

THE NEW SWING VOTES ON THE U.S. SUPREME COURT

By Daniel Harris

ABSTRACT—The big surprise on the U.S. Supreme Court during the October 2018 term was how often the Court’s newest members disagreed with each other. In cases with at least one dissent, Justice Neil Gorsuch and Justice Brett Kavanaugh were on opposite sides 49% of the time. Frequently, one or the other joined with the Court’s four Democratic appointees, resulting in liberal victories in cases involving federal business regulation and federal criminal law.

There is a pattern to the disagreements between the new appointees—the two Justices have profoundly different attitudes toward the federal government. Justice Kavanaugh has a positive view of the federal government. As a result, he tends to resolve ambiguities in favor of the government and the exercise of federal power. Justice Gorsuch, on the other hand, has a skeptical attitude toward federal power. He resolves doubts against the government and the exercise of federal power. As a practical matter, this means that Justice Kavanaugh is a potential liberal ally in federal regulatory cases and Justice Gorsuch is a likely ally in federal criminal cases.

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INTRODUCTION

Confounding expectations, the U.S Supreme Court’s four Democratic appointees did surprisingly well during the October 2018 term,¹ significantly increasing their overall winning percentages from the previous term.² Whether that success rate will continue in the future is hard to say, for it depends on the mix of cases that the Court decides to hear as well as other considerations. But one factor working in favor of the Democratic appointees seems likely to persist. That factor, the subject of this Essay, is the different jurisprudential outlooks of Justices Kavanaugh and Gorsuch.

Although they were expected to have similar voting patterns,³ the Court’s newest members often disagreed with each other.⁴ In cases with at least one dissent, Justice Brett Kavanaugh and Justice Neil Gorsuch were on opposite sides 49% of the time.⁵ Their splits did not track the familiar right to left political spectrum, and both were willing to vote with the Court’s

¹ See Adam Liptak & Alicia Parlapiano, *A Supreme Court Term Marked by Shifting Alliances and Surprise Votes*, N.Y. TIMES (June 29, 2019), <https://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html> [<https://perma.cc/K7SB-G68V>] (“The Supreme Court term that ended on Thursday was expected to be a blood bath for its four-member liberal wing. Instead, shifting alliances produced a series of surprising liberal victories. . . . [T]he [C]ourt’s liberals had far more success than they did last term, when Justice Anthony M. Kennedy was still on the [C]ourt.”).

² FINAL STAT PACK FOR THE OCTOBER 2018 TERM 24 (2019), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf [<https://perma.cc/9WWX-UKXQ>] (showing that during the October 2018 Term, the conservative justices won only 41% of ideologically conservative 5–4 decisions; by contrast, during the October 2017 Term, the conservatives won 100% of ideologically conservative 5–4 decisions).

³ See Jeremy Kidd, *New Metrics and the Politics of Judicial Selection*, 70 ALA. L. REV. 785, 803–04 (2019) (showing through quantitative analysis that Justice Gorsuch and Justice Kavanaugh had very similar conservative predictive scores).

⁴ See Robert Barnes, *They’re Not ‘Wonder Twins’: Gorsuch, Kavanaugh Shift the Supreme Court, but Their Differences are Striking*, WASH. POST (June 29, 2019, 7:00 AM), https://www.washingtonpost.com/politics/courts_law/theyre-not-wonder-twins-gorsuch-kavanaugh-shift-the-supreme-court-but-their-differences-are-striking/2019/06/28/63754902-99b6-11e9-916d-9c61607d8190_story.html [<https://perma.cc/9YZ5-9V7L>] (“Gorsuch and Kavanaugh have disagreed more than any pair of new justices chosen by the same president in decades.”).

⁵ FINAL STAT PACK FOR THE OCTOBER 2018 TERM, *supra* note 2, at 24.

Democratic appointees. Justice Kavanaugh voted with Obama appointee Justice Elena Kagan 70% of the time in all cases, and 51% of the time in divided cases (just as often as he agreed with Justice Gorsuch).⁶ In the cases decided five to four, Justice Gorsuch voted with Justice Ruth Bader Ginsburg 35% of the time and with Justice Sonia Sotomayor 35% of the time.⁷

This Essay argues that there is a pattern to the disagreements between Justice Kavanaugh and Justice Gorsuch that is clear from their Supreme Court opinions and is likely to impact their votes for many years to come. Specifically, the two Justices have fundamentally different attitudes toward the federal government and the scope of federal power.

Justice Kavanaugh, who has lived in the Washington D.C. area for almost all of his life and has spent his career working for the federal government,⁸ has a positive, Hamiltonian, insider view of the federal government and federal power. As will be shown below, he tends to resolve ambiguities in its favor. Justice Kavanaugh embraces jurisprudential philosophies that treat government as a force for good and believes laws should be construed pragmatically to benefit society. He is apt to vote with the liberal justices in federal regulatory cases in which the weak seek the protection of federal law.

Justice Gorsuch hails from Colorado. His mother, Anne Gorsuch, came under sharp criticism for her deregulatory efforts as President Reagan's Director of the Environmental Protection Agency in the early 1980s.⁹ As this Essay will show, Justice Gorsuch has a skeptical, Jeffersonian, outsider view of the federal government and federal power. He likes to resolve doubts against it. Justice Gorsuch subscribes to theories of jurisprudence that tend to restrain federal power, such as the traditional common law, separation of powers and originalism. He is apt to vote with the Court's liberal justices in federal criminal cases and other matters in which the weak seek protection from federal law.

