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A Right-Wing Rout: What the "Roberts Five" Decisions Tell Us About the Integrity of Today's Supreme Court

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We're hearing it more and more: The Supreme Court is as divided as the rest of the city in which it sits. Veteran Court watchers have noticed it. As Norm Ornstein put it, the Supreme Court "is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen."[1] Others, such as Linda Greenhouse and Jeffrey Toobin, have been more pointed—arguing that the Supreme Court under Chief Justice Roberts has become a delivery system for Republican interests.[2] Public opinion polls seem to have picked something up, too. Recent polling by Gallup shows that only 37 percent of respondents have "a great deal" or "quite a lot" of confidence in the Supreme Court[3] and that, while Democrats' approval of the Court has plummeted (to 40 percent), Republicans' has more than doubled (to 65 percent).[4] These expert observations, and the shift in attitudes among the public, compel a hard look at the data to find out what the opinions of the Roberts Court show.

It turns out that Republican appointees to the Supreme Court have, with remarkable consistency, delivered rulings that advantage the big corporate and special interests that are, in turn, the political lifeblood of the Republican Party. Several of these decisions have been particularly flagrant and notorious: *Citizens United v. FEC*, *Shelby County v. Holder*, and *Janus v. AFCME*. But there are many. Under Chief Justice Roberts' tenure through the end of October Term 2017-2018, Republican appointees have delivered partisan rulings not three or four times, not even a dozen or two dozen times, but 73 times. Seventy-three decisions favored Republican interests, with no Democratic appointee joining the majority. On the way to this judicial romp, the "Roberts Five" were stunningly cavalier with any doctrine, precedent, or congressional finding that got in their way.

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[1] Norm Ornstein, *Why the Supreme Court Needs Term Limits*, ATLANTIC (May 22, 2014).
[2] *See, e.g.*, Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER (May 25, 2009); Linda Greenhouse, *Polar Vision*, N.Y. TIMES (May 28, 2014); Linda Greenhouse, *Supreme Court Party Time*, N.Y. TIMES (Nov. 22, 2018).
[3] Megan Brenan, *Confidence in Supreme Court Modest, but Steady*, GALLUP (July 2, 2018).
[4] Justin McCarthy, *GOP Approval of Supreme Court Surges, Democrats' Slides*, GALLUP (Sept. 28, 2017).

I. Methodology

The conclusion that the Supreme Court under Chief Justice John Roberts has become an instrument of conservative and business interests and Republican donors is admittedly a harsh one. It is important, therefore, to understand how I reach it. The analysis begins with Chief Justice Roberts's investiture at the beginning of the Supreme Court's 2005 term and goes through the 2017-2018 term.[5] From 2005 to Justice Scalia's death in 2016, the conservative wing consisted of Chief Justice Roberts along with Justices Scalia, Kennedy, Thomas, and Alito. While Justices Stevens and Souter were also appointed by Republican presidents, during this period they had become associated with the Court's "liberal" wing. When they were replaced by Justices Kagan and Sotomayor, respectively, the 5-4 conservative/liberal spread of the court did not shift. The only change in the Roberts Five line-up during the period this analysis covers occurred when Justice Gorsuch took the seat Justice Scalia previously held.

This review is limited to the Roberts Court's decisions in civil cases, because those represent the common battleground for vying political and commercial interests—the interests that most directly implicate the financial interests of the Republican establishment. The review further limits the case pool to 5-4 decisions, of which the Roberts Court issued 212 during the period in question.[6]

Of those 212 cases, the most salient for purposes of this analysis are 78 in which the Roberts Five provided all five votes in the majority. Those are the cases where the Court wasn't just closely divided but was divided along ideological lines—meaning none of the liberal justices (Stevens, Souter, Ginsberg, Breyer, Kagan, or Sotomayor) joined the conservative majority's analysis. The Roberts Five voting as a bloc does not necessarily indicate partisan purpose, but this is the likeliest pool of cases to find one if it did exist.

I then looked at the 78 cases to see which ones implicated interests associated with the Republican Party. These interests fall into four categories: (1) controlling the political process to benefit conservative candidates and policies; (2) protecting corporations from liability and letting polluters pollute; (3) restricting civil rights and condoning discrimination; and (4) advancing a far-right social agenda. Let's review these.

First, political control: conservative interests seek to control the political process by giving their corporate, and often secret, big-money benefactors more freedom to spend on elections. This, in turn, helps them drown out opposing voices, manipulate political outcomes and set the agenda in Congress. For proof of this dynamic, look no further than how the Court's decision in *Citizens United* proved the death knell for climate change legislation in Congress. Before that fateful

[5] The replacement of Justice Kennedy with Justice Kavanaugh, his former law clerk, keeps the Roberts Five conservative bloc intact.

[6] Included in the 5-4 decisions discussed in this article are the eight 5-3 decisions where a justice recused him or herself (for example, Justice Kagan recused herself from cases on which she worked as solicitor general) and one decision from when the Court had only eight members, specifically the period after Justice Scalia died.

decision, which lifted restrictions on corporate spending in candidate elections, Congress had held regular, bipartisan hearings and even votes on legislation to limit the carbon emissions causing climate change. But *Citizens United* allowed the fossil fuel industry to use its massive money advantage to strike at this bipartisan progress, and it struck hard. The fossil fuel industry set its political forces instantly to work, targeting pro-climate-action candidates, particularly Republicans. Outside spending in 2010's congressional races increased by more than $200 million over the previous midterm's levels—a nearly 450 percent increase.[7] Bipartisanship stopped dead.

Second, protection from courts and regulatory oversight: powerful corporate special interests can become accustomed to disproportionate sway in Congress, where they enjoy outsized influence through political spending and lobbying. With government regulators and in federal courtrooms, this type of influence should make no difference. Some regulators are not captured by the industries they oversee and use the power Congress has given them to protect public health and safety. In courtrooms, corporations may find themselves having to turn over documents that reveal corporate malfeasance. They may find themselves having to tell the truth. And they lose their influence advantage; they may even find themselves being treated *equally* with real people. In response to this corporate frustration, the Roberts Five have made it harder and harder for regulators and juries to hold corporations accountable.

Third, the Roberts Five are making it harder for people to protect their individual rights and civil liberties. In this group of cases, the conservatives reflect an elitist world view that corporations know best; that courts have no business remedying historical discrimination; that views and experiences outside the typically white, typically male, and typically Christian "mainstream" are not worthy of legal protection. Over and over, the Roberts Five have found ways to make it harder to fight age, gender, and race discrimination.

Finally, there are the "base" issues—abortion, guns, religion—that Republicans use to animate their voters. Republicans promise a Supreme Court that will undo reasonable restrictions on gun ownership and protections for women's reproductive health, and they use this promise to drive turnout in elections. In this group of cases, the Roberts Five have invalidated federal and state laws, acting as a super-legislature to achieve by judicial fiat what Republicans cannot accomplish through the legislative process.

Seventy-three of the Roberts Five's 78 partisan, 5-4 cases fall into one of these four categories. In other words, in cases where no other justice joined the conservatives in a 5-4 decision (or in nine cases a 5-3 decision), 92 percent delivered a victory for conservative or corporate donor interests.

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[7] *Total Outside Spending by Election Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POL. (last visited Apr. 10, 2019).

The pattern is unmistakable and troubling. What makes it all the more troubling is how often the conservatives abandoned so-called "conservative" judicial philosophies to reach the desired outcome. Members of the conservative wing had assured senators at their confirmation hearings that they would simply "call balls and strikes,"[8] "follow the law of judicial precedent,"[9] and respect the "strong principle" of stare decisis as a limitation on the Court.[10] Once confirmed, they discarded these doctrines when they proved inconvenient to the outcomes the Roberts Five desired. Even the pet conservative doctrine of "originalism" was ignored when necessary. And doctrines about modesty and respect for decisions by elected members of Congress collapsed. In fact, as the Appendix at the end of this Issue Brief catalogues, in nearly 55 percent of the 73 cases, the conservative majority disregarded one or more of the following judicial principles: (1) precedent or stare decisis; (2) judicial restraint; (3) originalism; (4) textualism; or (5) aversion to appellate fact finding.

II. Conservative Outcomes

A. Controlling the Political Process to Benefit Conservatives

Of the Roberts Court's 73 partisan 5-4 cases, 13 put a thumb on the scale to favor Republicans at the ballot box, by facilitating the flood of dark and corporate money into the political process, by restricting the ability of citizens to vote or have their votes matter, or by working to undermine labor unions, a traditional base of Democratic support.

