ALLIANCE FOR JUSTICE

The Roberts Court and Judicial Overreach

A report by

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Overview

It has been well-documented that the Roberts Court consistently pursues an agenda that favors powerful corporate interests and the wealthy at the expense of everyday Americans. What is less well-known is that in order to reach these preferred outcomes, a bloc of five conservative justices has proven strikingly willing to engage in judicial activism by overreaching and twisting the law. The Supreme Court's shift is the result of a decades-long campaign by special interest groups to elevate corporate profits and private wealth over individual rights and personal freedoms. The Roberts Court's mission is hardly limited to pro-corporate bias; for example, the conservative bloc has reached to strike down long-upheld voting rights laws, strip away the rights of the accused in the criminal justice system, and eviscerate statutes combating housing, employment, and other discrimination. Since John Roberts became Chief Justice in 2005, the Supreme Court has demonstrated an increased readiness to do whatever it takes to interpret the law in a way that protects powerful interests at the expense of everyday Americans.

In recent testimony before the Senate Judiciary Committee, Justice Scalia made a point of saying,

> We do a lot of nothing. . . . [T]he main reason that we take a case is because there's disagreement below. But if there's no disagreement below, we don't get involved; we don't go *prowling* around looking for Congressional statutes that are unconstitutional. It's *only* when there's disagreement below that we take a case, with rare exceptions. If a lower court has found one of your laws to be unconstitutional, we'll take that, even though no other court has held the opposite. But except for rare situations like that, we let sleeping dogs lie.[1]

"[W]e don't go prowling around looking for Congressional statutes that are unconstitutional."

Shortly thereafter, he again stated that the Court is reluctant to take on cases in order to push an ideological agenda, asserting

> We have a general rule that unless there's a circuit conflict, you're wasting your time and your client's money to file a petition for certiorari. It is overwhelmingly likely that we will not grant it. It is not the case, I assure you, that we *prowl* about looking for an issue that we want to get up to the Court. I don't know any of my colleagues that behaves that way; I think that they all have standards: Is there a circuit conflict? Is it a significant issue on which the lower courts are divided?[2]

But the record belies Scalia's claims. Despite their publicly avowed commitment to principles of judicial restraint, the justices—in particular a five-member bloc comprising Chief Justice Roberts, Justice Antonin Scalia, Justice Anthony Kennedy, Justice Clarence Thomas, and Justice Samuel Alito—have shown no

compunction about overturning precedent to reach a desired result. In fact, the Court, led aggressively by Chief Justice Roberts, has noticeably engaged in "judicial overreach" in order to consider certain legal issues and draw attendant conclusions that comport with pro-corporate and other conservative interests. In the past several years, the Roberts Court has overstepped the boundaries of the proper role of the high court by:

- deciding to hear cases about legal issues which do not currently warrant Supreme Court review;
- answering questions not presented to the Court, thereby issuing broad new legal rules without consistency, logic, or fairness to the parties involved; and
- deciding factual issues more properly reviewed and decided by lower courts.

The Roberts Court Takes Cases It Does Not Need to Hear

The Supreme Court generally grants *certiorari*—that is, agrees to hear a case appealed to it—where there is an unsettled question of law or where the circuit courts of appeal have split on the proper interpretation of a given law. In recent years, however, the Court has taken a number of cases outside these parameters, which, in almost all cases, results in rulings favoring corporate interests. In deciding whether or not to grant a cert petition, the Court traditionally has relied heavily on the Solicitor General's position.[3] However, in recent years the Court granted cert in several cases against the wishes of the Solicitor General.

In ***Janus Capital Group v. First Derivative Traders*** (2011),[4] investors sued Janus Capital Group ("JCG") and its subsidiary, Janus Capital Management ("JCM"), after discovering that Janus Investment Fund ("Fund"), a second subsidiary, falsely denied in its prospectus that it engaged in a trading technique called "market timing." When the truth was revealed, stock prices dropped and investors lost money. Fund investors sought to hold JCG and JCM primarily liable for their deception. The Solicitor General argued that the Fourth Circuit Court of Appeals, which allowed the case to go forward, correctly held that the investors could allege that JCM "made" the false and misleading statements despite the fact that JCM and the Fund were legally distinct entities.[5] The brief added: "The Fourth Circuit's decision does not conflict with decisions of this Court or any other court of appeals. Although petitioners characterize JCM as a mere 'service provider' to the Janus Funds, respondent's complaint alleged that JCM was responsible for the Funds' day-to-day management, and that allegation is consistent with standard practice in the mutual-fund industry."[6] Instead, the Supreme Court granted cert, overturned the Fourth Circuit's ruling, and provided a blueprint for companies seeking to deceive investors without being held accountable.[7]