This Essay will illustrate the differences between the two Justices by looking at the four Supreme Court cases in which they were on opposite sides and both wrote substantial opinions. The first two are cases in which Justice Kavanaugh was in the majority and Justice Gorsuch was in dissent. The last two are cases in which Justice Gorsuch was on the winning side while Justice Kavanaugh was in dissent. These four cases illustrate the different philosophies of the two Justices pertaining to federal power: One Hamiltonian seeking to increase federal power and the other Jeffersonian

⁶ *See id.*

⁷ *See id.*

⁸ *See* MOLLIE HEMINGWAY & CARRIE SEVERINO, JUSTICE ON TRIAL 9, 95 (2019).

⁹ *See id.* at 59–60.

seeking to limit federal power. They provide some indication of when each Justice might be willing to cross the aisle and vote with the Democratic appointees on the Court.

I. JUSTICE KAVANAUGH PREVAILS OVER JUSTICE GORSUCH

A. Apple Inc. v. Pepper

An excellent example of how Justice Kavanaugh and Justice Gorsuch differ when it comes to construing the breadth of federal power is *Apple Inc. v. Pepper*,¹⁰ an antitrust case. Apple required that applications (“apps”) for Apple devices be sold through its app store. The app developers set the prices for the apps, but Apple imposed a uniform 30% commission.¹¹

Several consumers sued Apple, alleging that the company was a monopolist in violation of the Sherman Act and unlawfully used its monopoly power to charge customers higher prices than the customers would have paid in a competitive market. In response, Apple argued that its actions were not the proximate cause of the prices the customers were charged because those prices were set by the various app developers and not by Apple.¹²

The company invoked a 1977 U.S. Supreme Court precedent, *Illinois Brick Co. v. Illinois*,¹³ which held that only direct purchasers have standing to sue for damages under the federal antitrust laws.¹⁴ Apple argued that the consumer plaintiffs were analogous to indirect purchasers because they were suing a party that did not set the prices for allegedly causing the antitrust injury. The U.S. District Court for the Northern District of California agreed with Apple and dismissed the case.¹⁵ The Court of Appeals for the Ninth Circuit reversed, holding that the consumers were direct purchasers within the meaning of *Illinois Brick* and therefore had standing to sue.¹⁶ The question before the Supreme Court was whether to adopt a liberal construction of the Sherman Act and a narrow construction of the *Illinois Brick* exception, as the plaintiffs wanted, or conversely, a narrow construction of the Sherman Act, a broad construction of the *Illinois Brick*

¹⁰ 139 S. Ct. 1514 (2019).

¹¹ *Id.* at 1519.

¹² *Id.*

¹³ 431 U.S. 720 (1977).

¹⁴ *Id.* at 745–46; *Apple*, 139 S. Ct. at 1520.

¹⁵ *See In re Apple iPhone Antitrust Litig.*, 2013 U.S. Dist. LEXIS 169836, *22 (N.D. Cal. Dec. 2, 2013).

¹⁶ *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 325 (9th Cir. 2017).

exception, and a common law proximate cause requirement, as Apple urged.¹⁷

The Supreme Court sided with the consumer plaintiffs by a vote of five to four and affirmed the Ninth Circuit. The majority consisted of the Court's four Democratic appointees plus Justice Kavanaugh, who wrote the majority opinion.¹⁸ A key theme in the opinion was that the Sherman Act should be construed so as to fulfill its purpose of protecting consumers from monopolists. Early on, the opinion described the plaintiffs' allegations as stating a classic antitrust claim.¹⁹ The majority then noted that immunizing monopolistic retailers from an antitrust suit whenever the retailers had their suppliers set the base prices would be inconsistent with the statutory scheme. "We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent,"²⁰ the majority said.

Justice Kavanaugh brushed aside Apple's practical arguments that Apple could still be sued by its suppliers and that determining damages was too complex. That Apple could also be sued as a monopolist by its suppliers was of no matter: "Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases."²¹ The potential complexity of damage calculations was also immaterial.²²

In closing, Justice Kavanaugh returned to the theme that the Sherman Act should be interpreted so as to accomplish its pro-consumer purpose. He stated: "The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law."²³ The opinion went on: "Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, 'protecting consumers from monopoly prices' has been 'the central concern of antitrust.'"²⁴

Justice Gorsuch wrote a dissent, joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito.²⁵ Justice Gorsuch interpreted *Illinois Brick* broadly to prohibit pass-on theories of damages in

¹⁷ *Apple*, 139 S. Ct. at 1519.

¹⁸ *Id.* at 1518, 1525.

¹⁹ *Id.* at 1519.

²⁰ *Id.* at 1523–24.

²¹ *Id.* at 1524.

²² *Id.* ("*Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated.").

²³ *Id.* at 1525.

