The Curious Case of Justice Neil Gorsuch

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THE CURIOUS CASE OF JUSTICE NEIL GORSUCH

Justin Burnworth*

Abstract
Justice Gorsuch has a propensity for unexpected decisions. His opinions in Bostock v. Clayton County, United States v. Vello Madero, and McGirt v. Oklahoma confounded the legal community at large. Some argue that his Western upbringing played a role. Others argue that his time clerking for Justice Kennedy primed him for unpredictable decisions. These explanations do not get at the core of Justice Gorsuch’s legal reasoning. This article dives into the depths of these opinions to extract his “Enduring” theories of law. I argue that legal scholarship has incorrectly viewed these three decisions as isolated incidents when they are best understood as a collective effort by Justice Gorsuch. By extracting the themes and rules from these opinions, I maintain that he is the most likely conservative Justice on Supreme Court to rule in favor of marginalized people. Further, his steadfast following of his own theories of law will undoubtedly lead to more decisions like the ones discussed here. Justice Gorsuch’s predisposition for astonishing legal experts will continue to happen until they properly put his past decisions into perspective and understand them as a unified group. Blindly ignoring the recognizable pattern will only hinder efforts to make significant legal change, especially for the groups Justice Gorsuch has previously sided with.

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I. INTRODUCTION

“Once is happenstance, twice is coincidence,” and a third time is a revelation. Justice Gorsuch’s nomination to the Supreme Court caused ample speculation by legal experts and the general public when he replaced the late Justice Scalia. Many assumptions were made about the way he would decide and how he would stamp his mark on the Court. What no one in the legal community expected was for Justice Gorsuch to shock the public and legal experts with not one, not two, but three substantial decisions that advanced the interests of marginalized people. His opinions in *Bostock v. Clayton County*, *United States v. Vaello Madero*, and *McGirt v. Oklahoma* sent shockwaves through the nation and the legal community. Countless op-eds and law review articles attempted to make sense of each of the decisions—a myriad of theories were proposed hoping that some sort of clarity would emerge. This article argues that legal scholarship has mistakenly viewed each case individually when these momentous decisions are best understood as a collective effort by Justice Gorsuch. Further, it explores what his “Enduring” theories of law signify for marginalized people that fight to get their cases to the Supreme Court. While Justice Gorsuch’s more liberal colleagues will undoubtedly support marginalized groups more often, I argue that Justice Gorsuch is the most likely of the conservative justices to rule on their side.

1. IAN FLEMING, GOLDFINGER (1959).
3. See id.
8. See, e.g., Hurley, supra note 7 (“[H]is votes with the liberal justices in which he makes statements that echo liberal criticism of the U.S. government’s historic misdeeds stand out.”); Jason Buhi, Citizenship, Assimilation, and the Insular Cases: Reversing the Tide of Cultural Protectionism at American Samoa, 53 SEYON HALL L. REV. 779 (2023).
In an interview at the National Constitution Center, Justice Gorsuch spoke about the flaws and advantages of different constitutional theories.\(^9\) He said that originalism has a "terrible name" and that living constitutionalism "sounds kind of nice."\(^{10}\) However, he didn’t seem completely sold on either of the options and offered his own which he coined "Enduring Constitutionalism."\(^{11}\) I argue that when you view Justice Gorsuch’s decisions in Bostock v. Clayton County, United States v. Vaello Madero, and McGirt v. Oklahoma as a collective group they reveal both his theories of "Enduring Constitutionalism" and what I note as "Enduring Textualism." Treating each case as separate anomalies misses the point. Each case is linked by Justice Gorsuch’s "Enduring" theories of law and support that—despite the general expectations of the legal community—Justice Gorsuch will side with marginalized people in cases that fit into his theories of law.

Justice Gorsuch siding with marginalized people is probably not the first thing that pops into your head when you think of his time on the Court thus far. However, he has shown the propensity to do just that. On a recent episode of the podcast Divided Argument, law professors William Baude and Dan Epps discussed this theme in some of Justice Gorsuch’s opinions.\(^{12}\) Noting he supports "some" little guys if they are "being crushed or someone’s trying to crush the little guy."\(^{13}\) Professor Baude goes on to say that Gorsuch fights for "[a] little guy with a technical legal argument on his side."\(^{14}\)

Justice Gorsuch is puzzling to both those that cheered his nomination to the Supreme Court and those who opposed it.\(^{15}\) He provided little to no help to the legal community to understanding what kind of justice he would be on the Supreme Court during his

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10. Id.
11. Id.
13. Id. at 54:01.
14. Id. at 54:06.
confirmation hearings. This led legal scholars to suggest that his lack of answers—incorrectly utilizing the “Ginsburg rule”—concerning quintessential precedent would lead to “grave” results for the public at large. What exactly is it that makes Justice Gorsuch so unpredictable in certain salient cases? Some attribute Justice Gorsuch’s understanding of the effects of complex history of Federal Indian Law due to his upbringing in the West and serving on the Court of Appeals for the Tenth Circuit. Which makes sense to some degree but does not account for his sympathetic treatment of United States Territories or sex discrimination involving members of the LGBTQ+ community. Others argue that Justice Kennedy had a significant impact on him when Justice Gorsuch clerked for him. To better understand why Justice Gorsuch serves as a maverick on the Court, I dive into the three aforementioned cases to explore how Justice Gorsuch crafts his arguments. By extracting his logic in these cases, I will unveil the inner workings of his “Enduring” theories of law.

Recognizing Justice Gorsuch’s pattern of ruling in favor of marginalized people—who often lack the support structures and opportunity that is needed to repeatedly battle in the courts because they are often relegated by society—would help maximize the opportunities that these groups have to make significant change. Ignoring Justice Gorsuch’s affinity in these cases would be an injustice to all marginalized people. In his influential piece of scholarship, Marc Galanter explained why the “haves” come out ahead in the legal system and the

17. Id. at 477.
“have-nots” face such a difficult task in effecting legal change. His general idea is that the “one-shotters”—who only get to utilize the courts to their benefit on rare occasions—are at a significant disadvantage because of their lack of resources, influence on the rules that govern the law, and their need to win now since the outcome is so detrimental for them. However, the “repeat players” constantly engage in litigation, have extensive knowledge of the legal system, and can afford to lose in the short-term if it will benefit them in the long-term. The general legal community’s apathy towards the current Supreme Court is no excuse to waste the current efforts by marginalized groups—the “one-shotters” under Galanter’s typology. Two things can be and are often true—we can both call for reforms of the courts while continuing to employ them as they are. By ignoring Justice Gorsuch’s trend in these cases, we are playing a role in the harm done to these groups.

Part II of this article goes through some descriptive statistics that support my claim that Justice Gorsuch is more likely than his fellow conservative leaning colleagues to vote for liberal causes. I utilize judicial ideological scores to prove that the early predictions about the way Justice Gorsuch would vote have been proven incorrect. Part III unpacks the current theories that attempt to explain Justice Gorsuch’s surprising decisions. Part IV of this article takes a deep dive into Justice Gorsuch’s opinions in Bostock, Vaello Madero, and McGirt to discern the elements of his “Enduring” theories of law. The final part of this article brings together what we learned from the three cases and argues that they must be viewed as a collective group, not aberrations. Further,—building on evidence throughout the article,—I claim that Justice Gorsuch can be an ally for marginalized people fighting at the Supreme Court, even if he feels like an unlikely one.

II. DESCRIPTIVE STATISTICS ON JUSTICE GORSUCH’S VOTING BEHAVIOR

A. Justice Ideology Scores

When Justice Gorsuch replaced Justice Scalia on the Supreme Court many legal experts speculated about how conservative Justice

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23. See id. at 98–103.
24. See id.
Gorsuch would turn out to be.\textsuperscript{25} Some argued that Justice Gorsuch could turn out to be more conservative than his predecessor.\textsuperscript{26} He has been on the Court for a few years which gives scholars the opportunity to properly evaluate his ideological position on the Court.

The prominent approach for estimating a Supreme Court Justice’s judicial ideology is the Martin-Quinn Scores ("MQ").\textsuperscript{27} The measures are viewed on an ideological continuum and estimate using a dynamic item response theory model.\textsuperscript{28} These scores gives scholars a replicable measure to compare where justices fall on the ideological spectrum.\textsuperscript{29} A positive score indicates that a justice tends to make conservative rulings and a negative score indicates the justice consistently votes in the liberal direction.\textsuperscript{30} To provide some context I will use the scores of Justice Gorsuch, Justice Scalia, and Justice Kennedy to determine how Justice Gorsuch falls on the judicial ideological spectrum currently.

\footnotesize
\begin{enumerate}[\textsuperscript{25}]
\item See Taylor, supra note 2.
\item See id. at 137.
\item See id.
\item See id.
\item See id. at 145.
\end{enumerate}
Figure 1: Martin-Quinn judicial ideology scores for Justices Kennedy, Scalia, and Gorsuch during their tenure on the Supreme Court.\textsuperscript{31}

Figure 1 indicates that the early predictions of Justice Gorsuch were incorrect. Justice Gorsuch’s average MQ score is 1.06 over his time on the Court. Justice Kennedy’s was 0.68 and Justice Scalia’s was 2.51.\textsuperscript{32} To provide further context on what the spectrum of scores looks like Justice Thomas has an average score of 3.47 over his tenure on the court and Justice Ginsburg is at -1.75.\textsuperscript{33} It is unarguable that—as of now—Justice Gorsuch is closer to Justice Kennedy than he is Justice Scalia. These scores may change over time, but until they do it is empirically true that the early predictions about Justice Gorsuch’s place on the ideological spectrum were flat out wrong.

B. Analyzing Conservative Justices’ Votes

The Supreme Court Database (SCDB) is the standard for any researcher looking to examine the Supreme Court.\textsuperscript{34} The SCDB contains over 200 pieces of information for every case decided by the Supreme Court.

\begin{table}[h]
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\begin{tabular}{|c|c|c|}
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32. Id.
33. Id.
34. See Harold J. Spaeth et al., The Supreme Court Database, http://supremecourtdatabase.org (last visited Jan. 27, 2024).
\end{tabular}
\end{table}
Court between 1791 and 2021. The database’s information about the cases is broken down into 6 categories: identification variables, background variables, chronological variables, substantive variables, outcome variables, and voting and opinion variables.

The variable that I am focusing on is “decisionDirection” which codes the ideological leaning of the decision. The decisions are labeled conservative, liberal, or unspecifiable. As an example of how this works—a case concerning a criminal procedure issue would be labeled “liberal” if the result is “pro-person accused or convicted of crime, or denied a jury trial[.]” The same case would be labeled “conservative” if the decision was the reverse of that.

