

JUDGMENT DAY 2016

The Future of the Supreme Court as a Critical Issue
in the 2016 Presidential Election



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Of all the important issues at stake in the 2016 presidential election, one stands out for right-wing conservatives, as it should for all Americans: the future of the Supreme Court. Particularly in recent years, the Court has issued closely divided 5-4 rulings that have had enormous effects on our daily lives in a number of areas, including equal marriage rights for LGBT couples, the validity of the Affordable Care Act, reproductive rights, workers' rights, money in politics, civil rights, and many more. With four justices on the Court older than 80 during the first term of our next president, a shift of one vote on the Court could seriously endanger the 5-4 precedents that protect our rights but could also provide the opportunity to mitigate or even overturn damaging decisions that have harmed Americans, depending on who nominates justices after 2016. No wonder Carrie Severino of the right-wing Judicial Crisis Network states that we "cannot overstate the importance of the Supreme Court in the next election."¹ For the future of the Supreme Court, and for the rights of all Americans, November 8, 2016, is truly judgment day.

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In fact, leading presidential candidates from both parties have already recognized the importance of future Supreme Court appointments and made clear their intent to nominate justices in accord with their views on crucial constitutional issues. In criticizing the Court's recent 5-4 decision upholding LGBT marriage rights, for example, Republican candidates Jeb Bush and Marco Rubio pledged to appoint to the Court "people with a proven record of judicial restraint" and "justices committed to applying the Constitution as written and originally understood," in the hope of undermining or reversing the Court's decision.² On

¹ See P. Klein, "Supreme Court will weigh heavily in next presidential election," [Washington Examiner](#) (Oct. 6, 2014).

² See J. Keim, "What GOP contenders want for the Supreme Court," [National Review Online – Bench Memos](#) (Sept. 26, 2015); N. Gass and J. Topaz, "Republican presidential candidates condemn gay marriage ruling," [Politico](#) (June 26, 2015).

the other hand, in criticizing the Court's 5-4 decisions striking down campaign finance and voting rights laws, Hillary Clinton pledged to "do everything I can to appoint Supreme Court justices who protect the right to vote and do not protect the right of billionaires to buy elections."³

Recent history has clearly shown the effect of presidential elections on the Supreme Court and on Americans' rights. Prior to the 2000 elections, People For the American Way Foundation issued a report, entitled [Courting Disaster](#) predicting that a "court with two or three more right-wing justices in the mold of Antonin Scalia and Clarence Thomas would reverse decades of Supreme Court precedents in civil rights, reproductive rights, privacy," and many other areas.⁴ George W. Bush was elected president in 2000 and 2004, and in 2005-6 he nominated and had confirmed two new justices to the Supreme Court – John Roberts and Samuel Alito – to replace Chief Justice Rehnquist and Justice O'Connor.

The substitution of Justice Alito for the more moderate Justice O'Connor has been described as "the most consequential change on the Court since the first President Bush picked Clarence Thomas to replace Justice Thurgood Marshall in 1991."⁵ The resulting decisions of the Roberts-Alito Court since 2006 have in fact effectively reversed numerous prior Court decisions and harmed our rights and interests across the board. As one constitutional scholar has noted, the four justices who form the right-wing plurality – Scalia, Thomas, Roberts, and Alito – are "as conservative as any in American history" and their "views are understood far more by reading the 2008 Republican Party platform than by studying the views of the Constitution's framers," making the Roberts Court "the most conservative court since the mid-1930s."⁶ Even after the Court's 2015 decisions upholding the Affordable Care Act and marriage for same-sex couples, the vice dean of Columbia Law school wrote that "the Roberts court remains a deeply conservative one."⁷

³ E. Halper and D. Lauter, "Clinton says she'd make Supreme Court picks aimed at campaign finance reform," [Los Angeles Times](#) (May 18, 2015).

⁴ People For the American Way Foundation, [Courting Disaster: How a Scalia-Thomas Supreme Court Would Endanger Our Rights and Freedoms](#) (June 2000) at 3. See also People For the American Way Foundation, [Courting Disaster 2005](#) (March 2005).

⁵ L. Greenhouse, "It's All Right with Sam," [New York Times](#) (Jan. 7, 2015) ("Greenhouse").

⁶ E. Chemerinsky, "Supreme Court's conservative majority is making its mark," [Los Angeles Times](#) (Oct. 4, 2010).

⁷ See "Did the Roberts Court really lurch left?," [Politico](#) (June 29, 2015) (quoting Jamal Greene, vice dean and professor of law at Columbia Law School).

**Three Supreme Court justices
— Ruth Bader Ginsburg,
Antonin Scalia, and Anthony
Kennedy — will be more than
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president’s term begins
in 2017.**

Specifically, since Roberts and Alito joined the Court in 2005-6, the Court has issued more than 165 5-4 decisions, many of which have bent the law and defied logic, seriously harmed the rights of ordinary Americans, promoted the interests of powerful corporations, and damaged our democracy.⁸ For example:

- In Gonzales v. Carhart, the 5-4 Court majority effectively overruled a contrary decision and upheld a federal ban on certain late-term abortions
- In Citizens United v. FEC, the 5-4 majority overturned federal election law and prior decisions and ruled that corporations have a constitutional right to make unlimited campaign expenditures, seriously distorting election campaigns and our democracy
- The 5-4 majority in Michigan v. EPA overturned EPA regulations safeguarding communities from toxic pollution by power plants that causes up to 11,000 premature deaths each year
- The 5-4 majority in Burwell v. Hobby Lobby Stores, Inc. decided that for-profit corporations can claim religious rights and can exempt themselves from federal laws requiring them to provide contraceptive coverage to employees. The majority also rewrote the Religious Freedom Restoration Act, with potentially dangerous consequences for LGBT and other Americans
- In AT&T Mobility v. Concepcion, the 5-4 majority ruled that corporations can effectively mandate arbitration agreements that preclude consumers

⁸ The total number of 5-4 decisions since 2005-6 was derived from the annual “stat pack” summaries produced by SCOTUSblog.

from bringing class actions to combat fraud and enforce their rights

- The 5-4 majority in Shelby County v. Holder overturned a key section of the 1965 Voting Rights Act, making it much harder to protect against discrimination in voting
- In Ledbetter v. Goodyear Tire and Rubber Co., the 5-4 Court majority made it virtually impossible to bring a claim of long-running sex or race discrimination in pay under Title VII of the 1964 Civil Rights Act, a decision later reversed by a congressional statute
- The 5-4 majority in Leegin Creative Leather Products Inc. v. PSKS Inc. overruled a 96-year-old rule that had made vertical price fixing per se illegal under federal antitrust law
- In Parents Involved in Community Schools v. Seattle School District, the 5-4 Court majority prohibited school districts from attempting voluntarily to promote school desegregation through student reassignment plans
- In District of Columbia v. Heller, the 5-4 majority struck down a law regulating the ownership and use of guns and ruled for the first time that individuals have a constitutional right to have guns
- In Florence v. Board of Chosen Freeholders, the 5-4 Court majority ruled that local officials can strip-search anyone accused of any crime, even if there is no reason to suspect contraband or concealed weapons, and cannot be sued for invasion of privacy

There can be no doubt that the law in these and other cases would have been very different if a President Gore or Kerry, rather than President Bush, had named the replacements for Rehnquist and O’Connor.

On the other hand, the election of President Obama led to Sonia Sotomayor and Elena Kagan becoming the next two justices appointed to the Supreme Court. These two justices or their predecessors have combined with Justices Ginsburg and Breyer and, occasionally, a fifth justice, such as Justice Kennedy, to produce a number of important 5-4 decisions that have helped protect our rights. For example:

- In Obergefell v. Hodges, a 5-4 Court majority ruled that the Constitution protects the right of same-sex couples to marry

- A 5-4 majority in [Texas Department of Housing and Community Affairs v. The Inclusive Communities Project](#) upheld the longstanding interpretation of the federal Fair Housing Act to prohibit practices with unjustified discriminatory impact
- In [Massachusetts v. EPA](#), a 5-4 Court majority upheld the authority of the EPA to regulate greenhouse gases
- A 5-4 majority upheld voter-passed nonpartisan redistricting reform in [Arizona State Legislature v. Arizona Independent Redistricting Commission](#)
- In [Boumediene v. Bush](#), a 5-4 majority ruled that prisoners detained in Guantanamo can file habeas corpus petitions to challenge their detention
- In [Williams-Yulee v. The Florida Bar](#), a 5-4 majority upheld a ban on state judicial candidates directly soliciting campaign funds
- A 5-4 majority in [Alabama Democratic Conference v. Alabama](#) invalidated a state redistricting scheme that used race to harm minority voters

The list of precedents in danger of being overruled or cut back would be even longer if it included 6-3 decisions, since more than one moderate justice could well resign after the 2016 election. Particularly in light of the narrow 5-4 majorities in so many cases, there are particular dangers and important opportunities ahead, depending in large measure on the outcome of the 2016 elections. Three Supreme Court justices – Ruth Bader Ginsburg, Antonin Scalia, and Anthony Kennedy – will be more than 80 years old when the next president’s term begins in 2017, and Justice Breyer will be over 80 before the end of the next president’s first term.⁹ In fact, since 1971, the average retirement age for Supreme Court justices is 78 years old.¹⁰ The odds are excellent that the next president will have the opportunity to appoint one or more justices to the Court who could produce a critical shift in the ideological balance on the Court and have an enormous impact.

For example, many of the Supreme Court’s recent decisions that have harmed Americans’ rights have come in 5-4 rulings with strong dissents from Justice

Ginsburg and other moderates on the Court. Dissenting justices have indicated that they would vote to reverse some of these harmful rulings, such as the Court’s disastrous decision on money and politics in [Citizens United](#) and its devastation of the Voting Rights Act in [Shelby County v. Holder](#).¹¹ If a progressive president in 2017 can nominate a justice to replace Justice Scalia or Kennedy, who helped form the five-person majority in these rulings, the result could be significant progress in restoring the basic rights protected by the Constitution and our federal laws.

On the other hand, most of the Court’s positive rulings, such as the recent ruling establishing equal marriage rights in [Obergefell v. Hodges](#) and the decision upholding EPA authority to regulate greenhouse gases in [Massachusetts v. EPA](#), have been 5-4 rulings in which Justice Kennedy has joined the four moderates on the Court. If a right-wing president appoints a right-wing justice to replace Justice Ginsburg or Kennedy, the result would not only reinforce the Court’s negative decisions but would also endanger positive rulings on LGBT equality and more.



Even beyond these specific precedents, the Court will undoubtedly be deciding critical cases affecting Americans’ rights over the years to come. Already on the Court’s docket for 2015-16 are crucial cases concerning worker and union rights, affirmative action in higher education, and reapportionment and one-person one-vote. Close behind are challenges to restrictive state

⁹ Justice Breyer will be 78 after the 2016 election. See M. Doyle, “Aging Supreme Court justices may open seats for next president,” [McClatchy DC](#) (Oct. 1, 2012).

¹⁰ J. Fuller, “The Fix—Everything you didn’t even think you wanted to know about Supreme Court retirements,” [Washington Post](#) (April 21, 2014).

¹¹ See J. Rosen, “Ruth Bader Ginsburg Is an American Hero,” [New Republic](#) (Sept. 28, 2014)(quoting Justice Ginsburg).

abortion laws, to President Obama's executive actions on immigration, and on access to insurance coverage for contraceptives under the ACA, all of which are pending or have been decided by federal appellate courts and are likely to reach the Supreme Court soon.¹² The composition of the Court that decides these and other cases will be crucial for all of us.

The 2016 Republican presidential candidates, who ultimately must depend heavily on the conservative far right to be elected and re-elected, are carefully listening.

But, some may argue, how can we be sure that a Republican president elected in 2016 will nominate right-wing justices like Alito and Roberts? After all, it was Republican President George H.W. Bush who nominated moderate Justice David Souter to the Supreme Court. That example, however, proves the point. Far-right activists made clear their sense of betrayal with the nomination of Justice Souter and expressed their outrage, vowing “no more Souters” would be confirmed under any Republican president.¹³ The first President Bush then nominated Clarence Thomas, to the delight of the far right, and the second President Bush's first Court nominee was John Roberts. But when President George W. Bush first nominated his White House counsel Harriet

Miers to fill the next Court vacancy, the far right was outraged over what appeared to be her lack of true “conservative credentials,” her nomination was withdrawn, and far-right favorite Samuel Alito was nominated and confirmed.¹⁴ As People For the American Way Foundation explained in 2005, the “no more Souters” slogan is “a clear signal” that what right-wing advocates “expect from the President are not just conservative nominees, but activists for the ideological far right.”¹⁵ That is precisely what was delivered in nominating Thomas, Roberts, and Alito, and we can, unfortunately, be sure that all the 2016 Republican presidential candidates, who ultimately must depend heavily on the conservative far right to be elected and re-elected, are carefully listening – particularly since so many crucial Court decisions depend on just one vote. Indeed, after Roberts' recent opinions rejecting challenges to the Affordable Care Act, some right-wing activists are now demanding that future Republican presidents be more “careful about appointing conservatives” to the Court.¹⁶

Accordingly, this report comprehensively examines the Court's 80-plus 5-4 decisions since Justices Roberts and Alito joined the Court a decade ago and in which a shift as a result of a presidential appointment after 2016 could make an enormous difference to the Court and to our rights and liberties.¹⁷ It describes those decisions in 11 key areas: money and politics; civil and voting rights; LGBT rights; reproductive freedom and women's rights; workplace fairness; protecting the environment; religious liberty; gun violence; marketplace and consumer fairness; access to justice; and protection against government abuse. The critical importance of the Court in all these areas makes it imperative that all Americans, not just the far right, pay close attention to the Supreme Court as an issue in the 2016 presidential election. On that question, November 8, 2016, truly is judgment day.

¹⁴ M. Fletcher and C. Babington, “Miers, Under Fire from Right, Withdrawn as Nominee,” [Washington Post](#) (Oct. 28, 2005); Greenhouse.

¹⁵ People For the American Way Foundation, [Courting Disaster 2005](#) (2005) at 16.

¹⁶ See J. Gerstein, “Conservatives steamed at Chief Justice Roberts' betrayal,” [Politico](#) (June 25, 2015)(quoting Curt Levey of Committee for Justice).

¹⁷ Specifically, this report reviews the Court's 5-4 decision in civil cases in which the Court's four moderates (Ginsburg, Breyer, Sotomayor, and Kagan, and prior to the latter two appointments, Stevens and Souter) were either in the minority or, with one of the other justices (usually Kennedy), were part of the majority. It is these precedents that are most subject to possible change depending on who nominates possible successors to Ginsburg, Scalia, Kennedy, Breyer, or other justices. Although the report does not review criminal cases on behalf of individual criminal defendants, it does include civil cases that have an impact on criminal justice and abuse of power issues. Many of the Court's important decisions in the criminal law area, of course, have also been 5-4.

¹² See R. Barnes, “2 rulings' legacy: 1 nation, 1 policy,” [Washington Post](#) (July 1, 2015); R. Barnes, “Justices to hear union dues, restricting cases next term,” [Washington Post](#) (July 1, 2015); D. Kendall, “The Supreme Court takes center stage,” [Slate](#) (Nov. 12, 2014).

¹³ See “No More Souters,” [Wall Street Journal](#) (July 19, 2005); R. Kennedy, “The Bush Court,” [American Prospect](#) (Nov. 23, 1999).

Who will pick the next justice(s)?

With four justices in their eighties during the next president's first term, he or she could have the unique opportunity to drastically change the face of the Supreme Court.

Average Retirement Age: **78**



GINSBURG

Age: 82

Tenure: 22 years

Nominated by: Clinton



SCALIA

Age: 79

Tenure: 29 years

Nominated by: Reagan



KENNEDY

Age: 79

Tenure: 27 years

Nominated by: Reagan



BREYER

Age: 77

Tenure: 21 years

Nominated by: Clinton



THOMAS

Age: 67

Tenure: 24 years

Nominated by: G.H.W. Bush



ALITO

Age: 65

Tenure: 9 years

Nominated by: G.W. Bush



SOTOMAYOR

Age: 61

Tenure: 6 years

Nominated by: Obama



ROBERTS

Age: 60

Tenure: 10 years

Nominated by: G.W. Bush



KAGAN

Age 55

Tenure: 5 years

Nominated by: Obama

1. Money and Politics



Perhaps no decision is more identified with the Roberts-Alito Court than *Citizens United v. Federal Election Commission*.¹⁸ In that and other campaign finance cases, the far-right conservatives on the Supreme Court have effectively transformed the First Amendment into a tool wielded by wealthy and corporate interests to drown out everyone else's messages at election time. Always decided 5-4, these decisions have severely cut back on the American people's right to enact reasonable campaign finance laws to protect our democracy. Under the Constitution as rewritten by the conservative justices, it is effectively no longer possible for the American people to seek to mitigate the undue influence of the wealthiest of the wealthy over our elections and our elected officials.

