

# JUSTICE GORSUCH AND MORAL REALITY

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# JUSTICE GORSUCH AND MORAL REALITY

*Christopher R. Green\**

*Despite his advanced academic training in ethics, Justice Gorsuch has stoutly, repeatedly, and properly denied that officers today have any power to override the original meaning expressed in statutory or constitutional text in the name of contemporary moral considerations. However, moral reality can still be relevant to interpretation if we acknowledge—as we should—a gap between textually expressed meaning and the fact-dependent collection of tangible applications falling under that meaning. Moral reality can also be important as an empirical guide to original meaning to the extent that we attribute moral virtue to the Framers and as a consideration for when we should overrule precedents. This Essay considers what Justice Gorsuch’s first year and a half on the Court tells us about his understanding of the relationship between interpretation and moral considerations. His deep respect for tradition as an ethical guide frequently makes it difficult to tell whether he reads the Constitution as referring directly to tradition, right or wrong, or instead reads it to refer to moral reality, which he then uses tradition to fill out. Either way, Justice Gorsuch’s willingness to go his own way interpretively will render his methodological approach of lasting concern to our constitutional culture.*

## I. INTRODUCTION: IS MORAL REALITY ON OUR INTERPRETIVE INGREDIENTS LIST?

What should we expect from a Supreme Court justice with advanced academic training in ethics? Justice Gorsuch will be the fourth living justice with an Oxford degree, but the first with a D.Phil. (Justice Souter has an A.B., Justice Kagan an M.Phil., and Justice Breyer a B.A.).<sup>1</sup> His dissertation, now expanded into a book,<sup>2</sup> displays his deep commitment to tradition as a tool of moral inquiry.<sup>3</sup> What might such ethical views presage for our law? This short

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1. See *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Feb. 7, 2019). The Justice is the first with a doctorate, though no justice has apparently yet served with an American Ph.D. All of them since Justice Robert Jackson have had law degrees, some styled Juris Doctor. Justices Ginsburg, Breyer, O’Connor, Kennedy, and Souter received LL.B. degrees before this element of degree inflation took hold, but Justices Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh have J.D. degrees, as does former Justice Stevens, who did particularly well at Northwestern in the 1940s. See *id.*; see also ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REVIEW OF LEGAL EDUCATION 21 (1965) (recommending that law schools make the J.D. the “first professional degree” in law for everyone).

2. See NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* (2006).

3. See, e.g., *id.* at 19–47 (detailed examination of “[t]he [d]ebate over [h]istory,” deepening the historical analyses given in *Vacco v. Quill*, 521 U.S. 793, 802–03 (1997), *Washington v. Glucksberg*, 521 U.S. 702, 710–19 (1997), and *Cruzan v. Dir. Mo. Dep’t. of Health*, 497 U.S. 261, 294–95 (1990)); *id.* at 49 (“There is

Essay considers what Justice Gorsuch's first year and a half tells us about his approach to moral questions as they bear on the interpretive work of the Supreme Court.

One might be tempted to think that this Essay could be quite short indeed, however, because Justice Gorsuch should separate moral and legal issues into airtight, never-interacting containers. After all, Justice Gorsuch regularly indulges in rhetoric about the importance of leaving statutes or constitutional provisions as he found them, even provisions that are manifestly subpar, without improving them on moral or other policy grounds. The Justice seems quite intent on building a not-a-policymaker brand with almost every opinion he writes. Consider these exemplars:

In our democracy the people's elected representatives make the laws that govern them. Judges do not. The Constitution's provisions insulating judges from political accountability may promote our ability to render impartial judgments in disputes between the people, but they do nothing to recommend us as policymakers for a large nation. . . . [I]n our constitutional order the job of writing new laws belongs to Congress, not the courts.<sup>4</sup>

Deciding what privacy interests *should be* recognized often calls for a pure policy choice, many times between incommensurable goods—between the value of privacy in a particular setting and society's interest in combating crime. Answering questions like that calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts.<sup>5</sup>

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certainly a case to be made for the act/omission distinction. It is deeply entrenched and regularly employed in American law . . ."); *id.* at 56 (noting "implicit recognition of the commonsense (nontheologic) moral power of the double effect insight" in the fact that "American criminal law has long calibrated different levels of responsibility and punishment based on different levels of mens rea"); *id.* at 189–95 (building the ethical foundation for an "inviolability-of-life principle" by discussing cases like *Application of President & Dirs. of Georgetown Coll., Inc.*, 331 F.2d 1000 (D.C. Cir. 1964); *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978); *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986); *In re Phillip B.*, 156 Cal. Rptr. 48 (Cal. Ct. App. 1979); *In re Infant Doe*, No. GU8204-004A (Monroe County Cir. Ct., Apr. 12, 1982); *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990); *In re Farrell*, 529 A.2d 404 (N.J. 1987)). Two of the arguments in Gorsuch's book—his criticism of the "act-omission distinction" and his embrace of the distinction between purposeful and knowing effects—have appeared in his opinions. *See* *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1736 (2018) (Gorsuch, J., concurring) ("The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects."); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring) ("[T]he line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him).").

4. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1413 (2018) (Gorsuch, J., concurring).

5. *Carpenter v. United States*, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting).

The Constitution “reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs,” and it is not our place to replace that judgment with our own.<sup>6</sup>

The Constitution’s original public meaning supplies the key, for the Constitution cannot secure the people’s liberty any less today than it did the day it was ratified.<sup>7</sup>

Where a statute’s language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer.<sup>8</sup>

We need not and will not invent an atextual explanation for Congress’s drafting choices when the statute’s own terms supply an answer.<sup>9</sup>

Policy arguments are properly addressed to Congress, not this Court. It is Congress’s job to enact policy and it is this Court’s job to follow the policy Congress has prescribed. And whatever its virtues or vices, Congress’s prescribed policy here is clear . . . .<sup>10</sup>

[R]espect for Congress’s prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.<sup>11</sup>

Anthony Perry asks us to tweak a congressional statute—just a little—so that it might (he says) work a bit more efficiently. No doubt his invitation is well meaning. But it’s one we should decline all the same. . . . [T]he business of enacting statutory fixes [is] one that belongs to Congress and not this Court . . . .

. . . .

. . . If a statute needs repair, there’s a constitutionally prescribed way to do it. It’s called legislation.<sup>12</sup>

[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced. . . .

. . . .

. . . [R]easonable people can disagree with how Congress balanced the various social costs and benefits in this area. . . . Constant competition between constable and quarry, regulator and regulated, can come as no surprise in our changing world. But neither should the proper role of the judi-

6. *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting) (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

7. *Id.* at 1381.

8. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018).

9. *Id.* at 1357.

10. *Id.* at 1358.

11. *Murphy v. Smith*, 138 S. Ct. 784, 788 (2018).

12. *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1988, 1990 (2017) (Gorsuch, J., dissenting).

ciary in that process—to apply, not amend, the work of the People’s representatives.<sup>13</sup>

[I]t’s a judge’s job only to apply, not revise or update, the terms of statutes. . . . Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost.<sup>14</sup>

The [Double Jeopardy] Clause’s terms and history simply do not contain the rights Mr. Currier seeks.

Nor are we at liberty to rewrite those terms or that history. . . . [N]o one should expect (or want) judges to revise the Constitution to address every social problem they happen to perceive. The proper authorities, the States and Congress, are empowered to adopt new laws or rules experimenting with issue or claim preclusion in criminal cases if they wish.<sup>15</sup>

If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to “tak[e] . . . account of” legislative compromises essential to a law’s passage and, in that way, thwart rather than honor “the effectuation of congressional intent.” By respecting the qualifications of §1 today, we “respect the limits up to which Congress was prepared” to go when adopting the Arbitration Act.<sup>16</sup>

Justice Gorsuch is absolutely right that we have not hired him—or the rest of the Court—to philosophize, but to resolve disputes under the law. If contemporary policy concerns cannot override the original meaning expressed in a provision’s text, as Justice Gorsuch so stoutly and frequently (and properly) insists, moral questions might seem entirely separate from interpretation. Justice Gorsuch’s background in moral philosophy would then be like his background in Colorado: part of who he is, perhaps, but not part of what he does as a judge.

Are moral considerations categorically irrelevant for originalists, then? No.

Strict moral-interpretive independence does not follow from the fact that moral concerns cannot override textually expressed meaning. Even interpreters who take original meaning as binding—as the Article VI oath makes it!<sup>17</sup>—will take account of moral reality for three reasons: to get from the

13. *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725–26 (2017).

14. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

15. *Currier v. Virginia*, 138 S. Ct. 2144, 2156 (2018).

16. *New Prime v. Oliveira*, 139 S. Ct. 532, 543 (2019) (quoting *Bd. of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986), and *United States v. Sisson*, 399 U.S. 267, 298 (1970)).

17. U.S. CONST. art. VI, para. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *id.* para. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all

meaning of a moral term to its application, to clarify ambiguity, and to know how much confidence error correction requires.

Put another way, our interpretive recipe includes both an ingredients list and directions, and the order of operations in the directions is particularly critical. This feature is not universal. With spaghetti, the order of operations matters: as I once learned the hard way, adding spaghetti before heating the water produces inedible mush. Not so for crockpot stew: the meat, potatoes, and vegetables can go in in any order, as long as they are only going to be heated together for several hours. Interpretation is more like spaghetti than like a crockpot stew. Just because moral considerations appear *somewhere* on our list of interpretive ingredients does not mean that policy considerations can override original meaning whenever they are strong enough.

Likewise, just as originalism does not demand the complete removal of moral considerations from our list of interpretive ingredients, neither is it satisfied just because original meaning is on the list. Merely including original public meaning on the list of interpretive ingredients leaves open how binding it is when it conflicts with sufficiently weighty perceived policy considerations. Justice Kavanaugh, however, seemed to offer an original-meaning-is-relevant definition of originalism at his confirmation hearing. He answered Senator Mike Lee this way:

Justice Kagan . . . at her confirmation hearing[] said we're all originalists now, which was her comment. By that she meant the precise text[] to the Constitution matters, and by that the original public meaning, of course, informed by history and tradition and precedent . . . those matter as well. . . .

