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.” 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.” 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.”

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. They claimed that a plan to desegregate public schools violates Brown v. Board of Education. And they infamously cut back on women’s right to equal pay for equal work in the Ledbetter decision 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. They expanded corporations’ ability to force consumers to sign away their ability to enforce their rights in a court of law. And they massively expanded wealthy interest groups’ power to use their substantial fortunes to influence elections. 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.
No limits on judicial power

In light of the Republican Party’s near unanimous determination to, in the words of Sen. Jim DeMint (R-SC), turn the Affordable Care Act into President Obama’s “Waterloo,” it is easy to forget the law’s Republican roots. In 1989, the conservative Heritage Foundation proposed an insurance coverage requirement similar to the one signed into law by President Obama. In Heritage’s words, the government should “[m]andate all households to obtain adequate insurance.” Two years later, a team of conservative scholars designed a health care plan that included a similar mandate in an attempt to “persuade President George H.W. Bush and his administration to adopt a universal health-care proposal that would keep the government from eventually taking over the sector.” This proposal closely resembled the “Health Equity and Access Reform Today Act of 1993,” which was introduced by Sen. John Chafee (R-RI) and co-sponsored by 21 other senators, most of whom were also Republicans. Five senators who opposed the Affordable Care Act—Robert Bennett (R-Utah), Christopher Bond (R-MO), Chuck Grassley (R-Iowa), Orrin Hatch (R-Utah), and Richard Lugar (R-IN)—were among the 21 co-sponsors of Sen. Chafee’s bill. And, of course, the model for the Affordable Care Act was a 2006 state law signed by then-Massachusetts Gov. Mitt Romney.

In opposing the Affordable Care Act and insisting that its requirement that most Americans either carry health insurance or pay slightly more income taxes violates the Constitution, Republicans did not simply part ways with their past stances on health policy, they also asked the Supreme Court to embrace constitutional gobbledegook. The Constitution permits Congress to “regulate commerce … among the several states.” As the Supreme Court explained nearly 200 years ago, this power over interstate commerce “implies in its nature full power over the thing to be regulated,” and it also includes the power to regulate all forms of “trade.” Thus, because the United States has “full power” over trade in health care, it has the power to offer a financial incentive to encourage people to pay for their health care via insurance. Yet, in last June’s decision in the National Federation of Independent Business v. Sebelius, all five conservative justices ignored this fact, effectively over-ruling two centuries of precedent in the process.
Had each of the justices followed their own past opinions in resolving the constitutionality of health reform, it is likely that even Justice Scalia would have voted to uphold the law. The Constitution empowers Congress “[t]o make all laws which shall be necessary and proper for carrying into execution” its power to regulate interstate commerce. As Scalia explained in _Gonzales v. Raich_, this means “where Congress has the authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective.”

This is significant because the insurance coverage requirement challenged in the Supreme Court exists for a very specific purpose. The Affordable Care Act prohibits insurers from denying coverage to patients with preexisting health conditions, and this ban cannot function if patients are free to enter and exit the insurance market at will. If patients can wait until they get sick to buy insurance, they will drain all the money out of an insurance plan that they have not previously paid into, leaving nothing for the rest of the plan’s consumers. Thus, the coverage requirement is necessary to make the Affordable Care Act’s regulation of the insurance industry effective and Justice Scalia should have voted to uphold the law.

Although Chief Justice Roberts ultimately broke ranks to uphold the law as an exercise of Congress’ power to “lay and collect taxes,” the remaining Republican-nominated justices engaged in a kind of judicial maximalism that has absolutely no basis whatsoever in longstanding precedent. As the Supreme Court has explained, when a court strikes down a portion of a broader statute, “the normal rule is that partial, rather than facial, invalidation is the required course.” Indeed, the Court applies such a strong presumption in favor of maintaining as much of a law as possible that it will uphold the remainder of the law unless it is “evident” that Congress would have enacted nothing without the invalidated provision. Nevertheless, four of the Court’s conservatives voted to invalidate the Affordable Care Act “in its entirety” despite only believing that a couple of its provisions were unconstitutional.

So all five of the Court’s Republican-nominated justices overruled nearly two centuries of precedent. All five rejected a constitutional rule endorsed just seven years earlier by Justice Scalia, one of the most conservative members of the Supreme Court. And four voted to invalidate the entirety of President Obama’s most significant legislative accomplishment, in an election year, all while invoking multiple legal theories that have no basis in the Constitution or long-established precedent. If judges have this kind of power, then there truly are no limits on judicial power. Nothing at all would prevent the Supreme Court from forcing everyone in the country to eat broccoli.
In a Romney Supreme Court: If Gov. Romney has the opportunity to replace one of the justices who upheld the Affordable Care Act, it is all but certain that his new appointee will vote with the four conservatives who embrace a kind of judicial activism unheard of since the Great Depression. Moreover, the willingness of conservative justices to abandon longstanding, established precedent that are closely rooted in the text of the Constitution—or even to abandon their own prior opinions—raises the risk of a conservative Supreme Court appointment considerably. If the next justice is willing to engage in the same kind of unrestrained reasoning shown by the four justices who voted to strike down the Affordable Care Act, literally any law could be next on the chopping block.

