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March 17, 2017

The Honorable Charles E. Grassley
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
U.S. Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the Constitutional Accountability Center, I am writing to express concerns about Judge Neil Gorsuch's nomination to the United States Supreme Court.

The Constitutional Accountability Center ("CAC") was founded in 2008 as a public interest law firm, think tank, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests. As a law firm, CAC chooses the best cases to bring our ideas about the Constitution into court and secure victories in the U.S. Supreme Court, state supreme courts, and lower federal courts that move the law in a direction that comports with text and history. As a think tank, we produce original scholarship on the text and history of the Constitution, distilling the best legal and historical scholarship to help Americans better understand our Constitution and inform how modern debates about its text should be resolved. And, as an action center, we promote the Constitution as a progressive document, written by revolutionaries and amended by those who prevailed in the most tumultuous social upheavals in our nation's history—Reconstruction, Suffrage, and the Civil Rights movement. Through litigation, scholarship, and advocacy, we seek lasting victories rooted in the text, history, and values of our Constitution.

When crafting our Constitution, the Founders created a system of checks and balances meant to deter corruption, both real and perceived. They intentionally created three co-equal branches of government to prevent the concentration of corruptible power in one body and to shield law and policy from the whims of short-lived political passions. With the federal Legislature and Executive in the hands of one political party, and particularly with an Executive who has demonstrated a repeated lack of respect for the Constitution and the rule of law, it is more imperative than ever for the stability of our government that the federal Judiciary remain independent and serve as a check on the other branches. For the Judiciary to remain so, judicial nominees, at all levels, must demonstrate this independence as one prerequisite for being confirmed by the Senate.

The President's months of touting his litmus tests for a Supreme Court Justice, his numerous comments disparaging federal judges who do not rule in his favor, as well as his authoritarian and anti-Constitution executive actions, have placed a profound burden on Judge Neil Gorsuch. At his confirmation hearing, Judge Gorsuch must provide forthright answers when questioned about the President's statements and actions. He should not hide behind his current or potential office. As another sitting judge, Jay Bybee of the U.S. Court of Appeals for the Ninth Circuit, recently wrote, the President's

disparaging comments about judges who struck down his executive order banning certain Muslims from traveling to the United States "were out of all bounds of civic and persuasive discourse." Judge Gorsuch must also prove to the American people that, if confirmed, he will serve as an independent check on the elected branches, especially when they violate constitutional and legislative protections, including protections against corruption; he will not be a rubber stamp for the U.S. Chamber of Commerce and other business interests; and that will be open-minded, fair, and guided by the text and history of the whole Constitution, and not just by the parts he prefers, nor by a right-wing political agenda. His record on these issues is cause for concern.

As a judge on the U.S. Court of Appeals for the Tenth Circuit, Judge Gorsuch has authored opinions that demonstrate crabbed interpretations of laws protecting workers and others, strongly favored arbitration beyond what is required by governing statutes, and criticized Supreme Court doctrine deferring to the reasonable interpretation of executive branch agencies in their administration of ambiguous laws. These opinions, detailed in the attached report, "Supreme Court Nominee Neil Gorsuch: Expected by Big Business to be Another Reliable Vote on the Roberts Court," earned Judge Gorsuch the acclaim of the business community upon the President's announcement of his nomination to our nation's highest court. But to those of us who are focused on fair and equal justice for all, his support in the cases discussed in the report for corporate interests over the rights of individuals is particularly troubling when coupled with the fact that the Roberts Court, with the conservative Justices leading the charge, has ruled in favor of positions taken by the U.S. Chamber of Commerce nearly 70 percent of the time.

Judge Gorsuch has received further acclaim for being an originalist, a jurist who resolves constitutional disputes by relying primarily on the text and history of the provision in question as understood at the time of its drafting. However, to be a true originalist, a jurist must demonstrate a commitment to the text and history of the *whole* Constitution, including the transformative Amendments passed in the wake of the Civil War, not just the parts he or she likes. As explained in the attached Issue Brief, "The Selective Originalism of Judge Neil Gorsuch: A Review of the Record," Judge Gorsuch has failed to apply such principles when the Fourteenth Amendment is concerned. Furthermore, at times when he does consult text and history, Judge Gorsuch sometimes uses them to justify legal rulings that cannot be supported by the principles of our nation's Founding.

The American people are entitled to Supreme Court Justices who will protect the Constitution, adhere to mainstream legal thought, and serve as an independent check on the President and Congress. Particularly at a time when the Executive displays disregard and even disdain for the judiciary, the rule of law, the Constitution and the values it enshrines, the American people are dependent upon the Senate to thoroughly examine the records of judicial nominees to ensure that, if confirmed, those nominees will be independent, fair, and faithful to the law rather than a political agenda. On behalf of CAC, I ask that you fulfill this duty and closely scrutinize the record and judicial philosophy of Supreme Court nominee Neil Gorsuch.

Sincerely,

Elizabeth B. Wydra
President

cc: All Members, Senate Judiciary Committee

Supreme Court Nominee Neil Gorsuch:

Expected by Big Business to be Another Reliable Vote on the Roberts Court

By Judith E. Schaeffer

Acclaim for Gorsuch from Business Interests

When President Trump announced his nomination of Judge Neil Gorsuch to the Supreme Court on January 31, members of the business community could hardly have been more enthusiastic. A "fantastic nomination," said Thomas J. Collamore, Senior Vice President of the U.S. Chamber of Commerce, whose Litigation Center "fights for business at every level of the U.S. judicial system." The next morning, Collamore was part of a select group of private organizational representatives who met with Trump at the White House to discuss the nomination. Juanita Duggan, head of the National Federation of Independent Business, was also at the meeting, as were representatives of National Right to Life, the NRA, and the Federalist Society, among others. Describing the meeting later that day, White House Press Secretary Sean Spicer said:

> [T]his morning, the President met in the Roosevelt Room with representatives of outside groups to discuss Judge Gorsuch's nomination . . . The attendees thanked the President for making such an inspired choice and for delivering on what was, for many of them, their number one issue in the campaign. They committed vocally to supporting Judge Gorsuch throughout the confirmation process.

Advocates for business interests also weighed in to proclaim the Gorsuch nomination a big win for corporate America. For example, an article by attorneys with the Orrick law firm concluded,

> After reviewing Judge Gorsuch's background and record of judicial opinions, it appears that the prior relatively pro-business conservative trajectory of the Supreme Court [before Justice Scalia's death] will now be restored. . . . If the Senate confirms Judge Gorsuch's nomination, we expect the Court to return to its business-friendly leanings . . . .[1]

[1] Robert Loeb and Paul David Meyer, *The Gorsuch Nomination: The Return of the Business Friendly Court?* (Feb. 7, 2017), available at https://www.orrick.com/Insights/2017/02/The-Gorsuch-Nomination-The-Return-of-the-Business-Friendly-Court.

And a piece in *The Employer Defense Report* of the Conn Maciel Carey law firm entitled "Supreme Court Nominee Neil Gorsuch Sides with Businesses on Labor Issues" opined that

> Judge Gorsuch's opinions on labor and employment topics suggest that he favors businesses . . . Judge Gorsuch would likely be a welcome addition to the nation's highest court by employers. . . Ultimately, as to labor and employment cases that come before the Supreme Court, employers will likely benefit from Judge Gorsuch's confirmation if it should proceed. His ideals comport with President Trump's small government/anti-regulation agenda, and it seems likely that he would be highly critical of agency action throughout his tenure on the bench.[2]

Gorsuch and the Roberts Court's Pro-Business Lean

The enthusiasm in the business community for a Gorsuch confirmation stems, as reflected in the Orrick article, from the conclusion that a Justice Gorsuch would re-establish a pro-corporate conservative majority on the Supreme Court. This would further solidify the hold that big business has on the Court, as exemplified by the increasing success of the U.S. Chamber of Commerce before the Roberts Court. Since 2010, Constitutional Accountability Center has tracked the Supreme Court activities of the Chamber of Commerce and released empirical studies documenting a sharp increase in the Chamber's success rate before the Court since Chief Justice Roberts and Justice Alito were confirmed. We have shown not only that the Chamber now wins the vast majority of its cases (69% during the Roberts Court, compared to 56% during the stable Rehnquist Court and 43% during the late Burger Court), but also the existence of a sharp ideological divide on the Roberts Court in favor of the Chamber, with the Court's conservatives almost always ruling in favor of the Chamber in closely decided cases. On the Roberts Court, Justice Scalia had supported the Chamber's position in 71% of its cases (second only to Justice Alito's 74%), and his death left the Chamber without one of its most reliable votes. Clearly, the business community is counting on Judge Gorsuch, if confirmed, to provide another consistent vote in its cases, whether they involve forced arbitration, the rights of workers, consumers, and other everyday Americans, or anything else pitting the rights of individual Americans against more powerful businesses.

