CATO INSTITUTE CENTER FOR CONSTITUTIONAL STUDIES

Legal Policy Bulletin

March 22, 2017 | Number 2

What Kind of a Judge Is Neil Gorsuch?

By Ilya Shapiro and Frank Garrison

EXECUTIVE SUMMARY

In late March, the Senate Judiciary Committee is holding hearings to probe Judge Neil Gorsuch's judicial philosophy and evaluate whether he is fit to be the next member of the Supreme Court. President Donald Trump picked Gorsuch after promising the American people that he would appoint someone in the mold of the late Justice Antonin Scalia, who is best known for his devotion to the original meaning of the Constitution, his textualist approach to interpreting legal statutes, and his commitment to ordered liberty through constitutional structure. This policy bulletin weighs Judge Gorsuch's record with respect to those ideals, ultimately asking whether a Justice Gorsuch would uphold the Constitution's protection of individual liberty. A survey of Gorsuch opinions in cases involving criminal procedure, constitutional structure, and individual rights reveals an adherence to the rule of law. Moreover, Gorsuch has questioned legal precedent on the separation of powers—especially when it comes to the administrative state—in a way that shows a commitment to the judicial duty to check the other branches of government.

Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the *Cato Supreme Court Review*. Frank Garrison is a legal associate at the Cato Institute.

> "In many ways, the circumstances that led to Trump's picking Gorsuch became a fitting capstone to Scalia's life and legacy."

INTRODUCTION

On January 31, 2017, President Donald Trump nominated Judge Neil Gorsuch to fill the vacant Supreme Court seat left by the late Justice Antonin Scalia. This was the culmination of a series of unusual political events that took place after Scalia's untimely death. Indeed, when Scalia died, President Barack Obama had almost a year left in office, so it seemed likely that he would get to select the Court's next justice. But it was an election year—and the last time that a Senate controlled by the party not in the White House confirmed a Supreme Court nominee to a vacancy that arose during a presidential election year was 1888. In fact, primaries in both political parties were already underway. Accordingly, Republicans vowed not to consider *any* high-court nominee until after the election. In a politically polarized nation that had reelected a Democrat to the presidency in 2012 and then gave Senate control to the GOP in 2014, they were determined to let the people have another say regarding who would get to appoint the next justice. Nevertheless, Obama nominated Judge Merrick Garland, a seemingly uncontroversial pick designed to pressure Senate Republicans to cave. As Trump became the Republican nominee and the electoral winds blew harder against the GOP, Senate Majority Leader Mitch McConnell's political gambit seemed increasingly ill-advised. But the unlikely happened: Trump not only won the presidency, but was poised to pick his nominee from a gold-plated list of 21 candidates that he had issued during his campaign.[1]

In many ways, the circumstances that led to Trump's picking Gorsuch became a fitting capstone to Scalia's life and legacy. Scalia had long advocated a judicial philosophy that put the people as the main driver of the government's direction. "If you believe in democracy," he would say, "you put it to the people."[2] Given that the Supreme Court vacancy had swayed so many conservatives and erstwhile NeverTrumpers to return to the fold on Election Day, the people, voting through their constitutional institutions, had pretty much decided that they wanted the next justice to be Scalia-like.

Judge Gorsuch's credentials are stellar. An honors graduate of Columbia University, he became a Marshall Scholar at Oxford University (where he got a Ph.D. in legal philosophy) and graduated from Harvard Law School. He clerked for Judge David Sentelle of the D.C. Circuit and Supreme Court Justices Byron White and Anthony Kennedy, was a highly regarded lawyer at the Justice Department and in private practice, and has been a respected judge on the U.S. Court of Appeals for the Tenth Circuit for more than a decade. These experiences undoubtedly qualify Gorsuch for the high court. But in some respects he stands apart from the current justices. He is a Coloradan, for example, which would make him the Court's only "genuine Westerner"—quoting Scalia, who (rightly) didn't count California.[3] He would also be the only Protestant on a bench filled with Catholics and Jews.

