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## Neil Gorsuch: On Energy and Environmental Law

Benjamin Warden

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# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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## NEIL GORSUCH: ON ENERGY AND ENVIRONMENTAL LAW

BENJAMIN WARDEN\*

### *Table of Contents*

I. Who is Neil Gorsuch?.....	1494
A. Early Life and Education.....	1494
B. Early Legal Career.....	1497
1. Clerkships.....	1497
2. Private Law.....	1498
3. Department of Justice.....	1498
C. Personal Life.....	1498
II. Gorsuch's Philosophies Applied to Energy and Environmental Law	
Cases.....	1499
A. Energy Law.....	1500
1. <i>Energy and Environmental Legal Institute v. Epel</i> .....	1500
2. <i>Entek GRB, LLC v. Stull Ranches, LLC</i> .....	1502
3. <i>Lexington Insurance Co. v. Precision Drilling Co, L.P.</i> .....	1503
B. Environmental Law.....	1505
1. <i>Cook v. Rockwell International Corp.</i> .....	1505
2. <i>Scherer v. U.S. Forest Service</i> .....	1506
3. <i>Hydro Resources Inc. v. U.S. Environmental Protection</i>	
<i>Agency</i> .....	1507
4. <i>United States v. Magnesium</i> .....	1508
5. <i>Backcountry Hunters v. U.S. Forest Service</i> .....	1513

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\* Second-year student at the University of Oklahoma College of Law. Special thanks to my roommate and friend, Sam Jimison, for his part in inspiring this article's topic and for his relentless work as an editor for the Journal.

6. <i>George v. United States</i> .....	1514
7. <i>Forest Guardians v. U.S. Fish and Wildlife Service</i> .....	1514
III. <i>Gorsuch v. Scalia—On Chevron and Standing</i> .....	1515
A. <i>On Chevron</i> .....	1516
B. <i>On Standing</i> .....	1517
IV. <i>Conclusion</i> .....	1518

The purpose of this article is to provide a comprehensive analysis into the judicial philosophies of the newest Associate Justice of the Supreme Court, Neil Gorsuch.<sup>1</sup> In this way, the article may serve practitioners and legal scholars alike with a means to predict the outcome of future Supreme Court cases concerning energy and environmental law.

The article breaks into three main sections. Broken into three subparts, Part I provides not only insight into Gorsuch’s pre-confirmation life but also discussion on his: (1) Early Life and Education, (2) Early Legal Career, and (3) Personal Life. Part II, “Gorsuch’s Philosophies Applied to Energy and Environmental Law Cases,” overviews Gorsuch’s prominent judicial philosophies followed by a series of Gorsuch-authored, case analyses. Every analysis identifies the judicial philosophy Gorsuch uses and how that philosophy affects the outcome. Divided in two subparts—“Energy Law” and “Environmental Law”—the cases discussed fall within one of these two categories. Finally, Part III, “Gorsuch v. Scalia—On *Chevron* and Standing,” compares the two justices and details how their differences affect the future of the court and the industry.

### *I. Who is Neil Gorsuch?*

#### *A. Early Life and Education*

Neil McGill Gorsuch was born in Denver, Colorado on August 29, 1967.<sup>2</sup> He attended grade school at Christ the King, a K-12 Catholic school, where he learned the importance of moral character and service.<sup>3</sup> Gorsuch, according to his classmates and teachers, seemed to internalize this

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1. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES, <http://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> (last visited Mar. 24, 2018).

2. *Neil Gorsuch*, INSIDEGOV, <http://supreme-court-justices.insidegov.com/l/113/Neil-Gorsuch#References&s=ref> (last visited Dec. 18, 2017).

3. Kimberly Kindy, Sari Horwitz, & William Wan, *Simply stated, Gorsuch is steadfast and surprising*, WASH. POST, (Feb. 18, 2017), <https://www.washingtonpost.com/graphics/politics/gorsuch-profile/>.

importance in ways unlike many other kids his age.<sup>4</sup> One of Gorsuch's closest childhood friends, Jonathan Brody, recalled a time when this character shined.<sup>5</sup> Apparently, Gorsuch damaged a sleeping bag he borrowed from Brody to use at a sleepover one night.<sup>6</sup> Gorsuch was distraught because he felt that his integrity was put into question.<sup>7</sup> Brody remembered this intense form of self-reflection, and subsequently found himself questioning whether he took the importance of character "seriously enough."<sup>8</sup>

In somewhat of a contrast, Gorsuch's parents, Anne and David, both of whom were lawyers, taught their children from an early age the "art of verbal sparring."<sup>9</sup> Family debates could ignite anywhere and everywhere—about anything and everything.<sup>10</sup> Gorsuch's younger brother, J.J., said that during these bouts their parents would encourage them to consider the rationality of both arguments before forming their conclusions.<sup>11</sup> This lesson, according to J.J., taught the brothers that "the truth is often [somewhere] in the middle."<sup>12</sup> No doubt, a good lesson for a young Gorsuch destined to reach the highest court.

Anne Gorsuch was the politician of the family, successfully campaigning for the Colorado state legislature in 1976,<sup>13</sup> and later, to her appointment by President Reagan as the first, female Administrator of the United States Environmental Protection Agency.<sup>14</sup> After her appointment, Anne moved the kids to Washington D.C. and enrolled Gorsuch at Georgetown Preparatory School.<sup>15</sup> While Anne Gorsuch was busy cutting the agency's budget by twenty-two percent, Neil Gorsuch was championing Reagan conservatism in every way he could.<sup>16</sup> His stance was so well-known that

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Sara Clarke, *10 Things You Didn't Know About Neil Gorsuch*, U.S. NEWS, (Jan. 31, 2017, 8:18 PM), <https://www.usnews.com/news/national-news/articles/2017-01-31/10-things-you-didnt-know-about-neil-gorsuch>.

15. Who We Are, *Alumni, Notable Alumni*, GEORGETOWN PREPARATORY SCHOOL, <http://www.gprep.org/about/alumni/notable-alumni> (last visited Dec. 18, 2017).

16. Kindy, *supra* note 3.

an entry to his high school yearbook labeled him the “founder of the ‘Fascism Forever Club.’”<sup>17</sup> Unfortunately for the Gorsuch family, during Neil’s sophomore year, Congress grew concerned that Anne was mismanaging a toxic waste Superfund program, and after she denied their request for documents about the investigation, held her in contempt.<sup>18</sup> After only twenty-two months as administrator, Anne Gorsuch resigned.<sup>19</sup> Though Gorsuch struggled with the news of his mother’s resignation, he remained enrolled and later served as a United States Senate Page and became a national champion in debating,<sup>20</sup> until graduating in 1985.<sup>21</sup>

After high school, Gorsuch attended Columbia University where he received a degree in political science and was inducted into Phi Beta Kappa, a collegiate honors society.<sup>22</sup> As a freshman, Gorsuch co-founded “The Fed,” a newspaper inspired by two Columbia alumni, and authors of the original Federalist Papers, John Jay and Alexander Hamilton.<sup>23</sup> In their first issue, Gorsuch and his counterparts explained their mission: “Our voice will be an aggressive but considered one, one that may make you think or may just make you angry. But it will be heard, and it will not be shouted down.”<sup>24</sup>

After terrorizing the liberals on campus with his fiery editorial comments at Columbia, Gorsuch traveled to Boston to begin his legal training at Harvard Law School. While at Harvard, Gorsuch participated in the Harvard Prison Legal Assistance Project and the Harvard Defenders program.<sup>25</sup> He also served as an editor of the Harvard Journal of Law and Public Policy.<sup>26</sup> Ken Mehlman, Gorsuch’s housemate who later became chairman of the Republican National Committee, said that Gorsuch was

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17. *Id.*

18. *Id.*

19. Marina Cassio, *Predicting How a “Justice” Gorsuch Would Impact Environmental Law*, MARTEN LAW, (Apr. 3, 2017), <http://www.martenlaw.com/newsletter/20170404-justice-gorsuch-environmental-law>.