The sum total of these 5-4 rulings represents an existential threat to our political democracy. As constitutional law professor Jamie Raskin has explained, "because the *Citizens United* jurisprudence ... is targeted like a laser beam on the political process itself, it creates political conditions for its own survival."¹⁹ Five far-right

ideologues are using the Supreme Court not just to strike down individual laws limiting money in politics, but also to entrench wealth and corporate power in the political process itself.

The recent move to dismantle judicially sanctioned efforts to limit money in politics began in 2007. The first campaign finance case that appeared before the Roberts-Alito Court, *Federal Election Commission v. Wisconsin Right to Life*, created an enormous exception to a ban on corporate political spending before an election, which the Court had upheld four years earlier in a 5-4 ruling co-authored by Justice Sandra Day O'Connor. Her opinion had upheld a federal ban on corporate and union spending on TV ads referring to a candidate for federal office close to an election. With O'Connor replaced by Alito, the 5-4 balance shifted the other way, sharply limiting the provision to ads that could not reasonably be interpreted as anything other than urging the "election or defeat of a candidate for federal office."²⁰ This gave a green light to the sham "issue ads" the law was

¹⁸ *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

¹⁹ J. Raskin, *The Supreme Court in the Citizens United Era* (People For the American Way Foundation, 2015) at 3.

²⁰ *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

intended to prevent. “The decision was a reminder of the ways in which the justices appointed by President Bush are moving the court.”²¹

Justice Souter wrote in his dissent for the four moderates:

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.²²

Three years later, the 5-4 Roberts-Alito majority struck down all limits on corporate independent expenditures in Citizens United, delivering a devastating blow to the nation’s campaign finance structure. During the 2008 elections, advertisements for *Hillary: The Movie* had run within 30 days of a primary and had been found to violate restrictions on “electioneering communications” that had been upheld by the Court in 2003. Reaching out to decide an issue that had not been raised by the parties, the 5-4 majority concluded that the law violated the First Amendment because corporations and unions have an unlimited right to spend money in political campaigns. Indeed, they ruled that corporations have exactly the same rights as people when it comes to making independent expenditures in elections. Justice Kennedy wrote, “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”²³

In his dissent, Justice Stevens argued that the ruling “threatens to undermine the integrity of elected institutions across the Nation.”²⁴ Stevens pointed out that a “democracy cannot function effectively when its constituent members believe laws are being bought and sold.”²⁵ Additionally, he disagreed 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.”²⁶

Citizens United was immediately recognized by many as “the most serious threat to American democracy in

“Democracy cannot function effectively when its constituent members believe laws are being bought and sold.”

a generation.”²⁷ Law professor Richard Hasen argued that it “increases the dangers of corruption in our political system and it ignores the strong tradition of American political equality.”²⁸ 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.²⁹

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 corporate spending on political campaigns in that state.³⁰ 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” like those in Bullock, “did in fact lead to corruption or the appearance of

²¹ “Justices Loosen Ad Restrictions in Campaign Finance Law,” New York Times (June 26, 2007).

²² Id. at 536.

²³ Citizens United, 130 S.Ct. at 904.

²⁴ Id. at 931.

²⁵ Id. at 964.

²⁶ Id. at 972.

²⁷ J. Alter, “High-Court Hypocrisy,” Newsweek, (Jan. 22, 2010).

²⁸ Posting by R. Hasen to New York Times Room for Debate, <http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/> (Jan. 21, 2010, 15:00 EST).

²⁹ Citizens United, 130 S.Ct. at 979.

³⁰ American Tradition Partnership, Inc. v. Bullock, 132 S.Ct. 2490 (2012).

corruption in Montana.”³¹ Any illusion that one or more of the conservative justices would have ruled differently in Citizens United had they known the impact it would have was shattered by the decision in the Montana case.

In Citizens United, all nine justices agreed that under the First Amendment, Americans can regulate campaign finance to address corruption and the appearance of corruption. But the five conservatives defined that term extremely narrowly, to mean the threat of “quid pro quo” corruption; i.e., bribery. They rejected the idea that our electoral system itself needs to be protected from the corruption and rotting from within, such that occurs when money grossly distorts the electoral process.

The Roberts-Alito Court doubled down on that cramped definition of corruption in McCutcheon v. Federal Election Commission,³² when it struck down federal limits on aggregate direct campaign contributions during a single election cycle. In 2013-2014, the caps limited an individual to contributing a combined total of \$123,200 to federal candidates, parties, and PACs – more than double the total annual income of the average American family.

Congress had adopted aggregate caps in its post-Watergate set of election reforms, and they had been upheld by the Supreme Court in 1976 in Buckley v. Valeo. But rather than acknowledge that the Court



³¹ Id. at 2491.

³² McCutcheon v. FEC, 134 S.Ct. 1434 (2014).

was overruling precedent, Chief Justice Roberts wrote for the four-Justice plurality³³ that Buckley was not controlling because that section of the opinion was not long enough and the parties had not devoted enough time separately addressing that specific issue among all the many complex issues involved in that seminal campaign finance case.

Using the severely cramped definition of the type of corruption that campaign finance limitations can legitimately address, the chief justice wrote that “Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner ‘influence over or access to’ elected officials or political parties.”³⁴

In dissent, Justice Breyer sharply criticized the conservatives’ dangerous and ahistorically narrow conception of “corruption.”

In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself. [internal citations removed]³⁵

With the aggregate limit struck down, an individual previously capped at \$123,200 could now give the maximum permissible amount to every one of a party’s candidates and party committees, contributing a sum of more than \$3.5 million. It is hard to overestimate just how much influence such a mega-donor would have among party leaders – influence that the majority hailed as “a central feature of democracy.”³⁶ As Justice Breyer noted, “[t]aken together with Citizens United ..., [McCutcheon] eviscerates our Nation’s campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.”³⁷

³³ The fifth vote was supplied by Justice Thomas, who wrote separately to strike down the limits under an even stricter standard than that used by the others.

³⁴ McCutcheon at 1438.

³⁵ McCutcheon at 1466-67.

³⁶ McCutcheon at 1441.

³⁷ McCutcheon at 1465.



Other 5-4 decisions by the Roberts-Alito Court have done additional damage. In 2008's *Davis v. Federal Election Commission*, the 5-4 majority struck down McCain-Feingold's "Millionaires Amendment," which raised campaign contribution limits for candidates facing wealthy, self-funding opponents.³⁸ Writing for the majority, Justice Alito wrote that the law was not justified because self-financing actually reduces the likelihood of corruption.³⁹ Thus, "imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment."⁴⁰

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.⁴¹ He stressed the importance of the law's rationales: reducing the importance of wealth as a criterion for public office and countering the perception that seats in Congress are up for sale to the wealthiest bidder.⁴²

The right-wing 5-4 majority used similar logic as in *Davis* to defeat state efforts to make public financing a viable option for candidates in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*. Under the law being challenged, once matching funds were triggered, the publicly funded candidate would receive additional

funds to match money spent or raised by or for the privately funded candidate.⁴³ Arizona's voters had adopted the clean elections law to reduce the political corruption that was repeatedly driving the state into crisis. But the conservative 5-4 Court majority held that the law discriminated against wealthy self-funded candidates and their supporters, holding that their speech was burdened by enhancing the speech opportunities of the publicly funded candidate. In her dissenting opinion, Justice Kagan pointed out that the law did not reduce campaign speech but increased it. Moreover, she wrote, "[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.'"⁴⁴ She summed up the case perfectly: "Petitioners 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."⁴⁵

In another case, the Roberts-Alito Court came within one vote of even further damaging Americans' efforts to limit money in politics. By a 5-4 vote, the Court upheld a state campaign finance rule against a First Amendment challenge in 2015 relating to judicial elections. In *Williams-Yulee v. The Florida Bar*, 135 S.Ct. 1656 (2015), the Court ruled that Florida, which has elected state judges, may constitutionally prohibit judges and judicial candidates from directly soliciting campaign contributions.⁴⁶ Thirty-one states have such prohibitions against personal campaign donation solicitations by judges and candidates.⁴⁷

The Chief Justice wrote the majority opinion, and he was joined by Breyer, Sotomayor, Kagan, and (in all but one aspect) Ginsburg. The first issue addressed was the level of scrutiny. Eight of the nine justices – all but Ginsburg – agreed that the ban was subject to strict scrutiny, able to be upheld only if narrowly tailored to serve a compelling interest.

Justice Ginsburg wrote separately on this issue, urging the Court to give "substantial latitude" to the states to regulate money in judicial campaigns. She observed that "[w]hen the political campaign-finance apparatus is applied to judicial elections, the distinction of judges

³⁸ *Davis v. Federal Election Commission*, 554 U.S. 724 (2008).

³⁹ *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.")

⁴⁰ *Id.* at 744.

⁴¹ *Id.* at 750.

⁴² *Id.* at 752-753.

⁴³ *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011).

⁴⁴ *Id.* at 2830, citing *Republican Nat. Comm. v. FEC*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980), *aff'd* 445 U.S. 955 (1980).

⁴⁵ *Id.* at 2835.

⁴⁶ *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015).

⁴⁷ See M. Coyle, "Justices Asked to Rule on Judicial Campaign Fundraising," *National Law Journal* (Aug. 13, 2014).

from politicians dims. Donors, who gain audience and influence through contributions to political campaigns, anticipate that investment in campaigns for judicial office will yield similar returns. Elected judges understand this dynamic.”⁴⁸ She went into detail on the money flowing into judicial campaigns and the damage that it is doing to the delivery of justice. Although she urged less than strict scrutiny, she joined the majority in its conclusion that the Florida ban met even this exacting standard.

Writing for the 5-4 majority, Roberts determined that because of the vastly different roles of judges and politicians, states can regulate judicial elections differently from political elections. The state’s interest in preserving public confidence in the integrity of the judiciary extends beyond the corruption interest applicable to the political branches. Roberts noted that while elected political officials are expected to be responsive to supporters, “it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity.”⁴⁹ Florida could reasonably conclude that a direct and personal solicitation from the candidate may appear different to the public than a solicitation from their campaign committee or a thank-you note from the candidate to the contributor. The opinion concluded: “A state’s decision to elect judges does not compel it to compromise public confidence in their integrity.”⁵⁰ The principal dissent by Justice Scalia (joined by Justice Thomas) accused the majority of applying only “the appearance of strict scrutiny.”⁵¹

The conservative 5-4 Court majority held that the law discriminated against wealthy self-funded candidates.

⁴⁸ *Williams-Yulee*, 135 S.Ct. at 1674.

⁴⁹ *Williams-Yulee* at 1659-1660.

⁵⁰ *Williams-Yulee* at 1673.

⁵¹ *Williams-Yulee* at 1677.



While this specific campaign finance rule was upheld, the Court made clear that this was unrelated to cases like *Citizens United* and *McCutcheon*, so it cannot be read as an indication that the five conservatives are in any way letting up on their assault on efforts to limit money in politics. In addition, because no other justice agrees with Ginsburg about giving states substantial latitude to regulate money in judicial elections, the job of defending other reasonable limits in the future may still be quite difficult.

Despite cases like *Williams-Yulee*, the Roberts Court is transferring control of our democratic elections – and therefore our government – from the American people to a small group of the nation’s most powerful figures. As *The New York Times* wrote in the summer of 2015, “Fewer than four hundred families are responsible for almost half the money raised in the 2016 presidential campaign, a concentration of political donors that is unprecedented in the modern era.”⁵²

Going forward, whether *Citizens United* and its progeny will continue to damage America’s democratic core or will instead be revisited by a wiser Court is likely to be determined by who will be nominating the next Supreme Court justices. Election Day 2016 will indeed be Judgment Day.

⁵² “Small Pool of Rich Donors Dominates Election Giving,” *New York Times* (Aug. 1, 2015).

2. Civil and Voting Rights

Most 5-4 decisions handed down since John Roberts joined the bench have devastated important civil rights protections, although some have just barely preserved other such protections from right-wing legal attack.

In addition to the important 5-4 decisions of the Roberts-Alito Court on employment discrimination and LGBT and women's rights discussed elsewhere in this report, 5-4 Supreme Court rulings have had critical effects concerning voting rights, school desegregation, affirmative action, and immigration since Roberts and Alito have joined the court. Most of these decisions have devastated important civil rights protections, although some have just barely preserved other such protections from right-wing legal attack. The Court will undoubtedly be deciding additional cases in these areas, with important cases on voting and affirmative action already on the Court's docket for 2015-16. With the Court so narrowly divided on these issues, the question of who appoints Supreme Court justices after the 2016 election is crucial to the future of civil and voting rights.

With respect to voting rights, the Roberts-Alito Court's most devastating 5-4 ruling was Shelby County v. Holder, 133 S.Ct. 2612 (2013). In that case, the majority struck down as unconstitutional a key provision of the Voting Rights Act that required areas with a history of voting discrimination to preclear with the Justice Department or a court any voting law changes that could further harm minority voting rights. Technically, the Court did not invalidate the preclearance provisions of Section 5 of the Act itself, but invalidated section 4(b), which included the coverage formula under which jurisdictions with a discriminatory history were placed under preclearance requirements.

In her dissent for the four moderate justices, Justice Ginsburg demonstrated how the majority had "egregiously" erred and overstepped its authority in its ruling.⁵³ She discussed in detail the extensive legislative

hearings and fact-finding, including examples of the importance of preclearance in preventing discriminatory voting changes as recently as 2006, that led to the bipartisan renewal of sections 4, 5, and the rest of the Voting Rights Act in 2006. This included the conclusion that extensive evidence of "continued discrimination" showed the "continued need" for sections 4 and 5 to prevent racial and language minorities from being "deprived of the opportunity to exercise their right to vote."⁵⁴ But the Court majority, she pointed out, had made "no genuine attempt" even to "engage with the massive legislative record" amassed by Congress.⁵⁵ Instead, she explained, the 5-4 majority had relied on improvements concerning voter registration and other areas, which had been acknowledged by Congress but which Congress had found insufficient to justify eliminating critical Voting Rights Act protections. The majority's decision, she concluded, erroneously failed to accord to Congress the "substantial deference" that prior Court precedents required, improperly overruling a congressional law that had "overwhelming bipartisan support."⁵⁶ The result, she lamented, was a 5-4 ruling that struck at "the heart of the Nation's signal piece of civil-rights legislation."⁵⁷



John G. Roberts, Jr., Chief Justice of the United States of America

The harmful effects of Shelby County have already become clear. Within hours of the 5-4 Court ruling, Texas and Mississippi announced that they would implement restrictive voter identification laws that

⁵³ Shelby County, 133 S.Ct. at 2652.

⁵⁴ *Id.* at 2636, 2640-41.

⁵⁵ *Id.* at 2644.

⁵⁶ *Id.* at 2636, 2652.

⁵⁷ *Id.* at 2644.



had been blocked by preclearance requirements.⁵⁸ A comprehensive report by the Brennan Center for Justice one year after the decision found that the Act “no longer blocks or deters discriminatory voting changes” as it had for decades, and that “10 of the 15 states” that had been covered at least in part by section 5 had already “introduced new restrictive legislation that would make it harder for minority voters to cast a ballot,” with several such provisions already passed. Overall, the report concluded, the 5-4 majority had “gutted” a law “widely regarded as the most effective piece of civil rights legislation in American history.”⁵⁹

But the Roberts-Alito 5-4 majority has done even further damage to voting rights. In NAACP v. Husted, the state NAACP challenged a new Ohio law that severely cut back early voting before Election Day. In more than 100 pages of opinions in September 2014, lower-court judges explained that the new law would likely to be found to violate the Voting Rights Act and the Constitution and would cause irreparable injury to voters in the upcoming election, and preliminarily enjoined the law from taking effect. But in late September, in an unsigned order with no explanation and without hearing briefing and argument on the merits, the 5-4 conservative Supreme Court majority stayed the lower-court order, effectively acting to “deprive many Ohioans of the opportunity to vote”

in the coming election.⁶⁰ The case was later settled, with the state agreeing to restore significant early voting in future elections, so there was never even any explanation for the 5-4 ruling.⁶¹

Earlier, in Bartlett v. Strickland, 556 U.S. 1 (2009), the Court significantly narrowed the reach of section 2 of the Act by ruling that section 2 did not permit the North Carolina legislature to issue a redistricting plan seeking to prevent minority vote dilution. The plurality (Justices Kennedy and Alito and Chief Justice Roberts) found that Section 2 can be applied to prevent efforts to dilute minority voting strength only when minorities constitute at least 50 percent of a voting district; Justices Thomas and Scalia would have gone even further and ruled that Section 2 does not authorize any claims of minority vote dilution. As Justice Souter explained for the four moderate dissenting justices, the plurality’s view was “flatly at odds” with the Voting Rights Act’s purpose to provide equal voting opportunity in voting and with past precedent, and could ironically lead to increasing the role of race in state redistricting decisions.⁶²

⁵⁸ S. Applewhite, “For Republicans, no easy answers on voting rights act,” CBS News (July 5, 2013); T. Lopez, Shelby County: One Year Later, Brennan Center for Justice (June 24, 2014)(“Brennan Center report”) at 2-3.

