



An Obama Supreme Court Versus a Romney High Court

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Introduction and summary

The most important legal development in the last decade is the Republican Party's wholesale abandonment of judicial restraint. Less than a decade ago, President George W. Bush campaigned against "activist judges" who seize the power to "issue new laws from the bench."¹ And Bush's Supreme Court appointees peppered their confirmation hearings with the rhetoric of restraint. Chief Justice John Roberts said that he would "prefer to be known as a modest judge," and he emphasized that when judges make policy judgments, "they lose their legitimacy."² Justice Samuel Alito expressed similar sentiments, warning that judicial decisions should be narrow and focused on the facts of a particular case:

"[I]f judges begin to go further and announce and decide questions that aren't before them or issue opinions or statements about questions that aren't before them, from my personal experience, what happens when you do that is that you magnify the chances of getting something wrong. . . . [I]t makes for a better decision if you just focus on the matter that is at hand and what you have to decide and not speak more broadly."³

Whatever Justices Roberts and Alito believed during their confirmation hearings, however, it rapidly became clear that they have little interest in restraining themselves. In their first full term together, both justices joined an opinion overruling a very recent abortion precedent because "some women come to regret" their own choices when they are allowed to make them.⁴ They claimed that a plan to *desegregate* public schools violates *Brown v. Board of Education*.⁵ And they infamously cut back on women's right to equal pay for equal work in the *Ledbetter* decision⁶ that was later overturned by an Act of Congress.

In later terms, the Court's conservatives pushed to immunize corporations from state consumer protection law.⁷ They expanded corporations' ability to force consumers to sign away their ability to enforce their rights in a court of law.⁸ And they massively expanded wealthy interest groups' power to use their substantial fortunes to influence elections.⁹ They are widely expected to end, or at least dra-

matically roll back, affirmative action in public university admissions this coming term. And in *Citizens United v. Federal Election Commission*, the conservative justices reached far beyond the question presented to them in order to sweep away decades of law prohibiting corporate efforts to influence elections. So much for “focus[ing] on the matter that is at hand” and “not speak[ing] more broadly.”

None of this is to say, of course, that the Roberts Court can always be counted on to intervene in politically charged cases. To the contrary, on issues such as voting rights, where the Supreme Court has historically stood as one of democracy’s most important guardians, the Court’s conservatives have largely abdicated this essential role.

Moreover, as audacious as the conservative justices have been, their activism pales in comparison to Republican elected officials’ judicial wish list. The legal case against the Affordable Care Act has, in the words of a top conservative judge who was awarded the Presidential Medal of Freedom by former President George W. Bush, no basis “in either the text of the U.S. Constitution or Supreme Court precedent.”¹⁰ Now, however, belief in the law’s unconstitutionality is akin to gospel among Republican partisans (including four of the five conservatives on the Supreme Court). And for many Republicans, this constitutionally challenged assault on health reform is only the first item on a much longer list. As a Center for American Progress report documented last year, numerous top Republican lawmakers—governors, senators, and other members of Congress—are on record claiming that everything from Social Security to federal child labor laws to Medicare to the national ban on whites-only lunch counters is unconstitutional.¹¹

So while conservative judges use their dominance on the federal judiciary to implement many of the GOP’s deregulatory goals and slant the electoral playing field in a way that helps elect more Republicans, GOP elected officials are pushing these judges to become even more aggressive. If former Massachusetts Gov. Mitt Romney wins the presidential election in November, this Republican dominance will only be solidified. Moreover, as four of the Supreme Court’s current members are over the age of 70, Gov. Romney will likely be able to shift the Court even further to the right. If President Barack Obama should win a second term, by contrast, he could replace Justices Antonin Scalia, Anthony Kennedy, or another member of the Court’s conservative bloc, potentially giving the Court a progressive majority for the first time since the early days of the Nixon administration.

This report will explain several of the narrowly decided cases which have reshaped worker and consumer rights and changed the face of our democracy, as well as some narrow misses where the conservative bloc failed to gain a majority to achieve a Republican-favored outcome. Additionally, this report explores the future legal landscape, which will likely turn on the outcome of the upcoming presidential election. If President Obama prevails in November, many of the justices' incursions on consumers, workers, and voters would likely be reversed in a matter of just a few years if the president has the opportunity to replace one of the Court's five conservatives. Should Gov. Romney prevail, by contrast, his appointments could affect a massive transfer of power from the two branches—executive and legislative—the American people elect to the one branch—judicial—that would likely be controlled by Republican-nominated conservative judges for a generation or more.

Four sitting Supreme Court justices are over the age of 70, so the winner of November's presidential election could shape the Court for a generation to come. Moreover, because our current Court divides so closely along ideological lines, one or two new justices could significantly alter the face of American law. Here are 10 examples of the many cases whose continued existence could turn on this election.

If Obama wins, these cases could be overruled:

- **Election buying:** *Citizens United v. Federal Election Commission* held that corporations and unions may spend unlimited money to influence elections. One more left-of-center justice will provide the five votes needed to overrule it.
- **Forced arbitration:** A 5-4 Court in *Circuit City v. Adams* held that employers can force their employees to sign away their right to sue the employer in a neutral court of law, and force them into a corporate-run arbitration system. A more progressive Court would likely restore workers' ability to hold employers that violate the law accountable before a real judge.
- **Voter suppression:** In *Crawford v. Marion County*, the Supreme Court largely gave the thumbs-up to "voter ID" laws. These laws supposedly target the nonexistent problem of in-person voter fraud, and they disenfranchise thousands of minority, student, low-income, and elderly voters in the process. An additional Obama justice would likely provide the fifth vote needed to strike these laws down.
- **Discrimination:** A 5-4 Court held in *Boy Scouts v. Dale* that organizations are free to ignore state antidiscrimination laws and exclude certain groups from their membership. Although *Boy Scouts* was a gay rights decision, its reasoning could also be applied to groups that discriminate against women or African Americans.
- **Workers' rights:** In *Gross v. FBL Financial Services*, a 5-4 Court stripped older workers of much of their ability to ensure they will not be fired or demoted because of their age. A more progressive Court could restore these rights.

If Romney wins, these cases could be overruled:

- **Health care:** Four justices voted to strike down the Affordable Care Act in *National Federation of Independent Business v. Sebelius*, relying on an argument that, in the words of a top conservative judge who was awarded the Presidential Medal of Freedom by former President George W. Bush, has no basis "in either the text of the U.S. Constitution or Supreme Court precedent."
- **Judges for sale:** Four justices gave the thumbs up in *Caperton v. Massey* to a coal executive's scheme to spend \$3 million to elect a state supreme court justice, who then cast the deciding vote overruling a \$50 million verdict against the coal baron's company.
- **Gay rights:** Six justices held in *Lawrence v. Texas* that gay couples cannot be prosecuted for having sex. One was already replaced with a more conservative justice. Replacing another would likely lead to *Lawrence* being overruled.
- **Corporate immunity:** Four justices voted in *Cuomo v. Clearinghouse* to support a banking industry attempt to immunize itself from state fair-lending laws.
- **Reproductive freedom:** Finally, *Roe v. Wade* will likely not survive an additional conservative justice.

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