The business community has these expectations because, from cases such as those discussed below, they see in Gorsuch's record a judge who favors cramped interpretations of laws protecting workers and others, and one who strongly favors arbitration. They also see in Gorsuch a judge who has an openly-expressed hostility to Supreme Court precedent mandating

[2] Lindsay A. DiSalvo, *Supreme Court Nominee Neil Gorsuch Sides with Businesses on Labor Issues* (Feb. 10, 2017), available at https://employerdefensereport.com/2017/02/10/supreme-court-nominee-neil-gorsuch-sides-with-businesses-on-labor-issues/

judicial deference in certain circumstances to agency interpretations of laws they administer, including laws protecting workers, consumers, the environment, and more.

Key Business Cases in Judge Gorsuch's Record

For example, in *TransAm Trucking, Inc. v. Administrative Review Board, Department of Labor,*[3] Gorsuch dissented from the Tenth Circuit's ruling upholding a decision by the Department of Labor in favor of a trucker who had been fired when, after being stranded for hours in subzero temperatures in an unheated truck waiting for repairs to the frozen brakes on his trailer, he had refused his employer's directive either to continue to remain with the trailer (although he was going numb) or to drive away with the trailer, despite its frozen brakes. Instead, he unhitched the trailer and drove away, seeking warmth and safety. The majority held that the trucker was protected by a federal safety statute that "makes it unlawful for an employer to discharge an employee who 'refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.'"[4] Gorsuch disagreed, and would have upheld the company's firing of the trucker, arguing that the trucker had not "refused to operate" his vehicle because he drove away without the trailer—disregarding the majority's conclusion that the trucker's refusal to operate his vehicle in the unsafe manner his employer had directed qualified him for protection under the safety statute.

Gorsuch's dissent relied upon a crabbed interpretation of a federal law intended, among other things, "to promote the safe operation of commercial motor vehicles" and "to minimize dangers to the health of operators of commercial motor vehicles."[5] Instead of considering the text of the statute as a whole and Congress's plan in enacting the law, Gorsuch's dissent focused narrowly on several words of text. Starting with statutory text is entirely proper, of course, but courts interpreting laws must consider all of the text, not just the text of isolated phrases. Just two years ago, in *King v. Burwell*,[6] the Supreme Court properly rejected narrow textualism that operates to defeat Congress' plan in enacting a law. As Chief Justice Roberts wrote for a 6-3 majority in *King,* **"**[a] fair reading of legislation demands a fair understanding of the legislative plan."[7] Gorsuch's dissent in *TransAm Trucking* was anything but a fair reading of a statute enacted to protect worker and public safety. Indeed, an AP story reporting that "Gorsuch Often Sided with Employers in Workers' Rights Cases" specifically points to *TransAm Trucking* as illustrative of how Gorsuch's "fidelity to literal texts can lead to findings that appear to defy common sense and fairness."

[3] 833 F.3d 1206 (10th Cir. 2016).
[4] *Id.* at 1211.
[5] *Id.* at 1212.
[6] 135 S. Ct. 2480 (2015).
[7] *Id.* at 2486.

Gorsuch's dissent in *Compass Environmental, Inc. v. Occupational Safety and Health Review Commission*[8] is another example of his narrow interpretation of rules intended to protect worker safety, and the leeway he gives to businesses. In this case, he would have ruled in favor of a company that had failed to provide safety training to one of its workers about the dangers of an overhead high-voltage power line on a construction site, training that the company had in fact provided to other workers who had joined the job earlier. Tragically, the worker who had not received the training was electrocuted when his equipment came too close to the power line. The Department of Labor cited the employer for a "serious violation" of OSHA regulations and assessed a fine for failing to train the worker adequately. On appeal, the Tenth Circuit upheld the citation and fine, agreeing with the Secretary of Labor that a "reasonably prudent employer" – the evidentiary standard applicable here – would have provided the training.

Judge Gorsuch disagreed, claiming that the Secretary of Labor had failed to prove what a "reasonably prudent employer" would have done in terms of safety training, since she had provided no evidence of the training that *other* employers would have given in these circumstances. In so arguing, Judge Gorsuch totally discounted the fact that the company itself had previously trained its other workers on the very clear danger posed by the high voltage line, training that the company now claimed was "unnecessary" and not probative of what "a reasonably prudent employer" would have done.[9] The majority rejected those stunning assertions, explaining that "[a]n employer's identification of and training on a specific hazard is certainly relevant to the question of whether a reasonably prudent employer would have provided training on this hazard."[10] Judge Gorsuch, however, applying an unduly high test for determining the safety training that was required in these circumstances, would have held that it was improper for the company to have been sanctioned for a lack of training resulting in the electrocution of its employee.[11]

The simple fact that Judge Gorsuch sided with businesses over workers is not necessarily what causes concern—it is that in these two cases he applied cramped readings or understandings of the relevant statutes and legal standards in order to do so. The Roberts Court has already shown a willingness to bend over backwards to accommodate corporate interests at the expense of working Americans, and the next Justice needs to be someone who will apply the law fairly to all.

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[8] 663 F.3d 1164 (10th Cir. 2011).

[9] *Id.* at 1169.

[10] *Id*.

[11] Cases involving consumer safety in which Judge Gorsuch wrote or joined majority opinions siding with businesses include *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141 (10th Cir. 2016) (Gorsuch joins majority opinion invalidating CPSC regulation setting safety standards for small toy magnets that pose grave dangers to children because of risk of ingestion; the dissent would have upheld the rule, stating that "the record supports the Commission's findings on both the unreasonable risk of injury and reasonable necessity for the rule") and *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335 (10th Cir. 2015) (opinion by Gorsuch holding that a patient's state law tort claims against a medical device manufacturer arising out of injuries she sustained from the manufacturer's promoted off-label use of the device were pre-empted by federal law; the dissent would have allowed some of the claims to proceed, noting the "important federalism concerns at the heart of this case").

Another aspect of Judge Gorsuch's record that is particularly appealing to the business community is what the Orrick article calls his "deep-rooted skepticism of administrative agency interpretations of the law." Similarly, the *Employer Defense Report* calls Gorsuch "a staunch opponent of the power wielded by administrative agencies." These views come through in Gorsuch's dissents in such cases as *TransAm Trucking* and *Compass Environmental*, both cited by Orrick as "shed[ding] light on how [Gorsuch] would approach individual cases involving agency rulings" if confirmed. Another is *National Labor Relations Board v. Community Health Services,*[12] in which the NLRB ("Board") petitioned the court to enforce a backpay order of more than $100,000 against an employer that had unlawfully reduced the hours of some of its full-time staff. At issue was whether the Board had properly declined to deduct from the backpay award the interim earnings of affected employees (that is, earnings from secondary employment the workers had taken on to help make ends meet). The Tenth Circuit held that the Board had provided reasonable justifications for declining to deduct those interim earnings (including encouraging productivity and employment and accounting for additional hardships on the workers), and directed that the backpay award be enforced. In so ruling, the court noted that its task in this case was "narrow," and that the Board was entitled to deference in its backpay determination.[13]

Judge Gorsuch dissented, not only disagreeing with the majority's view of the Board's justifications for the backpay award, but also criticizing the Board's motives: "In the end," wrote Gorsuch, "it's difficult to come away from this case without wondering if the Board's actions stem from a frustration with the current statutory limits on its remedial powers – a frustration that it cannot pursue more tantalizing goals like punishing employers for unlawful actions or maximizing employment . . ."[14]

And in *Gutierrez-Brizuela v. Lynch*,[15] Judge Gorsuch went even further, taking the unusual step of writing a concurring opinion in a case in which he himself had written the majority opinion, for the sole purpose of attacking, at length, the doctrine of "*Chevron* deference" (named for the Supreme Court case from which it originates).[16] The *Chevron* doctrine generally requires courts to defer to agencies' reasonable interpretations of laws that they administer when those laws are ambiguous. In his concurring opinion in *Gutierrez-Brizuela*, Gorsuch suggested that *Chevron* deference was contrary to the Constitution's principle of separation of powers, claiming that *Chevron* has permitted "executive

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[12] 812 F.3d 768 (10th Cir. 2016).

