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Judge Gorsuch and Civil Rights: A Restrictive Reading

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Introduction

Upon the announcement of his nomination to the United States Supreme Court, Judge Gorsuch said that "[a] judge who likes every outcome he reaches is very likely a bad judge . . . stretching for results he prefers rather than those the law demands."[1] This notion is central to his jurisprudence. Judge Gorsuch hews closely to a narrow construction of rights, mercilessly trimming protections he believes hang over the law's edge.

In doing so, Judge Gorsuch has erected and heightened hurdles for civil rights plaintiffs in federal courts. In this Essay, we consider a sample of notable cases in the civil rights arena, attempting to illuminate Judge Gorsuch's judicial philosophy, namely his proclivity for restraint.

I. Procedure and Civil Rights

The Supreme Court continues to elevate procedural bars for plaintiffs in federal court. *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*[3] ushered in heightened pleading standards, while *Wal-Mart Stores, Inc. v. Dukes*[4] made certifying class actions more difficult. While some of these bars were set in civil rights cases, others were set in other areas of the law. Cumulatively, such procedural barriers restrict a plaintiff's ability to have her day in court, which necessarily constricts civil rights litigation.

Judge Gorsuch appears willing to heighten procedural barriers, regardless of their effect on both real and potential plaintiffs. For example, in *Christine B.*

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1. *Full Transcript and Video: Trump Picks Neil Gorsuch for Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://nyti.ms/2jTtSzu.
2. 550 U.S. 544 (2007).
3. 556 U.S. 662 (2009).
4. 564 U.S. 338 (2011).

ex rel. A.F. v. Española Public Schools,[5] he used restrictive statutory interpretation to narrowly define "administrative exhaustion," constructively barring myriad plaintiffs from litigation.[6]

Christine B. filed an Americans with Disabilities Act (ADA) claim that was also covered by an overlapping provision in the Individuals with Disabilities Education Act (IDEA).[7] However, she had settled her IDEA claim in mediation[8] rather than proceeding to a due process hearing.[9] When her ADA claim reached the Tenth Circuit, Judge Gorsuch wrote for the panel that affirmed the district court's dismissal based on a provision in the IDEA that instructs plaintiffs seeking to vindicate rights protected by both the IDEA and the ADA to exhaust all administrative remedies under the IDEA before filing in federal court.[10] He held that Christine B. had failed to exhaust administrative remedies—thereby foreclosing her claim under the ADA.[11] Judge Gorsuch noted that the "case ended almost before it began."[12]

Under Judge Gorsuch's holding, children receiving inadequate accommodations in school must choose between resolving claims (which may immediately guarantee them enhanced education programs) or forgoing immediate relief so they may later file an ADA suit.[13] Yet "the statutory framework anticipates, and in fact encourages, resolution of IDEA claims by way of mediation."[14] Judge Gorsuch recognized that his view of administrative exhaustion is restrictive and that it compels an unsatisfactory result, but he absolved himself by deferring to what he called an "unambiguous textual command."[15]

The *Christine B.* case does not stand in isolation. In *Garcia-Carbajal v. Holder*,[16] the Tenth Circuit reviewed a final order of removal issued by the Board of Immigration Appeals (BIA).[17] While immigration cases do not fall under the ambit of civil rights, Judge Gorsuch's interpretation of procedural requirements

5. 801 F.3d 1245 (10th Cir. 2015).

6. *See id.* at 1247-48.

7. *Id.* at 1246-47. Causes of action under the IDEA and the ADA may overlap; the IDEA recognizes that possibility and instructs that the statute should not "be construed to restrict or limit" those other federal rights. *See id.* at 1254 (Briscoe, C.J., dissenting) (quoting 20 U.S.C. § 1415(*l*)).

8. *Id.* at 1246 (majority opinion).

9. *Id.* (citing 20 U.S.C. § 1415(f)).

10. *Id.* at 1246-47.

11. *Id.* at 1248.

12. *Id.* at 1246.

13. *See id.* at 1256-57 (Briscoe, C.J., dissenting).

14. *Id.* at 1256.

15. *Id.* at 1251 (majority opinion).

16. 625 F.3d 1233 (10th Cir. 2010).

