

Written Statement

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**“The Nomination of Judge Neil M. Gorsuch
to be Associate Justice of the Supreme Court of the United States”**

**Committee on the Judiciary
United States Senate**

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I. INTRODUCTION

Chairman Grassley, Ranking Member Feinstein, and members of the Senate Judiciary Committee, my name is Jonathan Turley and I am a law professor at The George Washington University Law School, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. In addition to teaching a course on the Constitution and the Supreme Court, I have long written about the Court as an academic and legal commentator. It is an honor to appear before you today to discuss the nomination of the Honorable Judge Neil M. Gorsuch for the United States Supreme Court. I do not agree with all of Judge Gorsuch’s legal views, but I believe him to be an exceptional choice for the Supreme Court and someone who will bring intellectual depth and vigor to our highest court. Indeed, while many have focused on replacing a conservative on the Court with another conservative, the primary concern should be to replace an intellectual with an intellectual. Gorsuch is precisely that type of nominee who has the intellectual reach and vigor to sit in the chair of the late Antonin Scalia, an iconic figure in the history of the Court. He is worthy of this honor and has the makings of an outstanding justice.

Justice Scalia represented something of a rarity on the Court as someone who changed the Court more than it changed him.¹ The reason is that he came to the Court with a well-defined and coherent jurisprudence.

¹ Jonathan Turley, *Scalia’s Greatest Strength, His Steadfastness*, Wash. Post, Feb. 14, 2016.

Judge Gorsuch has the same jurisprudential foundations for the Court. He also displays the same intellectual honesty and independence. He is clearly conservative in his views and interpretative approach. Yet, presidents have historically been afforded discretion in the appointment of those with shared jurisprudential views. Among conservative candidates for the Court, Judge Gorsuch is the gold standard. Indeed, I have long been critical of the preference shown nominees who lack any substantive writings or opinions on the major legal issues of our time. This has led to what I have referred to as the era of “blind date nominees”—candidates with essentially empty portfolios when it comes to any provocative or even interesting thoughts. While such candidates present fewer potential targets for critics, they also offer the least information on the intellectual abilities or inclinations of a nominee. Such individuals make for good nominees, but not great justices.

Judge Gorsuch is a refreshing departure from that trend. He has a record of well-considered writings both as a judge and as an author. This is no blind date. We have a very good idea of who Judge Gorsuch is and the type of justice he will be. He is a thoughtful conservative jurist who is guided by first principles of constitutional and interpretive analysis. That is not to say that he is predictable on future votes. He has not written directly on many issues that concern people about the Court. More importantly, he has not shown a rigidity of thought or judicial temperament. He appears driven by his view of core, structuring principles—much like the jurist he will replace. That may take him in directions that are unexpected to the left or to the right. However, if his prior writings are any guide, it will be a direction that he believes is dictated by legal principle and not personal predilection.

The Committee has assembled an impressive array of witnesses to discuss Judge Gorsuch’s background and jurisprudence. I will focus my remarks on two specific areas. First, there has been a long debate over the proper standard or criteria for evaluating a nominee for the Supreme Court. Exploring many of these past criteria reveal an exceptionally strong nominee in Neil Gorsuch. Second, while many of Judge Gorsuch’s views are likely to overlap with those of Justice Scalia, the one area of likely divergence would be his approach to agency decisionmaking and the *Chevron* doctrine. I will address cases that are illustrative of Judge Gorsuch’s views on agency review, statutory interpretation, and more generally the Separation of Powers: *Hwang v. Kansas State University*, *Elwell v. Oklahoma, ex rel. Board of Regents of the University of Oklahoma*, 693 F.3d 1303, 1313 (10th Cir. 2012), *De Niz Robles v. Lynch*, *Gutierrez-Brizuela v. Lynch*, *United States v. Nichols*, and *TransAm Trucking, Inc. v. Administrative Review*

Board. These cases reveal a powerful intellect and voice committed to core principles of constitutional law. Judge Gorsuch's would bring valuable and needed contributions to both of these areas. We stand at a critical crossroad for the country with fundamental changes occurring in our constitutional system. There could not be a better time for the addition of a justice who has a deep understanding and fealty to the original design of our government. I believe that Judge Gorsuch is such a nominee.

II. THE ELUSIVE SEARCH FOR THE GREAT JUSTICE

There is no small degree of irony that the Supreme Court is a well-defined institution composed of members with entirely undefined qualifications. There are no mandatory standards for presidents in nominating justices or senators in confirming such nominees. Article II, Section 2, paragraph 2 of the United States Constitution simply states: “[The President] shall have Power . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court . . .” Thus, the Constitution is silent on the basis for such votes, leaving the decision (and its basis) to the conscience of each and every senator. Of course, this is no license for senators to engage in partisan or petty opposition. Senators are expected to act consistently with the text and spirit of the Constitution. This includes the recognition that the Framers afforded presidents the ability to shape the Court as the nationally elected leader of the country as a whole. That means that presidents will ideally select jurists with compatible jurisprudential views as well as exceptional qualifications. In the past, even senators from opposing parties have accepted that presidents have this inherent right and that it is not appropriate to vote on nominees solely on the basis of a litmus test on their expected votes.

Every president and senator has expressed a commitment to placing the best and the brightest on the Court, though few seem to agree on the qualitative measures for such nominees. Historically, the record is not encouraging. While the Supreme Court is rightfully held in great esteem by most citizens, the actual members of the Court have ranged from towering figures to virtual non-entities.² Any objective review would put the median closer to the weaker end of that spectrum. To put it bluntly, we have had far

² Jonathan Turley, *The Nine Greatest Supreme Court Justices*, American History Magazine, July 29, 2007 <http://www.historynet.com/the-9-greatest-supreme-court-justices.htm>

more “misses” than “hits” among appointees to the Court. One reason is the political pressure surrounding the selection of nominees. The criteria that make for great justices often take a backseat to those that make for easy nominations. Top candidates are often rejected due to writings or views that might attract opposition. The most influential legal minds are rarely considered and seldom nominated. Examples of such brilliant figures on different ends of political spectrum include Guido Calabresi on the Second Circuit and Richard Posner on the Seventh Circuit. It is the expected confirmation fights of the nomination, not the expected contributions of the nominee, that too often drives decisions over vacancies. The result is a preference for nominees with “clean” records that have no public thoughts challenging conventional theories or raising provocative ideas. In other words, full resumes but empty portfolios. I have long been critical of nominees who spent decades as lawyers without engaging in substantial discussions or publications on the foundations or the meaning of the law. That is not the case with this nominee. Neil Gorsuch is widely respected for his writings on legal theory and history. He has actively participated in debating fundamental questions of the structure of government, morality in the law, and interpretive theory. This is, in other words, a full portfolio of work at the very highest level of analysis.

