



Unprecedented Injustice: The Political Agenda of the Roberts Court

**“It is not often in the law that so few have so quickly changed so much.”
- Justice Stephen Breyer, *June 28, 2007***

When Associate Justice John Paul Stevens retires this summer, the Supreme Court will lose its most powerful spokesperson for personal freedoms, separation of powers, and the rule of law. Justice Stevens has been a staunch protector of the rights of ordinary Americans faced with unchecked corporate and government interests. Despite his perceived role on the Court as the ‘Chief Liberal Justice,’ Justice Stevens continues to consider himself a “judicial conservative”: he thinks he only appears liberal because he has been surrounded by ideologically extreme right-wing justices.¹ Indeed, Justice Stevens’s opinions stand out as a bulwark against the Court’s increasingly sharp turn to the right. Rather than keep faith with core American values, a slim majority on the Supreme Court has abandoned principles of fundamental fairness and steadily eroded, if not outright overturned, long-standing constitutional doctrine.

In *Citizens United*, the Court overturned a century of precedent to give corporations the First Amendment rights previously accorded only to real people to spend money to influence elections, thereby jeopardizing the integrity of our political system. Unfortunately, *Citizens United* is just the latest Supreme Court decision that puts corporate and special interests ahead of everyday Americans. From antitrust regulations to environmental protections to women’s rights to First Amendment rights, the Roberts Court has not been shy in rewriting decades of law to protect big business at the expense of everyday Americans. A review of recent cases shows the conservative justices’ disregard for precedent, eagerness to roll back personal freedoms, and willingness to ignore the promises that Chief Justice John Roberts and Associate Justice Samuel Alito made at their Senate confirmation hearings to respect precedent, neutrally uphold the Constitution, and fairly apply the law to everyone.

Promoting Powerful Corporate Interests at the Expense of Ordinary Americans

The nation’s highest court has shifted to the right on economic issues that affect millions of Americans’ everyday lives. Since Chief Justice Roberts joined the Court, the Court has taken a much larger number of business cases, from antitrust to securities to shareholder suits – and its sympathy to big business is striking. Forty percent of the cases heard every year by the Roberts Court involve or are significant to big business, up from 30% at the end of Chief Justice Rehnquist’s tenure.² The Supreme Court’s pro-corporate shift is the result of a conservative

¹ Jeffrey Rosen, “The Dissenter,” *New York Times Magazine*, September 23, 2007, available at http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html?_r=1.

² Rosen, “Roberts versus Roberts,” *The New Republic*, March 2, 2010, available at <http://www.tnr.com/article/politics/roberts-versus-roberts>.

court packing effort that began during the Reagan administration. A coalition of big business special interest groups engaged in a comprehensive campaign to elevate corporate profits and private wealth over individual rights and personal freedoms as the cornerstones of our legal process. The fruits of their labor have now ripened: of the 30 business cases heard in the 2006-07 term, 22 were decided unanimously in favor of big business, or with just one or two dissenting votes, and against the interests of everyday Americans.³ In the same term, the conservative U.S. Chamber of Commerce prevailed in 13 out of the 15 cases in which it filed friend-of-the-court briefs representing corporate interests, its highest winning percentage in its 30-year history.⁴

Shielding Corporations from Liability

- Charles Riegel suffered serious injury when a balloon catheter burst during an angioplasty procedure, and he sued the catheter's manufacturer, Medtronic, Inc., for damages. Medtronic moved to dismiss the lawsuit by arguing that patients cannot bring state-law damage actions if they were injured by medical devices that received premarket approval from the Food and Drug Administration. In ***Riegel v. Medtronic, Inc.*** (2008), the Supreme Court held that the case should be dismissed. Now, if the FDA gives a medical device its stamp of approval, no state can supplement it with tougher regulations and no jury can assess damages against a corporation in the event the device is faulty. The Bush administration supported Medtronic and inserted into more than 60 health and safety regulations the new legal theory that federal permission to market a device preempts unsafe product lawsuits in state courts. Lower court judges have since thrown out lawsuits filed on behalf of thousands of Americans who are endangered by faulty medical devices—even in a case where Medtronic, which also manufactured a faulty heart-defibrillator that can potentially deliver fatal shocks, admitted that patients have died and others have been seriously harmed by its product.
- Following a 19-year legal battle over one of the worst environmental disasters in history, a divided Court dealt a blow to the victims of the Exxon Valdez oil spill, holding that the jury's punitive damages award against the corporation was too high. The Ninth Circuit Court of Appeals had already cut the jury's award of \$5 billion in half, but that vast reduction did not satisfy the Supreme Court. In a 5-3 decision in ***Exxon Shipping Co. v. Baker*** (2008), the Court held that punitive damages cannot exceed compensatory damages in maritime cases—leaving tens of thousands of people affected by the oil spill with only a tenth of what the jury had awarded them.

