The New Scalia? An Aristotelian Analysis of Judge Gorsuch's Fourth Amendment Jurisprudence

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ABSTRACT

During the confirmation process of Justice Neil M. Gorsuch, many commenters and scholars discussed a methodology of constitutional interpretation employed by both then-Judge Gorsuch and the late Justice Antonin Scalia: originalism. Many scholars have discussed the strengths and weaknesses of originalism as a theory. This note takes a different approach. It uses Aristotle's teachings on rhetoric to analyze three Fourth Amendment opinions written by Justice Gorsuch when he sat as a judge on the United States Court of Appeals for the Tenth Circuit. Using Aristotelian rhetorical theory, the note ultimately concludes that Justice Gorsuch's use of originalism enables him to make highly persuasive arguments and that, during his time on the Supreme Court, Gorsuch will have the opportunity to become more than just the next Justice Scalia.

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* J.D., *magna cum laude*, Order of the Coif, Georgetown University Law Center (May 2018); B.S.B.A., *magna cum laude*, McDonough School of Business, Georgetown University (2015). I am immensely grateful to Professor Kristen Konrad Tiscione for her assistance in the formation of this note and for teaching me about Aristotle's ever-enduring influence on our profession. I am also thankful for my parents, the rest of my family, and my numerous friends. I dedicate this note to my goddaughter, Vivian Ann Cauldwell.

Justice Neil Gorsuch is often described as an originalist,[1] someone who looks to the original public meaning of a constitutional provision[2] to aid in interpreting it.[3] For an originalist, the original public meaning of a provision informs the resolution of a particular case or controversy.[4] Justice Gorsuch replaced perhaps the most famous advocate of originalism for the last three decades: Justice Antonin Scalia.[5] Gaining insights into how Justice Gorsuch might rule on a whole host of issues is of great interest not only to legal scholars but to the general public as well. Potential clues may be revealed by examining Gorsuch's opinions as a

1. *See* 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/ [https://perma.cc/B349-HHDL].

2. There are several theories of originalism. Neil Gorsuch, Antonin Scalia, and other scholars employ a theory called "new originalism" or "original public meaning originalism" as opposed to "original intent" or "founders' intent" originalism. *Compare* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (discussing original public meaning originalism), *with* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (contemplating original intent originalism). Original public meaning originalism "regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present." Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004); *see also* Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378–88 (2013) (discussing original public meaning originalism). This note describes Gorsuch's use of original public meaning originalism with several terms. Some of these terms include: "original public meaning," "original understanding," "understanding at the time of the founding," and "meaning at the time of the founding." In Gorsuch's opinions, he often uses the term "founders' understanding." This term concisely describes the understanding by the founding generation of what preexisting legal principles underpinned certain constitutional provisions. *See, e.g.*, Scalia, *supra* 859 ("It is apparent from all this that the traditional English understanding of executive power, or, to be more precise, royal prerogatives, was fairly well known to the founding generation . . . ."). All told, to discover the original public meaning of the Constitution's text, Gorsuch uses the founding generation's understanding of the legal concepts in place at the time of the Constitution's ratification.

3. Ponnuru, *supra* note 1 ("He is . . . an originalist: someone who interprets legal provisions as their words were originally understood.").

4. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); *see also* Aaron Blake, *Neil Gorsuch, Antonin Scalia and Originalism, Explained*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/?utm_term=.b568f895e14f [https://perma.cc/XM89-3WXC].

5. *See* Ponnuru, *supra* note 1.

judge on the United States Court of Appeals for the Tenth Circuit. His Fourth Amendment opinions, for example, give insights into his usage of originalism as a method of interpreting the Constitution.

This note undertakes the task of analyzing then-Judge Gorsuch's Fourth Amendment jurisprudence. Using the Aristotelian perspective on rhetoric, this note examines three such opinions. The note shows that Gorsuch crafts harmonious and persuasive arguments using Aristotle's three artistic appeals: *logos*, *pathos*, and *ethos*. In his opinions, Gorsuch explores the import of the original public meaning of the Fourth Amendment and applies that understanding to a variety of modern contexts. In this way, Gorsuch's Tenth Circuit opinions serve as initial evidence that Gorsuch may be more than just the new Scalia. Indeed, Gorsuch has the opportunity to expand the influence of originalism throughout American constitutional law.

In Part I, this note describes the canons of Aristotelian rhetoric. In Part II, the note provides a brief background of the modern Fourth Amendment doctrine and furnishes a description of three Gorsuch opinions. In Part III, the note examines the arguments Gorsuch advanced in those opinions using Aristotle's artistic appeals.[6] Finally, in Part IV, the note concludes by discussing how these three opinions provide initial evidence that Gorsuch may expand the influence of originalism on American law.

I. ARISTOTLE'S THEORY OF RHETORIC

Rhetoricians from both Athens and Rome generally agreed that rhetoric involves several key elements: invention, arrangement, style, memory, and delivery.[7] But "[m]emory and delivery are primarily useful in oral, as opposed to written, advocacy."[8] Because this analysis focuses on three of Gorsuch's Tenth Circuit written opinions, only invention, arrangement, and style are considered.

A. Invention

For Aristotle, invention meant the construction of arguments, or "proofs."[9] Invention involves the crafting of appropriate and coherent legal arguments[10] and the "discovering" of different ideas to be articulated during the analysis, speech,

6. In a typical rhetorical analysis using the Aristotelian perspective, the canons of invention, arrangement, and style are analyzed in turn. This note, however, organizes its analysis around the artistic appeals: *logos*, *pathos*, and *ethos*. But the note does analyze style and arrangement. Specifically, the note examines Gorsuch's style when describing his use of *pathos*, and the note considers Gorsuch's arrangement when discussing his use of *ethos*.

7. *See* ARISTOTLE, RHETORIC, *reprinted in* THE BASIC WORKS OF ARISTOTLE 1317, 1329, 1434-36 (Richard McKeon ed., 1941) (c. 333 B.C.E.) [hereinafter ARISTOTLE, RHETORIC]; *see also* MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 4 (2005) (citing CICERO, RHETORICA AD HERENNIUM 9 (H. Caplan trans., 1954)).

8. FROST, *supra* note 7, at 4.

9. *See* ARISTOTLE, RHETORIC *supra* note 7, at 1329–34.

10. *See id.*; *see also* FROST, *supra* note 7, at 4.

or judicial opinion.[11] There are two types of proofs: inartistic and artistic. Inartistic proofs preexist the oration, and the rhetorician does not create the inartistic proofs.[12] For instance, in the context of this note, examples of inartistic proofs include the Constitution and its provisions, the Founders' understanding of these provisions, the Fourth Amendment doctrine created through preexisting judicial opinions, and the facts involved in each case.[13]

The artistic proofs are crafted by the rhetorician. Indeed, the rhetorician creates them to persuade her audience.[14] Aristotle and other classical rhetoricians understood that the audience may consider factors other than logic, such as the credibility of the speaker and the emotions felt by the audience, when discerning whether the speaker's argument is persuasive.[15] Recognizing this reality, rhetoricians craft three types of artistic appeals: *logos* (logic-based arguments), *pathos* (emotion-based arguments), and *ethos* (credibility-based arguments).[16]

1. Logos

First, a speaker appeals to *logos* when she uses logical and rational arguments during an oration in an effort to persuade her audience.[17] Aristotle, as a natural scientist, recognized that logic involves individual terms and the relationship between those terms.[18] Aristotle also acknowledged that the mind's ability to distinguish different terms and the relationships between those terms requires the ability to categorize,[19] a capacity that is "ubiquitous and inescapable in the use of the mind."[20]

Before one can make arguments or use her intuitive reasoning skills, one must consider "definitions"; to best explain a concept, the rhetorician must tell the audience what the concept is by describing all its parts and showing how the concept works.[21] Aristotle emphasized understanding a concept's "essential definition," an explanation of the concept's core nature.[22] Thus, the human mind

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11. *See* CICERO, 2 DE INVENTIONE 19 (H.M. Hubbell trans., 1968); *see also* KRISTEN K. ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS 102 (1st ed. 2009) [hereinafter TISCIONE I].

12. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1329*; see also* Forbes I. Hill, *The Traditional Perspective*, *in* RHETORICAL CRITICISM: PERSPECTIVE IN ACTION 69, 76 (Jim A. Kuypers ed., 2d ed. 2016).

13. *See* TISCIONE I, *supra* note 11, at 101.

14. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1327, 1329; *see also* Hill, *supra* note 12, at 75–76.

15. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1329; *see also* FROST, *supra* note 7, at 5.

16. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1329–30.

17. *See id*. at 1330.

18. *See id*. at 1330–31.

19. *See* ARISTOTLE, CATEGORIES, *reprinted in* THE BASIC WORKS OF ARISTOTLE *supra* note 7, at 7, 9–28 [hereinafter ARISTOTLE, CATEGORIES] (describing substance, quality, quantity, and relatives); *see also* ARISTOTLE, RHETORIC, *supra* note 7, at 1325, 1329.

20. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 19 (2000).

21. *See* ARISTOTLE, TOPICS, *reprinted in* THE BASIC WORKS OF ARISTOTLE, *supra* note 7, at 188, 191 [hereinafter ARISTOTLE, TOPICS]; *see also* EDWARD P. J. CORBETT, CLASSIC RHETORIC FOR THE MODERN STUDENT 33 (4th ed. 1999).

22. *See* ARISTOTLE, TOPICS, *supra* note 21, at 191; ARISTOTLE, CATEGORIES, *supra* note 19, at 9–28; *see generally* CORBETT, *supra* note 21, at 33.

considers a host of aspects of an object to classify it and to define it. And "categories," in turn, help the human mind further define objects.

From this intuitive ability to categorize, the human mind is capable of deductive and inductive reasoning.[23] Deductive reasoning starts with a general proposition and narrows to a specific conclusion.[24] Alternatively, inductive reasoning takes a series of smaller, specific premises and draws a larger conclusion.[25] Lawyers—consciously or unconsciously—craft arguments from deduction and induction; indeed, people use inductive and deductive reasoning each day.[26]

But Aristotle also provided a more nuanced way to understand how to construct arguments and reach conclusions. Aristotle famously articulated a method by which one may persuade using deductive reasoning.[27] This invention is known as the "syllogism." Syllogistic reasoning involves premises and their component terms.[28] Syllogistic reasoning works like the transitive property of equality: if a = b and b = c, then a = c.[29] The following is an example of a syllogism:

> *All women are mortal beings.*
> *Ruth Bader Ginsburg is a woman.*
> *Thus, Ruth Bader Ginsburg is a mortal being.*[30]

This syllogism works because the first two premises are indisputably true and because the conclusion is constructed using valid logic.[31] For legal syllogistic reasoning to be persuasive, the premises must be reasonably true,[32] or the rhetorician must have "certitude" that the premises are true.[33]

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23. *See* ARISTOTLE, TOPICS, *supra* note 21, at 198; ARISTOTLE, RHETORIC, *supra* note 7, at 1330–31; *see also* KRISTEN KONRAD TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 79–97 (2d ed. 2016) [hereinafter TISCIONE II].

24. *See* ARISTOTLE, TOPICS, *supra* note 21, at 198; *see also* TISCIONE II, *supra* note 23, at 79–97.

25. *See* ARISTOTLE, TOPICS, *supra* note 21, at 198; *see also* TISCIONE II, *supra* note 23, at 79–97.

26. *See* TISCIONE II, *supra* note 23, at 79–97.

27. *See* ARISTOTLE, PRIOR ANALYTICS, *reprinted in* THE BASIC WORKS OF ARISTOTLE, *supra* note 7, at 62, 65–93 [hereinafter ARISTOTLE, PRIOR ANALYTICS]; CORBETT, *supra* note 21, at 38.

28. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 65–70; CORBETT, *supra* note 21, at 38.

29. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 68; TISCIONE I, *supra* note 11, at 115.

30. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 80; ARISTOTLE, RHETORIC, *supra* note 7, at 1332–33; CORBETT, *supra* note 21, at 42.

31. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 65–70.

32. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1330; TISCIONE I, *supra* note 11, at 118–20; CORBETT, *supra* note 21, at 42.

33. John Henry Newman, a Catholic theologian, famously drew a distinction between certainty and certitude. Persons may have certainty about certain axiomatic ideas, including arithmetic. For example, one may have certainty about this proposition: the sum of two and two is four. Certainty may also be achieved using the scientific method. Certitude, on the other hand, may be achieved when the mind—constantly searching for certainty—becomes sufficiently persuaded by the person's will that the mind can assent to a proposition without having "certainty." For Newman, only through the persuasion of the human will can the human mind assent to non-axiomatic propositions. And, according to Newman, the human will may only persuade the human mind with *reasonable* premises. *See* JOHN HENRY NEWMAN, APOLOGIA PRO VITA SUA 80 (London, Longman, Green, Longman, Roberts & Green 1864) ("[T]hat certitude was a habit of mind, . . . that probabilities which did not reach to logical certainty, might create

A valid syllogism has three terms: major, minor, and middle.[34] It must also contain three premises constructed using the three previously stated terms: the major premise, the minor premise, and the conclusion.[35] The major premise contains the major term. In the example above, the major premise is the first premise: "All women are mortal beings." The major term is "mortal beings." The minor premise is the premise that contains the minor term. In the example above, the minor term is "Ruth Bader Ginsburg." And the minor premise is this statement: "Ruth Bader Ginsburg is a woman."[36]

The conclusion contains the minor term and the major term. In the above syllogism, the conclusion is this statement: "Ruth Bader Ginsburg is a mortal being." Yet to reach the conclusion, the syllogism requires the middle term.[37] The middle term appears in both the major premise and the minor premise but not in the conclusion.[38] The middle term in the above example is "women" (and its singular form, "woman").[39] Every syllogism may be charted as follows:

MAJOR PREMISE: *Middle Term* → *Major Term*
MINOR PREMISE: *Minor Term* → *Middle Term*
CONCLUSION: *Minor Term* → *Major Term*[40]

In legal reasoning, lawyers often use Aristotle's syllogistic reasoning to persuade their audience of the "validity" of their arguments.[41] And, importantly, legal writers—and people generally—rarely state all three components of the syllogism; usually, either the minor premise or the major premise is missing.[42]

2. Pathos

The second type of artistic proof is *pathos*, which involves arguments that target the audience's emotions.[43] Appeals to *pathos* play a key role in advancing genuine and persuasive arguments, ones that motivate the audience to act in the advocate's favor.[44] To construct persuasive emotion-based arguments, Aristotle took three considerations into account.[45] First, he considered the emotion's

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a mental certitude; that the certitude thus created might equal in measure and strength the cer[tainty] which was created by the strictest scientific demonstration . . . .).

34. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 83–86; CORBETT, *supra* note 21, at 42.
35. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 68–70; CORBETT, *supra* note 21, at 42.
36. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 83–86; CORBETT, *supra* note 21, at 42–43.
37. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 83–86; CORBETT, *supra* note 21, at 42–43.
38. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 83–86; CORBETT, *supra* note 21, at 42–43.
39. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 83–86; CORBETT, *supra* note 21, at 42–43.
40. *See* ARISTOTLE, PRIOR ANALYTICS, *supra* note 27, at 83–86; TISCIONE I, *supra* note 11, at 114–20.
41. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1330–32; TISCIONE I, *supra* note 11, at 118–20.
42. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1331; TISCIONE I, *supra* note 11, at 118–20.
43. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1380.
44. *Id.*
45. *See id.*; TISCIONE I, *supra* note 11, at 121.

essence.[46] Second, he considered the audience and the setting.[47] And third, he considered what causes the emotion.[48]

Pathos is an important tool of persuasion because emotions—including hatred, love, anger, fear, and impatience—may influence people's ability to reason through choices and make decisions.[49] Aristotle believed rhetoricians must be purposeful when employing emotion-based arguments because each situation or context may require one or more emotions.[50] Modern scholars recognize that *pathos* can be employed throughout an oration, including when reciting the facts of the case, when articulating rules, and when using analogical reasoning.[51]

3. Ethos

Ethos, the third artistic proof, involves the credibility of the speaker and how the speaker's credibility affects her ability to persuade the audience.[52] Many scholars often argue that Aristotle taught that a rhetorician is best able to persuade her audience when that audience believes she is a person of "integrity."[53] But, oddly enough, Aristotle himself never included "integrity" within his "catalogue of virtues."[54] Yet at least one scholar argues that integrity was a part of Aristotelian ethics, but it was considered the combination of all the other virtues.[55] Aristotle "argue[d] for the *unity of the virtues*,"[56] and, in a sense, "integrity might well be called the master-virtue."[57] Some of those virtues include prudence, fortitude, wisdom, magnificence, liberality, and justice.[58]

Although a rhetorician cannot convey all of the virtues in any given oration, she must still attempt to convey the right *ethos*. The rhetorician may accomplish that by appearing to be a smart, well-intentioned person of moral character.[59] She may convey her intellect by advancing common-sense claims that are tasteful.[60] She may also establish her *ethos* by showing her expertise on the relevant subject.[61] Finally, she may demonstrate her good character by building an affinity

46. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1380; TISCIONE I, *supra* note 11, at 121.
47. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1380; TISCIONE I, *supra* note 11, at 121.
48. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1380; TISCIONE I, *supra* note 11, at 121.
49. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1381–1403; FROST, *supra* note 7, at 60.
50. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1403; FROST, *supra* note 7, at 67.
51. *See* FROST, *supra* note 7, at 64; Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 7 (1996).
52. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1379.
53. *See, e.g.*, TISCIONE I, *supra* note 11, at 122.
54. John Cottingham, *Integrity and Fragmentation*, 27 J. APPLIED PHILOSOPHY 2, 2 (2010).
55. *Id.*
56. *Id.* at 3 (emphasis in original).
57. *Id.* at 9.
58. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1353–59; TISCIONE I, *supra* note 11, at 122.
59. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1353–59; FROST, *supra* note 7, at 67.
60. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1353–59.
61. *See id.*

with her audience.[62] In other words, the speaker may prove her character by making assertions that the audience will find virtuous.[63]

B. Arrangement

Once the speaker "invents" arguments that she may decide to advance in her "oration," she will also have to organize those arguments in a persuasive manner.[64] The speaker organizes her arguments by determining the order in which she will make her arguments, the arguments on which she will place emphasis, and the arguments she invented but will ultimately not include.[65] The Greeks and Romans organized their arguments by including an introduction (*exordium*), a statement of the case (*narratio*), an argument summary (*partitio*), an argument (*confirmatio*), and a conclusion (*peroratio*).[66] In addition to large-scale organization, rhetoricians of Rome and Athens would also intuitively arrange their arguments on a more granular level (small-scale organization) based on the nature of the arguments involved.[67]

C. Style

Style, the third Aristotelian canon, involves the diction and syntax used by the rhetorician.[68] To persuade, Aristotle explained that the rhetorician must select appropriate language for her speech's setting and context.[69] Cicero, the great Roman orator, recognized that a rhetorician may employ one of three styles: plain, medium, and vigorous.[70] And based on the complexity of the speaker's sentence structure and word choice, the rhetorician's style may be considered high, medium, or low.[71]

Often, rhetoricians employ figures of speech, classically divided into schemes and tropes. A scheme diverges from what is considered the typical ordering of words.[72] Examples of schemes include parallelism, parenthesis, apposition, alliteration, and assonance.[73] A trope, on the other hand, diverges from the traditional understanding and usage of words.[74] Examples of tropes generally include

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62. *See id*.
63. *See id*.; *see generally* Cottingham, *supra* note 54.
64. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1434–35; TISICONE I, *supra* note 11, at 123.
65. *See* 3 CICERO, DE ORATORE 99 (E.H. Warmington ed., E.W. Sutton trans., Harvard Univ. Press 1967) (55 B.C.E.); TISICONE I, *supra* note 11, at 124.
66. *See* CICERO, DE INVENTIONE, *supra* note 11, at 41; FROST, *supra* note 7, at 4.
67. *See* TISICONE I, *supra* 11, at 127–28.
68. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1434–35.
69. *See id*.; TISCIONE I, *supra* note 11, at 130.
70. *See* 5 CICERO, ORATOR 357 (H. M. Hubbell trans., Harvard Univ. Press 1971) (46 B.C.E.); TISCIONE I, *supra* note 11, at 131 (noting that the plain style may be used for teaching, the medium style may be used for "pleasure," and the vigorous style may be used for persuasion).
71. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1435.
72. *See* TISICONE I, *supra* note 11, at 131.
73. *See id*. at 132.
74. *See id*. at 131.

metaphor, simile, personification, hyperbole, and rhetorical questions.[75]

II. THE CONTEXT: THE MODERN FOURTH AMENDMENT & GORSUCH'S TENTH CIRCUIT OPINIONS

In this part, the note describes the modern Fourth Amendment doctrine and summarizes three of then-Judge Gorsuch's opinions.

A. The Modern Fourth Amendment

The Fourth Amendment, by its text, protects citizens from unreasonable searches and seizures of their "persons, houses, papers, and effects."[76] Before 1967, the Fourth Amendment analysis generally would turn on whether the government completed a trespass against a citizen.[77] But the Supreme Court departed from this analysis in *Katz v. United States*.[78]

In *Katz*, the Supreme Court announced that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures [conducted by the government]."[79] The Court noted that the trespass-based doctrine "ha[s] been so eroded by our subsequent decisions" that it "can no longer be regarded as controlling."[80] Rather, Justice Harlan, concurring in the judgment, recognized that the Fourth Amendment permitted citizens to have "a reasonable expectation of privacy."[81] He stated that his "understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[82] Since *Katz*, courts have employed this bifurcated test.[83]

United States v. Jones reintroduced the trespass-based doctrine into modern Fourth Amendment jurisprudence based on an examination of the Fourth Amendment's original public meaning.[84] In *Jones*, the government attached a GPS beacon to the defendant's vehicle and monitored the vehicle's movements for months. Justice Scalia, writing for the Court, stated that, when the government attached the GPS beacon to the defendant's vehicle, "[t]he Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a

75. *See id.* at 132.
76. U.S. CONST. amend. IV.
77. *See, e.g.*, Goldman v. United States, 316 U.S. 129, 134–36 (1942); Olmstead v. United States, 277 U.S. 438, 457 (1928).
78. Katz v. United States, 389 U.S. 347 (1967).
79. *Id.* at 359.
80. *Id.* at 353.
81. *Id.* at 360 (Harlan, J., concurring).
82. *Id.* at 361.
83. *See, e.g.*, Bond v. United States, 529 U.S. 334 (2000); California v. Ciraolo, 476 U.S. 207 (1986); Smith v. Maryland, 442 U.S. 735 (1979).
84. United States v. Jones, 565 U.S. 400 (2012).

