NEIL MCGILL GORSUCH
NOMINEE TO THE UNITED STATES SUPREME COURT

EDUCATIONAL AND PROFESSIONAL BACKGROUND

Born in 1967, Gorsuch received his undergraduate law degree from Columbia University and his law degree from Harvard Law School.[1] He received his Ph.D. in legal philosophy from Oxford University.[2] After graduating law school in 1991, he clerked for Judge David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit from 1991-1992. From 1993-1994, Gorsuch clerked for Supreme Court Justice Byron R. White and then for Justice Anthony M. Kennedy, who replaced Justice White upon his retirement.[3] From 1995 to 2005, Gorsuch worked at Kellogg, Huber, Hansen, Todd, Evans, and Figel, specializing in complex commercial litigation. He became a partner in 1998.[4]

In 2005, Gorsuch served as Principal Deputy to the Associate Attorney General, Division of the U.S. Department of Justice.[5] At the Department of Justice, Gorsuch assisted with civil litigation management, including antitrust, civil, tax, civil rights and environmental cases.

CONFIRMATION TO THE TENTH CIRCUIT

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[1] Responses to *Senate Committee on the Judiciary, Questionnaire for Judicial Nominees* by Neil M. Gorsuch at 6 (June 21, 2006) [hereinafter *Judiciary Questionnaire Responses*], https://www.gpo.gov/fdsys/pkg/CHRG-109shrg32199/pdf/CHRG-109shrg32199.pdf.
[2] *Id*.
[3] *Id*.
[4] *Id*. at 7
[5] *Id.* at 7.

In 2006, President Bush nominated Judge Gorsuch to the Court of Appeals for the Tenth Circuit. His nomination generated no controversy, enjoyed bipartisan support, and he was confirmed by voice vote on July 20, 2006.[6]

In response to a question about whether his personal views would impact his approach to judging, Gorsuch responded, "Senator, my personal views, as I hope I have made clear, have nothing to do with the case before me in any case. The litigants deserve better than that, the law demands more than that."[7] He added that "personal politics or policy preferences have no useful role in judging; regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do."[8]

Gorsuch condemned ideologues that are "not willing to listen with an open mind to the arguments of counsel, to his colleagues, and to precedent, someone who is willing to just, willy-nilly, disregard those three things, to effect his own personal views, his politics, his personal preferences. That is unacceptable."[9]

Gorsuch also emphasized that "the independence of the judiciary depends upon people in both parties being willing to serve, good people being willing to serve who are capable and willing to put aside their personal politics and preferences to decide cases and to follow the law and not try and make it."[10]

In response to a question posed by Senator Graham concerning Gorsuch's prospective decision making process as a judge, Gorsuch asserted:

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[6] Ann C. Mulkern, *Gorsuch Confirmed for 10th Circuit*, DENVER POST (July 20, 2006), http://www.denverpost.com/2006/07/20/gorsuch-confirmed-for-10th-circuit/.
[7] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (37) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).
[8] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (3) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).
[9] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (37) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).
[10] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (37) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).

> I can tell you how I think I would like to view approaching decisions. That is, first and foremost, with this thought in mind: to those clients who are affected, to that lawyer in the well, that may be the most important thing in their life and that case deserves the attention, the care and the scrutiny of a complete lawyer and the complete attention of the judge without being diverted by personal politics, policy preferences, or what you ate for breakfast. Those people deserve your very best at all times. There are certain tools that I think can get you there. First, you listen to that lawyer in the well… The second tool, I think, is respecting your colleagues and trying to reach unanimity where possible, Senator… Then, finally, precedent. Precedent is to be respected and honored.[11]

In response to questions from Senator Patrick Leahy, Gorsuch commented further:

> As a practicing lawyer for many years, litigating matters in the state and federal courts across the country on behalf of plaintiffs and defendants, individuals, non-profits, corporations, and class actions, I never allowed my personal views and policy preferences to interfere with the zealous representation of my clients. My duty of loyalty meant preferring my clients' interests and objectives to my own views, even when I may not have agreed with my clients' point of view or purpose. If confirmed, I would have a new client: the law itself. Just as my personal and political views had no proper place in my job as an advocate and counselor, neither would they have any place in my role as a judge. I would seek only and always to follow the law faithfully and fairly in each and every case.[12]

With respect to the circumscribed role he believed appropriate for the federal judiciary, Gorsuch asserted that "judges must avoid the temptation to usurp the roles of the democratic branches and must appreciate the advantages those branches have in crafting and adapting social policy as well as their mandate, derived from the people, to do so."[13] He stated that "a firm and independent judiciary is critical to the protection of

