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IN THE CONTEXT OF STATUTORY
INTERPRETATION**

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JUSTICE GORSUCH'S VIEWS ON PRECEDENT IN THE CONTEXT OF STATUTORY INTERPRETATION

*Hillel Y. Levin**

The doctrine of precedent, in its *stare decisis* form, presents a challenge to any originalist.¹ This doctrine provides that a court should (at least sometimes) be bound by its own precedent, even if that precedent was wrongly decided in the first place.² Yet if the *original* meaning of the text at issue is a judge's focus, why should an *intervening* decision of the court—and a mistaken one at that—matter at all? Despite this tension, every originalist also at least purports to care about precedent.³

This Essay focuses on Justice Gorsuch's apparent views on precedent in the context of statutory interpretation, where precedent is said to have special force.⁴ To this end, I review the available evidence, including Justice Gorsuch's coauthored treatise on precedent,⁵ his opinions while serving on the court of appeals, his public speeches, and the early opinions (majorities, concurrences, and dissents) he has written while on the Supreme Court.

My analysis suggests that, notwithstanding the treatise's suggestion that precedent in the context of statutory interpretation indeed carries even greater weight than in other contexts, and notwithstanding his very occasional willingness to turn to nontextualist sources in interpreting statutes that Justice

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1. I view textualism in statutory interpretation as a subspecies of originalism. Generally, originalism posits that legal texts mean what they meant at the time of their enactment. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–82 (2012) [hereinafter SCALIA & GARNER, *READING LAW*]. Textualists argue that the correct original interpretation of the text is ascertained according to the most reasonable interpretation that would have been understood by the relevant community at the time of enactment. *See, e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23–25 (Amy Gutmann ed., 1997). An alternative subspecies of originalism, intentionalism, asserts in contrast that the original meaning of the act is determined by the actual or constructive intent of those who enacted it. *See, e.g.*, Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 8 (2011).

2. BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 4–5 (2016).

3. The only prominent exception is Professor Gary Lawson. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (arguing that reliance upon horizontal precedent interpreting the Constitution is unconstitutional where it is relied upon purely because of its precedential value, not the persuasiveness of the original decision).

4. Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1050–51 (2013).

5. GARNER ET AL., *supra* note 2.

Scalia would have rejected,⁶ it is nevertheless likely that Justice Gorsuch shares Justice Scalia's view that precedent carries no *special* weight in this context.⁷ More broadly, my deep dive into Justice Gorsuch's *oeuvre* also leads me to some observations about the future of textualist-originalism on the Supreme Court, particularly with respect to Justice Gorsuch's role in further developing it and a comparison of his style with Justice Scalia's.

The Essay proceeds as follows. Part I briefly reviews the arguments in favor of deference to precedent, with particular attention to the context of statutory interpretation and Justice Scalia's argument against special deference. Part II considers Justice Gorsuch's apparent views on the matter. Finally, Part III considers the role that Justice Gorsuch and the current Supreme Court may play in the continued development of textualism on the Court and in public discourse.

I. WHY DEFER TO PRECEDENT?

The concept of deference to precedent is at once elementary and puzzling. It is elementary because it forms a backbone of our judicial system and is familiar to every first-year law school student.⁸ It is puzzling because it demands that judges, who have both the power and opportunity to overturn what they may consider to be erroneous decisions of the past, forbear from doing so.⁹ This presents an especially acute dilemma for statutory originalists—including both textualists and intentionalists—because the central tenet of statutory originalism is that legal texts are to be interpreted only according to their meaning at the time of adoption.¹⁰ Yet all judges, including statutory originalists of all stripes, at least claim to place *some* value on precedent.

A. *Typical Arguments in Favor of Deference to Precedent*

Judges and legal scholars have offered a variety of arguments in favor of judicial deference to precedent. Such arguments include preserving public

6. See Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185 (2017).

7. *Id.*; see *infra* Part II.

8. See Levin, *supra* note 4, at 1037 (first citing Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2037 (1996); then citing Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1174 (2008); then citing Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23 (1994); and then citing Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987)).

9. See *id.* at 1041 (citing Schauer, *supra* note 8, at 575 ("A naked argument from precedent . . . urges that a decisionmaker give weight to a particular [past decision] regardless of whether that decisionmaker believes it to be correct . . .")).

