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Neil Gorsuch: Judicial Humility and Religious Pluralism

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When you decide cases for a living, it can be difficult to admit that you don't know something. But from the very beginning of his career, Supreme Court nominee Neil Gorsuch has shown a respect for the limits of what individuals — even judges — can truly understand about each other's deeply held beliefs.

This trait has served him well in resolving difficult conflicts over moral and religious questions, and would continue to serve him well on the high court.

The earliest evidence of this approach came not in a judicial opinion, but in a work of moral philosophy on the ethics of euthanasia. In that article, Gorsuch scrutinized the "balancing tests" that had frequently been proposed in response to the problem of assisted suicide. In one typical example of such a "balancing" approach, the philosopher Ronald Dworkin had written that "there are dangers both in legalizing and refusing to legalize [assisted suicide]; the rival dangers must be balanced, and neither should be ignored."

Though such tests may seem fair in theory, Gorsuch rejected them as fundamentally impossible to apply, expressing skepticism of our ability to truly understand the deeply-held interests of others. "How," he asked, "can one possibly compare, for instance, the interest the rational adult seeking death has in dying with the danger of mistakenly killing persons without their consent?"

After becoming a judge, Gorsuch carried this same skepticism with him, most frequently applying it in cases concerning religious exemptions under the Religious Freedom Restoration Act (RFRA). The most famous such case is *Hobby Lobby v. Sebelius*, in which the plaintiffs believed that their religion required a complete disassociation from health insurance policies that provided certain contraceptives.

In a concurring opinion, Gorsuch readily acknowledged that these "religious convictions are contestable. Some may even find [these] beliefs offensive." But this was no reason to give them less weight, he wrote. Judges are forbidden, under RFRA, from diminishing the importance of sincerely held religious beliefs simply because the judge himself does not understand why others would hold them. Through this rule, the statute "does perhaps its most important work in protecting unpopular religious beliefs."

In his *Hobby Lobby* concurrence, Gorsuch showed an understanding of why it is dangerous for judges to attempt to "weigh" the importance of others' religious beliefs. Studies have confirmed Gorsuch's intuition, that our ability to grasp what really matters to others is far worse than we assume, especially when others' value systems are much different from our own.

As the moral psychologist Jonathan Haidt has shown, the instincts and desires of socially "conservative" and socially "liberal" minds (to use broad and imprecise terms) can diverge dramatically. Conservatives, for example, tend to place a higher value on a moral paradigm called "sanctity/degradation," which encompasses a desire for "purity" and, crucially, a strong need for *disassociation* from activities seen as impure. As one manifestation of the differing attitudes toward this paradigm, a survey revealed that conservatives were much more likely to say they would never receive a clean, disease-free blood transfusion from a convicted child-molester, a desire that many liberals (and libertarians) can't help but find baffling.

It would be a dangerous world if those with "conservative" minds frequently had the power to weigh the desires of those with "liberal" minds, and vice-versa. But inevitably, that is what happens when personal convictions are subjected to judicial tests. This is why under RFRA, as Gorsuch put it in another of his religious-liberty opinions, courts "lack any license to decide the relative value of a particular exercise to a religion."

But if Gorsuch joins the High Court, not all of his colleagues will share his skepticism, or his faithful approach in applying RFRA. The *Hobby Lobby* case was appealed to the Supreme Court and affirmed by only a 5–4 vote. In dissent, Justice Ruth Bader Ginsburg performed exactly the scrutiny of other peoples' values that RFRA forbids, writing that "the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated." Further critiquing the beliefs of others, her dissent then attempted to draw objective moral lines between purchasing contraceptives and directing money into funds that pay for them, and between directing a woman to use contraceptives and merely providing the means for her to use them.

This is a path that Judge Gorsuch, wisely, has consistently declined to go down. When it comes to judicial wisdom, sometimes the most important virtue is knowing what shouldn't be decided.