

AFJ NOMINEE REPORT

# DAMIEN

# M. SCHIFF



*U.S. Court of Federal Claims*

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# INTRODUCTION

Damien Schiff—who has called Justice Anthony Kennedy a “judicial prostitute”<sup>1</sup>—has been nominated by President Trump to be a judge on the U.S. Court of Federal Claims (“CFC”). As this report demonstrates, rarely has there been a nominee who is so sorely unfit to serve as a judge.

Remarkably, attacking the integrity of a Supreme Court justice is just one example of Schiff’s character. He also has repeatedly disparaged environmentalists, LGBTQ advocates, union organizers, and legal scholars, among others.

He unquestionably lacks the temperament to be a fair and unbiased judge anywhere, let alone on the CFC, where he could serve several terms, potentially remaining for decades. The court has been called the “keeper of the nation’s conscience”<sup>2</sup> and “the People’s Court”<sup>3</sup> and hears monetary claims against the U.S. Government deriving from the Constitution, federal statutes, executive regulations, and civilian or military contracts. Moreover, judges on this court have been elevated to federal courts of appeals in the past.

Besides his disqualifying temperament, Schiff himself has emphasized that he would *not* be a neutral jurist. He sees the role of the judge not to apply facts to law, but to advance an agenda. He has called for a “reinvigorated constitutional jurisprudence, emanating from

the judiciary” which “could well be the catalyst to real reform, as opposed to that reform coming from other branches.”<sup>4</sup> He has written that the “the President is hampered by the modern administrative state” and “Congress, as a collective body of 535 persons, cannot act effectively.”<sup>5</sup> But, “the Supreme Court, with just five votes, can overturn precedents upon which many of the unconstitutional excrescences of the New Deal and Great Society eras depend.”<sup>6</sup>

Schiff is a member of The Federalist Society<sup>7</sup> and is a lawyer for the Pacific Legal Foundation (PLF), a group whose goal, PLF’s Vice President of Litigation admitted, is to “get rid of the regulatory state established by F.D.R.’s New Deal.”<sup>8</sup> PLF brings sweeping challenges to fundamental protections for the environment, workers, and victims of discrimination, and Schiff’s practice has been devoted to weakening environmental laws and other legal protections.

Indeed, as this report demonstrates, Schiff holds extremist views regarding property rights and the ability of government to protect the health and safety of the American people. He has dedicated his career to undermining protections for clean air, clean water, and wildlife. He believes that federal land should be sold, including Yosemite National Park to Walt Disney.<sup>9</sup> And, he believes persons who

<sup>4</sup> Damien M. Schiff, *Federalism and the Separation of Powers, Day II*, OMNIA OMNIBUS (May. 18, 2008, 6:59 PM), [https://web.archive.org/web/20081018211427/http://omniaomnibus.typepad.com/80/omnia\\_omnibus/2008/05/index.html](https://web.archive.org/web/20081018211427/http://omniaomnibus.typepad.com/80/omnia_omnibus/2008/05/index.html) (emphasis added).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Sen. Comm. on the Judiciary, 115th Cong., Damien Michael Schiff: Questionnaire for Judicial Nominees 4, <https://www.judiciary.senate.gov/imo/media/doc/Schiff%20SJQ.pdf>.

<sup>8</sup> David Helvarg, *Legal Assault On the Environment*, THE NATION, at 126 (Jan. 30, 1995).

<sup>9</sup> See D.A. Tuma, *Libertarian Counterpoint #1027, 4/7/11*, YOUTUBE, at 13:13 (Jul. 22, 2011), <https://www.youtube.com/watch?v=hyNm8SDBbSc>.

<sup>1</sup> Damien M. Schiff, *Kennedy as the most powerful justice?*, OMNIA OMNIBUS (Jun. 29, 2007, 8:35 AM), [https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com/80/omnia\\_omnibus/2007/06/index.html](https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com/80/omnia_omnibus/2007/06/index.html).

<sup>2</sup> 162 CONG. REC. S5665-66 (Sept. 13, 2016) (statement of Sen. Leahy), <https://www.congress.gov/congressional-record/2016/9/13/senate-section/article/s5665-2?r=66>.

<sup>3</sup> *Id.*

don't use public schools should not have to pay for educating our children, noting "[w]hy should folks have to pay for somebody else's education, or for facilities that they themselves do not use?"<sup>10</sup> He believes corporations should have even more unchecked power. For example, he believes the Occupational Safety and Health Act (OSHA) is unconstitutional.<sup>11</sup>

It is no surprise that a nominee who wrote "that the only useful [sic] metric for gauging success is money"<sup>12</sup> has simultaneously questioned free speech rights for individuals while advocating for greater corporate spending in elections. Namely, he has criticized the "progressivist argument" that "having lots of speech generally is always a good thing,"<sup>13</sup> but declared that what our nation needs is *more* corporate money in our politics saying "corporate speech adds value to a democratic society" and "their speech . . . should be encouraged, not censored."<sup>14</sup>

While extolling the rights of corporations and property owners, Schiff has minimized other essential constitutional protections. For example, he has vigorously opposed civil rights for LGBTQ Americans, including opposing *Lawrence v. Texas*, marriage equality, and even efforts to prevent LGBTQ children from being bullied at school. And, his record on issues involving persons of color and women are just as troubling. He has written that court decisions that upheld racial equity programs were comparable to *Dred Scott*, *Plessy*, and *Korematsu*. His assertion that policies designed to ensure equal opportunities for minorities

and women are comparable to court decisions upholding slavery, Jim Crow, and the internment of Japanese Americans is self-evidently absurd and offensive, as is his belief that the experience of Americans dealing with the Environmental Protection Agency is akin to slavery.<sup>15</sup>

He also has opposed efforts to ensure equal opportunity for women under Title IX, believing its application to high school athletics is unconstitutional. And he is a strong opponent of the right of a woman to decide whether to have an abortion.

The fact of the matter is, on issue after issue, Damien Schiff wants to use his prospective position as a judge to roll back essential protections and prevent local officials, states, and the federal government, including Congress, from addressing issues of public policy and the critical needs of the American people. He is temperamentally unfit to serve as a judge, and his views are dangerous—regularly rejected by even the most conservative federal judges. He simply should not serve as a federal judge.

## CONTEXT OF SCHIFF'S NOMINATION

Even before discussing his offensive writings and views, however, it is critical to put Schiff's nomination into context.

<sup>10</sup> Damien M. Schiff, *Teaching "gayness" in public schools*, OMNIA OMNIBUS (May 17, 2009, 2:32 PM), <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-1487-1488.pdf>.

<sup>11</sup> Damien M. Schiff, *Is OSHA unconstitutional?*, PLF LIBERTY BLOG (Jan. 6, 2016), <http://blog.pacificlegal.org/is-osh-unconstitutional/>.

<sup>12</sup> Damien M. Schiff, *The Measure of Success?*, OMNIA OMNIBUS (Oct. 15, 2008, 2:28 PM), <https://web.archive.org/web/20081017153255/http://omniaomnibus.typepad.com/80/>.

<sup>13</sup> See Gale Morgan, *Libertarian Counterpoint 1296 5-19-16*, YouTube, at 16:03-16:15 (May 20, 2016), <https://www.youtube.com/watch?v=oUee6bxEU>.

<sup>14</sup> Damien M. Schiff, *Fighting for political speech in the Supreme Court*, OMNIA OMNIBUS (Aug. 3, 2009), <http://blog.pacificlegal.org/fighting-for-political-speech-in-the-supreme-court/>.

<sup>15</sup> *Lou Dobbs Tonight* (Fox Business Network LLC Nov. 24, 2011), transcript available at <http://www.afj.org/wp-content/uploads/2017/05/Schiff-LouDobbs.pdf> (interviewing Damien Schiff about the role of the Environmental Protection Agency).

Schiff is nominated for a position that became vacant over three years ago, when Judge George W. Miller vacated the seat.<sup>16</sup> In fact, back on May 21, 2014, President Obama nominated Jeri Kaylene Somers to fill the vacancy.<sup>17</sup> Ms. Somers had served in the Air Force, retiring with the rank of lieutenant colonel; had spent two decades as a judge advocate general and then as a military judge in the Air Force and District of Columbia’s Air National Guard; and had served as a judge with the U.S. Civilian Board of Contract Appeals.<sup>18</sup>

On July 17, 2014, the Senate Judiciary Committee unanimously reported Ms. Somers’s nomination to the full Senate.<sup>19</sup> There was no opposition to Ms. Somers, and as Senator Leahy noted, “I have heard no objections to [her] qualifications.”<sup>20</sup> Yet Ms. Somers did not receive a vote before the 113th Congress adjourned. President Obama renominated her, and the Senate Judiciary Committee, on February 26, 2015, again unanimously reported Ms. Somers’s nomination to the full Senate.<sup>21</sup> Yet again, despite her sterling credentials and lack of opposition to her record, she did not receive a full Senate vote.