10. See *id.* at 1037 (citing Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723 (1988)) (discussing conflict between stare decisis and originalism).

faith in the judiciary,¹¹ maintaining judicial efficiency,¹² promoting equality,¹³ and protecting the reasonable reliance interests of the public.¹⁴ Elsewhere, I have argued extensively that only the last of these has much to say for it—and, as a result, courts should be wary of upending precedent when and to the extent that meaningful reliance interests are implicated.¹⁵

In any event, all of these arguments in favor of precedent share something in common: they serve what we might call “principles of justice.” Preserving public faith in the judiciary, for example, is an important principle of justice because the judiciary’s ability to persuade and to command obedience is undermined in its absence, thus eroding the judiciary’s ability to perform its job and serve as an institution of actual and perceived justice.¹⁶ Likewise, judicial efficiency in meting out justice is necessary because, in its absence, the courts would (allegedly) have to fully reconsider their earlier decisions at every opportunity.¹⁷ The courts would be swamped, cases would languish, and our judicial system would come to a screeching halt. Along the same lines, equality—here meaning treating like cases alike—is unquestionably a core principle of justice.¹⁸

Finally, protecting reliance interests allows people to invest and organize their lives around the courts’ pronouncements.¹⁹ It would therefore be unjust for a later court to effectively punish good faith reliance on the prior court’s assurances. For example, millions of Americans have relied on the Supreme Court’s decisions upholding the constitutionality of our financial system, and the Social Security program in particular.²⁰ Imagine the chaos that would ensue if a Supreme Court, led by a majority of originalists, suddenly decided that

11. See *id.* at 1044–46.

12. See *id.* at 1047–48.

13. See *id.* at 1048–50.

14. See *id.* at 1053–54.

15. *Id.*

16. In *A Reliance Approach to Precedent*, I argue that adherence to precedent does not necessarily serve the goal of preservation of public faith in the judiciary. See *id.* at 1044–46. I do not, of course, contest that public faith in the judiciary is a critical element in its ability to function, and is thus a necessary component in the pursuit of justice within our system. *Id.*

17. In *A Reliance Approach to Precedent*, I question whether the efficiency argument in favor of precedent is overblown, and suggest other ways of achieving this goal. *Id.* at 1047–48. Once again, though, some degree of efficiency is obviously necessary for the functioning of our courts. *Id.*

18. In *A Reliance Approach to Precedent*, I suggest that the equality principle is unpersuasive for three reasons. *Id.* at 1048–50. First, it is odd to suggest that it is equitable to reaffirm precedent the judge believes to be wrongly decided. *Id.* at 1049. Second, the equality principle does not describe the reality of a justice system where there are many reasons, e.g., prosecutorial discretion and economic factors, that like cases are treated *unlike*. *Id.* at 1049–50. Third, if the equality principle were truly the driving force behind precedent, it would also constrain legislatures—which it doesn’t. *Id.* at 1050.

19. For a complete account of the reliance approach to precedent, including its far-reaching implications and important limitations, see *id.* at 1053–86.

20. See *id.* at 1055–56 (first citing *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the Social Security Act); and then citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871) (upholding the constitutionality of paper money)).

this system was unconstitutional.²¹ In the private law context we would call this some kind of fraud on the part of the promisor.²² As I have suggested elsewhere, “[i]t would be immoral for the courts to say ‘oops,’ claim a do-over, and then do violence to those people whose actions have been induced by the courts themselves.”²³

For one or more of these reasons, all judges, including originalists, agree that precedent matters. Justice Scalia, the Supreme Court’s most prominent avatar of originalist textualism until his death, recognized the tension between originalism and the doctrine of precedent when he referred to himself as a “faint-hearted originalist.”²⁴ He meant that his commitment to the original public meaning of a legal text was tempered by his concern for intervening judicial precedent.²⁵ He agreed that justice demanded, at least in some cases, that even wrongly decided precedents must be upheld.

B. *The Debates Over “Super-Strong” Statutory Precedent*

Students and scholars of statutory interpretation will also be familiar with the argument that precedent has special force in the context of statutory precedent. Professor Bill Eskridge has called this “super-strong” statutory precedent,²⁶ while Justice Kagan, writing for a majority of the Court in a case concerning Marvel Comics, punningly referred to it as a “superpowered form of *stare decisis*.”²⁷ In this Part, I review the argument in favor of super-strong statutory precedent and explain Justice Scalia’s vehement opposition to it.

