

THE COURTS UNDER PRESIDENT OBAMA

SCOTT A. MOSS*

President Obama's plans for the economy and the military get more headlines, but his most lasting power could be shaping the next several decades of Supreme Court jurisprudence on abortion rights, discrimination laws, presidential power, church-state separation, and other issues. President Obama's ability to shape all other federal courts may be no less important, given that the thirteen federal courts of appeals and ninety-three federal district courts already, at the start of his term, have fifty-four judicial vacancies¹ that President Obama and the heavily Democratic Senate could, if they choose, largely fill in 2009-2010.

This short Essay discusses what can be predicted now, as President Obama begins his term, about the impact on the federal courts of the Obama presidency. The Essay first discusses the vacancies likely to arise on the Supreme Court in the eight-year window (2009-2017) that will be either President Obama's eight years in office or President Obama's four years followed by four years of another President, presumably the 2012 Republican nominee. The Essay then discusses what issue outcomes will change after four years of President Obama nominating justices and judges, and then after four more years of either President Obama or a Republican President following him; the issue areas discussed are abortion, the Establishment Clause, affirmative action and school desegregation, limits on federal employment and abortion laws under the Interstate Commerce power, and presidential power. Finally, this Essay discusses in a more limited fashion—because less can be predicted—the impact of the Obama presidency on the federal district and appellate courts.

I. THE SUPREME COURT'S COMPOSITION AND RETIREMENTS

A. *The Current Composition: An Old Court*

With only two new Justices appointed from 1995 to 2008, this is getting to be an old Supreme Court, one likely to see a number of Justices depart, and be replaced, in the next several years. Here is a list of

* Associate Professor, University of Colorado Law School (scott.moss@colorado.edu).

1. See Federal Judicial Vacancies, http://www.uscourts.gov/cfapps/webnovada/CF_FB_301/index.cfm?fuseaction=Reports.ViewVacancies (last visited January 17, 2009). Of local interest, there are three judicial vacancies within the Tenth Circuit, two for District Judges in the District of Colorado and one for a District Judge in the District of Wyoming.

the current Justices and their ages at the end of the first term, and possible second term, of the next President:

<u>Justice</u>	<u>Age at end of 1st term</u>	<u>Age at end of 2nd term</u>
John Paul Stevens	92	97
Ruth Bader Ginsburg	79	83
Anthony Kennedy	76	80
Antonin Scalia	76	80
Stephen Breyer	74	78
David Souter	73	77
Clarence Thomas	64	68
Samuel Alito	62	66
John Roberts	57	61

With six Justices already well into their 70s now, it seems likely that the next President will get to appoint at least two new Justices in a first term alone, possibly five or six in a second term. No recent President has had such an opportunity; President Nixon appointed four Justices in his five years, but the six Presidents since then have combined to appoint only ten Justices over thirty-five years:

<u>President</u>	<u>Years</u>	<u>Justices Appointed</u>
George W. Bush	8	2 (Roberts & Alito)
Bill Clinton	8	2 (Ginsburg & Breyer)
George H.W. Bush	4	2 (Souter & Thomas)
Ronald Reagan	8	3 (O'Connor, Scalia, & Kennedy)
Jimmy Carter	4	0
Gerald Ford	3	1 (Stevens)
Richard Nixon	5	4 (Burger, Blackmun, Rehnquist, Powell)

B. Predicting Upcoming Court Vacancies

We can have fun with the “name game”—whom might President Obama appoint?—but it really is impossible to predict individual appointments in advance.² A more meaningful game is to make predictions

2. Who anticipated President Bush's nomination of Harriet Miers? Even President Clinton's two fairly uncontroversial choices (Justices Breyer and Ginsburg, both federal appellate judges for over a decade who received overwhelming Senate support) were unpredictable in their own way, well-documented to have come after multiple twists and turns, with several other quite different individuals having been leading candidates, even possibly offered the job (*i.e.*, Mario Cuomo), or at

on issues, not names: What individual rights and government powers likely will change the most after President Obama gets to name a few Justices to cast votes on the Supreme Court? For this “Predict the Court” game, I use the following rules (not “rules” so much as reasonable assumptions that I cannot defend as certain to play out exactly this way):

(1) President Obama’s nominees likely will be essentially similar to the last two Democratic appointees, Clinton appointees Breyer and Ginsburg (the only two Democrat-appointed Justices in the past forty years, and therefore the only modern data points)—though likely disagreeing as to one or another specific points of law, as detailed in the below issue discussions. If a Republican is elected in 2012, I similarly assume that President would fulfill the identical campaign promise of most recent Republican presidential nominees and primary candidates: to appoint individuals like Justice Scalia and Thomas.³

(2) Two Justices will retire during President Obama’s first term from among the two oldest (Stevens and Ginsburg) and the one who, though younger, is reputed to have a personal desire to leave the Court (Souter). It is possible all three will retire, but to avoid exaggerating President Obama’s ability to reshape the Court, I will assume that only Justices Stevens and Ginsburg will depart during President Obama’s *first* term.