Indeed, since Ms. Somers was first unanimously reported to the full Senate in 2014, Senator Tom Cotton had blocked Ms. Somers’s nomination (along with other Obama-nominated judges to the CFC).<sup>22</sup> He has said the court “doesn’t need new judges. We should keep in mind that the

number of active judges authorized for the Court of Federal Claims by statute [sic], 16, isn’t a minimum number, it’s a maximum.”<sup>23</sup>

It is only because Jeri Kaylene Somers was refused a full Senate vote—despite being unanimously approved twice by the Senate Judiciary Committee—that President Trump was able to nominate Schiff.

The difference between Ms. Somers and Schiff could not be starker. Schiff—only 37 years old—was not even in middle school when Ms. Somers was serving in the military. He has just one year of government experience (as a law clerk), no apparent experience trying a case, and *no* judicial experience.<sup>24</sup>

In fact, Schiff’s sole “qualification” for the job seems to be his work as a lawyer for PLF trying to weaken environmental laws and other legal protections. Schiff, who graduated from Georgetown University and the University of San Diego School of Law, has spent nearly his entire career at PLF, having joined the organization in 2005 after clerking for Judge Victor J. Wolski of the CFC.<sup>25</sup> Now a Senior Attorney at the organization, Schiff has litigated several notable anti-environmental law and land-use cases in state and federal courts.<sup>26</sup> Most notably, he was the lead attorney in *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012), in which the Supreme Court held that landowners may obtain judicial review of compliance orders

16 See *Current Judicial Vacancies*, UNITED STATES COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last visited June 8, 2017).

17 Press Release, The White House, President Obama Nominates Three to Serve on the U.S. Court of Federal Claims (May 21, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/05/21/president-obama-nominates-three-serve-us-court-federal-claims>.

18 *Id.*

19 Senate Judiciary Committee, Results of Executive Business Meeting (July 17, 2014), <https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%20-%202007-17-14.pdf>.

20 CONG. REC., *supra* note 2.

21 Senate Judiciary Committee, Results of Executive Business Meeting (February 26, 2015), <https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%202-26-15%20Update.pdf>.

22 Jordain Carney, *Cotton blocks push to confirm Federal Claims judges*, THE HILL (Sept. 13, 2016), <http://origin-ny1.thehill.com/blogs/floor-action/senate/295805-cotton-blocks-push-to-confirm-federal-claims-judges>.

23 Jordain Carney, *Cotton blocks Senate from approving Federal Claims judges*, THE HILL (Jul. 14, 2015), <http://thehill.com/blogs/ballot-box/247934-cotton-blocks-senate-from-approving-federal-claims-judges>.

24 Damien M. Schiff, PACIFIC LEGAL FOUNDATION, <https://www.pacificlegal.org/staff/Schiff-Damien>.

25 *Id.*; In January 2015, Schiff joined Alston & Bird LLP for ten months as a Counsel in its Environment, Land Use & Natural Resources Group. See Sen. Comm. on the Judiciary, 115th Cong., Damien Michael Schiff, Questionnaire for Judicial Nominees 1-2, <https://www.judiciary.senate.gov/imo/media/doc/Schiff%20SJQ.pdf>.

26 See Schiff, PACIFIC LEGAL FOUNDATION, *supra* note 24.

issued by the EPA under the Clean Water Act.

# JUDICIAL TEMPERAMENT

Schiff's writings make clear that he lacks the judicial temperament to be a fair and unbiased judge.

Stunningly, he has called Justice Kennedy, "a judicial prostitute, 'selling' his vote as it were to four other Justices in exchange for the high that comes from aggrandizement of power and influence, and the blandishments of the fawning media and legal academy."<sup>27</sup> Schiff wrote: "[d]oesn't Justice Kennedy's toying or proclivity to concurrence-writing simply reveal a chameleon mind, without mooring in the rule of law or other principles extrinsic to its own fancy."<sup>28</sup>

It is not just Justice Kennedy whose integrity Schiff has disparaged. Indeed, it is not enough for him to have policy disagreements with government officials or environmental advocates or with legal scholars, he must personally attack them. He has said the EPA "treat[s] American citizens as if there [sic] were not American citizens, as if they were just slaves."<sup>29</sup> He has said that environmentalists "push an agenda that has more to do with stifling productive human activity than fostering ecological balance"<sup>30</sup> and that lawsuits to enforce laws like the Endangered Species Act have more to do with "enrich[ing]

environmental activist groups than benefit[ing] the environment."<sup>31</sup> He even blamed environmentalists for the drought in California: "[R]adical environmental regulations aren't the only cause of our drought, but they're a major contributor."<sup>32</sup> And he has emphasized that "the environmentalists can be defeated. It's all a question as to how you package it for the unions, how you package it for the social security recipients, AARP and what have you. They can defeat environmentalists; there is no question about that."<sup>33</sup>

In April 2017, he went so far as to claim, in an article entitled *We can pursue Earth Day's goals without endangering freedom*, that Earth Day was "a threat to individual liberty and property rights."<sup>34</sup> This statement should certainly come as a surprise to Senate Judiciary Committee Chairman Chuck Grassley, who has praised Earth Day for "educat[ing] and motivat[ing] people to leave behind a better, cleaner place for our children and our children's children."<sup>35</sup>

Schiff also has disparaged the "left-legal establishment," saying that its "decadence and intellectual atrophy . . . promises to undermine American constitutionalism."<sup>36</sup>

No litigant who appears before Schiff would ever believe he is anything

<sup>31</sup> Damien Schiff & Julie MacDonald, *The Endangered Species Act Turns 40 – Hold the Applause*, WALL ST. J. (Dec. 27, 2013), <https://www.wsj.com/articles/schiff-and-macdonald-the-endangered-species-act-turns-408212hold-the-applause-1388186442>.

<sup>32</sup> Brandon Middleton & Damien Schiff, *The greens are all wet*, SAN DIEGO UNION-TRIBUNE (Feb. 5, 2010), <http://www.sandiegouniontribune.com/sdut-greens-are-all-wet-2010feb05-story.html>.

<sup>33</sup> Tuma, *Libertarian Counterpoint #1027*, *supra* note 9, at 13:00-14:21.

<sup>34</sup> Damien Schiff, *We can pursue Earth Day's goals without endangering freedom*, AM. THINKER (Apr. 22, 2017), <http://www.americanthinker.com/articles/2017/04/we-can-pursue-earth-days-goals-without-endangering-the-environment-for-freedom.html>.

<sup>35</sup> Press Release, Senator Chuck Grassley, *Everyday is Earth Day for Farmers* (Apr. 28, 2003), <https://www.grassley.senate.gov/news/news-releases/everyday-earth-day-farmers>.

<sup>36</sup> Damien M. Schiff, *Ackerman and the Constitutional Canon*, OMNIA OMNIBUS (Jul. 17, 2007, 8:35 AM), [https://web.archive.org/web/20080610122338/http://omniaomnibus.typepad.com:80/omnia\\_omnia/2007/07/index.html](https://web.archive.org/web/20080610122338/http://omniaomnibus.typepad.com:80/omnia_omnia/2007/07/index.html).

<sup>27</sup> Schiff, *Kennedy as the most powerful justice?*, *supra* note 1.

<sup>28</sup> *Id.*

<sup>29</sup> *Lou Dobbs Tonight*, *supra* note 15.

<sup>30</sup> Damien Schiff, *Putting good sense on the endangered list*, STAR TRIB. (Sept. 28, 2009), [http://trib.com/news/editorial/forum/putting-good-sense-on-the-endangered-list/article\\_d158dfdc-2736-584d-872e-3ba13bda5fd.html](http://trib.com/news/editorial/forum/putting-good-sense-on-the-endangered-list/article_d158dfdc-2736-584d-872e-3ba13bda5fd.html).

but an extreme advocate, rather than a dispassionate jurist. Were an advocate for a better environment to appear before a Judge Schiff—who has openly discussed “defeat[ing] environmentalists”<sup>37</sup>—is there anyone who would truly believe the advocate would receive a fair hearing and justice?

# LEGAL RECORD

## I. THE ENVIRONMENT

The bulk of Schiff’s career has been devoted to undermining environmental protections.