²⁴ *Id.*

²⁵ *Id.* (Gorsuch, J., dissenting).

accordance with the general rule that statutory causes of action are “limited to plaintiffs whose injuries are proximately caused by violations of the statute.”²⁶ Justice Gorsuch went on to argue that the Court’s decision replaced the sensible proximate cause standard with a formalistic rule that ignored economic reality.²⁷

Justice Gorsuch’s dissent placed great weight on the practical difficulties of adjudicating the plaintiffs’ antitrust claim, asking: “Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple’s commission had been lower?”²⁸ Justice Gorsuch also chided Justice Kavanaugh for preferring the text of the Sherman Act to common law principles limiting liability, arguing that instead the Court should follow *Illinois Brick* and “the well-trodden path of construing the statutory text in light of background common law principles of proximate cause.”²⁹

For purposes of this Essay, the important takeaway from the *Apple* case is how differently the two Trump appointees approached federal regulation. Justice Kavanaugh supported a broad reading of a federal statute while Justice Gorsuch preferred limiting principles taken from common law traditions. Justice Kavanaugh sympathized with the people the statute was intended to protect. He had much less concern for alleged lawbreakers. By contrast, Justice Gorsuch was supportive of a doctrine from the traditional common law that limits the reach of federal liability and protects parties subject to federal regulation.

B. *Air and Liquid Systems Corp. v. DeVries*

A similar conflict between Justice Kavanaugh and Justice Gorsuch took place in *Air and Liquid Systems Corp. v. DeVries*,³⁰ a case involving the application of federal maritime law to a products liability claim. Plaintiffs Kenneth McAfee and John DeVries were exposed to asbestos while serving in the U.S. Navy (one in the 1950s, the other in the 1980s). They later developed cancer, allegedly as a result of their asbestos exposure.³¹ The plaintiffs could not sue the Navy because of a 1950 Supreme Court precedent and they were unable to sue the asbestos manufacturers because those

²⁶ *Id.* at 1527 (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014)).

²⁷ *Id.* at 1526.

²⁸ *Id.* at 1528.

²⁹ *Id.* at 1530.

³⁰ 139 S. Ct. 986 (2019).

³¹ *See id.* at 991.

companies were in bankruptcy.³² So, instead, the former sailors and their wives filed suit in Pennsylvania state court against the companies that had supplied the Navy with products such as pumps, blowers, and turbines to which the Navy had later added asbestos. The theory of liability was that the defendant companies should have warned the Navy about the dangers of asbestos insulation, so that the plaintiffs would have known to wear respiratory masks and could have avoided the hazard.³³

The defendants removed the cases to federal court because the cases fell within the federal maritime jurisdiction. The U.S. District Court for the Eastern District of Pennsylvania granted the defendants' motions for summary judgment, relying on the traditional common law "bare-metal defense," followed in many jurisdictions, under which product manufacturers have no duty to warn about the dangers of materials that are not in their products at the time of sale.³⁴ The U.S. Court of Appeals for the Third Circuit reversed in accordance with a modern products liability rule, followed in some jurisdictions, that requires manufacturers to warn about the dangers of added materials if it is foreseeable that the materials might be added to the product after sale.³⁵ Thus, the court of appeals rejected the traditional common law limit on liability followed by the district court in favor of holding the defendant manufacturers potentially liable under a more modern and expansive theory of product liability.

On review, the Supreme Court sided with the plaintiffs by a vote of six to three. But instead of following the Third Circuit's reasoning, the Supreme Court adopted a somewhat less plaintiff-friendly modern rule, followed in some jurisdictions, under which

[A] product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger.³⁶

The majority opinion was written by Justice Kavanaugh and joined by Chief Justice Roberts and the Court's four Democratic appointees. Justice Kavanaugh began his analysis by noting that in maritime cases the federal

³² See *id.* at 992 (citing *Feres v. United States*, 340 U.S. 135, 138 (1950) (barring service members from suing the federal government for service-related injuries)).

³³ See *id.*

³⁴ See *Devries v. Gen. Elec. Co.*, 188 F. Supp. 3d 454, 461, 464 (E.D. Pa. 2016); *McAfee v. 20th Century Glove Corp. of Texas*, 2015 U.S. Dist. LEXIS 75886 (E.D. Pa. June 10, 2015).

³⁵ See *In re Asbestos Prods. Liability Litig.*, 873 F.3d 232, 234 (3rd Cir. 2017); see also *Air and Liquid Sys. Corp.*, 139 S. Ct. at 992.

³⁶ *Air and Liquid Sys. Corp.*, 139 S. Ct. at 991.

courts act as common law courts with the same power to make law that state courts have “in state common-law cases.”³⁷ Justice Kavanaugh went on to emphasize that federal courts did not have to stick with traditional common law rules but instead could examine a wide variety of sources, including scholarly writings, treatises, legislation, and opinions of other courts, in deciding how to shape maritime law.³⁸

Justice Kavanaugh concluded that what he described as the intermediate approach offered the best rule. Justice Kavanaugh reasoned that because products can be used in so many ways with so many other products and with so many possible bad combinations, the foreseeability test adopted by the Third Circuit would be too costly and would lead to “overwarning” users (that is, a mind-numbingly long list of everything that might go wrong).³⁹ On the other hand, Justice Kavanaugh opined that the bare-metal defense followed by the district court would not do enough to force warnings and promote safety.⁴⁰ Justice Kavanaugh reasoned that the intermediate test would not raise the practicability concerns of the foreseeability test, noting that the Court was not aware of “substantial overwarning problems” in the jurisdictions that follow the intermediate approach.⁴¹

Justice Kavanaugh added a revealing policy reason for siding with the plaintiffs, stating: “Maritime law has always recognized a ‘special solicitude for the welfare’ of those who undertake to ‘venture upon hazardous and unpredictable sea voyages.’”⁴² Justice Kavanaugh went on: “The plaintiffs in this case are the families of veterans who served in the U. S. Navy. Maritime law’s longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances.”⁴³ Thus, Justice Kavanaugh treated helping the weak (in this case, sailors and their families) as a legitimate reason to expand federal liability, taking a positive and activist view of federal power.