[13] *Id.* at 772.

[14] *Id.* at 786 (Gorsuch, J., dissenting). However, Gorsuch has looked more favorably on NLRB decisions when the Board rejects employee union claims. As the *Employer Defense Report* has pointed out, Gorsuch has "sided with the National Labor Relations Board ("NLRB"), one of several administrative agencies he has criticized for overstepping its boundaries, in dismissing claims by employee unions," citing as one example *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d. 1198 (10th Cir. 2014) (Gorsuch opinion upholding NLRB order that an employer's unlawful and quickly-withdrawn threat to hire permanent replacement workers during a lockout of union workers did not make the lockout itself unlawful).

[15] 834 F.3d 1142 (10th Cir. 2016).

[16] *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth."[17]

Although *Chevron* deference can lead courts to defer to rules across the ideological spectrum, it has often resulted in courts upholding protections for the environment and for consumers, workers, and others**,** and drawn the ire of the business community that chafes at being regulated. Indeed**,** Judge Gorsuch's "willingness to challenge the *Chevron* Doctrine" was specifically cited by the National Federation of Independent Business in its statement "welcom[ing]" Gorsuch's nomination and essentially linking his confirmation to hoped-for victories in cases in which "NFIB is suing to overturn the EPA Waters of the U.S. Rule, the EPA Clean Power Plan, and the Department of Labor Overtime Rule. . . [and that] could end up in the Supreme Court."[18]

Finally, in addition to weakening regulatory agencies, another key agenda item for the business community is expanding forced arbitration – using take-it-or-leave-it contracts with workers, consumers, and others, often through fine print, to require people to give up their right to sue in court when victimized by corporate abuse or other wrongdoing. The business community sees Gorsuch as a supporter of arbitration and a friend of its agenda in this area as well. The Orrick article, for example, states that "Judge Gorsuch's opinions on the Tenth Circuit suggest that his confirmation would restore the pro-arbitration direction of the Court," pointing by way of example to *Ragab v Howard*,[19] in which Gorsuch dissented from the Tenth Circuit's ruling denying the defendants' motion to compel arbitration. In this case, the plaintiff and the defendants had entered into six different agreements governing their business relationship, each containing conflicting arbitration provisions. Given the conflicts among those provisions, and the lack of agreement on the essential terms of any arbitration, the court held that there had been no meeting of the minds regarding arbitration, and thus arbitration could not be compelled. Judge Gorsuch, however, would have compelled the parties to arbitrate, notwithstanding that there was no single arbitration agreement to enforce. Instead, he suggested some "workarounds" (his word)[20] to get past the absence of a governing arbitration agreement.

Conclusion

When the Senate Judiciary Committee holds its confirmation hearing for Judge Gorsuch, scheduled to begin on March 20, 2017, Senators should carefully question Gorsuch about his

[17] 834 F.3d at 1149 (Gorsuch, J., concurring).
[18] And, as noted above, the head of the NFIB, Juanita Duggan, was among the small group who met with Trump the morning after the announcement of the Gorsuch nomination and who "committed vocally to supporting Judge Gorsuch throughout the confirmation process."
[19] 841 F.3d 1134 (10th Cir. 2016).
[20] *Id.* at 1139 (Gorsuch, J., dissenting).

record in business cases. They should seek to determine, among other things, why he reads statutes and rules meant to protect ordinary Americans from corporate wrongdoing so narrowly that he undermines Congress' objectives in enacting them. They should probe his judicial philosophy regarding arbitration, and seek to learn whether he will support businesses in depriving Americans of their rightful day in court when they are victimized by them. They should question him about his hostility to *Chevron* deference and his apparent desire to overturn that precedent. In short, as the Senate considers confirming Neil Gorsuch to the Supreme Court, the American people are entitled to know whether, as the business community is expecting, a Justice Gorsuch would be another reliable vote in favor of corporate America and against the rights and interests of workers, consumers, and other less powerful individuals.

The Selective Originalism of Judge Neil Gorsuch

A Review of the Record

By David H. Gans

Introduction

Judge Neil Gorsuch has styled himself as an originalist cut from the same mold as Justice Antonin Scalia.[1] To those on the right, this makes Gorsuch an ideal nominee: brilliant, scholarly, and an impassioned defender of the Constitution.[2] The problem is that Gorsuch's record—reflected in his opinions and other writings—suggests that he is a selective originalist, committed to following only *some* of the Constitution's text and history. Judge Gorsuch will therefore have a heavy burden to meet when he testifies before the Senate Judiciary Committee: he can't simply call himself an originalist; he has to demonstrate that he is committed to following the text and history of the *whole* Constitution where it leads—both the Founding documents as well as the Amendments that transformed the Constitution.

Our Constitution is, in its most vital respects, a progressive document. At a time when monarchies reigned in much of the world, our Constitution's Framers created a democratic system based on the sovereignty of "We the People" and a system of checks and balances to better secure liberty and prevent any one branch from aggrandizing its power. The Framers created the independent Article III judiciary to vindicate individual rights and prevent abuse of power by the government, recognizing that "[t]here is no other body that can afford such a protection."[3] In the Bill of Rights, our Constitution requires that the federal government respect fundamental rights and ensure fair legal treatment for all persons, citizen and noncitizen alike.

Our 1789 Constitution was far from perfect, however: it sanctioned slavery and permitted massive violations of fundamental rights by state governments. Fortunately, the Amendments ratified in the wake of the Civil War, often termed America's Second Founding,[4] eliminated these blights on our Constitution.[5] The Thirteenth Amendment abolished slavery; the Fourteenth

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[1] *See* Brent Kendall, *Judge Neil Gorsuch Backs Scalia's "Originalist" Approach*, Wall St. J. (Jan. 31, 2017), available at https://www.wsj.com/articles/judge-neil-gorsuch-backs-scalias-originalist-approach-1485912175.

[2] *See, e.g.* Michael McConnell, *Neil Gorsuch: An Eloquent Intellectual,* Defining Ideas: Hoover Institution (Feb. 6, 2017), available at http://www.hoover.org/research/neil-gorsuch-eloquent-intellectual.

[3] 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Jonathan Elliott ed. 1836). *See generally* David H. Gans, *The Keystone of the Arch: The Text and History of Article III and the Constitution's Promise of Access to Courts* (2016), available at http://www.theusconstitution.org/think-tank/narrative/keystone-arch-text-and-history-article-iii-and-constitutions-promise-access.

[4] https://www.theatlantic.com/projects/the-second-founding/

[5] *See* David H. Gans and Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause of the Fourteenth Amendment* (2008), available at http://www.theusconstitution.org/think-

Amendment guaranteed birthright citizenship to all persons born or naturalized in the United States and wrote into the Constitution sweeping new guarantees that required state and local governments to respect the liberty, dignity, and equality of all persons; and the Fifteenth Amendment guaranteed the right to vote free from racial discrimination. All three of these Second Founding Amendments gave Congress broad enforcement power to help make these new constitutional guarantees real. In the 20th century, a host of Amendments broadened the right to vote and made our system of government more democratic.[6] Each of these voting rights Amendments—like the Second Founding Amendments—explicitly gave enforcement power to Congress.

