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Judge Neil M. Gorsuch: His Jurisprudence and Potential Impact on the Supreme Court

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Summary

On January 31, 2017, President Donald J. Trump announced the nomination of Judge Neil M. Gorsuch of the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) to fill the vacancy on the Supreme Court of the United States created by the death of Justice Antonin Scalia in 2016. Judge Gorsuch was appointed to the Tenth Circuit by President George W. Bush in 2006. The Tenth Circuit's territorial jurisdiction covers Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming, and parts of Yellowstone National Park that extend into Idaho and Montana.

Immediately prior to his appointment to the bench, the nominee served as the Principal Deputy to the Associate Attorney General, the third-ranking official at the U.S. Department of Justice, assisting the Associate Attorney General with oversight of the Department's various civil litigation components. Before serving in the Justice Department, the nominee worked in private practice as a civil litigator at the Washington, D.C. firm of Kellogg, Huber, Hansen, Todd, Evans & Figel. Judge Gorsuch began his legal career clerking for federal judges. He first served as a law clerk to Judge David B. Sentelle of the D.C. Circuit. Later, he served two Supreme Court Justices, newly retired Justice Byron White and Justice Anthony Kennedy, during the October 1993 term.

This report provides an overview of Judge Gorsuch's jurisprudence and discusses how the Supreme Court might be affected if he were to succeed Justice Scalia. In particular, the report focuses on those areas of law where Justice Scalia can be seen to have influenced the High Court's approach to particular issues or provided a fifth and deciding vote on the Court, with a view toward how the nominee might approach those same issues. The report begins by discussing the nominee's views on two cross-cutting issues—the role of the judiciary and statutory interpretation. It then addresses fourteen separate areas of law, arranged in alphabetical order, from "administrative law" to "takings." The report includes a table that notes the cases where the Supreme Court has reviewed majority opinions written or joined by Judge Gorsuch. Another set of tables in this report analyzes the nominee's concurrences and dissents and those of his colleagues on the Tenth Circuit.

A separate report, CRS Report R44772, *Majority, Concurring, and Dissenting Opinions by Judge Neil M. Gorsuch*, coordinated by Michael John Garcia, briefly summarizes all opinions authored by Judge Gorsuch during his tenure on the federal bench. Other CRS products discuss various issues related to the vacancy on the Court. For an overview of available products, see CRS Legal Sidebar WSLG1526, *Supreme Court Nomination: CRS Products*, by Kate M. Manuel and Andrew Nolan.

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On January 31, 2017, President Donald J. Trump announced the nomination of Judge Neil M. Gorsuch of the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit)[1] to fill the vacancy on the Supreme Court of the United States created by the 2016 death of Justice Antonin Scalia.[2] Judge Gorsuch was appointed to the Tenth Circuit by President George W. Bush in 2006.[3] Immediately prior to his appointment to the bench, the nominee served as the Principal Deputy to the Associate Attorney General, the third-ranking official at the U.S. Department of Justice,[4] assisting the Associate Attorney General with oversight of the Department's various civil litigation components.[5] Before serving in the Justice Department, the nominee worked in private practice as a civil litigator at the Washington, D.C. firm of Kellogg, Huber, Hansen, Todd, Evans & Figel.[6] Judge Gorsuch began his legal career clerking for federal judges. He first served as a law clerk to Judge David B. Sentelle of the D.C. Circuit. Later, he served two Supreme Court Justices, newly retired Justice Byron White and Justice Anthony Kennedy, during the October 1993 term.[7]

This report provides an overview of Judge Gorsuch's jurisprudence and discusses how the Supreme Court might be affected if he were to succeed Justice Scalia. However, in attempting to ascertain how Judge Gorsuch could influence the High Court, it is important to note that, for various reasons, it is difficult to predict accurately an individual's likely contributions to the Court based on their prior experience. A section of this report titled *Predicting Nominees' Future Decisions on the Court* provides a broad context and framework for evaluating how determinative a judge's prior record may be in predicting future votes on the Supreme Court.

Because Judge Gorsuch would succeed Justice Scalia on the High Court, this report focuses on those areas of law where Justice Scalia can be seen to have influenced the Court's approach to particular issues or provided a fifth and deciding vote,[8] with a view toward how the nominee might approach those same issues. The report begins by discussing the nominee's views on two cross-cutting issues—the role of the judiciary and statutory interpretation. It then addresses fourteen separate areas of law, arranged in alphabetical order, from "administrative law" to "takings." Within each section, the report reviews whether and how Judge Gorsuch has addressed particular issues in opinions he authored or joined. In some instances, the report also identifies other votes in which he participated (e.g., votes as to whether the Tenth Circuit should grant en

[1] For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Tenth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[2] *See* Press Release, The White House Office of the Press Secretary, President Donald J. Trump Nominates Judge Neil Gorsuch to the United States Supreme Court (Jan. 31, 2017), https://www.whitehouse.gov/the-press-office/2017/01/31/president-donald-j-trump-nominates-judge-neil-gorsuch-united-states. *See generally* CRS Legal Sidebar WSLG1728, *Neil Gorsuch's Nomination to the Supreme Court: Initial Observations*, by Andrew Nolan.

[3] *See Gorsuch, Neil M.*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=3125 (last visited Mar. 5, 2017) [hereinafter FJC, *Gorsuch*].

[4] *See* U.S. DEP'T OF JUSTICE, ORGANIZATION, MISSION, & FUNCTIONS MANUAL (Sept. 9, 2014) *available at* https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general.

[5] *See* S. COMM. ON THE JUDICIARY, 115TH CONG., QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT 43, NOMINATION NO. PN55-115 (2017), *available at* https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20%28Public%29.pdf [hereinafter *Committee Questionnaire*].

[6] *See id.* at 42–43.

[7] *See* FJC, *Gorsuch*, *supra* note 3. During the October 1993 term, Justice White sat by designation pursuant to 28 U.S.C. § 294(a) on nearly two dozen cases on the Tenth Circuit. *See, e.g.*, Beard v. City of Northglenn, 24 F.3d 110 (10th Cir. 1994) (White, J.).

[8] These areas are noted in CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*, coordinated by Kate M. Manuel, Brandon J. Murrill, and Andrew Nolan [hereinafter *CRS Scalia Report*].

banc review of decisions of three-judge panels). The report analyzes majority, concurring, and dissenting opinions, including decisions that Judge Gorsuch participated in while serving by designation on another federal court of appeals.[9] Where relevant, the report also notes Judge Gorsuch's nonjudicial writings,[10] many of which address assisted suicide and euthanasia.[11]

While the report discusses numerous cases and votes involving Judge Gorsuch, it focuses particularly on cases in which the sitting panel was divided, as these cases arguably best showcase how he might approach a legal controversy whose resolution is a matter of dispute and is not necessarily clearly addressed by prior case law.[12] In addition, the report highlights areas where Judge Gorsuch has expressed views on the law that may contrast with those of some of his colleagues. To the extent that the nominee's votes in particular cases arguably reflect broader trends and tendencies in his decision making that he might bring to the High Court, the report highlights such trends. Nonetheless, this report does not attempt to catalog every matter in which Judge Gorsuch has participated during his decade of service on the Tenth Circuit. A separate report, CRS Report R44772, *Majority, Concurring, and Dissenting Opinions by Judge Neil M. Gorsuch*, coordinated by Michael John Garcia, lists and briefly describes each opinion authored by Judge Gorsuch during his tenure on the federal bench.

Other CRS products discuss various issues related to the vacancy on the Court. For an overview of available products, see CRS Legal Sidebar WSLG1526, *Supreme Court Nomination: CRS Products*, by Kate M. Manuel and Andrew Nolan.

Predicting Nominees' Future Decisions on the Court

At least as a historical matter, attempting to predict how Supreme Court nominees may approach their work on the High Court is a task fraught with uncertainty.[13] For example, Justice Felix

[9] *See, e.g.*, Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 F. App'x 492 (9th Cir. 2009). For a complete list of the cases in which Judge Gorsuch sat by designation on another court, see *Committee Questionnaire*, *supra* note 5, at 37–38.

[10] While this report discusses many of Judge Gorsuch's nonjudicial writings, it excludes two types of writings from its discussion. First, the report does not discuss anything written by the nominee in a representative capacity for another party, such as a brief submitted on behalf of a client to a court, as such materials may provide limited insights into the advocate's personal views on the law. *See Confirmation Hearing on Federal Appointments: Hearing Before the S. Comm. on the Judiciary Part 1*, 108th Cong. 419 (2003) (statement of John G. Roberts, Jr.) ("I do not believe that it is proper to infer a lawyer's personal views from the positions that lawyer may advocate on behalf of a client."); *but see* William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 161 (2001) (suggesting that although "it is unlikely that judges would permit positions that they advocated as attorneys to directly bias their judicial decisions" and "most lawyers advocate positions about which they hold indifferent or conflicting opinions," it "often may" be possible to "discern a nominee's political predilections from the types of clients and cases that a nominee has had as an attorney"). Second, the report does not discuss any writings of the nominee that predate his graduation from law school, as such writings may be of limited import to gauging his educated views on the law.

[11] *See, e.g.*, NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA (2006) [hereinafter GORSUCH, FUTURE]; Neil M. Gorsuch, *The Legalization of Assisted Suicide and the Law of Unintended Consequences: A Review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change*, 2004 WIS. L. REV. 1347 (2004) [hereinafter Gorsuch, *Legalization*]; Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599 (2000) [hereinafter Gorsuch, *Right*]. The nominee studied this topic while obtaining a doctorate in legal philosophy at the University of Oxford. *See Committee Questionnaire*, *supra* note 5, at 42.

[12] *See* Jonathan H. Adler, *What Happened When Merrick Garland Wrote for Himself*, VOLOKH CONSPIRACY (Mar. 21, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/21/what-happened-when-merrick-garland-wrote-for-himself/ ("The best way to get a handle on a circuit judge's judicial philosophy is to look at the judge's concurrences and dissents.").

[13] Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838–2009*, 76 MO. L. REV. 999, 1040 (2011) ("[U]ncertainty is empirically well-founded. It is borne out (continued...)

Frankfurter, who had a reputation as a "progressive" legal scholar prior to his appointment to the Court in 1939,[14] disappointed[15] some early supporters by subsequently becoming a voice for judicial restraint and caution when the Court reviewed laws that restricted civil liberties during World War II[16] and the early Cold War era.[17] Similarly, Justice Harry Blackmun, who had served on the Eighth Circuit for a little over a decade prior to his appointment to the Court in 1970,[18] was originally considered by President Richard Nixon to be a "strict constructionist," in the sense that he viewed the judge's role as interpreting the law, rather than making new law.[19] In the years that followed, however, Justice Blackmun authored the majority opinion in *Roe v. Wade* recognizing a constitutional right to terminate a pregnancy.[20] He was generally considered one of the more liberal voices on the Court when he retired in 1994.[21]

The difficulty in attempting to predict how a nominee will approach the job of being a Justice remains even when the nominee has had a lengthy federal judicial career prior to nomination.[22]

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by Justices' overall voting records since at least 1838. The president's odds of appointing a Justice who sides with appointees of his party have been no better than a coin flip."); *id*. at 1021 (listing Justices Brennan, Clark, Frankfurter, Holmes, McLean, McReynolds, Reed, Souter, Stevens, Warren, and Wayne as examples of jurists who "disappointed" the expectations of the President who appointed them to the Court); *see also The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight & the Courts, S. Comm. on the Judiciary*, 107th Cong. 195 (2001) (statement of Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, The Catholic University of America) (similar).

[14] *See* Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 220 (1990) ("When Frankfurter took his seat on the Supreme Court in January 1939, almost everyone assumed that he would become the dominant spirit and intellectual leader of the new liberal Court. After all, he had been, in the words of Brandeis, 'the most useful lawyer in the United States': defender of Tom Mooney, the alien victims of the Palmer Red Raids, the striking miners of Bisbee, Arizona, Sacco and Vanzetti, and too many others to mention."); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 13–16, 46–47 (1989) (noting fears in some political circles that Frankfurter was a Communist or Communist sympathizer, "inspir[ing] American conservatives to label Frankfurter a dangerous radical"); *see generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 14, 21–27 (2010).

[15] *See, e.g.*, Rauh, *supra* note 14, at 220 ("But . . . a deep belief in judicial restraint in all matters overtook even [Justice Frankfurter's] lifelong dedication to civil liberties.").

[16] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring) (contending that the propriety of the Japanese-American civilian exclusion order was the "business" of Congress and the Executive, not the Court); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) (arguing for the constitutionality of a World War II-era law requiring students to salute the flag).

[17] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring) (upholding the conviction of three defendants under the Smith Act for conspiracy to organize the Communist Party as a group advocating the overthrow of the U.S. government by force).

[18] *See Blackmun, Harry Andrew*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=187&cid=0&ctype=sc&instate=na (last visited Mar. 5, 2017).

[19] *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 97 (1979) ("Nixon found Blackmun's moderate conservatism perfect. . . . [Blackmun] had a . . . predictable, solid body of opinions that demonstrated a levelheaded, strict-constructionist philosophy. . . . Blackmun was a decent man, consistent, wedded to routine, unlikely to venture far.").

[20] 410 U.S. 113 (1973) (Blackmun, J.).

[21] *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 235 (2005) (noting that, by 1994, "Harry Blackmun was, by wide consensus, the most liberal member of the Supreme Court").

[22] Judge Gorsuch has served for a little more than a decade on the Tenth Circuit. *See* FJC, *Gorsuch*, *supra* note 3. By comparison, of the current members of the Supreme Court, Justice Alito served the longest on the federal court of appeals—sixteen years—prior to being elevated to the High Court. *See Alito, Samuel A., Jr.*, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=26 (last visited Mar. 5, 2017).

Federal appellate judges are bound by Supreme Court and circuit precedent[23] and, therefore, are not normally in a position to espouse freely their views on particular legal issues in the context of their judicial opinions.[24] Moreover, unlike the Supreme Court, which enjoys "almost complete discretion" in selecting its cases, the federal courts of appeals are required to hear many cases as a matter of law.[25] As a result, the appellate courts consider "many routine cases in which the legal rules are uncontroverted."[26] Perhaps indicative of the nature of federal appellate work, the vast majority of cases decided by three-judge panels of federal courts of appeals are decided without dissent.[27] The Tenth Circuit, where Judge Gorsuch serves, is no exception to this general trend, with the overwhelming majority of opinions issued by that court being unanimous.[28] Accordingly, while Judge Gorsuch's work on the Tenth Circuit may provide some insight into his general approach to particular legal issues,[29] the bulk of the opinions that Judge Gorsuch has authored or joined may not be particularly insightful with regard to his views on specific areas of law, or how he would approach these issues if he were a Supreme Court Justice.

Even in closely contested cases where concurring or dissenting opinions are filed,[30] it still may be difficult to determine the preferences of the nominated judge if the nominee did not actually write

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[23] *See In re* Smith, 10 F.3d 723, 724 (10th Cir. 1993) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."); *see generally* Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 816 n.160 (2006) ("Vertical stare decisis binds hierarchically inferior federal appellate judges to follow the Supreme Court's on-point precedent. The relationship is vertical, or between inferior and superior.").

[24] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 367 (2009) ("Supreme Court decisions bind the courts of appeals in a way in which they do not bind the Court itself, and therefore narrow considerably the scope for those courts to exercise choice."); *see also* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 171 (1999) (claiming that the nature of a judge's work on a federal appellate court allows "most circuit judges [to] chart a course of moderation" and "more often than not, a circuit judge's opinions tend to betray outsiders' perceptions of that judge as a sharp ideological extremist").

Judges may believe that they have more freedom to state their views on how the law should properly be interpreted in concurring or dissenting opinions where they are not speaking for the court. Indeed, Judge Gorsuch in some cases wrote separately to express disagreement with existing precedent that controlled the outcome of a case. A notable example, discussed in more detail below, was the concurrence authored by Judge Gorsuch in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016). *See also* discussion *infra* in *Administrative Law*.

[25] Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1052 n.8 (1991); *see generally* POSNER, *supra* note 24, at 367 (observing that "more of the work of [the federal appellate] courts really is technical. . . . Most of the appeals they get can be decided uncontroversially by the application of settled principles.").

[26] *See* Sirico & Drew, *supra* note 25, at 1052 n.8.

[27] *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 160 (2007) (noting the "relative paucity of circuit court panel dissents").

[28] *See* Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 815 (2010) (noting that from 1998 to 2009, 2.54% of the opinions issued by the Tenth Circuit included a dissent); *see generally* Michael W. McConnell, *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33, 37 (2009) (suggesting that the Tenth Circuit "is more collegial" than other appellate courts); Neil M. Gorsuch, *Law's Irony*, 37 HARV. J.L. & PUB. POL'Y 743, 753 (2014) [hereinafter Gorsuch, *Law's Irony*] ("Over ninety percent of the decisions issued by my court are unanimous; that's pretty typical of the federal appellate courts.").

[29] *See* YALOF, *supra* note 24, at 170 ("Although hardly dispositive, federal appellate opinions offer perhaps the best gauge available for predicting an individual's future voting behavior on the Supreme Court."); *see also* David B. Rivkin, Jr. & Andrew M. Grossman, *What Kind of Judge is Neil Gorsuch?*, WALL ST. J. (Jan. 31, 2017), *available at* https://www.wsj.com/articles/what-kind-of-a-judge-is-neil-gorsuch-1485912681 ("The way to take a judge's measure is to read his opinions . . . .").

[30] *See* Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719, 1754–55 (2015) (suggesting that the "presence of a concurrence or dissent serves as a signal" that the case before the court is a "hard case"); *see* (continued...)

an opinion in the case. The act of joining an opinion authored by another judge does not necessarily reflect full agreement with the underlying opinion.[31] For example, in an effort to promote consensus on a court, some judges will decline to dissent unless the underlying issue is particularly contentious.[32] As one commentator notes, "[T]he fact that a judge joins in a majority opinion may not be taken as indicating complete agreement. Rather, silent acquiescence may be understood to mean something more like 'I accept the outcome in this case, and I accept that the reasoning in the majority opinion reflects what a majority of my colleagues has agreed on.'"[33]

Using caution when interpreting a judge's vote isolated from a written opinion may be particularly important with votes on procedural matters. For example, a judge's vote to grant an extension of time for a party to submit a filing generally does not signal agreement with the substantive legal position proffered by that party.[34] And while some observers have highlighted votes by Judge Gorsuch in favor of having certain three-judge panel decisions reconsidered by the en banc Tenth Circuit,[35] these votes should be viewed with a degree of caution. A vote to rehear a case en banc could signal disagreement with the legal reasoning of the panel decision, and may suggest that a judge wants the entire court to have an opportunity to correct a perceived error by

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generally Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–15 (1995) (noting the motivations that prompt judges to write concurring or dissenting opinions); Diane P. Wood, *When to Hold, When to Fold, When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445, 1451–57 (2012) (describing the considerations that prompt judges to publish separate opinions).

[31] *See* Irin Carmon, *Opinion, Justice Ginsburg's Cautious Radicalism*, N.Y. TIMES (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/opinion/sunday/justice-ginsburgs-cautious-radicalism.html (statement of Ruth Bader Ginsburg) (noting that "an opinion of the court very often reflects views that are not 100 percent what the opinion author would do, were she writing for herself").

[32] *See* Sanford Levinson, *Trash Talk at the Supreme Court: Reflections on David Pozen's Constitutional Good Faith*, 129 HARV. L. REV. F. 166, 174 (2016) (declaring the assumption that "all adjudicators are splendidly isolated" to be "foolish," and arguing that it may be "incumbent" upon judges to engage in "intellectual compromise[s]" "to serve the public weal"). There is an academic debate over whether the decision to join a concurrence or dissent signals complete agreement with that opinion. *Compare* Robert H. Smith, *Uncoupling the "Centrist Bloc"—An Empirical Analysis of the Thesis of A Dominant, Moderate Bloc on the United States Supreme Court*, 62 TENN. L. REV. 1, 10 n.36 (1994) (arguing that "decisions to join or not join others' opinions may in fact be influenced by a number of factors" outside of a judge's agreement with that decision), *with* Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 143 (2007) ("[A] decision to join a special opinion is a more finely tuned tool, one that almost certainly indicates agreement not just with the outcome but also with the reasoning.").

[33] *See* Steven D. Smith, *Lessons from Lincoln: A Comment on Levinson*, 38 PEPP. L. REV. 915, 924 (2011).

[34] *Cf.* Summers v. Utah, 927 F.2d 1165, 1167 (10th Cir. 1991) (noting that a case may raise "procedural point[s] that should be addressed" separately from the "substantive merits of the case.").

[35] *See, e.g.*, Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 799 F.3d 1315, 1316 (10th Cir. 2015) (Gorsuch, J., joining an opinion arguing for granting a petition for rehearing en banc in a matter arising under the Religious Freedom Restoration Act); United States v. Benally, 560 F.3d 1151 (10th Cir. 2009) (Gorsuch, J., declining to join an opinion seeking to rehear a case respecting racial biases in a jury's proceedings). Relative to its sister circuits, the Tenth Circuit grants en banc rehearings infrequently. In a one-year period between September 30, 2014, and September 30, 2015, for example, 1 of the 1,301 cases that the Tenth Circuit resolved on the merits was reheard en banc. *See* U.S. COURTS, *Judicial Facts and Figures, Table B-10, U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2015, available at* http://www.uscourts.gov/sites/default/files/data_tables/B10Sep15.pdf (last visited Mar. 5, 2017). One other court of appeals—the Second Circuit—had fewer en banc hearings during the same time period. *Id.* Even the decision *not* to take a case en banc seemingly garners little debate in the Tenth Circuit. *See* Jeremy D. Horowitz, *Not Taking "No" for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 GEO. L.J. 59, 76 (2013) (noting that, relative to the Ninth and D.C. Circuits, dissents from denials of rehearings en banc are "particularly infrequent[]" in the Tenth Circuit).

the panel.[36] On the other hand, as one federal appellate judge noted in a dissent from a decision denying a petition for a rehearing en banc:

> Most of us vote against most such petitions and suggestions even when we think the panel decision is mistaken. We do so because federal courts of appeals decide cases in three judge panels. En banc review is extraordinary, and is generally reserved for conflicting precedent within the circuit which makes application of the law by district courts unduly difficult, and egregious errors in important cases.[37]

Consequently, a vote for or against rehearing a case en banc or on other procedural matters does not necessarily equate to an endorsement or repudiation of a particular legal position.[38]

Finally, it should be noted that, despite having served on the federal appellate bench for a decade, Judge Gorsuch has said little about some areas of law because of the nature of the Tenth Circuit's docket. Accordingly, it may be difficult to predict how he might rule on certain issues if he were elevated to the Supreme Court. Spanning six western states—Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming (along with those segments of Yellowstone National Park extending into Idaho and Montana),[39] the Tenth Circuit has a relatively routine caseload when compared to some of its sister circuits. More than forty percent of the cases that the Tenth Circuit hears are criminal law matters or petitions from federal or state prisoners,[40] a number in line with the national average for the regional federal courts of appeals.[41] The Tenth Circuit also hears a number of private civil litigation disputes, such as cases on labor, insurance, contract, and tort law.[42] On the other hand, some seven percent of the Tenth Circuit's docket is devoted to administrative agency appeals,[43] a percentage far below that of the D.C. Circuit, where over half

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[36] *See* Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 784 (1983) (noting that "[s]ome judges vote routinely for rehearings en banc on all cases with which they disagree").

[37] *See* United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing en banc); *see also* Bartlett v. Bowen, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc) ("By declining to rehear a case, 'we do not sit in judgment on the panel; we do not sanction the result it reached'. . . . We decide merely that . . . review by the full court is not justified.").

[38] *See* Mitts v. Bagley, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in rehearing en banc) ("No one thinks a vote against rehearing en banc is an endorsement of a panel decision . . . .").

[39] *See General Information*, U.S. TENTH CIR. COURT OF APPEALS, https://www.ca10.uscourts.gov/clerk (last visited Mar. 5, 2017).

[40] U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS, U.S. COURT OF APPEALS—JUDICIAL CASELOAD PROFILED 23 (Sept. 2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0930.2016_2.pdf (categorizing appeals filed with and terminated by the Tenth Circuit between September 2010 and September 2016, and showing that over forty percent, and in some years more than half, of the appellate docket consisted of criminal cases or claims brought by prisoners); U.S. Courts, *Judicial Facts and Figures, Table B-6, U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2015*, at 4, *available at* http://www.uscourts.gov/sites/default/files/data_tables/B06Sep15.pdf (last visited Mar. 5, 2017) [hereinafter U.S. Courts, *Table B-6*] (noting that 25.1% of the Tenth Circuit's docket for a 12-month period ending on September 30, 2015, was devoted to criminal cases; 5.4% to petitions from federal prisoners and 10.2% to petitions from other prisoners).

[41] U.S. Courts, *Table B-6*, *supra* note 40, at 1 (noting that 23.8% of the entire federal appellate docket (excluding the Federal Circuit) for a 12-month period ending on September 30, 2015, was devoted to criminal cases; 5.4% to petitions from federal prisoners and 13.7% to petitions from other prisoners).

[42] These private civil matters made up 39.7% of the Tenth Circuit's docket for the 12-month period ending on September 30, 2015. *Id.* at 4. For a breakdown of the various civil matters heard by the Tenth Circuit during this period, see U.S. Courts, *Judicial Facts and Figures, Table B-7, U.S. Courts of Appeals—Civil and Criminal Cases Commenced, by Circuit and Nature of Suit or Offense, During the 12-Month Period Ending September 30, 2015*, at 2–3, *available at* http://www.uscourts.gov/sites/default/files/data_tables/B07Sep15.pdf (last visited Mar. 5, 2017).

[43] U.S. Courts, *Table B-6*, *supra* note 40, at 4 (noting that 6.8% of the Tenth Circuit's docket for a 12-month period (continued...)

the docket consists of administrative matters[44] as a result of various jurisdictional statutes and the court's location in the nation's capital.[45] Similarly, the Tenth Circuit rarely has the opportunity to address certain topics, such as international law and foreign affairs, terrorism and national security, and major agency actions in the field of environmental law.[46]

Role of the Judiciary

In assessing how Judge Gorsuch views the role of the judiciary, many commentators have likened the nominee to Justice Scalia.[47] During the nearly thirty years that Justice Scalia served on the Supreme Court, the late Justice was a well-known proponent of originalism, textualism, and the view that clear rules should guide the work of the lower courts.[48] Accordingly, Justice Scalia vigorously dissented from opinions that, in his view, failed to construe legal texts in accordance with their ordinary meaning at the time of drafting,[49] or resulted in too much ambiguity in the meaning of the law.[50] Following the nomination of Judge Gorsuch, many commentators opined that he would, if confirmed, follow in Justice Scalia's footsteps as an originalist,[51] and largely "preserve the ideological balance that existed on the court when [Justice] Scalia died."[52] These

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ending on September 30, 2015, consisted of administrative agency appeals). Many of these appeals involve the "management of the Nation's many public lands that lie within [the Tenth Circuit's] jurisdiction, including national parks, national wildlife refuges, and wilderness areas." *See, e.g.*, *Confirmation Hearings on Federal Appointments: Hearing before the S. Comm. on the Judiciary, Part 5*, 109th Congress 41 (2006) [hereinafter *Gorsuch Confirmation Hearing*] (question from Senator Patrick Leahy).

[44] *See* U.S. Courts, *Table B-6*, *supra* note 40, at 1 (noting that 54.5% of the D.C. Circuit's docket for a 12-month period ending on September 30, 2015, consisted of administrative agency appeals).

[45] *See* CRS Legal Sidebar WSLG533, *Why is the D.C. Circuit "So" Important?*, by Andrew Nolan.

[46] See generally CRS Report R44772, *Majority, Concurring, and Dissenting Opinions by Judge Neil M. Gorsuch*, coordinated by Michael John Garcia [hereinafter CRS Gorsuch Opinions Report] (collecting opinions by Judge Gorsuch and identifying their legal topics); see, e.g., Helen Klein Murillo, Yishai Schwartz, & Clara Spera, Neil Gorsuch on National Security Law, LAWFARE (Feb. 1, 2017) ("Perhaps unsurprisingly in the Tenth Circuit, Judge Gorsuch has written almost nothing in the areas of international law or foreign affairs."); Ann Carlson, Predicting How Neil Gorsuch Would Rule on Environmental Issues, LEGALPLANET (Jan. 31, 2017), http://legal-planet.org/2017/01/31/predicting-how-neil-gorsuch-would-rule-on-environmental-issues/ (noting that Judge Gorsuch "does not have a huge environmental record").

[47] *See, e.g.*, Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html?_r=0 ("President Trump, in nominating Judge Gorsuch to the Supreme Court, has chosen a judge who not only admires the justice he would replace but also in many ways resembles him."); Richard Primus, *Trump Picks Scalia 2.0*, POLITICO (Jan. 31, 2017), http://www.politico.com/magazine/story/2017/01/trump-gorsuch-supreme-court-scalia-20-214718 ("Of all the candidates Trump shortlisted for the Supreme Court, Gorsuch is the closest thing to the man whose death left the vacancy.").

[48] *See CRS Scalia Report*, *supra* note 8, at 2–4.

[49] *See, e.g.*, Obergefell v. Hodges, --- U.S. ---, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting); King v. Burwell, --- U.S. ---, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting).

[50] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 426–27 (1989) (Scalia, J., dissenting); Morrison v. Olson, 487 U.S. 654, 708–12 (1988) (Scalia, J., dissenting).

[51] *See, e.g.*, Liptak, *supra* note 47 ("Judge Gorsuch, 49—who was appointed to the United States Court of Appeals for the 10th Circuit, in Denver, by President George W. Bush—is an originalist, meaning he tries to interpret the Constitution consistently with the understanding of those who drafted and adopted it."); Robert Barnes, *Neil Gorsuch Naturally Equipped for His Spot on Trump's Supreme Court Shortlist*, WASH. POST (Jan. 28, 2017), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-naturally-equipped-for-his-spot-on-trumps-supreme-court-shortlist/2017/01/28/91b00a46-e49b-11e6-a453-19ec4b3d09ba_story.html (similar).

[52] *See* Amy Howe, *Trump Nominates Gorsuch to Fill Scalia Vacancy*, SCOTUSBLOG (Jan. 31, 2017),
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conclusions were echoed by academic studies. For example, following President Trump's election, several studies by political scientists suggested that Judge Gorsuch would replicate Justice Scalia's judging style if he were to be elevated to the Supreme Court.[53] Such an outcome would be in keeping with the reported intentions of President Trump, who repeatedly noted during the 2016 presidential campaign his desire to nominate judges to the Court who are "very much in the mold of Justice Scalia."[54]

On the other hand,[55] during Judge Gorsuch's confirmation hearings for his seat on the Tenth Circuit in 2006, the nominee explicitly rejected the view that he had any particular "philosophy" toward judging. He noted that he "resist[ed]" being "pigeon-hole[d]" because "people do unexpected things and pigeon holes ignore gray areas in the law, of which there are many."[56] When Judge Gorsuch has commented on which judges have most influenced his approach to judging, he has noted a wide range of jurists with varying judicial philosophies. For example, during the remarks following his nomination to the Supreme Court, Judge Gorsuch openly praised Justice Scalia's general influence, calling the late Justice a "lion of the law."[57] However,

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http://www.scotusblog.com/2017/01/trump-nominates-gorsuch-fill-scalia-vacancy/; *see also* Todd Ruger, *Neil Gorsuch Nominated by Trump for U.S. Supreme Court*, ROLL CALL (Jan. 31, 2017), http://www.rollcall.com/news/politics/neil-gorsuch-nominated-trump-u-s-supreme-court ("If confirmed, Gorsuch would retain the ideological balance on the court that was present before Scalia's death—a 5-4 advantage for the conservative wing."); Greg Stohr & Jennifer Jacobs, *Trump's Two Supreme Court Finalists Are Summoned for Announcement*, BLOOMBERG (Jan. 31, 2017), https://www.bloomberg.com/politics/articles/2017-01-31/trump-expected-to-make-supreme-court-pick-from-two-finalists ("Gorsuch . . . would in all likelihood restore the ideological balance that existed before Justice Antonin Scalia's death on Feb. 13, 2016, left a vacancy that has yet to be filled."); Michael A. Memoli, *Trump Chooses Neil Gorsuch, a Conservative Seen as Likely to be Confirmed, for Supreme Court*, L.A. TIMES (Jan. 31, 2016), http://www.latimes.com/politics/washington/la-na-trailguide-updates-hold-president-trump-scotus-pick-1485903484-htmlstory.html (similar).

[53] *See, e.g.*, Jeremy Kidd, et al., *Searching for Justice Scalia: Measuring the 'Scalia-ness' of the Next Potential Member of the U.S. Supreme Court*, at 11 (Jan. 27, 2017), https://ssrn.com/abstract=2874794 (using a "Scalia Index Score"— based on how often a judge (1) promotes or practices originalism, (2) cites to Justice Scalia's nonjudicial writings, and (3) writes separately—to determine that Judge Gorsuch is more likely than other rumored nominees to be "Scalia-like"); Lee Epstein, Andrew D. Martin & Kevin Quinn, *President-Elect Trump and His Possible Justices*, at 13 (Dec. 15, 2016), http://pdfserver.amlaw.com/nlj/PresNominees2.pdf (using a score based on the ideology of the Republican senator from Colorado at the time of Judge Gorsuch's nomination to the Tenth Circuit to suggest that Judge Gorsuch "fall[s] within . . . an ideological range" between Justices Scalia and Alito on the Supreme Court); *What Data Science Can Tell Us about Neil Gorsuch*, RAVEL LAW (Feb. 1, 2017), http://ravellaw.com/what-data-science-can-tell-us-about-neil-gorsuch/ (using a "Scalia Score" based on the number of times a potential nominee cited to an opinion by Justice Scalia to conclude that Judge Gorsuch had the highest "Scalia Score" of any other rumored nominee).

[54] *See Former Secretary of State Hillary Rodham Clinton, Democratic Presidential Candidate, and Donald Trump, Republican Presidential Candidate, Participate in a Debate*, CQ TRANSCRIPTIONS, Oct. 9, 2016 (statement of Donald J. Trump) ("I am looking to appoint judges very much in the mold of Justice Scalia."). This sentiment was echoed by the President during his announcement of the nomination of Judge Gorsuch to the Supreme Court. *See Judge Neil Gorsuch, Nominated to the Supreme Court*, CQ TRANSCRIPTIONS, Jan. 31, 2016 [hereinafter *Gorsuch Nomination*] (statement of Donald J. Trump) (stating that the "image and genius" of the "late, great Justice Antonin Scalia . . . was in my mind throughout the decision-making process").

[55] Some commentators have questioned the value of data studies that attempt to predict the future behavior of judicial nominees. *See, e.g.*, Zoë Robinson, *Comparative Judicial Attitudinalism: A Preliminary Study of Judicial Choices in Westminster Legal Systems*, 2011 U. CHI. LEGAL F. 209, 215 (2011); Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores to Assess Supreme Court Justices, With Special Attention to the Problem of Ideological Drift*, 101 NW. U. L. REV. 1891, 1902 (2007).

[56] *See Gorsuch Confirmation Hearing*, *supra* note 43, at 36. Similarly, in a questionnaire that he answered during his nomination to the Tenth Circuit, Judge Gorsuch resisted the idea that there was any "firmly fixed formula" with respect to interpreting the Constitution. *Id.* at 34.

[57] *See Gorsuch Nomination*, *supra* note 54 (statement of Judge Neil Gorsuch) ("Justice Scalia was a lion of the law.
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the nominee also noted the influence of "three significant but quite different judges"[58] who "brought him up in the law," Judge David Sentelle and Justices Byron White and Anthony Kennedy.[59] This statement has prompted some commentators to compare the nominee to those jurists, as well.[60]

The judicial and nonjudicial writings of Judge Gorsuch may provide another—perhaps richer and more nuanced—basis for evaluating how his approach to judging compares to that of Justice Scalia or any other jurist. While perhaps not espousing a particular judicial philosophy, Judge Gorsuch's judicial opinions and scholarly writings suggest that he could be seen to share many of Justice Scalia's views toward judging. For example, in a lecture delivered in April 2016 at Case Western Reserve University School of Law, Judge Gorsuch commended Justice Scalia's approach toward judging, describing the late Justice's "vision" of what a "good and faithful judge" entails to be a "worthy one."[61] Specifically, in the lecture, Judge Gorsuch praised what he described as Justice Scalia's "traditional view of the judicial function," in which a judge "strive[s] . . . to apply the law as it is," "looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."[62] Rejecting the view of the judge as a "pragmatic social-welfare maximizer,"[63] Judge Gorsuch, quoting Justice Scalia, argued for a more limited role for judges in the American political system.[64]

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Agree or disagree with him, all of his colleagues on the bench shared his wisdom and his humor. And like them, I miss him."). These remarks echoed many of the sentiments in a lecture Judge Gorsuch gave on Justice Scalia in 2016. *See* Neil M. Gorsuch, *2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 905 (2016) [hereinafter Gorsuch, *Lions*].

[58] *See* Adam J. White, *Higher Justice*, WEEKLY STANDARD (Feb. 20, 2017), http://www.weeklystandard.com/higher-justice/article/2006765 ("Between law school and private practice, Gorsuch clerked for three significant but quite different judges, each of whom has a legacy in Gorsuch's own work.").

[59] *See Gorsuch Nomination*, *supra* note 54 (statement of Judge Neil Gorsuch) ("I began my legal career working for Byron White . . . . He was one of the smartest and most courageous men I've ever known. When Justice White retired, he gave me the chance to work for Justice Kennedy, as well. Justice Kennedy was incredibly welcoming and gracious, and like Justice White, he taught me so much. I am forever grateful. And if you've ever met Judge David Sentelle, you'll know just how lucky I was to land a clerkship with him right out of school.").

[60] *See, e.g.*, White, *supra* note 58 ("Gorsuch seems to have adopted the best traits of both Supreme Court mentors: White's conservative temperament and respect for the people's right to govern themselves and Kennedy's recognition that liberty and republican self-government require a constitutional structure to channel political passions toward reasoned ends."); *Whizzer White's Ghost*, N.Y. SUN (Jan. 31, 2017), http://www.nysun.com/editorials/whizzer-whites-ghost/89886/ ("Like White, Gorsuch is famed for being a straightforward, easily comprehensible legal writer. And our guess is that if Judge Gorsuch makes it to the court, the ghost of Whizzer White will be waiting to greet him."); Noah Feldman, *Neil Gorsuch, Elite Conservative*, BLOOMBERG VIEW (Jan. 31, 2017), https://www.bloomberg.com/view/articles/2017-02-01/neil-gorsuch-elite-conservative-for-supreme-court (suggesting that Judge Gorsuch "might even move in the direction of Anthony Kennedy" if confirmed to the Court).

[61] *See* Gorsuch, *Lions*, *supra* note 57, at 917.

[62] *Id.* at 906.

[63] *Id.* at 918. Here, Judge Gorsuch's comments echo sentiments he had expressed in an article on the role of the judiciary more than a decade earlier, before he was nominated to the Tenth Circuit. *See* Neil M. Gorsuch, *Liberals'N'Lawsuits*, NAT'L REV. (Feb. 7, 2005) [hereinafter Gorsuch, *Liberals*], *available at* http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6 ("But rather than use the judiciary for extraordinary cases, von Drehle recognizes that American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education.").

[64] *See* Gorsuch, *Lions*, *supra* note 57, at 917. In these writings, Justice Scalia voiced concerns that separation-of-powers principles would be violated if the judiciary were to usurp the role of the legislature, as well as an interest in reducing indeterminacy in the judicial process. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS (continued...)

The themes highlighted in his 2016 lecture on Justice Scalia's legacy previously appeared in several of Judge Gorsuch's opinions on the Tenth Circuit. Notably, in a number of cases, the nominee rejected more flexible approaches to interpreting the Constitution in favor of originalism.[65] One such case is *Cordova v. City of Albuquerque*, wherein the Tenth Circuit dismissed a lawsuit alleging that attorneys for the city of Albuquerque had maliciously prosecuted the plaintiff in violation of the Fourth Amendment by charging him with assault after an altercation with the police.[66] In this case, Judge Gorsuch concurred in the judgment, grounding his opinion in originalism and writing that the Constitution "isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning."[67] The nominee examined the Fourth Amendment's text along with scholarly works on its historical underpinnings to conclude that the Amendment does not include a right against malicious prosecution.[68]

Likewise, in several opinions, Judge Gorsuch voiced sentiments similar to those of Justice Scalia about the need for the "rule of law" be "a law of rules"[69]—a view that can be seen to favor a more formalist approach to the law.[70] For example, in *Hydro Resources, Inc. v. EPA*, Judge Gorsuch, on behalf of a majority of the entire Tenth Circuit, concluded that the Environmental Protection Agency had incorrectly determined that certain property was "Indian land," requiring its owner to

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AND THE LAW 45–46 (1997).

[65] *See, e.g.*, United States v. Ackerman, 831 F.3d 1292, 1301 (10th Cir. 2016) ("[S]ince time out of mind the law has prevented agents from exercising powers their principals do not possess and so cannot delegate . . . . That is a rule of law the founders knew, understood, and undoubtedly relied upon when they drafted the Fourth Amendment . . . ."); United States v. Carloss, 818 F.3d 988, 1009 (10th Cir. 2016) (Gorsuch, J., dissenting) (looking to "the common law at the time of the founding" to determine whether the Fourth Amendment permits officers to approach a house and knock on the front door, notwithstanding the presence of several "No Trespassing" signs); *id.* at 1015 ("Neither, of course, is it our job to weigh [the] costs and benefits but to apply the [Fourth] Amendment according to its terms and in light of its historical meaning."); United States v. Krueger, 809 F.3d 1109, 1123 (10th Cir. 2015) (Gorsuch, J., concurring) ("When interpreting the Fourth Amendment we start by looking to its original public meaning—asking what traditional protections against unreasonable searches and seizures were afforded by the common law at the time of the framing." (internal citations and quotations omitted)); Williams v. Trammell, 782 F.3d 1184, 1219 (10th Cir. 2015) (Gorsuch, J., concurring) ("Indeed, executing someone for a strict liability offense would represent not only a highly 'unusual' punishment but one inimical to the common law at the time of the founding."); Kerr v. Hickenlooper, 759 F.3d 1186, 1195 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of rehearing en banc) (contending that the "scholarly literature on the [Guarantee] Clause's text and original meaning" indicate a lack of judicially manageable standards for a court to interpret and enforce the Clause).

[66] 816 F.3d 645 (10th Cir. 2016).

[67] *Id.* at 661 (Gorsuch, J., concurring).

[68] *Id.* at 662–63.

[69] *See* Antonin Scalia, *Essay, The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[70] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing the federal court's use of a "multi-factor balancing test" to determine whether *Chevron* deference is appropriate); De Niz Robles v. Lynch, 803 F.3d 1165, 1180 (10th Cir. 2015) ("Trying to commensurate incommensurable legal factors is never an easy judicial chore—and the job isn't made any easier when the number of factors we're asked to juggle proliferates."); ACAP Fin., Inc. v. Sec. & Exch. Comm'n, 783 F.3d 763, 769 (10th Cir. 2015) ("No doubt the open-ended nature of the multi-factor balancing tests the SEC uses when setting sanctions could be attacked on a variety of potential grounds."); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1157–58 (10th Cir. 2013) (Gorsuch, J., concurring) (noting the "bright-line" rule for distinguishing between jurisdictional requirements and claims-processing requirements); *see generally Kerr*, 759 F.3d at 1195 (Gorsuch, J., dissenting) (lamenting the panel's decision, which he characterized as having assigned "the litigants and the district court to a kind of litigation limbo—the promise of many more years wrestling with this case all without a wisp of an idea what rule of law might govern its disposition").

obtain a mining permit from the agency.[71] In so holding, the nominee adopted what he characterized as a "simple and predictable" two-part test for determining what constitutes Indian land.[72] Judge Gorsuch's en banc opinion thus rejected the government's invitation to interpret the operative statutory language according to an older, multi-factor test, which the nominee described as consisting of "multifarious and incommensurable competing factors" that yielded "unpredictable results" and "left the law and litigants confused."[73]

Beyond voicing a preference for rules based adjudication in his written opinions, Judge Gorsuch has argued more generally for simplification and clarity in the American legal system.[74] In particular, having expressed concerns over the costs of discovery and adequate representation, the nominee has suggested a number of attorney-initiated reforms aimed at making the civil justice system more accessible and affordable for both plaintiffs and defendants.[75]

More broadly, the views of Judge Gorsuch and Justice Scalia on the proper role of the judge seem to align in that both have emphatically rejected what may be described as "results-oriented judging" and, instead, emphasized that judges must render decisions that do not necessarily conform to their personal preferences. Justice Scalia, for instance, often pointed to his vote to strike down a law prohibiting flag burning as an example of how his judicial philosophy could yield results that did not align with his own inclinations.[76] Similarly, in a 2016 dissent, Judge Gorsuch emphasized that the role of the judge is to "apply, not rewrite, the law enacted by the people's representatives," noting that a "judge who likes every result he reaches is very likely a bad judge."[77] Instead, Judge Gorsuch has repeatedly declared that the proper role of a court is to interpret the law and not to "substitute" the court's "views of optimal policy" for Congress's judgment.[78] A number of the nominee's opinions have noted his personal sympathies for particular parties in the case, but distinguished these sympathies from what he viewed the law to require.[79]

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[71] 608 F.3d 1131, 1135 (10th Cir. 2010) (en banc).

[72] *Id.* at 1164; *see also id.* at 1166 ("Under the proper test we adopt today, only two questions are relevant in assessing claims of jurisdiction under § 1151(b): (1) Has Congress (or the Executive, acting pursuant to delegated authority) taken some action explicitly setting aside the land in question for Indian use? (2) Is the land in question superintended by the federal government?").

[73] *Id.* at 1164.

[74] *See generally* Gorsuch, *Law's Irony*, *supra* note 28, at 744–49 (discussing the increasing complexities of the civil and criminal justice system).

[75] *See* Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, 100 JUDICATURE 46, 47–48 (2016). In particular, Judge Gorsuch has proposed (1) relaxing the rules as to unauthorized practice of law, *id.*at 48–49; (2) reforming procedural rules to set "early and firm" trial dates and to increase the use of mandatory disclosures, *id.* at 50–51; and (3) changing legal education to allow for the practice of law after two years of law school as opposed to three years, *id.* at 51–53. On this latter suggestion, the nominee may depart from the view of Justice Scalia, who thought that the "the law-school-in-two-years proposals rest[]on the premise that law school is—or ought to be—a trade school." *See* Antonin Scalia, *Commencement Address at William & Mary Law School: Reflections on the Future of the Legal Academy* 2 (May 11, 2014), https://law.wm.edu/news/stories/2014/documents-2014/2014WMCommencementSpeech.pdf.

[76] *See CRS Scalia Report*, *supra* note 8, at 28–29.

[77] *See* A.M. *ex rel.* F.M. v. Holmes, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting). Judge Gorsuch quoted this passage during his speech following the announcement of his nomination to the Supreme Court. *See Gorsuch Nomination*, *supra* note 53 (statement of Judge Neil Gorsuch).

[78] *See* United States v. Spaulding, 802 F.3d 1110, 1133 (10th Cir. 2015) (Gorsuch, J., dissenting); *see also* Prost v. Anderson, 636 F.3d 578, 597 (10th Cir. 2011) ("[I]t is the job of this court, respecting the principles of judicial restraint, to enforce Congress's expressed purposes, not to replace them with our own.").

[79] *See, e.g.*, Espinoza v. Ark. Valley Adventures, LLC, 809 F.3d 1150, 1158 (10th Cir. 2016) ("Enduring the death of a (continued...)

