



Trump's Supreme Court Nominee Puts the Rights of Corporations over Individuals

By Billy Corriher | March 13, 2017

Judge Neil Gorsuch thinks that corporations are people, entitled to broad rights of religious freedom and free speech under the First Amendment. Corporations could use these rights as an excuse to deny their workers certain health care insurance, to discriminate against certain customers, or to spend big money to influence elections.

The U.S. Supreme Court, under the leadership of Chief Justice John Roberts, has significantly broadened the rights of corporations, often to the detriment of workers and consumers.¹ Before the death of Justice Antonin Scalia a year ago, big business was on a winning streak at the Court. The 5-4 conservative majority—Chief Justice Roberts and Justices Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito—made it harder for employees and consumers to file class action lawsuits, and the Court made it easier for corporations to force consumers into mandatory arbitration.² The Roberts Court also limited the reach of employment discrimination laws and other rules that protect workers.³

The Constitutional Accountability Center noted that in the past decade, the Court ruled for the U.S. Chamber of Commerce—the country's largest business organization—in 69 percent of the cases in which it filed a brief.⁴ But without a fifth pro-corporate vote in the previous term, the post-Scalia Court only decided one chamber case, and it ruled against the chamber.⁵

The American people can expect a return to big business' winning ways if Judge Gorsuch, President Donald Trump's Supreme Court nominee, is confirmed. Gorsuch's record suggests that he will restore the Court's reputation for putting corporations before workers and consumers.

Like the five-justice majority that included Justice Scalia, Judge Gorsuch consistently rules against workers.⁶ The Alliance for Justice analyzed several rulings by Judge Gorsuch, concluding that they illustrate his efforts "to deny critical remedies to workers wronged by their employers," including cases involving sexual harassment, workplace safety, and unfair labor practices.⁷

Judge Gorsuch's views on corporate personhood also suggest that he could take the Court even further down the road toward granting corporations rights that allow them to influence our democratic process or to get exemptions from laws protecting workers and consumers.

Granting corporations religious rights

In 2013, Judge Gorsuch and his colleagues broke new ground by ruling that for-profit corporations could have a right to religious freedom, an argument that no federal court had ever before accepted.⁸ The 10th U.S. Circuit Court of Appeals ruled in *Hobby Lobby Stores Inc. v. Sebelius* that the Hobby Lobby corporation was entitled to the protection of the Religious Freedom Restoration Act, or RFRA, a law that explicitly applies to “people.”⁹ RFRA says that the government should not “substantially burden” peoples’ exercise of religion unless it has a “compelling” justification and uses the “least restrictive means.”¹⁰

The court said that the corporation’s rights under RFRA allowed it to deny its employees health insurance that included coverage for contraception, despite the Affordable Care Act’s, or ACA’s, requirement to provide such coverage.¹¹ The judges in the majority, including Judge Gorsuch, granted the corporation a new right to religious freedom, allowing Hobby Lobby to deny its workers insurance coverage mandated under the law.

Not content with granting corporations new legal rights, Judge Gorsuch felt the need to write a concurring opinion illustrating his concern for the corporation looking to assert its religious beliefs. He showed no concern about employers denying their employees health care coverage, even when utilizing contraception was consistent with workers’ stated moral and religious beliefs. Instead, Judge Gorsuch deferred to the corporate owners’ complaints about their employees’ “gravely wrong” conduct.¹² The employer argued that some of the contraceptives covered by the ACA were abortifacients because they prevent the implantation of a fertilized egg—a claim that the dissenting judges challenged.¹³

Discounting the benefits to workers, Judge Gorsuch elaborated on how he believed the contraception requirement burdened the religious rights of the Hobby Lobby corporation. He began his opinion with an eloquent discussion of how religion can offer guidance on “the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.”¹⁴ A 2015 law review article noted that “complicity claims,” such as the one asserted by Hobby Lobby, “present special concerns about third-party harm.”¹⁵ These claims are about other peoples’ conduct, and they diverge from traditional religious freedom claims in which individuals seek protection for their own conduct.¹⁶

A dissenting judge noted that the 10th Circuit’s ruling was unprecedented, and she argued that “the decision of a female employee as to which contraceptive drug or device to use remains a private matter of individual choice.”¹⁷