⁵⁹ Brennan Center report at 1, 5.

⁶⁰ See A. Liptak, “Supreme Court blocks order to restore seven days of voting in Ohio,” New York Times (Sept. 29, 2014); E. Minberg, “A Disturbing New Trend for the Roberts Court,” Huffington Post (Oct. 15, 2014). The Court’s order in Husted v. NAACP, No. 14A336, was issued on Sept. 29, 2014.

⁶¹ See M. Kovac, “Husted, NAACP reach early voting settlement,” Daily Record (April 17, 2015).

⁶² Bartlett, 556 U.S. at 27. In a decision that will make it more difficult for plaintiffs in voting rights and other civil rights cases, the conservative 5-4 majority in Perdue v. Kenny A., 559 U.S. 542 (2010), limited the ability to obtain enhanced attorneys’ fees award for outstanding performance and results under an attorneys’ fees statute. As Justice Breyer explained for the four dissenting moderates, the ruling could lead improperly to “protected appellate review” of such awards. Id. at 571.

In two cases involving race and redistricting, the moderate justices joined with Justice Kennedy to form 5-4 majorities that narrowly avoided damaging results concerning voting rights. In League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006), the majority invalidated part of a Texas redistricting plan that redrew 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. If the minority had prevailed, the result would have “eroded minority voting rights in Texas.”⁶³ Similarly, a 5-4 majority in Alabama Legislative Black Caucus v. Alabama, 135 S.Ct. 1257 (2015), overturned a lower-court ruling that had rejected all challenges to an Alabama redistricting plan that allegedly had improperly packed minority voters in a smaller number of districts to decrease minority voting strength and help Republicans. It ruled that such challenges must be considered to individual districts, and strongly suggested that at least some of the districts were improperly racially gerrymandered.⁶⁴ One more vote with Roberts, Scalia, Alito, and Thomas in these cases would have harmed African-American and Latino voting rights.

⁶³ See LULAC, Hispanic voters vindicated in LULAC v. Perry Texas Redistricting Case (June 28, 2006). In one important respect, the decision was harmful to voting rights since, by a 5-4 majority, the Court refused to adjudicate a challenge to partisan redistricting in Texas that transformed the state congressional delegation from slightly Democratic to overwhelmingly Republican.

⁶⁴ See R. Hasen, “Opinion Analysis: A small victory for minority voters, or a case with ‘profound’ constitutional implications?,” SCOTUSblog (March 28, 2015).

More recently, Justice Kennedy joined the four moderates in rejecting an effort to harm voting by making it very difficult for voters to stop partisan redistricting. In 2000, Arizona voters adopted a state constitutional amendment permanently removing redistricting authority from the state legislature and assigning it to an independent commission. After the 2012 congressional redistricting, the Arizona Legislature went to federal court and argued that, for the purposes of congressional redistricting, the ballot initiative violated the Constitution’s Elections Clause, which states that “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof” (emphasis added). In a 5-4 decision, the Supreme Court rejected the challenge in Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S.Ct. 2652 (2015).

Writing for the moderates and Justice Kennedy, Justice Ginsburg noted in the very first paragraph that partisan gerrymanders are “incompatible with democratic principles.”⁶⁵ Those democratic principles infused the opinion as the Court found that the Elections Clause does not prohibit the people of Arizona from creating an independent commission to draw congressional districts. The Court noted that dictionaries in the founding era defined “legislature” broadly as the power that makes laws. That power varies by state; in Arizona,

⁶⁵ Arizona Independent Redistricting Commission, 135 S.Ct. at 2658.



it includes the people acting through ballot initiative. Noting that the Constitution conceives of “the people as the font of governmental power,” Ginsburg quoted James Madison: “The genius of republican liberty seems to demand ... not only that all power should be derived from the people but that those entrusted with it should be kept in dependence on the people.”⁶⁶

Writing for the four dissenters, however, Chief Justice Roberts argued that the Founders understood “legislature” to be limited to a representative body. The dissent includes an appendix of 17 constitutional provisions referring to the “legislature” of a state, some of which Roberts claimed could not be read to include “the people,” including some expressly distinguishing between “the legislature” and “the people.” One key example involves the election of senators. Article I originally called for them to be “chosen by the Legislature.” After what Roberts calls “an arduous, decades-long campaign” by reformers, this was altered by the 17th Amendment, which called for senators to be “elected by the people.” “What chumps! Didn’t [the reformers] realize that all they had to do was interpret the constitutional term ‘the Legislature’ to mean ‘the people?’”⁶⁷

One more vote with Roberts and the other dissenters would have jeopardized congressional redistricting commissions in other states that allow such ballot initiatives. Indeed, the Court could have undermined all manner of election-related state laws adopted by voter referenda. Before oral arguments, the Brennan Center classified as at risk “21 state laws adopted by ballot initiative and another 45 that needed approval by voters via a legislative referendum or constitutional amendment. Examples of such laws include Mississippi’s voter identification law, Oregon’s vote by mail ballot elections, and Ohio’s ban on straight party voting.”⁶⁸

One more such vote would also have devastated effective enforcement of the federal Fair Housing Act this year in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, 192 L.Ed.2d 514 (2015). The issue in that case was whether practices that have a discriminatory impact on the ability of racial minorities, women, disabled people, families with children, and others to obtain housing

The majority claimed that the school districts’ overall goal of promoting racial diversity was not important enough to warrant its actions.

and are not properly justified are illegal under the Act. Every court of appeals that had considered the issue, and both Republican and Democratic officials at the Department of Housing and Urban Development, had answered that question in the affirmative over the past 30 years, but many feared that the Court would overrule those decisions and say that specific intent to discriminate must be proven to violate the law.⁶⁹ Despite vigorous dissents, Justice Kennedy and the four moderate justices rejected those arguments and upheld the discriminatory impact standard under the Fair Housing Act. As The New York Times concluded, that decision was “critical” to combat harm to “minorities and other vulnerable groups the law was written to protect.”⁷⁰

In several cases concerning local government efforts to promote school desegregation and affirmative action, however, Justice Kennedy sided with the four right-wing justices to produce extremely troubling 5-4 decisions. In Ricci v. DeStefano, 129 S.Ct. 2658 (2009), the 5-4 majority ruled that the city of New Haven, Connecticut, had violated Title VII by throwing out the results of job promotion tests that had favored white candidates, even though the city found that the tests had flaws and could have led to a discrimination lawsuit against it. Justice Ginsburg’s dissent for the four moderate justices criticized the majority, pointing out that it “ignores substantial evidence of multiple flaws” in the tests and improperly limited the city’s actions.⁷¹ One expert suggested that the decision will “change the landscape of civil rights law,” making it harder for cities and other public employers to voluntarily end discriminatory practices.⁷²

⁶⁶ Arizona Independent Redistricting Commission, 135 S.Ct. at 2674-5, quoting The Federalist No. 37.

⁶⁷ Arizona Independent Redistricting Commission, 192 L. Ed. 2d at 736-37.

⁶⁸ “Could the Supreme Court Make Dozens of State Election Laws Unconstitutional?,” Brennan Center for Justice, <https://www.brennan-center.org/supreme-court-could-make-dozens-election-laws-unconstitutional> (accessed Aug. 10, 2015).

⁶⁹ See “A win for fair housing,” Baltimore Sun (July 6, 2015).

⁷⁰ “The Supreme Court keeps the fair housing law effective,” New York Times (June 25, 2015).

⁷¹ Ricci, 129 S.Ct. at 2690.

⁷² See A. Liptak, “Supreme Court finds bias against white firefighters,” New York Times (June 29, 2009)(quoting Professor Sheila Foster of Fordham University)

The Supreme Court will undoubtedly be hearing crucial civil rights cases in the near future, including on the President's actions on immigration and many more.

The same 5-4 majority made it much harder for school districts to voluntarily promote school desegregation and integration in Parents Involved in Community Schools v. Seattle School Dist., 551 U.S. 701 (2007). In that case, the Court ruled unconstitutional two school district plans that took students' race into account in school assignments in order to reduce racial isolation and promote diversity. The majority claimed that the school districts' overall goal of promoting racial diversity was not important enough to warrant its actions.⁷³ In the principal dissent, Justice Breyer explained the recognized importance of such diversity and the 5-4 majority's clear departure from past Court decisions, and concluded that the majority had issued a "radical" decision that "the court and the nation will come to regret."⁷⁴ Justice Stevens expressed his "firm conviction that no member of the court that I joined in 1975 would have agreed with today's decision."⁷⁵

Finally, the conservative Roberts-Alito 5-4 majority has issued several troubling decisions on immigration and related issues. In Horne v. Flores, 557 U.S. 433 (2009), the majority overruled a lower-court decision that had held Arizona in contempt for failing to adequately fund English Language Learner programs under the federal Equal Opportunities Act, effectively ruling that it was up to the state to decide how much to spend on such programs, despite the federal law.⁷⁶ The four moderate justices vigorously dissented, with Justice Breyer warning that the 5-4 holding "risks denying schoolchildren the English language instruction they need to overcome language barriers that impeded their equal participation."⁷⁷

⁷³ See Parents Involved, 551 U.S. at 732-33.

⁷⁴ Id. at 831, 868.

⁷⁵ Id. at 803. In a case raising civil rights issues for American Indians, the same four moderate justices dissented from a 5-4 holding that reversed a judgment of over \$700,000 because of discrimination based on race and tribal affiliation, in which the majority held that a tribal court could not even rule on a discrimination claim against a non-Indian bank. See Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008).

⁷⁶ See T. Lewin, "Supreme Court sides with Arizona in language case," New York Times (June 25, 2009).

⁷⁷ Id.; Horne, 578 U.S. at 474.

More recently, the same 5-4 majority reversed a lower-court decision that ruled that a U.S. citizen was at least entitled to an explanation of why the State Department refused to grant a visa to her husband in Kerry v. Din, 192 L.Ed.2d 183 (2015). The moderate justices strongly dissented from the ruling that no explanation was necessary other than referring to the statute under which the visa was denied; indeed, four justices in the majority (other than Justice Kennedy) ruled that not even that explanation was necessary. As Justice Breyer explained, the visa denial will require the Dins "to spend their married lives separately or abroad," and the failure to provide an explanation of "why the State Department denied a visa" violated Ms. Din's constitutional right to due process of law.⁷⁸

The Supreme Court will undoubtedly be hearing crucial civil rights cases in the near future, including on the President's actions on immigration and many more. These decisions, the fate of prior 5-4 rulings, and the future of voting and civil rights will depend in large measure on who appoints future Supreme Court justices after the 2016 election.



⁷⁸ Kerry, 192 L.Ed.2d at 198. In an earlier immigration case, Dada v. Mukasey, 554 U.S. 1 (2008), Justice Kennedy joined with the four moderate justices to produce a 5-4 ruling that compliance with a deportation order by agreeing to voluntary departure does not strip an immigrant of the right to then seek to reopen and effectively appeal that order. As Justice Kennedy's majority opinion pointed out, the view of the dissent and the government would "render the statutory right to seek reopening a nullity in most cases." Id. at 16.

3. LGBT Rights

Despite the addition of Roberts and Alito to the Court, the last several years have seen tremendous strides with respect to LGBT rights and equality, thanks to a series of landmark 5-4 decisions by Justice Kennedy and the four moderates on the Court. Most notable, of course, was the recent 5-4 decision in Obergefell v. Hodges, 192 L.Ed.2d 609 (2015), recognizing same-sex couples' constitutional right to marry. But the vociferous dissents in these cases, the narrow 5-4 majorities, the age of justices like Kennedy and Ginsburg in the majority, and continued advocacy on the right all make clear that the question of who appoints the next Supreme Court justices will be crucial to ensuring continued progress and preventing reversal or retreat on LGBT rights.

The question of who appoints the next Supreme Court justices will be crucial to ensuring continued progress and preventing reversal or retreat on LGBT rights.

Two years prior to Obergefell, another important 5-4 decision in United States v. Windsor, 133 S.Ct. 2675 (2013), struck down part of the so-called Defense of Marriage Act, which refused to give federal recognition for tax and other purposes to same-sex marriages that were legal under state law. Justice Kennedy's majority opinion made clear that based on prior Court precedents, including those that had invalidated state efforts to harm LGBT rights in Lawrence v. Texas, 539 U.S. 558 (2003), and Romer v. Evans, 517 U.S. 620 (1996), DOMA's "interference with the equal dignity of same-sex marriages" was unconstitutional.⁷⁹

Unlike Lawrence and Romer, which had been joined by six justices, including Justice O'Connor, her replacement by Justice Alito led to four justices

vigorously dissenting from the 5-4 decision in Windsor. Despite these same four justices agreeing to strike down other federal statutes concerning campaign finance and voting rights, they strongly criticized, as Justice Alito put it, "unelected judges" on the Court "arrogating to ourselves the power" to overturn DOMA as a law passed by Congress.⁸⁰ And all four vehemently disagreed with the merits of the majority's constitutional ruling, with Justice Scalia accusing it of containing "scatter-shot rationales" and "legalistic argle-bargle."⁸¹ There can be no question that with one more vote, the four right-wing justices would have upheld DOMA.

Similarly, one more right-wing vote would have reversed (or could overrule in the future) the landmark 5-4 ruling in Obergefell. Based on prior Court precedents, including the unanimous decision overturning state laws that banned interracial marriage in Loving v. Virginia, 388 U.S. 1 (1967), Justice Kennedy's opinion for the majority explained that under the Constitution, "same-sex couples may not be deprived" of "the fundamental right to marry" on the "same terms and conditions as opposite sex couples."⁸² The four dissenters vehemently disagreed, claiming that the majority was improperly overruling the judgment of state legislators and had "no basis" in the Constitution or precedent, as Chief Justice Roberts put it, for the merits of their decision.⁸³ But the dissents went even further and explicitly suggested grounds for undermining or even overruling Obergefell in the future.

Several dissenters discussed what they termed the inevitable "conflict" between the right of marriage equality and claims of religious liberty.⁸⁴ Chief Justice Roberts, for example, raised concerns about what will happen when people "exercise religion in ways that may be seen to conflict" with the decision, such as religious adoption agencies seeking to confine their services to opposite-sex couples or religious colleges limiting married student housing to such couples, and predicted (or invited) that such issues "will soon be before this Court."⁸⁵ Depending on which such issues are considered by the Court, and on the justices who

⁸⁰ Id. at 2718.

⁸¹ Id. at 2709.

⁸² Obergefell, 192 L.Ed.2d at 631.

⁸³ Id. at 639.

⁸⁴ Id. at 668.

⁸⁵ Id. at 654.

⁷⁹ Windsor, 133 S.Ct. at 2693.

are on the Court to decide them, such cases could either reinforce or undermine the ruling and the principles of Obergefell.

In addition, Chief Justice Roberts' dissent repeatedly claimed that the majority's decision was based on and similar to the "unprincipled approach" of cases later overruled or abandoned by the Court, most notably Lochner v. New York, 198 U.S. 45 (1905).⁸⁶ Roberts explained that under Lochner, a majority of the Court had used its personal views of economic liberty and the due process clause to overrule numerous New Deal and Progressive Era laws in the early part of the twentieth century, until the Court later "recognized its error and vowed not to repeat it."⁸⁷ The implication was clear: the marriage equality ruling is illegitimate and another Court, with a different majority, could well overturn or effectively abandon the ruling in Obergefell.