Figure 2: Percentage of Justices Voting Liberal Where the Majority Votes Conservative

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36. See id.
38. See id.
39. Id. at 50–51.
40. See id. at 51.
Figure 2 displays the percentage of “liberal” votes joined when the majority opinion is coded as a “conservative” decision by the current six republican-appointed justices on the Supreme Court. The table includes every decision that the justices mentioned have made since on the Supreme Court. As evident from the data, Neil Gorsuch is nearly twice as likely as the nearest conservative Justice to make a liberal vote when the majority of the Court makes a conservative decision. That number is both surprising and telling. Not only is Justice Gorsuch drastically more likely to join in this sort of decision, but it also shows that even when a majority of the Supreme Court is ruling in the assumed direction that many predict Justice Gorsuch to join, he is the most likely justice to pivot from the perceived assumptions about decisions.

These numbers show that Justice Gorsuch is the most likely of the six republican appointed Justices to oppose a conservative majority decision. This provides empirical evidence for my claim that Justice Gorsuch is more likely than the other conservative justices to vote for a liberal cause. While the eleven percent does not prove that Justice Gorsuch is any sort of champion of liberal rights, the fact that he is twice as likely to vote against a conservative majority than Chief Justice Roberts or Justice Kavanaugh—the perceived potential swing justices—gives credence to my argument that he is the most likely of the conservative justices to go against the grain.

Exploring a justice’s prior decisions can provide noteworthy insight into how they will decide future ones. Justice Gorsuch’s early jurisprudence in antitrust law and criminal law has been examined by
legal scholars. Daniel Kaplan argued that former President Trump “delivered on his promise to appoint a justice ‘in the mold of Justice Scalia’—assuming that he meant Scalia-the-jurist, and not Scalia-the-mantra.” Kaplan goes on to suggest that Trump most likely did not intend to do that, but “criminal defendants have reason to celebrate his mistake.” John Newman found that on the 10th Circuit Court of Appeals, Justice Gorsuch’s “opinions subtly—but substantially—deviated from the dictates of binding precedent” at times, which makes sense given the cases below and what the legal community has learned from Justice Gorsuch thus far.

The purpose of this article is to expand on these early attempts to evaluate Justice Gorsuch’s jurisprudence. Further, I am specifically looking at cases where Justice Gorsuch went against the perceived side he would rule for. Additionally, all of the cases share the characteristic of involving marginalized groups. By looking at these salient cases, it will give the legal academy a more complete picture on the totality of Justice Gorsuch’s jurisprudence. Therefore, the legal community will have a better idea what to look for in oral arguments involving these types of cases and have more context to the possible outcomes.

### III. EXPLANATIONS FOR JUSTICE GORSUCH’S UNANTICIPATED DECISIONS

#### A. Clerking for Justice Anthony Kennedy

Although Justice Gorsuch obtained the most competitive judicial clerkship in the country—through his achievements at Harvard Law School and Oxford—it was a fortuitous event that led him to clerk for Justice Kennedy. Justice Gorsuch was originally hired by Justice Byron White, who retired, so Justice Gorsuch was assigned to Justice Kennedy in the summer of 1993. This created a bond between

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43. Kaplan, supra note 42, at 33.

44. Id.


46. See Liptak & Fandos, supra note 20.

47. See id.
mentor and mentee that would come full circle twenty-five years later when Gorsuch would join Justice Kennedy on the Court, replacing the late Justice Scalia.\textsuperscript{48}

Critics claimed that Justice Gorsuch’s decisions would be more in line with the most conservative Justices and that he would not follow in the footsteps of his mentor Justice Kennedy.\textsuperscript{49} However, similar claims were levied against Justice Kennedy when he was nominated—he was even called a “true conservative” by former President Reagan.\textsuperscript{50} Justice Kennedy became the swing vote on the Court and often sided with the more liberal justices in monumental cases concerning marriage equality, abortion rights, and affirmative action.\textsuperscript{51} Justice Kennedy’s career could serve as precursor for his former clerk. A fellow clerk—that clerked during the same term as Justice Gorsuch—said that “[t]here were a lot of ideologies both left and right, and [Justice Gorsuch] wasn’t one of them . . . . He was careful, quiet.”\textsuperscript{52}

Justice Gorsuch participated in a tribute to Justice Kennedy in special issue of Harvard Law Review when the later retired from the Court.\textsuperscript{53} Justice Gorsuch reflected on his relationship with “Anthony Kennedy” and the impact that he had on him as a person and a judge.\textsuperscript{54} Justice Kennedy gave Justice Gorsuch a plethora of advice but one piece that stuck out to him the most was that “[t]his nation’s independent courts may not be perfect, but their promise of equal justice under law for all persons represents one of the noblest of human aspirations in any place or age.”\textsuperscript{55} Justice Gorsuch remarked, “Justice Kennedy could say these things because he lived all these things.”\textsuperscript{56} Justice Gorsuch recalled Justice Kennedy’s unabashed desire to join in on Gorsuch’s first opinion on the Court.\textsuperscript{57} Fighting through the adversity of failing technology and with the assistance of someone driving a hard copy out to the justice, Justice Gorsuch received a hand-written

\textsuperscript{48} See id.\textsuperscript{49} See id.\textsuperscript{50} Amy Howe, Anthony Kennedy, Swing Justice, Announces Retirement, \textsc{scotusblog} [June 27, 2018, 7:01 PM], https://www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/.\textsuperscript{51} Liptak & Fandos, supra note 20.\textsuperscript{52} Id.\textsuperscript{53} See John G. Roberts, Jr. et al., \textit{In Tribute: Justice Anthony M. Kennedy}, 132 \textsc{Harv. L. Rev.} 1, 3 (2018).\textsuperscript{54} See id.\textsuperscript{55} Id. at 4.\textsuperscript{56} Id.\textsuperscript{57} See id. at 4–5.
memo the next morning with “join memo” scribed on it—which he keeps in the top drawer of his desk.  

When then Judge Gorsuch joined the United States Court of Appeals for the Tenth Circuit, Justice Kennedy administered his oath of office and exclaimed, “[Justice Gorsuch is] doing it to remind all of us that the first obligation any American has is to defend and protect the Constitution of the United States.” The echoes of Justice Kennedy’s sentiments are apparent in Justice Gorsuch’s opinions below. They were the first Justice and former law clerk pair to both serve on the Court together. It is hard pressed to ignore the impact that Justice Kennedy had on a young Justice Gorsuch.

B. How the West Shaped Justice Gorsuch

Justice Gorsuch does not only disagree with the fellow conservatives on the Court in cases related to tribal law, he rips their blatant misunderstandings of tribes apart. A lawyer with expertise in Native American law said, “[t]he reason Justice Gorsuch gets these opinions right is because he’s had experience in those circuits.” Justice Gorsuch grew up in Denver, Colorado and would go on to serve on the Court of Appeals for the Tenth Circuit for a decade. Further, the member of the Onondaga Nation stated that Gorsuch’s years out West are what exposed him to the issues and complexities required to understand Native law and the people that it effects.

A former colleague said that Justice Gorsuch brings a “little bit more geographical diversity” to the Court and it allows him to understand uniquely Western issues. In an interview with the National Constitution Center, Justice Gorsuch joked how most of the current justices are from New York which he said is “okay.” But the

58. See id.
59. Liptak & Fandos, supra note 20.
60. Roberts et al., supra note 53, at 4.
61. See Vlamis, supra note 18 (“When Supreme Court Justice Neil Gorsuch broke from his conservative colleagues … on a case related to tribal sovereignty, he didn’t just disagree with them—he bashed their entire understanding of Native law and all but accused them of contorting the law to reach an outcome they wanted.”).
62. Id. (referring to Justice Gorsuch’s tenure on the Tenth Circuit).
63. See id. The Tenth Circuit covers Colorado, Wyoming, New Mexico, Utah, Kansas and Oklahoma. See id.
64. See id.
65. Id.
66. National Constitution Center, supra note 9, at 29:06.
sentiment and importance of geographical diversity—in a nation as large as the United States—is certainly something to consider.

During Justice Gorsuch’s nomination the Tribes endorsed him. The Chairman of the Crow Tribe Executive Branch wrote a letter to the Senate saying, “Judge Gorsuch’s record includes a great number of decisions involving tribal governments, tribal people and tribal interests, and he has consistently demonstrated not only a sound understanding of Federal Indian Law principles, but a respect for our unique and closely held cultural values . . .”67 The president of the Fort Belknap Indian Community Council echoed that attitude in a similar letter that stated that Justice Gorsuch is a “mainstream, commonsense Westerner who will rule fairly on Indian country matters.”68 While the McGirt69 decision discussed later on might have been a shock to legal academia and the public at large, it seems to be that the Native interest groups were well aware of Justice Gorsuch’s care and understanding of Federal Native law.70

Justice Gorsuch’s western upbringing played a role in his nomination process as well.71 Senator Jeff Flake from Arizona professed, “[a]s an Arizonan, I cannot overstate how important it would be to have a fellow Westerner serving on the Supreme Court. Where you’re from influences your understanding of cultural and regional sensitivities.”72 The senator went on to stress the lack of geographical diversity that has plagued the Court for decades.73 He stated, “[o]f the eight current Justices, five of them were born in New York or New Jersey . . . .”74 The heavy focus on Justice Gorsuch’s western roots was jostled by observers for taking the exercise a step or two too far.75 However, Berkeley Law School’s professor Jesse Choper noted that most of the cases surrounding Western issues such as public laws or water laws won’t come up very often.76 Further, they stated, “I think it’s nice that he’s from the West, but that’s not what they got him for. Let’s leave it

67. Vlamis, supra note 18.
68. Id.
70. See Vlamis, supra note 18.
72. Id.
73. See id.
74. Id.
75. See id.
76. See id.
at that." Professor Choper’s point is valid, but Justice Gorsuch has already shown his influence on Federal Indian Law cases with more to be decided soon. While being a Westerner is not the only thing that matters, the evidence shows that it is a plausible part of the equation that separates Justice Gorsuch from his fellow conservative justices and certainly that of Justice Scalia.

There is surely something to be said about Justice Gorsuch’s experience of growing up in the West and how that shaped his perspective on the law. However, it does not explain the whole story. The influence of clerking for Justice Kennedy and his roots in the West should be examined and certainly play a role in his legal philosophy. Nonetheless—I am sure Justice Gorsuch would agree with me—the best way to understand his “Enduring” theory of law is to dive into the text of his opinions and extract the logic on which they are established.