. . . [O]riginal public meaning, originalism, what I've referred to as constitutional textualism, [what] Senator Cruz . . . referred to as constitutionalism . . . those are all referring to the same things, which is the words of the Constitution matter. . . . [S]tart with the words, as Justice Kagan said, we're all originalists now in that respect of paying at least some attention to—or more than some—paying attention to the words of the Constitution.<sup>18</sup>

Akhil Amar made similar moves in his testimony on Kavanaugh's behalf two days later, defining an originalist as one “paying special heed to what the Constitution's words originally meant when adopted” and “prioritizing the Constitution's text, history, and structure,”<sup>19</sup> adding that “[o]riginalists start

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executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .”). For an argument that “this Constitution” refers to the original textually expressed meaning, see Christopher R. Green, “*This Constitution*”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009).

18. See *Supreme Court Nominee Brett Kavanaugh Confirmation Hearings, Day 2, Part 2*, C-SPAN (Sept. 5, 2018), <https://www.c-span.org/video/?449705-10/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-2&start=7119>.

19. Akhil Reed Amar, *Testimony Before the United States Senate Committee on the Judiciary on the Nomination of Brett Kavanaugh to the United States Supreme Court*, U.S. SENATE COMM. ON JUDICIARY, at 1 (Sept. 7, 2018), <https://www.judiciary.senate.gov/imo/media/doc/Amar%20Testimony.pdf>.

with the Constitution's text, history and structure, but almost always need to consult other constitutional sources such as tradition and precedent."<sup>20</sup> But mere *relevance* for original meaning is a very weak demand, much weaker than the bindingness that Article VI requires. "Special heed" and "priority" are a bit stronger than "relevant," but still too weak. One is reminded of Brent Musburger's absurdly faint praise of a the 8-0 Fighting Irish football team in 2012: "Folks, let me say this loud and clear: Notre Dame is relevant again."<sup>21</sup>

Likewise, relevance for moral considerations is a relatively weak thesis. Rather than allowing moral considerations to override original meaning, we can instead confine them to these three more specialized roles: filling in morally laden terms, clarifying ambiguous ones, and determining the degree of clarity required to upset legal apple carts. I consider the first role at greatest length here. Interpreting moral terminology requires an assessment of moral reality; that reality sometimes fills the gap between the Constitution's textually expressed meaning and its tangible constitutional application. In his commitment to the fixity of original meaning, moreover, Justice Gorsuch has emphatically and clearly embraced a meaning-application distinction for the Court.<sup>22</sup> I will consider here Justice Gorsuch's interpretations of six bits of constitutional language that could be read (sometimes not obviously) to express moral concepts and thus might require moral facts in order to be properly applied:

- ❖ *Due* in the Fifth<sup>23</sup> and Fourteenth Amendments,<sup>24</sup>
- ❖ *Proper* in the Sweeping Clause,<sup>25</sup>
- ❖ *Their* in the Fourth Amendment,<sup>26</sup>
- ❖ *Obligation* in the Contracts Clause,<sup>27</sup>
- ❖ *Citizens* in Article IV<sup>28</sup> and the Fourteenth Amendment,<sup>29</sup> and

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20. *Id.* at 2.

21. See WatchND, *Notre Dame at Oklahoma Highlights*, YOUTUBE (Oct. 27, 2012), <https://goo.gl/2w5RcN>.

22. See *infra* note 40 and accompanying text.

23. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

24. *Id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

25. *Id.* art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

26. *Id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

27. *Id.* art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

28. *Id.* art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

❖ *Faithfully* in Article II.<sup>30</sup>

For three of these provisions—due process, the Sweeping Clause, and the Fourth Amendment—Justice Gorsuch interprets their possibly moral aspect using the same source on which he relied in his dissertation: tradition!<sup>31</sup> He interprets the Contracts Clause, on the other hand, by rejecting any morally laden exception like the one the Court has placed on it.<sup>32</sup> As for citizenship and faithful execution of the laws, Justice Gorsuch has yet to dig (much) into the possibilities of reorienting the Court’s jurisprudence—especially First Amendment-style claims as applied to actors other than Congress—in terms of such concepts. Like the rest of the Court, he leaves a lot of important errors uncorrected, and without, as I see it, sufficient justification. While he has recently suggested a willingness to move some misbranded incorporation doctrine to the Privileges or Immunities Clause, he could do more in the same vein, for instance by using the Take-Care Clause for executive-branch creedal-discrimination cases.

Besides sometimes filling the meaning–application gap, moral facts—and policy considerations more generally—properly figure in two other issues related to interpretation: clarifying initially unclear meaning and in determining the stakes—and thus the requisite level of clarity—in correcting erroneous precedents. A few of Justice Gorsuch’s opinions suggest receptiveness to using normative considerations as a possible interpretive tool to clarify ambiguity. As for the nature of reliance interests, he has participated in two big overrulings—the union-fees case *Janus*<sup>33</sup> and the internet-tax case *Wayfair*<sup>34</sup>—but without writing separately to explain why he did not stick with precedent.

## II. INTERPRETING POSSIBLY MORAL TERMS

A. *Meaning, Facts, and Application*

A basic distinction in language—usually but not always recognized by the

29. *Id.* amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

30. *Id.* art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

31. See guru006, *Fiddler on the Roof—Tradition (with subtitles)*, YOUTUBE (Dec. 24, 2006), <https://www.youtube.com/watch?v=gRdfX7ut8gw> (introduction to *Fiddler on the Roof*). As explained below, however, it is not always easy to tell whether Justice Gorsuch is interpreting a moral term using tradition, or instead interpreting the term to refer directly to tradition, right or wrong. Cf. James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991) (offering a general historical account of how constitutionalist lawyers of the eighteenth century often conflated notions of custom and reason).

32. See *Sveen v. Melin*, 138 S. Ct. 1815, 1827–28 (2018) (Gorsuch, J., dissenting).

33. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018) (overruling *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

34. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753 (1967)).



Supreme Court, constitutional theorists, and philosophers—divides meaning from application. The basic distinction or its kin are sometimes termed the difference between sense and reference, between intension and extension, between connotation and denotation, or between analytic and synthetic truth.<sup>35</sup> In a world where disputes and disagreements are ubiquitous, this sort of distinction helps us isolate the subject matter of a dispute: does it concern words, on the one hand, or the reality to which those words are applied, on the other? Philosophers frequently come to conclude that they are not disagreeing about underlying reality, but “only” about the meaning of particular words.<sup>36</sup> Lawyers, on the other hand, might put more importance on the meanings of words, or they might agree about words but disagree “merely” about the reality to which those words are applied.<sup>37</sup> If we can draw this intuitive distinction between the source of disagreement—verbal or factual—we can distinguish between judgments about meaning and fact-infused judgments about application.

Justice Sutherland took the opportunity to explain the meaning–application distinction very clearly for the Court in *Euclid v. Ambler Realty* in 1926,<sup>38</sup> an explanation that Justice Gorsuch echoed in his first term. Here is how Justice Sutherland explained things for the Court:

[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.<sup>39</sup>

Here is how Justice Gorsuch put it for the Court in *Wisconsin Central* last spring, italicizing the same two key terms:

While every statute’s *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world. So “money,” as used in this statute, must always mean a “medium of exchange.” But what *qualifies* as a “medium of exchange” may depend on the facts of the day.<sup>40</sup>

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35. See generally Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006). For some elaboration on the analytic–synthetic distinction, see Green, *supra* note 17, at 1627.

36. See, e.g., David J. Chalmers, *Verbal Disputes*, 120 PHIL. REV. 515, 515 (2011).

37. Cf. *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) (“The Court does not quarrel with this test. . . . We part ways only on its application.”).

38. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

39. *Id.* at 387.

40. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (Gorsuch, J., for Court).

Relying on *Wisconsin Central*, Justice Gorsuch spoke similarly for the entire Court (except for still-coming-up-to-speed Justice Kavanaugh) in *New Prime* early this year:

[I]t's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." . . . Of course, statutes may sometimes refer to an external source of law and fairly warn readers that they must abide that external source of law, later amendments and modifications included.<sup>41</sup>

Justices Sutherland and Gorsuch (and the Courts of 1926, 2018, and 2019) thus stand together on one side of a very long-running dispute. Besides the Court in *Euclid*, *Wisconsin Central*, and *New Prime*, the distinction or its kin has been drawn by the likes of John Stuart Mill,<sup>42</sup> Gottlob Frege,<sup>43</sup> Rudolph Carnap,<sup>44</sup> Paul Grice,<sup>45</sup> P.F. Strawson,<sup>46</sup> David Chalmers,<sup>47</sup> Arthur Machen,<sup>48</sup> Charles Fried,<sup>49</sup> Robert Bork,<sup>50</sup> and about 65% of current philosophers,<sup>51</sup> but denied by Chief Justice Taney (in *Dred Scott*),<sup>52</sup> W.V. Quine,<sup>53</sup> about 27% of

41. *New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)). Justice Ginsburg joined the opinion in full and added a concurrence with a bit of additional support for the fact that "Congress . . . may design legislation to govern changing times and circumstances." *Id.* at 544.

42. See 1 JOHN STUART MILL, *A SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE: BEING A CONNECTED VIEW OF THE PRINCIPLES OF EVIDENCE AND THE METHODS OF SCIENTIFIC INVESTIGATION* 34–41 (8th ed. 1872).

43. See generally Gottlob Frege, *Über Sinn und Bedeutung*, 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 25 (1892), translated in Gottlob Frege, *Sense and Reference*, 57 PHIL. REV. 209 (1948).

44. See RUDOLF CARNAP, *MEANING AND NECESSITY: A STUDY IN SEMANTICS AND MODAL LOGIC* § 40, at 177–78 (1947).

45. See generally H.P. Grice & P.F. Strawson, *In Defense of a Dogma*, 65 PHIL. REV. 141 (1956).

46. *Id.*

47. See generally David J. Chalmers, *On Sense and Intension*, 16 PHIL. PERSP. 135 (2002).

48. Arthur W. Machen, Jr., *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 213 (1900).

49. Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 757–58 (1987).

50. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 82 (1990) ("[E]quality and segregation were mutually inconsistent, though the ratifiers did not understand that . . .").

51. See *The PhilPapers Surveys*, PHILPAPERS, <http://philpapers.org/surveys/results.pl> (last visited Feb. 7, 2019) (showing a 2009 PhilPapers survey of 931 philosophers finding that 604 accept or lean toward the analytic–synthetic distinction).

52. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1857) *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("[T]he men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.")

53. See generally W.V. Quine, *Main Trends in Recent Philosophy: Two Dogmas of Empiricism*, 60 PHIL. REV. 20 (1951).

current philosophers,<sup>54</sup> Raoul Berger,<sup>55</sup> Jacobus tenBroeck,<sup>56</sup> and Steven D. Smith.<sup>57</sup>

For his part, Justice Scalia's relationship with the meaning–application distinction was somewhat fraught. Justice Sutherland's explanation of the distinction for the Court in *Euclid* came just a month after *Myers v. United States*,<sup>58</sup> the paradigm of originalism touted by Justice Scalia in his Taft Lecture.<sup>59</sup> To the extent that Justice Scalia aimed to return constitutional theory to what it was like circa 1926, the meaning–application distinction was clearly a component. Justice Scalia also explained the distinction himself in 1993: “[P]erhaps it is only since that time [1791 or 1868] that concealed weapons capable of harming the interrogator quickly and from beyond arm’s reach have become common—which might alter the judgment of what is ‘reasonable’ under the original standard.”<sup>60</sup> At other times, however, Justice Scalia blurred the distinction.<sup>61</sup>

To get from a term's meaning to its application, we need facts of various kinds. One simple way to think of the distinction is with a mathematical metaphor. The meaning expressed by a text in historical context determines only a fact-dependent (or fact-unsaturated) function from possibilities to applications, not applications themselves. The type of fact needed to get from sense to reference—sociological facts, economic facts, biological facts, historical facts, or moral facts, for instance—will depend on whether a term is a sociological term, economic term, biological term, historical term, or a moral term. “[I]f the Constitution contains moral terminology, then moral theorizing would be needed in order to figure out the Constitutional referent.”<sup>62</sup>

Whether constitutional or statutory terms are moral terms, however, must be decided on what those terms express in their particular historical contexts; it must be settled at the retail level, rather than wholesale. The most obvious sorts of references to moral reality would be words like *just* in the Fifth Amendment or *compelling* in the Religious Freedom Restoration Act. The Court has not, however, considered those terms in any detail since Justice

54. See *The PhilPapers Surveys*, PHILPAPERS, <https://philpapers.org/surveys/results.pl> (last visited Feb. 7, 2019) (showing that 252 of 931 philosophers reject or lean against analytic–synthetic distinction).

55. Raoul Berger, *Death Penalties and Hugo Bedau: A Crusading Philosopher Goes Overboard*, 45 OHIO ST. L.J. 863, 872–73 (1984) (responding to Bedau's invocation of Frege).

56. Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CAL. L. REV. 399, 415–16 (1939).

57. Steven D. Smith, *That Old-Time Originalism*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 223, 239–42 (Grant Huscroft & Bradley W. Miller eds., 2011).

58. *Myers v. United States*, 272 U.S. 52 (1926).

59. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–52 (1989).

60. *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993).

61. See Green, *supra* note 35, at 555–58.

62. *Id.* at 626 (emphasis omitted).

Gorsuch joined the fray.<sup>63</sup> We turn then to a few candidates for moral terminology in the Constitution with which the Court has grappled recently.

*B. Six Candidate Moral Terms*

*1. Due*

I begin with the most interesting lineup of Justice Gorsuch's first full term, and the one with the greatest promise for changing our culture of constitutional argument: *Sessions v. Dimaya*,<sup>64</sup> in which Justice Gorsuch joined the liberal wing of the Court as to the result, but most emphatically not as to rationale.<sup>65</sup> Whatever their general pattern of agreement,<sup>66</sup> Justices Gorsuch and Thomas took the occasion in *Dimaya* for a debate over the first principles of due process.<sup>67</sup> The rest of the Court, alas, declined to take part. But because the other Justices were split on the case, Justice Gorsuch's original-meaning-based analysis was critical. *Dimaya* illustrates how a single Justice's methodological proclivities might shape the way cases are briefed: to the extent that Justice Gorsuch stands a good chance to be the Court's median voter, as he was in *Dimaya*, the failure to devote significant argumentative space to issues of original meaning is foolhardy. It does not take five originalist justices to cause advocates to take original meaning seriously, but only one, properly situated. Justice Scalia would sometimes remark that with two originalist justices, advocates would not lightly throw away two of the nine votes. But raw numbers of judges are not the only thing that matters for influence on constitutional culture; median-voter status matters as much or more.

In *Dimaya*, the Court considered the immigration implications of its earlier decision in *Johnson v. United States*,<sup>68</sup> which held that the phrase "crime . . . that . . . involves conduct that presents a serious potential risk of physical injury to another"<sup>69</sup> was too vague to support criminal punishment.<sup>70</sup> The *Dimaya*

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63. One Religious Freedom Restoration Act opinion that then-Judge Gorsuch wrote while on the Tenth Circuit, *Yellowbear v. Lampert*, 741 F.3d 48, 56–62 (10th Cir. 2014), engaged in a lengthy discussion of underinclusiveness as a reason to think that a proffered interest was not really "compelling." The court did not make clear, however, exactly how much inquiry into moral reality was required; because the government did not pursue its purported interest with sufficient diligence, there was no need to assess whether it was a "real" interest, or quite what that might amount to. *Id.* at 61–62.

64. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

65. *Id.* at 1223–34 (Gorsuch, J., concurring).

66. During the whole term, Justices Thomas and Gorsuch agreed in 78.3% of their written opinions and 67.4% of non-unanimous cases, a level of agreement matched only by that between Justice Gorsuch and Justice Kennedy. Comment, *The Supreme Court 2017 Term—The Statistics*, 132 HARV. L. REV. 447, 449–50 (2018).

67. *Dimaya*, 138 S. Ct. at 1224–28 (Gorsuch, J., concurring); *id.* at 1242–48 (Thomas, J., dissenting).

68. *Johnson v. United States*, 135 S. Ct. 2551 (2015).

69. 18 U.S.C. § 924(e)(2)(B) (2012).

70. *Johnson*, 135 S. Ct. at 2557–63.

Court held very similar language—“felony . . . that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”<sup>71</sup>—too vague to support deportation.<sup>72</sup>

But before the Court assessed whether and how the void-for-vagueness doctrine applies to deportation, Justice Thomas wanted to engage with a prior issue: is the doctrine legitimate at all? As in *Johnson*,<sup>73</sup> Justice Thomas answered no, suggesting that Justice Curtis and the Court got the Due Process Clause wrong as far back as 1856, in *Murray’s Lessee*.<sup>74</sup> Justice Kagan for her part very quickly answered yes based on precedent, and without even mentioning Justice Thomas’s position on the issue.<sup>75</sup> Justice Gorsuch complained: “For its part, the Court has yet to offer a reply [to Justice Thomas]. I believe our colleague’s challenge is a serious and thoughtful one that merits careful attention.”<sup>76</sup>

Taking up that challenge himself, Justice Gorsuch’s own defense of *Murray’s Lessee* relied chiefly on Coke, Blackstone, Chief Justice Rutledge’s testimony to Coke’s prestige, and Justice Story, as well as Justice Scalia’s *Pacific Mutual* concurrence from 1991.<sup>77</sup> Justice Gorsuch also cited an underappreciated, older law review article by Edward Eberle that had not been cited in the *Dimaya* briefing, but had been mentioned in a recent pro se petition for certiorari.<sup>78</sup> The Court denied certiorari in that case without asking for a response on April 16, 2018, a day before *Dimaya* was released. Justice Gorsuch’s citation of the Eberle article nonetheless offers (very) indirect evidence that Justice Gorsuch’s chambers reads not just 30-year-old law reviews, but pro se petitions for certiorari.

As mentioned above, Justice Gorsuch’s academic work has made clear his

71. 18 U.S.C. § 16(b).

72. *Dimaya*, 138 S. Ct. at 1223.

73. *Johnson*, 135 S. Ct. at 2572–73 (Thomas, J., concurring) (noting that he “need not choose between these two understandings of ‘due process of law’”).

74. *Dimaya*, 138 S. Ct. at 1242–43 (Thomas, J., dissenting) (questioning *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) (Curtis, J., for Court), calling the historical argument against *Murray’s Lessee* “not insubstantial”). It is worth noting that one of the sources on which Justice Thomas relied at this point in *Dimaya*—i.e., Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011)—had great untapped potential for improving the Court’s textual fidelity in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), as discussed below.

75. See *Dimaya*, 138 S. Ct. at 1212–13 (citing, e.g., *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926) (Sutherland, J., for the Court)); see also *Jordan v. De George*, 341 U.S. 223, 230–32 (1951) (applying the void-for-vagueness test to determine that an immigration statute was not unconstitutionally vague). Justice Scalia’s opinion for the Court in *Johnson* likewise failed to tangle with Thomas’s concurrence. See *Johnson*, 135 S. Ct. at 2555–64.

76. *Dimaya*, 138 S. Ct. at 1224 (Gorsuch, J., concurring in part and concurring in the judgement).