'search' within the meaning of the Fourth Amendment when it was adopted."[85]

Justice Scalia held that the government violated the Fourth Amendment under its original public meaning, an understanding of the Constitution that implicates the trespass-based inquiry. The Court, therefore, did not need to reach the *Katz* "reasonable expectation of privacy" analysis to resolve the case.[86] But the Court did not overrule or otherwise repudiate *Katz*. To the contrary, Justice Scalia announced: "At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'"[87] In other words, the Court ruled that if a government action would have not comported with the Fourth Amendment at the time of the Founding, then the Fourth Amendment must have been violated.[88] Thus, under *Katz* and *Jones*, a government search or seizure that either offends the original public meaning of the Fourth Amendment or infringes on a person's reasonable expectation of privacy violates the Constitution.

B. A Brief Description of Gorsuch's Opinions

While on the Tenth Circuit, then-Judge Gorsuch authored three notable opinions that this note analyzes using the Aristotelian perspective on rhetoric. These opinions—one majority opinion, one concurring opinion, and one dissenting opinion—are *United States v. Carloss*,[89] *United States v. Ackerman*,[90] and *United States v. Krueger*.[91]

In *Carloss*, the defendant moved to suppress evidence used to support drug and weapons charges against him because he believed the arresting federal agent and police officers violated the Fourth Amendment.[92] When the agent and the officers arrived at the defendant's home, they noticed four "no trespassing" signs, some lining the curtilage and even one on the front door. But they went on to approach the home, knock on the door, and enter the home after the defendant answered the door. The authorities noticed drug paraphernalia, yet the defendant would not allow them to go farther into the home. When the authorities returned to the home with a warrant, they found drug labs within the defendant's home.[93]

The district court and the Tenth Circuit denied the defendant's motion to suppress because the authorities had an "implied right" to enter the home's curtilage and conduct a knock and talk.[94] But Gorsuch dissented, fearing the implications of such an "implied right" and suggesting instead that the original public meaning

85. *Id*. at 404–05.
86. *Id*.
87. *Id*. at 406 (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).
88. *See id*.
89. United States v. Carloss, 818 F.3d 988 (10th Cir. 2016) (Gorsuch, J., dissenting).
90. United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016).
91. United States v. Krueger, 809 F.3d 1109 (10th Cir. 2015) (Gorsuch, J., concurring).
92. *See Carloss*, 818 F.3d at 991.
93. *Id*. at 991.
94. *Id*. at 991–92.

of the Fourth Amendment made their initial, warrantless entry illegal.[95]

In *Ackerman*,[96] the National Center for Missing and Exploited Children (NCMEC) reviewed images attached to an email sent to the defendant and determined that the images were child pornography. NCMEC received the email's attachments from the defendant's internet service provider, which had used a filter to determine that the email's attachments contained pornographic materials.[97] The defendant moved to suppress this evidence, and the trial court denied the motion.[98] Gorsuch, writing for the majority, reversed.[99] He held that NCMEC functioned as a government actor for Fourth Amendment purposes.[100] He then showed that NCMEC conducted an impermissible search, and the evidence should have been suppressed.[101]

Finally, in *Krueger*,[102] while being interviewed as part of an investigation into his distribution of child pornography, the defendant "admitted to viewing child pornography and trading it with others over the internet."[103] His computer and his hard drive were seized in Oklahoma. While he was detained in Oklahoma, the defendant waived his *Miranda* rights and confessed. The warrant used to justify his detention and the seizure of his effects was issued by a magistrate in Kansas. But the property and the defendant were already in Oklahoma when the warrant was issued.[104] The defendant moved to suppress the evidence because the warrant issued in Kansas for property located in Oklahoma violated the Federal Rules of Criminal Procedure.[105] The district court granted the defendant's motion, and the Tenth Circuit affirmed.[106] Gorsuch concurred separately to show how the original public meaning of the Fourth Amendment would help to resolve the case.[107]

III. ANALYSIS: GORSUCH'S ORIGINALISM-INFUSED ARTISTIC APPEALS

Based on the analysis of these three opinions, the note demonstrates that Justice Gorsuch uses originalism to invent harmonious and persuasive artistic appeals. Gorsuch explains the Fourth Amendment's original public meaning and applies that original understanding in a variety of modern contexts using originalism-based artistic appeals. If this trend of relying on the original public meaning of the Fourth Amendment to discern whether the government overstepped its constitutional authority continues, Justice Gorsuch will be presented with many

95. *Id*. at 1003–15 (Gorsuch, J., dissenting).
96. United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016).
97. *Id*. at 1294.
98. *Id*.
99. *Id*. at 1295.
100. *Id*. at 1297.
101. *Id*. at 1308.
102. United States v. Krueger, 809 F.3d 1109 (10th Cir. 2015).
103. *Id*. at 1111.
104. *Id*. at 1112.
105. *Id*.
106. *Id*. at 1113.
107. *Id*. at 1117–26 (Gorsuch, J., concurring).

opportunities to expand the use of originalism in the Fourth Amendment context and beyond. Thus, then-Judge Gorsuch's appeals to *logos*, *pathos*, and *ethos* serve as initial evidence of what is to come during his time on the Supreme Court.

A. Gorsuch's Appeals to Logos

Gorsuch's opinions often appeal to logical arguments and employ syllogisms that rely heavily on the original public meaning of the Fourth Amendment. But the theory of originalism itself can be understood as a syllogism. Justice Gorsuch and his fellow originalists believe that the original public meaning informs what is constitutional.[108] This represents the conclusion of the overarching syllogism of originalism.

The major premise emanates from the oath of office taken by every Article III judge. Indeed, all federal judges affirm that they will "support th[e] Constitution [of the United States]."[109] These judges carry out that obligation by "faithfully interpreting" the Constitution when a case implicates a constitutional question.[110] But judges, lawyers, and scholars dispute how to interpret the Constitution faithfully.[111] For an originalist, a faithful interpretation of the Constitution's text is informed by the original public meaning of the provision at issue.[112] This represents the minor premise. The overarching syllogism of the theory of originalism is complete. It may be summarized this way:

> MAJOR PREMISE: A faithful interpretation informs whether actions are constitutional.
> MINOR PREMISE: The original public meaning informs a faithful interpretation of the Constitution.
> CONCLUSION: Thus, the original public meaning informs whether actions are constitutional.

The conclusion of this overarching syllogism becomes the major premise for each application of the theory of originalism.[113] In other words, every time a judge engages in an originalist analysis, she will inevitably begin with the proposition that the original public meaning of the Constitution informs whether actions are constitutional. For example, conducting an originalist analysis in the area of the Fourth Amendment may be thought of in terms of a syllogistic paradigm. The touchstone of the Fourth Amendment is "reasonableness."[114] In a

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108. *See supra* notes 1–5 and accompanying text.

109. U.S. CONST. art. VI.

110. *Id.* (noting that judges must "faithfully discharge" their duties, which includes interpreting the Constitution).

111. *Compare* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010), *with* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2003), *and* Scalia, *supra* note 2, at 849.

112. *See supra* notes 1–5 and accompanying text.

113. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1331 ("It is possible to form syllogisms and draw conclusions from the results of previous syllogisms . . . .").

114. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

sense, reasonableness and constitutionality are perfectly synonymous when examining the government's behavior under the Fourth Amendment. In a syllogistic paradigm of a Fourth Amendment originalism-based analysis, the major premise may be stated this way: government conduct that was unreasonable at the time of the Founding (according to the Fourth Amendment's original public meaning) is unreasonable today.[115] Indeed, Justice Scalia made this very premise a matter of constitutional law in *Jones*.[116]

The major term is "what is unreasonable today." The middle term is "what was unreasonable at the time of the Founding." And the minor term is the particular conduct that is at issue in the case. For ease, call it "conduct *X*."[117] The minor premise emerges as "'conduct *X*' was unreasonable at the time of the Founding." And the conclusion is that "conduct *X*," therefore, is unreasonable today (and, as a result, necessarily violates the Fourth Amendment). Thus, a general syllogism representing an originalist's analysis of the Fourth Amendment could be summarized this way:

> MAJOR PREMISE: Unreasonable government conduct at the time of the Founding is unreasonable today.
> MINOR PREMISE: "Conduct *X*" was unreasonable at the time of the Founding.
> CONCLUSION: Thus, "conduct *X*" is unreasonable today.

