



DPCC

DEMOCRATIC POLICY & COMMUNICATIONS COMMITTEE
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CAPTURED COURTS
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WHAT'S AT STAKE: ECONOMIC JUSTICE

How the Right-Wing Capture of Our
Courts Protects Corporate Power
by Closing the Courthouse Door to
Americans

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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 her 27 years on the Supreme Court, Justice Ginsburg was a fierce defender of access to the courts for the American

Ruth Bader Ginsburg, [New York Times](#)

people. She recognized that the civil jury, as protected by the Seventh Amendment, is at the core of a fair and just legal system. Her dissents in cases like *Lamps Plus v. Varela*, opposing expansion of forced arbitration, stood as sharp rebukes to her conservative colleagues' decisions that foreclosed justice to millions of Americans harmed by corporate misconduct. Her powerful dissent in *Ledbetter v. Goodyear*, a case involving gender-based pay discrimination, spurred Congress to pass the Lilly Ledbetter Fair Pay Act of 2009, the first piece of legislation signed by President Obama. Justice Ginsburg was a champion of the civil justice system, and, to carry on her legacy, we must continue to fight to make the courthouse door open to all Americans.



- **Justice Ginsburg called the Roberts Court “one of the most activist courts in history.”**¹ Under Chief Justice John Roberts’s tenure, the Republican-appointed Supreme Court justices have blocked access to the courts for millions of Americans seeking to hold corporations responsible for injury or misconduct.
- **Through a series of partisan 5-4 cases** involving forced arbitration, class actions, pleading standards, and damages caps, the Roberts Five—the five-justice Republican majority that Chief Justice Roberts has led, in various iterations, since taking the bench—have helped insulate big corporations from accountability for misconduct.
- **As a result, corporations have been given a free pass** when they have placed defective products into the marketplace, discriminated against workers, violated federal consumer protection statutes, and defrauded consumers.
- **Corporations and big special interests have engaged in a decades-long lobbying campaign in Congress for immunity from lawsuits.** These same groups have filed dozens of *amicus curiae*—or “friend of the court”—briefs in Supreme Court cases involving Americans’ access to justice, and, under the Roberts Court, have won at historic rates.
- **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 has selected. The wealthy special interests that fund the Republican Party have made sure that President Trump’s nominee will be a reliable vote to help corporations evade accountability for their misconduct by keeping Americans out of court. Time and time again, the Roberts Court has put the rights of corporations over the American citizens’ right to an open, fair, and accessible

civil justice system. If Trump and Senate Republicans steal another Supreme Court seat, it will place Justice Ginsburg’s legacy—and access to justice for Americans for generations to come—at risk.

What the Supreme Court Has Done

The Big Picture

Courts are often the last resort for Americans who have been injured by a defective product, defrauded by a big bank, or wrongly fired by an employer. Access to the courts and a trial by jury are so fundamental to our democratic system that they were a leading cause of the American Revolution² and are enshrined in the Constitution’s Seventh Amendment right to a jury trial in civil cases. James Madison called the right to trial by jury in civil cases, “as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”³ Today, fair access to courts remains vital to achieving economic justice and equality in this country.

Not surprisingly, big corporations and special interests hate the prospect of being held accountable in court and have waged a decades-long campaign in Congress and the courts for laws and procedural rules that limit the American people’s ability to hold them liable for malfeasance.

For decades, Congressional Republicans have pushed for legislation designed to insulate their corporate funders from liability.⁴ Under the guise of “preventing litigation abuse,” and by villainizing plaintiffs’ lawyers, Republicans have pushed for legislation designed to make it more difficult for Americans to seek redress for corporate wrongdoing.⁵ There is perhaps no better example than Senate Majority Leader Mitch McConnell’s refusal to pass a meaningful COVID-19 relief bill unless it broadly shields businesses from liability from workers, patients, and consumers in coronavirus-related lawsuits.⁶

Republican-led legislative efforts to protect corporations from accountability for their harmful behavior have had virtually no bipartisan support on Capitol Hill and have little chance of being enacted. Consequently, Republicans and their corporate benefactors



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have increasingly turned to the courts to provide the protections they desire, and they have found willing allies in the Roberts Five.

Indeed, since Roberts became Chief Justice in 2005, the Roberts majority has consistently issued 5-4 partisan rulings choking off Americans' access to the courts. Under Roberts's watch, the U.S. Chamber of Commerce, a corporate lobbying group, has been on the winning side of a whopping 70% of cases in which it filed briefs.⁷ Specifically, the Court has issued decisions relating to forced arbitration, pleading standards, class actions, and punitive damages that have significantly limited Americans' ability to access the court and hold corporations accountable. Shockingly, despite posturing as "originalists," the Roberts Five give zero consideration to the importance the Founders placed on the civil jury or the Seventh Amendment in these decisions (imagine Roberts and the conservative justices ruling on a gun case without considering the Second Amendment).

