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POLITICS

In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style

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By ADAM LIPTAK JAN. 31, 2017

WASHINGTON — A year ago, Judge Neil M. Gorsuch was midway down a ski slope when his cellphone rang. Justice Antonin Scalia, he was told, had died.

"I immediately lost what breath I had left," Judge Gorsuch said in a speech two months later. "And I am not embarrassed to admit that I couldn't see the rest of the way down the mountain for the tears."

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. He shares Justice Scalia's legal philosophy, talent for vivid writing and love of the outdoors.

Mr. Trump's selection of Judge Gorsuch was nonetheless a bit of a surprise, coming from someone who had campaigned as a Washington outsider. Judge Gorsuch has deep roots in the city and the establishment Mr. Trump often criticized.

His mother was a high-level official in the Reagan administration. He spent part of his childhood in Washington and practiced law here for a decade, at a prominent

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law firm and in the Justice Department. And, like all of the current justices, he is a product of the Ivy League, having attended college at Columbia and law school at Harvard.

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. This approach leads him to generally but not uniformly conservative results.

"Ours is the job of interpreting the Constitution," he wrote in a concurrence last year. "And that document isn't some inkblot on which litigants may project their hopes and dreams."

While he has not written extensively on several issues of importance to many conservatives, including gun control and gay rights, Judge Gorsuch has taken strong stands in favor of religious freedom, earning him admiration from the right.

In two prominent cases, both of which reached the Supreme Court, he sided with employers who had religious objections to providing some forms of contraception coverage to their female workers.

He voted in favor of Hobby Lobby Stores, a family-owned company that objected to regulations under the Affordable Care Act requiring many employers to provide free contraception coverage. Similarly, he dissented from a decision not to rehear a ruling requiring the Little Sisters of the Poor, an order of nuns, to comply with an aspect of the regulations.

The Supreme Court ruled in favor of Hobby Lobby in 2014 and vacated the decision concerning the Little Sisters of the Poor in 2016.

Like Justice Scalia, Judge Gorsuch takes a broad view of the Fourth Amendment, which bars unreasonable government searches and seizures.

Judge Gorsuch was born and spent his early years in Colorado, and he returned there when he became a judge more than a decade ago. Michael W. McConnell, who served with Judge Gorsuch on the appeals court and is now a law professor at

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Stanford, said his former colleague's Colorado background would add something distinctive to the Supreme Court.

"He's a Westerner," Professor McConnell said. "There are so many cases that have to do with the West, and I also think the cultural sensibilities of the West are different. He's an outdoorsman, and the Supreme Court needs a little bit more geographical diversity."

In Colorado, Judge Gorsuch is known for his involvement with the outdoors and the local legal community. He lives in unincorporated Boulder County, in a mountain-view community on a property with several horses. He has raised chickens and goats with his teenage daughters, Emma and Belinda, and his wife, Louise, an avid equestrian. He is a black diamond skier and fisherman and hosts regular picnics for his former law clerks with another 10th Circuit judge, Timothy M. Tymkovich.

Judge Gorsuch has not hesitated to take stands that critics say have a partisan edge. He has criticized liberals for turning to the courts rather than legislatures to achieve their policy goals, and has called for limiting the power of federal regulators.

Nan Aron, the president of the Alliance for Justice, a liberal group, said Judge Gorsuch's stance on federal regulation was "extremely problematic" and "even more radical than Scalia."

"Not requiring courts to defer to agency expertise when an act of Congress is ambiguous," she said, "will make it much harder for federal agencies to effectively address a wide variety of critical matters, including labor rights, consumer and financial protections, and environmental law."

In a 2005 essay in National Review, written before he became a judge, he criticized liberals for preferring litigation to the political process.

"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," he wrote. "This overweening

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addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary."

Like Justice Scalia, Judge Gorsuch is a lively and accessible writer. Consider the first paragraph of a 2011 libel decision, which dispensed with the throat-clearing and jargon that characterizes many judicial opinions.

"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?" Judge Gorsuch wrote. "The answer is no. While the statement may cause you a world of trouble, while it may not be precisely true, it is substantially true. And that is enough to call an end to this litigation as a matter of law."

Judge Gorsuch's writing differs from Justice Scalia's in one major way: His tone is consistently courteous and mild, while some of Justice Scalia's dissents were caustic and wounding.

If Judge Gorsuch is confirmed, the court will return to a familiar dynamic, with Justice Anthony M. Kennedy, a moderate conservative, holding the decisive vote in many closely divided cases.

Judge Gorsuch was born in Denver, but he moved to Washington as a teenager when his mother, Anne M. Gorsuch, joined the administration of President Ronald Reagan as the first woman to lead the Environmental Protection Agency. Ms. Gorsuch, known after her remarriage as Anne Burford, resigned under fire from Congress after 22 months.

After law school, he also attended Oxford University in England as a Marshall Scholar, graduating with a doctorate in legal philosophy.

He served as a law clerk for a year to Judge David B. Sentelle, a conservative member of the United States Court of Appeals for the District of Columbia Circuit.

After the appeals court clerkship, Mr. Gorsuch served as a law clerk to Justice Byron R. White, then a retired member of the Supreme Court. As is the court's custom, Justice White shared his clerk with an active member of the court, Justice

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Kennedy. (When Judge Gorsuch joined the Denver appeals court, Justice Kennedy administered the oath of office.)

Mr. Gorsuch then practiced law for a decade at Kellogg, Huber, Hansen, Todd, Evans & Figel, a Washington law firm, before serving in the Justice Department from 2005 to 2006.

He is the author of "The Future of Assisted Suicide and Euthanasia," published in 2006 by Princeton University Press. The book argued that laws banning those practices should be retained.

In a 2002 article reflecting on Justice White's death, Mr. Gorsuch criticized the Senate's handling of judicial confirmations. "Some of the most impressive judicial nominees are grossly mistreated," he said, mentioning two candidates for the federal appeals court in Washington who he said were "widely considered to be among the finest lawyers of their generation."

One was John G. Roberts Jr., who went on to become chief justice of the United States. The other was Judge Merrick B. Garland, who was confirmed to the appeals court in 1997 after a long delay, but whose nomination to Justice Scalia's seat last year was blocked by Senate Republicans.

If he is confirmed, Judge Gorsuch will become the 113th justice, taking a seat that has been held not only by Justice Scalia but also by Justice Robert H. Jackson, perhaps the finest writer to have served on the court. "The towering judges that have served in this particular seat of the Supreme Court," Judge Gorsuch said in his remarks at the White House on Tuesday night, "are much in my mind at this moment."

But Judge Gorsuch seemed to take special pleasure in remembering the justice who had first hired him as a law clerk, a Westerner whose accomplishments were not limited to the law. "I began my legal career working for Byron White," he said, "the last Coloradan to serve on the Supreme Court — and the only justice to lead the N.F.L. in rushing."

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Julie Turkewitz contributed reporting from Denver, and Scott Shane from Washington.

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Essay
Max Alderman, Duncan Pickard [a1]

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JUSTICE SCALIA'S HEIR APPARENT?: JUDGE GORSUCH'S APPROACH TO TEXTUALISM AND ORIGINALISM

Introduction

Numerous commentators argue that, if confirmed, Justice Neil Gorsuch would follow the late Justice Antonin Scalia's signature methodological contributions: originalism and textualism. [1] Indeed, Judge Gorsuch styles himself as a judge in Justice Scalia's vein. In a tribute to the late Justice, he responded to Justice Scalia's critics by arguing that "an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function." [2]

What do Judge Gorsuch's Tenth Circuit opinions and his academic writing reveal about his approach to originalism and textualism? Judge Gorsuch, like Justice Scalia, is a rigorous textualist. Yet, when a textualist approach fails to clarify ambiguous statutory terms, Judge Gorsuch turns to sources that Justice Scalia decried. Additionally, and like Justice Scalia, Judge Gorsuch looks to the Founding to inform his reading of the Constitution but, perhaps, with a view toward expanding the coverage of constitutional rights. Judge Gorsuch is also skeptical, on originalist grounds, of judicial deference to executive agencies, in effect using Justice Scalia's favored interpretive tool to challenge *Chevron* deference--a rule of law Justice Scalia helped promote. [3]

*186 I. Originalism and Textualism as Modes of Analysis

In their academic writing, Judge Gorsuch and Justice Scalia demonstrate a commitment to textualism and originalism. Textualists believe judicial interpretation of statutes, rules, and constitutional provisions must follow the text, as written, without recourse to authorial or legislative intent. [4] A textualist, for Judge Gorsuch, should "strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and 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." [5] Relatedly, originalist judges interpret ambiguous constitutional provisions in light of their original meanings. [6] Justice Scalia, a pioneer of this method of interpretation, believed that judges should seek the original meaning of the text and not what the Founders intended [7] by relying on accounts that describe the "public understanding" of the meaning of the Constitution. [8]

The theoretical advantage of textualism and originalism is that they are neutral and objective. [9] As Justice Scalia and Bryan Garner argue: "History is a rock-hard science compared to moral philosophy" [10] or, impliedly, any other proposed method which might attempt to divine the original meaning of an ambiguous constitutional provision. Similarly, Judge Gorsuch called the "history test," as "perceived by its advocates," a "comparatively objective approach." [11]