77. See *id.* at 1224–26; see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24–40 (1991) (Scalia, J., concurring).

78. See Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 339 (1987), cited in *Petition for Writ of Certiorari* at 34, *Miley v. Cenlar FSB*, 138 S. Ct. 1551 (2018) (No. 17-1096).

predilection for tradition as a means of moral analysis, and it is clear that he would interpret much of the Constitution in light of tradition. This tendency makes it quite hard to tell whether Justice Gorsuch is engaging in a two-step or three-step process. On the two-step understanding of his interpretive scheme, Justice Gorsuch would be reasoning (a) that “due” means “traditional,” and then assessing (b) what processes of law are in fact traditional. On the three-step understanding, he would be instead reasoning (a) that “due” means morally fair or proper, (b) using tradition to assess moral fairness and propriety based on the empirical assumption that Anglo-American traditions are in fact fair, and only then (c) looking at what processes of law are traditional under Anglo-American law.

The same issue arises when we look at Justice Gorsuch’s sources. Justice Curtis’s explanation of “due process of law” for the Court in 1856—which Justice Gorsuch adopts and defends in *Dimaya*—is mostly focused on tradition, but with a bit of normative language added in too:

[W]e must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>79</sup>

Notice particularly here the bit about some English modes of proceeding being “unsuited” to America. What does that mean, exactly? Curtis notes that such procedures had not been “acted upon,” pointing again to tradition. It seems, then, that Curtis and Gorsuch interpret “due” to refer to “settled usages,” subject to an “unsuitable” exception, which is itself understood in light of Americans’ actions. The middle stage of the conceptual turducken—“unsuitable”—could, like “due,” be understood as a moral term, but it was (and is) not entirely clear.<sup>80</sup>

In *Dimaya*, Justice Gorsuch associated due process with the separation of powers,<sup>81</sup> and in his dissent in *Oil States*, in which he would have held administrative patent revocation unconstitutional, he did the converse, associating the separation of powers with due process.<sup>82</sup> While the Court did not consider a due process claim, Justice Gorsuch’s dissent quoted an earlier opinion discussing due process. He once again relied on *Murray’s Lessee* and asked whether the

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79. *Murray’s Lessee*, 59 U.S. at 275, 277.

80. For much more on the relationship between tradition and fairness, see Justice Scalia’s opinion in *Haslip*, 499 U.S. at 29–36 (Scalia, J., concurring), which traces the gradual slide from tradition to fairness as the focus of due process cases over the course of the nineteenth and twentieth centuries. As Justice Scalia acknowledged, however, normative and moral language were at least part of the analysis even at the beginning of the process in *Murray’s Lessee*. *Id.* at 29–30.

81. *Dimaya*, 138 S. Ct. at 1227–28.

82. See *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1384–86 (2018) (Gorsuch, J., dissenting).

patent-revocation procedure would be “the stuff of the traditional actions at common law.”<sup>83</sup> To the extent that “judicial” power and “due” process share significant doctrinal overlap, the concepts seem less likely to have substantial moral valence. Judicial power is what judges *actually* do, not what they *ought* to do, normatively speaking.

## 2. Proper

Justice Gorsuch’s dissent in *Artis v. District of Columbia*<sup>84</sup> went into surprisingly great detail about the Necessary and Proper Clause, particularly on the word “proper,” which has had an intellectual renaissance of late.<sup>85</sup> On behalf of the four dissenters, he offered a limited reading of the word *tolled* in the supplemental jurisdiction statute, but he did so partly with a constitutional rationale: a broader reading would infringe state court autonomy with insufficient reason.

Justice Gorsuch would have held that “our constitutional tradition,” state sovereignty included, was protected by the word *proper*.<sup>86</sup> In fuller context:

The Court’s approach isn’t just unnecessary; it isn’t proper either. A law is not “proper for carrying into [e]xecution” an enumerated power if it “violates the principle of state sovereignty” reflected in our constitutional tradition. The word “proper” was “used during the founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity.” Limitations periods for state law claims fall well within the peculiar province of state sovereign authority. As Chancellor Kent explained, “[t]he period sufficient to constitute a bar to the litigation of sta[[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.” Described as “laws for administering justice,” time bars are “one of the most sacred and important of sovereign rights and duties.” And “from a remote antiquity,” they have been the province of the sovereign “by which it exercises its legislation for all per-

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83. *Id.* at 1381.

84. *Artis v. District of Columbia*, 138 S. Ct. 594, 608–17 (2018) (Gorsuch, J., dissenting).

85. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2104–07 (2015) (Thomas, J., concurring); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558–61 (2012) (Roberts, C.J. for the Court); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“[G]reat substantive and independent power . . . cannot be implied as incidental to other powers, or used as a means of executing them.”); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 215–20 (2003); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1816 (2013); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993). See generally GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

86. See *Artis*, 138 S. Ct. at 616.

sons and property within its jurisdiction.” Our States have long “exercise[d] this right in virtue of their sovereignty.”<sup>87</sup>

As with Justice Gorsuch’s (and Justice Curtis’s) analysis of “due” in *Dimaya*, it is difficult to tell when the moral analysis stops and when the analysis of tradition begins. A lot of the language here seems moral: “sacred and important” certainly, but perhaps also the notion of sticking to one’s own “province.” Sovereignty itself might be a partly moral notion. In any event, as elsewhere, Justice Gorsuch is plainly devoted to tradition, and he ends on the same note with which the passage begins: “remote antiquity” and what states have “long exercised” are the key. Does Justice Gorsuch think “proper” in this context just means “consistent with tradition,” or does he think as an empirical, contingent matter that our traditions are in fact morally proper? His traditionally rooted approach to ethics makes it difficult to tell.

Independent of what the episode tells us about interpretation, Justice Gorsuch’s aggressive use of the Sweeping Clause as a reason to respect states’ statute-of-limitations choices in *Artis* marks him as a hawk on federal power. Would he follow Justice Thomas<sup>88</sup> all the way back to *Hammer v. Dagenhart*<sup>89</sup> and *Carter v. Carter Coal Co.*?<sup>90</sup> It is hard to say, but Justice Gorsuch’s unflinching rhetoric on original meaning, together with the strong consensus at the Founding that the federal government lacked power to regulate labor conditions—e.g., slavery—in the states, suggest that he might well do so. A more difficult question is what other justices might do if he and Justice Thomas were to push back in a serious way against the post-New Deal scope of federal power. Neither Justice seems likely to be the Court’s median voter on the issue anytime soon.

### 3. Their

A mere possessive pronoun might not seem the most likely place to find rich constitutional content or moral principle. But a property-based view of the Fourth Amendment, particularly on the rise since Justice Scalia’s opinions in *United States v. Jones*<sup>91</sup> and *Florida v. Jardines*,<sup>92</sup> is rooted in the word *their*: “The right of the people to be secure in *their* persons, houses, papers, and ef-

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87. *Id.* (citations omitted) (first quoting *Printz v. United States*, 521 U.S. 898, 923–24 (1997); then quoting *Lawson & Granger*, *supra* note 85, at 297; and then quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)).

88. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 57–74 (2005) (Thomas, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

89. *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

90. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

91. *United States v. Jones*, 565 U.S. 400 (2012).

92. *Florida v. Jardines*, 569 U.S. 1 (2013).



fects, against unreasonable searches and seizures . . . .”<sup>93</sup> Justice Gorsuch’s dissent in the cell-site case, *Carpenter*, construed the limit on Fourth Amendment beneficiaries embodied in “their” in terms of legal entitlements: “True to those words and their original understanding, the traditional approach asked if a house, paper or effect was *yours* under law.”<sup>94</sup> He analogized the delivery of information to a third party to the bailment of property,<sup>95</sup> but he concluded that the analogy needed better briefing from litigants to be viable.<sup>96</sup>

As with *due* and *proper*, it is not easy to tell in the *Carpenter* dissents where morality ends and where the traditions of the law pick up. A property-based view of the Fourth Amendment could be put in terms of a *moral* entitlement to security in one’s property—“Thou shalt not steal” is, after all, in the Ten Commandments<sup>97</sup>—but might also be put in terms of contingently existing positive law. On this issue, as in *Dimaya*, the conflict between Justices Thomas and Gorsuch in *Carpenter* is the most interesting part of the case. Justice Gorsuch indicated his preference for contingent positive law as the basis for Fourth Amendment property claims,<sup>98</sup> but he also suggested that there may be a constitutional floor not rooted in positive law: “[W]hile positive law may help establish a person’s Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it.”<sup>99</sup> What does that mean? Is Justice Gorsuch referring to natural law, i.e., moral reality? It seems so, but the Justice could have certainly been more explicit if he had wanted to.

For his part, Justice Thomas’s dissent in *Carpenter* refers pointedly and repeatedly to the natural rights theory of John Locke, who spoke several times of the need to have government to make preexisting natural property rights “secure.”<sup>100</sup> Like Justice Gorsuch, Justice Thomas mentions positive law, but he gives it in a distinctly subordinate role. Countering the petitioner’s invocation of Baude and Stern, Justice Thomas replies, “To come within the text of the Fourth Amendment, *Carpenter* must prove that the cell-site records are *his*; positive law is potentially relevant only insofar as it answers that ques-

93. U.S. CONST. amend. IV (emphasis added).

94. *Carpenter v. United States*, 138 S. Ct. 2206, 2267–68 (2018) (Gorsuch, J., dissenting).

95. *Id.* at 2268–70.

96. *Id.* at 2272. Justice Thomas harped in his dissent on the facts that *Carpenter* “stipulated below that the cell-site records are the business records of Sprint and MetroPCS,” that “[h]e cites no property law in his briefs to this Court, and he does not explain how he has a property right in the companies’ records under the law of any jurisdiction at any point in American history,” and that his cell phone contracts reserved him no property rights. *Id.* at 2242 (Thomas, J., dissenting). Justice Gorsuch did not engage with these details; indeed, he could have cited them himself in defense of his ultimate conclusion that *Carpenter* had waived any property rights relating to his data.

97. *Exodus* 20:15.

98. *See Carpenter*, 138 S. Ct. at 2268 (relying on William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821 (2016)).

99. *Id.* at 2270.