The Court's pro-corporate bias has only intensified with the addition of Trump Justices Neil Gorsuch and Brett Kavanaugh, whose nominations were

bolstered by tens of millions of dollars in corporate dark money.⁸ Not surprisingly, these same special interests are expected to shell out millions more in support of President Trump's nominee to replace Justice Ginsburg in an effort to further bend the law in their favor.

WHAT THE SUPREME COURT HAS DONE:

- Expanded Forced Arbitration
- Raised the Pleading Standard
- Limited Class Actions & Capping Damages
- Restricted Anti-Discrimination Laws

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Expanding Forced Arbitration

In a long line of 5-4 partisan decisions, the Supreme Court has expanded the ability of corporations to force individuals into arbitration—a corporate-friendly,⁹ private forum—rather than have their claims heard before an open, impartial jury. These decisions interpret the Federal Arbitration Act, a nearly 100-year-old law designed to resolve disputes between businesses, to allow corporations to require employers and consumers to agree to pursue any future lawsuits in secret, corporate-friendly arbitrations, rather than open court. Corporations embed these arbitration agreements in everything from employment contracts to cell phone contracts to retail coupons, and employees and consumers have no meaningful opportunity to negotiate them. Forced arbitration inherently disadvantages injured victims and benefits

corporations,¹⁰ who often pick the arbitrators and set the rules for the arbitration. Arbitration takes place behind closed doors, so the public and other victims never learn of corporate wrongdoings.¹¹ These are some of the Court's notable recent arbitration cases.

- In *14 Penn Plaza LLC v. Pyett*, the Court held in a 5-4 decision that unions could bargain away workers' rights to have age discrimination claims heard in court.¹²
- In *Rent-A-Center v. Jackson*, the same partisan 5-4 bloc held that would-be litigants challenging an arbitration agreement as unconscionable would have to do so before the very arbitrator whose legitimacy to hear the case they disputed.¹³
- That same term, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the Court prohibited the use of class arbitration unless all parties specifically agreed to it.¹⁴
- In *AT&T Mobility LLC v. Concepcion*, another 5-4 ruling, the Roberts Five prevented consumers from bringing class action suits against corporations for low-dollar, high-volume frauds.¹⁵
- In *American Exp. Co. v. Italian Colors Restaurant*, the Court, this time splitting 5-3, ruled that companies can enforce arbitration clauses that ban class actions even when class actions are the only economically feasible way of pursuing claims because the costs of arbitrating individually exceed the possible recovery for any one person.¹⁶
- *Epic Systems Corp. v. Lewis*, another 5-4 partisan decision, further diminished employees' right to pursue their claims as a group, allowing employers to force employees to waive statutory labor rights.¹⁷ By removing the threat of collective action, which makes it possible for injured workers and consumers to obtain redress for high-volume injuries that broadly affect a class of individuals, the Court insulated corporate interests from accountability for systematic wrongdoing like predatory lending, wage theft, discrimination, and even fraud.
- In *Lamps Plus, Inc. v. Varela*, the latest 5-4 arbitration decision, Justice Roberts and the other conservative justices made it more difficult for people, already forced into



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A 5-4 decision that allowed employers to use forced arbitration clauses to strip employees of rights to join together in cases to fight discrimination and wage theft.

arbitration, to join their claims together, which is often a more cost-effective and efficient option for plaintiffs.¹⁸ In the case, the conservative majority held that even if the arbitration clause is ambiguous on whether it permits class actions, it should be read to forbid them.

Taken together, the Court's pro-corporation arbitration decisions have fundamentally distorted the meaning of the Federal Arbitration Act that the Court is supposed to faithfully follow.¹⁹ Democrats in Congress have long sought to overturn these decisions by statute, for example through the Forced Arbitration Injustice Repeal Act, which would prohibit forced arbitration in an employment, consumer, antitrust, or civil rights dispute.²⁰ Republicans, apparently content to let their allies on the Supreme Court do the dirty work for their corporate donors, have obstructed these legislative efforts.

Justice Ginsburg's Voice of Conscience Against Forced Arbitration

As her conservative colleagues continued to expand the scope of the Federal Arbitration Act and stack the deck in favor of big corporations, Justice Ginsburg used her blistering dissents to shine a light on the Roberts Five's pro-corporate crusade and highlight the real-world consequences of their decisions.