Justice Gorsuch wrote the dissent, joined by Justices Thomas and Alito. He argued that the test adopted by the majority did not enjoy “meaningful roots in the common law.”⁴⁴ Citing the Restatement (Third) of Torts from 1997, Justice Gorsuch noted that “it is black-letter law that the supplier of a product generally must warn about only those risks associated with the

³⁷ *Id.* at 992.

³⁸ *Id.* at 992 (“In formulating federal maritime law, the federal courts may examine, among other sources, judicial opinions, legislation, treatises, and scholarly writings.”).

³⁹ *Id.* at 994.

⁴⁰ *Id.* at 994–95.

⁴¹ *Id.* at 995.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 997 (Gorsuch, J., dissenting).

product itself, not those associated with the ‘products and systems into which [it later may be] integrated.’”⁴⁵

Justice Gorsuch argued that the common law rule made the most sense from the standpoint of economic efficiency because manufacturers are the ones who know their products best and therefore should be the ones who have the duty to warn about product hazards.⁴⁶ Justice Gorsuch also argued that the traditional common law was more consistent with consumer expectations through examples:

A home chef who buys a butcher’s knife may expect to read warnings about the dangers of knives but not about the dangers of undercooked meat. Likewise, a purchaser of gasoline may expect to see warnings at the pump about its flammability but not about the dangers of recklessly driving a car.⁴⁷

Justice Gorsuch criticized the majority for replacing a clear common law rule with an opaque standard that will be difficult to administer. He then raised a fairness argument that the majority had not considered, noting that the defendants were being sued over products they had sold decades earlier and that the defendants had provided all the warnings at the time that the law then required. Now, the Court was imposing a new duty on them to warn “to warn about other people’s products. It is a duty they could not have anticipated then and one they cannot discharge now. They can only pay.”⁴⁸

Justice Gorsuch went on to argue that the Court

[M]ay be motivated by the unfortunate facts of this particular case, where the sailors’ widows appear to have a limited prospect of recovery from the companies that supplied the asbestos (they’ve gone bankrupt) and from the Navy that allegedly directed the use of asbestos (it’s likely immune under our precedents).⁴⁹

Nevertheless, he continued, sympathy for the plaintiffs and the Court’s desire to provide them a source of recovery did not justify imposing liability on the defendant manufacturers for conduct that was lawful at the time they acted.⁵⁰

Once again, Justice Kavanaugh sympathized with those needing the protection of federal law. Justice Gorsuch’s sympathies were with those

⁴⁵ *Id.* (alteration in original).

⁴⁶ *Id.* (“By contrast, we dilute the incentive of a manufacturer to warn about the dangers of its products when we require other people to share the duty to warn and its corresponding costs.”).

⁴⁷ *Id.* at 998.

⁴⁸ *Id.* at 999.

⁴⁹ *Id.* at 1000.

⁵⁰ *Id.* (“[H]ow were they supposed to anticipate many decades ago the novel duty to warn placed on them today? People should be able to find the law in the books; they should not find the law coming upon them out of nowhere.”).

needing protection from federal law. Consistent with his pragmatic approach and comfort with federal power, Justice Kavanaugh supported judicial innovation on behalf of the disadvantaged. Taking a modern, consumer protective view of the evolving common law, Justice Kavanaugh wanted the federal government to take an active role (through the federal courts) in helping the weak, even if that meant upsetting the settled expectations of business. Justice Gorsuch, by contrast, thought that it was wrong for the federal courts to make up new legal duties and then punish people for violating rules that did not exist at the time the defendants engaged in the challenged conduct. What Justice Kavanaugh regarded as beneficial activism, Justice Gorsuch saw as the overreach of arbitrary government. For Justice Gorsuch, courts should resist the temptation to do good with other people's money. Accordingly, Justice Gorsuch favored the traditional common law even if that meant sympathetic plaintiffs would go without a recovery.

II. JUSTICE GORSUCH PREVAILS OVER JUSTICE KAVANAUGH

The differences between Justice Kavanaugh and Justice Gorsuch did not track the familiar right to left political spectrum. Sometimes, Justice Gorsuch's anti-federal government approach led him to side with the underdog and the Court's Democratic appointees, while Justice Kavanaugh's pro-government stance put him on the same side as the Court's other Republican appointees. Here are two examples.

A. *United States v. Davis*

While brandishing a short-barreled shotgun, Maurice Davis and Andre Glover committed a string of gas station robberies in Texas.⁵¹ They were caught, prosecuted in federal court and convicted of (1) violations of the federal Hobbs Act; (2) using or carrying a firearm in connection with their Hobbs Act crimes; (3) conspiracy to violate the Hobbs Act; and (4) using or carrying a firearm in connection with their Hobbs Act conspiracy.⁵² The question before the Supreme Court involved the fourth charge.

