

Chapter 5

Lloyd Leva Plaine Distinguished Lecture Series The Supreme Court in the Age of Obama
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¶ 500 Relevance to Estate Planners

Mr. Toobin's insights into the Supreme Court and Chief Justice John Roberts are not merely interesting but are also highly relevant to estate planning practices. After all, the U.S. Supreme Court has a substantial impact on the estate planning practice area.

Consider for example, *Bosch*,¹ *Diedrich*,² *Byrum*,³ *Dickman*,⁴ *Boyle*,⁵ *Hubert*,⁶ *Chevron*,⁷ *Mayo Foundation*,⁸ *Home Concrete*,⁹ *Knight*,¹⁰ *Clark v. Rameker*,¹¹ and, of course, the same sex marriage cases, including notably *Windsor*,¹² a federal estate tax marital deduction case, and *Obergefell*.¹³ These, and various other Supreme Court cases, are very important in tax and estate planning practices.

Mr. Toobin is particularly well positioned to comment about the history, the current trends, and the future of the Supreme Court. He frequently discusses major cases before the Court as a senior analyst for CNN and as a legal writer for *The New Yorker*. He has written two best sellers about the Supreme Court, **The Nine: Inside the Secret World of the Supreme Court**, surveying the inner workings of the Court from the Reagan administration forward, and **The Oath: The Obama White House and The Supreme Court**, about the ideological war between the John Roberts Court and the Obama administration.

The balance of this Chapter 5 is a summary of Mr. Toobin's remarks.

¶ 501 The Supreme Court in 2015: An Introduction

¹ *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967) (effects of state court decisions for federal tax purposes).

² *Diedrich v. Commissioner*, 457 U.S. 191 (1982) (donor of a net gift realizes gain if the gift tax exceeds the basis of the property).

³ *United States v. Byrum*, 408 U.S. 125 (1972) (retained right to vote gifted stock did not result in estate inclusion under §2036(a)(1) or §2036(a)(2)).

⁴ *Dickman, et al. v. Commissioner*, 465 U.S. 330 (1984) (gift impact of interest-free loans and use of property).

⁵ *United States v. Boyle*, 469 U.S. 241 (1985) (relying on attorney to file estate tax return timely is not reasonable cause to avoid failure to file penalty).

⁶ *Commissioner v. Estate of Hubert*, 520 U.S. 93 (1997) (impact of administration expenses on marital deduction).

⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (deference to federal administrative agencies' interpretation of statutes; legislative regulations are generally afforded controlling weight unless "arbitrary, capricious, or manifestly contrary to the statute").

⁸ *Mayo Foundation for Medical Education and Research et al. v. United States*, 131 S. Ct. 704 (2011) (Treasury regulations, whether legislative or interpretive, that are issued under the Administrative Procedures Act's "notice and comment" procedures and that fall within the statutory grant of authority, are entitled to deference under the *Chevron* doctrine).

⁹ *United States v. Home Concrete & Supply, LLC, et al.*, 132 S. Ct. 1836 (2012) (retroactive tax regulation not granted deference under *Chevron* doctrine in light of prior Supreme Court contrary interpretation of Code provision).

¹⁰ *Knight v. Commissioner*, 128 S. Ct. 782 (2008) (investment advisory fees are subject to the §67(a) 2% floor on miscellaneous itemized deductions).

¹¹ *Clark v. Rameker*, 134 S. Ct. 2242 (2014) (inherited IRAs are not exempt from the claims of creditors of a beneficiary who has filed for bankruptcy).

¹² *United States v. Windsor, et al.*, 133 S. Ct. 2675, (2013) (estate tax marital deduction allowed for same-sex spouse; restricting U.S. federal interpretation of "marriage" and "spouse" to apply only to heterosexual unions under Section 3 of the Defense of Marriage Act is unconstitutional under the Due Process Clause of the Fifth Amendment).

¹³ *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015) (fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, requiring all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions).

¶ 501.1 Demographic

There are now six men and three women Justices on the Supreme Court. This is the first time in history that there have been three women Justices. There are six Catholics and three Jews. This is the first time that there are no Protestant Justices. Four Justices come from New York City boroughs – Justice Sotomayor from the Bronx, Justice Scalia from the Queens, Justice Ginsburg from Brooklyn, and Justice Kagan from Manhattan.