Yet it is Gorsuch's judicial philosophy that is most notable. Gorsuch is a devoted

1. For an account of the Republicans' political gamble, see Jess Bravin and Mark H. Anderson, "Donald Trump Poised to Tilt Supreme Court," *Wall Street Journal*, November 9, 2016, https://www.wsj.com/articles/donald-trump-poised-to-tilt-supreme-court-1478700002.
2. Robert Barnes, "Scalia: 'You Either Believe in a Democracy or You Don't'," *Washington Post*, November 17, 2015, https://www.washingtonpost.com/news/post-nation/wp/2015/11/17/scalia-you-either-believe-in-a-democracy-or-you-dont.
3. See Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

originalist[4] and textualist.[5] He adheres to fundamental principles of law even when the outcome may not be one he likes as a policy matter. Indeed, in a speech celebrating the life of Scalia, Gorsuch wrote:

> Perhaps the great project of Justice Scalia's career was to remind us of the differences between judges and legislators. To remind us that legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges should do none of these things in a democratic society. That judges should instead 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—not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.[6]

Less than a year later, Gorsuch would reiterate this theme in remarks at his White House nomination ceremony: "It is the role of judges to apply, not alter, the work of the people's representatives. 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."[7]

These words are backed up by his approach to deciding the cases that came before him. One of his former law clerks described Gorsuch's judicial process this way: "Whenever a constitutional issue came up in our cases, he sent one of his clerks on a deep dive through the historical sources. 'We need to get this right,' was the motto—and right meant 'as originally understood.'"[8] This adherence to the original meaning of the Constitution, and the text of the law, reverberates throughout his opinions.

CRIMINAL LAW AND PROCEDURE

The criminal law places heavy burdens for government to overcome if it wishes to exercise its awesome powers to deprive someone of his life or liberty. Indeed, the Framers explicitly provided for many of these protections in the Bill of Rights. Gorsuch's commitment to these foundational principles can be seen throughout his opinions.

Gorsuch's commitment to analyzing statutes by their plain meaning—ensuring that people are on notice of the law's demands—was on full display in *United States v. Games-Perez*, which involved a federal statute that prohibits the knowing possession of a gun by a felon.[9] The issue boiled down to whether the government must prove the "knowing" mens rea requirement as to both the possession of a gun and the fact that the accused is a felon. The panel found that court precedent

"This adherence to the original meaning of the Constitution, and the text of the law, reverberates throughout his opinions."

4. While there are variations of originalism, the most accepted version, and one that applies to Gorsuch, describes an approach to constitutional interpretation that gives the text its original public meaning. See Randy E. Barnett, "An Originalism for Nonoriginalists," *Loyola Law Review* 45, no. 4 (1999): 611–54.

5. Antonin Scalia, *A Matter of Interpretation: Federal Courts And The Law* (Princeton: Princeton University Press, 1998), pp. 18–25.

6. Neil M. Gorsuch, "Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia," *Case Western Reserve Law Review* 66, no. 4 (2016): 905–06.

7. Neil M. Gorsuch, Address at White House Nomination Ceremony, January 31, 2017), http://www.denverpost.com/2017/01/31/neil-gorsuch-full-remarks-supreme-court-nomination.

8. David Feder, "The Administrative Law Originalism of Neil Gorsuch," *Yale Journal on Regulation* (blog), November 21 2016, http://yalejreg.com/nc/the-adminstrative-law-originalism-of-neil-gorsuch.

9. 667 F.3d 1136 (10th Cir. 2012).

