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FOREWORD: THE ROBERTS COURT IN 2013–14—LOOKING BEYOND THE RHETORIC

*Evan Gerstmann**

I. INTRODUCTION

The Supreme Court's 2013–14 Term was eventful, with major decisions in the areas of freedom of speech, the Fourth Amendment, separation of church and state, freedom of religion, gun control, the death penalty, affirmative action, and women's access to contraceptives, among other hot button issues. Taking a close look at the term, two things stand out. First, the Court's decisions as a whole were far more balanced in terms of liberal and conservative results than much of the media coverage would suggest. Second, despite the overall balance, the Court continues to turn a deaf ear to many of the concerns of racial and religious minorities, women, and those concerned with the influence of the wealthy on elections. These blind spots might account for the perhaps overstated perception of the Court's conservatism. This forward will discuss both of these

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He is interested in broad range of legal and constitutional issues and his work has been widely reviewed and cited in federal and state court decisions on the constitutionality of same-sex marriage, in scholarly journals such as *The Yale Law Journal*, *The Harvard Law Review*, and *The University of Chicago Law Review*, as well as in national journals such as *The New York Review of Books*, *The New Republic*, *The Washington Post*, *The Nation* and *The Chronicle of Higher Education*.

observations, and conclude with some thoughts on the Court's future direction.

A. *The Court's Ideological Balance*

There is good reason to be cautious about using terms like "liberal" or "conservative" to describe the outcomes of complicated legal cases. Likewise, there is good reason to avoid talking about the views of "the Court" as a whole, given that its decisions are product of the writings of nine very different Justices. However, the media often writes about the Supreme Court as an ideological institution and much of that coverage depicts the Roberts Court as aggressively conservative. The New York Times's Adam Liptak has written that the "Court Under Roberts is the Most Conservative in Decades."¹ According to Slate's Dahlia Lithwick, "The Roberts Court is really, really conservative."² Nate Silver went even further, writing that the "Supreme Court May Be [the] Most Conservative in Modern History."³ MSNBC's Adam Serwer recently warned: "Don't Be Fooled, the Supreme Court Is Still Very Conservative."⁴ Bloomberg Business Week has described Justice Roberts as "The Chief Conservative Strategist."⁵ The New York Times Editorial Board asserted that the word "conservative," was inadequate to describe the right-ward direction of the Court and editorialized that the Supreme Court is "radical" and "calls to mind the defiance of the Court in the 1930s when it regularly struck down the New Deal Statutes during the Great Depression."⁶ Ian Millhiser, of The Center for American

1. Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 24, 2010, <http://www.nytimes.com/2010/07/25/us/25roberts.html>.

2. Dahlia Lithwick, *How the Supreme Court Changed America This Year: Nineteen Legal Thinkers Run Down the Court's Most Important Decisions*, POLITICO MAG. (July 1, 2014), <http://www.politico.com/magazine/story/2014/07/how-the-supreme-court-changed-america-this-year-108497.html>.

3. Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, N.Y. TIMES FIVETHIRTYEIGHT (Mar. 29, 2012), <http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-inmodern-history/>.

4. Adam Serwer, *Don't Be Fooled, the Supreme Court Is Still Very Conservative*, MSNBC (Sept. 13, 2013), <http://www.msnbc.com/msnbc/dont-be-fooled-the-supreme-court-still-v>.

5. Paul M. Barrett, *John Roberts, Chief Conservative Strategist*, BUSINESSWEEK (Apr. 10, 2014), <http://www.businessweek.com/articles/2014-04-10/john-roberts-leads-supreme-court-shift-to-the-right>.

6. *The Radical Supreme Court*, N.Y. TIMES, June 30, 2012, <http://www.nytimes.com/2012/07/01/opinion/sunday/the-radical-supreme-court.html>.

Progress, advised liberal and progressive advocacy groups to simply “stay away from the Supreme Court.”⁷

Yet a more careful look at the Court’s most recent term suggests that the Roberts Court deserves a second look. While it is possible that the 2013–14 Term was aberrational, it was actually a remarkably balanced term with regard to the number of liberal and conservative results. In order to take a fresh look at the Court’s ideology, I eschewed reliance on other people’s database and looked through all seventy three cases that produced opinions on the merits and counted twenty-one that could be characterized as having liberal outcome and an equal number that could be characterized as conservative, with the balance being opinions that could not be characterized one way or the other. With some exceptions, outcomes were considered liberal if they favored criminal defendants or civil plaintiffs, broadly interpreted gun control statutes or allowed regulation of pollution, limited the death penalty, or, in certain cases, protected freedom of speech. Outcomes were considered conservative if they favored police, prosecution or civil defendants, frustrated the rights claims of racial or religious minorities or women, or limited government power either to reign in campaign donations or to protect the environment.

There is of course some degree of subjectivity in this. I declined to list either *Bond v. United States*⁸ or *NLRB v. Noel Canning*⁹ as either liberal or conservative because they gave both liberals and conservatives some of what they wanted. I listed *McCullen v. Coakley*¹⁰ as conservative even though one could argue that a decision protecting protestors’ free speech rights is liberal and also because the Court could have gone significantly further than it did to limit protections against harassment of women seeking abortions.

Nevertheless, even accounting for the fact that there is always room for argument about how to ideologically characterize a case, the Court’s 2013–14 Term was remarkably ideologically balanced. Nor is it clear that the liberal decisions were less important than the conservative ones, although these are also somewhat subjective

7. Ian Millhiser, *Liberals Just Need to Stay Away from the Supreme Court*, SLATE (May 21, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/when_will_liberals_learn_to_stay_the_heck_away_from_the_supreme_court.html.

8. 134 S. Ct. 2077 (2014).