(3) Three of the next four oldest Justices (after Stevens and Ginsburg)—Kennedy, Souter, Scalia, and Breyer—all four of whom are close in age, will retire in President Obama’s second term, by the end of which their ages will range from 77 to 80. I will assume that one of the four—Scalia—will delay retirement to hold out for a later President of the same party (just as, I suspect, Breyer would hold out during a Republican presidency that starts in 2012).

Under this scenario, President Obama would appoint five Justices, replacing the following:

<u>2009-13</u>	<u>2013-17 (if Obama)</u>	<u>2013-17 (if Republican)</u>
• Stevens	• Souter	• Souter
• Ginsburg	• Kennedy	• Kennedy
	• Breyer	• Scalia

least preferred choices until being disqualified upon a review of medical records (*i.e.*, Richard Arnold) before the ultimate choices of Justices Ginsburg and Breyer.

3. Even moderate-leaning candidates for the Republican Presidential nomination, such as Rudy Giuliani (who is pro-choice), have so promised.

C. Can We Really Predict When Justices Will Retire—or How New Justices Will Vote?

Some may object that we never really know when Justices will retire, or in particular that retirement is likely for a Justice at the height of his powers as a “swing vote”—such as Justice Kennedy now, and for at least several years to come. Yet the past few decades of Justice retirements show a surprising degree of consistency in recent decades. There have been eight retirements in the past thirty years:

<u>Retiring Justice</u>	<u>Age at Retirement</u>
Rehnquist (2005)	80
O'Connor (2005)	75
Blackmun (1994)	86
White (1993)	76
Marshall (1991)	83
Brennan (1990)	84
Powell (1987)	79
Stewart (1981)	66

Setting aside the youngest and oldest retirement ages in the last thirty years,⁴ the retirement ages have ranged from 75 to 84. More notably, there is a pattern in who has retired when: Justices who were considered the “swing votes” of their time retire *earlier*, not later. Justice Kennedy’s predecessors as the Court’s key swing votes all retired in their 60s or 70s: Justices O’Connor (retired at 75), White (76), Powell (79), and Stewart (66). The other four of the past eight retirees (Justices Brennan, Marshall, Blackmun, and Rehnquist), far from being “swing votes,” were considered to be reliably on one “side” of the Court’s major jurisprudential schisms over individual rights, federal power, etc.—and all stayed on the Court into their 80s. This may or may not be a permanent pattern, but there is some evidence that the swing vote Justices retire at a more normal retirement age (60s to 70s) than the Justices who see their service on the Court as a “cause,” whether jurisprudential or political, that motivates them to remain on the Court about as long as their health allows.

Some also may object that Justices may not vote as Presidents want. Conservatives express disappointment about certain non-“conservative” individual rights and federal power rulings from three Republican appointees, Justices Souter, Kennedy, and Sandra Day O’Connor. Yet these three Justices’ appointments reflect odd political circumstances

4. Justice Stewart retired at age 66; Justice Stevens is still on the Court and thus has a retirement age yet to be determined but known to be at least his current age of 88.

unlikely to recur often: naming O'Connor fulfilled a campaign promise by President Reagan to appoint a woman at a time (1981) when there were relatively few prominent conservative female lawyers seasoned enough to be plausible Justices; Souter was chosen despite lacking a well-defined judicial ideology because he had powerful political patrons (White House Chief of Staff John Sununu and Senator Warren Rudman) from New Hampshire who were key to President Bush's 1988 victory in the New Hampshire Republican primary election; and Justice Kennedy was a backup, compromise nominee chosen only after two more originalist nominees (Judges Robert Bork and Douglas Ginsburg) failed in a Senate in which President Reagan's party was a relatively small minority.

More importantly, unpredictable Justices have become more rare in this era of professional, internet-facilitated background research and pressure to appoint ideologically simpatico Justices. The 2005 nomination of Bush confidante Harriet Miers, an ideological question mark, sparked the first conservative revolt against President Bush; and so far, the four Justices appointed in the 1990s and 2000s have voted about as expected.