Despite these parallels between the views of Justice Scalia and Judge Gorsuch, there are also discernible differences in their views on the role of the judiciary. First, Judge Gorsuch's approach to judging can be seen to differ in tone and tenor from that of Justice Scalia. Like Justice Scalia,[80] Judge Gorsuch has frequently been described as a talented writer.[81] In particular, the nominee's judicial writings—which frequently employ vivid prose, memorable turns of phrase,[82] and even humor[83]—have been praised widely by legal observers for their clarity and accessibility.[84] But whereas Justice Scalia's writing could be pointed and acerbic in disagreeing with his colleagues on the bench,[85] Judge Gorsuch's judicial writings have been noted for their cordiality.[86] His

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close family member in tragic circumstances is among life's bitterest challenges. The loss Ms. Apolinar's family has suffered is beyond words. But our charge is to follow the law. And in this case the law is just as the district court described it, permitting the enforcement of the release in this case and requiring the entry of summary judgment."); Fry v. Am. Home Assur. Co., 636 F. App'x 764, 765 (10th Cir. 2016) ("After her husband was tragically killed while working on an oil well, Eve Fry sued his employer, AOK Energy Services, in Oklahoma state court. But Ms. Fry faced a problem: Oklahoma's Workers' Compensation Act."); Browder v. City of Albuquerque, 787 F.3d 1076, 1084 (10th Cir. 2015) ("We face a traffic accident, a deeply tragic traffic accident, but also exactly the sort of thing state courts have long and ably redressed."); United States v. Christie, 717 F.3d 1156, 1160 (10th Cir. 2013) (similar); Wilson v. City of Lafayette, 510 F. App'x 775, 780 (10th Cir. 2013) (similar); Compass Envtl., Inc. v. Occupational Safety & Health Review Comm'n, 663 F.3d 1164, 1171 (10th Cir. 2011) (Gorsuch, J., dissenting) (similar); Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1151 (10th Cir. 2008) (similar).

[80] *See, e.g.*, Jeet Heer, *Antonin Scalia Is the Supreme Court's Greatest Writer*, NEW REPUBLIC (June 26, 2015), https://newrepublic.com/article/122167/antonin-scalia-supreme-courts-greatest-writer ("There have always been . . . judges who craft their words with brio, force, and wit, whose obiter dicta are rife with vernacular charm. This is the tradition of Supreme Court justices Benjamin Cardozo, Oliver Wendell Holmes, and Robert Jackson. The one current justice who has the strongest claim to belong in this elite pantheon is Antonin Scalia.").

[81] *See* John O. McGinnis, *A Great Legal Pen*, CITY J. (Feb. 1, 2017), https://www.city-journal.org/html/great-legal-pen-15000.html ("Gorsuch is . . . one of the best writers in the entire federal judiciary. That is not just my assessment, but that of Howard Bashman, who runs the leading blog on appellate decisions. It is also the verdict of the *Green Bag*, a magazine that makes annual assessment of legal writing.").

[82] *See, e.g.*, Genova v. Banner Health, 734 F.3d 1095, 1096 (10th Cir. 2013) ("When holding a hammer, every problem can seem a nail."); Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208, 1209 (10th Cir. 2012) ("Mootness has many moods."); Lee v. Max Int'l, LLC, 638 F.3d 1318, 1320 (10th Cir. 2011) ("We view challenges to a district court's discovery sanctions order with a gimlet eye.").

[83] *See, e.g.*, El Encanto, Inc. v. Hatch Chile Co., 825 F.3d 1161 (10th Cir. 2016) ("The Hatch Valley may be to chiles what the Napa Valley is to grapes. Whether it's the soil, the desert's dry heat, or the waters of the Rio Grande, the little town of Hatch, New Mexico, and its surroundings produce some of the world's finest chile peppers."); W. World Ins. Co. v. Markel Am. Ins. Co., 677 F.3d 1266, 1267 (10th Cir. 2012) ("Haunted houses may be full of ghosts, goblins, and guillotines, but it's their more prosaic features that pose the real danger. Tyler Hodges found that out when an evening shift working the ticket booth ended with him plummeting down an elevator shaft."); United States v. Rosales-Garcia, 667 F.3d 1348 (10th Cir. 2012) ("In the richness of the English language, few things can create as much mischief as piling prepositional phrase upon prepositional phrase.").

[84] *See, e.g.*, Michael McConnell, *I Served With Judge Gorsuch. This Is My Reflection on His Character*, THE HILL (Feb. 2, 2017) ("Many have commented on Gorsuch's writing skill, and it is true that he is one of the best writers in the judiciary today. More important than style, though, is that he sets forth all positions fairly and gives real reasons—not just conclusions—for siding with one and rejecting the other. And he does it in language that is accessible to non-lawyers."); Joe Palazzolo, *Supreme Court Nominee Takes Legal Writing to Next Level*, WALL ST. J. (Jan. 31, 2017), *available at* https://www.wsj.com/articles/supreme-court-nominee-takes-legal-writing-to-next-level-1485912410 ("Judge Gorsuch's opinions strive for accessibility. He tries to grab readers with his openings."); Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017), http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/ ("For one thing, the great compliment that Gorsuch's legal writing is in a class with Scalia's is deserved: Gorsuch's opinions are exceptionally clear and routinely entertaining; he is an unusual pleasure to read, and it is always plain exactly what he thinks and why.").

[85] *See, e.g.*, Obergefell v. Hodges, --- U.S. ---, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting) ("If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and (continued...)

dissents, in particular, often express his agreement with or admiration for, at least, certain aspects of the majority's opinion.[87]

The differences in Justice Scalia's and Judge Gorsuch's writing styles may indicate broader contrasts between the two jurists; the nominee may be more focused on collegiality and consensus-building than the Justice he could replace.[88] During his career on the High Court, Justice Scalia frequently authored fairly broad and uncompromising opinions that did not garner the votes of a majority of the Court.[89] In contrast, Judge Gorsuch's judicial record may reflect comments he made during his confirmation hearing for his Tenth Circuit appointment, wherein he noted the importance of "trying to reach unanimity where possible."[90] As **Table 1** indicates,

(...continued)

express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."); Holland v. Illinois, 493 U.S. 474, 486 (1990) (Scalia, J.) ("Justice [Marshall's] dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its intimidating effect if it continues to be fired so randomly."); Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) ("Justice [O'Connor's] assertion that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously." (internal citation omitted)).

[86] Brent Kendall & Jess Bravin, *Neil Gorsuch's Personality Could Shift Supreme Court's Dynamic*, WALL ST. J. (Feb. 6, 2017), https://www.wsj.com/articles/neil-gorsuchs-style-could-shift-supreme-courts-dynamic-1486401701 ("People who know Judge Gorsuch . . .say he is unfailingly respectful and, . . . extraordinarily careful with his word choice, tone and his approach when communicating with other judges." (internal quotation marks and citations omitted)).

[87] *See, e.g.*, Ragab v. Howard, 841 F.3d 1134, 1139 (10th Cir. 2016) ("My colleagues are of course correct that 'arbitration clauses are only valid if the parties intended to arbitrate.' . . . But, respectfully, I just don't see any doubt that the parties before us did intend to arbitrate."); A.M. *ex rel.* F.M. v. Holmes, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting) ("So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands—and in that I see the best of our profession and much to admire."); United States v. Spaulding, 802 F.3d 1110, 1128 (10th Cir. 2015) ("Of course, my colleagues take no pleasure in reaching their result: it is simply one they believe the law compels. My colleagues, too, offer a very thoughtful and persuasive opinion in support of their conclusion."); Cortez v. McCauley, 478 F.3d 1108, 1138 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part) (similar).

[88] On the other hand, one could argue that collegiality and consensus building is more commonplace on a federal appeals court than on the Supreme Court. *See* Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 135 (2011) ("We therefore predict, and we find, a higher dissent rate in the Supreme Court than in the courts of appeals. In fact a much higher rate: as shown in Figure 1, it is 62 percent in the Supreme Court and only 2.6 percent in the courts of appeals."); *but see infra* note 98 and accompanying text (comparing Justice Scalia's circuit court record to that of Judge Gorsuch).

[89] *See, e.g.*, Kerry v. Din, --- U.S. ---, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment) (declining to join Justice Scalia's opinion holding that a citizen does not have a protected liberty interest in the visa application of her alien spouse); Hudson v. Michigan, 547 U.S. 586, 602 (2006) (Kennedy, J., concurring in part and concurring in judgment) (declining to provide the fifth vote for Justice Scalia's opinion openly questioning the continued viability of the exclusionary rule); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 764 (1995) (Scalia, J.) (receiving only four votes for the proposition that "it is no violation [of the Establishment Clause] for the government to enact neutral policies that happen to benefit religion"); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (joint opinion of Kennedy, O'Connor, & Souter, JJ.) (rejecting Justice Scalia's argument to overturn *Roe* entirely); Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (declining to join part of Justice Scalia's opinion holding that an injury for purposes of Article III standing needed to equate with injuries found at common law); Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring) (refusing to join Justice Scalia's opinion arguing that the Eighth Amendment contains no proportionality guarantee); Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) (Scalia, J.) (delivering the opinion of the court except for footnote six, which broadly argued that due process rights should be viewed with heightened specificity); *see generally* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 99–100 (1996) (contending that Justice Scalia's "clear, fixed vision of how cases should be decided" may have prevented other Justices from joining his opinions).

[90] *See Gorsuch Confirmation Hearing*, *supra* note 43, at 36.

during the decade that Judge Gorsuch served on the Tenth Circuit, his colleagues dissented from majority opinions Judge Gorsuch wrote less frequently than they dissented from the majority opinions of other judges who served on active status on the Tenth Circuit during that entire time period.

In addition, while the existence of a concurrence may not necessarily signal disagreement with the majority opinion,[91] some scholars have suggested that separate opinions can be used to gauge the ability of a judge to secure a unified view of the court.[92] To the extent such views are probative, Judge Gorsuch's majority opinions were accompanied by separate opinions roughly 3.3% of the time.[93] By comparison, only one of the six active judges serving on the Tenth Circuit at the exact same time as the nominee had a lower rate of drawing a separate opinion when writing for the majority.[94] Although the Tenth Circuit has tended to generate few dissents overall,[95] the *relative* infrequency with which fellow judges dissented or otherwise wrote separately from Judge Gorsuch's majority opinions may suggest the nominee places a high value on reaching consensus in the opinions he writes[96] or, perhaps, has the ability to persuade others to join his opinions.[97] In this sense, Judge Gorsuch's approach can be seen to stand in contrast to that of Justice Scalia in his own majority opinions when he served on a circuit court.[98]

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[91] As one commentator has noted, while "a study of dissent alone will exclude instances of judicial disagreement," there may be "compelling reasons to concentrate on the frequency of dissent alone." *See* Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L.J. 1025, 1051–52 (2007) ("The concurring judge is not so easy to pin down: he may agree with the outcome but disagree with the reasoning adopted by the majority; he may agree that the legal regime dictates the outcome of the case but wish to express dissatisfaction with that legal regime; he may be engaged in preemptive exegesis of the opinion to influence future cases; he may wish to criticize (or expand) dictum in the majority opinion. Only the first of these possibilities represents a disagreement arising from the indeterminacy of the legal regime, and disentangling them requires subjective judgments by the researcher about the degree to which the concurring judge expresses agreement or disagreement with the majority opinion."); *see generally* Wald, *supra* note 30, at 1415 ("Concurrences . . . serve as vehicles for judges to present additional arguments rejected or ignored by the majority, to preserve doubts or reservations about the majority opinion for the future, to caution against its too-broad application, to disagree with all or part of its reasoning. The tone of concurrences is usually calm and rational, not agitated as in a dissent—after all, their authors agree with the result.").

[92] *Cf.* Stephen Choi & Mitu Gulati, *A Tournament of Judges*?, 92 CALIF. L. REV. 299, 310–13 (2004) (using dissents and concurrences by the studied judge as a proxy for how many disagreements a judge had with his or her colleagues); Corey Rayburn Yung, *A Typology of Judging Styles*, 107 NW. U. L. REV. 1757, 1775 (2013) ("Two types of disagreements were incorporated in the measurement: concurrences and dissents. In both situations, a judge presumably writes separately because she cannot find common ground with other written opinions.").

[93] *See infra* **Table 1**, *Dissents and Concurrences from Majority Opinions on the Tenth Circuit*.

[94] *Id.*

[95] *See supra* note 28.

[96] *Cf.* Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 364–65 (2001) (arguing that Justices, driven by a norm of suppressing dissent in order to preserve consensus, will write broad unanimous opinions).

[97] *See* Chad Flanders, *Toward A Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 71–72 (2009) ("[A] judge writing an opinion may have to persuade a majority of his or her colleagues to agree with her. This will entail modifying the judge's position to anticipate objections, or perhaps even moderating the decision in order to forge a winning coalition. An opinion that wins over one judge on a three-judge panel may be less persuasive than an opinion that garners unanimity.").

[98] The Supreme Court has a far higher dissent rate than the federal appeals courts. *See* Epstein, Landes & Posner, *supra* note 88, at 135. Thus, a LEXIS search was conducted of then Judge Scalia's opinions on the D.C. Circuit. That search indicated that while on the D.C. Circuit, then Judge Scalia authored 101 majority opinions, 12 of which generated a dissent (11.9% of opinions), and 20 of which drew any type of separate opinion (i.e., concurrence or dissent) (19.8%).

Table 1. Dissents and Concurrences from Majority Opinions on the Tenth Circuit

August 8, 2006, through January 31, 2017

Author of the Majority Opinion	Total Number of Authored Majority Opinions*	Number of Majority Opinions Accompanied by a Dissent*	Percentage of Majority Opinions Accompanied by a Dissent	Number of Majority Opinions Accompanied by a Separate Opinion (Dissent or Concurrence)*	Percentage of Majority Opinions Accompanied by a Separate Opinion
Neil M. Gorsuch (2006–present)	***778***	***12***	***1.5%***	***26***	***3.3%***
Mary Beck Briscoe (1995–present)	869	29	3.3%	46	5.3%
Harris L. Hartz (2001–present)	1013	18	1.8%	41	4.0%
Jerome A. Holmes (2006–present)	689	13	1.8%	28	4.1%
Paul Joseph Kelly, Jr. (1992–present)	918	40	4.4%	54	5.9%
Carlos F. Lucero (1995–present)	882	21	2.4%	31	3.5%
Timothy M. Tymkovich (2003–present)	940	19	2.0%	29	3.1%

Source: Congressional Research Service.

Notes: To generate this table, a search was conducted using the LEXIS database for all Tenth Circuit decisions from the date of Judge Gorsuch's commission through the date of his nomination to the Supreme Court. To ensure that the search reflected a consistent and similar caseload, the search was limited to majority opinions written by judges who, like Judge Gorsuch, were on active status as circuit judges during this entire period. Searches for particular judges were filtered by the LEXIS document segment terms OPINIONBY. The resulting majority opinions were then searched for (1) any dissenting or partially dissenting opinions (using the LEXIS document segment DISSENTBY) and (2) any concurring opinions (using the LEXIS document segment CONCURBY). Any concurrences by the author of the majority opinion were eliminated.

***As reported on LEXIS.** The table is dependent on coding done by the LEXIS database and is not intended to provide precise numbers on Judge Gorsuch or his colleague's opinions. For a complete listing of Judge Gorsuch's opinions, including opinions that may not have been entered into LEXIS, see CRS Report R44772, *Majority, Concurring, and Dissenting Opinions by Judge Neil M. Gorsuch*, coordinated by Michael John Garcia.

While Judge Gorsuch's majority opinions garnered few dissents, he has displayed relatively more willingness to dissent from others' majority opinions than some colleagues on the Tenth Circuit, as **Table 2** below shows. Nonetheless, the rate at which Judge Gorsuch dissented from Tenth Circuit decisions[99]—1.6% of all cases in which he participated—places him in the middle of his

[99] Judge Gorsuch dissented from two majority opinions while sitting by designation on the Ninth Circuit. *See* Blausey v. U.S. Trustee, 552 F.3d 1124, 1134 (9th Cir. 2009) (Gorsuch, J., dissenting); Salmon v. Astrue, 309 F. App'x 113, 116 (9th Cir. 2009) (Gorsuch, J., dissenting).

colleagues and is less frequent than the rate at which Justice Scalia dissented when he served as an appellate judge on the D.C. Circuit.[100]

Table 2. Dissents and Concurrences Authored on the Tenth Circuit

August 8, 2006, through January 31, 2017

Judge	Total Number of Decisions in Which Dissent or Concurrence Could Occur*	Number of Dissents*	Dissent Rate	Number of Separate Opinions* (Dissent or Concurrence) (as Reported by LEXIS)	Separate Opinion Rate
Neil M. Gorsuch (2006–present)	***2060***	***33***[a]	***1.6%***	***63***	***3.1%***
Mary Beck Briscoe (1995–present)	1836	38	2.1%	64	3.5%
Harris L. Hartz (2001–present)	2159	36	1.7%	89	4.1%
Jerome A. Holmes (2006–present)	1814	10	0.6%	31	1.7%
Paul Joseph Kelly, Jr. (1992–present)	2224	26	1.2%	38	1.7%
Carlos F. Lucero (1995–present)	2229	44	1.9%	70	3.1%

[100] A LEXIS search of cases that then Judge Scalia heard on the D.C. Circuit shows that he participated in 224 cases in which one of his colleagues wrote the majority opinion. Of these 224, he dissented in 24, or 10.7%, and wrote separately in 31, or 13.8%. Because the dockets of the judicial circuits may vary, as do the judicial philosophies and temperaments of the judges who sit on courts in these circuits, it cannot be said with certainty that a judge on one appellate court would necessarily have a similar rate of agreement with his colleagues if he sat on a different court. Judge Gorsuch, for example, sat by designation on the D.C. Circuit for six cases, in which he joined unanimous panel opinions in each case. He also sat by designation on the Ninth Circuit for nine cases, where he wrote dissenting opinions in two. *See Salmon*, 309 F. App'x 113; *Blausey*, 552 F.3d 1124. The limited number of cases heard by Judge Gorsuch while sitting in designation would seem to limit the value of any comparison between Judge Gorsuch's experiences sitting by designation on the D.C. or Ninth Circuit with his time on the Tenth Circuit.

Arguably, this could suggest that the nominee values collegiality and consensus more than some jurists. *See* Epstein, Landes, & Posner, *supra* note 88, at 135 (arguing that the frequency with which a judge dissents may reflect the judge's views about the costs of "impaired collegiality" as compared to the benefits of influencing or clarifying the law). In his nonjudicial writings, Judge Gorsuch has downplayed the lack of collegiality among federal judges. *See, e.g.*, Gorsuch, *Law's Irony*, *supra* note 28, at 752–53 ("But to admit that disagreements do and will always exist over hard and fine questions of law doesn't mean those disagreements are the products of personal will or politics rather than the products of diligent and honest efforts by all involved to make sense of the legal materials at hand."); Gorsuch, *Lions*, *supra* note 57, at 916–17 ("The fact is, over 360,000 cases are filed every year in our federal courts. Yet in the Supreme Court, a Justice voices dissent in only about 50 cases per year. My law clerks reliably inform me that's about 0.014% of all cases. Focusing on the hard cases may be fun, but doesn't it risk missing the forest for the trees?").

Judge	Total Number of Decisions in Which Dissent or Concurrence Could Occur*	Number of Dissents*	Dissent Rate	Number of Separate Opinions* (Dissent or Concurrence) (as Reported by LEXIS)	Separate Opinion Rate
Timothy M. Tymkovich (2003–present)	2065	26	1.3%	40	1.9%

Source: Congressional Research Service.

Notes: To generate this table, a search was conducted using the LEXIS database for all Tenth Circuit decisions from the date of Judge Gorsuch's commission through the date of his nomination to the Supreme Court. To ensure that the search reflected a consistent and similar caseload, the search was limited to majority opinions written by judges who, like Judge Gorsuch, were on active status as circuit judges during this entire period. The "Total Number of Decisions in Which Dissent or Concurrence Could Occur" was determined by using the LEXIS document segment terms JUDGES and OPINIONBY. Dissents and concurrences were determined by using the LEXIS document segment terms DISSENTBY and CONCURBY. Any recusals by the seven circuit judges were eliminated. Any concurrences by the author of the majority opinion were also eliminated.
***As reported on LEXIS.** The table is dependent on coding done by the LEXIS database and is not intended to provide precise numbers on Judge Gorsuch or his colleague's opinions. For a complete listing of Judge Gorsuch's opinions, including opinions that may not have been entered into LEXIS, see CRS Report R44772, *Majority, Concurring, and Dissenting Opinions by Judge Neil M. Gorsuch*, coordinated by Michael John Garcia.

a. Note that Judge Gorsuch dissented from two majority opinions while sitting by designation on the Ninth Circuit. *See* Blausey v. U.S. Trustee, 552 F.3d 1124, 1134 (9th Cir. 2009) (Gorsuch, J., dissenting); Salmon v. Astrue, 309 F. App'x 113, 116 (9th Cir. 2009) (Gorsuch, J., dissenting).

On the other hand, there may be limits to what can be gleaned from this data. The choice to write separately is one that stems from various factors, and may simply depend on the personality and preferences of an individual judge, or the nature of the dispute before the court.[101] Thus, the data may reflect other factors. For instance, the fact that Judge Gorsuch's majority opinions garnered relatively few dissents may be a product of the cases on which he wrote, which, in turn, are assigned by the most senior active judge on each panel.[102] This means that, at least early in Judge Gorsuch's career on the Tenth Circuit, he may not have been assigned to write the most challenging or controversial cases that tend to generate dissent.[103] Perhaps more importantly, because separate opinions are infrequent on the Tenth Circuit,[104] the dataset is relatively small, and only a handful of dissents and concurrences distinguish Judge Gorsuch's numbers from those of his colleagues.

[101] *See supra* notes 30–31.

[102] *See* PRACTITIONERS' GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT 62 (2016), https://www.ca10.uscourts.gov/sites/default/files/clerk/UPDATED%20Practitioner%27s%20Guide%2011-21-2016.pdf.

[103] *See* Henry T. Greely, *Quantitative Analysis of A Judicial Career: A Case Study of Judge John Minor Wisdom*, 53 WASH. & LEE L. REV. 99, 139 (1996) (arguing that because "who writes the majority opinion is decided generally by the senior active judge on a panel" "assigning judges [may assign] less interesting or challenging majority opinions" to other judges out of a concern for these judges or "out of a desire to keep a challenging opinion for himself or herself"); Jeremy W. Bock, *Restructuring the Federal Circuit*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 197, 245 n.264 (2014) (arguing that "[b]ecause the presiding judge (or the most senior active judge in the majority if the presiding judge dissents) has the power to assign opinion authorship, the active judges on the court with the highest levels of seniority may exert a disproportionate influence on the shape and direction" of federal appellate law).

[104] *See supra* note 28.

Nonetheless, when coupled with broader comments made by Judge Gorsuch's colleagues about his approach to judging, the findings in **Table 1** and **Table 2** may be noteworthy. For example, Professor Michael McConnell of Stanford University, who served on the Tenth Circuit with Judge Gorsuch from 2006 until 2009, described Judge Gorsuch as "unfailingly cordial and collegial," aiming to "find[] common ground" while being "scrupulously respectful of the other side, in tone and in substance."[105] Likewise, another former colleague, Robert Henry, now the President of Oklahoma City University, described Judge Gorsuch's "judicial temperament" as "superb."[106]

Judge Gorsuch's approach to judging may also differ in substance from that of Justice Scalia. In contrast to the oft quoted sentiment that "if it is not necessary to decide more, it is necessary not to decide more,"[107] Justice Scalia regularly criticized majority opinions that, in his view, failed to provide broader or clearer guidance to the lower courts because the opinions adopted a more minimalist approach.[108] While the nominee has not been immune from criticism that particular majority opinions he wrote swept too broadly,[109] in contrast to Justice Scalia, Judge Gorsuch's writings have generally espoused a more minimalist role for courts.[110] For example, he noted in a

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[105] *See* McConnell, *supra* note 84.

[106] *See* David G. Savage, *Scalia's Views Mixed with Kennedy's Style: Meet Neil Gorsuch, Trump's Pick for the Supreme Court*, L.A. TIMES (Jan. 31, 2017) (statement of Robert Henry), http://www.latimes.com/politics/la-na-pol-gorsuch-supreme-court-20170131-story.html; *see generally* Jimmy Hoover, *Similar on The Law, Gorsuch Differs from Scalia in Style*, LAW360 (Feb. 1, 2017), https://www.law360.com/tax/articles/887248 ("But in contrast to the overlap with Scalia's legal outlook, interviews with individuals close to Gorsuch ascribe a 'Western, laid-back air' and 'incredibly collegial' demeanor that departs sharply from the combative bearing Scalia was famous for."). Such sentiments were echoed by practitioners before the Tenth Circuit. Anonymous evaluations in the *Almanac of the Federal Judiciary* uniformly describe his legal ability and demeanor in positive terms, describing him as "cerebral," "very courteous and professional," and a "probing" but respectful questioner during oral arguments. *See Neil M. Gorsuch*, 2 ALMANAC OF THE FED. JUDICIARY, 2017 WL 14738.

[107] PDK Labs., Inc. v. Drug Enf't Agency, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

[108] *See, e.g.*, Bond v. United States, --- U.S. ---, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring) (arguing that the Court "shirk[ed] its job" by resolving a case on statutory, as opposed to constitutional grounds); NASA v. Nelson, 562 U.S. 134, 164 (2011) (Scalia, J., concurring) ("At this point the reader may be wondering: 'What, after all, is the harm in being minimalist and simply refusing to say that violation of a constitutional right of informational privacy can never exist? . . . .' Well, there is harm. The Court's never-say-never disposition does damage for several reasons."); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 633 (2007) ("Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future."); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 498 n.7 (2007) (Scalia, J., dissenting) ("This faux judicial restraint is judicial obfuscation.").

[109] *See, e.g.*, Hernandez v. Story, 459 F. App'x 697, 700 (10th Cir. 2012) (Lucero, J., concurring) ("I write separately because the majority proceeds to unnecessarily reach the second prong of the qualified immunity analysis, and in doing so, interjects dicta about plaintiffs' obligations in this context."); Prost v. Anderson, 636 F.3d 578, 599 (10th Cir. 2011) (Seymour, J., dissenting) ("The majority opinion, in contrast, sweeps far beyond this jurisdictional imperative."); McClendon v. City of Albuquerque, 630 F.3d 1288, 1299 (10th Cir. 2011) (Lucero, J., concurring) (arguing that parts of the majority opinion were "analytically unnecessary and . . . in the nature of dicta."); Lexington Ins. Co. v. Precision Drilling Co., L.P., 830 F.3d 1219, 1224 (10th Cir. 2016) (Bacharach, J., concurring) ("I write separately only with respect to the lead opinion's analysis of the absurdity doctrine. . . . In my view, Lexington waived this argument. And even if this argument had been preserved, I would reject it without defining the outer contours of the absurdity doctrine in Wyoming."). Nonetheless, adherence to judicial restraint may be in the eye of the beholder, as, in response to one dissent, the nominee argued that his approach was "far more judicially restrained" than that of his colleague. *See, e.g.*, *Prost*, 636 F.3d at 596 (majority opinion) ("In the end, the concurrence's claim to judicial restraint is simply unconvincing. Under its approach, the concurrence would have us bypass the question what Congress actually intended and apply the circuit foreclosure test without worrying about its provenance in the statutory text; handle plenty of knotty and novel legal questions about the test's application, in the process creating a significant and entangling body of advisory law about a test Congress never authorized; disagree with the Eighth Circuit's understanding of its own precedent; and still invite a separate schism with the Ninth Circuit.").

[110] *See, e.g.*, Gorsuch, *Law's Irony*, *supra* note 28, at 752 (discussing the "relatively modest station [judges are] meant (continued...)

2012 dissent that "[c]aution is always warranted when venturing down the road of deciding a weighty question of first impression and recognizing a previously unrecognized constitutional right."[111] And in a 2009 concurrence, the nominee wrote that "[j]udicial restraint usually means answering the questions we must, not those we can."[112] Indeed, in a number of opinions the nominee expressly limited the scope of the majority opinions he authored.[113] He has also frequently concurred or dissented to take issue with majority opinions that, in his view, reached issues that were unnecessary to the court's ultimate holding.[114] In a similar vein, while the

(...continued)

to occupy in a democratic society"); Valley Forge Ins. Co. v. Health Care Mgmt. Partners, LTD., 616 F.3d 1086, 1094 (10th Cir. 2010) ("Judicial restraint, after all, usually means answering only the questions we must, not those we can."); United States v. Pope, 613 F.3d 1255, 1262 n.1 (10th Cir. 2010) ("As a matter of judicial restraint, we generally leave the resolution of questions of law to cases where they make a difference."). In three opinions, Judge Gorsuch quoted Chief Justice Roberts in *PDK Labs, Inc.*, *see supra* note 107. *See Valley Forge Ins.*, 616 F.3d at 1094; Mink v. Knox, 613 F.3d 995, 1013 (10th Cir. 2010) (Gorsuch, J., concurring); Wyoming v. Dep't of Interior, 587 F.3d 1245, 1252 (10th Cir. Wyo. 2009). In contrast, per a LEXIS search reviewing the opinions written by all of Judge Gorsuch's colleagues on the Tenth Circuit, one other judge quoted the same language during the nominee's tenure on the appellate court. *See Prost*, 636 F.3d at 599 (Seymour, J., dissenting) (quoting *PDK, Labs, Inc.*, 362 F.3d at 799 (Roberts, J., concurring)). For a discussion of Judge Gorsuch's minimalist tendencies, see Melissa Hart, *Yes, the GOP Broke Supreme Court Nominations. But Blocking Gorsuch Won't Fix Them*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/posteverything/wp/2017/02/02/yes-the-gop-broke-supreme-court-nominations-but-blocking-gorsuch-wont-fix-them/?utm_term=.5c3b2e86a63f ("[Judge Gorsuch] cares about procedure. His decisions reflect close attention to whether and when the attorneys in appeals raised their arguments and whether that might limit the scope of the issues on which the court can rule. He has declined to address questions because they were not properly raised and presented."); Matthew Wessler, *Considering the Nomination of Neil Gorsuch to the Supreme Court*, YOUTUBE (Feb. 23, 2017), https://www.youtube.com/watch?v=YzoNi7pVX0o (noting the "dissonance" from the "mine-run" of Judge Gorsuch opinions and his opinion in *Gutierrez-Brizuela*, which "stakes out some ground that is controversial").

[111] Hooks v. Workman, 689 F.3d 1148, 1208 (10th Cir. 2012) (Gorsuch, J., dissenting).

[112] Fisher v. City of Las Cruces, 584 F.3d 888, 903 (10th Cir. 2009) (Gorsuch, J., concurring).

[113] *See, e.g.*, United States v. Makkar, 810 F.3d 1139, 1148 (10th Cir. 2015) ("We see no need, however, to resolve the defendants' additional objections along these and other lines. Whether or not their arguments bear merit, we think the essential point by now amply evident: their convictions rest on legal errors that cannot be easily dismissed as harmless."); Teamsters Local Union No. 455 v. NLRB, 765 F.3d 1198, 1205 (10th Cir. 2014) ("In saying this much we don't mean to suggest we endorse every jot and tittle in the administrative precedents we've discussed. To resolve this case, we need and do hold only that the Board's refusal to order additional remedial measures wasn't arbitrary in light of the administrative precedents the union has identified."); United States v. Christie, 717 F.3d 1156, 1175 (10th Cir. 2013) (similar); Kerns v. Bader, 663 F.3d 1173, 1182 (10th Cir. 2011) (similar); *Valley Forge Ins.*, 616 F.3d at 1094 (similar).

[114] *See, e.g.*, Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. *ex rel.* Roxanne B., 702 F.3d 1227, 1243 (10th Cir. 2012) (Gorsuch, J., concurring) ("But it is equally clear that a new test isn't necessary to the disposition of this case."); *Hooks*, 689 F.3d at 1209 (Gorsuch, J., dissenting) ("[O]ffering any view on whether such a new constitutional right should be recognized is simply unnecessary in this case."); United States v. Benard, 680 F.3d 1206, 1215 (10th Cir. 2012) (similar); Wilderness Soc'y v. Kane Cty., Utah, 632 F.3d 1162, 1180 (10th Cir. 2011) (en banc) (Gorsuch, J., concurring) (similar); Mink v. Knox, 613 F.3d 995, 1013 (10th Cir. 2010) (Gorsuch, J., concurring) (similar); Wilson v. Workman, 577 F.3d 1284, 1320 (10th Cir. 2009) (Gorsuch, J., dissenting) (similar). *See also Gorsuch Confirmation Hearing*, *supra* note 43, at 36 ("You do not treat [lawyers] as a cat's paw."). Judge Gorsuch has also criticized judicial opinions that have strayed from the parties' briefings, voicing concerns about the judiciary operating outside of the adversarial system. *See, e.g.*, WWC Holding Co. v. Sopkin, 488 F.3d 1262, 1282 (10th Cir. 2007) (Gorsuch, J., dissenting) ("At the same time, this case could have been readily resolved on the basis of the parties' actual arguments while fully preserving the viability of the majority's theory."); Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1184 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring) ("Addressing such a novel legal question for the first time en banc and on our own motion—without the benefit of detailed briefing from the litigants affected by our decision, a panel decision on point, or prior opinions from our sister courts—runs the risk of an improvident or ill-advised result given our dependence as an Article III court on the traditions of the adversarial process for sharpening, developing, and testing the issues for our decision.").

nominee has occasionally questioned precedent that he viewed as inconsistent with the rule of law,[115] his opinions at times evidence concern about judges "reshap[ing] the law as they wish it to be" by failing to "attach power to precedent."[116]

Finally, perhaps the best indication of Judge Gorsuch's approach to judging is provided by looking at how the Supreme Court has evaluated his work, a topic further detailed in **Table 3**. Of the approximately 180 *published* majority opinions authored by the nominee, only one has been reviewed in a formal opinion by the Supreme Court,[117] wherein the Court ultimately affirmed the Tenth Circuit decision by a 5-4 vote.[118] Five additional opinions that Judge Gorsuch *joined* have been the subject of a formal opinion by the Supreme Court. Of these five opinions, four were affirmed by the High Court.[119] One opinion that Judge Gorsuch joined, *Direct Marketing Ass'n v. Brohl*, was reversed by the Court in a substantive opinion.[120] As a result, Judge Gorsuch has an arguably high affirmance rate given that the Supreme Court in recent years has reversed the lower courts in roughly seventy percent of all cases it heard.[121]

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[115] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning the validity of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that the reasoning of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), may be "wash[ed] away with the tides of time."); United States v. Games-Perez, 667 F.3d 1136, 1142–46 (10th Cir. 2012) (contending that *United States v. Capps*, 77 F.3d 350 (10th Cir. 1996), is impossible to square with the plain language of the statutes *Capps* interpreted).

[116] *See Direct Mktg. Ass'n*, 814 F.3d at 1147 (Gorsuch, J., concurring); *see also Games-Perez*, 695 F.3d at 1124 (Gorsuch, J., dissenting from denial of rehearing en banc) (arguing that "*stare decisis* and precedential considerations are most serious ones" and that the en banc process should be limited to "correct grave errors" of law); Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1249 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) ("But the most elemental dictate of legal reasoning always has been and remains: like cases should be treated alike.").

[117] *See* Huang & Narechania, *supra* note 30, at 1756 n.129 ("Court observers routinely use reversal rates only among published opinions to measure the quality of a particular court.").

[118] *See* Dolan v. United States, 560 U.S. 605 (2010) (affirming United States v. Dolan, 571 F.3d 1022 (10th Cir. 2009) (Gorsuch, J.)). For a discussion of *Dolan*, see discussion *infra* in *Criminal Law and Procedure*. None of the six colleagues who served on active status during the entirety of Judge Gorsuch's tenure on the Tenth Circuit escaped having the Supreme Court review an opinion they wrote. Two judges—Judge Paul Kelly, Jr. and Judge Carlos Lucero—have similar records to Judge Gorsuch on review by the Supreme Court in that the Court affirmed the lower court's written opinion. *See* Marx v. Gen. Revenue Corp., 668 F.3d 1174 (10th Cir. 2011) (Kelly, J.), *aff'd*, --- U.S. ---, 133 S. Ct. 1166 (2013); Ramah Navajo Chapter v. Salazar, 644 F.3d 1054 (10th Cir. 2011) (Lucero, J.), *aff'd*, 567 U.S. 182 (2012). The infrequency of review at the Supreme Court has been one metric used in gauging the "quality" of lower court judges. *See* William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 325–26 (1998) (hypothesizing that the Supreme Court "rarely takes cases" from certain "top-ranked" federal appellate judges because these judges "get things 'right'"); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1405 (2009) ("[The] Supreme Court selectively reviews the most important decisions rendered by circuit courts, making it reasonable to use these important decisions as a metric . . . . [T]o the degree that evaluation of circuit court judges is employed as a standard for Supreme Court appointments, it seems appropriate to consider the fate of their decisions at the Supreme Court level."); *but see id.* at 1405 (noting that the rate of Supreme Court review may not fully gauge the work of a federal appellate court as "[m]any incorrect circuit court rulings may go unexamined by the Supreme Court, which is not a court of 'error correction'").

[119] *See infra* **Table 3**, *Majority Opinions of the Supreme Court Reviewing Cases in Which Judge Gorsuch Wrote or Joined an Opinion*.

[120] 735 F.3d 904 (10th Cir. 2013), *rev'd*, --- U.S. ---, 135 S. Ct. 1124 (2015). In *Direct Marketing Ass'n,* the Court rejected the Tenth Circuit's conclusion that the Tax Injunction Act barred a suit regarding a Colorado tax reporting law. 135 S. Ct. at 1127.

[121] *See Stat Pack Archive*, SCOTUSBLOG, http://www.scotusblog.com/reference/stat-pack/ (last visited Mar. 5, 2017) (indicating reversal rates of 67% for the October 2015 Term; 72% for the October 2014 Term; 73% for the October 2013 Term; 72% for the October 2012 Term; 63% for the October 2011 Term; and 72% for the October 2010 Term).

Table 3. Majority Opinions of the Supreme Court Reviewing Cases in Which Judge Gorsuch Wrote or Joined an Opinion

Opinions Listed in Reverse Chronological Order

10th Cir. Case	Relevant 10th Cir. Holding	Gorsuch's Role	S. Ct. Decision	S. Ct. Vote
Warner v. Gross, 776 F.3d 721 (10th Cir. 2015)	Use of the drug midazolam in executions by lethal injection was unlikely to violate the Eighth Amendment's prohibition against cruel and unusual punishment.	Joined majority opinion	**Affirmed**, Glossip v. Gross, --- U.S. ---, 135 S. Ct. 2726 (2015)	5-4
Direct Mktg. Ass'n v. Brohl, 735 F.3d 904 (10th Cir. 2013)	The Tax Injunction Act bars a suit in federal court seeking to enjoin enforcement of a state law requiring online retailers to report sales and use tax information to customers and the state's revenue department.	Joined majority opinion	**Reversed**, Direct Mktg. Ass'n v. Brohl, --- U.S. ---, 135 S. Ct. 1124 (2015)	9-0
Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc)	The Religious Freedom Restoration Act of 1993 likely prohibits the federal government from requiring closely held corporations that hold religious objections to certain contraceptive services to provide coverage of those services in employee health plans.	Joined majority and plurality opinions	**Affirmed**, Burwell v. Hobby Lobby Stores, --- U.S. ---, 134 S. Ct. 2751 (2014)	5-4
United States v. Loughrin, 710 F.3d 1111 (10th Cir. 2013)	The government does not need to prove that a defendant intended to defraud a bank to secure a conviction under a provision of the federal bank fraud statute.	Joined majority opinion	**Affirmed**, Loughrin v. United States, --- U.S. ---, 134 S. Ct. 2384 (2014)	9-0
Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011)	Oklahoma may restrict Texas water users' access to water in the Red River basin because an interstate water compact does not grant one state a right to take water located in another state.	Joined majority opinion	**Affirmed**, Tarrant Reg'l Water Dist. v. Herrmann, --- U.S. ---, 133 S. Ct. 2120 (2013)	9-0
United States v. Dolan, 571 F.3d 1022 (10th Cir. 2009)	A sentencing court retains the power to order a convicted criminal to pay mandatory restitution even though it missed a statutory deadline.	Authored majority opinion	**Affirmed**, Dolan v. United States, 560 U.S. 605 (2010)	5-4

Source: Congressional Research Service, based on various sources cited in **Table 3**.

Notes: This table shows those cases in which opinions authored or joined by Judge Gorsuch have been substantively reviewed by the Supreme Court. It includes any panel or en banc rulings written or joined by Judge Gorsuch that were, at least in part, reviewed in a written opinion by the Supreme Court. It does not include (1) any short order by the Supreme Court, such as a grant or denial of a writ of certiorari or an order summarily and simultaneously granting certiorari, vacating the ruling, and remanding the case for further proceedings; (2) any temporary order of the Court, such as a stay of an order of the Tenth Circuit; (3) any summary affirmance of an opinion authored or joined by Judge Gorsuch; or (4) any of Judge Gorsuch's votes on petitions

for rehearing en banc. As a result, Judge Gorsuch's opinion in *United States v. Sanchez*, 252 F. App'x 900 (10th Cir. 2007), and vote in support of the majority opinion in *United States v. Trotter*, 483 F.3d 694 (10th Cir. 2007), are not included in this table, because the Supreme Court issued a short order in these cases granting certiorari, vacating the ruling, and remanding the case for further proceedings in light of an intervening Supreme Court decision. This list also omits his votes in support of the opinions dissenting from the denial of rehearing en banc in *Kerr v. Hickenlooper*, 759 F.3d 1186 (10th Cir. 2014), *Pauly v. White*, 817 F.3d 715 (10th Cir. 2016), *Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007), and *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015).

The table also does not include cases in which the Supreme Court has functionally negated the judge's reasoning in a particular case by subsequent decision. *Compare* Williams v. Jones, 583 F.3d 1254, 1256–60 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) (arguing that neither the Sixth Amendment nor any other federal law allows a defendant to claim ineffective assistance of counsel based on poor advice regarding plea bargaining when the defendant otherwise gets a fair trial), *with* Missouri v. Frye, 566 U.S. 134, 149–50 (2012) (holding that the Sixth Amendment right to adequate assistance of counsel extends to the negotiation and consideration of plea offers that lapse), *and* Lafler v. Cooper, 566 U.S. 156, 174 (2012) (same with respect to offers that are rejected).

Statutory Interpretation

As several commentators have noted, Judge Gorsuch can be seen to employ the same general approach to questions of statutory interpretation that Justice Scalia did.[122] This approach—known as *textualism*—looks to the statutory text, context, and structure when construing laws, rather than to extrinsic evidence of the intent or purpose of the Congress that enacted the statute.[123] Textualism's focus on the wording of the statute is widely shared among contemporary jurists and commentators, but its rejection of extrinsic sources of meaning has been the subject of debate, as have textualist views about judges' proper role in establishing the meaning of statutory text.[124] With Judge Gorsuch in particular, attention to the statutory text has often centered upon questions of grammar,[125] with the nominee once going so far as to diagram part of a sentence in a written opinion.[126] With specific regard to interpreting criminal statutes, Judge Gorsuch can be seen to resemble Justice Scalia in invoking the "rule of lenity" when construing language that is seen to be ambiguous in favor of criminal defendants.[127] On the other hand, the nominee's recently

[122] *See, e.g.*, 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; Debra Cassens Weiss, *Trump Nominates Judge Neil Gorsuch to the Supreme Court*, ABA J. (Jan. 31, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/.

[123] *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24 (1990); Daniel A. Farber & Philip F. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 455 (1988).

[124] *Cf.* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) ("[V]irtually all theorists and judges are 'textualists,' in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear . . . . [V]irtually all theorists and judges are also 'purposivists,' in the sense that all believe that statutory interpretation ought to advance statutory purposes, so long as such interpretations do not impose on words a meaning they will not bear. And virtually all theorists and judges insist the statutory context is important in discerning the meaning of statutory texts. So what has the debate been all about? Doctrinally, the big debate has been whether interpretative context can include internal 'legislative history' preceding a statute's enactment into law . . . . Theoretically, the big debate has focused on what the role of judges should be."). For more on the latter, *see* discussion *supra* in *Role of the Judiciary*.

[125] *See, e.g.*, United States v. Rentz, 777 F.3d 1105, 1110 (10th Cir. 2015) (en banc) ("[T]his reading of the statute—like most good ones—flows from plain old grade school grammar . . . ."). For further discussion of this aspect of Judge Gorsuch's jurisprudence, see *infra* notes 134–47 and accompanying text.

[126] *See id.*; *see infra* **Figure 1**, "Diagram from *United States v. Rentz*."

[127] *See, e.g.*, United States v. Smith, 756 F.3d 1179, 1191 (10th Cir. 2014) ("The rule of lenity dictates that any doubts at the end of a thorough statutory investigation must be resolved for the defendant, any tie must go to the citizen, not the state. In our legal order it is not the job of independent courts to bend ambiguous statutory subsections in procrustean ways to fit the prosecutor's bill."); United States v. Manatau, 647 F.3d 1048, 1055 (10th Cir. 2011) (continued...)

expressed concerns about "*Chevron* deference"[128]—judicial deference to the reasonable interpretations by executive branch agencies of ambiguous or silent statutes[129]–distinguish him from Justice Scalia in certain ways.[130] These last two facets of Judge Gorsuch's jurisprudence—that is, his approaches to the rule of lenity and *Chevron* deference—are discussed in more detail later in this report.[131]

Consistent with a textualist approach to statutory interpretation, Judge Gorsuch in a number of his written opinions has identified what he views as the "plain text"[132] or "plain language"[133] of the statute in question (although his colleagues on the bench sometimes took different views as to whether this language was, in fact, so clear[134]). The exact words of the statute often formed the starting point for Judge Gorsuch's discussion of questions of interpretation,[135] and he has generally accorded such words their customary meaning,[136] as reflected by their dictionary definitions.[137] Perhaps the most notable aspect of the nominee's discussion of statutory text, though, has been his focus on the grammar of legislative language[138] and, in particular, the

(...continued)

(similar). *See also In re* Woolsey, 696 F.3d 1266, 1277 (10th Cir. 2012) (noting that, when a statute possesses both criminal and civil applications, "a narrowing interpretation in a criminal case driven by the rule of lenity must apply equally to civil litigants to whom lenity would not ordinarily extend").

[128] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (2016) (Gorsuch, J., concurring).

[129] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[130] *See generally CRS Scalia Report*, *supra* note 8, at 8–9; *see also* discussion *infra* in *Administrative Law*.

[131] *See* discussions *infra* in *Criminal Law and Procedure* and *Administrative Law*, respectively.

[132] *See* Lexington Ins. Co. v. Precision Drilling Co., L.P., 830 F.3d 1219, 1221 (10th Cir. 2016); A.F. v. Española Pub. Schs., 801 F.3d 1245, 1248 (10th Cir. 2015); *Smith*, 756 F.3d at 1193; Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1155 (10th Cir. 2013) (en banc); Iliev v. Holder, 613 F.3d 1019, 1025 (10th Cir. 2010).

[133] *See, e.g.*, *Lexington Ins. Co.*, 830 F.3d at 1221, 1224; El Encanto, Inc. v. Hatch Chile Co., 825 F.3d 1161, 1164 (10th Cir. 2016); United States v. Makkar, 810 F.3d 1139, 1146 (10th Cir. 2015); *A.F.*, 801 F.3d at 1249-50.

