NOTABLE OPINIONS

Religious Liberty

Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc) (concurrence)

- Judge Gorsuch joined an en banc opinion—later affirmed by the Supreme Court in *Burwell v. Hobby Lobby*—overturning an administrative Obamacare ruling that required closely-held corporations to violate their religious beliefs.
- Judge Gorsuch also wrote separately to explain his view that the corporation's individual owners and directors, as well the corporations themselves, had valid religious freedom claims:
  - "As the [individual owners] describe it, it is their *personal involvement* in facilitating access to devices and drugs that can have the effect of destroying a fertilized human egg that their religious faith holds impermissible. . . . [I]t is not for 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."
  - "[I]t is beyond question that the [owners] have Article III standing to pursue their claims individually . . . because the [Obamacare] mandate infringes the [owners'] religious liberties by requiring them to lend what their religion teaches to be an impermissible degree of assistance to the commission of what their religion teaches to be a moral wrong."

Little Sisters of the Poor v. Burwell, 799 F.3d 1315 (10th Cir. 2015) (joining dissent from the denial of en banc review)

- A panel of the Tenth Circuit held that Obamacare did not violate the Religious Freedom Restoration Act or the First Amendment, even though the law required religious organizations like the Little Sisters to violate their express religious commitments. Judge Gorsuch and the other dissenters disagreed with the panel and sought rehearing en banc.
  - "The opinion of the panel majority is clearly and gravely wrong—on an issue that has little to do with contraception and a great deal to do with religious liberty. When a law demands that a person do something the person considers sinful, and the penalty for refusal is a large financial penalty, then the law imposes a substantial burden on that person's free exercise of religion."
- The Supreme Court reversed and remanded the panel opinion in light of the parties' agreement that contraceptive coverage could be provided to petitioners' employees without any notice from petitioners. *Zubik v. Burwell*.

Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (majority)

- Judge Gorsuch held that government officials failed to meet the high bar set by Congress in a 2000 statute (the Religious Land Use and Institutionalized Persons Act) written to protect churches and religious prisoners. A prison's mere assertion that it would be "unduly burdensome" to provide a prisoner with access to its existing facilities was "conclusory legalese (borrowed from far-flung substantive due process doctrine, no less)" which "does no more to prove a compelling interest than post-hoc rationalizations unsupported by record evidence."
- Justice Alito later adopted the same analysis in *Holt v. Hobbs*, criticizing other lower courts for simply "defer[ing] to [] prison officials' mere say-so that they could not accommodate [a prisoner's] request."

Establishment Clause

Utah Highway Patrol v. Am. Atheists, 637 F.3d 1095 (2010) (dissent from denial of reh'g en banc)

- A panel of the Tenth Circuit held that the Constitution required Utah to remove roadside crosses honoring fallen state troopers. Judge Gorsuch disagreed and issued a dissent from denial of rehearing.
  - Judge Gorsuch argued that the panel had misapplied the *Lemon v. Kurtzman* "reasonable observer" test to order the removal of Utah's monuments by "employing [a hypothetical] observer full of foibles and misinformation," one with "selective and feeble eyesight" who notices only the religious aspects of a monument and not its secularizing context.
  - Judge Gorsuch argued as well that the court should have considered "whether even the true reasonable observer/endorsement test [under *Lemon*] remains appropriate for assessing Establishment Clause challenges" in light of the Supreme Court's decision not to use that test in a more recent 2005 case, *Van Orden v. Perry*.
- Justice Thomas dissented from the denial of certiorari, citing Judge Gorsuch's opinion.

Green v. Haskell County, 574 F.3d 1235 (2009) (dissent from denial of reh'g en banc)

- A panel of the Tenth Circuit ordered the removal of a Ten Commandments display at an Oklahoma courthouse. Judge Gorsuch disagreed with the decision and issued a dissent from denial of rehearing.
  - Judge Gorsuch argued that the panel erroneously "focused on the perceptions of an unreasonable and mistake-prone observer," and that 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 [Ten Commandments] alongside other markers of our nation's legal and cultural history do not threaten an establishment of religion."

Separation of Powers

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (2016) (majority and concurrence)

- Judge Gorsuch's majority opinion held that federal agencies cannot retroactively revise and overturn a judicial decision about the law's meaning.
- Judge Gorsuch's concurrence discussed the overwhelming growth of the regulatory state, arguing that Supreme Court cases like *Chevron USA v. NRDC* and *Natl Cable Assn v. Brand X* have "permit[ted] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that [is] difficult to square with the Constitution of the framers' design." In light of the founders' vision of our system of separated powers, Judge Gorsuch argued, the Supreme Court ought to reconsider its deference doctrines.
  - *Chevron* and *Brand X* "mean[] a judicial declaration of the law's meaning in a case or controversy [is] subject to revision by a politically accountable branch of government," a situation that ignores the fact that "[w]hen the political branches

disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It's called legislation."

