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2018 Sumner Canary Memorial Lecture: Our Newest Justice: Some Thoughts on Justice Gorsuch's Debut Opinions

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Our Newest Justice: Some Thoughts on Justice Gorsuch's Debut Opinions*

Honorable Diane S. Sykes†

Thank you for the invitation to deliver this year's Canary Lecture. It's an honor to participate in this lecture series, and I'm delighted to be with you today.

As we come together this afternoon, the clock is ticking down on the Supreme Court term that began last October. OT 2017 will likely be one of the most significant and closely scrutinized terms in recent memory. Only four argument weeks remain—just twelve days spread across two weeks this month and two weeks next month. It has not escaped notice that the Justices have not yet issued many merits opinions; all of the big cases of the term are still undecided. That will make for a dramatic finish, as Professor Adler and other legal commentators have noted.[1]

Almost everything the Court does is important, and each term produces at least a few blockbuster opinions. But law professors and pundits agree that this term will be particularly consequential. Justice Ginsburg confirmed the point in a notable interview just before the term started.[2] She said, "There is only one prediction that is entirely safe about the upcoming term. . . . [I]t will be momentous."[3]

The reason, of course, is that we have a new justice. And it is said that a new justice means a new Court. There's truth in that observation, as I know from my own experience serving on the supreme court of my home state of Wisconsin. Courts are human institutions; interpreting and applying legal texts requires judgment; and judges differ in the priority and weight they give to various sources of law,

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* The following is adapted from the 2018 Sumner Canary Lecture, delivered on March 7, 2018, at Case Western Reserve University School of Law. When these remarks were delivered, Justice Gorsuch was the newest justice on the Supreme Court.

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1. Jonathan H. Adler, *A Supreme Court Term for the Ages*, Nat'l Review (Sept. 29, 2017, 4:37 PM), https://www.nationalreview.com/2017/09/supreme-court-slate-term-ages/ [https://perma.cc/H22U-CSD3].

2. *Justice Ruth Bader Ginsburg Inspires New Georgetown Law Students at the 2017 Lecture to the Incoming Class*, Geo. L. (Sept. 22, 2017), https://www.law.georgetown.edu/news/justice-ruth-bader-ginsburg-inspires-new-georgetown-law-students-at-the-2017-lecture-to-the-incoming-class/ [https://perma.cc/THT3-GM27].

3. *Id.*

rules of legal interpretation, and normative constraints on their judgment.

With that in mind, today I'd like to focus on what by any measure is the biggest law story of this past year: the confirmation of Judge Neil Gorsuch as Associate Justice of the Supreme Court, filling the vacancy created by the untimely death of Justice Antonin Scalia. I think we can all agree that our newest justice has very big shoes to fill. Justice Scalia's influence on the law can scarcely be overstated. He is rightly regarded as one of the most consequential justices in our nation's history.[4] More than any other figure, he was responsible for the two most important shifts in interpretive method in our time: he reestablished the primacy of textualism in statutory interpretation, and he revived originalism in constitutional interpretation.[5] These ideas have their own force and have always been with us. But Justice Scalia's articulation of the justification for these overlapping interpretive theories was powerful and persuasive and has been uniquely responsible for their restoration. It's not too much to say that he changed the terms of the debate about the role of the judicial branch and the practice of judging in our country.

Justice Scalia's sudden death in February of 2016 was an enormous loss to the Court. The thirteen-month interregnum before his successor took his seat turned out to be a low-key, no-drama period of quietude as the Chief Justice steered his short-handed court away from high-stakes controversies and the justices waited for a new colleague. Professor Will Baude, a law professor at the University of Chicago, referred to this period as "the calm before the storm."[6] Astute court watchers agreed (here again, a nod to your own Professor Adler).[7] Time will tell whether they're right, but I wouldn't bet against them.

So we gather together today at the dawn of a new Court, and I think it's fitting to turn our attention to our newest justice. No doubt everyone in this room followed his nomination and confirmation with great interest. Judge Gorsuch's elevation was noteworthy for many reasons, not the least of which is that it's been a long time since we've had a justice from the Mountain West flyover country. Some

4. Jonathan H. Adler, *The Passing of a Legal Giant—Antonin Scalia, R.I.P.*, Wash. Post: The Volokh Conspiracy (Feb. 13, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/13/the-passing-of-a-legal-giant-antonin-scalia-rip/?utm_term=.80a1cb4d9ff9 [https://perma.cc/9VN8-LDXS].