[134] *See, e.g.*, *A.F.*, 801 F.3d at 1255 (Briscoe, C.J., dissenting) ("The majority in this case concludes that the above-highlighted language of [20 U.S.C.] § 1415 (l) unambiguously requires a litigant, such as A.F., to 'qualify under subsection [1415(i)] as a party 'aggrieved by the findings and decision' of administrative trial and appellate authorities.' . . . I submit, however, that the highlighted language is 'capable of being understood' in another, and indeed more reasonable, 'way[].'"); United States v. Rentz, 777 F.3d 1105, 1115 (10th Cir. 2015) (Hartz, J., concurring) (taking the view that "the words of 18 U.S.C. § 924(c)(1)(A) in isolation . . . lend themselves most readily to the government's interpretation," not that of the panel majority, but the majority's interpretation is to be preferred on lenity grounds); *id.* at 1131 (Kelly, J., dissenting) (rejecting the majority interpretation).

[135] *See, e.g.*, Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1094 (10th Cir. 2015) ("Start with the text."); *Smith*, 756 F.3d at 1181 ("We begin with 18 U.S.C. § 3661."); Elwell v. Okla. *ex rel*. Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1306 (10th Cir. 2012) ("[W]e begin as always with the language of the statute.").

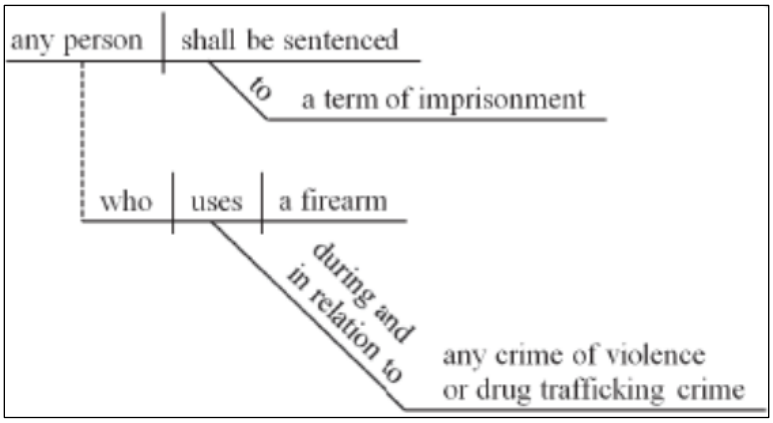
[136] *Cf. El Encanto, Inc.*, 825 F.3d at 1174 ("[S]urely our job when interpreting statutes is to read them as even an ordinary citizen might, not to lay spring traps for the unwary and force lay persons to become experts in the vestigial esoterica of every statute and federal rule.").

[137] *See, e.g.*, *Elwell*, 693 F.3d at 1306–07; Prost v. Anderson, 636 F.3d 578, 584 (10th Cir. 2011); Regional Air, Inc. v. Canal Ins. Co., 639 F.3d 1229, 1237–38 (10th Cir. 2011).

[138] *See, e.g.*, *Lexington Ins. Co.*, 830 F.3d at 1223; United States v. Krueger, 809 F.3d 1109, 1119 (10th Cir. 2015) (Gorsuch, J., concurring); *Elwell*, 693 F.3d at 1306; United States v. Rosales-Garcia, 667 F.3d 1348, 1356 (10th Cir. 2012) (Gorsuch, J., dissenting); United States v. Games-Perez, 667 F.3d 1136, 1144 (10th Cir. 2012) (Gorsuch, J., concurring); Payless Shoesource, Inc. v. Travelers Cos., Inc., 585 F.3d 1366, 1369 (10th Cir. 2009); United States v. Hinckley, 550 F.3d 926, 941 (10th Cir. 2008) (Gorsuch, J., concurring).

various parts of speech used in the statutory text.[139] For instance, as noted above, in his 2015 opinion for a majority of the en banc Tenth Circuit in *United States v. Rentz*,[140] Judge Gorsuch diagrammed a segment of a sentence in a criminal statute to help address the underlying interpretative question, as illustrated in **Figure 1** below. The specific interpretative question in *Rentz* was whether multiple charges may be brought under Section 924(c) of Title 18 of the United States Code —a statute that prescribes penalties for certain crimes involving firearms[141]— against a defendant who fired a single shot that hit two separate victims.[142]

Figure 1. Diagram from *United States v. Rentz*



Source: Screenshot taken from United States v. Rentz, 777 F.3d 1105 (10th Cir. 2015) (en banc), https://www.ca10.uscourts.gov/opinions/12/12-4169.pdf.

According to Judge Gorsuch's opinion for the majority, this diagram helped clarify that the total number of charges lodged against a criminal defendant under the statute should never "exceed the number of uses, carries, or possessions" because:

> Just as you can't *throw* more touchdowns *during the fourth quarter* than the total number of times you have *thrown* a touchdown, you cannot *use* a *firearm during and in relation to crimes of violence* more than the total number of times you have *used* a firearm.[143]

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[139] *See, e.g.*, *Krueger*, 809 F.3d at 1119 ("[T]he grammatical structure of the sentence indicates that magistrate judges shall have those powers specified by rule or other law (e.g., Rule 41), but those powers are effective only in certain specified geographic areas — and, as we've seen, none of those areas is implicated here."); *Rosales-Garcia*, 667 F.3d at 1355 (Gorsuch, J., dissenting) ("In the richness of the English language, few things can create as much mischief as piling prepositional phrase upon prepositional phrase."); *Hinckley*, 550 F.3d at 941 (Gorsuch, J., concurring) ("The first, and most narrow, such feature lies in the grammar of subsection (d) itself and the lack of clarity about what the phrase 'who are unable to comply with subsection (b) of this section' actually modifies.").

[140] United States v. Rentz, 777 F.3d 1105 (10th Cir. 2015) (en banc).

[141] *See* 18 U.S.C. § 924(c)(1)(A) ("Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.").

[142] *Rentz*, 777 F.3d at 1110.

[143] *Id*.

Previously, in dissenting from the denial of en banc review in *United States v. Games-Perez*, Judge Gorsuch had expressed similar concerns about reading the mens rea element of a criminal statute—or the state of mind required for guilt—as "leapfrogging over the first statutorily specified element and touching down only at the second listed element."[144] According to Judge Gorsuch, such a reading "defies grammatical gravity and linguistic logic."[145]

Judge Gorsuch's written opinions have also relied upon other interpretative practices characteristic of textualist approaches to statutory interpretation, including resort to the "larger statutory context,"[146] express statements of congressional purpose,[147] and the history of the statute.[148] The nominee has also invoked a number of canons—or general principles—of statutory interpretation when construing text that is seen to be ambiguous.[149] In so doing, Judge Gorsuch has generally cited to and applied specific interpretative canons without expressly involving himself in the broader debates about the merits of canons-based approaches to statutory interpretation, prompted by Justice Scalia's 2012 book, *Reading Law: The Interpretation of Legal Texts*.[150]

However, in his 2016 opinion for a three-judge panel of the Tenth Circuit in *Lexington Insurance Co. v. Precision Drilling Co., L.P.*, Judge Gorsuch contrasted canons that he viewed as "finely honed and consistent with the judicial function," such as the presumption that statutes do not apply outside the United States unless Congress clearly indicates it intends the statute to apply extraterritorially, with the so called "absurdity canon."[151] This canon is generally said to allow judges to "override even unambiguous statutory texts . . . in order to avoid putatively absurd consequences in their application."[152] However, Judge Gorsuch expressed concern that broad

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[144] United States v. Games-Perez, 695 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., dissenting for the denial of en banc review [need to check consistency throughout]).

[145] *Id.*

[146] Prost v. Anderson, 636 F.3d 578, 587 (10th Cir. 2011). *See also* Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1095–96 (10th Cir. 2015) ("surrounding textual features" and "larger statutory structure"); Elwell v. Okla. *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1309 (10th Cir. 2012) ("larger statutory structure"); *In re* Dawes, 652 F.3d 1236, 1239 (10th Cir. 2011) ("larger statutory structure").

[147] *See, e.g.*, *In re Dawes*, 652 F.3d at 1239; United States v. Hinckley, 550 F.3d 926, 932 (10th Cir. 2008) (Gorsuch, J., concurring).

[148] *See, e.g.*, *Cook*, 790 F.3d at 1096; Almond v. Unified Sch. Dist. #501, 665 F.3d 1174, 1182 (10th Cir. 2011); *Prost*, 636 F.3d at 587.

[149] One such canon is the rule against surplusage, or the rule that statutory language should be construed, insofar as possible, in such a way that "effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Corley v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)). *See, e.g.*, *Cook*, 790 F.3d at 1096; *Almond*, 665 F.3d at 1182; *Prost*, 636 F.3d at 587. Another is the *Russello* canon, or the rule that, where Congress has included particular language in one section of a statute, but omitted this language in another section, it is generally presumed to have acted intentionally, Russello v. United States, 464 U.S. 16 (1983). *See, e.g.*, United States v. Smith, 756 F.3d 1179, 1187 (10th Cir. 2014); Perez-Carrera v. Stancil, 616 F. App'x. 371, 372 (10th Cir. 2015). Yet another is the rule that *expressio unius est exclusio alterius* (i.e., the express mention of one or more items of a particular class is taken to mean that other items of that same class are excluded). *See, e.g.*, *Elwell*, 693 F.3d at 1309–10; Regional Air, Inc. v. Canal Ins. Co., 639 F.3d 1229, 1238 (10th Cir. 2011).

[150] *Compare* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 49–239, 241–339, 341–410 (2012) (setting forth thirty-seven principles generally applicable to legal texts; twenty principles applicable "specifically to governmental prescriptions," such as statutes; and thirteen fallacies), *with* Eskridge, *supra* note 124, at 536 (noting "three big problems" with the canon-based approach put forth in Justice Scalia's 2011 book, *Reading Law*, and suggesting that, because of these problems, the "actual effect of the Scalia-Garner canons would not be greater judicial restraint but instead a relatively less constrained and somewhat more antidemocratic textualism").

[151] 830 F.3d 1219, 1220 (10th Cir. 2016).

[152] *Id.* at 1220.

application of this canon could enable judges to disregard clear statutory text in favor of the jurists' perceived view of Congress's purpose in enacting the statute.[153] Judge Gorsuch's *Lexington Insurance* opinion can be seen to reflect broader concerns about interpretations of statutory text based on extrinsic evidence of congressional purpose common to textualist approaches, as discussed below.[154] However, the nominee's discussion of these concerns in *Lexington Insurance* is arguably notable for its relative length, particularly given that the sole legal authority cited by Judge Gorsuch as supporting purpose-based applications of the absurdity doctrine is an 1892 Supreme Court decision that has not enjoyed particular favor with the Court in more recent years.[155] The two other judges on the panel would not have reached the questions regarding the absurdity doctrine, concluding instead that the plaintiff had waived the argument.[156]

Furthermore, consistent with a textualist approach, Judge Gorsuch has made limited resort to legislative history materials. Unlike Justice Scalia, who generally viewed the use of legislative history materials as illegitimate even in support of text-based arguments,[157] Judge Gorsuch has cited legislative history materials in certain cases.[158] However, such citations may be based, in part, on his view that Supreme Court precedent directed lower court judges to consider legislative history materials in those instances.[159] He has elsewhere expressed concerns about the use of

[153] *Id*. Note, however, that Judge Gorsuch contrasts applications of the absurdity canon based on "scrivener's error," or manifest errors in the statutory text, such as misspellings, with applications based on jurists' views of the underlying purpose of the statute. *Id*. at 1223.

[154] In particular, in *Lexington Insurance*, Judge Gorsuch expressed concern that applications of the absurdity doctrine based on jurists' views of congressional purpose would generally require that judges engage in the "doubtful business of guessing at hidden legislative intentions" in order to arrive at the view that the legislature could not have intended particular consequences. *Id*. at 1220 ("Any attempt to use the absurdity doctrine to overrule plain statutory text would invite all the well-documented problems associated with trying to reconstruct credibly the intentions of hundreds of individual legislators."). He also contended that application of the absurdity canon based on extrinsic evidence of congressional purpose "risk[s] offending the separation of powers" by purporting to grant courts the power to disregard potential interpretations of statutes because of concerns about the implausibility of their consequences, and "threatens due process" by "foisting" upon persons textual interpretations they would have had "difficulty imagining when arranging their affairs." *Id*.

[155] *Id*. at 1222 (citing Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390–91 (2003)). In *Holy Trinity*, the High Court unanimously held that provisions in the Alien Contract Labor Act that made it unlawful "for any person, company, partnership, or corporation, in any manner whatsoever, to . . . in any way assist . . . the importation or migration of any alien or aliens . . . into the United States under contract or agreement . . . to perform labor or service of any kind in the United States" did not apply to an Episcopal church that hired a minister from England. In so doing, the Court noted that the church's action fell within the letter of the statute, but nonetheless concluded that "a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers." *Id*. at 459. However, the Court's approach in *Holy Trinity* is generally not seen to be widely favored at present. *See, e.g.*, Carol Chomsky, *The Story of* Holy Trinity Church v. United States*: Spirit and History in Statutory Interpretation*, in STATUTORY INTERPRETATION STORIES 3, 5–6 (William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garett, eds., 2011) (noting concerns about the *Holy Trinity* decision voiced by Chief Justice Rehnquist and Justices Scalia and Kennedy, among others).

[156] *Lexington Ins.*, 830 F.3d at 1224–25 (Bacharach, J., concurring, with McHugh, J., joining).

[157] *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518–19 (1993) (Scalia, J., concurring) (objecting to the use of legislative history materials to confirm text-based interpretations of statutes on the grounds that such use provides a "false and disruptive lesson in the law" by fostering the belief that "an 'unambiguous and unequivocal' statute can never be dispositive"). Justice Scalia did, however, express a willingness to consider legislative history materials to determine the contexts in which particular words had been used when ascertaining their ordinary meaning. *See, e.g.*, SCALIA & GARNER, *supra* note 150, at 388.

[158] *See, e.g.*, Caplinger v. Medtronic, Inc., 784 F.3d 1335, 1346 (10th Cir. 2015) (noting legislative history materials in support of a text-based interpretation); Almond v. Unified Sch. Dist. #501, 665 F.3d 1174, 1183 (10th Cir. 2011) (similar); United States v. Dolan, 571 F.3d 1022, 1025 (10th Cir. 2009) (similar).

[159] *See* United States v. Hinckley, 550 F.3d 926, 947 (10th Cir. 2008) (Gorsuch, J., concurring) ("Though the Supreme (continued...)

legislative history materials similar to those voiced by Justice Scalia.[160] In particular, Judge Gorsuch has expressed skepticism about a jurist's ability to discern a single legislative "intent" beyond that embodied in the express terms of the statute.[161] Consistent with his concerns about results-oriented judging, the nominee has noted the risks of judges cherry picking among legislative history materials to support their preferred interpretation of the statute being construed.[162] He has also expressed, as Justice Scalia did,[163] constitutional concerns with the use of legislative history materials, in that such materials are not subject to the same bicameralism and presentment requirements as statutes because they are not passed by both chambers of Congress and signed by the President.[164]

Judge Gorsuch has similarly expressed concerns, akin to those voiced by Justice Scalia,[165] about invocations of alleged congressional or statutory purposes that are untethered from or contrary to the express statutory text. Some of these concerns are seemingly practical ones, grounded in the difficulty of determining which of various possible purposes that could be attributed to a particular statutory text embody the shared intent of a legislature made up of dozens or even hundreds of members.[166] Other concerns appear to be grounded in the nominee's views about the respective roles of the judicial and legislative branches, as previously noted.[167] Much like Justice Scalia, Judge Gorsuch has opined that courts should interpret the law, not create it, as courts could be said to do if they were to adopt a particular construction of a statute based on the court's abstract view of the statute's purpose in lieu of one based on the statute's express text.[168] As a result, if Judge Gorsuch were to serve on the Supreme Court, his views on statutory interpretation would largely appear to align with those of the Justice he would replace.

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Court has recognized that legislative history is 'often murky, ambiguous, and contradictory,' . . . the Court itself has repeatedly told us to employ such history when seeking to resolve an ambiguous text.").

[160] *See generally CRS Scalia Report*, *supra* note 8, at 6.

[161] *See, e.g.*, United States v. Games-Perez, 695 F.3d 1104, 1118 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of en banc review) (noting the "difficulties of trying to say anything definitive about the intent of 535 legislators and the executive"). *See also* United States v. Spaulding, 802 F.3d 1110 (10th Cir. 2015) (Gorsuch, J., dissenting) ("[S]tatutes and rules are the product of many competing interests and compromised objectives . . . ."); United States v. Hernandez, 655 F.3d 1193, 1197 (10th Cir. 2011) ("The legislative art is, after all, one of compromise . . . .").

[162] *See, e.g.*, *Hinckley*, 550 F.3d at 947 (Gorsuch, J., concurring); *Zamora*, 478 F.3d at 1183 n.1 (Gorsuch, J., concurring).

[163] *See, e.g.*, Zedner v. United States, 547 U.S. 489, 509-10 (2006) (Scalia, J., concurring).

[164] *See Games-Perez*, 695 F.3d at 1118 (Gorsuch, J., dissenting from denial of en banc review).

[165] *See generally CRS Scalia Report*, *supra* note 8, at 6.

[166] *See, e.g.*, Lexington Ins. Co. v. Precision Drilling Co., L.P., 830 F.3d 1219, 1220–21 (10th Cir. 2016) (characterizing "speculation about [the] legislature's textually unexpressed intentions" as a "guessing game both sides can almost always play" and the "task of trying to discern the textually unexpressed intentions of (or really attribute such intentions to) a legislative body composed of scores or often hundreds of individuals" as a "notoriously doubtful business"); *Spaulding*, 802 F.3d at 1133 (Gorsuch, J., dissenting) (noting that Congress could be seen to have pursued a policy different than that suggested by the majority when it enacted the statute in question); Regional Air, Inc. v. Canal Ins. Co., 639 F.3d 1229, 1238 (10th Cir. 2011) (similar).

[167] *See* discussion *supra* in *Role of the Judiciary*.

[168] *See, e.g.*, Prost v. Anderson, 636 F.3d 578, 592 (10th Cir. 2011) ("We can well imagine an alternative statutory regime that might strike the balance differently than Congress has done. But it is not our place to adopt a test that replaces the balance Congress reached with one of our own liking.").

Administrative Law

Administrative law cases at the Supreme Court are often contentious, resulting in divided decisions on legal issues of national import.[169] For example, last term the Supreme Court split 4-4 in *United States v. Texas*, a case that implicated important administrative law doctrines such as the scope of an agency's discretion to issue guidance documents to set regulatory policy.[170] While the Tenth Circuit's docket does not include as many administrative law cases as other federal courts,[171] in the few cases that have come before him, Judge Gorsuch has articulated distinct views that may signal how he would approach administrative law matters if he were elevated to the Supreme Court.

Justiciability Issues. A central threshold issue in administrative law cases is whether a challenged agency action is suitable for judicial review in the first place, including whether a court has jurisdiction over the case.[172] While this inquiry is often dependent on the facts of a given case, a few trends can arguably be discerned from the various cases raising justiciability issues in which Judge Gorsuch presided. In cases both arising in the context of a challenge to a federal agency policy and outside of that context, the nominee sided with the majority of the appellate panel in most cases where access to judicial relief was litigated, and he has not demonstrated a proclivity towards a notably expansive or restrictive view of jurisdictional issues.[173] In the few judicial access cases in which Judge Gorsuch wrote a separate opinion, he

[169] *See, e.g.*, Michigan v. EPA, 576 U.S. ---, 135 S. Ct. 2699, 2706–07 (2015) (holding in a 5-4 decision that it was unreasonable for the Environmental Protection Agency not to consider costs when initially deciding that it was appropriate and necessary to regulate emissions from power plants under the Clean Air Act).

[170] 579 U.S. ---, 136 S. Ct. 2271, 2272 (2016) (per curiam) (affirming, in a 4-4, one-sentence decision, a judgment of the Fifth Circuit that preliminarily enjoined implementation of the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents program).

[171] *See* discussion *supra* in *Predicting Nominees' Future Decisions on the Court*.

[172] This assessment is often informed by constitutional, prudential, and statutory considerations. *See* Lujan v. Defs. Wildlife, 504 U.S. 555, 560 (1992); Bennett v. Spear, 520 U.S. 154, 162 (1997). A court may be called upon to determine, for example, whether a petitioner has standing to bring the lawsuit, *see id.* at 162; whether legal or factual developments have rendered the challenge moot, *see* Already, LLC v. Nike, Inc., --- U.S. ---, 133 S. Ct. 721, 726 (2013); and whether the case presents a nonjusticiable political question, *see* Baker v. Carr, 369 U.S. 186, 217 (1962). Although beyond the scope of this report, another major issue might be judicial review of agency compliance with the procedural requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. *See, e.g.*, United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1131 (10th Cir. 2010) (holding that EPA was not required to undergo notice and comment rulemaking when it changed its interpretation of an ambiguous regulation).

[173] *See, e.g.*, WildEarth Guardians v. EPA, 759 F.3d 1196, 1207 (10th Cir. 2014) (Hartz, J.) (Gorsuch, J., joining opinion denying a petition for review of EPA's Final Implementation Plan because, among other things, certain issues were moot); Aguilar-Alvarez v. Holder, 528 F. App'x 862, 863 (10th Cir. 2013) (Holmes, J.) (Gorsuch, J., joining an opinion dismissing a petition for review of a Board of Immigration Appeals decision because petitioner lacked standing, and the court otherwise lacked jurisdiction to review a claim concerning abuse of prosecutorial discretion); Muscogee (Creek) Nation Div. of Hous. v. U.S. Dep't of Hous. & Urban Dev., 698 F.3d 1276, 1281–82 (10th Cir. 2012) (McKay, J.) (Gorsuch, J., joining an opinion concluding the district court correctly dismissed a challenge to a regulation of the Department of Housing and Urban Development for lack of jurisdiction because the matter was committed to the agency's discretion); Rhodes v. Judiscak, 676 F.3d 931, 932 (10th Cir. 2011) (Lucero, J.) (Gorsuch, J., joining an opinion dismissing a petition for habeas corpus review on mootness grounds because the petitioner was no longer in prison); Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1144 (10th Cir. 2010) (en banc) (Gorsuch, J.) (holding that petitioners had Article III standing to challenge EPA's determination that their land qualified as Indian Land); Travis v. Park City Police Dep't, 277 F. App'x 829, 832 (10th Cir. 2008) (Gorsuch, J.) (concluding the petitioner lacked Article III standing to bring a First Amendment challenge to a city ordinance because he had not violated it and did not intend to violate it); Wyoming v. U.S. Dep't of Interior, 587 F.3d 1245, 1247 (10th Cir. 2009) (Gorsuch, J.) (ruling that a challenge to a National Park Service rule was moot because the agency had promulgated a new rule); Lewis v. Tripp, 604 F.3d 1221, 1224 (10th Cir. 2010) (Gorsuch, J.) (ruling that evidence of records being stolen from (continued...)

has tended[174] to do so on the basis that the court lacked jurisdiction over the suit.[175] For example, in *Wilderness Society v. Kane County*, a majority of the en banc panel held that the plaintiffs lacked prudential standing in a challenge brought against a local government entity under the Supremacy Clause.[176] Judge Gorsuch, however, wrote a concurring opinion concluding the court lacked subject matter jurisdiction over the case in the first place.[177] Similarly, in *Kerr v. Hickenlooper*, a suit brought by state legislators claiming that a voter initiative violated the Constitution's Guarantee Clause,[178] the original three-judge panel rejected arguments that the court lacked jurisdiction over the case.[179] Judge Gorsuch dissented from a subsequent denial of rehearing en banc, arguing that the court lacked jurisdiction to hear the suit because it presented a nonjusticiable political question.[180]

Statutory Review Cases. As background, under the Administrative Procedure Act (APA),[181] a reviewing court must set aside agency action that is "not in accordance with law" or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[182] Pursuant to the framework established by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[183] a court will generally defer to an agency's interpretation of a statute that is seen to be silent or ambiguous on a particular issue.[184] In *National Cable &*

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petitioner's office was sufficient to establish Article III standing).

[174] Judge Gorsuch wrote separately in *Hobby Lobby Stores, Inc. v. Sebelius* to argue that the plaintiffs, whom the majority concluded had standing as closely held business organizations to challenge agency regulations, 723 F.3d 1114 (10th Cir. 2013) (en banc), also had standing in their individual capacities to sue. *Id*. at 1152 (Gorsuch, J., concurring). For a detailed discussion of the merits of this case, see discussion *infra* in *Freedom of Religion*.

[175] *See, e.g.*, Kerr v. Hickenlooper, 759 F.3d 1186, 1193 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of rehearing en banc) (arguing that the case should have been dismissed on political question grounds); N.M. Off-Highway Vehicle All. v. U.S. Forest Serv., 540 F. App'x 877 (10th Cir. 2013) (Gorsuch, J., dissenting) (arguing that the plaintiffs had no right of intervention because an existing party already represents their interests); Wilderness Soc'y v. Kane Cty., 632 F.3d 1162, 1174 (10th Cir. 2011) ("Most of this case is moot—and has been for years. What little of this lawsuit that remains fails to implicate our jurisdiction because even a favorable decision won't redress the [plaintiff's] claimed injury."); Hanson v. Wyatt, 552 F.3d 1148, 1164 (10th Cir. 2008) (Gorsuch, J., concurring in the judgment) (declining to reach the merits, as the majority did, on the grounds that the case was nonjusticiable). Insofar as Judge Gorsuch's separate opinions suggest a trend against finding matters justiciable, his writings might be said to cohere with the views of Justice Scalia, who often wrote opinions that narrowed access to the courts for parties seeking to challenge administrative action. *See CRS Scalia Report*, *supra* note 8, at 9–10.

[176] 632 F.3d 1162, 1168 n.1 (10th Cir. 2011) ("Although prudential standing is not a jurisdictional limitation and may be waived, here it has been raised.").

[177] *Id*. at 1174–80 (Gorsuch, J. concurring in the judgment).

[178] U.S. CONST. art. IV, § 4, cl. 1.

[179] 744 F.3d 1156, 1161 (10th Cir. 2014), *cert. granted, judgment vacated*, --- U.S. ---, 135 S. Ct. 2927 (2015). The Supreme Court later vacated the majority panel's decision and directed the court to reconsider the case in light of its decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, --- U.S. ---, 135 S. Ct. 2652 (2015). The Tenth Circuit then reheard the case in light of this opinion and dismissed it for lack of Article III standing. Kerr v. Hickenlooper, 824 F.3d 1207, 1211 (10th Cir. 2016).

[180] *Kerr*, 759 F.3d at 1193 (Gorsuch, J., dissenting from denial of rehearing en banc).

[181] 5 U.S.C. §§ 551 *et seq*.

[182] *Id.* § 706(2)(A), (C).

[183] 467 U.S. 837 (1984).

[184] Under *Chevron*, courts engage in a two-step analysis of an agency's interpretation of a statute. At the first step, the court must generally determine whether Congress "has directly spoken to the precise question at issue." *Id.* at 842. If so, a court is required to give effect to Congress's intent, notwithstanding a contrary agency interpretation. *Id.* at 842–43. However, if a statute is silent or ambiguous on the matter, the second step of the *Chevron* analysis requires a court (continued...)

Telecommunications Ass'n v. Brand X Internet Services, the Supreme Court interpreted *Chevron* to extend to an agency's interpretation of a silent or ambiguous statute even if a court had previously interpreted the statute in question.[185] As a statistical matter, under the *Chevron* doctrine, courts have often deferred to an agency's interpretation of its own statutory authority.[186]

In engaging in substantive review of agency actions, Judge Gorsuch has questioned the size and power of the modern administrative state, declaring that the number of regulations issued by agencies has "grown so exuberantly it's hard to keep up. . . . And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal [guidance] might be found floating around these days."[187] Given the breadth and scope of federal agency power, the nominee has also raised "questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing 'law.'"[188] Reflecting these concerns, Judge Gorsuch has critiqued *Chevron* and *Brand X* and has taken a narrow view of the situations in which *Chevron* deference is due.[189] In perhaps the most discussed of Judge Gorsuch's opinions,[190] *Gutierrez-Brizuela v. Lynch*, after writing for a unanimous panel that

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to defer to an agency's reasonable statutory interpretation. *Id.* at 843. The Court has explained that *Chevron* deference does not apply to every agency's statutory interpretation; in determining whether *Chevron* deference is appropriate, courts must examine whether Congress delegated to the agency authority to "speak with the force of law," and the relevant interpretation was "promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226–27, 229 (2001). In a series of cases, the Supreme Court has limited *Chevron*'s applicability by introducing a threshold inquiry that uses a multifactor balancing test to determine whether the two-step *Chevron* analysis is appropriate. *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002); Christensen v. Harris Cty., 529 U.S. 576, 587 (2000). This threshold inquiry is often referred to as *Chevron* "step zero." *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

For a detailed discussion of Chevron deference, see CRS Report R43203, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, by Daniel T. Shedd and Todd Garvey [hereinafter CRS Chevron Report].

[185] Specifically, in *Brand X*, the Supreme Court held that a prior judicial interpretation of an agency's statutory authority does not preclude an agency from adopting a different reading in the future unless the court concludes that Congress clearly spoke to the issue at *Chevron*'s first step. *See* 545 U.S. 967, 981 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). For more background on the *Brand X* case, see *CRS Chevron Report*, *supra* note 184.

[186] *See* Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. --- (forthcoming 2017) (analyzing circuit court cases from 2003 and 2013 and concluding that agency interpretations prevailed in federal court about 25% more often when *Chevron* applied than when it did not).

The Court has ruled that *Chevron* deference extends to questions respecting an agency's regulatory jurisdiction. City of Arlington v. FCC, --- U.S. ---, 133 S. Ct. 1863, 1874–75 (2013). Courts will also defer to an agency's interpretation of its own regulations. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997). Several Supreme Court Justices, including Justice Scalia, have questioned this doctrine. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. ---, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part); *id.* at 1338–39 (Roberts, J., concurring, joined by Alito, J.); Perez v. Mortg. Bankers Ass'n, --- U.S. ---, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring); *id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment). Judge Gorsuch, however, does not appear to have written an opinion addressing the matter in any depth.

[187] Caring Hearts Pers. Home Servs. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016).

[188] *Id.*

[189] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015).

[190] *See, e.g.*, David Feder, *The Administrative Law Originalism of Neil Gorsuch*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 21, 2016), http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch/; Jonathan H. Adler, *Gorsuch's Judicial Philosophy is Like Scalia's—With One Big Difference*, WASH. POST (Feb. 1, 2017), https://www.washingtonpost.com/opinions/gorsuchs-judicial-philosophy-is-like-scalias--with-one-big-
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declined to defer to an agency's determination under *Chevron* and *Brand X*,[191] the nominee wrote a separate concurring opinion calling into the question the wisdom and constitutionality of the doctrines created by both cases.[192] Emphasizing the concept of separated powers envisioned by the Founders, Judge Gorsuch's concurring opinion distinguished between the elected legislature's task of setting policy prospectively and the judiciary's duty of neutrally interpreting the law in retroactively adjudicating disputes.[193] For Judge Gorsuch, this assignment of responsibilities ensures liberty by protecting parties who cannot alter their past conduct to the changes in majoritarian politics and bars unelected judges from setting policy for the nation.[194]

Judge Gorsuch's concurrence further noted that the Founders provided that "judicial judgments 'may not lawfully be revised, overturned or refused faith and credit by' the elected branches of government,"[195] ensuring that neutral decision makers would determine the meaning of the law in disputed cases. In the views of the nominee, however, *Brand X* runs contrary to this constitutional alignment by permitting executive branch agencies to displace the judiciary's legal determinations. As a consequence, Judge Gorsuch suggested that under *Brand X*, judicial declarations of what the law means are no longer authoritative, because such decisions are "subject to revision by a politically accountable branch of government."[196] For the nominee, the constitutional remedy when the political branches disagree with the judiciary's interpretation of the law is legislation.[197] But under *Brand X*, Judge Gorsuch has argued, the executive branch is empowered to render decisions on the meaning of the law, effectively "legislating" without complying with the procedures of bicameralism and presentment required by the Constitution.[198]

Following this line of reasoning, Judge Gorsuch's concurrence in *Gutierrez-Brizuela* also questioned the doctrine of *Chevron* deference itself. While the APA directs courts to interpret the statutory authority of federal agencies,[199] *Chevron* deference, in Judge Gorsuch's view, operates as an "abdication" of the courts' duty to say what the law is.[200] His concurrence notes that this practice implicates Due Process and Equal Protection concerns with "the political branches intruding on judicial functions."[201] Specifically, Judge Gorsuch raised concerns that, under *Chevron*, regulated entities are not given fair notice as to what the law requires;[202] and politicized decision makers are accorded vast discretion to determine the law's meaning according to "the shift of political winds,"[203] "risking the possibility that unpopular groups might be singled out for . . . mistreatment."[204]

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difference/2017/02/01/44370cf8-e881-11e6-bf6f-301b6b443624_story.html?tid=a_inl&utm_term=.306f48aef230.

[191] *Gutierrez-Brizuela*, 834 F.3d at 1149.

[192] *Id*. at 1149–58 (Gorsuch, J., concurring).

[193] *Id*. at 1149–50.

[194] *Id.*

[195] *Id*. at 1150 (quoting Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)).

[196] *Id*.

[197] *Id*. at 1150.

[198] *Id*. at 1151.

[199] 5 U.S.C. § 706(2)(A), (C).

[200] 831 F.3d at 1152 (Gorsuch, J., concurring).

[201] *Id*.

[202] *Id*. at 1152–53.

[203] *Id*.

[204] *Compare id*. at 1152 ("Transferring the job of saying what the law is from the judiciary to the executive (continued...)

Further, the *Gutierrez-Brizuela* concurrence also critiqued a prominent justification for the *Chevron* doctrine—that *Chevron* merely reflects a congressional delegation of interpretive authority—as a fiction that lacks any express manifestation of clear congressional intent.[205] In addition, Judge Gorsuch asserted that, even if Congress is assumed to have intended to delegate interpretative authority to federal agencies, the application of *Chevron* deference violates the non-delegation doctrine, which bars Congress from impermissibly delegating its constitutional authority to another branch of government.[206] While acknowledging the prevailing non-delegation principle—that in delegating authority, Congress must provide an "intelligible principle" to guide the agency's decision making[207]—Judge Gorsuch argued that the *Chevron* doctrine violates this principle by giving an agency authority to interpret the scope of its own jurisdictional power and issue broadly applicable regulations, coupled with the ability to reverse itself on short notice.[208]

Finally, Judge Gorsuch's concurrence questioned the propriety of consolidating power in the hands of a single branch of government, arguing that *Chevron* deference effectively "invests the power to decide the meaning of the law . . . in the very entity charged with enforcing the law."[209] Given the "vast power" of the executive branch and the lack of effective oversight of political appointees,[210] he argued, "[u]nder any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more."[211] Instead, Judge Gorsuch contended in *Gutierrez-Brizuela* that courts should examine the law's meaning de novo, or without deference to the agency's view, allowing regulated parties to rely on consistent agency interpretations while simultaneously allowing courts to operate properly within the Constitution's framework.[212]

On the one hand, Judge Gorsuch's views on judicial deference to agency legal interpretations contrast with those of Justice Scalia, who, for much of his time on the bench, was viewed by scholars as a defender of *Chevron* deference.[213] The doctrine, for Justice Scalia, operated as a clear background rule from which Congress could legislate.[214] Judge Gorsuch's opinions, in

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unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions."), *with id.* at 1149 ("Effectively leaving parties who cannot alter their past conduct to the mercy of majoritarian politics and risking the possibility that unpopular groups might be singled out for this sort of mistreatment—and raising—along the way, too, grave due process (fair notice) and equal protection problems.").

[205] *Id.* at 1153.

[206] *Id.* at 1154–55. For more on Judge Gorsuch's views on the non-delegation doctrine, see discussion *infra* in *Separation of Powers*.

[207] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

[208] *Gutierrez-Brizuela*, 834 F.3d at 1154 (citing Mistretta v. United States, 488 U.S. 361, 372–73 (1989)).

[209] *Id.* at 1155.

[210] *Id.* (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).

[211] *Id.*

[212] *Id.* at 1158.

[213] *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 859–60 (2001) ("Justice Scalia has consistently argued for the broadest possible conception of the scope of the *Chevron* doctrine, urging, for example, that it applies to agencies that lack the power to render binding legal rulings and to interpretations by agencies issued in opinion letters or in briefs."). *See generally CRS Scalia Report*, *supra* note 8, at 8.

[214] United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) ("*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (similar). *But see* Perez v. Mortg. Bankers Ass'n, --- U.S. ---, 135 S. Ct. 1199, 1211 (continued...)

contrast, can be read to suggest that he might favor eliminating the doctrine, or at least cabining its application as he did in the majority opinion in *Gutierrez-Brizuela* and in another case discussed below, *De Niz Robles v. Lynch*.[215] As a result, if he were to succeed Justice Scalia, the nominee's opinions in *De Niz Robles* and *Gutierrez-Brizuela* could suggest that he might favor a narrowing of the scope of *Chevron* deference in future cases.[216] On the other hand, while Justice Scalia supported *Chevron* deference in cases of perceived statutory ambiguity, he nevertheless frequently found that statutory text was unambiguous, and, thus, there was no need to consider whether deference to the agency was appropriate.[217] In that vein, insofar as Judge Gorsuch's decisions have found statutes to be unambiguous,[218] his approach to such statutes may be generally consistent with Justice Scalia's views.

Judge Gorsuch's opposition to the doctrine of *Brand X* on separation-of-powers grounds, on the other hand, finds harmony with Justice Scalia's view on the matter. Justice Scalia wrote a dissenting opinion in that case, objecting to the majority's decision on pragmatic[219] and constitutional grounds.[220] In Justice Scalia's view, and in a view similar to the nominee's, *Brand X* impermissibly permits "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution" to be overruled by executive branch officers.[221]

Nonetheless, Judge Gorsuch, while questioning the Supreme Court's precedents, acknowledged that as a federal appeals court judge, he was not in a position to overrule cases like *Chevron* and *Brand X*.[222] At the same time, when the applicability of these cases was unclear, Judge Gorsuch appears to have cabined the circumstance in which these doctrines apply. For example, in *De Niz Robles*, a precursor to the Tenth Circuit's opinion in *Gutierrez-Brizuela*,[223] Judge Gorsuch, writing for a unanimous panel, rejected the retroactive application of an agency's adjudication that upset the affected party's reliance interests.[224] While the details of the procedural history of *De Niz Robles* is quite complex and beyond the scope of this report, the Tenth Circuit had

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(2015) (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations.").

[215] 803 F.3d 1165 (10th Cir. 2015).

[216] For example, the Supreme Court declined to apply *Chevron* deference in certain cases that present "extraordinary" questions. *See, e.g.*, King v. Burwell, --- U.S. ---, 135 S. Ct. 2480, 2495–96 (2015). *See generally* Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1868 (2015) (discussing scholarship and cases that indicate a potential narrowing of the doctrine's scope).

[217] *See, e.g.*, Immigration & Naturalization Serv. v. Cardozo-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) ("Since the Court quite rightly concludes that the INS's interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act, there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference." (internal citations omitted)); Scalia, *supra* note 69, at 1183 ("It is rare . . . that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft.").

[218] *See, e.g.*, TransAm Trucking, Inc. v. Admin. Review Bd., U.S. Dep't of Labor, 833 F.3d 1206, 1208 (10th Cir. 2016).

[219] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (Scalia, J., dissenting) (criticizing the majority's decision for creating an unworkable rule for lower courts).

[220] *Id*. at 1017.

[221] *Id*. (internal quotations marks and citation omitted).

[222] De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015) ("Still, as but a court of appeals *Chevron* and *Brand X* bind us and the question is what to do in light of them.").

[223] *Id*. at 1180. For further detail on this case, see discussion *infra* in *Separation of Powers*.

[224] *De Niz Robles*, 803 F.3d at 1180.

previously deferred to an agency's interpretation of an ambiguous statute under *Chevron* and *Brand X* when the agency *prospectively* applied a statutory interpretation at odds with the court's prior reading.[225] In *De Niz Robles*, however, the agency *retroactively* applied an interpretation—at odds with the earlier Tenth Circuit opinion—against a party who had significant reliance interests on the prior contrary Tenth Circuit decision.[226]

Judge Gorsuch's opinion in *De Niz Robles* rejected the application of deference in this situation, effectively narrowing the circumstances in which the doctrines of *Chevron* and *Brand X* were appropriate.[227] In other words, at least in the Tenth Circuit, *De Niz Robles* did not read *Brand X* to apply when an agency seeks to apply its interpretation retroactively via adjudication. As in his opinion in *Gutierrez-Brizuela*, the nominee grounded his decision in principles of separation of powers, due process, and equal protection, noting the presumptive prospective effect of legislation compared with the retroactive effect of a judicial decision.[228] Judge Gorsuch reasoned that the more an agency's decision resembles that of a judge—applying a preexisting rule to new facts and circumstances—the stronger the case for retroactive application of the decision; but the more the decision resembles legislation—prescribing new generally applicable rules—the less likely such a decision should be granted retroactive force.[229] Given this guidepost, *De Niz Robles* concluded that when an agency issues an interpretation of an ambiguous statutory provision under *Chevron* via an adjudication that displaces a contrary judicial decision, it is operating like legislators setting new policies.[230] Consequently, per the 2015 ruling, such decisions should presumptively apply only prospectively.[231]

Beyond Judge Gorsuch's two major rulings in *Gutierrez-Brizuela* and *De Niz Robles*, he has tended to be more skeptical of deferring to agencies on legal questions.[232] For example, in *TransAm Trucking, Inc. v. Department of Labor*, the panel majority upheld a determination by the Department of Labor that a truck driver was terminated in violation of the Surface Transportation Assistance Act.[233] At issue was whether the truck driver engaged in protected activity under the Act by "refus[ing] to operate a vehicle" due to safety concerns.[234] The court deferred under

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[225] *See* Padilla-Caldera v. Holder, 637 F.3d 1140, 1153 (10th Cir. 2011).

[226] *De Niz Robles*, 803 F.3d at 1168.

[227] *Id*. at 1172.

[228] *Id*. at 1170–71.

[229] *Id*. at 1172.

[230] *Id*.

[231] *Id*. Judge Gorsuch also wrote that, while the Supreme Court's opinion in *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947), permits the retroactive application of agency adjudications, that opinion nevertheless indicates that in some cases adjudications should not be accorded retroactive force. To the nominee, the intersection between *Chevron*'s second step and *Brand X* presents such a case given the opportunity for partisan actors to upset reliance interests and punish individuals for past conduct. *See De Niz Robles*, 803 F.3d at 1175–76.

[232] *See, e.g.*, TransAm Trucking, Inc. v. Admin. Review Bd., U.S. Dep't of Labor, 833 F.3d 1206, 1208 (10th Cir. 2016); Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1145–46, 1166 (10th Cir. 2010) (en banc) (declining to defer to EPA's statutory interpretation and invalidating its "final land determination"); *id.* at 1170 (Ebel, J. dissenting) (arguing that EPA's statutory interpretation was entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which directs courts to defer to agency interpretations based on "those factors which give it power to persuade"); *see also* Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141, 1155 (10th Cir. 2016) (Ebel, J.) (Gorsuch, J., joining the majority opinion invalidating an agency rule promulgated under the Consumer Product Safety Act because the agency failed to explain its factual findings in support of the rule); *but see id*. at 1160–62 (Bacharach, J., dissenting) (finding substantial evidence to support the agency's decision and deferring to the agency's interpretation of the statute under *Chevron*).

[233] *TransAm Trucking*, 833 F.3d at 1208.

[234] 49 U.S.C. § 31105(a)(1)(B)(ii).

Chevron to the Department's determination that the driver's decision to drive his truck away from his trailer in freezing conditions qualified as protected activity under the statute.[235] Judge Gorsuch wrote a dissenting opinion, arguing that the statute's meaning was plain; for him, "refus[ing] to operate a vehicle" simply did not include actually driving a vehicle.[236] Further, he rejected extending *Chevron* deference to the agency's interpretation, noting that, in contrast to the majority's reasoning, the absence of a statutory definition did not create ambiguity.[237] Instead, Judge Gorsuch thought the statute was clear and unambiguous, and therefore would have ruled against the agency's interpretation at *Chevron*'s first step.[238]

Discretionary and Factual Review. In contrast to his views on the doctrine of judicial deference to agency statutory interpretations, Judge Gorsuch does not appear to have expressed strong objections to the mechanics of discretionary or factual review,[239] a second major area of substantive administrative law wherein courts will "hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion."[240] The

[235] *TransAm Trucking*, 833 F.3d at 1212.

[236] *Id*. at 1215–16 (Gorsuch, J. dissenting).

[237] *Id*. at 1216.

[238] *Id*. at 1217. In unanimous statutory review decisions that Judge Gorsuch has written or joined, he has also sometimes more narrowly construed the statutory authority of agencies. *See, e.g.*, Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 976–77 (10th Cir. 2016) (Gorsuch, J.) (invalidating a penalty issued by the Department of Health and Human Services because the agency applied the wrong regulation and the petitioner could not have been expected to know what actions were expected under the relevant statute); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J.); De Niz Robles v. Lynch, 803 F.3d 1165, 1180 (10th Cir. 2015) (Gorsuch, J.); Contreras-Bocanegra v. Holder, 678 F.3d 811, 813 (10th Cir. 2012) (en banc) (Lucero, J.) (Gorsuch, J., joining unanimous opinion holding that the agency's regulation contradicts Congress's statutory intent). That said, Judge Gorsuch has also joined and written opinions upholding an agency's legal interpretation. *See, e.g.*, S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf't, 620 F.3d 1227, 1240–42 (10th Cir. 2010) (Tymkovich, J.) (Gorsuch, J., joining opinion deferring to Bureau of Land Management's interpretation of its own order); Scherer v. U.S. Forest Serv., 653 F.3d 1241, 1242 (10th Cir. 2011) (Gorsuch, J.) (rejecting a facial challenge to a Forest Service regulation because at least some applications of the regulation were consistent with the Forest Service's statutory authority).

[239] It bears mention that a court's statutory analysis at *Chevron*'s second step, examining whether the agency's construction is reasonable, can overlap analytically with arbitrary and capricious review. *See* Judulang v. Holder, 565 U.S. ---, 132 S. Ct. 476, 483 n.7 (2011) ("The Government urges us instead to analyze this case under the second step of the test we announced in *Chevron* . . . to govern judicial review of an agency's statutory interpretations. Were we to do so, our analysis would be the same."); *see also* Arent v. Shalala, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995) ("The *Chevron* analysis and the 'arbitrary, capricious' inquiry set forth in [*Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29 (1983),] overlap in some circumstances, because whether an agency action is 'manifestly contrary to the statute' is important both under *Chevron* and under *State Farm*.").