> *The majority…"invented new principles of preemption law out of thin air to justify its dilution of the impossibility standard"*

The Supreme Court held in ***PLIVA v. Mensing*** (2011)[8] that federal regulations preempted state court lawsuits against manufacturers of generic drugs for failure to warn

because federal law requires manufacturers to keep labels identical to those on brand-name equivalents. Plaintiffs sued PLIVA because the company failed to warn consumers that taking one of its products created a risk of a severe and irreversible neurological disorder. The Eighth Circuit Court of Appeals held that PLIVA could have taken other action besides unilaterally changing its label that would have allowed it to adequately warn consumers while still adhering to federal law. Instead, PLIVA did nothing. The Solicitor General stated in his brief: "The court of appeals correctly rejected petitioners' contention that respondent's failure-to-warn claims are categorically preempted by the FDCA, and its decision is consistent with the decision of the only other court of appeals to address the question since *Wyeth* v. *Levine* . . . ."[9] Therefore, the Solicitor General concluded, "the Court should deny review."[10] Nonetheless, the Supreme Court granted cert and shielded generic-drug manufacturers from liability. As Justice Sotomayor wrote, the majority also reached out to create new law when it "invented new principles of preemption law out of thin air to justify its dilution of the impossibility standard."[11]

The Supreme Court has granted *certiorari* for the 2013-2014 term in ***Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.***, which will decide whether plaintiffs can use disparate impact theory under the Fair Housing Act to establish illegal discrimination in housing practices. Disparate impact theory is an increasingly important tool in the fight against "second generation" discrimination, in which defendants do not have an explicit practice of discrimination against protected groups, but nonetheless deny equal treatment to those groups. Under disparate impact theory, plaintiffs can show through empirical evidence that the only reasonable explanation for discriminatory results is unlawful discrimination against a particular group or groups. Federal appellate courts in 11 circuits have held, and the U.S. Department of Housing and Urban Development agrees, that disparate impact claims are valid under the Fair Housing Act. Furthermore, it is likely that upcoming HUD regulations will moot the case, which should have counseled hesitation for the Supreme Court's decision to hear *Mount Holly*. A loss for the civil rights plaintiffs in *Mount Holly* would significantly undermine enforcement of the Fair Housing Act, and potentially other anti-discrimination laws as well. The Solicitor General urged the Court to deny *certiorari* given the lack of a circuit conflict and HUD's imminent regulations, but the Roberts Court nonetheless decided to hear the case.

The Roberts Court Answers Legal Questions Not Squarely Before It

As a general rule, the Court does not decide issues outside the questions presented to it on *certiorari*.[12] However, the Roberts Court has displayed a tendency to answer questions not squarely before it that are unnecessary to decide the case.

In ***Citizens United v. FEC*** (2010),[13] the Court was presented with the narrow question of whether the electioneering communications provisions of the McCain-Feingold Act apply to "pay-per-view" movies made by not-for-profits. But the Court invited reargument on whether to overturn its 1990 and 2003 decisions upholding limits on corporate spending in federal elections, reaching out to address a constitutional question that had not been raised by the parties. Once the question was before it, the Court announced that corporations have the same First Amendment rights as do ordinary Americans to spend money to influence elections.

In his long and stinging dissent, Justice Stevens took the five-justice conservative majority to task for changing the parameters of the case in order to give themselves room to reach a constitutional question and produce the desired result., explaining that "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."[14] This decision has had lasting and devastating effects on public financing laws (following ***Arizona Free Enterprise Club's Freedom Club PAC v. Bennett***)[15] and in its application to state and local elections (following ***American Tradition Partnership v. Bullock***).[16] The Supreme Court has a chance to revisit campaign finance in the 2013-14 term with ***McCutcheon v. FEC***,[17] which will decide the constitutionality of limitations on aggregate financial contributions by individuals.