¶ 501.2 Ideological

A much more important fact is that there are five Republican and four Democrat justices. That is most of what you need to know about the Supreme Court.

Many hope and some even believe that the Supreme Court represents a refuge from the political partisanship and differences between the parties, but the Supreme Court is not a refuge from partisanship. The current divisions between the parties in American history are perhaps greater than in a very long time. There used to be moderate Democrats and moderate Republicans, but the parties are now deeply polarized and agree on very little. That applies with very few exceptions to controversial issues that come before the Supreme Court. The Republican and Democrat Justices on important issues by and large vote differently from each other.

¶ 502 Recent History of Supreme Court

¶ 502.1 Liberalism of Late Warren Court

The Court's Justices were not always so sharply divided ideologically on politically partisan grounds. In the mid-to late 1960s, there were seven liberals on the Supreme Court, led by Chief Justice Earl Warren's liberal agenda during the second half of his tenure. Every Saturday morning, Chief Justice Warren met with Justice William Brennan, whom many Court watchers called the Chief Justice's "deputy," to decide what cases to take and what decisions to render in order to direct the law in the preferred direction. A variety of liberal landmark cases were decided during this period including:

New York Times v. Sullivan,¹⁴ giving protection to the press;

Griswold v. Connecticut,¹⁵ first recognizing a right to privacy (regarding birth control);

Miranda v. Arizona,¹⁶ revolutionizing criminal procedure (and changing television drama forever – all young children know that defendants have the right to remain silent); and

¹⁴ 376 U.S. 254 (1964) (actual malice standard must be satisfied before press reports about public officials can be considered to be defamation and libel) (opinion by Justice Brennan).

¹⁵ 381 U.S. 479 (1965) (state statute outlawing birth control violated "right to marital privacy") (opinion by Justice William O. Douglas).

¹⁶ 384 U.S. 436 (1966) (statements made by defendant in police interrogation admissible only if defendant was informed of right to consult an attorney before and during questioning and of right against self-incrimination before police questioning, and that the defendant understood and voluntarily waived these rights) (opinion by Chief Justice Warren).

Loving v. Virginia,¹⁷ recognizing interracial marriages (with perhaps the best name of any Supreme Court case).

It seems hard to believe now that not until 1967 (under 50 years ago) did the Supreme Court get around to holding that bans on interracial marriages were unconstitutional. When President Obama's parents were married in 1960, their marriage would have been illegal in 19 states; people were in prison for doing that. These "anti-miscegenation statutes" are now unthinkable.

¶ 502.2 Significance of Supreme Court Justice Nominations

One of the most significant ways in which an American President can impact social policy in the United States is through the nomination of replacements for retiring Justices. A maxim that applies regarding when Justices will retire is – "those who know don't tell and those who tell don't know."

President Carter is the only President to serve a full term and have no opportunity to name a Justice to the Supreme Court. President Nixon only served five years (you recall he had to leave early) but made four appointments to the Supreme Court.

¶ 502.3 Impact of Four Nixon Appointees; Evolution of Republican Party

Four Justices left during Nixon's presidency: Chief Justice Warren, Justice Abe Fortas, Justice John Harlan, and Justice Hugo Black. They were replaced by Chief Justice Warren Burger, Justice Lewis Powell, Justice Harry Blackmun, and Justice William Rehnquist. These appointments were made before the evolution of the Republican Party. In the 1970s, the Republican Party was a largely moderate to conservative party, and the Nixon appointees were moderate to conservative. Despite the fact that the Republican President Nixon appointed four Justices, the Court did not move to the far right in its decisions.

Indeed, the 1970s decisions were about as liberal as the decisions in the 1960s. Examples of important decisions during the 70s include the Nixon tapes case¹⁸ (a unanimous decision forcing President Nixon from office), the Pentagon papers case,¹⁹ approval of school busing,²⁰ and death penalty decisions resulting in a de facto

¹⁷ 388 U.S. 1 (1967) (Virginia's Racial Integrity Act of 1924 prohibiting marriage between "white" and "colored" people violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment) (unanimous opinion authored by Chief Justice Warren).