1. *The Argument in Favor of Super-Strong Statutory Precedent*

The arguments in favor of super-strong statutory precedent are fairly straightforward: because the legislature has the opportunity to correct the Court’s misinterpretation of a statute, its decision not to do so signals acquiescence to the earlier decision.²⁸ Further, as Justice Rehnquist argued, “[t]he

21. *Id.*

22. *Id.* at 1055.

23. *Id.* at 1056.

24. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989). While Justice Scalia later rejected this label in the Eighth Amendment context, see Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>, he clearly still valued precedent more broadly, see Mike Rappaport, *Justice Scalia, Fainthearted Originalism, and Nonoriginalist Precedent*, LAW & LIBERTY (Oct. 11, 2013), <http://www.libertylawsite.org/2013/10/11/justice-scalia-fainthearted-originalism-and-nonoriginalist-precedent/>.

25. See Rappaport, *supra* note 24.

26. See William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO L.J. 1361, 1362 (1988) (“Statutory precedents . . . often enjoy a super-strong presumption of correctness.”).

27. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2410 (2015).

28. See Levin, *supra* note 4, at 1050–51 (first citing Eskridge, *supra* note 26, at 1366; and then citing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–32 (1982)).

opinion of one Justice that another's view of a statute was wrong, even really wrong, does not overcome the institutional advantages conferred by adherence to *stare decisis* in cases where the wrong is fully redressable by a coordinate branch of government."²⁹

Embedded in this justification are two closely related, but subtly different, reasons for heightened adherence to precedent in the statutory context: (1) by not legislating to overturn a court's interpretation of a statute, the legislature shows that it actually or constructively agrees with or prefers the court's interpretation; and (2) due to its institutional position relative to the legislature's, the Supreme Court should minimize its interference in the lawmaking process where Congress is capable of acting on its own. Said another way, when it is first confronted with a statutory ambiguity, a court has no option but to give the statute one authoritative meaning. In contrast, when the same question comes back to the court a second time, the court may passively minimize its entry into the sphere of lawmaking by simply deferring to its earlier decision, secure in the knowledge that the legislature may now do as it sees fit.

The dynamics present in the statutory context differ from those in the common law and constitutional contexts³⁰ in critical ways that make statutory precedent relatively more powerful. First, in the constitutional context, the legislature actually cannot overturn an erroneous decision of the courts on its own; doing so would require a constitutional amendment.³¹ Second, and in contrast to the common law, in the statutory context the legislature has already shown itself to be capable of, interested in, and accustomed to speaking to a particular area of the law. Third, when a court interprets an act of the legislature, it is ascribing a definite and specific meaning to a legislative act. As Judge Guido Calabresi put it, "When a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'"³²

For these reasons, at least one legal scholar has argued in favor of an absolute rule against overturning precedent in the statutory context.³³ Although this view has not been adopted by the courts, Eskridge has shown that adherence to super-strong statutory precedent has considerable purchase among judges,³⁴ and courts will rarely overturn a "settled judicial interpretation of a

29. *Hubbard v. United States*, 514 U.S. 695, 724 (1995) (Rehnquist, C.J., dissenting).

30. *See Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013) ("The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.").

31. *Cf. Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (explaining, in the Eighth Amendment context, that the Court's decision regarding the constitutionality of a punishment can be reversed only by constitutional amendment).

32. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–32 (1982).

33. Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 208–15 (1989).

34. *See Eskridge*, *supra* note 26, at 1368–69.

statute even if the earlier holding is of questionable validity.”³⁵

Prominent examples of this approach include *Toolson v. New York Yankees*³⁶ and *Flood v. Kuhn*,³⁷ both reaffirming an anomalous Supreme Court decision concerning the application of the Sherman Antitrust Act to professional baseball leagues;³⁸ *John R. Sand & Gravel Co. v. United States*,³⁹ upholding a questionable earlier decision concerning equitable tolling;⁴⁰ and *Kimble v. Marvel Entertainment, LLC*,⁴¹ adhering to an earlier decision concerning patent licensing agreements providing for the payment of royalties accruing after the patent's expiration.⁴²

2. Justice Scalia's Argument Against Super-Strong Statutory Precedent

In short, the justifications for super-strong statutory precedent amount to institutional capacity and legislative acquiescence. First, recall that the general justifications for adhering to precedent are all ultimately about principles of justice.⁴³ According to these arguments, adherence to precedent is necessary or useful in achieving an important goal that our judicial system depends on or strives toward. Perhaps the institutional principle of statutory super-precedent—that courts should not act where Congress can—can also be said to serve such a goal.⁴⁴ But the second and more-often cited justification for heightened deference is categorically different. Its claim is empirical: Congress could have overturned our earlier decision; because it did not, it evidently agrees with our decision.⁴⁵