17. *Id.* at 1235.

in *Garcia-Carbajal* is consistent with his interpretation in *Christine B.*, providing further evidence that he heightens procedural barriers for plaintiffs. In *Garcia-Carbajal*, the plaintiff sought to circumvent an administrative exhaustion requirement, arguing that he could appeal the BIA's order of removal because the BIA sua sponte considered an argument the plaintiff did not advance.[18] In doing so, the plaintiff argued, the BIA achieved exhaustion on his behalf under a "sua sponte exhaustion" rule, which was established in an earlier Tenth Circuit opinion.[19]

Although Judge Gorsuch's opinion for the panel acknowledged the existence of a sua sponte exhaustion rule in the circuit, he interpreted that rule as narrowly as possible.[20] In fact, he created a new tripartite test, asserting that plaintiffs must satisfy all three parts of the test in order to qualify for sua sponte exhaustion.[21] Ultimately, Judge Gorsuch ruled against the petitioner because "[a]llowing him to avoid a statutory exhaustion requirement... would do nothing to respect agency authority and much to undermine it, encouraging future efforts by litigants to squeeze elephants of arguments into court through administrative mouseholes."[22] Once again, Judge Gorsuch interpreted procedural standards as strictly as possible and limited plaintiffs' access to the courts.

That is not to say that Judge Gorsuch dismisses every plaintiff's case. Where the procedural question only implicates settled legal standards—leaving little discretion to fill in gaps and create new standards—Judge Gorsuch applies the law fairly.[23] But when called upon to interpret procedural requirements, in at least two cases he erected high procedural barriers, closing the doors of federal courts to many potential litigants.[24] If Judge Gorsuch ascends to the Supreme Court, a tendency toward raising procedural hurdles for plaintiffs would undoubtedly put increased strain on plaintiffs seeking to vindicate their civil rights.

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18. *Id.*

19. *Id.* (italics omitted) (citing Sidabutar v. Gonzales, 503 F.3d 1116 (10th Cir. 2007)).

20. *See id.*

21. *Id.*

22. *Id.* at 1240.

23. For example, in *Nasious v. Two Unknown B.I.C.E. Agents*, Judge Gorsuch authored an opinion reversing a lower court that had granted the defendants summary judgment with prejudice, calling it "the death penalty of pleading punishments." 492 F.3d 1158, 1162-63 (10th Cir. 2007); *see also* Lowber v. City of New Cordell, 298 F. App'x 760, 760 (10th Cir. 2008) (finding for a plaintiff arguing sex discrimination in violation of Title VII).

24. Our research revealed no civil rights case in which Judge Gorsuch interpreted a statute in a more procedurally permissive way than other judges on his panel.

II. Statutory Civil Rights

When given the opportunity, Judge Gorsuch has often defined statutory rights by interpreting statutes to limit the rights' application.[25]

In *Elwell v. Oklahoma ex rel. Board of Regents of the University of Oklahoma*, for example, the plaintiff brought a claim under Title II of the ADA.[26] She alleged that her employer, a public university, refused to accommodate her spinal injury and fired her because of it.[27] The parties disputed whether employment discrimination claims could be brought under Title II of the ADA, which forbids public entities from excluding an individual from "services, programs, or activities" because of a disability.[28] Judge Gorsuch's panel decision picked apart the statute and, at each turn, declined to infer a broader meaning. He held that "activity" did not include "employment," despite conceding that "one might well wonder whether the term 'activity' might bear a broader meaning."[29] Because "employment" is addressed elsewhere in the ADA, however, he concluded that Congress would have expressly included the term in Title II if it had intended Title II to cover employment.[30] In so holding, he disregarded regulations to the contrary issued by the Attorney General.[31]

When asked whether "reasonable accommodations" in the Rehabilitation Act included an extended leave of absence, Judge Gorsuch exhibited similar restraint.[32] Writing for the panel, he answered, "reasonable accommodations—typically things like adding ramps or allowing more flexible working hours—are all about enabling employees to work, not to not work.... The Rehabilitation Act [was not intended to] turn employers into safety net providers for those who cannot work."[33] Again, he expressed a disinclination to defer to administrative guidelines on the subject.[34]

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25. For another example of this theme in Judge Gorsuch's jurisprudence, see *Cinnamon Hills Youth Crisis Center, Inc. v. St. George City*, 685 F.3d 917, 919, 924 (10th Cir. 2012), which held that a residential treatment facility failed to establish a claim under the Fair Housing Act, the ADA, and the Rehabilitation Act.

26. 693 F.3d 1303, 1305 (10th Cir. 2012).

27. *Id.*

28. *Id.* at 1305-06 (quoting 42 U.S.C. § 12132). Employment discrimination cases traditionally fall under Title I of the ADA. *See id.*

29. *Id.* at 1307.

30. *Id.* at 1310.

31. *See id.* at 1313. That regulation provides: "No qualified individual with a disability shall ... be subjected to discrimination *in employment* under any service, program, or activity conducted by a public entity." 28 C.F.R. § 35.140 (2016) (emphasis added).

