

AFJ NOMINEE REPORT

KEVIN NEWSOM



U.S. Court of Appeals for the Eleventh Circuit

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INTRODUCTION

On May 8, 2017, President Trump nominated Kevin Newsom to the Court of Appeals for the Eleventh Circuit. Newsom's nomination was only possible because Senators Jeff Sessions and Richard Shelby refused to return their blue slips for Abdul Kallon, currently a federal district court judge in Alabama, whom President Obama nominated in February 2016. Judge Kallon would have been the first African American to sit on the Court of Appeals from Alabama, yet did not even receive a hearing because the Judiciary Committee followed custom and did not act without the blue slips.

Newsom has served as Solicitor General of Alabama under now-federal judge (and extremely controversial nominee) William Pryor. As Solicitor General, Newsom had a record of defending questionable death penalty practices in Alabama and advancing arguments which would curtail civil rights, including efforts to limit critical protections under Title IX. As an attorney, he has fought efforts by everyday Americans trying to remedy wrongs committed against them. He also has written critically of substantive due process, an essential constitutional doctrine for women's rights and LGBTQ rights, for example.

Given his record, Newsom, a member of the Federalist Society, must demonstrate at his hearing that he can be a fair and apolitical judge rather than a far-right ideologue committed to an agenda of rolling back long-cherished constitutional rights.

CONTEXT OF NEWSOM'S NOMINATION

On October 26, 2013, Judge Joel Dubina took senior status and a vacancy arose on the Court of Appeals for the Eleventh Circuit. Each state in the circuit, which comprises Alabama, Georgia, and Florida, had at least one Republican Senator for the entirety of President Obama's presidency. In Florida and Georgia, senators were willing to work with the President, and ultimately Beverly Martin (Georgia), Adalberto Jordan (Florida), Robin Rosenbaum (Florida), Julia Carnes (Georgia), and Jill Pryor (Georgia) were confirmed to the court.

In contrast, Alabama's senators, most notably now-Attorney General Jeff Sessions, refused to work with President Obama to fill seats.¹ Early in 2016, Senator Shelby dropped any pretext of cooperating with the President. He said of vacant judgeships in Alabama, including on the Eleventh Circuit: "Let's see if we can elect a conservative Republican and fill all those seats with Republicans."²

Nonetheless, after years of Alabama senators rebuffing the President's efforts to negotiate on the Eleventh Circuit vacancy, in February 2016 President Obama nominated Abdul Kallon, a federal

¹ Brandon Moseley, *Shelby Speaks to MARC in Vestavia*, ALABAMA POLITICAL REPORTER (Nov. 10, 2016), <http://www.alreporter.com/shelby-speaks-to-marc-in-vestavia/>.

² Mary Troyan, *New federal judges for Alabama unlikely*, MONTGOMERY ADVERTISER (June 30, 2016), <http://www.montgomeryadvertiser.com/story/news/politics/2016/06/30/new-federal-judges-alabama-unlikely/86565478/>.

judge in the Northern District of Alabama, to fill the vacancy. Judge Kallon would have been the first African-American judge to sit on the Eleventh Circuit from Alabama, a potentially historic accomplishment in a state that has long been afflicted by slavery, segregation, and discrimination. Both Senators Sessions and Shelby had previously supported Kallon's nomination to the Northern District of Alabama. Senator Sessions praised him for "his distinguished law career" as well as his "impressive legal credentials." He spoke of his integrity, judgment, and legal ability.³ When Judge Kallon was nominated to the Eleventh Circuit, the ABA rated him unanimously well-qualified. Neither senator questioned Judge Kallon's record as a district judge nor raised any issue with his legal work.⁴

Yet both senators refused to return their blue slip on Judge Kallon's nomination to the Eleventh Circuit. And, consistent with the practice during the entire Obama presidency, in which there were *no exceptions*, no hearing was held on Judge Kallon's nomination due to the lack of blue slips. Because the Senate did not act, Judge Kallon's nomination was returned to the President when the Senate adjourned in January 2017.

As Senator Shelby admitted, the reason that he and Sessions did not act on Judge Kallon's nomination was purely partisan, so a "conservative Republican" could fill the seat. And, indeed, on May 8, 2017, President Trump nominated Kevin Newsom to the vacancy.

³ Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary, 11th Cong. (2009) (statement of Jeff Sessions, Sen. Ala. on Nominee Abdul Kallon), available at <https://www.congress.gov/111/chrg/shrg63004/CHRG-111shrg63004.htm>.

⁴ See American Bar Association, Rating of Article III and Article IV Vacancies (Jan. 3, 2017), available at https://www.americanbar.org/content/dam/aba/uncategoryed/GAO/WebRatingC-hart114_authcheckdam.pdf.

BIOGRAPHY

Kevin C. Newsom was born on September 22, 1972 in Birmingham, Alabama. He received his bachelor's degree from Samford University and his J.D. from Harvard Law School, where he served on the *Harvard Law Review*.⁵ Following law school he clerked for Judge Diarmuid O'Scannlain of the U.S. Court of Appeals for the Ninth Circuit and Justice David Souter of the U.S. Supreme Court.⁶

Newsom began his career in private practice as an associate in Covington & Burling's appellate group in Washington, D.C, spending two years at the firm after his Ninth Circuit clerkship and another two after clerking for Justice Souter.⁷ Newsom served as Solicitor General of Alabama for four years from 2003 to 2007.⁸ Afterwards, Newsom returned to private practice as a partner at Bradley Arant Boult Cummings LLP in Birmingham, where he has built a successful appellate practice. He was appointed in 2011 and 2014 by Chief Justice John Roberts to serve on the Advisory Committee on the Federal Rules of Appellate Procedure.⁹

Newsom has been a member of the Federalist Society for almost two decades. He has served as the President of the Birmingham Lawyers Chapter and been a member of the Executive Committee for Federalism and Separation of Powers. In addition to the Federalist Society, Newsom

⁵ See Kevin C. Newsom, BRADLEY, <https://www.bradley.com/people/n/newsom-kevin-c>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

is a member of the U.S. Chamber Litigation Center and the American Law Institute.¹⁰ He has also served as an adjunct professor at Georgetown University Law Center, the Cumberland School of Law, and Vanderbilt Law School.¹¹

The process for how Newsom was selected also bears noting. Chairman Grassley, in laying the groundwork for potentially overturning the blue slip tradition that kept Judge Kallon from even receiving a hearing, has said that “[i]t’s much more a White House decision on circuit judges.”¹² Newsom’s nomination belies that statement. In fact, Senator Shelby’s staff first approached Newsom, and he first interviewed with Senators Sessions and Shelby, who recommended him to the White House. The White House did not interview him until several months later.¹³

LEGAL CAREER

Newsom has had three different positions as a practicing attorney: as an associate at Covington & Burling for four years, as the Solicitor General of Alabama for four years, and as a partner at Bradley Arant for a decade. His most important legal work, almost exclusively focusing on appellate litigation, can likewise be split up into three major buckets: death penalty cases, civil rights litigation, and pro-corporate defense work. He has a mixed track record before the Supreme Court, having lost three of the four cases he has argued.

10 Sen. Comm. on the Judiciary, 115th Cong., Kevin Christopher Newsom: Questionnaire for Judicial Nominees 6, <https://www.judiciary.senate.gov/imo/media/doc/Newsom%20SJQ.pdf>.
11 *Id.* at 40.

12 Niels Lesniewski, *Grassley Signals Deference to White House on Circuit Judges*, ROLL CALL (May 11, 2017) <http://www.rollcall.com/news/politics/grassley-shows-flexibility-blue-slips-appellate-vacancy#sthash.6RGxQhvj.dpuf>.

13 Sen. Comm. on the Judiciary, 115th Cong., Kevin Christopher Newsom: Questionnaire for Judicial Nominees 42, <https://www.judiciary.senate.gov/imo/media/doc/Newsom%20SJQ.pdf>.