II. THE ISSUES AT THE SUPREME COURT

Based on the recent history described above, we have good reason to think that the Justices whom Presidents appoint are chosen for their reliable track record on constitutional and other legal issues important to that President (and to others in a position to offer the President input on nominees, such as presidential advisors or key senators). If so, President Obama's appointments will reshape the Court's rulings on a wide range of currently controversial issues—but much more so in his second term (if he wins one) than in his first term.

A. *Abortion*

A President committed to appointing Justices like Scalia and Thomas (as virtually all recent Republican candidates for President have said they are) would need only one Justice appointment to eliminate the constitutional right to abortion first recognized by *Roe v. Wade*⁵ in 1973 and then narrowed by *Planned Parenthood v. Casey*⁶ in 1992. Justices Scalia and Thomas long have sought to eliminate constitutional abortion rights, and they likely have the support of the two recent appointees, Justice Alito and Chief Justice Roberts—leaving them one vote short of the five necessary to overturn *Roe*. All of the next five likely retirees are supporters of decisions (a) protecting a constitutional right to abortion and (b) refusing to overturn *Roe*. If any Republican similar to recent past

5. 410 U.S. 113 (1973).

6. 505 U.S. 833 (1992).

Republican nominee prevails in 2012, the Court very likely would have at least six votes to overrule *Roe*.

In contrast, the first term of an Obama presidency simply will preserve the status quo that the Constitution protects abortion rights; the second term could see a return to the broader right to abortion that *Roe* announced but that has been rolled back in recent years. Both of the likely retirees during President Obama's first term—Justices Stevens and Ginsburg—support the broad form of the right to abortion that *Roe* announced, so replacing them with even the strongest abortion rights supporters would not change any votes at the Court. In a second term, President Obama could bring about a return to the stronger *Roe*-era abortion rights of the 1970s and early 1980s by replacing two Justices: (1) most importantly, Justice Kennedy, who, in 5-4 votes at the Supreme Court, has voted (along with Justice Alito and Chief Justice Roberts) to allow various abortion restrictions, including blanket bans on the procedure alternately known as “partial birth” or “intact D&X” abortion;⁷ and (2) secondarily, Justice Souter, who in *Planned Parenthood v. Casey*⁸ voted to allow abortion-restricting, “informed consent” disclosures and “waiting periods” for an abortion following an initial abortion consultation.⁹

Even Obama appointees who disagree with the part of *Planned Parenthood v. Casey* that allowed two abortion restrictions, however, might not be willing to overturn those holdings for reasons of *stare decisis*.¹⁰ Thus in reproductive rights and other areas (such as the Establishment Clause, below), the question will be whether Obama-appointed Justices give priority to *stare decisis* or to restoring once-broader constitutional rights.

B. The Establishment Clause

As with abortion, there likely already are four votes to lower the wall of separation between church and state, such as precedents disallowing school prayers at public school graduations.¹¹ Ever since the ap-

7. *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1621 (2007).

8. 505 U.S. at 833.

9. Even if Justice Souter were to retire during President Obama's first rather than second term, that would not change any Court outcomes; Justice Kennedy would remain the fifth vote to allow various restrictions, like that on “partial birth” abortion, that neither Justice Souter nor his replacement would allow.

10. For an opinion famously declaring that it was giving precedential value to a decision the signatory Justices might not have otherwise supported, see *Planned Parenthood v. Casey*, 505 U.S. at 871 (“We do not need to say whether each of us, had we been Members of the [*Roe v. Wade*] Court . . . , would have concluded[] as the *Roe* Court did The matter is not before us in the first instance, and, coming as it does after nearly 20 years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding.”).

11. See e.g., *Lee v. Weisman*, 505 U.S. 577, 633 (1992) (Scalia J., dissenting) (supporting public school graduation prayers, a position supported by Justice and Thomas supporting allowing

pointment of Justice Alito to replace Justice O'Connor, there likely already have been five votes to overturn certain decisions, such as those disallowing governmental displays endorsing a particular religion.¹² More broadly, there already appear to be five Justices supporting the "coercion" test (that religion in government is acceptable as long as it does not coerce anyone) rather than the "endorsement" test (that religion in government is acceptable as long as it does not endorse religion), though the fifth "endorsement" vote is Justice Kennedy, whose more lenient version of the test recognizes that certain ostensibly voluntary religious endeavors are psychologically coercive, such as public school graduation prayers.¹³

With Justices Stevens and Ginsburg two of the more staunchly separation-of-church-and-state Justices, President Obama in his first term would simply replace them with presumably like-minded Justices who would retain current separation of church and state doctrine. A second term for President Obama, in contrast, could make the wall of church-state separation higher, reversing (for example) recent precedents allowing some public funding of private religious education (because Justice Kennedy was the fifth vote for those precedents)¹⁴ and some governmental displays of the Ten Commandments (because replacing Justices Kennedy and Breyer, who voted to allow some such displays, could make five votes to reverse, or at least not expand, those precedents).¹⁵

Were a Republican President to take office after the 2012 election, most or all of his appointees, replacing Justices Souter, Kennedy, and Breyer, likely would join Justices Thomas and Scalia, and probably Justice Alito, in overturning most of the body of case law disallowing public school prayer, eliminating virtually all Court precedents requiring separation of church and state, leaving only a rule that government cannot coerce participation in government-sponsored prayers or other religious rituals.¹⁶

public school graduation prayers, a position likely supported by two more recent arrivals, Chief Justice Roberts and Justice Alito).