[11] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (36-37) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).
[12] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (42) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).
[13] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (40) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).

all citizens' constitutional rights and to a well-functioning democracy."[14] "The Constitution imposes on the judiciary the vital role of ensuring the equal protection of each and every citizen – whatever his or her views – and the vindication of personal civil rights and liberties – however unpopular – as well as the work of making real for every American the Constitution's promise of self-government."[15]

Mr. Gorsuch also summarized his views on the role of legislative history in statutory interpretation acknowledging the Supreme Court's general approach that "when a statute's language is clear, its language alone governs but that, when ambiguities exist in statutory text, legislative history can be employed to resolve those ambiguities." Gorsuch promised to follow the Court's "guidance in this area."[16]

REPUTATION AND SUMMARY OF IMPORTANT OPINIONS

Judge Gorsuch has already established a reputation for his commitment to originalism. David Feder, a former Gorsuch law clerk and currently a partner with Munger, Tolles, & Olson, stated that Gorsuch's "deep commitment to the original understanding of the constitution and the rule of law" was manifest in many ways throughout his clerkship.

> 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." I can think of no one better to carry on Justice Scalia's legacy and, in the words of Justice Thomas, "to stand firm in the defense of the constitutional principles and structure that secure our liberty."[17]

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[14] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (40) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).
[15] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (40) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).
[16] *Confirmation Hearings on Federal Appointments: Hearing before the Committee on the Judiciary,* 109th Cong. (47) (2006) (statement of Neil Gorsuch, Nominee to be Circuit Judge for the Tenth Circuit).
[17] David Feder, *The Administrative Law Originalism of Neil Gorsuch*, NOTICE AND COMMENT (November 21, 2016), http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch/. Feder also praised Gorsuch as being one of the best writers on the federal bench.

Feder summarized Gorsuch's most notable opinions illustrating his commitment to originalism. One example was in a dissent from denial of rehearing in banc in *United States v. Nichols.*[18] There Judge Gorsuch made a forceful argument that the nondelegation doctrine is an essential structural safeguard of individual liberty. Summarizing this decision, Feder wrote:

> As always, [Gorsuch] started his analysis with the Constitution's text. Article I § 1 provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." The Supreme Court has long interpreted this provision as limiting Congress's ability to delegate legislative power, but it has rarely enforced that limitation. Judge Gorsuch would reinvigorate the doctrine. As the judge explained, the Framers separated "lawmaking and law enforcement" in order to thwart the ability of an individual or group to exercise arbitrary or absolute power." The Framers also required any legislation "to endure bicameralism and presentment" in order to make deprivations of individual liberty "more arduous still." Together and with others, "[t]hese structural impediments" were part of "a deliberate and jealous effort to preserve room for individual liberty."
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> These structural safeguards, the judge explained, are important not just to preserve individual liberty but also to protect representative democracy. The nondelegation doctrine ensures that our elected officials make the important policy decisions in our society, not unelected administrators who are only loosely controlled by elected officials. And those concerns take on special concern when it comes to the criminal law, the context in Nichols. Living under "the tyranny . . . of a whimsical king," the Framers were convinced of the danger of "placing the power to legislate, prosecute, and jail in the hands of the Executive." The Founders believed that "'the inefficiency associated with [the nondelegation doctrine] serves a valuable' liberty-preserving 'function, and, in the context of criminal law, no other mechanism provides a substitute.'"

Adam Feldman of *Empirical SCOTUS* classifies Gorsuch as a "heavy originalist," regularly using originalist principles in his decisions.[19]

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[18] 784 F.3d 666 (10th Cir. 2015).

[19] Adam Feldman, *An Alternative Take on Trump's Potential Supreme Court Nominees*, EMPIRICAL SCOTUS (Nov. 14, 2016), https://empiricalscotus.com/2016/11/14/trump-court/.

Eric Citron of SCOTUSBlog commented favorably on the prospect of a Gorsuch nomination, drawing many comparisons with Justice Scalia.