9. 134 S. Ct. 2550 (2014).

10. 134 S. Ct. 2518 (2014).

judgments. The liberal decisions were many and varied, and quite a few were of great importance. In *EPA v. EME Homer City*,¹¹ the Court broadly interpreted the power of the Environmental Protection Agency (EPA) to regulate cross-state air pollution. Cass Sunstein wrote that it “may well be the most important Supreme Court decision of the 2013 term” because of the “massive public health benefits” of the EPA rule that was upheld and because the decision “strongly affirmed the EPA’s authority.”¹² According to Sunstein the decision “largely affirmed the agency’s authority to [regulate greenhouse gases].”¹³ Given the great importance of climate change, and the probable lack of action by Congress in the foreseeable future, the decision is of great importance.¹⁴

In the same term, the Court issued two decisions broadly interpreting important federal gun control statutes. In *Abramski v. United States*,¹⁵ the Court held that a purchaser of a firearm must reveal if he is purchasing it for another person even if that other person could have legally purchased that firearm himself.¹⁶ The decision will allow the federal government’s complex system of background checks to function more effectively, which is an important result given that Congress is as unlikely to pass new gun control legislation in the future as it is to pass new protections for the environment.

In another major gun control decision, the Court broadly interpreted a statute barring any person convicted of a “misdemeanor crime of domestic violence” from possessing a gun.¹⁷ A number of lower courts had interpreted that statute narrowly, allowing some domestic abusers to continue to possess firearms.¹⁸ The Supreme

11. 134 S. Ct. 1584 (2014).

12. Cass Sunstein, *How the Supreme Court Changed America This Year*, POLITICO (July 1, 2014), <http://www.politico.com/magazine/story/2014/07/how-the-supreme-court-changed-america-this-year-108497.html>.

13. *Id.*

14. During the same term, the Court also decided *Utility Air Regulation v. Environmental Protection Agency*, 134 S. Ct. 2427 (2014). This is a harder decision to characterize because it contains some language harshly criticizing the breadth of the EPA’s argument but, as a practical matter, it upheld the agency’s “regulatory authority over all but three percent of the stationary sources” it claimed power over. *Clean Air Act—Stationary Source Greenhouse Gas Regulation—Utility Air Regulatory Group v. EPA*, 128 HARV. L. REV. 361, 361 (2014).

15. *Abramski v. United States*, 134 S. Ct. 2259 (2014).

16. *Id.* at 2263.

17. *United States v. Castleman*, 134 S. Ct. 1405 (2014).

18. *Id.* at 1410.

Court held that “misdemeanor crime of domestic violence” should be broadly interpreted to include violent actions often characterized as mere “offensive touching.” The case was hailed as a “landmark opinion” by Lynn Rosenthal, the White House Advisor on Violence Against Women.¹⁹

Perhaps the best known liberal decision of the term was the Court’s unanimous decision in *Riley v. California*,²⁰ which held that the police must obtain a warrant in order to search digital information on the cell phone of a person who has been arrested.²¹ The case was notable for its breadth of protection of electronic privacy. As described by SCOTUSblog’s Lyle Denniston:

The ruling was such a sweeping embrace of digital privacy that it even reached remotely stored private information that can be reached by a hand-held device—as in the modern-day data storage “cloud.” And it implied that the tracking data that a cell phone may contain about the places that an individual visited also is entitled to the same shield of privacy.

The Court’s ruling drew some suggestions by Justice Samuel A. Alito, Jr., to narrow its scope, but it did not accept those. The result was the broadest constitutional ruling on privacy in the face of modern technology since the Court’s ruling two Terms ago limiting police use of satellite-linked GPS tracking of a suspect’s movements by car.²²

In addition to *Riley*, the Court shored up constitutional and statutory protections in the criminal justice area in numerous other cases. It broadened the grounds for claiming ineffective assistance of counsel, overruled a state supreme court decision that narrowly interpreted the Double Jeopardy Clause, overruled the Eighth Circuit’s broad application of penalty enhancement under the

19. Lynn Rosenthal, *Supreme Court Decision in U.S. v. Castleman Will Save Women’s Lives*, WHITE HOUSE COUNCIL ON WOMEN & GIRLS BLOG (Mar. 28, 2014, 2:23 PM), <http://www.whitehouse.gov/blog/2014/03/28/supreme-court-decision-us-v-castleman-will-save-womens-lives>.

20. 134 S. Ct. 2473 (2014).

21. *Id.* at 2495.

22. Lyle Denniston, *Opinion Analysis: Broad Cloak of Privacy for Cellphones*, SCOTUSBLOG (June 25, 2014, 12:16 PM), <http://www.scotusblog.com/2014/06/opinion-analysis-broad-cloak-of-privacy-for-cellphones/>.

Controlled Substances Act, and held that a person cannot be found to have aided and abetted a violent crime or drug crime involving a firearm unless the defendant had advance knowledge of their confederate's possession of a firearm that gave them a realistic opportunity to quit the crime.²³ In addition, the Court extended its series of rulings restricting the application of the death penalty by holding that states cannot simply assume that a person with an IQ above seventy has the mental incapacity that would allow the imposition of capital punishment.²⁴

The Supreme Court's free speech cases were also remarkably balanced this past term. This is an especially difficult area in which to dichotomously label decisions as liberal or conservative, but the Court issued four decisions that would be best described as conservative and an equal number that could best be described as liberal. This is based on the admittedly contestable assumption that decisions that expand protection for free speech should be considered liberal if they do not open the door to domination of political campaigns by wealthy individuals or corporations and if they do not undermine access to medical facilities.

