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# Neil Gorsuch and the Return of Rule-of-Law Due Process

By Nathan S. Chapman

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Something curious happened at the Supreme Court last week. While the country was glued to the Cirque du Trump, the rule of law made a comeback, revived by Neil Gorsuch, whose place on the Court may prove to be one of Trump's most important legacies.

Unlike the partisan gerrymander and First Amendment cases currently pending before the Court, immigration cases are usually long on textual analysis and short on grand themes. Accordingly, court-watchers didn't have especially high expectations for *Sessions v. Dimaya*.

Dimaya is a lawful permanent resident who was convicted of first-degree burglary and faced deportation. The conviction seemed to count as a crime that "by its nature, involves substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Under the Immigration and Nationality Act, if the burglary were such a crime, he would be subject to deportation. Dimaya argued that the statutory provision was too vague to give him adequate notice, so deporting him would deprive him of liberty without due process of law. Although the Court had ruled three years ago that a similar federal criminal law was unconstitutionally vague, Dimaya's case was distinguishable: The two laws were phrased a little differently; courts usually think burglary is an inherently dangerous crime; and aliens — even lawful resident aliens — don't enjoy the full constitutional rights of U.S. citizens.

But a bare majority of the Court [concluded](#) that the "substantial risk" of "physical force" provision was too vague to authorize a deportation — even for burglary. While the holding was perhaps unsurprising, Justice Gorsuch's solo opinion, which provided the crucial fifth vote, was remarkable in every way. It reveals a lot about Gorsuch as a constitutional jurist and reintroduces a cross-partisan notion of due process as a guarantee of the rule of law.

First, Gorsuch's opinion was deeply originalist. His judgment was based on a searching review of legal materials that would have been familiar to jurists at the time of our country's founding, including a number of early state and federal cases declining to apply vague statutes. His conclusion? The "void for vagueness doctrine ... serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution." Based on this opinion, Gorsuch appears to be every bit as committed to an originalist approach to constitutional interpretation as his predecessor, Justice Scalia, was — perhaps more so.

Second, Gorsuch married careful historical scrutiny with candor and sensitivity for how our legal system has changed over time. This is where he and Justice Thomas parted

ways. Thomas's dissenting opinion provides a careful historical argument against invalidating vague laws for lack of due process. He thinks such laws may be forbidden by the separation of powers, but not by the Due Process Clause. And, in any case, he thinks the courts should rarely invalidate a vague law, choosing instead to decline to enforce where it does not clearly fit the facts. This is a sensible view of the historical material, but it gives no weight to numerous changes to the legal system since the Founding. One cannot return to the Founding era's constitutional understanding on a retail basis without unbalancing subsequent wholesale legal changes. (This is putting aside important social, moral, economic, and political changes.)

Gorsuch's opinion, by contrast, deploys a subtler view of the relationship between historical understanding and the law today. He shows that many Founding-era jurists (though not all) believed resident aliens were entitled to due process. His analysis thus accounts for plural understandings at the Founding. He also shows that lawful permanent residents, by virtue of affirmative acts of Congress, enjoy a different "liberty" interest today than they did at the founding. The basic requirements of due process may not change, but underlying rights to "life, liberty, and property" might. Such changes would interact dynamically with due process claims.

Gorsuch also questions the relevance of a strict distinction between criminal and civil cases. He notes that the Founding generation understood civil deprivations of rights to be subject to due process (as I have recently [argued](#)), and that today some civil punishments are more onerous than their criminal counterparts — even for the same conduct. One swallow does not a spring make, but Gorsuch appears to be more comfortable than other modern justices at incorporating legal change into his application of the original understanding of the Constitution. He avoids both the mistake of ignoring legal change altogether and that of sacrificing continuity of constitutional meaning on the altar of progress. Scholars such as Christopher Green have [argued](#) that such an approach, perhaps counterintuitively, may be entirely faithful to the original understanding of constitutional provisions.

Third and perhaps most remarkably, Gorsuch uses this historical material to articulate a position that is potentially more far-reaching and more protective of individual rights than even the plurality opinion does. That opinion, penned by Justice Kagan and joined by the three other liberal members of the Court, extends due process to *Dimaya* in part because of their view of the importance of the right of continued residence. Gorsuch goes considerably further. His view of the Due Process Clause would require the legislature to set out clear laws before anyone is deprived of any legal interest in "life, liberty, or property."

Without that clarity, executive officials and courts wind up effectively exercising the lawmaking power reserved for the legislature, as Michael McConnell and I have [argued](#) elsewhere. In that case, the people have no notice and little say over the content of the law; rights are subject to the opinions — or political expediency — of unelected officials and judges. But due process of law was originally understood to guarantee that the deprivation of rights would be subject to law.

Congress may not function as efficiently as many would like, but that is no excuse for executive officials or courts to supplant its constitutional role at the expense of people like Dimaya. As Justice Jackson said in his famous opinion in the Steel Seizure Case, the Due Process Clause, together with the president's responsibility to enforce the laws, "signif[ies] about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."

While the vision of due process Justice Gorsuch invoked differs from modern "procedural" and "substantive" due process, there is surely room for it alongside those doctrines. As Gorsuch's analysis illustrates, rule-of-law due process doesn't reliably lead to conservative or liberal results. It is not a panacea for perceived Supreme Court partisanship. But it may portend a return of the rule of law — within, and through, due process.

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