Four of these 13 cases—*FEC v. Wisconsin Right to Life*, *Davis v. FEC*, *Citizens United v. FEC*, and *McCutcheon v. FEC*—systemically decimated both the historic Bipartisan Campaign Reform Act of 2002 (also known as McCain-Feingold or BCRA) and prior Court precedents limiting corporate spending in elections.[11] BCRA was first introduced in 1995, and in the Senate, despite dogged opposition by now-Majority Leader Mitch McConnell, the bill passed on a 59-41 vote in 2001. Reformers in the House had to resort to a rarely used "discharge petition" to overcome opposition from House leadership and force a vote on the bill, and both chambers finally agreed

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[8] *Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat,'* CNN (Sept. 12, 2005).

[9] *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be An Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of then-Judge Neil Gorsuch).

[10] *Senate Confirmation Hearings: Day 2*, N.Y. TIMES (Jan. 10, 2006) (nomination hearing of Samuel Alito); *see also Confirmation Hearing on the Nomination of Hon. Clarence Thomas To Be An Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 102d Cong. (1991) ("[Y]ou cannot simply, because you have the votes, begin to change rules, to change precedent.").

[11] FEC v. Wis. Right to Life, 551 U.S. 449 (2007) (holding that "BCRA's prohibition on use of corporate funds to finance 'electioneering communications' during pre-federal-election periods violated corporation's free speech rights when applied to its issue-advocacy advertisements"); Davis v. FEC, 554 U.S. 724 (2008) (holding that BCRA's spending threshold and disclosure requirements violate the First Amendment); Citizens United v. FEC, 558 U.S. 310 (2010) (holding that "federal statute barring independent corporate expenditures for electioneering communications violated First Amendment"); McCutcheon v. FEC, 572 U.S. 185 (2014) (holding "that the statutory aggregate limits on how much money a donor may contribute in total to all political candidates or committees violated the First Amendment").

on legislation that was signed by President George W. Bush in 2002. BCRA was a bipartisan effort by legislators solving problems pragmatically, based on their own experiences as candidates.

The first challenge to BCRA to make it to the Supreme Court, *McConnell v. FEC*, upheld the main provisions of the law—restrictions on soft money and issue ads—deferring largely to congressional findings.[12] Subsequent BCRA challenges were more successful. What changed? Not the law or the facts, but the composition of the Court: Justice O'Connor, who was the last justice to have any experience running for public office and, therefore, any firsthand knowledge of the effects of money on electoral politics, was replaced by Justice Alito. In short order, out went the ban on issue ads (*Wisconsin Right to Life*), disclosure requirements for self-funding candidates (*Davis*), corporate spending (*Citizens United*) and aggregate contributions limits (*McCutcheon*). Along the way, the Court, by bare partisan majorities, also knocked out two sensible state-law campaign finance laws in Arizona and Montana.[13]

Out also went respect for precedent, federalism, and judicial restraint. In *Citizens United*, the most egregious of this slew of cases, Chief Justice Roberts articulated a new standard that if a precedent is "hotly contested"[14]—and justices can "hotly contest" any inconvenient precedent—it has less precedential value and can be replaced. The five-member majority also ignored hundreds of thousands of pages of findings in the Congressional Record, supplanting Congress's role as the finder of fact, not to mention Congress's inherent expertise on political issues.

The Roberts Court even trampled on its own procedures to get to its desired result. After all the briefs were filed and oral arguments heard, Chief Justice Roberts scheduled a rehearing and issued new "questions presented," reframing the narrow challenge to the McCain-Feingold law as a broad question about the ability of the government to regulate corporate spending on elections. This radical procedural maneuver was highly unusual, but it set up the question the conservatives wanted to answer, without a troublesome record to contend with. An elemental restriction on judges is that they must take cases as they come, but as Justice Stevens wrote in dissent, "[f]ive Justices were unhappy with the limited nature of the case before us, so they

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[12] *See* McConnell v. FEC, 540 U.S. 93, 132 (2003) ("In BCRA, Congress enacted many of the [Senate Government Affairs] committee's proposed reforms. BCRA's central provisions are designed to address Congress concerns about the increasing use of soft money and issue advertising to influence federal elections.").

[13] Ariz. Free Enter. Club v. Bennett, 564 U.S. 721 (2011) (holding that the state's interest in equalizing electoral funding could not justify the substantial burden on political speech imposed by a state statute's matching funds provision); Am. Tradition P'ship v. Bullock, 567 U.S. 516, 516 (2012) (holding that a state law providing that a "corporation may not make an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party" violates First Amendment political speech rights).

[14] Citizens United v. FEC, 558 U.S. 310, 379 (2010).

changed the case to give themselves an opportunity to change the law."[15] The result was a flood of corporate and corporate front-group money into elections, helping Republican candidates.

The five-justice conservative bloc also set about making it harder for Democrat-leaning minorities to vote. The Fifteenth Amendment prohibits racial discrimination in voting and gives Congress the power to enforce its prohibition by "appropriate legislation." The Voting Rights Act was originally passed in 1965 to effectuate this prohibition against racial discrimination in voting. Congress reauthorized the Voting Rights Act in 2006, with a factual record of over 15,000 pages, the result of 21 hearings involving scores of witnesses and expert reports. Congress concluded that the facts supported reauthorizing the Voting Rights Act and its pre-clearance provisions for 25 years. The provisions required states and localities with a history of discrimination to have changes to voting procedures pre-cleared by either a court or the Department of Justice before they could take effect. The votes to reauthorize the Voting Rights Act were 390-33 in the House and 98-0 in the Senate.

In *Shelby County v. Holder* (2013), five justices threw all that out, relying on a newly-created doctrine of "equal sovereignty" among the states and baseless factual findings about race and politics to justify invalidation of the pre-clearance requirements.[16] How did that turn out? State legislatures in the former pre-clearance states went right to work to limit minority voter access. Litigation exploded, and federal judges ended up finding minority voters targeted with "surgical precision."[17] This was done with no regard for the "conservative" doctrine of judicial restraint, or the principle that an appellate court ought to leave findings of fact to others.

The Roberts Five also permitted aggressive racial and partisan gerrymandering,[18] limited the rights of minorities to challenge racially concentrated districts,[19] allowed purges of voting rolls that have been shown to disproportionately disqualify minority votes,[20] and permitted voting under electoral maps that a federal district court concluded were drawn with racially discriminatory intent.[21] Every single map and policy upheld had been crafted by Republican legislatures and politicians.

Finally, starting with *Harris v. Quinn* in 2014 and concluding with *Janus v. AFSCME* in 2018, the 5-4 conservative bloc targeted a long-time Republican bugaboo: public-sector union political spending. At stake was the unanimous 1977 precedent *Abood v. Detroit Board of Education*, which upheld public sector unions' practice of collecting from non-union members funds, called "agency shop fees," to cover the cost of collective bargaining that benefits members and

[15] *Id.* at 398 (Stevens, J., dissenting).
[16] Shelby Cty. v. Holder, 570 U.S. 529, 542, 550-52 (2013).
[17] N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).
[18] League of Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).
[19] Bartlett v. Strickland, 556 U.S. 1 (2009).
[20] Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018).
[21] Abbott v. Perez, 138 S. Ct. 2305 (2018).

nonmembers alike.[22] *Abood* annoyed the union-busting right wing, which plotted its demise for years. The Supreme Court had reaffirmed *Abood* numerous times; more than 20 states had enacted statutes consistent with the case since it was decided; and public entities of all stripes had entered into multiyear contracts with unions following *Abood*'s guidance. Respect for precedent, unanimous reaffirmance, and reliance interests all militated in favor of the Court upholding this 40 year-old precedent. Under Chief Justice Roberts, however, settled law can become "hotly contested," and led by Justice Alito, the conservatives hotly contested this area of the law.

First, in a case involving public employee unions, Justice Alito digressed from the question presented to raise questions about the constitutionality of the unions' agency shop fees, all but directly inviting a challenge to *Abood*.[23] Next, in *Harris*, the five conservatives further unsettled this settled area of the law by concluding the First Amendment prohibited the collection of an agency shop fees from home health care providers who do not wish to join or support a union. Justice Alito ignored the traditional conservative doctrines of federalism and states' rights by concluding home health care workers were not "full-fledged" government workers although Michigan had designated them as such.[24] Finally, in a surprise to no one, the Court overruled *Abood* in *Janus* in 2018.[25] In dissent, Justice Kagan aptly summed up the conservatives' naked judicial activism:

> Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of stare decisis. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world . . . . Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today.[26]

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[22] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[23] Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012). Justices Ginsberg and Sotomayor concurred in the judgment of Justice Alito's 7-2 majority opinion in *Knox v. Service Employees International Union*. In her concurring opinion, Justice Sotomayor (joined by Justice Ginsberg) wrote that she could not "agree with the majority's decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing. By doing so, the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court's proper role in our system of separated powers." *Id.* at 323 (Sotomayor, J., concurring).