IV. BOSTOCK, VAELLO MADERO, AND McGIRT

A. Justice Gorsuch Shocks the Legal Community

Anyone that claims to not be stunned by the decision in Bostock v. Clayton County, Georgia is either lying or was an oracle in a past life. In an astounding and monumental decision, the Supreme Court ruled that when an employer fires an individual for being homosexual or transgender it is a violation under Title VII of the Civil Rights Act of 1964. As one of her last and wisest actions on the Court, the late Justice Ginsburg assigned the majority opinion to Justice Gorsuch, knowing full well the significance of that kind of opinion being written by the heir apparent to Justice Scalia.

Justice Gorsuch pulled no punches in the majority opinion that has already generated a significant amount of legal scholarship trying to analyze the idea of “living textualism” and the impact of the decision on the LGBT+ community. Justice Gorsuch ushered in a textualist

77. Id.
79. See id. at 1737.
80. See Kaplan, supra note 42, at 27 (emphasizing that President Trump appointed Neil Gorsuch “in the mold of the late Justice Antonin Scalia”).
81. See Nelson Lund, Unleashed and Unbound: Living Textualism in Bostock v. Clayton County, 21 FEDERALIST SOC’Y REV. 176, 178–81 (2020); Sean Cahill, Guest Editor, The Best of Times . . . the Worst of Times: What Bostock v. Clayton County,
reading that no one was prepared for. He began by dismissing the anticipation of those that wrote the Civil Rights Act. He states that though the drafters of one of the most significant pieces of legislation in our nation’s history may not have contemplated the case before them, that was irrelevant because “the limits of the drafters’ imagination supply no reason to ignore the law’s demands.”

The facts of the case were brief. Bostock involved three separate cases where each employee brought a suit under Title VII alleging unlawful discrimination based on sex. In each of the cases, the employers fired long-time employees soon after they revealed that they were homosexual or transgender. Gerald Bostock worked as a child welfare advocate for the state of Georgia who began to receive hateful comments by the community after joining a gay recreational softball league. Bostock was fired soon after—even though they had received multiple national awards for their job. Donald Zarda—a skydiving instructor in New York—was abruptly fired after multiple seasons once he mentioned that he was gay. The last case involved Aimee Stephens—a funeral worker from Michigan—who transitioned from identifying as a male to a female and was promptly told “this is not going to work out” by their employer. The Supreme Court granted certiorari because of the inconsistencies in how the different circuits were ruling on the scope of Title VII’s protections for homosexual and transgender persons.

Justice Gorsuch begins his analysis of the cases as every good textualist is taught to by referencing how the Court normally interprets a statute “with the ordinary public meaning of its terms at the time of its enactment.” To examine a statute any other way would allow judges to “add to, remodel, update, or detract from old statutory

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82. See Bostock, 140 S. Ct. 1731.
83. See id. at 1737 (“Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.”).
84. Id. at 1737.
85. See id. at 1738.
86. See id. at 1737.
87. See id.
88. See id. at 1737–38.
89. See id. at 1738.
90. Id.
91. See id.
92. Id.
terms inspired only by extratextual sources and our own imaginations, [and] would risk [the]amend[ment of] statutes outside the legislative process reserved for the people’s representatives.” Justice Gorsuch notes that sticking to the original meaning of the text is required for people to understand their “rights and obligations” under any law passed by Congress.

Justice Gorsuch takes us back to 1964 and the passing of the Civil Rights Act so that we can “orient ourselves to the time of the statute’s adoption” and properly assess the statutory terms at issue. The term at issue in the case was “sex” and he pointed out that the parties’ dispute over whether “sex” in 1964 was based on reproductive biology or if it included a broader spectrum including sexual orientation and gender identity is not important for what the Court must determine in the case. Justice Gorsuch signals that the issue is what Title VII itself says about “sex” and that “[m]ost notably, the statute prohibits employers from taking certain actions ‘because of’ sex.”

The majority goes on to say that the Court has previously ruled that the meaning of “because of” is “by reason of” or “on account of.” Therefore, it means that Title VII’s “because of” test uses the legal standard of but-for causation. The but-for legal test requires you to change one thing and determine if the outcome changes—if it does then you have found a but-for cause. To apply the but-for causation test with Title VII, Justice Gorsuch explains that the standard stipulates that an employer cannot avoid liability simply by claiming another factor as the reasoning that they fired the employee—because there can be multiple but-for causes in a case. If the plaintiff’s sex was one of the but-for causes, it triggers the law’s protection.

Gorsuch notes that Congress, when enacting the Civil Rights Act, could have taken a more “parsimonious approach” as it has done in other laws, but it did not do so. Actually, Congress took Title VII

93. Id.
94. Id. (citing New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538–39 (2019)).
95. Id. at 1738–39.
96. See id. at 1739.
97. Id.
99. See id.
100. See id. (quoting Nassar, 570 U.S. at 346, 360).
101. See id.
102. See id.
103. Id. at 1739.
in the opposite direction by amending the law “in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a ‘motivating factor’ in a defendant’s challenged employment practice.” ¹⁰⁴ Though but-for causation can be sweeping, Gorsuch notes that Title VII does not focus on “everything that happens ‘because of’ sex[,]” but that the statute “imposes liability on employers only when they ‘fail or refuse to hire,’ ‘discharge,’ ‘or otherwise . . . discriminate against’ someone because of a statutorily protected characteristic like sex.” ¹⁰⁵

Justice Gorsuch cites Justice Alito’s dissent noting that interpretation of the statute might refer to discrimination based on a category—not individuals¹⁰⁶—therefore it would only require employers to not treat women less favorably than men.¹⁰⁷ To answer this question, the Justice looks to the text and notes that “[t]he statute answers [this] question directly[,]” three times to be exact.¹⁰⁸ He quotes Title VII to exhibit that the Court’s focus should be on individuals not groups: “[e]mployers may not ‘fail or refuse to hire or . . . discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.’”¹⁰⁹

Justice Gorsuch goes further noting the ways that Congress could have written Title VII in such a way for the law to serve only to prevent sexist policies against women as a class, but Congress continued to emphasize that it was sex as an individual not as a group throughout the law.¹¹⁰ He goes on to provide an example of how the law protects individuals rather than groups purely to engage in the “academic” debate put forth by the dissenters.¹¹¹ His example follows as such: if an employer fires a woman because she is insufficiently feminine and also fires a man because he is insufficiently masculine, the employer has fired both individuals in part because of sex.¹¹² This would not prevent the employer from violating Title VII because he

¹⁰⁴. Id. at 1739–40 (quoting Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-2(m)).
¹⁰⁵. Id. at 1740 (quoting 42 U.S.C. § 2000e-2(a)(1)).
¹⁰⁶. See id.
¹⁰⁷. See id. (“Maybe the law concerns itself simply with ensuring that employers don’t treat women generally less favorably than they do men.”).
¹⁰⁸. See id.
¹⁰⁹. Id. (quoting 42 U.S.C. § 2000e-2(a)(1)).
¹¹⁰. See id. at 1741.
¹¹¹. See id.
¹¹². See id.
treated both the man and the woman “equally”; instead it would double evidence for violation of the law’s protections.\textsuperscript{113}

Justice Gorsuch then extracts the rule from Title VII based on the ordinary public mean of the statute’s language when the law was adopted: “[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex.”\textsuperscript{114} He notes that it doesn’t matter if there were other factors that led to the firing and it doesn’t matter if women were treated equally as a group to men: “If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred.”\textsuperscript{115} With a final nail in the coffin, Justice Gorsuch writes that the message of Title VII “is ‘simple but momentous’: An individual employee’s sex is ‘not relevant to the selection, evaluation, or compensation of employees.’”\textsuperscript{116}

After Justice Gorsuch interpreted the proper rule of Title VII, he then moved to applying it in the case at hand. In Gorsuch’s logic “it is impossible to discriminate against a person for being homosexual or transgender without discrimination against the individual based on sex.”\textsuperscript{117} In two examples that fully exhibit the Gorsuchian style of logic being deployed, the majority shows how it is simply impossible to discriminate against someone for being homosexual or transgender without doing it because of the individual’s sex.

In the first example, Gorsuch asks everyone to imagine two identical employees, from the mind of the employer, both are attracted to men, however one employee is a man and the other employee is a woman.\textsuperscript{118} The employer then decides to fire the male employee simply because they are attracted to other men.\textsuperscript{119} However, the employer decides to not fire the woman who is also attracted to men.\textsuperscript{120} If the employer fires the male employee but keeps the female employee, then they are firing the male employee for reasons they

\begin{itemize}
\item 113. See id.
\item 114. Id.
\item 115. Id.
\item 116. Id. (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion)).
\item 117. Id.
\item 118. See id.
\item 119. See id.
\item 120. See id.
\end{itemize}
find perfectly suitable for the woman employee.\textsuperscript{121} Gorsuch explains, “[p]ut differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge.”\textsuperscript{122}

To illustrate his point, Justice Gorsuch asks the reader to consider an employer who specifically has a policy to fire any woman because she is a Yankees fan.\textsuperscript{123} By firing that employee because they are a woman and Yankees fan it is undoubtedly “because of sex” if the employee would not also fire any man that turns out to be a Yankees fan.\textsuperscript{124} Justice Gorsuch then brings the analogy back to the case at hand when he argues:

When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual’s sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn’t care. If an employer would not have discharged an employee but for that individual’s sex, the statute’s causation standard is met, and liability may attach.\textsuperscript{125}

Justice Gorsuch’s attention moves to the intention of the employer and how that relates to the case. He argues that “intentional discrimination based on sex violates Title VII” even if the employer’s intention is only a workaround to discriminate specifically against their homosexual or transgender employees.\textsuperscript{126} To hammer his point down on the importance of intent, Justice Gorsuch provides another legal analogy gem, “[i]ntentionally burning down a neighbor’s house is arson, even if the perpetrator’s ultimate intention (or motivation) is only to improve the view.”\textsuperscript{127} The point is that even if the employee only wants to discriminate based on their employee’s sexual orientation, they must do so based on sex to get to that point. In the majority’s opinion, this is the plain meaning of Title VII and “should be the end of the analysis.”\textsuperscript{128}