- Broad deference to agency interpretations of the law essentially establishes "a judge-made doctrine for the abdication of the judicial duty." "Some concern has to arise . . . when so much power is concentrated in the hands of a single branch of government. . . . [O]n any account [deference cases like *Chevron* and *Brand X*] certainly seem[] to have added prodigious new powers to an already titanic administrative state . . . an arrangement [] that seems pretty hard to square with the Constitution of the founders' design."
- "[I]n a world without [these cases] . . . if this goliath of modern administrative law were to fall . . . [we] would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug would not be pulled out from under them tomorrow, the next day, or after the next election. . . . We managed to live with the administrative state before [cases like *Chevron* and *Brand X* and]… [w]e could do it again. Put simply . . . in a world without [them] . . . very little would change—except perhaps the most important things."

- Judge Gorsuch's arguments echo those Justice Thomas advanced in his concurrence in *Michigan v. EPA*, where he argued that current case law "wrests from the Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive. . . . As in other areas of our jurisprudence concerning administrative agencies, we seem to be straying further and further from the Constitution without so much as pausing to ask why."
- Judge Gorsuch's arguments are also similar to those in concurring opinions filed by Justices Scalia, Thomas, and Alito in *Perez v. Mortgage* Bankers, where Justice Scalia argued that he was "unaware of any [] history justifying deference to agency interpretations of its own regulations. And there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means."

Administrative State

Caring Hearts v. Burwell, 824 F.3d 968 (2015) (majority)

- Judge Gorsuch held that a federal agency improperly sought to apply new and prospectively applicable regulations to punish a private party for conduct that was already completed and expressly permitted by the law in force at the time.
  - "[O]ne thing no agency can do is apply the wrong law to citizens who come before it, especially when the right law would appear to support the citizen and not the agency."
  - "This case has taken us to a strange world where the government itself—the very 'expert' agency responsible for promulgating the 'law' no less—seems unable to keep pace with its own frenetic lawmaking. A world Madison worried about long ago, a world in which the laws are 'so voluminous they cannot be read' and constitutional norms of due process, fair notice, and even the separation of powers seem very much at stake."
  - "Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called 'delegated' legislative authority. The number of formal rules these agencies have issued thanks to their delegated authority has grown so exuberantly it's hard to keep up."
  - "[A]ll this delegated legislative activity by the executive branch raises interesting questions about the separation of powers" and "troubling questions about due process and fair notice—questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing 'law.'"

Trans Am Trucking v. Dept of Labor, 833 F.3d 1215 (2016) (dissent)

- In dissent, Judge Gorsuch insisted on following the plain text of the statute under review and explained that the court's "only task is to decide whether the decision was an illegal one." He argued that, while the Department of Labor offered various policy arguments for its position, its position was at war with the plain statutory language.
    - "Maybe the Department [of Labor] would like such a law, maybe someday Congress will adorn our federal statute books with such a law. But it isn't there yet. And it isn't our job to write one—or to allow the Department to write one in Congress's place."
    - "The fact is, statutes are products of compromise, the sort of compromise necessary to overcome the hurdles of bicameralism and presentment. And it is [the courts'] obligation to enforce the terms of that compromise as expressed in the law itself, not to use the law as a sort of springboard to combat all perceived evils. . . . "

Nondelegation Doctrine

United States v. Nichols, 784 F.3d 666 (2015) (dissent from the denial of en banc review)

- Judge Gorsuch dissented from the denial of en banc review, arguing that the Constitution's nondelegation doctrine prohibits Congress from granting the Attorney General the power to write new laws.
    - His dissent sought to protect the Constitution's separation of powers: "[i]f the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce."
    - "[B]y separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. . . The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king."
- Judge Gorsuch's arguments were previewed by Justice Scalia in *Reynolds v. United States*, a 2012 case involving the same law where Justice Scalia argued that "it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable[.]"
- Judge Gorsuch also pursued arguments found in concurrences by Justices Alito and Thomas in *Dep't of Transp. v. Ass'n of Am. Railroads*, where Justice Alito noted that "[t]he principle that Congress cannot delegate away its vested power exists to protect liberty," and Justice Thomas argued that "[i]f a person could be deprived of [life, liberty, or property] . . . on the basis of a rule [] not enacted by the legislature then he was not truly free."

Republican Form of Government

Kerr v. Hickenlooper, 759 F.3d 1186 (10th Cir. 2014) (dissent from denial of reh'g en banc)

- The citizens of Colorado passed a referendum limiting the power of the state legislature to adopt new taxes. A panel of the Tenth Circuit held that it could entertain a challenge to the citizen referendum and decide whether the referendum violated the Constitution's "republican form of government" clause. Judge Gorsuch dissented, explaining that the Supreme Court had previously held that disputes like this implicate political questions and are not appropriate for the courts to decide.