[24] Harris v. Quinn, 573 U.S. 616, 645-46 (2014).

[25] If there was any surprise here, it was that *Abood* wasn't overturned earlier. The issue had been teed up for the five conservatives in 2016 in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016) (mem.), but Justices Scalia's death left the Court deadlocked 4-4. I describe in greater detail the procedural machinations behind these cases and the extensive right-wing dark money support they received in an amicus brief in *Janus*. Brief of Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[26] *Janus*, 138 S. Ct. at 2487-88 (Kagan, J., dissenting).

B. Protecting Corporations from Liability and Letting Polluters Pollute

In 33 cases—the largest category by far, full of hugely important decisions that rarely make front-page news—the Roberts Five have engaged in a two-front effort to insulate corporations from liability: they have limited the ability of government agencies to regulate corporate acts; and they have made it harder for individuals harmed by corporate acts to have their rights vindicated in court. This one-two punch has made it increasingly hard for Congress and the states to protect public health and welfare, and has eroded the Seventh Amendment's guarantee of the right to a civil jury, a right which James Madison said was as "essential to secure the liberty of the people as any one of the pre-existent rights of nature."[27]

Environmental protection has borne the brunt of the Roberts Five's anti-regulatory zeal, freeing big corporations to pollute. This majority has rejected federal claims under the Endangered Species Act, the National Environmental Policy, and the Clean Air Act.[28] It has denied environmental groups standing and used the Takings Clause of the Fifth Amendment to make it harder for state and local governments to regulate development.[29] It also took an unprecedented procedural path to block the Clean Power Plan.[30]

Corporations have fewer limitations on their commercial transactions thanks to the Roberts Five. Corporations have seen this conservative majority weaken the federal antitrust law to the detriment of consumers,[31] and make it harder for consumers and investors to obtain accurate

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[27] THE PAPERS OF JAMES MADISON (William T. Hutchinson et al. eds., 1962).

[28] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (holding that a scheme to transfer federal permitting power under the National Pollution Discharge Elimination System to officials of state was not subject to the Endangered Species Act requirement that federal agencies ensure that their actions do not jeopardize endangered species); Winter v. NRDC, 555 U.S. 7 (2008) (holding that alleged irreparable injury to marine mammals resulting from Navy's training exercises using mid-frequency active sonar was outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors); Michigan v. EPA, 135 S. Ct. 2699 (2015) (ignoring EPA's cost-benefit analysis to hold that its regulation of hazardous air pollutants emitted by power plants was unreasonable for failing to consider the cost of compliance).

[29] Summers v. Earth Island Inst., 555 U.S. 488 (2009) (restricting the right of environmental groups by holding that they do not suffer any 'concrete injury'—and therefore do not have standing to sue—when the Forest Service allows logging in a national forest without following legally required procedures); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) (holding that the government conditioning issuance of a permit on a landowner paying money to improve public wetlands is a constitutional taking).

[30] *See*, Lawrence Hurley & Valerie Volcovici, *U.S. Supreme Court Blocks Obama's Clean Power Plan*, SCI. AM. (Feb. 9, 2016).

[31] Leegin Creative Leather Products, Inc. v. PSKS, 551 U.S. 877 (2007) (holding that federal antitrust laws allows manufacturers to set mandatory minimum prices for their products based on a "rule of reason" standard, replacing the previous bright-line rule that such price fixing agreements are per se illegal); Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (holding that federal antitrust laws do not prohibit credit card companies from barring merchants from steering customers toward alternative payment methods).

information.[32] The Roberts Five have even given more leeway to treat corporate executives better and employees worse.[33]

The Roberts Five's pro-corporate policy preference has been particularly evident in aggressive judicial expansion of the Federal Arbitration Act of 1925 (FAA). Their decisions have made this an avenue for powerful and wealthy interests to systematically deny ordinary individuals, like employees and customers, access to juries of their peers when wronged.

In *14 Penn Plaza v. Pyett*, the Court held 5-4 that unions could bargain away workers' rights to have age discrimination claims heard in court.[34] In *Rent-A-Center v. Jackson*, the same right-wing bloc held that would-be litigants challenging an arbitration agreement as unconscionable would have to challenge the unfairness of the arbitration before the very arbitrator whose legitimacy to hear the case they disputed.[35] Also in 2010, the Court prohibited the use of class arbitration unless all parties specifically agreed to it.[36] Less than a year later, in *AT&T Mobility LLC v. Concepcion*, the Robert Five prevented consumers from bringing class-action suits against corporations for low-dollar, high-volume frauds.[37] In *American Exp. Co. v. Italian Colors Restaurant*, the Court struck again, this time 5-3, dispensing with the rule—established by a long line of Supreme Court precedent—that contractual arbitration clauses are enforceable only so far as they actually permit individuals to vindicate their rights.[38] And last term, *Epic Systems Corp. v. Lewis*, another 5-4 partisan decision, further diminished employees' right to join their individual claims in the courtroom, allowing the FAA to swallow the National Labor Relations Act so that employment contracts can force employees to waive statutory labor rights.[39]

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[32] Stoneridge Inv. Partners v. Scientific-Atlantic, 552 U.S. 148 (2008) (holding that in order to sue for securities fraud, shareholders must show that they relied on the alleged fraudulent behavior in making their decision to acquire or hold stock); Pliva v. Mensing, 564 U.S. 604 (2011) (holding that federal law preempts state tort law against generic drug makers who failed to warn consumers about dangerous side effects); Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011) (holding that liability for securities fraud is limited to individuals or entities with "ultimate authority" over the misstatements, regardless of who contributed to those statements); Mut. Pharm. v. Bartlett, 133 S. Ct. 2466 (2013) (holding that federal law preempts state design defect claims, thereby restricting plaintiffs' ability to sue generic drug manufactures under state law for failure to adequately label medication).

[33] Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018) (holding that railroad executives are exempt from federal employment taxes on stock-based compensation); Conkright v. Frommert, 559 U.S. 506 (2010) (holding that courts are required to defer to a trust administrator's exercise of discretion even when the trustee's previous construction of the same terms was found to violate ERISA); Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) (expanding fair wage exemptions under the Fair Labor Standards Act, depriving certain categories of workers of statutory fair pay protections); Encino Motorcars v. Navarro, 136 S. Ct. 2117 (2016) (further expanding exemptions from the Fair Labor Standards Act to deprive certain categories of workers statutory fair pay protections).

[34] 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009).

[35] Rent-a-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010).

[36] Stolt-Nielsen S.A. v. AnimalFeeds Int'l, 599 U.S. 662 (2010).

[37] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[38] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

[39] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

You'll be hard-pressed to find any mention of the jury trial protections of the Seventh Amendment in these cases. So much for the doctrine of originalism.

For those lucky enough not to be ensnared in an arbitration agreement, actually getting to a jury of one's peers is more difficult than ever. In 1938, the federal courts, through the Federal Rules of Civil Procedure, adopted a notice pleading standard with Rule 8(a)(2) requiring simply a "short and plain statement of the claim." The idea was that, since plaintiffs often lack detailed information about their claim when they first file suit, they should be able to survive a motion to dismiss and reach the discovery stage without pleading the facts with particularity.

Discovery can be costly, embarrassing, and often damaging to corporate defendants, giving them a strong incentive to prevent it. The 5-4 conservative majority took a big step toward insulating corporations from discovery obligations in *Ashcroft v. Iqbal* (2009), where it heightened the "plausibility" standard the Court first announced in a 7-2 decision in *AT&T v. Twombly*, and signaled to lower court judges that they had a freer hand to dismiss cases before discovery.[40] The leading student of federal court civil procedure, Professor Arthur Miller, observed, "insisting on more pleading detail—on pain of dismissal—is not consistent with the view of American courts as democratic institutions committed to the resolution of civil disputes on their merits in an egalitarian, transparent fashion."[41] According to Miller, Justice Souter, who authored *Twombly* but dissented in *Iqbal*, thought *Iqbal*'s extension of *Twombly* beyond its facts was "entirely arbitrary and failed to guide the lower courts on how to draw the fact-conclusion distinction."[42] The door had been opened a crack; the Roberts Five took advantage and thrust it open all the way.