There is no doubt that Judge Gorsuch cares deeply about some parts of the Constitution. During his tenure as a judge, he has written a host of thoughtful opinions on topics such as the right of individuals to petition the government for redress of grievances,[7] and the limits the Fourth Amendment places on unreasonable searches and seizures by the police.[8] His Fourth Amendment cases, notably, recognize that "the Fourth Amendment is no less protective of persons and property against governmental invasions than the common law was at the time of the founding,"[9] and that the job of a judge is to enforce the Amendment's ban on all unreasonable searches and seizures "whatever our current intuitions or preferences might be."[10] Judge Gorsuch, a prolific writer who very often writes separately to express his own views and to urge significant changes in the law, is not shy about invoking the wisdom of James Madison,[11] or

tank/narrative/gem-constitution; David H. Gans and Douglas T. Kendall, *The Shield of National Protection: The Text and History of Section 5 of the Fourteenth Amendment* (2009), available at http://www.theusconstitution.org/think-tank/narrative/shield-national-protection-text-history-section-5-fourteenth-amendment; David H. Gans, *Perfecting the Declaration: The Text and History of the Equal Protection Clause of the Fourteenth Amendment* (2011), available at http://www.theusconstitution.org/think-tank/narrative/perfecting-declaration-text-and-history-equal-protection-clause-fourteenth.

[6] U.S. Const., amend XV, XIX, XXIII, XXIV, XXVI.

[7] *Van Deelen v. Johnson*, 497 F.3d 1151 (10th Cir. 2007).

[8] *See, e.g. United States v. Krueger*, 809 F.3d 1109, 1117-26 (10th Cir. 2015) (Gorsuch, J., concurring); *United States v. Carloss*, 818 F.3d 988, 1003-1015 (10th Cir. 2016) (Gorsuch, J., dissenting); *A.M. v. Holmes*. 830 F.3d 1123, 1169-70 (10th Cir. 2016) (Gorsuch, J., dissenting); *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016). Even here, however, Gorsuch's record is mixed. See, e.g. *Kerns v. Bader*, 663 F.3d 1173 (10th Cir. 2011) (authoring 2-1 opinion granting qualified immunity to police officers on Fourth Amendment claim); *Cortez v. McCauley*, 478 F.3d 1108, 1145-49 (10th 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part) (disagreeing with denial of qualified immunity to officers in excessive force case).

[9] *Ackerman*, 831 F.3d at 1307.

[10] *Carloss*, 818 F.3d at 1011 (Gorsuch, J., dissenting).

[11] *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc), *rev'd on other grounds*, 136 S. Ct. 1113 (2016); *Krueger*, 809 F.3d at 1125 (Gorsuch, J., concurring); *Caring Hearts Personal Home Servs., Inc. v. Burwell*, 824 F.3d 968, 969 (10th Cir. 2016); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

Alexander Hamilton,[12] or about invoking English common law principles well known to the Founders.[13]

His record when it comes to the Amendments adopted during our nation's Second Founding stands in stark contrast. In a host of areas, Judge Gorsuch has written or joined opinions that take a narrow view of the Fourteenth Amendment's protections. He has never written an opinion that takes seriously the text and history of the Fourteenth Amendment, and he has never invoked the genius of men like John Bingham, Jacob Howard, and others who wrote the ideals of equality and fundamental rights for all from the Declaration of Independence into the Fourteenth Amendment, although he has had several opportunities to do so.

Moreover, what Gorsuch has said is even more troubling than what he hasn't. During the presidential campaign, Donald Trump announced a litmus test for his Supreme Court nominees, insisting that they would have to be willing to overrule *Roe v. Wade*.[14] While his Senate hearings should probe whether Gorsuch passed Trump's litmus test, a review of Judge Gorsuch's writings reflect an extremely crabbed view of the Constitution's protection of substantive fundamental rights, a view hard to square with the Fourteenth Amendment's text and history and its protections for rights, including the right to choose whether, when, and with whom to have a family.

Even when Gorsuch consults text and history, he sometimes uses it to justify legal rulings that cannot be supported by first principles. His attack on the longstanding *Chevron* rule requiring, in certain circumstances, courts to defer to agency regulations interpreting ambiguous statutory language is a good case in point.[15] Gorsuch paints a picture of administrative agencies as an unchecked fourth branch of government not countenanced by the Framers, claiming that current Supreme Court precedents "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power."[16] But history shows that the Framers knew that the President would need to rely on subordinates to ensure the energetic enforcement of the laws. The idea that administrative agencies can exercise delegated power to enforce a statute they administer—so long as they act consistent with the statute—has a rich history from the Founding on. As Justice Antonin Scalia observed, "[a]gencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of . . . the 'executive Power.'"[17]

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[12] *Krueger*, 809 F.3d at 1225 (Gorsuch, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1149 n.1 (Gorsuch, J., concurring).

[13] *Williams v. Trammel*, 782 F.3d 1184, 1219-20 (10th Cir. 2015) (Gorsuch, J., concurring); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169 (10th Cir. 2015); *Krueger*, 809 F.3d at 1123-24 (Gorsuch, J., concurring); *Carloss*, 818 F.3d at 1009-1010 (Gorsuch, J., dissenting); *Ackerman*, 831 F.3d at 1300.

[14] Elizabeth B. Wydra, *Did Neil Gorsuch Pass Trump's Abortion Litmus Test?*, Huffington Post (Feb. 28, 2017), available at http://www.huffingtonpost.com/entry/did-neil-gorsuch-pass-trumps-abortion-litmus-test_us_58b5f90be4b0658fc20f9b29.

[15] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[16] *See Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

[17] *City of Arlington v. FCC,* 133 S. Ct. 1863, 1873 n.4 (2013).

Gorsuch's record thus raises serious questions whether he is committed to the following the text and history of the whole Constitution, including the Second Founding Amendments that ensure that states respect substantive fundamental rights and equality for all, protect the right to vote, and give Congress broad enforcement power to make these rights a reality. Given his record, Judge Gorsuch has a heavy burden to convince the Senate that he is a judge who is faithful to the *entire* Constitution.

This Issue Brief unfolds as follows. Part I examines Judge Gorsuch's record in cases involving the Fourteenth Amendment's limitations on states as well as his non-judicial writings that touch on the Amendment's protections of substantive fundamental rights, equality, and fundamental fairness. In these areas, Judge Gorsuch has, more often than not, turned a blind eye to the Constitution's text and history. Part II examines the most significant originalist opinions written by Judge Gorsuch—cases in which Judge Gorsuch has argued for reinvigorating the long-dormant non-delegation doctrine and overruling *Chevron*, one of the most cited cases in American law. A short conclusion follows.

I. Judge Gorsuch and the Second Founding

Judge Gorsuch's opinions interpreting the Fourteenth Amendment's substantive guarantees are troubling. Rather than hewing to the text and history of the Fourteenth Amendment, Judge Gorsuch's opinions, more often than not, discount the check on states that the Framers of the Fourteenth Amendment insisted on. For a purportedly originalist judge, Gorsuch's opinions in this area are woefully lacking in attention to the Constitution's text and history.

A. Protection of Substantive Fundamental Rights

Judge Gorsuch's opinions have taken a narrow view of the Fourteenth Amendment's guarantee of substantive fundamental rights. He has expressed grave doubts about permitting individuals to bring damages suits against state officials for violation of fundamental rights, insisting that individuals should have to go to state court first and seek relief under state common law. The Reconstruction Framers sought to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired,"[18] recognizing the role of the federal courts in checking abuse of power and fact that state courts might sometimes be unwilling to vindicate federal rights.[19] But rather than respect the shift in the federal-state balance the Fourteenth Amendment dictated, Gorsuch has sought to "restore the balance

[18] Cong. Globe, 42nd Cong. 1st Sess. 376 (1871).

[19] *See, e.g.* Akhil Reed Amar, *Law Story*, 102 Harv. L. Rev. 688, 703, 707 (1989) (noting the "obvious lack of fungibility between state and federal courts; profound differences in methods of selection, tenure of office, and institutional mindset" and "unique structural role" of federal courts in "protecting individuals against government") (reviewing Paul Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System* (3d ed. 1988)).

between state and federal courts,"[20] forcing plaintiffs to exhaust any possible state remedy before turning to federal court. He also has, in some cases, taken a narrow view of the purpose inquiry that applies in a host of Fourteenth Amendment contexts, insisting that when reviewing claims that state officials acted for an unconstitutional purpose, that inquiry must be sensitive to federalism concerns.