> He is celebrated as a keen legal thinker and a particularly incisive legal writer, with a flair that matches — or at least evokes — that of the justice whose seat he would be nominated to fill. In fact, one study has identified him as the most natural successor to Justice Antonin Scalia on the Trump shortlist, both in terms of his judicial style and his substantive approach. . . .
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> Like Scalia, Gorsuch also seems to have a set of judicial/ideological commitments apart from his personal policy preferences that drive his decision-making. He is an ardent textualist (like Scalia); he believes criminal laws should be clear and interpreted in favor of defendants even if that hurts government prosecutions (like Scalia); he is skeptical of efforts to purge religious expression from public spaces (like Scalia); he is highly dubious of legislative history (like Scalia); and he is less than enamored of the dormant commerce clause (like Scalia).[20]

In a study by four legal scholars purporting to measure the potential nominees on President Trump's short list likely to be most like Justice Scalia, Gorsuch was rated second highest after Judge Pryor, but before Judge Hardiman.[21] The conclusions were based on three criteria: 1) how often the potential nominees engaged in or promoted originalism; 2) how often the nominees cited Justice Scalia's non-judicial writings; and 3) how often the potential nominees wrote separate opinions. The study concluded that Gorsuch had a 62.2-79.4% likelihood of being the most like Justice Scalia; Judge Pryor a 70.5-76.7% likelihood and Judge Hardiman a 34.8-42.9% likelihood. The study

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[20] Eric Citron, *A Look at Judge Neil Gorsuch,* SCOTUSBLOG (January 24, 2017), http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/.

[21] Jeremy Kidd, Riddhi Sohan Dasgupta, Ryan D. Walters, and James Cleith Phillips, *Searching for Justice Scalia: Measuring the Scalia-ness of the Next Potential Member of the Supreme Court of the United States,* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874794.

concluded that Judge Hardiman "looks more like John Roberts or Samuel Alito did when they were federal appellate judges."[22]

Gorsuch may be most widely known for his criticism of the Supreme Court's administrative law jurisprudence, specifically the *Chevron* doctrine. Professor Jonathan Adler of Case Western Reserve University law school wrote favorably on Gorsuch's opinion criticizing the *Chevron* doctrine, stating that although Adler was not yet persuaded, Gorsuch had set forth a "compact and powerful argument."[23] He praised Gorsuch's "clear and thoughtful explication," stating that it was time to "think about the role of deference to federal agencies within our system of separation of powers."[24]

Professor Stephen I. Vladeck, of the University of Texas School of Law called Gorsuch a "stern critic" of the Supreme Court's administrative law jurisprudence, warning that:

> If he were to form part of a majority to scale back that principle, it would be a major sea change in the relationship between the executive branch and the courts, and one that would likely impose significant new constraints on the scope of federal regulatory authority on all topics -- from immigration and criminal law enforcement to environmental protection, consumer product safety, and drug regulation.[25]

Ethics and Public Policy Center President Edward Whelan has devoted several blog posts to defending Gorsuch from specious attacks by Andy Schlafly[26] who has claimed that Gorsuch is not pro-life,[27] and that he is an extreme supporter of stare decisis no matter how wrong the precedents. Whelan's blog posts discuss various Gorsuch

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[22] *Id*.
[23] Jonathan H. Adler, *Should Chevron Be Reconsidered, A Federal Judge Thinks So,* WASHINGTON POST (August 24, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/24/should-chevron-be-reconsidered-a-federal-judge-thinks-so/?utm_term=.09837453ae69.
[24] *Id*.
[25] Ariane de Vogue, *How Neil Gorsuch Could End Up as Trump's Nominee,* CNN (January 25, 2017), http://www.cnn.com/2017/01/25/politics/neil-gorsuch-supreme-court/index.html.
[26] Schlafly is the son of Phyllis Schlafly and heads up the Legal Center for Defense of Life.
[27] http://eppc.org/wp-content/uploads/2017/01/Gorsuch-is-NOT-pro-life-Supreme-Court.pdf.

opinions, and his writings against assisted suicide to demonstrate that Gorsuch's commitment to the sanctity of life cannot be gainsaid.[28] For example, in his book, Gorsuch wrote "human life is fundamentally and inherently valuable, and that the intentional taking of human life by private persons is always wrong."[29] Gorsuch also strongly criticized the idea that the value of human life is subjective depending on, for example the cognitive abilities of individuals. Such "arbitrariness" "is simply not acceptable when we are deciding who is and is not treated as fully human. . . . Indeed, it is at the heart of the promise of equal protection that like persons are treated alike by their government."[30] A full summary of Gorsuch's book is set forth herein.

