

# GORSUCH, THE JUDICIOUS JUDGE

## A COMMON-SENSE APPROACH TO EDUCATION ISSUES

**SINCE NEIL M. GORSUCH WAS NOMINATED** for the U.S. Supreme Court seat left vacant by the death of conservative jurist Antonin Scalia a year ago, the search for tea leaves has been relentless. Reviews of his long career, including his current appointment on the U.S. Court of Appeals for the Tenth Circuit, have settled on descriptors like gracious and eloquent.

Those in the education community have been studying Gorsuch with particular interest, given the critical issues before the court. In the current term, justices are hearing cases involving the appropriate scope of services guaranteed by federal special-education law, government aid to religious institutions providing educational services, and how intellectual property law applies to sports uniform design. Advocates on all sides want to know: if confirmed, how might Gorsuch influence these and other education-related decisions?

Forecasting a future justice's positions is hazardous, as presidents from Abraham Lincoln to George H. W. Bush could attest. New justices may view issues differently once they ascend to the court, and nominees considered reliably in line with the political right or left may tack in another direction. This holds even for an experienced judge with a substantial record to review: past performance, as the warning goes, is no guarantee of future results. Plus, intermediate-court judges like Gorsuch are bound by Supreme Court precedents, so appeals-court opinions often reflect more about a judge's understanding

by CLINT BOLICK





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of precedents than his or her constitutional philosophy.

Still, judges often do focus on and return to central themes and questions in their judicial service or scholarship. So, to learn more about Gorsuch's jurisprudence and see how it might connect to education, I read roughly two dozen of the major cases in which he has ruled, which yielded several key dispositions that likely would accompany him to Washington, D.C. I found Gorsuch's work to be sensible, law-bound, and quite readable, whether he is addressing high-toned issues such as the First Amendment's free exercise clause or more mundane subjects such as student burping. While my own position as a jurist precludes me from linking his past opinions to cases currently pending before the Supreme Court or headed in that direction, I'll sketch out some features of his jurisprudence and describe specific decisions with relevance for education—and leave the prognosticating to others.

### Similarities and Differences with Scalia

My review revealed five key aspects of Gorsuch's work. He is a textualist, does not automatically defer to government authority, takes a broad view of standing, is a clear writer, and is unfailingly gracious with his colleagues.

First, textualism is the key to understanding Gorsuch, much as it was with the justice he is nominated to replace. (I am

In every decision I reviewed, Gorsuch focused like a laser beam on the relevant text. Like any thorough judge, he'll address competing arguments and surrounding case law, but the text drives his decisions—in some cases leading to conclusions he might have preferred to avoid. As Gorsuch has observed, "a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels."

The second key point involves Gorsuch's orientation toward deferring to government authority. On this, conservative judges come in many stripes. Many, like the late judge Robert Bork, believe courts should nearly always defer to democratic processes. Some judges side with the state on almost all criminal issues, while others consistently enforce individual rights and constitutional constraints on government power. Gorsuch's jurisprudence falls in the latter category, and resembles Justice Scalia's in enforcing those rights and limits.

Third, Gorsuch takes a broad view of standing. The Constitution limits federal courts to deciding "cases or controversies," which the courts have construed fairly narrowly, with the result that many genuine disputes are often bounced out of court. Within precedential and statutory boundaries, Gorsuch's broad view—regardless of the position the plaintiffs are advancing—allows greater access to the courts.

Fourth, he is a conversational writer. He proceeds in logical progression, seriously entertains alternative arguments, and typically reaches conclusions that are difficult to fault—a quality that is more unusual in American jurisprudence than one might expect. When writing in dissent, which he does fairly often, Gorsuch applies the same logical approach to dismantle the majority view.

This makes the fifth feature so important: Gorsuch is genuinely and unfailingly gracious. This is perhaps the biggest distinction between Gorsuch and Scalia. Both are witty writers, but while Scalia displayed an acidic wit unsparingly aimed at his colleagues, Gorsuch goes out of his way to credit not only the good faith of those who disagree with him but also the quality of their arguments.

Disagreeing without being disagreeable makes it much easier to agree in future cases, a quality that may make for a very effective Supreme Court tenure.

### Education Decisions

While Gorsuch has not had the chance to weigh in on every education-related issue he would be likely to confront on the Supreme Court (for example, he has not dealt with affirmative action), he has heard several cases involving equity and special-education law. I've highlighted specific decisions of interest below.