To say that Justice Scalia disagreed with this latter argument would be an understatement. Scalia had two principal objections to the concept of legislative acquiescence. First, as a committed textualist-originalist, Justice Scalia believed that the only legislature whose understanding of the text matters is the legislature that enacted it.⁴⁶ The inaction of a subsequent legislature in response to a judicial decision is irrelevant.⁴⁷ Second, Justice Scalia rejected the notion that legislative inaction signals legislative acquiescence.⁴⁸ Although

35. See GARNER ET AL., *supra* note 2, at 335.

36. 346 U.S. 356 (1953).

37. 407 U.S. 258 (1972).

38. *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

39. 552 U.S. 130 (2008).

40. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990).

41. 135 S. Ct. 2401 (2015).

42. *Brulotte v. Thys Co.*, 379 U.S. 29 (1964).

43. See *supra* Subpart I.A.

44. See *supra* Section I.B.1.

45. See CALABRESI, *supra* note 28, at 31–32; Eskridge, *supra* note 26, at 1366.

46. SCALIA & GARNER, *READING LAW*, *supra* note 1, at 72–82.

47. See *Johnson v. Transp. Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting).

48. *Id.* at 671–72.

Congress surely has the power to overturn a statutory precedent, and it sometimes does so,⁴⁹ there are many reasons that it may not do so even if a particular judicial opinion was wrongly decided. If nothing else, the power of legislative inertia is strong;⁵⁰ it is always easier for Congress to do nothing than it is for it to pass a law (perhaps especially so in today's dysfunctional political and legislative climate). As a result, it is deeply problematic to ascribe any significance to legislative inaction.⁵¹ For this reason, Justice Scalia inveighed against the concept of legislative acquiescence, and generally rejected the idea that precedent carried special weight in the legislative context.

To be sure, it is not only Justice Scalia, or even only statutory originalists, who doubt or outright reject the concept of legislative acquiescence. Professor Eskridge, who is neither a textualist nor an originalist, has also argued that the concept of super-strong statutory precedent should be abolished due to the power of legislative inertia, the presence of vetogates, and the realities of law-making. He, too, agrees that it is impossible to read acquiescence into the things that Congress does not do and the bills it does not pass.⁵² But Justice Scalia's commitment to originalist-textualism, together with his didactic personality and writing style, made him a particularly outspoken critic of the concept.⁵³

None of this is to say that Justice Scalia rejected the concept of precedent altogether in statutory interpretation. He simply believed that statutory precedents are no different from other kinds of precedents—they deserve deference for the same reasons, but to no greater degree.

II. JUSTICE GORSUCH AND LEGISLATIVE ACQUIESCENCE

Where does the Justice who has assumed Justice Scalia's seat on the Court stand on the question of statutory precedents? Do they deserve special deference, or are they entitled to no more or less deference than any other form of

49. See, e.g., Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009) (codified as amended at 42 U.S.C. § 2000e-5(e) (2012) and 29 U.S.C. § 626(d) (2012)) (responding to Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting)).

50. See Levin, *supra* note 4, at 1051–53 (discussing “vetogates” and legislative inertia).

51. See *Johnson*, 48 U.S. at 671–72 (Scalia, J., dissenting) (“[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [the current Congress’s] intent from the *failure* to enact legislation.”); Eskridge, *supra* note 26, at 1405 (“The vagaries of the political process make it hard to determine what Congress’ ‘positive inaction’ meant.”).

52. See Eskridge, *supra* note 26, at 1409 (arguing that the super-strong presumption against overruling statutory precedent should be abandoned).

53. See *Johnson*, 480 U.S. at 671 (Scalia, J., dissenting) (arguing that the assumption the Court’s decision is correct because Congress fails to pass legislation rejecting it is based on false premises); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 67–68 (1988) (noting in 1988 that “[t]he debate within the Court over the significance of legislative inaction has intensified . . . in large part because of the appointment of Justice Antonin Scalia, who has articulated sophisticated arguments against giving positive meaning to legislative inaction”).

precedent? The short answer is that we do not yet know for certain because he has apparently not yet spoken or written explicitly on the subject. Reading his work *in toto*, though, although there are a couple of reasons to believe that he may be less averse to the idea than Justice Scalia was, there is better reason to believe that his views are similar to the late Justice Scalia's on this question.

