



DPCC
Democratic Policy & Communications Committee
Chairwoman Debbie Stabenow

CAPTURED COURTS

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WHAT'S AT STAKE: EQUAL JUSTICE UNDER LAW

How Captured Courts Tilt the Playing
Field Against America's Most Vulnerable

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Justice Ruth Bader Ginsburg

Throughout her career, Justice Ruth Bader Ginsburg worked tirelessly to bend the arc of the moral universe towards justice. As a litigator and co-founder of the Women's Rights Project of the American Civil Liberties Union, she pushed the Supreme Court to recognize that the 14th Amendment forbade sex discrimination. When she joined first the D.C. Circuit and then the Supreme Court, she was known for building consensus among judges across the political spectrum. In *United States v. Virginia*, Justice Ginsburg convinced her colleagues to hold, 7-1, that the Virginia Military Institute's all-male admissions

Ruth Bader Ginsburg, [CNN](#)

policy violated the Equal Protection Clause, establishing that it is unconstitutional to "den[y] to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society."¹

As the Court shifted rightward under the influence of corporate and special interests, Justice Ginsburg's dissents pulled back the curtain on how the Court privileged the powerful at the expense of the powerless. She sought to preserve affirmative action programs (*Ricci v. DeStefano*), uphold protections for immigrants (*Demore v. Kim*; *Chamber of Commerce v. Whiting*), and safeguard workers' access to courts to resolve employment disputes (*Epic Systems Corp. v. Lewis*). Ginsburg authored one of her most consequential dissents in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, a case involving wage discrimination based on gender. Though her opinion did not prevail in court, her position was subsequently written into law by Congress two years after the decision with the Lilly Ledbetter Fair Pay Act of 2009. Her absence on the Court will have a profound impact for years to come.

Justice Ginsburg's death—and the Republican Senate's promise to fill her vacancy in violation of the standard they established for President Obama's nominee Merrick Garland places the legitimacy of the Court and our democratic process in jeopardy. Little more than an hour after Ginsburg's passing, Majority Leader Mitch McConnell announced that the Senate would vote on Trump's nominee for her replacement. For Senate Republicans, it hardly matters whom Trump has selected. The wealthy special interests that fund the Republican Party have made sure Trump's pick will be a reliable vote to roll back protections for average Americans in favor of corporate interests and will not stand in the way of injustice. Justice Ginsburg's legacy is at risk—and with it the rights and equal protection of millions of Americans for generations to come.



- **While rigging the rules of democracy to help Republicans at the ballot box and distorting the Constitution to give corporate interests unbridled power,** the Supreme Court's right-wing majority has routinely ignored the interests of America's most vulnerable communities. Their world view is focused on the rights of big Republican donors—who are largely wealthy white men—at the expense of everyone else.
- **On issues ranging from workplace discrimination, to affirmative action, to immigrants' rights, to police misconduct,** the Roberts Five—the five-justice right-wing majority that Chief Justice Roberts has led, in various iterations, since he took the bench—have issued dozens of partisan decisions favoring the powerful over the powerless.
- **The confirmations of Justice Brett Kavanaugh, Justice Neil Gorsuch, and scores of far-right judges** hand-picked by big special interests threaten the foundational promise of equal justice under law, now and well into the future. A sixth Republican-appointed justice makes this threat even more dire.

How We Got Here

"Equal Justice Under Law"—four words, engraved on the Supreme Court's front entrance, express the fundamental promise of the American experiment, and the Court's own role in safeguarding that promise. For too many Americans, that principle has been an aspiration, not a reality.

Our country is reckoning with the inequities that undergird our society. Yet the promise of equal justice under law continues to ring hollow under Chief Justice Roberts and his right-wing Supreme Court majority.

Time and again, by bare 5-4 partisan majorities, the Court has bent over backwards to privilege the wealthy, the well-connected, and the powerful over vulnerable Americans: workers; racial minorities; women; immigrants; and religious minorities. When rights or interests come into conflict—such as when someone claims the right to discriminate by virtue

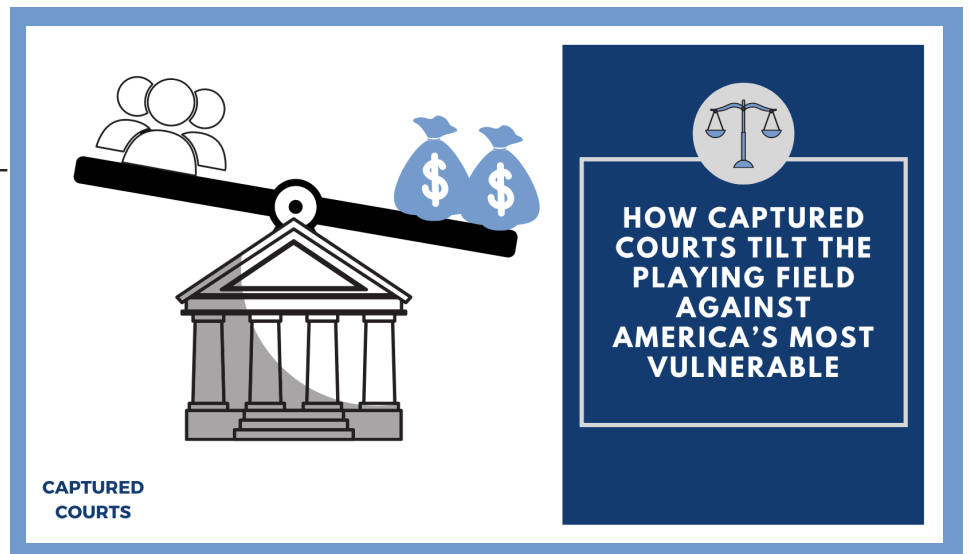
of their religious beliefs—the Court’s conservative wing has proven to be a reliable vote for Republican donor interests. Their view of the world is associated with mostly white, mostly male, and mostly wealthy interests.² When the government takes steps to remedy present injustices stemming from past inequality—for instance, through affirmative action in education—the Court’s Republican appointees have shown no interest in looking beyond this worldview. The Court isn’t just calling balls and strikes; it is rigging the game.