[240] *See* 5 U.S.C. § 706(2)(A). The Supreme Court has viewed this provision as requiring agencies to "examine the relevant data and articulate a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).The Court has explained that a decision is arbitrary if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Arbitrary and capricious review is generally "narrow," as "a court is not to substitute its judgment for that of the agency." *See* United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Hous. & Urban Dev., 567 F.3d 1235, 1239 (10th Cir. 2009) ("Our standard of review under the arbitrary and capricious rubric is narrow, and we may not substitute our own judgment for that of the agency."); *State Farm*, 463 U.S. at 43. While in certain cases, agency decisions must be supported by "substantial evidence," *see, e.g.*, 29 U.S.C. § 160(e) (National Labor Relations Act); 5 U.S.C. § 706(2)(E) (Administrative Procedure Act), courts and commentators have characterized review under the two standards as "essentially the same." Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141, 1148 (10th Cir. 2016) (noting in the circumstances of judging factual support, the two review standards are the same); Ass'n of Data Processing Serv. (continued...)

nominee has joined or written several unanimous decisions upholding agency actions under the arbitrary and capricious standard.[241] However, the nominee has sometimes departed from his colleagues and written separately to find agency actions arbitrary and capricious or lacking in substantial evidence, particularly where he has doubted that the parties received fair notice of applicable rules and regulations.[242] For example, in *National Labor Relations Board v. Community Health Services*, the majority panel upheld the Board's decision to "exclude interim earnings from backpay calculations when the employer has wrongfully reduced employee hours, but not terminated employment."[243] The majority noted that while the agency's decision was inconsistent with prior determinations, the agency had considerable discretion under the National Labor Relations Act to determine how back pay should be calculated and, accordingly, ruled that its justifications were reasonable.[244] Judge Gorsuch dissented, claiming that the agency's decision failed to explain why it treated similarly situated entities—that is, terminated employees versus reduced hours employees—differently and departed from its own preexisting rules.[245] His opinion rejected the agency's offered rationales, faulting the agency for essentially announcing a new rule without justification, and arbitrarily distinguishing between situations where employees were terminated or had their hours reduced.[246]

Capital Punishment

Judge Gorsuch's views on capital punishment may be particularly important insofar as he would, if confirmed, be replacing Justice Scalia, who believed the death penalty was fully consistent with the Eighth Amendment.[247] With two Justices currently on the Court who have argued openly that

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Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 77, 683–84 (D.C. Cir. 1984) (Scalia, J.) ("[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same."). *But see* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 763–64 (2008) ("[I]t is sometimes thought that review for substantial evidence is somewhat more searching.").

[241] Miami Tribe of Okla. v. United States, 656 F.3d 1129, 1151 (10th Cir. 2011) (holding that the denial of an application by the Bureau of Indian Affairs was not arbitrary or capricious because the agency properly applied its own regulations) (Tymkovich, J.) (Gorsuch, J., joining unanimous opinion); Copart, Inc. v. Admin. Review Bd., Dep't of Labor, 495 F.3d 1197, 1203 (10th Cir. 2007) (Gorsuch, J.) (holding that the award of attorney fees by the Administrative Review Board of the Department of Labor was not arbitrary or capricious); ACAP Fin., Inc. v. Sec. & Exch. Comm'n, 783 F.3d 763, 766 (10th Cir. 2015) (Gorsuch, J.) (ruling that the sanction levied by the Securities and Exchange Commission was not arbitrary and capricious in part because the plaintiffs failed to show the agency had changed its policy); *see also* Pub. Serv. Co. of N.M. v. NLRB, 692 F.3d 1068, 1079 (10th Cir. 2012) (Gorsuch, J.) (upholding the factual findings of the National Labor Relations Board in a decision finding that an employer had engaged in an unfair labor practice).

[242] *See* Compass Envtl., Inc. v. Occupational Safety & Health Review Comm'n, 663 F.3d 1164 (10th Cir. 2011) (Gorsuch, J., dissenting on the grounds that the Secretary failed to produce evidence that "reasonably prudent employers in the industry" would have anticipated the danger and provided proper training); *Zen Magnets*, 841 F.3d at 1155 (Ebel, J.) (Gorsuch, J., joining the majority opinion invalidating an agency rule because the agency failed to substantiate and explain its factual findings in support of its regulation); Salmon v. Astrue, 309 F. App'x 113, 116 (9th Cir. 2009) (Gorsuch, J. dissenting) (arguing that the panel should have upheld the district court's determination that the Social Security Administration's conclusions were reasonable).

[243] NLRB v. Cmty. Health Servs., 812 F.3d 768, 772, 780 (10th Cir. 2016).

[244] *Id*. at 772–74.

[245] *Id*. at 780 (Gorsuch, J., dissenting).

[246] *Id*. at 780, 782–83, 785–86.

[247] *See, e.g.*, Baze v. Rees, 553 U.S. 35, 87 (2008) (Scalia, J., concurring in judgment) ("This conclusion [that the death penalty violates the Eight Amendment] is insupportable as an interpretation of the Constitution, which generally leaves (continued...)

the practice is unconstitutional in all its forms,[248] and with the Court remaining closely divided on many issues relating to capital punishment,[249] Judge Gorsuch could be influential regarding the future of the death penalty. Although the nominee has not written extensively on capital punishment,[250] he has authored or joined opinions reviewing the manner in which states carry out executions, as well as opinions reviewing state court convictions and sentences in capital cases. These votes and opinions suggest that, while the nominee is not wholly opposed to scrutinizing a state's imposition of the death penalty, in line with his general views on judicial restraint, he generally accords a large degree of deference to decisions by state legislators, judges, and executive branch officials on matters relating to the states' imposition and administration of capital punishment.

One issue over which the Court has remained divided concerns the manner in which states carry out the death penalty. For example, in December 2016, the Supreme Court split 4-4 over whether to stay (i.e., suspend pending further review) the execution of an Alabama man who had challenged the state's method of administering the death penalty on the grounds that it violates the Eighth Amendment's prohibition against "cruel and unusual punishment."[251] The tie vote resulted in the denial of the inmate's application for a stay and left in place a decision by the Eleventh Circuit that had rejected as untimely and unmeritorious the prisoner's Eighth Amendment challenge to the drug protocol that the State of Alabama used in its lethal injections.[252] Judge Gorsuch's votes in support of two Tenth Circuit opinions rejecting similar

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it to democratically elected legislatures rather than courts to decide what makes significant contribution to social or public purposes."); Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("What compelled Arizona (and many other states) to specify particular 'aggravating factors' that must be found before the death penalty can be imposed was the line of this Court's cases beginning with *Furman v. Georgia*. In my view, that line of decisions had no proper foundation in the Constitution."). For further discussion of Justice Scalia's jurisprudence on capital punishment, see *CRS Scalia Report*, *supra* note 8, at 10–12.

[248] Glossip v. Gross, --- U.S. ---, 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting). Justice Ginsburg joined in Justice Breyer's dissent in *Glossip*. Previously, certain other Justices on the Court shared similar views. *See, e.g.*, *Baze*, 553 U.S. at 86 (Stevens, J., concurring) ("I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972))).

[249] *E.g.*, *id.* at 2746 (5-4 decision) (holding that the use of the drug midazolam in executions by lethal injection was unlikely to violate the Eighth Amendment's prohibition against cruel and unusual punishment); Hall v. Florida, 572 U.S. ---, 134 S. Ct. 1986, 1990 (2014) (5-4 decision) (holding that a state may not rely solely on an IQ test to determine whether an inmate has an intellectual disability that makes him ineligible for the death penalty). *But see* Hurst v. Florida, --- U.S. ---, 136 S. Ct. 616, 624 (2016) (8-1 decision with Justice Scalia in the majority) (holding that the Sixth Amendment requires that a jury—and not a judge—make factual determinations necessary for imposition of the death penalty).

[250] In 2006, Judge Gorsuch released a book in which he explored the ethical and legal issues surrounding assisted suicide and euthanasia. However, the book did not contain a discussion of capital punishment—a topic that the nominee characterized as raising "unique questions" of its own. *See generally* GORSUCH, FUTURE, *supra* note 11, at 157.

[251] Smith v. Alabama, --- U.S. ---, 137 S. Ct. 462, 462 (2016).

[252] *Id.* at 462; Grayson v. Warden, No. 16-17167, 2016 U.S. App. LEXIS 21758, *1–2 (11th Cir. Dec. 7, 2016) (per curiam). In May 2016, the Supreme Court split 4-4 on whether to stay the execution of an Alabama inmate who had challenged his death sentence on the grounds that his dementia made him incompetent for execution. Dunn v. Madison, --- U.S. ---, 136 S. Ct. 1841, 1841 (2016) (4-4 vote) (denying the application to vacate the stay of execution). The tie vote left in place the Eleventh Circuit's stay of execution. *See* Debra Cassens Weiss, *In 4-4 Split, Supreme Court Refuses to Overturn Execution Stay Based on Inmate's Dementia*, ABA J. (May 13, 2016), http://www.abajournal.com/news/article/in_4_4_split_supreme_court_refuses_to_overturn_execution_stay_based_on_inma.

challenges to the method in which a state carried out executions suggests that, if confirmed, he might provide a fifth vote against such challenges.[253] In *Warner v. Gross*, Judge Gorsuch joined the majority opinion holding that the use of the drug midazolam in executions by lethal injection was unlikely to violate the Eighth Amendment's prohibition against cruel and unusual punishment.[254] The Supreme Court later affirmed that decision by a vote of 5-4, with Justice Scalia in the majority.[255] Similarly, in *Estate of Lockett v. Fallin*, Judge Gorsuch joined the majority opinion affirming the dismissal of an Eighth Amendment claim brought by an executed prisoner's estate.[256] The court, relying on recent guidance from the Supreme Court, held that an accidental and "isolated mishap" that occurs during an execution does not violate the Eighth Amendment even if it causes some pain to the inmate.[257]

The nominee's views on the death penalty may also find expression in opinions he has authored or joined reviewing federal district court decisions on habeas corpus petitions. Assuming they have satisfied various procedural hurdles, state prisoners sentenced to death pursuant to a judgment of a state court may challenge their convictions and sentences in federal court on the grounds that they violate the Constitution or other federal law.[258] Such prisoners may file a petition seeking a writ of habeas corpus—that is, generally, a judicial determination as to whether the prisoner should receive a new trial, new sentence, or be released.[259] Notably, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires federal courts to accord a large degree of deference to state court decisions when reviewing a prisoner's conviction or sentence.[260] This deferential standard of review, which is designed to avoid friction between the federal government and the states,[261] typically makes it difficult for an inmate to prevail in a federal habeas case.[262]

Like Justice Scalia, who rarely voted to grant petitioners' applications for federal habeas relief in death penalty cases,[263] Judge Gorsuch has authored or joined majority opinions denying such

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[253] Warner v. Gross, 776 F.3d 721, 736 (10th Cir. 2015); *see also* Estate of Lockett v. Fallin, 841 F.3d 1098, 1110 (10th Cir. 2016).

[254] *Warner*, 776 F.3d at 736.

[255] Glossip v. Gross, --- U.S. ---, 135 S. Ct. 2726, 2746 (2015) (holding that use of the drug midazolam in executions by lethal injection was unlikely to violate the Eighth Amendment's prohibition against cruel and unusual punishment).

[256] *Estate of Lockett*, 841 F.3d at 1103–04.

[257] *Id.* at 1110 ("[A]n isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a substantial risk of serious harm.") (quoting Baze v. Rees, 553 U.S. 35, 50 (2008))).

[258] 28 U.S.C. § 2241.

[259] *See id.* § 2243; Trevino v. Thaler, --- U.S. ---, 133 S. Ct. 1911, 1917 (2013).

[260] Under AEDPA, if a state court has "adjudicated on the merits" a federal habeas petitioner's claim, the petitioner may obtain habeas relief only if the state court proceedings: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

[261] *See, e.g.*, Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 225 ("[S]tate courts are obligated to enforce federal law to the same extent as federal courts, and principles of comity and federalism dictate that their determinations be entitled to some deference."). For more on the role of habeas in Judge Gorsuch's federalism jurisprudence, *see* discussion *infra* in *Federalism.*

[262] Dobson, *supra* note 261, at 226 ("AEDPA . . . amended habeas law to direct federal courts to accord extreme deference to state court determinations of federal law.").

[263] Elizabeth Koh, *Here Are Trump Supreme Court Nominee Neil Gorsuch's Most Interesting Decisions*, MCCLATCHY (Jan. 31, 2017), http://www.mcclatchydc.com/news/politics-government/article129927159.html ("Scalia was rarely receptive to petitioners filing for relief from the death penalty, and it seems unlikely that Gorsuch would be any more (continued...)

relief in a number of cases, emphasizing AEDPA's deferential standard of review.[264] In a few cases, the judge has dissented from majority opinions granting such relief, arguing that the court should have accorded more deference to the state court's decision to reject the inmate's challenges to his sentence or conviction. For example, in *Wilson v. Workman*, the Oklahoma Court of Criminal Appeals had rejected two death row inmates' claims of ineffective assistance of counsel after declining to consider additional evidence proffered by the inmates on an issue that was not part of the trial court's record in the original proceeding.[265] The Tenth Circuit, sitting en banc, held that the deferential standard of review of state court decisions under AEDPA does not apply when the state court fails to consider material evidence because the state court has not adjudicated the claim "on the merits" under AEDPA.[266] Judge Gorsuch authored a dissent arguing that a state court's decision to exclude evidence in accordance with state evidentiary rules amounted to an adjudication on the merits, thereby requiring federal courts to apply AEDPA's deferential standard in reviewing the state court's decision.[267]

A further example of his tendency to defer to the states on capital punishment issues is his opinion in *Eizember v. Trammel*, in which the court reviewed the convictions and death sentence of a man who had murdered a married couple and committed various other crimes.[268] The prisoner argued that the state trial court should have excluded jurors because of their alleged bias in favor of capital punishment.[269] All three judges on the panel agreed that the prisoner's convictions should be affirmed, and two judges (including Judge Gorsuch) agreed that the prisoner's sentence should be affirmed.[270] However, Judge Gorsuch disagreed with the other two judges on the panel on the question of whether the state court of appeals had neglected to apply controlling Supreme Court precedent properly in assessing the petitioner's claim of juror bias during sentencing.[271] He argued that the court should defer to the state appeals court's statements

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likely to consider such requests as a justice of the high court.").

[264] *E.g.*, Matthews v. Workman, 577 F.3d 1175, 1182 (10th Cir. 2009) (amended decision) ("We cannot say that the [Oklahoma Court of Criminal Appeals'] decision amounts to reversible error under AEDPA's deferential standard."). In *Matthews*, the prisoner challenged his conviction and sentence on several grounds, including "juror misconduct, the lack of sufficient evidence to sustain his conviction, prosecutorial misconduct, and the ineffective assistance he received from his counsel." *Id.* at 1178. *See also, e.g.*, Grant v. Trammell, 727 F.3d 1006, 1024–25 (10th Cir. 2013) (determining, among other things, that the failure of the defendant's trial attorney to investigate and present evidence at the sentencing hearing about the defendant's childhood and family background would not have changed the outcome of the trial); Banks v. Workman, 692 F.3d 1133, 1136 (10th Cir. 2012) (rejecting claims based on the duty to disclose exculpatory evidence, ineffective assistance of counsel, and alleged prosecutorial misconduct, among others); Wackerly v. Workman, 580 F.3d 1171, 1173 (10th Cir. 2009) (rejecting a claim of ineffective assistance of counsel in a habeas challenge to a conviction resulting in the death penalty). Judge Gorsuch has also joined several opinions in which the court denied federal habeas relief that a petitioner on death row had sought on various grounds. *E.g.*, Rojem v. Royal, No. 14-6210, 2016 U.S. App. LEXIS 22174, *10 (Dec. 14, 2016) (rejecting claims of ineffective assistance of appellate counsel and exclusion of mitigating evidence); Selsor v. Workman, 644 F.3d 984, 986 (10th Cir. 2011) (rejecting claims asserting violations of due process rights, prosecutorial misconduct, and violation of Eighth Amendment rights, among others).

[265] 577 F.3d 1284, 1286–87 (10th Cir. 2009) (en banc).

[266] *Id.* at 1300.

[267] *Id.* at 1315 (Gorsuch, J. dissenting); *see also* Wilson v. Trammel, 706 F.3d 1286, 1311 (10th Cir. 2013) (Gorsuch, J. concurring) (stating that, under subsequent Tenth Circuit precedent, [*Wilson v. Workman*] "no longer controls" because it relied upon a mistaken interpretation of state evidentiary rules).

[268] 803 F.3d 1129, 1133–34 (10th Cir. 2015).

[269] *Id.* at 1135.

[270] *Id.* at 1148, 1163.

[271] The other two judges on the panel wrote separately to disagree with the majority opinion's determination that the (continued...)

in its opinion, which indicated that the state trial court had applied the correct standard.[272] Judge Gorsuch asserted that the Tenth Circuit owed "double deference" to the state criminal appeals court's decision that the state trial court did not improperly fail to exclude the jurors from sentencing proceedings.[273]

Although Judge Gorsuch's opinions in these cases suggest he will largely defer to the states on matters related to capital punishment, Judge Gorsuch's concurrence in one capital case in which the majority denied the petition for habeas relief indicates that there are some circumstances in which he may question the state's imposition of the death penalty. In *Williams v. Trammel*, Judge Gorsuch agreed that the court should deny the petitioner's claim for relief but expressed concerns with the state court's apparent willingness to impose capital punishment on an accomplice who had not intended that a criminal activity result in the death of another person or had not otherwise shown a reckless disregard for human life during the commission of the crime.[274] The judge wrote that the Eighth Amendment phrase "cruel and unusual punishment," as originally understood by people at the time of the founding and subsequently interpreted by the Supreme Court, would likely bar such a concept of accessory liability.[275] Thus, although Judge Gorsuch has generally demonstrated a propensity to defer to the decisions of state legislators, judges, and executive branch officials in matters relating to capital punishment, he appears willing to scrutinize state court decisions that appear to contravene existing constitutional protections for capital defendants if those protections are clearly articulated in Supreme Court decisions. Nevertheless, Judge Gorsuch may be reluctant to engage in a broad reading of the Constitution and Supreme Court precedent that would expand the rights of such defendants beyond existing precedent.[276]

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state appeals court had properly applied controlling Supreme Court precedent. Chief Judge Mary Beck Briscoe would have affirmed the prisoner's convictions but reversed his death sentence and remanded the case for resentencing. *Id.* at 1148–62 (Briscoe, C.J., concurring in part and dissenting in part). The Chief Judge would have held that the state court erred by applying the wrong legal standard in its assessment of the petitioner's juror bias claim, contrary to Supreme Court precedent. *Id.* She would have held that the state court erred when it failed to strike a juror who was biased in favor of imposing the death penalty over other forms of punishment. *Id.* Judge McHugh agreed with the majority opinion that the petitioner was not entitled to habeas relief, but disagreed that the state court applied the correct legal standard in assessing the petitioner's juror bias claim. *Id.* at 1163 (McHugh, J., concurring in part and dissenting in part). Judge Gorsuch responded to the partial dissents of his colleagues by stating that the petitioner had waived the argument that the state court applied the wrong legal standard, but that, even in the absence of waiver, the state appeals court actually applied the correct standard. *Id.* at 1140–43 (majority opinion).

[272] *Id.*

[273] *Id.* at 1138–39 ("When it comes to juror exclusion, the unavoidable fact is that the Supreme Court has left considerable room for trial court discretion, a discretion AEDPA only magnifies in the context of federal court review of state court decisions, and the resulting spectrum of permissible or reasonable judgment is large indeed."). *See generally* Wainwright v. Witt, 469 U.S. 412, 420–26 (1985) (establishing the standard for when a juror may be excluded "for cause" because of his views on capital punishment).

[274] 782 F.3d 1184, 1219 (10th Cir. 2015) (Gorsuch, J., concurring) ("I am unaware of any Supreme Court case law permitting states to execute accessories on a strict liability basis, without any showing of [criminal intent].").

[275] *Id.* (Gorsuch, J., concurring) ("It's hard to imagine the [Oklahoma Court of Criminal Appeals] meant such a revolution in accessory liability in murder cases. Hopefully (surely) the court will soon identify an appropriate *mens rea*. But if it really meant what it said, it will find itself on the wrong side of Supreme Court authority. . . . Indeed, executing someone for a strict liability offense would represent not only a highly 'unusual' punishment but one inimical to the common law at the time of the founding.").

[276] Warner v. Gross, 776 F.3d 721, 736 (10th Cir. 2015); *see also* Estate of Lockett v. Fallin, 841 F.3d 1098, 1110 (10th Cir. 2016). In another case, *Hooks v. Workman*, the majority held that the prisoner—who had been sentenced to death for killing his wife and unborn child—had a constitutional right to effective assistance of counsel in post-conviction *Atkins* proceedings. 689 F.3d 1148, 1159–60, 1207–08 (10th Cir. 2012). *Atkins* proceedings seek to ascertain whether a prisoner has an intellectual disability that makes him ineligible for the death penalty. *See* Atkins v. Virginia, 536 U.S. (continued...)

Civil Liability

One area where Judge Gorsuch could be influential, were he to be elevated to the Supreme Court, involves the procedural and substantive limits that federal law imposes on the exposure of defendants to monetary liability in civil cases, particularly in the context of lawsuits resulting from allegedly faulty products, discriminatory practices, or fraudulent activities.[277] This is because Justice Scalia, whom Judge Gorsuch could succeed on the Court, cast critical votes in several closely contested cases that read federal law relatively expansively to restrict the ability of plaintiffs to use (1) procedural vehicles, such as class action litigation, to facilitate civil recoveries,[278] and (2) substantive state law, including common law tort actions, to sue businesses that may have harmed them.[279] In other cases, Justice Scalia cast important votes in cases that more *narrowly* interpreted the scope of federal law to limit corporate defendants' potential civil liability.[280] Given Justice Scalia's decisions, commentators have considered how Judge Gorsuch might affect the Roberts Court's perceived "warmth" toward businesses on civil liability matters if the nominee were to be confirmed to the Court.[281] Pointing to his writings that are critical of the use of class action lawsuits in securities fraud cases,[282] his apparent preference for arbitration over litigation,[283] and his disfavor of affording deference to government agencies,[284] some

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304, 321 (2002) (holding that the Eighth Amendment's prohibition on "cruel and unusual punishment" precludes the execution of a cognitively disabled person). In *Hooks*, Judge Gorsuch, in a partial dissent, wrote that the court went too far by recognizing a new constitutional right to effective assistance of counsel in post-conviction *Atkins* proceedings that were not required by Supreme Court precedent. 689 F.3d at 1208 (Gorsuch, J., concurring in part and dissenting in part) ("I would decline Mr. Hook's invitation to address the novel constitutional question whether a right to counsel exists in post-conviction *Atkins* proceedings, a question my colleagues take up . . . . I would decline to offer an opinion on this question because there is no need to do so and many reasons to hesitate.").

[277] *See CRS Scalia Report*, *supra* note 8, at 12–15.

[278] *See, e.g.*, Comcast Corp. v. Behrend, --- U.S. ---, 133 S. Ct. 1426 (2013); Wal-Mart v. Dukes, 564 U.S. 338 (2011); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

[279] *See, e.g.*, Mut. Pharm. v. Bartlett, --- U.S. ---, 133 S. Ct. 2466, 2480 (2013); PLIVA, Inc. v. Mensing, 564 U.S. 604, 606 (2011); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 232 (2011).

[280] *See, e.g.*, Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011); Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401 (2011).

[281] *See, e.g.*, Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) ("Whether measured by decisions or Justices' votes, a plunge in warmth toward business during the 1960s (the heyday of the Warren Court) was quickly reversed; and the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were.").

[282] Jeff John Roberts, *What Supreme Court Nominee Neil Gorsuch Will Mean for U.S. Business*, FORTUNE (Feb. 1, 2017), http://fortune.com/2017/02/01/supreme-court-neil-gorsuch-business ("Meanwhile, corporations will see Gorsuch as an ally in their push to rein in class actions over alleged violations of securities law . . . . Gorsuch has railed about such suits as an opportunistic shakedown by lawyers.").

[283] *Id.* ("Companies, based on Gorsuch's previous rulings, can also expect he will support them in an ongoing push to force consumers to resolve disputes through arbitration instead of the courts."); *accord* Ragab v. Howard, 841 F.3d 1134, 1139–40 (10th Cir. 2016) (Gorsuch, J., dissenting) (reasoning that, although the parties' contracts contained conflicting provisions regarding the proper process for arbitration, the arbitration clauses were still enforceable because they signified an intent to arbitrate); Gorsuch, *Law's Irony*, *supra* note 28, at 746 ("No surprise, then, that many people now simply opt out of the civil justice system. Private alternative dispute resolution (ADR) abounds. Even the federal government has begun avoiding its own courts. Recently, for example, it opted to employ ADR to handle claims arising from the BP oil spill. These may be understandable developments given the costs and delays inherent in modern civil practice. But they raise questions, too, about the transparency and independence of decisionmaking, the lack of development of precedent, and the future role of courts in our civic life. For a society aspiring to live under the rule of law, does this represent an advance or perhaps something else?" (footnote omitted)).

[284] *See* discussion *supra* in *Administrative Law* (discussing *Chevron* deference); *see also* Rachel Apter, Bob Loeb &
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commentators suggest that Judge Gorsuch would limit the exposure of civil defendants, a tendency that may be perceived as business friendly.[285]

Through his judicial and nonjudicial writings, Judge Gorsuch has expressed an interest in issues related to civil liability, including what has been described by one commentator as a "penchant for . . . high pleading and procedural standards for civil litigants."[286] This interest is evident in several pointed critiques that he has authored on what he perceives as the misuses or excesses of litigation.[287] In addition, when asked to identify "the 10 most significant cases over which you presided" on the Senate Judiciary Committee's "Questionnaire for Nominee to the Supreme Court,"[288] two of the ten cases Judge Gorsuch selected were opinions that affirmed the dismissal of civil claims by the district court: a product liability suit involving a medical device[289] and a proposed class action alleging securities fraud.[290]

One broad theme that can be gleaned from Judge Gorsuch's judicial opinions related to civil liability is his distaste for the time and costs associated with protracted litigation.[291] In *Cook v. Rockwell International Corp.*, for example, the nominee lamented:

> It took a titanic fifteen years for the case to reach a jury. No doubt a testament to contemporary civil litigation practices that ensure before any trial is held every stone will be overturned in discovery—even if it means forcing everyone to endure the sort of staggering delay and (no doubt) equally staggering expense the parties endured here. Somehow, though, this case managed to survive the usually lethal gauntlet of pretrial proceedings and stagger its way to trial.[292]

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Paul David Meyer, *The Gorsuch Nomination: The Return of the Business Friendly Court?*, JD SUPRA BUS. ADVISOR (Feb. 6, 2017), http://www.jdsupra.com/legalnews/the-gorsuch-nomination-the-return-of-25081 (noting that Judge Gorsuch has "repeatedly expressed a distrust of the power entrusted to agencies" under *Chevron*).

[285] Apter, Loeb & Meyer, *supra* note 284 ("After reviewing Judge Gorsuch's background and record of judicial opinions, it appears that the prior relatively pro-business conservative trajectory of the Supreme Court will now be restored."); Roberts, *supra* note 282 ("[B]ased on Gorsuch's legal philosophy, and the business cases he has ruled on, it's no stretch to predict he will generally take the side of companies before the Supreme Court."); Sara Randazzo, *Judge Neil Gorsuch's Time on Bench: Several Opinions Favor Businesses Over Consumers*, WALL ST. J. (Jan. 31, 2017), https://www.wsj.com/articles/judge-neil-gorsuchs-time-on-bench-several-opinions-favor-businesses-over-consumers-1485912330 (similar).

[286] Jimmy Hoover, *Gorsuch Reveals 'Most Significant' Cases In Questionnaire*, LAW360 (Feb. 13, 2017).

[287] *See* Gorsuch, *Law's Irony*, *supra* note 28, at 743–44 (stating "the law's promise of deliberation and due process sometimes—ironically—invites the injustices of delay and resolution," and describing civil discovery as "today's version of the *Bleak House* irony"); Gorsuch, *Liberals*, *supra* note 63 ("But rather than use the judiciary for extraordinary cases, . . . American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education.").

[288] *Committee Questionnaire*, *supra* note 5, at 27–29.

[289] Caplinger v. Medtronic, Inc., 784 F.3d 1335 (10th Cir. 2015).

[290] MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P., 761 F.3d 1109 (10th Cir. 2014).

[291] *See* Gorsuch, *Law's Irony*, *supra* note 28, at 743–44.

[292] 790 F.3d 1088, 1090 (10th Cir. 2015); *see also* Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 984 (10th Cir. 2014) ("[W]hen, as in this case, a quick look at the case suggests material disputes of fact *do* exist on the question whether the parties agreed to arbitrate, round after round of discovery and motions practice isn't the answer. Parties should not have to endure years of waiting and exhaust legions of photocopiers in discovery and motions practice merely to learn *where* their dispute will be heard.") (emphasis in original); Kerr v. Hickenlooper, 759 F.3d 1186, 1195 (10th Cir. 2014) ("As things stand, the panel opinion assigns the litigants and the district court to a kind of litigation limbo—the promise of many more years wrestling with this case all without a wisp of an idea what rule of law might govern its disposition. That seems no small wrong to impose on any litigant in any case . . . .").

From this sentiment, it might be surmised that Judge Gorsuch may be particularly receptive to curtailing the costly litigation process through strict readings of statutes that create private rights of action and provide for procedural devices, such as class action suits, broad enforcement of arbitration clauses, or other means, to provide swift and definitive ends to protracted civil litigation to the extent the law allows.[293] Nonetheless, these views appear to be more nuanced when applied to the facts of particular cases.

In keeping with his approach to statutory interpretation,[294] in civil liability cases, Judge Gorsuch has shown a tendency to examine closely the federal statute or rule in question, especially in cases involving determinations of eligibility for class action status. In *Hammond v. Stamps.com, Inc.*, for example, the plaintiff filed a putative class action in state court alleging unlawful trade practices involving allegedly misleading website disclosures.[295] When the defendant sought to remove the case to federal court pursuant to the federal Class Action Fairness Act,[296] the district court refused to exercise jurisdiction because it found the defendant failed to meet its burden of showing that over $5 million was "in controversy," as required by the statute. On appeal, Judge Gorsuch authored a unanimous opinion reversing the district court based on a detailed construction of the statutory term "in controversy," which he described as "a term heavily encrusted with meaning."[297] Judge Gorsuch explained: "As historically used, the term 'in controversy' has never required a party seeking to invoke federal jurisdiction to show that damages 'are greater' or will likely prove greater 'than the requisite amount' specified by statute."[298] Based on this construction, he found "federal jurisdiction here beyond doubt," thereby allowing the class action to proceed in federal court.[299]

Similarly, in *BP America, Inc. v. Oklahoma ex rel. Edmondson*, a suit brought in state court alleging manipulations of propane gas prices in violation of state law, BP sought to remove the case to federal court as a "mass action" under the Class Action Fairness Act.[300] The district court denied this request.[301] In a unanimous opinion analyzing whether the Tenth Circuit had jurisdiction to hear an interlocutory appeal under the Class Action Fairness Act, Judge Gorsuch's analysis hinged largely on the plain language of the statute: "When we interpret a statute we begin, of course, with its plain terms. And here, as we've mentioned, the text of [the relevant provision of the Class Action Fairness Act] provides that a court of appeals 'may accept an appeal' from an order of remand 'if application is made to the court of appeals not [more] than 7

[293] *See In re* C & M Props., L.L.C., 563 F.3d 1156, 1167–68 (10th Cir. 2009) ("This is a case whose duration and complexity might induce a faint feeling of familiarity in the wards of Jarndyce and Jarndyce. We are loath[ ] to add to the duration and complexity of an already overlong and overly complex matter, let alone to deliver the unwelcome news that the parties have been litigating in vain in federal court for over four years based on a mistaken premise." (citing CHARLES DICKENS, BLEAK HOUSE 4–5 (Bantam 2006) (1853))).

[294] *See generally* discussion *supra* in *Statutory Interpretation*.

[295] 844 F.3d 909 (10th Cir. 2016).

[296] 28 U.S.C. § 1332(d)(2).

[297] *Hammond*, 844 F.3d at 911.

[298] *Id.* at 911–12.

[299] *Id.* at 910. Some commentators have suggested that making it easier for defendants to transfer class actions from state to federal court is business friendly, as it is "a move that companies often value" because "federal court is often more predictable." *See Randazzo*, *supra* note 285.

[300] 613 F.3d 1029 (10th Cir. 2010).

[301] *Id*. at 1030.

days after entry of the order.'"[302] Noting that "[t]he statute doesn't place any other conditions on our discretion,"[303] the nominee allowed the interlocutory appeal.[304]

Judge Gorsuch's textualist approach to statutes also extends to his interpretations of procedural rules, including those relevant to class action litigation. For example, in *Shook v. Board of County Commissioners of the County of El Paso*,[305] the district court denied the motion for class certification of county jail inmates with mental health needs based on its conclusion that the proposed class would be unmanageable, chiefly because of the difficulty of fashioning relief that would be applicable to the class as a whole.[306] On appeal, Judge Gorsuch affirmed this conclusion in a unanimous opinion based on a close examination of the "two independent but related requirements" of Federal Rule of Civil Procedure 23, which governs class actions in federal courts.[307] The nominee concluded that the rule "demands a certain cohesiveness among class members with respect to their injuries, the absence of which can preclude certification," as he found the rule did in *Shook*.[308]

Although he has few judicial opinions on the matter, Judge Gorsuch has also expressed clear opinions about a subcategory of class actions—those involving securities fraud—in nonjudicial writings. In 2005, the nominee, then in private practice, coauthored two articles critical of securities fraud class actions.[309] While acknowledging "some of the social benefits" of class action lawsuits, Judge Gorsuch also described the "vast social costs" resulting from these types of suits, arguing that "economic incentives unique to securities litigation encourage class action lawyers to bring meritless claims and prompt corporate defendants to pay dearly to settle such claims. These same incentives operate to encourage significant attorneys' fee awards even in cases where class members receive little meaningful compensation."[310] To counter these

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[302] *Id*. at 1033 (quoting 28 U.S.C. § 1453(c)(1)).

[303] *Id.*

[304] In another case, *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975 (10th Cir. 2014), the plaintiff sought to bring a class action against the defendant in federal court for allegedly overcharging him and other customers, and the defendant moved to compel the plaintiff to pursue his individual claim alone in arbitration. The district court, after allowing extensive discovery and motion practice on the question of venue, eventually denied the defendant's motion to compel arbitration. Relying on an examination of the relevant statute, the Federal Arbitration Act (FAA), Judge Gorsuch remanded the case for the district court to follow the procedures of the FAA, which "tells district courts to 'proceed summarily to the trial' of the relevant facts. Once the facts are clear, courts must then apply state contract formation principles and decide whether or not the parties agreed to arbitrate." *Id.* at 977 (citing 9 U.S.C. § 4; Hardin v. First Cash Fin. Servs., Inc., 465 F.3d 470, 475 (10th Cir. 2006)). Thus, because the court failed to follow the statutorily required procedure of proceeding summarily to trial to determine whether arbitration was appropriate, Judge Gorsuch remanded the case for such a determination instead of allowing it to proceed as a class action in federal court.

[305] 543 F.3d 597 (10th Cir. 2008).

[306] *Id.* at 614. In a prior appeal in this case, the Tenth Circuit reversed, holding that "the district court erred by relying on the jurisdictional limitations imposed by the Prison Litigation Reform Act ('PLRA') to the total exclusion of the standards laid out in Federal Rule of Civil Procedure 23." *See id.* at 600. On remand, the district court again denied class certification because it found the plaintiffs failed to satisfy their burden under Rule 23. A second appeal followed.

[307] *Id.* at 604.

[308] *Id.*; *see also id.* at 614 ("A district court does not abuse its discretion in denying class certification where providing the requested relief at the level of specificity required by Rule 65(d) would render a class action unmanageable—either because of difficulties in determining relevant aggregate characteristics of the class or because factual differences between class members require different standards of conduct for undefined groups within the class.").

[309] NEIL M. GORSUCH & PAUL B. MATEY, SETTLEMENTS IN SECURITIES FRAUD CLASS ACTIONS: IMPROVING INVESTOR PROTECTION 2, WASH. LEGAL FOUND. CRITICAL LEGAL ISSUES WORKING PAPER SERIES NO. 128 (Apr. 2005) [hereinafter GORSUCH & MATEY, SETTLEMENTS]; Neil M. Gorsuch & Paul B. Matey, *No Loss, No Gain*, Legal Times (Jan. 31, 2005) [hereinafter Gorsuch & Matey, *No Loss*] (describing "[t]he free ride to fast riches enjoyed by securities class action attorneys in recent years").

[310] GORSUCH & MATEY, SETTLEMENTS, *supra* note 309, at 2 ("While securities class actions have offered some of the (continued...)

purportedly negative consequences, the nominee advocated for stricter enforcement of the causation requirement in securities fraud class action suits.[311]

Should he be elevated to the High Court, Judge Gorsuch could also be influential in the area of enforcement of arbitration provisions. As one commentator observed, "[a]ll recent Supreme Court decisions about arbitration were closely split by 5-4 margins," and therefore Judge Gorsuch's views on this area of law could have a significant impact.[312] In an area where the Court has generally viewed federal law as encouraging alternative dispute resolution,[313] the nominee's few judicial opinions on contractual arbitration clauses and the Federal Arbitration Act (FAA) might be read as favoring arbitration over litigation. In *Howard v. Ferrellgas*,[314] for example, Judge Gorsuch read the FAA to require a remand to the district court to determine whether the parties had opted for arbitration, potentially precluding a class action in federal court.[315] In reaching this outcome, Judge Gorsuch characterized the FAA as having a "heavy hand in favor of arbitration."[316] And in *Ragab v. Howard*, the nominee disagreed with the panel majority's conclusion that a collection of conflicting arbitration provisions in the parties' contracts was unenforceable because "there was no actual agreement to arbitrate as there was no meeting of the minds as to how claims that implicated the numerous agreements would be arbitrated."[317] Judge Gorsuch dissented, stating "I just don't see any doubt that the parties before us did intend to arbitrate. All six—yes *six*—of the parties' interrelated commercial agreements contain arbitration clauses."[318] In doing so, Judge Gorsuch noted "the federal policy favoring arbitration embodied in the FAA," and that "[t]he Supreme Court has held that the FAA preempts state laws that single out arbitration clauses for disfavored treatment."[319]

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social benefits . . . envisioned, experience has shown that, like many other well-intended social experiments, they are not exempt from the law of unintended consequences, having brought with them vast social costs never imagined by their early promoters."); Gorsuch & Matey, *No Loss*, *supra* note 309, at 52–53 (stating "[t]he problem is that securities fraud litigation imposes an enormous toll on the economy, affecting virtually every public corporation in America at one time or another and costing businesses billions of dollars in settlements every year," and noting "[w]hile plaintiffs' attorneys have a strong financial incentive to bring even meritless suits if there's a chance they will settle, and defendants have a strong incentive to settle them, neither has a particularly strong incentive to protect class members.").

[311] Gorsuch & Matey, *No Loss*, *supra* note 309, at 52–53; *see also* GORSUCH & MATEY, SETTLEMENTS, *supra* note 309, at 15–21. After these writings were published, the Supreme Court, in a unanimous ruling in *Dura Pharmaceuticals v. Broudo*, addressed the causation requirement for securities fraud class actions, ultimately holding that "a plaintiff [must] prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss." 544 U.S. 336, 346 (2005).

[312] Erwin Chemerinsky, *Here's What U.S. Business Should Expect if Neil Gorsuch Becomes a Supreme Court Justice*, FORTUNE (Feb. 9, 2017), http://fortune.com/2017/02/09/neil-gorsuch-supreme-court-business-law-donald-trump-nuclear-option.

[313] *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983) ("The [FAA] establishes that . . . doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .").

[314] 748 F.3d 975 (10th Cir. 2014).

[315] *Id.* at 984 ("[W]hen factual disputes may determine whether the parties agreed to arbitrate, the way to resolve them isn't by round after round of discovery and motions practice. It is by proceeding summarily to trial. That is the procedure the Act requires and the parties should have undertaken a long time ago—and it is the procedure they must follow now.").

[316] *Id.* at 977.

[317] 841 F.3d 1134, 1136 (10th Cir. 2016).

[318] *Id.* at 1139 (Gorsuch, J., dissenting) ("In my view, parties to a commercial deal could have hardly demonstrated with greater clarity an intention to arbitrate their disputes and I see no way we might lawfully rescue them from their choice.").

[319] *Id.*

Like arbitration, preemption—the circumstance in which federal law displaces state causes of action, such as tort claims—has been an issue of considerable dispute on the High Court in recent years, and one in which Judge Gorsuch could have an impact should he be elevated to the Court.[320] In determining whether federal law preempts common law tort claims, the nominee's approach, as in other areas, is centrally grounded in the words of the federal statute at issue, a method that has resulted in judgments both in favor of and against civil defendants. In *Cook v. Rockwell International Corp.*, for instance, property owners filed a class action under the federal Price-Anderson Act and state tort law against operators of a nuclear weapons manufacturing plant to recover for damages caused by releases of plutonium and other hazardous substances.[321] After the federal claims failed, the district court disallowed the case to proceed on the state law claims, holding that they were preempted by federal law. Judge Gorsuch disagreed. Examining the statute's text, the nominee wrote: "Where does any of this language—expressly—preempt and preclude all state law tort recoveries for plaintiffs who plead but do not prove nuclear incidents? We just don't see it."[322] While finding the statute itself determinative, Judge Gorsuch also looked to the "larger statutory structure" and the statute's legislative history to buttress his conclusion.[323]

By contrast, in *Caplinger v. Medtronic, Inc.*,[324] a case in which the plaintiff asserted a variety of state tort claims alleging the defendant had promoted an "off label" use of a medical device that resulted in the plaintiff's injuries, Judge Gorsuch authored an opinion for the majority.[325] *Caplinger* affirmed the district court's dismissal of the complaint as preempted by federal law based on a reading of an express preemption clause within the Medical Device Amendments to the Federal Food, Drug, and Cosmetics Act (FDCA).[326] This provision, however, has a complex history of statutory interpretation by the Supreme Court. Judge Gorsuch noted that one such case articulated the following test for preemption, stating: "[T]ort suits do not impose new 'requirements' on manufacturers and are not preempted so long as the duties they seek to impose 'parallel' duties found in the FDCA."[327] But, Judge Gorsuch stated, "the Court's answer only invited the next question: when exactly does a state law duty 'parallel' a federal law duty enough to evade preemption? That term doesn't appear in the statute, so its meaning was left entirely to judicial exposition."[328] Furthermore, he observed, "the Supreme Court has twice revisited and cut

[320] *E.g.*, Oneok, Inc. v. Learjet, Inc., --- U.S. ---, 135 S. Ct. 1591 (2015); Mut. Pharm. Co., Inc. v. Bartlett, --- U.S. ---, 133 S. Ct. 2466 (2013); Kurns v. R.R. Friction Prods. Corp., --- U.S. ---, 132 S. Ct. 1261 (2012); PLIVA, Inc. v. Mensing, 564 U.S. 604 (2011); Wyeth v. Levine, 555 U.S. 555 (2009).

[321] 790 F.3d 1088, 1091–92 (10th Cir. 2015).

[322] *Id.* at 1095. Judge Gorsuch also found no preemption in *Russo v. Ballard Medical Products*, a case involving a medical device inventor's allegations that the defendant had misappropriated trade secrets and breached a confidentiality agreement by incorporating his innovations into its medical devices. 550 F.3d 1004 (10th Cir. 2008). On appeal, after a jury found for the plaintiff and awarded damages, the defendant primarily argued that the inventor's state law claims were preempted by federal patent law. *Id.* at 1006. Judge Gorsuch disagreed, concluding that "the dispositive point is that [the defendant] has identified no *legal* impediment in patent law to [the inventor's] right to recover the full incremental value added by his misappropriated trade secret." *Id.* at 1018. In other words, there was no indication that the federal patent law preempted the state law claims.

[323] *Cook*, 790 F.3d at 1096.

[324] 784 F.3d 1335 (10th Cir. 2015).

[325] Judge Lucero filed a separate opinion dissenting in part and concurring in part in which he stated "[o]ur disagreement in this case [with regard to the preemption issue] stems primarily from our varying characterization of Caplinger's complaint and her appellate briefing. In my view, the majority holds Caplinger's complaint and appellate briefing to an excessively stringent standard that places the onus on her to affirmatively demonstrate that state law claims are parallel to federal requirements." *Id.* at 1350 (Lucero, J., dissenting in part and concurring-in-part).

[326] 21 U.S.C. § 360k(a).

[327] *Caplinger*, 784 F.3d at 1338 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 495 (1996)).

[328] *Id.*

back the scope of its initial decision."[329] Left to reconcile competing statutory interpretations by the High Court, Judge Gorsuch asked: "How are we supposed to apply all these competing instructions? It's no easy task."[330] Nonetheless, the nominee applied these principles while referring back to the statute's plain text throughout his analysis.[331] Ultimately, the court held that the state law claims were preempted because the plaintiff failed to identify a parallel federal requirement based on off-label promotion of a medical device.[332]

Civil Rights

Civil rights is another area of law in which Judge Gorsuch could be influential if he were to be elevated to the Supreme Court. Justice Scalia's views regarding the scope of constitutional and statutory civil rights protections were established in a number of judicial opinions, and he participated in several closely divided cases, including cases addressing affirmative action and issues related to sexual orientation.[333] However, unlike Justice Scalia, Judge Gorsuch's views on constitutional civil rights questions are less well known because he has had relatively few occasions to address such questions directly in cases before the Tenth Circuit. He has not, for example, had occasion to write on the constitutional limits on affirmative action or the equal protection rights of sexual minorities. Rather, most of the civil rights decisions in which the nominee has participated have centered upon statutory civil rights claims and, in particular, statutory employment discrimination claims.[334] The nominee's opinions in these cases to date have resulted in a variety of outcomes—some favorable to individual plaintiffs, some unfavorable. Based on these decisions, an argument could be made that Judge Gorsuch's views on statutory civil rights reflect his textualist approach to construing statutes, instead of a more results-driven judicial philosophy.

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[329] *Id.* at 1339.
[330] *Id.* at 1340 (internal quotation marks and citation omitted).
[331] *Id.* at 1344 ("Textually, § 360k(a) simply does not contain the distinction [the plaintiff] would have us draw between suits addressing on-and off-label uses."); *see also id.* ("This theory faces a similar textual dead-end. Section 360k(a) doesn't preempt only those state safety requirements addressing the 'same subject' as federal requirements.").
[332] *Id.* at 1346 ("Aside from statutory terms, structure, and precedent there remains the question of statutory purpose.").
[333] *See CRS Scalia Report*, *supra* note 8, at 15–16.

[334] *See, e.g.*, Walton v. Powell, 821 F.3d 1204 (10th Cir. 2016); Myers v. Knight Protective Serv., 774 F.3d 1246 (10th Cir. 2014), *cert. denied*, Myers v. Knight Protective Serv., 135 S. Ct. 2061 (2015); Barrett v. Salt Lake Cty., 754 F.3d 864 (10th Cir. 2014); Hwang v. Kan. State Univ., 753 F.3d 1159 (10th Cir. 2014); Roberts v. IBM, 733 F.3d 1306 (10th Cir. 2013); Elwell v. Okla. *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303 (10th Cir. 2012), *cert. denied*, Elwell v. Okla. *ex rel.* Bd. of Regents, 133 S. Ct. 1255 (2013); Almond v. Unified Sch. Dist. #501, 665 F.3d 1174 (10th Cir. 2011), *cert. denied*, Almond v. Unified Sch. Dist. #501, 133 S. Ct. 317 (2012); Flitton v. Primary Residential Mortg., Inc., 614 F.3d 1173 (10th Cir. 2010); Johnson v. Weld Cty., 594 F.3d 1202 (10th Cir. 2010); Strickland v. United Parcel Serv., Inc., 555 F.3d 1224 (10th Cir. 2009); Orr v. City of Albuquerque, 531 F.3d 1210 (10th Cir. 2008); Hinds v. Sprint/United Mgmt. Co., 523 F.3d 1187 (10th Cir. 2008); Montes v. Vail Clinic, Inc., 497 F.3d 1160 (10th Cir. 2007); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079 (10th Cir. 2007); Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007); Young v. Dillon Cos., 468 F.3d 1243 (10th Cir. 2006).