5. *Id.*

6. Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, N.Y. Times (June 27, 2017), https://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html [https://perma.cc/TCK6-4Z74].

7. Adler, *supra* note 1.

commentators have pointed out that Justice Gorsuch brings some welcome geographic diversity to a Court long dominated by easterners.[8] In that respect he follows in the distinguished footsteps of his first boss and mentor, Justice Byron White.[9] I'll come back to this point about geographic diversity at the end of my remarks.

I'm sure it will come as no surprise to hear that I have long admired Judge Gorsuch's work from my vantage point two circuits away—as the crow flies, not numerically. He is a worthy successor to Justice Scalia. He appears to have many of the same judicial attributes and jurisprudential commitments as his predecessor. But there are important differences as well.

My goal today is modest: I will not make any predictions about how Justice Gorsuch might vote in particular cases or even more generally in particular classes of cases. That's a hazardous undertaking for even the most experienced scholars of the Court, and it's off limits for a lower-court judge. Instead, I thought it might be useful to review the decisions Justice Gorsuch wrote in his first few months on the Court—at the very end of last term—to look for some broader insights about his approach to his new role.

The first thing to notice is how many decisions he wrote. He was confirmed in time for the final round of arguments of the term—thirteen cases heard across two weeks in April—and was assigned to write for the Court in just one.[10] But he wrote *seven* separate opinions—three concurrences, three dissents, and a formal statement in the Justice Thomas tradition urging the Court to grant cert. on a particular legal issue at its next opportunity.[11]

8. *See, e.g.*, Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. Times (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html [https://perma.cc/E63T-5SEZ]; Press Release, Sen. Jeff Flake, U.S. Senate, Flake Delivers Opening Remarks in Support of Confirming Judge Neil Gorsuch to the Supreme Court (Mar. 20, 2017), https://www.flake.senate.gov/public/index.cfm/press-releases?ID=16E9F07F-B652-4B14-B09E-7001513A2267 [https://perma.cc/3K8E-RUW7].

9. *See Byron R. White*, Oyez, https://www.oyez.org/justices/byron_r_white [https://perma.cc/AE9T-9LZP] (last visited Sept. 10, 2018) (noting that Justice White was from Colorado).

10. Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).

11. Maslenjak v. United States, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (Gorsuch, J., concurring in part); Hicks v. United States, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring) (Mem.); Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1988 (2017) (Gorsuch, J., dissenting); Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting); Mathis v. Shulkin, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting) (Mem.);

That was a remarkable debut for a new justice; this rapid pace of separate opinion writing so early in a new justice's tenure is unprecedented. Perhaps we should have seen it coming in his energetic participation at oral argument. In recent years only Justice Sotomayor jumped into the fray so quickly as an interlocutor from the bench;[12] a more gradual approach seems to be the norm.

There was no shortage of media commentary about our new justice's confident and energetic early performance. Richard Wolf of *USA Today* wrote that Justice Gorsuch "arrived in April with gusto."[13] Adam Liptak, the Supreme Court reporter for *The New York Times*, described Justice Gorsuch's first opinions as "remarkably self-assured" for a brand new member of the Court, demonstrating his readiness to "swing for the fences."[14] Robert Barnes of *The Washington Post* offered similar observations, noting that "in his short 2½ months on the Supreme Court, Gorsuch has proved himself to be a self-assured jurist unafraid of the big stage."[15] NPR's Nina Totenberg, another veteran of the Supreme Court press corps, put it this way: "Justice Gorsuch seems both sure-footed and sure of himself and his views."[16] Linda Greenhouse, who used to cover the Court for the *Times* and now writes a column for the paper, was harshly critical of Justice Gorsuch's assertive performance so soon after joining the Court; she devoted a full column

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Bay Point Props., Inc. v. Miss. Transp. Comm'n, 137 S. Ct. 2002, 2002 (2017) (Gorsuch, J., statement of) (Mem.).

12. *Sonia Sotomayor*, OYEZ, https://www.oyez.org/justices/sonia_sotomayor [https://perma.cc/G5S2-WQEP] (last visited Sept. 11, 2018).

13. Richard Wolf, *Supreme Court Faces Blockbuster Term—and Trump*, USA TODAY (Sept. 28, 2017, 5:02 PM), https://www.usatoday.com/story/news/politics/2017/09/26/supreme-court-faces-blockbuster-term-and-trump/667367001/ [https://perma.cc/89J6-CEZ4].