All told, these cases expose a Republican-appointed Supreme Court majority that is “unwilling to understand or accept how minority communities are actually discriminated against today,”³ and which fundamentally misunderstands the nature of the injustices those communities face. The discriminatory effects of these decisions are clear—in cases involving affirmative action, police misconduct, and religious liberties, to name a few. When Republicans in Congress fail to gather enough support to turn these policies into law, the courts do the legislating for them, very often to the detriment of equal justice for all. An examination of the Supreme Court’s recent cases over a range of issues bears this out.

As the Roberts Court turned its back on the promise of equal justice, Justice Ginsburg remained a voice for the people the Court chose not to hear. With her passing, America loses one of its fiercest champions of equality.

Affirmative Action & School Integration

Ever since the Supreme Court’s landmark ruling in *Brown v. Board of Education* invalidated the Jim Crow standard of “separate but equal” education,⁴ conservatives—and the so-called conservative legal movement in particular—have worked tirelessly to resist the integration of America’s education system; beginning with massive resistance from the outset. As detailed below, recent resistance has been

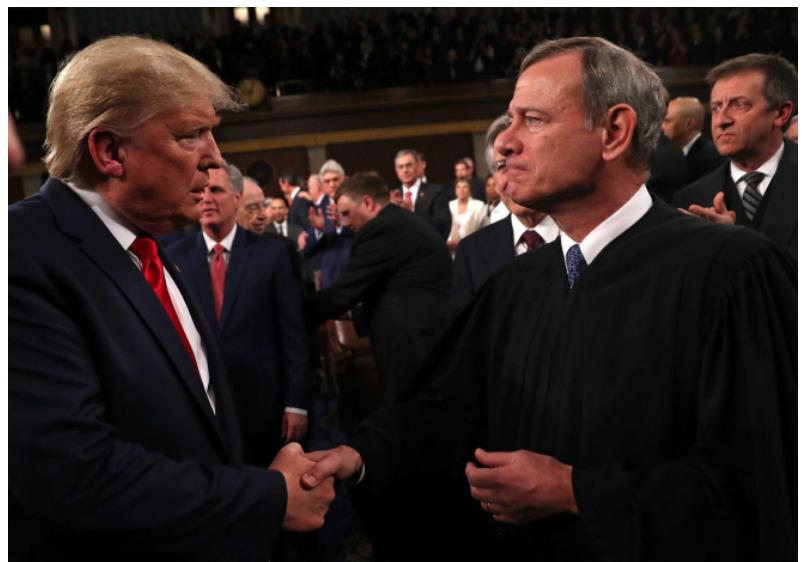


heavily funded by elements of the corporate right—groups like the Koch-operated DonorsTrust, and the DeVos Foundation—which have perpetuated racial segregation by advancing concepts like “school choice.”

Republican resistance to integrated education added a front when the Supreme Court acknowledged that universities benefit from a diverse student body and affirmed the constitutionality of affirmative action programs in *Regents of University of California v. Bakke*.⁵ Republicans began a campaign to dismantle these programs. In their *Captured Courts* report, Senate Democrats documented these efforts and how they influenced the selection of judges in the Trump Administration.⁶

Chief Justice John Roberts has been a fixture in the conservative legal movement for decades. As an ambitious young lawyer at the Department of Justice under President Reagan, Roberts was “a key player in the administration’s aggressive efforts to roll back affirmative action and other civil rights protections.”⁷ During that time, Roberts “solidified his view that remedies tied to an individual’s race were as repellant as racial discrimination in the first instance.”⁸

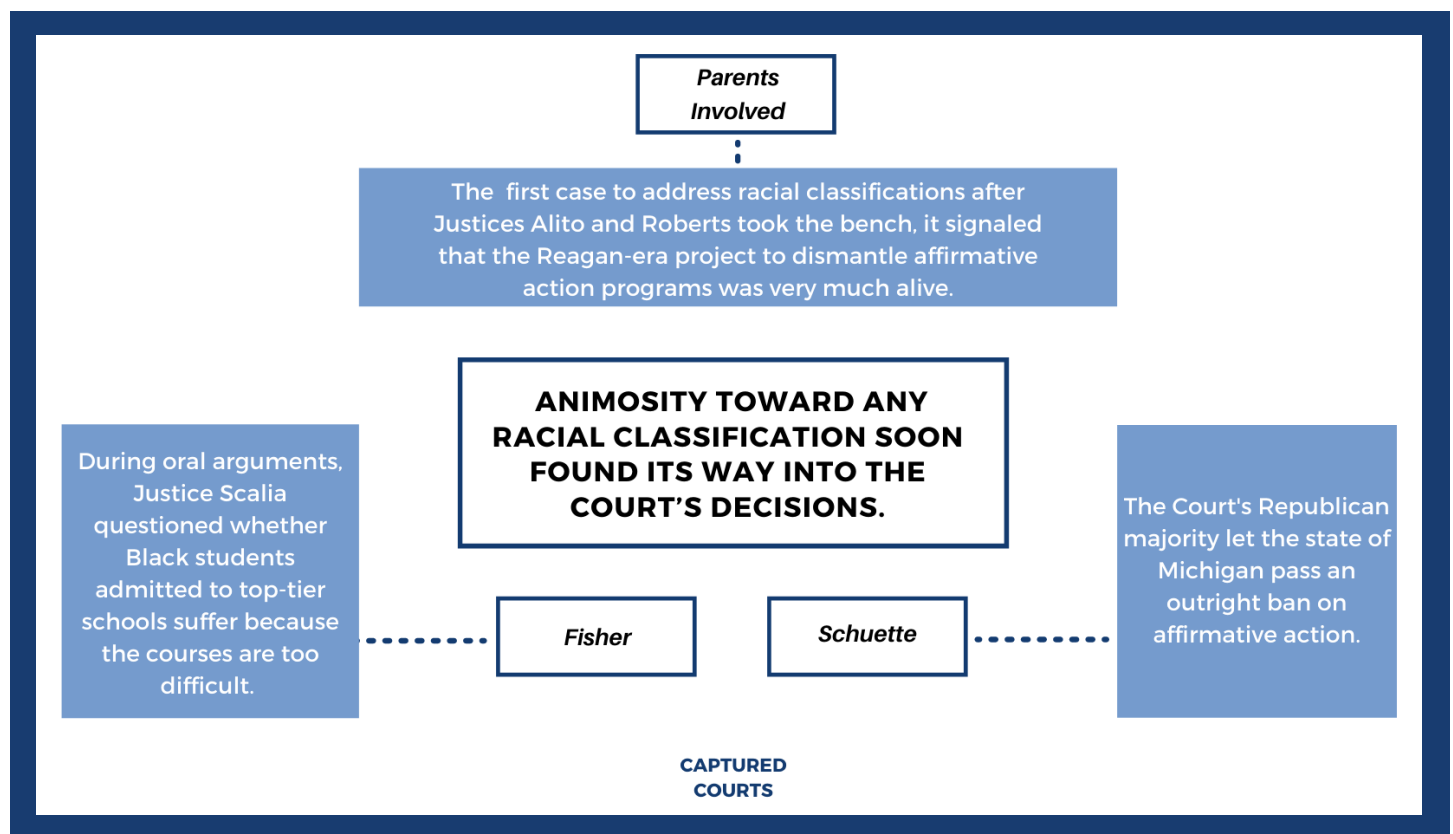
As Chief Justice, Roberts animosity toward any racial classification—however benign or just in intention—soon found its way into the Court’s decisions. 2007’s *Parents Involved in Community Schools v. Seattle School District No. 1* was the first case to grapple with racial classifications after Justices Alito and Roberts took the bench. Both Louisville’s and Seattle’s democratically elected school boards had adopted policies designed to correct for decades of housing discrimination and *de facto* and *de jure* segregation by including race as a factor in deciding which school to assign students.⁹ Roberts led the Court’s Republican appointees in striking down these plans, offering the platitude that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁰ His opinion relied, as Justice Stevens observed, on “a cruel irony”: the promise of equality laid out in *Brown v. Board of Education*.¹¹ As one scholar put it, in *Parents Involved*, the Roberts Court “worked the reverse alchemy of transforming *Brown v. Board of Education* from an instrument that held out the promise of equality to one that reinforces racial inequality.”¹² *Parents Involved* was a clear signal that the Republican project to dismantle affirmative action programs had found willing partners.