Andy Schlafly's charge that Judge Gorsuch's opinions in *Pino v. United States*[31] show that he is not pro-life is baseless. Schlafly mischaracterized Gorsuch's opinions in what was essentially an *Erie* doctrine case involving whether Oklahoma recognized a cause of action for the wrongful death of an nonviable stillborn fetus. Appropriately, Judge Gorsuch held that the uncertainty about the state of Oklahoma law required certification of the question to the State Supreme Court. When the state court held that the cause of action did exist, Judge Gorsuch wrote a subsequent opinion reversing the district court's grant of summary judgment for the defendant and restoring the parents' cause of action.

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[28] Ed Whelan, *More Andy Schlafly Smears of Supreme Court Candidate Neil Gorsuch*, BENCH MEMOS, (January 24, 2017); http://www.nationalreview.com/bench-memos.
[29] Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton University Press 2009), at 157.
[30] *Id*.at 162.
[31] 507 F.3d 1233 (10th Cir. 2007); 273 Fed. Appx. 732 (10th Cir. 2008).

Judge Gorsuch's approach to religious liberty is best exemplified in his concurring opinion in the abortion mandate case of *Hobby Lobby Stores v. Sebelius*.[32] Gorsuch was part of the majority opinion holding Hobby Lobby and Mardel had demonstrated a likelihood of success on the merits of their RFRA claim and had satisfied the irreparable harm standard. In Gorsuch's concurrence (joined by two other judges) he starts with a statement regarding religion and public life:

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. The Green family members are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case.

Gorsuch fully accepted that since (1) the ACA "compels Hobby Lobby and Mardel to underwrite payments for drugs or devices that can have the effect of destroying a fertilized human egg"; (2) "the Green's religion teaches them that the use of such drugs or devices is gravely wrong"; and (3) the Green's corporations cannot comply with the mandate "unless and until the Greens direct them to do so" as "the human actors who must compel the corporations to comply": the conclusion is plain, as they understand it, it is a violation of the Green's faith to order "their companies to provide insurance coverage" for such drugs or devices. To do so would be a level of complicity their religion did not allow.

Gorsuch rebutted the dissent's contention that the harm to plaintiffs' was too attenuated, stating "whether an act of complicity is or isn't too attenuated from the underlying wrong is sometimes itself a matter of faith we must respect."

[32] 723 F.3d 1114 (2013) (concurring in part) (en banc).

In two Establishment Clause cases, Judge Gorsuch has been very critical of the Tenth Circuit's endorsement test analysis, particularly the court's approach to the reasonable observer inquiry: *American Atheists, Inc. v. Duncan*,[33] and *Green v. Haskell County Board of Commissioners*.[34]

In a challenge to Utah's public display of white crosses along its highways, memorializing the names of fallen State troopers, a Tenth Circuit panel had ruled for the Plaintiffs. Judge Gorsuch first joined Judge Kelly's dissent, which argued that the panel's application of the endorsement test:

> (1) effectively imposed a presumption of unconstitutionality on religious symbols in the public sphere; (2) employed a "reasonable observer" who ignored certain facts of the case and instead drew unsupported and quite odd conclusions; and (3) incorrectly focused on the religious nature of the crosses themselves, instead of the message they convey.[35]

Writing a separate dissent, Gorsuch further criticized the Tenth Circuit's repeated misapplication of the "reasonable observer test," by employing a "reasonably biased, impaired, and distracted viewer" who presumes roadside crosses are unconstitutional; is unable, because he is driving at such a high rate of speed, to read the names of fallen officers in lettering as large as the words "speed limit" on highway signs; and yet does somehow notice the police insignia immediately below the lettering.[36]

Moreover, "the court's holding does and must rest on the view that anything a putatively 'reasonable observer' could think 'endorses' religion is constitutionally problematic."[37] Finally Gorsuch chides the court for "claiming the authority to strike down laws and policies a conjured observer could mistakenly think respect an

[33] 637 F.3d 1095 (10th Cir. 2010) (Gorsuch, J., dissent from a denial for rehearing en banc).
[34] 574 F.3d 1235, 1243 (10th Cir. 2009) (dissent from a denial for rehearing en banc).
[35] *American Atheists, Inc. v. Duncan*, 637 F.3d at 1101-02.
[36] *Id*. at 1109-10.
[37] *Id*. at 1110.

establishment of religion," and for failing to consider the Supreme Court's decision in *Salazar v. Buono*.[38] He concluded if the court is to make such "remarkable use" of the power of judicial review, Gorsuch says it should at least pause to consider the "propriety" of doing so "before rolling on."[39]

