The Roberts Court's Record of Overreaching

Regardless of which laws he likes,
He's only calling balls and strikes.
Of balls and strikes that he has eyed,
The union pitches all look wide.
When criminal defendants try
To throw a strike, it's always high.
Consumers make for easy calls:
Their pitches simply all are balls.
By chance, the pitches that are great—
The ones that nick or split the plate;
The ones deserving of ovations—
Are pitched by cops or corporations.
A left-wing lawyer sharp as Darrow
Will find the strike zone much too narrow.
Behind it, crouching, is the Chief,
Quite confident in his belief:
Regardless of which laws he likes,
He's only calling balls and strikes.

--- Calvin Trillin[1]

[1] Calvin Trillin, "As Elena Kagan's Confirmation Hearing Approaches, We're Reminded of John Roberts's Promise to Be an Umpire Calling Balls and Strikes," *The Nation,* June 7, 2010, *available at* http://www.thenation.com/article/elena-kagans-confirmation-hearing-approaches-were-reminded-john-robertss-promise-be-umpire-c (reprinted with permission).

"Adherence to precedent promotes evenhandedness, promotes fairness, promotes stability and predictability. And those are very important values in a legal system."

-- Chief Justice John Roberts at his confirmation hearing (2005)[2]

"Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."

-- Justice John Paul Stevens, dissenting in *Citizens United* (2010)[3]

The Roberts Court consistently pursues a political agenda that favors powerful corporate interests, and recent Supreme Court decisions show certain Justices' striking willingness to engage in judicial activism to fulfill their ideological goals. The Supreme Court's pro-corporate shift is the result of a decades-long campaign by special interest groups to elevate corporate profits and private wealth over individual rights and personal freedoms. Since John Roberts became Chief Justice in 2005, the Supreme Court has demonstrated an increased readiness to do whatever it takes to twist the law to protect powerful interests at the expense of everyday Americans. Despite their publicly avowed commitment to principles of judicial restraint, the Justices—in particular Chief Justice Roberts, Justice Antonin Scalia, Justice Anthony Kennedy, Justice Clarence Thomas, and Justice Samuel Alito—have no compunction about overturning precedent to reach a desired result, as exemplified by the landmark decision *Citizens United v. Federal Election Commission*.[4]

Moreover, the Court, led aggressively by Chief Justice Roberts, has noticeably engaged in "judicial overreach" in order to consider certain legal issues and draw attendant conclusions that comport with a political agenda and promote powerful corporate interests. In the past several years, the Roberts Court has overstepped the boundaries of the proper role of the high court by:

- deciding to hear cases about legal issues which do not currently warrant Supreme Court review;
- answering questions not presented to the Court, thereby issuing broad new legal rules without consistency, logic, or fairness to the parties involved;

[2] *Hr'g on the Nomination of John Roberts to be Chief Justice of the Supreme Court: Hr'g Before the Senate Comm. on the Judiciary,* 109th Cong. (Sept. 13, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html.

[3] *Citizens United v. Federal Elections Commission,* 558 U.S. __, 130 S. Ct. 876, 932 (2010) (Stevens, J., dissenting).

[4] *Id.*. at 913 (5-4 overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)). *See also, e.g., Leegin Creative Leather Prods. v. PSKS, Inc., No. 06-480,* 551 U.S. 877 (2007) (5-4 overruling a 1911 decision which held that resale price maintenance agreements between manufacturers and retailers are *per se* price-fixing and violate our antitrust law). The Court has also on numerous occasions effectively eviscerated long-standing precedent without explicitly overruling its prior decisions. *See, e.g., Gonzales v. Carhart,* 550 U.S. 124 (2007) (5-4 abandoning the core element of *Roe v. Wade* that abortion restrictions must contain an exception for when a woman's health is in danger); *Parents Involved in Community Schools v. Seattle School District #1* and *Meredith v. Jefferson County Board of Education,* 551 U.S. 701 (2007) (5-4 striking down two voluntary school integration programs run by democratically elected school boards, undermining *Brown v. Board of Education's* promise of racial equality); *Morse v. Frederick,* 551 U.S. 393 (2007) (5-4 holding that school authorities could suppress speech purportedly advocating illegal drug use, even when that speech does not take place on school grounds, limiting the Supreme Court's 1969 decision that students do not "shed their constitutional rights… at the schoolhouse gates").

