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Mainstream Jurisprudence and Some First Amendment Problems: Judge Neil M. Gorsuch on Free Expression

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Introduction

On the 2016 campaign trail, then-candidate Donald Trump promised he would pick a Supreme Court nominee in the mold of the late Justice Antonin Scalia. To this end, President Trump narrowed his candidate shortlist to three federal appellate judges who had the approval of the Heritage Foundation and Federalist Society,[1] and whom the press perceived as conservative.[2] Of the candidates, several scholars and commentators labeled Judge Neil M. Gorsuch of the Tenth Circuit the judge whose jurisprudence most closely tracks Justice Scalia's.[3] Indeed, several journalists and scholars argued Judge Gorsuch could prove to be significantly more conservative than the late Justice.[4]

We argue that Judge Gorsuch's characterization as a more conservative Justice Scalia—however true it may be as a general matter—is not particularly helpful in understanding the role a potential Justice Gorsuch would play in the field of free expression. In broad strokes, Judge Gorsuch's opinions in key First Amendment expression cases have fallen, like Justice Scalia's, within the mainstream. In the same vein as Justice Scalia's frequent votes with more liberal Justices—often as part of large majorities—in free expression cases,[5] Judge Gorsuch's free expression opinions have been either unanimous opinions for

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1. Ed Kilgore, *Trump's Supreme Court Pick Is Due Next Week, With 3 Conservatives Still in the Running*, N.Y. MAG. (Jan. 24, 2017, 3:04 PM), http://nymag.com/daily/intelligencer/2017/01/trumps-scotus-short-list-down-to-3-conservatives.html.
2. *See, e.g., id.*
3. *See* Oliver Roeder & Harry Enten, *Trump Picks Neil Gorsuch, A Scalia Clone, for the Supreme Court*, FIVETHIRTYEIGHT (Jan. 31, 2017, 8:04 PM), http://53eig.ht/2jSTQAs.
4. *See* Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES, https://nyti.ms/2jSTKsD (last updated Feb. 1, 2017).
5. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 446 (2011) (8-1 decision).

three-judge panels or separate concurrences with unanimous judgments.[6] Usually, these opinions have solidified protections for expression.[7]

Significant differences remain between Judge Gorsuch and Justice Scalia. Justice Scalia's trademark originalism has barely registered in Judge Gorsuch's free speech jurisprudence.[8] Justice Scalia himself did not use originalism to resolve First Amendment questions as much as he might have. By one account, he used it only about 30% of the time.[9] But that is still a lot of cases—and a lot more than Judge Gorsuch's 0%.[10] Moreover, a clear minimalist thread runs through Judge Gorsuch's decisions,[11] while Justice Scalia was not known for his minimalism.[12]

Ultimately, even though Judge Gorsuch's First Amendment methodology may diverge from Justice Scalia's, we conclude Judge Gorsuch is unlikely to work a sea change in this area of the Court's jurisprudence.

To understand Judge Gorsuch's potential impact on free expression jurisprudence as a Justice, we must look first to his work in this area as a judge. We begin in Part I with an overview of Judge Gorsuch's published free expression opinions. In Part II, we examine Judge Gorsuch's originalism and minimalism. In Part III, we look at Judge Gorsuch's substantive vision for what types of expression the First Amendment protects.

I. Freedom of Expression Cases

Judge Gorsuch has authored five published opinions implicating First Amendment expression issues. These cases have dealt with defamation (twice);[13] the Petition Clause,[14] retaliation,[15] and campaign finance.[16] Judge Gorsuch wrote the controlling opinion in three of these cases. In the other two, Judge