**Textualism doesn't mean you always reach the policy decisions that you want—as Gorsuch has observed, "a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels."**

also a textualist.) It is a school of constitutional and statutory interpretation in which the judge begins his or her decision by looking closely at the plain text, with the idea that each word should be taken at its literal, everyday meaning. If the meaning of the text is plain, the judge generally stops there. If the meaning is unclear, the judge will employ tools such as dictionaries to determine what the words meant to the people who used them. Textualists like me believe it is illegitimate to change the meaning of words or to employ interpretative techniques, such as considering "evolved" meanings or the law of foreign countries, which can lead to changed meaning.

**Student discipline.** Gorsuch balances individual rights and school authority in the student discipline context. In *Hawker v. Sandy City Corporation* (2014), he joined an unsigned panel opinion holding that a police officer did not use unconstitutionally excessive force against a nine-year-old student who stole an iPad from his school. The officer subdued the child using a “twist-lock” technique, in which a suspect’s hand is grabbed and his arm twisted to distract him with pain. “The facts in this case are unfortunate in all respects,” the court wrote. “It is regrettable that a police officer feels the need to resort to physical force, handcuffs, and arrest in order to gain control of and reason with a nine-year-old child. Equally regrettable is the disrespectful, obdurate, and combative behavior of that nine-year-old child. In any event, given [the child’s] resistance, [the officer’s] actions in this case simply do not rise to the level of a constitutional violation.”

In *A. M. v. Holmes* (2016), however, Gorsuch dissented from a decision by a conservative colleague upholding the arrest and handcuffing of a 7th grader who disrupted a class by repeatedly generating fake burps. Gorsuch pointed to several state-court rulings criminalizing conduct only where it substantially interfered with the actual functioning of the school, rather than momentarily diverting attention from classroom activity.

This case illustrates his stylistic differences from Scalia, who might have agreed with Gorsuch but in doing so surely would have castigated the other judges for disagreeing. Instead, quoting Dickens’s *Oliver Twist* for the proposition that the law can be “a ass—a idiot,” Gorsuch commented, “So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands—and in that I see the best of our profession and much to admire. It’s only that, in this particular case, I don’t believe the law happens to be as much of a ass as they do.”

**Special education.** Gorsuch has had several cases involving the Individuals with Disabilities Education Act (IDEA), and his rulings exhibit a serious yet modest view of the law’s scope. Federal courts have played a key role in the development of special education policy by interpreting what Congress wrote in IDEA three decades ago, and the Supreme Court is reviewing what the law means by a “free appropriate public education” as it considers *Endrew F. v. Douglas County School District*, which deals with the standard of services districts are required to provide (see “Special Education Standards,” *legal beat*, Summer 2017).

In *Muskrat v. Deer Creek Public Schools* (2013), he joined a panel opinion concluding that a family did not have to exhaust



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IDEA administrative procedures in order to seek legal remedy based on their claims of physical abuse. However, he affirmed the district-court ruling that teachers and aides repeatedly bringing the child to a closed-door “timeout room,” as well as alleged instances of physical abuse at school, did not rise to constitutional violations because they did not “shock the conscience.”

In *Garcia v. Board of Education of Albuquerque Public Schools* (2008), Gorsuch upheld an earlier ruling that a student plaintiff was not entitled to compensatory educational services despite the district’s failure to provide an individualized education program (IEP) after the student left school and evidenced no willingness to return. “Our decision today should . . . not be taken as excusing the school district’s actions, or as condemning Myisha for being a poor student,” Gorsuch wrote. “Rather, our affirmance of the district court’s disposition is simply a product of the discretion that Congress reposed in that court.”

In *Thompson R2-J School District v. Luke P.* (2008), Gorsuch reversed a lower-court decision and declined a family’s request to have private-school tuition costs reimbursed by their local school district after they opted to enroll their child with severe autism in a residential program. The decision noted that IDEA requires only that a school district demonstrate progress toward meeting the goals of an IEP, rather than assuring that progress can be generalized in the home and other environments, and thus the district was not responsible for the costs of a residential placement. Gorsuch observed that “Congress did not provide

in IDEA a guarantee of self-sufficiency for all disabled persons,” and that Congress “prescribed that IEPs should generally be addressed to and carried out in the least restrictive environment available—usually the public school classroom.” He concluded, “we sympathize with Luke’s family and do not question the enormous burdens they face. Our job, however, is to apply the law as Congress has written it and the Supreme Court has interpreted it.”

**Funding equity.** Most litigation concerning the equity of school funding has been heard in state rather than federal courts. However, there are multiple cases now active that could provide an opportunity for the Supreme Court to revisit its 1973 *San Antonio Independent School District v. Rodriguez* ruling, which held that the U.S. Constitution does not guarantee a right to equitable school funding (see “Reconsidering the Supreme Court’s *Rodriguez* Decision,” *forum*, Spring 2017). Gorsuch joined the opinion in *Petrella v. Brownback* (2015), holding that students and parents have standing to challenge statutory provisions that cap school districts’ ability to raise extra money through additional property taxes, on equal protection and due process grounds. The court did not comment on the merits of their complaint.