John Roberts and Donald Trump, [USA Today](#)

With Roberts and Alito on the bench, the Court's right-wing majority appeared to have the votes they needed to overturn *Bakke*, and in 2016, seemed ready to do so. After allowing the state of Michigan to pass an outright ban on affirmative action in *Schuette v. Coalition to Defend Affirmative Action*,¹³ the Court took up, for the second time, a case challenging the University of Texas at Austin's race-conscious admissions policy. During oral arguments in *Fisher v. University of Texas (Fisher II)*,¹⁴ the prejudices of the Court's conservative wing were laid bare when Justice Scalia questioned whether Black students admitted to top-tier schools suffer because the courses are too difficult: "There are those who contend," Scalia stated, "that it does not benefit African Americans to get them into the University of Texas, where they do not do well, as opposed to having them go to a less-advanced school, a slower-track school where they do well."¹⁵

Ultimately the Court narrowly upheld the Texas program —Justice Scalia passed away before a decision was rendered, and Justice Kennedy joined the Court's liberals to uphold the program. But with Kennedy gone, the Trump Administration has prioritized confirming justices and judges who have made clear their hostility to school integration and affirmative action. With a newly fortified Republican-appointed Supreme Court majority, this precedent remains at risk.¹⁶ Indeed, a prominent case seeking to invalidate affirmative action—backed, not surprisingly, by the right-wing Federalist Society network—is already on track to reach the high court.¹⁷



Discrimination

Even as Republican-appointed justices work to end racial classifications that seek to achieve diversity in education and other settings, they have been more than willing to look the other way when confronted with discrimination in the workplace, at the ballot box, and at the border. Thanks to the Roberts Five, women and minorities face more and higher hurdles to prove their discrimination claims in court.

Take *Ledbetter v. Goodyear Tire*.¹⁸ Lilly Ledbetter worked in Goodyear's Alabama tire manufacturing plant for nearly twenty years, holding managerial positions and receiving regular raises. But after she didn't receive a raise for three straight years, she received an anonymous note that her male peers were being paid better than she. By the end of her last year with the company, she made approximately \$15,000 less than the lowest-paid male employee with the same job title. Ledbetter sued. A jury of her peers awarded Ledbetter over \$3.5 million for years of discrimination.¹⁹ But with the stroke of a pen, the Republican-appointed justices on the Roberts Court wiped that verdict away. Because Ledbetter hadn't been aware of Goodyear's years of discrimination sooner, the Court reasoned, she wasn't entitled to relief.²⁰ Congress overturned that decision with the passage of the Lilly Ledbetter Fair Pay Act, the first bill signed into law by President Obama.²¹

Unfortunately, *Ledbetter* was not an isolated case. By 5-4 partisan votes, the Roberts Court has rejected claims seeking to ensure adequate funding for English as a Second Language classes (*Horne v. Flores*);²² and against a bank that was discriminating against tribal applicants (*Plains Commerce Bank v. Long Family Land and Cattle Co.*).²³ They have also rejected claims of age discrimination in the workplace (*Gross v. FBL Financial Services, Inc.*);²⁴ of workers alleging sexual harassment (*Vance v. Ball State University*);²⁵ and of minority workers alleging employer retaliation for their exercise of their civil rights (*University of Texas Southwestern Medical Center v. Nassar*).²⁶

Perhaps most alarming has been the Roberts Court's treatment of discrimination by the government itself. The Republican-appointed justices go out of their way to ignore or excuse evidence of obvious discrimination by government officials. In *Husted v. A. Phillip Randolph Institute*,²⁷ the Court's Republican appointees ignored evidence that, when Ohio removed 144,000 voters from the rolls ahead of the 2016 election, the purge disproportionately affected voters in predominantly Black

"The majority . . . entirely ignores the history of voter suppression . . . and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate." - Justice Sotomayor

neighborhoods.²⁸ As Justice Sotomayor wrote in dissent, “the majority . . . entirely ignores the history of voter suppression . . . and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate.”²⁹

