

# Judge Gorsuch's Extreme Views Could Undermine Urgently Needed Money-In-Politics Reforms

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## Trump's Nominee Must be Pressed on Money in Politics

- For four decades, the Supreme Court's [flawed approach to money in politics](#) has gutted common-sense protections against the power of special interests and wealthy individuals, and shaped a system that [85% of Americans](#) believe needs fundamental changes.
- [More than 90% of voters](#) (including 91% of Trump voters) think it's important that President Trump nominates a Supreme Court justice who is open to limiting the influence of big money in politics.
- Yet, Trump has pledged to nominate someone [in the mold of Justice Scalia](#), an ardent opponent of limits on big money. And Trump's nominees [were vetted by White House Counsel Don McGahn](#), one of the commissioners most hostile to money-in-politics rules in the history of the Federal Election Commission.

## Judge Gorsuch's Money-in-Politics Record

*Judge Gorsuch's record on money in politics, while sparse, raises significant concerns.*

- In his only opinion directly addressing money in politics, Judge Gorsuch expressed openness to providing a higher level of constitutional protection to a donor's right to make political contributions than the Court currently affords the right to vote.<sup>1</sup> Judge Gorsuch's openness to applying rigid "strict scrutiny" review to contribution limits—one of the few remaining checks on big money we have left, thanks to the Supreme Court—puts him among the ranks of justices extremely hostile to this issue, such as Thomas and Scalia, and is cause for serious concern.<sup>2</sup>
- In *Riddle v. Hickenlooper*, Judge Gorsuch joined a Tenth Circuit panel in striking down an ill-advised Colorado statute that imposed lower campaign contribution limits on minor party candidates than the limits applying to major party candidates.<sup>3</sup> Because the statute *was* discriminatory, the outcome of the case is not cause for concern in and of itself.

- What is troubling, however, is that Judge Gorsuch went out of his way to write a concurring opinion suggesting that making a political contribution is a “fundamental” right that ought to be afforded the highest form of constitutional protection, which is known as “strict scrutiny review.”<sup>4</sup>
  - As the highest form of constitutional protection, strict scrutiny review is reserved for our most precious rights, like the right to be free from discrimination on the basis of race or religion, or the right to express an unpopular viewpoint. Sometimes the Court doesn’t even apply this level of scrutiny to restrictions on the right to vote itself.<sup>5</sup>
  - In recent years, the Supreme Court’s 5-4 majority has applied strict scrutiny review to strike down laws governing money spent independently of candidates. If the court were to follow Judge Gorsuch’s reasoning and apply strict scrutiny to laws governing direct contributions to candidates, many remaining protections against big money in politics would similarly fall.
  - It is precisely this approach that has created a system in which single individuals and corporations can spend tens of millions of dollars to influence elections, and in which candidates and elected officials are significantly more responsive to the priorities of an elite donor class that is richer, whiter, and more male than Americans on the whole.
- It is unclear whether Judge Gorsuch would seek to apply strict scrutiny to all contribution limits, or only when there is an allegation of discrimination against a type of “speaker.” But even the latter, more modest approach could open the door for an attack on a range of contribution restrictions: in particular, the ban on corporate contributions directly to candidates may be vulnerable given Judge’s Gorsuch’s views on corporations.
- In the *Hobby Lobby* case, Judge Gorsuch joined a troubling extension of the Supreme Court’s holding in *Citizens United v. FEC*, in favor of corporate personhood. Specifically, the Tenth Circuit ruled that privately held, for-profit secular corporations are “persons” under the meaning of the Religious Freedom Restoration Act (RFRA), and could qualify for religious exemptions from the Affordable Care Act’s mandate to provide reproductive health services.<sup>6</sup>
- One of the central holdings of *Citizens United* is that the government can’t “discriminate” against corporations by banning them from spending treasury funds on electoral “speech.”<sup>7</sup> This misguided notion combined with strict scrutiny review could easily lead Judge Gorsuch to vote to strike the corporate contribution ban as “discriminatory.”<sup>8</sup> One of the few remaining protections against corporate influence on our elections could fall, and we could also see “secret money” from non-disclosing non-profit corporations going directly to candidates’ campaigns. There have been multiple challenges to corporate contribution bans following *Citizens United*, and one such challenge to Texas’ ban is currently pending before the state supreme court.<sup>9</sup>