There are common criteria that are oft-repeated in the evaluation of nominees. Obviously first and foremost is that a nominee must be free from disqualifying conflicts or questions of good-standing in the profession. History is replete with nominees who failed due to financial or ethical concerns. One of the most surprising failures occurred in the nomination of then Associate Justice Abe Fortas to be Chief Justice. Fortas was in almost every respect an ideal candidate for the Court with broad experience, a keen intellect, and a key role in the historic case of *Gideon v. Wainwright*. His nomination for Chief Justice, however, revealed ethical concerns over speaking fees. After the Administration failed to secure enough votes for cloture to overcome a filibuster, the nomination failed. Later, Fortas’ contract with Wall Street financier Louis Wolfson in 1966 for unspecified legal advice led to serious ethical questions and Fortas resigned from the Court.³

A nominee’s temperament has also been cited as a concern in past nominations. While this criteria was denounced as inviting bias during the

³ Bob Woodward, *Fortas Tie To Wolfson Detailed*, Wash. Post, Jan. 23, 1977.

confirmation hearings for Sonia Sotomayor,⁴ there is a legitimate question over the ability to work within such a small court. Clearly, such evaluations should be made with considerable caution. There can be sexist or prejudicial influences in the view of a nominee's temperament. Notably, Justice Sotomayor has disproven such critics and proved to be both collegial and effective on the Court. Moreover, temperament should not be an excuse to oppose a nominee who does not fit some litmus test. In the end, I will take a cantankerous genius over a gentile dolt. The area that I believe is worth considerable weight is the treatment of lawyers and parties by a judge. If a nominee has displayed contempt or arrogance before joining this Court, it is only likely to be magnified on the Court. That can be a corrosive and disruptive element on any court but can be a particularly harmful element for the Supreme Court. If a nominee has a pronounced history of abusing lawyers or litigants, the elevation to a higher court will only exacerbate that personal and professional weakness.

Another past criteria is the rejection of nominees viewed as cronies of a president with more political than legal inclinations.⁵ While some strong nominees like Chief Justice Errol Warren and Hugo Black did come from political backgrounds, they were viewed as highly competent choices selected for their legal insights rather than their political loyalties. That was not the case with the nomination of Harriet Miers in 2005, who was opposed by both Republicans and Democrats after being nominated by President George W. Bush.⁶ Close associates dismissed this allegation but many senators were clearly not convinced. Without casting judgment on Miers in particular, the Supreme Court is no place for lawyers who view their seat as a placeholder for a president or party.

Another accepted criteria is experience. However, such experience is not limited to either judicial posts or courtroom litigation. When I was asked to select the top justices at the turn of this century, I was struck by the diversity in background of those justices who stood out for their contributions to the law and the Court.⁷ The practice of law extends across a

⁴ Jo Becker & Adam Liptak, *Sotomayor's Blunt Style Raises Issue of Temperament*, N.Y. Times, May 28, 2009.

⁵ Jonathan Turley, *What Qualifies One For The Supreme Court*, USA Today, Oct. 5, 2005.

⁶ Geoffrey Stone, *Cronyism and the Court*, Chi. Trib., Oct. 4, 2005.

⁷ Jonathan Turley, *The Nine Greatest Supreme Court Justices*, American History Magazine, July 29, 2007 <http://www.historynet.com/the-9-greatest-supreme-court-justices.htm> The top justices in my view were John Marshall, Charles Evan Hughes, Earl

wide array of litigators, academics, in-house counsel, agency lawyers, and general practitioners. What stood out among these justices was the ability to see and articulate legal horizons barely perceptible to their contemporaries. They were able to lay deep conceptual and historical foundations for their decisions that have withstood the test of time.

The criteria that should be preeminent in the selection of a justice is intellect. By the time a nominee comes before the Senate, he or she should have a history of demonstrated intellectual ability and insight. This goes beyond simply “being smart,” as evidenced by law school placements or promotions. To be one of nine, a nominee should be an intellectual leader who has shown both a depth and scope of knowledge of the law and its history. Quite frankly, few nominees have been particularly distinguished on this basis. The low moment for this criteria came with Nixon’s nomination in 1970 of Judge G. Harrold Carswell, who was criticized as a “dull” nominee without distinction. Carswell was legitimately opposed for his lack of scholarly articles or significant decisions. Sen. Roman Hruska famously rose to his defense with the declaration that “Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance?”⁸ The answer is, of course, “no.” The highest court is a place for those who have earned the honor of confirmation through a lifetime of demonstrated and exceptional intellectual achievement. Yet, nominations often focus on resume splash rather than substantive evaluations of a nominee’s scholarly or analytical talents. When such records are reviewed, it is often with a superficial and political perspective. As discussed above, insightful or inquisitive work can be viewed as a liability in a nominee. There is even a fairly new minted verb and adjective named after one notorious failed nomination: “Bork.” Candidates who have challenged core theories or doctrines risked being “borked” as “outside of the mainstream” of legal thought. That characterization has too often been used to refer to nominees who are viewed as simply too liberal or too conservative despite large numbers of lawyers and citizens holding similar views. Moreover, some of our greatest justices like Louis Brandeis challenged mainstream or conventional thinking and wrote their best work in dissent.

On the basis of all of these criteria, Judge Gorsuch is a stellar nominee. I admit that I have a particularly high standard for the Court and I

Warren, Louis Brandeis, Oliver Wendell Holmes, William Brennan, John Marshall Harlan, Hugo Black, and (the top justice in my view) Joseph Story.

⁸ William H. Honan, *Roman L. Hruska Dies At Age 94*, N.Y. Times, April 27, 1999.

would not have recommended the majority of current members of the the Court based on their pre-confirmation records. However, I would have easily signed off on Neil Gorsuch. His record appears free of disqualifying conflicts or ethical concerns. His demeanor and professionalism has been heralded by fellow judges and lawyers alike. His experience includes private litigation as well as brief government service. Most importantly, he is an intellectual leader who has written profoundly on questions of law and policy. One can disagree with those views, but not the honest and articulate manner in which they have been presented. I realize that many do not welcome a conservative nominee any more than they welcomed a conservative president. However, President Trump has every right to nominate someone who shares his jurisprudential values. To oppose Judge Gorsuch in the absence of some major disqualifying revelation would be to effectively declare that no conservative could pass muster with the Senate. That would reduce our nomination process to a raw political exercise. Nothing can stop a senator from voting against Judge Gorsuch, but it will have to be based on criteria detached from the qualifications and achievements of this nominee. To put it simply, Neil Gorsuch is as good as it gets.

III. THE JURISPRUDENCE OF JUDGE NEIL GORSUCH

Modern confirmation hearings often produce greater heat than light on the backgrounds of nominees. This nomination is no exception. Past opinions by Judge Neil Gorsuch has been cycled through so many partisan spins that their public discussion barely resembles the underlying cases. It is time to return to the original sources if this Committee is seeking to shed light on the views of his nominee. The jurisprudence of Judge Neil Gorsuch reflects a jurist who crafts his decisions closely to the text of a statute. That is no vice in the view of many of us. It reaffirms the power of Congress in defining legal rights, privileges, and obligations in our country. Judge Gorsuch clearly recoils at the suggested task of courts to expand on language or enforce agency interpretations that effectively rewrite such language. In *Elwell v. Oklahoma, ex rel. Board of Regents of the University of Oklahoma*, 693 F.3d 1303, 1313 (10th Cir. 2012), for example, Judge Gorsuch maintained “whatever *Chevron* deference we owe to an agency’s interpretations and regulations when a statute is ambiguous, we are never permitted to disregard clear statutory directions in favor of administrative rules.” While the case has been cited as evidence of a hostility to workers,

Judge Gorsuch not only wrote for the Court, but his reasoning followed the conclusions of Third, Sixth, and Ninth Circuits.