In an Obama Supreme Court: Unlike the Court’s conservative bloc, the four left-of-center justices have shown little desire to upset the democratic framework at the core of the Constitution. An additional left-leaning justice could cast the fifth vote to overrule two decisions that restricted the federal government’s power to enact noneconomic legislation such as general criminal law, family law, or truancy law. As a practical matter, however, this would likely only have a marginal impact on the scope of federal law, as these two cases are the only modern examples where the Court determined that Congress enacted an impermissible noneconomic regulation.

In the 1990s, the Supreme Court also handed down two closely divided cases establishing that the federal government cannot require a state to take an action it does not want to take, although the United States remains free to encourage states to take a particular action through a financial incentive. At one point, it appeared likely that an additional left-leaning justice could provide the fifth vote to overrule these two cases. In the Affordable Care Act case, however, both Justices Stephen Breyer and Elena Kagan joined an opinion reaffirming these two precedents. For this reason it is unlikely that future appointments by President Obama would disturb the prohibition on federal laws that compel state action.
The hidden Constitution

Although the Supreme Court’s constitutional cases often garner the biggest headlines, they often are not where the justices work the most significant changes in the law. Once upon a time, Congress routinely overruled Supreme Court decisions which, in the legislature’s opinion, misconstrued federal law. According to research by University of California, Irvine Professor Richard L. Hasen, Congress overruled the Supreme Court an average of 12 times during each of its two-year terms between 1975 and 1990.28 Today, largely due to the increasing partisan polarization on the Hill, Congress overrules less than three decisions in an average term.29 Laws like the Lilly Ledbetter Fair Pay Act, which overruled the Court’s decision limiting women’s right to equal pay for equal work, have become rare exceptions to an increasingly common rule—the Supreme Court almost always has the last word on how a statute will be interpreted.

The practical impact of this development is that the Supreme Court’s interpretations of federal law enjoy virtually the same finality as a decision interpreting the U.S. Constitution itself. When the Supreme Court narrows a civil rights law or cuts back on the rights of workers or gifts corporate America with a new immunity to longstanding law, those decisions almost always go unanswered. To borrow from Justice Robert Jackson (who served between 1941 and 1954), the Supreme Court is not final because it is infallible, but it is increasingly final, and it has wielded this finality to radically shift the balance of power between wealthy companies and ordinary Americans.

Forced arbitration

In 1925 Congress enacted the Federal Arbitration Act, believing they were endorsing a modest bill intended to ensure that sophisticated businesspeople could agree to resolve their disputes through private arbitration, rather than through more costly and time consuming litigation. As the chair of the American Bar Association committee that drafted the law explained to a Senate hearing, the
Federal Arbitration Act “is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.” Yet the Rehnquist and Roberts Courts have repeatedly dashed these expectations, converting this modest bill into a sweeping license for corporations to force their workers and consumers out of ordinary courtrooms and into a privatized arbitration system, and often doing so in decisions that are wholly inconsistent with the text of the Federal Arbitration Act.

Thus, the conservative justices held in *Circuit City v. Adams* that employers can force their workers into arbitration—under penalty of termination—despite the fact that the Federal Arbitration Act explicitly exempts contracts involving “workers engaged in foreign or interstate commerce” from its pro-arbitration provisions. Likewise, the Court’s five conservatives held in *AT&T v. Concepcion* that corporations can invoke the act to force their workers and consumers to sign away their right to join together in a class action, even though the Federal Arbitration Act has nothing whatsoever to say about class actions. And just in case a worker or consumer complains that they were forced into an unfair agreement, the conservative justices took care of that one too. In *Rent-a-Center v. Jackson*, the Court held that, with only rare exceptions, an unfair contract can only be challenged in the same private arbitration forum named in the contract itself.

Lest there be any doubt, forced arbitration agreements are rarely voluntary. This is because merchants and other businesses can simply refuse to do business with anyone who does not agree to be bound by them—and most employers can outright fire any worker who insists on keeping their right to a day in court. Moreover, forced arbitration agreements often enable corporate parties—who routinely arbitrate cases and thus are far more familiar with how different arbitrators decide cases than individual consumers or workers—to effectively choose their own arbitrators. One study found a particularly notorious arbitration company sided with the corporate party in nearly 94 percent of cases, including one case where an arbitrator ordered a woman to pay more than $11,000 that she did not owe because she had the same name as another woman who did. That company was eventually forced out of the consumer arbitration market thanks to a consumer protection lawsuit brought by the Minnesota Attorney General’s office, but there remain few checks on abusive arbitration or ways for consumers and workers to escape its grasp.
In a Romney Supreme Court: The Supreme Court’s current majority takes a fairly maximalist approach to permitting forced arbitration agreements. As such, it is not clear that additional conservative justices would significantly change the state of the law in this space. Nevertheless, more conservatives would further entrench the Court’s forced arbitration jurisprudence and enable corporations to continue to weaken consumer and worker protections through forced arbitration agreements.