As Solicitor General, Newsom was responsible for all appeals in which Alabama was a party before the U.S. Supreme Court, the Alabama Supreme Court, and the U.S. Court of Appeals for the Eleventh Circuit. He was responsible for drafting and supervising all briefs and amicus briefs and for presenting oral argument in those courts.¹⁴ In Alabama, the Solicitor General serves at the pleasure of the Attorney General. Indeed, Newsom was personally hired by William Pryor, currently the only active Alabama judge on the Eleventh Circuit Court of Appeals.¹⁵ Shortly after hand-picking Newsom to serve as his Solicitor General, Pryor was one of President Bush’s most controversial nominees. He was declared “unfit to judge” by both the *Washington Post* and the *Atlanta Journal Constitution* (newspapers do not normally take a position on judicial nominations, but Pryor’s extreme record was impossible to ignore).¹⁶ Among his long list of outrageous statements, Pryor called *Roe v. Wade* the “worst abomination in the history of constitutional law”¹⁷ and wrote in an amicus brief that “states should remain free to protect the moral standards of their communities through legislation that prohibits homosexual sodomy.”¹⁸

I. DEATH PENALTY

From 1977 to 2013, Alabama sentenced more people to death per capita than any other state in the nation.¹⁹ As Solicitor

14 See *Solicitor General Division*, STATE OF ALA.: OFFICE OF THE ATT’Y. GENERAL, <http://www.ago.state.al.us/Page-Solicitor-General-Section>.

15 Kevin Newsom, *The State Solicitor General Boom*, 32 App. Prac. Jnl. Upd. 6.

16 PEOPLE FOR THE AMERICAN WAY, IN OPPOSITION TO THE CONFIRMATION OF WILLIAM H. PRYOR, JR., 1 (2003), <http://www.pfaw.org/report/william-pryor-unfit-to-judge/>.

17 Kevin Russell & Charles Davis, *Potential nominee profile: William Pryor (Expanded)*, SCOTUSBLOG (Jan. 20, 2017), <http://www.scotusblog.com/2017/01/potential-nominee-profile-william-pryor/>.

18 Bethania Palma, *Potential Trump SCOTUS Pick Argued States Should Be Able to Criminalize Gay Sex*, SNOPE (Nov. 17, 2016), <http://www.snopes.com/2016/11/17/pryor-lgbt-laws/>.

19 See *Death Sentences Per Capita by State*, DEATH PENALTY INFORMATION CENTER,

General, Newsom appeared on behalf of Alabama in several death penalty cases.

In *Nelson v. Campbell*, Newsom tried to prevent an inmate from even being able to challenge the constitutionality of Alabama's proposed execution procedure. [541 U.S. 637 \(2004\)](#). Alabama had notified the inmate, Nelson, that the execution procedure might require corrections officers to cut through muscles and fat in his arm to get access to a vein that could carry the toxins. Nelson argued that this was an inhumane method of execution and should be barred.

Newsom argued the suit was functionally equivalent to a habeas corpus challenge to the sentence itself, and was therefore prohibited under 28 U.S.C. § 2244, a federal statute that limits the number of habeas petitions an inmate may file. In Alabama's brief, Newsom characterized the lawsuit as a "transparent, last-minute effort to derail [the petitioner's] execution,"²⁰ and at oral argument cautioned that allowing such a suit would flood the Federal courts with "endless death row appeals."²¹ The Supreme Court *unanimously* ruled against Newsom and in favor of the inmate.

Newsom also filed several amicus briefs in death penalty cases on behalf of the state. The case [Hill v. McDonough](#) closely mirrored *Nelson v. Campbell*: namely, it concerned whether a death row inmate could bring a suit to challenge the method of his execution. [547 U.S. 573 \(2006\)](#).²² Again, the court ruled contrary to Newsom's brief, unanimously following the reasoning of its *Nelson* decision.

<https://deathpenaltyinfo.org/death-sentences-capita-state/>.

²⁰ Brief for Respondent, *Nelson v. Campbell*, 541 U.S. 637 (2004) No. 03-6821, 2004 U.S. S. Ct. Briefs LEXIS 196, at *8.

²¹ Transcript of Oral Argument, *Nelson v. Campbell*, 541 U.S. 637, No. 03-6821 (2004), available at <https://www.oyez.org/cases/2003/03-6821>.

²² See Brief of the States of Alabama et. al. as Amici Curiae Supporting Respondents, *Hill v. McDonough*, 547 U.S. 573 (2006) No. 05-8794, 2006 U.S. S. Ct. Briefs LEXIS 394, at *35.

In *Roper v. Simmons*, Newsom authored an *amicus* brief in the Supreme Court on behalf of Alabama and five other states. [543 U.S. 551 \(2005\)](#). He argued that the execution of minors does not violate the Constitution.²³ The Court again ruled against Newsom; Justice Kennedy determined that executing individuals for crimes they committed as a minor was contrary to "evolving standards of decency" and was "cruel and unusual" in violation of the Eight Amendment.