20. Kindy, *supra* note 3.

21. Who We Are, *supra* note 15.

22. Clarke, *supra* note 14.

23. Kindy, *supra* note 3.

24. *Id.*

25. Clarke, *supra* note 14.

26. *Neil M. Gorsuch ’91 nominated to the U.S. Supreme Court*, HARV. L. TODAY, (Jan. 31, 2017) <https://today.law.harvard.edu/president-trump-nominates-neil-m-gorsuch-91-u-s-supreme-court/>.

unlike many of the other Harvard students in that he cared about others and what they were saying.<sup>27</sup> He graduated *cum laude* in 1991.<sup>28</sup>

Only upon the final leg of his education, Gorsuch begins to distinguish himself from the other justices on the bench. After serving as a judicial clerk for Judge David B. Sentelle on the U.S. Court of Appeals for the D.C. Circuit, Gorsuch attended Oxford as a Marshall Scholar, performing research on assisted suicide and euthanasia under the supervision of acclaimed “natural law” scholar and theorist, John Finnis.<sup>29</sup> In his dissertation, later published as a book entitled, “The Future of Assisted Suicide and Euthanasia,” Gorsuch advocates against assisted suicide, opining that the “intentional taking of human life by private persons is always wrong.”<sup>30</sup> In Oxford, Gorsuch met and married his wife, Louise, a champion equestrian on the Oxford riding team.<sup>31</sup>

## B. Early Legal Career

### 1. Clerkships

As mentioned previously, Justice Gorsuch clerked for Judge David Sentelle on the D.C. Circuit immediately after graduating from Harvard.<sup>32</sup> After earning his doctorate at Oxford, Gorsuch returned to the States and clerked for Supreme Court Justices Byron White and Anthony Kennedy from 1993 to 1994.<sup>33</sup> Justice White hired Gorsuch but retired part-way through his clerkship.<sup>34</sup> Interestingly, Gorsuch and White are the only Coloradans to sit on the high court.<sup>35</sup> Perhaps even more interesting, because Kennedy is still active on the bench, Gorsuch is the first Justice to decide cases alongside a Justice he previously clerked under.<sup>36</sup>

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27. Kindy, *supra* note 3.

28. Hon. Neil Gorsuch, THE FEDERALIST SOC’Y, <https://fedsoc.org/contributors/neil-gorsuch> (last visited Dec. 18, 2017).

29. J. Paul Kelleher, *Neil Gorsuch’s “natural law” philosophy is a long way from Justice Scalia’s originalism*, VOX, (Mar. 20, 2017, 8:20 AM), <https://www.vox.com/the-big-idea/2017/3/20/14976926/gorsuch-natural-law-supreme-court-hearings>.

30. Clarke, *supra* note 14.

31. Kindy, *supra* note 3.

32. *Gorsuch ’91*, *supra* note 26.

33. Cassio, *supra* note 19.

34. Ephrat Livni, *Neil Gorsuch is the first US Supreme Court justice to sit on the bench with his high court boss*, QUARTZ, (Apr. 7, 2017), <https://qz.com/953345/neil-gorsuch-is-the-first-us-supreme-court-justice-to-sit-on-the-bench-with-his-high-court-boss/>.

35. Cassio, *supra* note 19.

36. Livni, *supra* note 34.

## 2. *Private Law*

Instead of joining an established firm, Gorsuch took a riskier route with a two-year-old, firm out of Washington—Kellogg, Huber, Hansen & Todd—working closely with one of the firm’s partners and leading trial lawyers, Mark Hansen.<sup>37</sup> The two became close, and Hansen later stated that the inherent risk of losing in litigation “pushed” Gorsuch to become a better litigator and that Gorsuch’s Midwestern way of talking gave Gorsuch a natural edge when communicating to a jury.<sup>38</sup> He displayed this effect during his first trial as a lead attorney. After the jury read the verdict in favor of Gorsuch’s client, a juror ran up to Gorsuch and compared him to Perry Mason.<sup>39</sup> Gorsuch became partner in 1998 and remained a partner until leaving the firm to work for President Bush’s Justice Department in 2005.<sup>40</sup>

## 3. *Department of Justice*

Justice Gorsuch served as Principal Deputy to the Associate Attorney General, Robert McCallum, at the Department of Justice from 2005-2006 before being tapped by Bush to become a federal appellate court judge.<sup>41</sup> As Principal Deputy, Gorsuch assisted in managing the Department’s civil litigation components.<sup>42</sup> He also handled all terror litigation arising from the War on Terror.<sup>43</sup>

## C. *Personal Life*

Justice Gorsuch is a family man, an outdoorsman, and a Westerner.<sup>44</sup> He lives in “unincorporated Boulder County, in a mountain-view community on a property with several horses” with his wife, Louis, and his two daughters, Emma and Belinda.<sup>45</sup> He is a black diamond skier,<sup>46</sup> an avid fly-

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37. Kindy, *supra* note 3.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Gorsuch '91*, *supra* note 26.

42. 152 Cong. Rec. S15346 (daily ed. July 20, 2006).

43. Charlie Savage, *Newly Public Emails Hint at Gorsuch’s View of Presidential Power*, N.Y. TIMES, (March 18, 2017), <https://www.nytimes.com/2017/03/18/us/politics/supreme-court-nominee-neil-gorsuch-bush-era.html>.

44. Adam Liptak, *In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES, (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html>.

45. *Id.*

46. *Id.*

fisherman,<sup>47</sup> and hosts regular picnics for his former law clerks.<sup>48</sup> He is famous for beginning an opinion with the statement, “Everyone enjoys a trip to the mountains in the summertime.”<sup>49</sup> In addition to all of that, Gorsuch enjoys rowing, running, and reading.<sup>50</sup> On the second day of confirmation hearings, in fact, Gorsuch said that he loves good fiction, and that “if you want to learn to write you must learn to read.”<sup>51</sup> Until confirmation, Gorsuch taught legal ethics at the University of Colorado Law School.<sup>52</sup>

## *II. Gorsuch’s Philosophies Applied to Energy and Environmental Law Cases*

Judges use judicial philosophy to help them understand, interpret, and rule on legal issues. Justice Gorsuch is no different. Like Scalia and many other conservative jurists, Gorsuch is a “textualist” when interpreting statutes and common, judge-made law<sup>53</sup> and an “originalist” when interpreting the U.S. Constitution.<sup>54</sup> Textualists believe that interpretation of law should focus solely on the written language in the law, ignoring intent in the process.<sup>55</sup> At a lecture delivered to the Case Western Law School in honor of Scalia, Gorsuch declared that a textualist should:

[S]trive 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>56</sup>

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47. Ariane de Vogue, *Meet Neil Gorsuch: A fly-fishing Scalia fan*, CNN, (Feb. 1, 2017), <http://www.cnn.com/2017/01/31/politics/neil-gorsuch-antonin-scalia/index.html>.