- In one dissent, Justice Ginsburg lamented, "It has become routine, in a large part due to this Court's decisions, for powerful economic enterprises to write [forced arbitration agreements] into their form contracts with consumers and employees . . . leaving them without effective access to justice."²¹
- In her dissent in *Lamps Plus*, Ginsburg explained that she was writing "to emphasize once again how treacherously the Court has strayed from the principle that 'arbitration is a matter of consent, not coercion.'"²² She explained that in the real world, most employees do not have a meaningful opportunity to negotiate the terms of an arbitration clause and are instead left with a "'Hobson's choice' . . . 'accept arbitration on their employer's terms or give up their jobs.'"²³
- Justice Ginsburg penned a lengthy dissent in *Epic Systems*, calling the majority's decision "egregiously wrong."²⁴ Her dissent included a historical analysis of the need for collective action and argued that the take-it-or-leave-it nature of arbitration clauses in employment contracts unfairly tilts the balance of power toward employers.

Justice Ginsburg laid bare that the Roberts Five's arbitration jurisprudence represented a windfall for big corporations at the expense of American workers and consumers. Ruth Bader Ginsburg, [CNN](#)



Raising the Pleading Standard

For those lucky enough not to be ensnared in a forced arbitration agreement, getting a case to a jury of one's peers is more difficult than ever, thanks to the Roberts Five. Before the Roberts Five stepped in, for a civil complaint to survive a defendant's motion to immediately dismiss the case, the plaintiff needed only to include a "short and plain statement of the claim showing that the pleader is entitled to relief."²⁵ Once that bar was met, the plaintiff would have the opportunity to obtain "discovery" from the defendant – documents, testimony, and other materials – that might allow the plaintiff to prove his or her case. But the Court's conservatives took a huge step to protect corporations in *Ashcroft v. Iqbal* (2009), drastically heightening the requirements for plaintiffs to plead a case.²⁶ Under this new standard, cases are more easily thrown out of court before plaintiffs have any opportunity to develop evidence in support of their claims through discovery.²⁷

Limiting Class Actions and Capping Damages

Class action litigation has long provided redress for corporate wrongdoing that may be a low-dollar harm but impacts many people (such as overcharging customers).²⁸ So it is not surprising that Roberts and his conservative allies on the Court have issued a series of decisions limiting the availability of class action litigation to injured workers and consumers.²⁹ For example:

- In *Wal-Mart v. Dukes*, the 5-4 conservative majority threw out a class action by 1.6 million women alleging gender discrimination by Wal-Mart, making it harder for members of a purported class to prove they have sufficiently common claims—a requirement for class certification.³⁰
- The Court also made it harder for groups of individuals to bring common claims³¹ and has made it harder for plaintiffs' attorneys to receive enhanced attorneys fee awards.³²
- And the Court has simply barred class actions altogether for claims brought under certain federal statutes.³³
- The Court has also limited the civil jury's traditional authority to impose punitive damages against corporate bad actors,³⁴ which acts as a strong deterrence against committing similar wrongdoing in the future.³⁵

Restricting Anti-Discrimination Laws

Finally, the Court's Republican appointees have adopted a restrictive reading of civil rights and worker rights statutes to foreclose liability for employers who discriminate against employees. In *Ledbetter v. Goodyear Tire*, the conservative majority threw out

a woman's gender pay discrimination claim because she hadn't been aware of the pay disparity sooner.³⁶

In *Ledbetter*, Justice Ginsburg penned one of her best-known dissents, which she read from the bench. In her scathing opinion, Justice Ginsburg explained the realities of the workplace and the insidious discrimination that women face – realities her all-male conservative colleagues were either oblivious to or chose to ignore. She ended her dissent with a call to Congress to fix the Roberts Five's mistake, stating, "Once again, the ball is in Congress' court."³⁷ Two years later, Congress acted and overturned that decision with the passage of the Lilly Ledbetter Fair Pay Act,³⁸ the first bill signed into law by President Obama.




Who is Behind It

A host of corporate-funded front groups have used the courts to shield big corporations from legal accountability.³⁹ At the Supreme Court, these groups often file "friend of the court" briefs in civil justice cases, signaling to the Roberts Five which way corporate America wants them to rule.