14. Adam Liptak, *Confident and Assertive, Gorsuch Hurries to Make His Mark*, N.Y. TIMES (July 3, 2017), https://www.nytimes.com/2017/07/03/us/politics/neil-gorsuch-supreme-court.html [https://perma.cc/CUH9-Z2JU].

15. Robert Barnes, *Gorsuch Asserts Himself Early as Force on Supreme Court's Right*, WASH. POST (June 27, 2017), https://www.washingtonpost.com/politics/courts_law/gorsuch-asserts-himself-early-as-force-on-supreme-courts-right/2017/06/27/d11f8fe6-5b3b-11e7-a9f6-7c3296387341_story.html?utm_term=.e0ba4f9cbd9f [https://perma.cc/74J4-Q9J6].

16. Nina Totenberg, *Justice Neil Gorsuch Votes 100 Percent of the Time with Most Conservative Colleague*, NPR (July 1, 2017, 12:25 PM), https://www.npr.org/2017/07/01/535085491/justice-neil-gorsuch-votes-100-percent-of-the-time-with-most-conservative-collea [https://perma.cc/JB24-US73].

to what she called the "sheer flamboyance of the junior justice's behavior."[17]

Northwestern Law Professor John McGinnis entered the discussion with an interesting post in response to this early commentary. In his view:

> [Justice] Gorsuch's confident performance flows directly from his formal conception of law. Being a Supreme Court justice for a formalist is no different from being any other kind of judge and in particular no different from being the Court of Appeals judge [Justice] Gorsuch had been for over ten years. Under this view, the lawful judge should render judgment on the basis of his best judgment about the meaning of statutory and constitutional provisions that are put before him or her and candidly set out the reasoning in support, regardless of the political consequences and regardless of what others think. Thus, as a formalist and experienced judge[,] Justice Gorsuch was able to act forcefully from day one on the Supreme Court.[18]

The professor makes a very insightful point. I think we'd do well to keep it in mind as we examine Justice Gorsuch's early work. So let's turn to that now. This will not be a comprehensive analysis of his first set of opinions. I'll limit my comments to those I view as most worthy of our study—his first opinion for the Court, his first two merits dissents, and his first two merits concurrences. From these opinions I offer three very general takeaways.

First, Neil Gorsuch is a textualist. And the Pope is Catholic.

Seriously, if anyone thought he would turn out to be anything but a principled textualist like his predecessor, these first few opinions put that misconception to rest. With that observation out of the way, my second point is this: Neil Gorsuch writes in vivid prose and with incisive analytical clarity, just as his predecessor did. But his style is more informal and sometimes downright conversational. He directly engages the reader with plain language and effective use of simple rhetorical questions to bring an otherwise complex dispute into sharper focus. Clear and lively writing is valuable for its own sake, but it can also be a powerful tool of persuasion and produce a more accessible set of instructions for the bench and bar and the other branches of government. There's something else to notice about his writing style.

17. Linda Greenhouse, Opinion, *Trump's Life-Tenured Judicial Avatar*, N.Y. Times (July 6, 2017), https://www.nytimes.com/2017/07/06/opinion/gorsuch-trump-supreme-court.html [https://perma.cc/V934-CTUH].

18. John O. McGinnis, *The Good Justice Is Just a Judge by Another Name*, Law & Liberty (July 10, 2017), http://www.libertylawsite.org/2017/07/10/the-good-justice-is-just-a-judge-by-another-name/ [https://perma.cc/5PAY-5YMF].

When he disagrees with his colleagues, he is unfailingly respectful and polite. This too distinguishes him from his predecessor. Justice Scalia's separate opinions were always powerful and often eloquent, but sometimes they were also sharp-edged.

My last takeaway is a more substantive point: Justice Gorsuch is deeply committed to enforcing the boundaries of the structural separation of powers—including the limits on the judicial branch within that structure—while at the same time maintaining a strong and independent space for the judiciary within our system of government. He also seems to hold process values in high regard.

All of these attributes and jurisprudential commitments were on display in *Henson v. Santander Consumer USA Inc.*,[19] Justice Gorsuch's debut opinion for the full Court.[20] The case raised a routine statutory-interpretation question, albeit one that had divided the lower courts: whether debt buyers qualify as "debt collectors" under the Fair Debt Collection Practices Act.[21] In keeping with recent tradition for new justices, the Court's decision was unanimous,[22] and the case was entirely pedestrian—some would say boring.