48. Liptak, *supra* note 44.

49. Scherer v. U.S. Forest Serv., 653 F.3d 1241, 1242 (10th Cir. 2011).

50. *Gorsuch Confirmation Hearing, Day 2, Part 2*, C-SPAN, <https://www.c-span.org/video/?425138-101/gorsuch-confirmation-hearing-day-2-part-2> (last visited Mar. 3, 2018).

51. *Id.*

52. de Vogue, *supra* note 47.

53. Cassio, *supra* note 19.

54. Kindy, *supra* note 3.

55. *Id.*

56. Honorable Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 2016 Summer Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), in 66 CASE W. RES. L. REV. 905, 909 (2016).



Scalia, a textualist in his own regard, was also a pioneer of Originalism, explaining “[t]he Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted.”<sup>57</sup> In other words, Originalists interpret the words of the U.S. Constitution as they were understood by its authors when they were written.

Unlike Scalia, Gorsuch employs a third—natural law—philosophy if the first two, textualism and originalism, are inapplicable or lacking. This typically occurs when a law is inconclusive, and past precedent cannot rectify the issue.<sup>58</sup> Jurists who embrace a natural law theory believe that judges should consider the morality of a particular law instead of constraining themselves solely to conventional legal materials.<sup>59</sup> Gorsuch adopted this third approach while researching and writing his dissertation in Oxford under the acclaimed natural law jurist, John Finnis.<sup>60</sup> It is important to note that the only areas of law where Gorsuch has openly advocated for natural law is assisted suicide and euthanasia.<sup>61</sup> Further, any environmental or energy law case Gorsuch would face could likely be rectified by either textualism or originalism thus taking natural law out of consideration. It is still worth noting, however, that if it came down to it, and Gorsuch needed to resort to other canons of decision making, it would not be surprising to see his natural law beliefs on center stage. Additional differences between Gorsuch and Scalia are discussed in detail in Section III.<sup>62</sup> The following sections contain case illustrations and analyses which showcase how these philosophies guide Gorsuch’s decision making when he faces energy and environmental law questions.

#### *A. Energy Law*

##### *1. Energy and Environmental Legal Institute v. Epel*

*Illustration.* Coloradans passed an energy mandate requiring electricity generators to ensure that twenty percent of the electricity they sell to

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57. NPR staff, *Originalism: A Primer On Scalia’s Constitutional Philosophy*, NPR, (Feb. 14, 2016, 5:41 PM), <https://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy>.

58. Kelleher, *supra* note 29.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See infra* Section III: “Gorsuch v. Scalia—On *Chevron* and Standing.”

Colorado consumers comes from renewable sources.<sup>63</sup> The Energy and Environment Legal Institute (“EELI”), a non-profit organization that represents coal producers, brought suit against the Commissioners of the Colorado Public Utilities alleging that “because Colorado is a net importer of electricity” and is part of a large electrical grid connecting several states, the new mandate causes out-of-state producers to “lose business with out-of-state utilities who feed their power onto the grid.”<sup>64</sup> This harm, EELI argued, violated one of the three branches of dormant commerce clause jurisprudence.<sup>65</sup>

Gorsuch telegraphed the outcome in the very first sentence when he questioned, “Can Colorado’s renewable energy mandate survive an encounter with the most dormant doctrine in dormant commerce clause jurisprudence?”<sup>66</sup> The answer, of course, was yes. “Detractors find dormant Commerce Clause doctrine absent from the Constitution’s text and incompatible with its structure,” Gorsuch wrote, citing dissents by Justices Antonin Scalia and Clarence Thomas.<sup>67</sup> Continuing, he concluded, “whatever doctrinal pigeonhole you choose to place them in<sup>68</sup> . . . [none] require us to strike down Colorado’s mandate . . . [f]or that mandate . . . isn’t a price control statute, it doesn’t link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters.”<sup>69</sup>

*Analysis.* This case is influential not just for Colorado regulatory authorities, the renewable energy sector, and the citizens of Colorado whom voted and passed this referendum, but also for every state which followed Colorado’s lead by creating similar renewable initiatives. Had the mandate been struck down, other state mandates in style similar would have been in jeopardy.<sup>70</sup> As such, this case is often regarded as Gorsuch’s most significant decision in the regulatory area,<sup>71</sup> and it is a perfect example of

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63. *Energy and Env'tl. Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir. 2015).

64. *Id.* at 1171.

65. *Id.*

66. *Id.* at 1170.

67. *Id.* at 1171.

68. This referred to the three Supreme Court precedents used for dormant commerce clause challenges.

69. *Epel*, 793 F.3d at 1173.

70. Seth Jaffe, *The 10th Circuit Affirms Colorado’s RPS; The Dormant Commerce Clause Remains Dormant*, FOLEY HOAG LLP (July 15, 2015), <http://www.lawandenvironment.com/2015/07/15/the-10th-circuit-affirms-colorados-rps-the-dormant-commerce-clause-remains-dormant/>.

71. Dan Farber, *Gorsuch and the Environment: A Closer Look*, LEGAL PLANET, (Mar. 20, 2017), <http://legal-planet.org/2017/03/20/gorsuch-and-the-environment-a-deeper-dive/>.

how his judicial philosophies interact with and could affect similar laws in the future.

Gorsuch applied Originalism when denying the existence of the dormant commerce clause in this case. He cites to prior dissents from Justices Scalia and Thomas, remarking that the doctrine is absent from the Constitution's text and is incompatible with its structure. According to Gorsuch and other Originalists like him, the dormant commerce clause does not exist simply because it is not found in the text of the Constitution.

If Gorsuch maintains this position, the balance of the Supreme Court on this issue will not change. He shares the same anti-dormant-commerce-clause belief with Scalia who was already the minority in that regard when he was on the bench. Therefore, unless another justice were to change their position, the dormant commerce clause is here to stay.

Supreme Court precedent is binding upon federal courts<sup>72</sup> and in this case, required Gorsuch to apply the dormant commerce clause test no matter how severely it pained him to do so. He used a textualist approach to interpret the dormant commerce clause doctrine and compare it to the Renewable Portfolio Standard in question. He then concluded that because the mandate was not a price controlling statute, the dormant commerce clause could not invalidate it. This is important because it demonstrates that no matter how badly he disagrees with a doctrine or result, if binding precedent it present, he will apply it accordingly. This opinion also shows that Gorsuch, much like Scalia, is not afraid of letting his opinion be known and heard. In that regard, the bench maintains that attitude, too.