## Other Causes for Concern for our Democracy

- Judge Gorsuch is hostile to regulations on the corporate sector and has a record of ruling against consumers and working Americans.<sup>10</sup>
- Like others on Trump's short list, Judge Gorsuch has ties to the Chamber of Commerce—the single largest lobby in the country comprised of corporate giants from the pharmaceutical, oil, and other industries, and which has spent tens of millions of dollars in elections while keeping its donors secret.<sup>11</sup> Before becoming a judge on the Tenth Circuit, Gorsuch represented the National Chamber of Commerce, arguing in favor of rules that would make it more difficult to hold companies accountable for securities fraud.<sup>12</sup>
- Judge Gorsuch has described his own jurisprudence as backward-looking.<sup>13</sup> On numerous occasions he has ruled against plaintiffs claiming to have been discriminated against on the basis of race, and his ruling in favor of law enforcement in an excessive use of force case raises concerns that his jurisprudence would continue to entrench systemic “colorblind” racism in the United States.<sup>14</sup>
- Judge Gorsuch's nomination has been applauded by the Center for Competitive Politics, a staunch defender of big money in American politics.<sup>15</sup>

## ENDNOTES

1. 742 F.3d 922, 930-31 (10th Cir. 2014) (Gorsuch, J., concurring). While not directly on point, Judge Gorsuch also joined a Tenth Circuit opinion that could be read in support of disclosure rules. See *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010). As Judge Gorsuch wrote prior to his appointment to the Tenth Circuit in a brief for the Chamber of Commerce, in some instances the lack of disclosure of critical information can be “inconsistent with the very premise of an open capital market, which depends on the freest possible flow of information.” See Brief of Amicus Curiae for the United States Chamber of Commerce at 17, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005) (citing Richard A. Posner, *Economic Analysis of the Law* 457-58 (6th ed. 2003)). This type of faux-support for disclosure while advocating for bigger-picture deregulation is not cause for celebration.
2. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 266-67 (2006) (Thomas, J., concurring). Justice Thomas’s concurrence was joined by Justice Scalia. See *id.*
3. See *Riddle*, 742 F.3d at 927-28. The panel held that the right to contribute money to a candidate is a fundamental right, and struck down the contribution limits under an intermediate scrutiny or a “closely drawn” standard of review.
4. See *id.* at 930-31 (Gorsuch, J., concurring). Specifically, he opined:

[The challengers] say that contributing in elections implicates a fundamental liberty interest, that Colorado’s scheme favors the exercise of that fundamental liberty interest by some at the expense of others, and for this reason warrants the most searching level of judicial scrutiny. For my part, I don’t doubt this line of argument has much to recommend it. The trouble is, we have no controlling guidance on the question from the Supreme Court. And in what guidance we do have lie some conflicting cues.

*Id.* It is worth reiterating that the statute challenged in *Riddle* implicated Equal Protection, in addition to First Amendment, concerns, since it discriminated on the basis of the political candidate that a donor supported. It is not entirely clear that Judge Gorsuch would apply strict scrutiny review in a simple First Amendment challenge to contribution limits (for example, in a case challenging a limit as being too low). The majority opinion also characterized making political contributions as a “fundamental right” while not going so far as to apply strict scrutiny. *Riddle*, 742 F.3d at 927. Yet, Judge Gorsuch wrote separately to discuss the appropriate level of scrutiny, and, if appointed to the Supreme Court, it could well be Gorsuch’s prerogative to provide the “controlling guidance” he said was missing, and to clarify that restrictive, strict scrutiny review should apply to contribution limits.

5. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (applying a lax, “undue burden” standard to challenged voter ID provision).
6. See *Hobby Lobby*, 723 F.3d 1114 (finding that the freedom to worship must be protected by a correlative freedom to engage in corporate efforts to those ends). Judge Gorsuch wrote separate concurrence opining that the Green family behind the Hobby Lobby company was entitled to additional relief, beyond the relief provided to the corporate “person.” See *id.* (Gorsuch, J., concurring).
7. 558 U.S. 310, 365 (2010) (“...the Government may not suppress political speech on the basis of the speaker’s corporate identity”).
8. In *Hobby Lobby Stores, Inc. v. Sebelius*, Judge Gorsuch joined the majority to hold that for-profit corporations have rights under the Free Exercise clause of the First Amendment. 723 F.3d 1114 (10th Cir. 2013). The opinion relied on *Citizens United v. FEC*, a Supreme Court opinion ruling that the First Amendment’s protection of political speech extends to for-profit corporations). 558 U.S. 310 (2010).
9. See, e.g., David Saleh Rauf, *Citizens United lawyer targets Texas campaign finance laws*, *Seattle Times* (Feb. 6, 2017), <http://www.seattletimes.com/nation-world/citizens-united-lawyer-targets-texas-campaign-finance-laws/>.
10. See, e.g., *Compass Environmental, Inc. v. OSHRC*, 663 F.3d 1164 (10th Cir. 2011) (Gorsuch, J., dissenting) (arguing that a fine imposed by the Dep’t of Labor because the company failed to train its employee, resulting in the employee’s death, should be overturned); *TransAm Trucking, Inc. v. Admin. Review Bd.* No. 15-9504, 2016 WL 3909526 (10th Cir., July 15, 2016) (Gorsuch, J., dissenting) (concluding a company did not unlawfully retaliate for whistleblowing). *Gutierrez v. Lynch*, 834 F.3d 1142, 1149-59 (10th Cir. 2016) (Gorsuch, J., concurring). Judge Gorsuch’s radical views against affording administrative agencies deference in interpreting the laws they are charged with enforcing makes him more conservative on this issue than former Justice Scalia. See Eric Citron, *Potential nominee profile: Neil Gorsuch*, SCOTUSBLOG.ORG (Jan. 13, 2017, 12:53 PM), [www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/](http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/).
11. See Center for Media and Democracy, *U.S. Chamber of Commerce*, SOURCEWATCH.ORG (Aug. 2, 2016, 9:37 AM), [http://www.sourcewatch.org/index.php/U.S.\\_Chamber\\_of\\_Commerce](http://www.sourcewatch.org/index.php/U.S._Chamber_of_Commerce). Two others on Trump’s rumored short list for Supreme Court Justice, Justices Sykes of the Seventh Circuit and Justice Kethledge of the Sixth Circuit, also have ties to the Chamber of Commerce at the state level.
12. See Brief of Amicus Curiae for the United States Chamber of Commerce, *supra* note 1; Neil M. Gorsuch, *No Loss, No Gain*, LEGAL TIMES (Jan. 31, 2005).
13. See Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy Of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016).
14. See, e.g., *Young v. Dillan Cos., Inc.*, 468 F.3d 1243 (10th Cir. 2008); *Alvarado v. Donley*, 490 Fed. App’x. 932 (10th Cir. 2012); *Officer v. Sedgwick Cty.*, 226 Fed. App’x. 783 (10th Cir. 2007). See also *Wilson v. City of Lafayette*, 510 Fed. App’x. 775 (10th Cir. 2013). In this case, Judge Gorsuch ruled in favor of a law enforcement officer in a case involving an officer’s excessive use of force causing the death of a young man. While the young man in the *Wilson* case was white, Gorsuch’s analysis indicates a willingness to shield trigger-happy law enforcement officers from liability, a problem that we know disproportionately affects people of color.
15. See, e.g., Matt Nese, *CCP Applauds Nomination of Judge Gorsuch for Supreme Court*, CENTER FOR COMPETITIVE POLITICS (Jan. 31, 2017), <http://www.campaignfreedom.org/2017/01/31/ccp-applauds-nomination-of-judge-gorsuch-for-supreme-court/>.



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