In an Obama Supreme Court: Many of the early cases that formed the backbone of modern forced arbitration doctrine were handed down in the 1980s when none of the Court’s current members held their current jobs and when the practical impact of a interpreting the Federal Arbitration Act broadly was not yet clear. Accordingly, it is uncertain whether President Obama could create a five-justice majority prepared to completely eliminate forced arbitration between parties of vastly unequal bargaining power. It is likely, however, that replacing just one member of the Court’s conservative bloc with a more progressive justice would end the practice of forced arbitration in employment contracts and reverse the Supreme Court’s attack on class actions. Moreover, a more progressive Court would be more likely to allow consumers to escape grossly unfair arbitration agreements when they had no practical ability to negotiate that contract.
The other side of states’ rights

Although the Affordable Care Act’s opponents positioned themselves as defenders of states’ rights, conservatives are far less bothered by the idea of an overreaching federal government when federal power can be invoked to immunize powerful interest groups from state law. Because the Constitution declares that federal law “shall be the supreme law of the land,” Congress has the authority to “preempt” state law that conflicts with federal policy. In recent years, however, corporate parties have grown increasingly aggressive in asking the Supreme Court to declare state consumer-protection laws preempted because of the mere existence of federal regulations that touch upon a similar topic. To be fair, many of these attempts to immunize themselves from state law have failed, but that could change rapidly if the Supreme Court’s membership becomes more conservative.

Much of the Supreme Court’s preemption jurisprudence is arcane and, at times, completely incoherent. In Geier v. American Honda Motor Co. (2000), a 5-4 Court (with Breyer joining the conservatives and Justice Clarence Thomas crossing over to dissent) held that car companies are immune to state lawsuits alleging they were negligent in failing to install airbags—pointing to federal regulations that were less strict than many states’ tort law. Bizarrely, five justices reached this conclusion despite the fact that federal law expressly stated that merely complying with federal safety standards “does not exempt any person from any liability under [state] common law.” Eleven years after Geier, the Court held in the nearly identical case of Williamson v. Mazda Motor, that car companies are not immune from state safety lawsuits concerning rear seatbelts.

Similarly, the Court held in Wyeth v. Levine (2009), a horrific case in which a dangerous drug caused a professional musician to lose her right arm, that drug manufacturers are not immune from state lawsuits claiming they failed to adequately warn doctors and patients of the risks presented by their products. Two years later, in PLIVA, Inc., v. Mensing, the Court’s five conservatives largely gutted Wyeth by holding that generic drug manufacturers are immune to state lawsuits similar
In recent years, however, the Court rejected corporate parties’ requests for lawsuit immunity more often than it granted them. Thus in *Altria v. Good*, a 5-4 Supreme Court rejected a tobacco company’s claim that it should be immune from state deceptive advertising laws. In *Cuomo v. Clearing House*, a 5-4 Court rejected a banking industry attempt to immunize itself from state fair lending laws.

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**In a Romney Supreme Court:** The addition of one or two Romney-nominated justices would likely convert many of corporate America’s preemption defeats into victories. *Altria* and *Cuomo* were both 5-4 decisions, and *Wyeth* was a 6-3 decision. Because preemption doctrine is complex and some of the justices—especially Justice Thomas—have idiosyncratic views on preemption, there is no guarantee that corporate America could run the table in each preemption claim it brought to a Romney Court. Nevertheless, adding additional conservative justices to the Court would all but certainly lead to corporate America enjoying greater immunity from state law.

**In an Obama Supreme Court:** Similarly, while it is unlikely that adding more left-of-center justices would lead to every single corporate immunity claim from being turned away by the Court, President Obama’s appointees would be unlikely to overrule cases like *Wyeth*, *Altria*, or *Clearing House*, where a majority of the present Court rejected immunity claims, and could lead to cases such as *PLIVA* being overruled.
The workplace

As Justice Ruth Bader Ginsburg explained in her influential *Ledbetter* dissent, employment law must remain cognizant of the "realities of the workplace" or else it will be rendered meaningless. Because the size of one’s paycheck is rarely an appropriate topic of conversation with one’s colleagues, a legal rule that expects workers to discover pay disparities swiftly robs equal pay laws of their force. Similarly, because employers who fire or deny promotions to their employees for impermissible reasons rarely disclose those reasons publicly, antidiscrimination law must develop mechanisms to protect workers even when an employer’s true motives remain hidden. The Roberts Court’s majority has not always shown cognizance to these realities, however. Worse, it has frequently cut back workers’ rights even when doing so flies in the face of well-established law or even a direct rebuke from Congress.

Federal law requires many employees who face pay discrimination to meet a very brief deadline—often as short as six months—or else they lose their ability to challenge their employer’s unlawful actions. The flip side of this, however, is that this clock starts anew every time an employee receives a lower paycheck than her or his co-workers due to unlawful discrimination. As a unanimous Supreme Court explained in its 1986 decision in *Bazemore v. Friday*, “[e]ach week’s paycheck that delivers less to [an African-American] than to a similarly situated white is a wrong actionable” under federal law. Because gender discrimination is banned by the same law that prohibits race discrimination, *Bazemore*’s holding also benefited women.