***187** And yet Justice Scalia's applied textualism and originalism could deviate from their neutral core. As many commentators note, [12] Justice Scalia's methods managed to bend [13] when confronted with a case where he seemed to desire a certain outcome. [14] *District of Columbia v. Heller*, which Justice Scalia called his "most complete originalist opinion," [15] is a lightning rod for skeptics of his methods. [16]

Decisions like *Heller* get at the crux of this Essay: What happens when originalist and textual methods fail to provide a clear answer or lead scholars and judges applying them to reach different conclusions? Judge Gorsuch notes that "the very hardest cases" are rare: only a sliver of cases make it before the Supreme Court each year and, of that sliver, a Justice voices dissent in only fifty or so. [17] But, he argues, objectivity in these hard cases is important: "[W]hen judges pull from the same toolbox ... we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow." [18]

Judge Gorsuch draws our attention to just such a hard case, *Lockhart v. United States*; [19] he speaks approvingly of Justices Sotomayor and Kagan's nuanced debate about a dangling participial phrase. [20] Without commenting on the reasoning, Judge Gorsuch takes delight in the Justices' argument. [21] But, it seems to us, this decision should worry Judge Gorsuch more than please him: the ***188** grammatical tools seem to cut both ways. As Joseph Kimble remarked before the Court decided *Lockhart*, "[i]t's anybody's guess how" the puzzle of "series qualifier[s]" will "play out in *Lockhart* and beyond." [22]

II. Judge Gorsuch and Textualism

A. Statutory Interpretation

Judge Gorsuch often employs standard textualist approaches to statutory interpretation. [23] Yet, at the same time, his approach to ambiguous statutory terms may hew more closely to Justice Kagan's or Justice Sotomayor's reasoning in *Lockhart* than it does to Justice Scalia's. In *United States v. Hinckley*, Judge Gorsuch interpreted the scope of the Sex Offender Registration and Notification Act. [24] After emphasizing the need to start with the "words Congress has chosen," [25] Judge Gorsuch concluded the statute was ambiguous as to which category of sex offenders the statute applied to. [26]

Judge Gorsuch dealt with this ambiguity by accounting for the language's context. He cautioned against ignoring the "reality of ambiguity created by misplaced modifiers," stating that "the most grammatical readings are not always the only reasonable ones." [27] Consequently, "judges are not charged with grading Congress's grammar but with applying laws in conformance with Congress's manifest purpose." [28]

Judge Gorsuch cited and discussed *United States v. X-Citement Video, Inc.*, a case in which Chief Justice Rehnquist held that the term "knowingly" did not modify the verbs surrounding it, which would have introduced a scienter requirement Congress could not have intended. [29] Judge Gorsuch's reliance on *X-Citement* ***189** *Video* [30] stands in stark contrast to Justice Scalia, who dissented in that case, arguing the majority had "contradict[ed] the plain import of what Congress has specifically prescribed regarding criminal intent." [31]

Judge Gorsuch then turned to "traditional tools of statutory interpretation in an effort to discern Congress's meaning," [32] including legislative history--a striking departure from Justice Scalia's textualism. Judge Gorsuch noted that the statute's title can "shed light on Congress's *intention*" and, in this case, "makes Congress's *purpose* blindingly clear." [33] He also

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cited statements by the sponsors' "consistent[] and emphatic[]" statements to determine what was "intended by the authors" of the statute. [34] The Supreme Court abrogated *Hinckley* in *Reynolds v. United States*. [35] Notably, Justice Scalia dissented in *Reynolds*, writing that he would have resolved the case through a purely textualist approach to the words "authority" and "specify." [36]

B. Textualism and Constitutional Interpretation

Judge Gorsuch has joined Justice Scalia in applying his textualist approach to constitutional interpretation. Justice Scalia critiqued the dormant Commerce Clause because it was implied, not written. [37] Similarly, as Eric Citron notes, Judge Gorsuch's opinions "reveal a measure of distrust" toward the dormant Commerce Clause--an unwritten constitutional principle taken as implied by Congress's power to regular interstate commerce. [38] In *Energy and Environment Legal Institute v. Epel,* Judge Gorsuch noted, "[d]etractors find dormant commerce clause doctrine absent from the Constitution's text and incompatible with its structure." [39]

***190 C. Stare Decisis**

Judge Gorsuch, again recalling Justice Scalia, appears willing to favor stare decisis over textualism. In *United States v. Games-Perez*, [40] Judge Gorsuch, concurring in the judgment, lamented this as a case where "[o]ur duty to follow precedent sometimes requires us to make mistakes" and lodged a textualist critique against controlling precedent. [41] He concluded by expressing frustration with courts that he believed usurped the place of Congress, yet he still upheld precedent. [42]

This deference to precedent--in particular, to Tenth Circuit precedent, which Judge Gorsuch could work to revise--in the face of reasonable textualist critique could indicate how seriously Judge Gorsuch takes stare decisis. Like Justice Scalia--who noted the lack of textual or originalist foundations for substantive due process yet did not attempt to disturb it [43] --Judge Gorsuch might sublimate frustrations about aspects of settled law so as to not upset established doctrine. Yet, at the same time, Judge Gorsuch's willingness to air these grievances may signal a desire to shake things up.

III. Judge Gorsuch and Originalism

A. Individual Rights

Judge Gorsuch has had less opportunity on the Tenth Circuit to apply originalism to interpreting the Constitution than textualism to interpreting statutes, but his academic writing reveals an interest in, and enthusiasm for, searching historical inquiry. In *The Future of Assisted Suicide and Euthanasia*, Judge Gorsuch sketches an answer to how he might decide originalist questions, at least in the context of substantive due process. Recognizing the "warts" of a history test, Judge Gorsuch limns assisted suicide justifications by "examin [ing] as broad a historical record as possible, consulting the ancients as well as more directly relevant English, colonial, and American history." [44] Judge Gorsuch does not limit his inquiry to the Founding, but pursues evidence from leading moral theorists, as well as evolving criminal and social sanctions of suicide. [45]

***191** In his judicial opinions, Judge Gorsuch has also looked--albeit not exclusively--to the Founding to determine the scope and application of constitutional rights. In *United States v. Ackerman*, Judge Gorsuch addressed whether the Fourth Amendment proscribed a search by a nongovernmental organization working on behalf of a law enforcement agency. [46] Judge Gorsuch determined that the private organization in this case was a governmental entity but, even if it

were not, its searches did not necessarily "escape the Fourth Amendment's ambit," articulating the agency principle, "a rule of law the founders knew, understood, and undoubtedly relied upon." [47]

Likewise, in *United States v. Carloss*, the Tenth Circuit considered whether police officers violated the Fourth Amendment when they knocked on the defendant's door despite posted "No Trespassing" signs. [48] Judge Gorsuch dissented, charging that the Government's position that its agents had a free-floating right to enter a homeowner's property to engage in a "knock and talk" was "difficult to reconcile with the Constitution of the founders' design." [49] He did this, he claimed, to defend the Fourth Amendment, which provides "ancient protections." [50]

B. Separation of Powers

As David Feder notes, Judge Gorsuch draws on originalism to lambast *Chevron* deference. [51] In a series of concurrences and articles, Judge Gorsuch has argued that *Chevron* contravenes "the Constitution of the framers' design." [52] In his tribute to Justice Scalia, Judge Gorsuch argued that judicial deference to administrative agencies runs against the "liberty-protecting qualities of the separation of powers" that motivated the Founders. [53] He cited the case of Alfonzo De Niz Robles, a Mexican citizen, who was caught up in a lengthy series of decisions and appeals after immigration authorities apprehended him. His case eventually made its way to the Tenth Circuit. [54] Judge Gorsuch, describing ***192** this judicial-executive-legislative process, stated that "what happened here might be enough to make James Madison's head spin." [55]

Justice Scalia famously endorsed *Chevron* as reflective of "the reality of government" and authorized by Congress. [56] Judge Gorsuch's critique, by contrast, is a formalistic reading of the Founders' intent.

Conclusion

Parsing Judge Gorsuch's writing to gain insight into his future jurisprudence feels like peering into a scrying glass. Our sources are few and inconsistent; his opinions are bound by the facts and politics of the cases before him. Yet these pieces provide a glimpse into the kind of Justice we might expect. Judge Gorsuch, like Justice Scalia, is a textualist and originalist. He also appears to feel bound by stare decisis and the rule of settled law, hesitant to disrupt precedent in "wrongly" decided cases. But at the same time, where Justice Scalia applied strict textualism, Judge Gorsuch may be more flexible. His willingness to evaluate legislative history, to explore alternative rationales, and to reach across the aisle may unite disparate parts of the Court.

Footnotes

a1 J.D. Candidates, Stanford Law School, 2017.

1 *See, e.g.*, Michael E. Kenneally et al., *A Principled and Courageous Choice*, U.S. NEWS & WORLD REP. (Feb. 13, 2017, 6:00 AM), http://www.usnews.com/opinion/articles/2017-02-13/judge-gorsuch-is-the-best-choice-to-fill-scalias-supreme-court-seat; Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), https://nyti.ms/2jSVfa9.