The Court took similar liberties in the most important case of the 2010-11 term. In ***Wal-Mart v. Dukes***,[18] female employees of Wal-Mart brought a claim against the company for gender discrimination in pay and promotions. The plaintiffs sought class action certification on behalf of all female employees on the basis that the discriminatory results of Wal-Mart's policies affected every region and nearly every store in the Wal-Mart empire. The justices ruled unanimously that the plaintiffs could not sue under a particular subsection of the Federal Rules of Civil Procedure because of the nature of the money damages they sought. However, a class of this type could have been certifiable under a different subsection of Rule 23. Rather than remanding the case to allow the plaintiffs to seek certification under the separate subsection, the conservative and all-male majority rewrote Rule 23 by setting a higher threshold for *all* class-action plaintiffs. In her dissenting opinion, Justice Ginsburg expressed dismay that the majority took up an issue not before it in order to rewrite the law. She wrote that the Court should have remanded the case instead of "disqualify[ying] the class at the starting gate . . . ."[19] The majority overlooked rampant gender discrimination and rewrote the Rules of Civil Procedure to serve the needs of big business over discrimination victims.

The majority … rewrote the Rules of Civil Procedure to serve the needs of big business over discrimination victims

Another example of stealth judicial overreach came in ***NFIB v. Sebelius*** (2012),[20] in which the Supreme Court upheld the Affordable Care Act (also known as Obamacare). Although the individual mandate, a centerpiece of the law, was upheld under the federal government's power to tax and spend, Chief Justice John Roberts wrote that the individual mandate lay outside of Congress's Commerce Clause powers. As a fundamental principle of constitutional judicial interpretation, once a majority of the Court has upheld a law on a sufficient constitutional ground, it does not decide any other grounds upon which the law might not be valid; legal analysis unnecessary to the Court's holding has no precedential power. While on its face, the Roberts Court gave President Obama a victory, the extraneous Commerce Clause section of the Chief Justice's opinion, joined by the four conservative justices who voted to strike down the Affordable Care Act and none of those who voted to uphold it, has the potential to be a Trojan Horse for those looking to erode federal power to regulate. Congressional Commerce Clause power has been the foundation for anti-discrimination, environmental protection, labor, and consumer protection

laws for over a century. Even in upholding the Affordable Care Act, Chief Justice Roberts took an opportunity to undermine an important basis for progressive legislation.

During the 2012-2013 term, a critical piece of human rights law was scaled back in ***Kiobel v. Royal Dutch Petroleum***.[21] In that case, 12 Nigerian nationals sued Royal Dutch Petroleum and two other oil companies under the Alien Tort Statute in alleging that these corporations aided and abetted human rights abuses committed in Nigeria. The Supreme Court originally heard arguments to decide whether corporations have legal immunity under the Alien Tort Statute, but the case was rescheduled to decide the broader question of whether any defendant can be held liable for human rights abuses which occur outside of the U.S., when neither party is an American citizen. In this typical example of overreaching, the conservative wing of the Supreme Court overturned decades of federal law that allowed "foreign cubed" lawsuits under the ATS to be heard in federal courts. For a variety of reasons, victims of human rights abuses in these situations will not have a fair forum in either their home country or the defendant's home country, which are often same as the country where these abuses occurred.

In ***Knox v. SEIU*** (2012),[22] the Court ruled that the First Amendment prohibited a public employees' union from collecting a special assessment from non-union members working in an agency shop unless those non-members were told what portion of the assessment would fund the union's political activities and affirmatively agreed to pay for that portion. This was the first time the Court imposed an opt-in requirement prior to collection of so-called agency fees. Justices Sotomayor and Ginsburg, in concurrence, emphasized that though the challenged assessment here was unconstitutional because of deficiencies in the opt-out procedure the Union had offered, imposing an opt-in rule that plaintiffs had not sought was an unjustifiably broad ruling.