Significantly, his legal views cannot be separated from his attacks on the integrity of environmental activists: He has said that environmentalists “push an agenda that has more to do with stifling productive human activity than fostering ecological balance”<sup>38</sup> and that lawsuits to enforce laws like the Endangered Species Act have more to do with “enrich[ing] environmental activist groups than benefit[ing] the environment.”<sup>39</sup> In fact, Schiff has called the California Coastal Commission “one of the leading abusers of private property rights in [California].”<sup>40</sup> Schiff even said that some environmentalists employ an “anti-human ideology that, unfortunately, to some extent the courts have gone along with.”<sup>41</sup> His characterization of California environmental regulations as “draconian, anti-development, anti-human regulations” is characteristic of the broader way he views government policy that affects property rights.<sup>42</sup>

37 Tuma, *Libertarian Counterpoint #1027*, *supra* note 9.

38 Schiff, *Putting good sense on the endangered list*, *supra* note 30.

39 Schiff & MacDonald, *supra* note 31.

40 Pacific Legal, *Coastal Commission Tries to Dash Another American Dream*, YOUTUBE (Sept. 29, 2009), <https://www.youtube.com/watch?v=C0mV5GXLYCY>.

41 Pacific Legal Foundation, *PLF on The Trevor Carey Show 1-7-16*, SOUNDCLLOUD, at 6:05–6:27 (Jan. 7, 2016), <https://soundcloud.com/pacific-legal-foundation/plf-on-the-trevor-carey-show-1-7-16>.

42 See D.A. Tuma, *Libertarian Counterpoint #0941*, 9/16/09, YOUTUBE, at 11:10 (FEB. 17, 2012), <https://www.youtube.com/watch?v=hyNm8SDBsc>.

According to his Senate questionnaire, just three days after reaching out to the White House Counsel’s Office to express his interest in serving on the CFC, Schiff wrote an article titled *Environmental Law – A good place to start for Trump to Make America Great Again*.<sup>43</sup> In it, he called for President Trump to:

[U]se environmental and other regulatory reforms to reduce the role of government in Americans’ lives and get the economy moving again. There could be no better place to start the pruning than with the webs of federal ‘green’ regulations – layers of redundant, unjustified, draconian, or counterproductive environmental mandates and restrictions that harm the economy often without actually helping the environment.<sup>44</sup>

He added that the Clean Water Act, Clean Air Act, and Endangered Species Act (ESA) “are enforced not for the public’s benefit but to stop productive activity that activists or bureaucrats dislike.”<sup>45</sup>

In fact, Schiff seems to have a particular hatred of efforts to protect endangered species.<sup>46</sup> He has said that the Endangered Species Act has “been perverted” into “a threat to individual liberty and property rights.”<sup>47</sup> Schiff also has said that the ESA is

43 See Sen. Comm. on the Judiciary, 115th Cong., Damien Michael Schiff: Questionnaire for Judicial Nominees 72, <https://www.judiciary.senate.gov/imo/media/doc/Schiff%20SJQ.pdf>; Damien Schiff, *Environmental Law – A Good Place To Start For Trump To Make America Great Again*, INV’R’S BUS. DAILY (Feb. 9, 2017), <http://www.investors.com/politics/commentary/environmental-law-a-good-target-for-trumps-efforts-to-make-america-great-again/>.

44 Schiff, *Environmental Law*, *supra* note 43.

45 *Id.*

46 Damien Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 U.C. DAVIS ENVTL. L. AND POL’Y J. 105 (2014), available at <http://environs.law.ucdavis.edu/volumes/37/2/Articles/Schiff.pdf>.

47 Schiff, *We can pursue Earth Day’s goals without endangering freedom*, *supra* note 34.

“one of the nation’s most potent threats to our constitutionally protected property rights” and that “[t]he idea that we need to preserve every species, whatever the cost, is unjustified.”<sup>48</sup> Whether orcas,<sup>49</sup> polar bears,<sup>50</sup> gray wolves,<sup>51</sup> dusky gopher frogs,<sup>52</sup> seals,<sup>53</sup> beetles,<sup>54</sup> bald eagles,<sup>55</sup> salmon,<sup>56</sup> kangaroo rats,<sup>57</sup> Preble’s meadow jumping mice,<sup>58</sup> gnatcatchers,<sup>59</sup> sucker fish,<sup>60</sup> butterflies,<sup>61</sup> splittail fish,<sup>62</sup> California towhees,<sup>63</sup> sea lions,<sup>64</sup> flying squirrels,<sup>65</sup> bull trout,<sup>66</sup> snowy plovers,<sup>67</sup> delta smelt,<sup>68</sup> pacific fishers,<sup>69</sup> wood storks,<sup>70</sup> marbled murrelets,<sup>71</sup> or manatees,<sup>72</sup> to name just a few, he has led

48 Phil Taylor, *Landmark law in throes of midlife crisis*, GREENWIRE, (Dec. 20, 2013), <https://www.eenews.net/greenwire/stories/1059992207>.

49 Damien M. Schiff & Daniel A. Himebaugh, *Orcas don’t belong on the endangered species list*, OREGONIAN (Aug. 17, 2012), [http://www.oregonlive.com/opinion/index.ssf/2012/08/orcas\\_dont\\_belong\\_on\\_the\\_endan.html](http://www.oregonlive.com/opinion/index.ssf/2012/08/orcas_dont_belong_on_the_endan.html).

50 Damien Schiff, *Opinion, ‘Endangered’ Polar Bear Is Trotted Out As the Extremists’ Latest Trojan Horse*, PACIFIC LEGAL FOUNDATION, (Feb. 25, 2008), <https://www.pacificlegal.org/page.aspx?pid=3873>.

51 Kenneth Artz, *Californians Sue to Remove Gray Wolf from State’s Endangered Species List*, HEARTLAND INSTITUTE (Feb. 22, 2017), <https://www.heartland.org/news-opinion/news/californians-sue-to-remove-gray-wolf-from-states-endangered-species-list>.

52 Damien M. Schiff, *Loss in gopher frog critical habitat challenge*, PLF LIBERTY BLOG (Jun. 30, 2016), <http://blog.pacificlegal.org/loss-in-gopher-frog-critical-habitat-challenge/>.

53 Damien M. Schiff, *Global warming and bearded seals*, PLF LIBERTY BLOG (Oct. 26, 2016), <http://blog.pacificlegal.org/global-warming-and-bearded-seals/>.

54 Damien M. Schiff, *Service proposes to delist Valley elderberry longhorn beetle*, PLF LIBERTY BLOG (Oct. 1, 2012), <http://blog.pacificlegal.org/service-proposes-to-delist-valley-elderberry-longhorn-beetle/>.

55 Press Release, Pacific Legal Foundation, *PLF Files Lawsuit To Compel Government To Act On Its Promise To Remove The Bald Eagle From Endangered Species List* (Nov. 1, 2005), copy available at Sen. Comm. on the Judiciary, 115th Cong., Damien Michael Schiff: Questionnaire for Judicial Nominees—Public Appendix 12(e).

56 *Cal. Forestry Assn. v. Cal. Fish & Game Comm’n*, 156 Cal. App. 4th 1535 (2007).

57 Damien M. Schiff, *Victory in the kangaroo rat case*, PLF LIBERTY BLOG (May 10, 2010), <http://blog.pacificlegal.org/victory-in-the-kangaroo-rat-case/>.

58 Damien M. Schiff, *PLF takes first move in effort to delist the Preble’s meadow jumping mouse*, PLF LIBERTY BLOG (Feb 7, 2010), <http://blog.pacificlegal.org/plf-takes-first-move-effort-delist-prebles-meadow-jumping-mouse/>.

59 Damien M. Schiff, *Petition to delist coastal California gnatcatcher filed*, PLF LIBERTY BLOG (Jun. 11, 2014), <http://blog.pacificlegal.org/petition-delist-coastal-california-gnatcatcher-filed/>.

60 Damien M. Schiff, *A “bear” of a decision for water users*, PLF LIBERTY BLOG (Nov. 15, 2014), <http://blog.pacificlegal.org/a-bear-of-a-decision-for-water-users/>.

61 Damien M. Schiff, *PLF ESA success*, PLF LIBERTY BLOG (Jun. 17, 2009), <http://blog.pacificlegal.org/plf-esa-success/>.

62 Damien M. Schiff, *The Sacramento splittail: the new Delta smelt?*, PLF LIBERTY BLOG (Oct. 7, 2010), <http://blog.pacificlegal.org/the-sacramento-splittail-the-new-delta-smelt/>.

63 Damien M. Schiff, *A delisting roll?*, PLF LIBERTY BLOG (Nov. 7, 2013), <http://blog.pacificlegal.org/a-delisting-roll/>.

64 *Id.*

65 Damien M. Schiff, *Global warming and the flying squirrel*, PLF LIBERTY BLOG (Aug. 30, 2010), <http://blog.pacificlegal.org/global-warming-and-the-flying-squirrel/>.