2 Judge Neil M. Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), *in* 66 CASE W. RES. L. REV. 905, 909 (2016).

3 *See* Justice Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, *Duke Law Journal* Administrative Law Lecture (Jan. 24, 1989), *in* 1989 DUKE L.J. 511, 511-12. *But see* Stephen J. Leacock, Chevron'*s Legacy, Justice Scalia's*

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Two Enigmatic Dissents, and His Return to the Fold in City of Arlington, Tex. v. FCC, 64 CATH. U. L. REV. 133, 157-59 (2014) (reviewing Justice Scalia's later critiques of *Chevron* deference).

4 *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 25-28 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348-49 (2005).

5 Gorsuch, *supra* note 2, at 906.

6 *See, e.g.*, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 243-45 (2009) (critiquing originalism's evolution).

7 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW3, 38 (Amy Gutmann ed., 1997).

8 *Cf., e.g.*, Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 339 (2004).

9 *See, e.g.*, DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 25 (2005) ("The key originalist premise is that (neutral) principle is possible only within the interpretive paradigm of originalism."); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2072 (2006) (reviewing ADRIAN VERMUELE, JUDGING UNDER UNCERTAINTY (2006)) (questioning whether textualist "opinions might appear more neutral and lawyerly" and the "public might perceive the federal courts to be less political").

10 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 402 (2012).

11 NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 19 (2006).

12 *See, e.g.*, BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 390-91 (2014).

13 *See, e.g.*, JACK BALKIN, LIVING ORIGINALISM 100-01, 108 (2011) (arguing that Justice Scalia "conflate[d] original meaning with original expected application"--a process which achieves a form of "living constitutionalism"); RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 169 (2006) (noting Justice Scalia's acceptance of incorporation and substantive due process, even though neither could be easily squared with originalism); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1005 (2007) ("We think that while Justice Scalia may have been right on the specific facts of *Hamdan*, his broader claims about Congress's power to strip jurisdiction from the Supreme Court are textually wrong." (citing Hamdan v. Rumsfeld, 548 U.S. 557 (2006)).

14 MURPHY, *supra* note 12, at 386 ("None of this posed any problem for Scalia, who was by now adept in manipulating his originalist theory to reach the result that he sought.").

15 *See id.* at 390 (quoting Justice Scalia from an interview with NPR's Nina Totenberg).

16 Two of the dissents in that case provide methodologically similar decisions to the majority but reach opposite conclusions. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); *id.* at 681 (2008) (Breyer, J., dissenting); *see also* MURPHY, *supra* note 12, at 385-93; J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 271 (2009) ("It is hard to look at all this [historical] evidence and come away thinking that one side is clearly right on the law.").

17 Gorsuch, *supra* note 2, at 916-17.

18 *Id.* at 917.

19 136 S. Ct. 958 (2016).

20 Gorsuch, *supra* note 2, at 907-08.

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21 *Id.*

22 Joseph Kimble, *The Puzzle of Trailing Modifiers*, MICH. B.J., Jan. 2016, at 38, 40*; see also* Daisy C. Karlson, *Recent Developments*, 69 ARK. L. REV. 871, 877-79 (2016) (describing the evenly matched textualist interpretations of the majority and dissent in *Lockhart*).

23 *See, e.g.*, Elwell v. Oklahoma, 693 F.3d 1303, 1306-09, 1312 (10th Cir. 2012) (applying dictionary definitions and canons of statutory construction to interpret the Americans with Disabilities Act); Almond v. Unified Sch. Dist. No. 501, 665 F.3d 1174, 1180-83 (10th Cir. 2011) (interpreting the plain meaning of the Lilly Ledbetter Fair Pay Act along linguistic and grammatical lines).

24 550 F.3d 926, 940 (10th Cir. 2008) (Gorsuch, J., concurring), *abrogated by* Reynolds v. United States, 565 U.S. 432 (2012).

25 *Id.*

26 *Id.*

27 *Id.* at 942.

28 *Id.*

29 513 U.S. 64, 68-69 (1994); *see Hinckley*, 550 F.3d at 942-43 (citing *X-Citement Video*, 513 U.S. at 68-70).

30 *Hinckley*, 550 F.3d at 943 (Gorsuch, J., concurring) ("[W]hen presented with a statute with a potential misplaced modifier or clause that might apply to more than just one antecedent, we must consult the surrounding context and structure before reflexively enforcing any construction of the statute.").

31 *X-Citement Video*, 513 U.S. at 81 (Scalia, J., dissenting).

32 *Hinckley*, 550 F.3d at 946 (Gorsuch, J., concurring).

33 *Id.* (emphases added).

34 *Id.* at 947 & n.7.

35 565 U.S. 432, 435 (2012).

36 *Id.* at 448-49 (Scalia, J., dissenting).

37 *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) ("The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause.").

38 Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch.

39 793 F.3d 1169, 1171 (10th Cir.) (holding a statute not to violate the doctrine), *cert. denied*, 136 S. Ct. 595 (2015).

40 667 F.3d 1136 (10th Cir. 2012).

41 *Id.* at 1142-43 (Gorsuch, J., concurring in the judgment).

42 *See id.* at 1145-46.

43 *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 780-83 (2003) (Scalia, J., concurring in part in the judgment); ROSSUM, *supra* note 13, at 169.

44 GORSUCH, *supra* note 11, at 22.

45 Noah Feldman argues that Judge Gorsuch will not be an originalist because he does not emphasize the Framers' intent in his discussion of assisted suicide. Noah Feldman, *Scalia's Replacement Won't Be Quite So Originalist*, BLOOMBERG VIEW

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(Jan. 29, 2017, 11:00 AM EST), http://bv.ms/2jscChj. We, however, do not find the absence of originalist arguments necessarily indicative of his failure to be an originalist. Moreover, he *does* explore Founding-era opinions toward suicide to cement his argument.

46 831 F.3d 1292, 1294-95 (10th Cir. 2016).

47 *Id.* at 1300-01.

48 818 F.3d 988, 990 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016).

49 *Id.* at 1005-06 (Gorsuch, J., dissenting).

50 *Id.* at 1011.

51 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.

52 *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

53 Gorsuch, *supra* note 2, at 914 (decrying the use of *Chevron* deference in an immigration law case).

54 De Niz Robles v. Lynch, 803 F.3d 1165, 1167-68 (10th Cir. 2015).

55 Gorsuch, *supra* note 2, at 915.

56 *See* Scalia, *supra* note 3, at 516-17, 521.

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IF GOLIATH FALLS: JUDGE GORSUCH AND THE ADMINISTRATIVE STATE

Introduction

When it comes to Judge Gorsuch's views on administrative law, the focus has been on one opinion--his concurrence in *Gutierrez-Brizuela v. Lynch*. [1] In addition to authoring the majority opinion, [2] Judge Gorsuch concurred separately to air concerns over *Chevron*'s rule requiring courts to defer to the judgments of executive agencies. [3] "We managed to live with the administrative state before *Chevron*," he wrote. [4] "We could do it again." [5] Commentators across the political spectrum have seized upon the opinion, praising [6] and criticizing [7] it as indicative of a willingness to abandon a pillar of the modern administrative ***172** state. But those tempted to rush to *Chevron*'s defense or to hasten its demise will miss other aspects of Judge Gorsuch's administrative law jurisprudence.

I. Facing the Behemoth

Judge Gorsuch's *Gutierrez-Brizuela* concurrence indicts the status quo, claiming that "*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." [8] Arguing from the Framers' understanding, Judge Gorsuch explains why we should care about the separation of powers in the first place--alluding to fundamental concerns of fair notice, equal protection, and democratic legitimacy--and why, in his view, *Chevron* and *Brand X* should raise concerns "[e]ven under the most relaxed or functionalist view of our separated powers." [9]

He also questions the doctrine's underlying logic. The Court in *Brand X* held that "judicial precedent [may not] foreclose an agency from interpreting an ambiguous statute" [10] because *Chevron*'s premise is that "ambiguities in statutes ... are delegations of authority to the agency to fill the statutory gap." [11] So agencies must be permitted to overrule earlier judicial decisions in some circumstances. Granting that this rule "follow[s] pretty naturally" if one accepts *Chevron*'s premise, Judge Gorsuch attacks the premise, arguing that "*Chevron*'s claim about legislative intentions is no more than a fiction--and one that requires a pretty hefty suspension of disbelief at that." [12] None of this was necessary to decide the case. Nevertheless, Judge Gorsuch seized an opportunity to "bring[] the colossus" of the administrative state "fully into view." [13]

II. Frenetic Lawmaking

In two recent cases, Judge Gorsuch opined sua sponte about the excessive proliferation of conflicting agency directives. In *El Encanto, Inc. v. Hatch Chile Co.*, he refused to defer to a "sub-regulatory manual" to determine the scope of permissible discovery in Trademark Trial and Appeal Board proceedings, in part because the party's proposed reading would have conflicted with the notice- ***173** and-comment regulations of the Patent and Trademark Office (PTO). [14] But Judge Gorsuch had independent grounds for rejecting the informal guidance: the PTO manual expressly disclaimed force-of-law authority. [15] Nevertheless, he chided that "if the agency is indeed so confused that it has spoken out of both sides of its regulatory mouth, it has to be the side speaking unambiguously through formal rulemaking ... that speaks the more loudly." [16]