Or, at least, it did until Justice Alito got his hands on it. Alito’s majority opinion in *Ledbetter* established that, if a woman’s employer makes a decision early in her career that undermines her earning power for decades, the woman must challenge that decision almost immediately or her rights are lost—and they are lost even if she did not discover she was a victim of pay discrimination until years later. Notably, in reaching this decision, the 5-4 majority relied heavily on a 1989 decision, *Lorance v. AT&T Technologies*, even though *Lorance* was overruled by an Act of Congress in 1991.
Congress overruled *Ledbetter* in the very first bill signed into law by President Obama, but the Roberts Court did not take the hint. Five months after Congress restored the rights lost in *Ledbetter*, the five conservative justices dealt a new blow to workers in *Gross v. FBL Financial Services*. *Gross* involved what is known as “mixed motive” discrimination, where an employee receives ill treatment because of a diversity of factors, one of which is unlawful. In a mixed motive suit, a worker’s claim that she or he suffered illegal discrimination will succeed if discrimination is one of the reasons behind an employer’s decision to fire, demote or otherwise treat the worker adversely. In most cases the employer can then limit the remedies available to the worker if they prove that they would have made the same decision regardless of the “impermissible motivating factor.” Thus, workers are spared the nearly impossible task of proving that their boss was thinking only of discrimination when they took action against their employee, and employers are given a chance to significantly constrain their liability by showing that discrimination was not the predominant reason a worker was cast aside.

In *Gross*, however, the conservative justices held that older workers cannot bring mixed motive suits alleging age discrimination. As Justice Stevens pointed out in dissent, this decision treats the words of law as if they have no meaning whatsoever because the federal law banning age discrimination uses the exact same language as a different law the Court interpreted to allow mixed motive suits in 1989. The Roberts Court’s majority offered little response to Stevens beyond a raw statement that they were in charge now and they would make the rules: “It is far from clear that the Court would have the same approach were it to consider the question today in the first instance.”

The Court’s politically charged decision in *Ricci v. DeStefano* follows a similar pattern. In *Ricci*, a promotion exam given to New Haven firefighters overwhelmingly favored white test takers, with African American and Hispanic candidates passing at only half the rate of white candidates. Because federal law prohibits hiring practices that have a “disparate impact” on minorities, New Haven decided to throw out these test scores. The Supreme Court ultimately held that it must do the opposite.

*Ricci* exposed the difficult balancing act at the heart of racial justice policymaking. On the one hand, there was no allegation that this test was designed for the purpose of excluding racial minorities, and the fact that its racial impact was not discovered until after it was administered meant that several candidates spent months studying only to learn their efforts were wasted. On the other hand, the test was fundamentally flawed. At the time New Haven offered the exam, nearly
two-thirds of municipalities had shifted away from written and oral exams to simulations of real-world firefighting to test promotion candidates, and most of the remainder had deemphasized the importance of their written test. In a major purpose of federal civil rights law is to root out flawed hiring and promotion practices that have little to do with an employer’s genuine needs, at least when those flawed practices impact racial minorities. Honoring the flawed New Haven exam thwarted this purpose.

Ultimately, however, it should not have been up to the Court to decide how to resolve this balancing act because a balance had already been struck by the American people’s representatives. After a Supreme Court decision weakened disparate impact law in 1989, Congress overruled that decision and reestablished a strong rule against such discrimination. Where an employment practice such as a promotion exam results in the kind of racially divided test scores that occurred in Ricci, the employer has a burden to demonstrate that their exam is “job related for the position in question and consistent with business necessity.” And even if the employer can prove this is so, they will still lose a disparate impact lawsuit if they refuse to adopt a more racially neutral “alternative employment practice.”

This may be the appropriate balance, or it may be the case that federal law goes too far in requiring employers to alter their employment practices. But that decision was for Congress to make, and the Court acted counter to that decision when it ordered the New Haven exams to be honored in a 5-4 opinion.

**In a Romney Supreme Court:** The addition of more conservative justices would, at the very least, entrench the Roberts Court’s efforts to replace congressional judgment about the scope of workers’ rights with its own. Moreover, because the Court’s conservatives have shown such willingness to depart from established law and rely on discredited doctrines, continued conservative dominance would add a great deal of uncertainty to the law. It is difficult to predict the actions of justices who do not defer to Congress or precedent.

**In an Obama Supreme Court:** The president’s signature on the Lilly Ledbetter Fair Pay Act leaves little doubt about how he feels about Court decisions undermining equal opportunity in the workplace. At the very least, an additional left-of-center justice would halt the Roberts Court’s unpredictable efforts to second guess workers’ rights.
Rigging the vote

The Republican Party’s abandonment of judicial restraint is fundamentally antidemocratic. When judges invent novel interpretations of the Constitution to strike down laws enacted by the people’s representatives, or when they give those laws implausible constructions more consistent with their own ideology than with the letter of the law, they seize power from the electorate and place it in the hands of the one unelected branch of government. Sadly, however, the judiciary is not the only arm of American governance eager to weaken the people’s right to choose their own leaders.