Class action litigation has long provided redress for low-dollar, many-victim frauds. The 5-4 conservative majority threw out a class action by 1.6 million women alleging gender discrimination by Wal-Mart, making it harder for members of a purported class to prove they have sufficiently common claims.[43] The Court also made it harder for groups of individuals to bring common claims[44] and has made it harder for plaintiffs' attorneys to receive enhanced attorneys fee awards.[45] And finally, the Court has simply barred altogether certain claims for

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[40] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[41] Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 71 (2010).

[42] *See id*. at 25.

[43] Wal-Mart Stores v. Dukes, 564 U.S. 338 (2011).

[44] *See* Genesis Healthcare Corp. v. Symczk, 569 U.S. 66 (2013) (limiting plaintiffs' ability to bring collective action claims under the Fair Labor Standards Act); Comcast v. Behrend, 569 U.S. 27 (2013) (making class action certification more difficult and limited suits against corporations for low-dollar, high-volume antitrust violations); Cal. Pub. Emps.' Ret. Sys. v. Anz Sec., Inc., 137 S. Ct. 2042 (2017) (making it harder for individual investors to protect their rights via class action).

[45] Perdue v. Kenny A, 559 U.S. 542 (2010) (heightening standards for civil rights plaintiffs' attorneys to receive compensation for their services).

relief under the Privacy Act, Family Medical Leave Act, False Claims Act, and Alien Tort Statute.[46]

C. Restricting Civil Rights and Condoning Discrimination

The Roberts Five have shown a persistent animosity toward civil rights and liberties, consistent with right-wing Republican priorities. A representative illustration of the eighteen cases in this category is *Ledbetter v. Goodyear Tire* (2007), in which the conservative majority threw out a woman's gender pay discrimination claim because she hadn't been aware of the pay disparity sooner.[47] Congress overturned that decision with the passage of the Lilly Ledbetter Fair Pay Act, the first bill signed into law by President Obama.

The five conservatives have delivered similar decisions limiting the ability of public schools to use affirmative action to achieve diversity and provide access to English as a Second Language Programs;[48] of Native Americans to challenge the discriminatory practices of banks;[49] and of employees to bring age discrimination claims and employment discrimination claims.[50] Protections for discrimination against immigrants have also been eroded by the Court's conservative majority.[51]

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[46] *See* FAA v. Cooper, 566 U.S. 284 (2012) (making it more difficult for plaintiffs to recover for intangible harms caused by government privacy violations); Coleman v. Court of Appeals of Md., 566 U.S. 30 (2012) (limiting plaintiffs from bringing suits against states for denying them sick leave under the Family Medical Leave Act); Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. 401 (2011) (limiting the ability of plaintiffs to bring suit as whistleblowers on behalf of the government); Jesner v. Arab Bank, 138 S. Ct. 1386 (2018) (holding that foreign corporations may not be sued under the Alien Tort Statute, protecting them from liability for human rights abuses).

[47] Ledbetter v. Goodyear Tire, 550 U.S. 618 (2007).

[48] *See* Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (holding that compelling interest of promoting diversity in higher education could not justify primary and secondary public schools to use affirmative action programs); Horne v. Flores, 557 U.S. 433 (2009) (holding that inadequate funding for English as a Second Language programs did not violate federal law absent showing that state was not fulfilling its obligation by "other means").

[49] *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008) (holding that a Tribal Court does not have jurisdiction to adjudicate a claim against a bank based on in its on-reservation commercial dealings treating applicants disadvantageously because of their tribal affiliation and racial identity).

[50] *See* Gross v. FBL Fin. Servs., 557 U.S. 167 (2009) (heightening the standard for age discrimination claims and making it more difficult for victims to obtain relief); Ricci v. Destefano, 557 U.S. 557 (2009) (holding that absent strong basis in evidence to believe there existed an equally valid, less-discriminatory alternative to use of examinations that served city's needs, a city must use current exam even though it has a disparate impact on minority applicants seeking promotions); Vance v. Ball State Univ., 570 U.S. 421 (2013) (making it harder for plaintiffs to bring workplace harassment claims, by limiting claims based on harassment by coworkers who are not supervisors); Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 570 U.S. 338 (2013) (increasing the standard of proof for employer retaliation claims, making these claims more difficult to bring).

[51] *See* Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582 (2011) (holding federal immigration law does not preempt state law that allows for suspension and revocation of business licenses for hiring undocumented immigrants); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (allowing the discriminatory Muslim ban to go into effect and restricted immigration from eight, mostly Muslim-majority, countries, despite explicit statements by President

In civil liberties cases, too, the Roberts Five repeatedly take the side of the government. They have limited First Amendment speech protections for public employees and students,[52] despite expanding the First Amendment for corporations at seemingly every opportunity.[53] The have made it harder to challenge potentially unlawful government surveillance,[54] and have limited the ability of prisoners to seek redress for harm under 42 U.S.C. § 1983,[55] the Fourth Amendment,[56] and the Eighth Amendment.[57]

D. Advancing a Far-Right Social Agenda

The final nine cases on the list advance a far-right social agenda—three of them restricting the rights of women to make choices about their reproductive health. This has been a top motivating force for conservative voters, and legal victories in high-profile cases help Republican politicians motivate their "base" without having to face the work and peril of legislating. In *Carhart*, *Hobby Lobby*, and *NIFLA*, the Roberts Five delivered anti-choice victories to the religious right.[58] This same constituency saw four partisan victories in cases involving the separation of church and state: *Hein*, *Buono*, *Winn*, and *Galloway*.[59]

Trump about the ban's discriminatory intent); Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (allowing immigrants to be detained for prolonged periods of time without a bail hearing).

[52] *See* Garcetti v. Ceballos, 547 U.S. 410 (2006) (narrowed speech protections for public employees, holding that statements made pursuant to official duties are not shielded for purposes of employer discipline); Morse v. Frederick, 551 U.S. 393 (2007) (limiting the speech rights of high school students).

[53] *See, e.g.*, TAMARA R. PIETY, CORP. REFORM COAL., THE CORPORATE FIRST AMENDMENT (2015).

[54] Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013) (denying plaintiffs standing even if they claim a reasonable likelihood that their communications will be illegally intercepted by the government under FISA surveillance).

[55] *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009) (holding that the Due Process Clause does not require states to turn over DNA evidence to a plaintiff post-conviction); Connick v. Thompson, 563 U.S. 51 (2011) (making it harder to hold prosecutors' offices liable for the illegal misconduct of individual prosecutors); Murphy v. Smith, 138 S. Ct. 784 (2018) (reducing compensation for prisoners when government officials violate their constitutional rights).

[56] *See* Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, 566 U.S. 318 (2012) (allowing strip searches of inmates without reasonable suspicion, reducing the Fourth Amendment protections of arrestees).

[57] *See* Glossip v. Gross, 135 S. Ct. 2726 (2015) (making challenging execution methods more difficult and thus limiting prisoners' Eighth Amendment rights).

[58] *See* Gonzalez v. Carhart, 550 U.S. 124 (2007) (making it harder for women to exercise their reproductive rights by holding Congress's ban on partial-birth abortion was not unconstitutionally vague and did not impose an undue burden on the right to an abortion); Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014) (permitting corporations to deny contraception based on objections to facially neutral, non-discriminatory laws); NIFLA v. Becerra, 138 S. Ct. 2361 (2018) (striking down a California law mandating disclosure related to available medical services for pregnant women, potentially deceiving women into believing that anti-abortion pregnancy centers are medical clinics).