As noted, in the 2013–14 Term the Court decided four cases that are best described as liberal by these criteria. Two of those cases, one statutory, the other constitutional, affirmed and broadened free speech protections for employees. In *Lawson v. FMR*,²⁵ the Court broadly interpreted the whistle-blower protection section of the Sarbanes-Oxley Act of 2002.²⁶ It held that the section's protections extend to employees of non-public contractors of publicly traded companies.²⁷ In doing so it overruled the lower court, which had emphasized that the caption of the section read "Whistleblower Protection for Employees of Publicly Traded Companies."²⁸ Although the language of the statute is ambiguous, the Court opted to interpret it an expansive manner. Justice Sotomayor's dissenting opinion, joined by Justices Anthony Kennedy and Samuel Alito

23. Respectively, *Hinton v. Alabama*, 134 S. Ct. 1081 (2014); *Martinez v. Illinois*, 134 S. Ct. 2070 (2014); *Burrage v. United States*, 134 S. Ct. 881 (2014); *Rosemond v. United States*, 134 S. Ct. 1240 (2014).

24. *Hall v. Florida*, 134 S. Ct. 1986 (2014).

25. 134 S. Ct. 1158 (2014).

26. *Id.* at 1161.

27. *Id.*

28. *Id.* at 1169.

highlighted the “stunning reach” of the majority decision: “By interpreting a statute that already protects an expansive class of conduct also to cover a large class of employees, today’s opinion threatens to subject private companies to a costly new front of employment litigation.”²⁹

In *Lane v. Franks*,³⁰ the Court re-affirmed the vitality of *Pickering v. Board of Education of Township High School District*,³¹ which protects the rights of government employees to speak out as citizens on matters of public affairs.³² *Pickering* had been significantly restricted in application by a 2006 case, *Garcetti v. Ceballos*,³³ which held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.”³⁴

A government employee, Edward Lane, testified under oath about fraud in a government program and claimed that he was the victim of retaliation as result of that testimony.³⁵ The district court, applying *Garcetti*, held that he enjoyed no First Amendment protection because he testified about information that he learned as a result of his government employment.³⁶ Such a rule would severely constrict the First Amendment protections of the *Pickering* decision, since it would strip protection from any employee who learned of government wrongdoing during the course of his or her employment. The Supreme Court reversed, holding:

Speech by citizens on matters of public concern lies at the heart of the First Amendment, which “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people[.]” This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment

29. *Lawson*, 134 S. Ct. at 1184 (Sotomayor, J., dissenting).

30. 134 S. Ct. 2369 (2014).

31. 391 U.S. 563 (1968).

32. *Id.* at 565.

33. 547 U.S. 410 (2006).

34. *Id.* at 410.

35. *Lane*, 134 S. Ct. at 2375.

36. *Id.* at 2376.

on the relinquishment of constitutional rights. There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For “[g]overnment employees are often in the best position to know what ails the agencies for which they work.” “The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.”³⁷

The Court issued two other decisions protecting free speech. In *Susan B. Anthony List v. Driehaus*³⁸ it reversed a lower court decision that had dismissed a pre-enforcement challenge to a restrictive regulation of campaign speech.³⁹ The Ohio statute provided for a criminal punishment of up to six months in jail and a fine of up to \$5,000 for campaign literature or advertisements that say anything known to be false about a candidate’s voting record. The law also assigned regulatory power to police “false statements” to the Ohio Elections Commission.⁴⁰ The decision was important not only in the free speech context—the law was eventually struck down on First Amendment grounds—but also for its liberal application of the rules of standing for a facial challenge to a law.

Perhaps most controversially, the Court held in *Paroline v. United States*⁴¹ that a single possessor of child pornography could not be held liable for all of the damages to the victim of that pornography.⁴² Over the dissent of three justices, the Court held that the victim was entitled to recover some damages from each possessor.⁴³ *Paroline* is a good example of how difficult it can be to characterize decisions as liberal or conservative. Justice Sotomayor wrote a lone dissent arguing that the victim should be able to recover all of her damages from Paroline, but Justices Roberts, Scalia, and Thomas all would have ruled that the victim should have received nothing:

I certainly agree with the Court that Amy deserves restitution, and that Congress—by making restitution mandatory for victims of child pornography—meant that

37. *Id.* at 2377 (internal citations omitted).

38. 134 S. Ct. 2334 (2006).

39. *Id.* at 2341.

40. *Id.* at 2338.

41. 134 S. Ct. 1710 (2014).

42. *Id.* at 1725–26.

43. *Id.* at 1718–22.

she have it. Unfortunately, the restitution statute that Congress wrote for child pornography offenses makes it impossible to award that relief to Amy in this case. Instead of tailoring the statute to the unique harms caused by child pornography, Congress borrowed a generic restitution standard that makes restitution contingent on the Government's ability to prove, "by the preponderance of the evidence," "the amount of the loss sustained by a victim as a result of" the defendant's crime. When it comes to Paroline's crime—possession of two of Amy's images—it is not possible to do anything more than pick an arbitrary number for that "amount." And arbitrary is not good enough for the criminal law.⁴⁴

Reasonable people can disagree, but certainly a strong argument can be made that the five-justice majority opinion produced a liberal result by providing for restitution despite flaws in the statute, without completely tossing aside principles of proportionality in punishment and liability.

Of course this review of the Court's most recent term is suggestive rather than conclusive. Perhaps the term was an island of balance in a sea of judicial conservative activism. It is also possible that the Court's overall case selection has changed so that many lower court cases with conservative outcomes have gone unreviewed by the Supreme Court. That is possible, but far from self-evident, and certainly has not been demonstrated.