Chamber of Commerce: Since the late 1990s, the U.S. Chamber of Commerce (the Chamber) has spearheaded an aggressive initiative to protect corporations from liability.⁴⁰ In 1998, the Chamber founded the Institute for Legal Reform (ILR), the Chamber's largest sub-group, to lobby for laws and regulations that make it harder for consumers and workers to sue big corporations.⁴¹ Since 2010, the ILR has spent over \$250 million on lobbying on behalf of corporations seeking to escape accountability.⁴²

In addition to its legislative lobbying, the Chamber also has lobbied the courts to



protect corporations from liability for wrongdoing. From 2006 to 2016, the Chamber was involved in 1,100 lawsuits, either as a plaintiff or *amicus curiae* (ironic given the Chamber and ILR's complaints that there is too much litigation).⁴³ The Chamber is particularly active in the Supreme Court, where it has filed more briefs, by far, than any other *amicus*,⁴⁴ including briefs in nearly all of the 5-4 economic justice cases described above.⁴⁵ In the 2018-2019 term, the Chamber filed 23 *amicus* briefs at the merits stage.⁴⁶ And when the Chamber weighs in, the Roberts Five listen. Since 2006, the Roberts Court has sided with the Chamber's position 70% of the time.⁴⁷

New England Legal Foundation: One of dozens of so-called "public interest" law firms which, in reality, serve only corporate donor interests, the New England Legal Foundation (NELF) describes itself as a nonprofit public interest law firm "addressing policy and constitutional concerns related to free enterprise."⁴⁸ The organization "deals with cases that involve economic or commercial questions," namely those involving taxation, business regulation, and environmental regulation, "and does not become involved in social issues."⁴⁹ NELF has filed *amicus* briefs opposing worker and consumer rights in *Concepcion*, *Italian Colors*, *Epic Systems*, and *Dukes*, among other cases.

Equal Employment Advisory Council: The Equal Employment Advisory Council (EEAC), now operating as the Center for Workplace Compliance, describes itself as "the nation's leading employer association dedicated to helping its members understand and manage their workplace compliance requirements and risks ... [with] a longstanding history as an effective advocate for its members' interests in the areas of equal employment opportunity, affirmative action, and workplace compliance."⁵⁰ The Chair and Vice Chair of the organization's Board of Directors are Dana Baughns of Allegis Group and Derek Suminoto of Kaiser Permanente. Valerie Vickers, the Chase Executive Director of Enterprise Affirmative Action at J.P. Morgan Chase, is the organization's Chair, Emeritus.⁵¹ The organization has filed over 700 briefs in cases involving labor and employment compliance, often opposing race-based affirmative action laws and supporting forced arbitration.⁵² The EEAC filed *amicus* briefs in many of the economic justice cases discussed above, including *14 Penn Plaza*, *Stolt-Nielsen*, *Rent-A-Center*, *Italian Colors*, *Epic System*, *Schindler Elevator Corp*, *Dukes*, *Comcast*, *Genesis Healthcare*, and *Ledbetter*.

Pacific Legal Foundation: Another so-called public-interest law firm, the Pacific Legal Foundation (PLF) states that it is a "nonprofit legal organization that defends Americans' liberties when threatened by government overreach and abuse."⁵³ PLF has received extensive funding from major tobacco companies including Philip Morris.⁵⁴ The organization has received \$195,000 from ExxonMobil since 1998⁵⁵ and has received contributions from the Koch brothers.⁵⁶ PLF has filed *amicus* briefs in *Stolt-*

Nielsen, Concepcion, Italian Colors, and Epic Systems.

Business Roundtable: The Business Roundtable is an organization composed of corporate CEOs whose self-described mission is “to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy.”⁵⁷ The organization’s executive committee is led by Wal-Mart CEO Doug McMillian. It was formerly led by Jamie Dimon, the Chairman and CEO of JP Morgan Chase. The organization’s President and CEO Joshua Bolten served as White House Chief of Staff under President George W. Bush.⁵⁸ The Business Roundtable contributed \$6 million to a dark money group associated with then-Speaker Paul Ryan.⁵⁹ The Business Roundtable filed *amicus* briefs in *Epic Systems* and *Comcast*.

Washington Legal Foundation: Yet another phony “public interest” group, the Washington Legal Foundation (WLF)’s mission is “to defend American free enterprise by litigating, educating, and advocating for a free market, a limited and accountable government, business civil liberties, and the rule of law.”⁶⁰ WLF’s Legal Policy Advisory Board members include Chevron Vice President and General Counsel R. Hewitt Pate, GlaxoSmithKline Vice President and General Counsel Daniel E. Troy, and Ken Starr, the conservative stalwart lawyer who led the investigation and impeachment against President Clinton and was part of President Trump’s impeachment legal team.⁶¹ WLF’s main litigation initiatives are challenging environmental and FDA regulations, and seeking to limit the ability of plaintiffs to file class-action lawsuits.⁶² WLF has received \$375,000 from ExxonMobil since 1998,⁶³ over \$1.6 million from Koch-controlled foundations,⁶⁴ and nearly \$3 million from the fossil-fuel-funded Carthage Foundation.⁶⁵ The WLC filed *amicus* briefs in *Perdue v Kenny A*, *Epic Systems*, *Dukes*, *Comcast*, *Anz Securities*, and *Iqbal*.