\textsuperscript{121} See id.
\textsuperscript{122} Id.
\textsuperscript{123} See id. at 1742.
\textsuperscript{124} Id.
\textsuperscript{125} Id. (emphasis added).
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 1743 (quoting Zarda v. Altitude Express, Inc., 883 F.3d 100, 135 (2d Cir. 2018) (Cabranes, J., concurring)).
Justice Gorsuch then turns his attention from the text of Title VII to the Supreme Court’s past cases on the matter at hand to show that their logic is also supported by precedent. The three cases he provides as support are: Phillips v. Martin Marietta Corp.,\textsuperscript{129} City of Los Angeles, Department of Water and Power v. Manhart,\textsuperscript{130} and Oncale v. Sundowner Offshore Services, Inc.\textsuperscript{131} Justice Gorsuch pulls three lessons from the cases to support their current decision.\textsuperscript{132} First, it is irrelevant what an employer calls, labels, or motivates its discriminatory practice.\textsuperscript{133} Second, sex does not have to be the only cause for the employer’s action.\textsuperscript{134} Lastly, employers cannot simply escape liability for exhibiting that they treat women and men the same as separate groups.\textsuperscript{135}

The next area of focus for Justice Gorsuch is the defenses that an employer makes in the case. The employers argue that discrimination against an employee based on their “homosexuality and transgender status” is not considered sex discrimination in “ordinary conversation.”\textsuperscript{136} This argument is based on the “conversational answer” that would be given by someone that was fired because they were transgender or gay because they would not respond that they were fired for their sex.\textsuperscript{137} Justice Gorsuch quickly dismisses this defense because it presumes that “conversational conventions” control Title VII legal analysis when in reality it simply asks “whether sex was a but-for cause.”\textsuperscript{138} To clarify his point, Justice Gorsuch explains that sex doesn’t have to be the only factor and it may not be the factor that the employee thinks was the reason, but it is one but-for cause which constitutes the requirements under Title VII.\textsuperscript{139} To conclude he reiterates, “[y]ou can call the statute’s but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.”\textsuperscript{140}

\textsuperscript{132} See Bostock, 140 S. Ct. at 1744.
\textsuperscript{133} See id.
\textsuperscript{134} See id.
\textsuperscript{135} See id.
\textsuperscript{136} Id. at 1745.
\textsuperscript{137} See id.
\textsuperscript{138} Id.
\textsuperscript{139} See id.
\textsuperscript{140} Id.
The majority opinion steadily works through possible defenses denouncing them with the logic already provided earlier on. One section provides a perfect summary of the logic being applied by Justice Gorsuch based on the requirements under Title VII. He says, "[b]y discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals’ sex, even if it never learns any applicant’s sex."\textsuperscript{141}

Justice Gorsuch goes on for some length about why Title VII was not amended to include the separate category of sexual orientation, even though there were multiple discussions to do so by later Congresses.\textsuperscript{142} The important aspect here is that Justice Gorsuch argues that while future Congresses considered and did not amend Title VII, it does not change the intention that the Congress had in 1964.\textsuperscript{143} Trying to figure exactly which later Congresses understood the broad language of Title VII is not important because it would set the dangerous standard of trying to discern "an interpretation of an existing law a different and earlier Congress did adopt."\textsuperscript{144}

In another defense, the employer argues that this sort of case feels different than previous sex discrimination cases because members of the opposite sex might face similar outcomes.\textsuperscript{145} To continue the unlimited Gorsuchian analogies, in this case, the justice responds by proposing another hypothetical. He asks you to imagine on a warm day you decide to open the window of your house.\textsuperscript{146} He argues that both the heat inside your house and the cool air outside it are but-for causes for why you opened the window.\textsuperscript{147} It does not change because you would have also opened the window if it was cold inside and warm outside—"the window is open 'because of' the outside temperature."\textsuperscript{148} Justice Gorsuch then applies his analogy to the case at hand:

\begin{quote}
when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can also get an
\end{quote}

\begin{itemize}
\item \textsuperscript{141} Id. at 1746.
\item \textsuperscript{142} See id. at 1746–47.
\item \textsuperscript{143} See id. at 1747.
\item \textsuperscript{144} Id. at 1747.
\item \textsuperscript{145} See id. at 1748.
\item \textsuperscript{146} See id.
\item \textsuperscript{147} See id.
\item \textsuperscript{148} Id.
\end{itemize}
employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case, though, sex plays an essential but-for role. 149

I bring in these quotes to show Justice Gorsuch’s unique style of judging and legal logic in Bostock. He first looks to the text to discern what the tests and controlling parameters of the statute are. 150 Once those are set, they are set in stone and any defense against them is dismissed by applying the logic obtained from the statute utilizing everyday analogies about sports teams or the weather. 151 This style of reasoning may seem unique and is what has defined Justice Gorsuch’s approach on the Court so far, but the reasoning is formulaic. It can be understood and applied once you understand the construction and rules.

Moving back to the opinion, Justice Gorsuch says the employer’s argument that sex be the “sole or primary” cause for the employment action goes against everything the Court knows about Title VII. 152 Justice Gorsuch gives another analogy to explain the inappropriate reasoning of the employer: If an employer wanted to go back to 1950’s gender roles in the workplace, the employer’s interpretation would have the Court rule that a woman being denied a job for a mechanic that a man was offered would not be discrimination and in turned it is proper to look to whether that employer would hire a man to be a secretary and instead hired a woman. 153 Justice Gorsuch argues that this misses the point; and it is the sex of the woman that was a but-for cause of the termination. 154

Justice Gorsuch is perplexed by the idea that we would apply the “simple test” when an employer hires based on sexual stereotypes, when they set pension contributions based sex, and when an employer fires men for not acting masculine enough around the office. 155 However, the employer asks in this case for a “new and more rigorous standard” when the same employer “discriminates against women who are attracted to women, or persons identified at birth as women

149. Id.
150. See supra notes 98–105 and accompanying text.
151. See supra notes 123–24, 146–48 and accompanying text.
152. See id.
153. See id.
154. See id.
155. See id. at 1749.
who later identify as men.”

Justice Gorsuch poses the question: “[w]hy are these reasons for taking sex into account different from all the rest? Title VII’s text can offer no answer.”

After failing to base their case on statutory text and precedent, the employers then turn to “assumptions and policy” contending that it is difficult to imagine that in 1964 Title VII would “apply to discrimination against homosexual and transgender persons.”

Justice Gorsuch notes that the Supreme Court has repeatedly held that when the meaning of a statute is clear then their job is over and that “people are entitled to rely on the law as it is written, without fearing that courts might disregard its plain terms based on some extratextual consideration.” Further, that bringing in any “extratextual considerations” will only bring fear that the courts might not apply those protections as they are written.

Justice Gorsuch makes clear that some members of the Court look to legislative history when the text is unclear, but they never do so to create ambiguity.

Bostock has generated an overabundance of legal scholarship. Some literature praised the Court and Justice Gorsuch, though they wished more had been done. The authors of Feminist Perspectives on Bostock v. Clayton County described the decision as monumental and a relief for advocates of LGBTQ+ rights who awaited the conservative leaning Court’s decision. Although the authors are critical of the unanswered questions in Bostock, they still argue it is “the most significant civil rights victory for the LGBTQ+ community since the landmark decision five years ago in Obergefell v. Hodges[.]” The decision is not short on its praise nor criticism in legal scholarship which is a testament to its importance.

An article by Jack Thompson published in Political Research Quarterly discovered an interesting finding on how Bostock affected
the attitudes of LGBTQ+ individuals by the larger public. Using a quasi-experiment, Thompson found increased favorability of LGBTQ+ individuals by the public at large after Bostock was decided—which gives credibility to the legitimacy model that "posits that judicial actions enshrine pro-LGBT policies with greater social legitimacy via the mass public’s respect for the rule of law."  

Other scholarship, from sources that typically champion Justice Gorsuch, slammed the decision. Both Nelson Lund and Rena Lindevaldsen criticized Bostock for contorting textualism in ways that had never been seen before. Nelson Lund candidly claimed that "Bostock is an outlandish judicial performance." Further, Lund claims that "Bostock's particular application of textualist principles is fatally flawed ...." More liberal scholars seemed to appreciate the outcome but desired the decision to go even further and answer questions about non-binary individuals and bisexuals, while more conservative takes on the decision ridicule Justice Gorsuch’s style of textualism which Lund describes as “living textualism.” Lund then goes on to argue for using the flawed reasoning—which is perplexing—but the point is that Justice Gorsuch’s opinion in Bostock has inspired praise and criticism from the legal community. This gives confidence to the sheer magnitude of the decision’s lasting importance.

Certainly, no decision will appease everyone—or law reviews would run dry of new material—but legal scholarship does not seem to understand exactly what to make of Justice Gorsuch’s style of textualism. While professor Lund called it “living textualism” given Justice Gorsuch’s self-labeled preference for "Enduring

166. Id. at 1375.
168. See Lund, supra note 81, at 176–77; Lindevaldsen, supra note 167, at 78–79.
169. Lund, supra note 81, at 185.
170. Id.
171. See McGinley et al., supra note 162, at 10, 13.
173. See id. at 185 (“Although Bostock’s particular application of textualist principles is fatally flawed, those principles can and should be faithfully applied in other cases.”).
174. See supra note 172 and accompanying text.
Constitutionalism”—I argue the appropriate way to understand Bostock is through a lens of “Enduring Textualism.” The whole point of Justice Gorsuch’s style of textualism is to stay true to the way the law was written when it is clear what the words mean. Further, it is not the Court’s job to bring in “extratextual circumstances” to alter the law in question—it is not the job of a judge to generate ambiguity where it does not exist.  

A lot of the confusion from Bostock comes from Justice Gorsuch’s relentless use of textualism by analogy. This type of textualism has been promoted in favor of the dictionary style use of textualism. Jason Weinstein argues that “[t]he dictionary is a failed mechanism to pinpoint exact parameters of words when it is written to do exactly the opposite.” Further, that analogy allows for an “indirect method of expression” and “[r]easoning by analogy, in a Rortyian sense, would allow the filling of gaps by expressing the contemplated meaning in a relevant phrasal context.” Weinstein contends that textualism by analogy provides transparency to “new textualism.” Justice Gorsuch perplexes many of the people that read Bostock with his overuse of analogy, but that is more to do with the general legal public’s assumption that textualism is always understood through the use of dictionaries. I argue that Justice Gorsuch’s “Enduring Textualism” utilizes an abundance of analogies so that whoever reads the opinion can fully grasp the textual argument that he is making—such as that sex is the but-for causation in the case in Bostock. The issue is that understanding the breadth of analogies can be difficult, but it is not impossible if you work through each of them and treat them like a question on the LSAT. Justice Gorsuch also employed his “Enduring Textualism” in McGirt v. Oklahoma, which will give us an example to explore it further in a different context.

