



Conservative Scholars Bullish That A Romney Supreme Court Could Reverse Longstanding Liberal Jurisprudence

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A potential Mitt Romney presidency carries huge implications for the Supreme Court that have conservatives excited and progressives fearful about the future.

Liberal-leaning Justices Ruth Bader Ginsburg, 79, and Steven Breyer, 74, are likely candidates for retirement during a Romney administration, the GOP nominee has vowed to appoint staunch conservatives, and the influential conservative legal community will make sure he follows through.

Replacing even one of the liberal justices with a conservative, legal scholars and advocates across the ideological spectrum agree, would position conservatives to scale back the social safety net and abortion rights in the near term. Over time, if a robust five-vote conservative bloc prevails on the court for years, the right would have the potential opportunity to reverse nearly a century of progressive jurisprudence.

For all those reasons, conservative legal activists anticipate that a Romney win would be the culmination of their decades-long project to remake the country's legal architecture.

Conservative Hopes

Roger Pilon, director of the libertarian Cato Institute's Center for Constitutional Studies and a member of the Federalist Society, told TPM that one more solid conservative vote would pave the way for "fundamental shifts on the Court" toward "a revival of greater protection for economic liberty and a direct assault on the modern regulatory state."

“If Romney were to appoint [conservative] justices and lower court judges, then we would see greater protection for economic liberty and greater scrutiny for regulation — whether they be environmental regulations, regulations for property rights, regulations for affirmative action, regulations of all sorts,” Pilon said. “That to my mind would be a return to the Constitution as it was originally understood prior to the New Deal constitutional revolution. And that is basically what the Tea Party movement has called for.”

The implication is that the Court would likely “chip away” at Congress’ power to compel states to participate in programs like Medicaid, and at the federal government’s power to erect national programs like Medicare and Social Security, Pilon says. “I expect that a Romney-appointed court would be more sympathetic to efforts to change the Medicare and Medicaid [and Social Security] programs because they’d come from that school of thought that says government has limited power.” It also means the Court would seek to narrow the berth for Washington to “engage in the kind of expansive programs like we saw with Obamacare and Dodd-Frank [financial regulatory reform],” he says.

Randy Barnett, a constitutional law professor at Georgetown University and a leading architect of the legal challenge to the Affordable Care Act, told TPM that attacking the legal premise of Medicare and Social Security (which rest on the Constitution’s rarely questioned powers to tax and spend) would be “a much longer-term project.” But he’s hopeful that a more conservative Court could cut away at regulatory measures and adopt a “this far and no further” approach to federal authority, to thwart further expansion of the social safety net.

“Realistically the best we can hope for in the short term is for courts to hold the line and justify any expansion of federal power,” he said, mentioning elements of Obamacare, Dodd-Frank and environmental regulations as targets that conservatives are already building cases against. “The reason why that’s justified is Congress has moved so far beyond its powers that it should have to justify moving any farther.”

The powers conservatives most want to limit are rooted in the Constitution’s Spending and Commerce Clauses, which the Supreme Court already constrained in its decision to uphold the Affordable Care Act. The Supremacy Clause could also be circumscribed with one more conservative vote, potentially limiting people’s ability to sue if government assistance laws are not properly implemented.

The ACA decision revealed that there are already four votes on the Court to prevent the Taxing Clause from being used to promote regulatory goals. And though the staunchest legal conservatives hope a fifth vote might lead to the eradication or restructuring of programs like Medicare and Social Security, Barnett cautions that the debate over the scope of that power dates “all the way back to Alexander Hamilton.”

Liberal Fears

Tim Jost, a liberal law professor at Washington & Lee University, warns that the Roberts Court has already, to a still unknown extent, limited Washington’s authority over federal-state programs and the regulation of interstate commerce. “It’s not inconceivable,” he says, that replacing a liberal justice with a conservative could limit different federal powers governing other programs.

With one more vote, he notes, conservatives could scale back the federal government's authority to compel states to participate in federal-state partnerships like Medicaid and instead "turn them into block grants." He says they could also curtail the Supremacy Clause to prevent low-income Americans from suing if they are denied government benefits under the law, calling to mind the *Douglas v. Independent Living Center* case, which was dismissed on a narrow 5-4 vote this year. The case was about whether entities could sue to block excessive cuts to Medicaid reimbursement rates.

"There's all kinds of mischief [a Romney-shaped Court] could make," Jost continued. "The Affordable Care Act survived by one vote, and four in the dissent were willing to get rid of all of it. Four members of the court have shown that they're perfectly happy to get rid of pretty major progressive initiatives if they disagree with them."

But Jost doubts that a Romney-shaped Court would rapidly make radical changes.

"I suppose it's conceivable that we would go back to a sort of Ayn Rand situation where Congress really had no power to do anything but provide for the national defense and a few other specifically enumerated powers in the Constitution," he said. "But boy that would be a radical change. I don't know if we're getting there anytime soon."

Then there's *Roe v. Wade* the sine qua non of abortion rights. It survives now on a fragile 5-4 margin, which would likely flip if Ginsburg, Breyer or even Kennedy were to be replaced by a down-the-line-conservative justice.

"Women's access to abortion is likely to be significantly curtailed under a Romney court," said Adam Winkler, a constitutional law professor at UCLA School of Law. "If *Roe* wasn't entirely overturned it's likely that the Supreme Court would continue to gut it."

And the expansion of gay rights would likely hit a wall, Winkler adds, perhaps ending same sex marriage advocates' hope that the Court will strike down the Defense of Marriage Act.

The Limited And Not-So-Limited Romney Scenarios

Romney could also meaningfully impact the Court, even without replacing liberal justices, if aging conservatives like Antonin Scalia, 76, and Anthony Kennedy, also 76, were to retire. Replacing them with younger conservatives would tilt the balance of the court for decades to come, likely solidifying the right-wing consensus on issues like campaign finance, affirmative action, civil rights and gun rights.

That's the limited scenario. Cato's Pilon believes that replacing one liberal justice with a conservative could pave the way for a slow return to the *Lochner* Era — a pre-New Deal period when the Supreme Court invalidated minimum wage and child labor laws as unconstitutional.

"Yes, but not for a while," the conservative scholar said. "Because there's just too much to roll back. The court could find Social Security unconstitutional tomorrow, and that would be a good thing, but that would be suicidal for them because many people depend

on it. We didn't get into this mess overnight and we're not going to get out of it overnight."

Barnett — whose advocacy for smaller government has landed him in conflict with both liberals and conservatives — stresses that the conservative legal community's goals are about principle and not a legislative agenda.

"I think that people who look at conservatives from the outside think this must be about a legislative agenda," he said. "It would be a mistake to think that. We want to see the text of the Constitution interpreted to hold Congress to its enumerated powers."

But that's exactly why a Romney presidency — even a one-term presidency — would pose a slow-release threat to key progressive accomplishments, and why small-government conservatives view his candidacy as a once-in-a-lifetime opportunity.

If Romney is elected president, Winkler says, "I think progressives should be very afraid and conservatives should be very hopeful."