In *Green v. Haskell County Board. of Commissioners*, the majority panel had held that the Board of Commissioners violated the Establishment Clause when it approved a request to place a Ten Commandments monument in front of the county courthouse. Dissenting again from a denial of a petition for rehearing en banc, Gorsuch stated:

> Respectfully, I believe we should have reheard this case for at least three reasons. First, by applying the *Lemon* test to a Ten Commandments display after *Van Orden*, the panel's analysis conflicts with the views of several of our sister circuits. Second, by then focusing on the perceptions of an unreasonable and mistake-prone observer, the panel's analysis conflicts with the Supreme Court's explanation of Lemon's endorsement test and our sister circuits' application of it. Finally, by making us apparently the first court of appeals since *Van Orden* to strike down an inclusive display of the Ten Commandments, the panel opinion mistakes the Supreme Court's clear message that displays of the decalogue alongside other markers of our nation's legal and cultural history do not threaten an establishment of religion.

Gorsuch argued further that *McCreary* and *Van Orden* are far more relevant to the analysis of a Ten Commandments monument than *Lemon*. "Shortly after *McCreary* and *Van Orden*, we held that *Lemon* continues to govern this domain," and the circuit should revisit that decision because "cases like *Van Orden* should come out like *Van Orden*."

Also of note in the Establishment Clause context, Judge Gorsuch joined Judge McConnell's dissent from the Tenth Circuit's denial of rehearing en banc in *Pleasant Grove City v. Summum*.

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[38] 559 U.S. 700 (2010).
[39] 637 F.3d at 1111.

SPEECHES

In a lecture, entitled *Of Lions and Bears, Judges and Legislators,* given at Case Western Reserve University School of Law, Judge Gorsuch commemorated the legacy of the Justice Antonin Scalia. Gorsuch opened by crediting Justice Scalia as a "lion of his profession," stating that he was "docile in his private life" and "ferocious when at work."[40] He also recalled how Justice Elena Kagan recently claimed that, due to Justice Scalia's contributions to legal thought, "we are all textualists now."[41]

Most notably, Gorsuch submitted that Justice Scalia's jurisprudence has greatly impacted his own disposition as a federal judge. Scalia's belief that the text, structure, and history surrounding statutory, regulatory, and constitutional law should be stressed above the individual judge's personal preferences, is in Gorsuch's view, essential for a judge to be a "good judge."[42] Gorsuch described the distinction between a judge who is committed to adhering to the text of the law and a judicial activist who seeks to see his or her own ideological preferences realized through their decisions, and articulated a clear empathy for the former. Furthermore, Gorsuch stated that "the ends never justify the means" if the means are anything other than a strict adherence to the text, history, and structure of the law.[43]

Gorsuch defended Scalia's textualism in light of his perspective on the founding principles of the separation of powers. Given the distinction between the legislative and judicial branches and their institutional purposes, Gorsuch believes that judges should do

[40] *Of Lions and Bears, Judges and Legislators: Some Reflections on the Legacy of Justice Scalia*, Case Western Reserve University School of Law, http://law.case.edu/Lectures-Events/Webcast/lecture_id/440 (last visited Jan. 16, 2017).
[41] *Of Lions and Bears.*
[42] *Id.*
[43] *Id.*

their part in respecting the limits of their official responsibilities.[44] In the speech, Gorsuch implied that deviating from Scalia's approach to the law borders on giving judges the undue responsibility of becoming "legislators."[45] In his view, the Founders intended judges to be "backward looking" in that they look at the text and history of the law and the ways in which the courts have interpreted the law in the past (stare decisis).[46] He ardently opposes the idea that judges ever get into the practice of legislating from the bench, stating that citizens become "slaves to their magistrates" when judges either wittingly or unwittingly engage in judicial legislation.[47]

Finally, Judge Gorsuch emphasized that the level which the legal community (e.g. professors, lawyers, and judicial commentators) overstates the significance of the "hard cases."[48] He noted that of the roughly 360,000 cases filed in the federal courts every year, differences of opinion in the Supreme Court (i.e. one or more justices voicing dissent in a given decision) occur only about 50 times a year, which is 0.014% of all federal cases annually. Given this empirical data, Gorsuch claims that the traditional tools of legal analysis prove sufficient in the majority of cases, given that the Court routinely comes to a consensus on the history, text and precedent surrounding the majority of legal issues. In light of this, he stated that whether the legal community admits it or not, Scalia's jurisprudence has proven the most efficacious in the majority of the Court's work, and should thus be the model used by judges when approaching the "hard cases."[49]

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[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

At *The Federalist Society's* 13th Annual Barbara K. Olson Memorial Lecture on November 15, 2013, Judge Gorsuch gave a speech entitled "*The Law's Irony.*"[50] Among his opening remarks included a statement which referred to "the business of law" as an irony in and of itself, in that we "depend upon the rule of law to guarantee freedom, but we have to give up freedom to live under the law's rules."[51] From this general point, Gorsuch expanded on some key areas in today's legal practice which he believes contain ironies worth addressing.