In 2015, in *Browder v. City of Albuquerque*, Judge Gorsuch wrote both the majority opinion and a separate concurring opinion. *Browder* involved a police officer who killed an innocent person and injured another person when, after going off duty, he drove his police car at high speeds and disregarded traffic lights. Gorsuch's majority opinion held that the officer was not entitled to qualified immunity, concluding that the plaintiffs' complaint had pled "direct and substantial impairments of their fundamental right to life," and that the facts alleged showed "a conscious contempt of the lives of others and thus a form of reckless indifference to a fundamental right."[21] If he had said nothing more in *Browder*, the case would not be significant.

But in his concurring opinion—which addressed an argument the officer had waived—Gorsuch suggested that the case did not belong in federal court at all because "the common law usually supplies a sound remedy when life, liberty, and property are taken" and "[f]ederal courts often abstain when they otherwise might proceed out of respect for comity and federalism and the absence of any compelling need for their services."[22] According to Gorsuch, "there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under . . . the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate those same rights using a deep and rich common law that's been battle tested through the centuries."[23] Gorsuch would have held that a plaintiff could not bring a substantive due process claim for damages in federal court because the relief provided in state courts by the common law provided all the process due, seeking in his words "to restore the balance between state and federal courts."[24] Permitting the case to be heard in federal court, Gorsuch argued, "risks imposing a cloud of uncertainty on government officials about the scope of their duties and liabilities."[25] Had this argument not been waived by the officer, Gorsuch would have held that the plaintiffs—who, again, had been injured by a defendant who had demonstrated "a conscious contempt of the lives of others and thus a form of reckless indifference to a fundamental right"—could not bring their claims in federal court and had to go to state court instead. Gorsuch would have forced plaintiffs to proceed in a potentially hostile state court without the structural protections of judicial independence available in federal courts and where it might take longer for an injured person to have his or her day in court.

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[20] *Browder v. City of Albuquerque*, 787 F.3d 1076, 1085 (10th Cir. 2015) (Gorsuch, J., concurring)
[21] *Id.* at 1080, 1081.
[22] *Id.* at 1083, 1084 (Gorsuch, J., concurring).
[23] *Id.* at 1084 (Gorsuch, J., concurring). Judge Gorsuch made similar arguments in *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016), when he argued that the court should not fashion a federal claim for malicious prosecution, insisting that the Constitution "isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law." *Id.* at 661 (Gorsuch, J., concurring).
[24] *Browder*, 787 F.3d at 1085 (Gorsuch, J., concurring).
[25] *Id.* at 1084 (Gorsuch, J., concurring).

Judge Gorsuch has also decided a number of fundamental rights cases raising claims of unconstitutional purpose. Although he has been willing to find constitutional violations in particularly egregious cases, in other cases he has been considerably more reluctant to do so. This is significant because claims of unconstitutional purpose are exceedingly common throughout constitutional law—and are often critical to the protection of substantive fundamental rights.

In a 2007 ruling, *Van Deelen v. Johnson*, Judge Gorsuch wrote a unanimous opinion holding that "the constitutionally enumerated right of a private citizen to petition the government for the redress of grievances does not pick and choose its causes but extends to matters great and small, public and private."[26] *Van Deelen* involved a clear case of purposeful retaliation—state tax officers had sought to intimidate the plaintiff into dropping legal challenges to tax assessments and promised "payback for suing us"—and Judge Gorsuch's opinion concluded this was clearly sufficient to permit a jury to find "impermissible retaliatory motive."[27]

Planned Parenthood Assn'n of Utah v. Herbert tells a different story, however.[28] That case raised a similar retaliation issue to *Van Deelen*: Planned Parenthood of Utah claimed that the Governor of Utah had retaliated against the organization for its abortion rights advocacy by refusing to act as an intermediary for Planned Parenthood's federal funding. The Governor claimed that he had taken this action in response to videos that linked Planned Parenthood to the sale of fetal tissue. But, as the Governor was aware, the videos did not involve the Utah affiliate of Planned Parenthood, none of the federal funding in question involved abortion or fetal tissue research, and the allegations in the video were unproven.

In *Planned Parenthood Ass'n of Utah,* a panel of the Tenth Circuit held that Planned Parenthood was likely to succeed on its claim that the Governor of Utah had retaliated against it because of its abortion rights advocacy, relying squarely on admissions made by the Governor, which, it reasoned, undermined his claim that he had good reason for singling out Planned Parenthood of Utah and raised an inference of unconstitutional retaliation.[29] Unlike in *Van Deelen*, Judge Gorsuch was sharply critical of this conclusion. Dissenting from the denial of rehearing *en banc*, Judge Gorsuch wrote that the panel's analysis—and particularly its reliance on the Governor's admissions—was "inconsistent with the sort of comity this court normally seeks to show the States and their elected representatives."[30] Judge Gorsuch did not explain his logic, and it is hard to reconcile his reasoning with the basic Fourteenth Amendment principle that states are not entitled to comity when they run roughshod over fundamental rights.

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[26] *Van Deelen*, 497 F.3d at 1153.

[27] *Id.* at 1157, 1158. Likewise, in *Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013), Judge Gorsuch had little difficulty concluding that guards at a juvenile detention center had used shackles to improperly punish an eleven-year-old, 96-pound boy in their charge rather than for any legitimate penological purpose.

[28] 828 F.3d 1245 (10th Cir. 2016), *petition for rehearing en banc denied*, 839 F.3d 1301 (10th Cir. 2016).

[29] *Planned Parenthood*, 828 F.3d at 1261-62.

[30] *Planned Parenthood*, 839 F.3d at 1311 (Gorsuch, J., dissenting from the denial of rehearing en banc).

B. Equal Protection

Judge Gorsuch has written few opinions regarding the scope of the Fourteenth Amendment's equal protection guarantee. In 2012, in *Secsys, LLC v. Vigil*,[31] Judge Gorsuch wrote the court's opinion rejecting an equal protection challenge brought by a government contractor who had been subjected to a shakedown by a state official. Judge Gorsuch's opinion eloquently recognized that "the Equal Protection Clause is a more particular and profound recognition of the essential and radical equality of all human beings," but he also stated that the equal protection requirement "doesn't . . . suggest that the law may never draw distinctions between persons in meaningfully dissimilar situations." [32] Gorsuch's opinion, however, offered no clues about how he might interpret the Fourteenth Amendment's promise of equality in more compelling cases.

Two other cases suggest that Gorsuch may take the equal protection guarantee more seriously in some contexts than in others. In 2014, in *Riddle v. Hickenlooper*,[33] Judge Gorsuch concurred in a ruling that struck down, as a violation of the Equal Protection Clause, a Colorado campaign finance statute that had different contribution limits for different candidates. Colorado law imposed a more restrictive contribution limit on write-in, unaffiliated, and minor-party candidates, a form of discrimination that Gorsuch concluded "offends the Constitution's equal protection guarantee, whatever plausible level of scrutiny we might deploy." [34] Gorsuch wrote that "a state cannot adopt contribution limits that so clearly discriminate against minority voices in the political process without some 'compelling' or 'closely drawn' purpose—and Colorado has articulated none."[35]

By contrast, in *Druley v. Patton*—an unpublished opinion joined by Gorsuch—the Tenth Circuit rejected with little analysis an equal protection claim brought by a transgender female prisoner who was housed over her objection in an all-male prison facility.[36] The opinion breezily dismissed the claim and said nothing about the "essential and radical equality of all human beings."[37] This opinion suggested that Gorsuch would not apply the Equal Protection Clause to protect all persons from state-sponsored discrimination.

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[31] 666 F.3d 678 (10th Cir. 2012).

[32] *Id.* at 684. Likewise, Judge Gorsuch's opinions in *De Niz Robles* and *Gutierrez-Brizuela*, which limit the power of administrative agencies to retroactively apply their rulemaking, note the "equal protection concerns associated with retroactive decisionmaking," stressing that an agency free to apply its rulings retroactively could "single out disfavored persons and groups and punish them for past conduct they cannot now alter." *De Niz Robles*, 803 F.3d at 1170, 1175; *Gutierrez-Brizuela*, 834 F.3d at 1146.

[33] 742 F.3d 922 (10th Cir. 2014).

[34] *Id.* at 930 (Gorsuch, J., concurring).

[35] *Id.* at 933 (Gorsuch, J., concurring).

