



## Judge Neil Gorsuch: The Case for Confirmation

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During the presidential campaign, President Trump produced a list of 21 potential nominees for Justice Scalia's vacant seat on the Supreme Court. We are pleased that he nominated a great candidate off that list—Judge Neil Gorsuch. Upon confirmation, Judge Gorsuch will be faced with a host of pressing legal issues, and it is important to understand how he will rule and why. This issue analysis generally discusses the type of justices who should sit on our highest court, and explains why Judge Gorsuch is qualified for that role and should be confirmed.

### **I. General Principles: What to look for in a Supreme Court Justice**

Since the founding of this Republic 240 years ago, it has been understood that first and foremost governments are put in place to secure the inalienable rights bestowed upon us by God, our Creator. These rights cannot be taken away from any American by any government. Our Constitution was adopted to preserve these rights and to institute a just government that will also provide those benefits enumerated in the Preamble to the Constitution.

The primacy of law-making by our elected representatives and the adherence to the rule of law by the executive branch form the keystone of our governmental framework. Over the past two hundred years, the power of the judiciary has grown to the point that it now threatens the separation of powers between the branches. The power of the legislative branch to make our laws has been challenged most directly by the courts. We must now confront a crisis of governance created by our judiciary and, more specifically, by the Supreme Court, which have grasped powers they were never intended to possess. In the period since the New Deal era, the Supreme Court has become an almost unchallengeable, unreviewable super-legislature. The Founding Fathers did not risk their lives, their fortunes, and their sacred honor so that someday we would be ruled over by an oligarchic, self-aggrandizing body of lawyers.

The late Justice Antonin Scalia was one who was ever cognizant of the danger of an activist Court. Just last year when the Court imposed same-sex marriage on the nation in *Obergefell v. Hodges*, Justice Scalia wrote in dissent:

“I write separately to call attention to this Court’s threat to American democracy ... Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court ... This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”<sup>1</sup>

Justice Scalia himself would agree that outstanding judicial nominees should recognize limits to the judicial power created by Article III of the Constitution. Such nominees for all federal judicial positions, including the U.S. Supreme Court, should only be those who respect the judiciary's proper place within the Constitution's governmental framework – one that recognizes the irreducible role of the States (federalism) and the irreducible role of the Congress and the President (separation of powers). We owe him no less than replacing his empty seat with a justice who holds to the same philosophy. Thankfully, Judge Gorsuch does.

When interpreting the Constitution, members of the judiciary must look first to the text of the Constitution, and their decisions must conform to the Constitution's original meaning as understood at the time a constitutional provision's language was adopted. Similarly, those interpreting statutes and regulations must look to the text of the documents and assess them in light of their meaning at the time they were enacted or adopted. Judge Gorsuch subscribes to these methods of interpretation.

The legitimacy of our government lies in the fact that it expresses the will of the American people through their elected representatives. Judicial activism undermines the sovereignty of the American people, the rule of law, and a proper understanding of the Constitution. This is true whether it occurs through an inappropriate reliance on foreign law, the Court's projections of "popular opinion," or some other means by which the Court imposes its policy preferences on the law. Thankfully, Judge Gorsuch understands the threat of judicial activism.

Since the late nineteenth century, Congress has ceded ever-growing quantities of legislative authority to executive branch administrative agencies. Such governmental entities were never envisaged by the Framers, and it is only with their creation and continued existence that our vast administrative state would even be possible. These agencies now produce unfathomable quantities of costly rules that typically have the force of law on par with statutes enacted by Congress. Regulations can only be known by the regulated in some hypothetical sense, and enforcement actions are often arbitrary and excessive. In short, the due process rights of Americans have been gutted by the regulatory state as the courts have enunciated elaborate doctrines of "deference" that place bureaucratic judgments and actions beyond the reach of judicial review and any reasonable definition of justice.

With respect to the administrative agencies, the best judicial candidates will be those who seek to reduce the excessive levels of deference that federal courts have granted federal agencies in interpreting the statutes that pertain to them, especially provisions related to the jurisdiction or scope of the agency's power. Having no judicial check on bureaucratic self-assessments of their own legislative and regulatory jurisdiction provides a dangerous invitation for ever-expanding governmental expansion. What bureaucracy will limit its own power? To ask the question is to answer it. In this regard, Judge Gorsuch's helpful criticism and wary approach to administrative deference is welcome news.