[59] *See* Hein v. Freedom From Religion Found., 551 U.S. 587 (2007) (restricting the ability of citizens to sue the government under the First Amendment for entangling church and state); Salazar v. Buono, 559 U.S. 700 (2010) (allowing a cross to remain on federal property, eroding the separation of church and state); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011) (making it harder for plaintiffs to challenge Establishment Clause violations in court); Town of Greece v. Galloway, 572 U.S. 565 (2014) (allowing legislative prayer even when a town fails to represent a variety of religions in its meetings). Of course, church-state issues do not always break down along partisan lines, as Justices Breyer's and Kagan's vote with the majority in *Trinity Lutheran Church of Columbia v. Comer*,

A decades-long political effort by the National Rifle Association to expand gun rights through the Second Amendment paid off in the 5-4 *Heller* and *McDonald* decisions. *Heller* was a radical shift in Second Amendment jurisprudence, in which the Court inferred for the first time in our history an individual right to keep and bear firearms for self-defense. No less an observer than Judge Posner has noted that "[t]he true springs of the *Heller* decision must be sought elsewhere than in the majority's declared commitment to originalism."[60] That "elsewhere" is not too hard to find. Since 1990, 84 percent of the NRA's political contributions, nearly $19 million, has gone to Republican politicians.[61]

Heller and *McDonald* present naked "judicial activism." As Justice Stevens noted is his *Heller* dissent,

> no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control. What impact the Court's unjustified entry into *this* thicket will have on that ongoing debate—or indeed on the Court itself—is a matter that future historians will no doubt discuss at length. It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.[62]

As a tide of tragic gun massacres continues to sweep this country, and with the Court set to decide another high-stakes gun case next term, Americans should keep their eyes on the Roberts Five and their pattern of victories for important interests of the Republican Party.

III. A History and Future of Court Capture

There is a pattern in the Roberts Era: 73 partisan decisions, in which the majority was composed of only the five Republican-appointed justices, that handed a win to big conservative and corporate interests. Quite often, these same decisions override or ignore conservative judicial principles. It is hard to review this pattern and conclude that the outcomes are attributable to coincidence and not design. When big conservative and corporate interests are at stake, the Roberts Five readily overturn precedent, invalidate statutes passed by wide bipartisan margins, and opine on broad constitutional issues they need not reach. Modesty, originalism, stare decisis, and even federalism—all supposedly conservative judicial principles—have been jettisoned when necessary to deliver these seventy-three partisan Republican wins.

The Roberts Court's pro-corporate bent has been well documented. The Constitutional Accountability Center (CAC) has tracked one measure of this—how the United States Chamber of Commerce has fared when it has taken a position before the Court. The Chamber represents

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137 S. Ct. 2012 (2017), demonstrated. Nevertheless, the Roberts Five has reliably proven to be a voting bloc on these issues.

[60] Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008).

[61] *National Rifle Assn*, OPENSECRETS.ORG (last visited Dec. 4, 2018).

[62] District of Columbia v. Heller, 554 U.S. 570, 680 n. 39 (2008) (Stevens, J., dissenting).

big corporate interests and supports Republican candidates. Since 2006, when the Roberts Five conservative bloc first solidified, the Chamber has won 70 percent of the time, compared with a win rate of 56 percent from 1994 to 2005. To be sure, many of the Chamber's wins have come with one or more liberal votes. But according to the CAC, "five conservative Justices now on the bench have given the Chamber more than three quarters of their total votes (77.2%), while the four moderate-to-liberal Justices have given roughly half (50.5%)."[63] Justice Gorsuch has become the Chamber's most reliable vote, siding with it 93 percent of the time. Justice Kavanaugh's pro-Chamber record on the U.S. Court of Appeals for the D.C. Circuit suggests this trend will continue now that he has joined the Five.

This undeniable pattern helps explain the mad scramble by right-wing interest groups and their Republican allies in the Senate to protect the Roberts Five at all costs, whether by refusing to even consider Chief Judge Merrick Garland, a moderate jurist nominated by a Democratic president, or by breaking longstanding Senate norms and traditions to ram through Judge Kavanaugh, a flawed Trump nominee, eighteen months later.

Republicans under Donald Trump now do not even try to hide the fact that they have "insourced" the judicial vetting process to these same interest groups, coordinated by the Federalist Society and its political gatekeeper Leonard Leo.[64] The big funders of the Federalist Society in turn benefit financially from the Court's pro-corporate tilt. To the extent its funders are public (many are secret), they come as no surprise: the U.S. Chamber of Commerce, the Koch brothers, the Lynde and Harry Bradley Foundation, and the Scaife Foundations—a who's-who of big Republican influencers.[65]

Once nominees are selected, the Judicial Crisis Network, funded as far as can be determined by big business and partisan groups, runs dark-money political campaigns to influence senators to support confirmation.[66] It worked for both Justices Gorsuch and Kavanaugh. Who exactly pays millions of dollars for that, and what their expectations and understandings are, is another secret.

Once the nominee is on the Court, business front groups with ties to funders of the Republican political machine file amicus briefs to signal their wishes to the Roberts Five. Who is really behind those "friends of the Court" is kept secret, but some patterns have emerged there, too. We know there are repeat players—that, for instance, the Pacific Legal Foundation and the

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[63] Brian F. Frazelle, *A Banner Year for Business as the Supreme Court's Conservative Majority Is Restored*, CONST. ACCOUNTABILITY CTR. (July 17, 2018).
[64] Todd Ruger, *Senate Republicans Steamroll Judicial Process*, ROLL CALL (Jan. 18, 2018).
[65] *The Money Behind Conservative Legal Movement*, N.Y. TIMES, (Mar. 19, 2017).
[66] Anna Massoglia & Kaitlin Washburn, *Only a Fraction of 'Dark Money' Spending on Kavanaugh Disclosed*, OPENSECRET.ORG (Oct. 24, 2018).

Center for Constitutional Rights filed briefs in *Citizens United*, *Shelby*, and *Hobby Lobby*, and the Cato Institute filed briefs in those same three cases plus *NIFLA*.

Janus, and its forebear *Friedrichs v. California Teachers Association*, show how conservative amici work in lockstep and fundraise off their efforts. *Friedrichs* was underwritten by the Lynde and Harry Bradley Foundation, which has openly acknowledged its goal of "reduc[ing] the size and power of public sector unions."[67] The Bradley Foundation not only bankrolled the nonprofit law firm bringing that case, but also donated to 11 different organizations that filed amicus curiae briefs supporting the plaintiffs. Many resurfaced in *Janus*. In out-of-court statements, these amici trumpeted their confidence in a pre-ordained outcome.[68] And the Bradley Foundation is a longtime supporter of the Federalist Society, where the selection of nominees to the Court began.[69]

We have reached the point where it appears the same set of big-money players is selecting nominees to our highest court, then spending millions of dollars to campaign for their confirmation, and then funding amicus briefs designed to signal a preferred outcome to those nominees once they have ascended to the bench. The pattern apparent in the spending and amicus presence of big Republican donor interests intersects in ominous ways with the pattern of those 73 partisan decisions by the Roberts Five giving wins to key conservative and corporate interests. It's no wonder that Americans increasingly feel the game is rigged.

Americans deserve to understand how that rigged game works. Further light must be shed. While we do not yet have a complete view of the ways these interests have captured the conservative bloc of the Court—many are still hidden in the shadow of dark money—the

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[67] *Priority Giving Areas*, LYNDE & HARRY BRADLEY FOUND. (last visited Feb. 11, 2019). *See* Brian Mahoney, *Conservative Group Nears Big Payoff in Supreme Court Case*, POLITICO (Jan. 10, 2016); Adele M. Stan, *Who's Behind* Friedrichs*?*, AM. PROSPECT (Oct. 29, 2015).

[68] *See, e.g.*, Brief of Senators Sheldon Whitehouse & Richard Blumenthal as Amici Curiae Supporting Respondents at Appendix at A-1, A-7, Janus v. Am. Fed'n of State, Cty, & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), ("A Judgment Day is coming very soon. . . . As a result [of the Court's grant of certiorari in *Janus*], we may well be on the verge of an historic victory over government unions . . . unions . . . We are very confident that the Supreme Court is about to rule [shop fees] illegal on a national scale—but that will just be the beginning."); Press Release, Freedom Foundation, Freedom Foundation Files Amicus Briefs in Landmark Right-to-Work Case (Dec. 6, 2017) ("The second Freedom Foundation *amicus* brief assumes the *Janus* ruling will invalidate *Abood* and urges the justices to include wording in it that would make enforcement easier."); *Will Government Union Gravy Train Come to an End?*, COMPETITIVE ENTERPRISE INST. (Sept. 20, 2017) ("A nearly identical lawsuit over the constitutionality of forced union dues was heard by the Court in 2016, but the untimely death of Justice Antonin Scalia led to a 4-4 split. The justices may want to take another shot at the issue with a full court."); *How Government Unions Plan to Keep Members and Dues Flowing After Janus*, COMPETITIVE ENTERPRISE INST. (Oct. 27, 2017) ("Government unions are preparing for a world where they can no longer force non-members to pay dues in the public sector."); Tom Gantert, *Supreme Court Could Bring Right-To-Work To Government Employees Nationwide*, MICH. CAP. CONFIDENTIAL (Sept. 30, 2017) ("If the Supreme Court rules in favor of Janus, as is expected, it would have the same effect as establishing a right-to-work law for public sector employees across the nation."); *Supreme Court Takes Up* Janus v. AFSCME, BUCKEYE INST. FOR PUBLIC POL'Y SOLUTIONS (Sept. 28, 2017) ("We are pleased that the Supreme Court will take up this crucial case . . . We are confident that Mr. Janus will prevail.").