[36] *Druley v. Patton*, 601 Fed. Appx. 632 (10th Cir. 2015).

[37] *Secsys*, 666 F.3d at 684.

C. Criminal Procedure Rulings

Against the backdrop of maladministration of justice in the South in the wake of the Civil War, the Fourteenth Amendment sought to secure "due process of law . . . which is impartial, equal, exact justice."[38] Judge Gorsuch's criminal procedure rulings in federal habeas cases in which defendants have brought due process or other procedural challenges to their conviction or sentence reflect a narrow understanding of the fundamental fairness the Fourteenth Amendment guarantees and a willingness to defer to state court decision-making.

In 2009, in *Williams v. Jones*,[39] Judge Gorsuch dissented from the Tenth Circuit's ruling granting habeas relief to a criminal defendant charged with first degree murder, who had been denied effective assistance of counsel when his attorney threatened to withdraw if he accepted a favorable plea deal. Williams ultimately went to trial, was convicted, and sentenced to life in prison without the possibility of parole, and then sought relief to vacate his conviction. In Gorsuch's view, "[t]he Sixth Amendment right to effective assistance of counsel is an instrumental right designed to ensure a fair trial. By his own admission, Michael Williams received just such a trial . . . . We have no authority to disturb this outcome."[40] "Plea bargains," Gorsuch wrote, "are matters of executive discretion" and the "due process clauses of the Constitution's Fifth and Fourteenth Amendments do not encompass a right to receive or accept plea offers."[41] When the Tenth Circuit declined to rehear the case *en banc*, Judge Gorsuch wrote another dissenting opinion, claiming that the majority's "holding represents a significant new federal intrusion into state judicial functions and a revamping of the separation of powers" and insisting that the court erred by ignoring the "high bar" the "Supreme Court has set" "before we may conscript the Due Process Clause into service on behalf of new and unenumerated constitutional rights."[42]

Ultimately, in *Lafler v. Cooper*,[43] the Supreme Court weighed in on the issue, decisively rejecting Judge Gorsuch's view. As Justice Kennedy's majority opinion explained, "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[44] The view that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining . . . ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[45]

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[38] Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).
[39] 571 F.3d 1086 (10th Cir. 2009).
[40] *Id.* at 1094 (Gorsuch, J., dissenting).
[41] *Id.*
[42] *Williams v. Jones*, 583 F.3d 1254, 1257, 1259 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing *en banc*).
[43] 132 S. Ct. 1376 (2012).
[44] *Id.* at 1388.
[45] *Id.*

In 2012, in *Hooks v. Workman*,[46] Judge Gorsuch dissented from the Tenth Circuit's ruling that there is a right to counsel in *Atkins* proceedings, which are post-conviction trial proceedings concerning whether a person is ineligible for the death penalty by reason of mental retardation. The Tenth Circuit held that the "Fourteenth Amendment's Due Process Clause applies as fully to an *Atkins* proceeding as to any other jury trial," observing that the idea that a "mentally retarded defendant has a right not to be executed by the State, but not a right to counsel in proceedings where the question of mental retardation will be determined, smacks of the absurd."[47] The majority's rejected the State's contention that *Atkins* proceedings should be treated like other post-conviction civil proceedings where the right to counsel does not attach, noting that the *Atkins* trial was "'the first designated proceeding' at which he could raise a claim of mental retardation" and that "an *Atkins* trial is inextricably intertwined with sentencing," which is plainly "part of the criminal proceedings."[48] This reasoning did not satisfy Judge Gorsuch, who stressed that "when it comes to post-conviction habeas proceedings, the Supreme Court's teachings have been consistent, clear, and categorical—holding that a constitutional right to counsel does *not* exist."[49] While Gorsuch would have avoided the question by holding that counsel in this case was constitutionally effective, he described the court's holding as "pitted with problems."[50]

In 2015, in *Eizember v. Trammel*,[51] Judge Gorsuch wrote the majority opinion, refusing to set aside the death penalty despite troubling evidence that a juror biased in favor of the death penalty had been seated on the jury. In Eizember's trial, the trial judge refused to dismiss one of the jurors even though her juror questionnaire had stated that "I firmly believe if you take a life you should lose yours," and that she had "no reservations about seeing someone put to death so long as it has been proven the person is guilty, especially if they have taken the lives of others."[52] And, during voir dire, the juror stated that she would be able to consider a sentence of life without parole "[i]f the death penalty was not an option" and that if forced to choose between life, life without parole, or death, she "would have to look at all three but just off the cuff, it would probably be death."[53] Gorsuch's 2-1 majority opinion conceded that some of the "questionnaire responses do seem to suggest a bias in favor of the death penalty," but that the responses "weren't as damning" as Eizember suggested and there were other statements that suggested a "willingness to follow the court's directions and keep an open mind."[54] Accordingly, Gorsuch's opinion deferred to the state court's conclusion that the juror could be seated. "Any other course would evince a serious disrespect for state courts, run afoul of the federalism and

[46] 689 F.3d 1148 (10th Cir. 2012).
[47] *Id.* at 1183, 1184-85.
[48] *Id.* at 1183, 1184 (quoting *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012)).
[49] *Id.* at 1209 (Gorsuch, J., concurring in part and dissenting in part) (emphasis in original).
[50] *Id.*
[51] 803 F.3d 1129 (10th Cir. 2015).
[52] *Id.* at 1136.
[53] *Id.* at 1136, 1137.
[54] *Id.* at 1138.

comity concerns that undergird AEDPA, and risk inviting reversal for misapplication of that statutory scheme."[55]

D. Enforcement Power

Judge Gorsuch has written only one opinion on the scope of Congress's power to enforce the Fourteenth Amendment, which—like his other Fourteenth Amendment opinions—did not discuss the text and history of the Fourteenth Amendment.

In 2012, in *Elwell v. Oklahoma ex rel. Bd. of Regents of the Univ. of Okla.*,[56] Judge Gorsuch wrote the court's opinion holding that an employee could not bring a claim for employment discrimination under Title II of the Americans with Disabilities Act. Judge Gorsuch's opinion reasoned that, because Title I of the ADA deals with employment discrimination, an employee could not bring a claim for discrimination under Title II, which deals with discrimination in the provision of public services. Judge Gorsuch could have resolved the case on this basis alone, but his opinion went on to raise constitutional doubts about the application of Title II to employment discrimination suits for damages against state employers. Gorsuch recognized that "Congress can abrogate [Eleventh Amendment] immunity using its powers under Section 5 of the Fourteenth Amendment. But to do so Congress must first demonstrate that the States have engaged in a pattern of irrational discrimination," a showing that Gorsuch doubted could be met.[57] The Fourteenth Amendment's explicit grant of enforcement power was designed by its Framers to bring the power to enforce the new guarantees of liberty and equality "within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper,"[58] but Judge Gorsuch evinced little recognition of this history or of Section 5's critical role in ensuring that the goals of the Fourteenth Amendment can be realized.

E. Judge Gorsuch's Non-Judicial Writings

Judge Gorsuch's non-judicial writings reflect a crabbed view of the Fourteenth Amendment's guarantees of liberty and equality and the role of the courts in enforcing those guarantees.

In a 2005 article in the National Review, *Liberals 'N' Lawsuits*, Gorsuch argued that liberals were too reliant on the courts "as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education," urging them to recognize that the "ballot box and elected branches are generally the appropriate engines of social reform."[59] Gorsuch argued that this "addiction to the courtroom as

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[55] *Id.* at 1143.
[56] 693 F.3d 1303 (10th Cir. 2012).
[57] *Id.* at 1310-11.
[58] Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866).
[59] Neil Gorsuch, *Liberals 'N' Lawsuits*, National Review (Feb. 7, 2005), available at http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.

the place to debate social policy is bad for the country and bad for the judiciary."[60] In urging with a broad brush that all these cases did not belong in the courts—even those that sought to vindicate fundamental rights and prevent state-sponsored discrimination—Gorsuch's argument ignored the basic Fourteenth Amendment precept that fundamental constitutional principles that protect the liberty and equal dignity of all persons are not subject to a popular vote. The Fourteenth Amendment prevents tyranny of the majority at the state and local level, forbidding states from discriminating against disfavored persons and denying them their fundamental rights. Lawsuits like those that led to the Supreme Court's landmark marriage equality ruling in *Obergefell v. Hodges*[61] are a critical means of ensuring the liberty the Fourteenth Amendment guarantees to all and preventing the subordination of disfavored persons. Gorsuch's argument cannot be squared with our Constitution's promise of access to the courts, nor its guarantee of rights so fundamental that they should not be subject to the whims of the political process.[62]

In his 2006 book, *The Future of Assisted Suicide and Euthanasia*, Judge Gorsuch took a dim view of the Fourteenth Amendment's protection of substantive fundamental rights and of landmark Supreme Court decisions, such as *Loving v. Virginia*,[63] and *Planned Parenthood v. Casey*,[64] which reaffirmed the broad protections of substantive liberty that our Constitution affords to all.