To start, Judge Gorsuch set out the ironies in the modern standards of civil procedure. He focused on the common practice of pre-trial discovery, identifying it as a device which dis-incentivizes the common citizenry from attempting to take their cases to trial.[52] Empirically speaking, because lawyers have been trained to practice pursuant to the current standards of civil procedure, cases are more commonly settled in the pre-trial discovery stage, often precluding trials from occurring.[53] This reality creates a systematic irony in that the Founding Fathers saw trials as "a bulwark to the rule of law."[54] Moreover, Gorsuch stated that current standards have molded today's lawyers into "discovery artists" instead of trial lawyers, going as far to say that current lawyers are taught to be "afraid of trial."[55] Ultimately, Gorsuch concluded on the topic of the irony in civil procedure by recognizing the well-intentioned nature of the current implementation

[50] *13th Annual Barbara K. Olson Memorial Lecture 11-15-2013*, YouTube, https://www.youtube.com/watch?v=VI_c-5S4S6Y (last visited Jan. 17, 2017).
[51] *13th Annual Barbara K. Olson Memorial Lecture.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*

of pre-trial discovery, but maintaining that it has "contributed to the death of an institution once thought essential to the rule of law."[56]

Gorsuch also briefly touched upon his concerns with the high quantity of federal criminal laws, stating that they are overly abundant and complicated.[57] He quoted Vice President Joe Biden with having once warned us of assuming a tendency to federalize "everything that walks, talks, and moves."[58] He also believes that the proliferation of federal criminal laws compromises the doctrine of fair notice (i.e. the idea that parties in criminal and civil procedure be afforded pertinent notice and information).[59]

Finally, Gorsuch addressed the prevailing cynicism of the legal profession held by many in today's society. He stated that when thinking of judges, many people today imagine "robed hacks" who simply seek after power these days, and who rule in line with their "policy preferences" as opposed to a real commitment to the rule of law.[60] While he admitted lawyers should take some responsibility for this prevailing public cynicism, he stated that society takes the work of law for granted. Because society has grown accustomed to the rule of law working as well as it does, society takes it for granted.[61] He pointed out that much of today's public skepticism comes from people's perception that the federal courts generally consist of judges who constantly disagree with one another based on their political ideologies, which he terms as "a serious selection effect problem."[62]

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[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.

Gorsuch also highlighted the differences between conservatives in jurisprudential thought, noting that *textualists* and *originalists* disagree on a variety of matters.[63] Gorsuch expressed the belief that disagreements among judges and justices on the difficult historical and contemporary legal questions are not matters of personal will and politics, but rather are an indication of "an honest effort of making sense of the legal materials at hand."[64]

PUBLICATIONS

In 2009, Judge Gorsuch wrote the book *The Future of Assisted Suicide and Euthanasia* (Princeton University Press 2009) which was based on two earlier law review articles he wrote: *The Legalization of Assisted Suicide and the Law of Unintended Consequences*,[65] and *The Right to Assisted Suicide and Euthanasia.*[66] In his book, Gorsuch sets out a compelling argument in favor of the "inviolability of human life" and against assisted suicide.

He identifies a bifurcated purpose for the book: "to introduce and critically examine the primary legal and ethical arguments deployed by those who favor legalization (of euthanasia and assisted suicide), and to set forth an argument for retaining existing law (banning the practices) that few have stopped to consider."[67]

Gorsuch surveyed Saint Augustine's and Aquinas' contributions to Christian thought on self-destruction. Augustine believed that intentional self-destruction, generally speaking, constituted "a violation of the Sixth Commandment (of the Biblical

[63] *Id*.
[64] *Id*.
[65] 2004 WISC. L. REV. 1347 (2004).
[66] 23 HARV. J. L. PUB. POL. 599 (2000).
[67] *Id*. at 5.