Gorsuch follows the Fourth Amendment paradigmatic syllogism in each of his opinions. In other words, Gorsuch uses this Fourth Amendment originalism-based syllogism and always begins his reasoning by noting that the protections that the Fourth Amendment afforded at the time of the Founding are the mandatory minimum of the protections today. For instance, in *United States v. Carloss*, Gorsuch based his discussion of the legal issues on the Founders' understanding of the Fourth Amendment.[118] Gorsuch vehemently disagreed with the majority's conclusion that police could conduct a knock and talk at a particular home.[119] The home and its curtilage were lined with several signs demanding passersby not to trespass onto the private property or approach the home.[120] The

115. This notion that the major premise is what is unreasonable at the moment a judicial decision is made is consistent with the Supreme Court's Fourth Amendment jurisprudence. Indeed, the Supreme Court's tests require courts to look at certain government conduct and determine if that conduct is unreasonable *after* the conduct has already occurred. To be sure, what the court considers "unreasonable" did occur at the time of the conduct. But this syllogism examines judicial decision-making, which occurs when a judge decides that certain conduct is unreasonable. *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 274 (2002) (reiterating that, to determine if the Fourth Amendment has been violated, the Supreme Court requires courts to "take into account the 'totality of the circumstances.'").

116. United States v. Jones, 565 U.S. 400, 406 (2012).

117. The minor term, likewise, makes sense because courts look to the totality of the circumstances of each case to determine if the Fourth Amendment has been offended; the "totality of the circumstances" inquiry is a rigorous, fact-specific test. *See, e.g.*, *Arvizu*, 534 U.S. at 274.

118. United States v. Carloss, 818 F.3d 988, 1004–05 (10th Cir. 2016) (Gorsuch, J., dissenting).

119. *Id.* at 1004.

120. *Id.* at 1003–04.

government argued that police always have an irrevocable right (or a *de facto* easement) to approach a home when the police wish to conduct a knock and talk.[121]

By contrast, Gorsuch stated: "In approaching this bold claim it's important to traverse a little common ground first."[122] And that common ground entailed the text of the Fourth Amendment itself and the original understanding of that text.[123] He then appealed to Justice Scalia's originalist contribution in *Jones*: "We know that the Fourth Amendment, at a minimum, protects the people against searches . . . to the same degree the common law protected the people against such things at the time of the founding[] . . . ."[124] This represents the major premise of Gorsuch's originalism-based syllogism in *Carloss*.

Then, Gorsuch acknowledged that "[t]he founders understood, too, that a 'search' of a constitutionally protected space such as a house or its curtilage generally qualifies as 'unreasonable' when undertaken without a warrant, consent, or an emergency."[125] This statement amounts to the minor premise: under the original public meaning of the Fourth Amendment, police could only search the curtilage without a warrant when there was consent or an emergency. Agents of the government were considered to "'search' a home's curtilage simply by entering that constitutionally protected place to obtain information."[126] Indeed, Gorsuch stated that "[w]e know, too, that at the time of the Founding the common law permitted government agents to enter a home or its curtilage only with the owner's permission or to execute legal process."[127] And Gorsuch noted that "[i]n fact, at common law a homeowner could usually revoke any license to enter his property at his pleasure."[128]

Gorsuch concluded that "it quickly comes clear that most of the conditions necessary to establish a violation of the Fourth Amendment are present here."[129] In other words, Gorsuch has stated his conclusion: this type of government conduct violates the Fourth Amendment. Thus, here is the originalism-based syllogism he created:

> MAJOR PREMISE: All unreasonable government conduct at the time of the Founding is unreasonable today.
>
> MINOR PREMISE: A government agent approaching a home to conduct a knock and talk without a warrant, the homeowner's consent, or the presence of an emergency was unreasonable at the time of the Founding.

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121. *Id*. at 1005.
122. *Id*. at 1004.
123. *See id*. at 1004–05.
124. *Id*. at 1006 (Gorsuch, J., dissenting).
125. *Id*. at 1004–05 (citations omitted).
126. *Id*. at 1004.
127. *Id*. at 1006.
128. *Id*.
129. *Id*. at 1004.

> CONCLUSION: Thus, a government agent approaching a home to conduct a knock and talk without a warrant, the homeowner's consent, or the presence of an emergency is unreasonable today.

After Gorsuch fully investigated the original public meaning of the Fourth Amendment and its implications, he logically dissected the government's argument that "[w]hile a homeowner may stop others from entering his curtilage, . . . a homeowner may *never* stop [government] agents from entering the curtilage to conduct a knock and talk."[130] He dismissed the government's argument on originalist grounds, for that "line of reasoning seems to me difficult to reconcile with the Constitution of the founders' design."[131]

Although the government failed to attack this historical authority, Gorsuch noted that the "government replie[d] by pointing . . . to the Supreme Court's observation that officers *usually* enjoy the homeowner's implied consent to enter the curtilage to knock at the front door."[132] Yet Gorsuch brushed off this argument by stating "nothing in that prosaic observation purported to upend the original meaning of the Fourth Amendment or centuries of common law recognizing that homeowners may revoke by word or deed the licenses they themselves extend."[133] Thus, Gorsuch dealt with this argument using evidence of the Fourth Amendment's original public meaning.

In his concurring opinion in *United States v. Krueger*,[134] Gorsuch also employed the paradigmatic Fourth Amendment originalism-based syllogism. The issue was whether "the government's phantom warrant argument—its contention that a warrant issued in defiance of the jurisdictional territorial restraints on a magistrate judge's power under statutory law somehow remains a valid warrant under the Fourth Amendment."[135] Gorsuch, at the beginning of his opinion, stated that the government's argument was "certainly a bold claim—but one I find no more persuasive for it."[136] This was the conclusion of Gorsuch's syllogistic reasoning.[137]

As in *Carloss*, the major premise of the syllogism employed by Gorsuch in *Krueger* was, in essence, the same: "Whatever else it may do, the Fourth Amendment [today] embraces the protections against unreasonable searches and seizures that existed at common law at the time of its adoption, and the Amendment must be read as 'provid[ing] *at a minimum*' those same protections today."[138] When moving next to the minor premise, Gorsuch proceeded by examining the Founders' understanding of the Fourth Amendment: "[I]t becomes

130. *Id.* at 1005.
131. *Id.* at 1006.
132. *Id.*
133. *Id.*
134. United States v. Krueger, 809 F.3d 1109 (10th Cir. 2015) (Gorsuch, J., concurring).
135. *Id.* at 1123.
136. *Id.* at 1118.
137. *Id.*
138. *Id.* at 1123.

quickly obvious that a warrant issued for a search or seizure beyond the territorial jurisdiction of a magistrate's powers under positive law was treated as no warrant at all . . . ."[139] Such a warrant would have been considered "*ultra vires* and *void ab initio* to use some of the law's favorite Latin phrases—as null and void without regard to potential questions of 'harmlessness.'"[140]

To further his argument, Gorsuch also furnished an example of how this notion of a "phantom warrant" would have offended the Constitution in the minds of those living in the Founding Era. An "example" is one type of "definition"[141] that Aristotle suggested rhetoricians could use to convey their arguments clearly.[142] Indeed, Aristotle recognized that one way to define an abstract concept is to provide an example of it.[143] Gorsuch provided two examples, one example of a valid warrant and one example of a null-and-void warrant: "[A] justice of the king's bench with nationwide territorial jurisdiction afforded by Parliament could issue a warrant anywhere in the kingdom. Meanwhile, warrants issued by justices of the peace—county officials empowered to act only within their respective counties—were executable only within those same limited bounds."[144] Gorsuch's use of example enhances and establishes the truth of the minor premise.