“After analyzing the history of extraterritorial warrants, Gorsuch concluded, ‘Ours is not supposed to be the government of the Hunger Games with power centralized in one district, but a government of diffused and divided power, the better to prevent its abuse.’”

mandated that knowledge was required only for the possession element of the crime. Gorsuch was forced to join this opinion—although he wrote a concurrence criticizing the precedent—because a circuit panel must follow circuit precedent; only the full circuit court sitting en banc may overrule it. The defendant here asked the full court to review his case, but a majority of judges decided not to rehear it. Gorsuch dissented and would have voted to overturn the court's prior flawed decision based on the plain meaning of the statute's text.[10] He argued that the statute mandated that the prosecution prove the defendant's knowledge of his status as a felon at the time the offense was committed.[11] The court in the precedent case, he wrote, misconstrued the text, and “its interpretation—reading Congress' mens rea requirement as leapfrogging over the first statutorily specified element and touching down only at the second listed element—defies grammatical gravity and linguistic logic.”[12] Gorsuch implicitly relied on the rule of lenity—the interpretive canon requiring that ambiguities in a criminal statutes be resolved in favor of the defendant—which would apply if the statute were not clear. That is a foundational protection for civil rights that has been applied since the common law.[13]

Gorsuch showed his commitment to the original meaning of the Fourth Amendment in two recent cases. *United States v. Krueger* involved a search warrant issued by a federal magistrate in Kansas to be executed in Oklahoma.[14] The defendant challenged the warrant's validity on the ground that the Kansas judge had no authority to issue the extra-territorial warrant—which is how the court ultimately ruled.[15] Gorsuch concurred specially to expound on the government's “phantom” argument that, despite the warrant's facial invalidity, the search should be upheld under the Fourth Amendment.[16] He began by declaring that “when interpreting the Fourth Amendment we start by looking to its original public meaning—asking what traditional protections against unreasonable searches and seizures were afforded by the common law at the time of the framing.”[17] Moreover, “whatever else it might do, the Fourth Amendment embraces the protections against unreasonable searches and seizures that existed at common law at the time of its adoption, and the Amendment must be read as providing at a minimum those same protections today.”[18] After analyzing the history of extraterritorial warrants, Gorsuch concluded that the search would have been unreasonable when the Fourth Amendment was adopted. “Ours is not supposed to be the government of the Hunger Games with power centralized in one district, but a government of diffused and divided power, the better to prevent its abuse.”[19]

Then there is *Cordova v. City of Albuquerque*, a civil-rights lawsuit claiming that the police

10. United States v. Games-Perez, 695 F.3d 1104, 1117-18 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc) (“When the case was before the panel, I was bound by *Capps* and forced by my duty to precedent to countenance its injustice. Now, though, the case is before the en banc court. Here, *Capps* does not control my vote or require the perpetuation of this wrong, and here I believe it should be overruled.”).
11. *Id.* at 1118–119.
12. *Id.* at 1117.
13. *Id.* at 1119.
14. 809 F.3d 1109 (10th Cir. 2015).
15. *Id.* at 1116–17.
16. *Id.* at 1123 (Gorsuch, J., concurring).
17. *Id.* (internal citation and quotation marks omitted).
18. *Id.*
19. *Id.* at 1125.

had used excessive force.[20] The plaintiff was involved in an incident with police where he pulled out a gun and was shot numerous times. After the dismissal of criminal charges against Cordova, he sued the police for numerous constitutional harms. Gorsuch voted with the majority to dismiss the claim, but once again concurred to address the original meaning of the Fourth Amendment:

> We are not in the business of expounding a common law of torts. Ours is the job of interpreting the Constitution. And that document 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.[21]

Gorsuch would have found that, while there was no basis for bringing this type of tort under the Fourth Amendment, the claim belongs in state court—not in a federal courtroom where judges would have to make up constitutional causes of action.[22]

As *Cordova* shows, the Fourth Amendment might not always come out on the side of those seeking redress from government abuses. But in the main, the Framers put these protections in place to stop the government from violating individual rights. Gorsuch stays true to these principles in the area of criminal law, even where his policy preference might guide him another way. While most criminal defendants will never get their cases heard by the Supreme Court, those who do can expect a Justice Gorsuch to apply the full force of constitutional protections.