**Free speech rights of public employees.** In *Casey v. West Las Vegas Independent School District* (2007), Gorsuch ruled on free-speech protections for employees within the school district

supervisors, “fell sufficiently outside the scope of her office to survive even the force of the Supreme Court’s decision in *Garcetti*.”

## Key Decisions Outside Education

In addition to Gorsuch’s opinions on education-focused cases, there are many more cases that may indirectly affect education. Below, I highlight several cases of interest.

**Agency discretion.** The case that is likely most illuminating about Gorsuch’s future Supreme Court jurisprudence is *Gutierrez-Brizuela v. Lynch* (2016). As an intermediate-court judge, Gorsuch has been judicious about applying Supreme Court precedents without much editorial comment. Not so in this case, where he voiced loudly his separation-of-powers concerns about unbridled agency power. His views on this issue, if they prevail, have the potential to limit the power of federal agencies, including the U.S. Department of Education.

Gorsuch’s opinion raises questions about the so-called “Chevron doctrine,” which stems from a 1984 decision in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.* In its decision, the Supreme Court ruled that where a federal statute is ambiguous, it is presumed that Congress has delegated authority to executive agencies to reasonably interpret it, and

courts should generally defer to agency expertise. The Supreme Court has cited Chevron deference in its decisions in subsequent cases, and the doctrine has been credited with giving executive agencies the power to define vague laws, including, for example, environmental laws that carry criminal penalties. The doctrine is controversial among judges, constitutional scholars, and policymakers, including current GOP leaders in Congress; in 2016, the House passed a bill that would end the Chevron doctrine, but it failed to advance under threat of veto from former president Barack Obama.

In *Gutierrez-Brizuela*, the question was whether, in the context of obscure Board of Immigration Appeals (BIA) regulations, agencies can overturn judicial opinions retroactively. In the opinion by Gorsuch, the court held BIA could not do so. Then Gorsuch issued an opinion concurring with his own majority opinion (a nifty move I may emulate sometime), calling out the “elephant in the room,” namely, the Chevron doctrine. That doctrine, he wrote, permits “executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”

Gorsuch warns that by usurping the judicial role, “liberties may now be impaired not by an independent decisionmaker seeking to declare the law’s meaning as fairly as possible—the

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setting. The plaintiff, a former superintendent, claimed she was demoted and then fired for exercising protected speech when she complained about allegedly illegal conduct by the district. Gorsuch dismissed most of the plaintiff’s claims, which were based on First Amendment protections, noting that in *Garcetti v. Ceballos* (2006), the Supreme Court took a narrow view of government employees’ free-speech rights and therefore a narrow view of their ability to seek legal remedy if disciplined for speech acts.

Gorsuch dutifully applied that precedent while ensuring that it did not apply to speech engaged in as a private citizen. As most of the complaints were made to the plaintiff’s supervisors pursuant to the plaintiff’s official duties, which are unprotected by the First Amendment, they were unprotected from retaliation, and thus those claims were dismissed. But a complaint made to the state attorney general, after the plaintiff lost confidence in her



*On religion, Gorsuch tends to view the scope of the establishment clause narrowly and the free exercise clause broadly. The Supreme Court followed similar logic when upholding a controversial Ohio school voucher program by a 5-4 vote in *Zelman v. Simmons-Harris* (2002).*

decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.” He argues that “under any conception of our separation of powers, I would have thought powerful and centralized authorities like today’s administrative agencies would have warranted less deference from other branches, not more,” and that judicial deference has “added prodigious new powers to an already titanic administrative state.”

**Religion.** Religion issues often touch on education. The First Amendment’s establishment clause was the principal weapon used to attack school vouchers, and the Supreme Court upheld vouchers in *Zelman v. Simmons-Harris* (2002) by a 5-4 vote, leaving them potentially subject to the court’s changing composition. Likewise, the free exercise clause—along with the Religious Freedom Restoration Act (RFRA) and related federal legislation—speaks to such issues as whether and how public schools can teach students about religion, and how school districts can

appropriately provide educational options for religious students (such as through vouchers to attend separate programs or accommodations to tailor typical offerings to their needs).

Like other textualists, Gorsuch tends to view the scope of the establishment clause (“Congress shall make no law respecting an establishment of religion”) fairly narrowly, and the free exercise clause (“or prohibiting the free exercise thereof”) fairly broadly. Sometimes these issues overlap with the First Amendment’s speech clause (“or abridging the freedom of speech”), which also is broad on its face.