175. See supra notes 159–61 and accompanying text.
178. Id.
179. Id. (citing RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 18 (1989)).
180. Id. at 650–51.
181. See, e.g., Mitchell N. Berman & Guha Krishnamurthi, Bostock Was Bogus: Textualism, Pluralism, and Title VII, 97 Notre Dame L. Rev. 67, 86 (2021) (“Gorsuch is pressing a false analogy . . . .”)
182. I appreciate the painful memories that thought might conjure.
The endeavor of slogging through the minutia of these opinions provides valuable learning opportunities to understand Justice Gorsuch’s jurisprudence. His feelings on precedent—especially precedent he deems was incorrectly decided on non-textualist grounds—are well known to legal scholars. In *Bostock*, Justice Gorsuch does use precedent in support of the majority’s opinion, but it is only after discerning what the text of Title VII requires. He also uses it because the most prominent Supreme Court precedents support their current reasoning. I would not be surprised at all that if the three mentioned cases did not support the majority’s understanding of the broad language of Title VII then Justice Gorsuch would have amended that section to show that the prior precedent simply misinterpreted the actual requirements of Title VII.

B. The Insular Cases Must Be Overturned

*United States v. Vaello Madero* was an 8-1 decision in which the Supreme Court held that the Fifth Amendment’s Due Process clause does not require Congress to make Supplemental Security Income benefits to be available to residents of Puerto Rico because of the text of the Constitution and the long history of Congress not requiring them to pay for federal income, gift, estate, and excise taxes. While the case itself was not too surprising, a concurring opinion by Justice Gorsuch sent waves through the legal community when he called for the *Insular Cases* to be overturned given that they “have no foundation in the Constitution and rest instead on racial stereotypes.”

The concurring opinion begins with a walkthrough of the history of the Insular Cases which, given their significance, always warrant a retelling. The Insular Cases were born from the Spanish-American War which gave a boost to the United States interest in

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186. See, e.g., United States v. Vaello-Madero: *The Impact of Varying Rights to Citizens of the United States*, Loy. U. Chi. L.J. 1, 35–37 (2023) (“While his acknowledgement of the Insular Cases was important in educating the public, Justice Gorsuch’s superficial discussion undermines the soundness of his concurrence.”).

187. *Id.* at 180 (Gorsuch, J., concurring).

188. See *id.* at 180–85.
engaging in colonial affairs. At the end of its powers, the Spanish Empire quickly succeeded the war, and the United States took possession over Puerto Rico, Guam, and the Philippines. Along with the annexation of Hawaii, the debate surrounding the proper governing of these newly obtained colonies exploded. There were those who thought the Congress could control them just like the European powers did and those that were concerned over the ruthless takeover and ruling of colonies with no regard to the Constitution which was formed with strong republican traditions.

Justice Gorsuch goes on to explore how the debate was so strenuous, and that it spurned a series of articles in Harvard Law Review in 1899. The three articles mentioned shed a very one-sided argument on the topic at the time. Christopher Langdell said that the Bill of Rights was English and the “compulsory application of [those rights] to ancient and thickly settled Spanish colonies would furnish . . . proof of our unfitness to govern dependencies, or deal with alien races.” James Bradley Thayer shared a similar sentiment in his article where he claimed that we have the same power as England to govern these newly taken colonies. Lastly, Abbott Lawrence Lowell bluntly stated, “apart from treaty or legislation, possessions acquired by conquest or cession do not become a part of the United States,” and ‘constitutional limitations . . . do not apply.”

Justice Gorsuch moves his retelling of American colonialism to the first time the debate found itself at the door of the Supreme Court in the case of Downes v. Bidwell. This case involved the Foraker Act


191. See id.

192. See id.

193. See id. at 181–82.

194. Id. (alteration in original) (citing Christopher C. Langdell, The Status of Our New Territories, 12 HARV. L. REV. 365, 386 (1899)).

195. See id. at 181–82 (citing James Bradley Thayer, Our New Possessions, 12 HARV. L. REV. 464, 467 (1899)).

196. Id. at 182 (citing Abbott Lawrence Lowell, The Status of Our New Possessions—A Third View, 13 HARV. L. REV. 155, 176 (1899)).

197. See id. (citing Downes v. Bidwell, 182 U.S. 244 (1901)).
passed by Congress to “impose[] a tax on goods exported to, or imported from, [Puerto Rico].[198] An importer challenged the law claiming it violated the Constitution’s Uniformity clause which states, “all Duties, Imposts, and Excises shall be uniform throughout the United States.”[199]

In deciding whether or not the Constitution applied to Puerto Rico, Justice Brown argued that it could only apply once Congress directed it to and before that occurred it didn’t make sense for “Anglo-Saxon principles” to be applied to colonies “inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought.”[200] Justice White argued that there were two categories that territories could fall into and whether the Constitution applied depended on the intention of Congress to “incorporate” the colony or territory.[201] He drew contrasts to Puerto Rico with western territories in which Congress had made clear its intention of including the latter into the United States while the former was kept at arm’s reach.[202]

Justice Gorsuch makes it clear that while the two Justices theory might differ to some degree, overall they shared the same principle that the United States’ “right to acquire and exploit ‘an unknown island, peopled with an uncivilized race . . . for commercial and strategic reasons’—a right that ‘could not be practically exercised if the result would be to endow’ full constitutional protections ‘on those absolutely unfit to receive [them].’”[203] The Supreme Court was not unanimous in its decision though. Chief Justice Fuller was dumbfounded that Congress would keep Puerto Rico in a perpetual state of quasi-existence.[204] Justice Harlan was equally critical of the Court for upholding a colonial system as was utilized under monarchies.[205]

Eventually the Supreme Court fully integrated Justice White’s “incorporation” theory with the inclusion “that certain constitutional protections are ‘fundamental’ and therefore apply even in far-flung

199. Id. (quoting U.S. CONST. art. I, § 8, cl. 1) (citing Downes, 182 U.S. at 247, 249).
200. Id. (quoting Downes, 182 U.S. at 287).
201. See id. at 183 (citing Downes, 182 U.S. at 339 (White, J., concurring)).
203. Id. (alteration in original) (quoting Downes, 182 U.S. at 306).
204. See id. (citing Downes, 182 U.S. at 372 (Fuller, J., dissenting)).
205. See id. (citing Downes, 182 U.S. at 380 (Harlan, J., dissenting)).
‘unincorporated’ possessions.” But what was deemed “fundamental” was different from what we would generally consider fundamental protections under the Constitution. The citizens of Puerto Rico were denied the right to trial by jury even though Congress had granted them U.S. citizenship five years prior.

Concluding his summary of the history of the Insular Cases, Justice Gorsuch dives into a deeply critical tirade against them. He pronounced that the “flaws in the Insular Cases are as fundamental as they are shameful.” As Justice Gorsuch routinely does, he first looks to the text of the Constitution for answers. He says that the Constitution does not speak of incorporated or unincorporated Territories, nothing in it says that only the latter receives “fundamental” constitutional guarantees, and more importantly nowhere does it say that judges are authorized to “engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.”

The severity of Justice Gorsuch’s criticism cannot be understated. He writes, “[t]he Insular Cases can claim support in academic work of the period, ugly racial stereotypes, and the theories of social Darwinists. But they have no home in our Constitution or its original understanding.” His disgust with the Insular Cases is stark. He says that in the United States the federal government gets its power from the people directly and is employed only with the powers given to it from the Constitution that was approved by the people. While monarchies and empires in Europe may have lived by the principle that “the people were made for kings, not the kids for the people” that was not what our country was founded on. Further, “our Nation’s government ‘has no existence except by virtue of the Constitution,’ and it may not ignore that charter in the Territories any more than it may in the States.”

206. Id. at 184 (quoting Dorr v. United States, 195 U.S. 138, 148–49 (1904)).
208. Id.
209. Id. at 184–85.
210. Id. at 185.
211. See id. (first citing McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 404–05 (1819); and then citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803)).
212. Id. at 185.
213. Id. at 185 (quoting Downes v. Bidwell, 182 U.S. 244, 382 (1901) (Harlan, J., dissenting)).
In an unanticipated move, Justice Gorsuch argued for the overturning of the Insular Cases based on Originalism.\textsuperscript{214} He maintains that the Insular Cases were a departure from the original meaning of the Constitution and even those involved in the debates “at the time” knew that “territorial incorporation was a... modern invention.”\textsuperscript{215} Further, he points out that the Cases ignored Supreme Court precedent at the time when the Court ruled that it was “beyond question” that the Constitution’s guarantee of the right to a jury trial extended to “the territories of the United States.”\textsuperscript{216}

Justice Gorsuch notes that the Supreme Court has admitted their concern over the rulings in the Insular Cases, but instead of curing the constitutional wrong the Court has attempted to apply a workaround by extending “fundamental” protections of the Constitution to the “unincorporated” territories.\textsuperscript{217} However, Justice Gorsuch says this is no solution because it leaves the Insular Cases as good precedent that lower courts feel pressured to apply.\textsuperscript{218} Further, the “fictions of the Insular Cases” cannot be fixed, and he asks if any judge can actually decide which aspects of the Constitution are “fundamental” or not and how these same judges can draw arbitrary lines between incorporated and unincorporated Territories which were drawn based on “bigotry.”\textsuperscript{219}

To bring his point home about how unworkable the attempted workaround of the Insular Cases has been Justice Gorsuch notes that even after one hundred years the right to a trial by jury is deemed not “fundamental” to the over three million U.S. citizens of Puerto Rico, but is “fundamental” to Palmyra Atoll, an uninhabited patch of land in the Pacific, because it is “incorporated.”\textsuperscript{220} Justice Gorsuch finally turns back to the case at hand and notes that neither party asks the Court to overturn the Insular Cases and instead Mr. Vello Madero

\textsuperscript{214} See id.
\textsuperscript{215} Id.
\textsuperscript{216} Id. at 185–86 (quoting Thompson v. Utah, 170 U.S. 343, 346–47 (1898)).
\textsuperscript{218} See id. (first citing Fitisemanu v. United States, 1 F.4th 862, 873 (10th Cir. 2021); and then citing Tuaua v. United States, 788 F.3d 300, 306–07 (D.C. Cir. 2015)).
\textsuperscript{219} See id. at 186–87.
\textsuperscript{220} See id. at 187.
argues that his claims are “fundamental” under the broken workaround. Justice Gorsuch acknowledges that it may make the Court’s job easier today, “[b]ut [that] it should not obscure what we know to be true about [the Insular Cases’] errors, and in an appropriate case [he] hope[s] the Court will soon recognize that the Constitution’s application should never turn on a governmental concession or the misguided framework of the Insular Cases.”