In *Barbour v. Haley*, Newsom argued before the court he is now nominated to join. [471 F.3d 1222 \(11th Cir. 2006\)](#). The case concerned a lower court's dismissal of a group of death row inmates' claims that they had a right to state-appointed counsel with respect to their post-conviction claims. See *Id.* at 1223.

Newsom argued, among other things, that nearly all death row inmates in Alabama had post-conviction legal assistance from public interest groups and large law firms working *pro bono*. He prevailed before the Eleventh Circuit, which came to the conclusion that "postconviction relief is not part of the criminal proceeding itself; rather, it civil in nature." *Barbour*, 471 F.3d at 1231.

The challengers then petitioned for certiorari before the Supreme Court, which was ultimately denied. Newsom's argument against the Court hearing the case was extremely dismissive: he lampoons the petitioners for "spin[ning] a fantastic tale - of scores of helpless death-row inmates wandering blindly, and alone, through a hopelessly complex

²³ See Brief of the States of Alabama et. al. as Amici Curiae Supporting Petitioner, *Roper v. Simmons*, 543 U.S. 551 (2004) No. 03-633, 2004 U.S. S. Ct. Briefs LEXIS 335.

procedural minefield - that has absolutely no foundation in the evidentiary record or, for that matter, in reality writ large.”²⁴ As the petitioners pointed out in their brief, Newsom’s hyperbolic statement is problematic. The inmates demonstrated that death-row prisoners in Alabama *have* “been unable to obtain counsel to represent ... [them] in postconviction proceedings.” Even the Eleventh Circuit said “Alabama’s condemned inmates are unable to obtain postconviction representation.”²⁵ The implication of Newsom’s brief greatly minimizes the legal needs and importance of representation for death row inmates.

In private practice, Newsom took part in one pro bono case for a death row inmate. The Florida Supreme Court overturned the man’s conviction based on new DNA evidence. See [Aguirre-Jarquin v. Jones, No. SC14-1332 \(Fl. Oct. 27, 2016\)](#).

II. CIVIL RIGHTS AND CIVIL LIBERTIES

In addition to his death penalty work, Newsom has argued several notable civil rights cases before the Supreme Court.

[Jackson v. Birmingham Board of Education, 544 U.S. 167 \(2005\)](#), concerned a retaliation case under Title IX. The plaintiff, a high school girls’ basketball coach, claimed he was fired for complaining that the girls’ team he coached was denied equal treatment by the school. The question for the Court was whether Title IX of the Education Amendments of 1972 provided a private right of action for retaliation for complaints about discrimination on the basis of sex. Writing in an *amicus* brief on behalf of

²⁴ Brief of the Respondents in Opposition to Certiorari, *Barbour v. Allen*, 551 U.S. 1134 (2007) No. 06-10605, 2007 U.S. S. Ct. Briefs LEXIS 1778, at *7.
²⁵ *Id.* at *67.

Alabama and eight other states, Newsom argued against such legal remedy.²⁶ He also participated in oral argument as *amici*. Contrary to Newsom’s position, the Court held that retaliation of this type is intentional sex discrimination within the meaning of Title IX. See *Id.*

Lest anyone suggest that Newsom was merely taking the position of his client, Newsom wrote a piece for the Federalist Society under his own name making clear that he personally believed the argument that he presented to the Supreme Court, that a retaliation claim should not be considered under Title IX.²⁷

Justice Sandra Day O’Connor’s opinion explained the flaws in Newsom’s analysis. She made clear that the statute’s enforcement scheme “depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received ‘actual notice’ of the discrimination.” *Jackson*, 544 U.S. at 375. Were recipients “able to avoid such notice by retaliating against all those who dare complain, the statute’s enforcement scheme would be subverted,” and nearly useless. *Id.* The law would have a gaping hole without a private right of action for retaliation.

Moreover, Justice O’Connor explains:

Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination

²⁶ Brief of the States of Alabama, et. al., as Amici Curiae in Support of Respondent, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2004) No. 02-1672, 2004 U.S. S. Ct. Briefs LEXIS 656.

²⁷ Kevin Newsom, *Discrimination, Retaliation, and a Private Right of Action*, FEDERALIST SOCIETY, May 1, 2005.

encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment... Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

Jackson, 544 U.S. at 370-71.