This approach is also evident in *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014) where Judge Gorsuch wrote an opinion affirming the dismissal of a complaint filed by a teacher who had taken a six-month leave to deal with a cancerous condition. After the expiration, she sought additional leave time even though the federal law specifies only a six-month period as required for employers. Again, Judge Gorsuch wrote for the Court and followed existing case law. Judge Gorsuch and his colleagues declined to follow not the language of the statute but a guideline produced by the EEOC. He relied on Supreme Court precedent that clearly does not make such an agency guideline binding on the court. Moreover, the court noted that the guideline is not clearly supportive of the claim and contains countervailing language, even if applied. He noted that Congress did not impose an open-ended obligation on employers who, after affording the required leave, may decide when or whether to extend additional time to an employee. He stated correctly that the Rehabilitation Act “seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disable persons to work—not to turn employers into safety net providers for those who cannot work.”⁹ That has been taken as a harsh statement but it is a legal statement. Courts should not read into laws additional periods of required benefits that Congress did not approve. The extension of such obligatory benefits is a matter left to Congress. The extension of voluntary benefits is a matter left to employers. Judge Gorsuch does not strike me a cold person but he is a judge who seems to take to heart the words of Edmund Burke who described the “cold neutrality of an impartial judge.” We do not want justices who rule by outcome or by passion. We want them to rule by law created by others.

Many of Judge Gorsuch’s views appear to mirror those of the man he would replace on the Court, Justice Scalia. However, one major exception would likely be his approach to agency review. Scalia strongly supported the ruling in *Chevron USA v. Natural Resources Defense Council*. *Chevron* ironically was a victory for Judge Gorsuch’s mother, who served as the Environmental Protection Agency Administrator under Ronald Reagan. The resulting *Chevron* doctrine has shaped administrative law and ultimately the federal system as a whole. Judge Gorsuch has warned how federal agencies “concentrate federal power in a way that seems more than a little

⁹ *Hwang v. Kansas State University*, 753 F.3d 1159, 1162 (10th Cir. 2014).

difficult to square with the Constitution of the framers' design."¹⁰ In a line that could now become prophetic, Gorsuch declared that courts had to deal with "the behemoth" that is *Chevron*. His discussion of *Chevron* and its implications for our constitutional system is profound and honest:

"There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* 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. Maybe the time has come to face the behemoth."¹¹

I share Judge Gorsuch's concerns over the basis and impact of the *Chevron* Doctrine, even though we come from sharply different political perspectives. Gorsuch could force a reexamination of the doctrine in a move that, in my view, is long overdue. I also believe that the opinions of Judge Gorsuch in some prior case have been unfairly characterized. These opinions do not reveal bias but Judge Gorsuch's deep-seated views on the role of agency interpretations and the limits of *Chevron* deference.

A. *Chevron* and The Rise Of The Fourth Branch

I have previously written¹² and testified¹³ about the rise of the Fourth

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

¹¹ *Id.*

¹² See, e.g., Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); see also Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013) (discussing the separation of powers consequences in the reduction of legislative authority).

¹³ See United States House of Representatives, House Committee on Science, Space, and Technology, "Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas," September 14, 2016 (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); United States House of Representatives, House Judiciary Committee,

Branch and the growing imbalance in our governmental system. The American governmental system obviously has changed dramatically since the founding when the vast majority of governmental decisions rested with state governments. The growth in the size of the federal government resulted in a shift in the center of gravity for our system as a whole. Massive federal agencies now promulgate regulations, adjudicate disputes, and apply rules in a system that often has relatively little transparency or accountability to the public. All but a tiny fraction of these actions are (or can be) reviewed by Congress, which has relatively few staff members and little time for such reviews. As a result, it is the Administrative State, not Congress, which now functions as the dominant “law giver” in our system. The vast majority of “laws” governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unseen bureaucrats. A

Regulatory Reform, Commercial and Antitrust Law, “*Examining The Allegations of Misconduct of IRS Commissioner John Koskinen*” June 22, 2016 (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); United States Senate, Committee on Homeland Security and Governmental Affairs, “*The Administrative State: An Examination of Federal Rulemaking*,” April 20, 2016 (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*,” March 15, 2016 (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), <http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-TurleyJ-20140716.pdf>; *Enforcing The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing nonenforcement issues and the rise of the Fourth Branch); *Executive Overreach: The President’s Unprecedented “Recess” Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); see also *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing the loss of legislative power and the role of confirmation hearings to address separation of powers issues).

citizen is ten times more likely to be tried by an agency than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000. As I have stated previously, this system is adopting new pathways and power centers that were never anticipated in the design of our system. This raises core challenges for our tripartite system that have gone without any significant national debate.

The carefully balanced powers of the three branches allowed inverse pressures to check abuses of power. The separation of powers doctrine was first and foremost a protection of individual rights from the concentration of power in any single branch or single person. Madison believed that the separation of powers, as a structure, could defeat the natural tendency to aggrandize power that tended toward tyranny and oppression. In Madison's view, "the interior structure of the government"¹⁴ distributed the pressures and destabilizing elements of nature in the form of factions¹⁵ and unjust concentration of power.¹⁶ He envisioned what he described as a "compound" rather than a "single" structure republic and suggested it was superior because it could bear the pressures of a large pluralistic state. Alexander Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the "distribution of power into distinct departments" and for the republican government to function in a stable and optimal fashion.¹⁷

The danger of the addition of the equivalent of a Fourth Branch is obvious. Social and political divisions were never meant to be resolved through an array of federal agencies, which are insulated from the type of public participation and pressures that apply to the legislative branch. We are gravitating to the de facto creation of an English ministry system in this country. Academics often treat the rise (and dominance) of the Administrative State as an inevitability and, accordingly, view those of us who cling to the Madisonian model as hopelessly naïve and nostalgic. However, until the American people decide to adopt a bureaucracy or technocracy as the principle form of government, we need to address this shift and, to do that, it must first deal with *Chevron*.

¹⁴ THE FEDERALIST NO. 51, at 320 (James Madison).

¹⁵ See THE FEDERALIST NO. 10, at 79 (James Madison) (noting that the "causes of faction" are "sown in the nature of man.").

¹⁶ See THE FEDERALIST NO. 51, *supra* note 145, at 320 (James Madison); see also Douglass Adair, "That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343, 348–57 (1957).

¹⁷ THE FEDERALIST NO. 9, at 72 (Alexander Hamilton).