The contraception mandate is part of the ACA’s effort to require employers to offer insurance that covers preventive care; this provision of the ACA addressed the fact that women paid much more for preventive care than men.¹⁸ Rosanna Padgett of Georgia, for example, said that she received coverage for contraceptive care after the ACA passed and was able to obtain permanent birth control.¹⁹ Padgett said that after she obtained custody of three of her nieces and nephews, she could not afford another pregnancy.²⁰

The Supreme Court affirmed the 10th Circuit’s ruling in favor of Hobby Lobby in 2014.²¹ This meant that closely held corporations could take advantage of the same exemption to the ACA’s contraception requirement as religious nonprofits.²²

The Court heard a related case last year, in which nonprofits and closely held corporations sued to challenge the government’s process for receiving an exemption from the contraception mandate.²³ The government allowed these employers to avoid paying for contraceptive coverage by signing a form, at which point a third-party insurer would act to ensure that employees still received their health care coverage. This compromise allowed religious employers to opt out, while still ensuring that workers received the insurance coverage the law required. The employers, however, claimed that merely signing the form substantially burdened their religious beliefs.²⁴

The eight-justice Court punted the lawsuit challenging this accommodation back to the lower courts.²⁵ Eight of the nine appellate courts that had considered these lawsuits rejected the argument that signing the form violates religious freedom.²⁶ When the 10th Circuit threw out one of these suits, Judge Gorsuch dissented.²⁷

Piercing a corporation’s veil

Corporations are established by state law, which imposes a separation between corporations and the individuals who own them. Owners and shareholders cannot be held liable for the corporation’s debts.²⁸ An owner can take action on behalf of the corporation, but that does not necessarily mean the owner will face legal responsibility for that action.

To sue the owners for the actions of a corporation, the owners must have done something wrong that abused the corporation’s legal status. The act of holding an owner liable for a corporation’s actions is known as “piercing the corporate veil.”²⁹ A court will pierce the corporate veil when the corporation’s legal status was misused by the individual owner to do something wrong, such as commit fraud, or when a corporation is established as a shell to conceal misconduct.³⁰ But without some wrongdoing on the owner’s part, the corporate form allows a business’ owners to avoid legal liability.

Despite this veil legally separating a corporation from its owners, Judge Gorsuch and his colleagues invented a right to corporate religious freedom. A dissenting judge in *Hobby Lobby v. Sebelius* said, “The structural barriers of corporate law give me pause about whether the plaintiffs can have their corporate veil and pierce it, too.”³¹

The 10th Circuit cited *Citizens United v. Federal Election Commission* and argued there was “no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.”³² The court said, “A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values.”³³ The majority called this a “form of evangelism.”³⁴

Until the 10th Circuit’s ruling, no federal court had recognized that corporations could have religious beliefs protected by the First Amendment.³⁵ The Supreme Court had always limited religious freedom to individuals and religious nonprofits. Hobby Lobby could point to no evidence that Congress intended RFRA to cover profit-making businesses.³⁶

Judge Gorsuch was confident that Hobby Lobby’s lawsuit was not the case “of a wily businessman seeking to use an insincere claim of faith as cover to avoid a financially burdensome regulation,” but he offered no guidance on distinguishing that hypothetical from Hobby Lobby’s claim.³⁷

In dissent, Chief Judge Mary Beck Briscoe chastised Gorsuch and the rest of the majority for its “eagerness to issue seemingly definitive rulings on the merits of plaintiffs’ novel claim that for-profit corporations” are protected by RFRA.³⁸ She argued that the corporation offered no real evidence that it had religious beliefs, beyond a reference to God in its mission statement.³⁹

Judge Briscoe warned that the court’s reasoning could even apply to much larger corporations. She said the holding was so ambiguous that no one “can confidently predict where it may lead, particularly when one considers how easily an ‘exercise of religion’ could now be asserted by a corporation to avoid or take advantage of any government rule or requirement.”⁴⁰