Having briefly laid out a set of principles to guide a conservative-originalist assessment of judicial candidates, we will now examine those cases concerning FRC's issue set that will arise or are likely to arise at the Supreme Court in the near future – the outcome of which will be clearly affected by Judge Gorsuch's judicial philosophy.

## II. Specific Cases and Issues

### 1. Cases and Issues Currently Before the Court

The Court has already agreed to hear cases concerning transgender rights and religious freedom; specifically, whether sex discrimination protections include transgender protections, and whether religious entities can be excluded from public programs just because they are religious. The Court will decide these cases within the next six months, and they will be most immediately impacted by the new justice – many in a 5-4 vote.

#### Transgender Rights

In *Gloucester County School Board v. G.G.*, the Supreme Court will decide whether to allow the Department of Education's specific interpretation of Title IX and 34 C.F.R. § 106.33, which provides that sex-separated facilities must "generally treat transgender students consistent with their gender identity," and whether a federal agency letter on the same topic should receive deference.<sup>2</sup>

The case is more broadly about whether a local school board is free to determine that students must use the bathroom of their biological sex, and whether "sex" in nondiscrimination law can be reinterpreted to include "gender identity." Last year, the Obama administration had hinted at the revocation of federal funds if localities such as Gloucester County take this course of action.<sup>3</sup> While President Trump recently removed that threat,<sup>4</sup> and the issue in the case involving the federal agency letter may now be moot, the question of how "sex" is to be interpreted in statute and regulation remains – in this case and beyond. We can be assured that activists will continue to try to shoehorn "gender identity" into definitions of "sex." Yet a jurist like Judge Gorsuch who looks strictly at the text of the statute will not cram the words "gender identity" into "sex" – and that is the type of justice we should have to replace the late Justice Scalia. This is especially critical because this case will likely be a 5-4 decision with the replacement justice breaking the tie (assuming Justice Kennedy votes with the conservatives on the Court).

#### Religious Freedom – Participation in the Public Square

In *Trinity Lutheran Church v. Pauley*, the Court will decide whether the First Amendment permits a state to exclude a church from a state grant program just because it is religious.<sup>5</sup> This case is important because the First Amendment does (and should) protect religious entities from being discriminated against when they play a part in the public square. Yet many academic and liberal elites (and judges) may think this should be permitted. It is important that we do not have such thinking on the Supreme Court.

Thankfully, Judge Gorsuch understands the First Amendment and the need to check government power against private citizens, making it quite likely he will rule for the church in *Trinity Lutheran*. While this case should be clear to the current eight justices, we can't know for sure how they will rule. If they decide this case as they did the similar case *Town of Greece v. Galloway* (which also concerned expressions of religion in the public square),<sup>6</sup> Judge Gorsuch would be breaking the tie. Again, it is crucial we have a good justice replacing Justice Scalia.

Thankfully, Judge Gorsuch's rulings show he properly understands the First Amendment and will interpret it from an originalist perspective.

## 2. Issues Which May Be Heard By the Court

While the Court has not yet decided to hear them, it may take up more religious freedom cases which involve questions of whether wedding vendors have a right to opt out of same-sex weddings (do First Amendment rights trump sexual orientation nondiscrimination laws?), and whether the federal Constitution bars states from prohibiting government aid to religious schools under the "Blaine Amendments" to state constitutions – another example of religious entities being marginalized in the public square just because they are religious.

### Religious Freedom – Wedding Vendors

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the issue is whether a state can force a small business owner to bake a cake for a same-sex wedding under sexual orientation nondiscrimination laws, or whether the baker's First Amendment free speech and free exercise rights protect his ability to opt out of such forced compliance.<sup>7</sup> Even if the Court does not take up this case, the issue will arise again in the future. There are multiple small business owners who have already been penalized by different states for refusing to use their talents to further same-sex weddings.<sup>8</sup> They should be protected by the First Amendment's free speech and free exercise protections, but lower courts too deferential to state authority and hostile to religious freedom have often ruled against them.

