



# DPCC

Democratic Policy & Communications Committee  
Chairwoman Debbie Stabenow

CAPTURED COURTS

OCTOBER 2020

# WHAT'S AT STAKE: DEMOCRACY

## How Captured Courts Support the Republican Party's Assault on American Democracy

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## Ruth Bader Ginsburg

Throughout her career, Justice Ruth Bader Ginsburg worked tirelessly to bend the arc of the moral universe toward 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. Ginsburg was consistently a powerful voice for marginalized groups, describing her dissents as "appealing to the intelligence of a future day."

Ruth Bader Ginsburg, [CNN](#)

In her emphatic dissent in *Shelby County v. Holder*, she objected to the majority's paring back of Voting Rights Act protections, famously writing that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."

Justice Ginsburg recognized the importance of the Court as a bulwark against powerful anti-democratic forces in this country. As the Court shifted rightward under the influence of corporate and special interests, her dissents pulled back the curtain on how the Court privileged the powerful at the expense of the powerless. She has said that her "impossible dream" was to have *Citizens United v. FEC* (a case that removed the cap on external campaign financing, and in which she joined a forceful dissent) overruled. She sought to remedy the injustices advanced by partisan gerrymandering (*Rucho v. Common Cause*) and protect the right to vote for all Americans (*Husted v. A. Philip Randolph Institute*). Her absence on the Court will be felt for years to come.

Justice Ginsburg's death places the legitimacy of the Court and our political process in jeopardy. Little more than an hour after Ginsburg's passing, Mitch McConnell announced that the Senate would vote on Trump's nominee for her replacement. For Senate Republicans, it hardly matters whom Trump selected. The wealthy special interests that fund the Republican Party have made sure that whomever President Trump nominates will be a reliable vote to advantage the rich and powerful over the most vulnerable populations that Justice Ginsburg worked to protect, doing irreparable structural damage to our system of government in the process. Her legacy is at risk and with it the integrity of our democracy for generations to come.



- **Recent Republican-appointed justices' Supreme Court rulings have opened the door for unlimited political spending by special interests**, making it harder for the voices of Americans to be heard.
- **These decisions have undercut free and fair elections** and led to voter suppression.
- **Outside conservative groups, many of which are not required to disclose their donors, have spent millions of dollars to advance their policy agendas before the courts.** A number of these same groups are now working to undermine access to the ballot in the 2020 election.
- **President Trump's judicial nominees, as well as judges nominated by previous Republican presidents, are responsible** for the vast majority of decisions that have resulted in voter suppression and made it nearly impossible to regulate political spending.

## How We Got Here

For more than 30 years – starting with the passage of the Federal Election Campaign Act (FECA) in 1971 and ending with the passage of Honest Leadership and Open Government Act in 2007 – Congress passed bipartisan legislation to increase transparency and regulate the role of money in our political system.<sup>1</sup>

FECA was originally enacted in 1971 to require candidates running in federal elections to adhere to more stringent disclosure requirements.<sup>2</sup> When those public reports documented “financial abuses” in federal elections, Congress took additional action.<sup>3</sup> FECA was amended several times, leading to stronger contribution regulations and, in 1975, the creation of the Federal Election Commission (FEC), which has a mission “[t]o protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws.”

Shortly after the FEC's first Commissioners were sworn in, the Supreme Court agreed

to hear the *Buckley v. Valeo* case, which raised the question of whether the campaign finance regulations passed in FECA violate the First Amendment.<sup>4</sup> The Court upheld regulations that set contribution limits, noting that they improve the “integrity of our system of representative democracy” by guarding against corruption and the appearance of impropriety.<sup>5</sup>

However, the Court also found that campaign contributions and expenditures pose a “substantial restraint on speech and association” and held that limits on such spending are unconstitutional.<sup>6</sup> Some scholars have noted that under this interpretation of the First Amendment, the voices of those who already hold significant power are amplified and those who lack political power are further disadvantaged.<sup>7</sup> Current FEC Commissioner Ellen Weintraub has called this ruling by the Court “a very wrong turn” that has allowed “billionaires and corporations” to have an outsized influence in our elections and paved the way to sustained deregulation of our campaign finance system.<sup>8</sup>

In addition to taking action on regulating “hard money” in the early 1990s, attention in Congress turned to the problems associated with “soft money,” which is unregulated money donated to political campaigns and PACs. Beginning in 1995, Senators John McCain (R-AZ) and Russ Feingold (D-WI) began a bipartisan push for additional regulations on soft money.<sup>9</sup> Their work led to passage of the Bipartisan Campaign Reform Act (also known as McCain-Feingold, or BCRA) with bipartisan support in both chambers. This landmark legislation, which was signed into law in 2002, bans national party committees and federal candidates from raising or spending soft money.<sup>10</sup>

In recent years, Congress has struggled to find bipartisan agreement on campaign finance reform. In 2007, the Honest Leadership and Open Government Act was signed into law, which increased the disclosure of campaign spending by lobbyists.<sup>11</sup> No significant campaign finance laws have been enacted since then.

