2013).

⁵²² For academic support, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1016 (1989).

⁵²³ Jeffrey F. Addicott, *Reshaping American Jurisprudence in the Trump Era – The Rise of “Originalist” Judges*, 55 CAL. W. L. REV. 341, 362 (2019) (some internal quotation marks omitted).

⁵²⁴ See Greg Johnson, *Write-On: Assessing the Legal Writing Style of Brett Kavanaugh*, 44 VER. BAR J. 30, 30 (2018).

particular expansions of federal power would be impractical, unwarranted, unnecessary, or unwise.

B. Formalist Outsider

A native of Colorado, whose early experience with the nation's capital was the public shaming of his mother,⁵²⁵ Justice Gorsuch has a wary, outsider view of Washington, D.C. Unlike those who worry about the federal government's possible sins of omission, Justice Gorsuch's focus is on the federal government's sins of commission. In particular, he thinks the federal bureaucracy should take greater care to stay within the limits of its authority and respect the traditions and liberties of others.

Justice Gorsuch sympathizes with those on the receiving end of federal power or otherwise at odds with the federal government. He cares about those who need protection from federal authorities. He has much less sympathy for those who exercise or seek to invoke federal power. The practical consequence of this approach is a series of votes that do not seem coherent from a liberal or conservative perspective. In the October 2018 term, he took the side of armed robbers,⁵²⁶ Apple Inc.,⁵²⁷ equipment manufacturers,⁵²⁸ the Tennessee state legislature,⁵²⁹ a Mississippi state prosecutor,⁵³⁰ a former carpenter seeking federal disability benefits,⁵³¹ an ex-offender convicted of illegal possession of a gun,⁵³² a federal criminal defendant convicted of possession of child pornography,⁵³³ and the Yakama Nation.⁵³⁴ In some ways, Justice Gorsuch may be likened to a small-town lawyer whose willingness to challenge the establishment attracts an odd collection of clients.

Justice Gorsuch has an “engaging and readable writing style”⁵³⁵ that is much more affable than that of his predecessor, Justice Scalia, and much more folksy than Justice Kavanaugh's

⁵²⁵ See Heather Elliott, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 711 (2019) (describing how Anne Gorsuch Burford was accused of dismantling her agency and “forced to resign after she was cited for contempt of Congress for refusing to turn over Superfund records” on the ground of executive privilege” and noting that it “is not hard to imagine these events shaping the then-teenage Neil Gorsuch's views of the Executive Branch”).

⁵²⁶ See *United States v. Davis*, 139 S. Ct. 2319 (2019).

⁵²⁷ See *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

⁵²⁸ See *Air and Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

⁵²⁹ See *Tenn. Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

⁵³⁰ See *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

⁵³¹ See *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019).

⁵³² See *Gamble v. United States*, 139 S. Ct. 1960 (2019).

⁵³³ See *United States v. Haymond*, 139 S. Ct. 2369 (2019).

⁵³⁴ See *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019).

⁵³⁵ Hillel Y. Levin, *Justice Gorsuch's Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687, 701 (2019).

institutional tone. Consistent with his anti-establishment attitudes, Justice Gorsuch starts sentences with conjunctions, writes in the second person, and uses contractions, sentence fragments, and alliteration.⁵³⁶ At the same time, consistent with his doctorate from Oxford, Justice Gorsuch employs the tropes of classical rhetoric, such as syllogism, pathos, hyperbole, and rhetorical questions.⁵³⁷ He prioritizes logical reasoning over modern policy analysis.

Justice Gorsuch follows a deontological theory of jurisprudence that works well for those who wish to restrain federal power⁵³⁸ but has limited support in the legal academy⁵³⁹ and Washington D.C. A key premise of that theory, in the words of a recent article by Gillian E. Metzger, is the “highly formalist” “classical image of law as fixed, determinate, and categorically distinct from policy.”⁵⁴⁰

In his recent book, Justice Gorsuch described the formalist theory more colloquially as the precept that judges “should apply the Constitution or a congressional statute as it *is*, not as [they] think[] it *should be*.”⁵⁴¹ This approach is necessary, Justice Gorsuch explains, because “sticking to the law’s terms is the very reason we have independent judges: not to favor certain groups or guarantee particular outcomes, but to ensure that *all* persons enjoy the benefit of equal treatment under existing law as adopted by the people and their representatives.”⁵⁴² According to Justice Gorsuch, judges should not exercise political discretion or look for the fair solution; rather: “Judges aren’t supposed to compromise principle but reach their decisions through the consistent application of logical premises to a natural end.”⁵⁴³

⁵³⁶ See Johnson, *supra* note 519.