It will be very important to have a nominee with a high view of the First Amendment and healthy suspicion of government power replacing Justice Scalia's seat and perhaps other seats. Such small business owners should be protected, and many more will need it in the years to come. We don't know how the Court will decide this case, but if *Boy Scouts of America v. Dale* is any indication (where the Supreme Court decided in a 5-4 vote that First Amendment freedom of association protections prevailed over a state sexual orientation nondiscrimination law),<sup>9</sup> the justice replacing Justice Scalia will once again be casting the tie-breaking vote.

### Religious Freedom – Participation in the Public Square

Additionally, multiple cases are pending before the Court that involve "Blaine Amendments" from several state constitutions, which are being used to discriminate against religious institutions in the use of state resources. Like in *Trinity Lutheran*, the issue in *Douglas County School District v. Taxpayers for Public Education* and *Colorado State Board of Education v. Taxpayers for Public Education* is whether such state level discrimination is barred by the federal Constitution.<sup>10</sup> Indeed, it should be, and we should look for a nominee who will hold to a robust view of federal constitutional rights which prohibits the state from discriminating against religious entities in the public square. These cases may fall along the lines of the 5-4 vote in *Town of Greece v. Galloway*, which contained a similar issue. It is crucial to have a justice in the mold of Justice Scalia to see a win for religious freedom in these cases. Judge Gorsuch would fill this role.

### 3. Issues Not Currently Before the Court but Which May Come Up

Of course, there are other issues which have been recently decided by the Court but which are likely to arise again in the near future. They include the ability to regulate abortion (and whether this right exists at all), religious freedom rights to opt out of the federal government's Health and Human Services (HHS) contraceptive mandate which coerces involvement in providing drugs and services which can function as abortifacients, and whether pharmacies can be forced to dispense such drugs at the state level and violate their consciences despite the protections of the First Amendment. These issues are all likely to come before the Court at some point, and it will greatly matter what kind of philosophy is held by the justices who decide these issues.

#### Abortion

Just last year in *Whole Woman's Health v. Hellerstedt*, the court ruled 5-3 that a Texas law improving abortion safety standards at abortion clinics, and requiring abortion doctors to have hospital admitting privileges, was an unconstitutional violation of a woman's right to choose abortion.<sup>11</sup> While confirming Judge Gorsuch will help turn the tide, if he had been involved in this case it still would have been a 5-4 loss for the state. But if a second justice is replaced with a nominee from President Trump's list, this result will almost certainly go the other way.

Not only would nominees from the list look at abortion as not a federal constitutional right at all under an originalist understanding, they would not read old abortion cases inaccurately as the *Hellerstedt* Court did when it relied on *Planned Parenthood v. Casey* to erroneously claim the Texas law in *Hellerstedt* imposed an undue burden.<sup>12</sup> Judge Gorsuch and other nominees from the list will allow states much more leeway to regulate abortion given their federalist leanings (meaning they will err on the side of allowing the states more power and claiming less for the Court by reading rights into the Constitution).

Moreover, like Judge Gorsuch, other nominees from the list will interpret the Constitution according to its original plain meaning, which says absolutely nothing about abortion. If this original meaning is faithfully applied, given the opportunity, they will rule there is no federal constitutional right to abortion at all.

#### Religious Freedom – HHS Mandate

Just last year the Court decided *Zubik v. Burwell*, where religious nonprofits claimed the Religious Freedom Restoration Act (RFRA) entitled them to an exemption from being forced to violate their consciences by participating in the Obama administration's HHS contraceptive mandate. Actually, the Court punted the issue and told the government and parties to arrive at a solution themselves, and there has been no permanent resolution to this case.<sup>13</sup>

While the issue could be moot if President Trump revises or eliminates the HHS contraceptive mandate, justices with a high view of religious freedom are important for this issue to be decided properly should it arise again. If the Court rules on *Zubik* right now, there is a real likelihood the case would be decided 4-4. Thus, it is crucial to have a justice in the mold of Justice Scalia, who would almost certainly have ruled for the religious nonprofits in that case.

Thankfully, Judge Gorsuch clearly fits the mold on this issue, as a review of his religious liberty record will show.

