

Justice Gorsuch's Appointment Likely Preserves Key Campaign Finance Precedents

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Last month, Neil M. Gorsuch was sworn in as an Associate Justice of the Supreme Court of the United States. He replaced Justice Antonin Scalia, who passed away in February 2016. Justice Gorsuch is widely expected to be a similarly conservative member of the Court and will join the other conservative Justices in cases assessing the constitutionality of campaign finance laws.

As we pointed out last year in the wake of Justice Scalia's death, the Court is closely divided on campaign finance cases. The Court issued several 5-4 decisions striking down various campaign finance laws, including *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (corporate electioneering communications); *Citizens United v. FEC*, 558 U.S. 310 (2010) (corporate independent expenditures); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (providing matching funds to candidates accepting campaign subsidies); and *McCutcheon v. FEC*, 134 S.Ct. 1434 (aggregate contribution limits). Justice Scalia was in the majority in each case. His death, and the prospect of President Obama's nominee, Judge Merrick Garland, replacing him, jeopardized the continuing vitality of these precedents.

Although it is not known precisely how Justice Gorsuch will rule on campaign finance cases, it is widely expected that he will approach them with a similar skepticism toward burdens on political speech that his predecessor had. His decisions as a judge on the U.S. Court of Appeals for the Tenth Circuit reveal that he has a generally conservative jurisprudence, and he has been described as an originalist when it comes to constitutional construction.

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Gorsuch has not had occasion to decide many campaign finance cases, but, in one such case, he joined an opinion striking down a Colorado campaign finance law that allowed party candidates to receive more contributions than write-in candidates. Gorsuch issued a concurring opinion noting the strong First Amendment protection afforded to the right to make campaign contributions. Whether this position will translate into advocating a higher level of scrutiny for campaign contribution limits than is currently applied remains to be seen.

It is also unclear whether Justice Gorsuch believes the First Amendment places stricter limits on the government's ability to require disclosure related to political spending. Justice Scalia famously defended the constitutionality of disclosure requirements, and seven of the eight remaining Justices have been broadly permissive of such laws. If Justice Gorsuch were to adopt a more skeptical position on disclosure, he would join Justice Clarence Thomas in this view.