Newsom, to his credit, has criticized Alabamans who cling to the Confederate flag and understands that the flag "thwarts desperately needed progress (all the while sticking its finger in the eyes of our black friends and neighbors."²⁸ Yet his legal work on civil rights cases on employment discrimination and voting rights (not to mention the death penalty) have not aided the cause of equality.

In [*Jones v. R.R. Donnelley & Sons Company*, 541 U.S. 369 \(2004\)](#), a group of African-American workers filed a class action lawsuit against a commercial printing company, claiming racial discrimination in employment. They claimed they had been subjected to a racially hostile work environment, given an inferior employee status, and wrongfully terminated. They sued under 42 U.S.C. § 1981, an 1866 statute that was amended by the Civil Rights Act of 1991. The question for the Court was whether to apply a four-year statute of limitations generally applicable to federal laws passed after 1990 (as dictated in 28 U.S.C. § 1658(a)) or a shorter two-

year statute of limitations established by the state law.

the shorter state-law limitations period should apply because the claim at issue was brought under the 1866 statute.²⁹ The Court disagreed, ruling unanimously, that the four-year limitations period applied to federal laws amended after 1990, and that the claims here were possible because of the 1991 amendments. See *Jones*, 541 U.S. 369 (2004).

In [*Williams v. Morgan*, 478 F.3d 1316 \(11th Cir. 2007\)](#), Newsom successfully defended Alabama's ban on the sale of sexual devices (products sold as sex toys or sexual aids) in front of the Eleventh Circuit. The ACLU had brought suit against the state on the grounds that the ban infringed upon the device users' right to privacy and personal autonomy under the Fourteenth Amendment. In Alabama's brief, Newsom argued, among other things, that the State's interest in promoting public morality is a legitimate basis for legislation.³⁰ The Eleventh Circuit ultimately upheld the ban on sexual devices. See *Williams* 478 F.3d 1316.

[*Riley v. Kennedy*](#) proved to be Newsom's single victory in his four tries before the Supreme Court. [*553 U.S. 406 \(2008\)*](#). Shortly after Newsom left the Solicitor General's office, the Governor of Alabama hired Newsom to represent him in *Riley v. Kennedy*, a voting rights case.³¹ At the time, Alabama was required under the Voting Rights Act of 1965 to preclear with the federal government any changes to its

²⁹ *Id.*

³⁰ Brief of Defendants-Appellees, *Williams v. King*, 478 F.3d 1316 (11th Cir. 2007) No. 06-11892-J, 2006 U.S. 11th Cir. Briefs LEXIS 690.

³¹ Q&A With Bradley Arant's Kevin Newsom, LAW 360 (December 7, 2009), available at <https://www.law360.com/articles/122755/q-a-with-bradley-arant-s-kevin-newsom>.

²⁸ Kevin Newsom, Letter to the Editor, BIRMINGHAM NEWS (Apr. 18, 2005), P. 6a.

election laws.³² In 1987, the Attorney General of Alabama precleared a local law providing for special elections for vacancies on a county commission, which had previously been filled by gubernatorial appointment. The Alabama Supreme Court struck down the local law on state constitutional grounds in two decisions. The issue for the U.S. Supreme Court was whether the two Alabama high court decisions themselves needed to be precleared. Newsom successfully argued that they did not. His winning argument, which the Court endorsed 7-2, was that the 1987 local law was only in place because a state trial court misapplied the law in holding it constitutional to begin with; thus it should not establish a baseline on which to judge later changes. See *Kennedy*, 553 U.S. 406. He summarized the position at oral argument like this: “it seems to me inconceivable, consistent with any meaningful notion of federalism, that [the Voting Rights Act] can require a world in which a State trial court . . . which exists at the bottom of the state judicial hierarchy, can by getting State law wrong in the first place lock into State law as a section 5 baseline an unconstitutional statute.”³³

III. PRIVATE PRACTICE

During his last decade in private practice, Newsom has litigated a multitude of cases. He has been particularly active defending the automobile industry and large pharmaceutical corporations.³⁴

