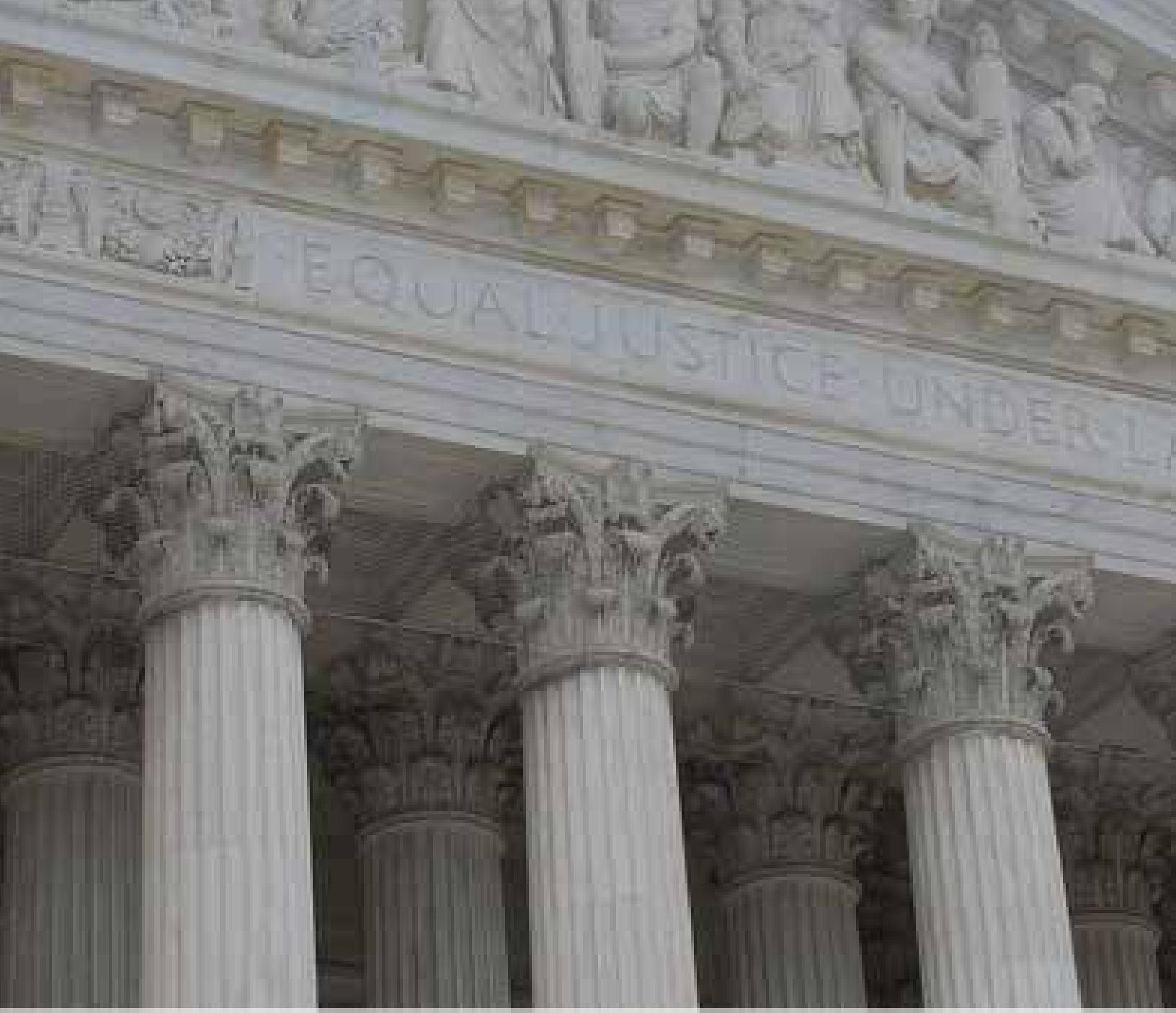

THE IMPORTANCE OF THE SUPREME COURT IN THE 2012 PRESIDENTIAL ELECTION

People For the American Way

Introduction: The Importance of the Supreme Court in the 2012 Presidential Election

With Election Day 2012 rapidly approaching, we are at a critical turning point for the Supreme Court. The next president will most likely pick at least one and possibly two or three Supreme Court Justices, deciding the Court's direction for decades to come. With so many cases affecting nearly every aspect of our lives being decided by slim majorities – often just one vote – the stakes for Supreme Court nominations couldn't be higher.

This report outlines exactly what is at stake for issues ranging from civil rights, women's rights, and workplace fairness to laws about money in politics and basic voting rights. Republican presidential candidate Mitt Romney has said that he wants to nominate more Supreme Court Justices like Clarence Thomas, Samuel Alito and Antonin Scalia – the Justices who brought us Citizens United, who slammed the courthouse door shut when Lilly Ledbetter and women Wal-Mart employees dared to fight pay discrimination, and who consistently twist the law beyond recognition to rule for corporate interests over the rights of individual Americans.

Mitt Romney has openly embraced judicial extremism by picking failed Supreme Court nominee Robert Bork as his judicial advisor. A bipartisan majority of the U.S. Senate rejected Robert Bork when Ronald Reagan nominated him to the Supreme Court. Why? Bork thought the Civil Rights Act of 1964 was unconstitutional. He promoted censorship. He rejected rights for women, minorities, and gays and lesbians. He was just too extreme for the Supreme Court. And now Mitt Romney wants Robert Bork to help him pick the next Justices of the Supreme Court.

America can't afford this kind of judicial extremism. For so many issues that shape our day-to-day lives, the consequences of this election will be vast.

Consumer Rights/Economic Fairness: The Corporate Court Could Get Worse

A Romney presidency would further undermine the already much-eroded ability of consumers to vindicate their rights in court, especially when it comes to resisting unfair and one-sided arbitration clauses in purchase, service or employment contracts.

In the last several years, the ruling bloc on the Roberts Court has dramatically curtailed consumers' rights to file class action suits and to bring contract unconscionability claims to court. An even more conservative Court could also cancel the ability of consumers to sue companies in areas where Federal regulation exists but has not been read to nullify individual rights of action.

The Court has made it decidedly much harder for consumers to file class action lawsuits—and this is a serious problem. When a corporate scheme cheats millions of customers of individually small amounts, the result can be a windfall for the company; it simply isn't worth it for an individual to sue to collect $20 or $30. Class action litigation allows the entire universe of cheated consumers to recoup their losses, while ensuring the company does not profit from its scheme.

In *AT&T Mobility v. Concepcion*, a 2011 case where such a scheme was alleged, the cell phone contract between respondents and AT&T provided for arbitration of all disputes, but did not permit class-wide arbitration. The Ninth Circuit held this provision was unconscionable under California law and that the Federal Arbitration Act did not preempt its ruling.[1]

The Supreme Court overturned this decision, holding that the Federal Arbitration Act preempted California law against the enforceability of contracts found to be unconscionable.[2] Justice Scalia wrote the opinion in

1 Laster v. AT&T Mobility, 584 F.3d 849 (9th Cir., 2009).

2 AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1742 (2011) ("The Concepcions claim that the Discover Bank rule is a ground that 'exist[s] at law or in equity for the revocation of any contract' under FAA § 2. When state law prohibits outright the arbitration of a particular type of claim, the FAA

this egregious 5-4 decision, stating that "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[3] The majority created out of thin air a statutory preference for the faster and more informal method of bilateral arbitration that is so easily susceptible to exploitation by big businesses.[4]

In his vigorous dissenting opinion, Justice Breyer pointed out that this decision makes it much harder for consumers to combat market injustices.[5] The ruling was seen as a major victory for corporations that not only disadvantages consumers but weakens legal protections against employment discrimination, since large employers often make new hires sign the same kinds of arbitration agreements.[6] As Vanderbilt law professor Brian Fitzpatrick said of the decision, "It gives companies a green light to exempt themselves from all class actions from their customers or from their employees. Companies can basically escape from the civil justice system. And why wouldn't a company take advantage of that?"[7]

Concepcion came just a year after another arbitration agreement defeat for consumers. In Rent-a-Center v. Jackson, an employee disputed an agreement providing that the arbitrator, and not a court, had exclusive authority to resolve any dispute relating to the enforceability of the arbitration agreement. The employee argued that the arbitration agreement was unconscionable under state law. The Court held that if a company's arbitration agreement includes a clause delegating fairness challenges to the arbitrator, a court must automatically enforce that agreement and send the matter to arbitration.[8]

This 5-4 decision, also authored by Justice Scalia, handed a major victory to corporations seeking to evade legitimate courts through imposition of arbitration clauses. According to Public Citizen, the holding in Rent-a-Center allows companies to "impose one-sided terms or select clearly biased arbitrators with close ties to the company, secure in the knowledge that any challenge to the fairness of arbitration will be decided by the arbitrator whose very authority comes from the challenged arbitration agreement." As a New York Times editorial put it, "[i]f a contract is invalid, he said, how can the arbitration clause it contains still be valid?"[9]

As bad as these rulings have been, things can clearly get worse on the Roberts Court. Consumer protection rulings have not all been on the side of the corporations as there have been a handful of 5-4 decisions of a pro-consumer leaning on the Roberts Court. In Cuomo v. Clearing House, the Court held that the "visitorial powers" accorded to the Office of the Comptroller of the Currency do not preempt state laws regulating banks.[10] In this 5-4 decision in which Justice Scalia joined the liberal justices and wrote the opinion, Scalia observed that states "have always enforced their general laws against national banks -- and have enforced their banking-related laws against national banks for at least 85 years."[11] If not for this surprising opinion by Justice Scalia, the states would simply not be able to uphold their own consumer protections against banks. A Romney nominee replacing one of the moderate-to-liberal justices would have produced a devastating outcome in this case.
The Court has also produced mixed results concerning whether pharmaceutical companies must warn consumers about the potential danger their drugs pose. In Wyeth v. Levine, the Supreme Court held in a 6-3 decision that FDA regulations governing the labeling of prescription drugs do not preempt state-law failure-to-warn claims

displaces the conflicting rule.").

3 Id. at 1748.

4 Id. at 1751 ("First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration — its in-formality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.").

5 Id. at 1761 ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"), citing Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30").

6 David Savage, Companies can block customers' class-action lawsuits, Supreme Court rules, L.A. Times, Apr. 28, 2011, http://articles.latimes.com/2011/apr/28/business/la-fi-court-class-action-20110428 (last viewed June 10, 2012).

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8 Rent-a-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010).

9 Editorial, Beware the Fine Print, N.Y. Times, June 26, 2010, at http://www.nytimes.com/2010/06/27/opinion/27sun2.html.

10 Cuomo v. Clearing House Assoc., 557 U.S. 519, 525 (2009) ("There is some ambiguity in the NBA's term "visitorial powers," and the Comptroller can give authoritative meaning to the term within the bounds of that uncertainty. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837. However, the presence of some uncertainty does not expand Chevron deference to cover virtually any interpretation of the NBA.")

11 Id. at 534.

against name brand drug manufacturers.[12] However, the Court held in PLIVA v. Mensing that federal law does preempt the same kind of suit against manufacturers of generic prescription drugs.[13] Justice Sotomayor argued that the 5-4 opinion "invents new principles of pre-emption law out of thin air to justify" its decision, and that the decision "makes little sense."[14]

As a result of PLIVA, consumers of brand-name drugs "can sue manufacturers for inadequate warnings," while "consumers of generic drugs cannot."[15] Those harmed by dangerously inadequate warnings on generic-drug labels now cannot seek compensation for their injuries in state court even if the drug manufacturer knew of newly discovered health risks and failed to inform the FDA.

The Court has, of course, also been famously disappointing when it comes to economic fairness issues relating to unions. In Knox v. SEIU, the Court crafted a new constitutional rule making it harder for public sector unions to protect workers' rights.[16] In that case, a union imposed a temporary dues increase in order to raise funds to fight anti-worker initiatives placed on the California ballot without giving non-members a chance to opt out of this specific increase, as they do each year when normally setting dues. The temporary increase came soon after the annual opt-out opportunity had come and gone. The five conservative members of the Court ruled that when there is a special assessment or dues increase, the union cannot collect any additional dues from non-members unless they affirmatively opt in, which severely limits unions' ability to protect workers when their rights are under attack.[17] It also severely weakens a major institutional supporter of progressive candidates and causes at a time when the politically-minded Roberts Court is augmenting the strength of conservative-leaning corporations.