66 Damien M. Schiff, *Fish and Wildlife Service proposes dramatically to expand bull trout critical habitat*, PLF LIBERTY BLOG (Jan. 20, 2010), <https://blog.pacificlegal.org/fish-and-wildlife-service-proposes-dramatically-to-expand-bull-trout-critical-habitat/>.

67 Damien M. Schiff, *More critical habitat proposed for the snowy plover*, PLF LIBERTY BLOG (Apr. 26, 2011), <http://blog.pacificlegal.org/more-critical-habitat-proposed-for-the-snowy-plover/>.

68 Damien M. Schiff, *Delta smelt breaking news: government wins partial remand extension*, PLF LIBERTY BLOG (Apr. 9, 2013), <http://blog.pacificlegal.org/delta-smelt-breaking-news-government-wins-partial-remand-extension/>.

69 Damien M. Schiff, *Environmental protection in conflict*, PLF LIBERTY BLOG (Mar. 15, 2013), <http://blog.pacificlegal.org/environmental-protection-in-conflict/>.

70 Damien M. Schiff, *PLF files petition to remove wood stork from “endangered” species list*, PLF LIBERTY BLOG (May 29, 2009), <https://blog.pacificlegal.org/plf-files-petition-to-remove-wood-stork-from-endangered-species-list/>.

71 Damien M. Schiff, *The costs of endangered species regulation*, PLF LIBERTY BLOG (Nov. 14, 2013), <https://blog.pacificlegal.org/the-costs-of-endangered-species-regulation/>.

72 Pacific Legal Foundation, *Manatee Victory*, YOUTUBE (Jan. 11, 2016), <https://www.youtube.com/watch?v=4Mwq4rZy1ag>.

efforts against protecting wildlife. In fact, the only time he has apparently supported protecting wildlife occurred when he was cynically expressing concern about birds and desert tortoises in an effort to try to block wind and solar energy expansion.<sup>73</sup>

Schiff’s extreme legal views are illustrated by his passion to have the Endangered Species Act declared unconstitutional. He concedes this position is contrary to every court of appeals that has addressed the issue.<sup>74</sup> As **J. Harvey Wilkinson, a Reagan appointee**, said in *Gibbs v. Babbit*, 214 F.3d 483,469 (4th Cir. 2000), “[i]t is within the power of Congress to regulate the coexistence of commercial activity and endangered wildlife in our nation and to manage the interdependence of endangered animals and plants in large ecosystems.” Just last month, a panel of the Tenth Circuit unanimously rejected Schiff’s position in an opinion written by **Judge Jerome Holmes, a George W. Bush nominee**. See *People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017).

Also, in *Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983 (9th Cir. 2010), Schiff challenged the Fish and Wildlife Service’s designation of approximately 850,000 acres of land as critical habitat for 15 endangered or threatened species under the Endangered Species Act. Among other claims, he argued that the Fish and Wildlife Service failed adequately to account for the “cumulative” economic impact of the

73 Letter from Damien Schiff, Principal Attorney, Pacific Legal Foundation, to Environmental Protection Agency, at 4 (Jul. 17, 2014), available at <http://blog.pacificlegal.org/wp/wp-content/uploads/2014/07/FINAL-signed-comment-letter-July-17-2014.pdf>.

74 Damien Schiff, *The Endangered Species Act and the Commerce Clause: A Tangential Relationship*, in 2015 Mineral Law Series, Endangered Species Act (2015), copy available at Sen. Comm. on the Judiciary, 115th Cong., Damien Michael Schiff: Questionnaire for Judicial Nominees—Public Appendix 12(a).

designation, including factoring in those costs that will “exist regardless of the decision made.”<sup>75</sup> In a unanimous decision joined by **George H.W. Bush appointee Judge Pamela Rymer**, the Ninth Circuit rejected his arguments.

Likewise, in *People v. Rinehart*, the California Supreme Court unanimously ruled against his efforts to block environmental regulations. [377 P.3d 818 \(Cal. 2016\)](#). There, the state of California, “in pursuit of protecting fish habitats and the quality of the state’s waterways, temporarily ban[ne]d a particular method of gold mining pending adoption of a suitable regulations.” *Id.* at 820. Schiff argued that it was the only practicable method of mining and that federal law, which promoted mining, preempted California’s law. As the court unanimously held, “the federal laws Rinehart relies upon reflect a congressional intent to afford prospectors secure possession of, and in some instances title to, the places they mine. But while Congress sought to protect miners’ real property interests, it did not go further and guarantee to them a right to mine immunized from exercises of the states’ police powers.” *Id.*

Moreover, Schiff has advocated selling all national parks. He once said “they should sell Yosemite,” and when it was suggested that the government should “turn it over to Walt Disney,” Schiff replied “yeah why not, they’d do a damn better job.”<sup>76</sup>

Finally, Schiff’s position on climate change is noteworthy. He has criticized “environmental groups” that “contend the temperature increases are in part a function of man-made changes to the environment – most important, the addition of greenhouse gases

to the atmosphere.”<sup>77</sup> He added that climate change was “perhaps the most contentious scientific issue of our time.”<sup>78</sup> And he has said that “climate change should not be used as a pretext to foist bigger government on, and to undercut the property rights of, the American people. Yet, these ulterior motives seem precisely the point” of the Obama Administration.<sup>79</sup> “Climate change is not the only environmental issue subject to pretextual misuse, but it may well be the most prominent.”<sup>80</sup>

In this context, Schiff criticized state government efforts to investigate Exxon for allegedly misleading consumers about climate change.<sup>81</sup>

## II. PRIVATE PROPERTY, LAND USE REGULATIONS, AND TAKINGS

Schiff bemoans that “our property rights have been left largely to the whims of the democratic process and bureaucratic regulators....such that the landowner may no longer exercise dominion over his property without first petitioning the permission from the authorities.”<sup>82</sup>

He added, “[t]he only effective way to protect the right to use and enjoy one’s own private property is to restore substantive constitutional protections for property rights.”<sup>83</sup> And, “[i]f we want a

<sup>77</sup> Schiff, ‘Endangered’ Polar Bear, *supra* note 50.

<sup>78</sup> *Id.*

<sup>79</sup> Damien M. Schiff, *A pretextual climate change report?*, PLF LIBERTY BLOG (May 6, 2014), <http://blog.pacificlegal.org/pretextual-climate-change-report/>.

<sup>80</sup> *Id.*

<sup>81</sup> Damien Schiff, *Government turns up the heat on the First Amendment*, THE HILL: CONGRESS BLOG (Apr. 13, 2016 2:01 PM), <http://thehill.com/blogs/congress-blog/judicial/276081-government-turns-up-the-heat-on-the-first-amendment>.

<sup>82</sup> Damien M. Schiff & Luke A. Wake, *Leveling The Playing Field In David V. Goliath: Remedies To Agency Overreach*, 17 TEX. REV. L. & POL. 97, 122-23 (2013), available at <https://www.troj.org/blog/2016/9/13/leveling-the-playing-field-in-david-v-goliath-remedies-to-agency-overreach>.

<sup>83</sup> *Id.* at 123.

<sup>75</sup> Brief for Petitioners’ Reply at 5, *Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983 (9th Cir. 2010) (No. 10-605), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/01/Brief-01-19-11-172921.pdf>.

<sup>76</sup> Tuma, *Libertarian Counterpoint #1027*, *supra* note 9.

truly free society, we must institute substantive reforms to protect property rights.”<sup>84</sup>

The consequences of Schiff’s views, discussed below, would be stunning, and cannot be overstated.

***Schiff would return the nation to the Lochner era***

Schiff wrote that “[t]he Founding Fathers believed that private property rights—including the freedom of contract—were the foundation of a free society, the cornerstone of liberty’s edifice.”<sup>85</sup> However, he believes, “the Founders’ concept of natural rights has been largely dismissed, and the constitutional guarantees protecting private property rights have been dismantled” as “inexpedient obstructions to the progressive movement’s idea of public progress.”<sup>86</sup>

Based on this belief, Schiff has advocated for severe restrictions on the long-recognized authority of states to protect health and safety. And he would impose these restrictions on “police powers,” not based on any provision of the Constitution or other legal enactments, but based on amorphous “natural law”:

I submit that the limits of the “police power” are nothing more or less than the natural law, or the divine law, or natural rights—however one wishes to denominate it—which no person, and no legislature, and no sovereign, can ever change or efface from the hearts of men.<sup>87</sup>

**As Supreme Court Justice Oliver Wendell**

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 121.

<sup>86</sup> *Id.* at 122.

<sup>87</sup> Damien Schiff, Principal Attorney, Pacific Legal Foundation, Property Rights and Environmental Regulation: Can the Two be Reconciled?, Address to the Members of the Birnam Wood Country Club (Nov. 6, 2006), copy available at Sen. Comm. on the Judiciary, 115th Cong., Damien Michael Schiff: Questionnaire for Judicial Nominees—Public Appendix 12(d).