Justice Gorsuch's opinion for the Court is *not* boring. Here's the background: The statute in question provides a remedy for abusive practices by debt collectors. It defines a "debt collector" as anyone who "regularly collects or attempts to collect . . . debts owed or due . . . another."[23] The Act dates to 1977, and since then the debt-buying business came into being and mushroomed; the circuits were split on whether debt buyers are covered.[24] The *Henson* plaintiffs sued a company that purchases defaulted auto loans and collects them on its own account.[25]

Here is how Justice Gorsuch began his opinion for the Court:

> Disruptive dinnertime calls, downright deceit, and more besides drew Congress's eye to the debt collection industry. From that scrutiny emerged the Fair Debt Collection Practices Act, a statute that authorizes private lawsuits

19. 137 S. Ct. 1718 (2017).

20. Jonathan H. Adler, *Justice Gorsuch's First Opinions Reveal a Confident Textualist*, Wash. Post: The Volokh Conspiracy (June 23, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/justice-gorsuchs-first-opinions-reveal-a-confident-textualist/?utm_term=.4508a146050d [https://perma.cc/TED8-ECBW].

21. *Henson*, 137 S. Ct. at 1720.

22. *Id.*; Adler, *supra* note 20.

23. 15 U.S.C. § 1692a(6) (2012).

24. *Henson*, 137 S. Ct. at 1721, 1724–25.

25. *Id.* at 1720.

> and weighty fines designed to deter wayward collection practices. So perhaps it comes as little surprise that we now face a question about who exactly qualifies as a "debt collector" subject to the Act's rigors. Everyone agrees that the term embraces the repo man—someone hired by a creditor to collect an outstanding debt. But what if you purchase a debt and then try to collect it for yourself—does that make you a "debt collector" too? That's the nub of the dispute now before us.[26]

Much ink has been spilled about this colorful opening, with its alliteration and informality—the *repo man*, the *nub* of the dispute. Less noticed is the conversational use of the second person, as if the writer is speaking directly to the reader: What if *you* purchase a debt and then try to collect it for yourself—does that make *you* a "debt collector" too?[27]

Justice Kagan often uses this technique, and to a lesser extent so does the Chief Justice. They are gifted writers, and their opinions are justly praised for their style, clarity, and rhetorical punch. Justice Gorsuch uses this technique no fewer than *fourteen times* in this debut opinion![28]

Here's one more example that I found particularly effective. Recall that the term "debt collector" means anyone who "regularly collects . . . debts owed or due . . . another."[29] The plaintiffs pointed out that the term "owed" is the past participle of the verb "to owe";[30] they knew that a textualist judge will sometimes consult ordinary rules of grammar to help solve interpretive puzzles. Invoking that principle, they argued that the statute must capture anyone who seeks to collect debts previously "owed . . . another."[31] The grammatical premise is correct but incomplete. Justice Gorsuch helpfully explained that past participles are "routinely used as adjectives to describe the present state of a thing—so, for example, *burnt* toast is inedible, a *fallen* branch blocks the path, and (equally) a debt *owed* to a current owner may be collected by him or her."[32]

To drive the point home, Justice Gorsuch again reverted to the conversational second-person style of address: "Just imagine if you told

26. *Id.*

27. *Id.*

28. *Henson*, 137 S. Ct. 1718 *passim*.

29. *Id.* at 1721 (quoting 15 U.S.C. § 1692a(6)).

30. *Id.* at 1722.

31. *Id.*

32. *Id.*

a friend that you were seeking to 'collect a debt owed to Steve.' Doesn't it seem likely your friend would understand you as speaking about a debt *currently* owed to Steve, not a debt Steve *used* to own and that's now actually yours?"[33] This informal style of writing makes the Court's decision easier to grasp, but it's also doing important interpretive work. Justice Gorsuch is using an ordinary, everyman style of writing to show us the ordinary, everyday meaning of the statutory text.

By now you've probably guessed how the Court resolved the case, but I'll keep you in suspense no longer: The term "debt collector" does *not* include a debt buyer collecting a debt for itself.[34] Of course there's much more to this statute—and the Court's opinion—than just the few short passages I've shared here.