The issue of whether an opt-in regime was required was never in the scope of questions on which the Court granted review.[18] Justice Sotomayor harshly condemned this action: "The majority's refusal to abide by standard rules of appellate practice is unfair to the Circuit, which did not pass on this question, and especially to the respondent here, who suffers a loss in this Court without ever having an opportunity to address the merits of the question the Court decides."[19] As a result, "Alito's ruling struck at the heart of American unionism … [coming] close to nationalizing the right-to-work laws that 23 states have adopted."[20]

While the Roberts Court has thus far left treacherous terrain for consumer protection and economic rights questions, an even more conservative court would spell a one-sided disaster. Class action suits by consumers would likely be completely barred against major corporations, as a result of their ability to craft arbitration agreements in their favor – no matter how lopsided, unfair and unconscionable. More and more, having one's day in court would not be a practical option for consumers and employees who find themselves victims of misconduct by large corporations.

Environmental Protection: A Romney Court Could Leave a Scorched Earth

A Romney presidency could turn the environmental laws of this country into roadside litter. While the Environmental Protection Agency would be under the direct control of an environmentally reckless Administration which believes that "corporations are people," a redefined Supreme Court would continue the

12 Wyeth v. Levine, 555 U.S. 555 (2008).
13 PLIVA v. Mensing, 131 S. Ct. 2567 (2011).
14 Id. at 2582-83.
15 Id. at 2593.
16 Knox v. Serv. Employees Int'l Union, 132 S. Ct. 2277 (2012).
17 Id. at 2296 ("Therefore, when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh Hudson notice and may not exact any funds from nonmembers without their affirmative consent.")
18 Id. at 2298 (Sotomayor, J., concurrence) ("The majority contends that its holding 'does not venture beyond the scope of the questions on which we granted review' … The majority is mistaken.")
19 Id. (Sotomayor, J., concurrence), quoting Jefferson v. Upton, 130 S. Ct. 2217, 2227, (Scalia, J., dissenting).
20 Harold Meyerson, Class war at the Supreme Court, Wash. Post, June 26, 2012, at http://www.washingtonpost.com/opinions/harold-meyerson-class-war-at-the-supreme-court/2012/06/26/gJQAuffO5V_story.html.

erosion of our basic environmental framework laws. **Romney-nominated Justices, taking after Romney hero Robert Bork, would effectively wipe out many of the statutory and regulatory protections that safeguard our air, water, and other natural resources.**

For example, the addition of one more conservative justice could remove a substantial proportion of our nation's waters from federal environmental protection under the Clean Water Act. In *Rapanos v. United States*, the plaintiffs wanted to fill their wetlands in order to build a shopping mall and condos. Four of the more conservative justices wanted to use a very narrow reading of the law. According to Scalia's four-Justice plurality opinion, the phrase "the waters of the United States" includes only bodies of water that are "streams[,] … oceans, rivers, [and] lakes," which would not include such things as wetlands.[21] To find otherwise would "result in a significant impingement of the States' traditional and primary power over land and water use." 531 U. S., at 174."[22] The four more liberal justices found this cramped definition inconsistent with the law's stated purpose of restoring and maintaining the chemical, physical, and biological integrity of the nation's water. They also concluded that regulation of wetlands by the Federal government as part of the term "waters of the United States" was perfectly valid and reasonable.[23]

In this 4-1-4 decision, Justice Kennedy's concurrence was more in line with the conservative approach, holding that only if a wetland or non-navigable waterway bears a "significant nexus" to a traditional navigable waterway does it fall within the power of the Clean Water Act.[24] Such a nexus exists where the wetland or waterbody, either by itself or in combination with other similar sites, significantly affects the physical, biological, and chemical integrity of the downstream navigable waterway.[25]

While Kennedy's view did not restrict the Federal government's ability to regulate wetlands as severely as the four other conservatives would have , the conflicting approaches have made the resulting precedent unclear and the balance a tenuous one. According to Lawrence Hurley of *Greenwire*, "[l]awyers rarely agree on anything, but here's an exception: They all say the Supreme Court bungled Rapanos . . ."[26] As a result, the decision left wetlands regulation in a confusing "mess."[27] To be sure, adding another conservative justice would make wetlands regulation less confusing but only because it would be downright retrograde: it would mean that huge amounts of wetland would not be covered at all under the Clean Water Act.

A Romney-inflected Court would also have a major effect on the ability of the EPA to regulate greenhouse gas emissions. In *Massachusetts v. Environmental Protection Agency*, twelve states and several cities sued the EPA in order to establish its power to regulate carbon dioxide and other greenhouse gas emissions. The EPA had earlier found that it did not have the authority to do so. In a 5-4 decision, the EPA was found to have "offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change."[28] Therefore, [i]ts action was . . . 'arbitrary, capricious, … or otherwise not in accordance with law.'"[29]

Justice Stevens, writing for the majority, found that under the Clean Air Act, the EPA could avoid having to regulate in this area "only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether

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21 Rapanos v. United States, 547 U.S. 715, 739 (2006).

22 Id. at 737

23 Id. at 788 ("The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision. See Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 842-845 (1984).")

24 Id. at 753.

25 Id.

26 Lawrence Hurley, Supreme Court's Murky Clean Water Act Ruling Created Legal Quagmire, N.Y. Times, Feb. 7, 2011, http://www.nytimes.com/gwire/2011/02/07/07greenwire-supreme-courts-murky-clean-water-act-ruling-cr-33055.html

27 Id. ("The short answer is that the state of post-Rapanos wetlands jurisdiction is a mess," said Richard Frank, director of the California Environmental Law & Policy Center at University of California, Davis. "Rapanos produced a broad consensus of opinion, virtually unheard of when it comes to wetlands regulation, that the Supreme Court had made things worse, rather than better.")

28 Massachusetts v. EPA, 127 S. Ct. 1438, 1463 (2007).

29 Id. at 1463.

they do."[30] In contrast, Chief Justice Roberts said the court should not have found that Massachusetts or any of the other plaintiffs had standing to bring the action. The finding "has caused us to transgress 'the proper — and properly limited — role of the courts in a democratic society,'" he said, quoting from a 1984 decision.[31] He also said "[t]his court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here is the function of Congress and the chief executive, not the federal courts."[32]

Roberts then argued that the alleged injury is "conjectural or hypothetical," rather than "actual or imminent."[33] He also rejected the idea that the regulations Massachusetts sought would respond to an injury that was caused by the EPA's inaction and that the requested rules would have the ability to redress its suspected injury:

> Petitioners are never able to trace their alleged injuries back through this complex web to the fractional amount of global emissions that might have been limited with EPA standards. In light of the bit-part domestic new motor vehicle greenhouse gas emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners' alleged injury--the loss of Massachusetts coastal land--the connection is far too speculative to establish causation.[34]

On the other hand, Justice Scalia conveniently used *Chevron* as the heart of his dissent, stating (quite ironically, given his habit of discarding administrative judgments he dislikes), that "this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency."[35] In short, by replacing one of the liberal Justices with a conservative, the ability of the states to force the EPA to regulate greenhouse gases would probably vanish sooner rather than later.

We have seen an already conservative court diminish the power of Federal agencies to enforce the Endangered Species Act. In *National Association of Home Builders v. Defenders of Wildlife*, a procedural conflict between agencies arose regarding the protection of endangered species. The Clean Water Act has specific requirements governing transfer applications, where NPDES permits may be enforced by state officials. On the other hand, the Endangered Species Act is largely enforced through the Commerce and Interior Departments of the Federal Government. At issue is whether the federal officials transferring authority to the state officials must also add the Endangered Species Act regulations when enforcing the CWA permits.

In the opinion, Justice Alito found that the Endangered Species Act did not apply in this case, and that Section 7(a)(2) of the Endangered Species Act does not effectively operate as a tenth criterion on which the EPA's transfer of certain permitting powers to state authorities under section 402(b) of the Clean Water Act must be conditioned.[36] Justice Stevens dissented, writing that the Endangered Species Act's requirements should be given precedence over other aims of federal agencies, despite the conflict between the Endangered Species Act and the Clean Water Act.

> [The court] erroneously concludes that the ESA contains an unmentioned exception for nondiscretionary agency action and that the statute's command to enjoin the completion of the Tellico Dam depended on the unmentioned fact that the TVA was attempting to perform a discretionary act. But both the text of the ESA and our opinion in Hill compel the contrary

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30 *Id. at 1462.*

31 *Id. at 1471, citing Allen v. Wright, 468 U.S. 737, 750 (1984).*

32 *Id. at 1464, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).*

33 *Id. at 1467 ("If petitioners' particularized injury is loss of coastal land, it is also that injury that must be "actual or imminent, not conjectural or hypothetical," citing Defenders of Wildlife, 112 S. Ct. 2130).*

34 *Id*. at 1469.

35 *Id*. at 1478.

36 *National Association of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2525 (2007) ("The question presented is whether § 7(a)(2) effectively operates as a tenth criterion on which the transfer of permitting power under the first statute must be conditioned. We conclude that it does not. The transfer of permitting authority to state authorities— who will exercise that authority under continuing federal oversight to ensure compliance with relevant mandates of the Endangered Species Act and other federal environmental protection statutes—was proper.").*

> determination that Congress intended the ESA to apply to "all federal agencies" and to all "actions authorized, funded, or carried out by them." Id., at 173 (emphasis deleted).[37]

The resulting holding means that the provisions of the Endangered Species Act are of secondary concern when transferring enforcement to local officials, since the transfer is not considered a final agency action reviewable by the courts.

Adding another like-minded justice would also strengthen conservatives' determination only to enforce environmental protection when they deem it cheap enough to apply without affecting the economic interests of industry. In *Entergy Corporation v. Riverkeeper, Inc.*, the Court reviewed whether EPA could use a cost-benefit analysis in choosing the Best Available Technology to meet national performance standards. In a majority opinion written by Justice Scalia, the Court ruled that the EPA could use a cost-benefit analysis in setting the national performance standards:

> The EPA's view that § 1326(b)'s 'best technology available for minimizing adverse environmental impact' standard permits consideration of the technology's costs and of the relationship between those costs and the environmental benefits produced governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844.[38]

In this 5-3 decision, Justice Breyer agreed with some aspects of the majority's opinion, but did not believe it should be as far-reaching as the more conservative justices did, stating that "those who sponsored the legislation intended the law's text to be read as restricting, though not forbidding, the use of cost-benefit comparisons."[39] The other liberal justices believed the text of the law was misinterpreted entirely.[40]

Many environmentalists argue that cost-benefit analysis ignores the "moral urgency" of environmental health and safety regulations, as well as being "relentlessly anti-regulatory in its design and implementation."[41] The consequences of *Riverkeeper* are that, if an environmental statute is ambiguous as to whether cost-benefit analysis is allowed, then it will be left to the agency to make the potentially controversial determination.[42]

As is obvious from the precedents above, a court dominated by Romney appointees and other conservatives would do great harm to our nation's environmental regulations, and our agencies' powers to correct ever-more serious environmental harms.

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37 Id. at 2541.

38 Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 209 (2009).

39 Id. at 230.

40 Id. at 237 ("Like the Court of Appeals, I am convinced that the EPA has misinterpreted the plain text of § 316(b). Unless costs are so high that the best technology is not 'available,' Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact. Section 316(b) neither expressly nor implicitly authorizes the EPA to use cost-benefit analysis when setting regulatory standards; fairly read, it prohibits such use.").

41 Jonathan Cannon, The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc., 34 Harv. Envtl. L. Rev. 425 (2010).

42 Review of Administrative Action — Clean Water Act — Judicial Review of Cost-Benefit Analysis: Entergy Corp. v. Riverkeeper, Inc., 123 Harv. L. Rev. 342 (2009).

Democracy and the Right to Vote: Endangering the Voting Rights Act, Majority-Minority Districts, and "One Person, One Vote"

A Romney-redefined Supreme Court would almost certainly mean the downfall of Section Five of the Voting Rights Act. Nullifying Section Five would make it easier for jurisdictions with a history of discriminatory practices to make future changes in "any voting qualification or prerequisite to voting, or standard, or procedure with respect to voting…"[43] This lifting of the key provision of the Voting Rights Act would include the practice of decennial redistricting.

In *League of Latin American Citizens v. Perry* (2006), the Court asked if the Texas Legislature violated the Constitution and the Voting Rights Act when it used 2000 Census data to redistrict for partisan advantage, resulting in districts that did not conform to the one person, one vote standard.[44] Texas had already redistricted using the 2000 Census data with a Legislative Redistricting Board, but Republicans wanted more districts that benefited their party. In an effort spearheaded by Rep. Tom DeLay, the Legislature did the process over again in 2003 once both Houses of the Legislature gained a Republican majority.[45]

The Court issued a fragmented set of opinions. Relying on different rationales, none of which garnered a clear majority, seven of the Justices rejected the plaintiffs' invitation to rule that the Texas Legislature's statewide, mid-decade, partisan redistricting violated the "one-person one-vote" rule and was therefore unconstitutional. Only Justice Stevens (who is no longer on the Court) and Justice Breyer saw the partisan mid-decade redistricting as violating the First Amendment (by officially retaliating against voters for their political affiliation) and the Fourteenth Amendment (by intending to harm a politically disfavored group).