This issue affects dozens of organizations involved in multiple lawsuits involving RFRA and First Amendment claims,<sup>14</sup> to say nothing of the for-profit entities affected by the Court's 5-4 ruling in *Burwell v. Hobby Lobby*.<sup>15</sup> In that case involving the same HHS contraceptive mandate, Justice Scalia voted with the majority.

*Zubik* involves the same HHS contraceptive mandate with additional regulatory-imposed accounting gimmicks the administration used to claim it accommodated the religious freedom of nonprofits. This issue could easily be decided in a way that violates religious freedom if someone holding different views than Judge Gorsuch is confirmed on the Court.

Between these sets of cases, there are at least 100 entities involved in the litigation alone,<sup>16</sup> aside from the incalculable number of others affected by the Court's rulings. Judge Gorsuch will take a high view of the private individual's rights protected by RFRA and the First Amendment's Free Exercise Clause, and will not so easily let the government trample those rights, as the Obama administration has done for the past eight years.

#### Religious Freedom – Pharmacists and Conscience

Moreover, the Court last year refused to take up *Stormans v. Weisman*, a religious freedom case in which pharmacies were barred from opting out of a coercive state law that forces them to dispense drugs they believe can function as abortifacients (despite exemptions being given for nonreligious reasons).<sup>17</sup> The First Amendment's Free Exercise Clause should protect such pharmacies and their pharmacists, but the Court refused to take up the issue. If Justice Scalia had still been on the Court, there is a real likelihood the Court would have at least agreed to hear the case, with the possibility of a 5-4 ruling in favor of the pharmacies once it was heard. Filling Justice Scalia's vacant seat with Judge Gorsuch is crucial to the Court agreeing to hear such cases, and for keeping alive the chance for religious freedom to be vindicated.

In their dissent from the denial of certiorari in *Stormans*, Justices Alito, Roberts, and Thomas called the decision an "ominous sign."<sup>18</sup> They were not pleased at the Court's refusal to protect religious freedom, nor would Justice Scalia have been. We can expect Judge Gorsuch and other nominees from President Trump's list to likewise oppose such discrimination against religion and show far greater respect for a strong First Amendment in the face of coercive government power, and we anticipate they will not miss an opportunity to declare clear First Amendment protections for such pharmacists.

#### **4. Other Cases Decided By One Vote and Showing the Importance of the Court to Conservatives**

While not all of these cases involve FCC's set of issues, they are important to many people for a variety of reasons. The statutory and constitutional rights issues in these cases may not come up before the Court any time soon, but the close 5-4 votes (the several 4-4 cases remind us that Justice Scalia's replacement would cast the tie-breaking vote) which decided these cases (some favorably and some not) remind us of the importance of filling the Court's vacant seat with

someone who holds the same legal philosophy as Justice Scalia. Judge Gorsuch holds such a philosophy, and should be confirmed.

#### 4-4 Cases:

- *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016): A 4-4 decision left in place a lower court ruling holding that requiring non-union members to pay shop fees did not violate the First Amendment.
- *United States v. Texas*, 579 U.S. \_\_ (2016): A 4-4 decision left in place a lower court ruling which had put the Obama administration's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) immigration program on hold because the challengers to the program would likely succeed on their claims that it was unlawful.

#### 5-4 Cases:

- *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016): A 4-3 majority upheld a public university admissions program which considered race as a factor in admissions as lawful under the Equal Protection Clause (Justice Scalia had passed away and Justice Kagan recused herself).
- *Obergefell v. Hodges*, 135 S. Ct. 2584 (2014): A 5-4 majority imposed same-sex marriage on the nation over the objections of an overwhelming majority of states whose citizens had voted for man-woman marriage in state referenda.
- *NFIB v. Sebelius*, 132 S. Ct. 2566 (2014): A 5-4 majority upheld the Obamacare individual mandate forcing everyone to purchase a government-approved health insurance plan as a constitutional exercise of Congress's taxing power.
- *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014): A 5-4 majority protected the freedom of government bodies to choose to have a time of prayer before public meetings as long as it permitted expressions from all faiths equally.
- *United States v. Windsor*, 133 S. Ct. 2675 (2013): A 5-4 majority ruled that Congress could not define "marriage" in federal laws to mean man-woman marriage.
- *District of Columbia v. Heller*, 554 U.S. 570 (2010): A 5-4 majority ruled that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia.
- *Citizens United v. FEC*, 558 U.S. 310 (2010): A 5-4 majority restored the First Amendment protection of political speech, allowing non-profit corporations and others to come together with their donors and supporters to educate the American people.
- *Gonzales v. Carhart*, 550 U.S. 124 (2007): A 5-4 majority upheld a federal law restricting the use of the horrific partial-birth abortion technique.
- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002): A 5-4 majority held that parents could use public funds (in the form of vouchers distributed to needy families) to choose to send their children to religiously affiliated schools.
- *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000): A 5-4 majority ruled that the First Amendment's freedom of association protects the Boy Scouts from being forced to admit scout leaders who identify as homosexual under state laws barring discrimination on the basis of sexual orientation.