## 2. Entek GRB, LLC v. Stull Ranches, LLC

*Illustration.* Entek GRB, LLC, a federal mineral lessee, (“Lessee”) sued Stull Ranches (“Landowner”) to secure access to a well located on surface estate owned by Bureau of Land Management (“BLM”).<sup>73</sup> The “dispute arose when [Lessee] asked permission to enter [Landowner’s] surface estate—both to develop new oil well sites” on Landowner’s property and to gain access to “one of its existing wells located on an adjacent surface estate owned by [BLM.]”<sup>74</sup> Importantly, the road across Landowner’s property was the only means of accessing BLM’s property.<sup>75</sup> Worried that Lessee’s presence would disturb Landowner’s current hunting operations,

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72. *Stare decisis*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining *stare decisis* as: to stand by decided cases; to uphold precedents; to maintain former adjudications).

73. Entek GRB, LLC v. Stull Ranches, LLC, 763 F.3d 1252, 1253 (10th Cir. 2014).

74. *Id.*

75. *Id.*

Landowner refused access. Lessee sued in the District Court of Colorado.<sup>76</sup> The district court granted Lessee's motion for summary judgment in part—entitling them access to portions of Landowner's surface to “mine certain leases lying below,” but denying their request to cross Landowner's surface to service the adjacent well.<sup>77</sup> Lessee appealed to the Tenth Circuit, wherein Judge Gorsuch delivered Lessee full relief.<sup>78</sup>

Gorsuch held that because Landowner is the successor in interest to land grants provided under the Stock-Raising Homestead Act of 1916 (“Act”), Lessee enjoys the right to use the already existing road on Landowner property to service the adjacent well, “rather than being forced to incur the waste of having to build a new and duplicative byway.”<sup>79</sup> To reach this conclusion, Gorsuch interpreted the plain language of the Act and determined that the right to “reenter and occupy” as much of the surface as needed for purposes “reasonably incident” to the mining of mineral beneath, encompasses Lessee's right to access the adjacent well via Landowner's private road.<sup>80</sup>

*Analysis.* Gorsuch employed a textualist approach to this problem, analyzing the plain language of a federal statute to hold for the operator in a leasing agreement. Importantly, Gorsuch did not reference the eternal policy struggle between the rights of private property owners and the interest the government has in regulating oil and gas production. Instead, he offered a straightforward approach to a legal issue and left all bias and leanings to the side.

This type of decision is common for Gorsuch. Where he could address policy, he is often silent. As the later cases indicate, Gorsuch turns to the text before anything else and applies the law as it is instead of trying to mold the law to parallel any social policy.

### 3. *Lexington Insurance Co. v. Precision Drilling Co, L.P.*

*Illustration.* An individual was injured while working on an oil rig.<sup>81</sup> The rig's owner, Precision Drilling Company (“Owner”), paid the individual a settlement for his injuries and sought indemnification from Lexington Insurance Company (“Insurer”).<sup>82</sup> Insurer admits that two insurance policies

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76. *Id.*

77. *Id.* (emphasis added).

78. *Id.*

79. *Id.* at 1255–57.

80. *Id.*

81. *Lexington Ins. Co. v. Precision Drilling Co.*, 830 F.3d 1219, 1220 (10th Cir. 2016).

82. *Id.*

were issued and paid for by Owner to cover accidents like the one here, however, it argues that a Wyoming Anti-Indemnity Statute renders those policies a nullity and thus any coverage was illusory.<sup>83</sup> Insurer brought action seeking declaratory judgment that it had no obligation to indemnify Owner.<sup>84</sup> The District Court of Wyoming granted summary judgment for Insurer and Owner appealed.<sup>85</sup>

Gorsuch, writing for a Tenth Circuit majority, held for Owner and reversed and remanded.<sup>86</sup> He began his opinion by stating that “Wyoming law *usually* prohibits those engaged in oil and gas productions from contractually shifting to others liability for their own negligence.”<sup>87</sup> However, as Gorsuch points out, the statute does not stop there.<sup>88</sup> The next sentence provides that “[t]his provision shall not affect the validity of *any insurance contract*.”<sup>89</sup> Even with this exception pointed out, Insurer argued that legislature intended only to benefit only the company that *purchases* the insurance policy, not third parties.<sup>90</sup> Gorsuch disagreed, stating that “the best evidence of legislative intentions lies in the language the legislature actually adopted and the executive actually signed.”<sup>91</sup> The statute in question, he continues, “expressly allow[s] enforcement of *any* insurance contract—and its choice to do something different than other states have done is a choice we as judges must honor, not undo.”<sup>92</sup> As a last effort, Insurer claims that even if the court is not persuaded by its previous arguments, that Tenth Circuit precedent binds the court to rule in their favor.<sup>93</sup> Gorsuch, again unpersuaded, showed that this precedent is unpublished, unbinding, and factually distinguishable.<sup>94</sup>

*Analysis.* This case demonstrates perfectly how textual jurisprudence can smoothly and efficiently settle litigation. The word “any” as used in the statute plainly excludes from the Anti-Indemnity clause “any and all” insurance contracts, according to Gorsuch. Continuing, he denounced Insurer’s argument that the legislature intended a different result. In perfect

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (emphasis added).

88. *Id.*

89. *Id.*; see WYO. STAT. ANN. § 30–1–131(a)(iii)(B).

90. *Id.* (emphasis added).

91. *Id.* at 1221.

92. *Id.*

93. *Id.* at 1224.

94. *Id.*

textual form, Gorsuch reminded the worlds that the intent of the legislature is only required when ambiguity exists in a statute—not a problem in this case. On this point, Gorsuch quoted a prior decision from the Federal Circuit Court of Appeals: “[w]hen a statute is clear as a glass slipper and fits without strain, it is our job merely to put it on the foot where it belongs.”<sup>95</sup>

### *B. Environmental Law*

#### *1. Cook v. Rockwell International Corp.*

*Illustration.* Landowners filed a class action under the Price-Anderson Act, a federal statute providing for liability after nuclear incidents, and state tort law against Operators of a nuclear weapons manufacturing plant to recover for damages caused by releases of radioactive material from the plant.<sup>96</sup> After a verdict in favor of Landowners, the District Court denied Operators’ motion for judgment as a matter of law and motion for new trial, or, alternatively, for remitter of damages, and Operators appealed.<sup>97</sup> The Tenth Circuit Court of Appeals<sup>98</sup> reversed and remanded, determining that the jury instructions given by the District Court about what constitutes a nuclear incident were too permissive. On remand, the United States District Court for the District of Colorado<sup>99</sup> entered judgment in Operators’ favor, and Landowners appealed.<sup>100</sup>

This time, the issue before Gorsuch and the Tenth Circuit was whether the Price-Anderson Act (“Act”) not only provides a federal forum when a nuclear incident is asserted but “*also* preempts and [thus] precludes any state law recovery where (as here) a nuclear incident is asserted but ultimately unproven.”<sup>101</sup> In his decision, Gorsuch began by detailing how preemption may come about, the differences between various forms of preemptions, before finally determining that the only preemption argument at issue here is whether the Act “expressly” preempts Colorado tort law.<sup>102</sup> Gorsuch ruled against preemption and directed the trial court to enter

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95. *Id.* at 1220 (quoting *Demko v. United States*, 216 F.3d 1049, 1053 (Fed. Cir. 2000)).

96. *Cook v. Rockwell Int’l Corp.*, 790 F.3d 1088, 1090 (10th Cir. 2015).