An earlier 5-4 decision of the Roberts-Alito Court may provide a preview of some of the religiously framed conflicts that advocates may urge the Court to review after Obergefell, and the importance of future appointments to the Court in resolving them. In Christian Legal Society v. Martinez, 561 U.S. 661 (2010), a chapter of the Christian Legal Society (CLS) at a state law school contended that it was entitled to official recognition as a student group, including use of school funds and facilities, even though it refused to abide by a school policy requiring all groups to "accept all comers" regardless of status or beliefs and not to discriminate on grounds including religion and sexual orientation. CLS claimed that the policy violated its First Amendment rights. The Court majority, including Justice Kennedy, narrowly rejected the CLS claim, pointing out that CLS could continue to meet but could not demand official recognition or funding, because the "all-comers" policy was an appropriate "viewpoint neutral" rule.⁸⁸

The four conservative justices joined in a vigorous dissent by Justice Alito. The dissent claimed that the neutral school policy was a "pretext" for discrimination based on religious viewpoint.⁸⁹ Quoting a friend of the court brief, Alito maintained that the decision would result in the "marginalization" of "religious groups" and would constitute "a judicial dagger at the heart" of such groups.⁹⁰ Just as the four conservative justices



argued for what Justice Ginsburg called a "preferential exemption" for CLS from the antidiscrimination rule⁹¹, it is unfortunately easy to predict that these justices would support efforts to whittle away at, if not overrule, the LGBT rights recognized in Obergefell and other decisions. With the appointment of a right-wing justice to replace Justice Kennedy or Ginsburg, they would likely have the votes to prevail. This makes the issue of who appoints Supreme Court justices after 2016 critical to the future of LGBT rights and equality.

A recent development underlines the importance of the Supreme Court concerning LGBT rights. In July 2015, the Equal Employment Opportunity Commission (EEOC) ruled 3-2 that workplace discrimination based on sexual orientation is already illegal under Title VII's existing prohibition on discrimination on the basis of sex. There is no question that the courts will be considering this ruling and this issue, which is very likely to be finally resolved by the Supreme Court in the future.⁹² The president who appoints Supreme Court justices after 2016 may well determine the answer to this important question for LGBT rights.

⁸⁶ Id. at 647.

⁸⁷ Id. at 645.

⁸⁸ See Martinez, 561 U.S. at 668, 669.

⁸⁹ Id. at 707.

⁹⁰ Id. at 741.

⁹¹ Id. at 669.

⁹² See N. Scheiber, "U.S. agency rules for gays in workplace discrimination," New York Times (July 17, 2015).

4. Reproductive Freedom and Women’s Rights



In several high-profile cases since Alito and Roberts joined the Court in 2005 and 2006, the conservative 5-4 majority has done extensive damage to women’s rights and reproductive freedom. These include decisions effectively reversing a recent decision on reproductive choice, making it much harder for women and others to prevail on job discrimination claims, and threatening to deprive many women of access to contraception under the Affordable Care Act. With abortion and other cases likely to be on the Court’s docket in coming years, the question of who will appoint justices to vacancies on the Court after the 2016 election is crucial.

One of the Court’s most criticized 5-4 decisions involving women’s fair employment rights was Ledbetter v. Goodyear Tire and Rubber Co., 550 U.S. 618 (2007), where the 5-4 majority made it much more difficult to bring suit under Title VII of the 1964 Civil Rights Act to combat long-running gender discrimination in pay. Justice Alito’s opinion for the majority ruled that any claim of pay discrimination had to be brought within 180 days of an initial pay decision, even if information about improper pay discrimination doesn’t become known or the effects experienced until much later. As Justice Ginsburg’s dissent for the moderate justices explained, the majority’s ruling contradicted EEOC rulings and lower-court decisions that had “overwhelmingly held” that the “current payment of salaries infected by gender-based” discrimination violated Title VII.⁹³ She criticized the

majority for its objective, as stated in Alito’s opinion, to “protect employers from the burden of defending” such pay claims, rather than vindicating Congress’ objective to provide “robust protection against workplace discrimination.”⁹⁴ She concluded that the majority had effectively robbed Lilly Ledbetter of any remedy for the “cumulative effect” of multiple pay decisions “that, together, set her pay well below that of any male area manager” of Goodyear, and noted pointedly that only Congress could “correct” the majority’s misinterpretation.⁹⁵ Congress did precisely that two years later in enacting the Lilly Ledbetter Fair Pay Act of 2009.⁹⁶

In the same year that it decided Ledbetter, the Court’s conservative 5-4 majority issued a decision severely harming women’s reproductive rights. In Gonzales v. Carhart, 550 U.S. 124 (2007), the 5-4 majority upheld a congressional statute barring certain late-term or “partial birth” abortions, despite the Court’s decision only seven years earlier striking down a similar state law in Stenberg v. Carhart, 530 U.S. 914 (2000). In Stenberg, the Court, which then included Justice O’Connor, found that the law was fatally flawed because it did not allow an exception to the ban when necessary for the health of the mother, as required under past precedent. But in Gonzales, the 5-4 majority (now including Justice Alito, who replaced Justice O’Connor) found no problem with the lack of a health exception, even though the procedure had been “found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists.”⁹⁷ Justice Ginsburg’s dissent for the four moderate justices found the majority’s ruling “alarming” because it puts women’s “health at risk,” and “irrational” because it contradicted Stenberg and other past precedents and violated “the rule of law.”⁹⁸ The respected New England Journal of Medicine criticized the 5-4 ruling, writing that for “the first time, the Court permits Congressional judgment to replace medical judgment.”⁹⁹

⁹⁴ *Id.* at 657, 660.

⁹⁵ *Id.* at 660,661.

⁹⁶ As discussed in the chapter of this report on Workplace Fairness, a number of later Alito-Roberts 5-4 decisions also harmed women as well as other workers by misinterpreting Title VII, but a more conservative Congress has not exercised its authority to correct these holdings and restore the law.

⁹⁷ Gonzales, 550 U.S. at 170-1.

⁹⁸ *Id.* at 170, 188, 191.

⁹⁹ G. Annas, “The Supreme Court and Abortion Rights,” 356 New England Journal of Medicine 2201, 2206 (2007).

⁹³ Ledbetter, 550 U.S. at 645.



In another case, the Court came within one vote of holding that virtually no effective action can be taken by local governments to protect women seeking access to abortion clinics. At issue in McCullen v. Coakley, 134 S.Ct. 2518 (2014), was the validity of a Massachusetts law creating “buffer zones” near abortion clinics in which anti-abortion protests and efforts to “persuade” individual women against having abortions were prohibited in order to protect women’s access to clinics and public safety. Although the Court unanimously agreed that the law as written was unconstitutional because it violated the First Amendment rights of protesters, five justices (Chief Justice Roberts and the four moderates) specifically did not overrule a prior precedent upholding a buffer zone law and made clear that some such laws would be constitutional.¹⁰⁰ But Justices Scalia, Kennedy, Thomas, and Alito would have gone further, either by overruling prior precedent allowing buffer zones in some circumstances or ruling that they should be subject to strict, and usually fatal, scrutiny.¹⁰¹ There is little question that one more far-right justice on the Court would produce a decision effectively outlawing buffer zones under any circumstances.

In a decision that also has important implications concerning religious liberty, LGBT rights, and other

areas, the conservative 5-4 majority ruled in Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014) that for-profit businesses could use a federal law protecting religious freedom to exempt themselves from the requirement under the Affordable Care Act that they provide insurance coverage that includes contraceptives to their employees. As Justice Ginsburg explained in a dissent for herself and the other moderate justices, the holding impaired the ability of millions of female employees to receive “the preventative care needed to safeguard their health and well being” as Congress required under the ACA. It also was a decision of “startling breadth” that could allow any corporation or commercial enterprise to “opt out of any law (save tax laws) they judge incompatible with their sincerely held religious beliefs.”¹⁰²

In Ledbetter v. Goodyear, Justice Ginsburg noted pointedly that only Congress could “correct” the majority’s misinterpretation.

¹⁰⁰ See McCullen, 134 S.Ct. at 2539, 2541.

¹⁰¹ Id. at 2541; see L. Denniston, “Opinion analysis: a broader right to oppose abortion,” SCOTUSblog (June 26, 2014).

¹⁰² Hobby Lobby, 134 S.Ct. at 2802, 2787.

Hobby Lobby claimed that the requirement that it provide contraceptive coverage to employees under the ACA violated the Religious Freedom Restoration Act (RFRA). As Justice Ginsburg explained, and as the language, history, and name of the law made clear, RFRA was designed to restore, as a matter of federal statutory law, the protection for religious liberty that the Constitution had provided under Supreme Court doctrine prior to the Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990). But Justice Alito's majority opinion claimed that RFRA provides "very broad protection for religious liberty" that is "even broader" than was available under the First Amendment under Smith. This led the majority to misinterpret RFRA, in Justice Ginsburg's words, as a "bold initiative departing from, rather than restoring, pre-Smith jurisprudence."¹⁰³



Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States

This significant difference in interpretation was crucial to the 5-4 majority's ruling that for-profit corporations whose owners had religious objections to contraception could invoke RFRA to refuse to obey the ACA's mandate that they provide contraceptive coverage to employees. As Justice Ginsburg explained, no previous Court decision under RFRA or the First Amendment had ever "recognized a for-profit corporation's qualification for a religious exemption" and the majority's decision to create a corporate right to religious liberty "surely is not grounded in the pre-Smith precedent Congress sought to preserve."¹⁰⁴

¹⁰³ *Id.* at 2760, 2761n.3, 2791-2.

¹⁰⁴ *Id.*, at 2794, 2796.

Although the Hobby Lobby ruling itself concerned only closely held corporations, such corporations employ more than half of all American workers¹⁰⁵ and, as Justice Ginsburg pointed out, the logic of the decision "extends to corporations of any size, public or private."¹⁰⁶

In addition, the 5-4 majority in Hobby Lobby went beyond previous case law in another crucial respect. Before a person can claim an exemption from a generally applicable federal law under RFRA, it must be demonstrated that the law imposes a "substantial burden" on the person's "exercise of religion." According to the Alito 5-4 opinion, the corporations in Hobby Lobby met that burden by showing that the use of certain contraceptives that could be purchased by their employees under their health plans would seriously offend their religious beliefs. As Justice Ginsburg explained, however, that holding conflicted with pre-Smith case law on what must be shown to demonstrate a "substantial burden." In several such cases, the Supreme Court had ruled that there was no "substantial burden" on religious free exercise created by, for example, the government's use of a Social Security number to administer benefit programs or its requirement that Social Security taxes be paid, despite the genuine and sincere offense that these actions caused to some religious beliefs. As Justice Ginsburg stated, offense to such religious "beliefs, however deeply held, do not suffice to sustain a RFRA claim," except under the 5-4 Court majority's new interpretation of RFRA.¹⁰⁷

In addition to the damage to women's rights done by Hobby Lobby, Justice Ginsburg's dissent explained that the ruling could do even more harm to the rights of women and others in the future. As she pointed out, using the new Hobby Lobby rationale, corporations can seek exemptions from many "generally applicable laws on the basis of their religious beliefs," including laws and rules banning gender and LGBT discrimination and requiring payment of a minimum wage.¹⁰⁸

¹⁰⁵ A. Blake, "A LOT of people could be affected by the Supreme Court's birth control decision — theoretically," Washington Post (June 30, 2014).

¹⁰⁶ Hobby Lobby, 134 S.Ct. at 2797.

¹⁰⁷ *Id.* at 2798, 2803. The two prior Court rulings were Bowen v. Roy, 476 U.S. 693 (1986), and United States v. Lee, 455 U.S. 22 (1982).

¹⁰⁸ Hobby Lobby, 134 S.Ct. at 2804, 2802. Interestingly, Justice Alito's majority opinion responded to another example used by Justice Ginsburg of the harm that could be done by the majority opinion by noting that religious claims of exemption from laws banning race discrimination would be defeated by the recognized compelling government interest and necessary use of such laws in banning such discrimination, but said nothing with respect to laws or rules banning discrimination based on gender or LGBT status. *See id.* at 2783.



Literally days after the [Hobby Lobby](#) ruling, the Court majority went even further. In [Hobby Lobby](#) itself, the majority had noted that one less-restrictive alternative that could be applied to corporations like Hobby Lobby with religious objections was to apply to them the limited exemption that was then available to religious colleges and other nonprofit institutions, under which they need only fill out a form prescribed by the government indicating their religious objection, after which the government would make other arrangements to provide contraceptive coverage to employees. A number of religious nonprofits were claiming that being required to fill out the government form imposed a substantial burden on their religious free exercise, and one, Wheaton College, sought a temporary injunction from the Court against having to comply with that requirement while its lawsuit was pending in the lower courts. Even though it had appeared to endorse the exemption in [Hobby Lobby](#) several days earlier, the Court agreed to grant such an injunction for Wheaton College, ruling that the college need not even fill out the form but simply had to notify the government of its objection by letter or other means. Justice Sotomayor vigorously dissented for herself and Justices Kagan and Ginsburg, pointing out that the injunction appeared to contradict [Hobby Lobby](#) and improperly granted relief even though there had been no ruling on the merits by the lower courts.¹⁰⁹ Although the Wheaton College ruling was only a temporary injunction decision without full consideration on the merits, the troubling decision certainly signaled further problems in this area.

In fact, Justice Ginsburg's warning that the Court was entering a "minefield" with the 5-4 [Hobby Lobby](#) decision has already proven true.¹¹⁰ Numerous other

¹⁰⁹ See L. Denniston, "Broadening right to object to birth control," [SCOTUSblog](#) (July 3, 2014); E. Minberg "A Disturbing New Trend for the Roberts Court," [Huffington Post](#) (Oct. 15, 2014).

¹¹⁰ [Hobby Lobby](#), 134 S.Ct. at 2805.

large and small for-profit companies have used the [Hobby Lobby](#) exemption to discriminate against female employees concerning contraceptive coverage, requiring additional litigation and a new rule by the government to provide such coverage outside the employers' health plans.¹¹¹ As with Wheaton College, numerous religious nonprofits have filed lawsuits claiming that even the requirement that they fill out a form or otherwise notify the government of their objection is a RFRA violation. While these claims have been rejected so far by every federal court of appeals that has considered them, it is very likely that the issue will return to the Supreme Court over the next several years.¹¹² As a report by the National Women's Law Center concluded, since [Hobby Lobby](#) there have been efforts to use RFRA "to challenge laws that protect women, LGBTQ individuals and students from discrimination."¹¹³ And at the state level, [Hobby Lobby](#) has helped lead more than 16 states to consider state RFRA laws in order to provide religious exemptions from nondiscrimination laws and ordinances, and several have already passed.¹¹⁴

Justice Ginsburg's dissent explained that the ruling could do even more harm to the rights of women and others in the future.

In addition to fallout from [Hobby Lobby](#), other cases threatening women's and reproductive rights are likely to reach the Supreme Court, including some concerning extremely restrictive state abortion laws. The question of who appoints the next Supreme Court justices is crucial for women's rights and reproductive freedom.

¹¹¹ See National Women's Law Center, [The Hobby Lobby 'Minefield': the Harm, Misuse, and Expansion of the Supreme Court Decision](#) (June, 2015) ("NWLC report") at 2; L. Bassett, "White House finds way around Hobby Lobby birth control decision," [Huffington Post](#) (July 10, 2015).

¹¹² See L. Denniston, "Pressing the ACA birth control issue," [SCOTUSblog](#) (June 23, 2015); L. Denniston, "Court clears way for birth control access," [SCOTUSblog](#) (June 29, 2015).

¹¹³ NWLC report at 1.

¹¹⁴ See E. Minberg, "Hobby Lobby comes home to roost as states consider 'religious freedom' legislation," [Huffington Post](#) (March 31, 2015).

5. Workplace Fairness

In important 5-4 rulings, the Roberts-Alito Court has harmed workers by significantly weakening federal laws that protect against discrimination in the workplace based on race, age, sex, and other factors.

The Supreme Court has historically played an important role in helping ensure fairness for workers, both to organize to protect their own interests and to combat discrimination and unfair treatment by corporations and other employers. Unfortunately, that has changed dramatically, particularly since Roberts and Alito joined the Supreme Court. In a series of 5-4 decisions since then, the Court has both severely weakened federal laws that protect against workplace discrimination, and has also seriously harmed other workers' rights, including the right to organize. A Democratic president could appoint justices after 2016 who could reverse or ameliorate these harms to workplace fairness, while conservative justices appointed by a Republican president would make matters even worse.