B. *Chevron* and the Expansion of the Administrative State

*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁸ addressed the question of how the Environmental Protection Agency (EPA) could treat “non-attainment” states that had failed to attain the air quality standards under the Clean Air Act. The Reagan Administration had liberalized preexisting rules requiring a permit for new or modified major stationary sources. The Natural Resources Defense Council challenged the EPA regulation and prevailed in court. With three justices not participating in the decision, the court voted 6-0 to reverse and order deference to the EPA’s interpretation.¹⁹

The *Chevron* decision proved to be something of a Trojan horse doctrine that arrived in a benign form but soon took on a more aggressive, if not menacing, character for those concerned about the separation of powers. The doctrine on its face is unremarkable and even commendable for a Court seeking to limit the ability of unelected judges to make arguably political decisions over governmental policy. As noted by Chief Justice John Roberts, “*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.”²⁰ *Chevron* put forward a simple test for courts in first looking at whether the underlying statute clearly answers the question and, if not, whether the agency’s decision is “permissible” or reasonable.²¹ That highly permissive standard shifted the center of gravity of statutory interpretation from the courts to the agencies, contrary to the language of the APA. With sweeping deferential language, the Court practically insulated agencies from meaningful review. In a system based on checks and balances, the Court helped create an internal system that would flourish under a protective layer of agency deference. To be sure, the Court has repeatedly recognized the right of Congress to check federal agencies. However, in practice, *Chevron* has proven a windfall for agencies in advancing their priorities and policies in the execution of federal laws. It is the administrative equivalent of *Marbury v. Madison*. Rather than declaring courts as the final arbiter of what the law means in *Marbury*, *Chevron* practically resulted in the same thing for agencies by giving them the effective final word over most administrative matters. Even though Congress can override agency

¹⁸ *Chevron*, 467 U.S. 837 (1984).

¹⁹ Chief Justice Rehnquist, Justice Thurgood Marshall, and Justice Sandra Day O’Connor recused themselves from the case.

²⁰ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

²¹ *Chevron*, 467 U.S. at 842-43.

decisions, it is unrealistic to expect millions of insular corrections to be ordered over agencies decisions.

In *Gutierrez-Brizuela v. Lynch*, Judge Gorsuch asked a question that I also previously raised in congressional testimony:²² “What would happen in a world without *Chevron*?”²³ Judge Gorsuch answered his own question: “If the goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce.”²⁴ The point is that, before *Chevron*, there was not a period of utter confusion and judicial tyranny in the review of agency decisions. Courts simply applied traditional interpretive approaches that looked at whether there was an ambiguity or gap in a statute as opposed to clarity on a given question. If so, it then reviewed the agency decision to determine whether it was legal and proper. This analysis was later developed further by the decision in *Skidmore v. Swift & Co.*, where the Court articulated factors to use to decide whether to overturn the particular agency's determinations.²⁵ Notably, without granting sweeping deference, the Court in *Skidmore* already recognized that agency determinations would carry weight, just not controlling weight:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. Justice Jackson referred to a historical treatment of agency interpretations with due “respect” and “considerable weight.” *Id.* at 140.

²² See generally United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*,” March 15, 2016.

²³ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

²⁴ *Id.*

²⁵ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Thus, the courts did not have a hostile or counter-agency position in such cases, but a fairly accommodating standard. Courts in the United States also have a well-understood and respected tradition of avoiding political questions and limiting judicial discretion. *Chevron* could have resulted in the very same way under this prior case law, but the Court instead created a new deferential standard that proceeded to expand as soon as the Court gave it breath.

While Justice Scalia once criticized as a “fiction” the view in *Chevron* that Congress knowingly passes vague or gap-filled laws with the intention that agencies should answer the lingering questions,²⁶ he continued to uphold *Chevron* deference over the course of his tenure on the Court. That “fiction” has become embedded in legisprudence and law students are often taught that agency interpretations are a part of the statutory process—as if Congress frames issues while agencies work out specific resolutions.²⁷ While Congress clearly at times leaves gaps due to poor legislative crafting or political impasses in statutes, it can hardly be said that those gaps are knowing invitations for agency lawmaking.

While Scalia called *Skidmore* “an anachronism”²⁸ the Court would rediscover the value of more serious judicial review in some cases. For example, in *Christensen v. Harris County*,²⁹ the Court suggested that the prior standard in *Skidmore* would apply to less formal agency decisions as opposed to those agency documents that carry “force of law.” Justice Clarence Thomas drew a distinction of when an agency interprets a statute in a decision that has “the force of law” from more rudimentary decision. As noted by Harvard Professor (and my former professor at Northwestern) Thomas Merrill,³⁰ Thomas’ proposal tracked a recommendation by the Administrative Conference of the United States.³¹ Thomas described the former category including “formal adjudication or notice-and-comment

²⁶ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

²⁷ Notably, Scalia would later be highly critical of the *Skidmore* standard in favor of the *Chevron* deference standard in cases like *Mead*. *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

²⁸ *Christensen v. Harris Cty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment).

²⁹ *Christensen*, 529 U.S. 576 (2000).

³⁰ See generally Thomas Merrill, *Chevron at 30: Looking Back and Looking Forward: Step Zero After City of Arlington*, 83 FORDHAM L. REV. 731 (2014).

³¹ OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS, RECOMMENDATION 89-5: ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS 31-33 (1989).

rulemaking.”³² Thus, because this case involved a Department of Labor opinion letter that was merely advisory on the meaning of the Fair Labor Standards Act, there was no deference extended under *Chevron*. In applying the *Skidmore* standard, the Court rejected the interpretation. Adding to the confusion of current meaning of *Chevron* were differing minority opinions, including the dissenting opinion of Justice Breyer who insisted that *Chevron* did not create a new standard and that *Skidmore* remains the only standard for deference.³³ *Chevron*, in his view, only extended the basis for deference on the basis that “Congress had delegated to the agency the legal authority to make those determinations.”³⁴

The evolving and conflicting view of *Chevron* was also captured in the decision of *United States v. Mead Corp.*³⁵ In that case of tariff classification rulings, the eight-justice majority opinion, recognized different deference tests under *Skidmore* and *Chevron*. Consistent with *Christensen*, the Court noted the application of *Chevron* for agency interpretations that have the “force of law.”³⁶ The Court embraced the notion of delegated authority from Congress for “the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”³⁷ However, the condition of what is an action with the force of law remained undefined. Yet, the ruling became the basis for the concept of “*Chevron* Step Zero,” the court first inquires into whether Congress delegated the authority before applying *Chevron* deference. If not, the less favorable standard in cases like *Skidmore* would apply.

Where *Chevron* set out a highly generalized rule for those statutes deemed “ambiguous,” the *Mead* decision in 2001 created the multi-factor test for applying *Chevron*. A debate among academics and judges has continued to rage on the proper scope and implications of the *Chevron* doctrine. This debate was heightened in 2005 after the decision in *National Cable & Telecomms. Association v. Brand X Internet Services* where the Court allowed an executive agency to overrule a judicial precedent in favor of the agency’s preferred interpretation. It was an alarming expansion of the deference afforded to agencies. Then came *City of Arlington v. FCC*.³⁸ The

³² Merrill, *Chevron* at 30, *supra* note 3024, at 587.

³³ *Id.* at 596 (Breyer, J., dissenting).

³⁴ *Id.*

³⁵ *Mead*, 533 U.S. 218 (2001).

³⁶ *Id.* at 226-27.

³⁷ *Id.* at 27.