97. *Id.*

98. *Id.* at 1091; *see Cook v. Rockwell Int’l Corp.*, 618 F. 3d 1127 (10th Cir. 2010).

99. *Cook*, 790 F.3d at 1092; *see Cook v. Rockwell Int’l Corp.*, 13 F. Supp. 3d 1153 (D. Colo. 2014).

100. *Cook*, 790 F.3d at 1092.

101. *Id.* (emphasis added).

102. *Id.*

judgment in favor of Landowners.<sup>103</sup> He reasoned that preemption should generally be rejected when the law at issue concerns public health or safety and found nothing in the statute which preempted state tort law.<sup>104</sup> Notably, Gorsuch nodded to a decision by the Fifth Circuit,<sup>105</sup> which took the opposite stance on the issue.

*Analysis.* *Cook* serves as an illustration of how Gorsuch approaches preemption cases, a significant issue in environmental law because there is so much state and federal regulation in the industry. Unsurprisingly, he ignored what the Fifth Circuit had done and instead held that state tort law was not preempted and that the residents could consequently recover.<sup>106</sup> Gorsuch abstained from the application of field preemption, and looked instead to the precise text of the Price-Anderson Act and found nowhere in the language an expressed or even implied intent to preempt.<sup>107</sup> Importantly, Gorsuch determined that preemption is disfavored in areas where state law deals with public health and safety.<sup>108</sup> This carve-out could be particularly important for state environmental laws.<sup>109</sup>

Gorsuch differs from his Scalia slightly in this regard, given that his predecessor's record in the area was somewhat shaky, with forceful opinions written both for and against the doctrine.<sup>110</sup> He fully embraced preemption in specific political contexts but championed states' rights in others.<sup>111</sup> If *Cook* is an accurate example of Gorsuch's philosophy of preemption, he could push the Court more solidly in the states' rights direction.<sup>112</sup>

## 2. Scherer v. U.S. Forest Service

*Illustration.* Residents who used a recreational area sued the United States Forest Service, alleging that charging a standard fee for the recreational use of a recreational area violated the Federal Lands Recreation Enhancement Act<sup>113</sup> ("REA").<sup>114</sup> The United States District Court for the District of Colorado found for Forest Service, and Residents appealed.<sup>115</sup>

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103. *Id.* at 1112.

104. *Id.* at 1094–95.

105. *See* *Gibson v. Worley Mills, Inc.*, 620 F.2d 567 (5th Cir. 1980).

106. *Cassio*, *supra* note 19.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. 16 U.S.C. § 6802(f).

Gorsuch, writing for a 10th Circuit majority, affirmed.<sup>116</sup> Because the plaintiff challenged the regulation as a whole, he could win only by showing that its *every* application was illegal, and that, according to Gorsuch, was simply not true.<sup>117</sup> Gorsuch started with the plain text of the REA and found Congress authorized amenity fees in 2004 for parks—an exception, he noted, to the general rule that people can “enter this country’s great national forests free of charge.”<sup>118</sup> He concluded that the Forest Service was acting within its statutory limitations when authorizing the fee because the area in issue offered amenities like a nature center and patrolling security guards to all visitors.<sup>119</sup> “[I]t’s just not the case that *every time* the Forest Service collects the amenity fee it exceeds its statutory authority,” and for that reason, the facial challenge fails, Gorsuch wrote.<sup>120</sup>

*Analysis.* This case illustrates Gorsuch’s appreciation for nature and the environment, a trait that was never seen from Scalia.<sup>121</sup> Gorsuch became somewhat famous from the first line in *Scherer*, “Everyone enjoys a trip to the mountains in the summertime.”<sup>122</sup>

### 3. Hydro Resources Inc. v. U.S. Environmental Protection Agency

*Illustration.* Gorsuch wrote the majority opinion on a petition for review heard en banc by the 10th Circuit regarding an Environmental Protection Agency decision to implement a pollution control program at a New Mexico uranium mine.<sup>123</sup> The case turned on whether the EPA or the New Mexico Environment Department was responsible for issuing a necessary permit under the Safe Drinking Water Act<sup>124</sup> given the mine’s proposal to use an underground injection system to extract uranium ore.<sup>125</sup> The EPA determined that it had jurisdiction because the property was within a “dependent Indian community” as defined by a non-environmental criminal law governing crimes committed in Indian country.<sup>126</sup>

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114. *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1242 (10th Cir. 2011).

115. *Id.*

116. *Id.* at 1245.

117. *Id.* (emphasis added).

118. *Id.* at 1242 (citing 16 U.S.C. § 6802(e)(2)).

119. *Id.* at 1243.

120. *Id.* at 1244.

121. Farber, *supra* note 71.

122. *Scherer*, 653 F.3d at 1242.

123. *Hydro Res. Inc. v. EPA*, 608 F.3d 1131, 1134 (10th Cir. 2010).

124. *See* 42 U.S.C. § 300f.

125. *Hydro Resources*, 608 F.3d at 1134.

126. *Id.*



Gorsuch rejected the EPA's position and found that the mine was not on property set aside as Indian land and was not under federal "superintendence."<sup>127</sup> He acknowledged the "checkerboard" pattern of the local area, much of which was Navajo tribal land, and noted that underground water sources "don't follow neat land survey lines."<sup>128</sup> However, the EPA's own limit on its permitting authority, modeled on a criminal jurisdiction statute, "mandated the outcome," he wrote.<sup>129</sup>

*Analysis.* This opinion showcases how Gorsuch applies case precedent when faced with cases which are factually similar. Interestingly, Gorsuch notes that *Venetie*, the Supreme Court case upon which his opinion relied, "complicates to some degree EPA's efforts to regulate activities affecting underground water sources, which don't follow neat land survey lines."<sup>130</sup> Then, he seemingly slighted the administration because of their decision to adopt a criminal statute's definition of "Indian lands" instead of promulgating their own.<sup>131</sup> "Crimes, after all," Gorsuch jokes, "usually occur on land, not in aquifers."<sup>132</sup>

#### 4. United States v. Magnesium

*Illustration.* The United States of America ("Government") sued the Magnesium Corporation of America ("Corporation"), a magnesium producer, seeking an injunction and monetary penalties for violating the Resource Conservation and Recovery Act ("RCRA"), specifically its implementing regulations concerning disposal of mineral process wastes.<sup>133</sup> Corporation argued that the Environmental Protection Agency ("EPA") had previously exempted the waste products in question from RCRA and as such, Corporation was not in violation.<sup>134</sup> The United States District Court of Utah entered judgment in favor of Corporation and Government appealed.<sup>135</sup> Writing for the Tenth Circuit majority, Gorsuch reversed and remanded the lower court's decision, reasoning that because the EPA never previously adopted a *definitive* interpretation of the regulation, it remained free, even under the legal precedents on which Corporation seeks to rely, to

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127. *Id.* (citing *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998)).

128. *Id.* at 1166.

129. *Id.* at 1157.

130. *Id.* at 1166.

131. *Id.*

132. *Id.*

133. *United States v. Magnesium Corp. of America*, 616 F.3d 1129 (10th Cir. 2010).

134. *Id.* at 1130–31.