CONSTITUTIONAL STRUCTURE AND ADMINISTRATIVE LAW

As in the area of criminal law and procedure, Gorsuch's jurisprudence regarding constitutional structure—which implicates the separation of powers, federalism, and administrative law—shows his strong commitment to textualism and originalism. He recognizes that upholding this foundational design is an important bulwark of liberty. This comes through in his analysis of cases that deal with judge-made doctrines giving deference to administrative agencies, and his willingness to second-guess the cases from which they emanate.

The modern administrative state—sometimes called the "fourth branch of government"—has been allowed to skirt constitutional lines, even as the Framers tried to limit the accumulation of legislative, executive, and judicial power in any one institution—something James Madison warned would be the "very definition of tyranny."[23] Madison's warnings came to fruition in *United States v. Nichols*, which purported to give the attorney general discretion to prosecute under the Sex Offender Registration and Notification Act those sex offenders who were convicted before the law's passage.[24] The defendant challenged the law in part on the "non-delegation doctrine," which holds that Article I vests Congress with "all legislative powers" and those powers may not be delegated to another branch. In modern times, the Supreme Court has applied a lenient "intelligible principle" standard when determining if the doctrine has been violated, and the Tenth Circuit panel rejected the challenge based on that standard.[25]

The full Tenth Circuit then denied rehearing en banc. Gorsuch dissented from that denial, finding the delegation from Congress to the

"While most criminal defendants will never get their cases heard by the Supreme Court, those who do can expect a Justice Gorsuch to apply the full force of constitutional protections."

20. 816 F.3d 645 (10th Cir. 2016).
21. *Id.* at 661 (Gorsuch, J., concurring).
22. *Id.* at 665–66.
23. *Federalist* 47, at 298 (James Madison) (Clinton Rossiter ed., 1961).
24. 775 F.3d 1225, 1230 (10th Cir. 2014).
25. See *id.* at 1231–32.

"While Gorsuch warned about the dangers of delegation of the legislative power in *Nichols*, he has also questioned the constitutional separation-of-powers implications of granting deference to administrative agencies through judge-made doctrines."

attorney general to have been improper.[26] He cited the Constitution's explicit separation of the "lawmaking power" and "law enforcement power" into two different spheres of the government.[27] Further, he highlighted the Framers' warning that combining these powers can lead to "absolute power" and that our system of checks and balances requires "bicameralism and presentment" to ensure an arduous process: "These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty."[28]

While Gorsuch warned about the dangers of delegation of the legislative power in *Nichols*, he has also questioned the constitutional separation-of-powers implications of granting deference to administrative agencies through judge-made doctrines. These doctrines—established in cases such as *Auer v. Robbins*,[29] *Chevron v. Natural Resources Defense Council*,[30] and *National Cable & Telecommunications Association v. Brand X Internet Services*[31]—require courts to defer to agency interpretations of ambiguities within federal statutes and regulations. *Chevron* and *Auer* deference allow agency "experts" to fill gaps to craft policy—essentially letting the executive exercise the legislative power. *Brand X* requires courts to defer to post hoc executive interpretations of statutes even after a federal court has determined statutory meaning—essentially letting the executive exercise judicial power.

Gorsuch addressed how these doctrines affect individual liberty in *De Niz Robles v. Lynch*, which involved adjudication by the Bureau of Immigration Appeals (BIA).[32] The BIA had cited *Chevron* and *Brand X* to overrule a federal court precedent, and its ruling would have applied retroactively even though the defendant had relied on that previous judicial interpretation of the law. The government argued that it could do this because the law was ambiguous—and *Brand X* allows an agency's reinterpretation to trump the federal court ruling.