In state after state, Republican lawmakers have enacted laws intended to shrink the franchise by preventing voters from registering, reducing opportunities to vote, and by erecting barriers to voting that disproportionately target Democratic voters. What’s more, their tactics appear to be working. In 2011 Florida’s Republican Gov. Rick Scott signed a law imposing fines on voter-registration groups who fail to comply with onerous paperwork requirements. Although a federal court struck down the law 11 months later, the damage was already done. Voter-registration efforts among new Democratic voters declined nearly 95 percent in Florida thanks to Gov. Scott’s law. Similarly, numerous GOP-led states enacted “voter ID” laws which require voters to present a photo ID at the polls. As explained later, these laws have little to do with their ostensible purpose—preventing voter fraud at the polls—and far more to do with shifting the electorate rightward.

The Supreme Court is complicit in many of these efforts, and by largely dismantling campaign finance laws, has contributed to them in their own way.

Campaign finance

No case symbolizes the Roberts Court’s overreach more clearly than *Citizens United v. Federal Election Commission*. *Citizens United* struck down a 63-year-old federal ban on corporate money in elections, overruling a 20-year-old precedent in the process.
Moreover, it did so based on reasoning that is either disingenuous or indicative of the conservative justices’ stunning lack of imagination. The backbone of *Citizens United*’s holding is Justice Kennedy’s declaration that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”\(^61\) Sixty-nine percent of respondents in one poll disagreed with this conclusion, while only 15 percent agree that unlimited corporate spending on elections will not lead to corruption, giving the lie to Kennedy’s claim that such spending does not even create “the appearance of corruption.”\(^62\)

To put this number into context, a 2007 poll found that 14 percent of Americans believe they have personally seen a UFO, 23 percent believe that they have been in the presence of a ghost, and 19 percent believe in “spells or witchcraft.”\(^63\) Simply put, *Citizens United* makes about as much sense as a Monty Python skit. It is the jurisprudential equivalent of burning a woman at the stake because she weighs the same amount as a duck.

*Citizens United* may not have turned anyone into a newt, but it turned American elections into the Wild West. In *Buckley v. Valeo*, the Supreme Court held that election spending is protected by the First Amendment, but lawmakers may still regulate such spending “to limit the actuality and appearance of corruption.”\(^64\) So when *Citizens United* decreed that all “independent expenditures”—meaning money that is not donated directly to a campaign—have absolutely no corrupting effect whatsoever, and that no one could possibly think otherwise, it held that the Constitution forbids any real attempt to regulate such spending. That doesn’t just mean that corporations can unleash their treasuries to elect the candidate of their choosing, it also means that super PACs and other vehicles to channel wealthy individuals’ and corporations’ money into elections may blossom and grow with the Supreme Court’s blessing.

Lest there be any doubt, the five conservative justices’ decision in *Citizens United* is an enormous boon for the Republican Party. Prior to *Citizens United*, Democrats and left-leaning groups actually enjoyed a moderate advantage in spending by outside groups seeking to influence elections. According to data from the Center for Responsive Politics, the conservative justices’ decision has not simply reversed this trend, it has ushered in a new era of Republican dominance. (see figure 1)

Moreover, the new waves of cash infusing the 2012 election are small potatoes compared to the influence the wealthiest individuals could have if they spent just a small fraction of their fortune on elections. Republican casino mogul Sheldon
Adelson and his wife have already spent tens of millions of dollars on the 2012 election cycle, but this is chump change to Adelson. With a net worth of nearly $25 billion, Adelson is worth more than the gross domestic product of the Central African Republic, Comoros, Tuvalu, Guinea-bissau, Maldives, Samoa, Dominica, Seychelles, Belize, Bhutan, Kiribati, Liberia, the Solomon Islands, Grenada, St. Vincent and the Grenadines, Cape Verde, Djibouti, St. Kitts and Nevis, Antigua and Barbuda, Vanuatu, St. Lucia, The Gambia, Tonga, and Sao Tome and Principe put together. If Adelson decided to spend $1 million on each House and Senate race in the country, he could do so this election cycle—and then do it again every other election cycle for the next 106 years.

Ordinary candidates, relying on small-dollar donations from ordinary citizens, cannot possibly expect to compete with this kind of money.

One way to level the playing field between the Sheldon Adelsons of the world and the hundreds of millions of Americans who do not possess his vast wealth is public financing. Unfortunately, the Roberts Court has largely cut off this avenue as well. Generally, public-financing systems work by asking candidates to forego raising funds from donors in return for a sum of money from the government. Candidates who sign up for public financing, however, are particularly vulnerable to influxes of spending opposing their campaign because they have signed away their ability to raise the additional funds needed to fight back. Accordingly, several states enacted laws providing publicly financed candidates with additional funds if they suddenly find themselves on the wrong side of massive election spending.

Yet, in Arizona Free Enterprise Club v. Bennett, a 5-4 Supreme Court struck down these laws, claiming that they punish big spenders who “vigorous[ly]
exercise” their “right” to buy elections by giving an advantage to candidates the big spenders oppose.66

The one bright light in the Roberts Court’s campaign finance jurisprudence is its 5-4 decision in Caperton v. A.T. Massey Coal. In that case, Justice Kennedy flipped sides to vote that when a West Virginia coal baron spends $3 million to elect a state supreme court justice, who then casts the deciding vote overturning a $50 million verdict against his company, that’s a bridge too far.67 Nevertheless, the most noteworthy thing about Caperton is the fact that four justices of the United States Supreme Court would allow wealthy businessmen to outright buy judges.