A. *Evidence that Justice Gorsuch May Accept the Concept of Legislative Acquiescence*

The first place to look in examining Justice Gorsuch's views on precedent is, of course, his coauthored treatise examining all things precedent-related: *The Law of Judicial Precedent*.⁵⁴ Sure enough, Chapter 38 is entitled "Stare Decisis with Statutes."⁵⁵ The chapter's heading is explicit in its embrace of the doctrine of super-strong statutory precedent. It reads,

Stare decisis applies with special force to questions of statutory construction. Although courts have power to overrule their decisions and change their interpretations [of statutes], they do so only for the most compelling reasons—but almost never when the previous decision has been repeatedly followed, has long been acquiesced in, or has become a rule of property.⁵⁶

The chapter explores at length—more than ten pages—the special treatment that courts give to such precedents, offering example after example,⁵⁷ explaining disagreements among Justices as to the correct application of the doctrine,⁵⁸ and considering its application in state courts.⁵⁹ It offers little critique of the doctrine, though it does carefully consider its limits and somewhat inconsistent application.

Case closed, right? Obviously, if Justice Gorsuch's own treatise on the topic of precedent endorses this doctrine without offering a strong critique, he surely agrees with it in some fashion.

Not so fast, however. The book generally offers more of a practical and descriptive treatment of the various doctrines and concepts of precedent than it does a normative or critical treatment. It is, after all, a treatise rather than a scholarly monograph. The chapter on statutory precedents is no different in this regard. Consequently, it may be better read as a report of what courts actually do rather than as an endorsement of these doctrines and practices. Additionally, Justice Gorsuch participated in authorship of the book as a judge on the court of appeals and not as a Supreme Court Justice. Given that the Supreme Court as a whole has generally endorsed this doctrine (notwithstand-

54. GARNER ET AL., *supra* note 2.

55. *Id.* at 333.

56. *Id.*

57. *Id.* at 335–37.

58. *Id.* at 338–40 (discussing a disagreement in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), between Justice Kennedy, writing for the majority, and Justice Breyer, in dissent).

59. *Id.* at 342–43.

ing Justice Scalia's critique), and given that lower court judges are obviously bound by the Supreme Court's pronouncements, he would have little reason to attack it.

Perhaps the most important reason for skepticism as to whether the book reveals Justice Gorsuch's personal views on any of the specific doctrines it explores has to do with the nature of its authorship. The treatise was written by twelve judicial coauthors and the coauthor and editor Bryan Garner.⁶⁰ Although different authors wrote different sections, they are not attributed to any particular author. Moreover, although "[t]he idea was . . . to make the entire book a fully coauthored work that each writer felt comfortable with[,] . . . it would be unrealistic for anyone to assume that all 13 coauthors stand by every single statement in the book."⁶¹ In other words, the book was simultaneously written by everyone and by no one. This is not an unreasonable approach, but caution is required in ascribing agreement of any particular author with any particular section.

A second reason to think that, unlike Justice Scalia, Justice Gorsuch may embrace the doctrine of super-strong statutory precedent and the concept of legislative acquiescence is that his views on statutory interpretation do not precisely track those of Justice Scalia. Broadly speaking, Justice Gorsuch does, like Justice Scalia, approach the law as a textualist-originalist. His early opinions on the Supreme Court suggest as much,⁶² he has said so himself,⁶³ and observers seem to agree with the characterization.⁶⁴ Nevertheless, a careful examination of his work as a judge on the court of appeals suggests that there is at least a sliver of daylight between his views and those of Justice Scalia on interpretive methodology in the context of statutory interpretation. In particular, a careful survey of his work by Max Alderman and Duncan Pickard reveals that, "when a textualist approach fails to clarify ambiguous statutory terms, Judge Gorsuch turns to sources that Justice Scalia decried."⁶⁵

Alderman and Pickard point us to then-Judge Gorsuch's concurring opin-

60. *Id.* at xiii–xiv.

61. *Id.*

62. Jonathan H. Adler, *Justice Gorsuch's First Opinions Reveal a Confident Textualist*, WASH. POST (June 23, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/justice-gorsuchs-first-opinions-reveal-a-confident-textualist/>.