- deciding factual issues more properly reviewed and decided by lower courts.

The Roberts Court Takes Cases It Does Not Need to Hear

The Supreme Court generally grants cert—that is, agrees to hear a case appealed to it—where there is an unsettled question of law or where the circuit courts of appeal have split on the proper interpretation of a given law. In recent years, however, the Court has taken a number of cases without any apparent reason for doing so, especially in the realm of environmental law—creating an assumption that the only justification for the Court's granting cert is to tamper with and undermine environmental protections. In deciding whether or not to grant a cert petition, the Court traditionally relies heavily on the Solicitor General's position, especially when a federal party that lost a case then files a brief in opposition to an industry intervener's request for review by the high Court.[5] However, the Court has recently granted cert on several environmental cases against the wishes of the Solicitors General of both the Obama and Bush Administrations.

- In the only environmental case before the Court this term, ***Monsanto Co. v. Geerston Seed Farms,***[6] the Court chose to hear the case even though Solicitor General Elena Kagan opposed review "because the court of appeals itself set forth the correct legal standard and its decision does not squarely conflict with any decision of this Court or of any other court of appeals."[7]
- In three of the five environmental cases heard in the 2008 term, all of which ended in decisions that protected polluters from liability for endangering the environment, President Bush's Solicitors General Paul Clement and Gregory Garre opposed review. Solicitor Clement filed briefs for a government agency opposing industry petitions in two Clean Water Act cases: ***Entergy Corp v. Riverkeeper, Inc.,*** where the Court reversed an issue in a Second Circuit decision written by then-Judge Sotomayor even though there was no conflict with other circuits and the opinion's impact "was not yet clear";[8] and ***Coeur Alaska v. Southeast Alaska Conservation Council, Inc.,*** where there was no circuit split and it was "unclear how important the court's decision will prove to be."[9] And in ***Burlington Northern & Santa Fe Railway Co. v. United States,*** Solicitor Garre argued in opposition to cert, "The decision of the court of appeals is correct, does not conflict with any decision of this Court, and does not create a conflict among the courts of appeals."[10]

---

[5] *See* Glenn Sugameli, "The Supreme Court's Activist, Pro-Corporate Opinions and Case Selection," ACSBlog (April 27, 2010), *available at* http://www.acslaw.org/node/15974.
[6] No. 09-475 (argued April 27, 2010).
[7] Brief for the Fed. Resp'ts in Opp'n, *Monsanto Co. v. Geerston Seed Farms* (Dec. 23, 2009) (No. 09-475).
[8] Brief for the Fed. Resp'ts in Opp'n, *Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. ___, 129 S. Ct. 1498 (2009) (Nos. 07-588, 07-589, and 07-597).
[9] Brief for the Fed. Resp'ts in Opp'n, *Coeur Alaska v. Southeast Alaska Conservation Council, Inc.,* 557 U.S. ___, 129 S. Ct. 2458 (2009) (Nos. 07-984 and 07-990).
[10] Brief for the Fed. Resp'ts in Opp'n, *Burlington Northern & Santa Fe Railway Co. v. United States,* 556 U.S. ___, 129 S. Ct. 1870 (2009) (Nos. 07-1601 and 07-1607).