32. *See* Hwang v. Kan. State Univ., 753 F.3d 1159, 1161-62 (10th Cir. 2014).

33. *Id.* at 1162.

34. *Id.* at 1163 ("[T]he EEOC manual commands our deference only to the extent its reasoning actually proves persuasive.").

This is more than just a penchant for textualism. Judge Gorsuch appears willing to use other tools of statutory interpretation to cabin civil rights. For example, in a 2008 IDEA case, Judge Gorsuch relied on Congress's purpose in enacting the IDEA to deny a remedy to the plaintiff due to "equitable" considerations.[35] In fact, he held that "[a]bsent an 'unequivocal' statement by Congress to the contrary," the district court was free to deny the plaintiff a remedy simply because it decided a remedy would be unfair.[36]

Overall, Judge Gorsuch's jurisprudence in statutory civil rights cases is consistent with his judicial values: he interprets statutes and standards narrowly, preferring to limit the application of rights rather than infer a broader meaning from the words of a statute.

III. Substantive Due Process

Construing Judge Gorsuch's treatment of constitutional civil rights is difficult because he has had limited opportunities to address the most pressing constitutional issues, including election law,[37] LGBT rights,[38] and abortion rights.[39] While we cannot confirm any specific views on these substantive areas, his analytic approach to substantive due process more generally indicates how he may adjudicate constitutional issues if the Senate confirms his appointment to the Supreme Court. Specifically, Judge Gorsuch employs a restrictive interpretation of substantive due process, and he has even questioned both

35. Garcia v. Bd. of Educ. of Albuquerque Pub. Schs., 520 F.3d 1116, 1129-30 (10th Cir. 2008).

36. *Id.* at 1129 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).

37. *But see* Riddle v. Hickenlooper, 742 F.3d 922, 930-31 (10th Cir. 2014) (Gorsuch, J., concurring) (determining that under either strict scrutiny or "closely drawn" scrutiny, the challenged state contribution limit could not pass constitutional muster); Hassan v. Colorado, 495 F. App'x 947, 948 (10th Cir. 2012) (holding that the "state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office").

38. *But see* Druley v. Patton, 601 F. App'x 632, 633 (10th Cir. 2015) (affirming the denial of a preliminary injunction for an incarcerated transgender woman who claimed a state corrections department had violated the Eighth and Fourteenth Amendments). Judge Gorsuch joined this opinion. *See id.*

39. Here, we are restricted to reading the tea leaves of Judge Gorsuch's book analyzing the right to assisted suicide. *See* NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 46 (2006). Other commentators point to the following language from the book to predict Judge Gorsuch's hostility to *Roe v. Wade*, 430 U.S. 113 (1973): "[H]uman life is fundamentally and inherently valuable, and . . . the intentional taking of human life by private persons is always wrong." *Id.* at 157; *see, e.g.*, Noah Feldman, *The Big Abortion Question for Gorsuch*, BLOOMBERG VIEW (Feb. 16, 2017, 5:00 AM EST), http://bv.ms/2kVF7HU. Interestingly, Judge Gorsuch himself emphasized that *Roe* "held that an array of doctrines and theories supported its result, with substantive due process only thrown into the mix as just one more element," GORSUCH, *supra*, at 79, suggesting that *Roe* could be upheld on other grounds.

whether federal courts should hear such claims and whether the doctrine should exist at all.

In his limited substantive due process jurisprudence, Judge Gorsuch closely heeds the Supreme Court's warning that the doctrine should "be applied and expanded sparingly"[40] and "reserved for 'patently egregious' conduct."[41] Take *Browder*, involving an off-duty police officer using his emergency lights to run eleven red lights before colliding with another car and killing the driver.[42] The plaintiffs argued that this conduct violated the decedent's "fundamental right to life" under the substantive due process doctrine of the Fourteenth Amendment.[43] Judge Gorsuch hedged his holding that the officer's actions were the "very model" of egregious conduct[44] with a criticism of the substantive standard: "Attempting to follow as best we can what guidance we've received in this murky area, we believe we can say this much about the case at hand."[45]

In an unusual step, Judge Gorsuch concurred in *Browder* to answer what his own panel opinion described as "an open question": "whether federal courts . . . should abstain" from hearing substantive due process claims where there are adequate state remedial processes.[46] Judge Gorsuch argued for an extension of *Parratt v. Taylor*.[47] Under *Parratt*, plaintiffs cannot bring procedural due process claims under 42 U.S.C. § 1983 if those claims relate to actions that were random and unauthorized by the state and there are adequate postdeprivation state law remedies.[48] Judge Gorsuch argued that the same principles should extend to substantive due process claims to preserve federalism and prevent federal judges from "using primordial constitutional tort principles that must be expounded more or less on the fly."[49]

Extending *Parratt* would have grave consequences for those wishing to challenge random or unauthorized—but no less egregious—violations of their substantive due process rights in federal court. There is a good reason the Court has not applied *Parratt* to substantive due process claims: the logic simply does

40. Browder v. City of Albuquerque, 787 F.3d 1076, 1078 (10th Cir. 2015) (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

41. Laidley v. City & County of Denver, 477 F. App'x 522, 525 (10th Cir. 2012) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 848, 850 (1998)).