63. Ryan Lovelace, *Neil Gorsuch: Scalia's Views on the Constitution Aren't "Going Anywhere on My Watch,"* WASH. EXAMINER (Nov. 16, 2017), <http://www.washingtonexaminer.com/neil-gorsuch-scalias-views-on-the-constitution-arent-going-anywhere-on-my-watch/article/2641012> ("Tonight I can report that a person can be both a publicly committed originalist and textualist and be confirmed to the Supreme Court of the United States," Gorsuch said. "Originalism has regained its place at the table . . . textualism has triumphed . . . and neither one is going anywhere on my watch.").

64. Ramesh Ponnuru, *Neil Gorsuch: A Worthy Heir to Scalia*, NAT'L REV. (Jan. 31, 2017), <https://www.nationalreview.com/2017/01/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir/>.

65. Alderman & Pickard, *supra* note 6, at 185.

ion in *United States v. Hinckley*.⁶⁶ There, after concluding that the text was ambiguous and other traditional tools of statutory interpretation inconclusive, Judge Gorsuch turned to legislative history, including statements of sponsors and drafters,⁶⁷ a move that Justice Scalia would have found unthinkable.⁶⁸ Judge Gorsuch also referred to “Congress’s intention,” “Congress’s purpose,” and the “inten[t of] the authors” in enacting the statute⁶⁹—concepts that Justice Scalia spent his career fighting. Given that some of Justice Scalia’s opposition to the concept of legislative acquiescence emerges from his commitment to textualism, opposition to the use of legislative history, and hostility to the very concept of legislative intent, Judge Gorsuch’s opinion in *Hinckley*, with its references towards these very concepts, may indicate a degree of openness towards the concepts of super-strong statutory precedent and legislative acquiescence.

That said, as with any argument built on a single chapter from a treatise on precedent, this is hardly sufficient evidence upon which to rest a conclusion on this question.

*B. Evidence that Justice Gorsuch Would Likely Reject
the Concept of Legislative Acquiescence*

Although we have no clear evidence as to the question at hand—because Justice Gorsuch has never addressed it directly—there is somewhat stronger evidence that Justice Gorsuch would likely reject the concepts of super-strong statutory precedent and legislative acquiescence.

As a general matter, and notwithstanding his occasional foray into legislative history, Justice Gorsuch does both claim to be a textualist-originalist and to adhere to the same principles articulated by Justice Scalia. As a judge on the court of appeals, Judge Gorsuch’s opinions interpreting statutes, even more than other judges, focused on the textual tools of interpretation and consist-

66. *Id.* at 188–89 (citing *United States v. Hinckley*, 550 F.3d 926, 940–47 (10th Cir. 2008) (Gorsuch, J., concurring), *abrogated by* *Reynolds v. United States*, 565 U.S. 432 (2012)).

67. *Hinckley*, 550 F.3d at 947 (Gorsuch, J., concurring); Alderman & Pickard, *supra* note 6, at 188–89.

68. *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (citing Judge Harold Leventhal in describing the use of legislative history as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends”); *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring) (arguing that legislative history is untrustworthy because it is easily susceptible to manipulation by staff and lobbyists); *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) (“An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.” (citations omitted)); *Immigration & Naturalization Servs. v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring) (“Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”).

69. *Hinckley*, 550 F.3d at 945–47; Alderman & Pickard, *supra* note 6, at 189.

ently assumed and asserted the primacy of the textualist approach.⁷⁰ Moreover, he cited Justice Scalia with notable frequency, and more so than any other Justice, on methodological approaches to statutory interpretation.⁷¹

Justice Gorsuch's early opinions on the Supreme Court, whether for the majority, in concurrence, or in dissent, also display a strong inclination towards textualism.⁷² His writing in cases involving statutory interpretation speaks *only* in textualist terms, rejecting policy and purposivist arguments and not even entertaining arguments from legislative history.⁷³ Given all of this, one can reasonably project that Justice Gorsuch would share Justice Scalia's view on this question.

There are also specific cases authored by then-Judge Gorsuch that tentatively suggest that he does not embrace the concepts of super-strong statutory precedent and legislative acquiescence. First, Justice Gorsuch has always declined to endorse the concept of legislative intent in general or to make hay of the ability of the legislature to correct erroneous decisions of the courts—both of which undergird arguments about super-strong statutory precedent and legislative acquiescence—even when doing so would support his interpretations of a statute. In *Lexington Insurance Co. v. Precision Drilling Co.*,⁷⁴ Judge Gorsuch was presented with an opportunity to argue from legislative intent or the ability of the legislature to correct him if his reading was wrong—“the legislature has had the opportunity to correct us” or “will have the opportunity to correct us”—but did not.⁷⁵

In that case, an oil rig's owner paid a settlement to an injured worker and sued the insurance company to reimburse him for the payment.⁷⁶ Despite the existence of two insurance policies covering these sorts of accidents, the insurance company refused to pay because of a Wyoming law making indemnity contracts regarding injured workers illegal in the oil industry.⁷⁷ However, the next section of the statute specifically exempted insurance contracts.⁷⁸ The

70. See, e.g., *Lexington Ins. Co. v. Precision Drilling Co.*, 830 F.3d 1219, 1221 (10th Cir. 2016) (“[T]he best evidence of legislative intentions lies in the language the legislature actually adopted and the executive actually signed.”).

71. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1148–59 (10th Cir. 2016) (Gorsuch, J., concurring) (citing several opinions written by Justice Scalia); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015) (same); *In re Woolsey*, 696 F.3d 1266 (10th Cir. 2012) (same); *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011) (same).

72. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018); *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1988 (2017) (Gorsuch, J., dissenting); *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

73. See, e.g., *Lewis*, 138 S. Ct. at 1624; *Perry*, 137 S. Ct. at 1988 (Gorsuch, J., dissenting); *Henson*, 137 S. Ct. at 1725.

74. 830 F.3d 1219 (10th Cir. 2016).

75. *Id.* at 1221.

76. *Id.* at 1220.

77. *Id.*

78. *Id.*

insurance company argued that this exception only applied where the covered entities themselves (as opposed to third parties) paid for the insurance policy, since an insurance policy bought by a third party arguably functions as an indemnity contract, which the legislature probably did not intend.⁷⁹ Judge Gorsuch concluded that, because the statute at issue meaningfully differed from similar statutes in other states, the allegedly contrary intent could not be read into the statute.⁸⁰ Judge Gorsuch could have argued in further support of his reading that “the legislature did not mean that,” and that “the legislature will correct me if I’m wrong”—a classic intentionalist move about legislative acquiescence. But he did not take the opportunity.

Additionally, in *Gutierrez-Brizuela v. Lynch*,⁸¹ Judge Gorsuch suggested a number of reasons to defer to precedent, notably omitting arguments about legislative acquiescence, and instead focused on reliance and faith in the judiciary.⁸² To be sure, the case was not primarily one of statutory interpretation—it primarily concerned precedent in the context of *Chevron* deference—but he could have added in further support that Congress had not overturned the prior precedents and thus indicated its acquiescence to them. Once again, he did not.

Moreover, Justice Gorsuch has prominently expressed his skepticism towards *Chevron* and *Auer* deference.⁸³ In doing so, he has not contended with the counterargument that Congress could itself overturn these doctrines were it so inclined, and that its inaction indicates acquiescence. This may suggest that Justice Gorsuch simply does not take such arguments all that seriously.⁸⁴

Finally, Judge Gorsuch’s dissent from the denial of a petition for en banc review in *United States v. Games-Perez*⁸⁵ may also be instructive. There, Judge Gorsuch argued forcefully that a prior decision of the Tenth Circuit concerning the *mens rea* necessary for conviction for a particular crime should be overturned because it contravened the plain language of the statute.⁸⁶ In so doing, he ignored any arguments in favor of legislative acquiescence in the statutory context and appeared to treat the prior precedent as no different from any other kind of precedential decision. Said another way, if then-Judge Gorsuch were a believer in legislative acquiescence, he probably would have joined the

79. *Id.* at 1220–21.

80. *Id.* at 1221–22.

81. 834 F.3d 1142 (10th Cir. 2016).

82. *Id.* at 1147–48.

83. *See id.* at 1149–58 (Gorsuch, J., concurring); Heather Elliott, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 719–20 (2019).

84. To be fair, he also could have used the opportunity to explicitly *denounce* the concept of legislative acquiescence and declined to do so.

85. *United States v. Games-Perez*, 695 F.3d 1104, 1116–25 (10th Cir. 2012) (Gorsuch, J., dissenting from the denial of the petition for rehearing en banc).

86. *See id.*

concurrence.⁸⁷ To be sure, it is important not to overread the absence of the legislative acquiescence argument, because such arguments generally do not apply with the same force with respect to lower court precedents as they do to Supreme Court precedents.⁸⁸ Nevertheless, given the dearth of direct evidence as to Judge Gorsuch's views on the matter, perhaps this case is at least somewhat probative.