This brings me to another important point about Justice Gorsuch's likely influence as an opinion writer. Many commentators have highlighted the easy, breezy style of his *Henson* opinion,[35] but its real strength actually lies in the structure. Justice Gorsuch organizes the opinion as a conversation with the losing side. Rather than start with a long, impenetrable account of the entire statutory regime, he lays out just the key portion of the text and identifies its most natural and straightforward reading.[36] Moving on, he gradually introduces other relevant parts of the statute as he sets up and tears down the losing side's arguments.[37]

It's almost like a game of tennis. Each argument is carefully served up in its own paragraph, only to be volleyed back and forth until the opinion's point is scored in the next paragraph. The arguments become more specific, nuanced, and difficult as he moves along, as if to guide the reader from the shallow to the deep end of the pool. (Forgive the mixed sports metaphors.) He then wraps up, like any good textualist, by dismissing the last-ditch policy arguments.[38]

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33. *Id.*

34. *Id.* at 1724.

35. *See, e.g.*, David G. Savage, *In His First Supreme Court Opinion, Gorsuch Shows Writing Flair, Strict Interpretation of Law*, L.A. Times (June 12, 2017), http://www.latimes.com/politics/la-na-pol-gorsuch-first-opinion-20170612-story.html [https://perma.cc/VWF6-TWKY]; Charles Fain Lehman, *Gorsuch Writes First Supreme Court Opinion With Unanimous Backing*, Wash. Free Beacon (June 12, 2017, 11:24 AM), https://freebeacon.com/issues/gorsuch-writes-first-scotus-opinion/ [https://perma.cc/29JW-S8VX].

36. *See, e.g.*, *Henson*, 137 S. Ct. at 1721–22 (dissecting the text of the Fair Debt Collection Practices Act).

37. *Id.* at 1722–24 (analyzing multiple subsections of the Fair Debt Collection Practices Act).

38. *Id.* at 1724–25 (noting that "petitioners ask us to move quickly on to policy" and subsequently rejecting the policy argument as "quite a lot of speculation").

Why is this so much more persuasive and easier to read than many judicial opinions? Because it's written the way people actually think. No one can hold an entire statute in his head and evaluate a barrage of arguments introduced later on. We tend to think in points and counterpoints. Statutes are dense, tedious things. There's a substantive command at the core, but usually many exceptions—and exceptions to the exceptions, interlocking definitions, and cross-references. Proceeding in small steps through the relevant text makes it easier to understand what the law is and why particular parts of the law may or may not be decisive in the case. Justice Gorsuch gives us each piece of law as needed to understand each piece of the argument. How sensible!

My final takeaway from this first Gorsuch opinion is this: Our newest justice is not content to simply say what the law is, dispatch the losing side's arguments, and call it a day. He closes his opinion in *Henson* with an elegant structure-of-government point, situating his textualist methodology within our constitutional system of separated powers:

> [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.
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> . . . .
>
> [R]easonable people can disagree with how Congress balanced the various social costs and benefits in this area, . . . [and] the evolution of the debt collection business might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past. After all, it's hardly unknown for new business models to emerge in response to regulation, and for regulation in turn to address new business models. 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 judiciary in that process—to apply, not amend, the work of the People's representatives.[39]

Let's move now to Justice Gorsuch's first dissent and first concurrence, and here I'll ask you to recall Professor McGinnis's point about judicial formalists.[40] Our new justice's first dissent came in *Perry*

39. *Id.* at 1725–26.

40. McGinnis, *supra* note 18 and accompanying text.

v. Merit Systems Protection Board,[41] a highly technical case about the proper forum for judicial review of certain decisions of the MSPB, an administrative tribunal that resolves workplace complaints by federal civil-service employees.[42] A complex statutory scheme sets up a bifurcated system of judicial review: Civil-service claims go to the Federal Circuit in Washington, D.C., and get deferential review; discrimination claims go to the regional district court and get de novo review.[43] The statute is so dense that Justice Alito asked at oral argument: "[W]ho wrote this statute? Somebody who takes pleasure out of pulling the wings off flies?"[44]

Justice Ginsburg's opinion for the Court holds (and I'm radically simplifying here) that certain "mixed cases"—those raising both civil-service and discrimination claims—go to the district court for review,[45] though that's not actually what the statute says. This atextual reading, she said, was a sensible way to resolve inefficiencies associated with the bifurcated review system actually set forth in the statute.[46]