100. *See id.* at 2239.

tion.”<sup>101</sup> For Justice Thomas, security of property, apparently per natural right, comes first; positive law only helps us sort out what property amounts to. However, while he gives a somewhat greater hint of attachment to a moral theory of inviolable property and security than does Justice Gorsuch, Justice Thomas too is less than fully explicit. Given that he, like Justice Gorsuch, would largely cash out that natural right in terms of contingently existing tradition, it is difficult to tell precisely how—and how much—their readings differ.

#### 4. Obligation

One area in which the Court has taken a morally infused reading of the Constitution, but where Justice Gorsuch has rejected it, is the Contracts Clause: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .”<sup>102</sup> Dissenting alone in *Sveen v. Melin*,<sup>103</sup> he criticized the Court’s 1983 holding in *Energy Reserves Group* that the facially exceptionless Contracts Clause implicitly allowed “reasonable” impairment of contract rights if in pursuit of a “significant and legitimate public purpose.”<sup>104</sup>

In addition to being “hard to square with the Constitution’s original public meaning,” such a morally infused balancing test posed several difficulties in Justice Gorsuch’s view:

Under a balancing approach . . . how are the people to know today whether their lawful contracts will be enforced tomorrow, or instead undone by a legislative majority with different sympathies? Should we worry that a balancing test risks investing judges with discretion to choose which contracts to enforce—a discretion that might be exercised with an eye to the identity (and popularity) of the parties or contracts at hand? How are judges supposed to balance the often radically incommensurate goods found in contracts and legislation?<sup>105</sup>

Justice Gorsuch is thus hostile to a morally infused reading of the Contracts Clause; “obligation” refers to the legally binding nature of a contract, not obligation with a moral tinge. Many of the considerations that Gorsuch gives against implementing the Contracts Clause with a balancing test, however, would recur with many other assessments of moral reality. “Radically incommensurate goods” are, if not ubiquitous, pretty common. Security versus civil liberty, fairness versus speed, length of life versus happiness—none of these tradeoffs are easily translated into a common moral currency. The Constitu-

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101. *Id.* at 2242.

102. U.S. CONST. art. I, § 10, cl. 1.

103. *Sveen v. Melin*, 138 S. Ct. 1815, 1826–31 (2018) (Gorsuch, J., dissenting).

104. See *id.* at 1827–28 (citing *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983)).

105. *Id.*

tion does not, however, consist exclusively of bright-line rules; its mushy standards are binding under Article VI, too.<sup>106</sup>

A final example of Justice Gorsuch's willingness to correct earlier mistakes has emerged quite recently: his openness to the resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment. Fourteenth Amendment scholars have long advocated<sup>107</sup> the reinvigoration of the Privileges or Immunities Clause—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"<sup>108</sup>—as a replacement for the Due Process Clause—"No State shall . . . deprive any person of life, liberty, or property, without due process of law"<sup>109</sup>—in cases involving fundamental substantive rights or the application of the Bill of Rights against the states. I have done my share, both pushing against broad substantive readings of due process<sup>110</sup> and in favor of overruling the *Slaughterhouse Cases*, replacing them with an equal-citizenship reading.<sup>111</sup>

Until this year, however, only Justice Thomas has indicated an interest in the project,<sup>112</sup> and even he has let the issue lie fallow in the many cases involving the Bill of Rights and the states.<sup>113</sup> The rest of the Court generally has also

106. See Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 504 (2014) ("Judges swear an oath to uphold 'this Constitution,' whatever it might prescribe. If the Constitution prescribes the exercise of relatively unconstrained judicial judgment in some contexts, that is its prerogative, however wise or unwise that prescription might be.")

107. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) ("[T]he demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence . . ."); *id.* at 522 n.1 ("Legal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873.")

108. U.S. CONST. amend. XIV, § 1.

109. *Id.*

110. See Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL'Y 73, 75–76 (2017); Christopher R. Green, *Our Bipartisan Due Process Clause*, GEO. MASON L. REV. (forthcoming 2019) (manuscript at 48–49 n.258), <https://ssrn.com/abstract=3249845>. See generally Christopher R. Green, *Twelve Problems with Substantive Due Process*, 16 GEO. J.L. & PUB. POL'Y 397 (2018).

111. Christopher R. Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 135 (2015) [hereinafter Green, *Incorporation*]. See generally CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015). My work builds on the view first defended at length in John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). Viewing the Privileges or Immunities Clause as requiring equality in civil rights among similarly situated citizens of the United States will make sense only if we understand the Equal Protection Clause—"nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws"—as a guarantee of protection, not a generic entitlement to equality. I defend this view at length in Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1 (2008), and Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219 (2009).

112. See *McDonald v. City of Chicago*, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring). Chief Justice Rehnquist also joined his dissent in *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999), but had left the Court by 2010.

113. See, e.g., *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2025 (2017) (Thomas, J., concurring) (failing to address Fourteenth Amendment issues regarding church's right to participate in playground-subsidy program); *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1740

left distinctive Fourteenth Amendment issues unresolved and in the background when it hears Bill of Rights claims involving the states; the Court simply treats the texts and meanings of 1791 as dispositive. At most, the Court, in its incorporated-Bill-of-Rights cases, mentions “the Fourteenth Amendment” generically, without embarrassing itself by picking a clause.<sup>114</sup> More frequently, it does not even mention the Fourteenth Amendment at all.<sup>115</sup>

An approach that treats the Fourteenth Amendment as invisible might make *some* sense if the Court had adopted Justice Black’s total-incorporation, “party like it’s 1791” view, in which the Bill of Rights, as such, is now binding on the states.<sup>116</sup> Justice Black’s view is wrong, to be sure,<sup>117</sup> but embracing it (and thus reversing cases allowing states to dispense with jury unanimity,<sup>118</sup> grand juries,<sup>119</sup> or civil juries<sup>120</sup>) would be more consistent than just ignoring the issue. Whoever is right about the Fourteenth Amendment, simply whistling past the incorporation graveyard hoping that people won’t notice how confused the Court’s story has become exerts a continuous drag on the Court’s constitutional-fidelity brand.

Justice Gorsuch participated in this dismal tradition in his double jeopardy case for the Court, *Currier v. Virginia*, mentioning the Fourteenth Amendment but not specifying a clause.<sup>121</sup> The opinion even refers to how the Double

(2018) (Thomas, J., concurring) (failing to address Fourteenth Amendment issues regarding state’s hostility to baker’s views on same-sex marriage); *Janus v. Am. Fed’n of State, Cty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2470 (2018) (failing to address Fourteenth Amendment original-meaning issues, despite Court’s discussion of “halfway originalism”).

114. For First Amendment cases since Justice Gorsuch joined the Court briefly mentioning the Fourteenth Amendment but not a clause, see *Janus v. Am. Fed’n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2463 (2018); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); and *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018). For Fifth Amendment cases, see *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018) (Gorsuch, J.); and *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017).

115. For recent First Amendment cases since Justice Gorsuch joined the Court where the Court did not mention the Fourteenth Amendment at all, see *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018); and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). For Fourth Amendment cases, see *Sause v. Bauer*, 138 S. Ct. 2561 (2018); *Collins v. Virginia*, 138 S. Ct. 1663 (2018); and *Kisela v. Hughes*, 138 S. Ct. 1148 (2018). For Sixth Amendment cases, see *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018); *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018); *Wilson v. Sellers*, 138 S. Ct. 1188 (2018); *Ayestas v. Davis*, 138 S. Ct. 1080 (2018); *Davila v. Davis*, 137 S. Ct. 2058 (2017); and *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). For Eighth Amendment cases, see *Murphy v. Smith*, 138 S. Ct. 784 (2018); *Dunn v. Madison*, 138 S. Ct. 9 (2017); and *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017).

116. See, e.g., *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting), *overruled in part by* *Mallory v. Hogan*, 378 U.S. 1 (1964).

117. See *Green, Incorporation*, *supra* note 111, at 128.

118. See *Apodaca v. Oregon*, 406 U.S. 404, 405–06 (1972).

119. See *Hurtado v. California*, 110 U.S. 516, 538 (1884).

120. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217–19 (1916).

121. See *Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018).

Jeopardy Clause was “written or originally understood,”<sup>122</sup> to “the Constitution’s original meaning,”<sup>123</sup> to the “original public understanding of the Fifth Amendment,”<sup>124</sup> and to how double jeopardy was “originally understood,” all of them referring to 1791 rather than Reconstruction, when the operative provision was actually adopted. In *Currier*, Justice Gorsuch’s original-meaning time machine was thus three-quarters of a century off.

In *Timbs v. Indiana*,<sup>125</sup> however, Justice Gorsuch indicated a willingness to join Justice Thomas in fixing the foundation of the Fourteenth Amendment’s incorporation of the Bill of Rights. He noted, “As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment’s Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause.”<sup>126</sup> In addition to citing leading scholars of incorporation like Michael Kent Curtis, Bryan Wildenthal, and Akhil Amar,<sup>127</sup> he relied on Justice Thomas’s concurrence in *McDonald v. Chicago*,<sup>128</sup> which he characterized as construing the Privileges or Immunities Clause to cover, “at minimum, the individual rights enumerated in the Bill of Rights.”<sup>129</sup>

Two questions immediately arise about Justice Gorsuch’s statement. First, does the restriction to *individual* rights suggest that provisions originally written as protections for federalism, like the Establishment Clause, might not be incorporated?<sup>130</sup> The issue could get addressed in *American Legion v. American Humanists*, an incorporated-Establishment-Clause challenge to a World War I cross memorial that the Court heard the week after *Timbs*. None of the lawyers or justices mentioned the Fourteenth Amendment at the *American Legion* argument, however.

Second, what about the “at minimum”? Does the Privileges or Immunities Clause cover any unenumerated rights *outside* incorporation? Does it cover, for instance, the sorts of rights set out in *Meyer v. Nebraska* in 1923—“the

122. *Id.* at 2149.

123. *Id.* at 2150.

124. *Id.* at 2152.

125. 139 S. Ct. 682 (2019).

126. *Id.* at 691 (Gorsuch, J., concurring).

127. *Id.* (relying on Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L. J. 1509 (2007); AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163–214 (1998); and MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986)).