It is also worth noting that the Court passed up a number of opportunities to issue conservative decisions that would have had broad impact but chose instead to write opinions that are far more modest in scope. For example, in *Harris v. Quinn*,⁴⁵ the Court ruled that personal assistants hired under a state Medicaid program to help patients with in-home care could not be required to pay union dues.⁴⁶ There was a widespread belief that the continued vitality of the case holding that public employees could be required to pay union dues, *Abood v. Detroit Board of Education*,⁴⁷ was in question.⁴⁸ Instead,

44. *Id.* at 1730 (Roberts, J., dissenting) (internal citations omitted).

45. 134 S. Ct. 2618 (2014).

46. *Id.* at 2627–44.

47. 431 U.S. 209 (1977).

48. Lyle Denniston, *Opinion Analysis: A Ruling Inviting a Plea to Overrule*, SCOTUSBLOG (June 30, 2014), <http://www.scotusblog.com/2014/06/opinion-analysis-a-ruling-inviting-a-plea>

the Court declined to overrule *Abood* and issued a narrow ruling based on the narrow facts of the case—the personal assistants were hired primarily by the patients, not the State, did not get many of the union-negotiated benefits such as pensions, and had their salaries set by statute rather than by collective bargaining.⁴⁹

Similarly, in *Bond*, the Court had an opportunity to rein in federal power under the Treaty Clause, by overruling or limiting a 1920 case, *Missouri v. Holland*,⁵⁰ which had expansively interpreted federal power under that clause.⁵¹ The facts on *Bond* were somewhat bizarre: an aggrieved wife attempted to take revenge on her husband's pregnant mistress by applying a chemical substance to various surfaces the mistress might touch.⁵² She succeeded in causing a minor injury that could be treated by applying water to the wound.⁵³ The state declined to bring charges for the assault; yet the federal authorities chose to prosecute her pursuant to a federal law implementing the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction.⁵⁴

Three Justices—Scalia, Thomas, Alito—wrote a concurring opinion that would have drastically reduced federal authority to enact legislation under the Treaty Clause and the Necessary and Proper Clause.⁵⁵ The other six Justices declined their invitation to scale back *Missouri v. Holland* and instead wrote a narrow decision of statutory interpretation holding the treaty did not apply to the crime at issue.⁵⁶

While there is certainly no definitive evidence that the Court does not eventually intend to use recent precedents such as *National*

-to-overrule/ (“In fact both sides in the *Harris* case had made the future of the *Abood* precedent the focus of their debate in this case.”).

49. *Harris*, 134 S. Ct. at 2634–38.

50. 252 U.S. 416 (1920).

51. *Id.* at 435.

52. *Bond*, 134 S. Ct. at 2081.

53. *Id.*

54. *Id.* at 2080.

55. *Id.* at 2094.

56. The *Bond* Court did indicate some skepticism about whether the Treaty Power could extend to purely local crimes, but did not rule on that question. See Ilya Somin, *Thoughts on Bond v. United States*, WASH. POST VOLOKH CONSPIRACY (June 2, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/02/thoughts-on-bond-v-united-states/> (“Therefore the majority opinion at least suggests that there are serious doubts about whether the treaty power can reach local crimes like those committed by *Bond*. That doesn't mean that the majority justices clearly conclude that it does not reach it. They *did* ultimately avoid that issue, after all. But it at least hints in that direction.”).

*Federation of Independent Business v. Sebelius*⁵⁷ (which upheld the Affordable Care Act as an exercise of the Tax Power, but held that the Commerce Power of Congress does not extend to requiring people to purchase health insurance) to further rein in federal power in the future,⁵⁸ *Bond* is a reminder that such speculation is just that—speculation. With its strange facts and seeming federal overreach, it would be difficult to imagine a better vehicle for the Court to constrain federal power than *Bond*, yet the Court declined to do so.

It has been suggested that the Roberts Court's brand of conservatism is more of the libertarian variety than it is socially conservative, which might account for liberal-seeming decisions such as *Riley* and the other criminal procedure cases.⁵⁹ If these cases are really more libertarian than liberal this might account for the perception that the Court consistently rules in a conservative manner. However, this would be an incomplete explanation at best. The Court's decisions in *Homer City*, *Abramski*, *Castleman*, and *Hall v. Florida*⁶⁰ all had outcomes in keeping with traditional liberal views on environmental regulation, gun control, and the death penalty. None of these cases could reasonably be described as libertarian.

One could also argue that the Court's conservative decisions are somehow more sweeping or impactful than the liberal decisions so that the simple counting of liberal and conservative opinions misses the forest for the trees. That is possible, but any such analysis would involve a lot of comparisons between apples and oranges. Is a decision making it easier for states to elect to limit affirmative action more sweeping or impactful than a decision making it easier for the EPA to limit cross-state pollution? Is a decision limiting protection of women seeking abortions from harassment more significant than a decision limiting access to guns by persons convicted for domestic violence?

57. 132 S. Ct. 2566 (2012).

58. See, e.g., Barrett, *supra* note 5 (“Roberts’s quirky definition of the mandate as a tax likely won’t have lasting jurisprudential impact. His narrow reading of the Commerce Clause, on the other hand, could well resurface in other cases as a potent tool to undercut regulatory statutes. What many saw as a conservative defeat thus in the long run might be the opposite.”).

59. Doug Kendall & Brianne Gorod, *Why the Roberts Court Is Less Conservative Than You Think*, WASH. POST: POSTEVERYTHING (June 25, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/06/25/the-roberts-court-is-way-less-conservative-than-you-think/>.

60. 134 S. Ct. 1986 (2014).