¹⁸ *United States v. Nixon*, 418 U.S. 683 (1974) (unanimous opinion authored by Chief Justice Burger).

¹⁹ *New York Times v. United States*, 403 U.S. 713 (1971) (allowing *New York Times* and *Washington Post* to publish the then-classified Pentagon Papers without risk of government censorship or punishment, despite President Nixon's claim of executive authority to suspend publication of classified information in the possession of the *Times*).

²⁰ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (busing appropriate to remedy racial imbalance in schools even if the imbalance resulted from selection based on geographic proximity to the school rather than from deliberate assignment based on race); *Milliken v. Bradley*, 418 U.S. 717 (1974) (students could be bused across district lines only when evidence of de jure segregation across multiple schools existed).

moratorium on the death penalty beginning in 1972²¹ (but reinstating it in 1976²² with required limitations on the permissible death sentencing systems).

¶ 502.4 Roe v. Wade

Of course, the most controversial of the liberal cases of the 70s was the landmark abortion case, *Roe v. Wade*,²³ holding that the states could not have outright bans on abortion. *Roe v. Wade* was a 7-2 opinion; the two dissenters were Justice Byron White (appointed by President Kennedy) and Justice William Rehnquist (appointed by President Nixon). Three of the four Nixon appointees were therefore in the majority in *Roe v. Wade*.

¶ 502.5 Election of Ronald Reagan; Role of Edwin Meese III

A key event in the Supreme Court history is the election of President Reagan in 1980. He brought to Washington Edwin Meese, one of the most under-recognized persons in this country's history, as the White House Advisor (later to become Attorney General). Edwin Meese believed there had been a liberal agenda and that a conservative agenda was needed with Justices to advance that agenda. The agenda included an expansion of executive power, ending racial preferences that had been intended to assist African Americans, speeding up executions, lowering the barriers between church and state, and above all reversing *Roe v. Wade* and allowing states again to ban abortion.

A big part of the Reagan revolution was the arrival in Washington of a group of young conservative lawyers with a similar agenda. The Federalist Society was founded in 1982 as a student organization that challenged what had been perceived as the Orthodox American liberal ideology found in most law schools. The Federalist Society is devoted to moving the law in a more conservative direction; that it was founded in the beginning of the Reagan years is no coincidence. Notable members of the Society have included Justices Antonin Scalia (who served as the original faculty advisor to the organization) and Clarence Thomas.

Two of the best and brightest members, John Roberts²⁴ and Samuel Alito, worked in the Reagan administration. In 1985, in a memorandum plotting litigation strategy for the Attorney General, Samuel Alito expressed his views about abortion:

What can be made of this opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigatingg [sic] its effects?²⁵

²¹ *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty in these particular cases constituted cruel and unusual punishment, but Court majority did not agree on constitutional rationale; insistence on degree of consistency in application of death penalty resulted in de facto moratorium throughout the United States).

²² *Gregg v. Georgia*, 428 U.S. 153 (1976) (death penalty is not cruel and unusual punishment under the Eighth Amendment if the capital sentence process [1] provides objective criteria to direct and limit death sentencing discretion with appellate review of all death sentences and [2] allows the judge or jury imposing the death sentence to consider the character and record of the individual defendant).

²³ 410 U.S. 113 (1973).

²⁴ Chief Justice John Roberts was reported to have been a member of the Society, but at one point he indicated that he had “no recollection of ever being a member,” though the *Washington Post* later located a Society Directory which listed Roberts as a member of the Washington chapter steering committee.