12. *Van Orden v. Perry*, 545 U.S. 677 (2005) (declaring that some, though not all, governmental displays of the Ten Commandments are permissible—but Justice O'Connor, who voted to disallow some such displays, has since been replaced by Justice Alito).

13. *Lee*, 505 U.S. at 592-93.

14. *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (allowing public funds for secular portions of teaching at parochial schools, thus overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

15. *Van Orden*, 545 U.S. at 681-82 (allowing government Ten Commandments display where public officials asserted it was part of a broader display of ancient laws).

16. Under this scenario, the Supreme Court's ruling disallowing *mandatory* public school prayer in *Engel v. Vitale*, 370 U.S. 421, 424 (1962), would remain, but a public school prayer from which students could opt out would be permissible, contrary to *Lee*, 505 U.S. at 599 (disallowing voluntary prayer at public school graduation), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 320 (2000) (disallowing voluntary prayer at high school football game), and other cases.

C. Affirmative Action and School Desegregation

The Supreme Court *may* already have the votes to disallow all governmental affirmative action of the “individual racial preferences” variety, or at least to disallow far more than it has in past decisions. The Court permitted some but not all affirmative action in higher education in a close vote (5-4) in 2003,¹⁷ but that was before Justice Alito (who in a recent desegregation case signaled opposition to any consideration of race¹⁸) replaced Justice O’Connor (who had sided with allowing affirmative action at the University of Michigan Law School¹⁹). Justice Kennedy now is the only potential fifth vote to allow any individual-preference affirmative action, but he voted in 2003 against both University of Michigan programs before the Court,²⁰ and in 2007 against both public school desegregation programs before the Court;²¹ in the latter case, Justice Kennedy expressed negative sentiments about the very concept of remedial racial preferences.²²

An Obama presidency likely would preserve the largely anti-affirmative action Court status quo in his first term—replacing Justice Stevens and Ginsburg with like-minded pro-affirmative action Justices, leaving a total of only four votes in favor of allowing most affirmative action. As with abortion, President Obama probably could change the law only in his second term, by replacing Justice Kennedy, the key fifth vote to eliminate much affirmative action.

D. Limits on Federal “Commerce” Legislation: Employment Discrimination and Abortion

The Court in 1995 and 2000 announced, for the first time since the 1930s, limits on Congress’s power to use its legislative power over “Interstate Commerce” to enact laws on noncommercial matters such as gun possession and bias-motivated violence.²³ The Court has since declined to limit Congress’s Commerce power further, issuing decisions allowing

17. *Gratz v. Bollinger*, 539 U.S. 244, 271-75 (2003) (disallowing affirmative action in University of Michigan undergraduate admissions because the school used a too-rigid and too-substantial award of “points” based on race); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (allowing affirmative action in University of Michigan Law School admissions because the school did not use a point system and appeared to consider race only as one of many diversity-related and subjective factors).

18. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

19. *Grutter*, 539 U.S. at 334.

20. *Gratz*, 539 U.S. at 275; *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting).

21. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

22. *Id.* at 2795-97. Justice Kennedy declined to join the four-Justice plurality declaring *any* use of race impermissible; Justice Kennedy instead opined that *some* race-based desegregation tactics, *e.g.*, redrawing school district lines to increase racial balance, might be acceptable, but only so long as they did *not* involve assigning *individuals* based on their race. *Id.* at 2791-92.