Vance v. Ball State University,[23] decided in the 2012-2013 term, addressed the question of who qualifies as a "supervisor" for the purposes of Title VII of the Civil Rights Act of 1964. The Court previously held that under the Act, an employer is liable for unlawful workplace discrimination if that employer is a "supervisor." On the other hand, if the discrimination that has taken place is at the hands of a co-worker, the company is liable only if the victim complains to his or her employer and the employer is negligent in responding to the complaint. In a 5-4 decision written by Justice Alito, the Court decided that a "supervisor" only refers to a person who has the power to take a "tangible employment action" against the victim. In other words, to be a "supervisor," one would have to be able to "effect a significant change in employment status . . . ."[24] An employee given control over nearly every aspect of a co-worker's day-to-day work environment, including assigning job tasks, might not qualify as a supervisor under this incredibly narrow standard. The Supreme Court, in this decision, adopted a more restrictive standard than either side advocated for, including the employer. In fact, even in deciding for the employer, the Seventh Circuit below had decided the case on narrower grounds than the Supreme Court majority.

Justice Ginsburg vigorously dissented, writing that the majority decision "ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces."[25]

The Roberts Court Lacks Respect for Longstanding Precedent

Another aspect of the Court's tendency to overreach is its penchant for crafting new legal doctrines without basis in and often conflicting with existing precedent. In his dissent in *Horne v. Flores,* Justice Breyer warned of the effects of the Court's made-up laws: "a new set of new rules that are *not* faithful to our cases [ ] will create the dangerous possibility that orders, judgments, and decrees long final or acquiesced in, will be unwarrantedly subject to perpetual challenge, offering defendants unjustifiable opportunities endlessly to relitigate underlying violations with the burden of proof imposed once again upon the plaintiffs."[26]

In ***Ashcroft v. Iqbal*** (2009),[27] the Supreme Court drastically changed the long-standing civil pleading standard, making it much harder for all plaintiffs to have valid claims heard in federal court. Javaid Iqbal was detained by federal officials under restrictive conditions in an indiscriminate sweep of Muslim Americans led by Attorney General John Ashcroft following the 9/11 attacks. Iqbal claimed that his designation as a person of high interest was a violation of his constitutional rights. The Supreme Court's 5-4 decision altered the pleading standards in the Federal Rules of Civil Procedure, raising the bar for all plaintiffs much higher. As far back as 1957, the Supreme Court held in *Conley v. Gibson* that Rule 8 requires only a "short plain statement" of the allegations of a lawsuit, otherwise known as notice pleading.[28] This standard was unquestioned by the Court until 2007, when a majority crafted a narrow exception requiring a higher level of pleading specificity for antitrust litigation in *Bell Atlantic v. Twombly*.[29] However, *Twombly* applied only to a small minority of cases, while *Iqbal* has made it more difficult for all suits to be heard in federal court, and has had a particularly harsh effect on cases alleging illegal discrimination. Although the Rules Enabling Act leaves it to Congress, rather than the Courts, to enact changes to the Federal Rules of Civil Procedure, a five-justice majority engaged in judicial legislation.

The dispute in ***AT&T Mobility v. Concepcion*** (2011)[30] arose after AT&T offered customers a "free" phone but illegally charged a sales tax of up to $30. When customers discovered the scheme and asserted their rights in court, AT&T sought to enforce a contract provision banning class actions and requiring all disputes to be settled in arbitration. Applying California contract law, the Ninth Circuit Court of Appeals invalidated the provision as unconscionable because it allowed AT&T to defraud many consumers out of an amount of money so small that victims were unlikely to arbitrate individually. California law applied the same unconscionability principles to class arbitration prohibitions as it did to class litigation prohibitions. Nonetheless, the 5-4 majority held that California law conflicted with the Federal Arbitration Act because California "disfavored arbitration."[31] Prior to *Concepcion*, the Supreme Court had long accepted state law defenses to compelled arbitration and class bans, including duress and unconscionability.[32]

The conservative majority rewrote the FAA to favor business-friendly arbitration over litigation

In his dissent, Justice Breyer stated that the Court should "think more than twice before invalidating a state law that does just what §2 [of the FAA] requires, namely, puts agreements to arbitrate and agreements to litigate 'upon the same footing.'"[33] The conservative majority rewrote the FAA to favor business-friendly arbitration over litigation, prevent states from protecting consumers, and facilitate an inevitable explosion of class action prohibitions by companies seeking to shield themselves from accountability.