Nor has the Roberts Court been especially eager to sweep away precedent. While many Supreme Court advocates called for the Court to overturn various precedents during the 2013–14 Term, the Court consistently declined to do so.⁶¹ Of course, a Court may uphold a precedent while interpreting it in far narrower way than had previously been understood. Indeed, this article argues below that the Roberts Court did exactly that in several cases this term, all in ways that resulted in conservative outcomes.⁶²

One thing that is clear is that the conservative cases received far more press coverage, which might explain the perception that the Court is so conservative that liberals should simply avoid it. For example, the Court's decision in *Burwell v. Hobby Lobby*⁶³ received enormous press attention. That case allowed closely held, for-profit corporations to decline on religious grounds to offer employees insurance that covers all of the contraceptives it was required to cover under the Affordable Care Act.⁶⁴ A search of the Lexis NEWS database for "Hobby Lobby and Contraceptives" produced 1723 hits, many of which discussed the case extensively. By contrast, a similar search for "Homer City and Supreme Court" (The 2013–14 Court's leading environmental case) produced only ninety-seven hits, mostly discussing the case tangentially, if at all.

In fact, many of the Court's conservative decisions during the last term involved issues that typically generate a great deal of media interest—affirmative action, church and state, campaign finance, as well as reproductive freedom. This may result in a perception that the Court produces consistently conservative decisions.

This leads to the most likely explanation for why the Roberts Court is often seen as so consistently right-leaning. When one looks at how the Court has responded this term to the claims of racial and religious minorities, as well as women, the Court has been largely unsympathetic. The Court has also turned an aggressively

61. See, Adam Liptak, *Roberts's Incremental Approach Frustrates Supreme Court Allies*, N.Y. TIMES (July 14, 2014), <http://www.nytimes.com/2014/07/15/us/supreme-court-shows-restraint-in-voting-to-overrule-precedents.html>.

62. Readers may note that this article's tone in Part B, critiquing a subset of the Court's conservative decisions, is more critical than the tone of Part A setting out the Court's more liberal decisions. This is because the point of Part A is to encourage a more nuanced critique of the Court by pointing out its liberal tendencies and also because the decisions in Part B do, in some cases, seem to narrow precedent in a way that the cases in Part A do not.

63. 134 S. Ct. 2751 (2014).

64. *Id.* at 2759–60.

unsympathetic ear to concerns about wealthy individuals and corporations dominating the political process. Further, these decisions reflect broader trends in the Roberts Court's decision-making, as will be discussed below. While liberals and progressives also care about issues such as the environment, digital privacy, gun control, and capital punishment, any Court that consistently rules against racial and religious minorities and women, and consistently rules in favor of wealthy campaign donors, is, understandably, bound to draw substantial fire from much of the media.

B. The Roberts Court and Its "Blind Spots"

In 2014, Justice Ginsburg suggested that the male justices had a "blind spot" regarding the concerns of women.⁶⁵ Looking at the Court's 2013–14 Term, it is possible to conclude that the Court's blind spots further extend to the concerns of racial and religious minorities and to those concerned about the influence of great wealth on the electoral process. A discussion of each of these issues follows.

1. Race

In *Schuette v. Coalition to Defend Affirmative Action*,⁶⁶ the Roberts Court upheld Michigan's Proposal 2, which amended the state constitution to read:

The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.⁶⁷

The Court upheld the amendment against a Fourteenth Amendment challenge.⁶⁸ The plaintiffs argued that the Michigan amendment ran afoul of the "political process doctrine," which prohibits the changing of the political process in a way that makes it more difficult

65. Sean Sullivan, *Justice Ruth Bader Ginsburg Says Male Justices Have a 'Blind Spot' on Women's Issues*, WASH. POST: POST POLITICS (July 31, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/31/justice-ruth-bader-ginsburg-says-male-justices-have-a-blind-spot-on-womens-issues/>.

66. 134 S. Ct. 1623 (2014).

67. *Id.* at 1629.

68. *Id.* at 1638.

for racial minorities to achieve their goals.⁶⁹ The argument is straightforward. A group that favors preferential admission for athletes, alumni, or most groups could achieve these goals by merely persuading the right elected officials. However, minorities would have to seek another constitutional amendment to reinstate race-conscious admissions.

The political process doctrine originated in the case of *Hunter v. Erickson*,⁷⁰ which struck down an amendment to the city charter of Akron Ohio that required voter approval for any city ordinance “which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry.”⁷¹ The Court held that the “State[s] may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”⁷²

The political process doctrine was applied again in the 1982 case, *Washington v. Seattle School District No. 1*.⁷³ That case struck down an initiative stating: “No school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence . . . and which offers the course of study pursued by such student”⁷⁴ The Court held that the political process doctrine forbids political restructuring that “subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.”⁷⁵

The plurality opinion in *Shuette* upholding the Michigan amendment was perhaps less notable for its result (Justice Breyer wrote a concurring opinion that would have upheld the Michigan amendment on far narrower grounds than the plurality) than it is for its reasoning. The plurality eviscerated the political process doctrine by changing it from protecting the ability of racial minorities to

69. *Id.* at 1626.

70. 393 U.S. 385 (1969); *see also* *Reitman v. Mulkey*, 387 U.S. 369 (1967).

71. *Hunter*, 393 U.S. at 387.

72. *Id.* at 393.

73. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

74. *Id.* at 462.

75. *Id.* at 467.

“achieve beneficial legislation” to prohibiting laws that have “the serious risk, if not purpose, of causing specific injuries on account of race.”⁷⁶

While the Court gave little guidance on how to apply this standard, it is not at all clear that the political process doctrine retains any independent vitality after *Schuette*. After all, laws that impose “the serious risk, if not purpose, of causing specific injuries on account of race” presumably invite strict judicial scrutiny under regular equal protection analysis.⁷⁷ Further, while the Court averred the decision was “not about the constitutionality, or the merits, of race-conscious admissions policies in higher education,”⁷⁸ the Court’s view that the fact that many of the minority applicants who would have gained admission to the state’s top universities no longer would be able to do so is a not a “specific injury on account of race,” says a great deal about how the Court regards affirmative action.