Based on these decisions, some commentators have expressed concern that Judge Gorsuch may be less sympathetic to civil rights claims than the commentators would wish. *See, e.g.*, Leadership Conf. on Civil & Human Rts., Advocacy Letter, Civil and Human Rights Organizations Oppose Confirmation of Judge Gorsuch to Supreme Court (Feb. 15, 2017), http://www.civilrights.org/advocacy/letters/2017/oppose-gorsuch.html (expressing the view of "the 107 undersigned national organizations" that the confirmation of Judge Gorsuch to the High Court would "undermine many of our core rights and legal protections"); ALLIANCE FOR JUSTICE, THE GORSUCH RECORD 1 (2017), http://www.afj.org/wp-content/uploads/2017/02/The-Gorsuch-Record.pdf (asserting that Judge Gorsuch shares in an "ultraconservative ideology" marked by "hostility toward social and legal progress" and "willingness to downplay abuses of constitutional rights by government actors").

Constitutional Civil Rights Claims. Judge Gorsuch has authored or otherwise participated in relatively few opinions addressing claims that a government enactment, policy, or practice has deprived persons of equal protection of the law in violation of the Fifth or Fourteenth Amendments to the U.S. Constitution, provisions that have been interpreted to implicate discrimination based on race,[335] gender,[336] disability,[337] and sexual orientation.[338] There is one opinion, *Secsys LLC v. Vigil*, authored by Judge Gorsuch for a unanimous panel of the Tenth Circuit, that engages in an extended discussion of equal protection.[339] This opinion characterizes equal protection as "the law's keystone"; explores the differences between intentional discrimination and discriminatory applications or enforcement of "rules of general application"; and explains what types of government action may be subject to heightened scrutiny.[340] However, *Secsys* is unusual in that the plaintiff corporation alleged that state officials had deprived it of equal protection by requiring it to award a subcontract under a state contract to a specific individual, who sought a higher price than the company was willing to pay.[341] Writing for the panel, Judge Gorsuch rejected this claim, in part, on the grounds that the state officials would have required a similar subcontracting agreement from any other contractor, making their actions distinguishable from "a rule saying that African Americans or women may not bid for a state contract or that only those of a certain religious faith may."[342] The nominee also described the plaintiffs as asking the court to endorse a "novel theory" of equal protection in this case to reach issues that were more commonly covered by criminal or civil laws against extortion.[343] This language, coupled with his characterization of equal protection as "the law's keystone," could suggest that Judge Gorsuch believes that the Constitution's equal protection principles play a crucial role in prohibiting certain government discrimination based on race or sex, but may be more skeptical of interpreting the Equal Protection Clause expansively to shield against previously unrecognized forms of discrimination.[344]

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[335] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2 (1967) (invalidating a Virginia law that prevented marriages between persons "solely on the basis of racial classifications" on the grounds that it violated the Equal Protection and Due Process Clause of the Fourteenth Amendment).

[336] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534–46 (1996) (finding that Virginia's exclusion of women from educational opportunities at a state school denies equal protection to women in violation of the Fourteenth Amendment).

[337] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447-50 (1985) (invalidating on equal protection grounds a municipal ordinance that required a special use permit for a proposed group home for the cognitively disabled).

[338] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–36 (1996) (striking down on equal protection grounds an amendment to the Colorado state constitution that precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships"). The Equal Protection Clause has also been seen to protect certain fundamental rights, a subject that Judge Gorsuch addressed in his writings on assisted suicide. *See* discussion *infra* note 764.

[339] 666 F.3d 678 (10th Cir. 2012).

[340] *Id*. at 684–87.

[341] *Id*. at 683. Note also that the court viewed the plaintiff's equal protection claims as grounded not in its unwillingness to pay per se, but as arising because "it was willing to pay only *some* of an allegedly extortionate demand." *Id.*

[342] *Id*. at 687. In particular, the court observed that because the defendants' subcontracting scheme was a generally applicable rule, the plaintiff had to show that the rule had a disparate impact on the plaintiff, something that would have required the plaintiff to produce evidence that the "defendants enforced their extortionate rule with the purpose of discriminating against those who wouldn't comply—because of, not in spite of, its disparate effect on that class of persons." *Id*.

[343] *Id*. at 683–84.

[344] By contrast, Judge Gorsuch's discussion of equal protection in his decision for a unanimous panel of the Tenth Circuit in 2012 in *United States v. Coleman* is relatively brief, noting only that a criminal defendant like Mr. Coleman, (continued...)

Judge Gorsuch also joined the unanimous decision by a panel of the Tenth Circuit in 2015 in *Druley v. Patton*, which rejected a transgendered prisoner's claim that prison officials violated her right to equal protection by, among other things, giving her inadequately low doses of her hormone medication, denying her request to wear female undergarments, and housing her in an all-male facility.[345] Previously, in 2009, Judge Gorsuch joined a unanimous decision by a panel of the Ninth Circuit—where he was sitting by designation—in *Kastl v. Maricopa County Community College District*, rejecting claims that a state institution of higher education had violated the equal protection rights, among other things, of a transsexual instructor whose contract was not renewed after she had been banned from using the women's restroom "until she could prove completion of sex reassignment surgery."[346]

In both cases, unanimous panels purported to rely on direct precedent in reaching their conclusions. For example, in *Druley*, the panel noted Tenth Circuit precedent holding that transsexuals are not members of a class for which heightened scrutiny is required under the Equal Protection Clause.[347] Because of this, in the panel's view, the state officials' decisions were subject to the less stringent "rational basis review," which the decisions were able to withstand.[348] Similarly, in *Kastl*, the panel noted, in a short three-page order, that the plaintiff had failed to "put forward sufficient evidence demonstrating that [the school's actions were] motivated by her gender."[349] This, in the panel's view, caused her claims to fail.[350]

Statutory Civil Rights Claims. More commonly, instead of assessing constitutional civil rights claims, Judge Gorsuch's opinions have addressed claims arising under one or more federal civil rights statutes. Such statutes include Title VII of the Civil Rights Act of 1964 (Title VII), as amended; the Family and Medical Leave Act (FMLA); the Age Discrimination in Employment Act (ADEA); the Americans with Disability Act (ADA); and the Individuals with Disabilities Education Act (IDEA). Examining Judge Gorsuch's various rulings interpreting these various statutes, it appears that his jurisprudence is largely a product of his preferences for textualism and rules based adjudication, as opposed to a preference to rule for a particular side. However, it should be noted that some commentators have criticized certain rulings by Judge Gorsuch in this area, taking note of the outcomes in specific cases on the grounds that the discrimination claims of particular victims were "thrown . . . out of court" in favor of a corporate or government

(...continued)

who had challenged an allegedly racially motivated search on equal protection grounds, must show that the asserted basis for the search was "disingenuous—a pretext for racial discrimination." 483 F. App'x 419, 420 (10th Cir. 2012). In the court's view, Mr. Coleman failed to do this. *See id*. (stating that "[t]he record in this case is entirely devoid of evidence suggesting racial animus and yet filled with evidence that Mr. Coleman was nervous and agitated").

[345] 601 F. App'x 632, 633, 635 (10th Cir. 2015). Technically, the plaintiff's claim as to her hormone medication was grounded in the Eighth Amendment's prohibition on cruel and unusual punishment, while the claim as to her garments and housing was grounded in the Equal Protection Clause. *Id*.

[346] Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 F. App'x 492 (9th Cir. 2009).

[347] *Druley*, 601 F. App'x at 635 (citing Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227–28 (10th Cir. 2007); Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1995)).

[348] *Id*. (holding that the plaintiff "did not allege any facts suggesting [that the challenged decisions] do not bear a rational relation to a legitimate state purpose"). The plaintiff's Eighth Amendment claim involving her hormone medication was similarly seen to fail partly because of Tenth Circuit precedent declining to recognize an Eighth Amendment right to estrogen hormone therapy for inmates like the plaintiff. *Id*. at 635. The panel also viewed the plaintiff as having failed to show that the deprivation of hormone therapy evidenced "deliberate indifference to a substantial risk of serious harm." *Id*.

[349] *Kastl*, 325 F. App'x at 494.

[350] *Id*.

entity.[351] While Judge Gorsuch has authored or joined some rulings that were unfavorable to such individuals,[352] this fact may be of limited utility in ascertaining Judge Gorsuch's views about the scope of statutory civil rights protections, as plaintiffs raising federal antidiscrimination claims, especially in the context of employment disputes, rarely prevail before the federal appellate courts as a general matter.[353] Many of the decisions on statutory civil rights in which the nominee participated involved unanimous rulings to dismiss a particular case.[354]

In addition, litigation involving statutory civil rights claims often turns on the facts of a particular case, as opposed to differences in opinions about the law,[355] meaning that few universal principles may be gleaned from isolated cases. For example, in 2009 in *Strickland v. United Parcel Service, Inc.*,[356] Judge Gorsuch agreed with two colleagues that the plaintiff should be able to proceed to trial on a FMLA retaliation claim, but differed from his colleagues as to the plaintiff's Title VII case based on the factual record before the court.[357] While the other two judges voted to reverse the district court's grant of summary judgment to the defendant on the Title VII claim, Judge Gorsuch would have affirmed the lower court's decision because he viewed the plaintiff's case as lacking in evidence.[358] In particular, he construed two key depositions relied on by the plaintiff as simply showing that the plaintiff's supervisor "harassed male employees in very much the same manner he harassed Ms. Strickland."[359]

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[351] *See* Leadership Conf. on Civil & Human Rts., *supra* note 334; ALLIANCE FOR JUSTICE, *supra* note 334, at 15–18 (noting various cases that, in the views of the author, show a "repeated pattern of siding with corporations over individuals trying to assert their rights under anti-discrimination laws."); Denise Lavoie & Michael Tarm, *Gorsuch Often Sided with Employers in Workers' Rights Cases*, ASSOCIATED PRESS (Feb. 27, 2017), http://bigstory.ap.org/article/9ae590166f114d9b9907ea4e3c75d04b/gorsuch-often-sided-employers-workers-rights-cases (arguing that Judge Gorsuch's opinions on workers' rights are "usually in the employer's favor.").

[352] *See, e.g.*, Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1183 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring) (rejecting the claims of an employee who alleged that he was the victim of discrimination on the basis of race and national origin, in violation of Title VII of the Civil Rights Act, when he was suspended from work until he could show that he was legally authorized to work in the United States and subsequently fired after he requested an apology for his suspension); *see also infra* text accompanying notes 371–74.

[353] *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127 (2009) ("For a plaintiff victorious at trial in an employment discrimination case, the appellate process offers a chance of retaining victory that cannot meaningfully be distinguished from a coin flip. Meanwhile, a defendant victorious at trial can be assured of retaining that victory after appeal."). *See also* Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 566 (2003) (noting that employment-discrimination "defendants' reversal rate stands at 42 percent, while the plaintiffs manage only a 7 percent reversal rate.").

[354] *See, e.g.*, Hwang v. Kan. State Univ., 753 F.3d 1159, 1161 (10th Cir. 2014) (affirming dismissal of a complaint filed under the Rehabilitation Act stemming from defendant's refusal to grant plaintiff more than six months of sick leave); Roberts v. IBM, 733 F.3d 1306 (10th Cir. 2013) (affirming the district court's grant of summary judgment to the employer-defendant on the plaintiff's ADEA claims); Weeks v. Kansas, 503 F. App'x 640, 641 (10th Cir. 2012) (dismissing a Title VII retaliation claim).

[355] *See, e.g.*, Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir.2001) (noting the "fact-intensive" nature of discrimination cases).

[356] 555 F.3d 1224 (10th Cir. 2009).

[357] *See id*. at 1231 (Gorsuch, J., dissenting) ("I admire and concur entirely in my colleagues' thoughtful treatment of Ms. Strickland's FMLA claim . . . . With respect to the gender discrimination claim . . . , I would affirm the judgment of the district court.").

[358] *Id.* at 1234 (contrasting the plaintiff's claims with another case where the "evidence was plentiful").

[359] *See id*. at 1232. The other panel judges, in contrast, opined that the evidence regarding "the treatment of Ms. Strickland's male co-workers" did not "compel" judgment as a matter of law because, although the male coworkers had also complained of the manager's style, there was evidence that Ms. Strickland was "treated differently from every male employee." *Id.* at 1231 (majority opinion).

In another fact-intensive civil rights case resulting in a different outcome—a ruling for the plaintiffs—*Orr v. City of Albuquerque*, Judge Gorsuch wrote the majority opinion.[360] This opinion, much like *Strickland*, engaged in a "thorough review of the record,"[361] which examined official policies and testimony from several officers to conclude that the plaintiffs had provided sufficient evidence to proceed to trial on their claims of illicit discrimination on the basis of pregnancy.[362] And *Orr* is not the only case in which Judge Gorsuch has ruled in favor of the *plaintiffs* in a statutory civil rights case,[363] which could suggest that the ultimate outcomes of particular cases are driven by Judge Gorsuch's general judicial philosophy as opposed to a general preference to reach a business or government friendly outcome.

Nonetheless, while evaluating Judge Gorsuch's record on statutory civil rights based on the outcomes in individual cases may not be particularly helpful, the substance of several of the nominee's opinions on federal antidiscrimination law is, at times, telling and may suggest that the nominee's general views on adjudication shape his approach to antidiscrimination claims.[364] For instance, in keeping with his preference for clear rules and his general critique of "needless" complexities in the law,[365] Judge Gorsuch has written multiple opinions questioning the efficacy of a central—but complicated—doctrine in federal employment discrimination litigation, the *McDonnell Douglas* test.[366]

Under the *McDonnell Douglas* test, a plaintiff must first establish a prima facie case of discrimination, and then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action.[367] If the employer meets this burden, the plaintiff can still prevail by offering evidence demonstrating that the employer's explanation is pretextual.[368] In *Paup v. Gear Products, Inc.*, Judge Gorsuch joined a per curiam opinion that, while acknowledging *McDonnell Douglas* was "binding on us" in the case at hand, noted criticism that its multipart, burden shifting test "divert[ed] attention away" from the question of whether discrimination "actually took place" and "in its stead" substituted a "proxy that only imperfectly tracks that inquiry."[369] Similarly, in *Barrett v. Salt Lake County*, the nominee highlighted criticism by two colleagues that the test is not "helpful enough to justify the costs and burdens associated with its administration."[370] Judge Gorsuch's most pointed critique of

[360] 531 F.3d 1210 (10th Cir. 2008).

[361] *Id.* at 1219.

[362] *Id.* at 1215–16.

[363] *See, e.g.*, Barrett v. Salt Lake Cty., 754 F.3d 864, 866, 872 (10th Cir. 2014) (affirming the district court's grant of summary judgment to the Title VII plaintiff "in all respects but one," the award of attorney's fees associated with participation in an employer's optional grievance process); Lowber v. City of New Cordell, 298 F. App'x 760 (10th Cir. 2008) (reversing a case dismissing a claim of sex discrimination under Title VII); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1083 (10th Cir. 2007) (reversing the district court's judgment as a matter of law for the defendant-employer on one plaintiff's Title VII retaliation claim and remanding that claim for trial).

[364] *See* discussion *supra* in *Role of the Judiciary*.

[365] *See generally* Gorsuch, *Law's Irony*, *supra* note 28, at 743.

[366] The *McDonnell Douglas* test derives from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[367] *Id.* at 802.

[368] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

[369] 327 Fed App'x 100, 113 (10th Cir. 2009) (per curiam) (citing Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1224–28 (10th Cir. 2003) (Hartz, J., concurring); MacDonald v. E. Wyo. Mental Health Ctr., 941 F.2d 1115, 1122–23 (10th Cir. 1991) (Seth, J., concurring); Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 528–29 (2008)).

[370] 754 F.3d 864, 867 (10th Cir. 2014).

McDonnell Douglas came in a 2016 First Amendment retaliation case, *Walton v. Powell*.[371] Rejecting the defendant's argument that the test should be applied in a free association case, the nominee noted that the "special and idiosyncratic" *McDonnell Douglas* test "has proven of limited value even in its native waters," with the Tenth Circuit finding it inapplicable outside of motions for summary judgment in cases relying on circumstantial evidence "because of the confusion and complexities its application can invite."[372] While it is unclear whether the elimination of the *McDonnell Douglas* test would necessarily favor a particular side in employment litigation,[373] legal commentators have noted that because the test is "bedrock employment law doctrine" any limits Judge Gorsuch might impose on the use of this test could cause a "significant change in how employment discrimination lawsuits are prosecuted and defended."[374]

Other statutory civil rights cases can be seen to have been directly shaped by Judge Gorsuch's general approaches to statutory interpretation.[375] For example, in *Almond v. Unified School District #501*, the nominee employed a textualist approach in one of the first opinions interpreting the Lilly Ledbetter Fair Pay Act of 2009, concluding that the Act's expanded accrual period for "discrimination in compensation" claims applied only to "unequal pay for equal work" claims, and not to all claims of discriminatory compensation.[376] Rejecting the view that the phrase "discrimination in compensation" was used in the Act as "some Rorschach inkblot to which we may ascribe whatever meaning springs to mind,"[377] Judge Gorsuch looked to the "language of the Act itself,"[378] the Act's structure,[379] key canons of statutory construction,[380] and the context in which the statute was enacted[381] in adopting a more narrow reading of the phrase in question.

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[371] Walton v. Powell, 821 F.3d 1204, 1207 (10th Cir. 2016).

[372] *Id.* at 1210–11 ("This court has expressly declined to employ *McDonnell Douglas* even in Title VII cases at or after trial because of the confusion and complexities it can invite. In the summary judgment context, too, where *McDonnell Douglas* is sometimes applied, it is *only* sometimes applied. We have used *McDonnell Douglas* in cases relying on circumstantial evidence but we will not use it in cases relying on direct evidence . . . ." (citations omitted)).

[373] *Compare* Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 681 (2013) ("Now, I appreciate that *McDonnell Douglas* was crafted to help plaintiffs in situations where there was a lack of direct evidence of discrimination. But given how employment law has evolved, I do not think it is helpful to anyone anymore."), *and* Jourdan Day, *Closing the Loophole: Why Intersectional Claims Are Needed to Address Discrimination Against Older Women*, 75 OHIO ST. L.J. 447, 472 (2014) ("[T]he *McDonnell Douglas* framework is . . . in fact a more difficult burden for plaintiffs to prove. . . . Not only would eliminating the *McDonnell Douglas* framework make the employment discrimination proof structure much more streamlined, but it would also eliminate the excessive, and sometimes impossible, burden of establishing a similarly situated employee as a comparator."), *with* William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 332 (1996) (arguing that weakening *McDonnell Douglas* would "make it difficult for plaintiffs to prevail and obtain adequate remedies in employment discrimination actions and, consequently, to discourage plaintiffs from suing."), *and* Ernest E. Haffner, *Judge Gorsuch and the* McDonnell Douglas *Framework: Throwing Out the Baby with the Bathwater*, ERNIE THE EEO NERD (Feb. 11, 2017), http://blog.eeonerd.com/2017/02/judge-gorsuch-and-mcdonnell-douglas.html ("As suggested by *Paup* and *Gacek*, elimination of the *McDonnell Douglas* framework would likely make it more difficult for plaintiffs to prevail because it would restore default causation standards.").

[374] *See* Alan L. Rupe & Jeremy K. Schrag, *Gorsuch Would Lay McDonnell Douglas Test to Rest*, LAW360 (Jan. 31, 2017), https://www.law360.com/articles/887139/gorsuch-would-lay-mcdonnell-douglas-test-to-rest.

[375] *See* discussion *supra* in *Statutory Interpretation*.

[376] 665 F.3d 1174, 1175 (10th Cir. 2011).

[377] *Id.* at 1181.

[378] *Id.* at 1180 ("The first and core difficulty with the plaintiffs' interpretation lies in the language of the Act itself.").

[379] *Id.* at 1181 ("Parallel language added to Title VII underscores the point.").

In another decision, *A.F. ex rel. Christine B. v. Española Public Schools*, Judge Gorsuch wrote for the majority in holding that a student who had previously settled a lawsuit involving alleged violations of the IDEA was barred from "seeking the same relief" under the ADA, the Rehabilitation Act, and 42 U.S.C. § 1983.[382] The nominee relied primarily on the "plain text" of the statute, which the majority construed to mean that plaintiffs attempting to bring civil actions under other federal laws "seeking the same relief IDEA supplies" must exhaust certain procedures set forth in the IDEA "'to the same extent' as you must to bring a civil action under IDEA itself."[383] The dissenting judge, however, argued that the majority had "misread[]" the statute in question by viewing Section 1415(*l*) of Title 20 of the United States Code as unambiguously imposing certain requirements on a litigant like A.F.[384] The dissent also objected that the outcome under the majority's reading ran contrary to Congress's intent by "harm[ing] the interests of the children that IDEA was intended to protect."[385] However, in perhaps a reflection on how his broader views on the role of the judge influence his civil rights jurisprudence, Judge Gorsuch's opinion took a different view of this argument based on perceived congressional intent, opining that the court would be substituting its view of desirable social policy for that of Congress if it were to adopt the plaintiff's proposed interpretation.[386]

Criminal Law and Procedure

Criminal law is an area where Justice Scalia had a significant influence on the High Court's jurisprudence.[387] Often (although not universally), he helped shape this jurisprudence in ways that could be seen to favor criminal defendants[388] on issues such as the scope of the Fourth Amendment's protections against unreasonable searches and seizures, the Fifth Amendment's prohibition on compelled self-incrimination, and the requirements of the Sixth Amendment's

(...continued)

[380] *Id.* ("[I]n this way, the plaintiffs' proposed interpretation commits not one but two statutory interpretation sins—first by rendering a statutory phrase superfluous and then by failing to give effect to Congress's reference to a preexisting legal term with a well settled meaning.").

[381] *Id.* at 1182 ("The Act's findings tell us that Congress's target was the *Ledbetter* majority and its purpose to undo the Court's treatment of 'discrimination in compensation' claims. But while Justice Ginsburg in dissent in *Ledbetter* expressly advocated just such a statutory change, she never advocated a limitations revolution for any claim somehow touching on pay." (citation omitted)).

[382] 801 F.3d 1245, 1248 (10th Cir. 2015) ("It's clear Christine B. cannot bring an IDEA lawsuit in federal court after choosing to settle her IDEA claims and agreeing to their dismissal with prejudice. . . . And from this it follows ineluctably that an ADA or Rehabilitation Act or § 1983 lawsuit seeking the same relief is also barred.").

[383] *Id*. Judge Gorsuch's opinion also noted other grounds for rejecting the plaintiff's argument, including that "there is nothing remotely implausible about the 'policy' result the plain language dictates." *Id*. at 1250.

[384] *Id*. at 1251 (Briscoe, J., dissenting).

[385] *Id*.

[386] *Id*. at 1250 (majority opinion) ("To permit a litigant to invoke the supposedly 'plain purpose[s]' of legislation at the expense of the terms of the statute itself' risks doing no more 'in the end [than] prevent[ing] the effectuation of congressional intent' by replacing Congress's compromise with another of our own devise.").

[387] *See generally CRS Scalia Report*, *supra* note 8, at 16–18.

[388] *See, e.g.*, Caleb Mason, *Will Gorsuch Be Another Scalia on Criminal Justice Issues? Not Likely*, CRIME RPT. (Feb. 1, 2017), http://thecrimereport.org/2017/02/01/will-gorsuch-be-another-scalia-on-criminal-justice-issues-not-likely/ (discussing areas of criminal law "in which [Justice] Scalia moved the law dramatically"); Kevin Ring, *Neil Gorsuch Follows Justice Scalia's Footsteps on Criminal Justice*, HIT & RUN BLOG (Feb. 2, 2017), http://reason.com/archives/2017/02/02/neil-gorsuch-follows-justice-scalias-foo ("In numerous cases, Justice Scalia showed that his fidelity to constitutional protections outweighed any personal biases he carried about suspected or convicted criminals.").

Confrontation Clause.[389] Given that more than forty percent of the cases on the Tenth Circuit's docket involve criminal law matters or petitions from federal or state prisoners,[390] Judge Gorsuch has heard many criminal cases during his tenure on that court.[391] He participated in notable decisions regarding searches and seizures, the exclusionary rule, ineffective assistance of counsel, and various statutory criminal law matters. However, his views on the Confrontation Clause and the scope of self-incrimination rights under the Fifth Amendment are less clear because he has not written on them to a significant extent.[392] On the whole, though, his opinions are seemingly shaped by his views regarding how legal texts, particularly the Constitution and statutes, are to be construed, as well as his conception that the courts' role is to apply the law, rather than create it.[393] Consequently, it would seem that Judge Gorsuch does not view the courts as being exclusively responsible for defining the playing field on which criminal suspects and the

[389] *See CRS Scalia Report*, *supra* note 8, at 16–19.

[390] *See* U.S. Courts, *Table B-6*, *supra* note 40, at 4 (noting that 25.1% of the Tenth Circuit's docket for a 12-month period ending on September 30, 2015, was devoted to criminal cases, 5.4% to petitions from federal prisoners, and 10.2% to petitions from other prisoners).

[391] *See generally CRS Gorsuch Opinions Report*, *supra* note 46.

[392] As regards the Confrontation Clause, Judge Gorsuch wrote one opinion that addressed whether particular limits on the defendant's cross-examination of a key witness for the prosecution in a criminal case fell within the "wide latitude" of the Confrontation Clause. *See* United States v. Mullins, 613 F.3d 1273, 1284 (10th Cir. 2010) (holding on behalf of a unanimous panel that barring a single question about possible tax evasion charges against a witness, which the court believed to be cumulative after counsel had elicited the witness's understanding that he did not have to pay taxes, was "reasonable and safely within the 'wide latitude' the Confrontation Clause affords the district court."). However, more commonly, Judge Gorsuch's Confrontation Clause cases addressed the question of whether any error in restricting particular lines of questioning was harmless. *See, e.g.*, Grant v. Tramell, 727 F.3d 1006 (10th Cir. 2013); Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012); Sanders v. Miller, 555 F. App'x 750 (10th Cir. 2014).

While Judge Gorsuch has written or joined a number of opinions respecting a criminal defendant's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the opinions have tended to be unanimous in nature and provide no noticeable trend in his jurisprudence. *See, e.g.*, United States v. Tapia, No. 09-3060, 2010 U.S. App. LEXIS 1812, at *7–12 (10th Cir. Jan. 27, 2010) (authoring opinion holding that a criminal defendant's statements to police were consensual and were not "overborne by means of psychological coercion" so as to require suppression); United States v. Lamy, 521 F.3d 1257, 1264 (10th Cir. 2008) (joining an opinion holding that because the defendant "was not subjected to custodial interrogation, the agents did not improperly question him"); United States v. Revels, 510 F.3d 1269, 1277 (10th Cir. Okla. 2007) (joining an opinion that concluded, based on the totality of the circumstances, that "a reasonable person in [the defendant's] position would have considered herself under a degree of restraint equivalent to formal arrest and that officers should have extended *Miranda* advisements prior to their questioning"). The nominee dissented from the majority opinion in *United States v. Benard*, 680 F.3d 1206 (10th Cir. 2012), wherein the court, based on *Miranda*, suppressed certain pre- and post-arrest statements by the criminal defendant. *Id.* at 1212. However, Judge Gorsuch's dissent in *Benard* did not disagree with the majority's assessment of the *Miranda* issue. *Id.* at 1215 (Gorsuch, J., dissenting) ("My colleagues hold . . . Mr. Benard's pre-arrest statements admissible. With all this, I agree. I agree, too, that Mr. Benard's post-arrest statement was erroneously admitted"). Instead, the nominee dissented as to whether the *Miranda* error was harmless based on other evidence presented by the government. *Id.* at 1217 ("Perhaps in another case to another defendant an error like this might have mattered. But in this case, on the evidence and argument before us, the government has met its high burden of showing harmless error and I would affirm.").

[393] In one dissent, Judge Gorsuch opined that judges are tasked with applying the law, even if the law could be viewed to be—to quote Charles Dickens's *Oliver Twist*—"'a ass—a idiot.'" A.M. ex rel. F.M. v. Holmes, 830 F.3d 1123, 1169 (10th Cir. 2016) (Gorsuch, J., dissenting) (quoting CHARLES DICKENS, OLIVER TWIST 520 (Dodd, Mead & Co. 1941) (1838)). In this case, he would have denied qualified immunity to a police officer who arrested and handcuffed a 7th grader for disrupting class by burping excessively on the grounds that circuit precedent should have alerted any reasonable officer that the statute at issue covered only more serious school disruptions. He faulted the majority not for rewriting the law in favor of a preferred outcome, but for misreading circuit precedent to reach an outcome none of them liked, commenting that "in this particular case, I don't believe the law happens to be quite as much of a ass as [the majority] do[es]." *Id.*

government interact in what he has described as the "constant competition between constable and quarry."[394]

Constitutional Rules of Criminal Procedure. One aspect of Judge Gorsuch's jurisprudence that could be seen to resemble Justice Scalia's involves the Fourth Amendment. Like Justice Scalia, the nominee has taken an originalist approach to construing the Fourth Amendment's protections against unreasonable searches and seizures, focusing on how the Framers would have construed the term "unreasonable" as it is used in this context.[395] Two notable opinions authored by Judge Gorsuch—both written in 2016—illustrate this. In one of these decisions, *United States v. Carloss*, Judge Gorsuch dissented from the majority's holding that federal agents did not abridge the defendant's Fourth Amendment rights when they approached the house where he was staying and knocked "for several minutes."[396] The house had several "No Trespassing" signs posted in its yard and on its front door.[397] However, the majority rejected the defendant's argument that these signs "revoked the implied license that the public has to approach the house and knock on the door" on the grounds that the placement of such signs around a home would not have conveyed to an objective officer that he could not knock on its door asking to speak with its residents.[398] Judge Gorsuch disagreed.[399] In so doing, he noted that, at the time when the Fourth Amendment was drafted, "the common law permitted government agents to enter a home or its curtilage only with the owner's permission or to execute legal process."[400] He also observed that at common law, homeowners could generally revoke licenses to enter their property at their pleasure, and "state officials no less than private visitors could be liable for trespass when entering without the homeowner's consent."[401]

In the second case involving the scope of the Fourth Amendment's protections against unreasonable searches and seizures, *United States v. Ackerman*, Judge Gorsuch wrote on behalf of a unanimous three-judge panel in holding that a government entity had conducted an impermissible search. In this case, the government had obtained one of the defendant's messages from an Internet service provider and opened the message and its accompanying attachments, thereby discovering child pornography.[402] The government argued, among other things, that this

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[394] United States v. Carloss, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J., dissenting).

[395] *See, e.g.*, *id.* at 1006 ("We know that the Fourth Amendment, at a minimum, protects the people against searches of their persons, houses, papers, and effects to the same degree the common law protected the people against such things at the time of the founding, for in prohibiting 'unreasonable' searches the Amendment incorporated existing common law restrictions on the state's investigative authority."); United States v. Ackerman, 831 F.3d 1292, 1301 (10th Cir. 2016) ("All these traditional agency principles were reasonably well ensconced in the law at the time of the founding and would seem the natural place to start in understanding the Amendment's original meaning and application to governmental agents."); United States v. Krueger, 809 F.3d 1109, 1123 (10th Cir. 2015) (Gorsuch, J., concurring) ("When interpreting the Fourth Amendment we start by looking to its original public meaning—asking what traditional protections against unreasonable searches and seizures were afforded by the common law at the time of the framing." (internal citations and quotations omitted)). *See also* Kyllo v. United States, 533 U.S. 27, 40 (2001) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.") (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)); Florida v. Jardines, 569 U.S. ---, 133 S. Ct. 1409 (2013) (drug dog sniff of front porch violates implied invitation to enter home's curtilage to knock on the door).

[396] *Carloss*, 818 F.3d at 990.

[397] *Id*.

[398] *Id*. at 994–95.

[399] *Id*. at 1004–15.

[400] *Id*. at 1006.

[401] *Id*.

[402] United States v. Ackerman, 831 F.3d 1292, 1303 (10th Cir. 2016) ("[T]hat sort of rummaging through private (continued...)

search was permissible pursuant to the "private search doctrine," which allows a warrantless search of a person's effects that had previously been searched by a private third party.[403] However, in his opinion, the nominee rejected this argument because the third party in *Ackerman* had not opened the email to view its contents, but instead had ran a search that merely identified the email as possibly containing child pornography, and forwarded the email to the government's agent.[404] In so doing, the court noted that the "Fourth Amendment was no less protective of persons and property against governmental invasions than the common law was at the time of founding."[405]

Another area implicating the Fourth Amendment's protections against unreasonable searches and seizures is the prohibition against the use of excessive force in the course of making an arrest, investigatory stop, or other seizure.[406] While Judge Gorsuch frequently relied on originalist principles in other areas of search and seizure law, Supreme Court precedent appears to be the exclusive focus in his excessive force opinions. In such cases, the nominee has relied on what he views as the "relatively exacting 'objective reasonableness standard' articulated in *Graham v. Connor*,"[407] which involves an examination of "three, non-exclusive factors: '[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.'"[408] Application of this test has led Judge Gorsuch to find both excessive force[409] and no excessive force,[410] depending upon his analysis of the facts of individual cases under the *Graham* factors.

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papers or effects would seem pretty obviously a 'search.' After all, if opening and reviewing 'physical' mail is generally a 'search'—and it is—why not 'virtual' mail too?" (internal citations omitted)).

[403] *Id*. at 1305.

[404] *Id*.

[405] *Id*. at 1307.

[406] *See* Graham v. Connor, 490 U.S. 386, 388 (1989).

[407] Porro v. Barnes, 624 F.3d 1322, 1326 (10th Cir. 2010).

[408] Herrera v. Bernalillo Cty. Bd. of Cty. Comm'rs, 361 F. App'x 924, 927–28 (10th Cir. 2010) (quoting *Graham*, 490 U.S. at 396–97) (alterations in original).

[409] *See, e.g.*, *id.* at 927–28; Fisher v. City of Las Cruces, 584 F.3d 888, 902 (10th Cir. 2009) (Gorsuch, J., concurring in judgment reversing the district court's finding of no factual dispute as to use of excessive force).

[410] *See, e.g.*, Harvey v. Segura, 646 F. App'x 650 (2016) (upholding the district court's determination that a male prisoner failed to allege facts suggesting a strip search performed by a female correctional officer was conducted in an abusive fashion or with excessive force); Hawker v. Sandy City Corp., 591 F. App'x 669, 670 (10th Cir. 2014) (O'Brien, J.) (Gorsuch, J., joining opinion upholding district court's ruling that an officer's use of a twist-lock hold to constrain a nine-year old boy who stole an iPad from his school was not excessive force); Thomas v. Durastanti, 607 F.3d 655, 669 (10th Cir. 2010) (Kelly, J.) (Gorsuch, J., joining an opinion reversing the district court's finding of a constitutional violation based upon excessive force because an officer's use of deadly force was within the range of reasonableness under the circumstances). In *Cortez v. McCauley*, moreover, Judge Gorsuch filed an opinion concurring in part and dissenting in part. *See* 478 F.3d 1108 (2007) (en banc). With regard to the excessive force claims, in contrast to the majority, which held that genuine issues of material fact existed as to whether police officers used excessive force against an arrestee's wife, the nominee would have found the officers' use of force against both the arrestee and the arrestee's wife to be in the range of what was reasonable. *Id.* at 1145) ("I agree with the majority's ultimate conclusion that the mere handcuffing of Mr. Cortez—without any further allegation of injury—is insufficient to state a claim for excessive force notwithstanding the illegality of his arrest. In my view, however, the level of force used in the investigative detention of Ms. Cortez—escorting her by the arm from her house and keeping her in a locked police car for an hour with use of an officer's cell phone—also does not rise to the level of an actionable claim for excessive force under the governing case law." (citing *Graham*, 490 U.S. at 396)).

For instance, in *Herrera v. Bernalillo County Board of County Commissioners*, a case where three sheriff's deputies tackled a plaintiff who was not resisting arrest, resulting in injuries to his knee, Judge Gorsuch authored a unanimous opinion affirming the district court's holding that the deputies were not entitled to qualified immunity because the law at the time of the incident clearly established that the conduct alleged was constitutionally excessive.[411] In reaching this conclusion, the nominee proceeded through an analysis of each of the *Graham* factors.[412] Similarly, but resulting in a contrary outcome, Judge Gorsuch authored the majority opinion in *Wilson v. City of Lafayette*, finding qualified immunity protected an officer who used a taser on an individual fleeing arrest, resulting in the suspect's death.[413] In doing so, the nominee again recited and analyzed each of the *Graham* factors.[414] Perhaps responding to concerns raised by the two other panel members in their concurring and dissenting opinions,[415] Judge Gorsuch noted that "no one questions that the use of a taser, especially if one probe hits the head, amounts to a significant physical intrusion requiring a correspondingly significant justification."[416] Nonetheless, the nominee found the "physical intrusion" in *Wilson* was not clearly established to be excessive in light of the other *Graham* factors, including the arrestee actively resisting arrest.[417] And in *Fisher v. City of Las Cruces*, where the majority found that a material factual dispute existed as to whether the plaintiff's injuries, which he sustained while being handcuffed after he had shot himself, were sufficient for an excessive force claim,[418] Judge Gorsuch concurred with the majority's use of the *Graham* factors and its conclusion that the factors suggested the officers may not have acted reasonably.[419] In so doing, however, the nominee, noting his strict reliance on *Graham* in excessive force cases, faulted the majority for "tak[ing] a detour, asking whether, in addition to satisfying all three *Graham* factors, Mr. Fisher has also shown that he suffered a 'non-*de minimis* injury.'"[420] Such an inquiry had previously been found to be required only in cases involving allegations of overly tight handcuffing, and the nominee felt that it was an inappropriate departure from *Graham* in this case.[421]

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[411] 361 F. App'x at 927–28.

[412] *Id.* at 927–29.

[413] 510 F. App'x 775 (2013).

[414] *Id.* at 778 (quoting Graham, 490 U.S. at 396 (1989)).

[415] Chief Judge Briscoe filed an opinion concurring in part in the result, and dissenting in part primarily because she felt "[t]he majority fail[ed] to give sufficient weight to the fact that the taser used by [the] Officer . . . had a targeting function, . . . and that the training manual [for the taser] specifically warned officers against aiming at the head or throat unless necessary." *Id.* at 781 (Briscoe, C.J., concurring in part in the result, and dissenting in part). Judge Scott M. Matheson filed a concurring opinion finding that the officer's conduct was excessive, but did not reach a level of egregiousness so as to preclude qualified immunity. *Id.*at 790 (Matheson, J., concurring).

[416] *Id.* at 778 (majority opinion).

[417] *Id.* at 779.

[418] 584 F.3d 888 (2009) (Tymkovich, J.).

[419] *Id.* at 902 (Gorsuch, J., concurring).

[420] *Id.*

[421] *Id.* at 903–04. In another excessive force case, *Estate of Bleck v. City of Alamosa*, Judge Gorsuch's unanimous opinion similarly included a detailed analysis of each of the *Graham* factors, ultimately finding that the plaintiff failed to establish that the police officers used excessive force when entering a hotel room with their guns drawn in response to a counselor's report that his patient was holed up in the room, intoxicated, suicidal, and possibly armed. 643 F. App'x 754, 756 (10th Cir. 2016) ("In measuring whether force qualifies as constitutionally excessive, the Supreme Court has directed us to examine the totality of the circumstances—including the amount of force employed, the severity of the suspect's crime, the threat the suspect posed to officers or others, and whether the suspect attempted to resist or flee." (citing *Graham*, 490 U.S. at 396)).

On another matter of constitutional criminal procedure that has, at times, divided the Supreme Court in recent years—the application and scope of the exclusionary rule[422]—Judge Gorsuch wrote a notable dissent in *United States v. Nicholson*.[423] The issue in *Nicholson* was whether a police officer, who mistakenly thought the defendant had violated a local traffic ordinance, could seize evidence from the defendant's car during the resulting stop.[424] Noting a New Mexico court ruling that had concluded that the ordinance relied on by the police officer did not provide a legal basis for the stop, the majority decision held that a failure to understand the law by the "very person charged with enforcing it" was objectively unreasonable and warranted suppression of the evidence seized.[425] However, Judge Gorsuch in dissent rejected the view that an officer's mistake of law "*always* violates the Fourth Amendment."[426] Instead, relying on the text of the Fourth Amendment and precedent emphasizing that suppression inquiries should be guided by a reasonableness inquiry, the nominee argued that, when the law at issue is "deeply ambiguous and the officer's interpretation [is] entirely reasonable,"[427] a totality of the circumstances test should counsel for not suppressing evidence seized because of a mistake of law.[428] A year and a half after the Tenth Circuit's opinion in *Nicholson*, the Supreme Court effectively sided with Judge Gorsuch's more flexible view of the exclusionary rule, holding in a different case that a mistake of law can "give rise to the reasonable suspicion necessary to uphold" a traffic stop under the Fourth Amendment.[429]

While the approach taken by Judge Gorsuch in his dissent in *Nicholson* eventually found favor at the Supreme Court, the nominee's dissent in a case on another often litigated issue in constitutional criminal law— ineffective assistance of counsel claims arising under the Sixth Amendment—did not ultimately become the prevailing view at the High Court. In *Williams v. Jones*, Judge Gorsuch served on a panel reviewing the ineffective assistance claim of a criminal defendant who, after receiving a full and fair trial, was sentenced to a harsher sentence than he otherwise would have received under an offered plea bargain.[430] The defendant argued that his trial counsel had unduly pressured him into rejecting the plea, and a majority of the court agreed that the defendant had established that the trial counsel rendered deficient performance that prejudiced his client.[431] Judge Gorsuch, however, dissented, arguing that there is no constitutionally protected entitlement to accept and enforce a pretrial plea offer because "due process guarantees a fair trial, not a good bargain."[432] Three years after *Williams*, the Supreme

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[422] *See, e.g.*, Utah v. Strieff, --- U.S. ---, 136 S. Ct. 2056, 2059 (2016) (holding in a 5-3 decision that evidence seized as part of a search incident to arrest following an illegal stop is admissible because an "officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.").

[423] 721 F.3d 1236, 1246 (10th Cir. 2013) (Gorsuch, J., dissenting).

[424] *Id*. at 1237 (majority opinion).

[425] *Id*. at 1240–41.

[426] *Id*. at 1247 (Gorsuch, J., dissenting) (emphasis in original).

[427] *Id*.

[428] *Id*. at 1250–51.

[429] Heien v. North Carolina, --- U.S. ---, 135 S. Ct. 530, 534 (2014).

[430] 571 F.3d 1086, 1088 (10th Cir. 2009) (per curiam).

[431] *Id.* at 1093–94.

[432] *Id.* at 1094 (Gorsuch. J., dissenting). On a petition to rehear the case en banc, Judge Gorsuch dissented from the decision to deny the petition, echoing many of his concerns from his earlier dissent. *See, e.g.*, Williams v. Jones, 583 F.3d 1254, 1258–59 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) ("Even assuming that Mr. Williams's lawyer gave him bad advice in the pre-trial plea bargaining process, that alone is not enough to establish a Sixth Amendment violation. To make out a Sixth Amendment violation under *Strickland*, a lawyer's bad advice (or deficient performance) must also prejudice the defendant by infringing some legal entitlement due him . . . (continued...)

Court, in a pair of 5-4 decisions for which Justice Scalia wrote dissenting opinions, held that the Sixth Amendment right to adequate assistance of counsel extends to the negotiation and consideration of plea bargains.[433]

Statutory Claims. Judge Gorsuch generally brought the same textualist approach to statutory criminal law issues that he brought to other statutory issues, as is illustrated by his opinion on behalf of a unanimous panel of the Tenth Circuit in *United States v. Dolan*.[434] At issue in this case was language in the Mandatory Victims Restoration Act stating that the "court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing."[435] The defendant argued that the language was jurisdictional, which would have meant that the court lacked the authority to enter any restitution order after the 90 days had passed.[436] However, in writing for the court, Judge Gorsuch took a contrary view, holding that the 90-day rule was a claims processing rule intended to promote speed and unconnected to the court's authority.[437] In so doing, the nominee noted various factors, including the "statute's language and structure," as well as an interpretative canon calling for courts to construe statutes as "directory," rather than jurisdictional, if the statute prescribes a period for the performance of an official duty, but does not include language that bars performance after the specified period of time.[438]

Although *Dolan* was written relatively early in Judge Gorsuch's tenure on the Tenth Circuit, it could suggest certain differences between his textualist approach and that of Justice Scalia, as the Supreme Court subsequently granted certiorari in the case.[439] A majority of the High Court voted to affirm the Tenth Circuit's decision in *Dolan*.[440] However, Justice Scalia joined a dissenting opinion authored by Chief Justice Roberts that viewed the "clear statutory text" to preclude the court from granting restitution more than 90 days after sentencing.[441] This difference between the Tenth Circuit's textualist interpretation and that of Chief Justice Roberts seems to have been shaped primarily by the different emphases that the Tenth Circuit and the Chief Justice gave to different words in the statute, which stated that "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a specified] offense . . ., the court shall order . . . that the defendant make restitution to the victim of the offense."[442] In writing for the Tenth Circuit, Judge Gorsuch focused on the "notwithstanding" clause, viewing it as mandating restitution in every case, even if such restitution is not made at sentencing or within 90 days thereof.[443] The

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Mr. Williams still has not identified *any* legal entitlement due him that was denied him or infringed.") (emphasis in original).

[433] *See* Missouri v. Frye, 566 U.S. 134, 149–50 (2012); Lafler v. Cooper, 566 U.S. 156, 174 (2012).

[434] United States v. Dolan, 571 F.3d 1022 (10th Cir. 2009), *aff'd*, Dolan v. United States, 560 U.S. 605 (2010).

[435] *Id*. at 1025 (quoting 18 U.S.C. § 3664(d)(5)).

[436] *Id*. at 1026.

[437] *Id*.

[438] *Id*. at 1026–27 (citing, among other things, 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 57:19 (6th ed. 2000)).

[439] 130 S. Ct. 1047 (2010). Judge Gorsuch lists also *Dolan* among his ten most significant opinions at the Tenth Circuit. *See Committee Questionnaire*, *supra* note 5, at 34.

[440] *Dolan*, 560 U.S. at 621.

[441] *Id*. at 625 (Roberts, C.J., dissenting).

[442] 18 U.S.C. § 3663A(a)(1).

[443] *Dolan*, 571 F.3d at 1026 (characterizing the "district court's obligation" to mandate restitution as "unmistakable" and viewing the 90-day deadline as "encompassed within § 3663A(a)(1)'s phrase 'any other provision of law,'" and reasoning that "while the 90-day deadline is surely a command of the Act, it can be reasonably understood only as a (continued...)

dissenters on the High Court, in contrast, relied, at least in part, on the phrase "when sentencing," which they would have construed to mean that a district court has no power to act after sentencing except as provided in the statute, which prescribes a 90-day window for doing so.[444]

On the question of the mens rea—or mental state—requirements of criminal statutes, Judge Gorsuch's textualist approach is sometimes said to have led to "defendant-friendly" results,[445] as illustrated by his opinion dissenting from the denial of rehearing en banc in *United States v. Games-Perez*.[446] This case centered on the question of whether federal statutes penalizing the possession of firearms by felons require the government to prove that a defendant knew of *both* his own status as a felon *and* his possession of a firearm, or whether the government needs to prove *only* that the defendant knowingly possessed a firearm.[447] The longstanding Tenth Circuit precedent is that the government need only prove knowing possession of a firearm.[448] However, in his dissent in *Games-Perez*, Judge Gorsuch opined that reading the mens rea element of a criminal statute as "leapfrogging over the first statutorily specified element and touching down only at the second listed element " "defies grammatical gravity and linguistic logic," among other things.[449] Similarly, in *United States v. Manatau*, Judge Gorsuch, writing on behalf of a unanimous panel, relied on the plain language of sentencing guidelines to reach a more lenient interpretation of the mens rea requirement than the government had urged.[450] The government had argued that the court should construe the term "intended loss," as used in connection with a sentencing enhancement for bank fraud and aggravated identity theft, to include any loss that the defendant "*knew* would result from his scheme," or that he "might have *possibly and potentially* contemplated."[451] However, the court disagreed, finding that the "plain language" of the guideline was such that "intended" must be construed to refer to a loss "done on purpose."[452] The court also noted the longstanding tradition in American criminal law of restricting liability to "cases where

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subsidiary command to the Act's primary and overriding directive that restitution must be ordered for certain crimes. Read together, the statute thus suggests that restitution shall be awarded within 90 days but also that, notwithstanding any missed deadline, restitution must be awarded").