Perhaps the most breathtakingly wide-reaching decision of the 2012-2013 term was ***Shelby County v. Holder***,[34] in which a five-justice conservative majority waved aside half a century of precedent in order to eviscerate the heart of the Voting Rights Act. Not only did Chief Justice Roberts dismissively reject tens of thousands of pages of Congressional findings supporting the coverage formula contained in Section 4 of the nearly-unanimous 2006 reauthorization of the VRA, but his opinion for the conservative wing of the Court was particularly noted for failing to provide any legal or constitutional rationale for its holding.[35] Nothing in the text of the Constitution was cited to justify the Court's novel decision to strike down the cornerstone of American civil rights law. This case could also stand for the Roberts Court's imposition of its own policy preferences in the place of the deference accorded legislative fact-finders traditionally required by Supreme Court precedent. *Shelby County* is a clear example of the current conservative majority's elevation of its own agenda over judicial restraint, the text of the Constitution, and the particular roles of Congress and the Court in making and interpreting the law. The determinations made by Congress, supported by a voluminous legislative record, "were well within Congress' province to make and should elicit this Court's unstinting approbation."[36]

Not only did the Court effectively undo decades of precedent, but Shelby County's appeal should never have made it to the Supreme Court. No party, and none of the justices, questioned that *any* conceivable coverage formula would include Shelby County. In other words, as applied to Shelby County, the Voting Rights Act was clearly constitutional. This is supposed to matter; many laws, such as restrictions on abortion, are upheld by the Supreme Court because as applied to a particular plaintiff, they are not unconstitutional. Additionally, the Voting Rights Act has administrative requirements for challenging the application of the Act to a particular state, county, or other jurisdiction. Shelby County simply ignored these administrative requirements. This, too, is supposed to matter; litigation is regularly dismissed by the Supreme Court and lower federal courts because a plaintiff failed to exhaust the administrative procedures required by state and federal law. Shelby County, simply put, was a bad plaintiff to challenge the Voting Rights Act, but the five-justice majority cast aside these concerns in order to scale back the law.

In ***American Express v. Italian Colors Restaurant*** (2013),[37] the Supreme Court addressed the question of whether an arbitration agreement that precluded class arbitration was enforceable even if the plaintiffs proved that it would be economically infeasible for individuals to pursue arbitration on their own. The case arose out of a dispute between American Express and a group of merchants who accept American Express cards for payment. The merchants formed a class to bring forward a claim that American Express had violated federal antitrust laws by using its monopoly power in the charge card market to extract inflated fees for merchants using its credit cards. However, because the merchants' contract with Amex required that all disputes be resolved by forced arbitration with a class action ban, American Express claimed that the merchants could only use arbitration as an option on an individualized basis, even though it would come at excessive cost to the merchants.

The Supreme Court held, in a 5-3 decision written by Justice Scalia, that the FAA does not permit courts to invalidate arbitration agreements even if the cost of individual arbitration may be a prohibitively high barrier to the vindication of federal rights. According to the Court, nothing in federal law guarantees plaintiffs an affordable procedural path to the vindication of every claim, even though the Supreme Court had consistently reaffirmed the "effective vindication" doctrine. First articulated in the 1985 case *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the effective vindication doctrine empowers courts to invalidate terms of agreements that would frustrate the ability of parties to protect their federal law rights.[38] In other words, a powerful defendant cannot escape its obligations under federal law simply by imposing procedural barriers in "freely bargained" contract terms. Justice Kagan dissented from the majority's opinion, tracing the development of the effective vindication doctrine and stating that the FAA does not preclude exceptions to arbitration agreements when necessary to enforce federal rights. She accused the majority of creating new law, and telling those who will no longer be able to vindicate their federal rights "[t]oo darn bad."[39] In conclusion, Justice Kagan explained that "[t]he Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled."[40]

The Roberts Court Reaches to Settle Questions Best Left to Fact-finders

As a general principle of appellate review, the Supreme Court resolves questions of law and, when it decides that a lower court misapplied the law, it sends a case back to the lower court to review the facts of the case in light of the Supreme Court's decision. The Court's recent eagerness to decide factual issues that are more appropriately remanded to a lower court is another facet of its tendency to overreach.