However, five Justices (Kennedy and the four more liberal Justices) ruled that part of the redistricting plan violated the Voting Rights Act by redrawing a district that was supposed to be Latino-majority in such a way as to deny Latino voters as a group the opportunity to elect a candidate of their choosing.[46] (This was supposed to be a new Latino-majority district to make up for redistricting most Latinos out of a different, formerly Latino-majority district.) They found that the groups of Latinos put into the new district – some in the Austin area, others near the Mexican border – were not only separated by an enormous distance, but also had disparate needs and interests, mostly because their economic status differed considerably. Because of both factors combined, the new district was not "compact" as required under Section 2 of the Voting Rights Act and thus not likely to empower Latinos in the district to elect candidates of their choice.[47] Rick Pildes argues this reflects an increasing "skepticism to grouping voters together based on racial or ethnic identity."[48]

Indeed, the Court further registered its skepticism in *Northwest Austin Municipal Utility District Number One v. Holder* (2009). In that case, the district attempted to seek a bailout from the Section Five preclearance provisions of the Voting Rights Act because it had no history of racial discrimination.[49] While the Court declined to rule on the constitutionality of Section Five, it agreed that the district was eligible to seek bailout under the Act.[50]

In his opinion for the Court, Chief Justice Roberts expressed skepticism as to whether the Voting Rights Act would be held constitutional in the near future:

> More than 40 years ago, this Court concluded that "exceptional conditions" prevailing in certain

43 *42 USC § 1973(C)(b).*
44 *League of Latin American Citizens v. Perry, 548 U.S. 399 (2006).*
45 *Id.*
46 *Id.*
47 *Id.*
48 *Rick Pildes, First Thoughts on Voting Rights, Gerrymandering, and Texas, http://www.scotusblog.com/2006/06/first-thoughts-on-voting-rights-gerrymandering-and-texas/ (last visited May 28, 2012).*
49 *Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193, 196-197 (2009).*
50 *Id. at 197.*

> parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. Katzenbach, 383 U.S., at 334. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today.[51]

Thus, acting in the name of constitutional avoidance, a nearly unanimous court upheld the Voting Rights Act. However, whether the Act will be held constitutional in the future is unknown. But it is clear that those odds drop precipitously with the addition of more conservative justices.

In *Bartlett v. Strickland* (2009), the Court held in a 5-4 decision that a minority group must constitute a numerical majority of the voting-age population in an area before Section Two of the Voting Rights Act would require the creation of a legislative district to prevent dilution of that group's votes.[52] When the district had been created in the previous redistricting, District 18 was a geographically compact majority-minority district.[53] When it came time for the district to be redrawn however, the African-American voting age population had fallen below 50 percent. The legislators decided to split the county in order "to give African-American voters the potential to join with majority voters to elect the minority group's candidate of choice."[54]

The decision resulted in turning 50% into a "magic number," and will likely "reduce the number of majority-minority districts mandated by Section Two."[55] Many were heartened by Justice Kennedy's comments that "racial discrimination and racially polarized voting are not ancient history" and that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."[56] This was a closely divided decision won on the conservative side. Adding a more conservative jurist would likely further restrict the import of Section Two.

Restrictions at the Polls

Another hot voting rights issue involves the growing number of restrictions on voters when they go to the polls. In *Crawford v. Marion County Election Board* (2008), the Court held that an Indiana law requiring voters to provide photo IDs did not violate the Constitution.[57] The 7th Circuit Court of Appeals was deeply divided when it upheld the law, with the dissent characterizing the law as a thinly-veiled attempt to disenfranchise low-income Democratic Party voters.[58]

While this was a 6-3 decision, with the generally liberal Justice Stevens joining the conservative majority, Stevens focused largely on the idea that the burden on voters obtaining the identification cards was low. This was due in part to the fact that the identification cards were free, and in part to the availability of provisional ballots, requiring an affidavit which did not require identification: "For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."[59]
Conservative justices are much less likely to believe such factors are necessary in order for identification laws

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51 Id. at 211.
52 Bartlett v. Strickland, 556 U.S. 1, 2 (2009).
53 Id. at 1.
54 Id.
55 Rick Hasen, Initial Thoughts on Bartlett v. Stickland: Narrowing the Voting Rights Act to Save It?, Election L. Blog, Mar. 9, 2009, http://electionlawblog.org/archives/013149.html.
56 Peter Wallsten & David G. Savage, Conservatives invoke Obama in Voting Rights Act challenge, L.A. Times, Mar. 18, 2009, at http://articles.latimes.com/2009/mar/18/nation/na-voting-rights18/2.
57 Crawford v. Marion County Election Board, 553 U.S. 181 (2008).
58 Crawford v. Marion County Election Board, 472 F.3d 949, 954 (7th Cir, 2007) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny—or at least, in the wake of Burdick v. Takushi, 504 U.S. 428 (1992), something akin to 'strict scrutiny light'—and strike it down as an undue burden on the fundamental right to vote.")
59 Crawford, 553 U.S. at 198.

to be held constitutional. In fact, conservative justices often do not even see the need for safeguards such as absentee ballots. As Justice Scalia went to great pains to state in *Crawford*, "That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."[60]

How Would a Romney-Bork Court Affect Latinos?

As a community, Latinos have been heavily affected by a number of Roberts Court cases relating to education, immigration and naturalization, worker's documentation of citizenship, and redistricting in elections.

In 2011's *Chamber of Commerce of the US v. Whiting*, Chief Justice Roberts wrote for the conservative majority (or, in parts, a plurality), upholding an Arizona law imposing draconian penalties on employers for hiring undocumented aliens, evading a federal law preempting such state laws. Specifically, the Court held that Federal law does not prevent Arizona from revoking the business licenses of state companies that knowingly hire undocumented workers (called "a death sentence for businesses"), or from requiring employers in that state to use a federal electronic system to check that their workers are authorized to work in the United States.[61] The Obama Administration argued that the Arizona law conflicts with Federal immigration policy, and the issue at question was whether Arizona could add to the penalties of federal law with much tougher ones of its own.[62]

This case was decided 5-3, with Justices Sotomayor, Breyer, and Ginsburg dissenting and Justice Kagan recused. In her dissent, Justice Sotomayor wrote "I cannot believe that Congress intended for the 50 states and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens."[63] Justice Breyer also said that the law disrupts the goals of Congress by "seriously threaten[ing] the federal act's antidiscrimination objectives by radically skewing the relevant penalties."[64]

However, in *Arizona v. United States* (the S.B. 1070 case), Roberts and Kennedy surprisingly joined three moderates to create a 5-3 majority limiting the ability of states to adopt even more aggressive legislation designed to make life so harsh for undocumented immigrants that they flee the state. Unlike the state laws upheld in Whiting, which regulated employers only, these directly targeted immigrants through the mechanism of criminal law.

In *Arizona v. United States*, the issue was whether federal immigration laws preclude what Arizona characterized as its novel efforts at "cooperative law enforcement." The state law made failure to comply with federal alien-registration requirements a state misdemeanor,[65] but this was struck down because the federal government has preempted the entire field of alien registration. The law also made it a misdemeanor for an unauthorized alien to seek or engage in work in the state, [66] a provision which was struck down as obstructing federal policy on hiring undocumented aliens. It also authorized officers to arrest a person if an officer has probable cause to think that he or she has committed any public offense "that makes the person removable from the United States."[67] This provision, too, was struck down as obstructing federal policy on when to arrest an undocumented alien. The law also provided that officers should make efforts to verify a person's immigration status during a stop, detention, or arrest[68]; this provision was upheld for now against a facial challenge but could be deemed unconstitutional as applied if the state engages in racial profiling.

60 Id. at 209.

61 Chamber of Commerce of the United States v. Whiting, SCOTUSBlog, http://www.scotusblog.com/case-files/cases/chamber-of-commerce-of-the-united-states-v-candelaria/ (last viewed May 28, 2012).

62 Adam Liptak, Illegal Workers: Court Upholds Faulting Hirers, N.Y. Times, May 26, 2011, at the lawhttp://www.nytimes.com/2011/05/27/us/27scotus.html?_r=2&hp.

63 Chamber of Commerce of US v. Whiting, 131 S. Ct. 1968, 2003 (2011).

64 Id. at 1990.

65 Ariz. Rev. Stat. § 13-1509 (West Supp. 2011).

66 Id. at § 13-2928(C).

67 Id. at § 13-3883(A)(5).

68 Id. at § 11-1051(B).

The Court essentially held that the first three provisions were impermissible because they are preempted by federal law.[69] The opinion "went far toward excluding states from having their own deportation policies."[70] The 5-3 decision was deemed to be close to a "rout in favor of the Obama Administration."[71] However, if the immigrant status verification provision is challenged against a regime of racial and ethnic profiling, the success of such a challenge will likely depend on who replaces the next Justice to leave this closely divided Court.

An election law case has also specifically affected Latinos, but in ways that could also affect other minority groups. In *League of Latin American Citizens v. Perry* (2006), five Justices (Kennedy and the four more liberal Justices) ruled that part of Texas's redistricting plan violated the Voting Rights Act by redrawing a district that was supposed to be Latino-majority in such a way as to deny Latino voters as a group the opportunity to elect a candidate of their choosing.[72] (This was supposed to be a new Latino-majority district to make up for redistricting most Latinos out of a different, formerly Latino-majority district.) They found that the groups of Latinos put into the new district – some in the Austin area, others near the Mexican border – were not only separated by an enormous distance, but also had disparate needs and interests, mostly because their economic status differed considerably. Because of both factors combined, the new district was not "compact" as required under Section 2 of the Voting Rights Act and thus not likely to empower Latinos in the district to elect candidates of their choice.[73] Rick Pildes argues this reflects an increasing "skepticism to grouping voters together based on racial or ethnic identity."[74]

In *Horne v. Flores*, the Court remanded the case to determine whether Arizona's general education funding budget supports Equal Educational Opportunities Act-compliant English Language Learner programming.[75] The case was brought in 1992 on the grounds that the Nogales Unified School District had failed to follow the Equal Educational Opportunities Act, which requires a State "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[76]

In January 2000, the US District Court of Appeals for the District of Arizona had cited the state for civil contempt for failing to adequately fund English Language Learner programs, in violation of the Equal Educational Opportunities Act and subsequently rejected proposed legislation as inadequate to resolve the programs' deficiencies. The superintendent and representatives argued that increases in state funding, changes in the management of the school district, and passage of the No Child Left Behind Act sufficiently altered the foundations of the district court's original ruling to warrant relief.

The opinion held that, in evaluating the actions of the state, attention should focus on student outcomes rather than on spending and inputs to schools.[77] The minority argued that majority opinion risks denying schoolchildren the English language instruction they need to overcome language barriers that impede equal participation.[78]

In *Flores-Villar v. US* (2010), the Court was split 4-4 on the constitutionality of a law setting standards for when certain foreign-born children of unmarried parents can automatically claim U.S. citizenship. The law establishes minimum residency requirements for the parents before citizenship can automatically transfer to the child, but the requirement for fathers is more onerous than that for mothers. The Ninth Circuit had ruled that the law did

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69 Arizona v. U.S., 132 S. Ct. 2492 (2012).

70 Lyle Denniston, Opinion recap: Immigration and judicial styles, SCOTUSblog (Jun. 25, 2012, 7:03 PM), http://www.scotusblog.com/2012/06/opinion-recap-immigration-and-judicial-styles

71 Andrew Cohen, Razing Arizona: Supreme Court Sides with Feds on Immigration, Atlantic, June 25, 2012, at http://www.theatlantic.com/national/archive/2012/06/razing-arizona-supreme-court-sides-with-feds-on-immigration/258932/.

72 League of Latin American Citizens v. Perry, 548 U.S. 399 (2006).

73 Id.

74 Rick Pildes, First Thoughts on Voting Rights, Gerrymandering, and Texas, http://www.scotusblog.com/2006/06/first-thoughts-on-voting-rights-gerrymandering-and-texas/ (last visited May 28, 2012).

75 Horne v. Flores, 557 U.S. 433 (2009).

76 Id. at 473.

77 Id. at 464.

78 Id. at 474.

not violate the Equal Protection Clause.[79]

The relevant statute provided that a foreign-born child of unmarried parents obtains citizenship automatically through a U.S. citizen mother if she resided in the U.S. for one year prior to his birth; but through a U.S. citizen father only if he had resided in the U.S. prior to the birth for ten years, five of which must be after he was 14 years old. (The specifics of the law have since changed, but a gender disparity remains.)

Mr. Flores-Villar tried to avoid deportation by claiming citizenship. However, his father was 16 years old when Flores-Villar was born, making it impossible for him to fulfill the requirement that five years of his residency occur after the age of 14. If Flores-Villar had been born to a U.S. citizen mother with the same history of residency, he would automatically be a citizen today.