Last year, in *Caring Hearts Personal Home Services, Inc. v. Burwell*, Judge Gorsuch wrote that the Centers for Medicare and Medicaid Services simply "applied the wrong law" when it penalized a health services provider pursuant to regulations it adopted *after* the contested services were provided. [17] Although the case involved seemingly simple retroactivity issues, Judge Gorsuch characterized it as "a case about an agency struggling to keep up with the furious pace of its own rulemaking." [18] Apart from his concern that the judiciary is no longer saying "what the law is," [19] he worried that "legislating agencies don't know what their *own* 'law' is." [20] And in "a world in which the laws are 'so voluminous they cannot be read"' by the agency that promulgates them, he argued, our "constitutional norms of due process, fair notice, and even the separation of powers seem very much at stake." [21]

III. Substance over Form

Judge Gorusch's skepticism of *Chevron*'s premise is paradigmatic of his willingness to privilege substance over form in the administrative law context. *De Niz Robles v. Lynch* provides another example. [22] There, he wrote for the panel that, while the Board of Immigration Appeals could overrule an earlier interpretation of a statute by the Tenth Circuit under *Brand X*, it could not apply its new rule retroactively to an earlier-filed petition for adjustment of status. [23] He noted that, unlike adjudication, legislation is presumed not to operate retroactively because of due process and equal protection interests. [24] Although an agency's exercise of *Brand X* authority in an adjudication is ostensibly ***174** adjudicatory, Judge Gorsuch reminded readers that "substance doesn't always follow form." [25] In reality, "an agency operating under the aegis of *Chevron* step two and *Brand X* comes perhaps as close to exercising legislative power as it might ever get." [26]

In a passage recognizing the limits on this "analogy to legislative activity," [27] Judge Gorsuch clarified his view. Although recognizing *Brand X* adjudications have force of law only after *judicial* approval, he insisted that "what's at issue in these cases is an *agency* decision" and that decision is "a policy choice subject to revision"--not an authoritative interpretation of law. [28] It is no surprise, then, that he wonders "whether the combination of *Chevron* and *Brand X* further muddles the muddle." [29] Because the agency is making policy--not interpreting law-- and because courts are deferring to that policy judgment, it's policy all the way down. [30]

IV. Delegation Run Riot

This all invites the question: other than through deference, how are judges to get along in a world where statutes are often little more than statements of general policy? Indeed, *Chevron* is arguably justified by the very separation of powers concerns that animate Judge Gorsuch's jurisprudence since it rests on the view that resolving statutory ambiguity requires courts to venture beyond the "traditional tools of statutory construction" [31] and make essentially legislative judgments. Scrapping *Chevron* could merely swap one separation of powers problem for another. [32]

It is unsurprising, then, that Judge Gorsuch displays sympathy for the nondelegation doctrine. *United States v. Nichols* [33] is a telling example. There, the Tenth Circuit declined to rehear a panel decision upholding the Sex Offender Registration and Notification Act, which delegated to the Attorney General authority to determine the statute's retroactive effect but provided no guidance on how to do so. [34] Judge Gorsuch dissented from the denial of rehearing. ***175** Rooting his analysis in the Constitution's text and the Framers' understanding, [35] he argued that the statute "effectively pass[ed] off to the prosecutor the job of defining the very crime he is responsible for enforcing" and therefore unconstitutionally delegated legislative authority to the executive branch. [36] That analysis transcended the facts of the case. [37] And *Nichols* is no anomaly. [38]

At the same time, Judge Gorsuch admits the difficulties inherent in nondelegation. Namely, he recognizes that the "[d]elegation doctrine may not be the easiest to tease out and it has been some time since the Court has held a statute to cross the line." [39] But *Nichols* demonstrates a recognition that, as he has written in another context, "the difficulty of a task is not reason enough to abandon it, especially if it illuminates and aids in the enforcement of underlying constitutional demands." [40]

V. A Radical Departure?

Some have suggested that Judge Gorsuch's views would represent a major shift from Justice Scalia's. [41] But that is far from clear. After initially endorsing *Chevron*, [42] Justice Scalia appeared to exhibit buyer's remorse. [43] For example, he recognized *Chevron* may not have been "faithful to the text of the Administrative Procedure Act," [44] insisted on strict application at step one [45] and step two, [46] ***176** suggested *Chevron* should not apply at all in criminal cases, [47] dissented from the *Brand X* rule, [48] lambasted *Auer* deference, [49] and conceded the nondelegation doctrine is "essential to democratic government." [50] And for his part, Judge Gorsuch recognizes that in a post-*Chevron* world "courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of a statute." [51]

The suggestion that Judge Gorsuch would represent a radical shift may also mistake his propensity to critically examine doctrine for a penchant to destroy it. But asking *why* doctrine looks the way it does seems like the quintessential task of a Supreme Court Justice. [52] And some of the shifts Judge Gorsuch might foreseeably bring about--like refusing to defer on pure questions of law [53] and closely scrutinizing an agency's cost-benefit analysis [54] --have already been suggested by others.

Moreover, Judge Gorsuch emphasizes that formalism matters because our constitutional structure has consequences for "personal liberty, fair notice, and ***177** equal protection." [55] In a speech discussing *De Niz Robles v. Lynch*, [56] he bemoaned that our separation of powers--the original solution to the problem of "parchment barriers" [57] --has become parchment itself: "[A]n *executive* agency acting in a faux-*judicial* proceeding and exercising delegated *legislative* authority purported to overrule an existing *judicial* declaration about the meaning of existing law and apply its new *legislative* rule retroactively to already completed conduct." [58] But he couched his structural concerns in practical, human terms: "What did all this mixing of what should be separated powers mean for due process and equal protection values?" [59] That "after a man relied on a judicial declaration of what the law was," an agency changed the rules, penalizing Mr. De Niz Robles "for conduct he couldn't alter, and denying him any chance to conform his conduct to a legal rule knowable in advance." [60]

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At first blush, Judge Gorsuch's concerns may seem to run in different directions. His objection to *Brand X* is that agencies are encroaching on the judicial power "to render authoritative judgments about what a statute means." [61] But his criticism of *Chevron*--and muddling of executive and legislative authority--rests on the notion that current doctrine "permit[s] agencies to *make* the law." [62] No matter. Judge Gorsuch recognizes the incompatibility between these competing judicial-separation-of-powers and legislative-nondelegation narratives. [63] But his thesis does not rise or fall on either. Rather, the ultimate principle is *judicial* nondelegation: "[f]or whatever the *agency* may be doing ..., the problem remains that *courts* are not fulfilling their duty to interpret the law." [64]

***178** To be sure, Judge Gorsuch's views admit of certain tensions. His conclusion that *Chevron* may be "a judge-made doctrine for the abdication of the judicial duty" [65] raises the ultimate question with which he will be peppered in coming weeks: what *is* the judicial duty? Considering judges adopted *Chevron* with a view toward judicial restraint, [66] what is a judge committed to full-throated judicial responsibility to do? If "goliath ... falls," [67] who will take his place? We may find out soon enough.

Footnotes

a1 J.D. Candidate, Stanford Law School, 2017.

aa1 J.D. Candidate, Stanford Law School, 2018.

1 834 F.3d 1142 (10th Cir. 2016).

2 *See id.* at 1143, 1147-49 (holding the Board of Immigration Appeals could not apply its decision imposing stricter standards for adjustment of status petitions to a petition filed after that decision was issued but before the Tenth Circuit overruled prior case law to approve the new standards).

3 *See id.* at 1149, 1153 (Gorsuch, J., concurring); *see also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (setting out the two-step framework for *Chevron* deference).

4 *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring).

5 *Id.*

6 *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. Other commentators recognize that the *Chevron* debate does not always have a clear political valence. *See, e.g.*, Diane Klein, *Gorsuch,* Gutierrez-Brizuela*, and Goodbye,* Chevron, DORF ON LAW (Feb. 1, 2017), http://www.dorfonlaw.org/2017/02/gorsuch-gutierrez-brizuela-and-goodbye.html.

7 *See, e.g.*, Alexander C. Kaufman, *Trump's Supreme Court Pick Wants to Gut Legal Rule That Environmental Groups Rely On*, HUFFINGTON POST (Feb. 13, 2017, 4:01 PM ET), http://huff.to/2kpZdXp.

8 *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

9 *Id.* at 1149-51, 1155. Judge Gorsuch might also be interested in the historical origins of *Chevron* itself. *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (tracing historical origins of judicial deference to executive statutory interpretation).

10 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

11 *Id.* at 980.

12 *Gutierrez-Brizuela*, 834 F.3d at 1151, 1153 (Gorsuch, J., concurring).

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13 *Id.* at 1151.

14 825 F.3d 1161, 1165-66 (10th Cir. 2016).

15 *Id.* at 1166.

16 *Id.*

17 824 F.3d 968, 970 (10th Cir. 2016).

18 *Id.*

19 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151-52 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803)).

20 *Caring Hearts*, 824 F.3d at 969-70 (emphasis added).

21 *Id.* at 976 (quoting THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961)).

22 803 F.3d 1165 (10th Cir. 2015).

23 *Id.* at 1171-72.