128. 561 U.S. 742, 805–58 (2010).

129. *Timbs*, 139 S. Ct. 682, 691 (2019).

130. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in judgment) (“[T]he Establishment Clause is a federalism provision which, for this reason, resists incorporation.”); cf. <http://www.tifis.org/sources/Howard.pdf> (last visited Mar. 1, 2019) (displaying a handwritten notes of Jacob Howard introducing the Fourteenth Amendment to the Senate, specially inserting “personal” in his description of which rights from the Bill of Rights were privileges of citizens of the United States) (in Duke University Special Collections Library).

right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”<sup>131</sup> And if unenumerated rights are covered, what criterion would Justice Gorsuch use to find them—Reconstruction history, consensus today, moral reality, or some other criterion? One of the parties in a case this term about liquor-license discrimination against new residents, *Tennessee Wine and Spirits Retail Association v. Blair*, raised a Privileges or Immunities Clause issue.<sup>132</sup> Because the prospective sellers had already become citizens of Tennessee, discrimination against other states’ citizens was not directly involved, and so neither the Privileges and Immunities Clause of Article IV nor the Dormant Commerce Clause in their traditional forms were perfect fits. The Privileges or Immunities Clause issue was not developed at oral argument. At some point, however, an unenumerated-rights case will surely press Justice Gorsuch to resolve whether the “at minimum” floor is also a ceiling.

When such a case does arise, Justice Gorsuch should grapple with whether *citizen* is a partly moral term. This may not be an obvious question to ask: what does citizenship—the “privileges or immunities of citizens of the United States,” to be more precise—have to do with moral reality? The connection is simply this: on the equal-citizenship interpretation of the Fourteenth Amendment, to be a citizen is not only to have a particular label attached to oneself, but to have the same civil rights as similarly situated fellow citizens. And similar-situatedness is a partly moral notion. This was not the only way the word *citizen* was used during the mid-nineteenth century, to be sure, but it was used by many very prominent people in this way, and such usage makes best sense in the precise context of the Fourteenth Amendment.

Consider some of the evidence. Justice Story noted in his massively influential 1833 treatise that the Article IV comity guarantee was tacitly restricted to “the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.”<sup>133</sup> William Lawrence, echoing

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131. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); An Act to protect all Persons in the United States in their Civil Rights, and Furnish the Means of Their Vindication, April 9, 1866, 14 Stat. 27, § 1 (April 9, 1866) (stating that citizens have equal right “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property”).

132. Brief for Respondent at 27–63, *Tenn. Wine and Spirits Retail Ass’n v. Blair* (No. 18-96), [https://www.supremecourt.gov/DocketPDF/18/18-96/76121/20181213152500238\\_Affluere%20Brief%20for%20Respondent.pdf](https://www.supremecourt.gov/DocketPDF/18/18-96/76121/20181213152500238_Affluere%20Brief%20for%20Respondent.pdf) (last visited Mar. 1, 2019).

133. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1800, at 675 (1833).

Story, invoked the concept of similarly situated fellow citizens in advocating the Civil Rights Act of 1866 veto override in early April 1866, a few weeks before Bingham proposed the Privileges or Immunities Clause to the Joint Committee: “all the privileges and immunities of citizens;’ that is, all citizens under the like circumstances.”<sup>134</sup> Horace Biddle in 1851, discussing a provision for equality in privileges and immunities among all citizens of Indiana, noted that it was obviously limited to citizens in the “same circumstances” receiving “similar terms.”<sup>135</sup> These sorts of tacit similar-situatedness limits on the privileges and immunities of citizens make sense of the general statements of equality in civil rights for all citizens of the United States under the Fourteenth Amendment. Senator Conness, supporting the Amendment in June 1866, said that to be “treated as citizens of the United States” was to be “entitled to equal civil rights with other citizens of the United States.”<sup>136</sup> Representative Raymond noted in May 1866 that “equality of rights among all the citizens of the United States” was the goal.<sup>137</sup> One newspaper noted in early May 1866, when the Fourteenth Amendment proposal was made public, that it was “intended to secure to all citizens of the United States, including the colored population, the same privileges and immunities.”<sup>138</sup> Benjamin Butler noted in October 1866 that the proposal would require “that every citizen of the United States should have equal rights with every other citizen of the United States, in every State.”<sup>139</sup> William Dennison noted in the same month: “[T]he colored man . . . shall have all the personal rights, all the property rights, all the civil rights of any other citizen of the United States.”<sup>140</sup>

To be a citizen was, for many, to be the equal of other citizens in the same circumstances. That was how *Dred Scott* could infer lack of African-American citizenship from lack of African-American equality (which it in turn inferred from African-American marital segregation).<sup>141</sup> In the citizenship declaration and Privileges or Immunities Clause, the Fourteenth Amendment Republicans embraced *Dred Scott’s* citizenship-entails-equality minor premise to turn the cast’s reasoning upside down, guaranteeing equality rather than denying citizenship. *Modus tollens* had, on this view of the Fourteenth Amendment, become *modus ponens*.

134. See CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866).

135. H. FOWLER, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1394 (1851).

136. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866).

137. *Id.* at 2502.

138. *The Weekly Standard*, TRI-WEEKLY STANDARD (Raleigh, N.C.), May 3, 1866, at 2.

139. CINCINNATI COMMERCIAL, SPEECHES OF THE CAMPAIGN OF 1866: IN THE STATES OF OHIO, INDIANA AND KENTUCKY 41 (1866).

140. *Id.* at 44.

141. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 409 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (racial separation imposed “stigma . . . of the deepest degradation”); *id.* at 423 (citizens could not be placed “in an inferior grade”).

How might we get incorporation of the Bill of Rights out of a requirement of equality among citizens of the United States? One way is to see the Privileges or Immunities Clause as a ban on civil liberty outliers: because almost all states respect rights in the Bill of Rights, the rights generally given to citizens of the United States are rights “of” citizens of the United States. If only a few states’ citizens are denied such privileges, there is unjustified inequality in American civil liberty. Indeed, many of the incorporation cases from the 1960s conduct such a poll of the states to decide whether to apply Bill of Rights provisions against them.<sup>142</sup> Another way to approach the First Amendment, however—one which fits quite well with current doctrine about content-based classifications, as it happens<sup>143</sup>—is to see freedom of speech and religion as a shield against “creedal discrimination.” Reconstruction Republicans regularly trumpeted that all citizens, of whatever race, color, or creed, are to receive the same civil rights. The preface to the Civil Rights Act of 1875, for instance, trumpeted “equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political.”<sup>144</sup>

Might Justice Gorsuch be interested in this sort of move? One tea leaf comes from his Dormant Commerce Clause concurrence in *South Dakota v. Wayfair*, suggesting that Dormant Commerce Clause principles might be “defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV’s Privileges and Immunities Clause.”<sup>145</sup> Justice Scalia made such a suggestion during his first year on the Court as well,<sup>146</sup> and it has significant scholarly and historical support.<sup>147</sup> If, as Justice Story and

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142. See *Benton v. Maryland*, 395 U.S. 784, 795 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968); *Klopfert v. North Carolina*, 386 U.S. 213, 225–26 (1967); *Pointer v. Texas*, 380 U.S. 400, 402–03 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963); *Mapp v. Ohio*, 367 U.S. 643, 651 (1961); Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 379 (2009). It is striking that the *McDonald* Court did not include such a present-day poll in its rationale for incorporating the Second Amendment, even though a greater percentage of state constitutions have rights to keep and bear arms today (44 of 50, 88%) than did in 1868 (22 of 37, 59%), a fact on which the Court relies heavily. See *McDonald v. City of Chicago*, 561 U.S. 742, 777 (2010); Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205 (2006). For its part, the *Timbs* Court mentioned both the 35-of-37 1868 ratio and the 50-of-50 unanimity today. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

143. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

144. An Act to Protect All Citizens in Their Civil and Legal Rights, ch. 114, 18 Stat. 335, 335–37 (March 1, 1875).

145. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100–01 (2018) (Gorsuch, J., concurring).

146. *Tyler Pipe Indus. v. Wash. State Dep’t. of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part) (“[D]iscrimination against citizens of other States . . . is regulated not by the Commerce Clause but by the Privileges and Immunities Clause . . .”).

147. ARTICLES OF CONFEDERATION art. IV (“[T]he free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . .”); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C. E.D. Pa. 1823) (explaining that the Comity Clause protects “the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, [or] professional pursuits” with “an exemption from higher taxes or impositions than are paid by the other citizens of the state”); *Petition for Writ of Certiorari, Marilley v. Bonham*,



others say, “citizen” effectively means “citizen with the same rights as similarly situated fellow citizens” in Article IV, and if Justice Gorsuch were to make good a citizenship-based antidiscrimination rebranding of Dormant Commerce Clause doctrine, he might also be interested in citizenship-based antidiscrimination rebranding of incorporation and fundamental rights doctrines too.

Rebranding incorporation doctrine under the Privileges or Immunities Clause would matter less for incorporation cases themselves than for other rights: it may be uncontroversial that freedom of speech is a privilege of citizens of the United States, but the precise reason why it is such a privilege—the criterion in virtue of which it counts as such a privilege—will have big implications elsewhere. To put the point in terms of the distinction drawn above, textually expressed meaning matters too, not just tangible applications. A consensus-based approach to incorporation of the Bill of Rights would matter because it would also protect rights on which there is a similar consensus, even outside the Bill of Rights. Rooting limits on state creedal discrimination in equal citizenship rather than the First Amendment would allow the Equal Protection Clause to guarantee a right to literal protection from violence. Beyond these pragmatic concerns, proper constitutional branding would have the additional simple benefits of honesty and constitutional fidelity.