⁵³⁷ See Christopher Fitzpatrick Cannataro, *The New Scalia? An Aristotelian Analysis of Judge Gorsuch’s Fourth Amendment Jurisprudence*, 17 GEO. J.L. & PUB. POL’Y 317 (2019).

⁵³⁸ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 410 (1991) (“Formalism . . . embodies a relatively antigovernmental philosophy.”); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659–60 (2009) (“[E]xalting originalism was part of a deliberate effort by the Reagan Justice Department to rally Americans against a Federal Judiciary it perceived as frustrating its conservative political agenda.”).

⁵³⁹ For academic support for this approach, see Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018). For an article summarizing opposing scholarship, see Jason Iuliano, *The Supreme Court’s Noble Lie*, 51 U.C. DAVIS L. REV. 911 (2018).

⁵⁴⁰ Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 28.

⁵⁴¹ NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10 (2019).

⁵⁴² *Id.*

⁵⁴³ *Id.* at 133.

In practice, for Justice Gorsuch, applying the law as it is means construing laws using the traditional interpretative tools that judges have used for centuries.⁵⁴⁴ He rejects the pragmatic idea that judges should update laws to fit current needs or modern sensibilities. This may sound like positivist deference to the legislature, but it is actually closer to natural law.⁵⁴⁵ The traditional interpretative tools Justice Gorsuch prescribes include a strong presumption that laws embody the basic precepts of Western Civilization, the traditional common law and the foundational principles of the American Republic. These are the originalist ideas he holds most dear. Whenever possible, he construes laws in accordance with his idealized vision of these norms.⁵⁴⁶ This means giving a liberal construction to provisions of the Bill of Rights that protect liberty (particularly from intrusion by the federal government) and a narrow construction to statutes that run contrary to the ideals of the founders.

At the same time, as the *Bostock* case illustrates, Justice Gorsuch regards the Civil Rights Act of 1964 (and likely some other modern statutes as well) as establishing new first principles akin to those recognized by the Bill of Rights. He is willing to follow the logic of their texts to expand individual rights or promote equality under the law.

Justice Gorsuch is not a prudential conservative. He does not mind defying consensus or convention. He does not worry all that much about the practical consequences of his decisions, being content to dismiss possible costs as part of the price for liberty that the Framers of the Constitution believed to be justified or otherwise outside the purview of the judicial role.⁵⁴⁷ While happy to support tradition when it is consistent with his philosophy, Justice Gorsuch is also happy to follow his principles to overturn precedent, upset the status quo, challenge the establishment, and relieve the oppressed.

⁵⁴⁴ For a good discussion of originalism, see Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 529 (2019).

⁵⁴⁵ See Richard A. Epstein, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295 (2017).

⁵⁴⁶ Interestingly, the seventeenth century English resistance to royal absolutism followed a similar ideological strategy. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1688 (1994) (“[Sir Edward] Coke was not a reactionary but a radical conservative, who reached back into the remote past not only to strike down innovations of the preceding century of accumulating royal power but also to justify wholly new legal principles.”); Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 LAW & HIST. REV. 439, 439 (2003) (describing Coke as “the seventeenth-century mythologist of the ‘ancient constitution’”).

⁵⁴⁷ See *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

VII. CONCLUSION

The philosophical differences between Justice Kavanaugh and Justice Gorsuch have made their collective impact on the Supreme Court less conservative, less partisan, less predictable, and more representative of the country than most people expected when Justice Kavanaugh joined the Court in 2018. While this turn of events may disappoint some, on balance it is good news for the Supreme Court as an institution—and good news for the nation.