23. *United States v. Morrison*, 529 U.S. 598, 601-02 (2000); *United States v. Lopez*, 514 U.S. 549, 551 (1995).

federal restrictions on marijuana grown for personal medicinal use²⁴ and on state auto accident litigation.²⁵

The leading voice on the Court for narrowing the Commerce power, Justice Thomas, so far has not won much support on the Court for his view that Congress has used the Commerce clause to enact far too much noncommercial legislation. The 1930s Supreme Court cases first allowing Congress to pass federal laws on all commercial activities with “substantial effects” on interstate commerce (including working conditions, consumer protection, and monopolization) were, in Justice Thomas’s view, a “wrong turn” from earlier case law disallowing any federal laws about activities, such as manufacturing, working conditions, or product quality, that occurred within one state despite their interstate effects.²⁶ Under this narrow view of the federal commerce power, which prevailed at the Court from the late nineteenth century until the mid-1930s, all federal employment discrimination, union rights, and minimum/overtime wage laws were impermissible exercises of federal power, to be struck down by the Court—cases that Justice Thomas has cited with approval.²⁷ Justice Thomas may or may not have support from Justice Alito and Chief Justice Roberts, who have not opined on this issue as Justices but did, as lower-court judges, hold that federal laws banning machine guns²⁸ and protecting a locally endangered species,²⁹ respectively, were impermissible expansions of the interstate commerce power.

As with several of the areas of law discussed so far, the first term of an Obama presidency would ossify the status quo, and the second term could slightly roll back, or at least limit the reach of, some of the Court’s recent jurisprudence. Four of the five Justices President Obama is likely to replace (all but Justice Kennedy) voted against the Commerce Clause limits the Court announced in 1995 and 2000, and with the Court majori-

24. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

25. *Pierce County v. Guillen*, 537 U.S. 129, 147-48 (2003).

26. *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., concurring) (“[F]rom the time of the ratification of the Constitution to the mid 1930’s, it was widely understood that the Constitution granted Congress only limited powers If anything, the ‘wrong turn’ was the Court’s dramatic departure in the 1930’s from a century and a half of precedent.”) (citing with approval *United States v. E. C. Knight Co.*, 156 U.S. 1, 13 (1895) (limiting federal antitrust law, holding that Congress’s interstate commerce power did not reach the manufacturing of products transported interstate, because the manufacturing itself was within one state) (other citations omitted)).

27. Justice Thomas’s concurrence in *Lopez*, 514 U.S. at 599, cited *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (disallowing federal law regulating mine labor because “[t]he relation of employer and employee is a local relation.”) and *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543-50 (1935) (disallowing federal law regulating intrastate sale of sick chickens, or the labor of employees involved in intrastate chicken sales, on same rationale).

28. *United States v. Rybar*, 103 F.3d 273, 287 (3d Cir. 1996) (Alito, J., dissenting) (arguing that the federal ban on possessing machine guns exceeded Congress’s power under the interstate commerce clause).

29. *Rancho Viejo, L.L.C. v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting) (suggesting he agreed that it is unconstitutional for the federal government to regulate environmental matters—there, protection of an endangered species—that are noncommercial and solely within one state).

ties rejecting all the Commerce Clause challenges the Court has faced since 2000; only two Justices among those four seem likely candidates to retire in President Obama's first term. Were President Obama to win a second term, replacing Justice Kennedy would give a potential fifth vote to the bloc of Justices that never have supported any of the Court's decisions imposing limits on the Commerce power.

If a Republican takes office in 2012, he or she would have a chance to strengthen limits on the Commerce power, perhaps substantially enough for Justice Thomas's narrower view of federal power to prevail. There now may be two or three votes for the Thomas view: Justice Scalia has not advocated as narrow a view of federal power,³⁰ but both of the new Justices, Alito and Roberts, supported narrowing the Commerce power as appellate judges and may support Thomas's view as members of the Court. A Republican President could replace three Justices who have disagreed with Justice Thomas; were two or more of the three new Justices to support the Thomas view, that would yield a majority. If the Thomas view becomes a majority position on the Court, all federal labor and employment laws likely would be struck down, leaving it legal to discriminate, pay less than the minimum wage, and crack down on unions, at least in the many states lacking their own state-specific labor and employment laws.

Interestingly, however, while a Court narrowing the Commerce power would likely be a Court that overturns the constitutional right to abortion (because the same Republican nominees would tend to do both), the Commerce narrowing likely would disallow any federal restrictions on abortion. The narrow Commerce view often is depicted mainly as a threat to progressive legislation—environmental, discrimination, gun control, etc.—but it also could disallow federal laws restricting individual health-related decisions, such as the right to use medical marijuana or to have an abortion. Though a staunch critic of *Roe*, Justice Thomas has hinted that he questions Congress's power to pass federal abortion laws such as the ban on "partial birth" abortion.³¹ His view, which may seem idiosyncratic politically but which is perfectly consistent with his judicial philosophy of interpreting the Constitution based on original intent, ap-

30. In *Gonzales v. Raich*, 545 U.S. at 34, Justice Thomas and two others voted to disallow a federal ban on state authorization of medical marijuana; Justice Scalia voted to allow the federal ban because the Constitution's Necessary and Proper Clause justifies federal regulation of *intrastate* commerce of a commodity (there, locally grown marijuana) as necessary to effectuate a federal ban in *interstate* commerce in the commodity.