How Trump’s Judiciary Is Rigging the Economic System for the Wealthy

President Trump has routinely nominated judges who have expressed open hostility to Americans seeking to hold corporations legally responsible for wrongdoing. It has become a form of auditioning for advancement. For the foreseeable future, this pro-corporate bias will make it more difficult for Americans to exercise their Seventh Amendment right to a trial by jury and further insulate corporations from accountability.



Supreme Court

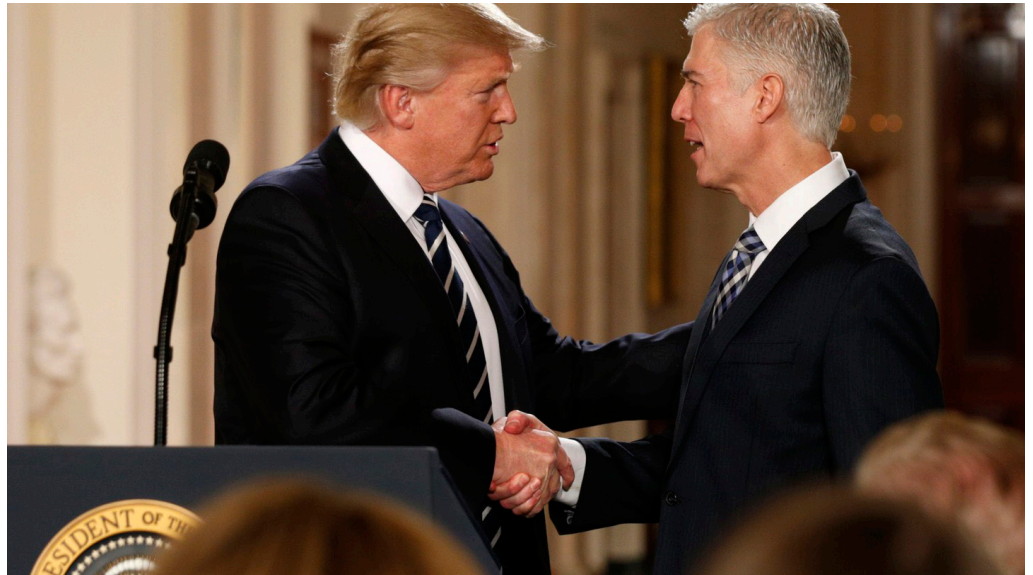
Neil Gorsuch, Trump's first Supreme Court nominee, wrote the majority opinion in *Epic Systems*.⁶⁶ In her dissent, Justice Ginsburg described the majority's decision as "destructive" and a continuation of a long line of "wrong turns" in cases involving the Federal Arbitration Act.⁶⁷ "The inevitable result of today's decision," Ginsburg observed, "will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."⁶⁸ Gorsuch's watershed decision was hardly a surprise given his long track record of pro-corporate rulings in economic justice cases while a judge on the Tenth Circuit⁶⁹ as well as his writings as a private attorney. Parroting Republican Party talking points, Gorsuch in a 2005 article criticized class actions brought by investors for security fraud as "free ride[s] to fast riches" for plaintiffs' attorneys.⁷⁰

According to a 2019 study, Justice Gorsuch has sided with the Chamber in 86% of cases since he joined the Supreme Court in 2017, making him the Court's most pro-corporate jurist.⁷¹

Brett Kavanaugh,

President Trump's second Supreme Court nominee, has displayed a similar hostility to

Americans seeking to vindicate their rights in court. While a judge on the D.C. Circuit, Kavanaugh authored a dissent in *Cohen v. United States*, a case involving a class action brought by taxpayers suing the IRS for overpayment of taxes. Kavanaugh's dissent was openly critical of access to justice, castigating class actions and the plaintiffs in the case as seeking a "jackpot" at the taxpayers' expense.⁷² In other dissents, Kavanaugh argued that the State Department should not have to follow federal age discrimination laws⁷³ and that the Department of Labor should not be able to regulate inherently dangerous workplaces.⁷⁴ Again, this was hardly shocking. During his tenure as a political operative in the George W. Bush Administration, Kavanaugh helped lead a legislative push, under the guise of "tort reform," to make corporate wrongdoers immune from lawsuits.⁷⁵ With that record, it is little wonder that those same corporate interests hastened to spend tens of millions of dollars to drag Kavanaugh's deeply problematic nomination across the finish line in the Senate.