In five important 5-4 rulings, the Roberts-Alito Court has harmed workers by significantly weakening federal laws that protect against discrimination in the workplace based on race, age, sex, and other factors. The most infamous of these rulings, which is discussed in more detail in the section of this report on women's rights and reproductive freedom, was Ledbetter v. Goodyear Tire and Rubber Co., 550 U.S. 18 (2007), where the Court made it much more difficult to bring suit under Title VII of the 1964 Civil Rights Act to combat long-running gender or other discrimination in pay. Congress effectively reversed that decision after the 2008 elections.

Unfortunately, as Congress itself has become more conservative, no congressional action has been able

to remedy the later harmful decisions of the Roberts-Alito Court misinterpreting Title VII and other laws protecting against workplace discrimination. In University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013), the 5-4 majority severely limited an employee's ability to prove that an employer fired him or her in retaliation for filing a job bias claim, ruling that it must be proved that the firing would not have occurred "but for" the retaliatory motive. This was despite the fact that Congress had added language to Title VII in 1991 to make clear that plaintiffs should prevail if they show simply that discrimination was a "motivating factor" in a job decision. As Justice Ginsburg explained in dissent, the net effect of the majority's ruling was to make it harder to prove a Title VII retaliation claim than before the 1991 law, so that the 5-4 majority had effectively "seized on a provision adopted by Congress as part of an endeavor to strengthen Title VII" and instead "turned it into a measure reducing the force of the ban on retaliation."¹¹⁵ As she concluded, the 5-4 Court decision contradicted past precedent, the guidance of the Equal Employment Opportunity Commission (EEOC), and the purpose of Title VII, and appeared "driven by zeal to reduce the number of retaliation claims against employers."¹¹⁶

The same 5-4 majority again helped business and drastically limited protection against workplace harassment in an opinion by Justice Alito in Vance v. Ball State University, 133 S.Ct. 2434 (2013). In that case, the Court majority ruled that an employer can be held liable for racial or other illegal harassment only if it is committed by a manager who has the power to fire or demote the victim, not when it is committed by a manager who controls the victim's day-to-day schedule, assignments, and working environment without that formal authority. As Justice Ginsburg wrote in dissent, the ruling contradicted EEOC guidance and prior precedent, went further than even the employer in the case advocated, and was "blind to the realities of the workplace."¹¹⁷ She indicted the majority for trying to shift Title VII "in a decidedly employer-friendly direction," and concluded that the ruling would "leave many harassment victims without an effective remedy" and "undermine Title VII's ability to prevent workplace harassment."¹¹⁸

¹¹⁵ 133 S.Ct. at 2535.

¹¹⁶ 133 S.Ct. at 2547.

¹¹⁷ 133 S.Ct. at 2466,2457.

¹¹⁸ 133 S.Ct. at 2463.

In addition to Title VII, several other federal laws designed to protect against workplace discrimination have been severely weakened by 5-4 decisions of the Roberts-Alito Court. In Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), the 5-4 Court ruled that in order to prove age discrimination under the Age Discrimination in Employment Act, workers must prove that they would not have been fired or demoted “but for” their age, as opposed to proving, as in most other civil rights laws, that age was a motivating factor in the adverse decision. This was similar to the 5-4 majority’s Title VII decision a few years later in the Nassar case. As Justice Stevens explained in dissent in Gross, the ruling reflected an “utter disregard” of Court precedent and congressional intent and was an “unabashed display of judicial lawmaking.”¹¹⁹

Justice Ginsburg had a similar reaction to the Court’s 5-4 ruling in Coleman v. Court of Appeals of Maryland, 132 S.Ct. 1327 (2012), in which the majority ruled that a sick worker could not sue a state employer for damages for refusing to grant him sick leave to which he was entitled under the Family and Medical Leave Act. As Justice Ginsburg explained, the majority had “no legitimate ground to dilute the force of the Act” in that way.¹²⁰

In addition to seriously weakening federal antidiscrimination protections, the Roberts-Alito Court has harmed workers through a series of 5-4 rulings that substantially damage their ability to organize and receive other basic protections. Most notorious among these are the 5-4 rulings in Harris v. Quinn, 134 S.Ct. 2618 (2014), and its predecessor, Knox v. SEIU, 132 S.Ct. 2277 (2012).

The decisions in Harris and Knox are an important part of what The New York Times has called the “war on workers” and unions being waged by Justice Alito and other conservatives on the Court.¹²¹ Almost 40 years ago, in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Supreme Court recognized the important principle that although workers cannot be forced to join a union or contribute to its political activities, since that would violate their rights under the First Amendment, they can be required to help pay for the cost of union collective bargaining and related activities from which they benefit even if they are not union members. That solution to what would otherwise be a “free rider” problem is critical to the “ability of

unions to survive” in this country.¹²² The 5-4 rulings in Knox and Harris, however, clearly undermine Abood and suggest that, particularly with one more right-wing vote, the current conservative 5-4 majority may well overrule Abood and virtually eliminate workers’ ability to organize through unions.



In Knox, the question before the Court was whether nonunion members could be required to contribute to a fund used to oppose a ballot initiative harmful to unions and workers. By a 7-2 majority, the Court agreed that such a requirement could not be imposed. But a narrow 5-4 majority led by Justice Alito went further and ruled that nonunion members must affirmatively choose to opt in to such a fund, rather than receiving the traditional opportunity to opt out. Justices Sotomayor and Ginsburg, who agreed that nonunion members could not be required to pay the fee, vigorously disagreed with the majority’s creation of a new opt-in requirement. As they explained, the 5-4 majority had violated Court rules by deciding an issue “not contained in the questions presented, briefed, or argued” to the Court, so that no one had even had the chance to argue against the result that the 5-4 majority reached.¹²³ The result also “cast serious doubt on long-standing precedent” by the Court that providing the choice to opt out of such assessments was sufficient to protect non-members’ First Amendment rights without imposing undue and harmful burdens on unions.¹²⁴

In Harris, the same 5-4 majority led by Alito went even

¹²² *Id.*

¹²³ Knox, 132 S.Ct. at 2297.

¹²⁴ *Id.* at 2298. Justices Breyer and Kagan, who dissented from the result in Knox, maintained that the Court’s creation of the opt-in requirement “runs directly contrary to precedent.” *Id.* at 2306.

¹¹⁹ 557 U.S. at 182, 190.

¹²⁰ 132 S.Ct. at 1349.

¹²¹ “The War on Workers,” New York Times (July 2, 2014).

further to harm workers and undermine Abood. The Court's narrow holding was that Abood does not apply to Illinois home-care workers who earn their pay from the state's Medicaid program, so that such workers who are not members of the union that represents and benefits them in collective bargaining cannot be required to pay their fair share of union costs. Alito's opinion also severely criticized Abood, calling its reasoning "questionable" and effectively inviting a broader attempt by union opponents to overrule the decision.¹²⁵

Justice Kagan vigorously dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. The Court's ruling, she explained, effectively "robbed Illinois" of the ability to make collective bargaining work "in administering its in-home care program."¹²⁶ More broadly, she condemned the majority's criticism of Abood, noting that this earlier decision was "deeply entrenched" and was the foundation for "thousands of contracts between unions and governments" that would be jeopardized if the decision is further undermined or overruled.¹²⁷ Critics have pointed out that the Harris decision "distorts the status of thousands of homecare workers" and "denies women working in the home the same right as other employees" to benefit from unionization and collective bargaining.¹²⁸

As The New York Times wrote, the 5-4 majority's language in Harris "suggests that this may be the court's first step toward nationalizing the 'right to work' gospel by embedding it in constitutional law."¹²⁹ In fact, the Court has already accepted for review in the 2015-16 Term a California case (Friedrichs v. California Teachers Association) that could provide a vehicle to reconsider or overrule Abood, if Alito can secure five votes.¹³⁰ All this makes the next appointment to the Court, and the president who makes it, critical to the future of unions and American workers.

The Alito-Roberts 5-4 majority has done additional damage to workers' rights that could either be reversed or made even worse depending on future Court appointments. In Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156 (2012), the 5-4 majority ruled that sales representatives at a large pharmaceutical firm



Samuel Alito, Associate Justice of the Supreme Court of the United States.

are not entitled to overtime pay and can be considered contractors under federal law. In Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523 (2013), the 5-4 Court ruled that a company could effectively dismiss a broad claim for failing to pay proper wages under the Fair Labor Standards Act by making an offer to pay some back wages owed to the individual who filed the suit. And in Garcetti v. Ceballos, 547 US 410 (2006), the 5-4 Court ruled that public employees can be fired and have no First Amendment protection for any public statements made in the course of their duties. As Justice Souter pointed out in dissent, this holding means workers have no protection even when such statements expose "official wrongdoing and threats to health and safety."¹³¹

Through a narrow 5-4 majority, the Roberts-Alito Court has clearly done major damage to workplace fairness. One more moderate justice could repair much of that damage and prevent more harm in the future. But the continuation of the current 5-4 majority or, worse yet, replacing one of the moderate justices with a Republican-nominated conservative justice, threatens to do even more harm to the rights of workers and fairness in the workplace.¹³²

¹²⁵ Harris, 134 S.Ct. at 2632-33.

¹²⁶ Id. at 2658.

¹²⁷ Id. at 2645.

¹²⁸ E. Boris & J. Klein, "Reducing Labor to Love," Nation (July 2, 2014).

¹²⁹ "The War on Workers," New York Times (July 2, 2014)

¹³⁰ See R. Barnes, "Justices to hear union dues, redistricting cases next term," Washington Post (July 1, 2015).

¹³¹ Garcetti, 547 U.S. at 428.

¹³² In two recent cases, narrow 5-4 majorities ruled in favor of workers' rights; even these few decisions could well be threatened by one additional right-wing justice. See CSX Transportation v. McBride, 131 S.Ct. 2630 (2011)(5-4 decision ruling railroads liable for workers' injuries under federal statute); U.S. Airways v. McCutcheon, 133 S.Ct. 1523 (2013)(5-4 ruling favoring workers concerning pension rights under federal statute).

6. Protecting the Environment

In a series of cases that have protected large corporations and limited government regulation, the 5-4 Supreme Court majority under Roberts and Alito has already done significant damage to laws and regulations protecting the environment. The Court under a Republican presidency after 2016 could make matters much worse, and could effectively wipe out many of the statutory and regulatory protections that safeguard our air, water, and other natural resources. It could also reverse key Court decisions that have provided some environmental protections. On the other hand, if a Democratic president can nominate even a single justice to replace Justice Scalia or Kennedy, such harm can be avoided and some of the injury done by the conservative 5-4 majority can be limited or even reversed.

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, while a new, more moderate justice could have the opposite effect. In Rapanos v. United States, the plaintiffs wanted to fill wetlands in order to build a shopping mall and condos. Four of the more-conservative justices wanted to adopt 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.¹³³ To find otherwise, they claimed, would "result in a significant impingement of the States' traditional and primary power over land and water use."¹³⁴ 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.¹³⁵

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.¹³⁶ 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, "[I] awyers rarely agree on anything, but here's an exception: They all say the

Supreme Court bungled Rapanos . . ."¹³⁷ As a result, the decision left wetlands regulation in a confusing "mess."¹³⁸ Adding another conservative justice would mean that huge amounts of wetlands would not be covered at all under the Clean Water Act, making it harder for the law to serve its stated purpose.

A Court so because such emissions are not "air pollutants" as defined by the Clean Air Act and, even if they were, there was uncertainty about their connection to global warming. In a 5-4 decision, the Court found that greenhouse gases easily fit into the statute's broad definition of air pollutants. The EPA was also found to have "offered no reasoned explanation for its refusal to decide whether greenhouse gases

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¹³³ Rapanos v. United States, 547 U.S. 715, 739 (2006).

¹³⁴ Id. at 738.

¹³⁵ 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).")

¹³⁶ Id. at 753.

¹³⁷ L. Hurley, "Supreme Court's Murky Clean Water Act Ruling Created Legal Quagmire," New York Times (Feb. 7, 2011).

¹³⁸ 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.")



cause or contribute to climate change.”¹³⁹ Therefore, “[i]ts action was . . . ‘arbitrary, capricious, ... or otherwise not in accordance with law.’”¹⁴⁰ Justice Stevens, writing for the majority that included Justice Kennedy, 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 they do.”¹⁴¹ In short, the majority ruled, the EPA could and should regulate greenhouse gas emissions.

In contrast, the four most conservative justices – Chief Justice Roberts and Justices Scalia, Alito, and Thomas – would have denied the states’ claims. They argued that the states did not have standing to sue and that, even if they did, the Court should defer to the agency.

Under the 5-4 conservative majority since Roberts and Alito joined the Court, the justices have already done significant harm to environmental protection efforts. Most recently, in Michigan v. EPA, the 5-4 majority struck a “major blow” against federal environmental efforts by invalidating a 2011 EPA regulation that regulated mercury and other toxic emissions by

power plants, and that saved up to 11,000 premature deaths and over a half million lost work days per year.¹⁴² Justice Scalia’s opinion for the five-justice majority held that the EPA had erred because, in its initial determination in 2000 that regulation of such emissions was “appropriate and necessary,” it did not explicitly consider costs. As Justice Kagan explained for the four dissenting justices, however, the agency did consider costs in the regulatory process. As a result, she explained, the holding “deprives the Agency of the latitude Congress gave it to design an emissions-setting process sensibly accounting for costs and benefits alike.”¹⁴³ The future of the EPA rule is unclear, since the EPA could seek to redo the rule after attempting to reassess costs and undergoing further industry challenges. But unless a lower court allows the rules to remain in place while that process occurs, the result will be, as Justice Kagan explained, to deprive “the American public” of pollution control measures that the EPA found “would save many, many lives.”¹⁴⁴

In addition, the 5-4 conservative majority has diminished the reach of the Endangered Species Act. In National Association of Home Builders v. Defenders of

¹³⁹ Massachusetts v. EPA, 127 S.Ct. 1438, 1463 (2007).

¹⁴⁰ Id. at 1463.

¹⁴¹ Id. at 1462.

¹⁴² J. Warrick and R. Barnes, “Supreme Court: EPA erred in rule on toxic emissions from power plants,” Washington Post (June 29, 2015).

¹⁴³ Michigan v. EPA, 2015 U.S. Lexis 4256 (2015) at 66.

¹⁴⁴ Id. As of September 7, 2015, no subsequent ruling had been issued.

Unless a lower court allows the rules to remain in place while that process occurs, the result will be, as Justice Kagan explained, to deprive “the American public” of pollution control measures that the EPA found “would save many, many lives.”

Wildlife, a procedural conflict between agencies arose regarding the protection of endangered species. The Clean Water Act has specific requirements governing transfer applications, where 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 was whether the federal officials transferring authority to state officials must also include the Endangered Species Act regulations when enforcing Clean Water Act permits. In the opinion for the 5-4 majority, Justice Alito found that the Endangered Species Act did not apply in this case, and that the relevant section of the Act does not effectively operate as a criterion on which the EPA’s transfer of certain permitting powers to state authorities under the Clean Water Act must be conditioned.¹⁴⁵

Justice Stevens dissented for the four moderate justices, writing that the Endangered Species Act’s requirements should be given precedence over other aims of federal agencies, despite the apparent conflict between the Endangered Species Act and the Clean Water Act. “[B]oth the text of the ESA and our opinion” in a prior case, he explained, “compel the contrary determination that Congress intended the ESA to apply to ‘all federal agencies’ and to all ‘actions authorized, funded, or carried out by them.’”¹⁴⁶ The dissent condemned the majority for allowing numerous species to be threatened in violation of the rule of law.¹⁴⁷

Adding another like-minded justice would also strengthen the Roberts-Alito majority’s 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 the

EPA could use a cost-benefit analysis in choosing the Best Available Technology to meet national performance standards. In a majority opinion for five justices written by Justice Scalia, the Court ruled that the EPA could use a cost-benefit analysis in setting the national performance standards.¹⁴⁸

The four moderate justices disagreed. Three joined in a dissent by Justice Stevens, who explained that the EPA had “misinterpreted the plain text” of the relevant statute, which “neither expressly nor implicitly authorizes” the use of cost-benefit analysis and, “fairly read, it prohibits such use.”¹⁴⁹ Although Justice Breyer believed that cost-benefit analysis may be usable in some situations, he also disagreed with the majority’s far-reaching decision, 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.”¹⁵⁰



¹⁴⁵ National Association of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518, 2525 (2007).

¹⁴⁶ Id. at 2541.

¹⁴⁷ Id. at 2551.

¹⁴⁸ Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 209 (2009).

¹⁴⁹ Id. at 237.

¹⁵⁰ Id. at 230.