Thus, Gorsuch evinced the minor premise, and he completed his originalism-infused syllogism in *Krueger*. In sum, the full syllogism may be stated this way:

> MAJOR PREMISE: All unreasonable government conduct at the time of the Founding is unreasonable today.
>
> MINOR PREMISE: A warrant issued outside a magistrate's territorial jurisdiction was unreasonable at the time of the Founding.
>
> CONCLUSION: Thus, a warrant issued outside a magistrate's territorial jurisdiction is unreasonable today.

United States v. Ackerman[145] represents an example of how Gorsuch employs originalism-based syllogistic reasoning to different-yet-related contexts. The first issue Gorsuch addressed in *Ackerman* was whether NCMEC qualifies as a "governmental entity" under the Fourth Amendment.[146] Unlike in *Carloss* and *Krueger*, Gorsuch employed an analog to the paradigmatic Fourth Amendment originalism-based syllogism to reach his conclusion. He began his analysis by framing the issue this way: "The problem of drawing a line between public and private entities is an old and difficult one."[147] Thus, he identified that discerning

139. *Id*.
140. *Id*.
141. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1330; *see generally* CORBETT, *supra* note 21, at 34–36.
142. ARISTOTLE, RHETORIC, *supra* note 7, at 1330.
143. *Id*.
144. *Krueger*, 809 F.3d at 1123.
145. United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016).
146. *Id*. at 1295.
147. *Id*.

what entities are governmental would have been a problem at the time of the Founding, too.[148] And, to resolve this matter, he looked to the Founders' understanding of the issue.[149]

He discussed "[p]erhaps the Supreme Court's first great tangle with the task."[150] He quoted Chief Justice Marshall's opinion in *Trustees of Dartmouth College v. Woodward*.[151] Chief Justice Marshall wrote that a governmental entity is one that is "invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority."[152] Next, Gorsuch stated that whether an entity functions like the police is one way of establishing that an entity is governmental.[153]

Gorsuch bolstered his analysis by tracing the history of policing back to the time of the Founding.[154] He recognized that "[e]ven before the rise of professional police departments, a private person dragooned into a 'posse comitatus' bore 'the same authority as the sheriff' and 'was protected [by law] to the same extent.'"[155] After compiling all of this legal data from the Founding Era, he evaluated NCMEC and its statutory authority using the Founders' understanding.[156] He concluded that "NCMEC's law enforcement powers extend well beyond those enjoyed by private citizens—and in this way it seems to mark it as a fair candidate for a governmental entity."[157] And if NCMEC is a government entity, then it must be subjected to the strictures of the Fourth Amendment, as a matter of both modern doctrine and the original understanding of the Fourth Amendment.[158]

In this instance, Gorsuch never explicitly supplied the major premise, which may be stated this way: any entity considered "governmental" at the time of the Founding must be considered a government entity today. And the fact that the syllogism employed by Gorsuch lacked an explicit major premise does not diminish the power of placing originalism at the heart of his syllogistic reasoning.[159] But Gorsuch did explicitly incorporate the syllogism's minor premise and its conclusion into his opinion. The minor premise was that NCMEC's law enforcement powers, which went much further than the powers granted to any ordinary citizen, would have been considered a government entity at the time of the Founding. He

148. *Id*. at 1295–96.
149. *Id*.
150. *Id*. at 1295.
151. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
152. *Ackerman*, 831 F.3d at 1295 (citing *Woodward*, 17 U.S. (4 Wheat.) at 634).
153. *Id*. (citing Foley v. Connelie, 435 U.S. 291, 297 (1978)).
154. *Id*.
155. *Id*. (quoting Filarsky v. Delia, 132 S. Ct. 1657, 1664 (2012)).
156. *Id*. at 1296–98.
157. *Id*. at 1296.
158. *Id*. at 1296–98.
159. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1331; *see generally* Hill, *supra* note 12, at 76 ("The essence of the enthymeme is that some parts of the logical argument are omitted when the speaker or writer can predict that the auditors will supply them.").

concluded that, based on the historical support he supplied and the entity's statutory authority, NCMEC amounted to a government entity. Thus, the syllogism employed by Gorsuch could be described in this summarized manner:

> MAJOR PREMISE: Any entity considered "governmental" at the time of the Founding is a government entity today.
> MINOR PREMISE: An entity with law enforcement powers beyond those of an ordinary citizen was treated like a government entity at the time of the Founding.
> CONCLUSION: Thus, an entity with law enforcement powers beyond those of an ordinary citizen is a government entity today.

Thus, Gorsuch relies heavily on logic-based arguments.[160] In his logical arguments, originalism supplies the primary support for his reasoning. Indeed, the original public meaning of the Fourth Amendment typically provides the substance for the "middle term" in Gorsuch's persuasive syllogisms.

B. Gorsuch's Appeals to Pathos

In addition to *logos*, Gorsuch employs emotion-based arguments, ones that appeal to *pathos*. Specifically, Gorsuch genuinely evokes fear of the government encroaching on the rights of the people, and he uses originalism to assist in conjuring that fear. According to Aristotle, "[f]ear may be defined as a pain or disturbance due to a mental picture of some destructive or painful evil in the future."[161] These appeals demonstrate Gorsuch's grave concern about the deleterious effects to the Fourth Amendment if the government exceeds its constitutional authority. His appeals to *pathos* are often enhanced by his use of the canon of style. Indeed, Gorsuch employs both schemes and tropes to clarify his concerns and, by extension, to enhance his emotion-based arguments. In *United States v. Carloss*, Gorsuch employed the scheme of parenthesis and the tropes of hyperbole and rhetorical questions.

Parenthesis is a scheme that breaks up the flow of a sentence by adding a word or phrase.[162] An example is this statement: "The Securities and Exchange Commission *(hereinafter 'SEC')* has announced that Dr. Jeffery Harris will serve

160. *See* United States v. Carloss, 818 F.3d 988, 1009–11 (10th Cir. 2016) (Gorsuch, J., dissenting) (employing the following syllogism: all unreasonable government conduct at the time of the Founding is unreasonable today. Government agents approaching a home despite the owner revoking the implied license to approach her home by either (a) explicit words revoking the license *or* (b) an action revealing her intent to revoke the license was unreasonable at the time of the Founding. Thus, government agents approaching a home despite the owner revoking the implied license to approach her home by either (a) explicit words revoking the license *or* (b) an action revealing her intent to revoke the license is unreasonable today.).

161. *See* ARISTOTLE, RHETORIC, *supra* note 7, at 1389.

162. TISCIONE I, *supra* note 11, at 132.

as its new chief economist."[163] The "(hereinafter 'SEC')" interrupted the normal flow of that sentence. But parenthesis can be used to advance arguments rather than simply insert an abbreviation for a federal agency. Gorsuch uses parenthesis to invoke the legitimate fear of government overreach in the audience.

For instance, in his dissenting opinion in *United States v. Carloss*, Gorsuch began his argument by establishing that the government encroached on a constitutionally protected space—the curtilage of the defendant's home.[164] Gorsuch explained that "[t]he government concedes that its officers physically entered the home's curtilage when *(and surely at the very latest)* they stepped foot on the front porch in order to reach and knock at the front door."[165] Gorsuch's point is that, at a minimum, the government entered a constitutionally-protected zone when the agents stepped onto the defendant's porch. But he leaves to his audience's imagination when the government *first* encroached on the defendant's property, a sanctum into which the government intruded. The parenthesis asks the reader to consider when she would feel the government had crossed the outermost threshold of the constitutionally-protected zone afforded to a home by the Fourth Amendment. Gorsuch used parenthesis to stoke fear of government overreach.