31. In *Gonzalez v. Carhart*, Justice Thomas joined the majority allowing the federal ban but wrote a four-sentence concurrence, the latter half of which read: "I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it." 550 U.S. at 1639-40. In light of Justice Thomas's earlier elaboration of his view that Congress's commerce power should be restricted substantially, it seems clear his concurrence was explaining that it was because of the limited procedural posture of the appeal that he was upholding the federal ban despite his "commerce" qualms.

pears to be that there is no individual constitutional right to abortion but also no federal power to ban abortion either; abortion is a matter the states, but not the federal government, can regulate. So there seem already to be five or six votes on the Court to strike down federal abortion laws, just for different reasons: the four Justices supporting abortion rights; Justice Thomas in opposition to Congressional power over non-commercial matters like abortion, possibly joined by Justice Alito or Chief Justice Roberts or both. Ironically, the Republican appointees most likely to bring about the demise of *Roe* are most likely to take a narrow view of federal power that would disallow federal abortion bans, leaving abortion battles to be fought individually in each of the states.

E. Presidential Power

Like federal abortion laws, presidential power is an area where ideological lines blur, with small-government conservatives (like Justice Scalia) taking polar opposite positions from conservatives who believe in theories such as a “unitary executive” branch led by a President with broad powers (like Justices Thomas and Alito). This is why ideological lines blur so badly in some of the most politically charged cases the Court has heard during both the Bush and Clinton presidencies. In 2004’s *Hamdi v. Rumsfeld*,³² one of the key “war on terror” cases, Justices Scalia and Stevens, who rarely agree on contested individual rights issues, jointly argued against any presidential power to detain American citizens captured abroad without trial as “unlawful combatants”; Justice Thomas argued the opposite, for allowing the broad executive power President Bush sought. The Court’s middle-ground ultimate ruling in *Hamdi*, requiring fair military tribunals but not full public trials for the alleged unlawful combatants, was issued by three Justices of vastly different perspectives: Chief Justice Rehnquist (a Nixon appointee who had advocated broad presidential national security power as a 1960s White House lawyer); Justice O’Connor (a Reagan appointee who became the Court’s “swing vote,” a pro-states’ rights conservative who also joined some decisions broadening individual rights); and Justice Breyer (a Clinton appointee who votes for broad individual rights but also espouses a pragmatic view of the need for government power and discretion).

Perhaps illustrating how most Presidents tend to push the bounds of executive power regardless of their ideology, President Clinton suffered a loss before a similarly ideologically muddled Supreme Court. In 1998’s *Clinton v. City of New York*,³³ some of the Court’s leading liberals (Justices Stevens and Ginsburg) joined conservatives (Justices Rehnquist and Thomas) to disallow the line-item veto as an impermissible expansion of presidential power.

32. 542 U.S. 507, 550, 579 (2004).

33. *Clinton v. City of New York*, 524 U.S. 417 (1998).

The presidential power cases show how not all issues the Court handles are predictable, and not all fall neatly along the left-versus-right lines that dominate the political debate. After all, President Bush's three Court nominees—Roberts, Alito, and the ill-fated Harriet Miers—had little in common but the fact that all three had worked as executive branch lawyers for Presidents seeking to expand presidential power, clearly a key issue for President Bush. With Chief Justice Roberts and Justice Alito replacing two of the Justices who voted to limit President Bush's war-on-terror powers in *Hamdi*, the Bush Justices may well already have expanded presidential power. Yet that presidential power will not be limited to Republican Presidents; as Comedy Central's Jon Stewart asked former top Bush White House lawyer Jack Goldsmith of the administration's efforts to expand presidential power, "Do you think the ultimate irony might be that all the work that Dick Cheney has done will make Hillary Clinton the most powerful president in the history of the United States?" (Goldsmith smiled, nodded, and said "possibly").³⁴

With presidential power a double-edged sword—or at least a sword that both you and your enemies alike get turns using—it is far from clear that a President Obama Justice would vote to restrict presidential power; it is just too unclear whether "original intent" theory, "living Constitution" theory, conservatism, or liberalism support *expanding or narrowing* presidential power. So not all Court rulings can be predicted from the name and party of the President appointing the next Justices. But you already knew that.