Indeed, *Schuette* is only the latest of a string of Roberts Court decisions demonstrating a deep hostility to race-conscious policies. In 2007, Justice Roberts set the tone for the Court, striking down a pair of race-conscious school desegregation plans, declaring: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁷⁹ Since then, the Court has consistently ruled against proactive attempts to combat race discrimination. In *Fisher v. University of Texas*,⁸⁰ the Roberts Court vacated a decision by the Fifth Circuit upholding the University of Texas Austin’s partly race-based affirmative action program, holding that the Circuit Court had not been strict enough in its examination of the constitutionality of the program.⁸¹ The Supreme Court faulted the Fifth Circuit for the feebleness of its inquiry, averring, “Strict scrutiny must not be strict in theory but feeble in fact.”⁸²

76. *Schuette*, 134 S. Ct. 1623, 1633 (2014).

77. This turns on the question of how the phrase “serious risk, if not purpose, of causing specific injuries on account of race” is interpreted by future courts. If it means nothing more than a law’s unintended disparate impact on a racial group, then the political process doctrine would provide racial minorities protection over and above what they receive otherwise. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977). However, that does not seem to be the most obvious interpretation of what the Roberts Court means by that term.

78. *Schuette*, 134 S. Ct. at 1630.

79. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 51 U.S. 701, 748 (2007).

80. 133 S. Ct. 2411 (2013).

81. *Id.*

82. *Id.* at 2421.

A few years earlier the Court also heightened the statutory standard an employer must meet in order to discard a promotion test that resulted in no African Americans being eligible for promotion. In *Ricci v. DeStefano*,⁸³ the Roberts Court held that the City of New Haven had violated the 1964 Civil Rights Act by declining to certify the results of a promotion exam that it considered racially discriminatory.⁸⁴ The Court held that the City's good faith belief that the test was discriminatory was not a sufficient basis to discard the results.⁸⁵ Rather the City would have to demonstrate "a strong basis in evidence that, had it not taken the action, it would have been liable under [Title VII for] disparate-impact."⁸⁶ Also, in *Shelby County v. Holder*,⁸⁷ the Court struck down the preclearance provisions of the Voting Rights Act.⁸⁸ The consequences of that holding have been wide spread, including passage of strict voter identification laws, restrictions on early voting, and reductions in the window of time for voter registration, all of which would have required preclearance by the Justice Department prior to the *Shelby County* decision.⁸⁹

2. Religious Minorities

In *Town of Greece v. Galloway*,⁹⁰ the Supreme Court upheld a town's practice of opening town council meetings with prayer sessions, almost all lead by Christian ministers.⁹¹ As the Court described it, "some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious Holidays, scripture or doctrine" The Court offered the following example:

Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the

83. 557 U.S. 557 (2009).

84. *Id.*

85. *Id.* at 575–76.

86. *Id.* at 563.

87. 133 S. Ct. 2612 (2013).

88. *Id.* at 2631.

89. See Tomas Lopez, *Shelby County: One Year Later*, BRENNAN CENTER FOR JUST. (June 24, 2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later>.

90. 134 S. Ct. 1811 (2014).

91. *Id.* at 1813.

saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. . . . We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan. . . . Praise and glory be yours, O Lord, now and forever more. Amen.⁹²

The Court acknowledged that “[c]itizens attend town meetings . . . speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances.”⁹³ The Court also acknowledged that there were “several occasions where audience members were asked to rise for the prayer.”⁹⁴ Ministers also, in full view of the council members who might well know the attending citizens by name, sometimes asked those citizens to join in the prayer, while some of the council members themselves bowed their heads or made the sign of the cross.⁹⁵

The Court refused to acknowledge that a reasonable person might feel pressure to join in these prayers or, at a minimum, to stand or bow their heads while the name of Jesus was invoked. The Court dismissed such concerns as simply unreasonable: “It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the place of public citizens. . . .”⁹⁶

Most significantly, the Court set an extremely high bar, in most cases probably impossibly high, for demonstrating the level of coercion necessary to successfully challenge such practices.⁹⁷ As noted, the invited prayer givers were overwhelmingly Christian, and frequently invoked explicitly Christian imagery, while attendees were asked to visibly join in these prayers. And these same citizens often had important requests to make of the council members whom

92. *Id.* at 1816–17.

93. *Id.* at 1825.

94. *Id.* at 1826.

95. *Id.*

96. *Id.* at 1814.

97. *Id.* at 1826.

they were in full and close view of.⁹⁸ The Court demanded much more than this:

Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined.⁹⁹

This demand for empirical proof of tit-for-tat retaliation by the government against a non-praying citizen is completely unprecedented in the Court's establishment clause jurisprudence. Many factors go into deciding whether a particular business gets something like a zoning variance, and proving that a particular business was denied a variance or other benefit as a direct result of its owner not crossing his or her chest would be extremely difficult absent some sort of "smoking gun" hostile statement by a council member.

The Court was completely unwilling to see the situation from the viewpoint of non-Christians. The majority could not imagine that any such attendees would feel the slightest bit self-conscious at even the prospect of walking out of the room during a prayer: "Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy."¹⁰⁰

As with *Schuette, Town of Greece* is part of a larger pattern by the Roberts Court. In *Salazar v. Buono*,¹⁰¹ the Court held that it did not violate the establishment clause to maintain a five-foot high Latin cross in the Mojave National Preserve by transferring ownership of one acre of land to a private group.¹⁰² A year earlier, in *Pleasant Grove City v. Summum*,¹⁰³ the Court ruled that a city may accept a monument displaying the Ten Commandments in a city park, while

98. *Id.* at 1829.