Meanwhile, for decades, the Republican-appointed majority on the Supreme Court has repeatedly overturned bipartisan campaign finance laws limiting money in politics. These decisions opened the floodgates for unlimited corporate political spending and allowed anonymous deep-pocketed interests to dominate the free and fair exchange of ideas in our democracy.

The Supreme Court’s 2010 *Citizens*



*United* decision arguably did the most damage to our nation's efforts to keep special interest money out of politics. In that case, five justices ruled that the First Amendment allows unlimited political spending by corporate and special interests, which led to the creation of super PACs and new nonprofit groups that are not required to disclose their donors. These "dark money" groups are allowed to spend significant amounts of undisclosed money as long as their campaign activities are not the "primary purpose" of their organization.<sup>12</sup> Their massive spending drowns out the voices of voters and advances policy outcomes that favor large corporations and special interests.

Recent Republican-appointed Justices' Supreme Court rulings have opened the door for unlimited political spending by special interests, making it harder for the voices of Americans to be heard.



Captured Courts

Despite more than a decade of well-reported violations of *Citizens United's* "transparency" and "independence" predicates, the Court has yet to police its boundaries. In fact, the majority's opinion did not acknowledge that the power to spend unlimited money in politics also means having the power to make promises or threats regarding such expenditures, which could themselves be corrupting.

Since *Citizens United* became the law of the land in 2010, dark money groups have spent roughly \$1 billion in federal and state elections.<sup>13</sup> Election expenditures from undisclosed sources topped \$312 million in the 2012 general election alone.<sup>14</sup> For example, the American Action Network, a 501(c)(4) "social welfare" organization, raised \$41.9 million in one year, \$24.6 million of which came from a single anonymous donor.<sup>15</sup>

It's not just *Citizens United*. In three other cases – *FEC v. Wisconsin Right to Life*,<sup>16</sup> *Davis v. FEC*,<sup>17</sup> and *McCutcheon v. FEC*<sup>18</sup> – a 5-4 Supreme Court majority made up of appointees from Republican presidents undermined the Court's own precedents limiting corporate spending in elections and the historic Bipartisan Campaign Reform Act of 2002, which was an effort by both Democrats and Republicans to address the problem of money in elections by drawing on their own experiences as candidates.

The first BCRA challenge that made it to the Supreme Court, *McConnell v. FEC*, failed in 2003; the Supreme Court upheld the central provisions of the law – restrictions on soft money and issue ads – deferring to bipartisan congressional findings.<sup>19</sup>

Subsequent BCRA challenges were more successful. What changed? Not the law



or the facts, but the justices on the Court. After Chief Justice Roberts and Justice Alito were confirmed, the Supreme Court's new majority struck down laws banning corporations from running pre-election advertisements about candidates (*Wisconsin Right to Life*), leveling the playing field between wealthy self-funded candidates and their challengers (*Davis*), corporate spending (*Citizens United*), and aggregate-contribution limits (*McCutcheon*). Along the way, the Court, by the same 5-4 majority, also overturned state campaign finance laws.<sup>20</sup>

During this same time period, the Supreme Court has undermined American democracy by steadily dismantling voting rights protections, allowing states to make it harder for many Americans – especially Black and Latino Americans – to vote. When the Republican-appointed majority on the Court gutted the Voting Rights Act in 2013, it opened the door to Republican-backed voter suppression and disenfranchisement tactics, such as voter ID laws, voter-list purges, vote-by-mail prohibitions, and partisan gerrymandering. There is clear evidence, including judicial findings, that such tactics are discriminatory and designed to suppress minority voting.

Racial discrimination in voting is prohibited by the Fifteenth Amendment, which gives Congress broad power to enforce this prohibition by “appropriate legislation.”<sup>21</sup> Congress did just that in the landmark Voting Rights Act of 1965.<sup>22</sup> Congress later reauthorized the Voting Rights Act in 2006<sup>23</sup> with landslide votes in both the House (390-22) and Senate (98-0).<sup>24</sup> That reauthorization was buttressed with scores of hearings and expert reports, culminating in a factual record spanning 15,000 pages.<sup>25,26</sup>

Those seeking to restrict the right to vote then brought their cases to the Supreme Court, asking it to repudiate the bipartisan work of the democratically accountable Congress. Notably, this effort was aided by dark-money groups, and it succeeded. As a result, in *Shelby County v. Holder*, five Republican-appointed justices set their sights on the “preclearance” requirements of the newly reauthorized Voting Rights Act, which required jurisdictions with proven histories of racially motivated voter suppression to seek court or Department of Justice approval before changing voting laws. The five-justice majority dismissed Congress's exhaustive findings of fact, substituting its own factual determinations about race and politics, all but declaring racism – and racially motivated voter suppression – a relic of the past.<sup>27</sup> They then eliminated the Voting Rights Act's preclearance requirement. As Justice Ginsburg argued in dissent, “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”<sup>28</sup> While the Court has found that racial gerrymandering can violate the Fourteenth Amendment's Equal Protection Clause<sup>29</sup> and has occasionally crossed ideological lines in such cases, their impact has been

overshadowed by the devastating repercussions of the *Shelby County* decision.<sup>30</sup>