The governing statute, 18 U.S.C. § 924(c), made it a crime to use or carry a firearm in connection with a federal "crime of violence."⁵³ A crime of violence was defined in 18 U.S.C. § 924(c)(3). There were two alternative definitions. According to subsection (A), a crime of violence was a felony that had "the use, attempted use, or threatened use of physical force" as one

⁵¹ *United States v. Davis*, 139 S. Ct. 2319 (2019).

⁵² *See id.* at 2324.

⁵³ 18 U.S.C. § 924(c)(1)(A) (2012).

of its elements.⁵⁴ Alternatively, according to subsection (B), a crime of violence was a felony “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”⁵⁵

The Government could justify the defendants’ convictions for carrying or using a firearm in connection with their Hobbs Act violations under subsection (A) because the use or threatened use of force was an element of that crime. But the Government could not justify the defendants’ convictions for carrying or using a firearm in connection with the conspiracy charge because the use or threatened use of force was not an element of conspiracy. Those convictions had to be justified under subsection (B).⁵⁶

The Government faced three big problems. First, subsection (B) had been construed, both by the courts and the Government, to require the “categorical” approach: an inquiry into the potential for harm inherent in the category of offense that the defendant committed (for example, is mail fraud the type of crime that has a substantial risk of harm?).⁵⁷ Second, the Supreme Court held in 2018 in *Sessions v. Dimaya* that a virtually identical statutory definition of a crime of violence mandated that same categorical approach.⁵⁸ Third, and most troublesome for the Government, in *Dimaya*, the Supreme Court held that the categorical approach was unconstitutionally vague because it required courts “to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk.”⁵⁹

To save the convictions and the statute, the Government asked the Supreme Court to get rid of the vagueness problem by reinterpreting subsection (B) so that its definition of a crime of violence would depend on what defendants actually did and not on the hypothetical potential for harm associated with their category of crime.⁶⁰ The Supreme Court, in a five to four decision, rejected the Government’s request. The five Justices in the majority were the Court’s four Democratic appointees plus Justice Neil Gorsuch, who wrote the majority opinion.

Consistent with his originalist approach, Justice Gorsuch began his opinion by setting forth his deductions from the founding principles of the republic. Justice Gorsuch noted that in our constitutional order only

⁵⁴ § 924(c)(3)(A).

⁵⁵ § 924(c)(3)(B); see *Davis*, 139 S. Ct. at 2324.

⁵⁶ § 924(c)(3)(B).

⁵⁷ See *Davis*, 139 S. Ct. at 2326.

⁵⁸ 138 S. Ct. 1204, 1211, 1214–16 (2018).

⁵⁹ *Id.* at 1216 (internal quotation marks omitted).

⁶⁰ *Davis*, 139 S. Ct. at 2327.

Congress can define federal crimes and those definitions have to be clear enough to give people fair notice of what the law prohibits.⁶¹ He further stated that vague laws violate these principles because they hand off the responsibility of defining criminal behavior “to unelected prosecutors and judges” and because they “leave people with no sure way to know what consequences will attach to their conduct.”⁶² The Supreme Court, he continued, could not fix vague laws by rewriting them because that is a function reserved for the legislature.⁶³

Applying these principles to the case at hand, Justice Gorsuch stated that subsection (B) meant a crime of violence was to be determined using the categorical approach, which involved assessing the potential for harm associated with the abstract category of the defendant’s offense. Because this inquiry provided “no reliable way to determine which offenses qualify as crimes of violence,” the section was “unconstitutionally vague.”⁶⁴

Justice Gorsuch further explained that while the Government’s alternative reading of the statute would cure the vagueness problem, it could not “be squared with the statute’s text, context, and history.”⁶⁵ Were the Supreme Court to adopt the Government’s revised version of the statute, Justice Gorsuch said, the Supreme Court Justices would be stepping outside their role “as judges and writing a new law rather than applying the one Congress adopted.”⁶⁶

Justice Gorsuch also noted that the Government’s new reading of subsection (B) would criminalize some conduct that was not made criminal by the law as it was actually written (such as a defendant’s use of a firearm in connection with an offense that does not normally involve the use of force). Expanding the statute through interpretation “would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests.”⁶⁷ Therefore, despite the general reluctance of courts to declare acts of Congress unconstitutional, “a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.”⁶⁸

Thus, Justice Gorsuch was not willing to rewrite the law in order to save it from being struck down as unconstitutionally vague. For Justice Gorsuch,

⁶¹ *Id.* at 2323.

⁶² *Id.*

⁶³ *Id.* at 2323–24.

⁶⁴ *Id.* at 2324.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 2333.

⁶⁸ *Id.*

the top priority was preserving the rule of law and separation of powers, even if that meant some criminals did not receive all the punishment that Congress may have wanted them to receive.