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.”¹⁵¹ 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, with potentially harmful consequences.¹⁵² And as the more recent Michigan v. EPA ruling indicates, the Court is willing to second-guess and overrule agencies if they have not given what the 5-4 majority believes is sufficient and proper consideration to the costs of regulation.

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In addition to its decisions substantively harming environmental protection, the Roberts-Alito majority has made it harder for environmental groups to bring challenges to defend the environment and easier for property owners to challenge pro-environment land use regulation. In Summers v. Earth Island Institute, 555 U.S. 488 (2009), Justice Scalia’s 5-4 opinion reversed an injunction granted by a court of appeals, and ruled that five environmental groups did not have standing

¹⁵¹ Jonathan Cannon, “The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc.,” 34 Harvard Environmental Law Review 425 (2010).

¹⁵² See generally K. Warren, “Supreme Court’s Riverkeeper Decision and Cost-Benefit Analysis,” Legal Intelligencer (July 16, 2009).

to challenge U.S. Forest Service rules exempting the sale of timber from smaller parcels of federal land from notice, comment, and appeal requirements because the specific controversy that sparked the dispute had been settled. Justice Breyer strongly dissented for the four moderate justices, pointing out that the Forest Service had “conceded that it would conduct thousands” of such sales in the future and that some were already pending, and that the facts “more than adequately show a ‘realistic threat’ of injury” sufficient to show standing under the Court’s prior precedents.¹⁵³ The majority, however, had reached a “counterintuitive conclusion,” Breyer explained, that was supported by “[n]othing in the record or the law.”¹⁵⁴

In contrast, Justice Alito wrote a 5-4 majority opinion in Koontz v. St. Johns River Management District, 133 S.Ct. 258 (2013), in which the majority made it easier for property owners to challenge land use regulations. In particular, the majority ruled that property owners could challenge conditions imposed on them when they choose to develop wetlands under the “Takings Clause” of the Fifth Amendment even though there had been no “taking” of property but simply the requirement to pay a fee. As Justice Kagan wrote for the four moderate justices in dissent, the majority’s opinion “runs roughshod” over prior Court precedent and “threatens to subject a vast array of land use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny” and potential invalidation.¹⁵⁵

As these decisions make clear, the addition of even one more right-wing justice to the Court threatens to do great harm to agencies’ ability to address serious environmental harms in keeping with congressional intent. On the other hand, the appointment of even one more moderate justice could reverse some of the Alito-Roberts majority’s dangerous 5-4 decisions and preserve those rulings that have helped protect the environment.

¹⁵³ *Id.* at 507, 510.

¹⁵⁴ *Id.* at 501.

¹⁵⁵ *Id.* at 2603, 2604. In its most recent Term, the Court decided a different “takings” case, part of which was 5-4. Eight members of the Court agreed in Horne v. Department of Agriculture, 2015 U.S. Lexis 4064 (2015), that when the federal government forbade a farmer from selling a substantial portion of his raisin crop as part of a program to decrease supply and increase prices, it constituted a “taking” under the Constitution. Four justices (Breyer, Kagan, and Ginsburg, plus Sotomayor who disagreed that a taking had occurred) felt that it was unclear that the farmer was entitled to any compensation, since he may have benefited financially from higher raisin prices, and that at least that issue should have been decided by a lower court. The effects of the decision are unclear, but one commentator has noted that “it could pose a threat to a wide range of government subsidy programs” concerning crops. See L. Denniston, “Opinion analysis: Is the New Deal in new trouble?,” SCOTUSblog (June 22, 2015).

7. Religious Liberty

As discussed above, the Roberts-Alito Court has rendered a number of important 5-4 decisions relating to religious liberty with significant impact on reproductive freedom, LGBT rights, and other issues, particularly its decision on RFRA in the Hobby Lobby case. In a number of other cases, the conservative 5-4 majority has harmed religious liberty by weakening First Amendment protections for church-state separation. An additional moderate on the Court would have made a huge difference in these cases, and future appointments will be crucial on this issue as well.

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In several cases, the 5-4 majority made it much harder even to bring challenges under the Establishment Clause of the First Amendment to government actions improperly promoting religion. In Flast v. Cohen, 392 U.S. 83 (1968), eight members of the Court agreed that taxpayers had standing to challenge federal government spending that may violate the Establishment Clause (in that case, by providing government funding for religious schools). But in Hein v. Freedom of Religion Foundation, 551 U.S. 587 (2007), the conservative majority ruled that Flast applies only to legislative appropriations that dictate such spending, and that taxpayers had no standing even to challenge discretionary executive branch spending decisions that they claim improperly promote religion. Two justices (Scalia and Thomas) would have gone even further and overruled Flast completely. Justice Souter strongly dissented for the four moderate justices, explaining that there was “no basis” in law or past precedent for the majority’s ruling.¹⁵⁶ Indeed, Justice Souter pointed out that under the majority’s rationale, the Department of HHS could use “general appropriations to build a chapel” and conduct sectarian religious services, in which case “Establishment Clause protection would melt away.”¹⁵⁷

¹⁵⁶ Hein, 551 U.S. at 637.

¹⁵⁷ Id. at 640.

The 5-4 majority went even further in Arizona Christian School Tuition v. Winn, 131 S.Ct. 1436 (2011). In that case, it ruled that taxpayers could not challenge the Arizona legislature’s decision to provide financial support for religious schools because the support was provided through tax credits rather than direct expenditures. As Justice Kagan explained in her dissent for the Court’s moderate justices, the state had already provided “nearly \$350 million in diverted tax revenues,” and the distinction between credits and expenditures has “as little basis in principle as it has in our precedent.”¹⁵⁸ Indeed, she pointed out that the decision was “devastating” to taxpayer standing since legislatures can almost always choose to fund measures via tax credits rather than direct expenditures, so that no matter how “blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts” under the majority’s decision.¹⁵⁹

In two additional cases, the conservative 5-4 majority weakened Establishment Clause protections on the merits. The Court had long recognized that government may not promote or endorse religion. In Salazar v. Buono, 559 U.S. 700 (2010), however, the conservative 5-4 majority overruled a court of appeals decision that prevented a land transfer that would effectively have evaded a prior judgment prohibiting the continued display of a large cross on federal land in California. The case was sent back to the lower court, but Justices Alito, Scalia, and Thomas would have gone further and ruled for differing reasons that the cross could remain since it would technically be on private land as a result of the transfer. Writing for three of



¹⁵⁸ Winn, 131 S.Ct. at 1450. As in Hein, Justices Scalia and Thomas made clear that they would have voted to overrule altogether taxpayer standing as provided in Flast.

¹⁵⁹ Winn, 131 S.Ct. at 1462.



the four dissenting moderate justices, Justice Stevens explained that the transfer had been “engineered” to evade the earlier judgment and that the net result of the Court’s ruling could be “continued endorsement of a starkly sectarian message” by the government.¹⁶⁰

Similarly, the conservative 5-4 majority ruled in Town of Greece v. Galloway, 134 S.Ct. 1811 (2014), that although the Court had previously ruled that state and local legislative bodies could begin their sessions with non-sectarian prayer, it was constitutional for a local town board to begin its sessions with what Justice Kagan described as “predominantly sectarian” Christian prayer.¹⁶¹ Justices Thomas and Scalia would have gone even further and ruled that the Establishment Clause does not apply to state and local government at all, and that if it does, it is violated only where there is government coercion “by force of law” to obey religious dictates.¹⁶² As Justice Kagan explained for the four dissenting moderate justices, the town’s practice of opening its meetings with a prayer led by a

community member that was almost always Christian, and where the town “did nothing to recognize” or promote “religious diversity,” was very different than the nonsectarian legislative prayer approved by the Court in Marsh v. Chambers, 463 U.S. 783 (1983).¹⁶³ By approving the town’s practice, she wrote, the Court was violating past precedent and authorizing “government-sponsored worship that divides” Americans of many faiths “along religious lines.”¹⁶⁴

Other religious liberty issues are likely to come before the Court in the future, such as whether religious nonprofits can use RFRA to effectively prevent their employees from receiving contraceptive coverage under Hobby Lobby. As a result of the Roberts-Alito conservative 5-4 majority, “[n]early every religious claim presented to the court has emerged a winner,” even when the result has damaged church-state separation or the rights of third parties.¹⁶⁵ The question of who appoints Supreme Court justices after 2016 will be crucial to whether the Court continues to erode church-state separation or whether it is able to restore principles of religious neutrality that are so important to true freedom of religion in this country.

¹⁶⁰ Salazar, 559 U.S. at 735. The case continues to be litigated in the lower courts. See K. Davis, “Cross land transferred; cross case not over,” San Diego Union Tribune (July 21, 2015).

¹⁶¹ Greece, 134 S.Ct. at 1842.

¹⁶² Id. at 1837. In a more recent decision concerning the free speech protections of the First Amendment, Justice Thomas agreed with the four moderates on the Court in a 5-4 ruling in Walker v. Texas Div., 135 S.Ct. 2239 (2015), that Texas could permissibly refuse a specialty license plate design featuring the Confederate flag.

¹⁶³ Greece, 134 S.Ct. at 1841.

¹⁶⁴ Id. at 1854.

¹⁶⁵ Greenhouse, “A Religion Case Too Far for the Supreme Court?,” New York Times (July 23, 2015).

8. Gun Violence

The problem of gun violence in the United States is serious and, in recent years, growing. After more than a decade of decline, the number of fatal and nonfatal firearms shootings increased from 383,500 in 2008 to 478,400 in 2011, a jump of almost 95,000.¹⁶⁶ With headlines of mass shootings in places like Columbine and Sandy Hook continuing to recur, there were 15 such mass shootings from 2009 through 2012, and the rate of people killed by guns in the U.S. is more than 19 times higher than in similar countries.¹⁶⁷ A recent editorial in the *Annals of Internal Medicine* noted that there were more than 33,000 firearms-related deaths in 2013 and that firearms cost American society more than \$174 billion in 2010, and it called the current firearms problem a “public health crisis.”¹⁶⁸ Not surprisingly, this dangerous uptick occurred after the Supreme Court conservative majority, in a closely divided 5-4 decision, effectively overruled past precedent and created, for the first time, a constitutional right to possess and use firearms under the Second Amendment, wholly apart from service in state national guards and militias.

Specifically, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the 5-4 Court affirmed a divided Court of Appeals ruling and struck down a 1975 D.C. law that restricted the ownership of handguns and required that other firearms be kept unloaded and disassembled or bound by trigger locks. In an opinion by Justice Scalia, the 5-4 majority further ruled, for the first time, that under the Second Amendment, individuals have a constitutional right to “keep and bear Arms.” Even though the wording of the Amendment specifically refers in its preface to the necessity of a “well-regulated Militia,” and even though prior decisions beginning in the 1930s had confined the right to bear arms to that context, Scalia’s opinion claimed that the prefatory clause merely stated the Amendment’s purpose and

did not limit the scope of the right to bear arms.¹⁶⁹ The majority opinion did state that the Second Amendment right was not unlimited, and specifically recognized the validity of laws restricting possession of firearms by felons, the mentally ill, and in sensitive places like government buildings. Nevertheless, the majority struck down the long-standing D.C. gun control law, specifically claiming that the Constitution creates an individual right to “possess and carry weapons in cases of confrontation” and to use them at home for the “defense of self, family, and property.”¹⁷⁰

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The four moderate justices – Stevens, Breyer, Souter, and Ginsburg –vigorously dissented in two opinions. Justice Stevens’ dissent explained that the majority had produced a “dramatic upheaval in the law” based on a “strained and unpersuasive reading” of the Second Amendment that effectively overturned long-standing precedent limiting the right to bear arms to the context of service in state militias.¹⁷¹ As Stevens pointedly noted, the majority’s decision showed a clear lack of “respect for the well-settled views of all of our predecessors on the Court, and for the rule of law itself” and amounted to the majority’s peremptory “announcement of a new Constitutional right to own and use firearms.”¹⁷²

Justice Breyer’s dissent explained that even if the Second Amendment could be read to confer an individual right to bear arms, the D.C. law should nevertheless be upheld, based upon historical analysis of widely accepted early laws that similarly

¹⁶⁶ See Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Firearms Violence 1993-2011* (May 2013).

¹⁶⁷ See A. Chen, “A Timeline of Mass Shootings in the U.S. Since Columbine,” *Think Progress* (Dec. 14, 2012).

¹⁶⁸ D. Taichman and C. Laine, “Reducing Firearms-Related Harms: Time for Us to Study and Speak Out,” *Annals of Internal Medicine* (April 7, 2015).

¹⁶⁹ The full text of the Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

¹⁷⁰ *Heller*, 554 U.S. at 592, 628.

¹⁷¹ *Heller*, 554 U.S. at 639 (Stevens, J., dissenting).

¹⁷² *Id.* at 639, 679.

restricted civilian firearms. Breyer also explained that D.C. and other legislators have relied on studies showing that the D.C. law “has indeed had positive life-saving effects” and that other such laws have reduced “homicides, suicides, and accidents in the home.”¹⁷³ Accordingly, Breyer concluded, “there simply is no untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in crime-ridden urban areas,” and D.C.’s compelling interest in preventing crime and violence should prevail.¹⁷⁴ In contrast, Justice Breyer explained, the majority’s ruling “threatens severely to limit the ability” of legislatures “to deal with gun-related problems” such as urban violence.¹⁷⁵

The Court’s 5-4 decision drew widespread criticism, including from other conservative judges. Judge Richard Posner, a Reagan appointee to the U.S. Court of Appeals for the Seventh Circuit, pointedly criticized Justice Scalia for betraying the “originalist” method of constitutional interpretation and creating a new constitutional right that did not previously exist. “The text of the [Second] amendment, whether viewed alone or in light of the concerns that actuated its adoption,” Posner wrote, “creates no right to the private possession of guns for hunting or other sport, or for the defense of person or property.”¹⁷⁶ Conservative Judge J. Harvie Wilkinson of the U.S. Court of Appeals for the Fourth Circuit agreed, noting that the Heller decision “encourages Americans to do what conservative jurists warned for years they should not do: bypass the ballot and seek to press their political agenda in the courts.”¹⁷⁷

Just as Judge Wilkinson predicted, numerous other gun control laws were challenged after Heller, one of which resulted in another 5-4 Supreme Court ruling striking down a gun control ordinance several years later. In McDonald v. City of Chicago, 561 U.S. 742 (2011), the same five-justice majority reversed an appellate court ruling, ruled that its new version of the Second Amendment applied to the states as well as the federal government, and struck down a Chicago ordinance restricting handgun possession. This was despite the fact that more than a century earlier, the Supreme Court had specifically ruled that the Second Amendment “is a limitation only upon the power of



Congress and the National government, and not upon that of the States.”¹⁷⁸

Once again, the four moderate justices (this time including Justice Sotomayor, who had replaced Justice Souter) dissented. As Justice Stevens explained in his dissent, the majority’s ruling represented a “dramatic change in our law” and served to “overturn more than a century of Supreme Court precedent.”¹⁷⁹ The majority’s decision, he explained, “invites an avalanche of litigation” as federal courts would have to rule on the details of numerous challenges to gun control laws and ordinances across the country.¹⁸⁰

In fact, as of the end of 2012, more than 500 court challenges to gun laws had been brought since the Court’s invention of constitutional gun rights. While most of these lawsuits have failed, a number have succeeded, including challenges to laws in California, Illinois, and D.C. as well as a recent ruling striking down a federal law that bans gun possession by those who have previously been committed to a mental institution.¹⁸¹ Perhaps even more troubling, in 2014 the Supreme Court came within one vote of effectively repealing key parts of one of our nation’s relatively few federal gun laws.

After the horrific gun assassinations of Martin Luther King, Jr. and Robert F. Kennedy, Congress passed

¹⁷³ Heller, 554 U.S. at 703 (Breyer, J., dissenting).

¹⁷⁴ Id. at 722.

¹⁷⁵ Id. at 719.

¹⁷⁶ R. Posner, “In Defense of Looseness,” New Republic (Aug. 27, 2008).

¹⁷⁷ J. Wilkinson, “Of Guns, Abortion, and the Unraveling Rule of Law,” 95 Virginia Law Review 253 (2009).

¹⁷⁸ Presser v. Illinois, 116 U.S. 252, 264-65 (1886). See also United States v. Cruikshank, 92 U.S. 542, 553 (1876).

¹⁷⁹ McDonald, 561 U.S. at 912 (Stevens, J., dissenting).

¹⁸⁰ Id. at 909.