In a Romney Supreme Court: If just one more conservative joins the Supreme Court, even Caperton’s modest rule against judge-buying would likely cease to exist. This past November, Gov. Romney named the four dissenters in Caperton as his models for potential nominees to the Supreme Court.68 Indeed, it is likely that Gov. Romney’s hypothetical justices would support eliminating campaign finance laws altogether. In a December 2011 interview, Gov. Romney said that wealthy individuals should be able to “give what [they’d] like to a campaign,” without any limits on the size of these donations.69

In an Obama Supreme Court: There’s little doubt that Obama’s justices would chart a very different course. President Obama criticized Citizens United during a State of the Union address, and both of his present appointees to the Supreme Court dissented from a recent decision reaffirming Citizens United.70 A more interesting question is how much farther a more progressive Supreme Court would be willing to go in enabling lawmakers to eradicate longstanding efforts by well-moneyed donors to change the result of elections. Congress has struggled, for example, to control wealthy individuals’ outsized influence over politics since the Court’s decision in Buckley struck down limits on individual expenditures to influence elections.

Voter suppression

The Constitution permits states to determine the “times, places and manner of holding” many elections, and common sense does indeed dictate that regulation is necessary to ensure orderly and fair elections. State authority over elections is not absolute, however, lest states regulate our democracy in such a way as to dictate its outcome. As the Supreme Court explained in Burdick v. Takushi, state election laws that place an unusually high burden on voters in order to address a particularly weak state interest are unconstitutional.71

This is why voter ID laws cannot be squared with the Constitution. Voter ID laws’ proponents claim the laws are needed to prevent in-person voter fraud—where a
voter shows up at the polls seeking to vote in someone else’s name—but this kind of fraud barely exists. In reality, a person is more likely to be struck by lightning than to commit in-person voter fraud. One study of Wisconsin voters determined that just 0.00023 percent of votes are the product of in-person fraud.\(^72\)

Moreover, voter ID laws are not simply a solution in search of a problem, they are a serious burden to the franchise. Although estimates vary on the full impact of voter ID laws, even modest estimates suggest these laws will prevent between 2 percent and 3 percent of registered voters from casting a ballot.\(^73\) And because the groups least likely to have ID include racial minorities, students, and low-income voters—all of whom are disproportionately likely to support Democrats—the real effect of these laws is to tilt the electorate to the right.

Nevertheless, the Roberts Court showed uncharacteristic restraint when voter ID came before it, refusing to strike down an Indiana voter ID law in *Crawford v. Marion County Election Board*. Worse, it did so despite no evidence that voter ID laws accomplish anything positive whatsoever. The Court’s plurality opinion acknowledged that “[t]he record contains no evidence of [in-person voter] fraud actually occurring in Indiana at any time in its history,” and the Court was only able to identify a single example of in-person fraud anywhere in the country in the last 140 years.\(^74\) Yet the Court deemed this paltry evidence of fraud sufficient to justify laws that could disenfranchise thousands of voters.

**In a Romney Supreme Court:** Gov. Romney supports unconstitutional voter ID laws, telling a Wisconsin audience this past April that he “like[s] voter ID laws” and wants “more of them.”\(^75\) In light of this fact and the fact that each of his four model justices voted not to strike down voter ID in *Crawford*, potential Romney nominees would almost certainly support this effort to shift the electorate rightward.

**In an Obama Supreme Court:** The fate of voter ID laws in a more progressive Court is more uncertain. *Crawford* was a 6-3 decision, with the six justices in the majority splitting into two opinions and Justice Stevens crossing over to vote with the conservatives. Obama subsequently replaced Stevens with Justice Kagan, so another appointee could provide the fifth vote to strike down voter ID laws. Nevertheless, given Stevens’ unusual decision to stand with voter ID laws in *Crawford*, it is possible that another justice would also defect in a future case.
Redistricting

Every 10 years a familiar ritual repeats itself in states where one party was fortunate enough to gain control of both the legislature and the governor’s mansion. Mapmakers, armed with polling data, census demographics, and sophisticated mapping software, construct legislative districts tailored to maximize their party’s control of the government and minimize their opposition’s. In states large enough that their congressional districts can also be gerrymandered, this ritual encompasses those maps as well. As a result, control of many state legislatures or even Congress often rides on which party was lucky enough to gain control during a redistricting year—not what the true will of the people may be.

The Supreme Court bears much of the blame for allowing this decennial ritual to occur. The Court largely abdicated its responsibility to ensure that voters do not effectively lose their right to choose new leaders because their current leaders disagree with them. Most recently, in Vieth v. Jubelirer, the justices decided 5-to-4 to toss out a lawsuit alleging that Pennsylvania’s congressional districts were unconstitutionally drawn to maximize Republican representation in Congress—although Justice Kennedy broke somewhat from his fellow conservatives to suggest that future challenges to partisan gerrymanders may someday be possible.