³⁸ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013).

case concerned a 1996 amendment to the Federal Communications Act mandating that local land use agencies process applications for the construction or modification of wireless transmission towers “within a reasonable period of time.”³⁹ The statute provided an avenue with a “court of competent jurisdiction” for relief to parties who did not receive action on requests. The case perfectly captured the fluid authority and utter flexibility of agencies in exercising their interpretive powers post-*Chevron*. The Federal Communications Commission (FCC) initially disclaimed the authority under the statute, but then reversed itself and issued an order setting a 90-day limit for any tower expansion or 150-day limit for new construction under the rule. The jurisdictional authority of the FCC was challenged. For many years, it was generally thought that, no matter how expansively *Chevron* is read, the one area where an agency could not claim deference would be in the interpretation of its own jurisdictional powers. After all, as discussed above, the APA specifically leaves to the court to determine if an agency has acted “in excess of statutory jurisdiction.” Nevertheless, the Fifth Circuit held that *Chevron* would apply in an agency defining its own jurisdiction. The Supreme Court agreed in a 5-4 decision with Justice Scalia joining the majority. Chief Justice Roberts (with Justices Kennedy and Alito) dissented. Five Justices found no way to distinguish jurisdictional and non-jurisdictional questions. Indeed, in his separate decision, Justice Scalia called such distinctions little more than a “mirage.”⁴⁰

Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented, and expressed the view that such expanded authority raised transformative challenges for the federal system. Roberts decried the court as evading its core responsibility in drawing lines of authority within that system: “Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive . . . We do not leave it to the agency to decide when it is in charge.”⁴¹ In a chilling warning, Roberts further notes that “[i]t would be a bit much to describe the result as ‘the very definition of tyranny,’ but the danger posed by the growing power of the Administrative State cannot be dismissed.”

³⁹ 47 U.S.C. § 332(c)(7)(B)(ii) (2012).

⁴⁰ Justice Scalia saw the distinction as another attack on *Chevron* that would be exploited in future cases. *City of Arlington*, 133 S. Ct. at 1873 (Scalia, J., concurring) (“Make no mistake - the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the ‘jurisdictional’ card in every case.”)

⁴¹ *Id.* at 1886 (Roberts, C.J., dissenting).

C. Gorsuch, the Separation of Powers, and the *Chevron* Doctrine

The most obvious avenue for limiting, or even eliminating the *Chevron* doctrine is through judicial action. After all, the doctrine is the creation of the Court and, while certainly reflecting constitutional values, is not imposed directly by any constitutional provision. Indeed, many have argued that the doctrine runs against the constitutional grain, particularly in the Vesting Clause of Article I. Judge Gorsuch has written at length on the doctrine and related doctrines while on the Tenth Circuit. Some of those cases have been the focus of public debate related to his nomination. The concurrence of Judge Gorsuch in *TransAm Trucking, Inc. v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016), has attracted some of the most heated rhetoric—and in my view some of the least informed commentary—after his nomination. I would also like to first address other cases that shed light on Judge Gorsuch’s view and the depth of his analysis in this area: *De Niz Robles v. Lynch*, *Gutierrez-Brizuela v. Lynch*, and *United States v. Nichols*.

1. *De Niz Robles v. Lynch*

Judge Gorsuch has explored the rapidly disappearing line between legislative and agency action. This has arisen in efforts by agencies to retroactively apply policy rulings. Such was the case in *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015). The case itself dealt with an inherent conflict in provisions of federal immigration law. On one hand, under 8 U.S.C. § 1255(i)(2)(A), federal law allows the attorney general discretion to extend lawful resident status to noncitizens who illegally entered the United States. On the other hand, federal law under 8 U.S.C. § 1182(a)(9)(C)(i)(I), requires anyone who illegally re-enters the United States to wait 10 years before obtaining lawful residency. The Tenth Circuit in 2005 ruled that the discretion granted to the Attorney General trumped the provision on the ten-year delay for lawful residency. *See Padilla-Caldera v. Gonzales (Padilla-Caldera I)*, 426 F.3d 1294, 1299-1301 (10th Cir. 2005), amended and superseded on reh’g by 453 F.3d 1237, 1242-44 (10th Cir. 2006). This set up a classic *Brand X* question when, in 2007, the Board of Immigration Appeals (BIA) reached a contrary conclusion in *In re Briones*, 24 I. & N. Dec. 355 (BIA 2007)—that the ten-year waiting period provision trumped the attorney general discretion provision. Thus, the earlier Tenth Circuit opinion was still on the books as good law but the BIA effectively negated it with its own agency determination in 2007. *De Niz Robles* petitioned for

adjustment of status after the ruling in *Padilla-Caldera I* in 2005 and before the agency decision in *Briones*.

Judge Gorsuch, writing for the Court, noted dryly “[u]sually, executive agencies can’t overrule courts when it comes to interpreting the law.” *De Niz Robles*, 803 F.3d at 1167 n.2. However, *Brand X* “requires this court to defer to the agency’s policy choice even when doing so means we must overrule our own preexisting and governing statutory interpretation.” *Id.* Yet, that still left the question of retroactivity of the application against an immigrant who followed the 10th Circuit authority at the time. Judge Gorsuch raised the fundamental question of how an agency ruling should be treated for the purposes of retroactivity. The opinion lays out how legislation is generally presumed to be prospective in application as opposed to judicial rulings, which by necessity must often be backward looking. Judge Gorsuch maintains that the same presumption should apply to the retroactive application of agency adjudications making delegated legislative policy decisions: “The presumption of prospectivity attaches to Congress’s own work unless it plainly indicates an intention to act retroactively. That same presumption, we think, should attach when Congress’s delegates seek to exercise delegated legislative policymaking authority.”

The decision evidences Judge Gorsuch’s unease with the shifting lines of authority between the branches in the *Chevron* era:

“The Constitution speaks far less directly to that peculiar question. Perhaps because the framers anticipated an Executive charged with enforcing the decisions of the other branches — not with exercising delegated legislative authority, let alone exercising that authority in a quasi-judicial tribunal empowered to overrule judicial decisions. Indeed, one might question whether *Chevron* step two muddles the separation of powers by delegating to the Executive the power to legislate generally applicable rules of private conduct. . . . And whether the combination of *Chevron* and *Brand X* further muddles the muddle by intruding on the judicial function too. . . .”

The decision shows a deep understanding of the dangers of retroactive application of new legislation or rules, a long-standing principle meant to prevent “the state from singling out disfavored individuals or groups and condemning them for past conduct they are now powerless to change.” *Id.* at 1169. Judge Gorsuch’s views of these underlying constitutional concerns

are presented in even sharper relief in a case that came before him just last year, as discussed below.

2. *Gutierrez-Brizuela v. Lynch*

The strongest language on *Chevron* from Judge Gorsuch came with the decision in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016). Judge Gorsuch wrote the majority decision for the U.S. Court of Appeals for the 10th Circuit and then added a concurrence that addressed the simmering issues over *Chevron* and *Brand X*. The case dealt with the same conflicting provisions and retroactive application discussed in *De Niz Robles*, which Judge Gorsuch relies on as precedent. Hugo Gutierrez-Brizuela, a Mexican citizen, sought adjusted status under the controlling case law at the time in *Padilla-Caldera I*. However, the BIA again retroactively applied its decision in *Briones* and found him ineligible despite the fact that the controlling case law of the Tenth Circuit was not changed until 2011 in *Padilla-Caldera II*.