42. 787 F.3d at 1077.

43. *Id.* at 1078, 1080.

44. *Id.* at 1080.

45. *Id.*; *see also* GORSUCH, *supra* note 39, at 14, 46 (critiquing one guidepost—the history test, which looks to whether a right is "deeply rooted in this Nation's history and tradition"—as "the subject of considerable methodological disputes" (quoting *Glucksberg*, 521 U.S. at 721)).

46. *Browder*, 787 F.3d at 1079; *id.* at 1084-85 (Gorsuch, J., concurring).

47. 451 U.S. 527 (1981); *see Browder*, 787 F.3d at 1084-86 (Gorsuch, J., concurring).

48. 451 U.S. at 543-44.

49. *Browder*, 787 F.3d at 1084-85 (Gorsuch, J., concurring).

not apply. The *Parratt* Court reasoned that procedural due process rights are violated only after a state fails to provide constitutionally adequate process; if the state provides sufficient postdeprivation remedies, there is no violation.[50] By contrast, substantive due process violations occur and accrue at the point of deprivation—regardless of process.[51]

And yet Judge Gorsuch reached out to answer what he framed as an open question[52] in a manner that would force litigants to rely on state tort law systems that may not adequately remedy deprivations. Beyond a mere exhaustion requirement, which the Court has held is not a prerequisite to a § 1983 claim,[53] Judge Gorsuch's *Parratt* abstention rule would shut the doors to federal court entirely.

Judge Gorsuch's challenges to substantive due process in *Browder* are consistent with his stated aversion to unenumerated rights generally. Seemingly exasperated by the reach of one plaintiff's claims, Judge Gorsuch explained 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."[54] To "claim a constitutional right," parties must "tell us where it lies, not . . . assume . . . that it must be in there *someplace*."[55]

This disdain for unenumerated rights is echoed in Judge Gorsuch's book analyzing the right to assisted suicide, where he queries whether treating the Due Process Clause as "the repository of other substantive rights not expressly enumerated . . . stretch[es] the clause beyond recognition."[56] While Judge Gorsuch does not directly answer that question, he has intimated that the Supreme Court may be wise to abolish substantive due process altogether. In *Browder*, for example, he wrote that there are "[s]ome" who "question whether [substantive due process] should find a home anywhere in the Constitution."[57] He did not affirmatively identify himself as one of those "some," but he emphasized that substantive due process exists only by doctrine, not because it

50. *See* 451 U.S. at 543-44.

51. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990).

52. *Browder* is not the last time Judge Gorsuch advanced this argument. *See* Cordova v. City of Albuquerque, 816 F.3d 645, 665 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (citing his *Browder* concurrence and again arguing for federal abstention where there are adequate state law remedies).

53. *See Zinermon*, 494 U.S. at 124-25.

54. *Cordova*, 816 F.3d at 661 (Gorsuch, J., concurring in the judgment).

55. *Id.*

56. GORSUCH, *supra* note 39, at 77.

57. Browder v. City of Albuquerque, 787 F.3d 1076, 1078 (10th Cir. 2015); *see also* GORSUCH, *supra* note 39, at 78 (describing Justice Scalia's and Justice Thomas's rejection of "all nonincorporation substantive due process" rights).

is found in the Constitution's text.[58] Substantive due process, he wrote for the *Browder* panel, exists because "the Supreme Court clearly tells us, home it has and has where it is."[59] Judge Gorsuch failed to clarify whether substantive due process would find constitutional shelter on his Supreme Court.

Conclusion

Judge Gorsuch presents himself as a restrained judge. But that "restraint" often translates to extreme results when applied to legal rights open to interpretation. By attempting to hew to the narrowest reading of rights-creating text, Judge Gorsuch creates new understandings of the law, leaving litigants with limited access to courts and restricting the reach of constitutional and statutory protections.

58. *Browder*, 787 F.3d at 1085 (Gorsuch, J., concurring).

59. *Id.* at 1078 (majority opinion).