- *Rosenberger v. UVA*, 515 U.S. 819 (1995): A 5-4 majority upheld the right of religious student groups to receive university funding on an equal basis with other student groups.
- *Lee v. Weisman*, 505 U.S. 577 (1992): A 5-4 majority ruled that schools cannot sponsor a member of the clergy to conduct even non-denominational prayers at a graduation.
- *Rust v. Sullivan*, 500 U.S. 173 (1991): A 5-4 majority upheld Reagan administration regulations providing that federal tax dollars could go to family planning but not to abortion counseling, referral, or advocacy.

### III. Judge Gorsuch Meets the Above Criteria and Should Be Confirmed

As outlined above, the ideal candidate to replace Justice Scalia would be a committed originalist and textualist who interprets the Constitution and statutory law for what it says rather than what he or she may want it to mean, and who understands the limited role of the judiciary. Judge Gorsuch is such a candidate, and his judicial record and personal views show someone who will rule the right way on religious liberty, life, and a host of other important issues.

#### Religious Liberty

On this issue, Judge Gorsuch's record clearly shows that he understands and has properly applied the Religious Freedom Restoration Act (RFRA), most prominently in the context of the HHS mandate religious liberty cases. He voted with the U.S. Court of Appeals for the 10th Circuit in its en banc decision in *Hobby Lobby v. Sebelius*, which sided with the religious challengers and articulated a strong view of RFRA.<sup>19</sup> In that same case, he wrote a concurring opinion explaining how the Green family (owners of Hobby Lobby) themselves are entitled to protection under RFRA. In addition, when the en banc 10th Circuit rejected the Little Sisters' claims in *Little Sisters v. Burwell*, Judge Gorsuch joined the dissent, clearly stating that their religious beliefs had been substantially burdened under RFRA.<sup>20</sup> Yet he won't allow RFRA to be used as an excuse for all behavior. In *United States v. Quaintance*, he rejected drug smugglers' claims that their marijuana distribution was motivated by religious belief as insincere and thus not protected by RFRA.<sup>21</sup>

In these rulings, Judge Gorsuch closely adhered to the textual requirement of RFRA, which bars courts from being able to second-guess religious claims once the claimant has shown a sincere religious belief that has been substantially burdened. Just because a belief seems unusual to the court or the government's burden makes sense in a judge's view, doesn't mean it can be struck down. If someone has a sincere religious belief that has been substantially burdened, their religious exercise can only be burdened if the government shows a compelling interest that is accomplished through the least restrictive means. Judge Gorsuch clearly has a good grasp of how RFRA operates and how it should be applied.

Similarly, he has shown careful attention to prisoner religious freedom claims, granting those that meet the statutorily-prescribed standard under the Religious Land Use and Institutionalized Persons Act (RLUIPA) – such as in *Yellowbear v. Lampert*,<sup>22</sup> where he wrote the opinion, and *Abdulhaseeb v. Calbone*, where he voted with the court in granting relief and wrote his own concurring opinion explaining the importance of RLUIPA in protecting claimants against conscience violations.<sup>23</sup> At the same time, he has rejected claims which do not meet the

statutory standard, as in *Ali v. Wingert*, where he wrote an opinion upholding the dismissal of a RLUIPA claim on appeal.<sup>24</sup> His rulings show a judge who is careful to follow the text of the law, whether he personally agrees with the claim or not. Judge Gorsuch also exhibits a neutrality and evenhandedness in his rulings, and does not unduly defer to government authorities.