Gorsuch, writing for the majority in striking down the BIA's holding, found that even if these doctrines that allow agencies to rewrite laws and judicial opinions aren't seen as violations of the Constitution's structure under current precedent, they can work in tandem to infringe "second-order constitutional protections sounding in due process and equal protection."[33] Citing these principles, Gorsuch explained that "the more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct."[34]

In a follow-up case dealing with a similar issue, *Gutierrez-Brizuela v. Lynch*, Gorsuch squarely addressed the separation-of-powers problems created by these judicial-deference doctrines.[35] He first dispensed with the case in a majority opinion citing *De Niz Robles*. But then he proceeded to concur *in his own opinion* to address what he called the "elephant in the room":

> We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and

26. United States v. Nichols, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).
27. *Id.*
28. *Id.* (citations and internal quotation marks omitted).
29. 519 U.S. 452 (1997).
30. 467 U.S. 837 (1984).
31. 545 U.S. 967 (2005).
32. 803 F.3d 1165 (10th Cir. 2015).
33. *Id.* at 1172.
34. *Id.*
35. 834 F.3d 1142 (10th Cir. 2016).

> *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.[36]

Chevron, Gorsuch wrote, "seems no less than a judge-made doctrine for the abdication of the judicial duty."[37] This dynamic has effectively made it so "liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whims may rule the day."[38] *Brand X* does no less to usurp the judicial power by allowing the executive to rewrite law. If the legislature disagrees, it can pass new legislation. Indeed, "an agency's recourse for a judicial declaration of the law's meaning that it dislikes would be precisely the recourse the Constitution prescribes—an appeal to higher judicial authority or a new law enacted consistent with bicameralism and presentment."[39]

Gorsuch concluded by throwing a judicial grenade at the regulatory state: "We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change—except perhaps the most important things."[40] Suffice it to say that in this pen-and-phone era, it's refreshing to see a judge recognize the lack of accountability in a system driven by bureaucrats rather than legislators. It's not something one would expect from a "judicial restraint" conservative, and it differentiates Gorsuch from Scalia.

The Constitution's structure not only deals with the separation of powers between the branches of government and the modern administrative state, of course, but also concerns enumerated powers and federalism. While Gorsuch hasn't had much occasion to work this terrain, there is one subfield that he's plowed that raises a modicum of concern: the so-called Dormant Commerce Clause.

When most people think of the Commerce Clause they think of Congress's power to pass legislation regulating interstate commerce, a power that has been perverted by modern Supreme Court jurisprudence to allow the government an almost limitless police power.[41] But the inverse of this reading—the congressional power to negate state actions that impede interstate commerce—is important, too. In fact, it was the main idea behind the clause and one of the principal reasons the nascent American republic moved from the Articles of Confederation to the Constitution. Gorsuch, however, like Scalia, is reluctant to strike down state laws on these grounds, in the absence of explicit congressional action that would activate the Supremacy Clause.

While Gorsuch seems to interpret the laws in order to follow precedent in this area, his opinions narrowly construe the doctrine. In *Energy & Environmental Legal Institute v. Epel*, he addressed a challenge to a Colorado renewable-energy mandate that required energy producers to ensure that 20 percent of the

"Suffice it to say that in this pen-and-phone era, it's refreshing to see a judge recognize the lack of accountability in a system driven by bureaucrats rather than legislators."

36. *Id.* at 1149 (Gorsuch, J., concurring).
37. *Id*. at 1153.
38. *Id.* at 1150.
39. *Id.* at 1158.
40. *Id.*
41. See, for example, Gonzales v. Raich, 545 U.S. 1 (2005); Wickard v. Filburn, 317 U.S. 111 (1942); Randy E. Barnett, "New Evidence of the Original Meaning of the Commerce Clause," *Arkansas Law Review* 55, no. 4 (2003): 847–99; Randy E. Barnett, "The Original Meaning of the Commerce Clause," University of Chicago Law Review 68, no. 1 (2001): 101–47; and Richard A. Epstein, "The Proper Scope of the Commerce Power," Virginia Law Review 73, no. 8 (1987): 1387–1455.