6. *See infra* Part I.
7. *See infra* Part I.
8. *See infra* Part II.A.
9. Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMM. L. & POL'Y 385, 402 (2012) (finding that only 30.4% of Justice Scalia's freedom of expression opinions through the 2010 Term used originalism).
10. *See infra* Part II.A.
11. *See infra* Part II.B.
12. *See* Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1064-71 (2009) (evaluating Justices' minimalist and "maximalist" tendencies and finding that Justices Scalia and Thomas were maximalist outliers relative to the rest of the Court).
13. Bustos v. A & E Television Networks, 646 F.3d 762, 762 (10th Cir. 2011); Mink v. Knox, 613 F.3d 995, 1012 (10th Cir. 2010) (Gorsuch, J., concurring).
14. Van Deelen v. Johnson, 497 F.3d 1151, 1153 (10th Cir. 2007).
15. Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1325 (10th Cir. 2007).
16. Riddle v. Hickenlooper, 742 F.3d 922, 930 (10th Cir. 2014) (Gorsuch, J., concurring).

Gorsuch joined the majority in the judgment but wrote separately to reject portions of the majority's reasoning as unnecessary.

A. Defamation

Judge Gorsuch has written two notable opinions involving constitutional limits on liability for defamation. In *Bustos*, Judge Gorsuch addressed a prisoner's defamation claim against a television network.[17] Writing for a unanimous panel, Judge Gorsuch decided *Bustos* on state law grounds, holding the plaintiff could not prove the statement at issue was materially false.[18] But Judge Gorsuch's opinion—which he listed as a "significant constitutional opinion[]" in his Senate Judiciary Committee questionnaire[19]—highlighted the issue's constitutional and historical underpinnings.[20] Judge Gorsuch chronicled the truth defense's origins at English common law, where "in a twist worthy of an award from the Circumlocution Office," truth was a defense in civil cases but an aggravating factor in criminal cases.[21] He noted that American courts "[s]ensibly" adopted the English civil approach, which became "a First Amendment imperative."[22]

In the other defamation case, *Mink v. Knox*,[23] Judge Gorsuch wrote a concurrence in which he expressed a reluctance to extend protections for defendants *too* far. Thomas Mink was a university student who published online a satirical editorial column fake-written by "Junius Puke," a not-so-veiled reference to a professor, Junius Peake.[24] Someone else might have brushed it off; Peake called the cops.[25] A criminal libel investigation ensued, deputy district attorney Susan Knox issued a search warrant, the police executed it, and Mink sued.[26] The district court dismissed Mink's claim against Knox, holding in part that Knox was entitled to qualified immunity because it was not clearly established that the column was constitutionally protected speech.[27]

17. 646 F.3d at 763.

18. *Id.* at 767.

19. Neil M. Gorsuch, United States Senate Committee on the Judiciary: Questionnaire for Nominee to the Supreme Court 36-37 (2017), https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20(Public).pdf.

20. *See Bustos*, 646 F.3d at 763-64.

21. *Id.* at 763.

22. *Id.* at 764.

23. 613 F.3d 995, 1012 (10th Cir. 2010) (Gorsuch, J., concurring).

24. *Id.* at 998 (majority opinion).

25. *Id.*

26. *Id.* at 998-99.

27. *Id.* at 999.

The Tenth Circuit reversed, holding that the column was a parody and thus constitutionally protected under clearly established circuit precedent.[28] Judge Gorsuch concurred, wanting to avoid what he saw as unnecessary dicta defending that precedent.[29]

B. Right to Petition

Judge Gorsuch addressed the First Amendment's Petition Clause in *Van Deelen v. Johnson*, where a taxpayer claimed that county officials tried to intimidate him into dropping tax assessment challenges.[30] The district court dismissed the suit, holding that the tax challenge was not a matter of public concern and therefore was not constitutionally protected.[31] Judge Gorsuch, writing for a unanimous panel, rejected the public concern limitation, explaining that the right to petition "extends to matters great and small, public and private."[32] While widely accepted, this position is not entirely uncontroversial.[33]