In Establishment Clause cases, Judge Gorsuch has shown he will not go along with activists who want to use that First Amendment protection to scrub the public square of all religious references. In three different cases, *Green v. Haskell County Board of Commissioners* (10 Commandments display on courthouse lawn),<sup>25</sup> *American Atheists v. Duncan* (public memorial cross on side of highway),<sup>26</sup> and *Summum v. Pleasant Grove City* (10 Commandments monument on public property),<sup>27</sup> he authored and/or joined dissents from denial of en banc review after the 10th Circuit ruled against the relevant public religious display. Notably, in its subsequent ruling in *Summum*, the Supreme Court agreed with the dissent joined by Judge Gorsuch.

In his rulings touching upon religious freedom issues, Judge Gorsuch has shown an acute desire to closely follow the relevant statutes and constitutional provisions, without regard to preference for either party. This is what is needed in the face of the anti-religious freedom fervor stirring in America today, and what is fitting in a Supreme Court nominee who will take the late Justice Scalia's seat.

## Life

While Judge Gorsuch has never ruled explicitly on abortion during his time on the bench, he has shown that he will not give the abortion issue a "pass" when it comes to the application of procedural rules, as many judges so often do. There are good indications that he will rule as a faithful textualist in this area of the law, resulting in the defense of the preborn child.

For instance, Judge Gorsuch criticized the 10th Circuit for treating an abortion-related claim under a more relaxed procedural standard. In *Planned Parenthood Ass'n of Utah v. Herbert*, the court upheld the preliminary relief granted to Planned Parenthood after it challenged its own defunding, and yet Judge Gorsuch wrote a dissent arguing Planned Parenthood's claims should have been rejected on procedural grounds.<sup>28</sup>

He also affirmed the dismissal of claims challenging a state program allowing "choose life" license plates while not allowing pro-abortion license plates. In *Hill v. Kemp*, while the court ruled on procedural grounds, the opinion he signed onto observed that "the State [] remain[s] free to promote adoption and ensure that none of its monies go to abortion-related activities or any other activities of which it disapproved."<sup>29</sup>

Judge Gorsuch's adherence to proper jurisdictional rules produced a pro-life outcome in a case about the wrongful death of a non-viable stillborn baby. In *Pino v. United States*, he wrote an opinion directing the Oklahoma Supreme Court to determine under state law whether a cause of action existed for a nonviable stillborn fetus.<sup>30</sup> After the Oklahoma Supreme Court found that a wrongful death cause of action was permitted,<sup>31</sup> the 10th Circuit – in an opinion which Judge Gorsuch joined – directed the lower court to allow the claim to move forward. While some may ask why Gorsuch didn't just decide this question himself, procedural doctrines mandated he

direct the question to the Oklahoma Supreme Court – something, by the way, which he could have avoided doing if he wanted to.<sup>32</sup>

President Trump promised on the campaign trail that he would nominate a pro-life justice “in the mold of Justice Scalia.” Judge Gorsuch’s extensive record shows that he is a textualist who will not issue rulings based on the perceived “spirit” of the Constitution. Even though he has not ruled on any abortion cases directly, his rulings on procedural grounds have produced pro-life results, and he can be trusted to not give special deference to abortion rights claims as so many judges do.

Moreover, aside from his judicial rulings, Judge Gorsuch authored the book *The Future of Assisted Suicide and Euthanasia*, presenting the thesis that human life is intrinsically valuable and that intentional killing is always wrong. In arriving at this conclusion, he relied on the natural law writings of legal scholar John Finnis, which is an encouraging sign. While the book does not explicitly talk about abortion, one chapter addresses the inviolability of human life and what it means to respect human life. The fact that Judge Gorsuch was willing to write and publish a book on this topic, given the backlash he could have received, shows he has strong convictions on the dignity of human life.

### Other Issues

There are a host of other issues on which Judge Gorsuch has clearly staked out a position as an originalist and textualist who will interpret the law instead of make it up or twisting it according to his own personal preferences.