In another 5-4 partisan decision, *Abbott v. Perez*,³⁰ the Roberts Five threw out a lower court’s finding, after a full trial, that Texas’s federal and state legislative districts were drawn with the intent to discriminate against Black and Latino voters. In a decision that “ignore[d] the substantial amount of evidence of Texas’ discriminatory intent,”³¹ the Court allowed the Texas GOP’s racist redistricting plan, arguing that “the good faith of [the] state legislature must be presumed.”³²

The Republican-appointed justices have shown the same willful blindness to President Trump’s own insidious discriminatory intent. Trump, for example, advertised his administration’s un-American travel ban as a “total and

complete shutdown of Muslims entering the United States.”³³ In light of this and other statements, challengers argued that the ban violated federal law, which provides that “no person shall . . . be discriminated against in the issuance of an immigrant visa”³⁴

5-4 PARTISAN DECISION

Abbott
v.
Perez



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The Court nevertheless upheld the ban in *Trump v. Hawaii*,³⁵ writing off dozens of Trump’s anti-Muslim statements as irrelevant. Wrote Chief Justice Roberts:

The issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.³⁶

In other words, because the words of Trump’s travel ban didn’t *explicitly* state that it was aimed toward Muslims, Roberts and his colleagues were willing to overlook the obvious fact the President Trump intended it to do just that.

In the rare instances when government animosity toward a minority group goes too far even for Chief Justice Roberts, he has given officials a roadmap to get past judicial review: You can discriminate, just hide it well. In *Department of Commerce v. New York*, the Court was confronted with copious evidence that the Trump

Administration sought to add a question about citizenship to the U.S. Census in order to suppress participation by Latinos.³⁷ That would lead to an undercount of certain groups, shifting political power and federal funding toward Republicans. To justify the citizenship question, the Trump Administration argued that the Department of Justice believed it was necessary to enforce the Voting Rights Act—a claim that the Court found “contrived.”³⁸ Although the Chief Justice ruled against the Trump Administration, he downplayed the fact that the government was caught in a lie about its intent to discriminate as a “distraction.”³⁹ Roberts then went on to give the Trump Administration a roadmap for how to get the same discriminatory outcome the “right” way next time.

The same pattern was evident in last year’s challenge to the Trump Administration’s decision to rescind President Obama’s Deferred Action for Childhood Arrivals (DACA) program. Again, Chief Justice Roberts ruled against the Trump Administration on a procedural technicality, ruling that its process violated the Administrative Procedures Act.⁴⁰ But in doing so, he rejected the immigrant plaintiffs’ claims of intentional racial discrimination, brushing aside the president’s statements that Latinos are “people that have lots of problems,” “the bad ones” and “criminals, drug dealers, [and] rapists.”⁴¹ Moreover, Roberts again paved the way for future Republican efforts to dismantle DACA—provided that they do it the “right” way.

Police Misconduct

As our nation grapples with police misconduct and its effect on communities of color, we cannot overlook the role our courts have played. General indifference to the lived experience of minorities combined with excessive deference to government actors—regardless of motive—closed the courtroom door to lawsuits that could drive real reforms and provide justice to victims of misconduct by law enforcement officers.

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In the past decade, the Court’s Republican appointees expanded an obscure doctrine called “qualified immunity” to make it nearly impossible for a victim of police misconduct to prevail in court.⁴² You won’t find the words “qualified immunity” in the Constitution or in any federal laws. It’s a doctrine made up by judges to protect government officials from lawsuits unless they violate “clearly established law.”⁴³ Without doubt, law enforcement officers face challenging, life-and-death situations

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on a daily basis. The Roberts Court, however, routinely protects officers from accountability when they have injured or even killed people using techniques or making decisions that no well-trained officer should.⁴⁴ Lower courts, in turn, have followed its lead.

For instance, courts have granted "qualified

immunity" to officers in cases in which they stole more than \$225,000 during a search;⁴⁵ shot a 10-year-old boy while attempting to kill a dog;⁴⁶ and destroyed an innocent woman's home to the point it was declared uninhabitable.⁴⁷ As a result, bad actors can avoid accountability for harms they cause, and victims can be left uncompensated for the pain they've suffered. With little incentive to reform bad policies and practices, systemic problems continue to fester, and people are disheartened. As one mother said after a court granted qualified immunity to the officers who killed her son: "It makes me feel that there was a mistake, but we can't win. We can't win fighting the cops."⁴⁸

The Court now often rules against victims without giving them a chance to argue their case and without providing a written decision explaining their decision.⁴⁹ The Court's so-called "shadow docket" is becoming a new, stealth way for the Roberts Five to shape the law without the public noticing.⁵⁰ The shadow docket refers to cases the Court decides without full briefing and oral argument, and often without explaining its reasoning. As with merits cases, the Court disproportionately uses the shadow docket to help the powerful. Justice Sotomayor has criticized her colleagues' willingness "to summarily reverse [lower] courts for wrongly denying officers the protection of qualified immunity" but to "rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases."⁵¹

Religious Liberty

There is one set of discrimination claims, however, that the Supreme Court's Republican-appointed majority has shown particular sympathy for: "religious liberty." While the Court has dialed back protections of minority groups, it has dialed up concern over perceived discrimination based on faith.⁵² Along the way, the Court has created religious rights for corporations and eroded the Constitution's separation between church and state.⁵³

Religious rights have become a cudgel for the Court to deny health care to women. In *Burwell v. Hobby Lobby*,⁵⁴ the Supreme Court ruled in a partisan 5-4 vote that for-profit corporations can be exempt from providing contraceptive coverage if their owners say such coverage violates their religious beliefs. In *Little Sisters of the Poor v. Pennsylvania*, the Supreme Court upheld a Trump Administration rule that made it even easier for employers, including publicly traded companies, to deny their employees birth control coverage on the basis of “moral” as well as religious grounds.⁵⁵

In *Town of Greece v. Galloway*,⁵⁶ a 5-4 partisan majority ruled that a town board’s practice of starting meetings with a Christian prayer did not violate the First Amendment’s separation of church and state.