Gorsuch also uses originalism to inflame the audience's fear of government overreach. At the end of the sentence quoted above, he inserted a footnote which stated that "[a]t common law the curtilage was far more expansive than the front porch, sometimes said to reach as far as an English longbow shot—some 200 yards—from the dwelling home."[166] Gorsuch likely intended this originalism-based aside to trouble the reader by juxtaposing the original public meaning of the curtilage with the fact that the agents stepped onto the defendant's porch.

Gorsuch further highlighted the fear of government invasion of one's home by discussing the number of "No Trespassing" signs posted by the defendant. Indeed, Gorsuch again used parenthesis to underscore the fact that "the concurrence . . . suggests a judgment that signs are categorically insufficient to revoke the implied license in the . . . 'residential context.'"[167] Gorsuch also acknowledged that "[a]fter all, the concurrence says that in the 'residential context' plastering a No Trespassing sign to the center of your front door is not 'particularly distinctive.'"[168] And "[e]ven lining the path from the street to your porch with four *(ten? twenty?)* signs doesn't change the equation."[169]

Gorsuch probably intended this parenthesis—which also includes rhetorical questions—to show that, under the concurrence's reasoning, the implied license

163. *See id.*; *Securities and Exchange Commission Names Jeffery Harris as Director of the Division of Economic and Risk Analysis*, AM. UNIV. KOGOD SCH. OF BUS., http://www.american.edu/kogod/news/jeff-harris-dera.cfm [https://perma.cc/ND4S-AECX].

164. *Carloss*, 818 F.3d at 1003 (Gorsuch, J., dissenting).

165. *Id.* at 1005 (emphasis added).

166. *Id.* at 1005 n.1.

167. *Id.* at 1008.

168. *Id.*

169. *Id.* (emphasis added).

can never be revoked no matter how many signs a homeowner posts to express her desire to revoke the implied license. And that should, in Gorsuch's view, upset the reader; Gorsuch believes that a property owner at the time of the Founding would have been left alone if she so desired and that a property owner today should be no less protected by the Fourth Amendment than a property owner in 1789.[170] Yet he—using the Founders' understanding of the Fourth Amendment—is the only judge on the panel to advance this argument.[171]

Gorsuch also employed hyperbole in this opinion. A trope, hyperbole involves exaggerating a point to evoke a heightened response to that point.[172] An example of hyperbole already mentioned is the parenthesis in which Gorsuch implied that the *Carloss* concurrence would not be persuaded even if the defendant had posted ten or twenty signs rather than four.[173] But another, clearer example appears earlier in the opinion when Gorsuch described the government's argument that "its officers enjoy an irrevocable right [or permanent easement] to enter a home's curtilage to conduct a knock and talk."[174] And he noted that the government emphasized at oral argument that *nothing* could take away that irrevocable right to enter the curtilage.[175] Indeed, "[a] homeowner may post as many No Trespassing signs as she wishes. She might add a wall or a medieval-style moat, too. Maybe razor wire and battlements and mantraps besides. Even *that* isn't enough to revoke the state's right to enter."[176]

This stanza amounts to hyperbole par excellence. No person, in the modern era, would think that she would need to construct a castle from the middle ages to keep the police outside her curtilage. And no person at the time of the Founding would think that she would need to construct such an installation, too. But Gorsuch employed this trope to prove that the government's reasoning would even permit the police "to storm the bastille" to conduct a knock and talk.[177] Gorsuch intended the hyperbole to trigger a visceral reaction by the audience to the government's argument; that same ire, stemming from fear of government overreach, probably would have been felt by an audience at the time of the Founding, too.

The other trope that Gorsuch employs is the rhetorical question. This trope involves posing a question to the reader that implicitly makes a point.[178] In *Carloss*, as already discussed, Gorsuch used rhetorical questions to imply that no matter how many signs the defendant had posted—four, ten, or twenty—the Tenth Circuit majority still would have found that the defendant failed to revoke

170. *See id.*
171. *See id.*
172. TISICIONE I, *supra* note 11, at 132.
173. *Carloss*, 818 F.3d at 1008.
174. *Id.* at 1004.
175. *Id.*
176. *Id.*
177. *Id.*
178. *See* TISCIONE I, *supra* note 11, at 132.

the government's implied license to enter the curtilage and conduct a knock and talk.[179] But at the beginning of his opinion, Gorsuch described the facts of the case using rhetorical questions:

> But what happens when the homeowner manifests an obvious intention to revoke the implied license to enter the curtilage and knock at the front door? When the owner literally substitutes the knocker with a No Trespassing sign, one smack in the middle of the front door? When she adds two more No Trespassing signs at the driveway's mouth to the street, one on either side of the only clear access route from the street to the front door—and along the very route any visitor would use to approach the home? And when, for good measure, she posts still another No Trespassing sign between the driveway and the house? So that to enter the home's front porch, its constitutionally protected curtilage, visitors would have to disregard four separate and plainly visible warnings that their presence is wholly unwelcome? May officers still—under these circumstances—enter the curtilage to conduct an investigation without a warrant and absent an emergency?[180]

Gorsuch's purpose for including this paragraph is obvious. As each question is posed, his implication is beyond doubt—the defendant clearly wanted to be left alone and had demonstrated that desire. The historical evidence from the Founding establishes that the founding generation would have agreed with the implication of the rhetorical questions,[181] and they probably would have feared any conclusion contrary to Gorsuch's position. The modern audience likely feels that same way. Modern jurisprudence places the curtilage within the ambit of the home which is unquestionably protected from unwanted government interference.[182] Indeed, the "reasonable expectation of privacy" concept protects the curtilage.[183]

Thus, using parenthesis, hyperbole, and rhetorical questions, Gorsuch's *pathos* likely demonstrates his genuine fear of government encroachment on an individual's Fourth Amendment protections. But Gorsuch does more than that, for his emotion-based arguments do not speak only to his contemporary audience but also to an audience at the time of the Founding. In that sense, his arguments tap into a *transcendental pathos*. In other words, Gorsuch's opinions evoke emotions shared by all Americans, no matter if they lived in 1789 or are alive today.

C. Gorsuch's Appeals to Ethos

Gorsuch also appeals to *ethos* throughout his opinions, trying to establish his credibility as a judge faithfully interpreting the Constitution. To prove his credibility, he relies heavily on the original public meaning of the Fourth Amendment.

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179. 818 F.3d at 1008.
180. *Id.* at 1003–04.
181. *See id.* 1004–10.
182. *See* United States v. Dunn, 480 U.S. 294, 297 (1987).
183. *See id.*

His appeals to *ethos* not only establish his credibility as a judge interpreting the Constitution faithfully but likewise demonstrate the value of originalism. Gorsuch uses the canon of arrangement—both large- and small-scale organization—to advance these credibility-based arguments. He makes arguments that establish his integrity and originalism's credibility in two ways. First, he consistently confirms that his conclusions, based on the evidence of the Fourth Amendment's original meaning, cohere with modern precedent. And second, his *peroratios*, or the concluding lines of his opinions, make plain both his credibility as a judge and originalism's virtue as a theory of constitutional interpretation.