III. THE APPELLATE AND DISTRICT COURTS

The impact of judicial nominations is even harder to predict at the district and appellate level than at the Supreme Court level, for several reasons. First, these courts have *nondiscretionary dockets*, making it harder for judges to select areas of law to rule upon and change. Second, and relatedly, *non-ideological cases* are more common, such as garden-variety contract or tort cases in federal courts on diversity jurisdiction but presenting no novel questions of law. Third, even some cases in ideologically charged fields simply are *very weak cases* destined to lose on dispositive motions before almost any judge. Fourth, with *almost a thousand judges* issuing thousands of decisions annually, it is harder to find a pattern, or to cite a handful of decisions as indicating anything significant about the courts' direction. Fifth, with *in-state recommendations or nominating commissions* playing a prominent role in Presidents' selection processes, it is harder to profile nominees by President.

34. The basic point remains valid, of course, even though Senator Clinton was not elected President in 2008, as seemed possible at the time of this October 2007 interview. *The Daily Show with Jon Stewart* (Comedy Central television broadcast October 4, 2007), available at <http://www.thedailyshow.com/video/index.jhtml?videoId=109135&title=jack-goldsmith>.

Still, there are two points worth noting about the possible direction of the courts after President Obama has an opportunity to fill an appreciable number of district and appellate vacancies. First, certain areas of law have seen dramatic change that could be reversed or slowed with a new crop of judges. For example:

- Some judges express outright hostility to employment discrimination cases, actually mocking plaintiffs' claims of discrimination, in fairly unprofessional terms, in decisions dismissing such claims.³⁵
- Other judges write judicial decisions gratuitously expressing hostility to entire remedial statutes providing federal causes of action.³⁶
- Just this decade, the Supreme Court has issued a series of "9-0 decisions reversing too-restrictive circuit holdings on the fundamental question of what constitutes sufficient evidence of discrimination"³⁷—overturning the views of the Second,³⁸ Fifth,³⁹ Sixth,⁴⁰ Ninth,⁴¹ and Eleventh⁴² Circuits (and other cir-

35. See, e.g., *Fisher v. Vassar College*, 114 F.3d 1332, 1351 (2d Cir. 1997) (Jacobs, J., concurring) (using literary reference to mock the idea of discrimination based on an intersection of two or more classes—specifically, plaintiff's claim, and the lower court finding, of discrimination on the basis of Dr. Fisher's status as a married woman: "'How fascinating is that class / Whose only member is Me!' W.H. Auden, 'Islands,' 24, *The Shield of Achilles* (1955)."); *Rosa v. Brink's Inc.*, 103 F. Supp. 2d 287, 288 (S.D.N.Y. 2000) (Rakoff, J.) (mocking the idea that a bigoted individual could be biased against several groups, beginning a judicial opinion dismissing an employment discrimination claim as follows: "Move over, Archie Bunker. According to the plaintiff here, defendant Brink's Inc. and three of its executives are so steeped in prejudice that they intentionally discriminated against her on grounds of race, national origin, gender, age, and disability—all at once.").

36. See, e.g., *Phillips v. The Pepsi Bottling Group*, No. 05-cv-01322, 2007 WL 3378544, at *1 (D. Colo. 2007) (Nov. 13, 2007) (denying motion for recusal made after, plaintiff claimed, a Magistrate Judge said: "The biggest problem with your case is that Judge Nottingham hates employment cases and there's nothing you can do about [it]. . . . [H]e will try to find anything in the summary judgment briefs to say there's no material issues and grant summary judgment, and if he doesn't, he will make it tough at trial, and you won't win."); *Phillip v. ANR Freight Systems, Inc.*, 945 F.2d 1054, 1055 (8th Cir. 1991) (affirming denial of recusal made after District Judge Dean Whipple said, in ruling on an evidentiary dispute: "I am not going to let them in, unproven allegations. Just because lawsuits are filed doesn't give credibility to them, especially in these cases. Those are Title VII cases. Congress has created a nightmare because they entice anybody and everybody to file those things and entice any attorney to file them in the mere chance that if they win a dollar they can win attorney fees. So I think any Title VII cases ought to be looked at with suspicion to begin with because it's a crap shoot, which everybody engages in.").

37. Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 *FORDHAM L. REV.* 981, 1001 (2007).

38. *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

39. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-49 (2000).

40. *Burlington N. Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2407 (2006).

41. *Desert Palace v. Costa*, 539 U.S. 90, 90 (2003).

42. *Ash v. Tyson Foods*, 546 U.S. 454, 456-57 (2006).

cuits with case law similar to that the Court reversed, such as the First⁴³ and Eighth⁴⁴ Circuits).