[444] *Dolan*, 560 U.S. at 625 (Roberts, C.J., dissenting) ("To avoid this conclusion, the Court runs through a series of irrelevancies that cannot trump the clear statutory text. It notes, for example, that § 3663A provides that '[*n*]*otwithstanding any other provision of law*, when sentencing a defendant convicted of [a specified] offense . . . , the court *shall* order . . . that the defendant make restitution to the victim of the offense.' But the issue before us is *when* restitution should be ordered, so the language the Court should underscore is '*when sentencing*.' This provision plainly confers no power to act *after* sentencing. Any such power attaches only by virtue of § 3663A(d), which incorporates the procedures of § 3664, including the limited 90-day exception." (citation omitted) (alterations in original)).

[445] *See, e.g.*, Ring, *supra* note 388.

[446] 695 F.3d 1104, 1116 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc). Previously, Judge Gorsuch had made similar arguments as part of a three-judge panel hearing this case. *See* United States v. Games-Perez, 667 F.3d 1136, 1142–43 (10th Cir. 2012) (Gorsuch, J., concurring) (viewing Tenth Circuit precedent as requiring the government to prove only that the defendant knowingly possessed a firearm, but noting that "just because our precedent indubitably commands this result doesn't mean this result is indubitably correct").

[447] 695 F.3d at 1105 (Murphy, J., concurring); *id*. at 1117 (Gorsuch, J., dissenting).

[448] *See* United States v. Capps, 77 F.3d 350 (10th Cir. 1996).

[449] *Games-Perez*, 695 F.3d at 1117 (Gorsuch, J., dissenting). *See also* United States v. Makkar, 810 F.3d 1139, 1146 (10th Cir. 2015) (rejecting a proposed construction advanced by the government that would have called for the "mens rea requirement applied to the statute [to] take an olympian leap over the first essential element and touch down only on the second").

[450] United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011).

[451] *Id*. 1050.

[452] *Id.* at 1050 (commenting that the very circularity of the definition—using "intended" twice to define "intended loss"—supported the view that the guidelines' authors thought the meaning of "intent" to be sufficiently clear).

an intentional choice to do wrong is present."[453] A more stringent approach to mens rea requirements, in which intention or knowledge of wrongdoing is generally construed to be part of the crime, is often associated with concerns about overcriminalization, something that Judge Gorsuch has criticized in much the same way Justice Scalia did.[454]

Another aspect of Judge Gorsuch's approach to statutory criminal law issues that could also be seen to be "defendant-friendly"—and to resemble Justice Scalia's approach—is his resort to the rule of lenity in construing criminal statutes that are seen to be ambiguous. In its standard formulation, the rule of lenity "insists that courts side with the defendant 'when the ordinary canons of statutory construction have revealed no satisfactory construction.'"[455] Much as Justice Scalia did,[456] Judge Gorsuch invoked the rule of lenity in several criminal cases, including his 2015 opinion for a majority of the en banc Tenth Circuit in *United States v. Rentz*.[457] Here, Judge Gorsuch invoked the rule of lenity in support of a primarily text based interpretation, asserting that "[t]o the extent any ambiguity remains at this point about the meaning of § 924(c)(1)(A)—after we have exhausted all the evidence of congressional meaning identified by the parties—we don't default to the most severe possible interpretation of the statute but to the rule of lenity."[458] The nominee opined that invoking the rule when construing ambiguous criminal statutes helps to ensure that individuals have "fair warning" when lawmakers want to impose criminal consequences to certain conduct.[459] He also noted that the rule promotes separation-of-powers principles by ensuring that the legislature, and not the prosecution, "decide[s] the circumstances when people may be sent to prison."[460] Previously, in his 2014 opinion for the panel majority in *United States v. Smith*, Judge Gorsuch had similarly cited a separation-of-powers rationale for the rule of lenity, opining that "[i]n our legal order it is not the job of independent courts to bend ambiguous statutory subsections in procrustean ways to fit the prosecutor's bill."[461]

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[453] *Id*. at 1051.

[454] *Compare* Gorsuch, *Law's Irony*, *supra* note 28, at 747 ("[T]oday we have about 5000 federal criminal statutes on the books, most added in the last few decades. And the spigot keeps pouring, with hundreds of new statutory crimes inked every few years. Neither does that begin to count the thousands of additional regulatory crimes buried in the federal register."), *with* Sykes v. United States, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting) ("We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.").

[455] Lockhart v. United States, --- U.S. ---, 136 S. Ct. 958, 968 (2016) (Kagan, J., dissenting) (citing Callanan v. United States, 364 U.S. 587, 596 (1961)).

[456] *See*, *e.g.*, Johnson v. United States, --- U.S. ---, 135 S. Ct. 2551 (2015); Burrage v. United States, --- U.S. ---, 134 S. Ct. 881 (2014); Sekhar v. United States, --- U.S. ---, 133 S. Ct. 2720 (2013); United States v. Santos, 553 U.S. 507 (2008); Abramski v. United States, --- U.S. ---, 134 S. Ct. 2259 (2013) (Scalia, J., dissenting). *But see* Zachary S. Price, *The Court After Scalia: The Rule of Lenity*, SCOTUSBLOG (Sept. 2, 2016), http://www.scotusblog.com/2016/09/the-court-after-scalia-scalia-and-the-rule-of-lenity/ (opining that "[w]hile Scalia succeeded in making lenity-based arguments a recurrent feature of criminal law cases, in practice even Scalia was only a fair-weather friend of the rule. In recent years, Scalia and his colleagues frequently invoked the rule rhetorically to back up interpretations reached on other grounds. They rarely gave it real bite.").

[457] United States v. Rentz, 777 F.3d 1105 (10th Cir. 2015).

[458] *Id*. at 1113.

[459] *Id.* ("[The rule of lenity] seeks to ensure, too, that if a legislature wishes to attach criminal consequences to certain conduct—to deprive persons of their property, liberty, or even lives—it provides fair warning.").

[460] *Id*.

[461] 756 F.3d 1179, 1191 (10th Cir. 2014). *See also* United States v. Manatau, 647 F.3d 1048, 1055 (10th Cir. 2011) (continued...)

Environmental Law

With the Supreme Court often closely divided on various aspects of environmental law in recent years,[462] Judge Gorsuch could serve as a critical vote on such matters if confirmed to the Court. The nominee has authored few opinions involving environmental law issues and participated in a handful of other environmental law cases while on the Tenth Circuit.[463] The lack of a robust record for Judge Gorsuch on environmental law matters may not be surprising. The Tenth Circuit does not hear many environmental law cases because many major environmental statutes require parties challenging nationally applicable federal laws or administrative agency actions to file a petition in the D.C. Circuit.[464] The territorial jurisdiction of the Tenth Circuit, however, does cover six western states and parts of Yellowstone National Park,[465] which collectively contain millions of acres of land owned by the federal government.[466] Consequently, while the nominee may not have written extensively on environmental law, Judge Gorsuch has authored or joined opinions in several cases challenging federal agency actions related to the management of federal public lands and natural resources. This constitutes the bulk of the nominee's environmental law record.[467]

The outcome of an environmental case often depends on the court's resolution of threshold procedural issues, such as whether a plaintiff has the right to bring a lawsuit in the first place or to join an ongoing lawsuit.[468] If such lawsuits are filed, to proceed to the merits, a plaintiff will need to establish standing, a procedural threshold that has, at times, impeded environmental litigation.[469] While Judge Gorsuch has authored or joined opinions in a few cases involving whether an environmental group or regulated business had the right to bring or join a lawsuit challenging federal agency action, there is no discernible trend in his environmental standing

(...continued)

(similar).

[462] *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (5-4 decision) (holding that the Clean Air Act gave EPA authority to regulate greenhouse gas emissions from new motor vehicles); West Virginia v. EPA, --- U.S. ---, 136 S. Ct. 1000, 1000 (2016) (5-4 decision) (issuing a stay that pauses the legal effect of EPA's Clean Power Plan rule that would set limits on emissions of carbon dioxide from existing power plants).

[463] Carlson, *supra* note 46.

[464] *See, e.g.*, 42 U.S.C. § 300j-7(a) (petitions for review of EPA actions pertaining to the establishment of national primary drinking water regulations); *id*. § 6976(a)(1) (petitions for review of EPA regulatory actions under the Resource Conservation and Recovery Act); *id*. § 7607(b)(1) (petitions for review of various EPA actions under the Clean Air Act). *See also* ATL Launch Sys. v. EPA, 651 F.3d 1194, 1195 (10th Cir. 2011) (Gorsuch, J., voting in support of the majority opinion) (transferring to the D.C. Circuit petitions challenging EPA's designation of parts of Utah as "nonattainment" areas as to National Ambient Air Quality Standards for fine particulate matter).

[465] *See* U.S. TENTH CIR. COURT OF APPEALS, *supra* note 39.

[466] *See* BUREAU OF LAND MGMT., PUBLIC LANDS STATISTICS 7–15 (2015), https://www.blm.gov/public_land_statistics/pls15/pls2015.pdf; FOREST SERV., LAND AREAS OF THE NATIONAL FOREST SYSTEM 1 (2014), http://www.fs.fed.us/land/staff/lar/LAR2014/LAR_Book_FY2014.pdf.

[467] *See, e.g.*, Backcountry Hunters & Anglers v. U.S. Forest Serv., 612 F. App'x 934, 936 (10th Cir. 2015) (motorized vehicle access to Yellowstone National Park); N.M. Off-Highway Vehicle All. v. U.S. Forest Serv., 540 F. App'x 877, 882–84 (10th Cir. 2013) (Gorsuch, J., dissenting) (limited off-highway vehicle use in Santa Fe National Forest).

[468] As a threshold matter, a plaintiff challenging federal agency action in court must have a legal right to a judicial determination of the issues raised in its complaint. *See* Flast v. Cohen, 392 U.S. 83, 99 (1968).

[469] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (requiring that a plaintiff, an environmental advocacy group, demonstrate that it has suffered a concrete and particularized injury that is caused by the challenged action and is redressable by a favorable court decision in order to have standing). The doctrine of constitutional standing derives from Article III of the Constitution, which limits the exercise of the federal judicial power to deciding "cases" and "controversies." U.S. CONST. art. III, § 2.

jurisprudence.[470] For example, his opinion for the majority in *Backcountry Hunters & Anglers v. U.S. Forest Service* provides one example of a case that was dismissed because the plaintiffs lacked standing. In this case, the plaintiffs challenged a temporary U.S. Forest Service order that allowed motorcycles—but prohibited all-terrain vehicles (ATVs)—on certain forest trails.[471] Judge Gorsuch, writing for a unanimous court, determined that the appellants lacked a genuine stake in the outcome of the proceedings because vacating the Forest Service plan as the appellants had requested would merely reinstate the previously enacted plan, which allowed both ATVs and motorcycles on forest trails.[472] In dismissing the case, the nominee wrote that a victory for the appellants "would seem to do nothing to help—and perhaps much to hurt—[their] cause," which was to reduce vehicles on forest trails.[473] By contrast, Judge Gorsuch joined a majority opinion determining that an environmental group had standing to challenge the Bureau of Land Management's (BLM) interpretation of its own prior order that allowed a coal mining project to go forward in Utah's Lila Canyon.[474] The majority opinion concluded that the environmental group would suffer injury from the company beginning mining operations by impairing "the ability of its members to continue enjoyment of the aesthetic and scientific benefits provided by the land in question."[475] Judge Gorsuch has also authored or joined other majority opinions in a number of other cases touching upon environmental issues in which the court determined that an environmental group or regulated business had standing to sue.[476] Nonetheless, the limited number of cases on standing in the environmental context makes it difficult to discern any broad tendencies of Judge Gorsuch on the subject.

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[470] Judge Gorsuch participated in a couple of environmental cases that he resolved (or would have resolved) on mootness grounds. Federal courts lack jurisdiction over cases that have become "moot" because they do not involve an ongoing dispute or "controversy." *See* Kingdomware Techs., Inc. v. United States, --- U.S. ---, 136 S. Ct. 1969, 1975 (2016) ("Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies,' and 'an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation.'" (quoting Already, LLC v. Nike, Inc., --- U.S. ---, 133 S. Ct. 721, 726 (2013))). In these cases, the issue of the underlying lawsuit, for various reasons, had, in the view of the nominee, resolved itself by the time the case reached the Tenth Circuit. For example, in *Wyoming v. U.S. Department of the Interior*, Judge Gorsuch, writing for the court, dismissed an appeal of a district court order temporarily allowing snowmobiles to enter Yellowstone National Park as moot. 587 F.3d 1245, 1254–55 (10th Cir. 2009) (dismissing the appeal as moot, vacating the judgment of the district court, and remanding with instructions to dismiss the case for lack of subject-matter jurisdiction). Judge Gorsuch reasoned that because the National Park Service had issued new regulations governing snowmobile access, a live controversy had ceased to exist. *Id.* at 1250–53; *see also* Wilderness Soc'y v. Kane Cty., 632 F.3d 1162, 1174 (10th Cir. 2011) (en banc) (Gorsuch, J., concurring) (concurring in the judgment to dismiss the suit—but, with the exception of one claim, on grounds of mootness rather than lack of standing—because the plaintiff had already secured its requested relief when Kane County rescinded its ordinance that allowed off-highway vehicle use on federal lands).

[471] *Backcountry Hunters*, 612 F. App'x at 935–36.

[472] *Id.*; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (requiring that a plaintiff's injury be redressable by a favorable court decision for the plaintiff to have standing).

[473] *Backcountry Hunters*, 612 F. App'x at 935–36.

[474] S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf't, 620 F.3d 1227, 1237–43 (10th Cir. 2010). The court ultimately affirmed the district court's decision upholding the order. *Id.* Another judge on the panel would have denied standing on the grounds that the environmental group could not demonstrate a causal connection between its alleged injuries and the actions of the federal agency defendants brought before the court. *Id.* at 1247 (Ebel, J., dissenting).

[475] *Id.* at 1233 (majority opinion).

[476] WildEarth Guardians v. EPA, 759 F.3d 1196, 1204–07 (10th Cir. 2014) (determining that an environmental group had standing to maintain a lawsuit against EPA for an alleged violation of consultation requirements under the Endangered Species Act); Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1144–45 (10th Cir. 2010) (holding that a company that sought a permit under the Safe Drinking Water Act in order to mine its property had standing to sue EPA).

In a related procedural matter—persons' ability to intervene in ongoing litigation—Judge Gorsuch's views are similarly unclear. While the Supreme Court itself would likely not rule on any immediate questions respecting intervention in ongoing litigation, its broader guidance on intervention could be influential to the lower courts.[477] During the Senate's consideration of Judge Gorsuch's nomination to the Tenth Circuit, the judge responded affirmatively to a written question about whether his courtroom "would be open to intervention in litigation by those concerned with the administration of . . . public lands."[478] He wrote that "Judges owe the same obligation of fidelity to the record and the law in all cases and to all persons appearing before them—regardless of who the litigant is or what the nature of the claim may be."[479]

Judge Gorsuch has had limited opportunities to evaluate intervention matters in environmental cases.[480] In 2013, he dissented from a majority opinion holding that environmental groups were entitled to intervene as of right in a lawsuit challenging a Forest Service plan that allowed for limited off-highway vehicle use in New Mexico's Santa Fe National Forest.[481] The majority reasoned that the groups had a right to intervene because the Forest Service might not adequately represent their interests if, for example, the agency shifted policy positions in favor of the industry group plaintiff during the litigation.[482] Judge Gorsuch dissented, arguing that the environmental groups lacked a right to intervene in the case because their interests were already adequately represented by the government, and that a shift in the Forest Service's position was "speculative."[483] Although his dissent in *Backcountry* argued that the environmental groups should not have been allowed to intervene in the case, the opinion also implied that he might have voted in favor of the groups joining the litigation if the government had abandoned its efforts to enforce the law at issue.[484]

Once a plaintiff in an environmental case has satisfied any jurisdictional and procedural requirements to bringing a lawsuit, a court might review the substance of the federal agency action at issue. Sometimes, an action by an environmental agency may be based on that agency's interpretation of a statute that it administers, such as in 2015 when EPA and the Army Corps of

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[477] *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997) ("An intervenor cannot step into the shoes of the original party unless the intervenor independently 'fulfills the [standing] requirements of Article III.'") (citation omitted); Donaldson v. United States, 400 U.S. 517, 527–31 (1971) (holding that a taxpayer could not intervene as of right in tax enforcement proceedings seeking records from his accountant and former employer because the taxpayer's interest was not of "sufficient magnitude.").

[478] *See Gorsuch Confirmation Hearing*, *supra* 43, at 41–42.

[479] *Id.*

[480] Judge Gorsuch has joined at least one Tenth Circuit opinion outside of the environmental context in which the court determined that a non-party to the lawsuit lacked a right to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2) because an existing party adequately represented its interests. *See* Statewide Masonry v. Anderson, 511 F. App'x 801, 806–07 (10th Cir. 2013).

[481] N.M. Off-Highway Vehicle All. v. U.S. Forest Serv., 540 F. App'x 877, 882–84 (10th Cir. 2013) (Gorsuch, J., dissenting). The Federal Rules of Civil Procedure provide that a party may intervene in a lawsuit when: (1) it has a right to do so under statute or it claims an interest "relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"; or (2) when the court permits intervention. FED. R. CIV. P. 24. The Tenth Circuit has held that a prospective intervenor has a right to intervene in a lawsuit based on lack of adequate representation when it makes a minimal showing that there is a possibility that none of the parties to the lawsuit will protect its interests. *Off-Highway Vehicle All.*, 540 F. App'x at 880–81 (Anderson, J.) (citation omitted).

[482] *Id.* at 881–82.

[483] *Id.* at 882–883 (Gorsuch, J., dissenting).

[484] *Id.* at 883 (Gorsuch, J., dissenting).

Engineers promulgated a rule defining the scope of waters protected under the Clean Water Act.[485] As noted elsewhere in this report, Judge Gorsuch has broadly expressed skepticism regarding the extent to which judges should defer to an administrative agency's reasonable interpretation of silent or ambiguous language in a statute it administers.[486] If Judge Gorsuch's views on *Chevron* deference were to prevail at the Court, there is some debate on what impact this would have for environmental law. On one hand, some commentators have suggested that a judge's refusal to defer to agency interpretations would impede efforts by federal agencies to regulate activities that would negatively impact the environment.[487] However, Judge Gorsuch's reluctance to defer to agency legal interpretations, if applied consistently, could also lead to a lack of deference to agency interpretations of environmental statutes that would lead to a *decrease* in regulation.[488] Given the range of environmental statutes that require the government to take an active role in environmental protection, one commentator has suggested that judicial scrutiny of agency decisions that, for example, determine whether operation of a certain type of facility is subject to Clean Water Act requirements, would not necessarily result in a legal outcome that was less protective of the environment.[489]

Another potentially relevant issue implicated by judicial review of final agency actions regarding environmental regulations is the scrutiny courts should provide in reviewing agencies' interpretations of their own regulations, including interpretations that alter previous interpretations or findings. Applying binding precedent, Judge Gorsuch has shown some deference to agencies' interpretations of their own environmental regulations. For example, in *United States v. Magnesium Corporation of America*, he wrote a majority opinion upholding EPA's reinterpretation of its Resource Conservation and Recovery Act regulations governing mineral processing waste.[490] The court upheld the reinterpretation, which subjected the wastes to more stringent management requirements, even though the agency's new interpretation conflicted with a previous "tentative" interpretation the agency had made in a report to Congress.[491] Neither the agency's original interpretation of its regulations nor the subsequent reinterpretation was made in accordance with the APA's notice and comment rulemaking procedures.[492] The court held that EPA was not required to provide notice and comment to change a "tentative" interpretation of its own rules.[493] Although the decision upheld EPA's change in its interpretation of its regulations, showing some skepticism toward "agency . . . interpretative reversals," Judge Gorsuch did note

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[485] *See, e.g.*, Final Rule, Clean Water Rule, Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,057 (June 29, 2015) (interpreting provisions of the Clean Water Act that define the "waters of the United States.").

[486] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); *see generally* discussion *supra* in *Administrative Law*.

[487] *See* Amanda Reilly, *Would Gorsuch's Skepticism on* Chevron *Spell Doctrine's Demise?*, E&E NEWS (Feb. 1, 2017), http://www.eenews.net/greenwire/2017/02/01/stories/1060049379.

[488] *Id.* ("Getting rid of *Chevron* might not necessarily be a good thing for President Trump, according to legal scholars, as he'll likely need it in place to push through an anti-regulatory agenda.").

[489] *See* Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. ENVTL. AFF. L. REV. 317, 333, 336 (2010) ("Just as federalism has been an important factor that has influenced the Court's decisionmaking in environmental law cases, *Chevron* deference has also been an important factor in many of the cases involving statutory interpretation, but *Chevron* deference has contributed to generally 'anti-environment' decisions.").

[490] 616 F.3d 1129, 1130–31 (10th Cir. 2010).

[491] *Id.*

[492] *Id.*

[493] *See id.* at 1138 (explaining that "the initial interpretation is only binding if it is definitive").

potential statutory and constitutional concerns regarding agency action that would uproot nontentative interpretations of law.[494]

Another example of Judge Gorsuch's deference to an agency's interpretation of its own environmental regulations occurred in a 2010 decision reviewing the BLM's interpretation of its own prior order that allowed a coal mining project to go forward in Utah's Lila Canyon.[495] Judge Gorsuch joined the court's opinion deferring to BLM's interpretation of its own order.[496] The court, citing Tenth Circuit precedent, determined that it owed deference to the Bureau's interpretation of the order because that interpretation was consistent with the circumstances surrounding the issuance of the order and the agency's subsequent conduct.[497]

Environmental cases may also implicate other constitutional issues, including the relationship between federal and state authorities.[498] One question that may arise is whether the Constitution's Commerce Clause should render invalid certain state environmental laws. The Supreme Court, in a series of decisions, has held that the Commerce Clause represents not only a grant of authority to Congress, but also a prohibition on states "imposing excessive burdens on interstate commerce without congressional approval."[499] This implied "negative command" is known as the dormant or negative Commerce Clause. In *Energy and Environmental Legal Institute v. Epel*, Judge Gorsuch reviewed a dormant Commerce Clause challenge to Colorado's renewable energy standard (RES), which requires many electric utilities in Colorado to ensure that twenty percent of electricity sold to state consumers comes from renewable sources.[500] Writing for the majority, Judge Gorsuch noted that Justices Scalia and Thomas had opposed the dormant Commerce Clause doctrine because they believed that it lacked a firm basis in the text and structure of the Constitution.[501] While noting these views, Judge Gorsuch acknowledged, however, that the Tenth

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[494] Judge Gorsuch pointed to the judicial review provisions of the APA and Due Process Clauses of the Fifth and Fourteenth Amendments as means to ensure that the regulated parties are not "abandoned . . . to the whims of an agency's arbitrary interpretive reversals." *Id.* at 1143–44. He determined that the defendant company had waived any arguments based on these provisions of federal law by not raising them during the prior proceedings. *Id.*

[495] S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf't, 620 F.3d 1227, 1230, 1237–43 (10th Cir. 2010).

[496] *Id.*

[497] *Id.* In the context of arbitrary and capricious or "hard look" review of environmental agency action, Judge Gorsuch also joined a panel opinion evaluating a challenge brought under the APA to the Fish and Wildlife Service's analysis of the likely environmental impacts of a release of a nonessential population of falcons into New Mexico. Forest Guardians v. FWS, 611 F.3d 692, 695, 712–19 (10th Cir. 2010). The court determined that that Service took a "hard look" at the environmental impacts of that action under the National Environmental Policy Act (NEPA), and did not predetermine the outcome of its NEPA analysis. *Id.*

[498] Judge Gorsuch has joined majority opinions in other cases touching upon environmental law issues. *See* Asarco, LLC v. Noranda Mining, Inc., 844 F.3d 1201 (10th Cir. 2017) (holding that a mining company could pursue a claim for monetary contribution for environmental cleanup costs from another company despite its prior settlement of Superfund liability in a bankruptcy proceeding); WildEarth Guardians v. EPA, 759 F.3d 1196 (10th Cir. 2014) (rejecting an environmental advocacy organization's challenge under the Endangered Species Act to EPA's promulgation of a Federal Implementation Plan to regulate emissions from a power plant on Indian land). However, it is difficult to draw from these opinions any firm conclusions about Gorsuch's judicial philosophy in environmental law cases.

[499] Comptroller of the Treasury v. Wynne, 575 U.S. ---, 135 S. Ct. 1787, 1794 (2015) ("Although the Clause is framed as a positive grant of power to Congress, 'we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject.'" (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)).

[500] Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1170–71 (10th Cir. 2015), *cert. denied*, --- U.S. ---, 136 S. Ct. 595 (2015).

[501] *Id.* at 1171. Judge Gorsuch discussed the debate about whether judges should continue to apply the dormant Commerce Clause doctrine to strike down state laws, noting that:

(continued...)

Circuit was bound by Supreme Court precedent on the dormant Commerce Clause doctrine.[502] Applying this precedent, the nominee's opinion read Supreme Court precedent narrowly to uphold the Colorado law,[503] concluding that Colorado's RES was distinguishable from analogous laws that the Supreme Court invalidated on dormant Commerce Clause grounds.[504] Judge Gorsuch's opinion in this case—and, in particular, his discussion of arguments made by Justices who have opposed the doctrine—suggests that, if confirmed to the Court, he might be willing to entertain arguments opposing the Court's use of the dormant Commerce Clause doctrine to strike down state environmental laws.

Federalism

During his tenure on the Court, Justice Scalia viewed federalism—the legal principles governing the division of power between the states and the national government—to be "one of the Constitution's structural protections of liberty,"[505] and he authored or joined a host of key opinions delineating the limits of federal power.[506] By contrast, during his tenure on the Tenth Circuit, Judge Gorsuch has addressed issues of federalism and the scope of congressional power vis-à-vis the states only in a limited number of cases. In many key areas of the law related to issues of federalism—such as the scope of Congress's affirmative powers under the Commerce Clause or the limits imposed by the Tenth Amendment—he has written little.[507] Thus, gleaning

(...continued)

> Employing what's sometimes called "dormant" or "negative" commerce clause jurisprudence, judges have claimed the authority to strike down state laws that, in their judgment, unduly interfere with interstate commerce. Detractors find dormant commerce clause doctrine absent from the Constitution's text and incompatible with its structure. But as an inferior court we take Supreme Court precedent as we find it and dormant commerce clause jurisprudence remains very much alive today, as but a glance at this term's slip opinions will confirm.

Id. (internal citations omitted).

[502] *Id.*

[503] *See* discussion *infra* in *Federalism*.

[504] *See id.* at 1173 (noting that the Colorado RES did not involve a price control statute that discriminated against out-of-state competitors and consumers; did not link prices in Colorado to those paid out of state; and did not discriminate against out-of-state entities). The only dormant Commerce Clause issue before the court was whether the RES violated the "extraterritoriality" aspect of the doctrine. A state law can have unlawful extraterritorial effects if the law impacts commerce taking place wholly outside the state's borders and has the practical effect of controlling commerce in another state such that the law directly regulates interstate commerce and, thus, violates the dormant Commerce Clause. Healy v. Beer Inst., 491 U.S. 324, 336 (1989); Brown-Forman Distillers v. N.Y. State Liquor Auth., 476 U.S. 573, 579–84 (1986).

[505] Printz v. United States, 521 U.S. 898, 921 (1997) (Scalia, J.).

[506] *See generally CRS Scalia Report*, *supra* note 8, at 21–24 (discussing key areas of the Supreme Court's jurisprudence related to federalism).

[507] For instance, Judge Gorsuch has not had the opportunity to address extensively issues related to the Tenth Amendment—a fundamental constitutional underpinning of federalism that reserves those powers not delegated to the federal government to the states or the people—or the Commerce Clause, which grants Congress the authority to legislate on matters concerning interstate commerce. *See* U.S. CONST. amend. X, art. I, § 8, cl. 3. Thus, it is difficult to draw any conclusions as to the nominee's views in these areas because he has considered few pertinent cases, beyond a handful of criminal appeals raising attenuated arguments about the constitutionality of federal laws pertaining to allegedly intrastate crimes. *See, e.g.*, United States v. Rutherford, 472 F. App'x 863, 864 (10th Cir. 2012) (upholding two federal criminal statutes as "valid exercises of the commerce power [that] regulate private parties as opposed to the states themselves, [and] do not contravene the Tenth Amendment," and denying prisoner's request for a certificate of appealability); United States v. Maldonado-Ortega, 467 F. App'x 797, 798 (10th Cir. 2012) (stating the court has "repeatedly upheld [the federal criminal statute at issue] against Commerce Clause and Tenth Amendment challenges," and denying prisoner's request for certificate of appealability); United States v. Gordon, 272 F. App'x 674 (10th Cir. (continued...)

any general trends respecting the nominee's views in this area of law is difficult, particularly because it is unclear to what degree the nominee's conclusions reflect his own approach to federalism questions, or what he perceives as adherence to Supreme Court precedent.[508] In general, however, in cases implicating federalism concerns, Judge Gorsuch has exhibited respect for state court decisions, interpretations, and rules,[509] and has expressed clear views in support of abstention,[510] the concept of a cooperative federalism,[511] and the practice of federal courts certifying some questions of state laws to state courts.[512]

Judge Gorsuch's general respect for the decisions, interpretations, and rules of state courts is evident in the majority and concurring opinions in *Browder v. City of Albuquerque*, both of which he drafted.[513] This case involved a claim against an off-duty police officer who killed one person and injured another while speeding through a red light.[514] Although Judge Gorsuch affirmed the district court's denial of qualified immunity for the police officer in his majority opinion,[515] he wrote separately to explain his views on when federal courts should abstain, for reasons of federalism, from deciding cases where state courts are able to vindicate rights adequately:

> To entertain cases like this in federal court as a matter of routine risks inviting precisely the sort of regime the Supreme Court has long warned against—one in which "any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation" in federal court and thus "make of the Fourteenth Amendment a font of tort law" needlessly superimposed on perfectly adequate existing state tort law systems.[516]

While abstention was not properly raised by the parties in *Browder*, Judge Gorsuch opined in his concurrence that "when the issue is raised in appropriate future cases, I believe we would do well to consider closely its invitation to restore the balance between state and federal courts. For we

(...continued)

2008) (upholding a federal criminal statute against a Commerce Clause challenge).

The same is true of cases involving the Supremacy Clause, which establishes the principle that the Constitution and federal laws are the "supreme Law of the Land" by which the state courts are bound. *See* U.S. CONST. art. VI, cl. 2. Because Judge Gorsuch has had limited occasion to address this area, and because such cases are often dependent on the specific language of the underlying federal law, it is also difficult to draw conclusions about his tendencies in this area. *Compare* Cook v. Rockwell Int'l Corp., 790 F.3d 1088, 1091–92 (10th Cir. 2015), *with* Caplinger v. Medtronic, Inc., 784 F.3d 1335 (10th Cir. 2015). However, in a concurring opinion in *Barber v. Colorado Department of Revenue*, a case where the majority found no conflict between a federal and state law, Judge Gorsuch noted that "a state law at odds with a valid Act of Congress is no law at all." 562 F.3d 1222, 1234 (10th Cir. 2009) (Gorsuch, J., concurring in judgment). In that case, however, he concluded that no federal-state conflict existed as would implicate the Supremacy Clause. *Id.* For a discussion of the nominee's judicial opinions involving preemption in general, see discussion *supra* in *Civil Liability*.

[508] *See* discussion *supra* in *Predicting Nominees' Future Decisions on the Court*.

[509] *See, e.g.*, Wood v. Milyard 721 F.3d 1190, 1192 (10th Cir. 2013).

[510] *See, e.g.*, Browder v. City of Albuquerque, 787 F.3d 1076 (10th Cir. 2015).

[511] *See, e.g.*, *id.*; Pino v. United States, 507 F.3d 1233 (10th Cir. 2007).

[512] *See, e.g.*, United States v. Reese, 505 F. App'x 733 (10th Cir. 2012); Larrieu v. Best Buy Stores, L.P., 491 F. App'x 864 (10th Cir. 2012) (unpublished); *Pino*, 507 F.3d 1233.

[513] *Browder*, 787 F.3d 1076.

[514] *Id.*

[515] For a detailed discussion of Judge Gorsuch's writings in the area of qualified immunity, see discussion *infra* in *Substantive Due Process*.

[516] *Browder*, 787 F.3d at 1084–85 (Gorsuch, J., concurring) (quoting Albright v. Oliver, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring in the judgment)).

should be able to expect both that justice will be done in cases like this one and that it will be done while exhibiting the sort of cooperative federalism that has traditionally defined our law."[517]

The nominee's respect for state court decisions and interpretations—which appears to be grounded in his support for the broader concept of a cooperative federalism between state and federal courts—figures prominently elsewhere in his federalism jurisprudence, particularly with regard to habeas petitions lodged by state prisoners.[518] Such themes are evident in his dissent from a denial of a request for a rehearing en banc in *Williams v. Jones*.[519] In that case, the majority declined to review a panel opinion that required a district court to craft a remedy for what the panel determined to have been ineffective assistance of counsel during plea negotiations in a criminal case.[520] In his dissent, Judge Gorsuch asserted that the panel's "holding represents a significant new federal intrusion into state judicial functions and a revamping of the separation of powers, one that unsurprisingly conflicts with the decisions of a number of other courts, including the Utah Supreme Court."[521] In another habeas case, *Wood v. Milyard*,[522] while the nominee's unanimous opinion held that a state procedural default did not bar federal habeas review, he noted that federal courts must respect state court rules when appropriate, stating: "As a matter of comity and federalism, . . . we will usually hold our tongues about any potential federal law violation lurking in the background of a state procedural default."[523]

While Judge Gorsuch has identified circumstances in which he believes deference to state courts is not only appropriate, but also vital to a system of cooperative federalism, he has also recognized limits to such deference, particularly when the actions of a state or its subdivisions are in clear conflict with federal court judgments. For example, in *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, the nominee wrote a unanimous opinion that granted an injunction preventing state and county officials from prosecuting Indian tribe members for crimes committed on tribal land.[524] In that case, the tribe had prevailed in federal court four decades earlier on its claims that Utah and several local governments were unlawfully trying to displace tribal authority through such prosecutions. While Judge Gorsuch acknowledged that the federal Anti-Injunction Act[525] "usually precludes federal courts from enjoining ongoing state court proceedings" "out of respect for comity and federalism," he relied upon "an important exception

[517] *Id.* at 1085–86 (Gorsuch, J., concurring). Judge Gorsuch used similar reasoning in *Cordova v. City of Albuquerque*, 816 F.3d 645, 664–65 (10th Cir. 2016) (Gorsuch, J., concurring).

[518] Indeed, in another case, Judge Gorsuch, writing for a unanimous panel, found no federal jurisdiction over a case that had been remanded to state court. Emphasizing the importance of federal-state comity, the nominee wrote: "fighting in federal district court over issues in already remanded claims can do no more than risk advisory opinions and invite the possibility that a claim will drift along aimlessly for years, half in federal court and half in state court, at a great cost alike to the parties, courts, and essential principles of federal-state comity." *In re* C & M Props., L.L.C. v. Burbidge, 563 F.3d 1156, 1166 (10th Cir. 2009).

[519] 583 F.3d 1254 (10th Cir. 2009) (en banc).

[520] *Id.*

[521] *Id.* at 1257 (Gorsuch, J., dissenting).

[522] 721 F.3d 1190 (10th Cir. 2013).

[523] *Id.* at 1192. Quoting Supreme Court precedent, Judge Gorsuch based this conclusion on "'the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them'"; "'a proper respect for the States [that] require[s] that federal courts give to the state procedural rule the same effect they give to the federal rule'"; and "'a strong prudential reason, grounded in considerations of comity and concerns for the orderly administration of criminal justice, not to pass upon a [procedurally] defaulted constitutional claim presented for federal habeas review.'" *Id.* (quoting Coleman v. Thompson, 501 U.S. 722, 746, 750 (1991); Dretke v. Haley, 541 U.S. 386, 392–93 (2004)).

[524] 790 F.3d 1000 (10th Cir. 2015).

[525] 28 U.S.C. § 2283.

. . . [that] expressly authorizes federal courts to enjoin state proceedings when it's necessary 'to protect or effectuate' a previous federal judgment."[526] Thus, one discernible limit on the nominee's general deference to state courts is the need for finality in federal court judgments. In reaching this conclusion, however, Judge Gorsuch emphasized comity and cooperative federalism, stating: "Though we are mindful of the importance of comity and cooperative federalism and keenly sensitive to our duty to provide appropriate respect for and deference to state proceedings, we are equally aware of our obligation to defend the law's promise of finality."[527]

Related to his views on comity and cooperative federalism is Judge Gorsuch's seeming preference to have state courts decide certain novel matters of state law, as evidenced by a number of opinions in which he certified such questions to state courts. In *Pino v. United States*,[528] Judge Gorsuch laid out certain principles to guide the determination of when certification is appropriate, which he then relied upon in several subsequent cases:[529] "While we apply judgment and restraint before certifying, . . . we will nonetheless employ the device in circumstances where the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance."[530] In articulating these principles, the nominee emphasized that "[i]n making the assessment whether to certify, we also seek to give meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts."[531] Judge Gorsuch's preference for leaving novel questions of state law to the state courts also informed a dissent he authored in a habeas case.[532] In *Wilson v. Workman*, the nominee faulted the majority for "ventur[ing] a guess about the meaning of state law" and asserted that "[a]sking the [state court] to interpret its own rule . . . would have had the benefit . . . of 'help[ing] build a cooperative federalism' by 'giv[ing] meaning and respect to the federal character of our judicial system.'"[533] As is evident, at the center of Judge Gorsuch's argument for sending questions of state law to the state is "certification's useful role in promoting a cooperative federalism."[534]

A related aspect of federalism is the doctrine of state sovereign immunity, which the Supreme Court has recognized underlies the Eleventh Amendment,[535] and is a fundamental aspect of sovereignty retained by the states under the federal system established by the Constitution.[536]

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[526] *Ute Indian Tribe*, 790 F.3d at 1007 (quoting 28 U.S.C. § 2283).

[527] *Id.* at 1012.

[528] 507 F.3d 1233 (10th Cir. 2007).

[529] United States v. Reese, 505 F. App'x 733, 734 (10th Cir. 2012) (unpublished) (relying on the principles of *Pino* and certifying a question of state law, noting "our respect for our cooperative federal system leads us to conclude that the New Mexico Supreme Court, not this court, should have the opportunity to decide it"); Larrieu v. Best Buy Stores, L.P., 491 F. App'x 864, 864–65 (10th Cir. 2012) (unpublished) (relying on the principles in *Pino* and certifying a question of state law "[b]ecause the case potentially involves the fate of a large province of state tort law—and a question the Colorado Supreme Court has already indicated an interest in resolving," and stating "federalism and comity interests lead us to think that court, rather than this one, should decide it").

[530] *Pino*, 507 F.3d at 1236.

[531] *Id.*

[532] Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009) (Gorsuch, J., dissenting).

[533] *Id.* at 1323–24.

[534] *Id.*

[535] *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

[536] U.S. CONST. amend. XI.

While Judge Gorsuch has had few occasions to address this aspect of federalism, in *Hill v. Kemp*, he wrote a unanimous opinion reversing a district court's dismissal of certain counts against a state official on Eleventh Amendment grounds.[537] In reaching this outcome, the nominee reviewed extensively the Supreme Court's Eleventh Amendment jurisprudence. Namely, Judge Gorsuch described *Hans v. Louisiana*,[538] which interpreted the Amendment as precluding suits by citizens in federal court against their own states, and *Ex parte Young*,[539] which specified circumstances under which the Amendment does *not* bar suits against a state—namely, when the suit seeks only declaratory and injunctive relief rather than monetary damages *and* is brought against state officers acting in their official capacities, rather than against the state itself. In reviewing further additions to the "rococo quality" of this Eleventh Amendment jurisprudence, Judge Gorsuch noted that "the Supreme Court has in recent years added a new gloss on *Young*'s gloss on *Hans*'s gloss on the Eleventh Amendment," perhaps suggesting frustration over the nature of the Court's jurisprudence in this area.[540] Ultimately, however, he found the case could be decided on the sole question of whether the relief was prospective in nature.[541] Having found that it was, Judge Gorsuch concluded that the case fell "within the scope of *Ex parte Young* and was not barred by the Eleventh Amendment."[542]

Of the various federalism cases interpreting the scope of federal powers granted by the Constitution, perhaps Judge Gorsuch's most telling writings have been with respect to the dormant Commerce Clause.[543] In this area, the nominee's clear views appear to align closely with those of Justice Scalia, who wrote in one case that "[t]he fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause," characterizing the doctrine as a "judicial fraud" and a "judge-invented rule."[544] Similarly, Judge Gorsuch's misgivings about the dormant Commerce Clause are expressed perhaps most clearly in his unanimous opinion in *Energy & Environment Legal Institute v. Epel*, where he described the doctrine as "another pocket of federal jurisprudence characterized by a long and evolving history of almost common-law-like judicial decision making."[545] In recounting the development of dormant Commerce Clause jurisprudence, the nominee stated in a seemingly skeptical tone:

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[537] Hill v. Kemp, 478 F.3d 1236 (10th Cir. 2007).

[538] 134 U.S. 1 (1890).

[539] 209 U.S. 123 (1908).

[540] *Hill*, 478 F.3d at 1256.

[541] *Id.* at 1259 (quoting Verizon Md. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002)).

[542] *Id.* at 1262. In another case, Judge Gorsuch, writing for a unanimous court, suggested that Congress exceeded its authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity in allowing states to be sued under Title II of the Americans with Disabilities Act. Elwell v. Okla. *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1311 (10th Cir. 2012) ("So even if Ms. Elwell *did* have a cause of action for employment discrimination under Title II, there's a real possibility it would still do her no good because the University might remain immune from suit.").

In another context, in a unanimous opinion in *Kay Electric Cooperative. v. City of Newkirk, Oklahoma*, Judge Gorsuch concluded that a state's immunity from liability under the Sherman Act does not extend to a municipality. 647 F.3d 1039, 1041 (10th Cir. 2011). In doing so, he noted that "[t]he Sherman Act has little to say about municipal immunity, at least directly," but "[o]ver the last 120 years, . . . much judicial embroidery has stitched out the scope of permissible and impermissible competitive activity under the Act, handiwork that's often been informed by evolving (if sometimes competing) schools of economic thought." *Id.*

[543] *See* U.S. CONST. art. I, § 8, cl. 3.

[544] *Id.* at 1807–08 (Scalia, J., dissenting).

[545] 793 F.3d 1169, 1172 (10th Cir. 2015).

> Most everyone accepts that [the Commerce Clause] grants Congress authority to pass laws concerning interstate commerce and to direct courts to disregard state laws that impede its own. Yet some see even more than that here. For many years . . . the Supreme Court has read the clause as embodying a sort of judicial free trade policy. Employing what's sometimes called "dormant" or "negative" commerce clause jurisprudence, judges have claimed the authority to strike down state laws that, in their judgment, unduly interfere with interstate commerce. Detractors find dormant commerce clause doctrine absent from the Constitution's text and incompatible with its structure.[546]

He went on to note, however, that "as an inferior court we take Supreme Court precedent as we find it and dormant commerce clause jurisprudence remains very much alive today."[547]

In *Epel*, Judge Gorsuch ultimately upheld a state law that required electricity generators to ensure that twenty percent of electricity sold to state consumers came from renewable resources.[548] This conclusion was based on a strict reading of one line of dormant Commerce Clause cases—those falling under *Baldwin v. G.A.F. Seelig, Inc.*[549]—which he described as "the most dormant doctrine in dormant commerce clause jurisprudence."[550] Reading the principles of the *Baldwin* cases narrowly, Judge Gorsuch concluded that the dormant Commerce Clause was not implicated in this case because the state law at issue "doesn't share any of the three essential characteristics that mark those cases: it isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters."[551] Although it is difficult to divine broad conclusions from this one case, Judge Gorsuch's opinion suggests a skeptical reading of the dormant Commerce Clause and an interest in cabining the doctrine to the facts of previous cases.

These views were also apparent in the concurring opinion Judge Gorsuch authored in *Direct Marketing Association v. Brohl*, which held that a state law imposing a notice and reporting obligation on out-of-state retailers that are not required to collect sales tax did not discriminate against or unduly burden interstate commerce, and therefore satisfied dormant Commerce Clause concerns.[552] In concurring, Judge Gorsuch summarized his views on the dormant Commerce Clause in a statement reminiscent of those of Justice Scalia:

> At the center of this appeal is a claim about the power of precedent. In fact, the whole field in which we are asked to operate today—dormant commerce clause doctrine—might be said to be an artifact of judicial precedent. After all, the Commerce Clause is found in Article I of the Constitution and it grants Congress the authority to adopt laws regulating interstate commerce. Meanwhile, in dormant commerce clause cases Article III courts have claimed the (anything but dormant) power to strike down some state laws even in the absence of congressional direction.[553]

While Judge Gorsuch's distinct views on the dormant Commerce Clause seem clear, the limited number of cases in which the nominee has ruled on other aspects of federalism and the scope of

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[546] *Id.* at 1171 (internal citations omitted).

[547] *Id.* (citing *Wynne*, --- U.S. at ---, 135 S. Ct. at 1808 (Scalia, J., dissenting); Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part)).

[548] *Id.* at 1170.

[549] 294 U.S. 511 (1935).

[550] *Epel*, 793 F.3d at 1170.

[551] *Id.* at 1173. For a discussion of the implications of this case for environmental law, see discussion *supra* in *Environmental Law*.

[552] 814 F.3d 1129 (10th Cir. 2016).

[553] *Id.* at 1148.

federal power vis-à-vis the states makes it difficult to conclude with certainty that he would, if confirmed to the Supreme Court, be as receptive to federalism based arguments as was Justice Scalia.[554] What is apparent, however, is his clear interest in upholding the "essential principles of federal-state comity"[555] in furtherance of a cooperative federalism[556] by deferring to the states when circumstances so warrant.

Freedom of Religion

Judge Gorsuch could, if confirmed to the Supreme Court, have a significant influence on the jurisprudence regarding freedom of religion—an area of law that, at its core, encompasses certain constitutional protections,[557] as well as statutory free exercise protections that augment these constitutional standards.[558] In recent years, the Court has taken up a number of religious freedom cases,[559] with Justice Scalia voting as part of five-Justice majorities to interpret more narrowly the

[554] *See CRS Scalia Report, supra* note 8, at 22–24 (noting that "Justice Scalia viewed federalism . . . to be 'one of the Constitution's structural protections of liberty'" (quoting Printz v. United States, 521 U.S. 898, 921 (1997) (Scalia, J.))).

[555] *In re* C & M Props., L.L.C. v. Burbidge, 563 F.3d 1156, 1166 (10th Cir. 2009).

[556] Browder v. City of Albuquerque, 787 F.3d 1076, 1085–86 (10th Cir. 2015).