In ***Ashcroft v. al-Kidd*** (2011),[41] Chief Justice Roberts and Justices Scalia, Thomas and Alito ignored a litany of evidence regarding the troubling tactics federal law enforcement used to obtain a material witness warrant against Abdullah al-Kidd and

needlessly concluded that former Attorney General John Ashcroft obtained it lawfully. Justice Ginsburg, in an opinion concurring in the judgment on narrower grounds, described their assumption as "puzzling." Ginsburg stated that "there is strong cause to question the Court's opening assumption—a valid material-witness warrant—and equally strong reason to conclude that a merits determination was neither necessary nor proper."[42] For example, the affidavit supporting the warrant did not disclose that law enforcement had no interest in obtaining testimony and that al-Kidd cooperated fully with the FBI every time the Bureau sought information. The affidavit also stated incorrectly that al-Kidd possessed a $5,000 first-class, one-way ticket to Saudi Arabia instead of the $1,700 round-trip, coach ticket he actually possessed. The Court's four most conservative justices used the leading opinion to usurp the fact-finding function of the trial court by drawing clear factual conclusions that were both dubious and unnecessary to decide the case.

In ***Genesis HealthCare Corp. v. Symczyk*** (2013),[43] Genesis HealthCare attempted to buy its way out of collective action litigation when sued for violations of the Fair Labor Standards Act. By offering Laura Symzcyk the full monetary value of her individual claim and then later seeking to have collective action certification rejected because their offer was rejected, Genesis HealthCare attempted to escape full responsibility for its federal law violations. At issue was whether a defendant could evade collective actions by offering individual plaintiffs (who often have the strongest cases) a full monetary settlement. The Court ruled 5-4 that Symczcyk had indeed mooted her claim by conceding that a full settlement offer ends a litigant's personal interest in continued litigation, rewriting the lower court's finding that Symczyk had not mooted her claim rather than decide the question presented. Justice Kagan's dissent lambasted the majority for twisting the record to avoid ruling in Symczyk's favor.

Boyer v. Louisiana (2013)[44] arose after Jonathan Edward Boyer was convicted of murder following a seven-year-delay between his original indictment and trial, during which the State of Louisiana held him in jail without bond. Boyer appealed this conviction on numerous grounds. In particular, he asserted that there had been a violation of his statutory and constitutional rights to a speedy trial due to the years of delay. Lower courts found that the prosecution was to blame for the delay, as in the midst of a "funding crisis," Louisiana refused to adequately fund indigent defense. Rather than follow appellate procedure and accept the lower courts' factual findings, the conservative justices, in a 5-4 opinion, rewrote the factual record and dismissed the case as having been improvidently granted. As Justice Sotomayor argued in dissent, the decision to dismiss was "especially regrettable" because "Boyer's case appears to be illustrative of larger, systemic problems in Louisiana."[45] The dissent continued: "Justice Alito's concurrence largely adopts Louisiana's arguments. . . . It is a mistake to second-guess the state court's findings on this point, particularly because Louisiana conceded below that most of the delay resulted from the lack of funding for Boyer's dissent."[46]

The 2013-2014 Term

The Supreme Court's 2012-2013 term has ended, but a look ahead at the cases already granted for the 2013-2014 term reveals a host of cases in which a conservative majority may be poised to revisit long-settled precedent and expand its already radical recent jurisprudence. Cases on issues ranging from campaign finance to anti-discrimination law may present the Roberts Court with further opportunities to rewrite federal law.

In ***Town of Greece v. Galloway***, the Court will take up the question of legislative prayer and whether its existence implicates religious imposition. Starting in 1999, the Town Board began its public meetings with a prayer from a chaplain. Though town officials said that members of all faiths were welcome to give the opening prayer, in practice almost all of the chaplains leading prayers were Christian. Although there is a well-developed Establishment Clause jurisprudence to address such public legislative prayers, the Roberts Court is poised to revisit the issue. It is evident that the Second Circuit correctly decided that the effect of the law blurred the lines between church and state in light of precedent, making the Supreme Court's choice to hear *Galloway* unnecessary.

In ***Mississippi ex rel. Hood v. AU Optronics Corp.***, the Court will take on the question of parens patriae actions and their interaction with the Class Action Fairness Act (CAFA). In these types of lawsuits, a state's attorney general brings an action on behalf of its residents. For example, state attorneys general can use these types of actions to enforce federal antitrust law when it would be prohibitive for citizens to act on their own. The Court will decide whether a state's parens patriae action is removable as a "mass action" under CAFA, when the state is the sole plaintiff, the claims arise under state law, and the state attorney general possesses statutory and common-law authority to assert all claims in the complaint. Parens patriae actions are critical tools for state attorneys general to enforce consumer protection, environmental, and other laws on behalf of state residents, and subjecting these suits to CAFA would be a burden on enforcement of state laws. During the legislative debates accompanying CAFA's enactment, an amendment specifically exempting parens patriae actions was deemed unnecessary, because CAFA's language already did not apply to representative actions brought by state attorneys general. In other words, the plain language of CAFA already exempts parens patriae actions, and almost all lower federal courts, with the exception of the conservative Fifth Circuit Court of Appeals, have rejected civil defendants' efforts to apply CAFA to these suits.