135. *Id.* at 1131.

change its opinion and issue a new interpretation without providing notice or time for comment.<sup>136</sup>

Corporation mines and processes magnesium, using what the Corporation refers to as the “anhydrous” process.<sup>137</sup> This process creates dangerous wastes which Corporation attempts to curtail through various pollution-control measures.<sup>138</sup> Sometimes a preventive measure will create waste in its own right—wastes that provide the foundation for the Government’s cause of action.<sup>139</sup>

Subtitle C of RCRA requires the EPA to promulgate regulations for the transportation, treatment, and disposal of hazardous wastes.<sup>140</sup> In 1978, EPA proposed regulations for implementing Subtitle C for notice and comment.<sup>141</sup> At first, some of these regulations were more stringent than others, based upon whether the wastes in question were relatively “high” or “low” in health risks.<sup>142</sup> However, in 1980, and after proposing its rule and receiving public comment, EPA reversed course and created a uniform regulation without regards to a “level” of risk associated with the wastes under this Subtitle.<sup>143</sup> “After various regulatory investigations and following more notice an comment, EPA issued a new rule in [1989].”<sup>144</sup> This finalized the criteria a waste must meet to qualify for exemption from Subtitle C.<sup>145</sup> Applying this new criterion, EPA stated that “process wastewater from primary magnesium production by the anhydrous process—the category of waste at issue in this case,” were wastes likely to qualify for the exemption carved from Subtitle C.<sup>146</sup> A year later, EPA submitted its *Report to Congress on Special Wastes from Mineral Processing*,<sup>147</sup> “tentatively” recommending the exclusion of many wastes, including the waste at issue.<sup>148</sup> In 1991, EPA, after considering comments on the *Report*, issued its final determination and rule (“Final Rule”) confirming that the waste did, in fact, qualify for exemption from Subtitle C

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136. *Id.* at 1131.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1131–32; see 42 U.S.C. §§ 6921-6939(f).

141. *Magnesium Corp.*, 616 F.3d at 1132.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 1133.

146. *Id.* (citation omitted).

147. *Id.*; see 55 FED.REG. 32,135 (1990).

148. *Magnesium Corp.*, 616 F.3d at 1133.

and should be subjected to less stringent regulations under Subtitle D.<sup>149</sup> Although in doing so, EPA did not interpret the phrase “process wastewater from primary magnesium processing by the anhydrous process.”<sup>150</sup> Soon after, EPA, Corporation, and the State of Utah began debating what the phrase actually encompassed.<sup>151</sup> Corporation, unsurprisingly, opined that the Final Rule exempted *all* of the wastes produced by their facility from Subtitle C while EPA argued that only *some* of the wastes were exempted.<sup>152</sup> This disagreement led to this suit in 2001.<sup>153</sup>

Before the district court, Government argued that five special wastes (collectively “Complaint Wastes”) did not qualify for exemption under Subtitle C because they were not “process wastewater from primary magnesium processing by the anhydrous process,” as required by the Final Rule.<sup>154</sup> Four of the five Complaint Wastes, the Government urged, were not “process wastewater *from primary magnesium processing*,” they were, instead, “process wastewater from the *processing of something else*.”<sup>155</sup> The fifth complaint waste did not qualify as a “wastewater” as it was a dry anode dust, according to the Government and it was instead a non-exempt solid waste.<sup>156</sup> Corporation, on the other hand, relied heavily on EPA’s 1990 interpretation and particular language from the Final Rule, alleging that all of the Complaint Wastes, at least at that time and under the Final Rule, were exempt.<sup>157</sup> Furthermore, Government and EPA were bringing this lawsuit in conflict of “its prior interpretation—at least without first engaging in a period of public notice an comment.”<sup>158</sup> This, Corporation urged, could not be done by principles of administrative law.<sup>159</sup> The district court subsequently held for Corporation, reasoning that EPA’s current interpretation—that not all five Complaint Wastes were exempted—was inconsistent with the interpretation previously adopted, and that EPA could not now change its mind without first providing time for public notice and comment.<sup>160</sup> The Government appealed.<sup>161</sup>

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1133–34.

153. *Id.* at 1134.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1135.

Justice Gorsuch writing for the majority began by distinguishing the issue before the court, specifically by detailing what the parties have agreed upon.<sup>162</sup> The parties stipulated that the Final Rule is ambiguous (not self-defining), that the EPA's current interpretation that excludes all of the Complaint Wastes is "plausible," and that an agency's own interpretation of an ambiguous rule is typically given deference under *Auer v. Robbins*.<sup>163</sup><sup>164</sup> Thus leaving only one question to be decided: "[c]an EPA change its original interpretation of the regulation without following the notice and comment procedural requirements of the Administrative Procedure Act ("APA")?"<sup>165</sup>

The Tenth Circuit agreed with EPA in that the initial interpretation it offered in its Final Rule was a *tentative* one, and as such, the EPA need not comply with the APA regarding the requirements for public comment and notice.<sup>166</sup> The court considered holdings from the D.C. Circuit Court of Appeals in *Alaska Prof'l Hunters Ass'n v. FAA*<sup>167</sup> and *Paralyzed Veterans of America v. D.C. Arena L.P.*,<sup>168</sup> which held that the APA requires agencies to provide notice and comment when significantly revising a *definitive* interpretation of its own regulation.<sup>169</sup> The court also pointed out that this issue is the subject of a circuit split, with the Third, Fifth, and Sixth Circuits adopting the D.C. Circuits' view and the First and Ninth taking the contrary position.<sup>170</sup> Instead of looking to APA § 551(5) for the answer as

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161. *Id.*

162. *Id.* at 1136.

163. 519 U.S. 452, 461 (1997).

164. *Magnesium Corp.*, 616 F.3d at 1136.

165. *Id.*

166. *Id.* at 1138; see 5 U.S.C. § 553 (section 553's notice and comment rulemaking procedures control but are distinct from formal (or on the record) rulemaking procedures governed by § 556).

167. 177 F.3d 1030, 1034 (D.C. Cir. 1999) (holding that an agency could not "significantly revise" its previous "definitive interpretation of its own regulations without first engaging in "notice and comment").

168. 117 F.3d 579 (D.C. Cir. 1997).

169. *Magnesium Corp.*, 616 F.3d at 1138.