Insulating Corporate Interests from Environmental and Antitrust Regulation

- Thanks to two recent decisions by the Supreme Court undermining the Clean Water Act, thousands of the nation's largest water polluters are now outside the EPA's reach. In ***Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*** (2001) and

³ Rosen, "Supreme Court Inc.," *The New York Times Magazine*, March 16, 2008, available at http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?_r=1&scp=1&sq=supreme%20court%20inc&st=cse.

⁴ "The Supreme Court: Open for Business," *BusinessWeek*, July 9, 2007, available at http://www.businessweek.com/magazine/content/07_28/b4042040.htm?campaign_id=rss_daily.

Rapanos v. United States (2006), the Supreme Court restricted the federal government’s jurisdiction over the nation’s waterways, suggesting that waterways entirely within one state, creeks that sometimes go dry, and lakes unconnected to larger water systems may not be “navigable waters” covered by the Clean Water Act—even though pollution from those waterways can make its way into sources of drinking water for about 117 million Americans. As a result of these decisions, more than 1,500 major pollution investigations have been discontinued or put on hold in the last four years, and EPA regulators now say that they are unable to prosecute as many as half of the nation’s largest known polluters because officials lack jurisdiction or proving jurisdiction would be extremely difficult or time consuming. And, while the number of facilities violating the Clean Water Act has steadily increased each of the last few years, EPA actions against major polluters have fallen by almost half since the Supreme Court rulings.

- In ***Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*** (2007), the Supreme Court overruled nearly 100 years of precedent and held that manufacturers and retailers of consumer goods could engage in price-fixing. In 1911, the Supreme Court had held in *Dr. Miles Medical CO. v. John D. Park & Sons Co.* that resale price maintenance agreements between a manufacturer and a retailer, in which a retailer agrees not to price below a specified level, are *per se* price-fixing that violates Section 1 of the Sherman Act. In a 5-4 decision, the *Leegin* majority expressly overruled *Dr. Miles*, abandoning its bright line rule and holding that resale price maintenance agreements may be legal on a case by case basis if deemed reasonable by a trial court. Manufacturers can now set minimum prices on products and force retailers to refrain from discounting. As the *Wall Street Journal* put it, manufacturers now have “broad new legal powers that amount to a type of price-fixing.”⁵ State attorneys general have since reported an increase in price-fixing, and one expert has said that *Leegin* has created “the potential for a reshaping of the retail landscape in America.”⁶ Experts also warn that resale price maintenance can feed inflation; in his dissent, Justice Breyer estimated that legalizing price-setting could add \$300 billion to annual consumer costs.

Putting Elections Up for Sale

- In ***Davis v. Federal Election Commission*** (2008), the Supreme Court, in a 5-4 decision, struck down the so-called “Millionaire’s Amendment” from the Bipartisan Campaign Reform Act of 2002, commonly known as the McCain-Feingold Act. The amendment provided that once a Congressional candidate declared her intention to spend more than \$350,000 of her own money on his campaign, her opponent would be allowed to accept contributions of three times the usual limit. Rather than limiting the amount a self-financed candidate could spend, the amendment represented Congress’s attempt to level the playing field by loosening the contribution limits normally imposed on her opponents and counter the perception that Congressional seats are available for purchase by the highest bidder. Justice Alito, writing for the majority, nevertheless concluded that Congress’s interest in reducing the influence of personal wealth on elections did not constitute a legitimate government interest and thus could not justify a restriction on a candidate’s First Amendment rights. Justice Alito

⁵ Joseph Pereira, “Price-Fixing Makes Comeback after Supreme Court Ruling,” *The Wall Street Journal*, Aug. 18, 2008, available at http://online.wsj.com/article/SB121901920116148325.html?mod=hps_us_pageone.

⁶ Gregory Gundlach, marketing professor at University of North Florida, quoted in *id.*

misconstrued prior precedent to announce that the only government interest that can justify campaign finance regulation is the elimination of corruption or the appearance of corruption—even though the Court just 5 years earlier recognized the “untoward consequences” of wealth in the political process. In retrospect, *Davis* was just the Roberts Court’s first step in undoing a century of precedent on its way to unleashing a torrent of money into the political process.