Judicial nominees of President Obama, the first President to have been an attorney representing plaintiffs in discrimination cases, may prove less hostile to this area of law, which constitutes a sizeable share of the federal docket.⁴⁵

Second, even if outcomes of an “Obama Judiciary” are hard to guess, the profile of the typical Obama nominee might be different from that of the typical Clinton or Bush nominee. Setting aside ideology, Clinton- and Bush-appointed judges had remarkably similar profiles in terms of gender, race, age, and professional background, as illustrated by the table below. Tables 1 and 2, below, tabulate statistics for all district and appellate judges appointed by either of the past two Presidents.⁴⁶

Pres.	Total	Female		Nonwhite		Age				
		#	%	#	%	30s	40s	50s	60s	Avg.
Clinton-All	361	100	28%	88	24%	7	171	152	31	50
Clinton-District	295	81	27%	71	24%	7	145	121	22	50
Clinton-Appellate	66	19	29%	18	27%	0	26	31	9	52
Bush-All	322	71	22%	56	17%	12	124	163	23	50
Bush-District	262	54	21%	49	19%	10	103	130	19	50
Bush-Appellate	60	17	28%	7	12%	2	21	33	4	51
Total Clinton/Bush	683	171	25%	144	21%	19	295	315	54	50

43. *Reeves*, 530 U.S. at 133, not only reversed the Fifth Circuit’s view, but also abrogated the First Circuit’s (and others’) view, that as a matter of law a discrimination plaintiff could not prevail by proving the employer’s asserted nondiscriminatory motivation pretextual. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994).

44. *Burlington Northern Santa Fe Railway*, 548 U.S. at 53, not only reversed the Sixth Circuit’s view, but also abrogated the Eighth Circuit’s (and others’) view, of what constituted actionable retaliation by employers. *See Spears v. Missouri Dep’t of Corr. & Human Resources*, 210 F.3d 850 (8th Cir. 2000) (holding that a retaliatory lateral transfer with no loss in pay was not actionable).

45. Labor and employment litigation (of which discrimination is the most prominent component) constitutes twelve to fourteen percent of the federal docket. Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 369 n.27 (2004).

46. All of the raw data underlying these tables is on file with the author. Following are two brief clarifications of the professional background information in Table 2: (1) each column indicates whether the individual ever held that type of job, whether or not that job immediately preceded the federal judicial nomination; and (2) the “Prosecutor or other Gov’t Atty” category includes work as a prosecutor or as any other kind of government attorney actually practicing law (or supervising a department of practicing attorneys), but not government jobs such as legislator or legislative staffer, judge or other judiciary employee, public defender (which is captured in a separate column), patent examiner, etc.

Pres.	Total	Elected Office		Prosecutor or other Gov't Atty		Public Defender		Private Practice	
		#	%	#	%	#	%	#	%
Clinton-All	361	13	4%	206	57%	42	12%	318	88%
Clinton-District	295	9	3%	164	56%	40	14%	262	89%
Clinton-Appellate	66	4	6%	42	64%	2	3%	56	85%
Bush-All	322	14	4%	171	53%	16	5%	283	88%
Bush-District	262	9	3%	140	53%	14	5%	229	87%
Bush-Appellate	60	5	8%	31	52%	2	3%	54	90%
Total Clinton/Bush	683	27	4%	377	55%	58	8%	601	88%

While the *decisions and judicial philosophies* of each President's judges may vary, the *professional profiles* of Clinton and Bush nominees seem strikingly similar:

- The vast majority of nominees had private practice experience, a bit over half had worked as prosecutors or as another kind of government attorney, and only small fractions were elected officials or public defenders.
- One-quarter were female, one-fifth were nonwhite, and for both presidents the average age identically was 50 (ranging from 35 to 69).

There are, however, a few differences, between the two Presidents' picks:

- Even though the pool of attorneys has become more diverse over time, and Bush nominees were in a later (and thus more diverse) eight-year period than Clinton's, the Bush nominees (22% female, 17% nonwhite) were a bit less diverse than Clinton's (28% female, 24% nonwhite).
- Despite overall similar professional profiles, more Clinton than Bush nominees were public defenders (12% versus 5%) and prosecutors or government attorneys (57% versus 53%), even though the same percentage were in private practice (88%)—which indicates that the Clinton picks were not more likely to choose public service *instead of* private practice, but instead more likely to have *both* private practice and public service experience.

As of this writing, before President Obama has chosen any judicial nominees, it remains to be seen (a) whether the overall Bush-Clinton similarity indicates that the same basic population of lawyers gets appointed no matter who is President, (b) whether the few Bush-Clinton differences indicate that Obama nominees will be more like President

Clinton's than President Bush's, or (c) whether President Obama may choose more outside-the-box judicial nominees differing in professional profile, demographics, or both, from those of the prior two Presidents.