Unsurprisingly, Justice Gorsuch objected on textualist grounds. He wrote: "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation."[47] The "business of enacting statutory fixes," he continued, "belongs to Congress and not this Court."[48] He goes on to explain why fidelity to the statutory text—also known as formalism—really matters:

> [T]aking up Mr. Perry's invitation [to tweak the statute] also seems sure to spell trouble. Look no further than the lower court decisions that have already ventured where Mr. Perry says we should follow. For every statutory "fix" they have offered, more problems have emerged, problems that have only led to more "fixes" still. New challenges come up just as fast as the old ones can be gaveled down. Respectfully, I would decline Mr. Perry's invitation and

41. 137 S. Ct. 1975 (2017).

42. *Id.* at 1979.

43. *Id.* at 1989 (Gorsuch, J., dissenting).

44. Transcript of Oral Argument at 43, Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975 (2017) (No. 16-399), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-399_3f14.pdf [https://perma.cc/6FRQ-E9JA].

45. *Perry*, 137 S. Ct. at 1988.

46. *Id.* at 1987–88.

47. *Id.* at 1990 (Gorsuch, J., dissenting).

48. *Id.* at 1988.

> would instead just follow the words of the statute as written.[49]

Even in this obscure and esoteric case, our new justice shows himself to be a thoroughgoing and principled textualist.

Justice Gorsuch's first concurrence is all about process values. The case is *Maslenjak v. United States*.[50] It raised an interpretive question about an immigration statute that makes it a crime to secure naturalization "contrary to law."[51] When the case at hand involves an immigrant's own naturalization, the government has to prove that the immigrant committed some illegal act in connection with his naturalization proceeding.[52] The question before the Court was one of causation: Must the government prove that the unlawful act actually contributed to the naturalization decision?[53] The unanimous answer was "yes," and Justice Kagan's opinion for the Court explained why the statutory language required that result.[54] But she did not stop there; she went on to fashion a two-part test for proving causation (with several subparts) and also an affirmative defense.[55]

Justice Gorsuch took issue with these causation "tests" and the affirmative defense, none of which had been briefed by the parties or addressed by the lower courts. His objection was modestly stated: "The work here is surely thoughtful and may prove entirely sound."[56] But "[r]espectfully," he said, "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."[57]

He concluded this way:

> For my part, I believe it is work enough for the day to recognize that the statute requires some proof of causation, that the jury instructions here did not, and to allow the parties and courts of appeals to take it from there as they

49. *Id.*

50. 137 S. Ct. 1918 (2017).

51. 18 U.S.C. § 1425(a) (2012).

52. *Maslenjak*, 137 S. Ct. at 1923.

53. *Id.* at 1924.

54. *Id.* at 1927.

55. *Id.* at 1929–30.

56. *Id.* at 1931 (Gorsuch, J., concurring in part).

57. *Id.*

> usually do. This Court often speaks most wisely when it speaks last.[58]

I've decided to call this the Matthew Chapter 6, Verse 34 concurrence: Let the day's own trouble be sufficient for the day.[59] Clearly Justice Gorsuch believes in adhering to the traditional norms of the judicial process, but it's not process for its own sake. He deeply respects his former colleagues on the lower courts. He wants to hear and learn from their work. And he holds the adversarial process in high regard as a hedge against judicial error.

These same commitments can be seen at work in another of Justice Gorsuch's opinions from the end of last term: his dissent in *Pavan v. Smith*.[60] The case involved a challenge to the birth-certificate regime in the State of Arkansas in the wake of *Obergefell v. Hodges*,[61] the Supreme Court's same-sex marriage decision. Two female same-sex married couples filed suit to alter Arkansas's rules for listing a child's parents on a birth certificate in order to accommodate the new reality of married same-sex parents. Each couple had conceived and borne a child through anonymous artificial insemination; in each case, the state Department of Health issued a birth certificate listing only the birth mother's name.[62]

That was consistent with state law, which provides that the birth mother is always listed; if she is married, state law further provides that her "husband shall be entered on the [birth] certificate as the father of the child."[63] An exception exists if the birth mother and her husband file affidavits identifying someone else as the child's biological father and the other man files an affidavit acknowledging paternity.[64] A separate statute covers children conceived through artificial insemination; it provides that "[a]ny child born to a married woman by means of artificial insemination shall be deemed the legitimate natural

58. *Id.* at 1932.