She agreed with concerns that “[a] Jehovah’s Witness could choose to exclude blood transfusions from his corporation’s health-insurance coverage. ... And corporations owned by certain Muslims, Jews, or Hindus could refuse to provide coverage for medications or medical devices that contain” beef or pork, “including anesthesia, intravenous fluids, prostheses, sutures, and pills coated with gelatin.”⁴¹ She warned that the implications of the ruling go beyond health insurance—that the ruling could open “the floodgates to RFRA litigation challenging any number of federal statutes.”⁴²

Exemptions to anti-discrimination laws

When the Supreme Court affirmed the 10th Circuit in *Hobby Lobby*, Justice Ruth Bader Ginsburg dissented and criticized the ruling for not scrutinizing the corporation's claim that its exercise of religion was "substantially burdened" by the contraception requirement.⁴³

Justice Ginsburg argued that the connection between the corporate owners' "religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial."⁴⁴ She pointed out that the ACA only requires employers to pay for certain benefits, without requiring any employees to take advantage of them: "The decisions whether to claim benefits under the plan are made not by Hobby Lobby ... but by the covered employees and dependents."⁴⁵ Like Judge Briscoe on the 10th Circuit, Justice Ginsburg warned that the Court's reasoning could extend far beyond health insurance.⁴⁶

A federal court in August applied *Hobby Lobby* in the case of a funeral home that was sued by the Equal Employment Opportunity Commission, or EEOC, for firing a transgender employee.⁴⁷ The judge said the closely held corporation that owns the funeral home "has a sincere religious belief that it would be violating God's commands if he were to permit an employee who was born a biological male to dress in a traditionally female skirt-suit at one of his funeral homes, because doing so would support the idea that sex is a changeable social construct rather than an immutable God-given gift."⁴⁸ The judge ruled that the EEOC's complaint substantially burdened this religious belief under RFRA and that the EEOC did not use the "least restrictive means" to protect the rights of workers.⁴⁹

A 2015 Center for American Progress report noted a variety of examples of businesses relying on *Hobby Lobby* to get exemptions from certain laws:

*In the time since the ruling, advocates, litigators, and judges have invoked Hobby Lobby to justify an ever-growing number of religious liberty claims in areas including child labor, employment protections, and nondiscrimination. ... As marriage equality swept through the country, a few businesses involved with weddings—bakeries, florists, and others—have refused service to same-sex couples planning to marry. Many of these businesses operate in cities with nondiscrimination ordinances that protect same-sex couples, but relying on this new and flawed interpretation of the federal Religious Freedom Restoration Act, some corporations now argue that their religious freedom trumps these civil rights laws.*⁵⁰

The report notes that a few months after *Hobby Lobby*, a federal judge cited the case "to justify excusing a member of a fundamentalist Mormon sect from an obligation to testify in a child labor case."⁵¹

State supreme courts put equality over corporate religious freedom

In 2004, Curtis Freed and Robert Ingersoll met and began a committed relationship.⁵² They married nearly 10 years later, after Washington state recognized equal marriage rights for same-sex couples. The couple planned a large wedding at a garden in Richland, Washington.⁵³ On February 29, 2013, Ingersoll went to his florist, Arlene's Flowers, where he had been a customer for almost a decade.⁵⁴ The owner, Barronelle Stutzman, knew him and his partner well.⁵⁵

Stutzman told Ingersoll that she would not provide flowers for his wedding because of her religious beliefs.⁵⁶ It was her first time denying service to anyone.⁵⁷ She gave him the name of other florists, and the two hugged.⁵⁸

After Ingersoll left, he wrote a Facebook post that his partner was "so deeply offended" that they were denied service because their relationship did not comply with Stutzman's "personal beliefs."⁵⁹ The couple said they stopped planning a large wedding because "they feared being denied service by other wedding vendors."⁶⁰ They married in a small ceremony at their home, with 11 guests in attendance.⁶¹

A judge found that Stutzman had violated Washington's anti-discrimination law, which says that businesses open to the public cannot discriminate against LGBT customers.⁶² Stutzman appealed and claimed that this requirement violated her and her corporation's right to religious freedom under the free exercise clause.⁶³

In a recent unanimous opinion, the Washington Supreme Court rejected her claim. The court said that even if her faith was burdened, the nondiscrimination law was justified by a "broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined."⁶⁴ The court pierced the corporate veil and held Stutzman liable, since it was her personal actions that violated state law.⁶⁵