He acknowledges that overturning the Insular Cases will not be easy and will only make for more difficult questions that the Court will have to answer. Justice Gorsuch contends that at least then the right questions would be asked and the “courts would employ legally justified tools to answer them, including not just the Constitution’s text and its original understanding but the Nation’s historical practices (or at least those uninfected by the Insular Cases).” Justice Gorsuch concludes that he hopes someday soon the Supreme Court will squarely overrule the Insular Cases because “[o]ur fellow Americans in Puerto Rico deserve no less.”

Justice Gorsuch’s concurring opinion in Vaello Madero sent a signal to the rest of the legal world to make another push for the Insular Cases to be overturned. The call was heard by The Yale Law Journal who ran a Special Issue on the Law of the Territories in direct response to his opinion. The special issue published four articles by legal scholars discussing the implications of the relationship between the U.S. and its territories.

Christina Duffy Ponsa-Kraus—in their article The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories—makes the argument “that the Insular Cases gave rise to nothing less than a crisis of political legitimacy in the unincorporated territories and that no amount of repurposing, no matter how well-intentioned—

221. See id. at 188.
222. Id.
223. See id.
224. Id. (citing Fitisemanu v. United States, 1 F.4th 862, 883 (10th Cir. 2021) (Tymkovich, C. J., concurring)).
225. Id. at 189.
or even successful—can change that fact. On the contrary: repurposing the Insular Cases will prolong the crisis.”228 This is very similar to the argument that Justice Gorsuch makes in Vaello Madero. Given the publication date of decision and the article it seems as though their shared feelings about the Insular Cases were simply the joint belief of two well-informed legal minds, or Justice Gorsuch and his clerks snuck a peak of Professor Duffy Ponsa-Kraus’s early draft of their article on SSRN. In an extremely well-crafted article, the professor calls to overturn the Insular Cases not because it will fix the political issues surrounding the Territories, “which the Court cannot do[,]” instead “[i]t is to end the proposition that the unincorporated territories exist in a nearly extraconstitutional zone.”229 This would have a two-fold effect according to Duffy Ponsa-Kraus:

[R]eining in the purely teleological and poorly reasoned jurisprudence engendered by that proposition, while withdrawing once and for all the Court’s implicit imprimatur from the outrageous notion that a U.S. territory can remain a territory forever—withstanding the flagrant political illegitimacy and shameless hypocrisy of a representative constitutional democracy that allows itself, in perpetuity, to govern a people without representation.230

It is not too far of a stretch to say that Justice Gorsuch and Professor Duffy Ponsa-Kraus share in their abhorrence of the Insular Cases. In further evidence of the significance of the opinion, Justice Gorsuch’s eye-opening comments persuaded the petitioners in Fitisemanu v. United States to ask the Court whether people born in the territories are guaranteed birthright citizenship under the Fourteenth Amendment’s Citizenship clause.231

For the purpose of this article, Vaello Madero provides another key to solving the puzzle that is Justice Gorsuch. This case shows that Justice Gorsuch will fight for a perceived liberal cause, equal citizenship and the recognizing of the United States troubling colonial

228. Id.
229. Id. at 2540.
230. Id.
history, using Originalism to cure a Constitutional wrong. If a group of people or a certain right has been tossed aside—corrupted by legal academy or the Supreme Court—then Justice Gorsuch will proudly take the lead in correcting the constitutional wrong that has tainted the Nation; even if that wrong does not directly align with the assumed positions he has on society. Understanding Justice Gorsuch's logic in *Vaello Madero* is another step in understanding and both helps those that wish to overturn the Insular Cases and those that are attempting to take similar battles to the Court. I argue that *Vaello Madero* is a reflection of Justice Gorsuch's constitutional philosophy and fully encapsulates his "Enduring Constitutionalism."

C. Congress Must Keep Its Word

The Supreme Court sets the stage in *McGirt v. Oklahoma* in the majority opinion's opening sentences, "[o]n the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever."

As Justice Gorsuch has been consistent in doing, he begins his analysis by bringing in the text of the various treaties with the Creek tribe of Indians. The treaty states that, in exchange for leaving, "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians" and that "[n]o State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves."

Justice Gorsuch explains that the question in this case is two-fold. In one way it is about Jimcy McGirt who was convicted of serious sexual offenses and his appeal of the case to federal court based on the Major Crimes Act (MCA) which states, "[a]ny Indian who commits' certain enumerated offenses 'against the person or property of another Indian or any other person' 'shall be subject to the same law and penalties as all other persons committing any of the above offenses.

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236. See *id.* at 2459–60.
The question under the act is whether or not Mr. McGirt committed the crimes on land that was previously promised to the Creek Nation.238

The case’s complexity rests on the joining of the Creek Nation as amicus curiae.239 They do not seek to shield Mr. McGirt from the crimes he committed, but instead have an interest in whether the land that was given to the Creeks is still a reservation today.240 Therefore, the case is really a conflict between Oklahoma and Creek Nation—if the Tribe is right then the State has no authority to bring charges against Native Americans in most of Northeastern Oklahoma, including the city of Tulsa.241 The significance of the case grew when the Tenth Circuit ruled that the land at issue remained a reservation and against the Oklahoma state courts ruling the opposite.242

Justice Gorsuch states that it is without question that Congress established a reservation for the Creeks, "[i]n a series of treaties, Congress not only ‘solemnly guarantied’ the land but also ‘establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians.’"243 Justice Gorsuch continues that because the Tribe’s move west of the Mississippi was “ostensibly voluntary,” Congress provided another assurance by “authoriz[ing] the President ‘to assure the tribe … that the United States will forever secure and guaranty to them ... the country so exchanged with them.’”244 The offer was accepted by the Creek Nation and it defined the borders for the “permanent home to the whole Creek nation of Indians”—under the condition that the land grant would only continue to the Tribe “so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them.”245

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237. Id. at 2459 (alteration in original) (citing 18 U.S.C. § 1153(a)).
238. See id. at 2459–60.
239. See id. at 2460.
240. See id.
241. See id.
242. See id. (citing Murphy v. Royal, 875 F.3d 896, 907–09, 966 (2017)).
243. Id. (alteration in original) (first quoting 1832 Treaty, supra note 233, art. XIV, 7 Stat. at 368; and then quoting 1833 Treaty, supra note 233, preamble, 7 Stat. at 418).
244. Id. (quoting Indian Removal Act of 1830, ch. 148, § 3, 4 Stat. 412).
245. Id. at 2461 (quoting 1833 Treaty, supra note 233, preamble, 7 Stat. at 418).
246. Id. (quoting 1833 Treaty, supra note 233, art. III, 7 Stat. at 419).
The majority notes that the early treaties did not refer to the land in question as a “reservation” because the word had yet to be used in context of Tribal land. However, other treaties from a similar time were used to create reservations. Also, by 1866 when Congress reduced the area that was promised to Creek Nation, they referred to it as “the reduced Creek reservation.”

Justice Gorsuch then traces the history of the Creek Reservation showing that throughout the 19th century countless federal laws referenced “the Creek Reservation.” With the final nail in the coffin, in the Treaty of 1856, Congress ensured “the Creeks were to be ‘secured in the unrestricted right of self-government,’ with ‘full jurisdiction’ over Tribe members and their property.” Justice Gorsuch found that “the Creek were promised not only a ‘permanent home’ that would be ‘forever set apart’; they were also assured a right to self-government . . . .”

Justice Gorsuch states that it is obvious that there was a reservation for the Creek Nation and that Congress has broken countless promises pertaining to it—the original reservation had been broken apart and even sold outside the Tribe. To answer the question as to whether in its current state the reservation existed then, the Court looked to the Acts of Congress as the Supreme Court consistently held that Congress assumed the power to establish reservations. In this vein, the States themselves have no power to change federal reservations that were created by Congress. To allow States the power to undermine Congress’s authority would be “at odds with the Constitution” and would "leave [T]ribal rights in the hands of the very neighbors who might be least inclined to respect them.”

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247. See id.
248. See id. (citing Menominee Tribe v. United States, 391 U.S. 404, 405 (1968)).
249. Id. (quoting Treaty Between the United States of America and the Creek Nation of Indians, Creeks-U.S., arts. III, IX, June 14, 1866, 14 Stat. 785, 786, 788 [hereinafter 1866 Treaty]).
250. See id.
252. Id. at 2461–62.
253. See id. at 2462.
254. See id.
255. See id.
256. Id.
Further, the courts should have no power in changing the boundaries of reservations. Justice Gorsuch argues that Congress is often faced with the difficult task of reducing reservations, and in an attempt to circumvent political blame, they pass laws that almost remove reservations—in hopes that judges will do the dirty work for them so that they do not have to suffer the consequences from the constituents. However, “wishes don’t make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.” Justice Gorsuch notes that Congress is the only branch with authority to make and dismantle reservations and if Congress wishes to break that promise it must do so by itself.

Justice Gorsuch points out that Congress has engaged in disestablishment of a reservation countless times when it has “muster[ed] the will” to do so. Sometimes Congress calls a reservation “discontinued,” “abolished,” “vacated,” or simply states that the tribal lands will be “restored to the public domain.” Regardless of how Congress chooses to label disestablishment, the important part is that “Congress clearly express its intent to do so, [c]ommon[ly with an] [e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.”

Oklahoma argues that Congress did just this during the “allotment era.” Beginning in the 1880s, Congress pressured tribes to abandon their traditional communal style of living and sought to convince the Creek Nation to give up some of their land or break it up into separate plots owned by individuals. The Tribe vehemently rejected either option and took a stand that they would not cede any of their lands. Justice Gorsuch notes that Congress took this stance

257. See id.
258. See id.
259. Id.
261. See id.
262. Id. at 2463 (quoting Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973)).
263. Id. at 2462–63. (quoting Hagen v. Utah, 510 U.S. 399, 412 (1994)).
264. Id. at 2463 (alterations in original) (quoting Nebraska v. Parker, 577 U.S. 481, 488 (2016)).
265. See id.
266. See id.
267. See id. (citing S. MISC. DOC. No. 53-24, at 7 (1894)).
“seriously and turned their attention to allotment….”

He says that Congress may have still been uncertain about their unilateral power to disestablish a reservation because this took place before the Court’s decision in Lone Wolf v. Hitchcock, and regardless, the discussions ended with an allotment agreement with Creek Nation in 1901. The agreement allotted 160-acre parcels to individual members of the Tribe who at first could not sell or transfer them, but eventually that condition was relaxed and Tribe members were given full autonomy to sell their allotted parcels to other Tribe members or non-Tribe members as well.