"For those of us who believe that the Dormant Commerce Clause has a basis in constitutional structure even without explicit details on its reach, Gorsuch's criticism raises concerns."

electricity they sell to Coloradans come from renewable sources.[42] The law was challenged on the ground that out-of-state coal producers would lose business with out-of-state utilities that feed power into the Colorado grid, which is of course interconnected with other states. Gorsuch, writing for the court, described the history of the Dormant Commerce Clause in detail and ultimately sided with the state.

His opinion began with a tone of skepticism describing the doctrine as "embodying a sort of judicial free trade policy" and noting that "judges have *claimed* the authority to strike down state laws that, in their judgment, unduly interfere with interstate commerce."[43] Moreover, he cited opinions by both Justices Scalia and Clarence Thomas for the proposition that the doctrine probably does not exist: "Detractors find dormant commerce clause doctrine absent from the Constitution's text and incompatible with its structure."[44]

In *Direct Marketing Association v. Brohl*, Gorsuch confirmed his doubts about the clause and its constitutional roots.[45] *Brohl* concerned the "Quill doctrine," which is a narrow subset of dormant-commerce-clause jurisprudence dealing with state sales- and use-tax collection. Colorado had passed a law imposing obligations on retailers that did not collect sales taxes. The plaintiffs here claimed that the obligations discriminated against, and unduly burdened, interstate commerce. Gorsuch joined the majority to follow precedent in upholding the Colorado law and once again wrote a concurring opinion critiquing the doctrine. "[T]he whole field in which we are asked to operate today—dormant commerce clause doctrine—might be said to be an artifact of judicial precedent."[46] He then pointed to the fact that the "Commerce Clause is found in Article I of the Constitution and it grants Congress the authority to adopt laws regulating interstate commerce . . . . Meanwhile, in dormant commerce clause cases Article III courts have claimed the (anything but dormant) power to strike down some state laws even in the absence of congressional direction."[47]

For those of us who believe that the Dormant Commerce Clause has a basis in constitutional structure even without explicit details on its reach—much like the very idea of judicial review—Gorsuch's criticism raises concerns. Still, it is a disagreement on the same field of play, rooted in analysis of the Constitution's text, structure, and history. This is encouraging.

INDIVIDUAL RIGHTS

Gorsuch does not have a lengthy judicial record when it comes to cases squarely involving either the rights enumerated in the Bill of Rights or unenumerated rights under the Ninth or Fourteenth Amendments. He hasn't written any Second Amendment opinions of which to speak, for example, or those involving abortion or same-sex marriage. But he has had the opportunity to weigh in on First Amendment rights, both directly in cases involving the Establishment Clause and indirectly in cases applying the Religious Freedom and Restoration Act (RFRA), which implicates the free exercise of religion. His opinions in this area show a great respect for the freedom of people to exercise their faith free from over-burdensome government, as well as a judicial humility that should be welcomed on the Supreme Court.[48]

Hobby Lobby Stores, Inc. v. Sebelius—a case that eventually went before the Supreme

42. 793 F.3d 1169 (10th Cir. 2015).
43. *Id.* at 1171 (emphasis added).
44. *Id.*
45. 814 F.3d 1129 (10th Cir. 2016).
46. *Id.* at 1148 (Gorsuch, J., concurring).
47. *Id.*
48. See Thomas Berry, "Neil Gorsuch: Judicial Humility and Religious Pluralism," *American Spectator*, February 23, 2017, https://spectator.org/neil-gorsuch-judicial-humility-and-religious-pluralism/.