The impact of cases like Vieth is mitigated somewhat by decisions prohibiting race discrimination. In League of United Latin American Citizens (LULAC) v. Perry, for example, the Court waded into more than a decade of partisan warfare over congressional maps. After a map drawn by Democrats in the 1990s gave their party massively more representation in Congress than Texas voter support for Democrats could justify, Texas Republicans responded in kind with a map that gave a similarly unfair advantage to GOP candidates. Under the Republican map, the GOP controlled more than two-thirds of the state’s House delegation despite receiving only 58 percent of the state’s votes. Although the justices largely allowed this political gerrymander to stand, Justice Kennedy joined his four more liberal colleagues to hold that Texas Republicans violated the Voting Rights Act when they tried to bolster an incumbent Republican congressman by making his district less Latino. Thus, part of the map was invalidated.
In a Romney Supreme Court: On the question of partisan gerrymanders, the Court has moved marginally to the left since Vieth. In the LULAC ruling, Chief Justice Roberts and Justice Alito did not join Justice Scalia’s conclusion that a partisan gerrymander can never be challenged in court, suggesting their views are closer to Justice Kennedy’s than to the Court’s most conservative members. Nevertheless, Roberts and Alito both voted to uphold Texas’ redistricting map in its entirety, and the fact remains that none of the Court’s conservatives have ever voted to allow a partisan redistricting claim to move forward. The addition of more conservatives would further entrench current lawmakers’ ability to weaken the American people’s power to vote them out of office.

In an Obama Supreme Court: The future in a more progressive Court is somewhat more uncertain. Although the Court’s left-leaning justices have historically been more open to permitting challenges to partisan gerrymandering, the four dissenters in Vieth produced three separate opinions with three different proposals for how that case should move forward. Uncertainty about how to solve the problem of partisan gerrymandering, however, does not mean the problem is unsolvable. For most of the 20th Century, the courts also refused to intervene in states that left the same legislative maps in place for many decades. As a result, some state legislative districts had up to 41 times as many voters as others within the same state. Two years passed between the Court’s 1962 announcement that the judiciary would address this problem and its subsequent announcement as to how it would solve the problem. The Court, nevertheless, proved adequate in addressing a serious redistricting problem then. It is likely that it will similarly address the problem of partisan redistricting if it adds just one more left-of-center member.

The Voting Rights Act

A short note is necessary about the uncertain future of the nation’s most important voting law. Section 5 of the Voting Rights Act requires many parts of the country to “preclear” new voting rules with the U.S. Department of Justice or with a federal court in Washington, D.C. before those rules may go into effect. The purpose of this law is to ensure that new state voting rules do not have a disproportionate impact on racial minorities. Most recently, this provision led to many voter ID laws and other voter-suppression laws that disproportionately target minorities being blocked because they could not survive the preclearance requirement.

Three years ago, the five conservative justices were widely expected to declare Section 5 of the Voting Rights Act unconstitutional in Northwestern Austin Municipal Utility District Number One (NAMUDNO) v. Holder. Instead, the Court surprised most observers with a much narrower holding. The Court, nevertheless, likely stayed its hand only temporarily, and multiple suits are currently pending urging the conservative justices not to stay their hand again. Should the Voting Rights Act remain intact before November’s election, the continued viability of Section 5 could depend on who is in the White House naming the next Supreme Court justice.
Reproductive freedom and gay rights

Finally, much of judicial conservatism’s undeserved reputation for judicial restraint stems from conservative opposition to court decisions protecting women’s and gay rights. It is certainly true that abortion rights are on the menu if the Supreme Court becomes more conservative. The same would likely be true for almost the entirety of the Supreme Court’s decisions protecting gay men and lesbians from an overzealous government. Both *Romer v. Evans*, which struck down an anti-gay Colorado constitutional amendment, and *Lawrence v. Texas*, which abolished Texas’ “sodomy” law, were 6-3 decisions with retired Justice Sandra Day O’Connor taking the progressive position. If one more conservative joins the Court, both of these decisions would likely be overruled.

It would be a mistake to conclude, however, that conservative rhetoric about judicial restraint on social issues matches conservative reality. To the contrary, conservatives are happy to weaponize the First Amendment in order to undermine antidiscrimination laws. Thus, in *Boy Scouts v. Dale*, a 5-4 Supreme Court held the Boy Scouts immune to a state antidiscrimination law protecting gay people because requiring the Scouts to comply with the law would violate their right to “expressive association.”82 And in *Christian Legal Society v. Martinez*, four justices joined a dissent arguing that student groups that exclude gay members are immune to public university antidiscrimination policies83—an argument that essentially requires the state to subsidize antigay groups by giving them privileged access to a university’s facilities.

Although it remains to be seen how the Supreme Court will respond to such claims, it is worth noting that a similar conservative effort is underway to immunize employers against laws protecting access to birth control. Eight years ago, the California Supreme Court upheld a state law guaranteeing that many employer-provided insurance plans include coverage for birth control. When a Catholic employer claimed they should be immune to the law, six of the court’s seven justices determined that the California law would survive even the most skeptical degree of constitutional scrutiny.84
This year leading Republicans, including Gov. Romney and House Speaker John Boehner (R-OH), attacked an Obama administration rule that closely resembles the California law, claiming that it violates the Constitutional guarantee of religious liberty. This widespread GOP opposition to birth control access is a fairly new development, however. Five of the six California justices who upheld the California law were Republicans.