C. Retaliation

Judge Gorsuch addressed First Amendment retaliation claims by public employees in *Casey v. West Las Vegas Independent School District*, which involved a school superintendent who had been fired after pushing her school board to bring the local Head Start program into compliance with federal requirements.[34] The Tenth Circuit addressed which of Casey's statements she had made as an employee rather than a private citizen; under the then-new Supreme Court precedent of *Garcetti v. Ceballos*,[35] the First Amendment does not protect the former class of statements.[36] Ultimately, Judge Gorsuch, writing for a unanimous panel, held that the "portfolio" of Casey's duties included advising her superiors and instructing her subordinate, but that she acted as a private citizen when she went around her superiors to complain to the state attorney general.[37]

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28. *Id.* at 1006, 1009, 1011.

29. *Id.* at 1012-13 (Gorsuch, J., concurring).

30. 497 F.3d 1151, 1153 (10th Cir. 2007).

31. *Id.*

32. *Id.*

33. *See* Dobbey v. Ill. Dep't of Corr., 574 F.3d 443, 447 (7th Cir. 2009) (criticizing *Van Deelen* as "exceedingly broad[]").

34. 473 F.3d 1323, 1325-27 (10th Cir. 2007).

35. 547 U.S. 410, 421-22 (2006).

36. *Casey*, 473 F.3d at 1328-29.

37. *Id.* at 1329-33.

D. Campaign Finance

Judge Gorsuch also addressed freedom of expression in his concurrence in *Riddle v. Hickenlooper*, although the case primarily dealt with Fourteenth Amendment campaign finance questions.[38] Plaintiffs challenged a Colorado campaign finance law that functionally allowed major-party candidates to raise twice as much money from an individual donor in a given campaign as third-party, independent, and write-in candidates.[39] The panel applied a campaign finance-specific form of heightened scrutiny to strike down the statute.[40] Judge Gorsuch concurred, agreeing the law was unconstitutional but noting uncertainty about the correct level of scrutiny to apply based on the Supreme Court's campaign finance jurisprudence.[41]

II. First Amendment Style

A. First Amendment Originalism?

Judge Gorsuch's originalism has received significant attention. But it has not been evident in his free expression jurisprudence.

Judge Gorsuch did not rely on originalist analysis in any of the opinions discussed above. The closest he came was in *Bustos*, where he explored the truth defense's history.[42] Because the case turned on a state law question,[43] there was not much room for originalism. The First Amendment's role would have been to constrain state law had it not already been more protective than required.[44] Accordingly, Judge Gorsuch used history only to flag the issue's constitutional backdrop and to support the idea that "the American defamation tort is intended to protect" the plaintiff's interest in her public reputation.[45]

More surprising is *Van Deelen*,[46] which extended the right to petition without discussing its original understanding. There, the Supreme Court had not definitively resolved the First Amendment issue—whether the right contains a public concern requirement—and a series of district court cases had come out the other way.[47] Yet Judge Gorsuch's only historical reference came

38. 742 F.3d 922, 931-32 (10th Cir. 2014) (Gorsuch, J., concurring).

39. *Id.* at 924-25 (majority opinion).

40. *Id.* at 927-28.

41. *Id.* at 930-33 (Gorsuch, J., concurring).

42. *See* Bustos v. A & E Television Networks, 646 F.3d 762, 763-64 (10th Cir. 2011).

43. *See id.* at 767.

44. *Id.* at 764.

45. *See id.*

46. Van Deelen v. Johnson, 497 F.3d 1151 (10th Cir. 2007).

47. *See id.* at 1156-58.

after he decided that question.[48] He argued that the right had been clearly established since the Boston Tea Party, defeating qualified immunity.[49] And that was it. Indeed, Judge Gorsuch made his key analytical moves on the First Amendment issue without citation.[50]

Even if Judge Gorsuch felt the issue was open and shut, his failure to at least give lip service to originalism is surprising. There is certainly room for an originalist analysis of the Petition Clause, as evidenced by the Justices' dueling analyses in *Borough of Duryea v. Guarnieri*.[51] There, writing for a seven-Justice majority, Justice Kennedy conducted an originalist analysis of the right to petition beginning with its origins in the Magna Carta.[52] Justice Kennedy found that a public concern requirement applies to public employees but hedged on whether it extends beyond the employment context.[53] Justice Scalia, in reply, invoked originalist evidence to raise doubts about whether lawsuits are protected by the Petition Clause at all and to reject the public-concern requirement outright.[54] Thus, *Guarnieri* highlights a gap between Judge Gorsuch and Justice Scalia with respect to using First Amendment originalism.