[69] *Federalist Society for Law and Public Policy Studies*, SOURCEWATCH.ORG (last visited Dec. 4, 2018).

overall picture is coming into the light. It is a picture in which money, influence, and partisanship, rather than objective legal analysis and interpretation, are reshaping some of the most important areas of the law in the United States. Although the pattern of special-interest funding is still indistinct, the pattern of 73 partisan 5-4 decisions under Chief Justice Roberts is undeniable.

Appendix
Roberts Five Decisions

The following 73 cases are those in which a majority opinion by the Roberts Five (Justices Roberts, Alito, Kennedy, Thomas, and Scalia or Gorsuch) served one of the following conservative interests: (1) controlling the political process to benefit conservative candidates and policies; (2) protecting corporations from liability and letting polluters pollute; (3) restricting civil rights and condoning discrimination; and (4) advancing a far-right social agenda. The final five cases are decisions by the Roberts Five in which no clear donor interests were identified.

Where appropriate the appendix also identifies the judicial principles these conservative justice generally espouse, but which they arguably disregarded in these cases to achieve a desired outcome, including: (1) stare decisis; (2) judicial restraint; (3) originalism; (4) textualism; and (5) aversion to fact finding.

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
League of Latin American Citizens v. Perry	548 U.S. 399 (2006)	Upheld racial and partisan gerrymandering that burdened the rights of minority voters in Texas.	Controlling the Political Process: Voter Suppression	**Stare Decisis**, *see* 548 U.S. at 462-63, 474-75 (Stevens, J., concurring and dissenting in part); *see also*, *id.* at 483 (Souter, J., concurring and dissenting in part)
Garcetti v. Ceballos	547 U.S. 410 (2006)	Narrowed speech protections for public employees, holding that statements made pursuant to official duties are not shielded for purposes of employer discipline.	Restricting Civil Rights & Condoning Discrimination	**Stare Decisis**, *see* 547 U.S. at 427 (citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* and *Givhan v. Western* (Souter, J. dissenting)
FEC v. Wisconsin Right to Life	551 U.S. 449 (2007)	Struck down the ban on issue ads during the 60 days before elections.	Controlling the Political Process: Dark Money	**Judicial Restraint**, *see* 551 U.S. at 504 (Souter, J., dissenting) **Stare Decisis**, *see id.* at 522, 534-35 (citing *McConnell v. FEC*)

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Leegin Creative Leather Products v. PSKS	551 U.S. 877 (2007)	Limited Section 1 of the Sherman Act to allow manufacturers to set mandatory minimum prices for their products, replacing the bright-line rule that resale price fixing agreements are per se illegal with a rule that vertical price restraints should be judged according to the "rule of reason."	Protecting Corporations from Liability	**Stare Decisis**, *see* 551 U.S. at 908 (citing *Dr. Miles Medical Co. v. John D. Park & Sons Co.*) (Breyer, J., dissenting)
National Association of Home Builders v. Defenders of Wildlife	551 U.S. 644 (2007)	Limited the reach of the Endangered Species Act and eliminated a major regulatory hurdle for developers.	Protecting Corporations from Liability: Letting Polluters Pollute	
Ledbetter v. Goodyear Tire	550 U.S. 618 (2007)	Made it more difficult for employees to bring Title VII claims and ignored the realities around proving wage discrimination.	Restricting Civil Rights & Condoning Discrimination	
Morse v. Frederick	551 U.S. 393 (2007)	Limited both the speech rights of high school students.	Restricting Civil Rights & Condoning Discrimination	
Parents Involved in Community Schools v. Seattle School District No. 1	551 U.S. 701 (2007)	Limited the ability of primary and secondary public schools to use affirmative action programs that promote diversity.	Restricting Civil Rights & Condoning Discrimination	**Stare Decisis**, *see* 551 U.S. at 799 (citing misapplication of *Brown v. Board of Ed.*) (Stevens, J., dissenting); *see also id.* at 803 (alleging majority "distorts precedent") (Breyer, J., dissenting) **Federalism**, *see* 551 U.S. at 866

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Hein v. Freedom From Religion Foundation	551 U.S. 587 (2007)	Restricted the ability of citizens to sue the government under the First Amendment for entangling church and state.	Advancing a Far-Right Social Agenda	**Stare Decisis**, *see* 551 U.S. at 637-38 (citing *Flast v. Cohen*) (Stevens, J., dissenting)
Gonzalez v. Carhart	550 U.S. 124 (2007)	Made it harder for women to exercise their reproductive rights by holding Congress's ban on partial-birth abortion was not unconstitutionally vague and did not impose an undue burden on the right to an abortion.	Advancing a Far-Right Social Agenda	**Stare Decisis**, *see* 550 U.S. at 170-71, 173-175 (citing *Casey* and *Stenberg v. Carhart* and noting *Stenberg v. Carhart* was decided only 7 years prior) (Ginsburg, J., dissenting)
Davis v. FEC	554 U.S. 724 (2008)	Eliminated the "Millionaire's Amendment" to the Bipartisan Campaign Reform Act, increasing the influence of wealth as a criterion for public office.	Controlling the Political Process: Dark Money	**Originalism**, *see* 554 U.S. at 751 (Stevens, J., dissenting)
Stoneridge Inv. Partners, LLC v. Scientific-Atlanta 5-3 (Breyer Recused)	552 U.S. 148 (2008)	Limited the ability of shareholders alleging securities fraud to sue, holding that they must be able to show that they had relied, in making their decisions to acquire or hold stock, on the deceptive behind-the-scenes behavior of financial institutions (and their lawyers and accountants).	Protecting Corporations from Liability	
Winter v. Natural Resources Defense Council	555 U.S. 7 (2008)	Invalidated an injunction to halt a naval training exercise despite its projected irreparable harm to marine life.	Protecting Corporations from Liability: Letting Polluters Pollute	

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Plains Commerce Bank v. Long Family Land and Cattle Co	554 U.S. 316 (2008)	Made it more difficult for Native American plaintiffs to challenge discriminatory conduct by banks.	Restricting Civil Rights & Condoning Discrimination	
District of Columbia v. Heller	554 U.S. 570 (2008)	Drastically expanded the scope of the Second Amendment and limited commonsense gun regulation.	Advancing a Far-Right Social Agenda	**Originalism & Stare Decisis**, *see* 554 U.S. at 637 (Stevens, J., dissenting) **Judicial Restraint**, *see* 554 U.S. at 680 (Stevens, J., dissenting)
Bartlett v. Strickland	556 U.S. 1 (2009)	Held that the Voting Rights Act does not require state officials in certain circumstances to redraw election district lines to help allow racial minority groups elect a candidate of their choice.	Controlling the Political Process: Voter Suppression	
14 Penn Plaza v. Pyett	556 U.S. 247 (2009)	Diminished employees' access to the federal courts and skewed employment agreements in favor of employers through mandatory arbitration.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Stare Decisis**, *see* 556 U.S. at 274 (Stevens, J., dissenting); *see also id.* at 281 (Souter, J., dissenting) **Judicial Restraint**, *see* 556 U.S. at 277 (Stevens, J., dissenting)
Ashcroft v. Iqbal	556 U.S. 662 (2009)	Heightened the civil pleading standard, making it more difficult for plaintiffs to sue in federal court	Protecting Corporations from Liability: Restricting Individual's Access to Courts	