[557] The Establishment and Free Exercise Clauses of the First Amendment respectively state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[558] In 1990, the Supreme Court clarified the applicable standard in challenges under the Free Exercise Clause, effectively lowering the constitutional barrier and barring religious objections from serving as the basis for exemptions from "neutral laws" of "general applicability." Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) (explaining that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). Congress responded to the Court's ruling by enacting the Religious Freedom Restoration Act (RFRA) of 1993, which created a new heightened standard of review of governmental actions by statute that was similar to the pre-*Smith* free exercise case law. *See* P.L. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq*. (requiring generally applicable governmental actions that impose a substantial burden on a person's religious exercise to have a compelling government interest and use the least restrictive means to achieve that interest). Following a 1997 decision in which the Court held RFRA's application to state and local government actions to be unconstitutional, *see* City of Boerne v. Flores, 521 U.S. 507 (1997), Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, which applied the RFRA standard to a limited set of state and local actions, specifically those involving zoning and institutionalization. *See* P.L. 106-274, 114 Stat. 803, codified at 42 U.S.C. § 2000cc *et seq.* (requiring state and local actions related to land use and institutionalized persons that impose a substantial burden on religious exercise to have a compelling governmental interest and use the least restrictive means to achieve that interest).

Another area of law implicating religious freedom rights involves federal nondiscrimination statutes with protections related to consideration of religion. *See, e.g.*, Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253, codified at 42 U.S.C. § 2000e *et seq*. (prohibiting discrimination based on religion in employment). Such laws often include corollary protections for religious employers, exempting qualifying employers from nondiscrimination requirements); *id.* § 2000e-1(a); Americans with Disabilities Act of 1990, Title I, § 103, P.L. 101-336, 104 Stat. 328, codified at 42 U.S.C. § 12113(d)). Judge Gorsuch has had only a few cases evaluating such claims. *See, e.g.*, Gad v. Kan. State Univ., 787 F.3d 1032, 1034 (10th Cir. 2015) (joining a unanimous opinion reversing a district court decision dismissing a Title VII religious discrimination claim for want of jurisdiction); Faragalla v. Douglas Cty. Sch. Dist., 411 F. App'x 140, 154 (10th Cir. 2011) (joining a unanimous opinion concluding that a coworker drawing a cross and hanging it on a wall did not, under the facts and circumstances of the case, amount to a hostile work environment for purposes of Title VII); United States v. Franklin-El, 399 F. App'x 427, 430 (10th Cir. 2010) (joining a unanimous decision dismissing a religious discrimination claim because the petitioner had waived the claim). Notably, while the Supreme Court's most recent Title VII religious discrimination case reversed a Tenth Circuit decision, Judge Gorsuch was not a member of the panel that decided that case in the lower court. EEOC v. Abercrombie & Fitch, --- U.S. ---, 135 S. Ct. 2028, 2032 (2015) (holding that, under Title VII, an applicant need only show that "his need for [a religious] accommodation was a motivating factor in the employer's decision" not to hire the applicant), *rev'g* 731 F.3d 1106 (10th Cir. 2013).

[559] *See, e.g.*, Zubik v. Burwell, --- U.S. ---, 136 S. Ct. 1557 (2016); Holt v. Hobbs, --- U.S. ---, 135 S. Ct. 853 (2015).

Constitution's prohibition on the "establishment of religion,"[560] while joining the same voting block to more expansively interpret statutory free exercise protections.[561] In contrast to other areas of law, where Judge Gorsuch's views remain uncertain,[562] freedom of religion is a subject on which the nominee has expressed fairly clear views, writing or joining several notable opinions during his time on the Tenth Circuit.[563]

Establishment Clause. A central constitutional issue respecting freedom of religion that Judge Gorsuch has considered concerns the reach of the First Amendment's prohibition on the establishment of a national religion, a restriction the High Court has, at times, read to bar certain government actions that endorse religion.[564] In determining what constitutes an unconstitutional endorsement of religion, the Court has in the recent past adopted Justice Sandra Day O'Connor's "reasonable observer test,"[565] which looks to whether an "objective observer," acquainted with the background of the challenged government action, would perceive it as a government endorsement of religion.[566] However, paralleling some of Justice Scalia's views on the Establishment Clause,[567] Judge Gorsuch has, in two dissents, criticized what he viewed as overly

[560] *See* Town of Greece v. Galloway, --- U.S. ---, 134 S. Ct. 1811, 1815 (2014) (5-4 vote) (holding that a town, by opening its monthly board meetings with a prayer, impermissibly established a religion).

[561] *See* Burwell v. Hobby Lobby Stores, Inc., --- U.S. ---, 134 S. Ct. 2751, 2759 (2014) (5-4 vote) (holding that RFRA prohibits the Department of Health and Human Services from "demand[ing] that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners").

[562] *See, e.g.*, discussions *infra* in *Takings* and *International and Foreign Law*.

[563] *See, e.g.*, Summum v. Pleasant Grove City, 499 F.3d 1170 (10th Cir. 2007) (joining opinion dissenting from denial of rehearing en banc); Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235 (10th Cir. 2009) (authoring opinion dissenting from denial of rehearing en banc); Am. Atheists, Inc. v. Duncan, 637 F.3d 1095 (10th Cir. 2010) (authoring one opinion dissenting from denial of rehearing en banc and joining another dissenting opinion); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (authoring concurring opinion); Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 799 F.3d 1315 (10th Cir. 2015) (joining opinion dissenting from denial of rehearing en banc); United States v. Quaintance, 608 F.3d 717 (10th Cir. 2010) (authoring opinion of the court); Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010) (authoring concurring opinion); Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (authoring opinion of the court).

[564] *See* McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 860 (2005) (holding that the Establishment Clause is violated when the government acts with the ostensible and predominant purpose of advancing religion); Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989) ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (holding that the Establishment Clause is violated by a "government endorsement or disapproval of religion" because "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."); *but see Town of Greece*, 134 S. Ct. at 1819 (holding that the Establishment Clause should be interpreted first by reference to historical practices and understandings).

[565] *See McCreary Cty.*, 545 U.S. at 862 (holding that the "eyes that look to" the purpose behind a government's message belong to an "objective observer"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (similar).

[566] Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring); *see also* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.").

[567] *See McCreary Cty.*, 545 U.S. at 901 (Scalia, J., dissenting) ("I have remarked before that it is an odd jurisprudence that bases the unconstitutionality of a government practice that does not actually advance religion on the hopes of the government that it would do so . . . But that oddity pales in comparison to the one invited by today's analysis: the legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion."); *Capitol Square Review & Advisory Bd.*, 515 U.S. at 768 (plurality opinion) ("It has radical implications for our public policy to suggest that (continued...)

expansive interpretations of the reasonable observer test on the grounds that these interpretations needlessly eliminate certain religious symbols and traditions from the public sphere.[568]

First, in *Green v. Haskell County Board of Commissioners*, Judge Gorsuch dissented from the denial of a request for rehearing in a case where the panel had previously enjoined a display of the Ten Commandments—which had been donated to the county—alongside other secular symbols on a courthouse lawn.[569] In his dissent, the nominee criticized the Tenth Circuit's formulation of the reasonable observer test, describing the observer utilized by the panel decision as an "*unreasonable* one" who "gets things wrong."[570] Judge Gorsuch's dissent noted a number of perceived errors made by the "unreasonable observer," which included confusing the donor's intent with the government's message[571] and equating silence by the government with endorsement.[572] Contending that "like cases should be treated alike," Judge Gorsuch's dissent further argued that the county's "inclusive display" of the Ten Commandments was indistinguishable from the display at issue in *Van Orden v. Perry*.[573] In that case, the Supreme Court had upheld a display of the decalogue among other monuments and historic markers on the grounds of the Texas state capitol.[574] Given these perceived parallels between *Green* and *Van Orden*, the nominee's dissent concluded by noting the "long" custom of displaying the Ten Commandments in public places[575] and arguing that the Tenth Circuit should reevaluate whether the endorsement test even applies to the dispute.[576] Judge Gorsuch's dissent is reminiscent of recent Supreme Court jurisprudence, where a majority of the Justices, including Justice Scalia, appeared to move from the endorsement test to looking to historical practices and understandings to resolve Establishment Clause disputes.[577]

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neutral laws are invalid whenever hypothetical observers may—even reasonably—confuse an incidental benefit to religion with state endorsement."); *see generally CRS Scalia Report*, *supra* note 8, at 24.

[568] *See Green*, 574 F.3d at 1243–45 (Gorsuch, J., dissenting from denial of rehearing en banc); *Am. Atheists*, 637 F.3d at 1110–11 (Gorsuch, J., dissenting from denial of rehearing en banc).

[569] *Green*, 574 F.3d at 1243 (Gorsuch, J., dissenting from denial of rehearing en banc).

[570] *Id.* at 1246.

[571] *Id.*

[572] *Id.* at 1247.

[573] *Id.* at 1248–49.

[574] 545 U.S. 677 (2005).

[575] *Green*, 574 F.3d at 1249 (Gorsuch, J., dissenting from denial of rehearing en banc) ("[W]e are long accustomed to seeing the decalogue—sometimes alongside the Mayflower Compact, the Magna Carta, or the Declaration of Independence—in and around courthouses and other public buildings associated with the administration of law. The Ten Commandments appear in displays at the State Capitol and in front of a city hall in Colorado, in front of a Kansas municipal building, before a county courthouse in New Mexico, and in public parks in Utah and Wyoming—just to mention some examples in our own circuit. Our Nation's capital practically abounds with the Commandments: at the Library of Congress, outside the (relatively new) Ronald Reagan International Trade Building, at the National Archives, inside and outside the Supreme Court building and even on its doors.").

[576] *Id.* ("I would prefer to rehear this case to determine whether and how *Lemon* applies . . . ."). *Lemon* refers to *Lemon v. Kurtzman*, 403 U.S. 602 (1972), in which the Court set forth a three-part test for assessing potential Establishment Clause violations, including a second prong that became the basis for Justice O'Connor's views on endorsement. *Id.* at 612–13. ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'") (internal citations omitted).

[577] *See* Town of Greece v. Galloway, --- U.S. ---, 134 S. Ct. 1811, 1819 (2014). It should be noted, however, that *Town of Greece* involved the practice of opening legislative sessions with prayer, which the Court has previously described as a unique practice that is "part of the fabric of our society." Marsh v. Chambers, 463 U.S. 783, 792 (1983). In this vein, an argument could be made that *Town of Greece* can be cabined to its facts.

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Nearly two years after *Green*, Judge Gorsuch similarly dissented from an order denying en banc rehearing in *American Atheists, Inc. v. Davenport*.[578] In that case, the panel had relied on the reasonable observer test in holding that the display of twelve-foot high crosses on public lands to memorialize fallen Utah Highway Patrol troopers violated the Establishment Clause.[579] Echoing his dissent in *Green*, Judge Gorsuch again raised concerns about the Tenth Circuit's interpretation of Justice O'Connor's test, arguing that "our observer continues to be biased, replete with foibles, and prone to mistake."[580] In particular, the dissent criticized what the nominee viewed as the observer's (1) "biased presumption that the Utah roadside crosses are unconstitutional"; (2) "internal bias" that disregarded "secularizing details" about the cross display; and (3) "selective and feeble eyesight," which resulted in misperceptions about the nature of the cross display.[581] In this sense, Judge Gorsuch viewed the panel decision in *American Atheists* as merely replicating the errors from *Green*, stating: "[W]e will strike down laws other courts would uphold, and do so whenever a reasonably biased, impaired, and distracted viewer might confuse them for an endorsement of religion."[582]

More generally, Judge Gorsuch's dissent pointedly criticized the concept of the reasonable observer on the grounds that this test differs from other formulations the Court has used in the Establishment Clause context in that it could be used "to strike down laws and policies a conjured observer could mistakenly think respect an establishment of religion."[583] Judge Gorsuch's dissent in *American Atheists*, like his dissent in *Green*, expressed skepticism regarding interpretations of the First Amendment that discourage accommodation for religious views. Instead, he appears to

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In another case respecting the Ten Commandments, *Summum v. Pleasant Grove City*, Judge Gorsuch joined a colleague's opinion dissenting from the denial of a petition for rehearing en banc. 499 F.3d. 1170, 1174 (10th Cir. 2007) (McConnell, J., dissenting from denial of rehearing en banc). Unlike *Green*, *Summum* did not involve an Establishment Clause challenge to the public display of the decalogue. Instead, the plaintiffs in *Summum* made a free speech challenge to the decision by the managers of a city park to reject the plaintiffs' proposed monument for display in that park, while accepting other monuments, including the Ten Commandments. *Id.* at 1174–75. The panel decision had viewed the government's conduct as illicit content-based discrimination in a public forum that warranted strict scrutiny under the First Amendment. 483 F.3d 1044, 1054 (10th Cir. 2007). In his dissent from the decision not to rehear the case, Judge McConnell, joined by Judge Gorsuch, argued that the selection of private religious symbols donated for display on public grounds constitutes government speech and is not subject to a free speech challenge. 499 F.3d. at 1175–76 (McConnell, J., dissenting from denial of rehearing en banc). Importantly, however, the dissent noted that as government speech, the "decisions of the city park managers could be challenged by appropriate plaintiffs under the Establishment Clause." *Id.* at 1178. While the dissent noted that the validity of such a challenge would depend on the "details of [the display's] context and history," the opinion refused to "speculate on the outcome of any such litigation." *Id.* On certiorari, the Court reversed the panel decision and, in a holding that echoed Judge McConnell's dissent, concluded that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009).

[578] Am. Atheists, Inc. v. Davenport, 637 F.3d 1095, 1101 (10th Cir. 2010) (denying rehearing en banc).

[579] Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1150 (10th Cir. 2010).

[580] 637 F.3d at 1108 (Gorsuch, J., dissenting from denial of rehearing en banc).

[581] *Id.*

[582] *Id.* at 1110.

[583] *Id.* ("Indeed, the result in this case could hardly be achieved under any different test. It is undisputed that the state actors here did *not* act with any religious purpose; there is *no* suggestion in this case that Utah's monuments establish a religion or coerce anyone to participate in any religious exercise; and the court does not even render a judgment that *it thinks* Utah's memorials *actually* endorse religion. Most Utahans, the record shows, don't even revere the cross. Thus it is that the court strikes down Utah's policy *only* because it is able to imagine a hypothetical 'reasonable observer' who *could think* Utah means to endorse religion—even when it doesn't.") (emphasis in original).

favor an approach that is more restrained in using the power of judicial review in Establishment Clause cases.[584]

Statutory Free Exercise Claims. Judge Gorsuch's most notable writings on freedom of religion may arise in the context of statutory free exercise claims. In two cases subsequently reviewed by the Supreme Court, the nominee authored or joined opinions involving challenges under the Religious Freedom Restoration Act (RFRA) to the contraceptive coverage requirement in the Affordable Care Act (ACA).[585] RFRA provides that federal laws that substantially burden a person's exercise of religion are permissible only if they are the least restrictive means of furthering a compelling governmental interest.[586]

In the Tenth Circuit's 2013 en banc decision in *Hobby Lobby v. Sebelius*, Judge Gorsuch joined the lead opinion of Judge Timothy Tymkovich and wrote a separate concurrence.[587] In *Hobby Lobby*, two closely held corporations, whose owners chose to "run their business to reflect their religious values," challenged the contraceptive requirement, arguing that it violated their religious beliefs for their businesses to "facilitate any act that causes the death of a human embryo."[588] The opinion for the majority of the Tenth Circuit concluded that the ACA contraceptive coverage requirement likely created a substantial burden on the organization's free exercise rights and was not the "least restrictive means" to justify a "compelling governmental interest."[589] In so holding, the Tenth Circuit deferred to the plaintiff's conception of its religious beliefs, and, viewing the dilemma posed by the contraceptive policy as a "Hobson's choice" in which the corporations and its owners could pay substantial fines for violating the requirement or "compromise their religious beliefs,"[590] concluded that the policy amounted to a substantial burden. While acknowledging the "importance" of the government's proffered compelling interests in promoting public health and gender equality,[591] Judge Tymkovich's opinion concluded that the existence of a wide range of exemptions to the requirement undermined the government's justifications for the policy[592] and demonstrated that the policy was not the least restrictive means of achieving these goals.[593] On appeal to the Supreme Court, a five-Justice majority (including Justice Scalia) largely agreed with the Tenth Circuit's assessment and affirmed the lower court.[594]

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[584] *Id.* ("That is a remarkable use of the awesome power of judicial review, . . . and it would have been well worth our while at least to pause to consider its propriety before rolling on.") (internal citations and quotations omitted).

[585] *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd sub nom*., Burwell v. Hobby Lobby Stores, Inc., --- U.S. ---, 134 S. Ct. 2751 (2014); *see also* Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 799 F.3d 1315 (10th Cir. 2015), *vacated and remanded sub nom.*, Zubik v. Burwell, --- U.S. ---, 136 S. Ct. 1557 (2016).

[586] 42 U.S.C. § 2000bb-1. For a discussion of RFRA and why it applies to federal agencies, see *supra* note 576.

[587] 723 F.3d at 1121 n.1; *see also id.* at 1152 (Gorsuch, J., concurring).

[588] 723 F.3d at 1120 (majority opinion).

[589] *Id.*

[590] *Id.* at 1141.

[591] *Id.* at 1143.

[592] *Id.* at 1143–44.

[593] *Id.* at 1144.

[594] Burwell v. Hobby Lobby Stores, Inc., --- U.S. ---, 134 S. Ct. 2751, 2759 (2014) ("We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."). One distinction between the Tenth Circuit's decision and that of the Supreme Court is that the High Court reserved judgment on the compelling interest prong of the RFRA inquiry. *Id.* at 2780. In contrast, the Tenth Circuit deemed the interests of the government as "insufficient" for purposes of satisfying RFRA because the interests were too broad, the government provided "no justification" for refusing to granting individual exemptions, and the (continued...)

Judge Gorsuch's concurring opinion in *Hobby Lobby*, while centrally focused on procedural matters tangential to the RFRA claims,[595] did discuss the substantive claims in broader terms than the majority opinion, suggesting that the nominee may have a clear preference for accommodation in free exercise disputes. Noting that RFRA was enacted for the express purpose of "vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance," Judge Gorsuch's concurrence emphasized that courts should largely defer to the assertions about the nature of religious beliefs made by those who sincerely hold these beliefs, both out of respect for religious liberty and because of the judiciary's limited competence to scrutinize the veracity of such beliefs.[596] Judge Gorsuch emphasized that it made little difference that the burden on the plaintiffs in *Hobby Lobby* did not stem from the government affirmatively requiring their use of a "particular drug or device."[597] This was because the plaintiffs had argued that the government imposed a religious burden by requiring their "*personal involvement* in facilitating . . . [the destruction of] a fertilized human egg that their religious faith holds impermissible," a "matter of faith" that, in the nominee's view, the court "must respect."[598] As a result, Judge Gorsuch's *Hobby Lobby* concurrence viewed RFRA as a "tie-breaker" that Congress designed to "override other legal mandates, including its own statutes, if and when they encroach on religious liberty."[599]

Two years later, Judge Gorsuch joined an opinion in *Little Sisters of the Poor v. Burwell* that repeated many of the themes of his *Hobby Lobby* concurrence.[600] *Little Sisters of the Poor* involved a corollary issue to the one raised in the earlier litigation. Specifically, the central issue in *Little Sisters of the Poor* was whether allowing religious entities that objected to the ACA requirement to fill out a form that would functionally require a third-party insurer to provide the coverage violates the free exercise rights of those religious entities.[601] Judge Harris Hartz, joined by four other judges, including Judge Gorsuch, dissented from the decision not to rehear a case dismissing a challenge to this government accommodation policy.[602] In particular, Judge Hartz's opinion criticized the panel's refusal "to acknowledge that [the plaintiff's] religious belief is that execution of the [accommodation] documents is sinful,"[603] arguing that the panel decision had "reframe[d]" and minimized the plaintiffs' religious objections.[604] In so doing, the dissent in *Little Sisters of the Poor* can be seen to have repeated many of the themes from Judge Gorsuch's *Hobby Lobby* concurrence by describing the majority approach as "dangerous . . . to religious liberty" because it is "not the job of the judiciary to tell people what their religious beliefs are."[605] On

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"contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143–44.

[595] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1154–56 (Gorsuch, J., concurring) (evaluating whether the individual owners of the plaintiff corporation had standing to bring the RFRA claims); *id.* at 1157–59 (evaluating whether the Anti-Injunction Act denied the court jurisdiction over the dispute).

[596] *Id.* at 1153 ("[I]t . . . is not, the place of courts of law to question the correctness or the consistency of tenets of religious faith, only to protect the exercise of faith.").

[597] *Id.*

[598] *Id.* (emphasis in original).

[599] *Id.* at 1156.

[600] 799 F.3d 1315, 1316 (10th Cir. 2015) (Hartz, J., dissenting from denial of rehearing en banc).

[601] *Id.*

[602] *Id.*

[603] *Id.* at 1317.

[604] *Id.*

[605] *Id.*

appeal, the High Court agreed to hear multiple lower court decisions on this issue, and in the consolidated case, *Zubik v. Burwell*, ordered the respective circuit courts to reconsider the cases after affording the parties time to reach a compromise that would provide contraceptive coverage without imposing the alleged burden on the challenging entities.[606] The High Court's action was seen as unusual in that the opinion did not formally adjudicate the underlying dispute, perhaps reflecting the close division of the current Court on free exercise matters.[607]

Outside of litigation over the ACA's contraceptive requirement, Judge Gorsuch has emphasized the importance of accommodating religious beliefs in other statutory free exercise challenges, especially in the context of prison litigation brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute that imposes the same burden RFRA imposes for the federal government on certain state entities, like prisons.[608] For instance, in *Yellowbear v. Lambert*, Judge Gorsuch, writing on behalf of a three-judge panel, held that a Wyoming prison lacked a sufficiently compelling interest in imposing a substantial burden on the religious exercise of an inmate who was an enrolled member of the Northern Arapaho Tribe and sought access to a sweat lodge to practice his religious beliefs.[609] In so doing, the nominee articulated two relatively pro-plaintiff interpretations of free exercise law, (1) noting the "modest" task of the court in determining a claimant's sincerity;[610] and (2) rejecting a conception of the compelling interest inquiry that would allow the government to rely on abstract interests to satisfy its burden under RLUIPA.[611] Similarly, in *Abdulhaseeb v. Calbone*, Judge Gorsuch joined the majority opinion and authored a concurring opinion reinstating several RLUIPA claims based on an Oklahoma prison's denial of an Islamic prisoner's request for a halal certified diet.[612] In his concurrence, the nominee emphasized that the inmate's charge was that he was denied "all means of accessing food [that] he can eat consistent with his . . . sincerely held religious beliefs," "effectively forcing him to choose between remaining pious or starving," a claim that "lies at [the] heart" of a statutory free exercise claim.[613]

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[606] Zubik v. Burwell, --- U.S. ---, 136 S. Ct. 1557, 1560 (2016) ("Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'").

[607] *See* CRS Legal Sidebar WSLG1534, *Supreme Court, Seemingly Divided at Oral Arguments, Requests Potential Compromises in Contraceptive Coverage Challenges*, by Cynthia Brown; CRS Legal Sidebar WSLG1579, *No Answer for Now: Supreme Court Remands Nonprofit Contraceptive Coverage Challenges*, by Cynthia Brown.

[608] *See* 42 U.S.C. § 2000cc-1. For a discussion of RLUIPA and its relationship with RFRA, see *supra* note 558.

[609] 741 F.3d 48, 52 (10th Cir. 2014).

[610] *Id.* at 53 (concluding that the sincerity requirement was "limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court").

[611] *Id.* at 57 ("Put simply, we must examine both sides of the ledger on the same case-specific level of generality: asking whether the government's particular interest in burdening this plaintiff's particular religious exercise is justified in light of the record in this case.").

[612] 600 F.3d 1301, 1306 (10th Cir. 2010). The majority opinion provided an explicit definition of "substantial burden" for purposes of RLUIPA for the first time in the Tenth Circuit. *Id.* at 1315 (concluding that a substantial burden occurs "when a government (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief").

[613] *Id.* at 1325–26 (Gorsuch, J., concurring).

Nonetheless, while Judge Gorsuch's opinions on statutory free exercise claims are solicitous of religious accommodation, there appear to be some limits on how far statutory free exercise protections extend in his view. For example, the nominee's concurrence in *Abdulhaseeb* rejected the prisoner's other claims, including the claim that the prison had violated his rights under RLUIPA merely by placing "jell-o and pudding" on the prisoner's cafeteria tray.[614] More broadly, while acknowledging that laws like RFRA and RLUIPA are "super statute[s]," "capable of mowing down inconsistent" laws, Judge Gorsuch noted that for a plaintiff "to win" under the law "takes no small effort," and such laws do "not offer refuge to canny operators who seek through subterfuge to avoid laws they'd prefer to ignore."[615] Seemingly consistent with this view, in one case, *United States v. Quaintance*, Judge Gorsuch, writing on behalf of a unanimous panel, rejected the argument that RFRA barred the prosecution of members of a marijuana distribution conspiracy who claimed that the use of the drug was central to the exercise of their newly created religion, which taught that "marijuana was a deity and sacrament."[616] Accordingly, while Judge Gorsuch is apt to interpret statutory free exercise laws, much like the Establishment Clause, to embrace the role of religion in society, there are limits to the degree to which he will defer to the purported interests suggested by claimants seeking to rely upon such laws.

Freedom of Speech

The Supreme Court has issued a number of notable opinions over the past decade respecting the First Amendment and freedom of speech,[617] with some legal scholars and practitioners going so far as to describe the Roberts Court as the "strongest First Amendment Supreme Court in our history."[618] Many of the Court's recent First Amendment rulings have been closely divided,[619] and the eight-member Court split evenly during the October 2015 term on a notable case regarding the First Amendment and public employee unions.[620] Given this, Judge Gorsuch could, if confirmed by the Senate, have a significant influence on the future direction of free speech law. The nominee has authored or joined a handful of opinions touching on free speech issues, providing a limited picture of how Judge Gorsuch views the First Amendment.[621]

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[614] *Id.* at 1325 (describing such claims as, at best, a "moderate impediment to—and not a constructive prohibition of—his religious exercise").

[615] *Yellowbear*, 741 F.3d at 53 (opining that individuals who "set up 'churches' as cover for illegal drug distribution operations" or "those who, facing the difficult realities of prison life, are tempted to seek special dispensations through fraudulent assertions of faith," should not be able to lodge a successful claim under RLUIPA).

[616] 608 F.3d 717, 718 (10th Cir. 2010); *see also id.* at 722 (observing that "numerous pieces of evidence in this case strongly suggest that the Quaintances' marijuana dealings were motivated by commercial or secular motives rather than sincere religious conviction").

[617] *See* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT xii (2017) (noting that from Chief Justice Roberts's "ascent in September 2005" to "Justice Scalia's death in February 2016," the Court issued "more than 40 decisions about the First Amendment's speech protections," which "form one of the most important parts of this Court's record and legacy.").

[618] BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 11 (2015); Kenneth Starr, *Address at the Pepperdine Judicial Law Clerk Institute* (Mar. 18, 2011); *see generally* MAGARIAN, *supra* note 617, at xii–xiv; *but see* Erwin Chemerinsky, *Not A Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011) ("[M]y claim is that the Roberts Court's overall record suggests that it is not a free speech Court at all.").

[619] *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., --- U. S. ---, 135 S. Ct. 2239 (2015) (vote of 5-4); Williams-Yulee v. Fla. Bar, --- U. S. ---, 135 S. Ct. 1656 (2015) (vote of 5-4); McCutcheon v. FEC, --- U. S. ---, 134 S. Ct. 1434 (2014) (vote of 5-4).

[620] Friedrichs v. Cal. Teachers Ass'n, --- U.S. ---, 136 S. Ct. 1083 (2016) (vote of 4-4).

[621] *See* Mark Joseph Stern, *Neil Gorsuch Is Not a Villain*, SLATE (Feb. 1, 2017), http://www.slate.com/articles/news_

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Judge Gorsuch's work on the Tenth Circuit has broached the issue of campaign finance regulation and the First Amendment—an area where a divided Supreme Court has invalidated a number of federal and state election laws[622]—at the margins. For example, in the en banc ruling in *Hobby Lobby v. Sebelius*,[623] Judge Gorsuch joined the majority opinion that concluded that the "logic" of *Citizens United v. FEC*—the 2010 Supreme Court ruling that, in relevant part, stated that "First Amendment protection extends to Corporations"[624]—compelled the conclusion that the First Amendment also protects a corporation's religious expressions.[625] While various commentators have suggested the *Hobby Lobby* decision signals Judge Gorsuch's broader support for decisions like *Citizens United*,[626] a lower court's reliance on Supreme Court precedent may not necessarily signal agreement with that precedent.[627] More specifically, as noted by one of the concurring opinions in *Hobby Lobby*, the disagreement between the members of the Court in *Citizens United* was more complex than whether the First Amendment protects a corporation's speech, and centered on whether the "asserted inclinations and advantages of corporations in corrupting officeholders" justified restricting corporate campaign expenditures.[628] In other words, Judge Gorsuch's vote in the 2013 en banc case may have limited significance with respect to his broader views on the constitutionality of campaign finance laws.

Perhaps more insights as to Judge Gorsuch's views on the First Amendment and campaign finance regulation come from *Riddle v. Hickenlooper*, a 2014 case that invalidated a Colorado law allowing major party candidates to accept twice as much in contributions per individual as independent and minor party candidates.[629] Concurring in *Riddle*, Judge Gorsuch agreed with the majority that the Colorado law violated the Equal Protection Clause of the Fourteenth Amendment because the law sprang from a "bald desire to help major party candidates at the expense of minor party candidates."[630] Moreover, Judge Gorsuch's opinion attempted to allay fears that the ruling "imperiled" any attempts to regulate campaign contributions, citing federal law as a nondiscriminatory model available to the State of Colorado.[631] In so concluding,

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and_politics/ jurisprudence/2017/01/neil_gorsuch_is_not_a_villain.html (noting that Judge Gorsuch's "stance on the First Amendment is mostly unknown"); *see also* Ilya Somin, *Thoughts on Gorsuch Pick*, VOLOKH CONSPIRACY (Jan. 31, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/thoughts-on-the-gorsuch-pick/?utm_term=.e0e033500632 (describing Judge Gorsuch's record on free speech as "limited").

[622] *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1434 (5-4 ruling striking down limits on the aggregate amount that an individual may contribute during a two-year period to all federal candidates, parties, and political action committees combined); Az. Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011) (5-4 ruling striking down an Arizona law that provided matching funds to candidates who accept public financing); Citizens United v. FEC, 558 U.S. 310 (2010) (5-4 ruling striking down certain restrictions limiting corporate independent expenditures for speech that expressly advocates the election or defeat of a candidate).

[623] 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd sub nom* Burwell v. Hobby Lobby Stores, Inc., --- U.S. ---, 134 S. Ct. 2751 (2014).

[624] 558 U.S. at 342.

[625] 723 F.3d at 1135.

[626] *See* Hans von Spakovsky, *From Campaign Finance to Regulations: Why Gorsuch Was the Perfect Pick for Trump*, CONSERVATIVE REV. (Feb. 2, 2017), https://www.conservativereview.com/commentary/2017/02/from-campaign-finance-to-regulations-why-gorsuch-was-the-perfect-pick-for-trump; Terry O'Neil, *The Case Against Neil Gorsuch*, THE HILL (Feb. 3, 2017), http://thehill.com/blogs/pundits-blog/civil-rights/317763-the-case-against-neil-gorsuch.

[627] *See generally* discussion *supra* in *Predicting Nominees' Future Decisions on the Court*.

[628] 723 F.3d at 1150 (Hartz, J., concurring).

[629] 742 F.3d 922 (10th Cir. 2014).

[630] *Id.* at 933 (Gorsuch, J., concurring).

[631] *Id.*

however, the concurrence broadly noted that the "act of contributing to political campaigns implicates a 'basic constitutional freedom,' one lying 'at the foundation of a free society' and enjoying a significant relationship to the right to speak and associate—both expressly protected First Amendment activities."[632] The nominee then observed that despite the First Amendment interests in campaign contributions, the Supreme Court "has yet to apply strict scrutiny to contribution limit challenges."[633] While Judge Gorsuch's concurrence in *Riddle* does not go so far as to argue explicitly for subjecting contribution limits to strict scrutiny, it does cite to Justices who have made such an argument in the past,[634] prompting some commentators to conclude that the nominee may favor subjecting campaign finance restrictions, including contribution restrictions, to the most stringent standard of review.[635] On the other hand, other legal scholars have read Judge Gorsuch's opinion in *Riddle* to "simply highlight[] the confusion he saw" in the Supreme Court jurisprudence on the proper level of scrutiny to be afforded campaign contributions.[636] At the very least, the *Riddle* concurrence's language, respecting the First Amendment interests implicated by the act of contributing to a political campaign, may signal that Judge Gorsuch disagrees with retired Justice John Paul Stevens's position that "money . . . is not speech."[637]

Beyond the context of campaign finance regulation, Judge Gorsuch has written or joined a number of opinions that view the First Amendment as an important restriction on government activity. For instance, in *Van Deelan v. Johnson*, a case centering on the First Amendment's Petition Clause, Judge Gorsuch, writing for a three-judge panel, reversed a district court's dismissal of a claim that several county officials had violated the plaintiff's First Amendment rights by "seeking to threaten and intimidate him into dropping various tax assessment challenges."[638] In a particularly pointed passage in *Van Deelan*, Judge Gorsuch wrote broadly about the underlying dangers of suppression of speech by government officials:

> When public officials feel free to wield the powers of their office as weapons against those who question their decisions, they do damage not merely to the citizen in their sights but also to the First Amendment liberties and the promise of equal treatment essential to the continuity of our democratic enterprise.[639]

With this backdrop, the nominee rejected the county's argument that the plaintiff's tax assessment challenges did not amount to "constitutionally protected activity" because they were not a matter of "public concern,"[640] concluding that the First Amendment "extends to matters great and small, public and private."[641] The *Van Deelan* decision and Judge Gorsuch's reluctance to distinguish between types of speech protected by the Constitution may align him with the majority of the

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[632] *Id.* at 931 (internal citations omitted).

[633] *Id.*

[634] *Id.* (citing Randall v. Sorrell, 548 U.S. 230, 266–67 (2006) (Thomas, J., concurring in the judgment) and Buckley v. Valeo, 424 U.S. 1, 241–45 (1976) (Burger, C.J., concurring in part and dissenting in part)).

[635] *See* David Keating, *Gorsuch's Record Shows Strong Support for the First Amendment View of Campaign Finance Laws*, WASH. EXAMINER (Feb. 3, 2017), http://www.washingtonexaminer.com/gorsuchs-record-shows-strong-support-for-the-first-amendment-view-of-campaign-finance-laws/article/2613866.

[636] *See* Ed Whelan, *Common Cause's Chicken Little*, NAT'L REVIEW (Feb. 15, 2017), http://www.nationalreview.com/node/444930/print.

[637] *See* Nixon v. Shrink Mo. Gov't Pac, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

[638] 497 F.3d 1151, 1153 (10th Cir. 2007).

[639] *Id.* at 1155.

[640] *Id.* at 1156.

[641] *Id.* at 1153.

Roberts Court that has, in recent years, rejected the argument that the First Amendment does not protect certain "low value" speech.[642]

In addition to *Van Deelan*, Judge Gorsuch has written or joined a number of opinions that promote the rights of the press at the expense of plaintiffs in certain state tort actions. For example, in *Bustos v. A&E Television Network*, Judge Gorsuch wrote an opinion holding that a prisoner who "merely *conspired* with" the Aryan Brotherhood could not sustain a defamation lawsuit resulting from a History Channel television series describing the plaintiff as a member of that gang.[643] Noting that the First Amendment requires a plaintiff pursuing a defamation claim to prove the underlying falsehood of the statement at issue,[644] the *Bustos* decision held that the plaintiff had failed to show the History Channel's statement had a significant impact on his reputation.[645] Likewise, Judge Gorsuch joined a panel opinion in *Cory v. Allstate Insurance*,[646] which dismissed a defamation lawsuit on the ground that "minor inaccuracies will not preclude" the defense of substantial truthfulness.[647] Similarly, in two other cases brought against television stations—*Anderson v. Suiters*[648] and *Alvarado v. KOB-TV, L.L.C.*[649]—Judge Gorsuch joined opinions that dismissed privacy tort claims on First Amendment grounds, reasoning that the underlying reported events involved protected speech on matters of public concern.[650]

Nonetheless, the nominee should not be viewed as a free speech absolutist, as a number of Judge Gorsuch's opinions have recognized limits to the First Amendment's speech protections. For example, in *Mink v. Knox*—a 2010 case that concluded that the First Amendment precludes defamation actions aimed at parody, even when involving a private figure on a matter of private concern[651]—Judge Gorsuch authored a concurring opinion that raised (without answering) the question of whether constitutionalizing the protections for such parodies was necessary or wise.[652]

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[642] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 471 (2010) (rejecting a balancing test for determining the kinds of speech protected by the First Amendment because that would "permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."); *id.* at 482 (Alito, J., dissenting) ("The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of 'crush videos,' a form of depraved entertainment that has no social value.").

[643] 646 F.3d 762, 762 (10th Cir. 2011) ("Can you win damages in a defamation suit for being called a *member* of the Aryan Brotherhood prison gang on cable television when, as it happens, you have merely *conspired* with the Brotherhood in a criminal enterprise? The answer is no.") (emphasis in original).

[644] *Id.* at 764.

[645] *Id.* at 765.

[646] 583 F.3d 1240 (10th Cir. 2009).

[647] *Id.* at 1244.

[648] 499 F.3d 1228 (10th Cir. 2007).

[649] 493 F.3d 1210 (10th Cir. 2007).

[650] *Anderson*, 499 F.3d at 1235 (concluding that a television station and reporter could not be held liable for publication of private facts because the underlying report related to a matter of public concern, the prosecution of a local attorney who had allegedly raped the plaintiff); *Alvarado*, 493 F.3d at 1219 (holding that a television station was not liable for invasion of privacy or intentional infliction of emotional distress as the result of revealing the names of two undercover officers on air because allegations of police misconduct are a matter of public concern).

[651] 613 F.3d 995, 1003–09 (10th Cir. 2010).

[652] *Id.* at 1013 ("One might argue, for example, that such a rule unnecessarily constitutionalizes limitations that state tort law already imposes. . . . Or that such a rule may unjustly preclude private persons from recovering for intentionally inflicted emotional distress regarding private matters, in a way the First Amendment doesn't compel."). In so doing, the nominee reserved judgment as to whether anything other than controlling precedent dictated the case's outcome. *Id.* at 1012 ("I reach [the] conclusion [that probable cause did not exist to think that criminal libel had been committed] for a simple and straightforward reason: this court has already said so.").

In the context of public employee speech,[653] the nominee has authored several opinions limiting or dismissing First Amendment lawsuits brought by government employees against their employers on the grounds that the speech occurred pursuant to the employees' official duties and, therefore, could be regulated by the government.[654] With regard to challenges to zoning ordinances targeting adult bookstores,[655] another area of First Amendment law that has divided the Supreme Court, Judge Gorsuch dissented from the denial of a petition for en banc rehearing.[656] In so doing, he contended that the underlying panel decision interpreted the First Amendment too broadly and "set[] a new and much higher burden for municipalities" that made it harder to regulate the secondary effects of adult businesses.[657] And, in a case raising issues similar to those in a case presently before the Court,[658] Judge Gorsuch, in *Doe v. Shurtleff*,[659] joined an opinion holding that a Utah law requiring registered sex offenders to provide the government with their usernames and online identifiers for certain websites was a permissible content-neutral regulation of speech.[660]

International and Foreign Law

Justice Scalia's written work and public speeches reflected distinct attitudes toward the use of contemporary foreign law and practice, ratified treaties, and international custom to inform understanding of the U.S. Constitution and federal statutes.[661] In contrast, due in part to the nature of the Tenth Circuit's docket, Judge Gorsuch's jurisprudence offers comparatively little guidance as to his likely approach on such matters if appointed to the Supreme Court.[662] While the originalist judicial philosophy ascribed to Judge Gorsuch[663] would arguably lead him, like Justice Scalia, to eschew consideration of contemporary foreign practice as an aid to interpreting the Constitution's meaning,[664] the nominee has not addressed such matters in the cases that have

[653] For more on the public employee speech doctrine, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Kathleen Ann Ruane, at 30–36. Public employee speech is an area of First Amendment law in which narrow majorities of the High Court have, at times, tended to favor the authority of the government over the rights of employees. *See* Garcetti v. Ceballos, 547 U. S. 410, 421 (2006) (holding that statements made by public employees pursuant to their official duties receive no First Amendment protection); *but see* Lane v. Franks, --- U.S. ---, 134 S. Ct. 2369, 2378 (2014) (holding that the First Amendment "protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities").

[654] Hogan v. Utah Telecomm. Open Infrastructure Agency, 566 F. App'x 636, 639 (10th Cir. 2014) (rejecting the First Amendment claim raised by the plaintiff because the "complaint arose out of a core duty of his employment."); Casey v. W. Las Vegas Ind. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007) (holding that only statements that the plaintiff made to the "New Mexico Attorney General regarding alleged violations of the Open Meetings Act, violations that she had no apparent duty to cure or report and which were not subject to her control," were actionable).

[655] *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) (plurality opinion).

[656] Abilene Retail #30, Inc. v. Bd. of Comm'rs, 508 F.3d 958, 959 (10th Cir. 2007) (Gorsuch, J., dissenting from denial of rehearing en banc).

[657] *Id.* at 959–60.

[658] State v. Packingham, 777 S.E.2d 738 (N.C. 2015), *cert. granted*, Packingham v. North Carolina, 137 S. Ct. 368 (2016).

[659] 628 F.3d 1217 (10th Cir. 2010).

[660] *Id.* at 1225–26.

[661] *See generally CRS Scalia Report*, *supra* note 8, at 30–32.

[662] *See CRS Gorsuch Opinions Report*, *supra* note 46 (collecting opinions by Judge Gorsuch and identifying by legal topic); Murillo, Schwartz & Spera, *supra* note 46 ("Perhaps unsurprisingly in the Tenth Circuit, Judge Gorsuch has written almost nothing in the areas of international law or foreign affairs.").

[663] *See* discussion *supra* in *Role of the Judiciary*.

[664] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) ("More fundamentally, however, the (continued...)

come before him. The Tenth Circuit docket involves few cases touching upon international law issues, and the handful of cases considered by Judge Gorsuch in this area has been unremarkable.[665] In short, if Judge Gorsuch has any distinctive leanings with respect to questions regarding the interpretation or enforceability of international law in U.S. courts, or whether foreign law has any bearing on U.S. law, they are not apparent in his judicial writings to date.

Right to Bear Arms

Judge Gorsuch has touched upon the Second Amendment and the constitutionality of firearms regulations briefly in his written opinions while on the Tenth Circuit. These writings suggest that Judge Gorsuch views the Second Amendment as generally protecting an individual right to bear arms, a position that could be seen as consistent with the originalist approach often ascribed to him.[666] However, none[667] of these cases purported to explore the scope of the Second Amendment's protections or the Supreme Court's decisions in *District of Columbia v. Heller*[668] and *McDonald v. City of Chicago*,[669] two challenges to firearms restrictions in which Justice Scalia notably participated during his time on the High Court.[670]

(...continued)

basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."); Thompson v. Oklahoma, 487 U.S. 815, 868 n. 4 (1988) (Scalia, J., dissenting) (criticizing the plurality's reference to foreign practice when it interpreted the meaning of the Eighth Amendment, and declaring that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding . . . the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution").

[665] For example, in one case involving the interpretation of a prisoner transfer treaty with Canada, Judge Gorsuch relied on prior circuit precedent interpreting the same provision of a similar treaty to conclude that the law of the receiving country applies to determine the length of the remaining term of imprisonment. United States v. Jolivet, 267 F. App'x 736, 738 (10th Cir. 2008) (citing Kass v. Reno, 83 F.3d 1186, 1192 (10th Cir. 1996)). Judge Gorsuch also wrote the panel opinion in a case recognizing that the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94–583, 90 Stat. 2898 (1976) (codified as amended at 28 U.S.C. §§1602-11), conferred immunity to two Chinese local governments accused of interfering in a joint business. Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't, 533 F.3d 1183 (10th Cir. 2008).The court affirmed the district court's reasoning granting the defendants' motion to remove the case from state to federal court, but rejected the defendants' assertion that of a purported congressional intent that cases involving foreign states be handled in federal court. *Id.* at 1189 ("If Congress had wished to grant exclusive jurisdiction to the federal courts over suits involving foreign governments, it could have so said."). In a civil lawsuit involving head-of-state immunity for the President of Rwanda, who was accused of ordering the murder of the previous presidents of Rwanda and Burundi and instigating the ensuing genocide, Judge Gorsuch agreed with the rest of the panel that, in accordance with "overwhelming" judicial precedent (and given that the FSIA did not govern), the State Department's suggestion of immunity controlled. Habyarimana v. Kagame, 696 F.3d 1029, 1032 (10th Cir. 2012) (quoting Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974) (Wisdom, J.)).

[666] *See* discussion *supra* in *Role of the Judiciary*.

[667] In dissenting from the Tenth Circuit's denial of en banc review in *Kerr v. Hickenlooper*, Judge Gorsuch, discussing the political question doctrine and the ability of a court to adjudicate a case, contrasted the Second Amendment, with its "manageable standards" to decide cases like *Heller*, with the Guarantee Clause, which Judge Gorsuch viewed to lack such standards. 759 F.3d 1186, 1194 n.1 (10th Cir. 2014) (Gorsuch, J., dissenting). However, he did not elaborate further upon what he viewed to be the Second Amendment's "standards" in that case.

[668] 554 U.S. 570 (2008).

[669] 561 U.S. 742 (2010).

[670] For further discussion of Justice Scalia's views on the Second Amendment, see generally *CRS Scalia Report*, *supra* note 8, at 32–34.

Judge Gorsuch's references to the Second Amendment have generally appeared in cases concerned with how to construe federal criminal statutes.[671] The most notable of these was arguably Judge Gorsuch's dissent from the Tenth Circuit's denial of en banc review in *United States v. Games-Perez*.[672] At issue in that case was whether federal statutes penalizing the possession of firearms by felons require the government to prove that a defendant knew of *both* his own status as a felon *and* his possession of a firearm, or whether the government needs to prove *only* that the defendant knowingly possessed a firearm.[673] The longstanding Tenth Circuit precedent is that the government need only prove knowing possession of a firearm.[674] However, in dissenting from the denial of en banc review in *Games-Perez*, Judge Gorsuch called for the Tenth Circuit to overrule this precedent[675] because of the specific statutory language in question,[676] as well as the general presumption that the mens rea—or mental state—requirements of criminal statutes apply to all elements of the crime.[677] It was in discussing these mental state requirements that Judge Gorsuch mentioned the Second Amendment, noting that "gun possession is often lawful and sometimes even protected as a matter of constitutional right."[678] In particular, he viewed the fact that gun possession can be lawful and constitutionally protected as weighing in favor of requiring the government to prove that the defendant knew of his status as a felon because the "*only* statutory element separating innocent (even constitutionally protected) gun possession from criminal conduct in [the statutory provisions in question] is a prior felony conviction."[679]

Judge Gorsuch made similar statements about gun possession being "often lawful" and a "matter of constitutional right" in subsequent decisions, including his 2015 opinion for the majority of the en banc Tenth Circuit in *United States v. Rentz*.[680] Like *Games-Perez*, the *Rentz* case was concerned with how to interpret a federal criminal statute related to firearms,[681] Section 924(c) of

[671] The one exception is *United States v. Denson*, which involved a constitutional challenge to a search and seizure involving firearms. *See* 775 F.3d 1214, 1220 (10th Cir. 2014). In this case, Judge Gorsuch wrote on behalf of a unanimous three-judge panel in finding that law enforcement officers did not violate the defendant's Fourth Amendment rights when they entered the defendant's home and seized his firearms. *Id.* In so holding, Judge Gorsuch noted that while "guns are often possessed lawfully and as a matter of constitutional right," that is not the case with "felons like" the defendant." *Id.* ("In his case, the guns were indeed contraband.").