In *Summum v. Pleasant Grove City* (2007), Gorsuch joined an opinion dissenting from the Tenth Circuit’s decision that struck down a municipality’s decision about which privately donated monuments it would accept for permanent display in a public park. The case eventually made its way to the Supreme Court, where the ruling adopted much of Gorsuch’s reasoning that displaying one monument, even if it is religious, did not obligate a governmental authority to display other offered monuments from other groups, including religious organizations.

Similarly, Gorsuch dissented in *American Atheists, Inc. v. Davenport* (2010), arguing that a private organization’s erection of crosses on a highway to commemorate fallen police officers was permissible under the establishment clause. The deciding factor

was whether a “reasonable observer” would think that government was endorsing religion. The majority, Gorsuch charged, “strikes down Utah’s policy only because it is able to imagine a hypothetical ‘reasonable observer’ who *could* think Utah means to endorse religion—even when it doesn’t.” The test, he continued, “rests on an uncertain premise—that this court possesses the constitutional authority to invalidate not only duly enacted laws and policies that *actually* ‘respect[] the establishment of religion’ . . . but also laws and policies a reasonable hypothetical observer could *think* do so. And in this circuit’s case, to go even a step further still, claiming the authority to strike down laws and policies a conjured observer could *mistakenly* think respect an establishment of religion. That is a remarkable use of the ‘awesome power’ of judicial review.” (OK, I detect a smidgeon of Scalia-style sarcasm in this passage, but it is well justified.)

**If they prevail, Gorsuch’s separation-of-powers concerns about unbridled agency power, voiced loudly in his opinion in *Gutierrez-Brizuela*, have the potential to limit the power of federal agencies including the U.S. Department of Education.**

Gorsuch sounded similar themes in *Green v. Haskell County Board of Commissioners* (2009), where the court invalidated the privately funded display of the Ten Commandments on public property. Notably, Gorsuch questioned the continuing vitality of *Lemon v. Kurtzman*, the 1971 Supreme Court decision setting forth a three-pronged establishment clause test which subsequently has been “criticized by many members of the Court, and a variety of legal scholars.” The so-called “*Lemon* test” decision is often referenced in decisions striking down government programs that direct funding to participating religious institutions.

In his decision, Gorsuch chastised the majority for “focusing on the perceptions of an unreasonable and mistake-prone observer” and ignoring “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.” He concluded that among “inclusive displays on places like the courthouse lawns, the Ten Commandments can convey a ‘secular moral message’ about the primacy and authority of law, as well as the ‘history and moral ideals’ of our society and legal tradition.”

Gorsuch also heard a key religious-freedom case involving the Affordable Care Act (ACA): *Hobby Lobby Stores, Inc. v. Sebelius* (2013). In that, he joined other judges in ruling that the company and its owners had standing under RFRA to challenge a federal contraceptive health-insurance-coverage mandate under ACA as a violation of their sincerely held religious beliefs. The court ruled, “It is beyond question that associations—not just individuals—have Free Exercise rights.”

Rejecting an inquiry into the “theological merit” of the religious beliefs, the majority ruled, “Our only task is to determine whether the claimant’s belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.” The court assigned the burden to the government to show its regulations advanced a compelling interest through the least restrictive means, and found the government did not. As a result, the court approved an injunction against the rules.

In a concurring opinion, Gorsuch noted that RFRA “doesn’t just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs.” Another passage illustrates his textualist approach to statutory interpretation: “In many ways this case is the tale of two statutes. The ACA compels the Greens [Hobby Lobby’s owners] to act. RFRA says they need not. . . . The tie-breaker is found not in our own opinions about good policy but in the laws Congress enacted. Congress structured RFRA to override other legal mandates, including its own statutes, if and when they encroach on religious liberty.”

Gorsuch applied similar reasoning in his majority opinion in *Yellowbear v. Lampert* (2014), finding that a prison violated an inmate’s religious freedom protected by federal statute by denying him access to a sweat lodge. The court found the prison’s justifications unpersuasive. “The more abstract the level of inquiry, often the better the governmental interest will look,” the court observed. But “the deference this court must extend the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat.”

It is no small task to replace Justice Scalia, who was a giant of American jurisprudence. But Neil Gorsuch’s judicial record is impressive. His combination of experience, intellect, and temperament provide the prospect of replacing one jurisprudential giant with another.

*Clint Bolick was appointed to the Arizona Supreme Court in January 2016. He previously litigated constitutional cases, including education issues. His books include Voucher Wars: Waging the Legal Battle Over School Choice.*