59. *Matthew* 6:34 (English Standard), https://www.esv.org/Matthew+6/ [https://perma.cc/9Y8D-MRAB] ("Therefore do not be anxious about tomorrow, for tomorrow will be anxious for itself. Sufficient for the day is its own trouble.") (last visited Oct. 6, 2018); *id.* (King James), https://www.kingjamesbibleonline.org/Matthew-Chapter-6/ [https://perma.cc/F5EJ-BS3P] ("Take therefore no thought for the morrow: for the morrow shall take thought for the things of itself. Sufficient unto the day *is* the evil thereof.") (last visited Oct. 6, 2018).

60. 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting).

61. *Id.* at 2076–77 (citing Obergefell v. Hodges, 135 S. Ct. 2584 (2015)).

62. *Id.* at 2077.

63. Ark. Code § 20-18-401(f)(1) (2014).

64. *Id.* § 20-18-401(f)(1)(B).

child of the woman and the woman's husband if the husband consents in writing to the artificial insemination."[65]

As the Arkansas Supreme Court read this statutory scheme, the requirements for listing a child's parents on a birth certificate "centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife."[66] On this understanding, the state high court held that the birth-registration regime was not inconsistent with *Obergefell*.[67]

The Supreme Court summarily reversed, rejecting the state court's determination that Arkansas had established a birth-recording system premised on biological parentage.[68] In a brief per curiam opinion, the Court noted that the statutory provision pertaining to artificial insemination showed that Arkansas had "chosen to make its birth certificates more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents."[69] And "[h]aving made that choice," the Court said, "Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition."[70]

Justice Gorsuch dissented, joined by Justices Thomas and Alito, but he did not announce his judgment on the merits.[71] Instead, he objected to the Court's unusual choice to proceed directly to decision without full briefing and oral argument. Summary reversal, he said, is "strong medicine."[72] It's "usually reserved for cases where 'the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.'"[73] Nothing in *Obergefell* had directly addressed the constitutionality of a birth-registration system based on biological parentage. He noted that Arkansas's birth-certificate regime has "many analogues across the country," and the state supreme court "did not in any way seek to defy [*Obergefell*] but rather [sought to] earnestly engage" the Supreme Court's decision.[74] "[W]hatever else we might do

65. *Id.* § 9-10-201(a) (2009).

66. Smith v. Pavan, 505 S.W.3d 169, 178 (Ark. 2016), *rev'd sub nom.* Pavan v. Smith, 137 S. Ct. 2075 (2017) (per curiam).

67. *Id.* at 177.

68. Pavan v. Smith, 137 S. Ct. at 2078–79.

69. *Id.*

70. *Id.* at 2079.

71. *Id.* (Gorsuch, J., dissenting).

72. *Id.* at 2080.

73. *Id.* at 2079 (quoting Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)).

74. *Id.*

with this case," he concluded, "summary reversal would not exactly seem the obvious course."[75]

He had other procedural objections too, but you get the gist. The issue in the case was substantial and unsettled. The state high court's decision was not an act of defiance. In the ordinary course, merits review entails a full adversarial process before the Court with a complete round of briefs and oral argument. For Justice Gorsuch, due respect for a reasoned decision of the state judiciary on an open question of federal constitutional law warranted giving the case the normal plenary consideration, not a summary disposition.

Finally, I'll say just a few words about Justice Gorsuch's concurrence in *Trinity Lutheran*,[76] the Court's important religious-liberty case from last term. Trinity Lutheran Church operated a preschool and applied to participate in a Missouri program that awards grants to nonprofit organizations that purchase playground surfaces made from recycled tires.[77] Missouri denied the application simply because it came from a church.[78] Trinity Lutheran argued that the State's policy of excluding churches from the playground-resurfacing program violated the Free Exercise Clause.[79]

The Supreme Court agreed. In an opinion by Chief Justice Roberts, the Court held that Missouri's policy "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[80] In practical effect, the State's policy "requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified."[81] That condition, the Court said, "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny."[82] Missouri's sole justification for excluding Trinity Lutheran from the playground grant program was to avoid raising Establishment Clause concerns.[83] That

75. *Id.*

76. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

77. *Id.* at 2017.

78. *Id.*

79. *Id.* at 2018.

80. *Id.* at 2021.

