

# NATIONAL REVIEW

## Neil Gorsuch and the Structural Constitution

*He well grasps the importance of limiting government to protect rights.*

Ilya Shapiro and Frank Garrison

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The Framers designed a system whereby the primary method of protecting individual rights lay in dividing the power of government both vertically and horizontally (federalism and the separation of powers, respectively). This innovation, applying a blend of ancient and Enlightenment-era political philosophy, would prevent anybody in the ruling class from gaining too much power over the people.

But our constitutional jurisprudence has not always reinforced this structure. Indeed, over the past century we have seen more and more power transferred from the states to the federal government — and from the judicial and legislative branches to the executive. The main protection for freedom became what the Founders originally considered a redundant afterthought, the Bill of Rights (which, as the late Justice Scalia liked to say, most tin-pot banana republics have). With the nomination of Judge Neil Gorsuch to the Supreme Court, however, there is renewed hope for a renaissance in enforcing the Constitution’s structure as the means for securing and protecting ordered liberty.

Like Justice Scalia — whose seat Gorsuch is tapped to fill — the nominee applies the Constitution’s original meaning to these structural provisions, and he recognizes the importance of limiting government to protecting rights. But Gorsuch has been more willing than Scalia was to take them seriously and not just defer to executive agencies, because he recognizes the damage that the modern administrative state has wrought on individual liberty.

In *United States v. Nichols* (2015), Gorsuch confronted the delegation of the legislative power to the executive branch. And so he considered the “non-delegation doctrine,” which comes directly from Article I of the Constitution: “All legislative powers herein granted shall be vested in a Congress of the United States.” That seems pretty clear, but the Supreme Court, in nodding toward the practicalities of modern government, has allowed congressional delegation of the lawmaking power if there is an “intelligible principle” for the executive to follow. In practice, Congress gives very few principles, much less intelligible ones; instead, it passes vague statutes with little guidance for how to implement them. This gives the executive free rein to promulgate rules that have the binding force of law.

In his Nichols dissent, Gorsuch invoked the Framers to explain the importance of keeping legislative power in Congress:

The framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from the encroachment by the Executive but essential to the preservation of the people's liberty. . . . By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power.

Gorsuch's opinions have also questioned the constitutional implications of granting deference to administrative agencies through judge-made doctrines. These doctrines — emanating from the cases in which they were derived, such as *Auer*, *Chevron*, and *Brand X* — require courts to defer to agency interpretations of ambiguous statutes and regulations. *Chevron* and *Auer* deference allow agency “experts” to fill gaps in these ambiguities to craft policy — essentially letting the executive write legislation. *Brand X*, for its part, requires courts to defer to post-hoc executive interpretations of statutes even after a federal court has already construed the statutes' meaning — conferring on the executive the judicial power to have the final say on “what the law is” (to quote Chief Justice John Marshall in the foundational case of *Marbury v. Madison*). Gorsuch wrote a much-heralded opinion (and separate concurrence!) in *Gutierrez-Brizuela v. Lynch* (2016) analyzing whether these doctrines violate the Constitution's separation of powers.

But it is another case — which he says “would make James Madison's head spin” — that stands out for his consideration of how these doctrines affect individual liberty. In *De Niz Robles v. Lynch* (2015), an executive-agency adjudication cited *Chevron* and *Brand X* to essentially overrule federal court precedent interpreting an immigration statute, applying it retroactively even though the defendant had relied on the courts' previous interpretation of the law.

The government argued that it could do this because the law was ambiguous. Gorsuch, writing for the majority in striking down the government's ruling, pointed out that even if these rules are not seen as violations of our Constitution's structure under current precedent, these doctrines when combined can work together to infringe on “second-order constitutional protections sounding in due process and equal protection.”

Of course, even as Gorsuch's administrative-law jurisprudence shows a devotion to the Constitution's original design, no judge is perfect. When it comes to the dormant commerce clause — the idea that states can't impose regulations that impede interstate commerce even if Congress hasn't expressly forbidden them to do so — Gorsuch, in our view, gets it wrong. In two recent opinions, Gorsuch questioned the doctrine's constitutional foundation (as did Justice Scalia, we hasten to add). While the commerce clause has been invoked since the New Deal as a warrant for nearly unlimited federal power, its inverse actually seems more faithful to a founding document concerned with the free flow of commerce throughout the nation.

That's a complicated and highly technical legal dispute that generally cuts across jurisprudential lines. But it just goes to show that while not everyone will agree with Judge Gorsuch's analysis in every area of law, he has shown a willingness to respect the judicial duty and enforce the Constitution's structural protections against federal overreach. That approach will make a welcome addition to the Supreme Court.

*Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the Cato Supreme Court Review. Before joining Cato, he was a special assistant/adviser to the Multi-National Force in Iraq on rule-of-law issues and practiced at Patton Boggs and Cleary Gottlieb.*

*Fank Garrison is a legal associate in the Cato Institute's Center for Constitutional Studies. Previously, he was a Law Clerk for the Pacific Legal Foundation and a Judicial Intern for Frank A. Shepherd of Florida's Third District Court of Appeal. Frank holds a Juris Doctor from St. Thomas University School of Law and a Master of Laws from American University's Washington College of Law.*