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

Judge Amy Coney Barrett

Justice Ginsburg was a champion of the Seventh Amendment and protecting Americans' access to the courts. President Trump's nominee to replace Justice Ginsburg, **Judge Amy Coney Barrett** (Seventh Circuit), who Trump has nominated to fill the vacancy created by Justice Ginsburg's passing, has routinely favored big corporations over the rights of the American people. In under three years on the bench, Judge Barrett has already amassed a lengthy track record of opinions that close the courthouse door to workers and consumers and help insulate corporations from accountability for wrongdoing. For example,

- In *Chronis v. United States*, Judge Barrett authored the majority opinion dismissing the case of a woman, representing herself, who was injured during a pap smear and was seeking just \$332 in damages. Even though the relevant law is designed to make it easy for non-lawyers to have their cases heard, Judge Barrett threw this case out of court simply because the victim misworded her communications with the government. Judge Barrett didn't seem to care that in the real world, no one would be able to hire a lawyer for a \$332 case, but rather seemed more intent on punishing a would-be plaintiff for a technicality.
- In *FTC v. Credit Bureau*, Judge Barrett joined a ruling denying rehearing in a case overturning a 20-year-old circuit precedent that allowed the Federal Trade Commission (FTC), a federal watchdog that protects consumers from fraud, to require companies pay back ill-gotten gains. The decision means that companies in Indiana, Illinois, and Wisconsin can illegally defraud customers without having to worry that the FTC will make them pay consumers back.
- In *Casillas v. Madison Avenue Debt Collection*, Judge Barrett penned the majority opinion dismissing a case brought under the Fair Debt Collection Practices Act (FDCPA), which protects consumers from abusive debt collection practices. The court held that the plaintiff could not sue because she failed to show a specific injury. The dissent, which included a judge appointed by President Bush, explained that Barrett's decision "will make it much more difficult for consumers" to protect "against abusive debt collection practices."
- In *Kleber v. CareFusion Corp.*, Judge Barrett joined an opinion that held that job seekers cannot bring lawsuits claiming that companies' hiring practices violate the Age Discrimination in Employment Act (ADEA) by unfairly discriminating against older workers. One dissenting judge called Barrett's opinion "closing its eyes to fifty years of history, context, and application."
- In *Webb v. FINRA*, Judge Barrett authored an opinion throwing out a case brought by two former employees alleging that FINRA, their former employer, had improperly conducted their arbitration. A sharp dissent accused Judge Barrett's opinion of ignoring "established practice, grounded in well-settled case law across the Nation."
- In *Wallace v. Grubhub Holdings*, Judge Barrett wrote a majority opinion that closed the courthouse door to Grubhub drivers seeking unpaid wages and forced them into corporate-friendly arbitration.



Amy Coney Barrett
[The Federalist Society](#)

These cases make clear that Judge Barrett seems more concerned with protecting big corporations from liability than protecting American workers and consumers from discrimination, malpractice, and even outright fraud. Americans deserve a justice who will look out for them, not wealthy special interests.

Circuit Courts

Just as troubling as Trump's Supreme Court appointees are his numerous circuit court appointees with pro-corporate and anti-plaintiff records. Because the Supreme Court hears so few cases, federal appellate courts are often the last venue for plaintiffs to vindicate their rights, meaning Trump's extremist circuit court judges often have the final word. Nearly all of his appellate court judges were hand-picked by the corporate-funded Federalist Society,⁷⁶ and many nominees stand out as particularly biased in favor of corporations and against Americans.

For example:

- **Andrew Brasher** (Middle District of Alabama; Eleventh Circuit) filed an *amicus* brief in the Supreme Court arguing that it should be harder for people to bring class actions against corporations and characterizing class actions as "abusive."⁷⁷
- **John Bush** (Sixth Circuit) has authored or joined opinions dismissing a number of valid employment claims, protecting employers and preventing employees from bringing their cases before a jury. Bush joined an opinion dismissing a case brought by a 76-year old woman alleging age discrimination against her employer, despite strong evidence of discrimination.⁷⁸ He also wrote an opinion, joined by fellow Trump appointee **Judge Joan Larson**, upholding the firing of an aviation worker who raised safety concerns to her employer, preventing a jury from hearing the facts.⁷⁹ This pro-corporate bias should not come as a surprise, because, as a private lawyer, Bush worked for big tobacco companies trying to avoid liability for lying about the effects of smoking and targeting ads toward children.⁸⁰
- **Daniel Bress** (Ninth Circuit) authored a dissent in which he argued that thousands of Amazon workers alleging that Amazon underpaid them in violation of federal law should be forced to bring their claims individually in corporate-friendly arbitrations, rather than bring a class action in open court.⁸¹ Because the other judges on the panel disagreed with Bress, these workers are now able to more efficiently pursue their claims.
- **Allison Eid** (Tenth Circuit), as a law professor, praised Colorado laws designed to block access to the courthouse for plaintiffs,⁸² and as a Colorado Supreme Court justice, she accumulated an extensive record in favor of granting immunity for corporate wrongdoing.⁸³



