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Newsroom: Can Court 'Restore Fundamental Liberties'? 03-23-2016


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Newsroom

March 23, 2016

Can Court 'Restore Fundamental Liberties'?

Professor David Logan and U.S. Senator Sheldon Whitehouse (an RWU Law adjunct) discuss what's at stake in replacing Justice Scalia on the Supreme Court.

*In a guest column for the **American Constitution Society (ACS)**, **Senator Sheldon Whitehouse (D-RI)** and **Professor David A. Logan** of Roger Williams University School of Law ask, "[Could a New Supreme Court Justice Help Restore Fundamental Civil Liberties?](#)"*

March 22, 2016



President Obama's nomination of Judge Merrick Garland to the Supreme Court of the United States, if confirmed, is an opportunity to restore important civil liberties that have been eroded over three decades of dominance by five conservative justices; and it gives the Court a chance to revisit its disastrous decision in *Citizens United*, which has fouled our electoral process with unprecedented torrents of money and influence. The prospect of a new justice also presents the opportunity to revisit an array of decisions that have made the Roberts Court the most "pro-business" court since the Gilded Age of the 19th century. In particular, the Roberts Court has interpreted federal statutes to chip away at the right of citizens to redress for injuries from defective products and violations of consumer law, and thousands of Americans have lost their "day in court."

This is not just bad policy; it undermines a core feature of American democracy, the jury trial. Juries are a constitutional element in American democracy, providing citizens meaningful participation in self-government. "Representative government and trial by jury are the heart and lungs of liberty," wrote John Adams. The Declaration of Independence cited threats to the jury trial as a central grievance of the

Colonies. Alexis de Tocqueville observed that “Juries ... instill some of the judicial mind into every citizen, and ... those habits are the very best way of preparing people to be free.” Legal scholar Akhil Amar has written that the jury system “summed up — indeed embodied — the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”

Juries serve important purposes: they bring broadly-based community values to dispute resolution; they provide a check on abuses of power both by government and by powerful private entities; they are immune to the “pay to play” influences that seek to shape legislation; and finally, they bring ordinary, random citizens directly into governance. In sum, as the fictional champion of the downtrodden Atticus Finch observed, “Courts are the great leveler.”

Despite the essential role of juries in our democracy, they have been subject to a broad-ranging attack by the Court’s conservative bloc. Supreme Court decisions have:

- increased the availability of summary dispositions, dramatically lessening the chance that injured plaintiffs can have their claims heard by a jury of their peers,
- made it more difficult for citizens to aggregate small claims into powerful class actions, with a corresponding weakening of the deterrent effect of product safety and consumer protection laws, and
- expansively interpreted federal laws to shunt consumers into pro-business mandatory arbitration.

People today are frustrated by government that seems often not to respond to them. That’s where the jury comes in. The Constitution sets the jury as a last bastion of popular sovereignty when the elected branches are captured by special interests. The quest by special interests for influence over government is a constant and voracious activity. But tampering with a jury is a crime. Influenced only by fairness, the facts and the law, juries can be a wrecking ball through walls of well-kept legislative indifference. This constitutional role makes them a danger to powerful special interests, however; hence the assault.

Congress can also do its part, for example, by passing the Arbitration Fairness Act, cosponsored by Senators Pat Leahy (Vt.) and Al Franken (Minn.), which would return to consumers the right to avoid the unfairness of mandatory arbitration.

In the end, a more balanced Court will help restore the jury to its rightful place at the center of our democracy. We lose this institution of government at our peril.