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Summers v. Earth Island Institute	555 U.S. 488 (2009)	Restricted the right of environmental groups to sue over environmental violations.	Protecting Corporations from Liability: Letting Polluters Pollute	
Entergy v. Riverkeeper	556 U.S. 208 (2009)	Ignored the Clean Water Act's mandate that power plants use the "Best Technology Available" to protect fish and aquatic life, allowing them to use less-costly, less-effective devices.	Protecting Corporations from Liability: Letting Polluters Pollute	
Gross v. FBL Financial Services	557 U.S. 167 (2009)	Heightened the standard for age discrimination claims and made it more difficult for victims to obtain relief.	Restricting Civil Rights & Condoning Discrimination	**Judicial Restraint**, *see* 557 U.S. at 190 (Stevens, J., dissenting)
District Attorney's Office for the Third Judicial District v. Osborne	557 U.S. 52 (2009)	Held that the Due Process Clause does not require states to turn over DNA evidence to a plaintiff post-conviction.	Restricting Civil Rights & Condoning Discrimination	
Horne v. Flores	557 U.S. 433 (2009)	Diminished minority students' access to English as a Second Language programs.	Restricting Civil Rights & Condoning Discrimination	**Aversion to Fact Finding**, *see* 557 U.S. at 513-14 (Breyer, J., dissenting)
Ricci v. Destefano	557 U.S. 557 (2009)	Distorted federal civil rights law to promote the disproportionate exclusion of minority groups from career advancement.	Restricting Civil Rights & Condoning Discrimination	
Citizens United v. FEC	558 U.S. 310 (2010)	Opened the door to special interests and lobbyists influencing American politics through unlimited corporate spending.	Controlling the Political Process: Dark Money	**Originalism, Textualism, & Judicial Restraint**, 558 U.S. at 948 (Stevens, J., dissenting)

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Conkright v. Frommert 5-3 (Sotomayor Recused)	559 U.S. 506 (2010)	Held that courts are required to defer to a trust administrator's exercise of discretion even when the trustee's previous construction of the same terms was found to violate ERISA	Protecting Corporations from Liability	
Stolt-Nielsen S.A. v. AnimalFeeds International Corp. 5-3 (Sotomayor Recused)	559 U.S. 662 (2010)	Restricted plaintiffs from using class arbitration (similar to a class action lawsuit) unless all parties specifically agree to it.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	
Rent-A-Center, West, Inc. v. Jackson	561 U.S. 63 (2010)	Diminished employees' access to the federal courts and skewed arbitration agreements in favor of employers over employees.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	
Perdue v. Kenny A.	559 U.S. 542 (2010)	Heightened the standards for civil rights plaintiffs' attorneys to receive compensation for their services.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Aversion to Fact Finding**, *see* 559 U.S. at 572 (Breyer, J., dissenting)
McDonald v. Chicago	561 U.S. 742 (2010)	Continued the expansion of Second Amendment rights and made it more difficult for states to implement gun regulations.	Advancing a Far-Right Social Agenda	**Originalism,** *see* 561 U.S. at 912 (Breyer, J., dissenting)
Salazar v. Buono	559 U.S. 700 (2010)	Allowed a cross to stay on federal property, chipping away at the separation of church and state.	Advancing a Far-Right Social Agenda	

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Arizona Free Enterprise Club's Freedom Club PAC v. Bennett	564 U.S. 721 (2011)	Struck down Arizona law restricting PACs and dark money sources from funding political candidates without limit.	Controlling the Political Process: Dark Money	**Originalism,** *see* 564 U.S. at 757, 784 (Kagan, J., dissenting) **Stare Decisis,** *see* 564 U.S. at 776-77 (Kagan, J., dissenting)
Schindler Elevator Corp. v. U.S. ex rel. Kirk 5-3 (Kagan Recused)	563 U.S. 401 (2011)	Limited the ability of plaintiffs to bring suit as whistleblowers on behalf of the government.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	
AT&T Mobility v. Concepcion	563 U.S. 333 (2011)	Reduced consumers' ability to bring class-action claims against corporations for low-dollar, high-volume frauds.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Federalism**, *see* 564 U.S. at 357, 367 (Breyer, J., dissenting)
Janus Capital Group v. First Derivative Traders	564 U.S. 135 (2011)	Heightened the pleading bar in private securities fraud cases seeking to hold defendants liable for the misstatements of their companies or others. Held that SEC liability was limited to individuals or entities with "ultimate authority" over the misstatements, regardless of who contributed to those statements.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Textualism**, *see* 564 U.S. at 150-51 (Breyer, J., dissenting)
Wal-Mart Stores v. Dukes	564 U.S. 338 (2011)	Limited the ability of individuals to bring class-action lawsuits.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	
Pliva v. Mensing	564 U.S. 604 (2011)	Preempted state tort law claims against generic drug makers who failed to warn consumers about dangerous side effects.	Protecting Corporations from Liability	**Federalism**, *see* 564 U.S. at 627 (Sotomayor, J., dissenting)

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Chamber of Commerce of U.S. v. Whiting 5-3 (Kagan Recused)	563 U.S. 582 (2011)	Allowed states to pass laws that target immigrant workers.	Restricting Civil Rights & Condoning Discrimination	
Connick v. Thompson	563 U.S. 51 (2011)	Made it harder to hold prosecutors' offices liable for the illegal misconduct of individual prosecutors.	Restricting Civil Rights & Condoning Discrimination	**Aversion to Fact Finding**, *see* 563 U.S. at 94 (Ginsburg, J., dissenting)
Arizona Christian School Tuition Organization v. Winn	563 U.S. 125 (2011)	Made it harder for plaintiffs to challenge Establishment Clause violations in court, chipping away at the separation of church and state.	Advancing a Far-Right Social Agenda	**Stare Decisis,** *see* 563 U.S. at 147-48 (citing *Flast v. Cohen*) (Kagan, J., dissenting) **Originalism**, *see* 563 U.S. at 168-69 (Kagan, J., dissenting)
American Tradition Partnership v. Bullock	567 U.S. 516 (2012)	Struck down Montana statute regulating independent corporate expenditures on behalf of candidates, allowing special interests and lobbyists to influence American politics through money.	Controlling the Political Process: Dark Money	**Federalism**, *see* 567 U.S. at 517 (Breyer, J., dissenting)
F.A.A. v. Cooper 5-3 (Kagan Recused)	566 U.S. 284 (2012)	Made it more difficult for plaintiffs to recover for intangible harms caused by government privacy violations.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Textualism**, *see* 566 U.S. at 306-07 (Sotomayor, J., dissenting)
Coleman v. Court of Appeals of Maryland	566 U.S. 30 (2012)	Limited plaintiffs from bringing suits against states for denying them sick leave under the Family Medical Leave Act.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Christopher v. SmithKline Beecham	567 U.S. 142 (2012)	Expanded fair wage exemptions under the Fair Labor Standards Act, depriving certain categories of workers of statutory fair pay protections.	Protecting Corporations from Liability	
Florence v. Board of Chosen Freeholders of County of Burlington	566 U.S. 318 (2012)	Allowed strip searches of inmates without reasonable suspicion, reducing the Fourth Amendment protections of arrestees.	Restricting Civil Rights & Condoning Discrimination	
Shelby County v. Holder	570 U.S. 529 (2013)	Invalidated sections of the Voting Rights Act, making it easier for states with a history of racial discrimination to pass discriminatory voting laws.	Controlling the Political Process: Voter Suppression	**Originalism**, *see* 570 U.S. at 567 (Ginsburg, J., dissenting) **Aversion to Fact Finding**, *Id.* at 576
American Exp. Co. v. Italian Colors Restaurant 5-3 (Sotomayor Recused)	570 U.S. 228 (2013)	Diminished employees' access to the federal courts and skewed employment agreements in favor of employers.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Stare Decisis**, *see* 570 U.S. at 240, 247 (Kagan, J., dissenting)
Comcast v. Behrend	569 U.S. 27 (2013)	Made class action certification more difficult and limited suits against corporations for low-dollar, high-volume antitrust violations.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Aversion to Fact Finding**, *see* 569 U.S. at 46 (Ginsburg & Breyer, Js., dissenting)
Genesis Healthcare v. Symczk	569 U.S. 66 (2013)	Limited plaintiffs' ability to bring collective action claims under the Fair Labor Standards Act.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Judicial Restraint**, *see* 569 U.S. at 79 (Kagan, J., dissenting)