John Bush
[The Federalist Society](#)

- **Gregory Katsas** (D.C. Circuit), before joining the bench, described *Dukes*, the case that severely limited class actions alleging widespread sex discrimination, as “a nice win for business,”⁸⁴ and testified before Congress in favor of heightened pleading standards that protect companies by keeping injured plaintiffs out of court.⁸⁵ While on the D.C. Circuit, he authored a dissent arguing for an extremely narrow interpretation of federal whistleblower protection laws.⁸⁶ Judge Katsas’s view would make it easier for employers stealing taxpayer money to fire whistleblowers.



Gregory Katsas
[Law.com](https://www.law.com)

- **Kenneth Lee** (Ninth Circuit) is another Trump-appointed nominee who wrote extreme articles voicing his opposition to access to justice before joining the bench. In an article titled “Questionable Classes,” Lee expressed open hostility to class actions against false advertising, calling many of them “essentially lawyer-manufactured lawsuits in which there has been no real harm to the consumers.”⁸⁷ In a different article, Lee wrote: “Trial lawyers increasingly litigate new entitlements for favored groups, establish exotic new individual rights, and overturn well-established legal and legislative prerogatives. As legal savant Walter Olson puts it, ‘Trial lawyers are now an unelected fourth branch of government.’”⁸⁸ Lee also lamented that “wage-and-hour” class actions alleging that companies underpaid their employees can “dent Fortune 500 companies’ bottom line,” and he argued for restrictive discovery rules that help corporate defendants shield information from plaintiffs.⁸⁹

- **Steven Menashi** (Second Circuit), as a private attorney, wrote inflammatory articles indicating a deep resentment for civil justice. In one op-ed, he vilified plaintiffs’ attorneys, who sue corporations on behalf of injured Americans, as “feeding on the public.”⁹⁰ He also mocked lawyers who help the elderly receive Medicaid benefits, saying “there[s] a whole discipline of ‘elder law’ devoted to these tricks.”⁹¹



Steven Menashi
[New York Times](https://www.nytimes.com)

- **Eric Miller** (Ninth Circuit) wrote an opinion letter published by the Washington Legal Foundation criticizing a Washington State Supreme Court decision holding that surgical-device manufacturers have a “duty to warn” hospitals about potential dangers of their products.⁹² Miller’s position would put patients at risk of being injured by faulty products during surgery.

- **Kevin Newsom** (Eleventh Circuit) wrote an opinion that makes it much more difficult for victims of employment discrimination to have their day in court, unless there is “smoking gun” evidence of discrimination, which rarely exists in the real world.⁹³ The dissenting judges argued that Newsom’s ruling “drops an anvil on the employer’s side of the balance” in employment cases.⁹⁴
- **Chad Readler** (Sixth Circuit) authored a law review article while in law school questioning federal and state anti-discrimination laws, suggesting anti-discrimination policies should be left up to employers.⁹⁵ As Acting Assistant Attorney General of the Civil Division at the Department of Justice, Readler appeared supportive of Republican legislation designed to make it more difficult for victims of asbestos exposure to receive compensation for their injuries.⁹⁶
- **Allison Rushing** (Fourth Circuit) wrote an opinion reversing a district court decision and forcing a consumer into arbitration against DIRECTV for making illegal telemarketing calls, even though the consumer never signed an arbitration agreement with DIRECTV.⁹⁷
- **Don Willett** (Fifth Circuit) was the most corporate-friendly member of the Texas Supreme Court. Willett ruled for consumers in just 19% of cases,⁹⁸ and a 2016 Center for American Progress report determined that Willett “voted for corporate defendants more than 70% of the time.”⁹⁹

With these judges (and dozens more just like them) now confirmed to lifetime seats on the country’s most powerful courts, corporate America now enjoys a built-in advantage that could last a generation. As if America’s wealthiest institutions needed yet another leg up.

What It Means

As Americans Continue to Lose Access to the Courts, Big Corporations Continue to Act with Impunity

The civil justice system, and class action litigation in particular, is essential in helping consumers injured by faulty products or corporate misconduct seek redress for their harm. Likewise, employees often rely on the courts to prevent or stop discrimination and harassment. The threat of liability also provides strong deterrent against corporate negligence and malfeasance. By making it more difficult for consumers and employees

to seek justice in the courts, the Roberts Five and the cadre of Trump-appointed extremists put Americans at risk. The consequences of the Republican judiciary's reliably pro-corporate position are not hard to see. But too few Americans understand the Supreme Court's role in rigging the system against economic justice.