²⁵ The memorandum was addressed in great detail in the confirmation hearings for Justice Alito. A copy of the memorandum can be found at <http://www.thesmokinggun.com/documents/crime/more-alito-abortion->

Later that year, in applying for a promotion, he said he was “particularly proud of my contributions to recent cases in which the government has argued in the Supreme Court ... that the Constitution does not support the right to an abortion.”²⁶

¶ 502.6 Impact of Reagan Appointees

When campaigning for the presidency, Ronald Reagan made a 1980 campaign promise that if he given a chance, he would appoint the first woman to the Supreme Court. Two weeks after President Reagan was shot in March 1981, Justice Potter Stewart announced that he was retiring. President Reagan told his subordinates that he had made a campaign promise, and asked them to find a qualified woman for the Court. In 1981, finding a qualified Republican woman in the traditional pipelines of federal circuit level judges or state supreme court judges was not as easy as today. Ultimately, the administration located Justice Sandra Day O’Connor at an intermediate state court of

insight. The memorandum is a 17-page detailed analysis of the reasoning of the relevant cases and recommending to the Solicitor General positions that should be included in an amicus brief in a particular abortion case. Some of the provisions in the memorandum include the following.

Accordingly, and in view of the lessons of Akron, I make the following recommendation. We should file a brief as amicus curiae supporting appellants in both cases. In the course of the brief, we should make clear that we disagree with Roe v. Wade and would welcome the opportunity to brief the issue of whether, and if so to what extent, that decision should be overruled. Then, without great formal discussion of levels of scrutiny or degrees of state interest, we should demonstrate that many of the provisions struck down by the Third and Seventh Circuits are eminently reasonable and legitimate and would be upheld without a moment’s hesitation in other contexts. If the court can be convinced to sustain these regulations, it may have to adjust its standard of review.

...

We need not raise all of these issues. Our point is that, even after Akron, abortion is not unregulable. There may be an opportunity to nudge the Court toward the principles in Justice O’Connor’s Akron dissent, to provide greater recognition of the states’ interest in protecting the unborn throughout pregnancy, or to dispel in part the mystical faith in the attending physician that supports Roe and the subsequent cases.

I find this approach preferable to a frontal assault on Roe v. Wade. It has most of the advantages of a brief devoted to the overruling of Roe v. Wade: it makes our position clear, does not even tacitly concede Roe’s legitimacy, and signals that we regard the question as live and open. At the same time, it is free of many of the disadvantages that would accompany a major effort to overturn Roe. When the Court hands down its decision and Roe is not overruled, the decision will not be portrayed as a stinging rebuke. We also will not forfeit the opportunity to address—and we will not prod the Court into summarily rejecting—the important secondary arguments outlined above.

²⁶ Justice Alito was also grilled about this application in the confirmation hearings. The application is described at <http://www.npr.org/templates/story/story.php?storyId=5033132>. When asked by Senator Durbin about his current position in light of this memorandum and application, Justice Alito replied that

the first step for me would be the issue of stare decisis. And that would be very important. If I were to get beyond that, I would approach that question the way I approach every legal issue that I approach as a judge, and that is to approach it with an open mind and to go through the whole judicial process, which is designed, and I believe strongly in it, to achieve good results, to achieve good decision-making....The things that I said in the 1985 memo were a true expression of my views at the time from my vantage point as an attorney in the Solicitor General’s office. But that was 20 years ago and a great deal has happened in the case law since then.... So the stare decisis analysis would have to take account of that entire line of case law.

This dialogue is available at http://www.ontheissues.org/Court/Samuel_Alito_Abortion.htm.

appeals in Arizona. She was not a social conservative, but a Westerner with a more libertarian style of conservatism. President Reagan was proud of her record as a Justice and of his nomination of her.

Chief Justice Burger resigned in 1986. Justice Rehnquist was elevated to Chief Justice and his position was filled with Justice Antonin Scalia.

A big turning point in the history of the Supreme Court occurred when Justice Lewis Powell resigned in July 1987. He was viewed as a “swing Justice,”²⁷ and his replacement would obviously have a huge impact on the Court’s future direction. The Administration nominated Robert Bork, but an important development had occurred between the time of the appointments of Justices Rehnquist and Scalia-- the Democrats had assumed control of the Senate in 1986. The Chairman of the Senate Judiciary Committee was no longer conservative Strom Thurmond. It was Joe Biden, who orchestrated a searching detailed inquiry into Robert Bork’s extremely conservative record. In the Senate hearings, Mr. Bork answered and engaged with the Senators regarding all their questions. That was to his credit, but a mistake that no subsequent Supreme Court nominee has made. Bork was rejected by a 58-42 vote. Former Chief of Staff Howard Baker told President Reagan they could not get someone as conservative as Robert Bork through the Senate. They chose a more moderate nominee, Anthony Kennedy, who was confirmed in 1988 in the last year of President Reagan’s administration and subsequently has become the important swing Justice following Justice O’Connor’s resignation.