Holmes made clear, judges who adhere to “natural law” principles, “seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”<sup>88</sup> Moreover, during Justice Clarence Thomas’s confirmation hearing, then-Senator Joe Biden warned of the risks of adopting Schiff’s radical natural law philosophy: “Today, natural law proponents of what they term new economic rights and new property rights have called into question many of the most important laws enacted in this century: Laws protecting the environment, our water and our air; laws regulating child care and senior citizen facilities; and even called into question the constitutionality of the Social Security system.”<sup>89</sup>

The Supreme Court has repeatedly made clear that “[t]he states traditionally have had great latitude under their police powers to legislate as ‘to the protection of lives, limbs, health, comfort, and quiet of all persons.’” *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985); see also, e.g., *Jacobson v. Mass.*, 197 U.S. 11, 24-25 (1905) (“Although this court has refrained from any attempt to define the limits of [a state’s police power] . . . the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety.”).

Yet Schiff, based on his own particular view of “natural law,” would take it upon himself

<sup>88</sup> Quote reproduced in Anthony Murray, *When Judges Believe in ‘Natural Law’*, THE ATLANTIC (Jan. 27, 2014), <https://www.theatlantic.com/national/archive/2014/01/when-judges-believe-in-natural-law/283311/>.

<sup>89</sup> *The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing before the Senate Judiciary Committee*, 102nd Cong. 3 (1991) (Opening Statement of Chairman Joseph R. Biden, Jr.), available at <https://www.loc.gov/law/find/nominations/thomas/hearing-pt1.pdf>.

to decide which health and safety measures are appropriate or not. In fact, his emphasis on “natural law” and “freedom of contract” as the “cornerstone of liberty’s edifice” are nothing more than a call to return to the *Lochner* era, and federal judges invalidating health and safety measures. [\*Lochner v. United States\*, 198 U.S. 45, 57 \(1905\)](#) (noting, in language no different than that used by Schiff, “[i]t is a question of which of two powers or rights shall prevail -- the power of the State to legislate or the right of the individual to liberty of person and freedom of contract”).

None other than **Chief Justice John Roberts** has explained how radical views like Schiff’s are:

There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). We should not seek to reclaim that ground for judicial supremacy.

[\*United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.\*, 550 U.S. 330, 347 \(2007\)](#); see also *id.* at 355 (**Thomas, J., concurring**) (noting “[i]n *Lochner* the Court located a ‘right of free contract’ in a constitutional provision that says nothing of the sort”).

***Schiff would empower federal judges to second-guess state and local land use decisions***

In noting that “the Founders’ concept of natural rights has been largely dismissed,”<sup>90</sup> Schiff explicitly references *Euclid v. Ambler Realty Company* as an example of a case that “dismantled” property rights. [272 U.S. 365 \(1926\)](#). *Euclid* is the landmark 1926 Supreme Court decision in which the constitutionality of zoning laws was upheld as a proper exercise of a local government’s police power. The Court stated, “it must be said before the ordinance can be declared unconstitutional that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Id.* at 395.

In other words, Schiff wants to reverse a 90-year old landmark Supreme Court decision and allow federal courts to invalidate responsible land use regulations at the state and local level, including zoning laws.

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, **Justice Antonin Scalia**, joined by **Justice Clarence Thomas**, had this to say about those, like Schiff, who seek to expand “liberty” beyond its traditional meaning in a case involving land use regulation:

Freedom from delay in receiving a building permit is not among these “fundamental liberty interests.” To the contrary, the Takings Clause allows government *confiscation* of private property so long as it is taken for a public use and just compensation is paid; mere *regulation* of land use need not be “narrowly tailored” to

90 Schiff & Wake, *supra* note 82, at 122. [https://texashistory.unt.edu/ark:/67531/metapth638989/m2/1/high\\_res\\_d/UNT-0023-0010.pdf](https://texashistory.unt.edu/ark:/67531/metapth638989/m2/1/high_res_d/UNT-0023-0010.pdf).

effectuate a “compelling state interest.”

[538 U.S. 188, 200 \(2003\)](#) (Scalia, J., concurring).

***Schiff would greatly expand the Takings Clause well beyond current doctrine***

Former Reagan Solicitor General Charles Fried described efforts, like Schiff’s, to use the Takings Clause as a way to invalidate scores of government actions as

[a] specific, aggressive, and, it seemed to me, quite radical project, to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right . . . . [T]here would be, to say the least, much less regulation.<sup>91</sup>

Two cases illustrate how, as a judge, Schiff would indeed expand current “takings” doctrine to second-guess local officials and to invalidate efforts by governments to address the needs and rights of its citizens. And it is clear that he wants to implement his views on the CFC, a court that hears a disproportionate number of takings claims.<sup>92</sup>

First, Schiff opposed efforts to address affordable housing in California. In 2010, in response to a local and regional affordable housing shortage, the City of San Jose passed a housing ordinance requiring that at least 15% of new residential development projects

<sup>91</sup> Quote reproduced in Glenn P. Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 FORDHAM ENVTL. L. REV. 521, 529 (2011), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1454&context=elr>.

<sup>92</sup> Fed. Cl., STATISTICAL REPORT FOR THE FISCAL YEAR OCTOBER 1, 2015-SEPTEMBER 30, 2016 (2016), <http://www.uscfc.uscourts.gov/sites/default/files/Statistical%20Report%20for%20FY2016.pdf>.

of 20 or more units be sold at “affordable prices.”<sup>93</sup> Schiff, on behalf of the California Building Industry Association, challenged the ordinance, claiming that it was an unconstitutional exaction under the Takings Clauses of the California and U.S. Constitutions. Schiff called the ordinance “unfair” and “illegal.”<sup>94</sup>

The California Supreme Court unanimously upheld the regulation. *See Cal. Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974 (Cal. 2015). The court emphasized that such a restriction “is an example of a municipality’s permissible regulation of the use of land under its broad police power.” *Id.* at 988. The court noted that the purpose was to combat the overall lack of affordable housing and “to enhance the public welfare by promoting the use of available land for the development of housing that would be available to low- and moderate-income households.” *Id.* at 986. It added, “[a]s a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property owner’s future use of his or her property.” *Id.* at 991.

Also relevant is Schiff’s complaint in *Cedar Point Nursery v. Gould*,<sup>95</sup> challenging as a violation of the Fifth Amendment a state regulation promulgated by California’s Agricultural Labor Relations Board (ALRB)

<sup>93</sup> Brief in Opposition for Respondents-Intervenors Affordable Housing Network of Santa Clara Cty., Housing Cal., Cal. Coalition for Rural Housing, Non-Profit Housing Ass’n of N. Cal., S. Cal. Ass’n of Non-Profit Housing, and San Diego Housing Federation at 10, *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 136 S. Ct. 928 (2016), (No. 15-330), 2015 U.S. S. Ct. Briefs LEXIS 4511, available at <https://www.pacificlegal.org/document/doc?id=2141>.

<sup>94</sup> Dave Roberts, *San Ramon sued over “pension tax”*, CALWATCHDOG (Apr. 24, 2014), <http://calwatchdog.com/2014/04/24/san-ramon-sued-over-pension-tax/>.

<sup>95</sup> Complaint at 1, *Cedar Point Nursery v. Gould*, No. 1:16-cv-00185-LJO-BAM, 2016 U.S. Dist. LEXIS 51819 (E.D. Cal. Apr. 18, 2016), available at <https://www.pacificlegal.org/document/doc?id=2155>.

allowing union organizers to enter agricultural property “for the purpose of meeting and talking with employees and soliciting their support” (referred to as the Access Regulation). [No. 1:16-cv-00185-LJO-BAM, 2016 U.S. Dist. LEXIS 84780 at \\*2 \(E.D. Cal. June 29, 2016\)](#).

**George W. Bush appointee Lawrence O’Neill** dismissed the complaint. *Id.* at \*15.

Under the Access Regulation, a labor organization must provide notice to the ALRB and the employer of its intent to appear onsite. *Id.* at \*1-2. No organization may appear for more than thirty days in any year. *Id.* at 2. Also, organizers can enter an employer’s property “for a total period of one hour before the start of work and one hour after the completion of work” and for not more than one hour to talk to employees during lunch. *Id.*

Despite these limitations, Schiff argued that the state law constituted an impermissible per se taking under the Fifth Amendment.<sup>96</sup> Schiff maintained his argument in face of contrary case law. As the court noted, there are only

two categories of regulatory action that generally will be deemed per se takings for the Fifth Amendment purposes. The first is where a government requires an owner to suffer a permanent physical invasion of her property—however minor. The second applies to regulations that completely deprive an owner of all economically beneficial use of her property.