The reach of *Citizens United* will once again be tested before the justices when the Supreme Court hears ***McCutcheon v. Federal Election Commission***. The Court will rule on the constitutionality of federal law limits on aggregate campaign contributions to national party and non-candidate committees. The Republican National Committee, National Republican Senatorial Committee and National Republican Congressional Committee, Senate Minority Leader Mitch McConnell, and the Tea Party Leadership Fund all filed amicus briefs opposing limits on political campaign contributions.

The Supreme Court has consistently differentiated between political *spending* and political *contributions*, prohibiting limits on the former while permitting limits on the latter. The plaintiffs in *McCutcheon* are seeking an end to limits on aggregate direct contributions to political campaigns. *Citizens United* held that limits on donations to ostensibly independent political action committees are unconstitutional, but the ruling did not speak to limits on direct contributions to political candidates or campaigns. An expansion of *Citizens United* could lead to an even greater flood of election spending by entrenched special interests and wealthy political donors.

Finally, in ***National Labor Relations Board v. Noel Canning***, the Court takes on the question of Presidential recess appointments. In this case, the Supreme Court will decide the constitutionality of President Obama's recess appointments made to the National Labor Relations Board during *pro forma* Senate sessions intended to continue Republicans' efforts to block any and all nominees to certain federal agencies. The two nominees in question had long been obstructed by Republicans in the U.S. Senate, who had not allowed up-or-down votes on any nominees to the NLRB or to the Consumer Financial Protection Bureau. This obstruction was not based on an opposition to or concerns about the qualifications of individual nominees, but a broader attempt to undermine enforcement of labor and consumer protection laws.

A three-judge panel of the conservative D.C. Circuit Court of Appeals struck down President Obama's appointments in a ruling that would invalidate recess appointments made by presidents as far back as the mid-1800s. A ruling striking down President Obama's appointments would call into question over 150 years of executive practice and agency action.

Conclusion

At his 2005 confirmation hearings, Chief Justice John Roberts claimed that "[j]udges are like umpires. Umpires don't make the rules; they apply them . . . . And I will remember that it's my job to call balls and strikes and not to pitch or bat."[47] However, in his time as Chief Justice, a five-justice majority of the Supreme Court has rewritten the rules and gone to bat for a conservative agenda that shields the most powerful interests in American society at the expense of the most vulnerable.

The courthouse doors are increasingly shut to those who have been harmed by corporate malfeasance and powerful interests, because the Roberts Court has changed long-standing rules of the game. Even those who are forced into arbitration by fine-print contracts are now deprived of the ability to band together in class arbitration, a practice that had long been protected by state laws.

The performance of the United States Chamber of Commerce—the lobbying arm of corporate America—before the current Supreme Court is a clear example of the obstacles facing non-corporate plaintiffs. The Chamber has an unmatched record in convincing the Court to hear cases, and an almost perfect record in its contested cases before the justices in the 2012-2013 term.[48] The Court has found novel ways to prevent everyday Americans from holding wealthy and powerful defendants accountable for their actions, while making it harder for victims of unjust

discrimination, criminal justice system abuses, environmental degradation, or other wrongs to have their day in court.

At the same time, the Court has ignored settled precedent to undermine, or even completely eviscerate, critical civil and human rights, consumer protection, environmental, and other laws that are contrary to a conservative agenda. Cases are heard when there are no circuit splits on a legal question and when the Solicitor General opposes *certiorari*, while in other cases the majority "change[s] the case to give themselves an opportunity to change the law."[49] Far from being a model of judicial restraint, the current conservative majority of the Supreme Court has been a stark example of unrestrained, result-driven jurisprudence.