Likewise, in *Espinoza v. Montana Department of*

Revenue,⁵⁷ the Republican-appointed bloc of the Supreme Court ruled that Montana must fund religious education as part of a voucher program for private schools, even though its own state constitution requires strict church-state separation. This ruling will have the practical impact of benefitting Christian schools and will “exacerbate the gov[ernment’s] favoritism of Christianity.”⁵⁸ *Espinoza* also highlights the Republican-appointed justices’ troubling double standard. Montana’s constitution protects and fosters the religious freedom of all citizens by ensuring that the state does not wield its taxing power to fund religious education either directly or indirectly. In this way, no taxpayers are compelled to financially support a religion that is not their own. (Thomas

Jefferson called this coercive overstep “sinful and tyrannical.”). Instead of focusing on *that* religious liberty interest—which is a bedrock principle of our Constitution and American state/church relations—the majority listened to the claims of a few conservative Christian parents.

The right-wing majority’s concern for “religious

5-4 PARTISAN DECISION

Burwell
v.
Hobby Lobby



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liberty” has not been consistently applied across all faiths. In *Dunn v. Ray*,⁵⁹ the Supreme Court in a partisan 5-4 vote allowed Alabama to execute Domineque Ray, a Muslim, African-American man, without the presence of a religious advisor. Alabama permits a Christian chaplain to be present in the execution chamber. Ray simply sought equal treatment in requesting that an imam be with him in the last moments of his life. Alabama officials refused, and the Supreme Court’s Republican-appointed majority reversed a lower court’s ruling in Ray’s favor.

Just six weeks later, in *Murphy v. Collier*,⁶⁰ Justices Kavanagh, Alito, and Roberts reached the opposite result on the same question raised by a white Buddhist. Although it was a “strikingly similar case” to *Ray*, the three Justices switched their vote “with little explanation.”⁶¹ If anything, *Ray* had the stronger case before the Supreme Court since the lower court there found

Ray had acted in a timely manner whereas the lower court in *Murphy* found that *Murphy* acted with undue delay. The obvious difference between the Supreme Court’s inconsistent decisions was that *Murphy* was a white Buddhist whereas *Ray* was a Black Muslim.⁶²

The Republican majority’s double standard on religion was also evident in two recent, high-profile cases, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and *Trump v. Hawaii*. *Masterpiece Cakeshop*⁶³ concerned whether a baker could refuse to sell a wedding cake to a gay couple based on the baker’s religious belief that same-sex marriage was immoral. The Civil Rights Commission of Colorado ruled that the baker had impermissibly discriminated against the couple. In its ruling, the Supreme Court sidestepped the central issue and instead determined on narrow grounds that the commission did not properly consider the issue because two of the seven commissioners demonstrated what the Court perceived to be anti-religious bias. Even though the “purported evidence of [anti-religious] bias was weak at best,” the Court stressed the need for government officials to remain neutral.⁶⁴



[Demonstration outside of Supreme Court, Washington Post](#)

“ What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. . . . Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it.” *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (Justice Ginsburg, dissenting).

That concern for religious neutrality was notably absent, however, from the Court’s ruling in *Trump v. Hawaii*,⁶⁵ which dealt with the constitutionality of Trump’s Muslim travel ban. As discussed above, in that case the Court refused to consider extensive evidence of the President’s discriminatory intent, upholding the ban because the language was “neutral on its face.”⁶⁶ Justice Sotomayor aptly observed that “[u]nlike in *Masterpiece*, where the majority considered the state commissioners’ statements about religion to be pervasive evidence of unconstitutional government action, (citation omitted) the majority here completely sets aside the President’s charged statements about Muslims as irrelevant.”⁶⁷

The Trump administration has prioritized confirming justices and judges who have made clear that they are hostile to equal protection. After the death of Justice Ginsburg, Republicans have the opportunity to cement their control of the Court, further endangering these precedents.⁶⁸ Republicans won’t have long to wait: This term, the Court will decide whether the City of Philadelphia must contract with a religious foster care agency even though that agency refuses to follow the City’s anti-discrimination laws and policies.⁶⁹ A prominent case seeking to invalidate affirmative action—backed, not surprisingly, by the right-wing Federalist Society network—is already on track to reach the high court.⁷⁰

Who’s Behind It

The various threads of the Trump judiciary’s denial of equal justice under law—from its assault on affirmative action, to its unwillingness to check police misconduct, to its systematic preferential treatment of “religious liberty” interests—may seem disconnected. But a look behind the curtain reveals the same cabal of corporate and Republican special interests fueling this work.

At the center of the action in many of these cases is **Edward Blum**, the failed Texas congressional candidate who orchestrated the Right’s years-long assault on affirmative action and participation in democracy by Black and Latino voters.⁷¹ Like Leonard Leo, the operative who directs the Federalist Society’s sprawling dark-money court capture network,⁷² Blum operates multiple organizations that serve as fronts for corporate mega-donors seeking to change the law through the courts.

For much of the early 2000s, Blum was the legal director of a group called the **American Civil Rights Institute** (ACRI),⁷³ which describes itself as a “civil rights organization created to educate the public on the harms of racial and gender preferences.”⁷⁴ Funded by far-right Federalist Society supporters like the **Bradley**

Foundation, the **Scaife Foundations**, the Koch-linked **Donors Capital Fund**, and the now-defunct **Olin Foundation**,⁷⁵ ACRI and Blum are a driving force behind the conservative legal movement’s campaign to end affirmative action.

More recently, Blum tapped the Federalist Society’s funding network to prop up a new anti-affirmative action litigation front group, **Students for Fair Admission** (SFFA), whose strategy pits Asian-American plaintiffs against affirmative action programs that tend to benefit Black and Latino applicants. Blum claims the group has 22,000 members,⁷⁶ though Harvard University—defending its admissions program against an SFFA lawsuit—contests those numbers, claiming the group is merely Blum’s “alter ego.”⁷⁷ SFFA’s website claims “a one-time membership fee of \$10” and keeps its member list entirely confidential.⁷⁸ In reality, it appears SFFA is funded primarily through the Koch operation’s shadowy dark-money operation DonorsTrust, known as the “dark-money ATM of the conservative movement.”⁷⁹ **Michael Park**, one of SFFA’s lead lawyers in the Harvard case, now enjoys lifetime tenure as a Trump-appointed appellate judge on the United States Court of Appeals for the Second Circuit.⁸⁰ Taking over the SFFA case is Park’s former law partner **William Consovoy**, the frequent Federalist Society speaker who also represents Leonard Leo’s voter suppression group, the ironically named “**Honest Elections Project**,” as well as the Republican National Committee and the Trump campaign.⁸¹