[Cedar Point Nursery v. Gould, No. 1:16-cv-00185-LJO-BAM, 2016 U.S. Dist. LEXIS 51819 at \\*9-10 \(E.D. Cal. Apr. 18, 2016\)](#) (internal citations and quotation marks omitted). Judge O’Neill also

noted that Schiff did not “allege facts that suggest the Access Regulation will amount to a permanent, physical intrusion.” *Gould*, 2016 U.S. Dist. LEXIS 84780 at \*9. Thus, the court “cannot find that Plaintiffs have stated a viable as-applied categorical takings claim.” *Id.* Moreover, Schiff “fail[ed] to allege facts in the[] pleadings that suggest that the Access Regulation has had *any negative economic impact on them at all*. Thus, [Plaintiffs] have not provided a basis from which this Court might plausibly conclude that the economic burden they shoulder is unjust.” *Id.*

Given Schiff’s meritless claims regarding California’s laws, there are serious questions whether he will faithfully apply Supreme Court jurisprudence in the area of takings, or whether he will apply the law as he wishes it was—as an instrument to be used by a federal judge to invalidate public policy he disagrees with.

***Schiff would threaten the Americans with Disabilities Act, Fair Housing Act, and other critical protections***

Schiff’s beliefs that “private property rights have been dismantled” and that a landowner “no longer exercise[s] dominion over his property” raise serious questions about whether he believes the American with Disabilities Act,<sup>97</sup> public accommodation provisions of the Civil Rights Act, the Fair Housing Act, and even the most basic anti-pollution measures—all of which restrict in some way private property rights—are permissible. As he said, “[a] threat to property anywhere is a threat to liberty everywhere.”<sup>98</sup> What, if any,

<sup>96</sup> Schiff & Wake, *supra* note 82 at 122.

<sup>97</sup> Damien M. Schiff, An Address to the Distinguished Members of the San Mateo Rotary Club (Nov. 3, 2016), available at <https://www.pacificlegal.org/file/San-Mateo-Ro->

<sup>96</sup> *Id.* at 8–9.

are the limitations of this principle?

### III. CIVIL RIGHTS

As noted, Schiff has an incredibly expansive vision of “natural rights” and “liberty,” most notably when it comes to protecting the economic interests of property owners. But he is dismissive of other critical rights.

#### **LGBTQ Equality**

For example, Schiff wrote that the Constitution, including substantive due process, protects “economic liberties.”<sup>99</sup> But, in his view, it does not protect the rights of LGBTQ Americans to be equal citizens.

Relaying a conversation he had with a colleague about the Supreme Court’s decision in *Lawrence v. Texas*—the case striking down the criminal sodomy law in Texas—Schiff expressed consternation that his colleague assumed that Schiff’s suggestion that the Due Process Clause contained a substantive component meant that Schiff supported *Lawrence*:

I of course made clear that I strongly disagree with the [sic] *Lawrence* because I can find no historical or precedential basis, pre-1868, for its limitation on the legislative proscription of sodomy. It is unfortunate that substantive due process has been so sullied by the Left that one cannot put forth a coherent and plausible originalist yet also substantive interpretation of the due process clause without being associated with the likes of Justice Douglas et al.<sup>100</sup>

[tary-Speech.pdf](#).

99 See Damien M. Schiff, *The original meaning of Due Process*, OMNIA OMNIBUS (Aug. 1, 2007, 10:36 PM), [https://web.archive.org/web/20080610122355/http://omniaomnibus.typepad.com:80/omnia\\_omnibus/2007/08/index.html](https://web.archive.org/web/20080610122355/http://omniaomnibus.typepad.com:80/omnia_omnibus/2007/08/index.html).

100 Damien M. Schiff, *Federalism and Separation of Powers Part I*, OMNIA OMNIBUS (May 15,

He made clear that “I contend that the due process clause, assuming that it has a substantive component, likely does not forbid the criminalization of sodomy.”<sup>101</sup>

Schiff also spoke out against and was critical of marriage equality in California. Schiff authored an Amici Curiae brief for the Pacific Legal Foundation in *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011), to the California Supreme Court urging it to decide a certified question from the Ninth Circuit related to whether proponents of Proposition 8 (banning same-sex marriage) had standing to defend the measure’s validity when the state government was not enforcing it.<sup>102</sup> Schiff also was an author on the PLF’s request to file an Amicus Curiae brief on the merits of the certified question, urging the Court to find standing for advocates to challenge the state government’s failure to enforce Proposition 8.<sup>103</sup>

Schiff also was critical of the *Marriage Cases* in California, which held that same-sex couples were entitled to marry under the California Constitution: “Far more significant in the *Marriage Cases* was the court’s adoption of strict scrutiny in cases where the government classifies people on the basis of sexual orientation. This portion of the opinion will have far-ranging effects in the coming years.”<sup>104</sup> He added that “[g]iven that California remains the epicenter of major battles between

2008), [https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia\\_omnibus/2008/05/index.html](https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia_omnibus/2008/05/index.html).

101 Schiff, *supra* note 99.

102 See Amicus Letter for Pacific Legal Foundation, *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (No. S189476), available at <http://www.courts.ca.gov/documents/4-s189476-letter-from-damien-m-schiff-1-24-11.pdf>.

103 See Application for Permission to File Amicus Curiae Brief and Brief Amicus Curiae, *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (No. S189476), 2011 CA S. Ct. Briefs LEXIS 709.

104 Damien M. Schiff & Timothy Sandefur, *The Modern California Supreme Court: Progressivism and Practical Constraints*, THE FEDERALIST SOCIETY at 10 (Oct. 6, 2008), <http://www.fed-soc.org/publications/detail/the-modern-california-supreme-court-progressivism-and-practical-constraints>.

traditionalists, located for the most part in the state's rural counties, and urban social liberals, a statewide rule requiring school districts, public health clinics, and all other government institutions to treat both groups with precise equality may result in serious conflicts in the decades ahead."<sup>105</sup>

Schiff also was critical of a decision in Florida invalidating that state's ban on same-sex couples adopting children. In a blog post entitled *Traditional Sexual Mores and the Permissible in Secular Discourse*, he noted, "[m]any have now heard of the Florida state trial court decision overturning that state's ban on same-sex couple adoption as violative of Florida's equal protection clause. The court held that the state could not articulate any rational basis for treating same-sex couples differently from heterosexual couples, notwithstanding the state's proffering of expert testimony indicating that adoptees of same-sex relationships exhibit higher incidences of drug and alcohol abuse, and other anti-social behavior."<sup>106</sup> He added, "I think that this decision simply underscores my fear that soon the advocacy of traditional sexual morality will be deemed to fall outside the sphere of legitimate secular political debate, much like racism has (and quite rightfully so)."<sup>107</sup>

In fact, in the same post, Schiff shared his musing on racism and anti-LGBTQ animus:

[R]acism became a pariah position because (1) its enforcement, both legally and culturally, effected loathesome [sic] evils (and evils recognized as such by all sides), and (2) its supposed empirical foundations were without merit. Similarly,

when it comes to gay issues, many folks on the gay rights side would contend that both (1) and (2) are present, which thus justifies the villification [sic] of anti-gay-rights folks. I would disagree.<sup>108</sup>

He also has criticized a school district's attempt to address bullying of LGBTQ students. In a blog post entitled *Teaching "gayness" in public schools*, Schiff criticized the district for teaching "not only that bullying of homosexuals qua homosexuals is wrong, *but also* that the homosexual lifestyle is a good, and that homosexual families are the moral equivalent of traditional heterosexual families."<sup>109</sup> He added that "as a secular society, even here in California, we are nowhere near a consensus on the moral implications of homosexuality. Thus, how can our schools presume to teach our children principles and beliefs that many of those children's parents do not share, and prefer not to have their children share?"<sup>110</sup> He even said that for this reason he "objected to an anti-racism curriculum being taught in 1950s Arkansas."<sup>111</sup> He noted his belief that "until consensus is reached on the moral implications of homosexuality, any attempt on the part of the public schools to take sides on those implications is wrongheaded."<sup>112</sup> Again, Schiff's comment addressed the efforts of a district to address bullying in its schools.