With the legal protections in the Voting Rights Act removed, Republican groups began to encourage states to pass laws that make voting harder. Studies have shown that Democrats benefit from high turnout<sup>31</sup> and that nonvoters tend to lean slightly Democratic.<sup>32</sup> One Republican political operative told a private group of influential conservative donors last fall that their party's electoral strategy "traditionally" relies on "suppressing votes." As Justice Ginsburg so rightly predicted, without the preclearance umbrella, Black and Latino Americans' voting rights got soaked. Shortly after the decision, Republican state legislatures passed voting restrictions that decreased access to voting for minorities. As one federal appellate court found, the North Carolina Legislature "targeted African Americans with almost surgical precision."<sup>33</sup> The Supreme Court's decision in *Shelby County* was instrumental to that strategy.

“

*[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.*

**JUSTICE GINSBURG**

In her *Shelby County v. Holder* dissent



Captured  
Courts

We recently saw the effects of the *Shelby County* decision – and Donald Trump's extreme judges – in Florida. In 2018, Florida voters overwhelmingly voted to restore voting rights to formerly incarcerated individuals. But Florida Republicans sought to undo the will of the voters by passing a new poll tax, requiring that Floridians pay off all fees and fines associated with past felony convictions before having their voting rights restored. A U.S. District Judge ruled that the poll tax violated the Constitution by conditioning the right to vote on wealth, but the 11th Circuit reversed that ruling, and the U.S. Supreme Court declined to step in. As a result, more than one million Floridians will be disenfranchised in 2020.<sup>34</sup>

In another racial gerrymandering case considered after *Shelby*, *Abbott v. Perez*, the plaintiffs alleged that Republican-drawn congressional and state legislative districts in Texas discriminated against Black and Latino voters.<sup>35</sup> After a trial, a federal court in Texas agreed that the maps were intentionally discriminatory, but five Republican-appointed justices on the Supreme Court disagreed. Despite the lower court's clear factual findings, the 5-4 Supreme Court majority upheld the gerrymandered maps and declared that the Republican-controlled Texas State Legislature – despite its record of race-based voter discrimination – was entitled to a “presumption of good faith.” In dissent, Justice Sotomayor wrote that the majority’s “disregard of both precedent and fact comes at serious costs to our democracy. It means that, after years of litigation and undeniable proof of intentional discrimination, minority voters in Texas . . . will continue to be underrepresented in the political process.”<sup>36</sup>

Allowing racial discrimination is not the only way the Supreme Court has made it harder for Americans to vote. In *Husted v. A. Philip Randolph Institute*, the five Republican-appointed justices ruled that Ohio could purge voters from the voting rolls if they chose not to exercise their right to vote and failed to respond to a notice in the mail.<sup>37</sup> Congress had passed the National Voter Registration Act (NVRA) to “enhance the participation of eligible citizens as voters in elections for Federal office,” recognizing that voting rights are “fundamental” and that “discriminatory and unfair registration laws and procedures can . . . disproportionately harm voter participation by various groups, including racial minorities.”<sup>38</sup> Congress made it clear at the time that state laws “shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote.”<sup>39</sup> Yet, the five Republican-appointed justices on the Supreme Court later disagreed with Congress and upheld the voter purge. This decision has led states to continue massive purges of voter rolls, including in Georgia<sup>40</sup> and Wisconsin.<sup>41</sup> Conservative dark-money groups are using the decision to launch “an aggressive campaign to force states” to purge their voter rolls.<sup>42</sup>

**“[the majority’s] disregard of both precedent and fact comes at serious costs to our democracy. It means that, after years of litigation and undeniable proof of intentional discrimination, minority voters in Texas . . . will continue to be underrepresented in the political process.” - Justice Sotomayor**

Cases like *Shelby County*, *Abbott*, and *Husted* show how a bare majority of the Court set the stage for Republican efforts to strike down or undermine laws protecting the right to vote and ultimately opened the door to partisan gerrymandering. Partisan



gerrymandering undermines the principle of representative democracy, permitting a party in power to keep that power by manipulating district lines.

Take Wisconsin: In 2018, Democrats “won 53 percent of the vote and only 36 percent of the seats” in the state legislature.<sup>43</sup> This partisan gerrymandering resulted from Wisconsin Republicans’ post-2010 efforts to “draw[] new legislative district boundaries to ensure that they’d never cede [legislative] control again.”<sup>44</sup> Their goal was to sequester Democratic-leaning voters in a few districts so that the remaining districts would be left with Republican majorities.