Justice Gorsuch says that this is all well and good, but there was never a statute from Congress clearly expressing the “present and total surrender of all tribal interests” of the land. It is without question that the Creek Nation “cede[d]’ their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma.”

Justice Gorsuch also notes that “in 1866, they ‘cede[d] and convey[ed]’ a portion of that reservation to the United States.” However, there was no law passed by Congress that completely gave up the land that was left. Therefore, “the Creek Reservation survived allotment.”

This is no new realization according to Justice Gorsuch. He clarifies that, “[f]or years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument.” Congress is the body that defines “Indian country” as “all land within the limits of any Indian reservation… notwithstanding the issuance of any patent, and, including any rights-of-

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268. Id.
269. See Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (holding that Congress has the power to “abrogate the provisions of an Indian treaty”).
271. See id. (citing Act of Mar. 1, 1901, supra note 270, §§ 3, 7).
272. See id. (citing Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312).
273. Id. at 2464.
274. Id. (alteration in original) (quoting 1832 Treaty, supra note 233, art. I, 7 Stat, at 366).
275. Id. (alterations in original) (quoting 1866 Treaty, supra note 249, art. III, 14 Stat. at 786).
276. See id.
277. Id.
278. See id.
279. Id.
way running through the reservation.”

Further, it does not matter that this land is now in private ownership or that the land has transferred to non-Tribal owners. Rather, reservation status continues, even with the allotment and “transfer of individual plots.”

Justice Gorsuch equates this logic to that of the federal government issuing land patents to homesteaders to encourage them to settle the West. Those patents led to most of private ownership in the Western states today, but it is not argued that this weakened the United States sovereignty over the land. He argues that this logic applies to allotment in the same way and that is supported by the plain meaning of “Indian country” as defined by the Major Crimes Act. In response, Oklahoma argues that allotment was the first step by Congress to achieve disestablishment, which Justice Gorsuch agrees with, saying: “[n]o doubt, this is why Congress at the turn of the 20th century ‘believed to a man’ that ‘the reservation system would cease’ ‘within a generation at most.’” This does not cure the issue though. Justice Gorsuch reiterates that if Congress wants to engage in disestablishment, it must do so officially.

This distinction is important because it would destroy statutes that Congress had passed explicitly abolishing reservations for the Ponca and Otoe Tribes before allotment had run its course. Congress took the effort to explicitly abolish those reservations and there is no evidence that they have taken that crucial step with the Creek Nation. Therefore, the reservation lives today as it did over a 100 years ago when allotment took place.

Oklahoma’s argument then moves to prove disestablishment by showing that Congress encroached on the Creek Nation’s

280. Id. (omission in original) (citing 18 U.S.C. § 1151 (a)).
281. See id.
282. Id.
283. See id.
284. See id.
285. See id.
286. Id. at 2465 (quoting Solem v. Bartlett, 465 U.S. 463, 468 (1984)).
287. See id. ("Still, just as wishes are not laws, future plans aren’t either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.")
289. See id.
290. See id.
“promised right to self-governance . . . .”291 Justice Gorsuch notes that there were countless efforts by Congress to curtail the governing power of the Creeks such as abolishing their tribal courts and requiring presidential approval for tribal ordinances.292 However, Justice Gorsuch gives examples of many areas of self-governance that the Creek Nation continued to have full control over such as: the power to collect taxes, operate schools, legislature through tribal ordinances, and eventually, oversee the allotment process.293 While the attacks by Congress were surely devastating to the Tribe—in contrast to proving disestablishment Justice Gorsuch says that—these intrusions proved the Tribe’s power over themselves and “fell short of eliminating all tribal interests in the land.”294

Justice Gorsuch continued his walk through the allotment history of the Creek Reservation. The 1901 allotment stated that the tribal government “‘shall not continue’ past 1906,” but was caveated with “subject to such further legislation as Congress may deem proper.”295 The year of 1906 came and went, and—to the surprise of many—Congress enacted the Five Civilized Tribes Act which did not eradicate tribal government but only levied heavy restrictions on their autonomy: the President could remove and replace the Chief of the Creek, the tribal council could not meet more than 30 days in a year, and the Secretary of the Interior took control of the tribal schools.296

The stripping of power of the Creek Nation by Congress continued, “[b]ut Congress never withdrew its recognition of the tribal government, and none of its adjustments would have made any sense if Congress thought it had already completed that job.”297 To further this point, Justice Gorsuch alludes that the opinion on Tribes completely changes starting in the 1920s.298 The federal government switched from assimilation policies to “more tolerance and respect for

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291. See id.
292. See id. at 2465–66.
293. See id. at 2466 (first citing Act of Mar. 1, 1901, supra note 270, §§ 39, 40, 42; and then citing Buster v. Wright, 135 F. 947, 949–950 (8th Cir. 1905)).
294. Id.
295. Id. (quoting Act of Mar. 1, 1901, supra note 270, § 46).
297. Id.
298. See id. at 2467 (citing 1 FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.05 (Neil Jessup Newton ed., 2012)).
traditional aspects of Indian culture." By 1936, Congress had completely flipped on its head from the allotment period and authorized the Creek nation to adopt a constitution and bylaws. Since then, "[t]he Creek Nation has done exactly that. In the intervening years, it has ratified a new constitution and established three separate branches of government." The Nation is now led by a democratically elected Chief, has its own police force and hospitals while employing over 2,000 people and operating with an annual budget of $350 million.

Next, Justice Gorsuch dismissed an argument put forth by Oklahoma that the "historical practices and demographics" around the legislation suggest disestablishment. Justice Gorsuch says that the State’s assumption that we must follow a three-step test from Solem is mistaken, while the Court will look to historical practices and circumstances when a law is ambiguous, the State does not point to any part of the statutes that require such an endeavor from the Court. Further, the Court in Rosebud Sioux Tribe v. Kneip found that the congressional intent was to diminish the reservation and the Court rejected the inclusion of historical practices submitted by the Tribe because that kind of evidence cannot supplant congressional intent. Justice Gorsuch clarifies this point by saying, "[t]here is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms." To allow otherwise would be "to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others." Further, that none of this follows the Court’s normal process of interpretation, "let alone [the Court’s] rule that

299. Id. (quoting Cohen, supra note 298).
301. Id. (first citing Hodel, 851 F.2d at 1442-47; and then citing Muscogee (Creek) Nation Const. arts. V, VI, VII).
302. See id.
303. Id. at 2468.
304. See id.
305. Id. at 2469 (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603-05 (1977)).
306. Id.
307. Id. at 2470.
disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights.”

To exhibit the issues with engaging in this sort of work by the courts, Justice Gorsuch says “we need look no further than the stories we are offered in the case before us.” He humors the argument and walks through the historical evidence to “supplement” unambiguous statutes. Justice Gorsuch goes through account after account of the history that Oklahoma and the dissent present as straightforward and he concludes the history, “supplies us with little help in discerning the law’s meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the ‘practical advantages’ of ignoring the written law.” You cannot simply ignore the written law if it is clear and any “practical advantages” gained from doing so would result in “rule of the strong, not the rule of law.”

Justice Gorsuch seemed especially irritated with Oklahoma’s next move which was to flip their argument and say that “Congress never established a reservation in the first place.” He notes that neither the Solicitor General nor the dissenting opinion support nor provide any defense for the Hail Mary of an argument even though they are both on Oklahoma’s side. Ultimately, Justice Gorsuch says for the Court to find that no reservation was ever established it would have to “stand willfully blind before a host of federal statutes.”

Justice Gorsuch entertained a few more efforts that also found lack of support by the dissent, but ultimately Oklahoma abandons their arguments and rest their claim to win on the “transform[ative]’ effects of a loss today” because if the Court rules that the Creek Reservation was never disestablished the State worries that other tribes will follow suit. This would put nearly half of the State’s territory in jeopardy and 1.8 million of its residents living in Tribal country. Justice Gorsuch pulled no punches in his response to this “self-

308. Id. (citing Solem v. Bartlett, 465 U.S. 463, 472 (1984)).
309. Id.
310. See id. at 2470–74.
311. Id. at 2474.
312. Id.
313. Id.
314. See id.
315. Id.
317. See id.
defeating argument” asserting that “[e]ach tribe’s treaties must be considered on their own terms, and the only question before us concerns the Creek. Of course, the Creek Reservation alone is hardly insignificant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma.”

Though Oklahoma worries about its population that could wake up finding out they were living in Tribal country, Justice Gorsuch retorts “we imagine some members of the 1832 Creek Tribe would just as surprised to find them there.”

The State continued to throw every worry against the wall in hopes one might stick as they list upsetting convictions, the burden on federal and tribal courts, and even the consequences the ruling could have on civil and regulatory law. However, Justice Gorsuch says, “dire warnings are just that, and not a license for us to disregard the law.” He does acknowledge that what the future holds after this decision is not certain and there may be “cost and conflict” around these jurisdictional boundaries.

Justice Gorsuch concludes that the federal government may have restricted and expanded the authority of the Creek Nation, but it has never withdrawn its reservation. He returns to the earlier tone of the opinion, noting that the promises that were made to the Creek Nation are not the duty of the Court to break. Justice Gorsuch writes, “[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”

It is evident from McGirt that Justice Gorsuch focuses on the text of the governing statute and the historical context that led to their passage. The opinion is a combination of his logic in Bostock and Vaello Madero and gives its readers a lengthy example of what constitutes Justice Gorsuch’s constitutional theory of “Enduring Constitutionalism.” Any argument trying to persuade Justice Gorsuch must start with the text at hand and cannot ignore it as the State attempted

318. Id.
319. Id.
320. See id. at 2480.
321. Id. at 2481.
322. Id.
323. See id. at 2482.
324. See id.
325. Id.
to do in *McGirt*. Further, it is the duty of the Court to cure constitutional wrongs and hold the other branches accountable for their actions.