Gorsuch's book is an extended argument about the constitutionality of assisted suicide laws, looking at the issue from the vantage point of law, history, moral philosophy, and practical experience. But nowhere in the book does Gorsuch examine the text and history of the Fourteenth Amendment, which was written against the backdrop of the suppression of fundamental rights in the wake of the Civil War. Judge Gorsuch's book does not mention at all the Privileges or Immunities Clause, which is "the natural textual home . . . for unenumerated fundamental rights,"[65] and repeatedly emphasizes the "procedural tone"[66] of the Due Process Clause, suggesting that the Fourteenth Amendment lacks a textual hook for the protection of the full range of substantive fundamental rights. The only originalist writer that Gorsuch cites is Judge Robert Bork,[67] who famously derided the Privileges or Immunities Clause as an "ink blot" and

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[60] *Id.*

[61] 135 S. Ct. 2584 (2015).

[62] It has been reported that Judge Gorsuch has called this article one of the biggest mistakes he ever made, *see* Rick Hasen, *What Does Judge Gorsuch Disagree with in His 2005 National Review Online Piece? Ask Him at Hearing*, Election Law Blog (Feb. 2017), available at http://electionlawblog.org/?p=91160. If that is true, Gorsuch should publicly repudiate his arguments in the article at the hearing, and explain the proper approach to access to courts and the protection of fundamental rights and equality.

[63] 388 U.S. 1 (1967).

[64] 505 U.S. 833 (1992).

[65] Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 Vand. L. Rev. 409, 449 (1990). We tell the story of the Privileges or Immunities Clause in *The Gem of the Constitution*, *supra* note 5, and filed a brief on behalf of preeminent scholars from across the ideological spectrum, explaining the way in which the Clause was intended to protect substantive rights, in *McDonald v. City of Chicago*, see http://theusconstitution.org/cases/briefs/mcdonald-v-city-chicago/supreme-court-amicus-brief-mcdonald-v-city-chicago.

[66] Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* 8 (2006).

[67] *Id.* at 21.

thought the Supreme Court's cases broadly protecting substantive fundamental rights were wrong.[68]

In his book, Gorsuch suggests that incorporation of the fundamental rights contained in the Bill of Rights—which was discussed at great length during the debates over the Fourteenth Amendment[69]—is a stretch. "One might ask," he writes, "whether it is bold enough to hold that the procedurally oriented language of the due process guarantee contains the enumerated substantive rights of the Bill of Rights; does going any further—holding that the clause is also the repository of other substantive rights not expressly enumerated in the text of the Constitution or its amendments, and thus entirely dependent for their legitimacy solely on the 'reasoned judgment' of five judges—stretch the clause beyond recognition?"[70] But, as history shows, the Framers of the Fourteenth Amendment sought to protect the full scope of liberty, including fundamental rights, such as the right to marry and others, not enumerated elsewhere in the Constitution.[71]

Gorsuch also offered an exceedingly crabbed reading of *Planned Parenthood v. Casey*, suggesting that the parts of the opinion in which five Justices reaffirmed a broad reading of the Due Process Clause as protecting the full scope of liberty and personal autonomy could be treated as "nonbinding dictum" since "*Casey*'s reliance on *stare decisis* was the narrower of the two grounds for decision offered by the plurality, and it, was standing alone, sufficient to decide the controversy before the Court."[72] The broader discussion, Gorsuch suggested, was "arguably inessential to that plurality's decision."[73]

Gorsuch sought to discredit *Casey*'s statement that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not form the attributes of personhood were they formed under compulsion of the State."[74] According to Gorsuch, this reasoning "may prove too much. If the Constitution protects as fundamental liberty interests *any* 'intimate' or 'personal' decisions, the Court arguably would have to support future autonomy-based constitutional challenges to laws banning any private consensual act of significance to participants in defining their 'own concept of existence.'"[75] Similar arguments have been made in the past,[76] but the Supreme Court has repeatedly maintained that the Fourteenth Amendment's protections "extend to certain

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[68] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 166 (1990).
[69] *The Gem of the Constitution, supra* note 5; *McDonald v. City of Chicago*, 561 U.S. 742, 762 n.9, 770-80 (2010); *id.* at 813-38 (Thomas, J., concurring).
[70] Gorsuch, *Future of Assisted Suicide*, *supra* note 66, at 77.
[71] *The Gem of the Constitution*, *supra* note 5.
[72] Gorsuch, *Future of Assisted Suicide*, *supra* note 66, at 80. Throughout his discussion, Gorsuch refers to *Casey* as a plurality opinion, forgetting that its critical discussion substantially reaffirming a woman's right to choose abortion was joined by five Justices.
[73] *Id.*
[74] *Casey*, 505 U.S. at 851.
[75] Gorsuch, *Future of Assisted Suicide*, *supra* note 66, at 81-82.
[76] *Casey*, 505 U.S. at 984 (Scalia, J., concurring in part and dissenting in part); *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting); *Obergefell*, 135 S. Ct. at 2620-23 (Roberts, C.J., dissenting).

personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[77] *Casey*'s affirmation of personal autonomy in a context key to equal citizenship—basic reproductive agency—is an important part of the liberty the law affords to all.

Gorsuch's book also questioned whether *Loving*'s due process analysis striking down laws prohibiting interracial marriage as a violation of the fundamental right to marry deserved to be treated as a holding, observing that "[t]he Court in *Loving* analyzed the antimiscegenation law at issue not just—or even primarily—under a due process lens. Instead, the *Loving* court rested its decision almost entirely on a traditional equal protection analysis; its appeal to due process came appended only to the very tail of the opinion."[78] Despite the fact that the *Loving* Court clearly made two separate holdings, Gorsuch suggested that *Loving*'s due process holding, much like *Casey*'s discussion of the broad scope of personal liberty, should be treated as inessential. This is not only a troubling view of precedent—which Gorsuch, if confirmed, could invoke as a Supreme Court justice to disregard rulings he dislikes—but also of the meaning of the Due Process Clause, one which again fails to grapple with the Fourteenth Amendment's text and history.

II. Judge Gorsuch's Attack on the Administrative State

Conservatives who celebrate Judge Gorsuch for his originalist rulings often point to his opinions that seek to revive the long-dormant nondelegation doctrine, which limits the authority of Congress to delegate its powers to other branches, and hamper the power of administrative agencies by eliminating *Chevron* deference.[79] But those cases, it turns out, appear to rest more on hostility to the work of agencies than on the Constitution's text and history.

In *United States v. Nichols*, Judge Gorsuch's opinion dissenting from the denial of rehearing *en banc* argued that Article I's Vesting Clause "limits the ability of Congress to delegate its legislative power to the Executive," reflecting that the "framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people's liberty." [80] The Constitution's "structural impediments to lawmaking," Gorsuch wrote, "were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty."[81] Quoting Professor Gary Lawson, Gorsuch argued that "'to abandon openly the nondelegation doctrine [would be] to abandon openly a substantial portion of the foundation of American representative government.'" [82] Gorsuch argued that the nondelegation doctrine should be stricter in the context of criminal laws,

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[77] *Obergefell*, 135 S. Ct. at 2597.

[78] Gorsuch, *Future of Assisted Suicide*, *supra* note 66, at 79.

[79] *See, e.g.* Ilya Shapiro & Frank Garrison, *Neil Gorsuch and the Structural Constitution*, National Review, Feb. 22, 2017, available at http://www.nationalreview.com/article/445130/neil-gorsuch-limited-government-constitutionalist.