¶ 503 The Rehnquist Court

¶ 503.1 Personal Dynamics

When he first started reporting on the Supreme Court, Jeffrey Toobin was inspired by “The Brethren” by Bob Woodward and Scott Armstrong. It was the first behind-the-scenes look at the Supreme Court. The theme of that book was how all of the Justices could not stand Chief Justice Warren Burger. In the history of the Supreme Court, those sorts of contentious relationships among the Justices are the rule rather than the exception. Justice James Clark McReynolds, who served from 1914-1941, was such an appalling anti-Semite that he left the room when Justices Brandeis or Cardozo spoke. Justice William O. Douglas was a cantankerous liberal who served on the court for 36 years, the record holder for the longest tenure. In 1958 he had a terrible car accident in rural Washington state. Justices Douglas and Felix Frankfurter hated each other, and some people back at the Supreme Court jokingly mused about where Justice Frankfurter was at the time and whether he might have tried to run Justice Douglas off the road.

Jeffrey Toobin’s book **The Nine: Inside the Secret World of the Supreme Court** is about the Rehnquist Court. He began the project thinking that he could write about how all the Justices hated each other during the Rehnquist years. He found out however, that the Justices got along well and in particular liked Chief Justice Rehnquist.

¶ 503.2 Change in Workload

²⁷ The Supreme Court Justices do not like references to the concept of a swing Justice; it makes them appear too predictable and political. But since the 1970s, there has been a swing Justice – Justice Powell in the 80s, Justice O’Connor in the 90s, and now Justice Anthony Kennedy.

One of the reasons the Chief Justice may have been so well liked by the other Justices was that he engineered a tremendous reduction in the Court's workload. In the 1980s, the Justices decided about 150 cases a year and that declined to about 70 cases a year by the end of the Rehnquist tenure.²⁸

In the 1980s, the workload of the Court got so extensive that Chief Justice Burger pushed a serious proposal for a super appeals court between the federal courts of appeal and the Supreme Court. When this proposal went to the White House for evaluation, as a young lawyer on the staff John Roberts was asked to write a recommendation memorandum. He wrote: "While some of the tales of woe emanating from the Court are enough to bring tears to the eyes, it is true that only Supreme Court Justices and school children are expected to and do take the summer off." (The Chief Justice does not talk that way anymore.)

¶ 503.3 Aftermath of *Bush v. Gore*

A dividing point in the history of the Supreme Court is *Bush v. Gore*.²⁹ The well-known result of *Bush v. Gore* is that President Bush became President, but the quite unexpected legacy of *Bush v. Gore* is that the Supreme Court became more liberal from 2000-2005. Representative decisions include the end of the death penalty for mentally retarded persons,³⁰ the end of the death penalty for juvenile offenders,³¹ the end of sodomy laws,³² the approval of affirmative action in the University of Michigan law school case,³³ and the repeated rejection of the position of the Bush administration involving detainees in Guantanamo.³⁴

The swing vote in many of these cases moving the Court to the left was Justice O'Connor. She became more alienated from the modern Republican Party in the Bush years. She did not like John Ashcroft, the way the war on terror was being conducted, or

²⁸ Mr. Toobin quips that 70 cases divided by nine Justices divided by four clerks each results in a "pretty cushy deal. It's no wonder they live so long."

²⁹ 531 U.S. 98 (2000).

Bush v. Gore always draws a great deal of public attention. Justice Scalia is a wonderful engaging public speaker who speaks frequently. He is frequently asked hostile questions about *Bush v. Gore* and always responds with four words: "Oh, get over it."

