



Supreme Court Nominee Neil Gorsuch

Judge's Record Raises Questions About the Future of Democracy Law

What's at Stake for Our Democracy

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 percent of Americans](#) believe needs fundamental changes.

In addition to checks on big money, transparency is also critical to a strong campaign finance system. Despite relentless legal attacks on disclosure laws in recent years, their constitutionality remains an area of broad consensus in the courts. As the Supreme Court has repeatedly found — including in *Citizens United*, in which it upheld disclosure 8-to-1 even as it struck down corporate spending limits — there is a vital public interest in ensuring that voters know who is paying to influence their votes so they can make informed decisions at the polls.

In the voting rights realm, in recent years, the Supreme Court has eroded protections. In 2013, in [Shelby County v. Holder](#), the Court dismantled a [key provision](#) of the Voting Rights Act. Further, the Supreme Court has yet to establish a standard for adjudicating claims of partisan gerrymandering, an [increasingly aggressive](#) practice that erodes the integrity of our elections.

The Supreme Court plays a vital role in ensuring that our democracy is one where all citizens are able to meaningfully participate—by protecting access to the ballot box and placing a check on vote dilution through manipulation of district lines. Leaving the rules to be written by elected officials alone, without the robust check of the courts, would allow the foxes to guard the henhouse. Key questions regarding voting rights and redistricting—including the issue of unlawful partisan gerrymandering and the constitutional limits on burdensome voter ID laws — are likely to be addressed by the Court in short order. They could impact our elections for many years to come.

The Nomination of Neil Gorsuch

President Donald Trump nominated Judge Neil Gorsuch of the Tenth Circuit Court of Appeals to fill Justice Antonin Scalia's seat on the U.S. Supreme Court on January 31, 2017. Trump's nominee Gorsuch [was 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.

Rather than focusing on pressing issues in our democracy, President Trump has made [false statements](#) alleging widespread voter fraud, [foreshadowing](#) a legislative agenda that would further restrict access to the right to vote. And while [more than 90 percent of voters](#) (including 91 percent of Trump voters) think it's important that President Trump nominate a Supreme Court justice who is open to limiting the influence of big money in politics, Trump chose to nominate someone [in the mold of Justice Scalia](#), who was an ardent opponent of limits on big money.

For these reasons, as the Senate considers Gorsuch's nomination, it is important that Senators fully examine his record and press him on democracy issues.

Gorsuch's judicial record on [money in politics](#), while sparse, raises 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.ⁱ Judge Gorsuch's interest in applying "strict scrutiny" review to contribution limits puts him among the ranks of Justices Thomas and Scalia, who are extremely hostile to this issue, and is cause for serious concern.ⁱⁱ
- 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.ⁱⁱⁱ 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."^{iv}
 - As the most stringent form of constitutional review, strict scrutiny 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.^v
 - 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 contributions to candidates, many remaining protections against big money in politics might 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 than to Americans on the whole.

Judge Gorsuch has no record on the constitutionality of political disclosure and should be pressed on his views on this issue.

- Judge Gorsuch has not reviewed the constitutionality of a political disclosure law although he has discussed the value of anonymous speech in a different context.^{vi}
- Although no friend to money in politics limits overall, Justice Scalia was [a staunch supporter](#) of political disclosure laws. As he put it, “requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.” His potential successor ought to be asked whether he agrees with Scalia’s statement that “campaign[ing] anonymously” does not benefit “the Home of the Brave.”

Judge Gorsuch’s thin record on voting rights and redistricting requires close questioning.