Like voter identification laws and state voter-roll purges, partisan gerrymandering is a political ploy that courts are positioned to prevent. But in 2019, in *Rucho v. Common Cause*, the Court’s Republican appointees instead stripped federal judges of their power to stop partisan gerrymandering.<sup>45</sup> As Justice Kagan wrote in dissent, partisan gerrymandering “imperil[s] our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections.”<sup>46</sup>

## Supreme Complicity

Since 2005, the Republican-appointed majority of the Supreme Court has refused to check well-established political strategies to suppress voting rights and flood elections with unlimited money. Here are just a few examples:

- Gutting the Voting Rights Act to greenlight voter suppression (*Shelby County*)
- Upholding discriminatory voter identification laws (*Crawford v. Marion County Elections Board*)
- Rubber-stamping partisan gerrymandering (*Rucho v. Common Cause*)
- Approving indiscriminate voter purges (*Husted v. A. Phillip Randolph Institute*)
- Flooding elections with unlimited corporate money (*Citizens United*)

## Who Is Behind It

The Supreme Court’s campaign finance and voting rights decisions are not supported by its precedents. Instead, they represent the adoption of novel legal theories by Republican-appointed judges and justices whose nominations were advanced by special interests. At the Supreme Court, the 5-4 decisions present a pattern: In case after case, outcomes shift the ground rules of democracy to benefit Republicans and special interests. The special interest assault on the courts and the undermining

of American voting rights are interconnected. Indeed, the same groups supporting Republican judicial nominations have now turned their attention and money directly to suppressing the vote in the 2020 election.

The apparatus used to capture the Court is outlined in greater detail in the Senate Democrats' *Captured Courts* report<sup>47</sup> in which Senate Democrats documented a \$250 million dark-money judicial-influence machine, comprised of multiple groups, and run by Leonard Leo.<sup>48</sup> Leo recently left his position as Federalist Society Executive Vice President (though he still remains co-chairman of its board) to found CRC Advisors, where he has vowed to spend at least \$10 million in political advocacy around judges in the 2020 election cycle.<sup>49</sup> The powerful groups and individuals in Leo's Court-packing network — which also worked to bring us *Citizens United*, *Shelby County*, and other Republican-friendly Court decisions — are now out to suppress the vote in the 2020 election. These are just a few examples of these front groups:



Leonard Leo  
[The Federalist Society](#)

## Honest Elections Project

The Honest Elections Project describes itself as “a nonpartisan group devoted to supporting the right of every lawful voter to participate in free and honest elections.”<sup>50</sup> In reality, it does just the opposite, seeking to make voting as hard as possible, especially for people who tend to vote Democratic. Its efforts to date include a six-figure ad campaign opposing vote-by-mail,<sup>51</sup> a lawsuit against the state of Michigan to compel it to purge voters from its rolls,<sup>52</sup> and *amicus curiae* briefs opposing accommodations to make voting more accessible in light of the ongoing COVID-19 pandemic.<sup>53</sup> The Honest Elections Project claims to be a new, nonpartisan entity. But documents reviewed by reporters from *OpenSecrets* and *The Guardian* indicate it is not new at all. It “is just a legal alias for the Judicial Education Project,” a preexisting group that received “more than 99 percent of [its] funding” for 2018 “from a single \$7.8 million [anonymous] donation from DonorsTrust,” the Koch network’s dark-money vehicle.<sup>54</sup> At the heart of this operation is the Federalist Society’s Leonard Leo, who plays an outsized role in President Trump’s judicial selection process.

## Judicial Watch

Founded in 1994, Judicial Watch is a 501(c)(3) nonprofit that describes itself as a “conservative, non-partisan educational foundation.”<sup>55</sup> In recent years, Judicial Watch has been a key player in litigation over “voter purges,” in which state governments remove thousands of inactive voters from their rolls, often without those voters’

knowledge or consent. Early in 2020, following the *Husted* decision described above, it sent legal notices to several populous counties and states, threatening to sue if those jurisdictions didn't act within 90 days to carry out voter purges.<sup>56</sup> The group's president made false claims online about counts of registered voters in the run-up to the 2020 Iowa caucuses – leading even Iowa's Republican Secretary of State to describe Judicial Watch's numbers as “#FakeNews.”<sup>57</sup> Though Judicial Watch took in more than \$45 million in 2016 and more than \$53 million in 2017,<sup>58</sup> it is not obligated to disclose its donors. The sources of its funding remain largely unknown. It received at least \$8.7 million from the Scaife Foundations – which are major benefactors of the Federalist Society and other right-wing groups – between 1997 and 2010.<sup>59</sup> It has also received anonymous contributions from DonorsTrust, including about \$100,000 between 2009 and 2014, and at least \$15,000 in 2017.<sup>60</sup> As described in *Captured Courts*, DonorsTrust is the Koch-linked “donor advised fund” known as the “dark-money ATM of the conservative movement.”<sup>61</sup>

## **True the Vote**

True the Vote was founded in 2010 by Catherine Engelbrecht, who also started the Tea Party group King Street Patriots. From its outset, the group's primary goal has been to recruit military veterans to serve as “poll watchers,” whose task of finding “suspicious” activity is often focused on voters and neighborhoods of color.<sup>62</sup> They have recently retained Jim Bopp, the Republican campaign finance attorney who represented *Citizens United*, to file lawsuits challenging states' efforts to expand absentee voting and vote-by-mail in light of the COVID-19 pandemic. Though its finances are largely unknown, we know that of the millions of dollars True the Vote has received since 2013, at least \$150,000 came anonymized through DonorsTrust.<sup>63</sup> Other right-wing interests and foundations have made sizable contributions to True the Vote as well, including the Bradley Foundation (at least \$50,000) and the bloc of think tanks known as the State Policy Network (at least \$40,000).<sup>64</sup>