It is possible that Judge Gorsuch could use the extra maneuvering room he'd have as a Justice to embrace a more originalist approach, but the First Amendment has not exactly provided fertile ground for originalism.[55] And nothing in Judge Gorsuch's record suggests that he desires to revitalize First Amendment originalism.

B. Maintaining Minimalism

Throughout his free expression opinions, Judge Gorsuch has shown a consistent tendency to avoid deciding legal issues unnecessarily. His concurrences in *Mink* and *Riddle* sought a more cautious resolution to the case at hand than those provided by the majority opinions. Similarly, his majority opinion in *Casey* followed a fairly intuitive interpretation of Supreme Court precedent, and he took care to include language indicating the decision's limits.

The *Mink* panel relied on *Pring*, a Tenth Circuit precedent directly on point that resolved the key First Amendment issue.[56] Judge Gorsuch agreed that *Pring*

48. *See id.* at 1158.

49. *Id.*

50. *See id.* at 1156.

51. 564 U.S. 379 (2011).

52. *Id.* at 394-99.

53. *Id.*

54. *Id.* at 403-07 (Scalia, J., concurring in the judgment in part and dissenting in part).

55. *See* Silver & Kozlowski, *supra* note 9, at 390-91, 423-24 (discussing the lack of originalist sources and arguing originalism fails to restrain judges in this area).

56. Mink v. Knox, 613 F.3d 995, 1006-07 (10th Cir. 2010) (citing Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 438-43 (10th Cir. 1982)).

controlled but criticized the majority for "offer[ing] a lengthy new defense" of *Pring*.[57] Asserting that "reasonable minds can and do differ about the soundness of [*Pring*'s] rule," he raised two potential arguments against it: (1) it might "unnecessarily constitutionalize[] limitations that state tort law already imposes"; and (2) it might "unjustly preclude private persons from recovering for intentionally inflicted emotional distress regarding private matters, in a way the First Amendment doesn't compel."[58] Judge Gorsuch did not necessarily endorse these arguments, but to "avoid these thickets," he demurred from the panel's discussion of *Pring*.[59] Indeed, the single most notable aspect of Judge Gorsuch's concurrence may be the language he borrowed from then-Judge Roberts: "[I]f it is not necessary to decide more, it is necessary not to decide more."[60]

Judge Gorsuch also displayed his minimalism in *Riddle*, where the majority elected to examine a campaign finance statute under *Buckley v. Valeo*[61] heightened scrutiny.[62] Judge Gorsuch concurred to observe that while the law was unconstitutional, the appropriate scrutiny tier was uncertain.[63] Like in *Mink*, Judge Gorsuch noted the lack of definitive Supreme Court guidance on the issue.[64] Recognizing the difficulty of the scrutiny question, Judge Gorsuch pointed out that the court needn't resolve it.[65] Colorado's law failed even under the more relaxed *Buckley* standard: *Buckley* requires that contribution limits be designed to ward off corruption, but the challenged law was not.[66] Judge Gorsuch underscored the decision's narrowness by describing how an alternative regime would survive the *Riddle* court's reasoning.[67] The opinion indicates Judge Gorsuch's desire both to limit the decision's scope and to clarify that the political branches retain the ability to solve the problems campaign finance regulation seeks to address.