- Judge Gorsuch has a very thin record on voting rights and redistricting. Therefore, it will be all the more important for Senators to question him during his confirmation hearing about these crucial issues to our form of government.
- However, Judge Gorsuch’s commentary on *Vieth v. Jubilerer*, the leading case on partisan gerrymandering, is cause for serious concern and additional questions. In a case addressing the Guarantee Clause, Judge Gorsuch wrote a dissent to denial for rehearing en banc (full panel of judges). In that dissent, he suggested that *Vieth* “put to bed” the issue of partisan gerrymandering due to a lack of judicially manageable standards.^{vii}

That is not the case. While four Justices in *Vieth* would have held that partisan gerrymandering is not justiciable (and “put the issue to bed”), Justice Kennedy’s controlling opinion recognized the corrosive effects of excessive partisan gerrymandering and held the door open for a judicially manageable standard.^{viii} Several cases are currently advancing in the courts that put forward potential standards. While far from definitive, this passing commentary on *Vieth* suggests that Judge Gorsuch might agree with the plurality in *Vieth* that partisan gerrymandering is not justiciable and would be content to leave our electoral systems in the hands of self-interested legislators. Judge Gorsuch should be asked to clarify his views on *Vieth* and the issue of a partisan gerrymandering standard.

- Judge Gorsuch’s only case directly addressing voting rights is an uncontroversial NVRA case. Judge Gorsuch joined a panel opinion, written by Judge Briscoe, that correctly held that section 7 of the NVRA requires that public agencies offer voter registration forms to all agency applicants unless the individual affirmatively declines the form in writing not just those that check a box requesting one. The panel opinion also correctly held that the plaintiffs in that case were entitled to attorneys’ fees.^{ix}
- Judge Gorsuch has tied himself closely to the judicial philosophies of Justice Scalia. But Justice Scalia strongly opposed the Voting Rights Act and other robust protections of the right to vote. During oral argument in *Shelby County v. Holder*, Justice Scalia referred to the Voting Rights Act—the law that opened the door to the ballot for minorities in 1965 and was continuously reauthorized and, indeed, unanimously approved by the Senate in 2006—as a “perpetuation of racial entitlement.” Judge Gorsuch must be asked if he shares Justice Scalia’s view of the Voting Rights Act and whether he would continue Justice Scalia’s pattern of weakening protections of the right to vote while continuously increasing the constitutional protections for money spent to influence votes.

There are other causes for concern in Judge Gorsuch’s record.

- In the *Hobby Lobby* case, Judge Gorsuch joined a troubling extension of the Supreme Court’s holding in *Citizens United v. FEC*,^x 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.^{xi}
- 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.^{xii} 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.^{xiii}

Thank you to our partners, Demos, for contributing to this report.

ⁱ 742 F.3d 992, 930-31 (10th Cir. 2014) (Gorsuch, J., concurring).

ⁱⁱ 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.*

ⁱⁱⁱ 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.

^{iv} 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 unclear whether 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). Yet, if appointed to the bench, it may 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.

^v 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).

^{vi} Judge Gorsuch's views as to other areas of campaign finance regulation, such as disclosure, remain unclear. He joined a Tenth Circuit opinion upholding a Utah statute requiring registered sex offenders to disclose certain online activity to the state. The panel, applying intermediate scrutiny, found that the law did not violate the First Amendment right to "speak anonymously"—but highlighted that the disclosures were non-public and served compelling state law enforcement interests. 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)).

^{vii} *Kerr v. Hickenlooper*, 759 F.3d 1186, 1196 (10th Cir. 2014) (denial of rehearing en banc) (Gorsuch, J. dissenting) ("The situation we confront in this case is more than a little reminiscent of the one the Supreme Court faced in *Vieth*, where the plaintiffs sought to challenge a political gerrymander as unconstitutional. There, 18 years of experimenting by various courts failed to yield any sure standards for litigating those sorts of cases. . . . If the law's promise of treating like cases alike is to mean something, this case should be put to bed now as *Vieth's* was then, rather than being destined to drag on forlornly to the same inevitable end. I respectfully dissent.").

^{viii} *Vieth v. Jubilerer*, 541 U.S. 267 (2004) (The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. . . . If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.").

^{ix} *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012).

^x 558 U.S. 310 (2010).

^{xi} See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (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).

^{xii} 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_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.

^{xiii} See Brief of Amicus Curiae for the United States Chamber of Commerce, *supra* note i; Neil M. Gorsuch, *No Loss, No Gain*, LEGAL TIMES (Jan. 31, 2005).