¹⁸¹ See E. Bazelon, “The Next Second Amendment War,” Slate (Jan. 16, 2013); M. McGough, “Did the 9th Circuit Court just kill gun control?,” Los Angeles Times (Feb. 13, 2014); J.R. Absner, “Appeals Court Says Gun Ban for Committed Man Unconstitutional,” Shooting Illustrated (Dec. 19, 2014).

the Gun Control Act of 1968, which, among other provisions, prohibits criminals and others who clearly should not have them from buying guns. As part of the effort to keep guns out of dangerous hands and to help police track down weapons used to commit crimes, gun purchasers must show identification to federally licensed gun dealers, who then undertake an instant background check of the purchaser and keep the information on purchasers in their files. In order to prevent “straw” purchases in which someone buys a gun to transfer to someone else – who may not be eligible to purchase a gun – the form to be filled out by a purchaser specifically asks whether the purchaser is the “actual buyer” or is instead obtaining the firearm “on behalf of another person.” Studies demonstrate that criminals often use straw purchases to obtain guns, and nearly half the gun trafficking investigations by the Bureau of Alcohol, Tobacco, and Firearms involve such straw purchasing.¹⁸²

Despite the law, in 2009 former police officer Bruce Abramski purchased a Glock 19 for his uncle and falsely claimed the gun was for himself. He was criminally convicted under the 1968 law for making a false statement concerning “any fact material to the lawfulness” of the sale of the gun to him.¹⁸³ On his initial appeal, he contended that the law should not apply to him because his uncle could legally have owned a gun. But when the case got to the Supreme Court, with the support of the National Rifle Association, he made an even bolder argument. He asserted that straw purchasing was not illegal at all, and that even if a person who buys a gun intends to transfer it to a criminal, the purchase is legal as long as the person standing at the counter is legally qualified to buy a gun.¹⁸⁴

The Court’s four most conservative justices – Scalia, Alito, Roberts, and Thomas – actually accepted the Abramski/NRA argument. According to the dissent written by Justice Scalia, the law should be interpreted to allow straw purchases, even though he conceded that this interpretation would limit the law’s ability to promote crime prevention.¹⁸⁵

Fortunately, the other five members of the Court disagreed. Justice Kennedy joined the four moderate

members of the Court in an opinion by Justice Kagan that soundly rejected the Abramski/NRA argument. As Justice Kagan explained, the interpretation accepted by the four dissenters would “undermine – indeed, for all important purposes would repeal – the gun law’s core provisions” designed to “keep guns out of the hands of criminals and others who should not have them, and to assist law enforcement authorities in investigating serious crimes.”¹⁸⁶



The importance of future Supreme Court appointments on the issue of gun violence is clear. If a right-wing justice like Alito or Roberts replaces one of the four moderates on the Court, or even replaces Justice Kennedy, federal laws like the 1968 Act seeking to control firearms would be hobbled or overruled, and state and local laws would be struck down as a result of the 5-4 Court’s “announcement” of new gun rights under the Second Amendment. On the other hand, if a moderate justice replaces Scalia or Kennedy, we can expect reasonable laws seeking to control firearms to be sustained and carried out effectively, and we may even see limitations on the new Second Amendment created by the current right-wing majority. On this issue, the 2016 election is truly judgment day for the Supreme Court.

¹⁸² See A. Winkler, “Maybe the Supreme Court Isn’t as Pro-Gun as We Thought; Justice Kennedy rejects an audacious new NRA argument,” *New Republic* (June 16, 2014)(“Winkler”).

¹⁸³ 18 U.S.C. 922(a)(6).

¹⁸⁴ See Winkler.

¹⁸⁵ *Abramski v. U.S.*, 134 S.Ct. 2259, 2278 (Scalia, J., dissenting).

¹⁸⁶ *Abramski*, 134 S.Ct. at 2267 (Kagan).

9. Marketplace and Consumer Fairness

In addition to 5-4 decisions limiting consumers' access to the courts, as discussed elsewhere in this report, the Roberts-Alito majority has directly harmed consumers in a number of cases by weakening or eliminating legal protections against misconduct by large corporations in the marketplace. In other cases, a bare majority of the Court has rejected efforts to weaken such protections even further, and has upheld, by just one vote, important laws and rules protecting consumers. This makes the question of who will appoint new justices after 2016 a crucial one with respect to consumer and marketplace fairness.

Congress and the courts, he noted, had “repeatedly” considered and rejected essentially the same arguments relied upon by the majority

In one of the Court's early decisions after Roberts and Alito joined, the conservative 5-4 majority took a bold step and overruled a decision more than 95 years old that had protected consumers. Leegin Creative Leather Products Inc. v. PSKS Inc., 551 U.S. 877 (2007), concerned a large manufacturer of leather goods which refused to sell its products to retailers that offered discounts or otherwise sold to consumers at prices below the retail price demanded by the manufacturer. Under the Supreme Court ruling in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), such retail price maintenance was considered illegal as a matter of law under federal antitrust statutes and would have resulted in damages against the manufacturer. But Justice Kennedy's opinion for the five conservative justices flatly overruled Dr. Miles and said that such restraints would be considered legal unless they could be shown to be anticompetitive based on specific facts in the case.

Justice Breyer vigorously dissented for the four moderate justices. As he explained, businesses and consumers had relied on the clear rule against vertical

price restraints “for close to a century.” Congress and the courts, he noted, had “repeatedly” considered and rejected essentially the same arguments relied upon by the majority to overturn Dr. Miles, and thus there was no good reason to overturn the “well-established” precedent.¹⁸⁷ As one expert commented, the 5-4 majority overruled Dr. Miles based on “recycled arguments that had been around for decades and had been consistently rejected,” and the anticompetitive resale price maintenance now allowed by the majority “inevitably results in higher prices to consumers.”¹⁸⁸

Several years later, the 5-4 conservative majority limited liability for false statements in prospectuses issued by mutual funds. Under established law and rules of the Securities and Exchange Commission, investors can file suits for damages for such false statements. The 5-4 majority ruled in Janus Capital Group Inc. v. First Derivative Traders, 131 S.Ct. 2296 (2011), however, that only the board or other entity that had ultimate and formal authority for the issuance of the prospectus can be held liable. (When that entity is a mutual fund, as in this case, it actually has no assets apart from those owned by the investors, making a suit for damages pointless.) On behalf of himself and the other three moderate justices, Justice Breyer vigorously dissented. He pointed out that others besides the entity formally responsible for a prospectus may play a crucial role in such false statements, particularly where, as in the Janus case, those accused of making the false statements are “closely related” to the mutual fund issuer – in this case, he explained, they managed the issuer's investments, strategies, and daily activities.¹⁸⁹ In addition, he pointed out, the majority's new rule could easily create a situation where “no one” would be responsible for a false statement, if such a statement was written by an adviser who knew it was false but then adopted by a fund that had no such knowledge. In short, he concluded, there was absolutely no proper basis for such a “loophole” and the limits on consumer liability created by the 5-4 majority.¹⁹⁰

In several cases, the conservative 5-4 majority has harmed consumers by stating that they cannot recover damages from generic drug companies under state

¹⁸⁷ Leegin, 551 U.S. at 908, 909.

¹⁸⁸ E. Cavanaugh, “Vertical Price Restraints after Leegin,” 21 Loyola Consumer Law Review 1, 17 (2008).

¹⁸⁹ Janus Capital, 131 S.Ct. at 2306.

¹⁹⁰ Id. at 2310, 2311.

laws that seek to protect against misconduct, ruling that such laws are preempted by federal laws. In PLIVA Inc. v. Mensing, 131 S.Ct. 2567 (2011), Justice Thomas' opinion for the five conservative justices held that patients who contended that they suffered severe neurological harm from the use of a digestive drug without adequate warning by the manufacturer could not seek relief under state law, claiming that federal law required that the content of the drug's warning labels match the warnings in brand-name labels. As Justice Sotomayor explained in dissent for the moderate justices, however, the generic drug manufacturers could simply have sought federal agency permission to change their labels, and there is "no basis in our precedents" for the ruling that state law claims were preempted.¹⁹¹ The result of the 5-4 ruling, she explained, was to "strip generic-drug consumers of compensation when they are injured by inadequate warnings," a particularly significant injury since "75% of all prescription drugs dispensed in this country" are generic.¹⁹²

The 5-4 majority went even further in Mutual Pharmaceutical Co. v. Bartlett, 133 S.Ct. 2466 (2013), applying their preemption theory to reverse a verdict of over \$21 million to a woman who had been severely injured and rendered almost blind because of a design defect in a generic drug. As Justice Sotomayor pointedly noted in dissent, the majority's decision to further "expand the scope" of its preemption theory "leaves consumers like Karen Bartlett to bear enormous losses on their own."¹⁹³

In two other cases, the moderate justices were able to convince one of the conservative justices to join them in 5-4 decisions rejecting attempts to misuse preemption to do even more harm to consumers. In Altria Group, Inc. v. Good, 555 U.S. 70 (2008), Justice Kennedy and the four moderates rejected an assertion that federal tobacco-labeling rules preempted a state law claim for damages because of deceptive tobacco ads, an important ruling concerning cigarette company liability. In Cuomo v. Clearinghouse Association LLC, 557 U.S. 518 (2009), Justice Scalia and the four moderate justices ruled that the New York attorney general could take action against large national banks for violating state fair-lending laws and was not preempted by federal banking regulation. These important rulings would have been reversed, and could be in the future, with one more right-wing vote on the Court.

Several other 5-4 decisions have just barely rejected far-right legal arguments that would have harmed consumers. The most well-known, of course, was National Federation of Independent Businesses v. Sebelius, 132 S.Ct. 2566 (2012), where a 5-4 Court including Chief Justice Roberts rejected a constitutional challenge to the individual mandate to purchase insurance under the Affordable Care Act that would have effectively eliminated the law.¹⁹⁴ In Merrama v. Citizens Bank of Massachusetts, 549 U.S. 365 (2007), Justice Kennedy joined with the four moderate justices in rejecting an argument by Justice Alito that would have allowed a bankrupt company that acted in bad faith to convert to another form of bankruptcy that would have harmed good-faith creditors. And in Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009), Justice Kennedy again joined with the moderate justices in ruling that, under the Due Process Clause, an elected state supreme court judge who owed his narrow campaign victory to enormous election spending by the president of a coal company could not participate in reviewing a judgment that involved a large verdict against that company.



In short, the Alito-Roberts Court has already done significant harm to consumer and marketplace fairness in 5-4 decisions, but some right-wing efforts to do even more such damage have been rejected in 5-4 votes. Even more damage can be done, or significant harm can be prevented or reversed, depending on who appoints justices to the Court after the 2016 elections.

¹⁹¹ PLIVA, 131 S.Ct. at 2589.

¹⁹² Id. at 2592, 2583.

¹⁹³ Mutual Pharmaceutical, 133 S.Ct. at 2494, 2496.

¹⁹⁴ Indeed, many legal observers regarded the challenge to the mandate on Commerce Clause and other grounds as extreme and expected it to be much more easily rejected by the Court. See, e.g., D. Strauss, "Commerce Clause Revisionism and the Affordable Care Act," 2012 Supreme Court Review 1 (2012).

10. Access to Justice

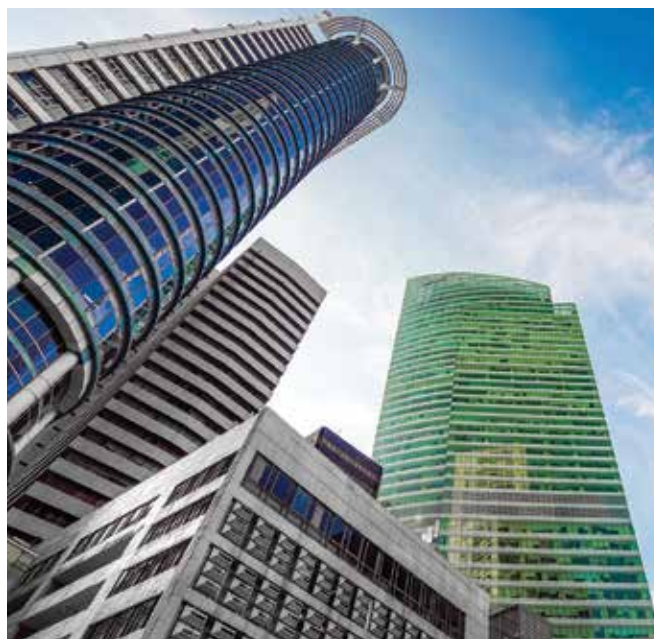
A fundamental principle of justice in America is that everyone deserves their day in court to try to right wrongs committed against them.

A fundamental principle of justice in America is that everyone deserves their day in court to try to right wrongs committed against them. But the conservative 5-4 majority of the Roberts-Alito Court has severely weakened that principle, often ruling that consumers, workers, and others cannot even get to court to challenge big corporations and government in a number of cases. In addition to decisions discussed elsewhere concerning standing to pursue environmental and other claims, 5-4 rulings that mandate arbitration and limit class actions have produced results that harm access to justice. In a few cases, moderates on the Court have persuaded Justice Kennedy to join them in preserving the ability to file suit, but these 5-4 cases are precarious and could be reversed by one more right-wing justice. To prevent such damage, and to try to correct some of the harmful 5-4 decisions by the Roberts-Alito Court in this area, the issue of who will nominate Supreme Court justices after the 2016 election is crucial.

In a series of rulings since 2009, the Court's conservative 5-4 majority has held that consumers, workers, and small businesses cannot seek relief from wrongdoing by corporations in the courts, but must attempt to use arbitration agreements forced on them by the companies themselves. In 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009), the majority ruled that federal age discrimination claims against a corporation could not be brought in court but must be arbitrated. As the dissenters pointed out, this contradicted a unanimous decision 35 years earlier concerning Title VII claims and, in Justice Stevens' words, was a "subversion of precedent to the policy favoring arbitration" by the

majority.¹⁹⁵ In Rent-a-Center v. Jackson, 561 U.S. 63 (2010), the 5-4 majority ruled that workers could not even ask a court to determine whether an agreement to arbitrate was so unfair that it was illegal, and that only the arbitrator itself could decide that question.

In AT&T Mobility v. Concepcion, 563 U.S. 321 (2011), the 5-4 majority made it possible for large corporations to engage in schemes that can cheat millions of customers out of individually small amounts that individuals will not have the incentive or ability to try to recoup, resulting in a potential windfall for the company. To prevent such schemes, the law in some states prohibits companies from abusing their enormous power advantage and forcing customers to agree to give up their rights to any class action against the company. But the 5-4 majority ruled that, state law notwithstanding, companies can require their customers to agree to one-on-one arbitration even under those circumstances. As Justice Kagan commented in another case, "[i]n the hands of today's majority, arbitration threatens to become" a method "to block the vindication of meritorious federal claims and insulate wrongdoers from liability."¹⁹⁶



¹⁹⁵ 14 Penn Plaza, 556 U.S. at 275.

¹⁹⁶ American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304,2320 (2013). In Italian Colors, which was a 5-3 decision since Justice Sotomayor did not participate, the conservative majority ruled that a small-business owner could not bring an antitrust lawsuit challenging a large corporation's alleged abuse of its monopoly power, even though, it was claimed, it was that very monopoly power that allowed the corporation to force an agreement to arbitrate and not litigate all complaints against it.



The results of these decisions have already been devastating to workers, consumers, and small businesses in favor of large corporations. A 2011 Cornell University study found that workers stand a much lower chance of winning in arbitration than in courts, and received smaller recovery amounts when they do. A public interest law firm reported that it had recovered more than \$65 million in settlements for victims of payday lending before the Concepcion decision, but that as a result of that ruling, similar class actions were dismissed and low-income borrowers had no effective remedy. As law professor Herman Schwartz concluded after reviewing these and other results, the Court majority “has given financial institutions, businessmen, unscrupulous employers and others a license to do wrong” through mandatory arbitration clauses.¹⁹⁷

The pro-corporation 5-4 Roberts-Alito majority has further hampered access to justice. Even in cases not dealing with arbitration, it has made it much more difficult to utilize class actions to challenge corporate wrongdoing. Such lawsuits, brought by

a small number of individuals on behalf of a larger number who have been harmed by misconduct, are crucial to provide access to justice, since often the harm to each individual is not sufficient to make individual lawsuits possible. As Justice Breyer pointed out, quoting conservative Judge Richard Posner, the “realistic alternative to a class action is not 17 million individual suits, but zero individual suits.”¹⁹⁸ And as a comprehensive study by New York Law School’s Center for Justice and Democracy found, class actions have been “critically important not only for the victims of corporate law-breaking, but also for the deterrence function” and to obtain injunctions against corporations in areas ranging from “employment and civil rights violations to price-fixing and consumer fraud to automotive defects to health care abuses.”¹⁹⁹

In addition to cases discussed above concerning arbitration, two Roberts-Alito Court 5-4 decisions in particular have seriously harmed the ability to use class actions. Wal-Mart Stores Inc. v. Dukes, 131 S.Ct. 2541 (2011), was a class action brought on

¹⁹⁷ H. Schwartz, “How Consumers Are Getting Screwed by Court-Enforced Arbitration,” Nation (July 8, 2014).