Blum and Consovoy have been at the heart of right-wing efforts to gut the Voting Rights Act and suppress minority access to the franchise.⁸² Another of Blum’s litigation front groups, the so-called **Project on Fair Representation (PFR)**, was (as of 2012) exclusively funded with over a million dark-money dollars from—yet again—the Koch-supported DonorsTrust.⁸³ DonorsTrust’s staff also “handles the administrative side” of this tax-exempt “charitable” nonprofit entity.⁸⁴ On his quest to dismantle the Voting Rights Act, Blum hand-selected Shelby County, Alabama, as the plaintiffs for the case that became *Shelby County v. Holder*.⁸⁵ William Consovoy argued that case at the

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Supreme Court for PFR. PFR and lawyers affiliated with Blum and Consovoy have likewise had their dark-money fingerprints on other major Supreme Court challenges to programs seeking to achieve diversity and advancement for racial minorities, such as the *Parents Involved* and *Fisher* cases discussed above.⁸⁶

The same suite of dark-money Federalist Society funders lurks behind the conservative legal movement's seemingly unrelated attack on the separation of church and state (as well as LGBTQ rights) in the name of "religious liberty." Leading the charge in this arena is the **Becket Fund for Religious Liberty**, which spearheaded the litigation in *Hobby Lobby* and *Little Sisters of the Poor*.⁸⁷ Becket is a tax-exempt "charitable" group that states its mission is to "protect the free expression of all faiths."⁸⁸ Like all the groups above, Becket has deep and lucrative ties to the Federalist Society's major backers, such as the Bradley Foundation, the Koch Family Foundation, and DonorsTrust.⁸⁹ Leonard Leo sits on Becket's board, and former Becket COO Roger Severino—husband of Judicial Crisis Network president and Leo dark money protégé Carrie Severino—has led the Trump Administration's effort to eliminate nondiscrimination protections for transgender individuals.⁹⁰



Leonard Leo
[The Federalist Society](#)

How Trump Judges Will Continue the Assault on Equal Justice Under Law

As Senate Democrats outlined in *Captured Courts*,⁹¹ Mitch McConnell has turned the Senate into a conveyor belt to confirm dozens of extreme nominees to all levels of the federal bench. Many of these nominees have track records hostile to the rights of people of color, immigrants, and other minority groups.⁹² Some have worked in the same groups that actively litigate these positions in federal courts. With life tenure, these judges will have a profound effect on the law for decades to come, regardless of whether Democrats or Republicans control the presidency or Congress.

- **Brett Kavanaugh:** In 1999, as a lawyer in private practice, Brett Kavanaugh filed an amicus brief⁹³ in *Rice v. Cayetano*—a Supreme Court case that challenged the legality of permitting only native Hawaiians to vote in an election for the trustees of the Office of Hawaiian Affairs, an organization that allocates benefits to native Hawaiians.⁹⁴ Kavanaugh argued it was unconstitutional for the state of Hawaii to use race to determine voter eligibility, signaling his hostility to even well-justified racial classifications like affirmative action programs.

- **Michael Park** (2d Cir.) represented the dark-money group SFFA in their headline-grabbing suit against Harvard's race-conscious admissions process.⁹⁵ The case is "one of the most high profile and controversial lawsuits designed to end affirmative action in college admissions."⁹⁶ Civil rights activists fear the Supreme Court's far-right majority could use the case to "end the consideration of race in admissions to all universities and colleges" and ultimately "shut out large numbers of minorities from top schools."⁹⁷

Amy Coney Barrett



Amy Coney Barrett
[The Federalist Society](#)

With Amy Coney Barrett's nomination to the Supreme Court, the guarantee of equal justice for all Americans hangs in the balance. If Barrett is confirmed, the Court, which at its best has risen to the challenge of protecting the most vulnerable among us, will side ever more with big business and special interests. Judge Barrett, with her deep roots in the Federalist Society, has come to know well what these interests want.

Her record speaks for itself. In workplace discrimination claims, Barrett has often sided with corporate employers. She joined the majority in *Kleber v. CareFusion Corp.*, making it harder to prove age discrimination for older workers.⁹⁸ In *United States EEOC v. AutoZone Inc.*, she refused to reconsider a decision by her colleagues rejecting the claim that a corporation allocated employees to its stores based on race.⁹⁹ The dissent in that case characterized the decision as a return to a state of "separate but equal."¹⁰⁰

In *Ramos v. Barr*, Barrett allowed the immediate deportation of an immigrant who had legally resided in the United States for 30 years, denying the individual the opportunity to demonstrate that his removal violated the constitutional guarantee of equal protection.¹⁰¹ Barrett dissented in *Cook County v. Wolf*,¹⁰² disagreeing with her colleagues' decision to block the Trump Administration's "public charge" rule, which makes it harder for low-income immigrants to lawfully enter the United States. The rule gives immigration officials unprecedented leeway to turn away immigrants who are "likely to be a public charge."¹⁰³ Barrett breezily dismissed as mere "policy disputes" conclusions that the rule was arbitrary, not permitted by statute, and ran the risk of depriving people their rights due to stereotypes and unsupported assumptions about them.¹⁰⁴

- **Kenneth Lee** (9th Cir.) came to the bench with a track record of inflammatory public comments denouncing affirmative action programs as a “pernicious ethnic spoils system.”¹⁰⁵ Echoing Justice Scalia’s offensive insinuation that minorities could not perform well at top-tier schools, Lee argued that affirmative action programs “admit unqualified students to challenging schools where they are likely to fail.”¹⁰⁶ Lee further alleged that “[t]he main problem with affirmative action is not that it hurts a white or Asian student,” but instead “[t]he real problem is that it hinders progress for Black Americans.”¹⁰⁷

Once confirmed, Trump’s life-tenured judges strike down discrimination claims with zeal. For example:

- **Don Willett** and **Andrew Oldham** (5th Cir.) dismissed a Black man’s racial discrimination claim against officials in the Mississippi Secretary of State’s office where he worked.¹⁰⁸ Judge Jennifer Walker Elrod, a George W. Bush appointee, authored a dissent criticizing Willett and Oldham for creating a new standard in dismissing the claim that deviated from 30 years of well-established circuit precedent.¹⁰⁹
- **Amul Thapar** (6th Cir.) authored *Johnson v. Ohio Dep’t of Public Safety*,¹¹⁰ which affirmed the dismissal of a Black state trooper’s racial discrimination claim. According to the dissenting judge, Thapar narrowed the circuit’s existing precedent and made it significantly harder for discrimination victims to prove their claims in court.¹¹¹
- **John Bush** (6th Cir.) voted to dismiss a claim by a 76-year-old woman who contended she was fired because of her age.¹¹² In dissent, Judge Eric Clay observed that Bush’s opinion discounted ample circumstantial evidence of discrimination simply because there was no direct evidence of discrimination. Clay concluded that under this logic, “an employer could never be held liable for discrimination . . . as long as the employer did not admit to its discriminatory animus.”¹¹³ Since direct evidence is uncommon, this ruling will prevent numerous victims of discrimination from obtaining justice.
- **Kurt Engelhardt** (5th Cir.) affirmed summary judgment against a Latino police detective who contended he was discriminated against when



John Bush
[The Federalist Society](#)

seeking a promotion in *Inocencio v. Montalvo*.¹¹⁴ Judge Leslie Southwick, who was nominated by President George W. Bush, dissented and argued there were genuine fact issues and evidence of potential discrimination that should have been sent to a jury.¹¹⁵

- **Kevin Newsom** (11th Cir.) authored an *en banc* opinion, joined by Trump judges **Elizabeth Branch** and **Britt Grant**, which made it significantly harder for victims of employment discrimination to prove their case without a smoking gun.¹¹⁶ As the dissent noted, the court “drop[ped] an anvil on the employer’s side of the balance” between employers and workers that the Supreme Court and Congress carefully sought to stabilize.¹¹⁷
- In *Bey v. Falk*, **Joan Larsen** (6th Cir.) overruled a district court ruling that denied qualified immunity to four police officers who surveilled and stopped a Black man solely because of his race.¹¹⁸ Although Larsen allowed the plaintiff to pursue his claims against the initiating officer, she ruled the other three officers were entitled to qualified immunity. Judge Clay penned a strong dissent arguing there was no legal authority differentiating the three other officers and that the majority improperly drew factual inferences.¹¹⁹ Judge Clay further argued that this opinion narrows the scope of the Equal Protection Clause and “turns a blind eye to race-based policing that violates the constitutional rights of Black and Latino Americans.”¹²⁰
- **David Porter** (3d Cir.) voted to affirm the rejection of a Black man’s claim that his all-white jury was not drawn from a fair cross-section of the community.¹²¹ In his dissent, Judge Felipe Restrepo observed that Porter’s decision created a new, unattainable standard that would preclude numerous Sixth Amendment claims and improperly heightened the Third Circuit’s requirements to prove a Sixth Amendment violation.¹²²
- All five Trump-nominated judges on the Fifth Circuit – **James Ho**, **Don Willett**, **Kyle Duncan**, **Kurt Engelhardt**, and **Andrew Oldham** – voted to deny rehearing in a case decided by Engelhardt that could effectively eliminate disparate-impact claims under the Fair Housing Act.¹²³ In dissent, Judge Catharina Haynes (a George W. Bush appointee) argued that the ruling makes bringing



a disparate-impact claim “nearly insurmountable” due to an “impossible pleading standard.”¹²⁴ Haynes concluded that the litigated policy “perpetuates segregation” and therefore the opinion “moves us backwards on the pathway to equality and integration.”¹²⁵

- In 2018, Florida voters overwhelmingly voted to restore voting rights to formerly incarcerated individuals. But Florida Republicans, led by Governor Ron DeSantis, ignored the will of Florida voters by passing a new poll tax, requiring that Floridians pay off all fees and fines associated with past felony convictions before their voting rights are restored.¹²⁶ U.S. District Judge Robert Hinkle ruled that the poll tax violated the U.S. Constitution by conditioning the right to vote on wealth, but the **11th Circuit**—stacked with Trump-appointed judges, including Supreme Court shortlist finalist **Barbara Lagoa**—reversed that ruling, and the U.S. Supreme Court declined to step in.¹²⁷ Over 1 million Floridians —disproportionately people of color—will be disenfranchised in 2020 as result of this blatant judicial activism.¹²⁸
- Trump-nominated justices **Gorsuch** and **Kavanaugh** joined a 5-4 ruling allowing states to bypass federal immigration laws and enforce their own restrictive immigration employment policies.¹²⁹ As Justice Breyer observed in dissent, this decision allows the states to undermine Congress’s decision to not impose criminal penalties on immigrants who seek employment.¹³⁰ It also allows states to “take immigration policy in their own hands,” which may lead to harsh treatment of undocumented immigrants in the U.S.¹³¹
- **Elizabeth Branch** (11th Cir.) affirmed a lower court order that upheld Alabama voter ID laws even while recognizing that Black and Latino voters were twice as likely as whites to lack ID.¹³² In doing so, she argued that “no reasonable factfinder” could find the laws discriminatory,¹³³ the laws were justified as a response to “well-documented” voter fraud,¹³⁴ and that Alabama should not be penalized for its history of racial discrimination.¹³⁵ The dissenting Judge Darrin Gayles accurately observed that voter fraud was “virtually non-existent”¹³⁶ and that there was a “wealth of direct and circumstantial evidence”¹³⁷ of both discriminatory purpose and effect of the voter ID law. As a consequence of Branch’s opinion, these discriminatory Alabama voting restrictions remain on the books.¹³⁸



Donald Trump and Neil Gorsuch, [The Atlantic](#)



What to Expect

Under Republican control, the federal government will make discrimination worse; the Roberts Court will look the other way.