## 6. Faithfully

A second area in which the Court could pay proper attention to the first word of the First Amendment (one in which I unfortunately can offer no particular tidbits related to Justice Gorsuch) arose in the travel ban litigation against the President. Federal executive officers, like state officers, are not “Congress.” Yet in *Trump v. Hawaii*,<sup>148</sup> the Court treated the First Amendment as if it applied to the President and his subordinates. The Court, to its credit, began by quoting the full text of the Amendment, “Congress” included,<sup>149</sup> but then quoted a paraphrase of the clause in the passive voice: “[O]ne religious

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No. 16-1391, 2017 WL 2263956, at \*36 (2017) (“The historically and textually anchored guarantees of the Privileges and Immunities Clause represent a firmer basis on which to ground many accepted aspects of dormant Commerce Clause doctrine . . . .”); Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention New York*, in 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: SOUTH CAROLINA 12, 19 (John P. Kaminski et al. eds., 2016) (noting that the Comity Clause would “extend[] the rights of the Citizens of each State, throughout the United States” and “is formed exactly upon the principles of the 4th article of the present Confederation”); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 448 (1982) (“[T]he equality-oriented privileges and immunities clause of the Constitution, and not the commerce clause, was historically designed to define the scope of state legislative power in commercial matters where Congress has not yet acted.”).

148. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

149. *Id.* at 2416–17.

denomination cannot *be officially preferred over another*.”<sup>150</sup>

David Strauss and others have considered the obviousness of constitutional restraints on executive infringements on the freedoms of speech or religion as a *reductio ad absurdum* of First Amendment textualism,<sup>151</sup> while Nicholas Rosenkranz,<sup>152</sup> Gary Lawson,<sup>153</sup> and Guy Seidman<sup>154</sup> have accepted the consequence and insisted that we must stick with the actual text. There have been fewer cases than one might think, however, challenging federal executive action in isolation under the First Amendment. State executive or judicial action, of course, would obviously be covered by the Privileges or Immunities Clause, which forbids states to “make *or enforce*” laws abridging the privileges of citizens of the United States.<sup>155</sup> A trial-court opinion from 1833 suggests that the First Amendment confirms the lack of federal judicial power restricting the rights of religious institutions, but it does not suggest that the First Amendment restricts executive officers, who were not involved in the case.<sup>156</sup> The *Pentagon Papers Case*, in which the President sought a court order enjoining the *New York Times* and *Washington Post* from publishing stolen documents,<sup>157</sup> and which has become an important precedent on prior restraints, was not quite the same posture as *Trump v. Hawaii*. There were two particular reasons in the *Pentagon Papers Case* to demand the existence of a law before enjoining publication. First, the newspapers’ liberties were to be affirmatively restrained and so would require “due process *of law*” under the Fifth Amendment, which is not

150. *Id.* at 2417 (emphasis added).

151. See, e.g., David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 30–34 (2015).

152. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1252–54 (2010) [hereinafter Rosenkranz, *Subjects*]; Rosenkranz, *supra* note 74, at 1028. Recall from above, *supra* note 74, Justice Thomas’s familiarity with Rosenkranz’s work. In *Dimaya*, Justice Thomas relied on Rosenkranz’s view that the Fifth Amendment restricts only the President, not Congress. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1243 n.1 (2018). But in *Trump v. Hawaii*, he let Rosenkranz’s far more textually airtight view that the First Amendment restricts only Congress, not the President, pass by without comment. See *Trump*, 138 S. Ct. at 2424–29.

153. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 42 (2004) (“To read the First Amendment to apply to entities other than Congress is simply to abandon the enterprise of textual interpretation.”).

154. *Id.*

155. U.S. CONST. amend. XIV, § 1 (emphasis added). This textual change answers the suggestion in Justice Thomas’s opinion concurring in the denial of certiorari in *McKee v. Cosby*, 139 S. Ct. 675, 680 (2019), that the freedom of speech may not cover “common-law rights of action that are not codified by state legislatures.” It is true that, as Justice Thomas notes, “[b]y its terms, the First Amendment addresses only ‘law[s]’ ‘ma[d]e’ by ‘Congress.’” *Id.*, but the Fourteenth Amendment addresses laws *made or enforced* by states, including through their courts.

156. *Magill v. Brown*, 16 F. Cas. 408, 419 (E.D. Pa. 1833) (after quoting the First Amendment: “This extends to the judicial as well as legislative departments of the government, and annuls all jurisdiction over the subject matter, past or future.”). Note that this is not quite the same as “assuming that the First Amendment applied to the entire federal government,” as the case is characterized in Strauss, *supra* note 151, at 31 n.165. The lack of “jurisdiction” is the lack of judicial power supplied by any law of Congress that might be made. But lack of executive power is a different matter.

157. *N.Y. Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713, 714 (1971).

limited to Congress.<sup>158</sup> Second, the exercise of judicial power requires law for the court to apply to particular litigants. Without a law of the sort only Congress could create, neither the Fifth Amendment nor Article III would allow the sort of order that the President sought regarding the Pentagon papers. But the executive action in the travel ban case involved neither of these features. Refusal of entry to the country is not a Fifth Amendment deprivation of liberty, and the President sought only to exercise his own powers, rather than asking a court to exercise judicial power (indeed, he sought on several grounds to have the dispute declared nonjusticiable<sup>159</sup>).

Given that the President in the travel ban case had no Fifth Amendment need to produce a law directing his desired result and that the Court concluded that the immigration statutes gave him discretion over entry into the country,<sup>160</sup> the freedom-of-religion claim in the case needed to be rooted in a constitutional provision governing executive discretion rather than one governing the content of the law. That provision was not the First Amendment, but the President's take-care duty of Article II section 3: "[H]e shall take Care that the Laws be faithfully executed."<sup>161</sup> Given the emphasis that opponents of the Trump Administration have placed on that clause—an entire blog with lots of prominent lawyers and law professors even took it for a name<sup>162</sup>—it is surprising that the clause made no appearance in the travel ban briefing. But the take-care duty is a very good fit for the sort of discrimination claim in the travel ban case. A new article by Fordham professors Andrew Kent, Ethan Lieb, and Jed Shugerman documents in great detail that this requires that the President exercise his discretionary powers "impartially,"<sup>163</sup> a position Nicholas Quinn Rosenkranz<sup>164</sup> and Gary Lawson and Guy Seidman<sup>165</sup> have also championed.

158. U.S. CONST. amend. V (emphasis added).

159. *Trump v. Hawaii*, 138 S. Ct. 2392, 2407, 2416 (2018).

160. *Id.* at 2407–15.

161. U.S. CONST. art. II, § 3.

162. See generally TAKE CARE BLOG, <https://takecareblog.com/> (last visited Feb. 21, 2019).

163. See Andrew Kent, Ethan J. Lieb & Jed Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. (forthcoming 2019) (manuscript at 8), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3260593](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593) (“[F]aithful execution was repeatedly associated in statutes and other legal documents with . . . impartial execution . . . .”); *id.* at 31 (impartiality of king’s council and sheriffs); *id.* at 34 (impartiality of tax commissioners); *id.* at 37 n.179, 44 n.221 (impartiality of auditors); *id.* at 53 (impartiality of Massachusetts “gager of casks”); *id.* at 54 n.278 (impartiality of “tything men,” “a low-level elected office in England and New England, charged with overseeing the conduct of neighbors, policing taverns for drunkenness and rowdy behavior”); *id.* at 56 n.290 (impartiality of packers); *id.* at 56 n.291 (impartiality of lumber inspector); *id.* at 57 n.295 (impartiality of river commissioners); *id.* at 62 n.325 (impartiality of governor and other state officers); *id.* at 64 (impartiality of officers with charge of public money); *id.* at 65 (impartiality of officer in War Department).

164. Rosenkranz, *Subjects*, *supra* note 152, at 1272 n.253 (“[T]he Take Care Clause . . . reflects a principle of nondiscrimination (on the basis of speech and religion, among other things) in the execution of law.”).

165. See LAWSON & SEIDMAN, *supra* note 85, at 134 (noting that the president is subject to “basic fiduciary duties of loyalty, care, and impartiality”). The etymological connection between “faith” (Latin:

Rooting an executive ban on creedal discrimination in the take-care duty would mean that even before 1791, it was unconstitutional for the President to, say, prosecute only the members of one political party and leave the law unenforced with respect to his political friends. Housing antidiscrimination principles in a general term like *faithfully* means, moreover, that forms of discrimination other than those addressed in the First Amendment would also be forbidden. We might divide discrimination among that based on blood, soil, or creed.<sup>166</sup> The First Amendment only deals with political or religious beliefs—creed—but *faithfully* could encompass a ban on racial (“blood”) or geographical (“soil”) discrimination in the exercise of executive discretion as well. Jealousies in the new republic over possible geographical disparities among disparate parts of the Union in the exercise of executive discretion of course ran high, so it would be natural for a provision limiting executive power to attempt to alleviate that concern. Lots of people justifiably worried about whether presidents after Washington would really serve the interests of all Americans. Housing a general ban on discrimination in the Take Care Clause could make it into a much more general ban on discrimination—a much more general requirement of impartial, faithful evenhandedness—than one confined to the First Amendment.

As with moving from due-process-based to privileges-of-citizenship-based incorporation of the Bill of Rights, the rebranding I suggest here might not fundamentally change the details of how courts would have resolved the antidiscrimination inquiry in the travel ban case itself. The level-of-scrutiny divide among the Justices,<sup>167</sup> or the issue of how seriously to take campaign promises, imperfectly reflected in actual policy, for instance, could have been resolved under the rubric of the term *faithfully* rather than “respecting an establishment of religion”<sup>168</sup> without changing a great deal. The shift would, however, change quite dramatically what sorts of other antidiscrimination claims could even get off the ground. Those seeking a more robust jurisprudence supporting the rule of law in the administrative state should find a lot to like about the move. And fidelity to the very clear text, of course, is a big virtue too.

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“fides,” meaning “trust,” see *Faith*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/faith> (last visited Feb. 7, 2019) and “fiduciary” (Latin: “fidere,” meaning “to trust,” see *Fiduciary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fiduciary> (last visited Feb. 7, 2019)) suggests that “faithfully” literally means “in a manner characteristic of a trustee or fiduciary.”