## **Project Veritas**

Founded in 2010 by James O'Keefe, Project Veritas records “sting” videos, in which its operatives go undercover and attempt to obtain footage damaging to Democratic officials and liberal groups. Though substantial evidence indicates that Project Veritas videos are often staged and/or deceptively edited,<sup>65</sup> legislators in states like Mississippi have cited its videos to justify enacting strict Voter ID laws.<sup>66</sup> Project Veritas began infiltrating voter registration and election assistance groups in late 2019, with plans to release staged footage of “ballot harvesting” and other alleged misdeeds in the lead-up to this fall's presidential election.<sup>67</sup>

## How Trump's Judiciary Is Continuing the Assault on Democracy

President Trump has appointed a number of unfit nominees to lifetime federal judgeships who often hold extreme ideological views on issues ranging from abortion to LGBTQ+ rights. As outlined below, many of Trump's judicial nominees also have shown a demonstrated hostility to free and fair elections, including by seeking to erase any distinction between individuals and corporations, and between money and speech. They have even made it easier for foreign governments to interfere in our elections through unlimited dark-money spending. At the same time, they have been reliable votes to allow GOP-driven voter suppression in the states.

### Brett Kavanaugh (U.S. Supreme Court)

While on the D.C. Circuit, then-Judge Kavanaugh created an opening for foreign nationals to interfere in U.S. elections with dark money-funded "issue ads,"<sup>68</sup> went out of his way to loosen campaign finance restrictions,<sup>69</sup> and stated that money "absolutely" is the equivalent of speech.<sup>70</sup>

He authored an opinion upholding a South Carolina voter ID law against a challenge that the law violated the VRA, notably refusing to join a concurring opinion that emphasized the importance of the VRA.<sup>71</sup>

UPHELD STRINGENT STATE VOTING RESTRICTIONS

APPROVED EXTREME PARTISAN GERRYMANDERING

ENDORSED FLORIDA'S POLL TAX



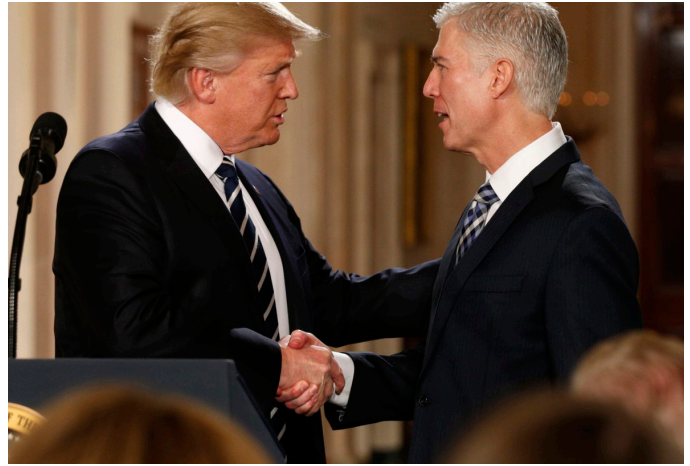
Since joining the Supreme Court, Kavanaugh has proven to be a reliable vote for anti-democracy interests, upholding stringent state voting restrictions, endorsing Florida's poll tax for formerly incarcerated voters, and giving his blessing to extreme partisan gerrymandering.

### Neil Gorsuch (U.S. Supreme Court)

While on the Tenth Circuit, then-Judge Gorsuch went out of his way to question Supreme Court precedent, suggesting that limits on campaign contributions should be subject to the strictest level of scrutiny, which would make it easier to strike down such limits.<sup>72</sup> Once on the Supreme Court, Justice Gorsuch joined Justice Thomas as the only two justices who voted to hear a challenge to the McCain-Feingold law's ban

on unlimited “soft money” contributions.<sup>73</sup>

On the Supreme Court, Gorsuch has provided a decisive fifth vote for special interests in critical voting rights and democracy cases, including *Husted* (voter purges), *Abbott v. Perez* (racial gerrymandering), and *Rucho* (partisan gerrymandering).



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

### **Greg Katsas (D.C. Circuit)**

Judge Greg Katsas authored an opinion arguing that limits on political contributions are unconstitutional if the contribution is a bequest upon a person’s death, even if in exchange for favors that benefit the donor’s friends, family, and affiliated interests.<sup>74</sup>

### **James Ho (Fifth Circuit, Texas)**

In a 1997 article, James Ho argued that “we must reverse course and abolish all restrictions on campaign finance,” and that “[p]artial regulation leads inevitably to complete regulation.”<sup>75</sup> Once on the Fifth Circuit, Judge Ho authored a dissent harshly attacking Supreme Court precedent and arguing that all limits on campaign contributions are unconstitutional.<sup>76</sup> Judge Ho wrote that “many Americans of good faith bemoan the amount of money spent on campaign contributions and political speech. But if you don’t like big money in politics, then you should oppose big government in our lives. . . . [I]f there is too much money in politics, it’s because there’s too much government.”<sup>77</sup> This year, dissenting in a redistricting case, Ho tried to reverse a lower court decision in order to give white voters another chance to prove that a 2011 redistricting plan in Dallas County, Texas, racially discriminated against them and hurt their ability to elect their chosen candidates.