Ten Commandments)," which plainly states "thou shalt not kill."[68] Aquinas believed that human life is one among certain irreducible basic goods;[69] that is, to do any sort of damage to a basic good would, in Aquinas' view, run "contrary to nature and charity."[70]

Gorsuch recognizes, and implicitly endorses a moral distinction between the right to refuse potentially life-saving medical treatment and physician assisted suicide.[71] While he acknowledges that there is criticism of the distinction,[72] Gorsuch concludes that state laws against assisted suicide and euthanasia should survive rational basis review under Equal Protection doctrine."[73]

Gorsuch contends that *Casey's* autonomy principle should likely not apply to the practices of assisted suicide and euthanasia as they purported to in *Roe v. Wade*.[74] Acknowledging, without criticizing, *Roe*'s express holding that a fetus does not qualify as a person, Gorsuch argued that there are strong autonomy interests belonging to persons on both sides of the assisted suicide and euthanasia issue—the interest of those persons who wish to control the timing of their deaths and the interest of those vulnerable

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[68] *Id*. at 26.
[69] This is especially noteworthy when considering that Gorsuch's arguments against the practices of assisted suicide and euthanasia heavily rely on these philosophical principles delivered by Aquinas.
[70] *Id*. at 27.
[71] *Id*.at 75.

> "We have also seen, however, that a morally significant distinction does exist, insofar as one practice (the right to refuse) need not involve an intent to kill on the part of the assistant, while the other (assisted suicide) always involves an intent to kill on the part of the principal, and an intent to help kill on the part of the assistant.

[72] Some, such as former Supreme Court Justice John Paul Stevens, have asserted that some terminally-ill patients may refuse life-saving medical treatment precisely with the intention to end their own lives, which can be said to be effectively no different than requesting assisted suicide.
[73] *Id*.
[74] *Id*. at 82.

individuals whose lives may be taken without their consent due to mistake, abuse, or pressure in a regime where assisted suicide and euthanasia are legal."[75]

Gorsuch moves from analyzing assisted suicide and euthanasia in light of historical and legal arguments both for and against the practices to constructing his own moral argument against these practices based on the value of human life.[76] Excluding controversial methods of taking life such as capital punishment and war, Gorsuch explicitly seeks to "explain and defend an exceptionless norm against the intentional taking of human life by private persons."[77] He defends the "inviolability of human life," bolstering the proposition that human life is a "basic good," intrinsically meant to be secure from destruction and termination.[78] "To claim that human life qualifies as a basic good is to claim that its value is not instrumental, not dependent on any other condition or reason, but something intrinsically good in and of itself."[79]

Gorsuch strongly criticizes individuals who attempt to attribute proportional values to the lives of individual humans based on their cognitive abilities, such as Peter Singer, Ronald Dworkin, etc. He contends that such "arbitrariness" can be tolerable in some legal questions, but "it is simply not acceptable when we are deciding who is and is not treated as fully human. . . . Indeed, it is at the heart of the promise of equal protection that like persons are treated alike by their government."[80]

Finally, Gorsuch outlines what it means to explicitly respected human life as a basic good. Most basically, this "inviolability-of-life principle" would "rule out cases

[75] *Id*.
[76] *Id*. at 157.
[77] *Id*. at 157.
[78] *Id*. at 157–63.
[79] *Id*. at 158.
[80] *Id*.at 162.

where the doctor intends to kill his or her patient . . . . [C]urrent laws against assisted suicide and euthanasia largely should be retained."[81] "The inviolability-of-life principle would likewise do nothing to preclude patients from discontinuing even basic life sustaining medical care when death is foreseen."[82] The inviolability-of-life principle ought to be applied when the Judicial Branch interprets statutes pertaining to the practices of assisted suicide and euthanasia.[83] He also encourages the legislative branch to keep this principle in mind when designing statutes which deal with the practices as well.[84]

In a second book, Gorsuch contributed to a series of essays in *The Law of Judicial Precedent* (Thomson West 2016). We are in the process of obtaining a copy of that book.

Gorsuch has also co-published *No Loss, No Gain; The Supreme Court Should Make Clear That Securities Fraud Claims Can't Dodge The Element Of Causation,*[85] *Access To Affordable Justice: A Challenge To The Bench, Bar, And Academy,* [86] and *Will the Gentleman Please Yield? A Defense of the Constitutionality of State Imposed Term Limits.*[87] Should Gorsuch become the nominee, we will attempt to obtain copies of these publications which are not available online.