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Mutual Pharmaceutical v. Bartlett	133 S. Ct. 2466 (2013)	Limited plaintiffs' ability to sue generic drug manufactures under state law for failure to adequately label medication.	Protecting Corporations from Liability	**Federalism**, *see* 133 S. Ct. at 2482 (Breyer, J., dissenting)
Koontz v. St. Johns River Water Management District	570 U.S. 595 (2013)	Deprived local and state governments of the flexibility to ensure environmentally sound and economically productive development.	Protecting Corporations from Liability: Letting Polluters Pollute	**Federalism**, *see* 570 U.S. at 635-36 (Kagan, J., dissenting)
Vance v. Ball State University	570 U.S. 421 (2013)	Made it harder for plaintiffs to bring workplace harassment claims.	Restricting Civil Rights & Condoning Discrimination	
University of Texas Southwestern Medical Center v. Nassar	570 U.S. 338 (2013)	Increased the standard of proof for employer retaliation claims, making these claims more difficult to bring.	Restricting Civil Rights & Condoning Discrimination	
Clapper v. Amnesty International	568 U.S. 398 (2013)	Blocked plaintiffs' access to the courtroom even if they claim a reasonable likelihood that their communications will be illegally intercepted by the government under FISA surveillance.	Restricting Civil Rights & Condoning Discrimination	
McCutcheon v. FEC	572 U.S. 185 (2014)	Created a loophole that allows a single individual to donate millions of dollars to a political party or campaign.	Controlling the Political Process: Dark Money	**Originalism, Textualism, Stare Decisis, & Judicial Restraint**, *see* 572 U.S. at 232 (Breyer, J., dissenting)
Harris v. Quinn	134 S. Ct. 2618 (2014)	Weakened public sector unions and took a major step toward overturning public sector fee collection from all non-union members in another 5-4 decision, *Janus v. AFSCME*.	Controlling the Political Process: Union Busting	**Invitation to Challenge Precedent**, *see* 134 S. Ct. at 669 (citing *Abood v. Detroit Board of Education*) (Kagan, J., dissenting)

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Town of Greece v. Galloway	572 U.S. 565 (2014)	Allowed legislative prayer even when a town fails to represent a variety of religions in its meetings.	Advancing a Far-Right Social Agenda	**Originalism**, *see* 572 U.S. at 619-21 (Kagan, J., dissenting)
Burwell v. Hobby Lobby Stores	573 U.S. 682 (2014)	Permitted corporations to deny contraception based on objections to facially neutral, non-discriminatory laws.	Advancing a Far-Right Social Agenda	**Originalism**, *see* 573 U.S. at 740 (Ginsburg, J., dissenting) **Stare Decisis**, *Id.* at 744 (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*) **Judicial Restraint**, *Id.* at 746
Michigan v. EPA	135 S. Ct. 2699 (2015)	Limited EPA's ability to regulate power plants by requiring it to consider cost at every stage of the regulatory process, impeding the agency's ability to pursue aggressive public health and environmental priorities.	Protecting Corporations from Liability: Letting Polluters Pollute	
Glossip v. Gross 5-3 (Vacancy)	135 S. Ct. 2726 (2015)	Made challenging execution methods more difficult and thus limited prisoners' Eighth Amendment rights.	Restricting Civil Rights & Condoning Discrimination	
California Public Employees' Retirement System v. Anz Securities	137 S. Ct. 2042 (2017)	Made it harder for individual investors to protect their rights via class action	Protecting Corporations from Liability: Restricting Individual's Access to Courts	
Abbott v. Perez	138 S. Ct. 2305 (2018)	Allowed the use of electoral maps that a lower court determined had been drawn with discriminatory intent.	Controlling the Political Process: Voter Suppression	**Stare Decisis & Aversion to Fact Finding**, *see* 138 S. Ct. at 2235-36 (Sotomayor, J., dissenting)

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Husted v. A. Phillip Randolph Institute	138 S. Ct. 1833 (2018)	Allowed Ohio to purge voter rolls in a way that disproportionately affects minority voters.	Controlling the Political Process: Voter Suppression	
Janus v. AFSCME	138 S. Ct. 2448 (2018)	Overturned a 40-year-old precedent allowing public sector unions to collect fair share fees.	Controlling the Political Process: Union Busting	**Stare Decisis & Judicial Restraint**, *see* 138 S. Ct. at 2487 (citing *Abood v. Detroit Board of Education*) (Kagan, J., dissenting)
Epic Systems v. Lewis	138 S. Ct. 1612 (2018)	Prohibited workers from banding together to redress workplace violations including sexual harassment, racial discrimination, and wage theft.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	**Judicial Restraint**, *see* Garrett Epps, *An Epic Supreme Court Decision on Employment*, ATLANTIC (May 22, 2018) (noting "[t]his is a judge-made policy invention, reflecting conservative justices' empathy for corporations. . .")
Jesner v. Arab Bank	138 S. Ct. 1386 (2018)	Held that foreign corporations may not be sued under the Alien Tort Statute, protecting them from liability for human rights abuses.	Protecting Corporations from Liability: Restricting Individual's Access to Courts	
Encino Motorcars v. Navarro	138 S. Ct. 1134 (2018)	Expanded exemptions from the Fair Labor Standards Act and deprived certain categories of workers of statutory fair pay protections.	Protecting Corporations from Liability	
Wisconsin Central Ltd. v. United States	138 S. Ct. 2067 (2018)	Ruled that railroad executives are exempt from federal employment taxes on stock-based compensation.	Protecting Corporations from Liability	
Ohio v. American Express	138 S. Ct. 2274 (2018)	Held that federal antitrust laws do not prohibit corporate "anti-steering" provisions, allowing credit cards to prevent merchants from steering	Protecting Corporations from Liability	**Aversion to Fact Finding**, *see* 138 S. Ct. at 2303-05 (Breyer, J., dissenting)

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
		customers toward alternative payment methods.		
Jennings v. Rodriguez 5-3 (Kagan Recused)	138 S. Ct. 830 (2018)	Allowed immigrants to be detained for prolonged periods of time without a bail hearing.	Restricting Civil Rights & Condoning Discrimination	**Originalism**, *see* 138 S. Ct. at 863, 866, 869 (Breyer, J., dissenting)
Murphy v. Smith	138 S. Ct. 784 (2018)	Reduced compensation for prisoners when government officials violate their constitutional rights.	Restricting Civil Rights & Condoning Discrimination	
Trump v. Hawaii	138 S. Ct. 2392 (2018)	Allowed the discriminatory Muslim ban to go into effect and restricted immigration from eight, mostly Muslim-majority, countries.	Restricting Civil Rights & Condoning Discrimination	**Originalism & Stare Decisis**, *see* 138 S. Ct. at 2433 (Sotomayor, J., dissenting)
NIFLA v. Becerra	138 S. Ct. 2361 (2018)	Struck down a California law mandating disclosure related to available medical services for pregnant women, potentially deceiving women into believing that anti-abortion pregnancy centers are medical clinics.	Advancing a Far-Right Social Agenda	
F.C.C. v. Fox Television Stations, Inc.	556 U.S. 502 (2009)	Upheld a Federal Communications Commission regulation that bans "fleeting expletives" on television broadcast.	No Identified Donor Interest	
Free Enterprise Fund v. Public Co. Accounting Oversight Board	561 U.S. 477 (2010)	Struck down the dual layer of "for cause" protection against presidential removal for PCAOB members.	No Identified Donor Interest	

Case Name	Citation	Holding	Conservative Interest	Judicial Principle Disregarded
Stern v. Marshall	564 U.S. 462 (2011)	Held that bankruptcy courts lack the constitutional authority under Article III to enter a final judgement on a state law counterclaim.	No Identified Donor Interest	
Kerry v. Din	135 S. Ct. 2128 (2015)	Held that the government is not required to give an explanation for denying an alien's visa based on terrorism-related grounds under the Immigration and Nationality Act.	No Identified Donor Interest	
SAS Institute v. Iancu	138 S. Ct. 1348 (2018)	Held that when the United States Patent and Trademark Office institutes a review to reconsider an already-issued patent, it must rule on the patentability of all claims the petitioner challenges.	No Identified Donor Interest	

About the Author

In the United States Senate, Sheldon Whitehouse has fought to strengthen campaign finance laws, increase transparency in government, and defend the rule of law. He leads the effort to pass the DISCLOSE Act, to end the flood of undisclosed dark money polluting our elections. He has conducted rigorous oversight of the executive branch to root out ethical abuses. He is also an outspoken advocate for protecting access to justice so each American can have their day in court.

A graduate of Yale University and the University of Virginia School of Law, Sheldon served in multiple senior roles in Rhode Island government before his appointment by President Clinton as Rhode Island's United States Attorney in 1994. Sheldon was elected Attorney General of Rhode Island in 1998, and in 2006 to the Senate, where he serves on the Judiciary Committee; the Budget Committee; the Environment and Public Works Committee; and the Finance Committee.

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