Gorsuch establishes his credibility by showing that the conclusions he reaches by examining evidence of the original public meaning would be the same conclusions reached by applying modern precedent. Although Gorsuch—as a circuit judge—had to comply with binding Supreme Court precedent as a matter of stare decisis,[184] his compliance establishes the credibility of his originalist analysis.[185]

For instance, in *United States v. Ackerman*,[186] Gorsuch began his analysis of whether NCMEC was an agent of the government (and thus subject to the Fourth Amendment) with a discussion of prevailing agency principles at the time of the Founding.[187]

But his discussion did not stop with the original meaning. He then stated that "[a]dmittedly, in recent years some courts have offered more stylized agency tests for the Fourth Amendment cases, which at first glance may appear to depart from and demand more than the common law did to establish an agency relationship."[188] Following this admission, he described in turn the tests developed by the different circuits. He concluded that "in this particular case it doesn't much matter which agency test you might wish to employ . . . [because] it's hard to see how we could avoid deeming NCMEC the government's agent in this case."[189] And "[b]olstering our confidence about all this is the Supreme Court's leading Fourth Amendment agency case, . . . [when] the Court seemed to follow *the common law* . . . ."[190] Later in the opinion, he dispatched one of the government's counterarguments on this issue by showing that, in this particular case, the common law, the Supreme Court's precedent, and the Tenth Circuit's precedent agree that

184. *See* TISCIONE I, *supra* note 11, at 63–64.

185. The fact that Gorsuch confirmed that the conclusion driven by originalism and the outcomes based on the modern doctrine are the same in no way diminishes the import of originalism. Precedent and originalism may often diverge, and some argue originalism should drive the analysis in those situations. *See generally* BARNETT, *supra* note 111. But that is beyond the scope of this note, which purely looks at three of Gorsuch's Fourth Amendment opinions written when he sat on the Tenth Circuit.

186. 831 F.3d 1292 (10th Cir. 2016).

187. *Id.* at 1300 ("[S]ince time out of mind the law has prevented agents from exercising powers their principals do not possess and so cannot delegate.").

188. *Id.* at 1301.

189. *Id.*

190. *Id.* at 1302.

NCMEC is an agent of the government for Fourth Amendment purposes.[191]

Likewise, in *United States v. Carloss*,[192] the dissenting Gorsuch used this same approach to dispatch an argument advanced by the concurring opinion. The concurrence suggested that "some kind of physical obstacle [like a fence] was necessary to revoke the implied license" afforded to the government to breach the curtilage and conduct a knock and talk.[193] Gorsuch retorted that he could find no evidence of such a requirement "at common law at the time of the Fourth Amendment's adoption."[194] And Gorsuch pointed out that "rather than attempt an argument along those lines, the concurrence cites only a handful of contemporary decisions that, even on their own terms, do not support such a view."[195] Gorsuch then analyzed the modern decisions, case by case, to show that these dispositions would lead to the same conclusion: the Constitution does not require a physical obstacle to be present in order for a homeowner to revoke the government's implied license to enter the home's curtilage. Indeed, explicit words are enough to reveal the homeowner's intent to revoke that license.[196]

Second, his overall conclusions also, by their terms, establish his credibility as a judge faithfully interpreting the Constitution. In *Carloss*, Gorsuch explicitly said as much by noting that "[o]ur duty of fidelity to the law requires us to respect all these law enforcement tools."[197] And that duty of fidelity requires more, too. Indeed, "it also requires us to respect *the ancient rights of the people* when law enforcement exceeds its limits."[198]

In *Krueger*,[199] he evoked a similar *ethos* by stating that "[t]he government asks us to resolve but one question, bold as it is: whether a warrant issued in defiance of positive law's jurisdictional limitations on a magistrate judge's powers remains a warrant for Fourth Amendment purposes."[200] And he responded to the question, just as judges are required when a constitutional case or controversy is presented, saying that he "would not hesitate to answer that question put to us and reply that a warrant like that is no warrant at all."[201]

These concluding words show that, at bottom, Gorsuch is a judge seeking to interpret the Constitution faithfully and to preserve the rights of citizens. He uses originalism to reach these goals. In one opinion, he demonstrated his *ethos* by invoking the language of the Fourth Amendment's text when he explained how "warrants" worked to protect the rights of citizens at the time of the Founding and how they should do the same thing today. In another opinion, he described

191. *See id.* at 1303.
192. 818 F.3d 988 (10th Cir. 2016).
193. *Id.* at 1009.
194. *Id.*
195. *Id.*
196. *See id.* at 1009–10.
197. *Id.* at 1015.
198. *Id.* (emphasis added).
199. 809 F.3d 1109 (10th Cir. 2015) (Gorsuch, J., concurring).
200. *Id.* at 1126.
201. *Id.*

the purpose of the Fourth Amendment to justify his protecting the people's ancient rights rather than permitting law enforcement to go beyond its authority. These conclusions are not only critical to his credibility as the arbiter, but they are also necessary to establish the credibility of originalism. Gorsuch shows in these opinions how originalism can work as a theory to protect the rights of the citizens, which supports the theory's *ethos*.

IV. GORSUCH'S *ELOQUENTIA PERFECTA*[202] EVIDENCES HIS POTENTIAL TO EXPAND ORIGINALISM'S INFLUENCE

This note's rhetorical analysis establishes two ultimate conclusions. The first is that Justice Gorsuch uses originalism to underpin his persuasive and harmonious artistic appeals. Using *logos*, Gorsuch shows the coherence of the theory of originalism, using syllogistic reasoning to prove what outcomes are commanded by the original public meaning of the Fourth Amendment. Moreover, he crafts emotional appeals that evoke common fears of government overreach that would have bothered Americans in 1789; for Gorsuch, those same fears should still bother Americans today. In a sense, he establishes that many of these fears transcend time. Gorsuch's credibility-based arguments—*ethos*—establish both his integrity as a judge and the virtues of originalism as a theory used to interpret the Constitution faithfully. All told, when Gorsuch's appeals to *logos*, *pathos*, and *ethos* are combined, the persuasiveness of originalism reaches its crescendo.

The second conclusion, however, is more profound. The note observes that not only is Justice Gorsuch the natural heir of Justice Scalia's Fourth Amendment originalism, but Gorsuch has the potential to expand the influence of originalism on American law more broadly. In all three opinions, Gorsuch includes an originalist imperative that Justice Scalia reintroduced into American constitutional law in *Jones*: the notion that the Fourth Amendment must be just as "rights protective" as it was at the time of the Founding.[203] Indeed, the originalist concept enshrined in *Jones* plays a critical role in Gorsuch's syllogistic reasoning. But, in each opinion, Gorsuch took the originalist imperative from *Jones* to the next level; in each opinion, he applied the import of the original public meaning of the Fourth Amendment in different contexts. Thus, his opinions extend the reach of Scalia's originalist contribution to Fourth Amendment jurisprudence. These Fourth Amendment opinions provide initial evidence that Justice Gorsuch will

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202. This term of art (translated from the Latin as "perfect eloquence") describes the type of rhetoric employed by priests of the Society of Jesus, or the Jesuits. When employing *Eloquentia Perfecta*, "an optimal orator would combine written and oral language concepts such as morality or ethics and intelligence." Steven Mallioux, *A Good Person Speaking Well: Eloquentia Perfecta in U.S. Jesuit Colleges: A Brief Genealogy*, 43 CONVERSATIONS ON JESUIT HIGHER EDUC. 10, 10 (2013). Gorsuch, who attended Georgetown Preparatory School, would no doubt be familiar with this term. *See* Andrew Metcalf, *Trump's Supreme Court Pick Has Montgomery County Connection*, BETHESDA MAG. (Feb. 1, 2017, 9:41 AM), http://www.bethesdamagazine.com/Bethesda-Beat/2017/Trumps-Supreme-Court-Pick-Has-Montgomery-County-Connection/ [https://perma.cc/SQE2-REDA].

203. *See Carloss*, 818 F.3d at 1004 (Gorsuch, J., dissenting); United States v. Ackerman, 831 F.3d 1292, 1307 (10th Cir. 2016); *Krueger*, 809 F.3d at 1123 (Gorsuch, J., concurring).

increase originalism's influence on Fourth Amendment jurisprudence. And because Gorsuch's use of originalism so fully permeates each of his artistic appeals, it stands to reason that Gorsuch may, through his Supreme Court opinions, infuse originalism into other areas of constitutional law. Thus, Gorsuch has the potential to be more than just the new Scalia.