

A Jurisprudence of Doubt:

Judge Gorsuch's Troubling Inconsistency About Disclosing His Constitutional Views

<https://www.youtube.com/watch?v=rPLF1rLvlfk>

MAIN TAKEAWAYS

- After months of touting his [litmus tests](#) for a Supreme Court Justice, numerous comments disparaging federal judges who do not rule in his favor, as well as authoritarian and anti-Constitution executive actions, Trump placed a profound burden on his nominee to the Supreme Court, Judge Neil Gorsuch.
- During his confirmation hearing, Gorsuch had to prove to the American people that, if confirmed, he would serve as an independent check on the elected branches, especially when they violate constitutional and legislative protections, including protections against corruption; that would not be a rubber stamp for the U.S. Chamber of Commerce and business interests; and that he is open-minded, fair, and guided by the whole text and history of the Constitution, and not by a right-wing political agenda.
- Unfortunately, Gorsuch failed to satisfy this burden by being elusive on basic questions of constitutional rights and guarantees. He refused to shine any light on his judicial philosophy concerning voting rights, the right to choose an abortion, access to contraception, and equality for gay, lesbian and transgender people. Although he provided his views on other cases and constitutional values, Gorsuch had virtually nothing to say about these fundamental principles.

A JURISPRUDENCE OF DOUBT (click links to jump to this point in the video)

[BLUMENTHAL](#): “Liberty finds no refuge in a jurisprudence of doubt.” Your declining to be more direct, and give the same answer about these cases that you did about *Brown*, leaves doubt.

[HIRONO](#): You have said again and again in these hearings that you cannot provide your views on specific precedents, but at times you have done that. You have praised the *Youngstown* case, you have criticized *Korematsu*, you have praised the *Brown* decision, you said that *Cruzan* and *Glucksberg* were rightly decided. So, how can you express these opinions, but refuse to provide your views on *Casey*, *Heller*, *Roe*, *Citizens United*, *Griswold*, *Gideon*, *Ledbetter*, *Groves*, *University of Texas Southern Medical Center*?

GORSUCH'S PLEDGE TO CONCEAL HIS VIEWS

[GORSUCH](#): As a judge, my job is to decide cases as they come to me. And if I start suggesting that I prefer or not prefer -- dislike this or that precedent, I'm sending a signal -- a hint, a promise, a preview, as Justice Ginsburg called it -- about how I'd rule in future cases, or those principles from that case are going to be at issue.

[GORSUCH](#): Senator, I've offered my legal judgement as a judge about cases. I've not offered any personal views about anything -- or I've tried not to very hard. I've tried to adhere to Justice Ginsburg's rule about no hints, no previews, no forecasts.

[GORSUCH](#): And for a judge to start tipping his or her hand about whether they like or dislike this or that precedent would send the wrong signal.

GORSUCH'S VIEWS ON SEGREGATION (*BROWN V. BOARD OF EDUCATION*)

[GORSUCH](#) : We're on the same page on *Brown v. Board of Education*, Senator.

BLUMENTHAL: OK.

GORSUCH: It's a great and important decision.

GORSUCH'S VIEWS ON INTERRACIAL MARRIAGE (*LOVING V. VIRGINIA*)

[GORSUCH](#): Seminal. Important application of the principles recognized in *Brown v. Board of Education*. A vindication, again, for the original meaning of the -- of the equal protection clause. That all of us, every single person, is equal, and that we can all choose with whom we wish to live our lives without respect to race.

GORSUCH'S VIEWS ON GOVERNMENT-SPONSORED INTERNMENT (*KOREMATSU V. U.S.*)

[HIRONO](#): ...But the Supreme Court never overruled *Korematsu*. So, *Korematsu* has joined the short list of the most regrettable decisions in the court's history, and even though most American citizens of Japanese ancestry were loyal, the court in *Korematsu* found that the government's curfew and internment program was constitutionally acceptable because some unknown faction or fraction of that group posed a special statistical risk of disloyalty and danger. Today, if the court were to assess special restrictions on U.S. citizens of Iranian, Yemeni, Somalian, Syrian, Libyan and Sudanese ancestry, do you believe *Korematsu* would be applicable precedent for the court to consider?

GORSUCH: No.

GORSUCH'S VIEWS ON GOVERNMENT SEARCHES (*U.S. V. JONES*)

[GORSUCH](#): I take *United States v. Jones*, recent case for the United States Supreme Court involving whether police officers might attach a GPS tracking device to a car... And the court held that if that's a trespass to chattels and a search 200 years ago, it has to be today, though the technology is obviously different. So the technology changes, but the principles don't. And, it can't be the case that the United States Constitution is any less protective of the people's liberties today than it was the day it was drafted.

GORSUCH CONCEALS VIEWS ON CAMPAIGN FINANCE (*CITIZENS UNITED V. FEC*)

[LEAHY](#): ...You have suggested that constitutional law should be grounded solely in the original meaning of the text. You have said judges should, and I quote you, "strive to apply the law as it is, focusing backward, not forward." Well, if they do that, let's go to the First Amendment. Do you believe that James Madison and the other drafters of the First Amendment understood the term "speech" to include corporate money being funneled into campaigns?

GORSUCH: Senator, I can tell you that the Supreme Court of the United States has a lot of precedent in this area, as you're well aware. Quite a lot of it permitting Congress to compel disclosure; to limit contributions; and a lot of other case law in this area. There's a lot of precedent in this area.

LEAHY: Well, is there precedent from the drafters that speech included corporate money being put into corporations -- being put into campaigns?