Newsom’s work for car companies largely involved defending companies from tort suits in which victims (or their families, in the event of their deaths) sued the corporations for

defective or malfunctioning car parts. In *Kia Motors Corp. v. Leytham*, No. 1110312 (Ala.), Tonya Leytham brought suit on behalf of her deceased daughter after a Kia seat belt malfunctioned. Similarly, in *Mazda Motor Corp. v. Hurst*, No. 1140545 (Ala.) (pending), Newsom defended Mazda after Jon and Barbara Hurst brought a case against the company when their daughter Natalie died due to a car fire. In both cases, Newsom alleged that expert testimony about the safety of the car was improperly admitted and in *Mazda* he questioned whether the jury failed to properly consider if Natalie had been contributorily negligent in her own death. In two cases in front of the Mississippi Supreme Court, Newsom represented Hyundai after juries determined they were liable to accident victims. Newsom questioned whether evidence supported the juries’ awards and again questioned whether expert testimony was properly admitted at trial. See *Hyundai Motor America v. Applewhite*, No. 2015-CA-01886 (Miss.) (pending); *Hyundai Motor America v. Hutton*, No. 2015-CA-01013 (Miss.) (pending). The cases have not yet been decided.

Newsom has been even more active defending pharmaceutical companies, particularly corporations facing suit based on the doctrine of “innovator liability.” The Supreme Court has determined that federal law preempts state lawsuits against generic drug makers for injuries or ailments that arise from their product. Victims harmed by a generic drug thus have sued the original owner of the drug formula. In 2009, California permitted suit against name-brand pharmaceutical companies when a victim was injured by a generic

³² The preclearance requirement was later held unconstitutional in *Shelby County v. Holder*, 570 U.S. 2 (2013).

³³ Transcript of Oral Argument, *Riley v. Kennedy*, No. 07-77 (U.S. 2008), available at <https://www.oyez.org/cases/2007/07-77>

³⁴ See Kevin Newsom: Experience, BRADLEY, <https://www.bradley.com/people/n/newsom-kev-in-c?tab=experience>.

version of the same drug formula. This doctrine became known as “innovator liability.”

Since then, alleged victims have filed suits in states around the country under the innovator liability doctrine. Newsom has become one of the foremost defenders of big pharma in this field. He has argued that such suits are not cognizable under Alabama, Kentucky, Florida, and Mississippi law in a variety of cases. See e.g., [Franzman v. Wyeth, Inc.](#), 451 S.W.3d 676 (Mo. Ct. App. 2014) (ruling that innovator liability was not cognizable under Kentucky law); [Wyeth, Inc. v. Weeks](#), 159 So. 3d 649 (Ala. 2014) (determining that a cause of action based on innovator liability was permitted under Alabama law); [Lashley v. Pfizer, Inc.](#), 750 F.3d 470 (5th Cir. 2014) (finding that innovator liability was not a cause of action under Mississippi law); [Metz v. Wyeth LLC](#), 525 F. Appx. 893 (11th Cir. 2013); [Guarino v. Wyeth LLC](#), 719 F.3d 1245 (11th Cir. 2013) (ruling that Florida law did not allow for innovator liability).

Newsom has also defended pharmaceutical companies in a variety of other cases. In [Bryant v. Wyeth Inc.](#), 487 F. Appx. 207 (5th Cir. 2012), Mary Anne Bryant’s widowed husband brought suit against Wyeth arguing that her cancer was caused by the company’s product. Newsom successfully defended the company, convincing the Fifth Circuit that Bryant’s claim had been filed too late for redress. In [SmithKlineBeecham Corp. d/b/a GlaxoSmithKline v. Alabama](#), 41 So. 3d 15 (Ala. 2009), Newsom defended several pharmaceutical companies from suit filed on the basis that they had fraudulently inflated their prices.

ADDITIONAL WRITINGS

Newsom has also written several articles. Most notable is his Yale Law Journal piece, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*.³⁵

The inspiration for his article arose from the case [Saenz v. Roe](#), 526 U.S. 489 (1999), which found that the Privileges or Immunities Clause of the Constitution conferred a right to interstate travel for citizens. Newsom used *Saenz* as a springboard to discuss the Court’s *Slaughterhouse Cases*, which foreclosed the use of Privileges or Immunities Clause as a means of protecting many individual rights.