Pursuant to *Brand X*, Gorsuch (writing for the panel) acknowledged that it must accept that the agency's policy decision effectively overruled the federal court. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d at 1144 (citing *Padilla-Caldera v. Holder* (Padilla Caldera II), 637 F.3d 1140, 1148-52 (10th Cir. 2011)). Again he clearly has great misgivings about *Brand X* (as I do) but he still faithfully applied it. However, he (and his colleagues) on the panel balked at the retroactive application of the change. He wrote that the petitioner could seek the attorney general's discretion to receive legal status in light of the controlling decision in *Padilla-Caldera* that was not overruled by the Tenth Circuit until 2011. He based this decision on the basic due process and equal protection rights of the petitioner. It was *Padilla-Caldera I* that governed the petition for adjustment in 2009—not the 2007 *Briones* decision. The *Briones* decision did not take effect until 2011 with *Padilla-Caldera II* and like legislative acts would apply only prospectively.

In his concurrence, however, Judge Gorsuch went further to say that the panel should have addressed the lingering and troubling questions raised by *Chevron* and *Brand X* in the case. Judge Gorsuch saw this Mexican immigrant as facing precisely the type of arbitrary power that our Framers sought to limit. I am going to take the liberty of quoting Judge Gorsuch at length here because his words should be read without significant abridgement or translation on this critical point:

In enlightenment theory and hard won experience under a tyrannical king the founders found proof of the wisdom of a government of separated powers. In the avowedly political legislature, the framers endowed the people's representatives with the authority to prescribe new rules of general applicability prospectively. In the executive, they placed the task of ensuring the legislature's rules are faithfully executed in the hands of a single person also responsive to the people. And in the judiciary, they charged individuals insulated from political pressures with the job of interpreting the law and applying it retroactively to resolve past disputes. This allocation of different sorts of power to different sorts of decisionmakers was no accident. To adapt the law to changing circumstances, the founders thought, the collective wisdom of the people's representatives is needed. To faithfully execute the laws often demands the sort of vigor hard to find in management-by-committee. And to resolve cases and controversies over past events calls for neutral decisionmakers who will apply the law as it is, not as they wish it to be.

Even more importantly, the founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties, including all those later enumerated in the Bill of Rights. What would happen, for example, if the political majorities who run the legislative and executive branches could decide cases and controversies over past facts? They might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice. Effectively leaving parties who cannot alter their past conduct to the mercy of majoritarian politics and risking the possibility that unpopular groups might be singled out for this sort of mistreatment — and raising — along the way, too, grave due process (fair notice) and equal protection problems. Conversely, what would happen if politically unresponsive and life-tenured judges were permitted to decide policy questions for the future or try to execute those policies? The very idea of self-government would soon be at risk of withering to the point of pointlessness. It was to avoid dangers like these, dangers the founders had studied and seen realized in their own time, that they pursued the separation of powers. A government of diffused powers, they knew, is a government less capable of invading the liberties of the people. *See* The Federalist No. 47 (James

Madison) (“No political truth is . . . stamped with the authority of more enlightened patrons of liberty” than the separation of powers).

In that passage, Judge Gorsuch captured the essence of the constitutional concerns with *Chevron* and its progeny. He then focused on the implications of *Brand X* on the judicial role in the tripartite system:

Precisely to avoid the possibility of allowing politicized decisionmakers to decide cases and controversies about the meaning of existing laws, the framers sought to ensure that judicial judgments “may not lawfully be revised, overturned or refused faith and credit by” the elected branches of government. *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S. Ct. 431, 92 L. Ed. 568 (1948); see also *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410, 1 L. Ed. 436, 2 Dall. 409 n* (1792) (“[B]y the Constitution, neither the Secretary . . . nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.”). Yet this deliberate design, this separation of functions aimed to ensure a neutral decisionmaker for the people's disputes, faces more than a little pressure from *Brand X*. Under *Brand X*'s terms, after all, courts are required to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-85, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005). By *Brand X*'s own telling, this means a judicial declaration of the law's meaning in a case or controversy before it is not “authoritative,” *id.* at 983, but is instead subject to revision by a politically accountable branch of government.

What emerges from these opinions is a jurist who is (hopefully) a formalist rather than a functionalist in his approach to questions of the separation of powers. While many have focused on the belief that Judge Gorsuch is an “originalist,” that term has lost much of its substance in academic debates. Rather, they seek the original public meaning of text in the interpretation of the Constitution. A far more important distinction is between formalists and functionalists. The rise of the administrative state roughly corresponded with the rise of functionalist reasoning in federal courts and the erosion of clear lines of separation between the branches. Formalist analysis is premised on the belief that “[a]ny exercise of governmental power, and any governmental institution exercising that power,

must either fit within one of the three formal categories . . . or find explicit constitutional authorization for such deviation.”⁴² Formalists like myself favor a relatively rigid separation of the branches that serves to combat the aggregation of power and protects individual rights from the danger of governmental abuse.⁴³ Where formalism offers predictability, functionalism offers adaptability.⁴⁴ The term “functionalist” is often used as if it has a self-evident meaning, even though it frequently appears defined largely as a rejection of formalism—allowing greater flexibility so long as the “basic purposes” of the Constitution are maintained.⁴⁵ Functionalism is seen as allowing for “workable” changes⁴⁶ in the role of the branches to reflect the new administrative state while allowing the courts to intervene where changes would fundamentally alter the functioning of the tripartite system—a generally high standard for intervention.⁴⁷ Functionalist reasoning is rampant in decisions allowing the expansion of agency power at the cost of both legislative and judicial authority. I am hopeful that Judge Gorsuch will introduce a more formalist voice to the Court and this passage is illustrative of this optimism:

⁴² Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 858 (1990) (“The Separation of Powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.”). See also William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998-99).

⁴³ See generally Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U.L. REV. 1523 (2013).

⁴⁴ Eskridge, *supra*, at 21.

⁴⁵ See generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions -- A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

⁴⁶ Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990).

⁴⁷ As Professor John Manning recently noted:

[T]he Constitution not only separates powers, but also establishes a system of checks and balances through power-sharing practices such as the presidential veto, senatorial advice and consent to appointments, and the like. In light of that complex structure, functionalists view the Constitution as emphasizing the balance, and not the separation, of powers.

“When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It’s called legislation. Admittedly, the legislative process can be an arduous one. But that’s no bug in the constitutional design: it is the very point of the design. The framers sought to ensure that the people may rely on judicial precedent about the meaning of existing law until and unless that precedent is overruled or the purposefully painful process of bicameralism and presentment can be cleared. Indeed, the principle of *stare decisis* was one “entrenched and revered by the framers” precisely because they knew its importance “as a weapon against . . . tyranny.” Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. Pitt. L. Rev. 695, 707 (2003). Yet even as now semi-tamed (at least in this circuit), *Brand X* still risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law’s meaning prospectively, just as legislation might — and all without the inconvenience of having to engage the legislative processes the Constitution prescribes. A form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people.”

At a time when our tripartite design is being fundamentally threatened, Judge Gorsuch could prove a transformative choice for the Court. As he pointedly asked in *Gutierrez-Brizuela*, “[e]ven under the most relaxed or functionalist view of our separated powers some concern has to arise, too, when so much power is concentrated in the hands of a single branch of government.” *Id.* at 1155.

3. *United States v. Nichols*

A third decision is equally illuminating in understanding Judge Gorsuch’s view of nondelegation and its importance as a protection of individual liberty. That case is *United States v. Nichols*, 784 F.3d 666, 667-7 (10 Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc). The case involved Lester Nichols, a convicted sex offender who left the United States without updating his status on the federal sex offender registry. He was charged with failing to register, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). One of the issues raised was SORNA’s delegation of authority to the

Attorney General to determine SORNA's retroactive application is unconstitutional. Judge Gorsuch wrote a dissent to the denial of a rehearing en banc.

Article I of the United States Constitution states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. CONST., art. I, § 1. Those words and the general principle of the separation of powers led to “the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government.” *Touby v. United States*, 500 U.S. 160, 165 (1991). While the Supreme Court has long reaffirmed the need for Congress to exercise such powers, it created a fluid test that allowed agencies to “fill up the details” left by legislation in the execution of laws.⁴⁸ The Court allowed delegation of rulemaking powers if there is an “intelligible principle”⁴⁹: a standard that has proven perfectly unintelligible in allowing any statutory reference—short of utter silence⁵⁰—to suffice for delegation.⁵¹ The *Nichols* case presented a particularly stark and troubling example of delegation. Judge Gorsuch noted that this doctrine protects individuals from the arbitrary and abusive use of power.

In his dissent from denial of rehearing in banc in *Nichols*, Judge Gorsuch made a powerful case for the nondelegation doctrine as an essential structural safeguard of individual liberty. He stated correctly that “If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce.” *Id.* at 668. He added:

Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law. The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king. Their endorsement of the separation of powers was predicated on the view that “[t]he inefficiency associated with [it] serves a valuable” liberty-preserving

⁴⁸ *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

⁴⁹ *Loving v. United States*, 517 U.S. 748, 772 (1996).

⁵⁰ *Yakus v. United States*, 321 U.S. 414, 426 (1944) (“Only if ... there is an absence of standards ... would we be justified in overriding [the congressional] choice of means for effecting its declared purpose.”).

⁵¹ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

“function, and, in the context of criminal law, no other mechanism provides a substitute.” Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1011-17, 1031 (2006).

Id. at 670. Judge Gorsuch does a masterful job in laying about the threat to individual liberty in delegating such authority in the criminal law area.

Delegation doctrine may not be the easiest to tease out and it has been some time since the Court has held a statute to cross the line. But it has also been some time since the courts have encountered a statute like this one — one that, if allowed to stand, would require the Judiciary to endorse the notion that Congress may effectively pass off to the prosecutor the job of defining the very crime he is responsible for enforcing. By any plausible measure we might apply that is a delegation run riot, a result inimical to the people’s liberty and our constitutional design.

Id. at 677. Judge Gorsuch’s approach returns such cases to their proper threshold question over the separation of powers and the need to maintain core powers within the tripartite system. This view is becoming increasingly rare on the Court, which seems to have tossed caution to the constitutional winds of delegation. The dismissive view of nondelegation was evident in the Court’s decision in *Whitman v. American Trucking Ass’n*,⁵² when the Court noted “we have found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’” Of course, as with its *Chevron* standards, it is often hard to discern what the Court considers an “intelligible” from an “unintelligible” principle for the purposes of delegation. Justice Thomas made this point in his concurring opinion in *American Trucking* when he expressed obvious frustration on finding any meaning in the notion of “intelligible principles”:

Rather, it speaks in much simpler terms: “All legislative Powers herein granted shall be vested in a Congress.” U.S. Const., Art. I, 1 (emphasis added). I am not convinced that the intelligible

⁵² *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than “legislative.”⁵³

Like the standard under the post-*Chevron* cases of determining those actions with “deep economic and political significance,” the standard of “intelligible principles” is largely undefined. The result is ample room for agency actions while maintaining the pretense of judicial review. This is not to assign all of the blame to the courts. Clearly this history shows not just judicial abrogation of the duty to maintain lines of separation but also the willing role of Congress as an enabler of agency expansion. There have been times when Congress has turned a blind eye to the usurpation of its authority by a popular president. Congress has at times even facilitated the circumvention of its own authority. This can occur for a number of obvious reasons. A president may be enormously popular and members fear a public backlash from any action about could be seen as disloyal. Likewise, the political environment may be viewed as too risky for members to stand on constitutional principle as with periods of national security or economic crisis. The Framers well understood the wavering principles that can characterize politics. While Madison hoped in *Federalist No. 51* that “ambition must . . . counteract ambition,” personal ambition can prevail over institutional interests in modern politics as members become agents of their own obsolescence.

Once again, Judge Gorsuch articulates a view of the Constitution that eschews the type of functionalism that has led to delegation of greater and greater authority to agencies and executive branch officials. The opinion evidences a deep appreciation for the lines of separation and the need to maintain those lines to defend not just the powers of the branches but individual liberty. His repeated reference to such first principles is reminiscent of the writings of the man he would replace on the Court. Gorsuch, like Scalia, tends to lay a foundation in constitutional doctrine and history before addressing the insular issues of a case. That methodological preference gives his opinions not only a welcomed depth of analysis, but a consistency in decisions across these various disputes.

4. *TransAm Trucking, Inc. v. Administrative Review Board*

⁵³ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. at 487 (2001) (Thomas, J., concurring).

One of the most discussed cases related to this confirmation is *TransAm Trucking, Inc. v. Administrative Review Board*, 833 F.3d 1206 (10th Cir. 2016). The case has been described by critics as evidence of everything from Judge Gorsuch's indifference to worker rights to a form of "judicial activism" (a much over-used term with dubious meaning). I believe that the *TransAm Trucking* case has been unfairly characterized and misconstrued in coverage. While I have differences with aspects of his analysis, Judge Gorsuch maintained a consistent approach to the *Chevron* issues in the case and followed a textualist methodology in the interpretation of the underlying law.⁵⁴ Textualism is not "out of the mainstream." It is a long-accepted interpretative approach. A federal judge following textualism tends to yield to the authority of Congress and minimize judicial roles in our system. That is a good thing as long as the judge is not adopting textualist arguments on an inconsistent or outcome-determinative fashion. Judge Gorsuch is very consistent in his interpretative approach, which is tied directly to his understanding of the role of courts in our tripartite system.

TransAm Trucking is a fascinating case for those of us with an interest in "legisprudence" or the proper interpretation of legislative source of authority.⁵⁵ The case involved Alphonse Maddin who was employed as a truck driver. In January 2009, Maddin was driving cargo through Illinois when the brakes on his trailer froze in the subzero temperatures. He reported the problem to the company and was told to wait for a repairman. Maddin waited for hours but, fearing for his welfare after experiencing a numbness in his feet and legs, again called the company. The company told him to sit tight and not to abandon the load. Maddin however decided to unhitch the truck and drive down the road. The repairman arrived fifteen minutes later and he returned. He filed a complaint with the Labor Department's Occupational Safety and Health Administration (OSHA) but OSHA dismissed the complaint. However, an administrative law judge (ALJ) and the Department of Labor Administrative Review Board (ARB) ruled in his favor, finding that the company violated the whistleblower provisions of the Surface Transportation Assistance Act (STAA).

⁵⁴ This textualist approach is evident in other opinions including *Almond v. Unified School District #501*, 665 F.3d 1174 (10th Cir. 2011) ("the plaintiffs' proposed interpretation commits not one but two statutory interpretation sins — first by rendering a statutory phrase superfluous and then by failing to give effect to Congress' reference to a preexisting legal term with a well-settled meaning.").