### ***Rights of Women***

<sup>105</sup> *Id.*

<sup>106</sup> Damien M. Schiff, *Traditional Sexual Mores and the Permissible in Secular Discourse*, OMNIA OMNIBUS (Nov. 26, 2008, 8:21 PM), <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-Attachments-Final-1503.pdf>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Schiff, *supra* note 10.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

Schiff has fought to weaken Title IX. He brought a lawsuit challenging application of Title IX to high school students:

Most people thought that Title IX only applied to collegiate athletics until recently the National Women’s Law Center, a left leaning group, has been threatening all sorts of high schools through the country because they contend that they are out of compliance with Title IX . . . . Our argument is applying Title IX to high school athletes not only violates Title IX itself, the statute, but in fact violates the Constitution because under the Constitution the government can only discriminate or differentiate on the basis of sex only if the government has a strong justification for it.”<sup>113</sup>

He added that “Congress had absolutely no evidence before it enacted Title IX that there was sexual discrimination going on in high schools. Therefore, they [have] no constitutional basis to impose those requirements on high schools.”<sup>114</sup> Schiff’s lawsuit was dismissed on standing grounds. *See Am. Sports Council v. Dep’t of Educ.*, 850 F. Supp. 2d 288 (D.D.C. 2012).

In 2007, PLF filed a letter with the Department of Education requesting that the Department rescind the regulation and guidance that applied Title IX to high schools. The Department, led by **George W. Bush appointee Margaret Spellings**, denied the request, noting that PLF had raised the same failing argument in 2003.<sup>115</sup> Spellings reminded PLF that numerous courts have upheld Title IX and that it “neither

<sup>113</sup> D.A. Tuma, *Libertarian Counterpoint #1044, 8/4/11*, YOUTUBE at 17:20 (Aug. 13, 2011), <https://www.youtube.com/watch?v=cQbBuAYlov4>.

<sup>114</sup> *Id.*

<sup>115</sup> Letter from Margaret Spellings, Secretary of Education, United States Department of Education, to Steven Geoffrey Gieseler, Pacific Legal Foundation (Mar. 27, 2008), <https://www2.ed.gov/>

violates equal protection nor creates a gender-conscious affirmative action or quota system.”<sup>116</sup>

As with almost every area of law, these actions demonstrate how out of touch Schiff and PLF are with current legal doctrine. See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (permitting Title IX claim involving a high school to go forward); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843 (9th Cir. 2014) (affirming judgment for female high school students under Title IX; panel included two **George W. Bush appointees N. Randy Smith and Morrison England**); *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910 (7th Cir. 2012) (reversing summary judgment for school district in suit involving violation of Title IX and high school sports; panel included **Reagan appointee Frank Easterbrook**).

As Senator Mike Enzi noted on the 40th anniversary of Title IX, “I think it’s one of the most important civil rights laws.”<sup>117</sup> He added, “[a]ny discussion of [T]itle IX is not complete without acknowledging the role it has had in opening opportunities for women in athletics . . . . [O]nly 295,000 girls participated in high school sports in 1972 compared to 3.67 million boys. That was just 7.4 percent of all high school athletes. Since then, participation in women’s sports has grown exponentially. [In 2012], 3.2 million girls participate in high school sports compared to 4.5 million boys.”<sup>118</sup>

It is disturbing that Schiff sought to have

[about/offices/list/ocr/letters/title-ix-2008-0327.pdf](https://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf)

<sup>116</sup> *Id.* at 2.

<sup>117</sup> *Forty Years and Counting: The Triumphs of Title IX: Hearing before the Senate Committee on Health, Education, Labor, and Pensions*, 112th Cong. (2012) (Comments of Senator Enzi), available at <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg92384/html/CHRG-112shrg92384.html>.

<sup>118</sup> *Id.*

declared unconstitutional a law that has made such a positive difference in the lives of so many Americans.

Schiff also wrote numerous pieces stating his disagreement with a woman's right to choose whether to have an abortion:

- In a blog post, Schiff wrote: "I am not saying that people in favor of legalized abortion are morally decrepit (although I would consider their view on this matter to be gravely in error)."<sup>119</sup>
- He wrote that in regard to "forbidding women to abort their unborn children . . . at most it might be a deprivation of liberty within the meaning of the DPC [Due Process Clause], but that position, although conceptually less disagreeable than the EPC [Equal Protection Clause] argument, is nevertheless without originalist merit."<sup>120</sup>
- He criticized an article by Professor Reva Siegal by noting that her argument "presupposes that the unborn person is not a person entitled to any of the protections of the Constitution, including the Due Process and Equal Protection Clauses of the 14th Amendment."<sup>121</sup>
- Commenting on a speech by Archbishop Charles Chaput criticizing Catholics who voted for Obama, Schiff wrote that Chaput's "remarks underscore that abortion is a trumping issue, and that a pro-choice vote cannot be justified by

reliance upon a candidate's family or poverty or war policies."<sup>122</sup>

- He is on the board of the Sacramento Life Center.<sup>123</sup> The Sacramento Life Center, prominently, did not comply with a state law requiring they put up signs informing patients about California's free and low-cost public programs for family planning, prenatal care, and abortion services.<sup>124</sup>

### **Racial Justice**

On the Court of Federal Claims, Schiff could be expected to confront issues related to racial equity and equal employment in the context of government contracting. Schiff wrote about "affirmative action" policies in a law review article that preceded the Supreme Court's consideration of the first *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) case. Schiff and his co-author advocated that the Court should find the University of Texas's affirmative action policy unconstitutional by, in part, overturning *Grutter v. Bollinger*, 539 U.S. 306 (2003), and rejecting diversity as a compelling interest.

In the article, Schiff compared efforts to ensure equal opportunity for people of color and women to slavery, Jim Crow, and the internment of Japanese Americans in World War II:

The sad truth is that the United States has a sordid history when it

119 Damien M. Schiff, *Abortion and "Secular Government"*, OMNIA OMNIBUS (July 22, 2008, 10:15 PM), [https://web.archive.org/web/20081018211439/http://omniaomnibus.typepad.com:80/omnia\\_omnia/2008/07/index.html](https://web.archive.org/web/20081018211439/http://omniaomnibus.typepad.com:80/omnia_omnia/2008/07/index.html).

120 Damien M. Schiff, *Abortion and Equality*, OMNIA OMNIBUS (June 21, 2007, 7:56 AM), [https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia\\_omnia/2007/06/index.html](https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omnia/2007/06/index.html).

121 *Id.*

122 Damien M. Schiff, *Chaput on Obama*, OMNIA OMNIBUS (Oct. 20, 2008, 10:35 PM), <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-Attachments-Final-1511.pdf>.

123 Sen. Comm. on the Judiciary, 115th Cong., Damien M. Schiff: Questionnaire for Judicial Nominees 4, <https://www.judiciary.senate.gov/imo/media/doc/Schiff%20SJQ.pdf>.

124 Sammy Caiola, *Sacramento anti-abortion pregnancy centers resist new law requiring signage*, SACRAMENTO BEE (Mar. 15, 2016), <http://www.sacbee.com/news/local/health-and-medicine/healthy-choices/article66246282.html>.

comes to dealing with issues involving race. From *Dred Scott v. Sandford*, to *Plessy v. Ferguson*, to *Korematsu v. United States*, the Supreme Court has all too often been at the forefront of this ugly history. Yet, the Supreme Court has also righted each one of those wrongs. In the *Slaughterhouse Cases*, the Supreme Court recognized that the Fourteenth Amendment overturned *Dred Scott* by making all persons born in the United States citizens (and not chattels). In *Brown v. Board of Education*, the Supreme Court overturned *Plessy* by holding that separate is inherently unequal. And in *Adarand Constructors v. Peña*, the Supreme Court affirmed that strict scrutiny must be rigorously applied so mistakes like *Korematsu* do not happen again.

*Grutter v. Bollinger* should also be recognized as one of the Supreme Court's mistakes.<sup>125</sup>

Schiff's views on *Grutter* cannot be separated from other statements he has made comparing the experience of Americans in dealing with the EPA as akin to being "slaves."<sup>126</sup> He also admits he would have "objected to an anti-racism curriculum being taught in 1950s Arkansas."<sup>127</sup>

## IV. WORKERS' RIGHTS

Schiff believes that OSHA is unconstitutional, and that it "raises a non-delegation concern."<sup>128</sup> By using the non-delegation doctrine to invalidate OSHA, Schiff would be reinvigorating a doctrine last used successfully in 1935 by a famously reactionary Supreme Court majority

<sup>125</sup> Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in Grutter*, 15 TEX. REV. L. & P. 437, 486 (2011). <https://drive.google.com/file/d/0BxwJ7kqwYA7FLXV4N0hRMWdfbWM/view>.

<sup>126</sup> Lou Dobbs Tonight, *supra* note 15.

<sup>127</sup> Schiff, *supra* note 10.

<sup>128</sup> Schiff, *supra* note 11.

bent on invalidating the New Deal. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Since 1935, as **Justice Scalia** noted, "we [the justices] have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–45 (2001) (internal citation omitted).

Indeed, while labor law is not Schiff's primary litigation focus, his record does demonstrate a commitment to eroding legal protections for America's workers.