170. *Id. Compare SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) ("[I]f an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA."), *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) ("[T]he APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation."), and *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005) ("It is true that once an agency gives a regulation an interpretation, notice and comment will often be

the D.C. Circuit did, the court looked instead at § 553, which clearly states that the notice and comment requirements don't apply to interpretive rules.<sup>171</sup> This fact, the court stated, was missed in error by the *Alaska Hunters* court.<sup>172</sup> As it followed, the court disagreed with Corporation that *Alaska Hunters* was supportive of their contention.<sup>173</sup> Specifically, the court noted that even if the *Alaska Hunters* decision was appropriately decided, its precedent is unsupportive because the interpretation at issue in this case was merely *tentative* not *definitive* as stated in *Alaska Hunters*.<sup>174</sup> "Even under the *Alaska Hunters* doctrine" the court noted, "before an agency adopts a definitive interpretation of its own rule it remains free to hear new arguments, make adjustments, and change directions all without having to undergo notice and comment."<sup>175</sup> Before concluding, Gorsuch invoked the constitution, stating that "even if Congress repealed the APA tomorrow, the Due Process Clauses of the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice."<sup>176</sup> This pertains when an agency advances its own interpretation during a civil proceeding, however, Gorsuch noted, this potentially interesting argument was waived because Corporation failed to raise it during argument.<sup>177</sup> In sum, the court held that because the EPA had not previously adopted a definitive interpretation of its 1991 rule, and even under the case law that Corporation urges the court to follow, EPA is at liberty to adopt without notice and comment a reasonable interpretation of that ambiguous regulation.<sup>178</sup> Accordingly, the district court's judgment was vacated and remanded.<sup>179</sup>

*Analysis.* Many of Gorsuch's critics complain about his tendency to discuss in his opinions the legal arguments that were not presented at trial. This opinion does just that. He seems to be using the case as a teaching lesson instead of getting straight down to business. However, this tendency

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required before the interpretation of that regulation can be changed." (emphasis omitted), with *Warder v. Shalala*, 149 F.3d 73, 81–82 (1st Cir. 1998), and *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) ("[N]o notice and comment rulemaking is required to amend a previous interpretive rule." (emphasis omitted)).

171. *Magnesium Corp.*, 616 F.3d at 1139; see 5 U.S.C. § 553(b)(A).

172. *Magnesium Corp.*, 616 F.3d at 1140.

173. *Id.*

174. *Id.*

175. *Id.* at 1141.

176. *Id.* at 1144.

177. *Id.*

178. *Id.* at 1145.

179. *Id.*

may be useful to him as a Justice, as his opinions will be studied and referenced as binding precedent across the land.

A pro-agency part of this opinion is captured when Gorsuch made considerable effort to decide the case on narrow grounds. Instead of analyzing the argument presented by the Corporation, that the EPA must go through a public rulemaking procedure, he concluded that the earlier EPA interpretation was only tentative. In this way, he did not have to answer the tough question or make law before it was necessary to do so.

#### 5. Backcountry Hunters v. U.S. Forest Service

*Illustration.* Sportsmen advocacy organization (“Organization”) brought action against the United States Forest Service (“Service”), challenging a temporary order which permitted motorcycles, but not other motorized vehicles, to use specific trails in a national forest.<sup>180</sup> The United States District Court for the District of Colorado entered judgment for the Service and Organization appealed.<sup>181</sup> Gorsuch, writing for the majority, held that Organization had no standing to sue, stating that “to show standing to sue in federal court you have to show that it’s likely, as opposed to merely speculative that you’ve suffered an injury that can be redressed by a favorable decision.”<sup>182</sup> Because a victory for Organization in this case would do nothing to help their cause of action, in fact, it would only hurt it; they have no standing.<sup>183</sup>

*Analysis.* This case is important as it illustrates Gorsuch’s position on the modern standing doctrine which Justice Scalia championed while on the bench. Standing is crucial to environmental groups which want to challenge a law or regulation in federal court. Without standing, they cannot be heard. This case should be encouraging to them as Gorsuch does not appear eager to dismiss plaintiffs for lack of standing, much unlike his predecessor was. He is “sympathetic to outdoor enthusiasts, even when ruling against them, and shows his Colorado roots in his writings.”<sup>184</sup>

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180. Backcountry Hunters & Anglers v. U.S. Forest Serv., 612 Fed. App’x 934, 935 (10th Cir. 2015).

181. *Id.*

182. *Id.* at 936.

183. *Id.*

184. Holbrook Mohr & Garance Burke, *Gorsuch Willing to Limit Environmental Groups in Land Cases*, U.S. NEWS (Mar. 5, 2017, 8:01 AM), <https://www.usnews.com/news/best-states/colorado/articles/2017-03-05/gorsuch-willing-to-limit-environmental-groups-in-land-cases>.

6. *George v. United States*

*Illustration.* An Individual bought New Mexico property in 2005 from a man who received it in a 1979 land exchange with the federal government, which reserved an easement across the property to access the Gila National Forest.<sup>185</sup> After the Forest Service repeatedly removed the plaintiff's fences, she sued under the Quiet Title Act<sup>186</sup> which waives federal sovereign immunity to allow claims seeking "to adjudicate a disputed title to real property in which the United States claims an interest."<sup>187</sup>

Writing for the Tenth Circuit, Gorsuch affirmed the U.S. District Court for the District of New Mexico's ruling that the suit was time-barred because the Quiet Title Act's 12-year limitations period began to run when the previous owner executed the land swap with the Forest Service. "Whatever legal entitlement she might have had to build a fence across the Forest Service's road she lost years ago thanks to an even less permeable barrier to entry: the statute of limitations," he wrote.<sup>188</sup>

*Analysis.* Simply, this case showcases Gorsuch's fun, almost humorous style of writing. He can take a boring procedural question and make it enjoyable to read.

7. *Forest Guardians v. U.S. Fish and Wildlife Service*

*Illustration.* Environmental group sued the Fish and Wildlife Service ("FWS"), arguing that their decision to reintroduce a captive-bred experimental population of endangered falcons into New Mexico violated the Administrative Procedures Act ("APA") because it does not comply with the Endangered Species Act ("ESA") or the National Environmental Policy Act ("NEPA").<sup>189</sup> The United States District Court for the District of New Mexico ruled for FWS, and Environmental group appealed.<sup>190</sup>

The Tenth Circuit affirmed the District Court's decision to uphold the rule, saying the FWS had reasonably interpreted the definition of "population" under the Endangered Species Act and had not "pre-decided" its NEPA environmental analysis.<sup>191</sup>

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185. *George v. United States*, 672 F.3d 942, 943 (10th Cir. 2012).

186. *Id.* at 944; *see also* 28 U.S.C.A. § 2409a.

187. *George*, 672 F.3d at 944.

188. *Id.* at 943.

189. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692 (10th Cir. 2010).

190. *Id.*

191. *Id.* at 702–03.

After the conclusion and affirmation, Gorsuch writes, “I am pleased to concur in the court’s opinion . . . [and] note only two minor points.”<sup>192</sup> First, he disagrees with the manner by which the majority reached its conclusion, stating that the court should not have “look[ed] beyond the four corners of the Fish and Wildlife Service’s environmental assessment . . . .”<sup>193</sup> Second, Gorsuch disagreed with the majority’s analysis of two precedents, wherein, according to the majority, the court rejected an evidentiary approach to cases like this one.<sup>194</sup> “As it happens,” Gorsuch illuminates, these precedents “did not analyze or resolve the question.”<sup>195</sup> Put simply, the majority reached when it interpreted the prior holdings, and Gorsuch was unashamed to bring it to everyone’s attention.

*Analysis.* This case serves as another example of Gorsuch’s ability to write without shame when he feels his colleagues have overstepped their judicial authority or when they have employed an erroneous technique for solving legal questions. In this regard, he reflects Justice Scalia, one who is infamously known for writing fiery dissents against the other members of the bench.