### **John Bush (Sixth Circuit, Kentucky)**

Before his nomination, John Bush suggested that there should be “more money, not less” in politics<sup>78</sup> and that public financing of campaigns is unconstitutional.<sup>79</sup> In extensive and often inflammatory blog posts, Bush signaled his allegiance to the Republican Party, issuing a call to “roll with Trump” in 2016.



John Bush  
[The Federalist Society](#)

This May, Judge Bush cast the deciding vote to stay a district court order easing state ballot restrictions for the COVID-19 pandemic.<sup>80</sup> The result – as the dissent argued – was to harm the “candidates’ right to associate” and run for office, as well as “the rights of voters to cast their votes effectively.”

### **Amul Thapar (Sixth Circuit, Kentucky)**

While on the district court, Judge Thapar was reversed by the Sixth Circuit after ruling that Kentucky’s campaign finance laws for judicial elections were unconstitutional.<sup>81</sup>

### **Lawrence VanDyke (Ninth Circuit, Nevada)**

Before his nomination to the federal bench, Lawrence VanDyke ran for a seat on the Montana Supreme Court. His campaign was funded by \$170,000 from the Koch brothers.<sup>82</sup> During his campaign, VanDyke argued that dark money poses less danger of a conflict of interest because candidates won’t know who spent money to help them.<sup>83</sup> President Trump recently added VanDyke to his Supreme Court short list, even though the American Bar Association deemed him “not qualified” for his circuit court appointment after colleagues described VanDyke as “arrogant,” “lazy,” and an “ideologue.”<sup>84</sup>

### **Kyle Duncan (Fifth Circuit, Louisiana)**

Kyle Duncan defended a series of restrictive voting regulations implemented by North Carolina the day after the Supreme Court’s ruling in *Shelby County*. These included: a strict voter ID requirement; a reduction in the early-voting period from 17 to 10 days; a ban on casting provisional ballots for out-of-precinct voting; a ban on pre-voter registrations of 16-year-olds; and the complete elimination of same-day



Kyle Duncan, [New York Times](#)

voter registration.<sup>85</sup> The Fourth Circuit struck down the North Carolina law, concluding it “target[ed] African Americans with almost surgical precision.”<sup>86</sup> In an appeal to the Supreme Court, Duncan argued that the Fourth Circuit’s decision was “an affront to North Carolina’s citizens and their elected representatives.”<sup>87</sup>

### **Eric Murphy (Sixth Circuit, Ohio)**

As Ohio's State Solicitor, Eric Murphy led efforts to defend Ohio's voter purge process in *Husted*, described above. Murphy claimed that Ohio's process did not violate the National Voter Registration Act because the voter's failure to respond to the confirmation notice disrupted any proximate cause connection between not voting and being removed from the voter rolls.<sup>88</sup>

### **Cory Wilson (Fifth Circuit, Mississippi)**

Cory Wilson criticized the Obama Justice Department for sending observers to his state to prevent "voter suppression" – which he put in quotations to signal his skepticism of its existence. "Given that all the poll workers were African-American," he wrote, "it was unclear who the feds thought was doing any intimidating. [The government] might spend less time chasing agendas that aren't there, and more time investigating . . . voter fraud . . ." <sup>89</sup> In a separate op-ed, Wilson described "voter suppression" as "as phony as the 'war on women.'" <sup>90</sup>

### **Barbara Lagoa (Eleventh Circuit, Florida)**

As a member of the U.S. Court of Appeals for the Eleventh Circuit, Barbara Lagoa voted to allow Florida to impose a discriminatory poll tax on voters with felony convictions, defying the will of Floridians who voted overwhelmingly to allow these citizens to vote.<sup>91</sup> In participating in that decision, she failed to honor her previous commitment to recuse from cases she had previously been involved in as a Florida Supreme Court Justice.<sup>92</sup> As the Washington Post recently explained, "[t]he voting rights issue was one Lagoa had been vocal about while on Florida's high court, repeatedly challenging the arguments made by attorneys for former inmates, who could become a sizable voting pool in a state with a history of close presidential contests."<sup>93</sup>



Barbara Lagoa  
[Florida Supreme Court](#)

Some seeking judgeships now appear to be signaling to the donors influential in selecting nominees that they will be anti-transparent in campaign finance disclosure, permissive of voter-suppression laws in election rulings, and pro-money in politics. At least three Trump nominees authored or assisted *amicus* briefs submitted in *Shelby County* itself, all in favor of gutting the Voting Rights Act:

### **Andrew Brasher (Eleventh Circuit, Alabama)**

Andrew Brasher argued that despite Alabama's history of disenfranchising African-American voters, the Voting Rights Act was "not fair" and burdened the state.<sup>94</sup>

### **Britt Grant (Eleventh Circuit, Georgia)**

In an *amicus* brief urging the Supreme Court to strike down Section 5 of the Voting Rights Act, Britt Grant argued that “significant evidence of voting discrimination in the southern States” no longer existed and that the law “applies arbitrarily.”<sup>95</sup>

### **Andy Oldham (Fifth Circuit, Texas)**

Andy Oldham argued that “the preclearance requirement [had] become[ ] a weapon for DOJ to prevent or delay the implementation of voter-identification laws,” which he called “an intolerable burden to impose.”<sup>96</sup>



Amy Coney Barrett  
[The Federalist Society](#)

### **Amy Coney Barrett**

History is unlikely to cast a kind eye upon the circumstances of Amy Coney Barrett’s nomination. President Trump’s and Senate Republicans’ decision to rush her confirmation while an election is underway and during a pandemic is a raw exercise in political power to benefit the special interests that drive the Republican Party’s agenda.