Justice Kagan recused herself because she had worked on the case as Solicitor General. The Court was split 4-4, with no indication as to the positions of any particular Justice.[80] Only the judgment of the lower court was affirmed, with no written opinion, so the issue can reappear before the Court, with Kagan's participation. **Depending on who nominates the next Justices, the Court may make it harder for this class of immigrants to claim U.S. citizenship.**

Money in Politics: In the Roberts Court, Corporations Are People. In the Romney Court, They will be King.

With the 5-Justice conservative majority in the driver's seat, the Roberts Court has already had a sweeping effect on the campaign finance laws of this country, striking down one democracy-protecting regulation after another. Despite a history of campaign finance limits dating back to at least Teddy Roosevelt's time, the "Corporate Court" has transformed the politics of the country by turning corporate treasuries into political slush funds and systematically rearranging the nation's laws to benefit the rich, the powerful and the corporate. The Court's upending of the nation's campaign finance regime and its electoral politics reached its peak in the *Citizens United* decision, and many have already come to think of this as the *Citizens United* era.

The offensive against campaign finance rules has involved systematic demolition of the law known as "McCain-Feingold." Officially titled the Bipartisan Campaign Reform Act of 2002, McCain-Feingold was created, in part, to regulate phony "issue ads" paid for by corporations in the weeks before an election. This Act made it a federal crime for a corporation to use its general treasury funds to pay for any "electioneering communication," which McCain-Feingold defined as any broadcast that referred to a candidate for federal office and was aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction where that candidate was running.[81]

In 2007's *Federal Election Commission v. Wisconsin Right to Life*, the court ruled 5-4 that ads were eligible for an "as applied" exception to the McCain-Feingold limits on issue ads close to an election unless the ad could not reasonably be interpreted as anything other than urging the "election or defeat of a candidate for federal office."[82] It was said at the time that this first Roberts Court case undermining our campaign finance laws marked a "sea-change with respect to corporate speech rights [rather] than as a case upending the First Amendment's general treatment of campaign finance regulation."[83] In his opinion, Chief Justice Roberts stated that these issue ads were not the equivalent to contributions to candidates, and to "equate … [the] ads with contributions [would be]

79 U.S. v. Flores-Villar, 536 F.3d 990 (2008).

80 Flores-Villar v. U.S., 131 S. Ct. 2312 (2011).

81 2 U.S.C. 434(f)(3)(A).

82 Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449 (2007). ("In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. We conclude that the speech at issue in this as-applied challenge is not the 'functional equivalent' of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly we hold that BCRA § 203 is unconstitutional as applied to the advertisements at issue in these cases.")

83 Posting of Marty Lederman to SCOTUSblog, http://www.scotusblog.com/2007/06/wisconsin-right-to-life-in-a-nutshell/ (June 25th, 2007, 13:37 EST).

to ignore their value as political speech."[84]

Justice Souter, on the other hand, wrote in his dissent for the 4 moderates and liberals:

> The ban on contributions will mean nothing much, now that companies and unions can save candidates the expense of advertising directly, simply by running 'issue ads' without express advocacy, or by funneling the money through an independent corporation like WRTL.[85]

As Richard Briffault has said, this ruling was "no mere as-applied exception but an effective gutting of the law."[86] *The New York Times* points out that "[i]t is often hard … for the casual observer to tell the difference between [issue advocacy and express advocacy]."[87]

In 2008's *Davis v. Federal Election Commission*, the McCain-Feingold Act took another dramatic hit at the hands of the Court. McCain-Feingold contained a provision called the "Millionaire's Amendment," which changed campaign contribution limits for candidates facing wealthy, self-funding opponents. When the self-financing candidate uses more than $350,000 of his or her personal funds in his or her campaign, the individual contribution limit could triple for the non-self-financing candidate.[88] This provision in the law was meant to help prevent a richer candidate from winning an election simply because of his or her personal wealth.

The Court struck down the Millionaire's Amendment by a 5-4 margin along the predictable lines. In his opinion, Justice Alito found that there was no compelling "governmental interest in eliminating corruption or the perception of corruption" with the expenditure of personal funds.[89] Instead, Alito argues that the use of personal funds reduces the likelihood of corruption in the political process.[90] Thus, Alito states, "imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment."[91]

In his dissent, Justice Stevens found that the provision was "a modest, sensible, and plainly constitutional attempt . . . to minimize the advantages enjoyed by wealthy candidates" compared to those who must rely on others to assist in funding their campaigns.[92]

> It cannot be gainsaid that the twin rationales at the heart of the Millionaire's Amendment--reducing the importance of wealth as a criterion for public office and countering the perception that seats in the United States Congress are available for purchase by the wealthiest bidder--are important Government interests.[93]

The Court seems to have argued that candidates with the "natural advantage" of wealth have a "constitutional right to bar Congress" from making it easier for opponents to "mount tougher competition."[94]

The Court also undermined state campaign finance laws with the same perverse logic found in Davis. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, an Arizona state matching funds provision was

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84 FEC v. Wisconsin Right to Life at 479.
85 Id. at 536.
86 Posting of Gretchen Sund to SCOTUSblog, http://www.scotusblog.com/2007/06/wrtl-the-anti-mcconnell/ (June 25th, 2007, 16:02 EST).
87 Michael Luo, Money Talks Louder Than Ever in Midterms, N.Y. Times, Oct. 7, 2010, http://www.nytimes.com/2010/10/08/us/politics/08donate.html?pagewanted=all.
88 Davis v. Federal Election. Commission, 554 U.S. 724, 746 (2008).
89 Id. at 740.
90 Id. at 740-741 ("The Buckley Court reasoned that reliance on personal funds reduces the threat of corruption, and therefore § 319(a), by discouraging use of personal funds, disserves the anticorruption interest.")
91 Id. at 744.
92 Id. at 750.
93 Id. at 752-753.
94 Opinion recap: Davis v. FEC, posting to SCOTUSblog, http://www.scotusblog.com/2008/06/opinion-recap-davis-v-fec/ (June 26th, 2008, 15:06 EST).

challenged on the basis that it unconstitutionally penalizes free speech. Once matching funds were triggered in Arizona, publicly financed candidates received "one dollar for every dollar raised or spent by the privately raised candidate," as well as those raised by any "independent groups that support[ed] the privately financed candidate."[95]

Arizona's voters adopted the clean elections law in the 1990s to reduce the political corruption that was repeatedly driving the state into crisis. Two governors had faced criminal indictment. Nearly ten percent of the Arizona legislature ended up facing civil or criminal charges after several legislators were caught on video accepting campaign contributions and bribes in exchange for legislative acts. Arizonans thus acted to reduce candidates' dependence on wealthy campaign funders and restore integrity to their elections.

Nevertheless, the Court held that Arizona's law discriminated against the wealthy self-funded candidates. According to the Court, the law "substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny."[96] Chief Justice Roberts argued that the law would cause self-funded candidates as well as supportive independent expenditure groups to spend less, impairing their free speech rights.[97]

In her dissenting opinion, Justice Kagan pointed out that the law did nothing more than add to the quantity of political speech in the campaign. She wrote that "the Act promotes the values underlying both the First Amendment and our entire Constitution by enhancing the "opportunity for free political discussion to the end that government may be responsive to the will of the people."[98] Moreover, the quality of the speech market is enhanced because"[c]andidates who rely on public, rather than private, moneys are 'beholden [to] no person and, if elected, should feel no postelection obligation toward any contributor.'"[99] As Justice Kagan stated, "in this case, the majority says that the prospect of more speech—responsive speech, competitive speech, the kind of speech that drives public debate—counts as a constitutional injury." In essence, the majority found that the wealthy have not only a right to spend to the heavens in pursuit of public office but a right to freeze their cash advantage over opponents.

However, the Court had an even more devastating blow to deliver to the nation's campaign finance structure in the infamous *Citizens United v. Federal Election Commission* decision. In *Citizens United*, advertisements for *Hillary: The Movie* had run within 30 days of a primary, thus violating the McCain-Feingold restrictions on "electioneering communications."[100] Instead of ruling on whether the movie was a political communication under the statute, a question that could have been easily resolved for the plaintiffs, the conservative justices ordered the case reargued to address a constitutional question not raised by the litigants – whether Section 203 of McCain-Feingold violated the First Amendment because corporations have an unlimited right to spend money in political campaigns.

True to form, the Court found the prohibition of all independent expenditures by corporations and unions violated the First Amendment's protection of free speech.[101] Specifically, Kennedy's 5-4 decision held that corporations have the same First Amendment political speech rights as individuals and that they can make unlimited independent expenditures from their general corporate accounts. Kennedy wrote, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for

95 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2809 (2011).

96 Id. at 2809.

97 Id. at 2826, quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("'Leveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom — the 'unfettered interchange of ideas' — not whatever the State may view as fair.").

98 Id. at 2830.

99 Id., citing Republican Nat. Comm. v. FEC, 487 F. Supp. 280, 284 (S.D.N.Y. 1979), aff'd 445 U. S. 955 (1980).

100 Citizens United v. Fed. Election Commission, 130 S. Ct. 876, 888 (2010) ("The court held that § 441b was facially constitutional under McConnell, and that § 441b was constitutional as applied to Hillary because it was 'susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.' 530 F. Supp. 2d, at 279.")

101 Id. at 917.

simply engaging in political speech."[102]

Both the substance and the process of the ruling shocked and dismayed the more liberal justices. Indeed, before the case was reargued but while the conservatives were nonetheless planning to "resolve" the constitutional issue no one had raised, Justice Souter originally wrote a dissent that reportedly "aired some of the Court's dirty laundry."[103] According to Jeffrey Toobin, Souter "accused the Chief Justice of violating the Court's own procedures to engineer the result he wanted." However, the case was reargued in the next session, and by then Souter had retired. Justice Stevens read part of his ninety-page dissent from the bench, something "quite unusual for a dissenter to do."[104]

Stevens argued that the ruling "threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution."[105] Stevens later wrote that "[a] democracy cannot function effectively when its constituent members believe laws are being bought and sold."[106] Additionally, Stevens disagrees with such an extreme extension of the legal fiction of corporations' "personhood," pointing out that corporations are not "members of 'We the People' by whom and for whom our Constitution was established."[107]

The Citizens United ruling has been called "the most serious threat to American democracy in a generation."[108] Richard Hasen argues that it "increases the dangers of corruption in our political system and it ignores the strong tradition of American political equality."[109] Indeed, Justice Stevens concluded with the following:

> At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.[110]

The Court continued the precedent of *Citizens United* in *American Tradition Partnership v. Bullock*. Without even hearing oral arguments, the Supreme Court decided by a 5-4 vote to summarily reverse a Montana Supreme Court decision upholding a 1912 voter-approved ban on corporations' spending of their own money on political campaigns in that state.[111]

Despite the fact that Montana's highest court had found that the state had a history of profoundly corrupt corporate influence in politics, the Court held that Montana's argument was already rejected in *Citizens United*. In his dissent, Justice Breyer pointed out that in *Citizens United*, the Court found that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," but that "independent expenditures by corporations" in *Bullock* "did in fact lead to corruption or the appearance of corruption in Montana."[112] Any illusion that one or more of the conservative Justices would have

102 Id. at 904

103 Jeffrey Toobin, Money Unlimited: How Chief Justice John Roberts orchestrated the Citizens United decision, New Yorker, May 21, 2012, http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin?currentPage=all.

104 Posting of Lisa McElroy to SCOTUSblog, http://www.scotusblog.com/2010/01/citizens-united-v-fec-in-plain-english/ (Jan. 22nd, 2010, 23:45 EST).

105 Citizens United at 931.

106 Id. at 964.

107 Id. at 972.

108 Jonathan Alter, High-Court Hypocrisy, Newsweek, Jan. 22, 2010, http://www.thedailybeast.com/newsweek/2010/01/22/high-court-hypocrisy.html.

109 Posting by Richard Hasen to N.Y. Times Room for Debate, http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/ (Jan. 21, 2010, 15:00 EST).

110 Citizens United at 979

111 American Tradition Partnership, Inc. v. Bullock, 132 S. Ct. 2490 (2012).

112 Id. at 2491.

ruled differently in *Citizens United* had they known the impact it would have was shattered by the decision in the Montana case. Yet the issue is bound to arise again in one form or another, and its fate will be determined by who will be nominating the next Supreme Court Justice.

Women's Rights: Romney and Bork Would Turn Back the Clock Further on the Roberts Court

The Roberts Court has had a bad effect on the rights of women. In particular, the Court has set back women's rights when it comes to equal pay and fair treatment in the workplace as well as women's reproductive choice. Congress was able to reverse a critically damaging decision with the Lilly Ledbetter Fair Pay Act, but a woman's constitutional right to choose hangs by a thread. Mitt Romney's constitutional right-hand man, Robert Bork, is a sworn enemy of *Roe v. Wade* and *Planned Parenthood v. Casey* and calls feminism a "totalitarian" movement.