For instance, he has clearly stated that the Constitution should be interpreted from an originalist perspective in the context of the Fourth Amendment. In *United States v. Krueger*, he wrote a strong concurring opinion exploring the original meaning of the Fourth Amendment for purposes of what constitutes a valid warrant.<sup>33</sup> In *United States v. Ackerman*, he stated we should look to the time of the founding to understand the Constitution, and cited Joseph Story’s *Commentaries* – a good sign.<sup>34</sup> And in *United States v. Carloss*, he dissented when the majority held to a carelessly loose definition of “search” under the Fourth Amendment.<sup>35</sup>

He has also shown he will stick to the text of the Constitution instead of reading into it. For example, in *Cordova v. City of Albuquerque*, he explained in a concurring opinion that judges should not assume the validity of claims not clearly expressed in the Constitution (in this case, the Fourth Amendment).<sup>36</sup>

Another area of the law that is of great importance to checking the power of the administrative state lies in how much deference courts should give to the statutory interpretations of such agencies – also known as the *Chevron* doctrine.<sup>37</sup> As an originalist, Judge Gorsuch is very critical of such excessive deference to executive agency authority.<sup>38</sup> In his unanimous decision in *Gutierrez v. Brizuela v Lynch*, he expressed considerable skepticism of these legal doctrines that call for courts to abandon their important role as checks on executive power.<sup>39</sup> His opinion is impressive both for its lucidity and the knowledge of American and British legal history it exhibits. This is an area of the law that has badly departed from its originalist moorings and needs corrective action to be taken, and Judge Gorsuch appears to be one of the best jurists in

the nation to lead the Court back in an originalist direction on this issue. Anyone concerned about runaway executive branch authority (regardless of the party in power) should consider this to weigh heavily in favor of Judge Gorsuch.

In his speech given at Case Western Reserve University as a tribute to Justice Scalia after his death, Judge Gorsuch endorsed the late justice's approach when he said judges should strive "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."<sup>40</sup>

What more can we ask for in replacing the late Justice Antonin Scalia? Based on his philosophical and judicial record, we urge the immediate confirmation of Judge Neil Gorsuch for the U.S. Supreme Court.

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<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626-27 (2015) (Scalia, J., dissenting).

<sup>2</sup> Petition for a Writ of Certiorari, *Gloucester County School Board v. G.G.*, No. 16-273 (Oct. Term 2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/08/Gloucester-Cty-Cert-Pet-FINAL-w-APPX.pdf>.

<sup>3</sup> Dear Colleague Letter, U.S. Department of Justice and U.S. Department of Education, May 13, 2016, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwinxv\\_umPfQAhWnwVOKHTc9A6gQFggmMAI&url=https%3A%2F%2Fwww.justice.gov%2Fopa%2Ffile%2F850996%2Fdownload&usq=AFQjCNFnsy-RHuW\\_kbcq5wgJ\\_Ojv3PQT4A&sig2=HgNoEAHGbs4L21SXnpfXOg&bvm=bv.141536425,bs.1,d.eWE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwinxv_umPfQAhWnwVOKHTc9A6gQFggmMAI&url=https%3A%2F%2Fwww.justice.gov%2Fopa%2Ffile%2F850996%2Fdownload&usq=AFQjCNFnsy-RHuW_kbcq5wgJ_Ojv3PQT4A&sig2=HgNoEAHGbs4L21SXnpfXOg&bvm=bv.141536425,bs.1,d.eWE).

<sup>4</sup> Dear Colleague Letter, U.S. Department of Justice and U.S. Department of Education, February 22, 2017, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>.

<sup>5</sup> Brief of Petitioner, *Trinity Lutheran Church v. Pauley*, No. 15-577 (Oct. Term 2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranPetitionersBrief.pdf>.

<sup>6</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

<sup>7</sup> Petition for a Writ of Certiorari, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (Term TBD), available at <http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf>.

<sup>8</sup> Travis Weber and Adam Burton, *Religious Liberty and the "Wedding Vendor" Cases*, Family Research Council (Dec. 2016), <http://downloads.frc.org/EF/EF16L23.pdf>.