It does not bode well for democracy. President Trump and Senate Republican leaders are already sowing seeds of distrust and doubt in our election, and casting the Supreme Court, not the voters, as having the final say in who will be our next President. “I’m counting on [the Court] to look at the ballots” said President Trump at a recent Presidential debate.<sup>97</sup> And he is counting on Senate Republicans to install his hand-picked nominee to be part of that decision.

Judge Barrett isn’t new to election controversies. She was part of the team that represented George W. Bush in *Bush v. Gore*, where a 5-4 majority on the Supreme Court intervened in a state election recount to hand the election to Bush.<sup>98</sup> As a judge, she authored the majority opinion in *Acevedo v. Cook County Officers Electoral Board*, holding that a candidate for County sheriff’s First and Fourteenth Amendment rights did not outweigh the state’s interest in creating a high bar for signature requirements for candidates looking to get on ballots.<sup>99</sup>

If Amy Coney Barrett is confirmed, the evidence suggests the Supreme Court’s steady attack on the procedural guarantees for free and fair elections will continue.



## What to Expect, and What's at Stake

### **Courts will not protect voters when their rights are under attack.**

Trump-appointed and other Republican-appointed judges have had a profound impact on the right to vote. Consider the experience of Ellie Bradish, a Wisconsin voter seeking to cast a ballot in the midst of the COVID-19 pandemic. As detailed in the *Washington Post*, Bradish and her husband never received their absentee ballots, “tried to vote at a drive-through site” where “the wait was two hours long,” and finally voted “in person despite fears of coronavirus infection.”<sup>100</sup> Bradish explained, “We decided to risk our lives to come vote. . . . I feel like I’m voting for my neighbor, all the people who don’t have the luxury to wait this long.”<sup>101</sup>

At that time, states did not have adequate knowledge or the protective equipment to reconfigure polling places to protect voters and poll workers from the deadly virus. In the end, thousands of Wisconsin voters like Bradish were forced to risk exposure to the COVID-19 virus to exercise their right to vote, after the Supreme Court, in a 5-4 decision authored by Republican appointees, refused to allow Wisconsin to extend its voting deadlines so people could vote safely.<sup>102</sup> As Justice Ginsburg wrote in her dissent, Wisconsin voters “will [either] have to brave the polls, endangering their own and others’ safety. Or they will lose their right to vote, through no fault of their own.”<sup>103</sup> “That,” she continued, “is a matter of utmost importance – to the constitutional rights of Wisconsin’s citizens, the integrity of the State’s election process, and in this most extraordinary time, the health of the Nation.”<sup>104</sup>

As problems have mounted in this election year, the GOP has escalated its war against democratic participation. Trump’s reelection campaign and the Republican National Committee have doubled their litigation budget to more than \$20 million for voting rights lawsuits.<sup>105</sup>

Meanwhile, as the pandemic continued to rage throughout the country, the same 5-4 partisan Supreme Court majority blocked a trial judge’s order that would have made it easier for voters in three Alabama counties to use absentee ballots in that state’s primary election.<sup>106</sup> The 5-4 Wisconsin and 5-4 Alabama rulings continued a troubling and longstanding pattern of partisan rulings by the Supreme Court in recent voting rights cases.



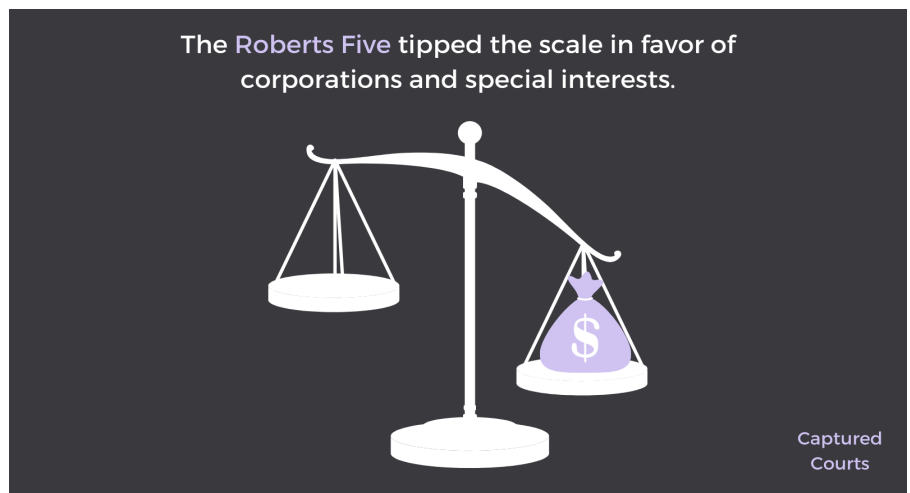
Voting lines in Wisconsin  
[Star Tribune](#)