Justice Kavanaugh wrote the dissent, joined by Justices Thomas and Alito and in part by Chief Justice Roberts. Rather than adverting to the governing principles of a free society, as Justice Gorsuch had done, Justice Kavanaugh focused on the practical needs of modern American society. Citing crime statistics, Justice Kavanaugh noted how violent crime became a serious problem in America in the last third of the twentieth century.⁶⁹ Justice Kavanaugh went on to explain how the challenged law, 18 U.S.C. § 924(c), was passed in response to the demands of the American people and how since its passage thirty-three years ago, “violent crime with firearms has decreased significantly.”⁷⁰

Justice Kavanaugh then attacked as surprising and extraordinary the Supreme Court’s decision to strike down a key provision of § 924(c), “a federal law that has been applied so often for so long with so little problem.”⁷¹ He warned that the Court’s decision “will make it harder to prosecute violent gun crimes in the future” and will release those convicted of violent gun crimes earlier than specified by Congress when it enacted § 924(c).⁷²

Justice Gorsuch devoted a section of his majority opinion to respond to Justice Kavanaugh’s dissent.⁷³ He responded to Justice Kavanaugh’s first argument by saying that there was nothing surprising or extraordinary about striking down a statute that even the Government conceded was unconstitutional, even if it continued to be interpreted as it had been interpreted through thousands of prosecutions. On the contrary, Justice Gorsuch said, it would be surprising and extraordinary if the Supreme Court could save the statute by suddenly giving it “a new meaning different from the one it has borne for the last three decades.”⁷⁴

In his dissent, Justice Kavanaugh argued that the most sensible interpretation of a statute such as § 924(c)(3)(B), that imposes enhanced penalties on defendants who use a firearm in connection with a crime of violence, was to focus on what the defendant had actually done and not to employ the categorical approach of looking at the potential for harm associated with the abstract crime.⁷⁵ Justice Kavanaugh quoted a lower court

⁶⁹ *Id.* at 2336 (Kavanaugh, J., dissenting).

⁷⁰ *Id.* at 2337.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 2333–36.

⁷⁴ *Id.* at 2333.

⁷⁵ *Id.* at 2343 (Kavanaugh, J., dissenting).

opinion: “If you were to ask John Q. Public whether a particular crime posed a substantial risk of violence, surely he would respond, ‘Well, tell me how it went down—*what happened?*’”⁷⁶ Justice Gorsuch responded by noting that the language of the statute before the Supreme Court wasn’t “the language posited in the dissent’s push poll. [Subsection (B)] doesn’t ask about the risk that ‘a particular crime posed’ but about the risk that an ‘offense . . . by its nature, involves.’”⁷⁷

Justice Kavanaugh said that it was irrelevant that the Government had for many years taken the position that subsection (B) mandated the (now unconstitutional) categorical approach. He noted that the Government only adopted that position “after the courts settled” on the categorical approach and that the Government took the position at a time “when it did not matter for constitutional vagueness purposes.”⁷⁸ In response, Justice Gorsuch asked: “Isn’t it at least a little revealing that, when the government had no motive to concoct an alternative reading, even it thought the best reading of § 924(c)(3)(B) demanded a categorical analysis?”⁷⁹

Justice Kavanaugh’s dissent noted that the word “offense” in subsection (B) could be read to refer to what the defendant had actually done,⁸⁰ and that under a canon of statutory construction, ambiguous statutes must be interpreted to avoid unconstitutionality.⁸¹ Therefore, Justice Kavanaugh argued, the statutory definition of a crime of violence should be interpreted to focus on the defendant’s actual conduct because that reading would eliminate the vagueness problem and thus make the statute constitutional.⁸²

In response, Justice Gorsuch pointed out that the dissent’s new reading of the law would criminalize conduct that was not criminal under the categorical approach, the interpretation that fit best with the statute’s language and history. Justice Gorsuch chided the dissent for not even trying to explain how criminalizing “conduct that *isn’t* criminal under the fairest reading of a statute might be reconciled with traditional principles of fair notice and separation of powers.”⁸³ Justice Gorsuch noted that the dissent seemed willing to consign thousands of defendants to prison for a long time because it was “merely possible” that Congress might have ordained those

⁷⁶ *Id.* (quoting *Ovalles v. United States*, 905 F.3d 1231, 1241 (11th Cir. 2018), *abrogated by Davis*, 139 S. Ct. at 2319).

⁷⁷ *Id.* at 2334 (majority opinion).

⁷⁸ *Id.* at 2355 (Kavanaugh, J., dissenting).

⁷⁹ *Id.* at 2334 (majority opinion).

⁸⁰ *Id.* at 2346 (Kavanaugh, J., dissenting).

⁸¹ *Id.* at 2349–50.

⁸² *Id.* at 2351.

⁸³ *Id.* at 2335 (majority opinion).

penalties.⁸⁴ Justice Gorsuch concluded: “In our republic, a speculative possibility that a man’s conduct violated the law should never be enough to justify taking his liberty.”⁸⁵

The last section of the dissent returned to the theme that the Court’s decision meant that “people who in the future commit violent crimes with firearms may be able to escape conviction under § 924(c).”⁸⁶ Justice Kavanaugh argued that when the consequences of statutory interpretation are this bad, the Court should double-check its legal analysis.⁸⁷ Accordingly, this double-checking would lead the Court to conclude that Justice Kavanaugh’s preferred (re)interpretation of the statute was reasonable.⁸⁸ Justice Kavanaugh concluded: “I am not persuaded that the Court can blame this decision on Congress. The Court has a way out, if it wants a way out.”⁸⁹

