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Where Does Judge Gorsuch Stand on Limiting the Federal Government?

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This week, all eyes are on Judge Gorsuch’s confirmation hearing for a seat on the Supreme Court. While Gorsuch has not explicitly stated that he wants to drown or deconstruct the federal government, there is troubling language in his opinions that indicates that he shares that goal. While this will hearten many a Tea Partyer, moderate Republicans along with Democrats should be wary of someone who does not value the good that the federal government can and does do.

His opinion in Caring Hearts Personal Home Services v. Burwell describes a federal government that has ceased to function rationally: “The number of formal rules [administrative] agencies have issued thanks to their delegated legislative authority has grown so exuberantly it’s hard to keep up. The Code of Federal Regulations now clocks in at over 175,000 pages. And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal or ‘sub-regulatory’ policy manuals, directives, and the like might be found floating around these days.”

He continues, “This case has taken us to a strange world where the government itself — the very ‘expert’ agency responsible for promulgating the ‘law’ no less — seems unable to keep pace with its own frenetic lawmaking. A world Madison worried about long ago, a world in which the laws are ‘so voluminous they cannot be read’ and constitutional norms of due process, fair notice, and even the separation of powers seem very much at stake.”

While this opinion draws a colorful picture of a topsy-turvy government that plays well to the crowd, the fact is that the federal government runs pretty well given its size and complexity. Indeed, employees of large and profitable corporations can often be heard making the same kind of complaints about their employers. All large organizations have their catch-22s, their inconsistencies, their maddening snafus. But the fact remains that large organizations have been remarkably successful at navigating the modern world.

Gorsuch’s lazy originalism, with musings of Madison’s concerns about a legal code so massive that it is unknowable, may have packed a punch at the dawn of the administrative state a hundred years ago. Today it misses its mark. Indeed, the first lesson I teach my law students is that their job is not to know what the law is in advance, but rather to be able to figure it out when a case presents itself. The same could be said of any professional. A doctor need not
know all of the medical literature. She just needs to be able to search it in order to diagnose her patient. In fact, the massive code is pretty knowable. Just use Google. It’s all there.

For those of us who work for large organizations, who deal with large amounts of data, who crisscross the world’s borders, who do business over state lines, we know that we can survive and thrive in this complex world. And there simply is no alternative. To deny this is to pander to silly romantics who pine for a time that passed more than a century ago for most people: when you only did business with your neighbors, when your justice of the peace lived down the block and when you walked to your job across town.

President Trump knows this. His businesses are scattered across the globe. Steve Bannon knows this. He worked at Goldman Sachs. And Judge Gorsuch certainly knows this. But they also know that people like to hear that we can go back to a simpler time that never really existed for most Americans.

We do not need that kind of patronizing nostalgia in the Supreme Court. Our ninth justice should be one who can craft solutions to our 21st century legal problems that are based on the values embodied in the Constitution, not the facts of life of a bygone era.