24 *Id.* at 1169-71.

25 *Id.* at 1173.

26 *Id.* at 1172.

27 *See id.* at 1174.

28 *Id.* at 1174 n.7.

29 *Id.* at 1171.

30 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1150-51 (10th Cir. 2016) (Gorsuch, J., concurring).

31 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

32 Indeed, the alternative is potentially more problematic. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1873 (2013).

33 United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (en banc).

34 *See id.* at 668 (Gorsuch, J., dissenting from the denial of rehearing en banc).

35 *See id.* at 670.

36 *Id.* at 677.

37 *See, e.g.*, *id.* at 670 ("So it is that 'to abandon openly the nondelegation doctrine [would be] to abandon openly a substantial portion of the foundation of American representative government.'" (alteration in original) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002))).

38 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153-55 (10th Cir. 2016) (Gorsuch, J., concurring).

39 *Nichols*, 784 F.3d at 677 (Gorsuch, J., dissenting from the denial of rehearing en banc).

40 De Niz Robles v. Lynch, 803 F.3d 1165, 1174 (10th Cir. 2015).

41 *See, e.g.*, Jonathan H. Adler, *Gorsuch's Judicial Philosophy Is Like Scalia's--With One Big Difference*, WASH. POST (Feb. 1, 2017), http://wapo.st/2mdhiKq.

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42 *See* Justice Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, *Duke Law Journal* Administrative Law Lecture (Jan. 24, 1989), *in* 1989 DUKE L.J. 511, 516-17.

43 Justice Alito recently stated that Justice Scalia was "rethinking the whole question of *Chevron* deference." *See* Robin Bravender, *Alito Snubs* Chevron*, Obama EPA's 'Eraser*,*'* GREENWIRE (Nov. 17, 2016), http://www.eenews.net/greenwire/2016/11/17/stories/1060045952.

44 United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

45 *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 227-29 (1994).

46 *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442-44 (2014); Christensen v. Harris County, 529 U.S. 576, 591 (2000) (Scalia, J., concurring in part and concurring in the judgment).

47 *See*Whitman v. United States, 135 S. Ct. 352, 352-54 (2014) (Scalia, J., statement respecting the denial of certiorari).

48 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1014-17 (2005) (Scalia, J., dissenting); *see also Mead*, 533 U.S. at 248 (Scalia, J., dissenting) ("I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency ....").

49 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211-13 (2015) (Scalia, J., concurring in the judgment); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part).

50 *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

51 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring). In our review of precedential opinions, Judge Gorsuch regularly sided with agencies. For example, in labor cases involving the NLRB, Gorsuch sided with the agency in three out of four cases. *Compare* Teamsters Local Union No. 455 v. NLRB, 765 F.3d 1198, 1200 (10th Cir. 2014) (voting with the NLRB), Pub. Serv. Co. of N.M. v. NLRB, 692 F.3d 1068, 1079 (10th Cir. 2012) (voting the same way), *and* Laborers' Int'l Union, Local 578 v. NLRB, 594 F.3d 732, 734 (10th Cir. 2010) (voting the same way), *with* NLRB v. Cmty. Health Servs., Inc., 812 F.3d 768, 780 (10th Cir. 2016) (Gorsuch, J., dissenting) (voting against the NLRB).

52 Indeed, the sitting Justices recently raised serious questions about *Chevron*, seemingly sussing out one another's views in anticipation of a new colleague. *See* Transcript of Oral Argument at 11-12, 14-18, 38-39, Esquivel-Quintana v. Sessions, No. 16-54 (U.S. Feb. 27, 2017).

53 *See* Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part); *cf.* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment).

54 *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 230, 235 (2009) (Breyer, J., concurring in part and dissenting in part).

55 Judge Neil M. Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), *in* 66 CASE W. RES. L. REV. 905, 915 (2016); *see* Peter Margulies, *Judge Gorsuch on Empathy and Institutional Design*, LAWFARE (Feb. 2, 2017, 12:29 PM), https://www.lawfareblog.com/judge-gorsuch-empathy-and-institutional-design.

56 803 F.3d 1165 (10th Cir. 2015).

57 *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 21, at 308.

58 Gorsuch, *supra* note 55, at 915.

59 *Id.*

60 *Id.*

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61 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring); *see also id.* at 1150 ("Quite literally then, ... an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals.").

62 *See id.* at 1152; *see also* De Niz Robles v. Lynch, 803 F.3d 1165, 1174 n.7 (10th Cir. 2015) (portraying agencies as "mak[ing] policy judgments," not "construing statutory text").

63 *See Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (contrasting differing "account[s]" of agency action).

64 *Id.* at 1152-53.

65 *Id.* at 1152.

66 *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1873 (2013) ("We have cautioned that 'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency .... That is precisely what *Chevron* prevents." (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980))).

67 *See Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring).

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GIVE GORSUCH A 21ST CENTURY LITMUS TEST

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Introduction

The United States Senate began confirmation hearings on March 20 to vet Neil Gorsuch, who was nominated to succeed the late Supreme Court Justice Antonin Scalia. Lawmakers are expected to apply litmus tests, probing him on issues such as abortion. They should also delve into his views on technology. As *Wired*'s political reporter Issie Lapowsky noted, "[w]hile liberals [focus] on such contentious issues as women's reproductive rights and environmental protections, Gorsuch will also face cases that demand a solid command of the complex issues digital technology raises, from copyright and privacy to intellectual property rights and data storage." [1] Although Gorsuch has a decade of experience serving as a judge on the U.S. Court of Appeals for the Tenth Circuit, he lacks an extensive record on tech-related cases and his decisions have been mixed, which should raise concerns about how he might decide such cases as a Supreme Court Justice. For example, Gorsuch is widely regarded as a strong supporter of free speech, including online speech, but he has not been as reliable an advocate for digital privacy. His support of network neutrality is far from certain. If confirmed, Gorsuch will likely rule on cases involving all of these issues and more. "The Supreme Court already has a list of digital civil liberties issues to consider in the near future, and that list is likely to grow," predicted Kate Tummarello of the Electronic Frontier Foundation, a digital rights advocacy group. "If confirmed ... Gorsuch ... will be in a position to make crucial decisions affecting our basic rights to privacy, free expression, and innovation." [2] ***2** Indeed, he may be the deciding vote on important tech cases. During Scalia's term, for example, the Supreme Court ruled 5-4 that the Child Online Protection Act violated the Free Speech clause of the First Amendment. [3] "As we have seen with critical 5-4 decisions applying constitutional doctrine to changes in technology over the years ... each and every Justice on the bench matters" - wrote Lisa Hayes, general counsel for the Center for Democracy & Technology, an internet rights group - "[w]e must take the time to thoroughly vet Judge Gorsuch and ensure we preserve an independent judiciary." [4]

As it is, the High Court has "difficulty in handling the intersection of the [Constitution] with technology" [5] and is often mocked for being "[h]opelessly behind the times ... out of touch ... techno-fogeys." [6] For example, many of the Justices do not even use email. [7] "The Justices are not necessarily the most technologically sophisticated people," Justice Elena Kagan admitted. [8] Without a tech savvy new Justice who appreciates how the average American uses computers, smart phones and social media, the Court risks taking a step backwards. That is because the new Justice's predecessor had been the Court's "standard-bearer" when it came to technology law. [9] Despite his typically conservative views on social issues, Scalia was "shockingly forward-looking" on technology issues. [10] In fact, he was considered a "hero" [11] by tech and legal experts, who cite his "pro-technology" decisions on cases providing First Amendment rights for video games,

privacy protections for smart phones, and regulations for network neutrality. [12] Given that the Court will increasingly be called upon to make important judgments that relate to technology, experts say Scalia's successor should demonstrate a genuine desire to keep up with the latest developments and provide guidance on how the Constitution should apply to the ***3** legal issues they raise--just as the late Justice did. Although President Donald Trump said he wants a Justice who is "'very much in the mold of Justice Scalia"' [13] and many court observers have dubbed Gorsuch "Scalia 2.0," [14] that may not be the case when it comes to technology law. An analysis of Scalia's and Gorsuch's decisions related to the First Amendment, Fourth Amendment and network neutrality indicate that the two jurists may be more different than similar. This should raise questions at the confirmation hearing by Democrat and Republican lawmakers alike.