GORSUCH: Senator, that was exactly what was at issue in part in *Austin*, and then again in *Citizens United*. And the Supreme Court issued a variety of opinions on that subject, on that very subject, looking back to the original understanding of the First Amendment to see whether it embraced the speech at issue in those cases. And different justices came to different conclusions on that score.

LEAHY: But nothing in the Federalist Papers talked about corporate money going into campaigns. Is that correct?

GORSUCH: Well, Senator...

LEAHY: That's an easy yes or no.

GORSUCH: I think there's an awful lot in the Federalist Papers and elsewhere that were relevant to and considered by both concurrences and dissents in *Citizens United*.

LEAHY: But nothing about corporate money.

GORSUCH: I don't remember that term, no, Senator.

LEAHY: Trust me...

(CROSSTALK)

LEAHY: ... trust me, there wasn't.

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GORSUCH HAS NO VIEWS ON ABORTION (*ROE V. WADE*)

[GRASSLEY](#): ...can you tell me whether *Roe* was decided correctly?

GORSUCH: Senator, again, I would tell you that *Roe v. Wade*, decided in 1973, is a precedent of the United States Supreme Court. It has been reaffirmed. The reliance interest considerations are important there and all the other factors that go into analyzing precedent have to be considered. It is a precedent of the United States Court, was reaffirmed in *Casey* in 1992 and in several other cases. So, a good judge will consider it as precedent of the United States Supreme Court, worthy as treatment of precedent like any other.

[BLUMENTHAL](#): ...Do you agree with the result in *Roe v. Wade* and *Planned Parenthood v. Casey*?

GORSUCH: Senator, I'm drawing the same line that Justice Ginsburg drew, Justice O'Connor drew, Justice Souter, Justice Scalia -- many, many, many people who sit at this confirmation table have declined to offer their personal views to this or that precedent.

FLASHBACK, JULY 21, 1993: THEN-JUDGE GINSBURG ON WOMEN'S RIGHT TO CHOOSE CHILDBIRTH

[GINSBURG](#): In this case, it was her choice for childbirth, and the government was inhibiting that choice. It came at the price of remaining in the service. But you asked me about my thinking about equal protection versus individual autonomy, and my answer to you is it's both. This is something central to a woman's life, to her dignity. It's a decision that she must make for herself, and when government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

GORSUCH CONCEALS VIEWS ON PRIVACY (*GRISWOLD V. CONNECTICUT*)

[GORSUCH](#): What I've said about *Griswold v. Connecticut*, Senator, is that it is a decision by the United States Supreme Court recognizing the right of married couples in the privacy of their own home to use contraceptive devices.

BLUMENTHAL: And I'm asking you, do you believe it was the right result?

GORSUCH: And what I've said is, Senator, it's 50 years old, more than 50 years old, right? The reliance interests surrounding it are obvious and strong. It has been repeatedly reaffirmed. Those are powerful things in the law of precedent. I've also said I cannot imagine a state trying to pass a law in this area, and I've said I cannot imagine the United States Supreme Court taking such a law seriously.

BLUMENTHAL: ...Do you believe it was the right result, based on your understanding of law -- not your personal beliefs about whether contraceptives are a good thing or a bad thing, but your -- your beliefs about the constitutional underpinning, the right to privacy, the Fourth Amendment, substantive due process, underpinning of *Griswold v. Connecticut*, was it the right result?

GORSUCH: Senator, I've consistently -- I'm not picking out *Griswold* or any other particular case -- I've drawn a line that I think is required of a good judge to be fair and to respect the separation of powers, without respect to precedent. A precedent of the United States Supreme Court, as we were talking with Senator Flake, they're all precedents. They all deserve respect of a judge.

BLUMENTHAL: Some more than others.

GORSUCH: Senator, it depends upon the factors under the law of precedent.

FLASHBACK, SEPTEMBER 13, 2005: THEN-JUDGE ROBERTS OFFERS HIS VIEW OF *GRISWOLD*

[KOHL](#): as we all know, the *Griswold v. Connecticut* case guarantees that there is a fundamental right to privacy in the Constitution as it applies to contraception. Do you agree with that decision and that there is a fundamental right to privacy as it relates to contraception? In your opinion, is that settled law?

ROBERTS: I agree with the *Griswold* court's conclusion that marital privacy extends to contraception and availability of that.

GORSUCH CONCEALS VIEWS ON SAME-SEX MARRIAGE (*OBERGEFELL V. HODGES*)

[GORSUCH](#): *Obergefell* is a precedent of the United States Supreme Court. It entitles persons to engage in single-sex marriage. That's a right that the Supreme Court has recognized. It is a precedent of the United States Supreme Court.

GORSUCH STILL CONCEALS VIEWS ON PRIVACY (*LAWRENCE V. TEXAS*)

[BLUMENTHAL](#): And *Lawrence v. Texas*, which held that the government can't criminalize gay and lesbian relationships?

GORSUCH: That's a holding of the United States Supreme Court due all the weight of precedent, Senator, as well.

BLUMENTHAL: And would you agree that it overturned an incorrect decision in *Bowers*?

GORSUCH: That is what it declared, Senator. That is the precedent of the United States Supreme Court.

BLUMENTHAL: Do you agree?

GORSUCH: Senator, it's the precedent of the United States Supreme Court. I'm going to give you the same answer every time.

BLUMENTHAL: Well, I suspect you will. But let me just say that the answer that you have given leaves doubt in a lot of minds. And to quote from a concurrence by Justice Kennedy, as well as Justice Souter and Justice O'Connor -- and I'm quoting, "liberty finds no refuge in a jurisprudence of doubt." Your declining to be more direct, and give the same answer about these cases that you did about *Brown*, leaves doubt.