Conservatives on the Court have been looking for ways to cut back on women's rights to reproductive choice. In *Gonzales v. Carhart*, for example, the Court upheld the Partial-Birth Abortion Ban Act. The law, signed by President Bush in 2003, bans a procedure referred to as intact dilation and extraction.[113] The law bans a procedure "found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists."[114] The law has no exceptions for the health of the woman, as required under precedent, including the 1992 *Planned Parenthood v. Casey* opinion reinforcing the core right of a woman to choose.

In 2000, when Justice O'Connor was still serving, the Court struck down a nearly identical law, with O'Connor part of the 5-4 majority. However, when Justice Alito replaced her, the result was quite different: In a 5-4 decision, the Court upheld the Act.[115] Justice Kennedy wrote that the federal ban would only be unconstitutional "if it subjected women to significant health risks."[116] Kennedy argued that safe medical options are available, so the case does not infringe upon a woman's right to choose: "[t]he Act allows…a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right."[117] Kennedy's decision relied in part on paternalistic views of women: that women regret their choices to have abortions; and that because of women's fragile emotional state and the mother's bond of love for her child, the state may deprive them of the right to make an autonomous choice.

In her dissenting opinion, Justice Ginsberg found the decision "alarming."[118] She particularly took issue with the absence of a health exception, citing "women who, in the judgment of their doctors, require an intact D & E because other procedures would place their health at risk."[119] The Justice also called the decision "irrational," pointing out that the decision strays far from "our earlier invocations of 'the rule of law' and the 'principles of *stare decisis*."[120]

The American College of Obstetricians and Gynecologists described the Court's decision as "shameful and incomprehensible."[121] The New England Journal of Medicine criticized the decision, writing: "[f]or the first time, the Court permits congressional judgment to replace medical judgment."[122] The Center for Reproductive

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113 Gonzales v. Carhart, 127 S. Ct. 1610, 1640 (2007).
114 Id. at 1641.
115 Id. at 1639.
116 Id. at 1635, citing Ayotte v. Planned Parenthood, 546 U.S. 320, 328 (2006); see also Planned Parenthood v. Casey, 505 U.S. 833, 880 (1992).
117 Carhart at 1637.
118 Id. at 1641 ("Today's decision is alarming. It refuses to take Casey and Stenberg seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in Casey, between previability and postviability abortions. And, for the first time since Roe, the Court blesses a prohibition with no exception safeguarding a woman's health.").
119 Id. at 1651.
120 Id. at 1652-1653.
121 Press Release, American Congress of Obstetricians and Gynecologists, ACOG Statement on the US Supreme Court Decision Upholding the Partial-Birth Abortion Ban Act of 2003 (Apr. 18, 2007), at http://web.archive.org/web/20110610140050/http://www.acog.org/from_home/publications/press_releases/nr04-18-07.cfm.
122 George Annas, The Supreme Court and Abortion Rights, 356 New Eng. J. Med. 2201, 2206 (2007).

Rights called the decision "a sharp reversal from prior abortion jurisprudence."[123]

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court considered whether a person can bring a salary discrimination suit under Title VII of the Civil Rights Act of 1964 when the disparate pay is received during the 180-day statutory limitations period, but is the result of discriminatory pay decisions that occurred outside the limitations period.[124] Lilly Ledbetter had been given "poor evaluations because of her sex," and as a result, "these past pay decisions continued to affect the amount of her pay throughout her employment."[125] The pay difference between Ledbetter and her male counterparts was "stark," with her pay rate at $3,727 per month, while "the lowest paid male area manager received $4,286 per month, the highest paid, $5,236."[126]

In a 5-4 decision, the Court gave a cramped interpretation to the statute's 180-day requirement. It ruled that Ledbetter could not sue her employer because the 180-day window to file her discrimination claim began to run when her employers set her salary illegally, rather than being renewed each time she got a paycheck reflecting illegal discrimination. This meant that by the time she discovered the pay discrimination, she was plain out of luck. Justice Alito argued that the Court was "not in a position to evaluate Ledbetter's policy arguments," and that it is not the job of the Court to change Title VII in order to "balance the interests of aggrieved employees."[127] Justice Ginsburg read a powerful dissenting opinion from the bench in order to "criticize the majority for opinions that she said undermine women's rights."[128] Ginsburg argued that the Court should not apply the 180-day limit that way, citing the fact that pay disparities occur in small increments over time, and that employers tend to keep their reasons for pay raises confidential.[129] Ginsburg also argued that the Court's "cramped interpretation of Title VII" was irreconcilable with the statute's "broad remedial purpose."[130]

As a result of the Court's decision, lower courts used the precedent to reject a wide variety of lawsuits claiming discrimination based on race, sex, age, and disability.[131] In 2009, President Barack Obama signed the Lilly Ledbetter Fair Pay Act into law, in order to correct the Court's decision.[132]

In *Wal-Mart v. Dukes*, one and a half million current and former female employees accused Wal-Mart of employment discrimination.[133] In one of the largest class actions ever, the employees alleged that local managers' broad discrimination in pay and promotion opportunities violated Title VII by discriminating against women.[134]

The Court held in a 5-4 decision that the plaintiffs could not proceed as to any kind of class action suit because they did not have enough in common to constitute a class. In his opinion, Justice Scalia wrote "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay."[135]

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123 Jason Harrow, A Sharp Reversal: Commentary from the Center for Reproductive Rights, SCOTUSblog (Apr. 18, 2007 18:17 EST), http://www.scotusblog.com/2007/04/a-sharp-reversal-commentary-from-the-center-for-reproductive-rights/.

124 Ledbetter v. Goodyear Tire and Rubber Co., 127 S. Ct. 2162, 2167 (2007).

125 Id. at 2166.

126 Id. at 2178, citing 421 F.3d 1169, 1174 (11th Cir. 2005); Brief for Petitioner 4.

127 Id. at 2177.

128 Robert Barnes, Over Ginsburg's Dissent, Court Limits Bias Suits, Wash. Post, May 30, 2007, at http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html.

129 127 S. Ct. at 2178-79 ("Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves. Pay disparities are thus significantly different from adverse actions 'such as termination, failure to promote, . . . or refusal to hire,' all involving fully communicated discrete acts, "easy to identify" as discriminatory.")

130 Id. at 2188.

131 Robert Pear, Justices' Ruling in Discrimination Case May Draw Quick Action by Obama, N.Y. Times, Jan. 4, 2009, at http://www.nytimes.com/2009/01/05/us/politics/05rights.html?_r=1.

132 Joanna Grossman, The Lilly Ledbetter Fair Pay Act of 2009: President Obama's First Signed Bill Restores Essential Protection Against Pay Discrimination, FindLaw, Feb. 13, 2009, at http://writ.news.findlaw.com/grossman/20090213.html.

133 Wal-Mart v. Dukes, 131 S. Ct. 2541, 2547 (2011).

134 Id. at 2547.

135 Id. at 2560.

The four liberals agreed with the five conservatives that the case for back pay could not proceed as a class under Federal Rule 23(b)(2). However, the liberal justices did not agree as to whether any kind of class action suit would be barred. Justice Ginsburg wrote that Wal-Mart's "delegation of discretion over pay is a policy uniform throughout all stores," and that "each individual's unique circumstances" with discrimination "should not factor into the Rule 23(a)(2) determination."[136] Without a class action determination, each employee will have to sue in much smaller classes or even on their own, making it much for difficult to obtain justice.

As bad as these developments were, things could get even worse for women if a future President Romney chooses conservative justices for the Supreme Court. A woman's right to choose and the ability to combat employment discrimination would be further imperiled. For instance, we may see the Court decide whether an employee can prohibit an aggrieved employee from class action lawsuits (or any type of lawsuit) by requiring new hires to agree to settle grievances by arbitration. In addition, anti-choice "personhood" proponents are eagerly trying to create a test case in which *Roe v. Wade* will be completely overruled, rather than whittled away on a case-by-case basis. So the stakes are high for women in this election.

Workplace Fairness: Corporations would be People in the Romney Court -- Workers Not so Much

The Roberts Court has had negative consequences for workplace fairness and dignity. It has made it much more difficult for workers to file class action suits and to escape unconscionable contracts. It has made it more difficult to bring suits based upon age discrimination (as well as sex discrimination, as discussed above), and it has laid the groundwork for letting companies force employees into arbitration for any conflicts that arise.

Physical Harm on the Job

The addition of another conservative justice is likely to have negative consequences for the rights of employees to hold their employers accountable for harm caused on the job. In *CSX Transportation v. McBride*, the Court considered whether an injured railroad employee suing under the Federal Employers' Liability Act (FELA) has to prove that his employer's negligence was the main cause of his injury, or only that it played some part in the injury.[137] Reversal of the lower court would have made it harder for injured employees to hold railroads accountable under FELA.

In a 5-4 decision, the Court held that under FELA, injury was proximately caused by the railroad's negligence if that negligence played any part in causing the injury.[138] In her opinion, Justice Ginsburg held that "a defendant railroad 'caused or contributed to' a railroad worker's injury 'if [the railroad's] negligence played a part--no matter how small--in bringing about the injury.'"[139] In his dissent, Chief Justice Roberts felt that the decision meant that "the sky's the limit" when it comes to employees' liability claims, stating "[w]here does 'foreseeability of harm' as the sole protection against limitless liability run out of steam?" Justice Thomas voted with the four liberals on most aspects of this case. Therefore, despite a conservative majority, the Court was able to come up with a decision allowing railroad workers to exercise the rights that Congress granted them.

Employee Rights and Arbitration Cases

In 14 *Penn Plaza v. Pyett*, the Court asked whether a provision in a collective-bargaining agreement requiring union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 is enforceable.[140] When plaintiffs believed that their job reassignments were the result of age discrimination, they

136 *Id. at 2567.*
137 *CSX Transportation v. McBride, 131 S. Ct. 2630 (2011).*
138 *Id. at 2634.*
139 *Id. at 2644.*
140 *14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009).*

sued despite a union-negotiated waiver of a right to litigate certain federal statutory claims.[141] The Court had ruled in 1974 that an individual's statutory rights under federal anti-discrimination statutes (including the right to go to court) cannot be waived in union-negotiated contracts.[142]

Nevertheless, in a 5-4 decision, Justice Thomas (joined by the other conservatives) held that the provision in the collective-bargaining agreement is enforceable as a matter of federal law: "Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."[143] The majority believed that arbitration is an efficient and acceptable forum for addressing grievances related to employment discrimination.[144]

In his dissent, Justice Souter stated "Congress itself has … operated on the assumption that a [collective bargaining agreement] cannot waive employees' rights to a judicial forum to enforce antidiscrimination statutes." Justice Stevens added, "Notwithstanding the absence of change in any relevant statutory provision, the Court has recently retreated from, and in some cases reversed, prior decisions based on its changed view of the merits of arbitration. … It is for Congress, rather than this Court, to reassess the policy arguments favoring arbitration and revise the relevant provisions to reflect its views."

Employee rights are also threatened from a consumer rights case. In the *AT&T Mobility v. Concepcion* case discussed above, the hard-right 5-4 majority forced defrauded consumers to comply with contracts so unconscionable and unbalanced as to be illegal under state law. The Court's undermining of state consumer protection laws could also weaken legal protections against employment discrimination, since large employers often use their overwhelming bargaining power to force new employees to sign the same kinds of arbitration agreements. In essence, the Court might allow powerful companies to force employees to sign away their right to go to court – especially in a class action case – to combat illegal discrimination.

Age Discrimination

In, an employee believed he was the victim of age discrimination when many of his responsibilities were transferred to a former subordinate in a newly created position.[145] The Court addressed whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967.[146] (A "mixed motive" case is one where an employer makes an employment decision based on both lawful and unlawful bases.)

In a 5-4 decision split along the predictable lines, the Court held that the worker must prove that age is the key factor in an employment decision, not just that age played a role in the decision. In his opinion, Justice Thomas stated:

> We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.[147]

The decision made it much harder to prove an age discrimination suit. In his dissent, Justice Stevens pointed

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141 Id. at 253-254.
142 Alexander v. Gardner-Denver Co., 415 U. S. 36 (1974).
143 14 Penn Plaza at 258.
144 Id. at 269 ("At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.")
145 Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343, 2346-47 (2009).
146 Id. at 2346.
147 Id. at 2352.

out that the opinion "utter[ly] disregard[s] … our precedent and Congress' intent."[148] "[I]t is particularly inappropriate for the court, on its own initiative, to adopt an interpretation of the causation requirement in the ADEA that differs from the established reading of Title VII."[149]

Despite the setbacks on workplace fairness already imposed by the Roberts Court, a Romney presidency would likely make things worse. Romney nominees would likely make it much easier for employers to escape liability for illegal discrimination against or actual physical harm to workers. They would also likely strengthen the current Court's efforts to weaken unions.