The Roberts Court Answers Legal Questions Not Squarely Before It

As a general rule, the Court does not decide issues outside the questions presented to it on certiorari.[11] In certain circumstances, it becomes clear to the Court that a new, more pertinent legal question has arisen during the review of a case, so the Court will invite the parties to submit supplemental briefs on the new question and schedule a reargument. Inviting reargument itself can be an act of judicial overreach. In ***Citizens United v. FEC,*** the Court was presented with the narrow question of whether the electioneering communications provisions of the McCain-Feingold Act apply to "pay-per-view" movies made by not-for-profits. But the Court invited reargument on whether to overturn its 1990 and 2003 decisions upholding limits on corporate spending in federal elections, reaching out to address a constitutional question that had not been raised by the parties. Once the question was before it, the Court announced that corporations have the same First Amendment rights as do ordinary Americans to spend money to influence elections. In his long and stinging dissent, Justice Stevens called out the five Justices for changing the parameters of the case in order to give themselves room to reach a constitutional question and produce the desired result.[12]

But even without inviting reargument, the Roberts Court has displayed a tendency to simply answer questions not squarely before it. This practice may be deeply unfair to the parties to a case, who did not have the opportunity to advocate their position on an issue that the Court ultimately focuses on. And by deciding questions not fully presented during the briefing process, the Court short-circuits the process by which Justices review and consider a range of opinions on a given legal issue. Without going through that process, the Justices are more prone to come to ill-founded and unworkable conclusions. As the Roberts Court itself recently noted, the Court runs the danger of "bad decisionmaking" when the briefing on a question is "woefully inadequate."[13]

- In ***Gross v. FBL Services*****,** the parties asked the Court to decide the narrow question whether a plaintiff in an age discrimination case had to present direct evidence of discrimination in order to obtain a "mixed-motive" instruction to a jury.[14] Instead of answering that question, the five conservatives took it upon themselves—over the opposition of the Government at oral argument[15]—to determine whether the burden of persuasion ever shifts to the party defending a "mixed motives" discrimination claim brought under the Age Discrimination in Employment Act (ADEA). The unrestrained conservatives on the Court then answered their own broad question by untethering the ADEA from Title VII of the Civil Rights Act of 1964 (under which claims for race and sex discrimination are brought) and imposing a new, tougher standard for ADEA plaintiffs to meet. Essentially, five Justices transformed a narrow question about the kind of evidence a plaintiff must present in an age discrimination case into a sweeping opinion rearranging the fundamental rules of proving age discrimination, much to the advantage of defendants. In what Justice Stevens called "an unabashed display of judicial lawmaking,"[16] the Court held that the plaintiff would have to prove that age was the "but for"

---

[11] *See Glover v. United States,* 531 US. 198, 205 (2001).
[12] 558 U.S. ___, 129 S. Ct. at 932 (Stevens, J., dissenting).
[13] *Pearson v. Callahan,* 555. US. __ , 129 S. Ct. 808, 812 (2009).
[14] 557 U.S.___, 129 S. Ct. 2343 (2009). In a "mixed motives" discrimination case, a plaintiff alleges that an adverse employment decision (e.g. a firing, demotion, or failure to hire), occurred for both legitimate and illegitimate reasons.
[15] 129 S. Ct. at 2353 n.2 (Stevens, J., dissenting).
[16] *Id.* at 2358 (Stevens, J., dissenting).

cause of the discrimination and would bear the evidentiary burden of production on each element.

- In ***Ashcroft v. Iqbal,*** the Court took it upon itself to consider an issue that both parties had conceded did not require review and had no bearing on the resolution of the case—but which effectively eviscerated an entire legal theory by which individuals whose rights have been violated by government officials can seek redress in court.[17] Iqbal sued senior government officials, including Attorney General John Ashcroft and FBI Director Robert Mueller, in what is called a *Bivens* action, for alleged constitutional violations during his detainment following 9/11. In their cert petition and again in their merits brief, the government defendants briefed the question whether a plaintiff's conclusory allegations that a high-ranking official knew of allegedly unconstitutional acts committed by subordinate officials is sufficient to state a claim. The defendants explicitly conceded that they would be liable if they had "actual knowledge" of discrimination by their subordinates and exhibited "deliberate indifference" to that discrimination. Nevertheless, the five Justices *sua sponte* reviewed the scope of supervisory liability—not just the pleading requirements, but the theory of liability itself—and severely restricted it. In dissent, Justice Souter called out the majority for abandoning the Supreme Court practice of not overriding a party's concession and of deciding an issue not properly briefed or argued.[18] By deciding the precise contours of supervisory liability without adequate briefing, Justice Souter wrote, "[t]he attendant risk of error is palpable," and the Court "denies Iqbal a fair chance to be heard on the question."[19] Accusing the majority of engaging in a "cursory" analysis that insufficiently considers the range of possible tests for supervisory liability, Justice Souter admitted, "I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one."[20]