- In *Citizens United v. Federal Election Commission* (2010), the five conservatives reversed a century of law and opened the floodgates for special interests and for-profit corporations to spend money in our elections. In a stunning display of judicial overreach, the conservative justices abruptly broke with long-settled precedent to fundamentally change the rules of the game in favor of big business. The Court tossed aside 100-year old precedents to allow corporations to use unlimited funds from their general treasuries to influence federal elections—and held for the first time in American history that corporations have the same right to spend money on elections as ordinary people. The narrow issue originally presented to the court was whether Citizens United, a non-profit corporation, could use its general treasury funds to pay for broadcasts of its movie slamming Hillary Clinton during the 30-day period before an election. In a highly unorthodox move, the Court invited reargument on the broad question of whether to overrule two earlier Supreme Court decisions upholding restrictions on corporate electioneering. As Justice Stevens wrote in dissent, “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.” Ignoring the principles of deciding cases on narrow grounds and avoiding constitutional questions where possible, the majority operated, in Justice Stevens’ words, “with a sledge hammer rather than a scalpel” to strike down one of Congress’s most significant efforts to regulate the role of big business in electoral politics.

Making it Easier for Companies to Discriminate Against Women and the Elderly

- In *Ledbetter v. Goodyear Tire & Rubber Co.* (20087), the Supreme Court overturned a jury’s finding that Goodyear had systematically paid Lilly Ledbetter less than her male co-workers. Again ignoring precedent, the five conservatives held that Ledbetter could not bring legal action for pay discrimination despite receiving less pay than men in the same position for approximately twenty years. The Court reasoned that Ledbetter should have brought the case within 180 days of the first act of pay discrimination—regardless of the fact that she had no way of learning of the discrepancy until much later or that the discrimination continued for two decades. In dissent, Justice Ginsburg pointed out that the majority’s holding contravened past Supreme Court decisions that each time an employee is paid a wage based on discrimination, the employer has violated the law.
- Noreen Hulteen and three other AT&T employees sued the company after discovering that their pensions were smaller than expected because AT&T failed to credit them for their time off during pregnancy as they would have credited any non-pregnancy disability leave. The district court and a full panel of the Ninth Circuit held that AT&T violated Title VII of the Civil Rights Act each time it calculated benefits in a way that gave less credit for pregnancy leave than for any other temporary disability leave. But in *AT&T v. Hulteen* (2009)—which

Justice Ginsburg later called “*Ledbetter* repeated”—the Supreme Court reached back to a 1976 decision, *General Electric Co. v. Gilbert*, which held that discrimination against pregnant women was not discrimination on the basis of sex. Because Hulteen and her co-workers took their leave at a time when it was legal to discriminate against pregnant women under *Gilbert* (before Congress passed the Pregnancy Discrimination Act to clarify that Title VII protects against discrimination based on pregnancy), the majority concluded that AT&T’s policy was legal—even though it perpetuated a pension benefit calculation that would now unquestionably be unlawful discrimination.

- In *Gross v. FBL Financial Services* (2009), the Court made it considerably more difficult for victims of age discrimination to prevail in court. The Court was presented with the narrow question whether a plaintiff in an age discrimination case had to produce direct evidence of discrimination in order to obtain a “mixed motive” instruction to a jury. But the five conservatives on the Court took it upon themselves to untether the Age Discrimination in Employment Act from Title VII of the 1964 Civil Rights Act and impose a new, tough standard for ADEA plaintiffs. A plaintiff alleging age discrimination now has to prove that age was the “but for” cause of the discrimination and bears the evidentiary burden of production on each element—a far more stringent standard for a plaintiff to meet, especially when going up against a well-financed corporate defendant.

Overturing Decades of Precedent and Undermining Core Constitutional Values

While the conservatives on the court rail against ‘judicial activism’ in one breath, they unabashedly exercise it in the next. Despite his misleading confirmation platitude about ‘calling balls and strikes,’ Chief Justice Roberts has revealed through his votes and his opinions that as umpire he’s willing to change the rules of the game to benefit one team. In recent years, the Court has overturned precedent at a radical rate, running roughshod over the doctrine of *stare decisis*. The acceleration of the pace of sweeping pro-corporate decisions since Chief Justice Roberts and Justice Alito joined the bench makes a mockery of the principle that law does not change abruptly simply because new Justices join the Court.

Closing the Courtroom Doors to Ordinary Americans

- In *Bell Atlantic v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), the Supreme Court radically altered the standards by which litigants’ claims are reviewed in federal court. The Court erected new procedural barriers that keep victims of unlawful conduct from seeking redress in our courts and immunize lawbreakers from appropriate sanctions. These decisions have created an unnecessarily heightened burden on the plaintiff during the pleading phase to prove yet-unknown facts. In these decisions, the Court abandoned the standard that had been set forth half a century ago in *Conley v. Gibson* (1957) to give plaintiffs the opportunity to have their day in court. After *Iqbal*, all civil claimants must plead “factual content,” rather than just a “short and plain statement of the claim,” and the trial judge, according to Justice Kennedy’s ruling, should “draw on its judicial experience and common sense” to evaluate whether the claim is plausible. A trial judge now has enormous leeway to determine the

merits of a claim before a plaintiff has had an opportunity to uncover vital facts in the discovery process. In the last three years, federal courts have relied on the new standards to dismiss thousands of lawsuits involving the environment, medical malpractice, dangerous drugs, investor protection, disability rights, civil rights, employment discrimination, and the taking of private property.