¹⁹⁸ See Concepcion, supra, 131 S.Ct. 1740, 1761 (2011).

¹⁹⁹ Center for Justice and Democracy, First Class Relief: How Class Actions Benefit Those Who Are Injured, Defrauded and Violated (Oct. 14, 2014) at 2.

behalf of 1.5 million women contending that they had been victimized by companywide Walmart policies delegating pay and promotion decisions to local store managers. All nine justices agreed that the case could not be brought under a rule about class actions seeking only injunctive relief, since this case also sought damages. But the five conservative justices went further and ruled that the case could not be brought for all the women as a class action at all, requiring women to identify much smaller (and less effective) classes, to somehow seek relief as an individual (which could be prohibitively expensive), or to give up their claims. As Justice Ginsburg wrote in dissent on behalf of all four moderate justices, the majority's ruling ignored allegations that gender bias "suffused" the company's culture, improperly focused on "what distinguishes individual class members, rather than on what unites them," and could make class actions more difficult to utilize in other cases as well.²⁰⁰

Making matters even worse, the 5-4 majority ruled in Comcast v. Behrend, 133 S.Ct. 1426 (2013) that a class action could not be used by millions of Philadelphia-area cable TV subscribers to seek relief for claimed antitrust violations by Comcast. In dissent, Justice Ginsburg criticized the majority's "profoundly mistaken view" of antitrust and class action law.²⁰¹

In other areas, a narrow 5-4 majority of the Court has preserved some access to the courts, but only where Justice Kennedy joined the moderate members in rejecting extreme arguments advanced by the far-right Court members. In Sprint Comm. Co. L.P.



²⁰⁰ Wal-Mart, 131 S.Ct. at 2563, 2566, 2567.

²⁰¹ Comcast, 133 S.Ct. at 1437.

In each of these cases, the replacement of Justice Kennedy or Justice Ginsburg by a more conservative justice could lead to the positive decision being undermined or overruled.

v. APCC Services, 554 U.S. 269 (2008), the majority upheld standing to pursue claims in court against a long-distance company, rejecting the argument that such claims could not be pursued at all. In Boumediene v. Bush, 553 U.S. 723, 739 (2008), the majority ruled that prisoners detained at Guantanamo can file habeas corpus claims in federal court to challenge their detention in order to uphold a "fundamental precept of liberty," despite the dissenters' assertions that such claims should not be permitted. In Douglas v. Independent Living Center, 132 S.Ct. 1204 (2012), the majority ruled that lawsuits can be filed to challenge sharp state cuts to Medicaid as violating federal law, even though the dissent would have precluded such challenges altogether. And in Haywood v. Drown, 556 U.S. 729 (2009), the majority held that states cannot prohibit civil rights lawsuits under 42 U.S.C. 1983 against prison officials from being pursued in state court.

In each of these cases, the replacement of Justice Kennedy or Justice Ginsburg by a more conservative justice could lead to the positive decision being undermined or overruled. It could also make even worse the Court's harmful precedents limiting access to justice for consumers, workers, small businesses, and others victimized by corporate law-breaking. The Court has already agreed to consider one case (Tyson Foods v. Bouaphakeo) that could further limit class actions and overturn a judgment of \$5.8 million for workers against a large corporation.²⁰² The question of which president appoints new Supreme Court justices after November 2016 is critical to preserve and promote access to justice.

²⁰² See J. Lesh, "Supreme Court Case Review May Limit Class-Action Lawsuits," Legal Reader (June 10, 2015).

11. Protection Against Government Abuse

Traditionally, Americans have always depended on the courts to provide us with protection from and accountability for abuse by the other branches of government, ranging from instances of fraud or physical abuse by local police and prosecutors to improper censorship, wiretapping, or overreaching by federal officials. The conservative Roberts-Alito Court, however, has significantly eroded such protections, and in some cases came within one vote of doing even more damage, in a number of 5-4 decisions. With the Court so closely divided, the question of who will appoint future Supreme Court justices after the 2016 election is crucial in this area as well.

With respect to abuse by state and local officials, the 5-4 Roberts-Alito majority ruled in Florence v. Board of Chosen Freeholders, 132 S.Ct. 1816 (2011), that it is legal for local officials to strip-search anyone arrested for any reason, even if there is no reason to suspect contraband or concealed weapons, and that the officials cannot be sued for invasion of privacy. Albert Florence had been arrested after a records check conducted when he was at a traffic stop revealed (erroneously) that he had failed to pay a civil fine due a number of years earlier. He was sent temporarily to two different local jails where, despite the fact that neither drugs, violence, weapons, or contraband was involved or suspected, he was strip-searched twice. This included, he claimed, being required to “lift his genitals” so officials could peer underneath.²⁰³ The 5-4 conservative majority nonetheless ruled that he could not bring a suit claiming improper invasion of privacy.

In his dissent for the four moderate justices in Florence, Justice Breyer explained how other courts had concluded that such a strip search is a “serious invasion of privacy” that is “demeaning, dehumanizing” and “humiliating.”²⁰⁴ He catalogued how such strip searches

have been found not reasonably related to law enforcement or other interests and how other courts had found that alternatives existed and that liability for such improper conduct was appropriate. He concluded that it was improper to “subject those arrested for minor offenses” to such unconstitutional invasions of privacy by government officials without any possible redress.²⁰⁵

Similarly, in Connick v. Thompson, 131 S.Ct. 1350 (2011), Justice Thomas’ opinion for the 5-4 majority overturned a \$14 million verdict against a Louisiana prosecutor’s office and ruled that the prosecutors could not be sued at all for improperly failing to disclose a laboratory report that could have completely cleared John Thompson of a murder charge. Instead, he spent 18 years in prison, including 14 years on death row, before being freed. Justice Ginsburg, in her dissent for the four moderate justices, carefully reviewed the factual record and

explained how the prosecutors’ improper failure to disclose exculpatory evidence was “neither isolated nor atypical,” as the majority claimed, but instead reflected a systematic “disregard” of the prosecutors’ constitutional obligations that was “pervasive” in the prosecutors’ office.²⁰⁶ The majority should have upheld the jury’s verdict against the prosecutor, she concluded, in order to vindicate the “gross, deliberately indifferent, and long-continuing violation” of Thompson’s constitutional rights.²⁰⁷

In two recent cases, the Roberts-Alito Court came within one vote of sanctioning further abuse or lack

Americans have always depended on the courts to provide us with protection from and accountability for abuse by the other branches of government,

²⁰³ Florence, 132 S.Ct. at 1514.

²⁰⁴ Id. at 1526.

²⁰⁵ Id. at 1532.

²⁰⁶ Connick, 131 S.Ct. at 1370. In another 5-4 ruling, the Court upheld a public school’s decision to suspend a high school student for ten days because he publicly displayed a banner that the school thought was supportive of drug use. As Justice Stevens explained in dissenting for three justices, the majority’s ruling did “serious violence to the First Amendment in upholding – indeed, lauding – a school’s decision to punish [the student] for expressing a view with which it disagreed.” Morse v. Frederick, 551 U.S. 393, 435 (2007).

²⁰⁷ Id. at 1387.



of accountability by local officials, as Justice Kennedy joined the four moderates in preventing such rulings. In Kingsley v. Hendrickson, 192 L.Ed.2d 416 (2015), Justice Breyer ruled for the 5-4 majority that a pretrial detainee who brings a suit for excessive force by officials (in this case, including slamming his head against a concrete bunk) can prevail if it is proved that the force used was objectively unreasonable, and is not required to prove, as someone already convicted of crime would, that the officials intended “maliciously and sadistically to cause harm.”²⁰⁸ And in City of Los Angeles v. Patel, 192 L.Ed.2d 435 (2015), Justice Sotomayor ruled for the 5-4 majority that a Los Angeles ordinance that allowed police officers to demand to see identifying and other private information in hotel registers, without any kind of warrant, and then immediately arrest any hotel employee who declines to comply, without any precompliance review, was unconstitutional. The four dissenters – Chief Justice Roberts and Justices Scalia, Alito, and Thomas – would have upheld the ordinance and allowed police to demand what Justice Sotomayor described as instant access to such records without “individualized” review and “at the risk of a criminal penalty.”²⁰⁹

In a number of cases where Justice Kennedy joined Roberts, Scalia, Alito, and Thomas, however, the resulting 5-4 majority has failed to provide protection against or accountability for abuse by federal officials. Two cases relate to conduct by Bush administration

officials concerning the “war on terror” after 9/11. In Ashcroft v. Iqbal, 556 U.S. 662 (2009), the conservative 5-4 majority ruled as a matter of law that former Attorney General Ashcroft and FBI Director Mueller could not be held liable for alleged racial and religious discrimination against individuals who were detained in custody after the 9/11 attacks.

Justice Souter’s opinion for the four moderate dissenting justices catalogued in detail the serious allegations in Javid Iqbal’s complaint that the majority refused to consider as a matter of law. According to the complaint, Iqbal was arrested under a deliberate policy to detain individuals based on their race, religion, and national origin after 9/11; he was subjected to abuse including being thrown against a wall, being hit in the stomach, and being denied medical care for two weeks during a six-week detention period; and Ashcroft and Mueller were “aware of the discriminatory detention policy and condoned it,” with “many allegations linking” them “to the discriminatory practices of their subordinates.”²¹⁰ Indeed, Justice Souter pointed out, Ashcroft and Mueller conceded that they could be held liable if it could be proved that they had “knowledge of a subordinate’s unconstitutional misconduct and deliberate indifference to that conduct.”²¹¹ Nevertheless, Souter noted, the majority ruled as a matter of law that Iqbal’s claim could not prevail “under any theory of supervisory liability,” and that the complaint’s allegations should be dismissed because they were implausible and “conclusory.”²¹² This ruling, he explained, clearly contradicted past precedent about supervisory liability and about assuming the truth of a complaint’s allegations in considering a motion to dismiss as a matter of law, and there was simply “no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinates’ discrimination.”²¹³

In addition to the effects of the Ashcroft decision concerning accountability for actions after 9/11, subsequent research has shown that the ruling has had even broader harmful consequences. Research has shown that, as a result of the decision, it has become much easier for government as well as corporate defendants to simply have claims against them dismissed as a matter of law as “implausible” at an early stage of a lawsuit. One study found that the decision had “hit the powerless the hardest,” with the

²¹⁰ Ashcroft, 556 U.S. at 688, 697, 688-89.

²¹¹ Id. at 691.

²¹² Id. at 692, 697.

²¹³ Id. at 699.

²⁰⁸ Kingsley, 192 L.Ed.2d at 428.

²⁰⁹ Patel, 192 L.Ed.2d at 447.

rate of early dismissal of claims by individuals growing after [Ashcroft](#) from 42 percent to 59 percent.²¹⁴ Indeed, one federal appellate judge has suggested that under the [Ashcroft v. Iqbal](#) standard, even the complaint in [Brown v. Board of Education](#) could have been dismissed.²¹⁵

The 5-4 ruling was roundly condemned, with one commentator noting that it “handed the government a virtual ‘get out of jail free’ card.”

The conservative Roberts-Alito 5-4 majority also set back accountability of federal government officials in [Clapper v. Amnesty International USA](#), 133 S.Ct. 1138 (2013), when it ruled, in an opinion by Justice Alito, that no one among a large group of individuals and media, legal, labor, and human rights groups had standing to challenge a law authorizing broad telephone and email surveillance. Justice Breyer’s dissent for the four moderate justices carefully explained how the ruling contradicted prior precedent and could not be justified based on the plaintiffs’ allegations, which he concluded showed a “very strong likelihood” that the government would “intercept” some of their communications and were not “speculative,” as the majority claimed.²¹⁶ The 5-4 ruling was roundly condemned, with one commentator noting that it “handed the government a virtual ‘get out of jail free’ card for national security statutes” that have “an eye towards secrecy.”²¹⁷

Two other conservative 5-4 Roberts-Alito rulings concerned potential abusive conduct by federal authorities. In [FCC v. Fox Television Stations, Inc.](#), 556 U.S. 502 (2009), in an opinion by Justice Scalia, the majority upheld the authority of the FCC to take action against a television station based on even a single instance of the unexpected use of a four-letter word in

a live broadcast, although the court later ruled 8-0 that the FCC rule as applied was unconstitutionally vague.²¹⁸ And in [Free Enterprise Fund v. Public Company Accounting Oversight Board](#), 51 U.S. 477 (2010), Chief Justice Roberts’ opinion ruled unconstitutional a provision in the Sarbanes-Oxley law that said members of the board that regulates accounting firms that conduct corporate audits could be removed only “for cause.” As Justice Breyer explained for the four moderate dissenting justices, the ruling not only harmed the law but also “threatens to disrupt severely the fair and efficient administration of the laws” by permitting many other federal government officials to be fired without cause.²¹⁹

Finally, Justice Kennedy joined with the four moderates to narrowly avoid efforts by the four right-wing justices to weaken an important safeguard against abuse of power by federal officials. The Federal Torts Claims Act (FTCA) allows people to file lawsuits for damages when they have been harmed by federal agencies. In [United States v. Kwai Fun Wong](#), 135 S.Ct. 1625 (2015), the four right-wing justices (minus Kennedy) would have held that an FTCA suit should be thrown out of court for failure to follow strict time limits, even when that failure may have been caused by government officials themselves because of newly discovered evidence. Justice Kagan’s majority opinion explained that such “harsh consequences” were not justified under prior precedent and based on the text, context, and legislative history of the statute.²²⁰

In short, in a series of 5-4 decisions, the Roberts-Alito Court has done significant damage to preventing and providing accountability for abuse by government, and has come within one vote of doing even more such harm. The question of who appoints new Supreme Court justices after the 2016 election will be critical in determining whether the Court will help repair the injury already done and prevent even more in the future.

²¹⁸ The second decision, from which Justice Sotomayor recused herself, was [FCC v. Fox Television Stations, Inc.](#), 132 S.Ct. 2307 (2012).

²¹⁹ [Free Enterprise](#), 561 U.S. at 514, 540-1.

²²⁰ [Wong](#), 135 S.Ct. at 1632. In another case where Justice Kennedy joined the four moderates, [NLRB v. Noel Canning](#), 134 S.Ct. 2550 (2014), Justice Scalia’s opinion for the other four justices would have held that even where Congress abuses its authority and refuses to vote on confirming presidential nominees, the president cannot make recess appointments except where vacancies actually open during the brief recess between congressional sessions. Although all nine justices agreed that the NLRB appointments in [Noel Canning](#) itself were improper, Justice Breyer’s opinion for the majority explained that Justice Scalia’s view “would render illegitimate thousands of recess appointments reaching all the way back to the founding era” and would effectively write the Recess Appointments Clause “out of the Constitution.” [Noel Canning](#), 134 S.Ct. at 2577.

²¹⁴ See A. Liptak, “Supreme Court ruling altered civil suits, to detriment of individuals,” [New York Times](#) (May 18, 2015).

²¹⁵ [Id.](#) (referring to opinion by Judge David Hamilton).

²¹⁶ [Clapper](#), 133 S.Ct. at 1159.

²¹⁷ M. Sledge, “Supreme Court’s Clapper v. Amnesty International Decision Could Affect Indefinite Detention Lawsuit,” [Huffington Post](#) (Feb. 27, 2013).

With four justices on the Court older than 80 during the first term of our next president, a shift of one vote on the Court could seriously endanger the 5-4 precedents that protect our rights but could also provide the opportunity to mitigate or even overturn damaging decisions that have harmed countless Americans.

Money and Politics

Civil and Voting Rights

LGBT Rights

Reproductive Freedom and Women's Rights

Workplace Fairness

Protecting the Environment

Religious Liberty

Gun Violence

Marketplace and Consumer Fairness

Access to Justice

Protection Against Government Abuse

For the future of the Supreme Court, and for the rights of all Americans, November 8, 2016, is truly judgment day.



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1101 15th St., Suite 600, Washington, DC 20005 202-467-4999 or 800-326-7329 www.pfaw.org

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