The majority opinion by Justice Gorsuch challenged the dissent’s public policy arguments by questioning why Justice Kavanaugh would point out all the potential consequences if not to suggest that judges read the law to satisfy their policy goals.⁹⁰ For Justice Gorsuch, the law should be interpreted in accordance with its language and original meaning, not given the interpretation that would best advance the judge’s idea of public policy. Justice Gorsuch went on to note the various ways Congress could fix the problem and then concluded that these options are within Congress’s purview, and it is not the role of the Court to write new statutes.⁹¹

The *Davis* decision illustrates the philosophical differences between Justice Gorsuch and Justice Kavanaugh. Justice Gorsuch determined the meaning of the challenged law by looking at its language, history, and prior construction. He did not worry about whether this interpretation was consistent with sound public policy, the needs of law enforcement, or the objectives of Congress. By contrast, Justice Kavanaugh focused on the general statutory purpose and the practical consequences of alternative interpretations. He saw the judicial role as acting to benefit society and not just trying to find out the meaning of words used in a law.

Justice Gorsuch resolved doubts about the meaning of the statute against the Government and in favor of liberty. He considered it immoral, and contrary to the basic principles of a free society, that people should be

⁸⁴ *Id.* (internal quotation marks omitted).

⁸⁵ *Id.*

⁸⁶ *Id.* at 2353 (Kavanaugh, J., dissenting).

⁸⁷ *Id.* at 2355.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 2335 (majority opinion).

⁹¹ *Id.* at 2336.

punished based on the mere possibility that Congress might have wanted to proscribe what they had done. Justice Kavanaugh resolved ambiguities in favor of the Government and against wrongdoers. For him, it was wrong for the Court to ignore the public interest in law enforcement or the interest of society in deterring and punishing violent crime.

Consistent with his originalist approach, Justice Gorsuch treated the law's meaning as fixed, something courts were bound to follow whether or not they liked the consequences. Consistent with his pragmatic approach, Justice Kavanaugh saw the law's meaning as something the Court could shape or alter to serve the public interest.

B. Washington State Department of Licensing v. Cougar Den, Inc.

Justice Gorsuch and Justice Kavanaugh were also on opposite sides of *Washington State Department of Licensing v. Cougar Den, Inc.*⁹² a five to four decision involving the interpretation of an 1855 treaty between the Yakama Nation and the U.S. Government.

The State of Washington taxes motor vehicle fuel importers who bring large quantities of motor fuel into the state using ground transportation.⁹³ The state sought to impose the tax on Cougar Den, a company owned by a member of the Yakama Nation and incorporated under Yakama law that trucked motor fuel over public highways to the Yakama reservation.⁹⁴

Cougar Den objected to the tax based on an 1855 treaty between the United States and the Yakama Nation. The treaty gave the United States ten million acres of Yakama land (a quarter of what is now the State of Washington) and gave members of the Yakama Nation certain rights in exchange. Among other things, the treaty promised the Yakamas “the right, in common with citizens of the United States, to travel upon all public highways.”⁹⁵ Cougar Den argued that this meant the Yakamas could import fuel by highway without being subject to state taxation. The State of Washington argued that the challenged law taxed the possession of motor fuel and did not violate the treaty.⁹⁶

By a vote of five to four, the Supreme Court ruled for the Yakama fuel importer. The majority coalition consisted of the Court's four Democratic appointees plus Justice Gorsuch. The main opinion on behalf of the fuel importer was a plurality opinion by Justice Breyer that was joined by Justice Kagan and Justice Sotomayor. Justice Breyer's opinion limited its scope to

⁹² Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1001 (2019).

⁹³ *Id.* at 1006–07 (citing WASH. REV. CODE §§ 82.36.010(12), (16) (2012) (repealed 2016)).

⁹⁴ *See id.* at 1007 (plurality opinion by Breyer, J.)

⁹⁵ *Id.* (internal quotation marks omitted).

⁹⁶ *Id.* at 1009.

protecting the Yakamas from the state tax on fuel imported over public highways and was careful not to impugn state power over the Yakamas in a variety of other circumstances.⁹⁷

Justice Gorsuch wrote a concurring opinion, joined by Justice Ginsburg, which used more sweeping logic to decide in favor of the Yakamas. That opinion began by noting the long history of the Yakamas in the Pacific Northwest and that they gave up ten million acres of their land in exchange for rights under the 1855 treaty with the United States.⁹⁸ Consistent with his originalist approach, Justice Gorsuch went on to describe the Court's task as the "modest one" of construing the treaty to adopt "the interpretation most consistent with the treaty's original meaning."⁹⁹

Quoting precedent, Justice Gorsuch emphasized that the relevant meaning was not what the government might have understood but rather what the treaty meant to the Yakamas.¹⁰⁰ Justice Gorsuch explained the reason for this rule: "After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen."¹⁰¹

Turning to the language of the treaty, Justice Gorsuch acknowledged that "[t]o some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else."¹⁰² But the modern understanding of the words did not matter, Justice Gorsuch went on, because that was not the Yakamas' understanding at the time the 1855 treaty was signed.¹⁰³ Citing binding, factual findings from another treaty case, Justice Gorsuch noted that in the "Yakama language, the term 'in common with' . . . suggest[ed] public use or general use without restriction."¹⁰⁴ This meant that the Yakamas understood the treaty to mean they could use the public highways without restriction.