- In two companion school desegregation cases, the five conservative justices undercut one of our nation's most cherished precedents, *Brown v. Board of Education*. In ***Parents Involved in Community Schools v. Seattle School District #1*** and ***Meredith v. Jefferson County Board of Education*** (2007), the majority struck down two voluntary school integration programs run by democratically elected school boards. Even though the five conservative justices have all expressed considerable respect for *Brown*, they turned *Brown* on its head and damaged its promise of racial equality. By declaring voluntary race-based school integration plans unconstitutional, the Court undid years of precedent and undermined settled federal law. As Justice Breyer wrote in dissent, "What has happened to *stare decisis*? ... This is a decision that the Court and the Nation will come to regret." And Justice Stevens opined: "It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."
- In ***Gonzales v. Carhart*** (2007), the Supreme Court, in a 5-4 ruling, eviscerated more than thirty years of precedent requiring that abortion restrictions provide an exemption to protect a pregnant woman's health. The Court upheld a federal law banning so-called "partial birth abortions," even though the law had no health exception. Despite their insistence at their confirmation hearings that they would adhere to precedent, Justices Alito and Roberts took the first opportunity they could to abandon a core element of *Roe v. Wade*, jeopardizing women's health in the process. The majority's opinion rested in part on antiquated moral judgments, including the rationale that women need to be saved from their own bad decisions.
- In 1971, in ***Griggs v. Duke Power Co.***, a unanimous Supreme Court held that Title VII prohibited employment practices that had a disparate impact on minorities and were not necessary for the job. After *Griggs*, it was no longer necessary to prove that employers intended to discriminate; rather, the focus was on whether hiring and promotion criteria tested for skills that were job related. The disparate impact standard of Title VII of the Civil Rights Act became one of the nation's most effective weapons for eliminating discrimination from our workplaces. In ***Ricci v. DeStefano*** (2009), the five conservatives on the Supreme Court struck a blow against the disparate impact standard. Over the strong dissent of four justices, the conservative majority held that New Haven, Conn., engaged in intentional discrimination against white firefighters when it rejected the results of tests for firefighter promotions because they disproportionately excluded African American and Hispanic candidates. In a striking departure from principles that govern appellate review, the Court reversed the case outright, rather than following its usual practice of sending the case back to the lower courts to apply the facts to the new standard in the first instance. In doing so, the five conservative justices created a new standard, stating that New Haven needed a "substantial basis in evidence" before it could reject the results of a test that had the overwhelming effect of excluding African Americans and Hispanics from promotion as firefighters. In effect, the Court said that the City would have to prove the case against itself and establish that it had committed a disparate impact violation before it could withdraw the

test and start over by searching for a less discriminatory alternative. The Court's decision will create a disincentive for employers who want to comply voluntarily with Title VII but don't want to prove that they have violated Title VII. The Court also laid the foundation to hold that the provision of Title VII prohibiting disparate impacts is a form of race-conscious relief that may not survive equal protection scrutiny.

- In *Morse v. Frederick* (2007), Chief Justice Roberts, writing for the five conservatives, limited the rights of high school students to express themselves. In 1969, the Supreme Court had said that students do not “shed their constitutional rights... at the schoolhouse gates.” After nearly forty years of precedent, however, the Roberts court held that school authorities could suppress speech purportedly advocating illegal drug use, even when that speech does not take place on school grounds. This holding threatens to limit the ability of teenagers to debate a variety of important issues, including, but not limited to, the wisdom of our country's ‘war on drugs.’
- In a striking display of arch-conservative judicial activism, five members of the Supreme Court departed from a century of jurisprudence to hold for the first time that the Second Amendment protects an individual right to bear arms. In *District of Columbia v. Heller* (2008), the Court struck down the District of Columbia's gun restrictions, which for over 30 years have played an integral role in the city's fight against urban violence. Concluding that the Second Amendment protects an individual right to bear arms, Justice Scalia failed to provide legislatures with guidelines on firearm restrictions, thereby ignoring dozens of his own opinions where he criticizes other decisions he dislikes as “opening the floodgates of litigation.”

The Future of the Supreme Court

A striking number of recent Supreme Court decisions promote big business's agenda while abandoning fundamental principles of fairness and freedom. As the Court has careened to the right, Justice Stevens has emerged as the stalwart champion of core Constitutional values and the rule of law, leaving a legacy of preserving civil rights, environmental protections, and judicial oversight of executive power. Without a worthy successor to Justice Stevens, We the People will be left with a Court more likely to overturn long-established precedents that fostered generations of social, economic, and political progress in order to advance a radical conservative agenda.