When Republican-appointed justices refuse to protect voting rights even during this unprecedented public health crisis, it sends a powerful signal about this political goal. The pattern is clear: In every significant case pitting Americans' fundamental right to vote against GOP voter suppression, the five Republican appointees on the Supreme Court have come down in favor of voter suppression. And the pattern tells us that Americans preparing to vote in this fall's historic presidential election, concerned for their health and safety amid a worsening pandemic, can expect that a five-vote majority of the Court will continue to decide in favor of GOP electoral advantage over voter rights.

**More and more special interest money will flood into our elections, drowning out the voices of voters and increasing political corruption.**

By allowing unlimited election spending, the Republican-appointed Supreme Court majority has tipped the political scale in favor of corporations and special interests and against the general public.

Super PACs are able to raise and spend unlimited amounts of money in elections and are overtaking the campaign finance system. Through this mechanism, a small number of big donors wield vastly disproportionate influence. Super PACs have received approximately \$6 billion in contributions since 2010. Eleven donors contributed more than \$1 billion of those funds.<sup>107</sup> Once unheard of, this form of influence has become the new normal.



Such "independent" groups are increasingly outraising even the candidates themselves. During the 2020 election cycle, with the election nearly a month away, Super PACs have already raised more than \$1.3 billion.<sup>108</sup>

These groups have outspent the candidates in 126 congressional races since 2010,<sup>109</sup> including in 28 races in 2018.<sup>110</sup> In the most competitive races, outside money typically outstrips candidate spending. For example, an examination of spending from 2000 to 2006 found that candidates spent more in the top ten most expensive Senate races in every single race. By 2014, after *Citizens United*, it had flipped. Outside groups topped candidate spending in seven of the top ten races – and in those races, the groups spent an average of 80% more than the candidates.<sup>111</sup> The predicates of

“transparency” and “independence” upon which *Citizens United* stood have been made a mockery. According to the *Citizens United* majority opinion, these predicates are supposed to be our bulwark of protection against corruption of our government. Yet during more than a decade of their repeated-violations, the Court majority has made no effort to reconsider their validity.

**Even our existing campaign finance laws are at risk.**

A number of Trump appointees to the bench have embraced the concept of money equaling political speech. Before their nominations, many argued, sometimes in legal opinions and sometimes in written articles, that campaign finance laws should be overturned or abolished. On the bench, some have gone out of their way to write opinions that would do just that.

Many of these judges were supported by the conservative legal movement that continues to advance extreme legal theories in courts around the country. In a group of cases out of California now on appeal to the Supreme Court, a dark-money group is urging the Court to give strict First Amendment protections to donations made to not-for-profit organizations.<sup>112</sup> Scores of donors, including the same groups behind *Citizens United* and *Shelby County*, have rallied behind this case to argue that no one – not the public, not the press, not Congress – has a right to inquire who funds their efforts. Should these interests once again prevail, America’s democracy – already gradually undermined by this captured Court – will become weaker still.

**Captured Courts**

**THE JUDICIAL ASSAULT ON DEMOCRACY**

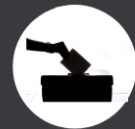
**UNLIMITED POLITICAL SPENDING**

The Roberts Court has sanctioned unlimited political spending by special interests and their front groups, making it harder than ever for the voices of real Americans to be heard.



**REPUBLICAN DONOR ELITE**

A Republican donor elite has spent millions of dollars of dark money to use courts to enshrine its policy preferences as the law of the land. That same group is now working to suppress the vote in the 2020 election.



**VOTER SUPPRESSION**

The Republican appointees on the Supreme Court have undercut free and fair elections by reliably endorsing Republican efforts to suppress minority participation. Now, amid the COVID-19 pandemic, they are forcing Americans to choose between their safety from this disease and their right to vote.



**PRESIDENT TRUMP**

President Trump has stacked the courts with activist judges willing to rig the rules of democracy in favor of wealthy special interests for years to come.



## Conclusion

We have a duty to ensure that our judicial and political systems work for all Americans. For our system to work, people must have confidence in their ability to be heard by political leaders. Our current campaign finance system allows special interests and foreign actors to exploit loopholes at the expense of the American people. And it lets dark money drown out the voices of everyday Americans. As a result, many have lost trust in government. And it isn't just a political problem – the judicial system is complicit in this loss of confidence. By striking down laws that reduce the effectiveness of campaign finance regulations, and by allowing partisan voter suppression of Black and Latino voices to proliferate, Republican-appointed majorities on the Court have undermined our system of governance, which rests on the notion that each voter has an equal say in our democracy. We must do more to restore people's trust. It starts with limiting the corrupting influence of money in our political system and by fighting to ensure that every American has easy access to the ballot in free and fair elections.

# 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%** 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

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