In his article, Newsom argues that the [Slaughterhouse Cases](#), 83 U.S. 36 (1873), have long been misread. He argues that *Slaughterhouse* did not cut off the possibility of using the Privileges or Immunities Clause to individual rights but instead merely denied the Clause’s applicability to most economic rights. “The majority’s rejection of the revolutionary view of the Fourteenth Amendment espoused by Campbell and endorsed by the dissenters,”³⁶ Newsom writes, “does not in any way render the Privileges or Immunities Clause ‘trivial.’” Newsom says “the Clause did not protect *all* personal rights (including the ordinary common-law interests invoked by the butchers); rather, it

³⁵ Kevin Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643.

³⁶ *Id.* at 666.

protected only ‘uniquely federal’ rights – a class of rights that included many of the freedoms contained in the federal Bill of Rights.”³⁷ He goes further, arguing that Justice Miller’s opinion “was merely emphasizing that the Fourteenth Amendment had *not* federalized the common-law rules that governed the making of contracts, the disposition of property, and the regulation of employment,” and was not “casting doubt on the notion that the Privileges or Immunities Clause had incorporated Bill of Rights freedoms against the states.”³⁸

Newsom’s call for expanded protection under the Privileges or Immunities Clause is very much tempered by his disdain for the doctrine of substantive due process. He writes:

My reading [of the Privileges or Immunities Clause and *Slaughterhouse*] would permit courts to lay aside the historically confused and semantically untenable doctrine of “substantive due process,” a doctrine that has for years visited suspicion and disrepute on the judiciary’s attempt to protect even textually specified constitutional freedoms, such as those set out in the Bill of Rights, against state interference.³⁹

He adds:

Above all else, it seems to me, a legal doctrine that emerges from a constitutional provision should not, at least absent the most compelling historical evidence, patently contradict the plain meaning of the text from which it emerges.” What “process,” for instance, is violated when a state legislature

duly enacts a law that, say, broadly prohibits people from picketing on a downtown sidewalk? Presumably, the substance of such a law would run afoul of the First Amendment’s free speech guarantee, but the law would in no way contravene the express mandate of the Due Process Clause that no state may “deprive any person of life, liberty, or property without due process of law.” The legislature might have deprived individuals of their “liberty” - the right to speak freely - but it would have done so with due process of law; hence, no constitutional violation.⁴⁰

Of course, the substantive portion of the Due Process Clause has been a foundation of modern constitutional jurisprudence and has protected LGBTQ individuals from states criminalizing sodomy, has protected the right to obtain birth control, and most famously has safeguarded the right to an abortion. See [Lawrence v. Texas, 539 U.S. 558 \(2003\)](#); [Griswold v. Connecticut, 381 U.S. 479 \(1965\)](#); [Roe v. Wade, 410 U.S. 113 \(1973\)](#). Newsom finds little to like in this set line of cases:

Courts invoking substantive due process - the idea of grounding protection for a substantive right in what is, by all accounts, a purely procedural provision - would do well to remember that all roads lead first to *Roe*, then on to *Lochner*, and ultimately to *Dred Scott*.⁴¹

Newsom sees nothing but dire consequences if the courts continue to

³⁷ *Id.* at 666.

³⁸ *Id.* at 673.

³⁹ *Id.* at 650.

⁴⁰ *Id.* at 650.

⁴¹ *Id.* at 742.

use substantive due process, again the basis for critical legal protections in our country. He writes:

Clearly, then, as any interpretation of the Due Process Clause that reaches beyond matters of procedure to embrace matters of substance contradicts not only the text of the Fourteenth Amendment but also the expressed intentions of the Due Process Clause’s principal framer, John Bingham... [T]here is a risk that the Supreme Court’s stubborn adherence to a doctrine that comports with neither text nor history will ultimately undermine the integrity of both the Court and the institution of judicial review.⁴²

In other words, substantive due process is so bad that it will undermine the Supreme Court as the final arbiter of constitutional law.

In the end, Newsom refuses to say if privacy protections arising from the Due Process Clause that gave rise to *Griswold* and *Roe* could be placed under the Privileges or Immunities Clause. He writes in a footnote

Given that this Article is addressed only to a single aspect of the Supreme Court’s substantive due process jurisprudence - the incorporation of Bill of Rights freedoms against state governments - I leave for another day the question whether the Court’s privacy decisions (including, most infamously, *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny) might find support in a resurrected Privileges or Immunities Clause.⁴³

Among other issues raised by his article, his

⁴² *Id.* at 740.

⁴³ *Id.* at n.450. Alas this day has yet to come.

decision to describe *Roe* as “infamous,” and his statement equating *Roe* with *Dred Scott* raises serious questions as to whether he will fully protect and enforce a woman’s right to decide whether to have an abortion.