- "The plaintiffs' failure for so long to identify any legal standards for deciding their own case pretty strongly suggests there aren't any—or that what standards the Guarantee Clause may contain won't prove favorable to them. Indeed, this hypothesis is fully borne out by the scholarly literature on the Clause's text and original meaning."
- "Federalism and comity appear to count for little when we condemn a state, its governor, and its constitution to a multi-year scavenger hunt up and down the federal court system looking for some judicially manageable standard that might permit us to entertain the case in the first place. . . . Here, the plaintiffs haven't even attempted to identify workable legal standards for adjudicating their case despite many opportunities over many years. If the law's promise of treating like cases alike is to mean something, this case should be put to bed now . . . rather than being destined to drag on forlornly to the same inevitable end."

- The Supreme Court summarily vacated and remanded the panel opinion.

Judicial Restraint

Planned Parenthood Ass'n of Utah v. Herbert, — F.3d —, 2016 WL 6310780 (2016) (dissent from the denial of reh'g en banc)

- A panel of the Tenth Circuit overturned a district court's factual findings and required it to grant a preliminary injunction to Planned Parenthood. The injunction forced Utah's governor to continue the group's public funding, even though the governor sought to end funding after videos showed Planned Parenthood officials engaging in what the governor believed to be the unlawful sale of fetal tissue. Judge Gorsuch disagreed with the panel decision and issued a dissent from denial of rehearing.
- Both parties to the case accepted that the governor's decision to terminate funding would have been lawful if—as the district court expressly found— his decision was based on the group's affiliation with those accused of illegally selling fetal tissue. Judge Gorsuch argued that it was inappropriate for the panel to overturn the district court's express factual finding, and that the panel should have deferred to the district court's traditional role as factfinder.
  - "As it stands, the panel opinion leaves litigants in preliminary injunction disputes reason to worry that this court will sometimes deny deference to district court factual findings; relax the burden of proof by favoring attenuated causal claims our precedent disfavors; and invoke arguments for reversal untested by the parties, unsupported by the record, and inconsistent with principles of comity."
  - "Preliminary injunction disputes like this one recur regularly and ensuring certainty in the rules governing them, and demonstrating that we will apply those rules consistently to all matters that come before us, is of exceptional importance to the law, litigants, lower courts, and future panels alike."

Cordova v. City of Albuquerque, 816 F.3d 645 (2016) (concurring in judgment)

- Judge Gorsuch sought to limit the role of the courts in creating new constitutional law by protecting law enforcement officers against new judicially-created malicious prosecution tort claims under the aegis of the Fourth and Fourteenth Amendments.
  - "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."
  - "When the parties cannot be bothered to identify the source of their supposedly

constitutional complaint, when the avenues to a constitutional home are lined with doubt, and when there's a perfectly free and clear common law route available to remedy any wrong alleged in this case, I just do not see the case for entering a fight over an element of a putative constitutional cause of action that may not exist and no one before us needs. Often judges judge best when they judge least."

- Judge Gorsuch followed the approach laid out by Justice Rehnquist in his majority opinion in the 1981 case of *Parratt v. Taylor*. The Supreme Court is currently considering this issue in *Manuel v. City of Joliet*.

Sixth Amendment

Williams v. Jones, 571 F.3d 1094 (2009) (dissent)

- Dissenting from the panel opinion, Judge Gorsuch concluded that the Sixth Amendment's right to counsel is not violated when defense counsel fails to secure a favorable plea agreement, so long as the defendant received effective assistance at a fair trial.
  - "The right to effective representation originated in the Due Process Clause, which prohibits the government from depriving any person of liberty by fundamentally unfair or unreliable procedures. Because the right to effective assistance exists to serve the underlying purpose of ensuring a fair trial, a violation of the right requires some showing that counsel's deficiency impacted the fair trial right."
  - The defendant "would have us follow him through the looking glass, to a world where a fair trial is called 'prejudice'; where the results of a fair trial are void because of a lost opportunity rather than an infringed legal entitlement; and where a lawyer's incompetence transforms the executive plea bargain prerogative into a judicially enforceable entitlement. I do not believe the Sixth Amendment permits us to accompany him there."
- Judge Gorsuch's position was later echoed in the dissents written by Justices Scalia and Alito in *Lafler v. Cooper* and joined by Chief Justice Roberts and Justice Thomas.