In 2013, the New Mexico Supreme Court also rejected a business' First Amendment defense when it was accused of violating the state's nondiscrimination law. Elane Photography, a limited liability corporation under state law, refused its services to a lesbian couple seeking to document their wedding.⁶⁶ The state supreme court ruled that applying the law to Elane Photography did not violate the owners' rights to free speech or exercise of religion.⁶⁷

The U.S. Supreme Court is currently deciding whether to hear an appeal from a Colorado Court of Appeals ruling that a cake baker outside Denver violated the state's nondiscrimination law by refusing service to an LGBT couple.⁶⁸ The Colorado court rejected similar First Amendment arguments and noted that the nondiscrimination law:

*creates a hospitable environment for all consumers by preventing discrimination on the basis of certain characteristics, including sexual orientation. In doing so, it prevents the economic and social balkanization prevalent when businesses decide to serve only their own "kind," and ensures that the goods and services provided by public accommodations are available to all of the state's citizens.*⁶⁹

Unlike Judge Gorsuch in *Hobby Lobby*, these state courts rejected arguments from businesses that wanted to assert religious freedom to justify violations of a law.

Granting campaign donors a First Amendment right to influence elections

The 10th Circuit issued another decision in 2014 that, like *Hobby Lobby*, relied on *Citizens United*. That decision struck down an ill-advised Colorado law that imposed different campaign contribution limits on third-party candidates—a clearly unconstitutional measure.⁷⁰ But Judge Gorsuch wrote another concurring opinion suggesting that campaign donors should have a broader right to give money to political campaigns.

Judge Gorsuch suggested that making a campaign contribution should be considered a fundamental right that is protected by the strictest form of judicial review.⁷¹ The non-partisan Campaign Legal Center, or CLC, noted that “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.”⁷² In an opinion issued the same year as Judge Gorsuch’s, the Supreme Court declined to subject limits on contributions to strict scrutiny, and only Justice Clarence Thomas argued in favor of doing so.⁷³ The CLC warned that, if the Court follows the reasoning of Justice Thomas and Judge Gorsuch, it could strike down the remaining limits on money in politics.⁷⁴

More money in politics means that elected officials are more responsive to wealthy campaign donors. A Brennan Center for Justice analysis noted that between 2010, when *Citizens United* was decided, and 2014, spending by super-political action committees in U.S. Senate races more than doubled to nearly half a billion dollars.⁷⁵

Judge Gorsuch’s approach “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,” the CLC said.⁷⁶ A recent report from Demos found that the overwhelming majority of elite donors are white and warned that this can “produce public policies and practices that are skewed against people of color on issues from housing policy to mass incarceration to fair wages.”⁷⁷

The Roberts Court has struck down many limits on campaign spending by corporations and other special interests.⁷⁸ The confirmation of Judge Gorsuch would likely mean even more decisions allowing wealthy campaign donors to influence politicians.

Gorsuch wants lawsuits for corporations, but not ‘liberals’ or LGBT couples

Just before he joined the 10th Circuit in 2005, Judge Gorsuch wrote a blog post that claimed, “American liberals have become addicted to the courtroom.”⁷⁹ He criticized liberals for relying on courts “as the primary means of effecting their social agenda,”

including marriage equality for LGBT couples.⁸⁰ Judge Gorsuch has not shown the same kind of disdain for corporations looking to enact their own agenda through the courts by, for example, suing the government to challenge regulations.⁸¹

Polling shows that the vast majority of Americans—Republicans and Democrats—disagree with Judge Gorsuch and the Supreme Court’s view that corporations are people.⁸² A poll conducted in 2012 found that 56 percent of respondents rejected this idea, while only 25 percent agreed.⁸³ The vast majority of citizens do not think corporations should have the right “to spend unlimited amounts of money in political campaigns.”⁸⁴

The same poll found that voters strongly believe that the judicial system favors corporations.⁸⁵ Judge Gorsuch’s record of anti-worker rulings and his broad views of corporate personhood show that if he is confirmed to the Supreme Court, he would reliably provide a deciding vote in favor of big business.

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Endnotes

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