For example, under OSHA, a representative of employees has an opportunity to participate in an inspection. See *Nat'l Fed'n of Indep. Bus. v. Dougherty, No. 3:16-CV-2568, 2017 U.S. Dist. LEXIS 15915, at \*2* (N.D. Tex. Feb. 3, 2017). Under OSHA regulations, that individual may be an employee who is the collective bargaining representative or any other individual designated by the employees where the inspector determines that the individual will aid the inspection. *Id.* at \*2–3. In response to an inquiry from the United Steelworkers in February 2013, OSHA issued a letter of interpretation stating that workers could designate a non-employee representative if the inspector determines it would aid the inspection. *Id.* at \*3–4. OSHA noted that such a representative could help workers who feared possible retaliation, might aid non-English speaking workers in communicating with inspectors, or provide special technical knowledge or skills.<sup>129</sup>

Instead of supporting a measure that

<sup>129</sup> Letter from Richard E. Fairfax, OSHA, to Steve Sallman, United Steelworkers Union

would help ensure that workers can effectively participate in OSHA inspections and help improve workplace safety and health, Schiff filed suit against OSHA's interpretation.<sup>130</sup> Schiff called the rule "just another tool for unions in their organizing campaigns to effectively proselytize as to why they should organize, and why they should use that particular union."<sup>131</sup> He referred to it as a "pretext for union evangelization."<sup>132</sup> Moreover, he said, the rule "was promulgated by bureaucratic fiat."<sup>133</sup> Instead of focusing on worker safety, he focused on the parade of horrible "union intruders" "sow[ing] seeds of discord."<sup>134</sup> The suit was withdrawn after the Trump Administration rescinded the rule in April.

## V. FIRST AMENDMENT

Schiff has expressed skepticism toward the First Amendment, *but* only when it comes to non-corporate speakers. In an interview on the cable television program *Libertarian Counterpoint*, he disagreed with the "progressivist argument" that "having lots of speech generally is always a good thing."<sup>135</sup> He said, "I don't necessarily think that's true."<sup>136</sup> He questioned whether free speech is of "great value."<sup>137</sup> Instead, he suggested that libertarians should care primarily about property rights:

I wouldn't think that libertarians would

("Fairfax Memo") (Feb. 21, 2013), available at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=28604](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604).

130 Original Complaint for Declaratory and Injunctive Relief, Nat'l Fed'n of Indep. Bus. v. Dougherty, No. 3:16-CV-2568 (N.D. Tex. Feb. 3, 2017), available at <http://docplayer.net/32994665-Case-3-16-cv-d-document-1-filed-09-08-16-page-1-of-15-pageid-1-united-states-district-court-northern-district-of-texas-dallas-division.html>.

131 Stephen Lee, *Business Federation Sues OSHA Over Walkaround Rights Memo*, BLOOMBERG BNA, Sept. 12, 2016, at 176 DLR A-5.

132 PLF Challenges Feds' Politicization of Workplace Safety Inspections, COURTING LIBERTY, at 15:50 (Sept. 21, 2016), <https://www.pacificlegal.org/9-21-16-Podcast>.

133 Press Release, Pacific Legal Foundation, NFIB and PLF sue OSHA for foisting union activists on businesses (Sept. 8, 2016), <https://www.pacificlegal.org/release-9-8-16-nfib-4-1558>.

134 Karen Harned & Damien Schiff, *Pushing back against a union foot in the door*, THE WASHINGTON TIMES (Sept. 19, 2016), <http://www.washingtontimes.com/news/2016/sep/19/pushing-back-against-a-union-safety-inspections/>.

135 See Gale Morgan, *Libertarian Counterpoint 1295 5-19-16*, YOUTUBE, at 16:06–16:14 (May 22, 2016), <https://www.youtube.com/watch?v=oUee6b1x1EU>.

136 *Id.*

137 *Id.* at 15:25–15:36.

be particularly keen on free speech as the great value, as opposed to just simply property. Because the reason why we should be upset that someone's rally [on a college campus] is being—is being—interrupted is presumably it's being interrupted by trespassers.<sup>138</sup>

While downplaying the free speech rights of individuals, Schiff has argued for *more* free speech rights for corporations, particularly in our elections. In an in *Citizens United*, he wrote,

PLF believes that the First Amendment prohibits government regulation of speech—be it political or commercial, by individuals, associations, or corporations—unless the regulation satisfies strict scrutiny. Critical to the strict scrutiny analysis is identification of the compelling state interest, which PLF believes should be limited to actual evidence of individual corruption. Moreover, PLF believes that corporate speech adds value to our democratic society and should not be treated as a malignancy that the body politic rejects.<sup>139</sup>

Schiff's view of the compelling state interest—"actual evidence of individual corruption"—is incredibly narrow and difficult to prove. If it were adopted, it could lead to further erosions of our democracy.

It is true that the Court narrowed the definition of corruption in *Citizens United*

138 *Id.* at 15:25–15:48.

139 Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant on Supplemental Question at 2, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), available at [plf.typepad.com/files/plf-ac-brf-in-sprt-of-apint.pdf](http://plf.typepad.com/files/plf-ac-brf-in-sprt-of-apint.pdf).

and *McCutcheon v. FEC*. But this was not always the case. Before *Citizens United*, the Court recognized in *Austin v. Michigan State Chamber of Commerce*, that the government had a compelling interest in protecting our democracy from “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” [494 U.S. 652, 660 \(1990\)](#). The Court worried that corporate wealth can dominate the political process and “unfairly influence elections.” *Id.* Furthermore, the Court in *McConnell v. FEC*, had found that corruption of government is “not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors.” [540 U.S. 93, 143 \(2003\)](#) (internal quotation marks omitted). The possibility that legislators will “decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder” is a more subtle form of corruption than straight *quid pro quo* transactions, but is “equally dispiriting.” *Id.* at 153.

Even though the Court has in recent years narrowed the definition of corruption, it has never required concrete evidence of bribery or other *quid pro quo* exchanges to sustain a contribution limit that seeks to prevent these abuses, as Schiff has advocated. The Court has continued to acknowledge that government may fight not just corruption but also its appearance. As **Chief Justice Roberts** has made clear, “preventing corruption or its appearance is a legitimate objective.” [McCutcheon v. FEC, 134 S. Ct. 1434, 1450 \(2014\)](#). It is troubling that Schiff advocated for an even

more constricted understanding of true corruption in our democracy, and that his purported standard would strip jurisdictions of any ability to enact campaign finance laws.

In fact, rather than being troubled by the influence of money in politics, Schiff implies it is an unquestioned good that corporations can spend unlimited amounts of money and have an oversized influence in our politics. Schiff argued that “this Court usually defers to Congress’ judgment that corporate political speech is of a type more prone to actual corruption and the appearance of corruption, thus justifying greater regulation than it would countenance for individuals.”<sup>140</sup> But, he argued, “there is no evidence that corporations—as an identifiable group—are corrupt or introduce corruption into the political process, at least to any greater degree than individuals.”<sup>141</sup>

He further argues that what we need is *more* corporate speech because “corporate speech adds value to a democratic society.”<sup>142</sup> Indeed, as he wrote, “corproations [sic] provide significant societal goods” and “their speech . . . should be encouraged, not censored.”<sup>143</sup> It would shock anyone who has watched recent elections to think that corporations are having a difficult time getting their message out.

The notion that society would benefit from more corporate influence on our democratic decision-making is a radical

<sup>140</sup> *Id.* at 4.

<sup>141</sup> *Id.* at 9.

<sup>142</sup> *Id.* at 11.

<sup>143</sup> Damien M. Schiff, *Fighting for political speech in the Supreme Court*, PLF LIBERTY BLOG (Aug. 3, 2009), <http://blog.pacificlegal.org/fighting-for-political-speech-in-the-supreme-court/>.

departure from how the vast majority of Americans see their government.

# CONCLUSION

Schiff is absolutely not fit to serve as a federal judge. He disparages sitting Supreme Court Justices, environmental advocates, and progressive scholars. He believes government is bound not by the Constitution, but by “natural law.” He believes that the role of judges is not to apply law to facts and decide cases without bias, but to be a “catalyst to real reform” that would upend the “excrescences of the New Deal and Great Society eras.” He believes that “freedom to contract” and “economic liberty” are at the heart of our Constitution, but women, LGBTQ Americans, and people of color should not have critical legal protections. He is staunchly opposed to efforts by the government to protect the environment, civil rights, and worker safety. He envisions a return to the *Lochner* era, when federal courts second-guessed health and safety measures enacted by state and local governments. He downplays the value of free speech for individuals, but advocates for more speech rights for corporations. Schiff’s worldview is one of more power granted to corporations and powerful special interest groups.

Alliance for Justice strongly opposes the nomination of Damien Schiff to the Court of Federal Claims.