**In a Romney Supreme Court:** Roe v. Wade is already on life support and Gov. Romney said earlier this month, that “it would be my preference that [the Supreme Court] reverse Roe v. Wade.” It is likely that the Court would do so if it became more conservative. Additionally, the Court’s landmark gay rights decisions in Romer and Lawrence could be overruled.

It is also worth noting that although Christian Legal Society happened to involve an anti-gay group, there is little in Justice Alito’s dissenting opinion in that case that could not also be applied to sexist or white supremacist groups. To the contrary, groups that disapprove of women or minorities would likely also be protected under the rationale articulated by Justice Alito. Thus, a more conservative Court could cut much deeper in to antidiscrimination law than the Boy Scouts decision already has.

**In an Obama Supreme Court:** Conversely, a more progressive Court would likely strengthen reproductive rights and entrench Romer and Lawrence. Additional left-of-center justices would also be far less sympathetic to claims that an organization can be immune from antidiscrimination law or that an employer can be immune from laws protecting access to contraception.
Conclusion

Not too long ago, there was a consensus in this country that we are a democracy. While the judiciary can and must intervene when government engages in unlawful discrimination or tramples on fundamental rights, questions about our economic policy, how we regulate business, and how we should protect our workers rest firmly in the hands of the people’s representatives.

Today, however, this consensus is breaking down. The Roberts Court releases a steady flow of decisions weakening or eliminating laws intended to protect workers, consumers, and voters, and Republican lawmakers want to turn this flow into a flood. If just one more conservative joins the Supreme Court, it is likely that they will get their wish.
About the author

Ian Millhiser is a senior constitutional policy analyst at the Center for American Progress and is the Editor of The Center for American Progress Action Fund’s ThinkProgress Justice. He clerked for Judge Eric L. Clay of the United States Court of Appeals for the Sixth Circuit, has worked as an attorney with the National Senior Citizens Law Center’s Federal Rights Project, as assistant director for communications with the American Constitution Society, and as a Teach For America corps member in the Mississippi Delta.

He received a bachelor’s in philosophy from Kenyon College and a Juris Doctorate magna cum laude, from Duke University, where he served as senior note editor on the Duke Law Journal and was elected to the Order of the Coif. Ian is a frequent speaker on constitutional topics, and has spoken at numerous law schools including Yale, Michigan, Georgetown, Berkeley, New York University, and Boston College. His writings appeared in a diversity of legal and mainstream publications, including The New York Times, the Los Angeles Times, U.S. News and World Report, The Guardian, AOLNews, The American Prospect, Politico, Huffington Post, Slate, The National Law Journal, The Yale Law & Policy Review, and The Duke Law Journal. He has been a guest on CNN, MSNBC, Al Jazeera, and Fox News, and many radio stations including NPR and the BBC.
Endnotes


8 See, e.g., AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (2011); Rent-a-Center West, Inc. v. Jackson, 130 S.Ct. 2772 (2010).


10 Seven-Sky v. Holder, 613 F.3d 1, 18 (D.C. Cir. 2011).


13 Stuart M. Butler, “Assuring Affordable Care for All Americans,” 218 (Washington: THE HERITAGE LECTURES 6 (1989)).


21 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment).


24 NFIB, 132 S.Ct. at 2677 (joint dissenting opinion of Scalia, Kennedy, Thomas and Alito, J.J.).


27 See NFIB, 132 S.Ct. at 2622 (“T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions” (quoting New York, 505 U.S. at 162)).


29 Ibid.


31 Compare 532 U.S. 105, 115 (2001) with 9 U.C.S. § 1 (exempting “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”). The Court interpreted the word “commerce” so that the FAA’s exemption only applied to workers similar to seamen or railroad workers. Yet it also interpreted the word “commerce” in a completely inconsistent manner when it appeared in a difference portion of the statute. Circuit City, 532 U.S. at 114.


33 130 S.Ct. 2772, 2778 (2010).


41 131 S. Ct. 2567, 2582 (2011).
42 Ibid at 2583 (Sotomayor, J., dissenting).
48 127 S.Ct. at 2175.
49 Ibid at 2183 (Ginsburg, J., dissenting).
50 131 S. Ct. 2543 (2009).
52 129 S.Ct. at 2346.
53 Ibid at 2353 (Stevens, J., dissenting).
54 Ibid at 2352–53.
56 Ibid at 634–35 (Ginsburg, J., dissenting).
57 Ibid. at 624 (Ginsburg, J., dissenting) (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).
58 Ibid.
61 130 S.Ct. 876, 909 (2010).
63 Ibid.
64 424 U.S. 1, 26 (1976).
69 Ian Millhiser, “Romney Wants His Billionaire Wall Street Donors To Be Able To Give Him Unlimited Sums of Money,” ThinkProgress, December 21, 2011.
78 Ibid at 423–42, 442–43.
79 Ibid at 511–512 (Scalia, J., dissenting).
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