C. Tentative Conclusion

Frankly, it is too soon to tell just how committed to absolute textualism Justice Gorsuch is. That seems to be his general inclination and his firm starting point, but he occasionally deviated from its orthodoxy while serving on the court of appeals. Further, he may not yet have fully developed opinions on the specific concepts of super-strong statutory precedent or legislative acquiescence. Given the evidence, though, it is reasonable to assume that Justice Gorsuch will not embrace the concepts of super-strong statutory precedent and legislative acquiescence, though he may never explicitly disclaim them unless and until forced to by the facts and issues presented by a particular case.

I say this for two reasons. First, having read dozens of Judge and Justice Gorsuch's opinions (including opinions that he did not author, but joined) on statutory interpretation and beyond, as well as various speeches and other writings, I cannot help but conclude that, although he is no absolutist, Justice Gorsuch's jurisprudence has clearly been heavily influenced by Justice Scalia and his fellow travelling textualist-originalists. Second, it does not take an absolutist textualist-originalist to question the concepts of super-strong statutory precedent and legislative acquiescence. As noted *supra*, a decidedly nontextualist and leading scholar of statutory interpretation, Professor Bill Eskridge, has suggested that these doctrines be done away with because of the simplistic and mistaken notions about the nature of the political process that lay at their foundation.⁸⁹ In combination, these two factors suggest to me that Justice Gorsuch is unlikely to embrace these concepts.

III. JUSTICE GORSUCH, TODAY'S SUPREME COURT, AND THE FUTURE OF ORIGINALIST-TEXTUALISM

Reading Justice Gorsuch's opinions makes one thing fairly clear: although he shares some of Justice Scalia's substantive views, Justice Gorsuch does

87. See *id.* at 1116 (Murphy, J., concurring in the denial of rehearing en banc) (opining that Congress had "failed or refused to amend" the relevant statutes following sixteen years of circuit court decisions).

88. See GARNER ET AL., *supra* note 2, at 333–45.

89. Eskridge, *supra* note 26, at 1409.

not—at least yet—share Justice Scalia's academic and stylistic bent.

He shares with Justice Scalia a philosophically conservative textualist-originalist approach to jurisprudence, an engaging and readable writing style, and no lack of confidence in his own views. But whereas Justice Scalia arrived on the Court with virtually fully formed, nearly absolutist, and strongly held views on the proper way to interpret and apply the law, Justice Gorsuch's approach, at least for now, appears to be at least somewhat flexible. Further, unlike Justice Scalia, who wrote in a manner intended to convert the academy, future judges and lawyers, and the public to his methodological approach to law, Justice Gorsuch's audience appears to be different. He generally prefers to stick to the facts and narrow issues presented by the case and also to convince his fellow judges as to his views in a particular case. These differences make sense given that Justice Gorsuch came to the Court having served as a judge and a lawyer in private practice rather than from academia.⁹⁰ His careful and narrow writing style might strike some as somewhat infantilizing, while others may find it highly engaging and folksy.

Finally, Justice Gorsuch came to a very different Court and a different legal landscape than did Justice Scalia. Professor and then-Justice Scalia passionately argued for, developed, and popularized his brand of jurisprudence. Thanks largely to his efforts, Justice Gorsuch—as well as Justice Alito, Chief Justice Roberts, and even Justice Kagan—can simply assume or adopt many of the methodological positions and language that Justice Scalia had to explain and fight for. Everyone now understands well the arguments for original public meaning constitutionalism and textualist-originalist statutory interpretation. None of these Justices appears to be quite as ardent or consistent a textualist-originalist as Justice Scalia was (at least in his rhetoric), and so none echo his furious advocacy for the methodology.⁹¹

All of this suggests both a victory and a loss for textualism on the Supreme Court. Because of Justice Scalia, the Court now has a shared language, set of tools, and ideas, even if they are hardly universally and consistently applied by the Justices; what it may have lost is a reliable and coherent public advocate for textualist principles on the Court.

90. See Elliott, *supra* note 83, at 711–12.

91. Justice Thomas is a staunch textualist-originalist as well, of course, but his energies seem primarily focused not on argumentation concerning methodology, but rather on applying his methodology to particular substantive areas of the law where he believes the Court to have been unfaithful to it and to reorient the doctrine in those areas. See, e.g., *Morse v. Republican Party of Va.*, 517 U.S. 186, 258–62 (1996) (Thomas, J., dissenting); *Holder v. Hall*, 512 U.S. 874, 914 (1994) (Thomas, J., concurring); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).