81. *Id.* at 2024.

82. *Id.* (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

83. *Id.*

did not suffice. The Court held that excluding the church from the program violates the Free Exercise Clause.[84]

Justice Gorsuch joined "nearly all" of the Chief's majority opinion, but he wrote separately to announce "two modest qualifications."[85] The first was a concern that the Court left open "the possibility [that] a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*."[86] Justice Gorsuch had some "doubts about the stability of such a line."[87] To illustrate, he offered a few examples: "Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission?"[88]

The doctrinal point is not hard to grasp, but it has caused some difficulty for the Court in past cases. Justice Gorsuch explained that the First Amendment "guarantees the free *exercise* of religion, not just the right to inward belief (or status)."[89] What this means, among other things, is that the government may not force people "to choose between participation in a public program and their right to free exercise of religion."[90] Justice Gorsuch couldn't see "why it should matter whether we describe [the public] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way."[91]

His second point of departure was related but struck some observers as gratuitous. The Chief Justice included a footnote in the majority opinion that might be understood as an effort to limit the scope of the Court's holding. Footnote number 3 reads: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[92] Though both statements are literally true, Justice Gorsuch found himself "unable to join the footnoted observation" and went out of his way to say so.[93]

84. *Id.* at 2024–25.

85. *Id.* at 2025 (Gorsuch, J., concurring in part).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 2026 (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990)).

90. *Id.*

91. *Id.*

92. *Id.* at 2024 n.3 (majority opinion).

93. *Id.* at 2026 (Gorsuch, J., concurring in part).

What are we to make of this skirmish over a footnote? We have no way of knowing if it signals a debate among the Justices. All we have to go on is what Justice Gorsuch said on the printed page, and his explanation begins with a statement of the obvious: he acknowledged that "[o]f course the footnote is entirely correct."[94] But he

> worr[ied] that some might mistakenly read it to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion.[95]

His concern was evidently strong enough that he was moved to state for the record what any law-trained reader would already know: the free-exercise principles that were decisive in the case were of general, not specific, application (footnote 3 notwithstanding). Apparently he thought it was important to make that point explicit, so he declined to join the footnote and closed his concurrence with this: "[T]he general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else."[96] Fair enough.

More proof of Justice Gorsuch's formalist and textualist commitments can be found in his other separate writings from his first few weeks on the job and also in his first few offerings this term. But I think that's enough food for thought for today; a nice reception awaits us. I will close this afternoon with a lighter moment from one of Justice Gorsuch's first oral arguments. And here I return to my earlier point about geographic diversity.

The case is *BNSF Railway Co. v. Tyrrell*,[97] and it concerned personal jurisdiction in Montana over a railway that carries goods through the state but has no other presence there.[98] The Chief Justice asked the plaintiff's lawyer about the limits of her argument.[99] She responded that the jurisdictional rule she urged the Court to adopt need not extend beyond railroads.[100] The Chief was not convinced that this line was sound. Here's the exchange:

94. *Id.*

95. *Id.*

96. *Id.*

97. 137 S. Ct. 1549 (2017).

98. *Id.* at 1553.

99. Transcript of Oral Argument at 33–34, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017) (No. 16–405), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-405_9olb.pdf [https://perma.cc/68CS-ZNWY].

100. *Id.* at 34.

> CHIEF JUSTICE ROBERTS: So . . . [t]rucking companies, they carry a lot of goods, too. . . . [T]hey're going to take -- what is it? -- 95 across [Montana][?] [N]ot 95. 90?
>
> JUSTICE GORSUCH: I-80 across Montana.
>
> (Laughter.)
>
> CHIEF JUSTICE ROBERTS: There you go. It's that geographical diversity. (Laughter.) So . . . I-80 across Montana, that's the route they're going to take. They're going to, just like the railroad[] is[,] going to follow the railroad tracks.
>
> JUSTICE GORSUCH: Maybe it's 90.[101]

Then a few minutes later:

> JUSTICE GORSUCH: And . . . I must apologize. It's 90 across Montana. (Laughter.) 80 across Wyoming. I'm very sorry, Mr. Chief Justice.
>
> (Laughter.)
>
> CHIEF JUSTICE ROBERTS: Didn't I say 90?
>
> (Laughter.)[102]

Thank you very much for your kind attention. I've enjoyed being with you.

101. *Id.* at 34–35.

102. *Id.* at 38.