Court—was a challenge to Obamacare's contraceptive mandate on the ground that certain implementing regulations of the Affordable Care Act violated closely held corporations' free exercise rights under RFRA.[49] The government was trying to force these companies to provide insurance plans that included drugs and devices that the corporate owners considered to be abortifacients and thus to act contrary to their religious beliefs. In a concurrence to an en banc majority that reversed a Tenth Circuit panel's ruling upholding the regulation, Gorsuch made a forceful argument that the government can't compel business owners into a "Hobson's choice—an illusory choice where the realistically possible course of action trenches on an adherent's sincerely held religious belief."[50] And it is not the place of "secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes 'too much' moral disapproval on those only 'indirectly' assisting wrongful conduct."[51]

Lest anyone think that Gorsuch's commitment to religious liberty is limited to cases implicating the Christian faith, in *Yellowbear v. Lampert* he wrote for the majority in striking down a Wyoming prison's policy of denying a Native American access to a ceremonial sweat lodge.[52] In addressing the prison's policy, Gorsuch applied a textbook analysis of the judicial scrutiny required under the Religious Land Use and Institutionalized Persons Act of 2000. He found that the burden on the plaintiff's free exercise rights was high, in that the prison denied *all* access to the lodge. The government's interests, on the other hand, were low, because it provided little evidence that prison operations would be affected if access were allowed.[53]

What truly stands out in this opinion is Gorsuch's opening statement, which shows great respect for the ability to exercise one's faith even in the most desperate of situations:

> Andrew Yellowbear will probably spend the rest of his life in prison. Time he must serve for murdering his daughter. With that much lying behind and still before him, Mr. Yellowbear has found sustenance in his faith. No one doubts the sincerity of his religious beliefs or that they are the reason he seeks access to his prison's sweat lodge—a house of prayer and meditation the prison has supplied for those who share his Native American religious tradition. Yet the prison refuses to open the doors of that sweat lodge to Mr. Yellowbear alone, and so we have this litigation. While those convicted of crime in our society lawfully forfeit a great many civil liberties, Congress has (repeatedly) instructed that the sincere exercise of religion should not be among them—at least in the absence of a compelling reason. In this record we can find no reason like that.[54]

Gorsuch has also written on the Establishment Clause. The jurisprudence here has long been rife with convoluted and confusing precedent that's hard to apply from case to case. Scalia once described the Court's invocation of the "*Lemon* Test" (from *Lemon v. Kurtzman*)[55]

"Gorsuch made a forceful argument that the government can't compel business owners into a 'Hobson's choice—an illusory choice where the realistically possible course of action trenches on an adherent's sincerely held religious belief.'"

49. 723 F.3d 1114 (10th Cir. 2013) (en banc); *aff'd sub nom* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
50. *Id*. at 1141 (Gorsuch, J., concurring).
51. *Id.* at 1153-54.
52. 741 F.3d 48 (10th Cir. 2014).
53. *Id*. at 64.
54. *Id.* at 51–52.
55. 403 U.S. 602, 612–13 (1971) (statute must have a secular legal purpose; its primary effect must not be to either advance or inhibit religion; and there must not be "excessive government entanglement" with religion).

"Gorsuch's opinions in all these cases reveal a commitment to questioning precedent that does not comport with the original meaning of the Constitution."

thus: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys."[56]

Like Scalia, Gorsuch has shown a disdain for *Lemon* because it deviates from the original meaning of the Constitution. But in two dissents from denial of rehearing en banc, it was the misapplication of the "reasonable observer" corollary that he confronted—that a government action violates the Establishment Clause if a reasonable observer could see it as endorsing religion. In *Green v. Haskell County Board of Commissioners*, at issue was a display of the Ten Commandments outside of a courthouse, surrounded by secular displays.[57] A Tenth Circuit panel reversed a district court's determination that the display passed Establishment Clause muster and the full court declined to review that ruling. Dissenting from that denial of en banc review, Gorsuch criticized the panel for not using a "reasonable observer" but instead an "unreasonable one."[58] The panel's observer, he concluded, "just gets things wrong. For example, while the reasonable observer's job . . . is to evaluate the monument's 'objective meaning of the [government's] statement in the community,' our observer spends most of his time doing something entirely different—speculating about whether the government might have secretly shared the private intent of the monument's *donor*."[59]