Jeffrey Toobin tried repeatedly to interview Al Gore during the process of writing *The Nine*. Al Gore always declined. Mr. Toobin later met him at a social occasion and said he was writing a new book involving *Bush v. Gore* and told Al Gore that he was the biggest *Bush v. Gore* junky in the world. Al Gore responded, "You may be second."

³⁰ *Atkins v. Virginia*, 536 U.S. 304 (2002).

³¹ *Roper v. Simmons*, 543 U.S. 551 (2005).

³² *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down sodomy laws in Texas and by implication 13 other states, so that same-sex persons could no longer be thrown in prison for having consensual sex), *overturning Bowers v. Hardwick*, 478 U.S. (1986) (no constitutional protection of sexual privacy between same-sex individuals).

³³ *Grutter v. Bollinger*, 539 U.S. 306 (2003) (admission policy that may favor underrepresented minority groups but that took into account many factors evaluated on an individual basis did not amount to a quota system that would have been unconstitutional under *Regents of the University of California v. Bakke*).

³⁴ The Supreme Court in case after case rejected the Bush administration's position and ruled that Guantanamo detainees had a right to the habeas corpus under the Constitution and the Military Commissions Act of 2006 was an unconstitutional suspension of that right. *E.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

the war in Iraq. She became particularly alienated by the Terri Schiavo case, regarding the treatment of a critically ill woman in a persistent vegetative state. Congress and President Bush enacted legislation to keep her alive following a local court's order after extensive litigation to remove her feeding tube. At that same time, Justice O'Connor's husband was falling victim to Alzheimer's disease and Justice O'Connor was appalled at what the Republican Congress did to intervene in the Schiavo case.

¶ 504 The Roberts Court

¶ 504.1 Departure of Justices O'Connor and Rehnquist; George W. Bush Appointees

Justice O'Connor's husband was slipping deeper into Alzheimer's disease in 2005, and Justice O'Connor announced her intention on July 1, 2005 to resign upon the confirmation of her successor. John Roberts was nominated to replace her. Over the Labor Day weekend of 2005, Chief Justice Rehnquist died of cancer. Therefore, there were two simultaneous vacancies. Justice Roberts' nomination was changed to be the Chief Justice, and Harriet Miers was nominated to replace Justice O'Connor. She was ultimately replaced by Samuel Alito as the nominee; Roberts and Alito were appointed about the same time.

These changes in the Justices have resulted in the Court being much more conservative. Chief Justice Roberts is more conservative than Chief Justice Rehnquist, and Justice Alito is *much* more conservative than Justice O'Connor.

¶ 504.2 Judicial Restraint and Key Decisions of the Roberts Court

One of the differences in the current meaning of conservatism compared to prior years is the approach to judicial restraint. In the 1960s and 70s, conservatives maintained that the Court's job was to defer to the elected branch of government. That has changed; the signature opinions of the Roberts court reflect judicial activism on the part of conservatives.

Key decisions by the conservative Roberts court have been illustrations of judicial activism. These include striking down gun control laws in Chicago,³⁵ allowing certain immigration restrictions imposed under Arizona laws to stand,³⁶ and invalidating some provisions at the core of the Voting Rights Act.³⁷

Signature cases of the Roberts court have dismantled campaign spending restrictions. The major case is *Citizens United v. Federal Election Commission*,³⁸

³⁵ District of Columbia v. Heller, 554 U.S. 570 (2008).

³⁶ Arizona v. United States 567 U.S. ___ (2012) (certain provisions of Arizona's law intended to punish unauthorized immigrants were preempted by federal law, but leaving intact other parts of the law including allowing law enforcement to investigate a person's immigration status).

³⁷ Shelby County v. Holder, 570 U.S. ___ (2013) (finding §4(b) of Voting Rights Act unconstitutional because the coverage formula to determine which jurisdictions are subject to preclearance before implementing changes to voting laws or practices is based on 40-year old data that is no longer responsive to current needs and is an impermissible burden on constitutional principles of federalism and equal sovereignty of the states).