<sup>9</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

<sup>10</sup> See Petition for a Writ of Certiorari, *Doyle v. Taxpayers for Public Education*, No. 15-556 (Term TBD), available at <http://www.scotusblog.com/wp-content/uploads/2015/11/Families-cert-petition.pdf> (same issue as *Colorado State Bd. of Education v. Taxpayers for Public Education*).

<sup>11</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>12</sup> Travis Weber, "'Abortion Distortion' at work in *Whole Woman's Health v. Hellerstedt*," FRC Blog, June 28, 2016, accessed December 16, 2016, <http://www.frcblog.com/2016/06/abortion-distortion-work-whole-womans-health-v-hellerstedt/>.

<sup>13</sup> *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

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- <sup>14</sup> “HHS Mandate Information Central,” The Becket Fund for Religious Liberty, accessed December 16, 2016, <http://www.becketfund.org/hhsinformationcentral/>.
- <sup>15</sup> *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).
- <sup>16</sup> “HHS Mandate Information Central.”
- <sup>17</sup> *Stormans v. Wiesman*, 136 S. Ct. 2433 (2016) (Alito, J., dissenting).
- <sup>18</sup> *Ibid.*
- <sup>19</sup> *Hobby Lobby v. Sebelius*, 723 F.3d 114 (10th Cir. 2013).
- <sup>20</sup> *Little Sisters v. Burwell*, 799 F.3d 1315 (10th Cir. 2015) (dissenting from denial of rehearing en banc).
- <sup>21</sup> *United States v. Quaintance*, 2010 U.S. App. LEXIS 10218, at \*2 (10th Cir. May 19, 2010).
- <sup>22</sup> *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014) (upholding RLUIPA claim).
- <sup>23</sup> *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1325 (10th Cir. 2010) (upholding RLUIPA claim).
- <sup>24</sup> *Ali v. Wingert*, 569 F. App’x 562 (10th Cir. 2014).
- <sup>25</sup> *Green v. Haskell County Bd. of Comm’rs*, 574 F.3d 1235 (10th Cir. 2009) (dissenting from denial of rehearing en banc).
- <sup>26</sup> *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095 (10th Cir. 2010) (dissenting from denial of rehearing en banc).
- <sup>27</sup> *Sumnum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007) (dissenting from denial of rehearing en banc).
- <sup>28</sup> *Planned Parenthood Ass’n of Utah v. Herbert*, 839 F.3d 1301 (10th Cir. 2016) (dissenting from denial of rehearing en banc).
- <sup>29</sup> *Hill v. Kemp*, 478 F.3d 1236, 1261 (10th Cir. 2007).
- <sup>30</sup> *Pino v. United States*, 507 F.3d 1233 (10th Cir. 2007).
- <sup>31</sup> *Pino v. United States*, 183 P.3d 1001 (Okla. 2008).
- <sup>32</sup> *Pino v. United States*, 273 F. App’x 732 (10th Cir. 2008).
- <sup>33</sup> *United States v. Krueger*, 809 F.3d 1109 (10th Cir. 2015).
- <sup>34</sup> *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016).
- <sup>35</sup> *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016) (Gorsuch, J., dissenting).
- <sup>36</sup> *Cordova v. City of Albuquerque*, 816 F.3d 645 (10th Cir. 2016) (Gorsuch, J., concurring).
- <sup>37</sup> *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
- <sup>38</sup> Daniel Fisher, “Bureaucrats May Be The Losers If Gorsuch Wins A Seat On Supreme Court,” *Forbes*, January 26, 2017, accessed March 2, 2017, <https://www.forbes.com/sites/daniefisher/2017/01/26/bureaucrats-may-be-the-losers-if-gorsuch-wins-a-seat-on-supreme-court/2/#d958fd74a929>.
- <sup>39</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016).
- <sup>40</sup> Honorable Neil M. Gorsuch, 2016 *Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Res. L. Rev. 905, 906 (2016), available at: [http://scholarlycommons.law.case.edu/caselrev/?utm\\_source=scholarlycommons.law.case.edu%2Fcaseirev%2Fvol66%2Fiss4%2F3&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](http://scholarlycommons.law.case.edu/caselrev/?utm_source=scholarlycommons.law.case.edu%2Fcaseirev%2Fvol66%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages).