

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. To those on the right, this makes Gorsuch an ideal nominee: brilliant, scholarly, and an impassioned defender of the Constitution. 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." 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. 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

<u>tank/narrative/gem-constitution</u>; 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. 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. He 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.'" the properties of the conduct adjudication of the conduct of the power."

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

CAC Issue Brief Page | 4

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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." 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.

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." *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." 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.

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.

^{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

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." Gorsuch argued that this "addiction to the courtroom as

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. Hodges⁶¹ 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," and repeatedly emphasizes the "procedural tone" 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, of who famously derided the Privileges or Immunities Clause as an "ink blot" and

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 Amendment⁶⁹—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." The broader discussion, Gorsuch suggested, was "arguably inessential to that plurality's decision."

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

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." 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,

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." 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."

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." 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." 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. 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" 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." 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." 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." 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.'" 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," 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." 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.

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").

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.