99. *Id.* at 1826.

100. *Id.* at 1827.

101. 559 U.S. 700 (2010).

102. *Id.* at 701.

103. 555 U.S. 460 (2009).

rejecting a monument displaying the tenets of a minority religion.¹⁰⁴ In two other cases, the Court limited to near extinction taxpayer standing to challenge establishment clause violations.¹⁰⁵

3. Women

In *McCullen v. Coakley*,¹⁰⁶ the Court struck down a Massachusetts statute that provided:

No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.¹⁰⁷

The law had been enacted because the state legislature had concluded that the previous law did not adequately protect women seeking abortions—or their doctors—from intimidation and harassment.¹⁰⁸

The previous law had established an eighteen foot buffer zone, within which, “no one (other than certain exempt individuals) could knowingly approach within six feet of another person—unless that person consented—for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”¹⁰⁹ The six-foot zone was commonly referred to as a “floating” buffer zone.¹¹⁰

The new, thirty-five foot, buffer zone was challenged by a number of persons who regularly attempted to counsel women against abortions.¹¹¹ They contended that they had many fewer conversations and distributed many fewer leaflets since the new law

104. *Id.* at 463.

105. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Heien v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007).

106. 134 S. Ct. 2518 (2014).

107. MASS. GEN. LAWS ANN. ch. 266, § 120E½(b) (West 2012), *invalidated by McCullen*, 134 S. Ct. 2518.

108. *McCullen*, 134 S. Ct. at 2525.

109. *Id.*

110. *See Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997).

111. *McCullen*, 134 S. Ct. at 2528.

was enacted.¹¹² The Supreme Court held that, although the law was content neutral and that the state's interests in "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways" were significant, the new law was not narrowly tailored to achieve those ends.¹¹³

One of the most striking aspects of this decision is the lack of weight the Court put upon the testimony of police officers who had extensive on-the-ground experience at the clinics and who clearly stated that they had not been able to protect pregnant women from harassment or prevent blockage of clinic entrances prior to the enactment of the new law.¹¹⁴ A Boston Police Captain who had served as the commanding officer of the district containing the Boston Planned Parenthood clinic testified that the prior buffer zone law "was extremely difficult . . . to enforce," and that there "were frequent disturbances, including physical jostling."¹¹⁵ He also testified that when both certain pro-life and pro-choice groups were both present they would "effectively block the door."¹¹⁶ According to the Captain, "it was difficult for anyone trying to enter or leave the facility to do so without coming into physical contact with protestors."¹¹⁷ Another officer, a Detective with thirty-eight years of experience on the Boston Police Force testified: "Before the amended buffer zone law took effect, it was very difficult for the police . . . to determine when the law was being violated . . . Since the amended buffer zone law took effect, the atmosphere outside the clinic has been much more orderly. There have been fewer confrontations between the protestors and people walking to the clinic. . . . The fixed zone makes it possible for us to be sure when the law is being violated."¹¹⁸

Another striking feature of *McCullen* is how readily accepting the Court was of the unproven assertions of the pro-life counselors. For example, the Court recited Ms. McCullen's testimony that having to stop abruptly at the border of the buffer zone "causes her to

112. *Id.*

113. *Id.* at 2535.

114. *See id.* at 2539.

115. Joint Appendix at 122–23, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (No. 12-1168).

116. *Id.* at 123.

117. *Id.* at 124.

118. *Id.* at 126.

appear ‘untrustworthy’ and ‘suspicious.’”¹¹⁹ The juxtaposition with the Court’s opinion in *Town of Greece* is stark. Recall that in that case, the Court simply could not believe that a person who walked out in the middle of a prayer they had just been asked to join might believe that they would not be as effective in pleading their case to the town council. Yet the Court readily accepted the pro-life counselors’ testimony that the buffer zone diminished their effectiveness.

As with the cases concerning racial and religious minorities, the *McCullen* case is not an isolated instance; it is part of a string of cases diminishing the rights of women. In the same term, the Court held that closely held, for-profit corporations may decline, on religious grounds, to offer female employees insurance that covers all of the contraceptives it was required to cover under the Affordable Care Act.¹²⁰ A few years earlier, in *Ledbetter v. Goodyear Tire & Rubber Co.*,¹²¹ the Court held that a female plaintiff could not pursue her Title VII claim of gender-based pay discrimination against her employer because of the statute of limitations, even though she had no reasonable way to know of the disparities prior to her suit.¹²² In *Wal-Mart Stores, Inc. v. Dukes*,¹²³ the Court held that female employees seeking to sue their employer for sex discrimination could not bring their suit as a class action, which, given the practical obstacles to single-plaintiff discrimination suits, virtually foreclosed most of the women from having their claims heard in court.¹²⁴ In *AT&T Corp. v. Hulteen*,¹²⁵ the Court held that maternity leave taken prior to the passage of the Pregnancy Discrimination Act of 1978 could not be considered in calculating employee pension benefits.¹²⁶

4. Wealth, Corporations, and the Political Process

The Roberts Court has been notoriously hostile to legislative attempts to limit the impact of wealthy individuals on the political

119. *McCullen*, 134 S. Ct. at 2535.

120. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

121. 550 U.S. 618 (2007).

122. *Id.* at 618.

123. 131 S. Ct. 2541 (2011).

124. *Id.* at 2544–45.

125. 556 U.S. 701 (2009).