[80] *Nichols*, 784 F.3d at 670 (Gorsuch, J., dissenting from the denial of rehearing *en banc*).

[81] *Id.*

[82] *Id.* (quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 332 (2002)).

and would have invalidated the federal law at issue on the grounds that it "effectively pass[es] off to the prosecutor the job of defining the very crime he is responsible for enforcing."[83]

Nichols involved a criminal case, but Gorsuch would apply the non-delegation doctrine broadly across the board and would reject established limits on the doctrine that conservative Justices, including Justice Scalia, approved. Gorsuch has questioned the Supreme Court's long-standing non-delegation doctrine—which merely requires Congress to set forth an intelligible principle to guide agencies—and has doubted whether the intelligible-principle standard "serve[s] as much as a protection against the delegation of legislative authority as a license for it, undermining the separation between the legislative and executive powers that the founders thought essential."[84] Based on his view of separation of powers, Gorsuch would eliminate the longstanding *Chevron* doctrine that requires a court to defer to an agency's reasonable construction of ambiguities in a statute it is charged by Congress with administrating. In his concurring opinion in *Gutierrez-Brizuela v. Lynch*, Gorsuch charged that *Chevron* and its progeny "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design," insisting that "[m]aybe the time has come to face the behemoth."[85]

In *Gutierrez-Brizuela*, Gorsuch attacked *Chevron* as a "judge-made doctrine for the abdication of the judicial duty," arguing that it "[t]ransfer[s] the job of saying what the law is from the judiciary to the executive" and impermissibly "delegate[s] legislative power to the executive branch."[86] Gorsuch wrote that "*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law," claiming that "[e]ven under the most relaxed or functionalist view of our separated powers some concern has to arise . . . when so much power is concentrated in the hands of a single branch of government."[87]

Judge Gorsuch's opinions in this area are undoubtedly thoughtful and erudite, invoking the Federalist Papers, legal scholarship, and concurring and dissenting opinions written by Chief Justice Roberts, Justice Thomas, and Justice Scalia, all of which Gorsuch clearly wishes were the law. But his attempt to portray what he calls the "titanic administrative state"[88] as an unaccountable fourth branch is full of holes when looked at from an originalist perspective.

First, Gorsuch ignores entirely the role of executive branch agencies in our constitutional design. When the Framers drafted our enduring Constitution, they created a President vested with the responsibility for executing the nation's laws, who would be aided in that constitutional obligation by subordinate officers of his choosing. As the Framers recognized, "[t]he ingredients

[83] *Id.* at 677.
[84] *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring).
[85] *Id.* at 1149 (Gorsuch, J., concurring).
[86] *Id.* at 1152, 1154 (Gorsuch, J., concurring).
[87] *Id.* at 1155 (Gorsuch, J., concurring).
[88] *Id.*

which constitute energy in the Executive are . . . an adequate provision for its support."[89] As our First President put it, in light of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution provides for executive officers to "assist the supreme Magistrate in discharging the duties of his trust."[90] Not surprisingly, the Supreme Court has long recognized that "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."[91]

Administrative agencies are not a modern invention; the story of administrative law in the United States goes all the way back to the Founding. Indeed, "[f]rom the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking."[92] Judge Gorsuch's concurring opinion does not discuss any of this history, let alone grapple with it, preferring instead to side with accounts that question the status of administrative law as law.[93] It is more than a little irresponsible to take one of the most cited cases in American law—what Gorsuch calls "the goliath of modern administrative law"[94]—without fully engaging with this history.

Second, when agencies use authority delegated by Congress to interpret statutory ambiguities, they are exercising the Article II executive power—not the Article I legislative power—as Gorsuch erroneously insisted. More than a century ago, the Supreme Court explained this key point: "From the beginning of the Government, various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their department, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations."[95] The *Grimauld* Court recognized that "'Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' . . . . But the authority to make administrative rules is not a delegation of legislative power."[96] As Professor Adrian Vermeule recently made the point, "Where is the *positive* evidence, in American legal

[89] *The Federalist No. 70* at 422 (Hamilton) (Clinton Rossiter ed., 1961); *The Federalist No. 72* at 434 (Hamilton) (Clinton Rossiter ed., 1961) (recognizing that there would be "assistants or deputies of the chief magistrate" who "ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence").

[90] 30 *Writings of George Washington* 334 (J. Fitzpatrick ed., 1939).

[91] *Myers v. United States*, 272 U.S. 52, 117 (1926).

[92] Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 5 (2012).

[93] *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (citing Phillip Hamburger, *Is Administrative Law Unlawful?* (2014)); *De Niz Robles*, 803 F.3d at 1171 n.5 (same). Compare Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547, 1547 (2015) (reviewing Hamburger, *Is Administrative Law Unlawful?*) ("The book makes crippling mistakes about the administrative law of the United States; it misunderstands what that body of law actually holds and how it actually works.").

[94] *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring).

[95] *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

[96] *Id.* at 521 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

sources, for the view that . . . any and all binding administrative regulations promulgated under statutory authority count as forbidden exercises of legislative power? There is none."[97] Rather, as Justice Scalia wrote in a key 2013 ruling, "[a]gencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of . . . the 'executive Power.'"[98] At the heart of Gorsuch's attack on *Chevron* is a huge categorical mistake of constitutional dimension.

Third, Gorsuch dramatically overstates the case when he argues that *Chevron* requires courts to abdicate their judicial duty to say what the law is. At each step of the *Chevron* analysis—at step zero when the Court asks whether *Chevron* applies, at step 1 when the Court asks whether Congress has spoken directly to the question, and at step 2 when the Court asks whether the agency's construction is a reasonable one—courts perform their job of interpreting federal law, employing traditional tools of statutory construction.[99] Gorsuch's portrayal of a judiciary that has given up on the job of interpreting statutes, simply rubberstamping the agency's view, cannot be squared with what the *Chevron* doctrine requires of courts. While Gorsuch would clearly prefer to eliminate any judicial deference to agency policymaking, *Chevron* and its progeny reflect that when Congress has charged an agency with administering a statute, the agency, not the courts, should be charged with "how best to construe an ambiguous term in light of competing policy interests."[100] As Scalia made the point, "'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency. That is precisely what *Chevron* prevents."[101]

Gorsuch's case against *Chevron* falls far short of what is necessary to scrap one of the most cited cases in American law. As Justice Scalia recognized, "'a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action,'"[102] but Gorsuch insists that it is unconstitutional to give agencies the authority to interpret reasonably statutory ambiguities, even when Congress explicitly delegates power to an agency. That has never been the law. "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers."[103] *Chevron* may not be required by the Constitution, but Gorsuch's claim that it rests on an unconstitutional delegation of legislative and judicial power to agencies is wrong.

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[97] Vermeule, *No*, *supra* note 93, at 1562 (emphasis in original).
[98] *City of Arlington,* 133 S. Ct. at 1873 n.4.
[99] *See, e.g. id.* at 1874 (explaining that the answer to the "fox-in-the-henhouse syndrome" is "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."); *id.* at 1876 (Breyer, J., concurring) (emphasizing that "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous and can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law").
[100] *Id.* at 1873.
[101] *Id.* (quoting *Ford Motor Credit Co v. Milhollin*, 444 U.S. 555, 568 (1980)).
[102] *Whitman v. Am. Trucking Assn's, Inc.*, 531 U.S. 457, 475 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).
[103] *Yakus v. United States*, 321 U.S. 414, 425-26 (1944).

Conclusion

A Justice of the Supreme Court must be faithful to the entire Constitution; he or she cannot pick and choose based on their own predilections. But a review of Judge Gorsuch's record demonstrates that he often practices a selective, myopic form of originalism, which gives pride of place to the Founders but takes a narrow view of the Amendments that later generations of constitutional Framers drafted, and "We the People" adopted, to improve upon the serious flaws in our original Constitution. Judge Gorsuch thus has a heavy burden to carry when he appears before the Senate Judiciary Committee: he must demonstrate his fidelity to the *entire* Constitution—including the Second Founding Amendments that protect fundamental rights and ensure equal dignity under the law for all persons—if he wants to be confirmed to the Supreme Court.