I. Big Shoes to Fill

Scalia's death leaves the Supreme Court with big shoes to fill when it comes to tech jurisprudence. He was widely regarded as a strong defender of technology. Even his biggest critics concede that he was progressive when it came to technology. "Scalia's opinions were backwards in almost every possible arena," observed Katharine Trendacosta, a staff writer at tech blog Gizmodo. "For all the harm he did sitting on the Court for nearly thirty years, Scalia was surprisingly adept at understanding technology." [15] Likewise, Jack Smith IV, who covers technology and inequality for millennial news site Mic, wrote: "Say what you want about Justice Antonin Scalia, he was great for technology." [16] Lisa Larrimore Oullette, a professor of technology law at Stanford Law School, called him "a pro-technology Justice." [17] Michael Bennett, a lawyer and associate research professor at Arizona State University's School for the Future of Innovation in Society, labeled Scalia a "minor philosopher of technology." [18] Matthew Rozsa of Daily Dot, a blog covering Internet culture, added: "when it comes to Internet freedom, he may have been one of the great legal minds of our time." [19]

In particular, video game enthusiasts owe a debt of gratitude to Scalia. He wrote the "historic majority opinion" in *Brown v. Entertainment Merchants* ***4** *Association*, which gave video games First Amendment protection. [20] The Supreme Court's ruling stopped California from regulating video games as products like cigarettes and alcohol instead of as a medium for expression like music, books, and movies. [21] The Entertainment Software Association praised the decision: "It was a momentous day for our industry and those who love the entertainment we create and we are indebted to Justice Scalia for so eloquently defending the rights of creators and consumer everywhere." [22]

Scalia also left an indelible mark on digital privacy laws. [23] He made several key rulings, including requiring law enforcement to get a warrant before accessing the iPhone of a person they arrested, [24] before using thermal imaging devices to search a home for marijuana, [25] or before tracking a suspect using GPS. [26] Scalia's precedents continue to shape tech law and policy in other ways. For example, digital privacy advocates are now using the GPS precedent to challenge the constitutionality of Stingray-style devices. [27] Smith, a tech journalist, said Scalia's strong support of digital privacy rights has altered the way police conduct investigations: "[S]omewhere out there, there are police officers trying to use the most sophisticated technology of our time to peer into our lives in ways we never thought possible. And because of Antonin Scalia, someone is saying, 'You're going to need a warrant for that."' [28]

Additionally, Scalia was "net neutrality's unlikely hero," according to Robinson Meyer, tech editor for *The Atlantic*. [29] He went against the Court's majority in a 2005 case, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, arguing that Internet service was a telecommunications service, which made it subject to stricter government regulation. [30] A decade later, the Federal Communications Commission reclassified Internet service as a telecommunication service in order to impose network neutrality--the principle that internet service providers should treat all data on the internet equally, not discriminating or charging differentially by user, content, or website. [31] "It is

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***5** certainly true that Justice Scalia's dissent was pivotal to the FCC's theories in the Open Internet Order," said Peter Karanjia, co-chair of the appellate practice for law firm Davis Wright Tremaine. "The FCC in the order took pains to cite Justice Scalia's opinion." [32]

This is not to imply that Scalia was a computer whiz. During hearings, he sometimes asked embarrassing questions about technologies many Americans took for granted, such as cable television. [33] He admitted to being "clueless" when it came to social media. [34] And he staunchly opposed allowing cameras to broadcast Supreme Court hearings. [35] But Scalia made great strides in understanding the latest technology. For example, at age 74, he boasted that he owned an iPod and an iPad and did so much work on his gadgets that he could "hardly write in longhand anymore." [36] Scalia also said that when he had to "take materials home for work, he use[d] a thumb drive, or accesse[d] the Court computer system remotely." [37] He even "joked that he played" the popular fighting game Mortal Kombat as part of his research in preparing for oral arguments in *Brown*. [38]

As a result, "he seemed to understand technology better than his peers*,* " according to Trendacosta. [39] Likewise, Steve Vladeck, professor of law at University of Texas School of Law, said that "Justice Scalia was quick to grasp how particular technological innovations implicated constitutional protections in ways that might have taken his colleagues an additional step or two." [40] When reviewing Scalia's body of work in technology cases, his legacy is nonpareil, according to experts. "[I]f there was any force in the forward-march of modern ***6** history that could consider Scalia a standard-bearer, it was technology ... over and over again, he got it right," Smith said. [41] Stanford Law's Oullette agreed: "[H]e deserves his reputation as a pro-technology Justice .... He supported legal rules that allow new technologies to flourish." [42]

II. Gorsuch's Mixed Record

Gorsuch has been dubbed "Scalia 2.0" by many court observers, including University of Michigan Law Professor Richard Primus, who wrote that Gorsuch is "not far from" being "Scalia reincarnated." [43] While that characterization may be accurate broadly speaking, it is less clear the two judges are identical when it comes to specific areas, especially technology law. Like Scalia, Gorsuch has a strong record defending free speech, including online speech. He also has some quirky preferences reminiscent of Scalia's opposition to cameras in the courtroom. For example, while moonlighting as an adjunct law professor, Gorsuch "forbade students in his legal ethics class from using computers--an unusual move within law schools, where laptops are ubiquitous," according to legal blog Above The Law. [44] In contrast to Scalia, Gorsuch has been inconsistent in defending digital privacy rights. In addition, "Gorsuch, being the strict Constitutionalist that he is, may rule to strike down net neutrality regulations." [45] Given these disparities, Gorsuch's record on technology deserves a closer look by the Senate.

On issues related to free speech, "it is readily apparent that" Gorsuch has a "long and informed commitment to the First Amendment," according to Ronald Collins, a First Amendment professor at University of Washington School of Law. [46] Gorsuch's free speech advocacy includes defending the rights of online journalists. In a much-celebrated 2010 decision, Gorsuch joined Tenth Circuit in ruling that a college journalist had his constitutional rights violated when police searched his home and confiscated his computer after a professor complained of being libeled by the student's online satirical newsletter. In his concurrence in *Mink v. Knox*, Gorsuch wrote that "the First Amendment precludes defamation actions aimed at parody, even parody causing injury to individuals who are not public figures or involved in a public controversy." [47] The American Civil ***7** Liberties Union, Student Press Law Center and Foundation for Individual Rights in Education all lauded the court's decision. [48]

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On privacy matters, Gorsuch "has dealt with several Fourth Amendment cases that raised novel technology issues." [49] Based on his record on such cases, he does not appear to share Scalia's "legacy as a defender of privacy rights" [50] in technology. That said, as Orin S. Kerr, a George Washington University law professor who specializes in Fourth Amendment and technology issues observed, Gorsuch's opinions suggest that he is "not a knee-jerk vote for the government." [51] Most recently, in August 2016, Gorsuch strengthened online privacy protections in *United States v. Ackerman*. [52] That case--involving authorities searching emails for child pornography without a warrant--expanded the definition of what a search means, thereby expanding the types of situations that require a warrant to include instances where a person or organization is searching emails on behalf of the government. [53] In a 2013 case, involving police officers erroneously stopping someone because of a faulty license plate database, then discovering evidence of a crime, Gorsuch ruled that the police's use of the flawed technology made the search sufficiently unlawful to block prosecutors from using the drugs as evidence. [54] In some cases, however, Gorsuch has sided with law enforcement. For example, in June 2016--despite Scalia's and the Supreme Court's 2012 ruling that police officers need warrants to monitor suspects' movements by attaching GPS trackers to their cars--Gorsuch ruled that prosecutors could use GPS evidence without a warrant because the tracking occurred a year prior to the Supreme Court's decision. [55] In another blow to digital privacy, in the 2007 case *United States v. Andrus*, Gorsuch ruled that a 91-year-old man giving authorities permission to search his son's computer files was sufficient consent under the Fourth Amendment. [56] These inconsistent decisions indicate that Gorsuch could be a swing vote on digital privacy cases in the Supreme Court.

There is also doubt over whether Gorsuch will uphold network neutrality. Internet Service Providers have challenged the FCC's policy in federal court and the case could eventually make its way to the Supreme Court by 2018 "by which ***8** point Gorsuch, of the Tenth Circuit, may be confirmed." [57] The FCC maintains that it has the authority to regulate the Internet based on the "*Chevron* doctrine," named for a 1984 Supreme Court decision that expanded the regulatory power of the federal government, which Scalia "was often a defender of." [58] On the other hand, a "recent concurring opinion Gorsuch wrote from the appellate bench suggests that he could target just the sort of agency authority the FCC asserted in its net neutrality order." [59] In his August 2016 concurring opinion in *Gutierrez-Brizuela v. Lynch*, Gorsuch called Chevron, and a subsequent Supreme Court ruling that recognized the FCC's authority to determine whether the Internet should be regulated as a telecommunications service, the "elephant in the room." [60] Gorsuch said the principles enshrined by Chevron "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." [61] According to Case Western Reserve University Law Professor Jonathan Adler, the issue of whether courts should defer to administrative agencies such as the FCC when a statute is ambiguous is "the greatest area of difference between Gorsuch and Scalia." [62]

III. Tech Litmus Test

In addition to ruling on network neutrality, Gorsuch could make landmark rulings for technologies that have not even been imagined yet. Because Supreme Court Justices enjoy lifelong appointments, Gorsuch--who would be the youngest Justice on the current Supreme Court bench at 49 years old--could serve for three or four decades. Just within the next few years, several key issues involving technology are on the horizon. With Apple resisting the Federal Bureau of Investigation's demand to help it hack a terrorist's iPhone, Google's data-mining techniques leading to invasion of privacy lawsuits, and cyberbullying testing the limits of free speech, *Ars Technica* tech policy reporter Joe Silver predicts that "the Supreme Court is likely to be confronted with many ... challenging technology cases, and it will play a central role in shaping the 21st century cyberlaw debate." [63]

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It is crucial that senators carefully vet Gorsuch to ensure he is the right jurist to decide such issues. Both his savvy and legal philosophy regarding technology ***9** should be examined. "Future nominees to the bench should be quizzed on their knowledge of technology at confirmation hearings," suggested Trevor Timm, Executive Director of the Freedom of the Press Foundation.[64] They do not need a million followers, or even a social media account. But, like Scalia, Court nominees should at least demonstrate a genuine desire to learn about technology and attempt to properly balance innovation and expression with privacy and safety. "A justice typically isn't confirmed or denied based on these kinds of issues," said Shaun Bockert, an intellectual property attorney at Blank Rome.[65] "There are hot button issues, and unfortunately whether software is copyrightable is not one of them."[66] But, as *Wired*'s Lapowsky notes, "that doesn't mean these cases won't have far-reaching implications for the tech industry and users of tech alike--which is to say pretty much everyone."[67] For everyone's sake, the Senate must ensure Gorsuch is "very much in the mold of Justice Scalia" when it comes to technology.

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JUDGE GORSUCH ON QUALIFIED IMMUNITY

Introduction

In the wake of Tenth Circuit Judge Neil Gorsuch's nomination to the Supreme Court, there has been much buzz about his 2016 dissent in a case involving a seventh grader arrested for burping during gym class. [1] The Tenth Circuit shielded the arresting officer from suit, granting him qualified immunity. [2] Judge Gorsuch disagreed: "Respectfully, I would have thought [existing law] sufficient to alert any reasonable officer in this case that arresting a now compliant class clown for burping was going a step too far." [3] Commentators cited this dissent in praising Judge Gorsuch as "steadfast and surprising," [4] "a gift" to liberals. [5] But it does not stand as an exemplar of his qualified immunity jurisprudence. Rather, it highlights an important trend: although Judge Gorsuch tends toward generosity in granting government officials qualified immunity, he is cognizant of and polices the doctrine's outer bounds.

This Essay teases out that trend by examining Judge Gorsuch's major qualified immunity opinions. Three common threads emerge: First, Judge Gorsuch harbors a robust--though not boundless--vision of qualified immunity. Second, he believes courts ought not decide unnecessary constitutional issues and often inverts the qualified immunity analysis to avoid doing so. Third, he is sensitive to the practical concerns qualified immunity is meant to mollify--namely, the realities of law enforcement. This Essay's final Part weaves together these threads in an effort to divine the influence a potential Justice Gorsuch might have.

*164 I. Background

Qualified immunity generally shields government officials from damages lawsuits, most notably under 42 U.S.C. § 1983. [6] The doctrine balances "the need to hold public officials accountable" with "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." [7] In other words, it "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." [8]

But the immunity is, as its name suggests, qualified. A plaintiff can overcome it by pleading "facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." [9] Courts may address either of these prongs first. [10]

II. Judge Gorsuch's Past Opinions

Judge Gorsuch's past qualified immunity opinions reveal his generous--though not boundless--view of the doctrine's coverage. As he has put it: "True, qualified immunity is strong stuff .... But even accounting for this," juvenile detention center staff who used the Pro-Straint Restraining Chair, Violent Prisoner Chair Model RC-1200LX--complete with "wrist, waist, chest, and ankle restraints"--to discipline a juvenile detainee could not claim qualified immunity's protection. [11]

A. "Strong Stuff" [12]

Wilson v. City of Lafayette [13] exemplifies Judge Gorsuch's generous conception of qualified immunity. In that case, parents sued a police officer under § 1983 after he killed their son by tasing him. [14] Judge Gorsuch, writing for the majority, held that the parents "falter[ed] on at least their second burden"--the "clearly established" prong--and the officer was therefore immune. [15] He noted the Tenth Circuit's "sliding scale" approach to the "violated right" prong: "[T]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the ***165** violation." [16] But he nonetheless followed what he saw as the Supreme Court's directive "to apply qualified immunity broadly." [17] And he heeded the Court's "admonition" to "proceed 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,"' [18] an admonition seemingly "intended for this deeply saddening case." [19]

Judge Gorsuch echoed this same admonition in *Cortez v. McCauley*. [20] In that case, the Tenth Circuit denied an officer qualified immunity because he lacked probable cause for an arrest made after receiving an unfounded report of child molestation. [21] Judge Gorsuch concurred in part and dissented in part. While he agreed the officer lacked probable cause, he also believed the plaintiff failed to satisfy the clearly established prong. [22] Judge Gorsuch admonished the majority for asking--under the violated right prong-- "whether the officers might've, could've, or should've done more." [23] He explained that the Supreme "Court has repeatedly warned us against 'unrealistic second-guessing' of police judgments." [24]

Turning to the clearly established prong, Judge Gorsuch recalled qualified immunity's underlying purpose: "to protect diligent law enforcement officers, in appropriate cases, from the whipsaw of tort lawsuits seeking money damages." [25] He was unable to "blame law enforcement officers for having failed to divine" the Tenth Circuit's outcome on the evidentiary issues at play "while busy responding to a call reporting an alleged child molestation." [26] Rather, he blamed the majority--and the plaintiff--for failing to point to any precedent clearly establishing the right at issue. [27]

Judge Gorsuch again granted qualified immunity on the clearly established prong in *Kerns v. Bader*. [28] In that case, a police helicopter was shot down. Police subsequently searched Kerns's home, arrested him, and prosecuted him. [29] Kerns sued the officers who had searched his home, a sheriff who had attempted to obtain his psychiatric records, and various other law enforcement personnel. [30]

***166** Judge Gorsuch, writing for the majority, decided all three qualified immunity issues with judicial minimalism and resources in mind. He first remanded the question of the searching officers' qualified immunity "to the district court to finish the work of answering the second qualified immunity question," which it had initially declined to do. [31] Judge Gorsuch echoed the Supreme Court's instruction "that courts should proceed directly to, 'should address only,' and should deny relief exclusively based on the second element" under certain circumstances. [32] In his words, "constitutional

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avoidance considerations trump and 'courts should think hard, and then think hard again, before turning small cases into large ones.'" [33]

Judge Gorsuch then granted qualified immunity to the sheriff who had requested Kerns's psychiatric records based on the clearly established prong. "[D]oing so," he noted, "allows [the court] to avoid rendering a decision on important and contentious questions of constitutional law with the attendant needless (entirely avoidable) risk of reaching an improvident decision on these vital questions." [34] And he upheld the final defendants' claims of qualified immunity under the violated right prong "because doing so turn[ed] out to be the easiest and most economical way to resolve their various appeals." [35]

B. But Within Limits

Though generous, Judge Gorsuch has by no means issued government officials a blank check when it comes to qualified immunity. His dissent in *A.M. ex rel. F.M. v. Holmes* is illustrative. [36] In that case, F.M., a seventh grader, "generated several fake burps" in gym class. [37] His teacher called the police, who arrested F.M. for "interfering with the educational process" in violation of New Mexico law. [38] F.M.'s mother sued the officer under § 1983, alleging a violation of F.M.'s Fourth Amendment rights. [39] The officer asserted qualified immunity, [40] the district court agreed, and the Tenth Circuit affirmed. [41] The ***167** majority "center[ed] [its] analysis on the clearly-established-law question" [42] and held that it was not clearly established at the time that arresting a burping student violated the Fourth Amendment. [43]

Judge Gorsuch disagreed. [44] He lauded his colleagues for "reach[ing] a result they dislike[d] but believe[d] the law demand[ed]." [45] But he did not "believe the law happen[ed] to be quite as much of a ass as they" did. [46] Rather, Judge Gorsuch thought it sufficiently clear at the time "that arresting a now compliant class clown for burping was going a step too far." [47] He pointed to a New Mexico case interpreting the statutory language at issue--albeit in a separate statute--that ought to have "alerted law enforcement that the statutory language on which the officer relied ... does not criminalize 'noise[s] or diversion[s]' that merely 'disturb the peace or good order.'" [48]

Browder v. City of Albuquerque [49] is similar. That case involved a police officer who, after his shift ended, sped off from the police station at about sixty-six miles per hour. [50] He ran a red light and hit a car containing Ashley and Lindsay Browder, killing Ashley and severely injuring Lindsay. [51] Lindsay and her parents sued for damages under § 1983. [52] Judge Gorsuch--writing for the majority--denied the officer qualified immunity. [53] Addressing the clearly established prong, he again noted the Tenth Circuit's "sliding scale": "[T]he more obviously egregious the conduct" is, "the less specificity is required" for the clearly established prong. [54] This case, Judge Gorsuch explained, was "perhaps a case along these lines." [55]

But he did not stop there. Judge Gorsuch also concurred, addressing an argument the officer had waived and issuing an "invitation to restore the balance between state and federal courts" by reinvigorating *Parratt v. Taylor* in future cases. [56] In *Parratt*, the Supreme Court held that state tort remedies that "could ***168** have fully compensated" a plaintiff for the deprivation of his rights "are sufficient to satisfy the requirements of due process" and therefore defeat a § 1983 procedural due process claim. [57] Judge Gorsuch believed the same principle applied in *Browder*: a state court could have provided "relief using established tort principles (e.g., negligence) and there's little reason to doubt it would." [58] "To entertain cases like this in federal court," he warned, risks creating a regime 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.'" [59]

III. Justice Gorsuch's Future Opinions?

Over the past few decades, the Supreme Court has slowly expanded qualified immunity protection for government officials. [60] There is little reason to believe a Justice Gorsuch would divert this trend. Indeed, Justice Gorsuch would bring with him a view that "qualified immunity is strong stuff." [61] He has interpreted the Court's precedent--and will likely continue to do so--as instructions "to apply qualified immunity broadly." [62] But "broadly" does not mean unboundedly. In particularly egregious cases, a Justice Gorsuch may--as Judge Gorsuch has--allow plaintiffs latitude on the clearly established prong, perhaps under a sliding scale approach. [63] Put simply, though, Judge Gorsuch's like-mindedness on the doctrine and respect for stare decisis [64] indicate that his qualified immunity opinions would likely be in line with those the Court has recently issued.