Civil Rights, Affirmative Action and School Desegregation: A Race to the Past

A Romney Presidency could have a significant and negative impact on the Court's approach to issues of racial discrimination and racial equity. The Roberts Court has already made moves to push back on certain actions to promote affirmative action and school desegregation. However, an increase in the number of conservatives on the Supreme Court could bring to a close many remedial actions to deal with past and present discrimination.

Affirmative Action

In *Ricci v. DeStefano*, the City of New Haven used objective examinations to determine promotions within the fire department.[150] When the results showed that white candidates outperformed minority candidates, the city recognized that the tests may have been flawed and, to avoid being sued under federal civil rights laws for using a flawed test with a racially disparate impact, the results were thrown out based upon the racial disparity.[151] The white candidates sued based upon racial discrimination.

The Court held 5-4 that the City violated Title VII by discarding the tests.[152] In his opinion, Justice Kennedy (joined by the other conservatives) found that an action such as New Haven's is prohibited "unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[153]

In her dissent, Justice Ginsberg states, "[i]n assessing claims of race discrimination, '[c]ontext matters.'"[154]

> In so holding, the Court pretends that "[t]he City rejected the test results solely because the higher scoring candidates were white." Ante, at ____, 174 L. Ed. 2d, at 507. That pretension, essential to the Court's disposition, ignores substantial evidence of multiple flaws in the tests New Haven used. The Court similarly fails to acknowledge the better tests used in other cities, which have yielded less racially skewed outcomes.[155]

As Sheila Foster, a law professor at Fordham, noted "this decision will change the landscape of civil rights law."[156] *Ricci* makes it much harder for public institutions to end discriminatory practices voluntarily.

School Desegregation

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148 *Id. at 2353.*
149 *Id.*
150 *Ricci v. DeStefano, 129 S. Ct. 2658, 2661 (2009).*
151 *Id.*
152 *Id. at 2661.*
153 *Id. at 2664.*
154 *Id. at 2689, citing Grutter v. Bollinger, 539 U.S. 306 (2003).*
155 *Ricci at 2690.*
156 *Adam Liptak, Supreme Court Finds Bias Against White Firefighters, N.Y. Times, June 29, 2009, at http://www.nytimes.com/2009/06/30/us/30scotus.html?pagewanted=all.*

In *Parents Involved in Community Schools v. Seattle School District*, two school districts voluntarily desegregated in order to achieve racial balance. The school districts took students' race into account in assigning certain students to particular schools in order to achieve racially integrated schools. Parents sued the school districts, claiming the plans violated the Fourteenth Amendment.[157]

The Court held that public schools may not use students' race as the sole determining factor for assigning them to schools.[158] Applying "strict scrutiny," the five conservatives agreed that the plans were not narrowly tailored to serve a compelling government interest, but the five were split among themselves. Four of them (the five minus Kennedy) wrote that the school districts' goal of racial diversity was not only not compelling, it was not even legitimate.[159] Chief Justice Roberts (writing for the four Justices) stated that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[160] In contrast, Kennedy wrote that the goal is compelling, but that directly looking at the race of individual students was not a sufficiently narrowly tailored way to meet that goal. He argued that school districts could constitutionally use race as a factor without looking at the race of individual students. Examples he gave included strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

In the principal dissent, Justice Breyer called the opinion "radical,"[161] stating that "[t]his is a decision that the court and the nation will come to regret."[162] Writing for the four dissenters, he explained in detail why racial diversity in primary and secondary public schools is a compelling government interest. Justice Stevens went so far to say "[i]t is my firm conviction that no member of the court that I joined in 1975 would have agreed with today's decision."[163]

The Use of Race in Redistricting

Adding Romney-nominated far-right Justices to the Supreme Court could mean the downfall of Section Five of the Voting Rights Act. Getting rid of Section Five would make it easier to discriminate against minority groups with changes in "any voting qualification or prerequisite to voting, or standard, or procedure with respect to voting…" in jurisdictions with a history of discriminatory voting practices.[164] This includes the practice of redistricting, which occurs at least once per decade after the US Census is released.

In *League of Latin American Citizens v. Perry* (2006), five Justices (Kennedy and the four more liberal Justices) ruled that part of Texas's redistricting plan violated the Voting Rights Act by redrawing a district that was supposed to be Latino-majority in such a way as to deny Latino voters as a group the opportunity to elect a candidate of their choosing.[165] (This was supposed to be a new Latino-majority district to make up for redistricting most Latinos out of a different, formerly Latino-majority district.) They found that the groups of Latinos put into the new district – some in the Austin area, others near the Mexican border – were not only separated by an enormous distance, but also had disparate needs and interests, mostly because their economic status differed considerably. Because of both factors combined, the new district was not "compact"

157 Parents Involved in Community Schools v. Seattle School District, 551 U.S. 701 (2007).

158 Id. at 701.

159 Id. at 732-733 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' While the school districts use various verbal formulations to describe the interest they seek to promote--racial diversity, avoidance of racial isolation, racial integration--they offer no definition of the interest that suggests it differs from racial balance.. …
"However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled 'racial diversity' or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.")

160 Id. at 748.

161 Id. at 831.

162 Id. at 868.

163 Id. at 803.

164 42 USC § 1973(C)(b).

165 League of Latin American Citizens v. Perry, 548 U.S. 399 (2006).

as required under Section 2 of the Voting Rights Act and thus not likely to empower Latinos in the district to elect candidates of their choice.[166] Rick Pildes argues this reflects an increasing "skepticism to grouping voters together based on racial or ethnic identity."[167]

LGBT Equality: Romney Justice Would Move Straight Backwards

Most recent cases implicating LGBT rights predate the Roberts Court, but five of the nine serving Justices participated in key Rehnquist Court decisions: Justices Scalia, Kennedy, Thomas, Ginsburg, and Breyer. We can make educated predictions about how they might rule in future cases: Scalia and Thomas are instinctively hostile to claims that anti-LGBT laws violate the Constitution, while Kennedy, Ginsburg, and Breyer have demonstrated a more expansive vision of constitutional protection for members of the LGBT community.

The Court broke new ground in LGBT rights in the 1996 case of *Romer v. Evans*.[168] In 1992, Colorado voters amended the state constitution to bar state and local governments from prohibiting discrimination on the basis of sexual orientation ("Amendment 2"). The measure repealed a number of existing anti-discrimination statutes, regulations, ordinances, and policies and made it exceptionally difficult for gay people to achieve civil rights protections. The Court ruled 6-3 that Amendment 2 violated the federal Equal Protection Clause, with Justice Kennedy writing the majority opinion. Ginsburg and Breyer joined Kennedy's opinion, while Scalia and Thomas dissented.

The majority noted that "[h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[169] The Court rejected the conservative line that Amendment 2 simply denied gays and lesbians access to "special rights." "To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint."[170] The Court did not address the question of whether classifications based on sexual orientation trigger heightened Equal Protection scrutiny (as with race and sex, for instance), because Amendment 2 failed even the low-level rational-basis scrutiny given to ordinary legislation: that it must bear a rational relation to some legitimate end, since Amendment 2 "seem[ed] inexplicable by anything except animus toward the class it affect[ed]," which is not a legitimate end.[171]

Justice Scalia's dissent criticized the majority for pronouncing that animosity toward homosexuality is wrong and defended the right of the majority to legislate on the basis of their moral disapproval of homosexuality. He characterized Amendment 2 as not disfavoring gays in any substantive sense, but only denying them preferential treatment. He called it a legitimate response against a small population that concentrated in cities, was disproportionately wealthy, had extraordinary political influence beyond their small numbers, opposed traditional morality, and had successfully brought its quest for "social endorsement" from New York, San Francisco, LA, and Key West to major Colorado cities like Denver, Aspen, and Boulder.

Importantly, the question of the appropriate level of Equal Protection scrutiny for laws classifying on the basis of sexual orientation remains open to this day. Most lower courts that have struck down anti-LGBT equality laws have done so using the rational basis test. Many other courts, applying the same test, have upheld such laws. The guidance that other courts receive from an Obama Court or a Romney Court will determine the extent to which LGBT people will be able to vindicate their basic constitutional rights in court.

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166 Id..

167 Rick Pildes, First Thoughts on Voting Rights, Gerrymandering, and Texas, http://www.scotusblog.com/2006/06/first-thoughts-on-voting-rights-gerrymandering-and-texas/ (last visited May 28, 2012).

168 Romer v. Evans, 517 U.S. 620 (1996).

169 Id. at 627.

170 Id. at 631.

171 Id. at 632.

The second major case directly implicating LGBT rights was *Lawrence v. Texas*[172], which struck down a state law criminalizing "deviate sexual intercourse" between people of the same sex. Police officers who had been notified about a weapons disturbance entered John Lawrence's home, allegedly saw him having sex with another man, and arrested them both. They were fined $200 apiece, and they appealed.

The Supreme Court held that under the liberty interest contained in the 14th Amendment's Due Process Clause, adults have a constitutional right to engage in private, consensual sex with members of the same sex. In so doing, it reversed the 1986 case of *Bowers v. Hardwick*, which had upheld state anti-sodomy laws as applied to same-sex relations. Bowers had held that the 14th Amendment's right to privacy (through the Due Process Clause) did not extend to the right to have sex with people of the same sex.[173] (Neither that case nor any others addressed whether such laws, either as written or as enforced, unconstitutionally targeted gays and lesbians in violation of the 14th Amendment's Equal Protection Clause.)

The *Lawrence* Court determined 6-3 that the Texas law violated the Constitution, with Justice Kennedy writing for five Justices (including Ginsburg and Breyer) that *Bowers* should be overturned. (Justice O'Connor, who has since been replaced by Justice Alito, concurred only in the judgment. She would not have overruled Bowers or ruled on the Due Process issue, but instead wrote that the law violated the Equal Protection Clause.)[174] Among the three dissenters, Scalia and Thomas are still on the Court.

Justice Kennedy wrote that the right to liberty under the Due Process Clause includes a promise that there is a realm of personal liberty which the government may not invade. The Court concluded that sodomy laws' criminal penalties and purposes have "far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. … When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[175] *Bowers* did not recognize this liberty interest and was wrongly decided.

Just as it is for heterosexuals, sexual intimacy for gays and lesbians is a matter "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment."[176] The majority ruled that the Texas statute furthered no legitimate state interest that could justify its intrusion into the personal and private life of the individual; moral condemnation, alone, is not sufficient grounds for legislation intruding upon fundamental liberty. Therefore, the law was unconstitutional.

Scalia's dissent (joined by Thomas)[177] did not characterize the case as being about the human act of sexual intimacy and all that entails for fundamental liberty, but instead as about "homosexual sodomy," the protection of which is not "deeply rooted in this Nation's history and tradition" (the test for whether it is a fundamental liberty interest). He characterized the majority's conclusion that there was no legitimate state interest in adopting the law (so that the law had no rational basis) as "out of accord with … the jurisprudence of any society we know."[178] If the state cannot further the belief of its citizens that certain forms of sexual behavior are immoral and unacceptable – the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity – then, according to Scalia, none of these other laws could survive rational basis review. Similarly, since the majority (according to Scalia) delegitimizes morals-based laws, the dissent argues

172 Lawrence v. Texas, 539 U.S. 558 (2003).
173 Bowers v. Hardwick, 478 U.S. 186 (1986).
174 Lawrence at 579.
175 Id. at 567.
176 Id. at 574, quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (which reaffirmed the constitutional liberty interest in personal decisions relating to abortion).
177 Justice Thomas also wrote his own very short dissent stating that the Constitution contains no general right to privacy.
178 Lawrence. at 599.

that it calls into question laws against same-sex marriage, prostitution, bigamy, obscenity, and adult incest.

Scalia addressed marriage equality in more detail at the end of his *Lawrence* dissent:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,;" what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution?" Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.[179]

The *Lawrence* majority also suggested that laws against same-sex sexual activity should not be seen as punishing conduct rather than punishing status: "When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres."[180]

Both *Lawrence* and *Romer* were decided 6-3, with Justices Kennedy and O'Connor voting with the liberals. With Alito replacing O'Connor (and assuming Roberts, Sotomayor, and Kagan would vote the same way as the Justices they replaced), there may only be a 5-4 majority still supporting these two critically important foundations of LGBT rights. Both could fall to an aggressively conservative Supreme Court majority empowered by a new Romney nominee.

In *Boy Scouts of America v. Dale*,[181] a 5-4 conservative majority (including current Justices Scalia, Kennedy, and Thomas) ruled that the Boy Scouts of America (BSA) had a constitutional right to exclude gay men from leadership positions, trumping a New Jersey law prohibiting discrimination in places of public accommodation on the basis of sexual orientation. James Dale, an accomplished Scout as a youth, became an adult leader but was fired from his leadership position when the BSA discovered from a newspaper article that he was gay.