³⁸ 558 U.S. 310 (2010) (First Amendment prohibited restrictions on independent political expenditures by nonprofit corporations).

invalidating campaign spending restrictions applicable to nonprofit corporations. Various subsequent cases have extended the Court's attack on campaign spending limitations.³⁹

¶ 504.3 Money in Politics

Jeffrey Toobin has written that “the Court remains committed to the project announced most prominently in the *Citizens United* case . . . : the deregulation of American political campaigns.”⁴⁰ The basic belief of the majority, led by Justice Kennedy, is that giving money is an act of political speech. There are two metaphors at the heart of *Citizens United*. The first is that corporations are “people” and have First Amendment rights. Interestingly, in the wake of *Citizens United*, corporations have given relatively little money to political campaigns; the major political campaign contributions come from individuals. The second is that “money is speech.” From the days of President Theodore Roosevelt up to 2010 in *Citizens United*, there had been a generally accepted principle in Congress and the Supreme Court that Congress has the right to regulate money in campaigns because of the potential damage to democracy.

¶ 504.4 Justices Not Always in Lockstep

The Justices do not always vote in lockstep with political predictions. The most prominent recent exception has been in the area of gay rights. All of the gay rights decisions have been 5-4 decisions and all have been written by Justice Kennedy. These include *Lawrence v. Texas*⁴¹ in 2003, *United States v. Windsor*⁴² in 2013, and *Obergefell v. Hodges*⁴³ in 2015; all were written by Justice Kennedy. No justice has dominated one area of the law on the Supreme Court as much as Justice Kennedy has dominated gay rights issues.

While the Supreme Court cases may involve momentous legal issues, the outlook of individual Justices may be impacted by the particular facts of the cases. For example, in *Windsor* the estate was being denied an estate tax marital deduction costing the estate about \$300,000 because the federal government did not recognize the same-sex marriage that was recognized for state law purposes. Some of the Justices had a real problem with that tax inequity.

The Court has also not followed the traditional conservative approach in the two Obamacare cases.⁴⁴ Chief Justice Roberts' view in these cases seems to be that his fellow

³⁹ E.g., *McCutcheon v. Federal Election Commission*, 572 U.S. __ (2014) (invalidating aggregate caps on the total amount that an individual may give to all candidates and parties in an election); *McComish v. Bennett* (striking down Arizona law providing extra taxpayer-funded support for certain office seekers who are outspent by privately funded opponents or by independent political groups; companion case is *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*).

⁴⁰ Jeffrey Toobin, *The John Roberts Project*, *The New Yorker* (retrieved April 3, 2014).

⁴¹ 539 U.S. 558 (2003).

⁴² 133 S. Ct. 2675, (2013).

⁴³ 135 S. Ct. 2071 (2015).

⁴⁴ *National Federation of Independent Business v. Sebelius*, 567 U.S. __ (2012) (upholding the individual mandate to buy health insurance as a constitutional exercise of Congress's taxing power; 5-4 decision authored by Chief Justice Roberts); *King v. Burwell*, (2015) (upholding giving refundable tax credits to certain individuals who have enrolled in an insurance plan through “an Exchange established by the State;” Treasury regulations interpret that language as making tax credits available “on an Exchange” regardless of whether the Exchange is established and operated by a State or by the federal government; 6-3 opinion authored by Chief Justice Roberts).

Republicans should overturn Obamacare in Congress and that he should not re-write the Constitution and the statute to overturn Obamacare.

¶ 505 Oral Arguments

Attending oral arguments provides one with a good sense of individual Justices and their personalities and approaches. One comes away with the impression that the Justices are a congenial group that hold respect for each other.

One very well-known fact about Supreme Court oral arguments is that there are eight Justices who are very engaged and very prepared and ask lots of hard questions – and Justice Clarence Thomas who never says anything. February 22, 2016 will mark 10 years since Justice Thomas asked a question at the court. Even though Justice Thomas does not ask questions, he is not silent during argument. He sits between Justices Breyer and Kennedy. They pass notes, whisper to each other, etc. throughout the arguments. Justice Thomas, notwithstanding his silence on the bench, is an important and influential member of the Court. Justice Thomas is often the first justice who has introduced ideas that have resulted in some of the more conservative opinions (for example dealing with campaign spending and Second Amendment gun rights).