Casey presents a different flavor of Judge Gorsuch's minimalism in that he is writing for a unanimous panel, not criticizing the breadth of his colleagues' opinion. *Casey* was primarily concerned with resolving the new question put to courts by *Garcetti*: When is a government employee speaking pursuant to her

57. *Id.* at 1012 (Gorsuch, J., concurring).

58. *Id.*

59. *Id.* at 1013.

60. *Id.* (quoting PDK Labs., Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment)).

61. 424 U.S. 1 (1976).

62. Riddle v. Hickenlooper, 742 F.3d 922, 927-28 (10th Cir. 2014).

63. *Id.* at 930-32 (Gorsuch, J., concurring).

64. *Id.* at 931.

65. *Id.* at 932.

66. *Id.* at 932-33 (citing *Buckley*, 424 U.S. at 25-29).

67. *Id.* at 933.

official duties, rendering her speech unprotected?[68] While *Casey* did not present the same opportunities as *Mink* and *Riddle* to avoid deciding certain legal questions, Judge Gorsuch's opinion has a minimalist hue. Importantly, he makes sure to note the limits of the decision, leaving room for other kinds of public employee whistleblowing.[69]

III. First Amendment Substance

Judge Gorsuch's freedom of expression opinions indicate that he is generally satisfied with the scope of First Amendment protections. While Judge Gorsuch has hinted at some areas where he may favor narrower protections than most judges and others where he may favor more expansive protections, his views occupy the mainstream.

Bustos and *Mink* exemplify Judge Gorsuch's cautious approach. In *Bustos*, Judge Gorsuch embraces the First Amendment's firm protections against tort liability while counseling judges to avoid taking those protections so far that they create libel-proof plaintiffs.[70] This commonsensical limitation is not the work of a judge itching to undo *New York Times Co. v. Sullivan*.[71]

Mink is perhaps more concerning to those who favor a robust First Amendment. At first glance, Judge Gorsuch's concurrence is a benign call for judicial restraint.[72] Considering, however, that all the panel did was straightforwardly apply and explain *Pring*,[73] Judge Gorsuch's concurrence reads as a nudge toward rolling back *Pring*'s parody protections. Judge Gorsuch's stance is hardly the stuff of dystopian novels; he suggests only that private figures might sometimes be able to recover for speech on private matters.[74] This view has much in common with Justice Alito's dissent from the Court's extension of First Amendment protection to the Westboro Baptist Church's picketing at a military funeral[75]—a case in which Justice Scalia joined all seven other Justices in the majority.[76]

68. Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1328 (10th Cir. 2007) (citing Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).

69. *Id.* at 1331.

70. Bustos v. A & E Television Networks, 646 F.3d 762, 763-65, 769 (10th Cir. 2011).

71. 376 U.S. 254 (1964).

72. *See* Mink v. Knox, 613 F.3d 995, 1013 (10th Cir. 2010) (Gorsuch, J., concurring).

73. *See id.* at 1004-08 (majority opinion).

74. *See id.* at 1012 (Gorsuch, J., concurring).

75. *See* Snyder v. Phelps, 562 U.S. 443, 463-64 (2011) (Alito, J., dissenting).

76. *See id.* at 446 (majority opinion).

Judge Gorsuch inches instead toward expanded protections in *Van Deelen*. His rhetoric about the "liberties . . . essential to the continuity of our democratic enterprise" demonstrates his deep respect for the values at stake.[77]

Conclusion

Ultimately, we do not expect a potential Justice Gorsuch to advocate any major changes to the Court's First Amendment freedom of expression jurisprudence. Methodologically, he cannot be called a "Scalia clone."[78] Perhaps most significantly, if you were hoping for a Justice who would "open up our libel laws,"[79] Judge Gorsuch is not your man.

77. Van Deelen v. Johnson, 497 F.3d 1151, 1155 (10th Cir. 2007).

78. *Cf.* Roeder & Enten, *supra* note 3.

79. *See* Hadas Gold, *Donald Trump: 'We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM EST), http://politi.co/1QlBCjS.