Justice Gorsuch went on to argue that this reading of the treaty made the most sense given the huge amount of land that the Yakamas surrendered in the deal. He noted that under the State's interpretation, the treaty's right to travel only promised tribal members "the right to venture out of their reservation and use the public highways like everyone else. But the record

⁹⁷ *See id.* at 1015.

⁹⁸ *Id.* at 1016 (Gorsuch, J., concurring).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing *Minnesota v. Mille Laacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1017.

¹⁰⁴ *Id.* (alteration in original) (quoting *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1265 (E.D. Wash. 1997)).

shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation.”¹⁰⁵

Justice Gorsuch concluded that the case really told “an old and familiar story.”¹⁰⁶ The federal government took millions of acres of tribal land in exchange for “a handful of modest promises.”¹⁰⁷ Now the State was dissatisfied with the consequences of one of those promises.¹⁰⁸ Justice Gorsuch gave the Supreme Court credit for holding the government to the terms of its deal, noting: “It is the least we can do.”¹⁰⁹

The main dissent was written by Chief Justice Roberts and joined by Justices Thomas, Alito, and Kavanaugh. Justice Kavanaugh also wrote a separate dissent that was joined by Justice Thomas. In that dissent, Justice Kavanaugh gave the treaty language a modern, commonsense interpretation. According to his dissent, “[t]he treaty’s ‘in common with’ language means what it says. The treaty recognizes tribal members’ right to travel on off-reservation public highways on equal terms with other U.S. citizens.”¹¹⁰ Justice Kavanaugh noted that in 1855 the government could have required the Yakamas to obtain special licenses before travelling off-reservation, so the Yakamas had reasons to agree to this deal.¹¹¹

Justice Kavanaugh acknowledged that, given this interpretation, the treaty might not have been a fair agreement for the Yakamas,¹¹² but the Supreme Court could not fix that problem because “[a]s a matter of separation of powers, however, courts are bound by the text of the treaty.”¹¹³ Furthermore, Justice Kavanaugh noted, Congress subsequently did many things to help the Yakamas, particularly since 1968.¹¹⁴ Therefore, Justice Kavanaugh concluded, “lament about the terms of the treaty negotiated by the Federal Government and the Tribe in 1855 does not support the Judiciary (as opposed to Congress and the President) rewriting the law in 2019.”¹¹⁵

So, once again, we see profoundly different attitudes toward the federal government. In this case, as in the others, Justice Gorsuch resolved ambiguities against the federal government while Justice Kavanaugh

¹⁰⁵ *Id.* at 1018.

¹⁰⁶ *Id.* at 1021.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1026 (Kavanaugh, J., dissenting).

¹¹¹ *Id.* at 1027.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1027–28. The help included additional compensation and benefits beyond that specified in the treaty.

¹¹⁵ *Id.* at 1028.

resolved doubts in favor of the government. Justice Gorsuch saw the federal government as something of a predator in its dealing with the Yakamas. Justice Kavanaugh saw the government as their benefactor.

And again, we see very different jurisprudential philosophies. Justice Gorsuch sought to enforce the treaty's original meaning to aid those subjected to federal power, namely the Yakamas. They were the parties who had his sympathy. But Justice Gorsuch made it clear that he was not deciding based on sympathy. For Justice Gorsuch, the question was not what interpretation of the treaty would be most equitable or most consistent with modern sensibilities or represent the best public policy. The question, rather, was what the treaty meant to the Yakamas in 1855 in the Yakama language, with all doubts to be resolved against the federal government. As far as Justice Gorsuch was concerned, that meaning was the deal. The government could not waltz on the deal or try to modernize it to fit the government's view of the larger public interest.

By contrast, consistent with his pragmatic, dynamic, and pro-government view of law, Justice Kavanaugh preferred the modern, commonsense understanding of the treaty text under which the government was free to impose nondiscriminatory taxes on the Yakamas. Justice Kavanaugh's focus was on the present, what was fair in the here and now. He was not particularly interested in what the treaty might have meant to the Yakamas in 1855.

CONCLUSION

In the October 2018 term, the Supreme Court's newest Justices were a study in contrasts. Justice Kavanaugh tended to resolve ambiguities in favor of the federal government and federal power. Justice Gorsuch resolved doubts the opposite way. Justice Kavanaugh favored a modern and pragmatic approach to the law. Justice Gorsuch preferred originalism, separation of powers, and the traditional common law. Justice Kavanaugh sympathized with those who needed the protection of federal power, while Justice Gorsuch's sympathies were with those who needed protection from federal power.

The differences between the two Justices are most likely to surface in cases involving the federal bureaucracy, federal regulation of business, and federal criminal law. In other areas, they are more likely to agree. Both, for example, are sympathetic to state and local governments. For instance, Justice Kavanaugh joined a plurality opinion by Justice Gorsuch upholding a Virginia statute prohibiting the mining of uranium.¹¹⁶

¹¹⁶ See *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1895 (2019).

There is something else that the two Justices seem to have in common: Both followed their principles even when that meant voting against the more powerful party and siding with liberals and the weak. That consistency is good news for the Court's four Democratic appointees because it means that the Court's newest members are potential swing votes in cases involving federal authority. The new Justices' willingness to vote for underdog parties is also a hopeful sign for those who prize equal justice under the law.