126. *Id.* at 701–02.

process. In *FEC v. Wisconsin Right to Life*,¹²⁷ it ruled that the restrictions on corporate or union-funded television in the period before an election amounted to censorship of core political speech unless those advertisements explicitly urge a vote for or against a particular candidate.¹²⁸ In *Davis v. FEC*,¹²⁹ the Court struck down the “Millionaire’s Amendment,” which allowed candidates for Congress to raise larger contributions from donors, if their opponents spent more than \$350,000 of their own money in the election.¹³⁰ Most famously, in *Citizens United v. FEC*,¹³¹ the Court struck down limits on “independent expenditures” by corporations and unions.¹³² The year after *Citizens United*, the Court decided *Arizona Free Enterprise Club v. Bennett*.¹³³ In that case, the Court struck down the part of the Arizona Citizens Clean Elections Act, which gave public money to candidates who agreed to limit their personal spending to \$500, participate in at least one debate, and which gave candidates more money based on the amounts spent by privately financed opponents and by independent groups supporting them.¹³⁴ The following year in *American Tradition Partnership v. Bullock*,¹³⁵ the Court struck down Montana’s ban on corporate political spending despite extensive findings that outside spending was threatening corruption or the appearance of corruption.¹³⁶

The 2013–14 Term was no exception to this trend. In *McCutcheon v. FEC*,¹³⁷ the Court struck down a federal limit on “aggregate contribution” limits, i.e., the amount one contributor can give in federal elections to all candidates, political parties, and PACs, combined.¹³⁸ This was a major development, because the Court had never before struck down a federal contribution limit, as opposed to limits on independent spending. The logic of the decision was that,

127. 551 U.S. 449 (2007).

128. *Id.* at 449–50.

129. 554 U.S. 724 (2008).

130. *Id.* at 724–26.

131. 558 U.S. 310 (2010).

132. *Id.*

133. 131 S. Ct. 2806 (2011).

134. *Id.* at 2809, 2814.

135. 132 S. Ct. 2490 (2012).

136. *Id.* at 2491.

137. 134 S. Ct. 1434 (2014).

138. *Id.*

unlike a single large donation to a specific candidate, large aggregate donations do not have the same potential for quid pro quo corruption.

II. CONCLUSION

Despite what one might expect from the conventional media wisdom, the Court's 2013–14 Term is not easily described by a single phrase such as liberal or conservative.

In that term the Court demonstrated numerous liberal tendencies:

- a desire to reign in excesses of capital punishment;
- a willingness to broadly interpret laws allowing the government to protect people against pollution;
- a willingness to enforce reasonable restrictions on gun possession;
- a sensitivity to issues of privacy in an age of rapid technological change;
- a concern for protecting whistleblowers;
- an openness to protecting the rights of criminal defendants across a range of constitutional areas.

On the other hand, in 2013–14, the Court repeatedly ruled against the claims of women, racial and religious minorities, and those seeking to limit the influence of the wealthy on the political process. Even with regard to these issues though, the Court has already shown in its most recent term that it is open to siding with women and minorities under the right circumstances. In the 2014–15 Term, the Court overruled the Tenth Circuit, which had granted summary judgment in favor of an employer that was being sued for intentional discrimination against a Muslim woman.¹³⁹ The employer, Abercrombie and Fitch, declined to hire an otherwise qualified Muslim woman because she wore a headscarf that they saw as violating their “no caps” policy. The Tenth Circuit ruled in Abercrombie’s favor because “ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of his need for an accommodation.”¹⁴⁰

139. *EEOC v. Abercrombie & Fitch Stores, Inc.* 135 S. Ct. 2028 (2015).

140. *Id.* at 2031.

In an opinion written by Justice Scalia but joined by all the Court's more liberal members, the Supreme Court reversed:

Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. We disagree. Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision.¹⁴¹

In the same term the Court also significantly expanded the class of women who can sue their employers for pregnancy discrimination. Overruling the Fourth Circuit, the Court held: "In our view, the Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work."¹⁴² The Court also unanimously overruled the Eighth Circuit, holding that Muslim prisoners have the right to grow a half-inch beard despite various stated security concerns.¹⁴³

Further, although, it was not an issue in the 2013–14 Term, the Court has shown a strong concern for the equality and dignity of same-sex persons and couples¹⁴⁴. At the time of this writing, the Court had not yet ruled on the issue of the constitutionality of same-sex marriage, but the ark of their reasoning so far indicates a strong likelihood that they will rule in favor of same-sex couples who wish to marry.

Perhaps one way to describe the Roberts Court's pattern is that it has a cramped view of what constitutes an injury. Unless it sees proof that a legislator was all but bribed by a campaign donation or that a non-praying citizen was directly retaliated against by the city council, the Court sees no injury. Unless a racial minority can demonstrate a specific act of racism, the Court sees no injury in the elimination of affirmative action or the use of a test that promotes no African Americans. But the Court has no trouble seeing the injury that comes from specific government retaliation against whistleblowers or from the federal government's refusal to grant specific

141. *Id.*

142. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1344 (2015).

143. *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

144. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

federal benefits to a same-sex marriage that is legal under state law. Indeed, while the Roberts Court can hardly be said to be a friendly venue for women's rights, it has consistently ruled in favor of the plaintiffs when the context has been a claim of employer retaliation against employees alleging gender discrimination or sexual harassment.¹⁴⁵

Of course, the Court's complex pattern of decision-making is not likely to be susceptible to any single all-purpose explanation. The Court has always satisfied, disappointed, and sometimes infuriated various Court watchers. The 2013–14 Term was no exception, nor are its subsequent terms likely to be.

145. See Brianne Gorod, *Roberts at 10: Roberts's Quiet, But Critical, Votes to Limit Women's Rights*, CONST. ACCOUNTABILITY CTR., <http://theconstitution.org/sites/default/files/briefs/Roberts-at-10-Roberts-Quiet-But-Critical-Votes-To-Limit-Womens-Rights.pdf> (last visited Jan. 15, 2015).