The majority opinion (written by then-Chief Justice Rehnquist) concluded that BSA's mission – to inculcate values in young boys, using adult men as guides and examples – made it an "expressive association" subject to First Amendment protections.[182] BSA stated in the litigation that it teaches Scouts that homosexual conduct is not "morally straight," and that it does not want to promote "homosexual conduct" as a legitimate form of behavior. The majority accepted this assertion as fact, concluding that opposition to "homosexual conduct" was part of the value system the BSA promoted as part of its mission. Therefore, he wrote, its First Amendment right of expressive association would be violated by a state requirement to admit an openly gay scoutmaster: That would significantly burden BSA's desire to not promote "homosexual conduct" as a legitimate form of behavior. The majority ruled that the state interests in the public accommodations law did not justify such a severe intrusion.

The four dissenters (including currently serving Justices Ginsburg and Breyer) countered that the BSA, despite its claims during litigation, did not in fact hold condemnation of homosexuality as part of its core beliefs. They analyzed BSA's Scout Oath, Scout Law, and Scout Handbook, which require that scouts be "morally straight" and clean." These and other basic material do not mention homosexuality. In addition, the organization's rules for scoutmasters directs them "not [to] undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area…" The dissent found

179 Id. at 604-605 (internal citations removed).

180 Id. at 575 (emphasis added).

181 Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

182 The Court cited a unanimous 1995 case recognizing the First Amendment right of private organizers of a St. Patrick's Day parade to exclude an LGBT Irish group imparting a message that the organizers do not wish to convey, a right that trumps a local anti-discrimination ordinance. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

no evidence that BSA actually taught scouts that homosexuality or homosexual conduct was contrary to being "morally straight" or "clean." As a result, BSA's ban on gay members and leaders clearly did not follow from its founding principles and was not part of its expressive activities. As a result, they wrote, the anti-discrimination law did not impose any serious burdens on BSA's collective effort on behalf of shared goals, nor did it force BSA to communicate any message that it did not wish to endorse: The state law did not abridge their constitutional rights.

In *Christian Legal Society v. Martinez* (2010)[183], a sharply divided Court upheld a state university's policy of withholding official recognition from any student group that does not welcome all students regardless of status or beliefs as members or leaders. University of California, Hastings College of the Law had denied official recognition to a conservative Christian group that required members to subscribe to its religious beliefs, including those against homosexuality. The school's written policy prohibited unlawful discrimination in all school-sponsored activities. Importantly, the administration interpreted this policy to require officially recognized organizations to "accept all comers" in membership and leadership, regardless of status or beliefs. [General requirements unrelated to status or beliefs, such as a skills requirement, were acceptable.] Even more importantly, the parties stipulated early in the litigation that this was, indeed, the school's policy.

Justice Ginsburg wrote for the liberals, joined in this case by Kennedy. Under Court precedent, a state university cannot constitutionally withhold recognition on the basis of a group's viewpoints. However, according to Ginsburg, an "accept all comers" policy is a viewpoint-neutral approach that does not violate the First Amendment rights of the Christian Legal Society (CLS). "CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no constitutional right to state subvention of its selectivity."[184]

This "all-comers" policy created a limited public forum, where states have a right to preserve the property under its control for the use to which it is lawfully dedicated. Restrictions on access to a limited public forum are permitted as long as they are reasonable and viewpoint-neutral, as the majority says was the case here.

Justice Ginsburg also rejected CLS's assertion that it did not exclude people simply on the basis of sexual orientation (which violates the "all-comers" policy) but because of a conjunction of conduct with a belief that the conduct is not wrong. Citing *Lawrence*, she wrote that the Court's "decisions have declined to distinguish between status and conduct in this context."[185]

The conservative dissenters, in an opinion authored by Justice Alito, framed this as a case of a group's being targeted by the university for its beliefs. They argued that CLS was the only group to be denied official recognition. They also argued that the "all comers" formulation arose for the first time during this litigation. Therefore, they sought to ignore the stipulation of fact that said otherwise, prompting a lecture from the majority on what it means when parties stipulate to a set of facts.

The dissent also argued that even assuming the "accept all comers" policy was in play, that policy contradicts the basic purpose of the limited public forum that Hastings had created. The purpose, they said, was to recreate on campus the broad array of organizations similar to what exists off campus. Since the state cannot force expressive groups to accept members who disagree with the organization's principles, having such a system on campus avoids the replication of the outside world that Hastings seeks to create. In addition, the parties stipulated that the purpose of the limited public forum is to promote a diversity of viewpoints "*among*" – not "within" – registered student organizations.

In the next term, the Roberts Court is likely to hear cases reviewing the constitutionality of Proposition 8 (which was decided on very narrow grounds applicable only to California by the Ninth Circuit, but which could

183 *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez, 130 S. Ct. 2971 (2010).*

184 *Id. at 2978.*

185 *Id. at 2990, also citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is* a tax on Jews.")

nevertheless be expanded to include whether a state's denial of marriage equality violates the U.S. Constitution); and the constitutionality of the Defense of Marriage Act's denial of federal recognition to gay and lesbian couples' legal, state-recognized marriages. The Court may also address in the next year or so whether – and, if so, to what extent – the Free Exercise Clause (and, on the federal level only, the Religious Freedom Restoration Act) gives individuals and institutions the right to discriminate against LGBT people on the basis of religion, even if there are anti-discrimination laws to the contrary.

Conclusion

As documented in this report, a great deal of damage has already been done by the Justices that Mitt Romney promises to use as his models if he is ever given the chance to fill a vacancy on our nation's highest court. These Justices have sought, often with success, to roll back environmental protections as well as civil rights for minorities, women, and LGBT communities. They put even more power in the hands of corporations, twisting the law to support powerful corporate interests rather than everyday Americans. Samuel Alito, Antonin Scalia, and Clarence Thomas – America cannot afford to elect a president who wants to nominate more Supreme Court Justices like these.

As much damage as Romney could do to America over a four-year term, it pales in comparison to the damage his Supreme Court Justices would do over the decades of their lifetime service on the Court. With the election rapidly approaching, the stakes for America could not be higher. The outcome of this election could shape Supreme Court decisions – and, in turn, the rights of everyday Americans – for generations to come.

Appendix: Key 5-4 Cases Roberts Court Cases

A. 5-4 Roberts Court Cases Where the Right Wing Won

Citizens United v. FEC (2010) gave corporations the ability to spend unlimited funds from their corporate treasury to affect elections.

The 5-4 right-wing majority overruled precedent and struck down prohibitions on corporations using their general treasury to finance independent expenditures or electioneering communications. They ruled that limiting speech on the basis of the speaker's corporate identity was unconstitutional. Reversing precedent, they ruled that government has no interest in countering the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form, because that unconstitutionally interferes with the marketplace of ideas. They also rejected the relevance of an anti-corruption rationale for limiting independent expenditures including those made by corporations, saying they do not give rise to corruption or the appearance of corruption.

Davis v. Federal Election Commission (2008) helped wealthy candidates maintain a large financial advantage over their opponents.

The conservative 5-4 majority struck down the McCain-Feingold "Millionaires' Amendment," in which candidates who spend more than certain amounts of their own money on their campaigns might render their opponents eligible for higher limits on individual contributions and party-coordinated expenditures. Congress acted to reduce the advantage of wealthy candidates and combat the perception that congressional seats are for sale to the highest bidder. The Court ruled that the law effectively penalized candidates who spent large amounts of their own funds on their campaigns in violation of the First Amendment. The Court determined that the burden this places on wealthy candidates is not justified by any governmental interest in preventing corruption or the appearance of corruption, and that equalizing electoral opportunities for candidates of different personal wealth was not a permissible Congressional purpose.

Arizona Free Enterprise Club v. Bennett (2011) struck down a campaign public financing program designed to break candidates' dependence on large donors and bundlers.

After years of scandal, Arizona's voters adopted a voluntary public financing system in the 1990s to reduce candidates' dependence on wealthy campaign funders and restore integrity to their elections. The law provided matching funds for publicly financed candidates when either an opposing privately-funded candidate spent more than a certain amount, or an independent group spent more than a certain amount campaigning against the publicly funded candidate. But the 5-4 majority held that the law unconstitutionally chilled political speech by imposing a penalty for it: If you give money to a candidate or spend money opposing a candidate, the result will be strengthening the candidate who you oppose. The dissenters argued that the law didn't chill speech but subsidized it in a content-neutral manner. As the dissenters wrote, the interests opposing the law "are able to convey their ideas without public financing—and they would prefer the field to themselves, so that they can speak free from response."

Ledbetter v. Goodyear Tire and Rubber (2007) severely limited the ability of victims of pay discrimination to obtain compensation for the discrimination.

After working for the same company for many years, Lilly Ledbetter got an anonymous tip that for years on end she was being paid far less than were her male colleagues doing the same work due to a discriminatory evaluation. She sued and a jury awarded her back pay, but the Court ruled that she should have filed her lawsuit within 180 days of the discriminatory evaluation. The far-right Justices rejected the view that each paycheck received that was based on a discriminatory evaluation starts a new 180-day clock running on the time to sue. This cramped interpretation was not compatible with the law's purpose of eliminating discrimination. Many employees have no idea what their co-workers earn, and discriminatory pay is often hidden by employers. Because of this decision, it is now much harder for victims of illegal pay discrimination to recover the back pay to which they are entitled, and it is much easier for companies to get away with illegal discrimination.

Wal-Mart Stores v. Dukes (2011) made it harder for victims of systemic employment discrimination by large employers to file class action lawsuits.

By a 5-4 vote, the conservatives overturned a class certification in a lawsuit by up to 1.5 million women plaintiffs contending that they had suffered sex discrimination as Wal-Mart employees under a system of standardless pay and promotion decisions delegated to mostly male local management teams all over the country. Women occupy 70% of the hourly jobs in Wal-Mart stores but only 33% of management employees; the higher one looks on the corporate ladder, the fewer women appear; and women are paid less than men in every region. The women presented evidence that Wal-Mart has a national corporate climate infused with invidious bias against women. Wal-Mart's policy is to have personnel decisions made by local managers, all of whom are products of that toxic corporate climate. Because local managers made the decisions without guidance or standards from the company, the right-wing majority concluded that there was no "common contention" uniting the women's claims, so they cannot form a class. This decision will make it harder to certify large class action lawsuits of any type.

Coleman v. Maryland Court of Appeals (2012) poked a hole in the Family and Medical Leave Act.

The FMLA requires covered employers to provide at least 12 weeks of unpaid leave annually for employees to take care of sick family members or themselves. Aggrieved employees can sue their employers, but when the employer is the government, they can sue only if the government entity lacks sovereign immunity. A previous case had held that Congress constitutionally abrogated the states' sovereign immunity for the FMLA's provision on family-care as an exercise of its 14th Amendment authority to enforce the Equal Protection Clause, since it was designed to address discrimination against women. However, the 5-4 conservative majority ignored the history of self-care provision and ruled that FMLA protections for sick workers needing time off to take care of themselves were not passed to remedy sex discrimination and therefore were not an exercise of congressional authority under the Fourteenth Amendment. Therefore, aggrieved state and local government employees were stripped of their ability to sue for violations of the self-care provision of the FMLA.

Ricci v. DeStefano (2009) limited employers' ability to diversify their workforce and avoid lawsuits for illegal discrimination.

New Haven used examinations to determine fire department promotions, which resulted in their having a racially disparate impact. Under the tests, several white firefighters would have received a promotion, but none of the black firefighters scored high enough to be considered for the positions. New Haven officials feared the test was flawed and would open themselves to a discrimination lawsuit. To avoid such a lawsuit, the city threw out the test results, and the white firefighters sued. The arch-conservative 5-4 majority ruled that New Haven had discriminated against them illegally by throwing out the test. The Court ruled that an employer in New Haven's position must demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute; in this case, the majority ruled, there was no such basis. The dissent criticized the majority for acting as if the only reason the city threw out the test results was that all the qualifying candidates were white, while ignoring real flaws with the test and the existence of better and less racially skewed tests used by other cities.

Parents Involved in Community Schools v. Seattle School Dist. No. 1 (2007) struck down the voluntary integration plans of two public school districts seeking to promote racial diversity.

The Roberts Court invalidated school integration plans voluntarily adopted by public school districts in Seattle, WA and Louisville, KY. The plans, which took students' race into account in assigning certain students to particular schools in order to achieve racially integrated schools, were struck down as violating the Equal Protection Clause. Applying "strict scrutiny," the five conservatives agreed that the plans were not narrowly tailored to serve a compelling government interest, but the five were split among themselves. Four of them (the five minus Kennedy) wrote that the school districts' goal of racial diversity is not only not compelling, it is not even legitimate. In contrast, Kennedy wrote that the goal is compelling, but that directly looking at the race of individual students was not a sufficiently narrowly tailored way to meet that goal. He suggested that schools could constitutionally use race as a factor in ways that did not depend on an individual student's race (such as by drawing attendance zones with general recognition of the racial demographics of neighborhoods). This leaves school districts with limited ability to seek racial diversity in indirect ways, while the Court is only one vote away from declaring public school diversity an illegitimate goal.