### *III. Gorsuch v. Scalia—On Chevron and Standing*

Gorsuch was midway down a ski slope in Colorado two years ago when he found out Antonin Scalia was dead.<sup>196</sup> “I immediately lost what breath I had left,” he said in a speech two months later, “[a]nd I am not embarrassed to admit that I couldn’t see the rest of the way down the mountain for the tears.”<sup>197</sup> His regard for the late Justice is unquestioned, and their friendship is something almost all Supreme Court watchers know. But it is not because of this fondness that President Trump decided to appoint the Coloradan; that credit is due to the approach they take when facing questions of law.<sup>198</sup> The “great Justice Antonin Scalia was in my mind throughout the decision making process,” Trump explained when asked how he decided to appoint Gorsuch.<sup>199</sup> And if the President’s goal was to replace Scalia with someone with similar style, he brought in the right guy. Similar they may be, there are critical differences between them which are the focus of this section.

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192. *Id.* at 719 (Gorsuch, J., concurring).

193. *Id.*

194. *Id.*

195. *Id.*

196. Liptak, *supra* note 44.

197. *Id.*

198. de Vogue, *supra* note 47.

199. *Id.*



A. *On Chevron*

The *Chevron* doctrine comes from the Supreme Court's decision in *Chevron v. NRDC*<sup>200</sup> wherein the Court held that if a statute is ambiguous on a particular issue, a court should defer to any reasonable interpretation properly promulgated by the statute's implementing agency.<sup>201</sup> The theory behind the doctrine is generally that "Congress intended to leave things up to the agency when it left gaps in a statute," as agencies are in the best position to fill those gaps because of their technical expertise.<sup>202</sup> Gorsuch, unlike his predecessor, is strikingly opposed to the doctrine, even going so far as to author a concurrence to his own majority opinion in order to skewer the concept.<sup>203</sup> In that case, he wrote:

There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* . . . permit[s] 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.<sup>204</sup>

Gorsuch argued that *Chevron* allows "trampling [of] the constitutional design" by allowing executive agencies to overrule a judicial declaration without the legislative process prescribed by the constitution.<sup>205</sup>

By contrast, Scalia was a supporter of *Chevron*.<sup>206</sup> Even though he applied it in his own conservative way and bashed the prior decisions leading up to the holding, he upheld the doctrine on several occasions and never hinted that it should be done away with.<sup>207</sup> This view of

200. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

201. Cassio, *supra* note 19 (emphasis added).

202. *Id.*

203. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* James M. McClammer, *Facing the Behemoth: Gorsuch's Implications for Environmental Law*, THE LEGAL INTELLIGENCER (Feb. 27, 2017), <https://www.law.com/thelegalintelligencer/almID/1202780042875/?slreturn=20180028221442>.

204. *Brizuela*, 834 F.3d at 1149.

205. *Id.* at 1151.

206. Cassio, *supra* note 19.

207. Noah Feldman, *Get Ready, Supreme Court Fan. Brush Up on Your Chevron Doctrine.*, BLOOMBERG VIEW (Feb. 3, 2017, 11:21 AM), <https://www.bloomberg.com/view/articles/2017-02-03/get-ready-supreme-court-fans-brush-up-on-your-chevron-doctrine>.

administrative law is perhaps the biggest difference between the two Justices and has environmentalists nervous.<sup>208</sup>

Without *Chevron* to give deference to agency interpretations, their ability to apply statutory directives in a way that ensures enforcement powers is significantly impacted.<sup>209</sup> This, and the fact that the Trump administration is set to dismember the Clean Power Plan (directive created during the Obama presidency), foreshadows a vital role Gorsuch will face as the pending litigation makes its way to the Supreme Court. With that said, Gorsuch maintains that even without *Chevron*, the courts “could and would . . . apply the agency’s interpretation when it accords with the best reading of the statute.”<sup>210</sup>

### B. On Standing

Access to the courts is an essential and uniquely significant issue for environmental law.<sup>211</sup> Particularly, “the doctrine of standing is used to decide whether or not a plaintiff is asserting the type of ‘case or controversy’” which affords them the opportunity to come before an Article III, federal judiciary.<sup>212</sup> Scalia promoted the modern standing doctrine which was often a fatal flaw to environmental groups seeking access to the courts.<sup>213</sup>

In 2005, before becoming a Tenth Circuit judge, Gorsuch wrote an essay published in *National Review* criticizing liberals for turning to the courts to achieve their policy goals rather than their legislatures.<sup>214</sup> He wrote: “American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box . . . .”<sup>215</sup> This attitude he shares with Scalia, though unlike his predecessor, has not surfaced in his jurisprudence. That is, Gorsuch does not seem quite as eager to use standing as a fatal flaw in litigation.<sup>216</sup> In *Cook v. Rockwell Int’l*, Gorsuch found standing for an owner of a state permit because the owner had already paid for it and would have had to jump through similar hoops to

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208. Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch>.

209. *Id.*

210. *Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring).

211. Cassio, *supra* note 19.

212. *Id.*

213. *Id.*

214. Liptak, *supra* note 44.

215. *Id.*

216. Farber, *supra* note 71.

obtain a required federal permit.<sup>217</sup> In *Backcountry Hunters & Anglers v. U.S. Forest Serv.*, however, he held that a group opposed to motorized vehicles in a park could not object to a regulation which would allow them to enter because doing so would actually leave a less-restrictive regulation in place and thus the group had no standing, or better put, no “case or controversy.”<sup>218</sup> The importance of these cases shows that Gorsuch is not interested in using the modern standing doctrine as Scalia did.

What does this mean for the industry? If Gorsuch mirrors Scalia and brings to the court a narrow approach on standing issues, it could mean that environmental organizations, flush with donations after the withdrawal from the Paris Accord and increased efforts at deregulation, would have a harder time getting their cases heard in federal court. However, if Gorsuch continues to demonstrate a more nuanced approach to these issues, relying on case precedent and the law first before sending plaintiffs away for lack of standing, courts will become more accessible.

#### *IV. Conclusion*

Justice Neil Gorsuch, the Westerner with a degree from Oxford, the natural law theorist and black diamond skier, is eccentric, electric, and downright brilliant. His presence on the Court to most represents the perfect replacement of the late Justice Antonin Scalia. In many ways, he is. Not merely because their philosophies, for the most part, align, but because of his passion for the law and for justice and for everything that a judge stands for.

Gorsuch’s textualist approach to solving legal questions can no longer be seen as a predictor of traditionally conservative results.<sup>219</sup> He is a Justice first, and conservative second. His handling of energy and environmental law cases depends wholly on the way the law is written and not how he believes the law should be. That said, his general disdain for the *Chevron* doctrine poses somewhat of a threat to agencies that want autonomy and reliance afforded to them. Further, his disinterest in standing could afford environmentalists more opportunity to have their day in court.

As the Trump administration continues to cut regulatory authorities, back out on global climate plans, and reverse efforts made to cut down on carbon emissions, it is not unlikely that states will try to fill the void left with their

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217. *Id.*; see *Cook*, 790 F.3d 1088.

218. Farber, *supra* note 71; see *Backcountry Hunters*, 612 Fed. App’x at 934.

219. Cassio, *supra* note 19.

own rules and regulations. It is equally likely that interest groups will turn to litigation to try and keep the status quo. These are all areas in which Justice Gorsuch will have a determining voice, a voice which will ultimately shape the future of both industries.