⁵⁵ Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 *Hastings Law Journal* 145-275 (1992).

Judge Gorsuch notes dryly that it would be “fair to ask whether TransAm’s decision was a wise or kind one.”⁵⁶ However, he turned to the statutory language at the heart of the case and found an irreconcilable conflict with the ARB decision. The entire case turned on a provision, 49 U.S.C. § 31105(a)(1)(B), that forbids employers from firing employees who “refuse[] to operate a vehicle” out of safety concerns. Judge Gorsuch noted the anomaly of using the provision in a case where an employee was told not to operate the vehicle but to wait for help. (There was a suggestion in the record by the supervisor that he either wait or try to drag the trailer with the frozen brakes. The latter suggestion is not legally permitted and may have been meant in jest). Judge Gorsuch zeroed in on the basis for treating an order not to operate a vehicle as violating a provision protecting workers who “refuse[] to operate a vehicle.” He raised the interesting point that “[t]he trucker was fired only after he declined the statutorily protected option (refuse to operate) and chose instead to operate his vehicle in a manner he thought wise but his employer did not.”

The facial contradiction between the worker’s actions and the statutory provision of course does not answer the question. The case turns on how to interpret the critical words “to operate a vehicle.” Gorsuch dealt correctly with the threshold question of the extent, if any, deference that should be afforded to the agency under *Chevron*:

“My colleagues suggest that the Department should be permitted to read the statutory phrase “refuse[] to operate” to encompass its exact opposite and protect employees who operate their vehicles in defiance of their employers’ orders. They justify this unusual result on the ground that the statutory phrase is ambiguous and so we owe the Department deference under step two of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But, respectfully, it seems to me *Chevron* is a curious place to turn for support given that the Department never argued the statute is ambiguous, never contended that its interpretation was due *Chevron* step two deference, and never even cited *Chevron*. In fact, the only party to mention *Chevron* in this case was TransAm, and then only in a footnote in its brief and then only as part of an argument that the statute is not ambiguous. We don’t normally make arguments for

⁵⁶ *TransAm Trucking, Inc. v. Administrative Review Board*, U.S. Department of Labor, 833 F.3d1206 (10th Cir. 2016) (Gorsuch, J., dissenting).

litigants (least of all administrative agencies), and I see no reason to make a wholly uninvited foray into step two of Chevronland.”

Judge Gorsuch notes that the majority had taken the position that there is ambiguity (to trigger *Chevron* analysis) whenever a term is left undefined in a statute, even terms that are plain on their face. Using standard dictionary definitions, Judge Gorsuch maintained that the meaning of “refuse” and “operate” is neither ambiguous nor supportive in the driver’s case. When the law and the language is clear, there is no license to apply *Chevron* deference—an important and defensible position. Most coverage has looked solely at the outcome rather than the key *Chevron* issue identified by Judge Gorsuch. Judges are not supposed to judge cases by their outcomes and neither should judges be judged solely by such outcomes. The analysis in the dissent raises an important and, in my view, a compelling argument on the limits of *Chevron*.

Judge Gorsuch ultimately concludes that “the law before us protects only employees who refuse to operate vehicles, period.” Since the employer actually told the driver not to operate the vehicle, he found the provision to be inapplicable. That is not an unreasonable interpretation. Frankly, while I agree with Judge Gorsuch on his *Chevron* position, I am not sure that I would have adopted as narrow a definition of “operate.” I think that the term can be defined in modern parlance to cover this rather peculiar set of facts in favor of the driver. However, the alternative view is entirely reasonable and well supported by Judge Gorsuch in his dissent. The employer asked him not to operate the vehicle, a view that may have been reinforced later by questions of the fitness of a driver to operate the vehicle when experiencing numbness in his feet or legs. I did not find the dissent to be dismissive of the driver’s interests, nor biased in the application of the standard for interpretation. It is a textualist approach to the interpretation of federal law that characterizes much of Judge Gorsuch’s jurisprudence. Indeed, while I read the dissent with some skepticism given my more favorable view of the driver’s case, I found myself intrigued and almost persuaded on the final interpretative conclusion. It is wrong to take such a well-reasoned opinion and adopt convenient, superficial explanations based on judicial bias. The reasons for the dissent are expressed honestly and directly for what they are: good-faith and well-considered views of the text of the federal law.

IV. CONCLUSION

Confirmation hearings often take on an almost mystical character as members and experts hold forth on what type of justice a nominee will prove to be over the course of a long tenure on the Court. For someone like Judge Gorsuch, that could prove five decades. It is an exercise that not only defies logic, but can border on the occult. In the end, only one person can authoritatively address that question and, if history is any judge, even the nominee cannot say for certain where his or her tenure on the Court will take them. These hearings always remind me of a story of Supreme Court Justice Oliver Wendell Holmes who was traveling by train to Washington, D.C. When the conductor asked for his ticket, Holmes searched high and low for it until the conductor reassured him, “Don’t worry about your ticket, Mr. Holmes. We all know who you are. When you get to your destination, you can find it and just mail it to us.” Holmes responded “My dear man, the problem is not my ticket. The problem is ... where am I going?”

Most nominees are in a position not unlike that of Holmes. People of good-faith can evolve on the Court and even change dramatically in their new role. Liberal justices like William Brennan, Henry Blackmun, and David Souter were thought to be conservative at the time of their confirmations. Conservative justice Bryon White was considered fairly liberal when appointed by John F. Kennedy. As I mentioned, I do not expect such a transformation in Neil Gorsuch, who has deep and well-established jurisprudential views. However, I also do not expect him to be a robotic vote on the right of the Court. While conservative, he has shown an intellectual curiosity and honesty that is likely to take him across the ideological spectrum of the Court. Like Holmes, he might be wondering this week where he is going and I would be hard pressed to give a destination with absolute certainty. What I do know is that Neil Gorsuch is exceptionally well-qualified to take as a member of the United States Supreme Court.

I had great personal affection for the late Antonin Scalia with whom I shared a Sicilian background.⁵⁷ Even though I criticized his opinions and public statements on occasion, he was one of the most brilliant and engaging people I have ever met. He will have one of the most lasting legacies of any justice of the Supreme Court because of his commitment to core principles of constitutional and statutory interpretation. It is still difficult for many of

⁵⁷ Jonathan Turley, *Scalia’s Greatest Strength, His Steadfastness*, Wash. Post, Feb. 14, 2016.

us to imagine anyone sitting in that now vacant chair. However, as someone who had great affection and respect for Justice Scalia, I can think of no one more deserving of that honor than Neil Gorsuch. He is no Scalia but we are not looking for the best imitation or facsimile of Scalia. We are looking for someone who can be an intellectual force on the Court in his own right. I believe that we have found such a person in Neil Gorsuch, who just might eclipse even his iconic predecessor. In the end, I suppose I can say where Gorsuch is going after all. He will go wherever his conscience takes him regardless of whether it proves a track to the left or the right. That may make the final terminus uncertain but it will be an exciting trip to watch.

It is therefore my honor to recommend the confirmation of the Honorable Judge Neil Gorsuch for Associate Justice of the Supreme Court.

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