Newsom also co-authored an amicus brief in [Caperton v. A.T. Massey Coal Co.](#), 556 U.S. 868 (2009). Newsom argued that the U.S. Constitution did not require a West Virginia Supreme Court Justice—Brent Benjamin—to recuse himself from a case where one of the litigants—Don Blankenship—had spent \$3 million on Benjamin’s election. Blankenship’s coal company had been sued for fraud and a jury had entered a \$50 million verdict against it. Newsom argued that states were best suited to handle matters of judicial recusal and that constitutionalizing recusal was both “unnecessary” and “hopelessly inadministrable.”⁴⁴ Newsom said that a “due-process rule” requiring recusal “would unduly burden the court, cause judges to ‘over-recuse’ *en masse*, and encourage litigant mischief.”⁴⁵ Newsom also authored an article arguing that the Court’s decision in *Caperton* gives litigants “a broadly-worded and seemingly open-ended federal constitutional sword to wield.”⁴⁶

The Supreme Court rejected Newsom’s argument and ruled that the Due Process Clause required Justice Benjamin to recuse himself. The Court emphasized that while the jury award was being

⁴⁴ Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah as *Amici Curiae* in Support of Respondents at 5, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22), available at https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs/07_08_08_22_RespondentAmCu7States.authcheckdam.pdf.

⁴⁵ *Id.*

⁴⁶ Kevin C. Newsom & Marc James Ayers, *A Brave New World of Judicial Recusal?: The United States Supreme Court Enters the Fray*, 70 ALA. LAW. 368, 372 (2009).

appealed and likely to end up in front of the West Virginia Supreme Court, Blankenship spent over \$3 million to elect Benjamin. *Caperton*, 556 U.S. at 873, 886. That sum was “more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee.” *Id.* at 873. Writing for the majority, Justice Kennedy noted that “Blankenship’s significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—offer a possible temptation to the average judge to lead him not to hold the balance nice, clear, and true.” *Id.* at 886 (internal quotation marks and ellipses omitted). Accordingly, on the case’s “extreme facts the probability of actual bias rises to an unconstitutional level.” *Id.* at 886–87.

Newsom’s position also was widely rejected by independent groups, including by the President of the American Bar Association, who “applauded the [Supreme Court’s] decision” and by the Brennan Center for Justice, which said that the Court’s decision was a “victory . . . for the rule of law.”⁴⁷

Newsom also wrote a brief piece strongly criticizing the Supreme Court’s 6-3 decision in *Veronia School District 47J v. Acton*, 115 S. Ct 2386 (1995). There, the Court, in an opinion by Justice Scalia, found mandatory drug testing for students to be constitutional. In his article, Newsom believed the Court wrongly used a balancing test when interpreting the Fourth Amendment.⁴⁸ The balancing approach “weighs the intrusiveness of the search against the magnitude of the state interest at stake in assessing the general ‘reasonableness’ of governmental action.”⁴⁹ In contrast, Newsom

avored strict scrutiny because it is applied as an “objective standard” and “more accurately reflects the fundamentality of the liberty interest at stake in Fourth Amendment cases.”⁵⁰ Newsom suggests the court should “genuinely” determine if the challenged search is “the least intrusive means for effecting a compelling government interest,” and this is not done when using a balancing test approach. *Id.* According to Newsom, the balancing test is too vague and often influenced by the political and social movement of the time.

CONCLUSION

Newsom’s record on substantive due process, the death penalty, rights of the accused, civil rights and ability of those injured by corporate wrongdoing to seek redress raises concerns that need to be addressed at his hearing. He must demonstrate that he will faithfully apply the Constitution and law and give full meaning to our nation’s most important constitutional rights and legal protections.

⁴⁷ *Caperton v. Massey*, BRENNAN CENTER FOR JUSTICE (June 8, 2009), <https://www.brennan-center.org/legal-work/caperton-v-massey>.

⁴⁸ Kevin C. Newsom *Suspicionless Drug Testing and the Fourth Amendment: Veronia School District 47J v. Acton*, 115 S. Ct 2386 (1995), 19 HARV. J.L. & PUB. POL’Y 209 (1995).

⁴⁹ *Id.* at 209.

⁵⁰ *Id.* at 213.