

OPINION

Of Gorsuch, the Supreme Court, and Campaign Finance

By [Jeff Brindle](#) • 02/07/17 2:19pm

If U.S. Supreme Court nominee Neil Gorsuch is confirmed, rulings involving campaign finance law can be expected to follow the same course as when the late Justice Antonin Scalia served on the Court.

This means that the High Court is likely to strongly protect First Amendment free speech and assembly rights.

In the mold of Justice Scalia, Tenth Circuit Judge Gorsuch is described as an originalist, or as has been said, a constitutional “textualistic.”

As Judge Gorsuch himself commented upon the death of Justice Scalia, a judge should “apply the law as it is . . . looking to text, structure and history . . . not to decide cases on their own moral convictions or the policy consequences they believe might serve society best.”

In other words, a judge should apply the law as written not make law.

There is not much about Judge Gorsuch and his rulings involving campaign finance law. One such case, however, might provide a glimpse into his thinking.

Riddle v. Hickenlooper suggests that he, like Justice Scalia, will place importance on First Amendment rights.

In Riddle, Judge Gorsuch agreed with the opinion that found different contribution limits for major and minor party candidates unconstitutional.

But rather than just citing the equal protection clause, the judge added “the act of contributing to political campaigns implicates a ‘basic constitutional freedom,’ one lying ‘at the foundation of a free society,’ and enjoying a significant relationship to the right to speak and associate—both expressly protected First Amendment activities.”

This has reformers alarmed. In his article, *Trump Denounced “Broken System” of Big Money Politics. Neil Gorsuch Could Make It Worse*, Jon Schwarz fears that “Neil Gorsuch . . . would take the broken campaign finance system and, rather than fixing it, potentially smash it with a sledgehammer.”

Schwarz further writes “his record suggests he could quite possibly vote for the final removal of all limits for everyone.”

While Judge Gorsuch’s mention of “right to associate” in the Riddle case suggests that he could vote to end the ban on soft money to national parties in *Louisiana Republican Party, et al. v. F.E.C.*, there is no evidence that he would decide to eviscerate contribution limits altogether. This is mere speculation.

In fact, strengthening political parties by eliminating soft money, or at least raising contribution limits applicable to them, and questioning the constitutionality of the Federal Election Campaign Act (FECA) provisions that regulate federal campaign finance activity by state and local parties would be a good thing.

With the scourge of dark money groups scarring the electoral landscape, the resurgence of accountable, regulated political parties would be of benefit to the public.

In *Buckley v. Valeo*, the seminal decision of 1976 that has provided guidance on campaign finance law, the U.S. Supreme Court acknowledged a real or potential connection between corruption and political contributions.

Since that time, succeeding courts have done the same, including the current Roberts' court in *Citizens United*, which, though permitting corporations and unions to spend independently, did retain the ban on direct contributions to candidates by corporations and unions.

One of the hopes of reform minded groups and individuals is for *Citizens United* to be overturned. Though overlooking the unintended consequences of *McCain/Feingold* in 2002, which was the initial spark plug for the growth of independent expenditures, reformers are looking to *Citizens United* to be rescinded.

Yet, as was noted in an earlier column, overturning *Citizens United* is not likely to happen. Even if Judge Gorsuch is for some reason denied confirmation, President Trump would simply nominate another of the same philosophical ilk, leaving the only avenue for eliminating *Citizens United* being an amendment to the Constitution. In addition, there are others on the High Court that may well vacate their seats and be replaced during a Trump administration, ensuring the longevity of *Citizens United*.

Often overlooked in *Citizens United* is its strong support for disclosure, which was subsequently reinforced in *Speech Now 2010* and *Carey 2011*.

Therefore, rather than focusing on *Citizens United* or Judge Gorsuch, those who desire strong campaign finance laws and a transparent electoral system, should step back, breathe deeply, and approach the issue pragmatically. *Citizens United*, whether liked or not, is a fait accompli.

Federally, attempts to convince Congress to pass legislation that would require registration and disclosure of contributions and expenditures by Super PACs and 501c groups should be made.

Simultaneously, effort should be put forth to offset independent groups and their party networks, and instead strengthen core political parties which serve as the real people's link to government.

And for those truly worried that a "sledgehammer" will be taken toward eliminating contribution limits, sound legal strategies should be pursued to protect and preserve donor limits applicable to candidates.

As is the case in New Jersey, where the Election Law Enforcement Commission has been calling for a stronger political party system and registration and disclosure by independent groups, similar efforts should be made in the states that have not already done so.

By not panicking over a Supreme Court nominee and by developing commonsense approaches to campaign finance law, a rational scheme can surely be established, one that will redound to the benefit of the public good.

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The opinions presented here are his own and not necessarily those of the Commission.