In 2005, Gorsuch wrote an essay for the National Review in which he lamented "American liberals" strategy of using litigation to achieve policy goals.[88] He argued that the excessive reliance on judicial resolution of the most contentious political issues

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[81] *Id*. at 164.
[82] *Id*. at 165.
[83] *Id*. at 182-215, 218.
[84] *Id*.
[85] Neil M Gorsuch and Paul B. Matey, *No Loss, No Gain; The Supreme Court Should Make Clear That Securities Fraud Claims Can't Dodge The Element Of Causation,* THE NATIONAL LAW JOURNAL (January 31, 2005).
[86] Neil M. Gorsuch, *Access To Affordable Justice: A Challenge To The Bench, Bar, And Academy* 100 JUDICATURE (2016), https://law.duke.edu/judicature/volume100-number3/.
[87] 20 HOFSTRA L. REV. 341 (1991).
[88] Neil M. Gorsuch, *Liberals'N'Lawsuits*, NATIONAL REVIEW (February 7, 2005), http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6

remove them from the political process and therefore from input from the citizenry. He noted further that the independence of the judiciary is severely compromised because the appointment of judges has become so politicized when judges become "politicians in robes."

> Who do you think said this: "Reliance on constitutional lawsuits to achieve policy goals has become a wasting addiction among American progressives. . . . Whatever you feel about the rights that have been gained through the courts, it is easy to see that dependence on judges has damaged the progressive movement and its causes"? Rush Limbaugh? Laura Ingraham? George Bush? The author is David von Drehle, a Washington Post columnist. This admission, by a self-identified liberal, is refreshing stuff. It is a healthy sign for the country and those rethinking the direction of the Democratic party in the wake of November's election results. Let's hope this sort of thinking spreads.
>
> There's no doubt that constitutional lawsuits have secured critical civil-right victories, with the desegregation cases culminating in *Brown v. Board of Education* topping the list. But rather than use the judiciary for extraordinary cases, von Drehle recognizes that American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education.
>
> This overweening addiction to the courtroom as the place to debate social policy is bad for the country and bad for the judiciary. In the legislative arena, especially when the country is closely divided, compromises tend to be the rule the day. But when judges rule this or that policy unconstitutional, there's little room for compromise: One side must win, the other must lose. In constitutional litigation, too, experiments and pilot programs–real-world laboratories in which ideas can be assessed on the results they produce–are not possible. Ideas are tested only in the abstract world of legal briefs and lawyers arguments. As a society, we lose the benefit of the give-and-take of the political process and the flexibility of social experimentation that only the elected branches can provide. At the same time, the politicization of the judiciary undermines the only real asset it has–its independence. Judges come to be seen as politicians and their confirmations become just another avenue of political warfare. Respect for the role of judges and the legitimacy of the judiciary branch as a whole diminishes. The judiciary's diminishing claim to neutrality and independence is exemplified by a recent, historic shift in the Senate's confirmation process. Where trial-court and appeals-court nominees were

> once routinely confirmed on voice vote, they are now routinely subjected to ideological litmus tests, filibusters, and vicious interest-group attacks. It is a warning sign that our judiciary is losing its legitimacy when trial and circuit-court judges are viewed and treated as little more than politicians with robes.

In May 2002, Gorsuch composed a eulogy[89] honoring the late Justice Byron White.[90] He described Justice White's accomplishments, including leading the NCAA in points scored in football, achieving the status of highest paid NFL athlete, being named a Rhodes Scholar, and graduating top in his class at Yale Law School.[91] Justice White also defended desegregation efforts while at the Justice Department.[92]

Judge Gorsuch said that Justice White was named to the Supreme Court because of his "integrity, accomplishment, and life experience."[93] Justice White had "confidence in the people's elected representatives, rather than the unelected judiciary."[94] He decided cases, and did not advance his own ideology.[95]

Additionally, Gorsuch discussed the current state of the judicial confirmation process, and stated "there are too many who are concerned less with promoting the best public servants and more with enforcing litmus tests and locating unknown 'stealth candidates' who are perceived as likely to advance favored political causes once on the bench."[96] Moreover, he argues that the "current morass" is not due to any one political group, and that excellence is the answer in choosing jurists going forward.[97] Gorsuch concluded by noting, "Though we will never see the like of Justice White again, here's

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[89] Neil Gorsuch, *Justice White and Judicial Excellence*, UPI (May 4, 2002), http://www.upi.com/Justice-White-and-judicial-excellence/72651020510343/.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*

hoping we again see a time in which the excellence he so richly embodied serves as the essential standard for picking and confirming our nation's judges."[98]

[98] *Id.*