166. Thanks to David Upham for framing this way of classifying types of discriminations.

167. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2441 (2018) (Sotomayor, J., dissenting) (complaining that the Court “without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny”).

168. *Id.* at 2417.

### III. TWO OTHER ROLES FOR MORAL CONSIDERATIONS

#### A. Clarification

Despite Justice Gorsuch's hostility to openly policy-based interpretation,<sup>169</sup> he has used his sense of proper results to help confirm his readings. For instance, he noted in his extraterritorial-patent dissent the "anomalous results" and the "very odd role" that a contrary interpretation would require, noting that it is "doubtful Congress would accept" them.<sup>170</sup> He noted in his supplemental jurisdiction dissent that his reading was (as he saw it) "straightforward and sensible," but the Court's was "anything but."<sup>171</sup> "[T]o state the [Court's] test is to see it is a nonsense—one we would not lightly attribute to any rational drafter, let alone Congress."<sup>172</sup> While these comments on the rationality of the majority's interpretation go by without extended theoretical justification, they suggest that Justice Gorsuch is comfortable with a subsidiary role for policy considerations in clarifying initially unclear text that the Court has recognized since 1805: "[W]here great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed."<sup>173</sup>

#### B. Measuring Reliance Interests

It is striking how frequently Justice Gorsuch has, in his short time on the Court, suggested that earlier precedents might be wrongly decided.<sup>174</sup> Only in

169. See *supra* notes 4–15 and accompanying text.

170. *WesternGeco L.L.C. v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2142–43 (2018).

171. *Artis v. District of Columbia*, 138 S. Ct. 594, 611–12 (2018).

172. *Id.* at 612.

173. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805); *cf. id.* at 389–90 ("That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.—But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce."); see also *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (Gorsuch, J., dissenting) ("The Director may (today) think his approach makes for better policy, but policy considerations cannot create an ambiguity *when the words on the page are clear.*" (emphasis added)).

174. See *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari) (suggesting doubt about *Williams v. Illinois*, 567 U.S. 50 (2012)); *Carpenter v. United States*, 138 S. Ct. 2206, 2262, 2264, 2266, 2271 (2018) (Gorsuch, J., dissenting) (suggesting doubt about *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Greenwood*, 486 U.S. 35 (1988); *Smith v. Maryland*, 442 U.S. 735 (1979);

*Janus* and *Wayfair*, however—in neither of which he wrote for the Court or explained his views in a separate concurrence—has he pulled the trigger. These suggestions remain only suggestions—for now. When might misgivings about earlier cases ripen into overrulings?

Justice Gorsuch was part of Bryan Garner’s gang of twelve judges, including now-Justice Kavanaugh, who co-authored *The Law of Judicial Precedent*, six sections of which deal with when to overrule an earlier case.<sup>175</sup> The summary statement at the head of this chunk of the book makes plain that moral and policy considerations are critical to that decision: “Stare decisis does not prevent a court from overruling a horizontal precedent that on reconsideration it finds to be plainly and palpably wrong. But the court must first decide whether overruling the precedent would result in more harm than continuing to follow the erroneous decision.”<sup>176</sup>

The brief statement flags two sorts of issues: the “epistemic” issue of an earlier decision being rendered “plainly and palpably wrong” and the “pragmatic” issue of the stakes involved—the “harm”—in getting the decision right or wrong. “Harm” is a normative, moral consideration, of course, and the book uses a lot of other kindred moral or policy notions to describe the overruling calculus: “[W]hether overruling a precedent and adopting its opposite would cause more harm than good,”<sup>177</sup> stare decisis as a “principle of policy,”<sup>178</sup> how “important” proper resolution is relative to settlement,<sup>179</sup> and the need to “balance the negative impact of the rule as it stands against the nega-

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United States v. Miller, 425 U.S. 435 (1976); Fisher v. United States, 425 U.S. 391 (1976); and Katz v. United States, 389 U.S. 347 (1967)); *Currier v. Virginia*, 138 S. Ct. 2144, 2149–50 (2018) (Gorsuch, J.) (suggesting doubt about *Ashe v. Swenson*, 397 U.S. 436 (1970)); *Sveen v. Melin*, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting) (suggesting doubt about *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400 (1983)); *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) (suggesting doubt about *Emp’t Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990)); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (Gorsuch, J.) (suggesting doubt about *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984)); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1412–13 (2018) (Gorsuch, J., concurring) (suggesting doubt about *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (Gorsuch, J.) (suggesting doubt about *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984)); *Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (Gorsuch, J., concurring) (suggesting doubt about *Nunez v. United States*, 554 U.S. 911 (2008)); *Trinity Lutheran Church of Columbia, Inc., v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring) (suggesting doubt about *Locke v. Davey*, 540 U.S. 712 (2004)); *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring) (suggesting doubt about *Kungys v. United States*, 485 U.S. 759 (1988)).

175. See BRYAN GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, *THE LAW OF JUDICIAL PRECEDENT* 388–439 (2016) (sections 46 through 51). Garner’s introduction gives them each plausible deniability regarding details: “[I]t would be unrealistic for anyone to assume that all 13 coauthors stand by every single statement in the book.” *Id.* at xiv.

176. *Id.* at 388.

177. *Id.*

178. *Id.* at 390.

179. *Id.* at 391.

tive impact of overruling the precedent.”<sup>180</sup> Later sections flesh out both how to assess costs and how to gauge our confidence about whether an earlier decision is really an error.

Elsewhere I have written about the way in which, as stakes increase, we need more clarity in order to make pronouncements about the law.<sup>181</sup> We can see precedent through such a lens: a mere slight preponderance of evidence against a precedent is not enough to overcome significant reliance interests the precedent has engendered. Justice Stevens explained in his *McDonald v. Chicago* dissent why he would not overrule *Slaughterhouse*. “[T]he original meaning of the [Privileges or Immunities] Clause is . . . not nearly as clear as it would need to be to dislodge 137 years of precedent.”<sup>182</sup> Note the three moving parts to Justice Stevens’s formulation—one part setting a criterion for constitutional truth and error (i.e., “original meaning”), one part assessing the reliance-based stakes in overruling (i.e., “dislodge 137 years of precedent”), and one part laying down a general epistemic guide (i.e., “as clear as it would need to be,” meaning that greater stakes require greater clarity about the truthmaker to justify overruling precedent). Caleb Nelson has given a historical defense of the same sort of rule,<sup>183</sup> and the Garner group’s statement is broadly consistent with it.

One reason from his early tenure on the Court to think that Justice Gorsuch takes the epistemic part of his group’s statement seriously—the “plainly and palpably” bit—is that he expresses his doubts about precedent so tentatively and without significant elaboration. As compared to Justice Thomas, many of whose solo attacks on earlier precedents have gone on at great length and display considerable confidence from the time they are first unveiled, Justice Gorsuch’s doubts give off a much more tentative vibe. In several cases, he has indicated a desire to go slowly, only adopting views after a proposed correction has been adequately ventilated,<sup>184</sup> and this desire seems particularly

180. *Id.*

181. See Christopher R. Green, *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403, 407 (2014).

182. *McDonald v. City of Chicago*, 561 U.S. 742, 859–60 (2010) (Stevens, J., dissenting).

183. See generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

184. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (“[C]ustomers have substantial legal interests in this information, including at least some right to include, exclude, and control its use. Those interests might even rise to the level of a property right. The problem is that we do not know anything more. . . . In these circumstances, I cannot help but conclude—reluctantly—that Mr. Carpenter forfeited perhaps his most promising line of argument.”); *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018) (Gorsuch, J.) (“We leave it to the Washington Supreme Court to address these arguments in the first instance. Although we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below . . . in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us. . . . [I]f . . . the question turns out to be more complicated than the dissent promises . . . the virtues of inviting full adversarial testing will have proved themselves once again.”); *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in

apropos when reliance interests are at stake. With more time on the Court, the Justice will likely gain confidence in his suggestions to the extent that they do not receive compelling answers (though of course he may lose confidence if they do), and that process will give him more occasions to explain exactly how much confidence he requires in particular circumstances and how exactly he calculates reliance costs. As with other moral issues, tradition seems likely to be Justice Gorsuch's basic normative guide, but until he says more about the overruling calculus in his own voice, it is hard to tell how aggressive he will be in eventually correcting (what he takes to be) interpretive errors. The day may come when the courage to overrule bigger precedents succeeds, and Justice Gorsuch feels a more pressing need to explain his precise willingness to break his bonds of fellowship with earlier error. "[B]ut it is not this day."<sup>185</sup>

#### IV. CONCLUSION

Justice Gorsuch's first full term on the Court shows him at times quite confident but at others much more hesitant to lay his interpretive or moral cards on the table. He has repeatedly and rightly insisted that moral considerations cannot override the original meaning of the Constitution or statutes. This does not mean that such considerations are interpretively useless, either in implementing such meaning when terms express moral concepts, finding original meaning when it is imperfectly clear, or in deciding just how clear original meaning must be to overrule a precedent. Justice Gorsuch's carefulness in his initial forays into such fields is certainly preferable to making big mistakes. His due-process opinion in *Dimaya* shows his potentially huge significance as an originalist swing vote, while his necessary-and-proper dissent in *Artis* suggests a possible radical streak regarding federal power, and his dissent in *Carpenter* displays an unwillingness to go beyond what the parties have briefed. The lesson to litigants from those three cases is clear: those who consider the original meaning and brief it to the Court have a lot to gain, while those who do not have a lot to lose. Originalism's moment in the median-voter sun may not last, either because Justice Gorsuch proves reluctant in the clutch to fix too many mistakes, or because his principles lead him to positions too radical for his colleagues to stomach. But for now, Justice Gorsuch has stated very clearly what it will take to get his vote, and a lot of litigants are surely poised to tailor their arguments in his direction.

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part) ("Respectfully, it seems to me at least reasonably possible that the crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.").

185. *Cf.* THE LORD OF THE RINGS: THE RETURN OF THE KING (New Line Cinemas 2003) (Aragorn's Henry-V-ish Black Gate speech).