Notes

[1] *Considering the Role of Judges Under the Constitution of the United States Before the Senate Judiciary Committee*, 112th Cong. Oct. 5, 2011 *available at* http://www.senate.gov/fplayers/jw57/urlMP4Player.cfm?fn=judiciary100511&st=1170&dur=9752 (statement of Antonin Scalia, Associate Justice, United States Supreme Court) (emphasis added).

[2] *Id.*

[3] *See* Glenn Sugameli, "The Supreme Court's Activist, Pro-Corporate Opinions and Case Selection," ACSBLOG April 27, 2010, *available at* http://www.acslaw.org/node/15974 (emphasis added).

[4] *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011).

[5] http://www.scotusblog.com/wp-content/uploads/2010/05/09-525_amicus-us-cvsg.pdf, at 8.

[6] http://www.scotusblog.com/wp-content/uploads/2010/05/09-525_amicus-us-cvsg.pdf, at 8.

[7] http://www.supremecourt.gov/opinions/10pdf/09-525.pdf, at

[8] *PLIVA v. Mensing,* 131 S.Ct. 2567, 2582 (2011).

[9] http://sblog.s3.amazonaws.com/wp-content/uploads/2010/11/CVSG.Pliva_.pdf, at 10.

[10] *Id.*

[11] PLIVA, 131 S. Ct. 2567, 2582 (2011) (Sotomayor, J., dissenting).

[12] *See* Glover v. United States, 531 U.S. 198, 205 (2001).

[13] *See* Citizens United v. FEC, 558 U.S. 310 (2010).

[14] *Id.* at 397-98 (Stevens, J., dissenting).

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

[16] *See* American Tradition Partnership, Inc. v. Bullock, 132 S. Ct. 2490, 2493 (2012).

[17] *See* McCutcheon v. Federal Elections Commission, 893 F. Supp. 2d 133 (2012).

[18] Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011).

[19] *Id.* at 2562 (Ginsburg, J., dissenting).

[20] *See* National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012).

[21] *See* Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013).

[22] *See* Knox v. SEIU, 132 S. Ct. 2277 (2012).

[23] Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

[24] *Id.* at 2443.

[25] *Id.* at 2455 (Ginsburg, J., dissenting).

[26] *See* Horne v. Flores, 557 U.S. 433, 495-96 (2009) (Breyer, J., dissenting).

[27] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[28] Conley v. Gibson, 355 U.S. 41 (1957).

[29] Bell Atlantic v. Twombly, 550 U.S. 544 (2007).

[30] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[31] *Id.* at 1743.

[32] *Id.* at 1760 (Breyer, J. dissenting).

[33] *Id.* at 1758 (Breyer, J., dissenting).

[34] Shelby County v. Holder, 133 S. Ct. 2612 (2013).

[35] *See, e.g.,* Richard A. Posner, *Supreme Court 2013: The Year in Review, Entry 16: The Voting Rights Act ruling is about the conservative imagination*, SLATE, June 26, 2013, http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html.

[36] *Id.* at 2632-33 (Ginsburg, J., dissenting).

[37] American Express Co. v. Italian Colors Restaurant*,* 133 S. Ct. 2304 (2013).

[38] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[39] *Id.* at 2313 (Kagan, J., dissenting).

[40] *Id.* at 2320 (Kagan, J., dissenting).

[41] *See* Ashcroft v. Al-Kidd, 131 S. Ct. 2074 (2011).

[42] *Id.* at 2088 (Ginsburg, J., dissenting).

[43] *See* Genesis Healthcare Corp. v. Symczyk*,* 133 S. Ct. 1523 (2013).

[44] *See* Boyer v. Louisiana, 133 S. Ct. 1702 (2013).

[45] *Id.* at 1708 (Sotomayor, J., dissenting).

[46] *Id.* (Sotomayor, J., dissenting).

[47] *Roberts: 'My job is to call balls and strikes and not to pitch or bat,"* CNN, Sept. 12, 2005, http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/.

[48] Doug Kendall & Tom Donnelly, *Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Reports Court – An Early Report for 2012-2013*, CONSTITUTIONAL ACCOUNTABILITY CENTER, May 1, 2013, http://theusconstitution.org/text-history/1966/not-so-risky-business-chamber-commerces-quiet-success-roberts-court-early-report.

[49] Citizens United, 558 U.S. at 397-98 (Stevens, J., dissenting).