Fourth Amendment

United States v. Nicholson, 721 F.3d 1236 (2013) (dissent)

- A panel of the Tenth Circuit held that evidence from an officer's stop and search had to be suppressed and charges dropped because the officer made a reasonable and innocent mistake about whether the defendant's conduct violated state law, a mistake even a state appellate court had made. Judge Gorsuch dissented.
  - Judge Gorsuch explained that a traffic stop does not *automatically* violate the Fourth Amendment just because it is premised on a police officer's incorrect understanding about the law. Some officer mistakes about the law may be "reasonable" within the plain and original meaning of the Fourth Amendment. And that includes innocent mistakes that even state courts themselves have already made. "In an age where law is as plentiful as trees in a forest and as tangled as the undergrowth, is it really appropriate to assume—as the court does—that every mistake of law is a Fourth Amendment violation?"
- The Supreme Court later agreed with Judge Gorsuch's view in *Heien v. North Carolina*.

United States v. Carloss, 818 F.3d 988 (2016) (dissent)

- Judge Gorsuch argued that the curtilage of the home is protected from government trespasses when the homeowner has made clear that uninvited visitors are not welcome and the government lacks a warrant or exigent circumstances or other reasonable bases for an intrusion or good faith. Judge Gorsuch explained that the

original meaning of the Fourth Amendment forbids such trespasses.

- "The Fourth Amendment is . . . supposed to protect the people at least as much now as it did when adopted, its ancient protections still in force whatever our current intuitions or preferences might be. . . . [Y]ou can't help but wonder if millions of homeowners (and solicitors) might be surprised to learn that even a long line of clearly posted No Trespassing signs are insufficient to revoke the implied license to enter a home's curtilage—that No Trespassing signs have become little more than lawn art."
- "[O]ur job . . . [is] to apply the [Fourth] Amendment according to its terms and in light of its historical meaning. . . . [I]t is hardly the case that following the Fourth Amendment's teachings would leave the government as bereft of lawful alternatives as it seems to suppose. . . . Our duty of fidelity to the law requires us to respect all these law enforcement tools. But it also requires us to respect the ancient rights of the people when law enforcement exceeds their limits."

- Judge Gorsuch followed Justice Scalia's 2013 opinion in *Florida v. Jardines*, which also protected the land abutting a home from governmental intrusion.

Habeas

Prost v. Anderson, 636 F.3d 578 (2011) (majority)

- Judge Gorsuch limited the availability of habeas corpus review to a money launderer and drug trafficker who sought to reopen his case a decade after pleading guilty.
- The federal habeas statute contains a "savings clause" that allows a defendant to pursue second or successive habeas petitions if, but only if, his first habeas petition was "inadequate or ineffective to test the legality of his detention." Judge Gorsuch held that a defendant's failure to pursue an argument in his first petition does not render that petition "inadequate or ineffective to test the legality of his detention." Any failure here rests with the prisoner, not the petition process.
  - As Judge Gorsuch noted, "[t]he principle of finality, the idea that at some point a criminal conviction reaches an end, a conclusion, a termination, 'is essential to the operation of our criminal justice system.'"
  - In foreclosing a further appeal under the statutory scheme provided by Congress, Judge Gorsuch looked specifically at the text of the savings clause in the statute and the statutory context, noting that Congress "sought to balance the competing interests of vindicating the potentially innocent and providing a degree of finality to criminal convictions without pursuing either interest blind to the other."
- Judge Gorsuch's opinion was the first to interpret the federal habeas savings clause by closely examining its textual and structural features.

NONJUDICIAL WRITINGS

Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 66 Case Western L. Rev. 905 (2016)

- Judge Gorsuch argued in this memorial tribute to Justice Scalia that "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. As Justice Scalia put it, '[i]f you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong.'"

Law's Irony, 37 Harv. J.L. & Pub. Pol'y 743 (2014)

- Judge Gorsuch identified several ironies of contemporary American law that stem from noble ideals. He argued that open-ended civil discovery rules designed to promote speedy and fair resolution of legal disputes have inappropriately increased litigation delays and costs; that our commitment to written legal rules to make law accessible has ironically led to a proliferation of statutes and regulations that make it impossible to know the law's content; and that in their quest for excellence law schools have adopted requirements that unnecessarily raise the costs of entry into the profession and, consequently, limit access to justice. He also identified an irony in cynical complaints about the legal system's failings: "If sometimes the cynic in all of us fails to see our Nation's successes when it comes to the rule of law maybe it's because we are like David Foster Wallace's fish that's oblivious to the life-giving water in which it swims. Maybe we overlook our Nation's success in living under the rule of law only because, for all our faults, that success is so obvious it's sometimes hard to see."

THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA, Princeton University Press 2006

- Judge Gorsuch examined and defended the right of states to enact traditional laws banning assisted suicide and euthanasia. In doing so, he built on Chief Justice Rehnquist's opinions for the Supreme Court in *Quill v. Vacco* and *Glucksberg v. Washington* and philosophical work by John Finnis and Robert George.

THE LAW OF JUDICIAL PRECEDENT, Thomson West 2016

- Together with a law professor and other appellate judges, Judge Gorsuch offered the first treatise-length discussion on the use of judicial precedent in American law in a century.