This issue came before the Tenth Circuit again in *American Atheists, Inc. v. Duncan*.[60] The case dealt with whether roadside memorial crosses donated by the Utah Highway Patrol Association to commemorate fallen troopers violated the Establishment Clause. Gorsuch, again dissenting from denial of rehearing en banc, would have found the display constitutional under the Establishment Clause. He hammered home that the Tenth Circuit panel misapplied the reasonable observer analysis: "The reasonable observer should not be seen as any ordinary individual, who might occasionally do unreasonable things, but . . . rather [as] a personification of a community ideal of reasonable behavior."[61] Yet, he wrote "our observer continues to be biased, replete with foibles, and prone to mistake."[62] Gorsuch goes even further in this case by questioning "whether even the true reasonable observer/endorsement test [under *Lemon*] remains appropriate for assessing Establishment Clause challenges."[63]

Gorsuch's opinions in all these cases reveal a commitment to questioning precedent that does not comport with the original meaning of the Constitution—even as he must follow circuit precedent while on a panel or Supreme Court precedent as a circuit judge. While he respects the rule of law, he is willing to engage claims of government overreach to make sure that the precedent is applied in the right way or to push for its reversal.

CONCLUSION

This Legal Policy Bulletin analyzed the nominee's own words—both judicial opinions and speeches—to try to determine whether Gorsuch would advance the Constitution's

56. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).
57. 568 F.3d 784 (2009) (10th Cir. 2009).
58. Green v. Haskell County Bd. of Comm'rs, 574 F.3d 1235, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc).
59. *Id.* (emphasis in original).
60. 616 F.3d 1145 (10th Cir. 2010).
61. American Atheists, Inc. v. Davenport, 637 F.3d 1095, 1107–08 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc) (citations and quotation marks omitted).
62. *Id.* at 1108.
63. *Id.* at 1110 (citations and quotation marks omitted).

promise of individual liberty through limited government. Fundamentally, Gorsuch is like Scalia in the ways that made Scalia a legal legend—his originalism, textualism, and erudition—but unlike him by the measures that prevented even the great Nino from having the impact he could have. There are no rough edges here, no acerbic flourishes. And yet the commitment to enforcing the text of a law (not divining its purpose) is clear, the devotion to a Constitution whose structure alone protects our liberty is complete. Gorsuch combines all of the best aspects of Scalia's work, but there is a quality to his jurisprudence that sets him apart from the late justice. Gorsuch has expressed disagreement with precedent that undermines what the Constitution demands—even as he followed it as a lower-court judge—questioning judge-made doctrines that allow government to overstep its bounds.[64]

We'd be remiss in not making one final note, which comes from the White House nomination ceremony. Gorsuch there mentioned two figures who had occupied the seat he now aims to fill: Justice Scalia, of course, but also Justice Robert Jackson. Jackson was one of the best writers the Court has ever seen. He also served as attorney general and as Nuremberg Trials prosecutor. And he was the last justice appointed who did not graduate from law school. He is famous especially for two opinions: the 1952 *Steel Seizures Case*, in which the Court rejected President Harry S Truman's attempt to nationalize the steel industry (where Jackson's concurrence became the legal standard for evaluating executive actions);[65] and *Korematsu* (1944), in which the Court allowed the wartime internment of Japanese Americans (where Jackson dissented).[66] It's no coincidence that the silver-haired nominee name-checked Jackson, and that should hearten those dismayed by a politics gone off the rails. When push comes to shove, the elegant Judge Neil Gorsuch will preserve our republic.

"When push comes to shove, the elegant Judge Neil Gorsuch will preserve our republic."

64. Jonathan H. Adler, "Gorsuch's Judicial Philosophy Is like Scalia's—With One Big Difference," *Washington Post*, February 1, 2017, https://www.washingtonpost.com/opinions/gorsuchs-judicial-philosophy-is-like-scalias--with-one-big-difference/2017/02/01/44370cf8-e881-11e6-bf6f-301b6b443624_story.html.

65. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

66. Korematsu v. United States, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).