That the Trump Administration has shown it is not interested in enforcing our nation's civil rights laws is not surprising; indeed it is typical of Republican administrations. In dozens of federal agencies, there are offices dedicated to investigating and enforcing the civil rights of Americans in housing, health care, criminal justice, and other critical areas. President Trump gutted these departments. According to the U.S. Commission on Civil Rights, by 2019, federal civil rights offices were plagued by "insufficient resources, reduced staffing levels, failure to process complaints in a timely manner, vague complaint-processing mechanisms, a tapering off of agency-initiated charges and systemic litigation in some key areas, backtracking in affirmative civil rights policy guidance, a lack of coordination in the face of emerging civil rights crises, and a need for more data collection, research, and public reporting."¹³⁹


Under Chief Justice Roberts, the Supreme Court has become complicit in the Republican Party's discrimination agenda. Whether it is DACA, the travel ban, or the Census, the message from this Supreme Court has been loud and clear: If you want to discriminate, hide it well. If you get caught, lie better.

Our courts have traditionally been the venues where facts are tested, pretexts are challenged, and the oath to tell the truth puts the powerful on a level playing field with the powerless. Today's federal judiciary is packed with judges who have shown they are happy to look the other way when faced with obvious evidence of discriminatory intent.

Governments and institutions that do try to enact policies that aim to remedy the effects of the past—like the school boards in Seattle and Louisville—are told by the federal courts that they can't. Individuals who turn to the federal courts to stand up against discrimination by their employers, or abusive conduct by the police, are more and more likely to find themselves kicked out of court before ever getting to argue their case. Nothing in the law compels these results. In fact, these decisions are often starkly at odds with the statutes they are based on.

Our federal courts will increasingly reflect the views of a wealthy, white, male, elite America, to the exclusion of other perspectives and views.

The so-called conservative legal movement has turned anti-discrimination law on its head. Chief Justice Roberts' glib statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"¹⁴⁰ may seem to embrace the spirit of *Brown v. Board of Education*,¹⁴¹ but it is hardly the view of those



who face discrimination every day. It is the perspective of those who believe that society today bears little responsibility for our country's long history of discrimination against people of color and other minority groups.

President Trump has appointed judges that lack demographic and ideological diversity. All three of his appointments to the Supreme Court have been white. Of his 53 judges confirmed to the federal circuit courts of appeal, not one is Black, and only one is Latino.¹⁴² Eighty-five percent of his nominees to the bench overall have been white.¹⁴³ This is a group that neither reflects American values nor America itself. They have shown, and we fear they will continue to show, that not all Americans will receive equal justice under law.

CAPTURED COURTS OVERVIEW

The GOP's Big-Money Assault on the Constitution, Our Independent Judiciary, and the Rule of Law

In May 2020, DPCC released a report with Senators Schumer and Whitehouse to shed a light on the right-wing takeover of our judicial system. The Trump Administration and Mitch McConnell's Senate Republicans have few significant legislative accomplishments. Instead, they're packing the judiciary with far-right extremist judges. The Senate has confirmed more than 200 new life-tenured federal judges, most of whom were chosen not for their qualifications or experience—which are often lacking—but for their allegiance to Republican political goals.

This court capture has been perpetrated through a complex network of anonymously-funded groups like the Federalist Society and spearheaded by right-wing activists like Leonard Leo. Their web consists of:

1. deep-pocketed, special-interest donors, who provide the money;
2. shell entities, which funnel the money and exploit tax laws to keep donors' identities secret;
3. public relations firms and political operatives who run multi-million-dollar ad campaigns to support and oppose judges and generate press to craft favorable public narratives; and
4. a brain trust of ideological think tanks, academic institutions, and "public interest" law firms, filled with lawyers and professors who generate "intellectual capital"—law review articles, *amicus* briefs, and so on—to advance the donors' interests through the courts.

Senate Democrats' report exposes that web:

- ✓ How the "conservative legal movement" has rewritten federal law to favor the rich and powerful with 80 partisan Supreme Court decisions
- ✓ How the Federalist Society, Leonard Leo, and special-interest money dominate our courts
- ✓ How Mitch McConnell's broken Senate confirmation process helps Republicans and the big-money donors behind them

WHAT DOES GOP COURT-PACKING MEAN FOR AMERICA:

- Voters across the country wait in line for hours to vote
- Special interests flood our airways with political ads
- Workers have discrimination cases thrown out of court
- Communities can't regulate gun violence
- Polluters can pollute our air and water without consequence
- Access to healthcare, including protections for pre-existing conditions, remains under attack

BY THE NUMBERS:



AT LEAST \$250 MILLION in dark money is funding Republicans' court capture machine

86%

86% of Donald Trump's nominees to the Supreme Court and influential appellate courts are Federalist Society members



FOR 50 YEARS right-wing donors and paid-for activists built a "conservative legal movement" to deliver for their agenda



80+ PARTISAN 5-4 DECISIONS at the Roberts Supreme Court have delivered wins to the Republican Party and the big corporate interests behind it



NEARLY 90% of the House-passed bills that Mitch McConnell sidelined to confirm partisan judges received bipartisan support

Endnotes

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109 See Elliot Minberg, *Trump Judges Dismiss Racial Workplace Discrimination Claim Against Mississippi State Officials: Confirmed Judges, Confirmed Fears*, PEOPLE FOR THE AMERICAN WAY (Apr. 17, 2020), available at <https://www.pfaw.org/blog-posts/trump-judges-dismiss-racial-workplace-discrimination-claim-against-mississippi-state-officials-confirmed-judges-confirmed-fears/>.

110 *Johnson v. Ohio Department of Public Safety*, 942 F.3d 329 (6th Cir. 2019).

111 See *id.* at 332-35 (Moore, J., dissenting).

112 *Alberty v. Columbus Township*, 730 Fed.Appx. 352 (6th Cir. 2018).

113 See *id.* at 367 (Clay, J., dissenting).

114 *Inocencio v. Montalvo*, 774 Fed.Appx. 824 (5th Cir. 2019).

115 See *id.* at 835-37 (Southwick, J., dissenting in part).

116 *Lewis v. City of Union City, Georgia*, 918 F.3d 1213 (11th Cir. 2019).

117 See *id.* at 1231 (Rosenbaum, J., concurring in part and dissenting in part).

118 *Bey v. Falk*, 946 F.3d 304 (6th Cir. 2019).

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122 See *id.* at 273 (Restrepo, J., concurring in part and dissenting in part).

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