Law professor, Maggie Blackhawk perfectly emphasized the importance and disbelief that Justice Gorsuch’s decision in *McGirt* means to the legal world broadly in their article *On Power and the Law: McGirt v Oklahoma*.\(^\text{326}\) Professor Blackhawk begins by saying, “[a]lmost every aspect of *McGirt v. Oklahoma* strains the imagination.”\(^\text{327}\) Blackhawk goes on to say that *McGirt* was a victory at the Supreme Court that Native people have not seen in nearly fifty years as the Court has become “skeptical of federal Indian law.”\(^\text{328}\) To further explain the gravitas of *McGirt*, while the legal academy has lauded the decision, the general public and the scholarly discourse have not come to appreciate the “implications for broader theories of social and racial justice” partially due to its technical language.\(^\text{329}\) This sounds very similar to *Bostock*, though that Justice Gorsuch’s decision is better understood by the general public. However, in *McGirt*, Justice Gorsuch points out that Oklahoma and the Tribes have historically been capable of living and working together so there is no reason that will not still hold true.\(^\text{330}\)

Justice Gorsuch’s decision in *McGirt* was unequivocally important for the Supreme Court and Federal Indian Law. However, the progress made in *McGirt* was short lived. The Court rolled back the advancement in *Oklahoma v. Castro-Huerta*.\(^\text{331}\) In *Castro-Huerta*, the Supreme Court held “that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country.”\(^\text{332}\) Justice Gorsuch adamantly dissented in the case.\(^\text{333}\)

Justice Gorsuch cited *Worcester v. Georgia*, in which Chief Justice Marshall wrote the majority opinion and ruled that the state of Georgia had no authority to “govern the territory of a separate sovereign”—referring to the Cherokee Tribe.\(^\text{334}\) He goes on to say, “[w]here

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\(^\text{327}\). *Id.* at 368.
\(^\text{328}\). *Id.* at 369.
\(^\text{329}\). *Id.*
\(^\text{332}\). *Id.* at 2491.
\(^\text{333}\). See *id.* at 2505 (Gorsuch, J., dissenting).
\(^\text{334}\). *Id.* at 2505 (citing *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)).
this Court once stood firm, today it wilts.”

The disappointment that Justice Gorsuch has in the Court is prominent throughout his dissent. He lamented, “[w]here our predecessors refused to participate in one State’s unlawful power grab at the expense of the Cherokee, today’s Court accedes to another’s.”

Justice Gorsuch’s disappointment turns to scolding of the Court’s decision arguing that “a mountain of statutes and precedentsplain that Oklahoma possesses no authority to prosecute crimes against tribal members on tribal reservations until it amends its laws and wins tribal consent.”

He continues that the Court has no power to negate the Nation’s treaties and Congress’s statutes. Further, that “[t]he Court may choose to disregard our precedents, but it does not purport to overrule a single one. As a result, today’s decision surely marks an embarrassing new entry into the anticanon of Indian law. But its mistakes need not—and should not—be repeated.”

Justice Gorsuch’s dissent reads—due to his understanding of the history surrounding the unjust treatment of Native Americans in this country—as a scathing response full of discontent, frustration, and a sense of sorrow for the Tribes who have fought for so long to retain the few bits of sovereignty they have left.

The redemption arc for Native American Sovereignty and Justice Gorsuch’s defense of them would take another step in a case decided this last term, Haaland v. Brackeen. In a conclusive 7-2 decision, the Supreme Court ruled that Congress had the proper constitutional authority to enact the Indian Child Welfare Act (ICWA).

To no Surprise, Justice Gorsuch voted with the majority but wrote a concurring opinion that was partially joined by Justice Sotomayor and Justice Jackson.

Justice Gorsuch praises the Court for its decision, stating that “the Court also goes a long way toward restoring the original balance between federal, state, and tribal powers the Constitution

335. Id.
336. Id.
337. Id. at 2521.
338. See id.
339. Id.
341. See id. at 1641.
342. See id. (Gorsuch, J., concurring).
envisioned.”

Once again, Justice Gorsuch stressed the importance of understanding the history that led Congress to adopting the Indian Child Welfare Act—just as he has continued to emphasize throughout the Tribal cases and *Vaello Madero*. He concludes:

Native American Tribes have come to this Court seeking justice only to leave with bowed heads and empty hands. But that is not because this Court has no justice to offer them. Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life. It promises them sovereignty for as long as they wish to keep it.

Not only is this quote revealing of Justice Gorsuch’s passion and firm stance on the protections that the Constitution provided Tribes, it continues his theme of the law being “enduring.” Justice Gorsuch’s track record of going to battle for Native Americans displays his “Enduring” theories of law that I have brought to light throughout this article.

It holds true that part of Justice Gorsuch’s “Enduring” theories of law is a sense of obligation that rests upon the shoulders of the Court. It is their duty to uphold the law as it was democratically written. It is their responsibility to cure the past mistake of their decisions. It is their obligation to not break the bounds of the separation of powers to “fix” Congress’s mistakes. Justice Gorsuch believes the Court did just that in McGirt and then disregarded that decision in Castro-Huerta—simultaneously failing the Native people of Oklahoma. His battle with the rest of the conservative members of the Court will not end any time soon. There are two guarantees in life—Justice Gorsuch will fight for Native American sovereignty and he will do so in his own unique way:

[The Navajo] efforts to find out what water rights the United States holds for them have produced an experience familiar to any American who has spent time at the Department of Motor Vehicles. The Navajo have waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another.

343. *Id.*
344. See *id*.
345. *Id.* at 1661.
346. See *id.* at 1648.
V. Conclusion

Throughout this article, I have parsed out the logic and reasoning that Justice Gorsuch utilizes in cases concerning marginalized people. As mentioned earlier, Justice Gorsuch himself claims to prefer the idea of "Enduring Constitutionalism"—over the main competing theories originalism and living constitutionalism.\(^{348}\) Two important themes emerge from his concurring opinion in *Haaland*. First, long standing precedent that has no basis in the Constitution must be overruled. Second, when the Court attempts to create a workaround for improperly decided cases it never truly solves the issue. In the interview with the National Constitution Center, Justice Gorsuch joked, "who wants a dead constitution?" which drew a laugh from the audience.\(^{349}\) Just after that is when he mentioned that he prefers to think of it as "Enduring Constitutionalism" as he gestured with his fists\(^{350}\) which I believe was to signify that the purpose of a justice is to help the meaning of the constitution—or a law passed by Congress—withstand the test of time. His view of the constitution is unique to that of both originalists and living constitutionalists.

Justice Gorsuch goes on to point out that the biggest issue with originalism is that it insinuates that the original constitution was perfect—which he argues ignores the "vital importance of the 13\(^{th}\), 14\(^{th}\), 15\(^{th}\), and 19\(^{th}\) amendments" which constitute the Nation's "second constitution."\(^{351}\) He also criticizes living constitutionalist justices on the Court because they lead to people losing rights because a judge thinks another right is more important at the time.\(^{352}\) He does admit that he is an originalist,\(^{353}\) but I believe his earlier critique shows that Justice Gorsuch is not fully committed to the theory. These decisions are proof that—at his core—he is an "Enduring Constitutionalist." Which means he will stick to the original meaning of the text of the Constitution—containing all of the principals, not only those scribed in its first iteration. Further, to uphold the Constitution the Court must seek out and cure the errors in its decisions such as the *Insular Cases*. However, he would argue that it is not the job of judges to

\(^{348}\) See National Constitution Center, *supra* note 9, at 41:09.
\(^{349}\) See *id*.
\(^{350}\) See *id*.
\(^{351}\) *Id.* at 41:19.
\(^{352}\) See *id.* at 44:30.
\(^{353}\) See *id.* at 44:12.
distort history or text in ways that suit what they best think the law ought to be instead of what it is. This is best exemplified in a published speech by then-Judge Gorsuch: “[l]ike any human enterprise, the law’s crooked timber occasionally produces the opposite of its intended effect. We turn to the law earnestly to promote a worthy idea and sometimes wind up with a host of unwelcome side effects and find ourselves ultimately doing more harm than good.”

The anchor of his “Enduring” theories to law is that judges will ultimately make a mess of a law if they try to circumvent what the democratic system passed—which is evident in Bostock, Vaello Madero, and McGirt.

Justice Gorsuch never utters the phrase “Enduring Textualism,” but Professor Lund declared that the justice was engaging in a distorted form of textualism that he called “living textualism.” I argue that Justice Gorsuch’s style of textualism is best described by the former rather than the latter. When he interprets a law, the goal is to secure the original understanding of the text because regular people have been relying on that understanding in their daily lives. If the text is plain, such as in Bostock, there is no need to bring in “extratextual considerations.” Further, the text must actually be in the law itself as in McGirt. If Congress did not explicitly say what is being claimed, it is not the role of the Court to finish their work for them. The purpose of these laws is to endure and the only way for that to happen is for Justices to interpret them accordingly.

In a lecture at Case Western Reserve University School of Law, Justice Gorsuch spoke about the value of understanding the differences between judges and legislators. He said that judges should not shape the law in the ways that legislatures do. Further that judges should “strive . . . to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be . . . .” I bring this in to say that according to Justice Gorsuch, the role of a judge is to make a law endure over

355. See Lund, supra note 81, at 178.
356. Id. at 179 (quoting Bostock v. Clayton County, 140 S. Ct. 1731 1749 (2020)).
357. See id. (quoting Bostock, 140 S. Ct. at 1749); McGirt v. Oklahoma, 140 S. Ct. 2452, 2463, 2482 (2020).
359. See id. (explaining that legislators appeal to their moral convictions and judges should not).
360. Id.
time as it was originally democratically passed. His “Enduring Textualism” strives to do just that.

The three cases in this article tend to be treated as separate, once-in-a-lifetime decisions. However, the evidence shows otherwise. It shows a trend and just because it supports the improbable, does not mean it is implausible. Justice Gorsuch has repeatedly showed that he will side with marginalized people. I gave you three significant cases that would be the crowning achievement for any Justice appointed by a Democratic President. We can learn from Justices Blackmun, Stevens, and Souter who were all appointed by Republican Presidents but moved more liberal during their tenure on the Court.361 Further, Republican appointees Justice O’Connor and Justice Kennedy became essential swing votes in many liberal outcomes.362 Justice Gorsuch’s decisions already show that he is not the extreme conservative that many warned he would be. That may change over time, but the current evidence shows that something compels Justice Gorsuch to break from the extreme conservative block of the Court.

I argue that his “Enduring” theories of law explain why this happens so often in cases normally decided by ideological preferences. These core values and tenets that he believes a judge should follow lead to him making decisions that the legal community does not anticipate. Hopefully this article sheds light on why it is that Justice Gorsuch makes these surprising decisions. With any luck, they will no longer be such a shock when they happen. Irrespective of your views of Justice Gorsuch, he has a deep appreciation for the law regardless of which party wins “[t]he rule of law in this country, there is plenty of room for improvement, but is something we should be very proud of too.”363 When the sun sets on Justice Gorsuch’s tenure on the Supreme Court, his legacy will echo that of the mentor he clerked for not the justice he replaced.

362. Id.