Gross v. FBL Financial Services (2009) made it harder for a victim of illegal age discrimination to win in court.

Sometimes an employer makes a negative decision toward an employee with mixed motives, both legitimate and illegitimate. The conservative 5-4 majority ruled that under the Age Discrimination in Employment Act of 1967, an aggrieved worker must prove that age is the key factor in an employment decision, not just that age played a role in the decision. So even if age was a motivating factor, that alone is not enough to constitute illegal age discrimination. This is a harder standard to meet than in mixed motive cases for sex or racial discrimination filed under the 1964 Civil Rights Act, even though the relevant statutory language is the same.

Knox v. SEIU (2012) crafted a new constitutional rule on an issue not even discussed by the parties in order to de-fund public sector unions.

This case involved a public sector union in California, a state which prevents "free riders" by requiring government employees protected by a union to pay union dues. Under a 1986 precedent, public sector unions must annually send out a notice of anticipated expenses for the upcoming year and give non-members a chance to opt out of that portion of dues that would cover political activities not directly germane to the union's duties as an agent for collective bargaining. In this case, the question was whether a union had to send out an additional "opt-out" notice when it instituted a special mid-year dues increase to cover political activities relating to a ballot initiative. Seven Justices agreed that this was required. However, the five far-right Justices went much farther and addressed an issue that had never been raised and which the union therefore had never had a chance to discuss: They ruled that the opt-out system substantially impinges upon the First Amendment right of nonmembers, so when there is special assessment or dues increase, the union cannot collect any additional dues

from non-members unless they affirmatively opt in. This decision also strongly undermined the viability of the 1986 opt-out precedent and adds to the right-wing efforts to defund unions.

Arizona Christian Tuition v. Winn (2011) let states send taxpayer money to religious schools.

This case barred taxpayers from challenging tuition tax credits that funnel taxpayer money to religious schools. States are constitutionally prohibited from directly supporting religious education, so Arizona set up a program where taxpayers get dollar-for-dollar tax credits for money they give to "school tuition organizations" (STOs), nonprofit organizations that award private school scholarships to children. Many of the STO awards actually require parents to send their children to religious schools as a condition of receipt. So money that is owed in taxes is instead funneled to a religious STO to pay for someone's religious education. The 5-4 majority said there is no government spending here at all, so taxpayers have no standing to challenge this money-laundering scheme under the Establishment Clause.

AT&T Mobility v. Conception (2011) empowered large corporations to cheat their customers in violation of state consumer protection laws.

AT&T allegedly scammed thousands of customers by offering a "free" second phone, then charging them for the taxes on the undiscounted price of the phone. A California customer filed a class action lawsuit on behalf of all the scam victims, most of whom likely had not even noticed the small added amount to their bill. However, AT&T had made consumers sign a service contract where they agreed to resolve claims against the company through arbitration, rather than the courts, and not to participate in any class action. California consumer protection law makes such contracts unenforceable, since class action lawsuits are often the most effective way to discourage and punish corporate scams that are designed to cheat large numbers of customers of small amounts of money apiece without their knowledge. So aggrieved consumers in California should have been able to file a class action lawsuit. But the 5-4 right-wing majority ruled that a federal law making arbitration agreements enforceable in federal courts pre-empts state consumer protections laws, so the "arbitration and no class action" provision of the contract must be enforced.

Gonzales v. Carhart (2007) upheld a federal ban on a vaguely defined abortion procedure, despite the absence of an exception in the law to protect a woman's health.

The Roberts Court upheld the federal "Partial-Birth Abortion Ban Act" of 2003 despite the absence of an exception for the woman's health, and even though it had struck down a virtually identical state law in 2000 as imposing an undue burden on women seeking an abortion. But George W. Bush's replacement of Justice O'Connor with Justice Alito made the outcome different this time. The Court found that the government had an interest in "protecting the integrity and ethics" of the medical profession, and this method of abortion required regulation because it implicated additional ethical and moral concerns that justify a special prohibition. The Court said restrictions on abortion could be justified by the government's interest in protecting a woman from the psychological consequences of having an abortion, especially by this method. As the dissent observed, this case severely weakened Court precedents ruling that government may not place an "undue burden" on the right to abortion.

Chamber of Commerce of the US v. Whiting (2011) upheld Arizona's "death penalty" for companies hiring undocumented immigrants.

Arizona adopted a law in 2007 punishing employers who knowingly hire undocumented aliens by suspending or revoking most of their state licenses. The Chamber of Commerce argued that the law was preempted by the federal Immigration Reform and Control Act of 1986 (IRCA). IRCA prohibits the hiring of undocumented aliens and sets forth procedures employers must follow before hiring someone and the sanctions they will incur for violating the law. It expressly preempts local and state laws creating sanctions, other than through licensing and similar laws. The majority upheld Arizona's law defining "licensing" so broadly as to even include a company's articles of incorporation. The Court also upheld Arizona's requiring employers to use the federal E-Verify database to confirm that a person is legally authorized to work, even though federal law makes its use

voluntary.

Florence v. Board of Freeholders (2012) upheld strip searches for people arrested for minor infractions.

A New Jersey government database incorrectly stated that Albert Florence had failed to pay an old fine. When he was in a car that was pulled over by a state trooper, the trooper called up the (inaccurate) records and immediately handcuffed and arrested Florence. He was held in jail for seven days and strip-searched twice. The 5-4 conservative majority said that jails are dangerous places, and courts must defer to correctional officers' judgment as to whether a strip search is needed to prevent new inmates from putting others' lives at risk with weapons or contraband hidden in their bodies.

Rapanos v. United States (2006) left the federal government's ability to protect wetlands in doubt.

This ideologically split 4-4-1 decision, with Kennedy concurring in the judgment with the other four conservatives, left an unclear precedent. At issue was the definition of "the waters of the United States," which are protected by the Clean Water Act. The four conservative Justices (minus Kennedy) would have adopted a restrictive reading, stripping the federal government of authority to protect vast areas of wetlands it has long protected. The four moderates would have deferred to the Corp of Engineers' decades-long inclusion of wetlands adjacent to tributaries of traditionally navigable waters; these preserve the quality of the country's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. Kennedy adopted neither position, but was more restrictive than the moderates. He argued a wetland must have a significant nexus to a body of water that is actually navigable or that could reasonably be so made. While lower courts have interpreted the case different ways, the identity of the next Justice could change the balance.

B. 5-4 Roberts Court Cases Where the Right Wing Lost

*Massachusetts v. Environmental Protection Agency (*2007): The Court ruled that the Clean Air Act empowered the EPA to address global warming.

The Bush-era EPA had rejected a petition that it regulate emission of greenhouse gases under the mandate of the Clean Air Act. The EPA denied the petition, saying (1) the Clean Air Act didn't authorize it to address global climate change, and (2) regardless, it would have been unwise to do so because the science was uncertain. A 5-4 majority of the Supreme Court ruled that greenhouse gases are pollutants under the CAA, which gives EPA the needed authority. Therefore, the EPA can avoid regulating only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. The four conservatives would have ruled that EPA has the discretion not to regulate greenhouse gases.

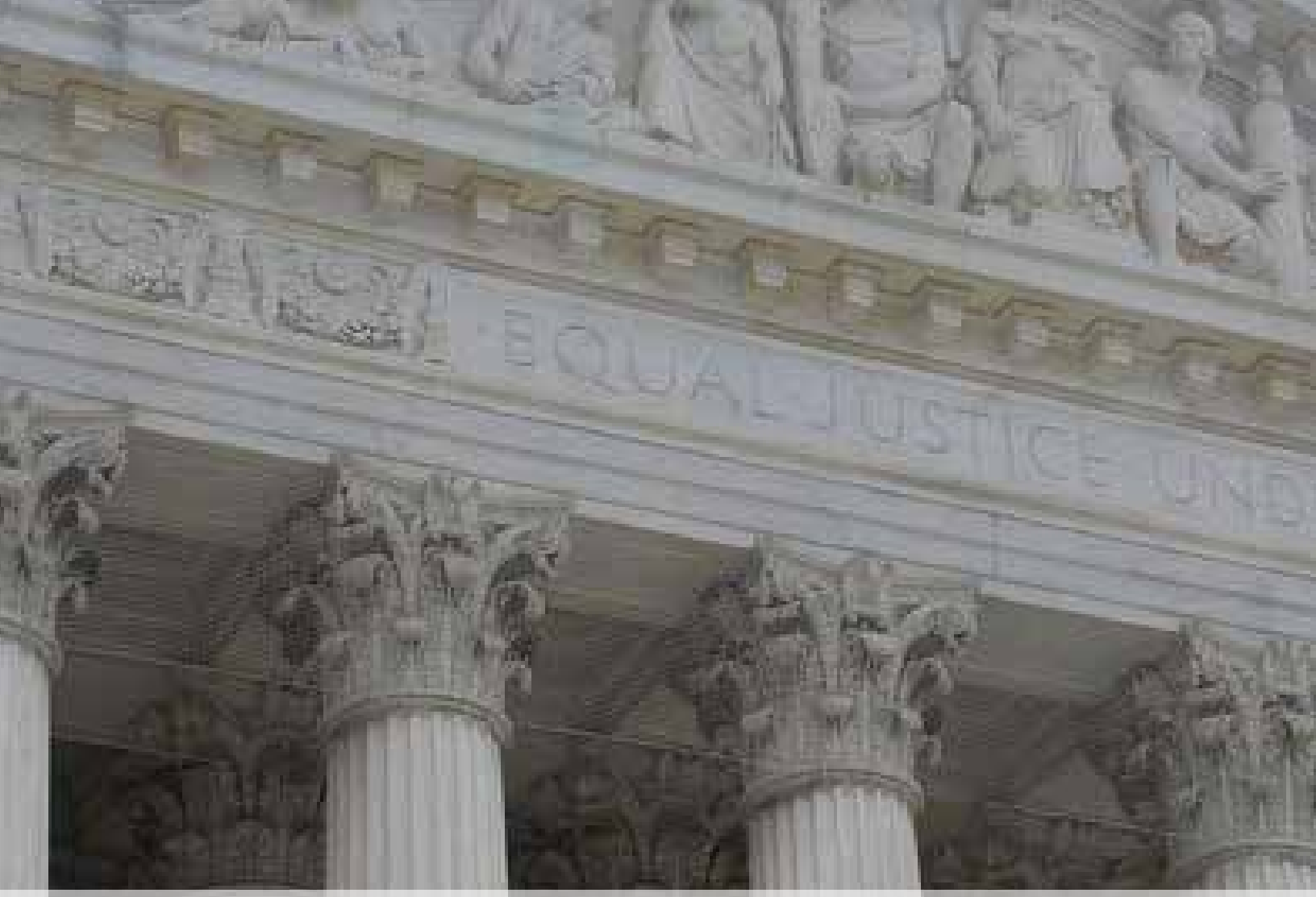
Caperton v. Massey Coal (2009): The Court ruled that the Constitution can prohibit an elected state judge from presiding over a case involving someone who spent millions of dollars to get him into office.

When Brent Benjamin was running to be a WV Supreme Court justice, Massey Coal was planning to appeal an important case coming before the court. Massey's CEO spent $3 million to help Benjamin get elected. His contributions were vastly more than the total amount spent by all of Benjamin's other supporters, and they dwarfed the amount spent by the judge's campaign committee. When it came time to hear the case, Justice Benjamin refused to recuse himself. A 5-4 Supreme Court ruled this extreme case created such a probability of bias that it violated litigants' Due Process rights. Voting with the moderates, Justice Kennedy wrote: "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own cause." The remaining four arch-conservatives found no constitutional violation and even questioned the relevance of the $3 million in independent expenditures, since Benjamin had no control over how they were spent.

Boumediene v. Bush (2008): Prisoners at Guantánamo have the constitutional right to contest their

imprisonment in federal court.

This case involving aliens at Guantánamo was a critical check to President Bush's assertion of nearly unbridled authority under the "War on Terror." Under the Military Commissions Act of 2006, prisoners at Guantánamo (who Bush had designated as "enemy combatants") could not go to federal court to contest the legality of their imprisonment (i.e., they had no habeas corpus rights). A 5-4 majority of the Supreme Court ruled they are not barred from seeking the writ of habeas corpus simply because they have been designated as enemy combatants or because of they are located on Guantánamo rather than a place where the U.S. has legal sovereignty. The government must provide the prisoners with a meaningful opportunity to demonstrate that they are being held contrary to law, and the habeas court must have the power to order the conditional release of an individual unlawfully detained. The dissenters – the conservatives minus Kennedy – wrote that aliens detained abroad by U.S. forces have no constitutional habeas rights at all.



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