***169** In writing those opinions, Justice Gorsuch would likely keep his view of the courts' proper role--and the need to avoid deciding unnecessary constitutional questions--front and center. As Judge Gorsuch has put it, "[o]ften judges judge best when they judge least." [65] This reasoning underlies his consistent admonitions to avoid addressing unnecessary constitutional issues and instead rely on the clearly established prong to keep from "turning small cases into large ones" and risking "improvident governing appellate decision[s]." [66] This avoidance would likely become all the more significant to a Justice Gorsuch given the long-lasting and far-reaching influence of Supreme Court opinions.

But Justice Gorsuch would not counsel avoidance in every case. Rather, where the violated right prong represents "the easiest and most economical way to resolve" the case, one might expect him to advise lower courts to begin there. [67] And though resource constraints are markedly different in the Supreme Court, there is still reason to believe Justice Gorsuch would begin with the violated right prong where it promises an easier and more straightforward resolution. [68]

Also likely to weigh heavily on Justice Gorsuch's mind are the practical dangers that attend restrictions on qualified immunity. Judge Gorsuch has oft spoken of the Court's warning "against 'unrealistic second-guessing' of police judgments." [69] One might expect him to echo this same warning from the Court, reminding lower courts that law enforcement officers act in "highly tense, uncertain, and rapidly evolving circumstances without any *clear* direction in the law." [70]

Finally, one might expect Justice Gorsuch--given the opportunity--to reinvigorate *Parratt* and expand it beyond the procedural due process context, thereby skirting the qualified immunity analysis. [71] As Judge Gorsuch sees it, courts "are not in the business of expounding a common law of torts" and the Constitution "isn't some inkblot on which litigants may project their hopes and ***170** dreams." [72] Rather--"out of respect for considerations of judicial modesty, efficiency, federalism, and comity"--he would have courts ask not "which amendment the plaintiff might happen to invoke" but rather "whether state law is adequate to vindicate the injury he alleges" in deciding whether the plaintiff has a § 1983 claim at all. [73] If confirmed, Justice Gorsuch would be poised to make this vision a reality.

Conclusion

In opinions peppered with concerns about the avoidance of unnecessary constitutional issues and the reality of law enforcement, Judge Gorsuch has championed a robust though not limitless conception of qualified immunity. Should

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the Senate confirm a Justice Gorsuch, he might be expected to join the Court in expanding qualified immunity protection but within principled and practical boundaries.

Footnotes

a1 J.D. Candidate, Stanford Law School, 2017.

1 A.M. *ex rel.* F.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016).

2 *Id.* at 1150.

3 *Id.* at 1070 (Gorsuch, J., dissenting).

4 Kimberly Kindy et al., *Simply Stated, Gorsuch Is Steadfast and Surprising*, WASH. POST (Feb. 18, 2017), http://wapo.st/gorsuch-profile.

5 Radley Balko, Opinion, *In Gorsuch, Trump Gave Democrats a Gift. They Should Take It.*, WASH. POST (Feb. 1, 2017), https://wpo.st/6p8d2.

6 *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 & n.30 (1982); *see also* 42 U.S.C. § 1983 (2015).

7 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

8 Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

9 *Id.* at 735 (quoting *Harlow*, 457 U.S. at 818).

10 *Pearson*, 555 U.S. at 236.

11 Blackmon v. Sutton, 734 F.3d 1237, 1239 (10th Cir. 2013).

12 *Id.*

13 510 F. App'x 775 (10th Cir. 2013).

14 *Id.* at 776.

15 *Id.* at 777.

16 *Id.* (quoting Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007)).

17 *Id.* at 780.

18 *Id.* at 779 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

19 *Id.*

20 478 F.3d 1108 (10th Cir. 2007).

21 *Id.* at 1112-14, 1117, 1122.

22 *Id.* at 1141-44.

23 *Id.* at 1139.

24 *Id.* at 1138 (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).

25 *Id.* at 1141.

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26 *Id.* at 1142.

27 *Id.* at 1143.

28 663 F.3d 1173 (10th Cir. 2011).

29 *Id.* at 1177-79.

30 *Id.* at 1180.

31 *Id.* at 1182.

32 *Id.* at 1180 (quoting Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011)).

33 *Id.* (quoting *Camreta*, 131 S. Ct. at 2032).

34 *Id.* at 1183-84.

35 *Id.* at 1187.

36 830 F.3d 1123 (10th Cir. 2016).

37 *Id.* at 1129.

38 *Id.* at 1130. A.M. also sued the officer and school officials over a separate search. *Id.* at 1129. But Judge Gorsuch did not address the qualified immunity claims related to that incident.

39 *Id.* at 1129, 1132; *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ....").

40 *A.M.*, 830 F.3d at 1134.

41 *Id.* at 1136.

42 *Id.* at 1139.

43 *Id.* at 1138, 1151.

44 *Id.* at 1169 (Gorsuch, J., dissenting).

45 *Id.* at 1170.

46 *Id.* (alluding to CHARLES DICKENS, OLIVER TWIST 520 (Dodd, Mead & Co. 1941) (1838)).

47 *Id.*

48 *Id.* at 1169 (quoting State v. Silva, 525 P.2d 903, 907 (N.M. Ct. App. 1974)).

49 787 F.3d 1076 (10th Cir. 2015).

50 *Id.* at 1077.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 1082 (quoting Shroff v. Spellman, 604 F.3d 1179, 1189-90 (10th Cir. 2010)); *see supra* note 16 and accompanying text.

55 *Browder*, 787 F.3d at 1083.

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56 *Id.* at 1085 (Gorsuch, J., concurring); *see* Parratt v. Taylor, 451 U.S. 527 (1981).

57 451 U.S. at 544.

58 *Browder*, 787 F.3d at 1084 (Gorsuch, J., concurring).

59 *Id.* at 1084-85 (quoting Albright v. Oliver, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring in the judgment)).

60 *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 78 (2016) ("In recent years, the Supreme Court opinions applying the qualified immunity defense have engaged in a pattern of describing the defense in increasingly generous terms ....").

61 Blackmon v. Sutton, 734 F.3d 1237, 1239 (10th Cir. 2013).

62 Wilson v. City of Lafayette, 510 F. App'x 775, 780 (10th Cir. 2013); *see also* Hopper v. Fenton, No. 16-5006, 2016 WL 6958137, at *2 (10th Cir. Nov. 29, 2016) (noting that "the Supreme Court has instructed" courts to apply the doctrine broadly).

63 *See, e.g.*, Browder v. City of Albuquerque, 787 F.3d 1076, 1082 (10th Cir. 2015).

64 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he principle of *stare decisis* was one 'entrenched and revered by the framers' precisely because they knew its importance 'as a weapon against ... tyranny."' (second alteration in original) (quoting Michael B.W. Sinclair, Anastasoff *Versus* Hart*: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 707 (2003))). *But cf. id.* at 1158 ("[I]t seems to me that in a world without *Chevron* very little would change--except perhaps the most important things.").

65 Cordova v. City of Albuquerque, 816 F.3d 645, 666 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment).

66 Kerns v. Bader, 663 F.3d 1173, 1181-82 (10th Cir. 2011) (quoting Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011)); *see also* Painter v. City of Albuquerque, 383 F. App'x 795, 801 (10th Cir. 2010) ("Even if Officers Kelly and Porlas lacked probable cause to effect an arrest, Mr. Painter has not shown that they violated 'clearly established' law ....").

67 *Kerns*, 663 F.3d at 1187.

68 *See, e.g.*, Martinez v. Carr, 479 F.3d 1292, 1295 (10th Cir. 2007) ("[W]e are able to resolve Mr. Martinez's claim at the first step ... and thus need not reach the second.").

69 Cortez v. McCauley, 478 F.3d 1108, 1138 (10th Cir. 2007) (Gorsuch, J., concurring in part and dissenting in part) (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).

70 Wilson v. City of Lafayette, 510 F. App'x 775, 779 (10th Cir. 2013).

71 Cordova v. City of Albuquerque, 816 F.3d 645, 665 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) ("I cannot think of a good reason why [*Parratt*] should be limited to [procedural due process] or any particular class of cases ...."); *see supra* notes 56-59 and accompanying text.

72 *Cordova*, 816 F.3d at 661.

73 *Id.* at 664-65.

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Essay

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JUDGE GORSUCH AND CIVIL RIGHTS: A RESTRICTIVE READING

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.* ***156** *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 ***157** 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.

*158 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]

***159** 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 ***160** 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]

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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 ***161** 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 ***162** 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.

Footnotes

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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).

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.

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.

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.").

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.

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).

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

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

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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).

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

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

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