¶ 506 Favorite Justice

Jeffrey Toobin is often asked who his favorite Supreme Court Justice is. He had a favorite for many years – Justice David Souter. He admires his jurisprudence and “that he was just so weird.” Justice Souter led a 19th century existence into the 21st century. He did not use a computer, cell phone, or answering machine; indeed, he did not even like electric lights, preferring to move throughout the day to sit in natural sunlight. He eats the same thing for lunch every day—a cup of yogurt and an apple, including the core (which is disgusting, but lovable).

For some reason that remains obscure, Justices Souter and Stephen Breyer tended to be mistaken for each other (though they look nothing alike). One time, nearing the end of his tenure on the Supreme Court, Justice Souter was driving from Washington D.C. to his home in New Hampshire. He stopped at a restaurant in Massachusetts. In the restaurant a gentleman said to him “I know you. You’re on the Supreme Court – you’re Stephen Breyer, right?” He said yes because he did not want to embarrass the man in front of his wife. They chatted a while, and eventually the man asked, “So Justice Breyer, what is the best thing about being on the Supreme Court?” The Justice responded “I have to say it is the privilege of serving with David Souter.” How can you not love that guy?

¶ 507 Looking Ahead

¶ 507.1 Death Penalty

Another area besides gay rights in which Justice Kennedy votes with liberals is in the death penalty cases. A 2016 decision strikes down the death penalty in Florida (and a similar Alabama provision will probably fall as well). This is the first important majority opinion written by Justice Sotomayor. The death penalty cases illustrate how the Supreme Court, though an independent entity, is reflective of the larger political trends in the country. The death penalty has been fading in this country. For example, in 2015 no one was sentenced to death in Texas and only two persons were executed in Texas. The number of executions throughout the country last year was at an historic low – below

100. The Court's decisions reflect the country's changing sentiments about the death penalty.

¶ 507.2 Impact of Presidential Election

The future direction of the Supreme Court depends on who wins the 2016 Presidential election. That is the only question that matters about the future of the Supreme Court. It is vitally important because of Justice Scalia's sudden death and because three other Justices are over the age of 75. All of the Justices appear to be in good health, but the next President will likely have the opportunity of nominating one or more new Justices, which could have a major impact on the future of the Court that is currently fairly evenly divided between conservative and liberal leaning Justices.

* Jeffrey Toobin is a senior analyst for CNN in New York, New York and staff writer for *The New Yorker*.

The author of critically acclaimed bestsellers, Mr. Toobin delved into the historical, political and personal inner workings of the Supreme Court and its Justices in his book **The Nine: Inside the Secret World of the Supreme Court**. *The Nine* spent more than four months on the *New York Times* Best Seller list and was named one of the best books of the year by *Time*, *Newsweek*, *Entertainment Weekly* and the *Economist*. His newest book, *The Oath*, a sequel to *The Nine*, is a gripping insider's account of the momentous ideological war between the John Roberts Supreme Court and the Obama administration.

Mr. Toobin is an unbiased, deeply analytic (and often very funny) expert on all matters of American law, politics and media. Mr. Toobin provides a unique look into the inner workings of the Supreme Court and its influence, as well as how upcoming elections will shape the Court and, in turn, the nation.

Mr. Toobin is also the author of renowned bestseller **Too Close to Call: The 36-Day Battle to Decide the 2000 Election**, which is the definitive story of the Bush-Gore Presidential recount and the basis for an HBO movie.

After a six-year tenure at ABC News, where he covered the country's highest-profile cases and received a 2000 Emmy Award for his coverage of the Elian Gonzales custody saga, Mr. Toobin joined CNN in 2002. Also a staff writer for *The New Yorker* since 1993, he has written articles on such subjects as the Bernie Madoff scandal, the case of Roman Polanski, and profiles of Justices Clarence Thomas, Stephen Breyer, and John Paul Stevens, and Chief Justice John Roberts. His article "An Incendiary Device" for the magazine broke the news that the O.J. Simpson defense team planned to accuse Mark Furman of planting evidence and to play "the race card."

Mr. Toobin received his bachelor's degree from Harvard College and graduated magna cum laude from Harvard Law School, where he was an editor of the Harvard Law Review.

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