[672] 695 F.3d 1104, 1116 (10th Cir. 2012) (Gorsuch, J., dissenting for the denial of en banc review). Previously, Judge Gorsuch had made similar arguments as part of a three-judge panel hearing this case. *See* United States v. Games-Perez, 667 F.3d 1136, 1142–43 (10th Cir. 2012) (Gorsuch, J., concurring) (viewing Tenth Circuit precedent as requiring the government to prove only that the defendant knowingly possessed a firearm, but noting that "just because our precedent indubitably commands this result doesn't mean this result is indubitably correct").

[673] 695 F.3d at 1105 (Murphy, J., concurring); *id*. at 1117 (Gorsuch, J., dissenting from the denial of en banc review).

[674] *See* United States v. Capps, 77 F.3d 350 (10th Cir. 1996).

[675] 695 F.3d at 1117–18.

[676] *Id*. at 1117 ("[R]eading Congress's mens rea requirement as leapfrogging over the first statutorily specified element and touching down only at the second listed element . . . defies grammatical gravity and linguistic logic . . . .").

[677] *Id*. ("Ordinarily, . . . when a criminal statute introduces the elements of a crime with the word 'knowingly,' that mens rea requirement must be applied 'to all the subsequently listed [substantive] elements of the crime.'") (quoting Flores-Figueroa v. United States, 556 U.S. 646, 650 (2009)).

[678] *Id*. at 1119.

[679] *Id*. *See also* United States v. Games-Perez, 667 F.3d 1136, 1144–45 (10th Cir. 2012) (Gorsuch, J., concurring) ("Following the statutory text would simply require the government to prove that the defendant knew of his prior felony conviction. And there's nothing particularly strange about that. After all, there is 'a long tradition of widespread lawful gun ownership by private individuals in this country,' and the Supreme Court has held the Second Amendment protects an individual's right to own firearms and may not be infringed lightly.").

[680] 777 F.3d 1105 (10th Cir. 2015).

[681] *Id*. at 1106–07.

Title 18 of the U.S. Code which imposes "heightened penalties on those who use[, carry, or possess] guns to commit violent crimes or drug offenses."[682] Judge Gorsuch's opinion, which primarily centered on a text-based interpretation of the statute, also suggested that his interpretation was consistent with constitutional requirements. Specifically, the statutory provision in question could not be reasonably construed to prohibit using, carrying, or possessing a gun per se, "for guns often may be lawfully used, carried, or possessed: the Constitution guarantees as much."[683] Judge Gorsuch's opinions could, in part, be seen to reflect or even expand on the precedent of the Supreme Court's decision in *Heller*, which his opinions have (although not universally) cited.[684]

Other opinions authored by Judge Gorsuch, though, suggest potential openness to at least certain restrictions on firearms possession, consistent with the widely cited dictum in *Heller* that "nothing in [the Supreme Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[685] Judge Gorsuch has quoted or otherwise noted *Heller*'s language about restrictions on the possession of firearms by felons, in particular, in several decisions, including his 2010 opinion for a unanimous three-judge panel in *United States v. Pope*, which ultimately was resolved on procedural grounds.[686] Other opinions authored by Judge Gorsuch include similar language.[687] In a few cases, such as *Pope*, the opinions cite to other judges who have taken a different view of *Heller*'s dictum, at least in particular contexts.[688] However, these citations by Judge Gorsuch may be intended to signal awareness of these judges' arguments, rather than agreement with them.

The remaining mentions of firearms in Judge Gorsuch's opinions arise in contexts that do not directly raise Second Amendment claims, and the outcomes in these cases could be seen to reflect other factors beyond the nominee's views about gun possession and the scope of the Second Amendment. For example, in one case, Judge Gorsuch authored a unanimous opinion rejecting a necessity defense to a federal gun charge as a matter of law.[689] In another case, he joined a unanimous opinion authored by another judge concluding that law enforcement did not violate

[682] *Id*. at 1109–10 (stating, of the construction of the statute in question adopted by the Tenth Circuit, that "this reading of the statute—like most good ones—flows from plain old grade school grammar").

[683] *Id*. at 1109.

[684] *See, e.g.*, United States v. Games-Perez, 695 F.3d 1104, 1119 (10th Cir. 2012) (Gorsuch, J., dissenting); United States v. Games-Perez, 667 F.3d 1136, 1145 (10th Cir. 2012) (Gorsuch, J., concurring). *Heller* is not, however, cited in *Rentz* or *Denson*.

[685] 554 U.S. 570, 626–27 (2008).

[686] 613 F.3d 1255, 1257 (10th Cir. 2010).

[687] *See, e.g.*, United States v. Games-Perez, 667 F.3d 1136, 1145 (10th Cir. 2012) (Gorsuch, J., concurring).

[688] *See* United States v. Pope, 613 F.3d 1255, 1257 (10th Cir. 2010) (citing *In re* United States, 578 F.3d 1195, 1196 (10th Cir. 2009) (Murphy, J., dissenting); United States v. McCane, 573 F.3d at 1037, 1047–50 (10 Cir. 2010) Tymkovich, J., concurring)). In *In re United States*, for example, Judge Michael Murphy raised the question whether a statute penalizing the possession of a firearm by a person previously convicted of a misdemeanor falls within the scope of *Heller*'s dictum about felons. 578 F.3d at 1196. Similarly, in *McCane*, Judge Tymkovich suggested that *Heller*'s dictum regarding felons "may lack the 'longstanding' historical basis that *Heller* ascribes to it," and that there is "possible tension" between this dictum and the High Court's underlying holding. 573 F.3d at 1037, 1047–48.

[689] *See* United States v. Fraser, 647 F.3d 1242, 1245 (10th Cir. 2011). *See also* United States v. Reese, 559 F. App'x 777, 777–78 (10th Cir. 2014) (Gorsuch, J.) (writing for a unanimous three-judge panel in concluding that the defendant's conviction for being a felon unlawfully in possession of a firearm could not be sustained where even the prosecution conceded that the defendant had had his civil rights restored, satisfying an exception to the prohibition on firearms possession expressly provided for in the federal statute).

the Fourth Amendment rights of a defendant carrying a concealed handgun when the officers subjected the defendant to an investigative detention and weapons seizure.[690] The law of the state in question exempted persons with valid licenses to carry concealed weapons, among others, from its general prohibition upon carrying loaded firearms in public.[691] However, in the Tenth Circuit's view, the existence of this exemption did not negate law enforcement's reasonable suspicion, at the time when the defendant was detained, that the defendant's possession of the firearm was unlawful.[692] Accordingly, law enforcement had "no affirmative obligation prior to seizing Defendant—at the risk of harm to [themselves] and others—to inquire of [the defendant] whether his possession of the handgun fell within the classes excepted by the statute."[693]

Separation of Powers

With respect to Separation of Powers, the Tenth Circuit docket does not appear to have afforded Judge Gorsuch an opportunity to evaluate any rifts between the President and Congress involving the allocation of war powers or executive claims of exclusivity in the conduct of foreign affairs, for example. But a review of his written opinions suggests misgivings when Congress assigns legislative or judicial responsibilities to be carried out by the executive branch.[694] Specifically, his writings indicate he is a proponent of reinvigorating the non-delegation doctrine to police overly broad statutory delegations of legislative functions to the other branches.[695] Judge Gorsuch has objected to what he views as Congress foisting legislative authority onto the judiciary. For example, he seems to view vagueness problems with criminal statutes at least partially through a separation-of-powers lens. Accordingly, he has noted that vague criminal statutes invite the judiciary to legislate:

> Not incidentally, vague laws also pose a danger to separation of powers: "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[, t]his would, to some extent, substitute the judicial for the legislative department of government."[696]

[690] United States v. Rodriguez, 739 F.3d 481, 487 (10th Cir. 2013).

[691] *Id*. at 486.

[692] *Id.* at 487

[693] *Id*. at 490.

[694] *See, e.g.*, United States v. Baldwin, 745 F.3d 1027, 1030 (10th Cir. 2014) ("Can Congress so freely delegate the core legislative business of writing criminal offenses to unelected property managers at GSA?"); Caring Hearts Pers. Home Serv. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016) ("Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called 'delegated' legislative authority."); United States v. Nichols, 784 F.3d 666, 674 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) (criticizing criminal statute in which "Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out").

[695] *See, e.g.*, *Nichols*, 784 F.3d at 670 (Gorsuch, J., dissenting from denial of rehearing en banc) (stating that to "abandon openly the nondelegation doctrine [would be] to abandon openly a substantial portion of the foundation of American representative government"); *Caring Hearts*, 824 F.3d at 976 (suggesting a need to rein in the administrative state as evident in this "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.").

[696] United States v. Cardenas-Alatorre, 485 F.3d 1111, 1114 (10th Cir. 2007) (quoting Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983)). In the case at bar, however, the defendant's plight was not eased by the court's separation-of-powers concerns. Relief in the form of suppression of evidence was withheld on account of the police officer's entitlement to qualified immunity. *See id.* at 1114–15.

His writings from the bench suggest he prefers to apply what scholars frequently term a "formalist" approach to separation of powers—an evaluation of strict delineations of governmental powers set forth in the Constitution—to resolve disputes between and among the branches. Based on these writings, if elevated to the Supreme Court, Judge Gorsuch could be expected to reject "functionalist" approaches that weigh the extent to which a challenged law or action upsets the equilibrium of powers the Framers hoped to achieve.[697] His formalist approach seems to guide his views on both the limited and exclusive nature of judicial power,[698] which are informed by the structure of the Constitution.[699] For example, he wrote the panel opinion in *Loveridge v. Hall* overturning a district court decision allowing malpractice and breach of fiduciary duty claims to be resolved in a non-Article III bankruptcy court without the consent of the parties.[700] Judge Gorsuch described the purpose of Article III of the Constitution as crafted by the Framers to be "the cure for their complaint [against the crown], promising there that the federal government will never be allowed to take the people's lives, liberties, or property without a decision maker insulated from the pressures other branches may try to bring to bear."[701] Echoing a concurrence from Justice Scalia,[702] the nominee also exhibited some doubt regarding the continued viability of the longstanding distinction between public rights and private rights as a governing principle for determining the types of claims Article I courts (like bankruptcy courts) can hear.[703]

Judge Gorsuch has repeatedly stressed that he believes that the division of legislative and judicial powers is not a mere "formality dictated by the Constitution."[704] Nor is it "just about ensuring that two institutions with basically identical functions are balanced one against the other."[705] Rather, he views the separation of powers as essential to the preservation of liberty:

> To the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design, an independent right of the people essential to the preservation of all other rights later enumerated in the Constitution and its amendments.[706]

Perhaps echoing Justice Scalia's quotation of poet Robert Frost,[707] Judge Gorsuch wrote:

> [O]ur whole legal system is predicated on the notion that good borders make for good government, that dividing government into separate pieces bounded both in their powers

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[697] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("Even under the most relaxed or functionalist view of our separated powers some concern has to arise, too, when so much power is concentrated in the hands of a single branch of government."). For an overview of the functionalist and formalist lines of separation-of-powers analysis, see generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

[698] *See* discussion *supra* in *Role of the Judiciary*.

[699] Gorsuch, *Lions*, *supra* note 57, at 909.

[700] Loveridge v. Hall (*In re* Renewable Energy Dev. Corp.), 792 F.3d 1274, 1278 (10th Cir. 2015).

[701] *Id.* (citing Stern v. Marshall, --- U.S. ---, 131 S. Ct. 2594, 2609 (2011)).

[702] Stern v. Marshall, 564 U.S. 462, 504 (2011) (Scalia, J., concurring).

[703] *Loveridge*, 792 F.3d at 1278 (describing public rights doctrine as manifesting a "potluck quality" and a boundary that is becoming ever more misshapen due to "seesawing battles between competing structuralist and functionalist schools of thought.") (internal citations omitted).

[704] Gorsuch, *Lions*, *supra* note 57, at 911.

[705] *Id.*

[706] *Id.* at 912.

[707] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) ("Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.").

> and geographic reach is of irreplaceable value when it comes to securing the liberty of the people.[708]

According to Judge Gorsuch, the combination of legislative and judicial functions poses a grave threat to liberty, fair notice, and equal protection.[709] Consequently it appears that a judicial test that would approve Congress's delegation of legislative responsibility to the executive branch so long as such delegation is accompanied by an "intelligible principle," would be insufficient for Judge Gorsuch in the case of criminal proscriptions.[710] This assessment is in keeping with his broader views on the modern administrative state[711] and the proper role of courts in interpreting the law.[712]

Judge Gorsuch has emphasized the principle of individual liberty in applying his formalist approach to a number of cases implicating the separation of powers, especially challenges to criminal laws where some aspect is left to the executive branch to define.[713] In *United States v. Baldwin*, he spent a portion of his majority opinion criticizing the proliferation of criminal prohibitions in the Code of Federal Regulations, even though the appellant did not challenge the regulation as an exercise in excessive delegation.[714] The conviction was nevertheless affirmed.

After a panel of judges affirmed a conviction for failure to register as a sex offender, in *United States v. Nichols,* Judge Gorsuch dissented from the denial of a petition for rehearing en banc based on his view that Congress, in delegating to the Attorney General the authority to determine how to apply the Sex Offender Registration and Notification Act (SORNA)[715] to those whose offenses occurred prior to its enactment, had foisted too much of its authority on the executive branch.[716] He explained his view that:

> 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. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty.[717]

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[708] United States v. Krueger, 809 F.3d 1109, 1125 (10th Cir. 2015) (Gorsuch, J., concurring in the result) (citations omitted).

[709] Gorsuch, *Lions*, *supra* note 57, at 915 (opining that if legislators were empowered to regulate retroactively, they could easily take action against disfavored groups, and individuals past actions are known and unalterable would make be "easy targets for discrimination").

[710] *See* United States v. Nichols, 784 F.3d 666, 672–73 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) ("It's easy enough to see why a stricter rule [than the requirement of an 'intelligible principle'] would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation—something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider.").

[711] *See* discussion *supra* in *Administrative Law*.

[712] *See* discussion *supra* in *Role of the Judiciary*.

[713] *Nichols*, 784 F.3d at 672 (noting that the Supreme "Court has repeatedly and long suggested that in the criminal context Congress must provide more 'meaningful[]' guidance than an 'intelligible principle'" (alteration in original)).

[714] United States v. Baldwin, 745 F.3d 1027, 1030–31 (10th Cir. 2014).

[715] P.L. 109-248, 120 Stat. 587 (2006).

[716] *Nichols*, 784 F.3d at 668 (Gorsuch, J., dissenting from denial of rehearing en banc) ("If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce. Yet, that's precisely the arrangement the [SORNA] purports to allow in this case and a great many more like it.").

[717] *Id.* at 670.

Judge Gorsuch has also taken exception to the executive branch engaging in activities he regards as judicial functions, even where Congress has delegated the authority. In a pair of cases interpreting two statutory provisions, one permitting the Attorney General to grant relief from removal to aliens and the other prohibiting it, he applied—but objected to—the Supreme Court's precedent in *Chevron* and *Brand X*.[718] These two cases, which are discussed in more detail above,[719] generally permit agency decisions to override judicial decisions where statutory ambiguity is identified.[720] In *De Niz Robles v. Lynch*, Judge Gorsuch established for the majority that there is a presumption of prospectivity to agency exercises of delegated legislative authority unless Congress has clearly authorized retroactivity, especially when agency interpretation effectively overturns a prior judicial decision.[721] In reaching this conclusion, however, Judge Gorsuch let it be known that, if not bound by Supreme Court precedent, the court would have thought it improbable that the Framers had envisioned that an executive branch agency could ever overrule a federal court in the first place.[722]

When the agency in question, the Board of Immigration Appeals again applied its own reinterpretation of the immigration statutes retroactively, this time to a petition submitted prior to both the reinterpretation and the subsequent appellate court approval of it, Judge Gorsuch, writing for the majority in *Gutierrez-Brizuela v. Lynch*, held the retroactive application invalid.[723] He wrote that to do otherwise would raise due process and equal protection concerns.[724] Judge Gorsuch also penned a solo concurrence to take note of the "elephant in the room":

> [T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.[725]

He went on to explicate his views on the separation-of-powers implications of deference of agency interpretations of law,[726] concluding that "powerful and centralized authorities like today's administrative agencies . . . warrant[] less deference from other branches, not more."[727] Citing to Justice Felix Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer,* Judge Gorsuch's concurrence dismissed more functionalist arguments in favor of a "titanic

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[718] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding courts are to defer to executive branch agencies' reasonable interpretation of statutes they are empowered to enforce); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (extending *Chevron* doctrine to cover agencies' preferred interpretations even where they conflict with those of a court).

[719] *See* discussion *supra* in *Administrative Law*.

[720] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015).

[721] *De Niz Robles*, 803 F.3d at 1172.

[722] *Id.* at 1171 ("[A]s but a court of appeals *Chevron* and *Brand X* bind us and the question is what to do in light of them—what the law might have to say about the retroactive application of agency adjudications making delegated legislative policy decisions—accepting that such agency actions are themselves legally permissible.").

[723] *Gutierrez-Brizuela*, 834 F.3d at 1145 (rejecting the Board's theory that the timing of the petition was such that retroactive application of the BIA reinterpretation of the statutes would be permissible).

[724] *Id.* at 1146.

[725] *Id.* at 1149 (Gorsuch, J., concurring).

[726] *Id.* at 1150 ("Quite literally then, after this court declared the statutes' meaning and issued a final decision, an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals. If that doesn't qualify as an unconstitutional revision of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we've forgotten what might.").

[727] *Id.* at 1155.

administrative state," noting the dangers of '"unchecked disregard of the restrictions' imposed by the Constitution."[728] Judge Gorsuch's *Gutierrez-Brizuela* concurrence may suggest that if he is elevated to the High Court, he may embrace a more formalist approach to separation-of-powers questions that more closely scrutinizes the boundaries the Constitution places on each branch of government.

Substantive Due Process

The Supreme Court has been divided in recent years in cases involving the substantive component of the Due Process Clauses of the Fifth and Fourteenth Amendments[729]—the source for various unenumerated rights that have been recognized by the Court as constitutionally protected, including the right to privacy,[730] the right to an abortion,[731] and the right to marry.[732] Justice Scalia was a vocal critic of the substantive due process doctrine. He regularly joined majority opinions that limited the scope of the doctrine,[733] and he dissented in cases where the Court recognized new fundamental liberty interests.[734] Whereas Justice Scalia's views on substantive due process were well known by the time of his death,[735] the nominee's expressed views on the doctrine are arguably less apparent and certainly less voluminous.

While serving on the Tenth Circuit, Judge Gorsuch has authored or joined a few opinions that touch on the substantive due process doctrine,[736] and he has never squarely ruled on the right to an abortion[737] or the right to marry.[738] However, two opinions do provide some insights into his

[728] *Id.* (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)).

[729] *See, e.g.*, Whole Woman's Health v. Hellerstedt, --- U.S. ---, 136 S. Ct. 2292 (2016) (5-3 decision striking down Texas abortion regulation on substantive due process grounds); Obergefell v. Hodges, --- U.S. ---, 135 S. Ct. 2584 (2015) (5-4 decision invalidating several state laws that excluded same-sex couples from civil marriage, in part, on substantive due process grounds).

[730] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[731] *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

[732] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[733] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 706 (1997) (holding that a Washington law prohibiting "causing" or "aiding" a suicide does not violate the Fourteenth Amendment); Gonzales v. Carhart, 550 U.S. 124, 133 (2007) (holding that the Partial-Birth Abortion Ban Act of 2003 did not impose an undue burden on a woman's right to abortion).

[734] *See, e.g.*, *Obergefell*, 135 S. Ct. at 2626 (Scalia, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

[735] *See generally CRS Scalia Report*, *supra* note 8, at 37–39.

[736] Substantive due process, beyond protecting certain fundamental liberty interests, has also been seen to protect against exercises of government power that shock the conscience. *See* Seegmiller v. LaVerkin City, 528 F.3d 762, 767 (10th Cir. 2008). Such cases tend to be fairly context-specific, and Judge Gorsuch has authored or joined a number of unanimous opinions evaluating whether state conduct was conscience-shocking in violation of the Fourteenth Amendment. *See, e.g.*, Miller v. Utah, 638 F. App'x 707, 715 (10th Cir. 2016) (holding that the conduct of Utah state employees respecting the plaintiff's property interests in a mine fell "far short of an outrageous and shocking plan to deprive Mr. Miller of his personal property."); Muskrat v. Deer Creek Pub. Schs., 715 F.3d 775, 787 (10th Cir. 2013) ("Viewing the record in a light most favorable to the plaintiffs, this incident showed, at most, 'a merely careless or unwise excess of zeal' rather than a 'brutal and inhumane abuse of official power.'"); Ward v. Anderson, 494 F.3d 929, 939 (10th Cir. 2007) (similar). Of the conscience-shocking Due Process cases involving the nominee, *Laidley v. City & County of Denver*, 477 F. App'x 522 (10th Cir. 2012), appears to be the only case in which Judge Gorsuch discussed in detail the standard for evaluating such claims. In *Laidley*, Judge Gorsuch rejected a due process claim premised on officials in Denver impounding the plaintiff's car pursuant to a local ordinance that violated state law, concluding that the Due Process Clause requires a "great deal more" and cannot be used to supplant or duplicate state law. *Id* at 525.

[737] Commentators have pointed to two additional cases not discussed in the main text of this report as evidence of Judge Gorsuch's views on abortion rights, *Pino v. United States*, 507 F.3d 1233 (10th Cir. 2007), and *Planned Parenthood* (continued...)

views on substantive due process rights. In a 2011 case, *Kerns v. Bader*, Judge Gorsuch, writing on behalf of a divided panel, dismissed the substantive due process claims brought by a plaintiff who alleged that a county sheriff had violated the plaintiff's rights to informational privacy by asking for and obtaining his psychiatric records from a local hospital.[739] Noting that the government's "mere collection of information" without any further public dissemination of that information does not implicate rights to informational privacy, Judge Gorsuch dismissed the claim on qualified immunity grounds after concluding that the plaintiff had failed to demonstrate that his rights were clearly established at the time of the alleged violation.[740] The dissent, however, called the majority's conclusion on the privacy issue "dismaying"[741] and argued that it was "patently clear" that "individuals have a constitutional right to have their medical records kept private from law enforcement officers pursuing general investigative ends and acting in the absence of any authority to breach that privacy."[742] Nonetheless, while acknowledging the

(...continued)

Ass'n of Utah v. Herbert, 839 F.3d 1301 (10th Cir. 2016). *See, e.g.*, ALLIANCE FOR JUSTICE, THE GORSUCH RECORD 21–23 (2017), http://www.afj.org/wp-content/uploads/2017/02/The-Gorsuch-Record.pdf (discussing *Pino* and *Planned Parenthood* decisions as relevant to Judge Gorsuch's views on abortion and access to contraception). *Pino* involved the question of whether the Oklahoma Wrongful Death Statute affords a cause of action for the wrongful death of a nonviable stillborn fetus. *See* 507 F.3d at 1235. On behalf of a unanimous panel, Judge Gorsuch, noting the "novelty and difficulty" of the central issue in the case, granted the plaintiffs' motion to certify the question raised by the state law to the Oklahoma Supreme Court. *Id.* at 1238. Upon receiving an answer from the Oklahoma Supreme Court that the Oklahoma statute *did* provide for a cause of action for the wrongful death of a nonviable stillborn fetus, Judge Gorsuch issued a short order remanding the case to the district court for further proceedings "not inconsistent with this court's orders or the opinion of the Oklahoma Supreme Court." 273 F. App'x 732, 733 (10th Cir. 2008).

Planned Parenthood centered on a challenge to an order issued by Utah Governor Gary Herbert after the release of certain videos allegedly showing Planned Parenthood officials negotiating the sale of fetal tissue. Specifically, the order required the Utah Department of Health to cease providing federal funds to Planned Parenthood Association of Utah. On appeal to the Tenth Circuit, a divided three-judge panel reversed a lower court ruling that had declined to grant a preliminary injunction to block the Governor's order. 828 F.3d 1245, 1248 (10th Cir. 2016). In so ruling, the panel concluded that a "reasonable finder of fact" was "more likely than not to find that Herbert, a politician and admitted opponent of abortion," used the release of the videos as a pretext to "weaken [the association] and hamper its ability to provide and advocate for abortion services," in violation of its constitutional rights. *Id.* at 1262. Judge Gorsuch dissented from a subsequent order declining to rehear the case en banc, arguing that the panel decision "departed from" the deferential rules of review respecting the factual findings of a district court when evaluating how the lower court viewed the Governor's intentions. 839 F.3d at 1308 (Gorsuch, J., dissenting from denial of rehearing en banc).

While both *Pino* and *Planned Parenthood* implicate issues that broadly relate to abortion rights, neither case discusses the right to an abortion or more broadly discusses the Court's substantive due process jurisprudence. As a result, relying on either case to ascertain Judge Gorsuch's views on the scope of the Constitution's protections respecting abortion may raise difficulties.

[738] While Judge Gorsuch did not participate in two recent decisions from the Tenth Circuit regarding the right to marry in the context of state recognition of same-sex marriage, *see* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), prior to becoming a judge, he did criticize the strategy of seeking recognition through the courts, as opposed to state legislatures. *See* Gorsuch, *Liberals*, *supra* note 63 ("Liberals may win a victory on gay marriage when preaching to the choir before like-minded judges in Massachusetts. But in failing to reach out and persuade the public generally, they invite exactly the sort of backlash we saw in November when gay marriage was rejected in all eleven states where it was on the ballot.").

[739] 663 F.3d 1173, 1185 (10th Cir. 2011). On the related question of whether the defendants violated the plaintiff's Fourth Amendment rights, the panel concluded that the law was sufficiently unsettled as to whether the police could obtain medical records from a third-party medical service provider without a warrant as to justify a grant of qualified immunity. *Id.* at 1184–85.

[740] *Id.* at 1186–87.

[741] *Id.* at 1199 (Holloway, J., dissenting).

[742] *Id.*

dissent's eloquence,[743] Judge Gorsuch concluded that it was inappropriate to resolve the "complex" Fourteenth Amendment "questions surrounding medical records," especially in the context of a qualified immunity challenge,[744] intimating at least some reluctance to adopting a more expansive reading of substantive due process rights in an unresolved area of law.

The second opinion—perhaps the most notable substantive due process opinion authored by Judge Gorsuch—is *Browder v. City of Albuquerque*. This 2015 opinion held that the plaintiffs' substantive due process rights had been violated in the context of a lawsuit arising from a "terrible crash" that resulted when a police officer raced through the city streets of Albuquerque in his police cruiser after finishing his shift.[745] In *Browder*, Judge Gorsuch, writing on behalf of a unanimous three-judge panel, upheld a district court order that declined to dismiss the substantive due process claims brought against the officer by the victims of the crash, one of whom died[746] and the other of whom suffered serious injuries.[747] In so holding, Judge Gorsuch broadly discussed the substantive due process doctrine. Describing the doctrine as having a "paradoxical name"[748] and being a "murky area" of law,[749] he noted the view that the doctrine either misplaces the source of fundamental rights in the Due Process Clause or has no basis whatsoever in the Constitution.[750] However, acknowledging that the Supreme Court has established the Due Process Clause as the "home" for certain fundamental unenumerated rights, the *Browder* majority continued by explaining that the "doctrine should be applied and expanded sparingly" because of the open ended nature of substantive due process.[751] In particular, relying on concurring opinions authored by Justices Kennedy and Scalia in a 1998 Supreme Court opinion, Judge Gorsuch then observed that "history and precedent" and the plaintiff's state of mind are critical guideposts to cabin the inquiry into whether a fundamental right has been infringed under the Due Process Clause.[752]

In addition to noting these limits on the doctrine in the majority opinion, Judge Gorsuch authored a separate opinion in *Browder* to discuss an argument forfeited by the defendant that would further limit substantive due process claims in federal court.[753] Namely, the nominee's concurrence argued that, if state tort law can provide an adequate remedy for an alleged substantive due process violation, federal courts should abstain from ruling on the federal claim on comity and federalism grounds.[754] The extensive discussion of substantive due process and the limits on the doctrine in both the majority and concurring opinions in *Browder* is notable. After

[743] *Id.* at 1187 ("The dissent eloquently argues that if the scope of Mr. Kerns's Fourth and Fourteenth Amendments rights in third party held medical records isn't clear enough then we should use this case to address the matter definitively.").

[744] *Id.*

[745] 787 F.3d 1076, 1077 (10th Cir. 2015).

[746] The deceased victim's claims were brought on her behalf by the personal representative of her estate. *Id.* at 1076.

[747] *Id.* at 1077.

[748] *Id.* at 1078.

[749] *Id.* at 1080.

[750] *Id.* at 1078 ("Some suggest this latter doctrine with the paradoxical name might find a more natural home in the Privileges [or] Immunities Clause; others question whether it should find a home anywhere in the Constitution.").

[751] *Id.*

[752] *Id.* at 1079–80 (citing Cty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) and *id.* at 860–62 (Scalia, J., concurring in judgment)).

[753] *Id.* at 1083 (Gorsuch, J., concurring).

[754] *Id.* at 1084–85. This aspect of the *Browder* decision is discussed in further detail in the federalism section of this report. *See* discussion *supra* in *Federalism*.

all, the majority decision ultimately concluded that the underlying legal questions raised by the case did not broach "any serious borderline disputes," with the court holding that the plaintiffs had properly alleged a violation of their fundamental rights to life without sufficient justification.[755] As a result, the extensive concerns raised by Judge Gorsuch with respect to the substantive due process doctrine in his *Browder* opinions may signal the nominee's skepticism toward the application of the doctrine in cases presenting less egregious fact patterns.

Judge Gorsuch's most extensive writings on fundamental rights and substantive due process are found not in his court opinions, but in his outside work, most notably a book he wrote in 2006 entitled *The Future of Assisted Suicide and Euthanasia*.[756] Notably, during the 2006 confirmation hearing for his seat on the Tenth Circuit, Judge Gorsuch stated that, while his "writings" on euthanasia and assisted suicide were, in his view, "consistent with the Supreme Court's decisions . . . and existing law," his "personal views" as expressed in his writings "have nothing to do with the case before me," as the "litigants deserve better than that" and "the law demands more than that."[757] In fact, much of the book has little to do with the law. At its heart, the book explores the various *ethical* arguments regarding assisted suicide and euthanasia,[758] ultimately lodging an argument against their legalization "based on secular moral theory."[759] Specifically, Judge Gorsuch argues in the work that "human life is fundamentally and inherently valuable . . . the intentional taking of a human life by private persons is always wrong."[760] Importantly, his book does not address "publicly authorized forms of killing like capital punishment and war,"[761] nor does it seek to define what is encompassed by the term "human life."[762] Nonetheless, in assessing

[755] 787 F.3d at 1080. Specifically, the court, noting "history and precedent," as well as the defendant's underlying state of mind, held that the defendant's alleged conduct "count[ed] as direct and substantial impairments of [the plaintiffs'] fundamental right to life" that were not reasonably justified by a legitimate governmental objective. *Id.* at 1080–81.

[756] *See* GORSUCH, FUTURE, *supra* note 11. In addition to the 2006 book on assisted suicide and euthanasia, the nominee has written extensively on the subject, including in his thesis at the University of Oxford. *See* Neil M. Gorsuch, The Right to Receive Assistance in Suicide and Euthanasia, with Particular Reference to the Law of the United States (Oxford: University of Oxford, 2004); *see also* Gorsuch, *Right*, *supra* note 11; Gorsuch, *Legalization*, *supra* note 11; Neil M. Gorsuch, *A Reply to Raymond Tallis on the Legalization of Assisted Suicide and Euthanasia*, 28 J. LEGAL MED. 327 (2007). Because the other works either do not relate to questions of law or broach issues that are discussed in more detail in the 2006 book, this report focuses on the 2006 book.

[757] *See Gorsuch Confirmation Hearing*, *supra* 43, at 37.

[758] The nominee does distinguish the concepts of assisted suicide and euthanasia from the right to refuse treatment, which he acknowledges has been recognized in "virtually every American jurisdiction." *See* GORSUCH, FUTURE, *supra* note 11, at 48–49.

[759] *Id.* at 157.

[760] *Id.*

[761] *Id.*

[762] In a footnote, Judge Gorsuch is explicit that the book is not intended to "engage the abortion debate." *Id.* at 272 n.2. Noting that his argument would only "rule[] out" abortion "*if*, but only *if*, a fetus is considered a human life," the nominee acknowledges that the "Supreme Court in *Roe* . . . unequivocally held that a fetus is not a 'person' for purposes of constitutional law." *Id.* (emphasis in original). In another passage of the book, Judge Gorsuch distinguishes the right to an abortion from the right to assisted suicide, explaining that "strong autonomy interests belong[] to persons on both side of the assisted suicide and euthanasia issue—the interest of those persons who wish to control the timing of their deaths and the interest of those vulnerable individuals whose lives may be taken without their consent due to mistake, abuse, or pressure in a regime where assisted suicide and euthanasia are legal." *Id.* at 82. In contrast, Judge Gorsuch notes that under the Court's abortion jurisprudence "a fetus does not qualify as a person." *Id.* If the Court had recognized the fetus as a person, the nominee suggests that there may have been no recognition of a "right to abortion because no constitutional basis exists for preferring the mother's liberty interests over the child's life." *Id.*

the philosophical arguments related to assisted suicide and euthanasia, the nominee addressed key legal doctrines implicating the right to die, including the substantive due process doctrine.[763]

The legal discussion in Judge Gorsuch's book raises broader questions about the substantive due process doctrine and how to assess when a fundamental right is protected by the clause, providing some insight into the nominee's views on such issues.[764] In addressing the constitutional debate regarding assisted suicide and euthanasia, the book centers on two Supreme Court cases from 1997, *Washington v. Glucksberg*[765] and *Vacco v. Quill*,[766] that collectively upheld state laws that outlawed assisted suicide against substantive due process and equal protection challenges.[767] In recounting the litigation in the two cases, Judge Gorsuch devotes a chapter to questions related to determining whether a right to assisted suicide can be justified by looking at past historical practices.[768] In evaluating the historical test for substantive due process, he notes that the test is the subject of "considerable methodological disputes,"[769] including "what 'level' of historical abstraction"[770] is needed, "whose history" should be evaluated, and "how far back" in history the test should look.[771]

The book itself does not expressly reject the historical test for substantive due process, nor does it attempt to resolve the debate over the test's "methodological warts."[772] Instead, Judge Gorsuch, "seeking to apply the history test faithfully," examines the "historical record broadly in terms of time and at different levels of abstraction," concluding that there is limited support for a historical right to assisted suicide.[773] In the discussion of the historical test, however, Judge Gorsuch challenges the views of Justices O'Connor and Kennedy respecting the historical test and the

[763] *Id.* at 8–85.

[764] Beyond substantive due process matters related to the constitutionality of laws *prohibiting* assisted suicide, Judge Gorsuch discusses in some detail the concerns related to the constitutionality of *allowing* assisted suicide based on equal protection grounds. *See id.* at 177–80. Noting that "the inviolability-of-life principle is strongly associated with the concept of human equality," *id.* at 177, the nominee concludes that there is a "nontrivial legal argument" that laws, like Oregon's assisted suicide laws, fail to "pass muster" under the Equal Protection Clause. *Id.* at 178. Judge Gorsuch's argument primarily centers on the idea that laws that permit assisted suicide "may raise" equal protection concerns by "treating . . . the lives of the terminally ill as meriting fewer protections and safeguards against intentional destruction through mistake, abuse, or coercion than the lives of all other persons." *Id.* Legal commentators have debated whether Judge Gorsuch's equal protection argument could extend beyond the context of assisted suicide and euthanasia. *Compare* Noah Feldman, *The Big Abortion Question for Gorsuch*, BLOOMBERG VIEW (Feb. 16, 2017), https://www.bloomberg.com/view/articles/2017-02-16/the-big-abortion-question-for-gorsuch ("If it violates equal protection to let doctors prescribe lethal doses of medication only for the terminally ill, it could be argued by extension that it violates equal protection to allow the intentional killing of fetuses in the course of abortion."), *with* Ramesh Ponnoru, *A Question for Gorsuch, And an Answer*, NAT'L REVIEW (Feb. 16, 2017), http://www.nationalreview.com/corner/444994/gorsuch-abortion-and-equal-protection ("Judge Gorsuch has said nothing to indicate whether he believes that unborn children should be considered to be included in constitutional references to 'persons.' . . . If asked about this equal-protection argument, it would be reasonable and not terribly provocative for him to respond that the Supreme Court has held that human embryos and fetuses are not constitutional persons, and that this holding, like all Supreme Court rulings, deserves some deference as a precedent.").

[765] 521 U.S. 702 (1997).

[766] *Id.* at 793.

[767] *See* GORSUCH, FUTURE, *supra* note 11, at 8–18.

[768] *Id.* at 19–47.

[769] *Id.* at 46.

[770] *Id.* at 20.

[771] *Id.* at 22.

[772] *Id.*

[773] *Id.* at 44–46.

level of abstraction needed to recognize a historically based fundamental right.[774] In *Michael H. v. Gerald D.*,[775] Justice O'Connor's concurring opinion, joined by Justice Kennedy,[776] had rejected the conclusion in Justice Scalia's plurality opinion that courts should look to the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified" when identifying what "liberty" interests are protected under the Fourteenth Amendment.[777] Noting the distinction between the history of the law on assisted suicide and the law on suicide more generally, Judge Gorsuch questioned "whether Justices O'Connor and Kennedy meant to suggest in *Michael H.* that a court actually may disregard an on-point specific tradition . . . in favor of a more generally analogous, but less directly applicable one . . . ."[778] Viewing the central case cited by Justice O'Connor's *Michael H.* concurrence, *Eisenstadt v. Baird,*[779] as "an equal protection decision,"[780] rather than a due process one, Judge Gorsuch appears to be somewhat skeptical of more expansive views of the historical test to determine what constitutes a fundamental right.

In addition to examining the historical test for determining which liberty interests are protected by the Due Process Clause, Judge Gorsuch's book also examines what he calls the "reasoned judgment" approach whereby "moral reasoning" and "critical discourse"—as opposed to historical norms—dictate what constitutes a fundamental right.[781] In recent years, a divided Court appears to have moved toward such an approach.[782] Judge Gorsuch neither endorses nor rejects the reasoned judgment approach, opting instead to ask open questions that "one might" ask about the efficacy of such a method of interpretation.[783] Nonetheless, the book does question the reach of *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[784] which could be seen to be based on the "reasoned judgment" approach. In particular, the controlling plurality opinion in *Casey*, reaffirming *Roe v. Wade*'s central holding respecting the right to an abortion, grounded the decision partly on the moral argument that "choices central to personal dignity and autonomy" "are central to the liberty protected by the Fourteenth Amendment."[785] The *Casey* plurality also concluded that the doctrine of stare decisis—or respect for long settled law—required upholding *Roe*.[786] Relying on this second holding to respond to autonomy based arguments for a right to

[774] *Id.* at 20–21.

[775] 491 U.S. 110 (1989).

[776] *Id.* at 111–12 (O'Connor, J., concurring).

[777] *Id.* at 127–28 n.6 (plurality opinion).

[778] *See* GORSUCH, FUTURE, *supra* note 11, at 21.

[779] 405 U.S. 438 (1972) (striking down a law prohibiting the sale of contraceptives to unmarried persons).

[780] GORSUCH, FUTURE, *supra* note 11, at 21 ("*Eisenstadt*'s result can be defended fully . . . as an equal protection decision simply and quite straightforwardly requiring the same access to contraceptives for married and unmarried persons alike.").

[781] *Id.* at 76–85.

[782] *See* Obergefell v. Hodges, --- U.S. ---, 135 S. Ct. 2584, 2602 (2015) ("*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.").

[783] *See* GORSUCH, FUTURE, *supra* note 11, at 77 ("[O]ne might ask: Are judges any more competent at the task . . . than legislators? How does substantive due process doctrine differ from outright judicial choice, or what is sometimes derisively labeled as 'legislating from the bench?' How many moral philosophers actually agree . . . about what metaphysical imperatives . . . entail?").

[784] 505 U.S. 833 (1992).

[785] *Id.* at 851 (plurality opinion).

[786] *Id.* at 861.

assisted suicide, Judge Gorsuch contended that *Casey* should be viewed as based on its "narrowest rationale," the stare decisis rationale.[787] Moreover, he took the view that the alternative of recognizing new rights based on broad libertarian concepts like individual autonomy could "prove too much," justifying the striking down of laws that prohibit "polygamy, consensual duels, prostitution, and . . . the use of drugs" on similar grounds.[788] In this sense, paralleling Chief Justice Roberts's reasoning with regard to the scope of substantive due process protections,[789] the views in Judge Gorsuch's 2006 book may question broader conceptions of the Due Process Clause that are based on abstract notions of morality.

There are, however, limits on what can be gleaned from Judge Gorsuch's book with respect to his broader views on unenumerated, fundamental rights. While the book "introduce[s] and critically examine[s] the primary legal . . . arguments" respecting legalization of assisted suicide and euthanasia, including fundamental rights and substantive due process,[790] it does not purport to provide a conclusive view of the author's understandings of the underlying constitutional issues. At times, the book raises more questions about the underlying legal issues than it attempts to resolve definitively.[791] And, as noted earlier, during his 2006 confirmation hearing, Judge Gorsuch has largely dismissed the argument that his writings on euthanasia and assisted suicide would in any way influence his work as a judge.[792] More broadly, the writings of a nominee to the Supreme Court—especially those authored before the nominee became a judge—may not fully represent the nominee's current views.[793] At the same time, Judge Gorsuch's nonjudicial writings on substantive due process, coupled with the few opinions he has written on the subject and his general views on the role of the courts,[794] suggest that the nominee, if elevated to the Supreme

[787] *See* GORSUCH, FUTURE, *supra* note 11, at 80–81.

[788] *Id.* at 81–82 (quoting Compassion in Dying v. State of Wash., 85 F.3d 1440, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of en banc review), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997)). Judge Gorsuch also notes that there are "strong autonomy"-based arguments for upholding laws prohibiting assisted suicide, in that such laws protect the autonomy interests of "those who fear inadvertent or wrongful death at the hands of an assisted suicide regime." *Id.* at 82.

[789] *See* Obergefell v. Hodges, --- U.S. ---, 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting) ("[T]his assertion of the 'harm principle' sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. . . . Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's *On Liberty* any more than it enacts Herbert Spencer's *Social Statics*.").

[790] *See* GORSUCH, FUTURE, *supra* note 11, at 5.

[791] *See, e.g.*, *id.* at 4 ("Is there historical precedent for legalization? Do principles of equal protection or fairness dictate that, if we permit patients to refuse life-sustaining care like food and water, we must also as a matter of logical consistency allow assisted suicide and euthanasia? Does proper respect for principles of personal autonomy and self-determination compel legalization? And would legalization, in a purely utilitarian calculus, represent the legal rule or solution that would provide the greatest good for the greatest number of persons?"); *id.* at 21 ("When interpreting the Fourteenth Amendment, should we limit ourselves to preratification history, as originalists like Judge Robert Bork might suggest, or should we look to more recent history as well?").

[792] *See Gorsuch Confirmation Hearing*, *supra* 43, at 37.

[793] *See* Clay Calvert & Robert D. Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 LOY. L.A. ENT. L. REV. 259, 293 (2003) (quoting Judge Alex Kozinski, who argues that "We would be better off if the Senate didn't go digging through all the writings. . . . [P]eople may change their opinions once they are appointed to the bench. Second, I'm not sure how good of an indicator a person's writing is in any event. Writing opinions in real cases is different from writing law review articles dealing with hypothetical legal issues."). *See generally* discussion *supra* in *Predicting Nominees' Future Decisions on the Court*.

[794] *See* discussion *supra* in *Role of the Judiciary*.

Court, is unlikely to interpret the substantive component of the Due Process Clause expansively.[795]

Takings

Relative to Justice Scalia, who authored and joined several opinions that can be interpreted as strengthening the protection of private property rights afforded by the Takings Clause of the Fifth Amendment during his tenure on the Supreme Court,[796] Judge Gorsuch has said little on the subject and does not appear to have significantly addressed the merits of a takings claim in a judicial opinion.[797] This is unsurprising, as the Tenth Circuit does not hear many takings claims because the Tucker Act vests the U.S. Court of Federal Claims (CFC) with jurisdiction over such claims when the plaintiff seeks more than $10,000 in compensation from the federal government.[798] With limited exceptions,[799] the CFC's jurisdiction over such claims is exclusive,[800] and appeals from the CFC are heard by the Federal Circuit, not the Tenth Circuit.[801] If Judge Gorsuch is elevated, he could very well hear takings issues on the Court's docket.[802] However, there is currently an insufficient basis to evaluate his views regarding the scope of the Takings Clause.

[795] While Judge Gorsuch has never squarely adjudicated matters related to whether the substantive due process doctrine protects against government interference with certain economic rights under the theory of *Lochner v. New York*, 198 U.S. 45 (1905), at least one commentator, in noting the nominee's 2005 opinion piece praising "New Deal-era liberals' 'judicial restraint and deference to the right of Congress to experiment with economic and social policy,'" has suggested that Judge Gorsuch would not be receptive to resurrecting *Lochner*. *See* Ilya Somin, *Supreme Court pick Neil Gorsuch has troubling views on federalism and judicial review*, N.Y. DAILY NEWS (Jan. 31, 2017), http://www.nydailynews.com/news/politics/scotus-pick-neil-gorsuch-troubling-views-judicial-review-article-1.2960953 (quoting Gorsuch, *Liberals*, *supra* note 63).

[796] *See CRS Scalia Report*, *supra* note 8, at 39–41. The Takings Clause limits government action by providing that private property shall not be "taken for public use" without "just compensation." *See* U.S. CONST. amend. V.

[797] The few takings claims that Judge Gorsuch had to resolve on the Tenth Circuit provide little insight into his substantive views on the clause. *E.g.*, Pinder v. Mitchell, 658 F. App'x 451, 456–57 (10th Cir. 2016) (dismissing a takings claim for lack of subject matter jurisdiction because an adequate state remedy existed); Heller v. Quovadx, Inc., 245 F. App'x 839, 842 (10th Cir. 2007) (dismissing a takings claim as frivolous).

[798] *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). The $10,000 amount specified here would encompass many claims for just compensation against the federal government.

[799] *See generally* Gordon v. Norton, 322 F.3d 1213, 1216–17 (10th Cir. 2003) ("Generally, compensation for a taking may be obtained under the Tucker Act, which confers jurisdiction on the United States Court of Claims. Thus, if a Tucker Act remedy is available, plaintiffs must first avail themselves of the process provided by the Tucker Act and file suit in the Court of Claims for compensation.") (internal citations omitted).

[800] The CFC has exclusive jurisdiction over such claims "by default." In other words, no federal law vests another federal court with jurisdiction over these claims. *See* Robert Meltz, *The Impact of* Eastern Enterprises *and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 ALA. L. REV. 1161, 1161 (2000).

[801] 28 U.S.C. § 1295(a)(3).

[802] Fred Lucas, *Neil Gorsuch Could Rule on These 3 Big Cases If He Joins Supreme Court Soon*, THE STREAM (Feb. 2, 2017), https://stream.org/neil-gorsuch-rule-3-big-cases-joins-supreme-court-soon/.

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