The Founders understood that the right to a trial by jury in civil cases was central to a truly just democracy. Thomas Jefferson called the jury part of "the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation."¹⁰⁰ Alexander Hamilton explained that the Founders regarded trial by jury as "a valuable safeguard to liberty" and "the very palladium of free government."¹⁰¹ Indeed, the civil jury trial was so critical to the Founders that they enshrined it in the Seventh Amendment. Yet, Chief Justice Roberts and the conservative justices have routinely chipped away at this touchstone right without giving any consideration to the importance the Founders placed on it. This is particularly ironic because the conservative justices hold themselves out as "originalists" and "textualists" who seek to tie their understanding of the Constitution to views of the Founders (apparently only when it suits the justices' purposes).

Consider how corporate defendants have taken advantage of the Roberts Five's forced arbitration and class action decisions. When customers sued Wells Fargo for creating sham accounts in their names, the bank sought to funnel all litigation into arbitration, where injured customers were forced to litigate their claims individually, rather than as a group, making it extremely difficult for many customers to be made



whole.¹⁰² Fox News likewise used forced arbitration clauses to hide widespread sexual harassment of female employees and protect high profile male employees.¹⁰³ Members of the military who have become victims of predatory lending have been forced into arbitration.¹⁰⁴ And relying on the Court's arbitration jurisprudence, nursing homes have used arbitration clauses to protect themselves from lawsuits alleging that substandard care injured or killed a





senior.¹⁰⁵ (The Trump Administration, moreover, rolled back an Obama Administration ban on arbitration clauses in nursing home contracts, meaning nursing homes can once again block lawsuits brought by aggrieved families.)¹⁰⁶


According to one study, the share of U.S. workers subject to forced arbitration has risen to over 55%, more than doubling the rate in the early 2000s.¹⁰⁷

The same study indicated that forced arbitration is imposed more often on low-wage workers, and that class action waivers were most often exploited by the largest corporations.¹⁰⁸ These are tools that the wealthy few use regularly to rob hard-working Americans of their right to seek justice.

While some of these cases have made headlines, shining a public light on the crippling economic injustice at play in the legal system, thousands more cases are snuffed out each year without anyone noticing. For example, according to an American Association for Justice study of arbitration cases from 2014-2018:¹⁰⁹

- Only 1,909 consumers won a monetary award over the five-year period. Only 6.3% of cases arbitrated resulted in consumers winning a monetary award over the five years.
- Of the 60 million employees subject to forced arbitration, only 11,114 – 0.02% – tried to pursue a dispute in forced arbitration. Just 282 of these employees were awarded monetary damages over the five-year period.
- Forced arbitration clauses allow nursing homes to avoid accountability for everything from negligent care to sexual assault. Over five years, consumers pursuing nursing home claims won a monetary award in only four cases.
- Consumers pursued 6,012 forced arbitrations involving financial claims, claiming at least \$3.7 billion in damages. They won monetary awards in just 131 cases (2.2%), totaling \$7.4 million – 0.2% of the claimed damages. One study found that a typical consumer in arbitration against a financial institution ends up paying the financial institution nearly \$8,000.¹¹⁰

Looking forward, there is considerable cause for alarm that, absent either significant legislative correction or a meaningful re-composition of the federal judiciary, the doors to economic justice for regular Americans will remain shuttered by the courts. Indeed, many of Trump's judges – with their evident pro-corporate biases and proud hostilities to civil plaintiffs – were selected and confirmed specifically to make sure those doors



never open, not even a crack.

And make no mistake: Trump's army of judges is already delivering for the corporate ruling class that bought them their robes. Last month, for example, in the midst of the COVID-19 pandemic that has put America's vulnerable gig-workers at unprecedented risk, Trump's Supreme Court nominee Judge Amy Coney Barrett ruled that Grubhub drivers could not claim a statutory exemption from forced arbitration, denying them their day in court.¹¹¹ (Of course, corporate mouthpiece Washington Legal Foundation urged that result in an *amicus* brief.¹¹²)

From the elderly, to victims of discrimination, to veterans, to people injured by faulty products or corporate fraud, Americans deserve to have their day in court, a right enshrined in the Seventh Amendment. We expect wealthy corporations, and their cadre of dark money front groups, to continue their assault on access to justice in order to protect themselves from accountability for their misconduct. Unfortunately, in Chief Justice Roberts, the other conservative justices, many of President Trump's activist judges, and Congressional Republicans, these wealthy corporations have found allies willing to trample the American peoples' rights.

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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