- Another example of the five conservatives' willingness to grasp at issues which have not been properly presented or briefed is ***Horne v. Flores***.[21] Arizona state officials brought a motion to set aside a 2000 district court judgment holding that the state's plan for funding its English language learning program was arbitrary and therefore did not fulfill Arizona's duty under federal law to provide educational opportunity for Spanish-speaking students. When the district court reviewed this motion, the state parties argued that the judgment was no longer necessary in light of changed circumstances. In a 2009 decision, Justice Alito, writing for five Justices, remanded the case for the lower court to conduct a "proper examination" of four possible changed circumstances—even though it had already held an 8-day evidentiary hearing before coming to its decision to deny the motion. In dissent, Justice Breyer suggested that, no matter how it justified its analysis, the majority decided that the district court came to the wrong conclusion, not an uninformed conclusion. As Justice Breyer pointed out, the district court had actually considered and rejected three of the four possible changed circumstances, and "petitioners *nowhere raised* the remaining argument, which has sprung full-grown from the Court's own brow, like Athena from the brow of Zeus."[22] Justice Breyer continued, it is not the role of the Supreme Court to substitute its judgment for the district court's on "a host

[17] 556 U.S. __, 129 S. Ct. 1937 (2009).
[18] *Id.* at 1957-58 (Souter, J., dissenting).
[19] *Id.* at 1957 (Souter, J., dissenting).
[20] *Id.* at 1958 (Souter, J., dissenting).
[21] 557 U.S. ___, 129 S. Ct. 2579 (2009).
[22] 129 S. Ct. at 2622 (Breyer, J., dissenting).

of subsidiary fact-related determinations that warrant deference" under prevailing Supreme Court precedent.[23]

The Roberts Courts Makes Up New Laws Out of Thin Air

Another aspect of the Court's tendency to overreach is its penchant for crafting new laws out of thin air, without the apparent need to do so. In his dissent in *Horne v. Flores,* Justice Breyer warned of the effects of the Court's made-up laws: "a new set of new rules that are not faithful to our cases [ ] will create the dangerous possibility that orders, judgments, and decrees long final or acquiesced in, will be unwarrantedly subject to perpetual challenge, offering defendants unjustifiable opportunities endlessly to relitigate underlying violations with the burden of proof imposed once again upon the plaintiffs."[24]

- In Chief Justice Roberts's and Justice Alito's first major environmental decision on the Supreme Court, ***Rapanos v. United States,***[25] they joined a plurality opinion with Justices Scalia and Thomas arguing in favor of a very narrow reading of the term "navigable waters" in the Clean Water Act, thereby radically restricting the Environmental Protection Agency's ability to protect the clean water supply for as many as 117 million Americans.[26] The plurality decision—described by Justice Stevens, writing in dissent for four Justices, as displaying "antagonism to environmentalism"[27]—has effectively rewritten the Clean Water Act so as to impede EPA enforcement actions against the country's worst corporate polluters. According to Justice Stevens's dissent, the "impropriety of crafting these new conditions" on Clean Water Act jurisdiction is "highlighted by the fact that no party or amicus has suggested either of them.... [T]he plurality disregards ... its own obligation to interpret laws rather than to make them."[28]
- Following a 19-year legal battle over one of the worst environmental disasters in history, a divided Court dealt a blow to the victims of the Exxon Valdez oil spill by creating a new rule restricting the liability of a wrongdoer like Exxon. The Ninth Circuit Court of Appeals had already cut the jury's award of $5 billion in half, but that vast reduction did not satisfy the Supreme Court. In a 5-3 decision written by Justice Souter in ***Exxon Shipping Co. v. Baker***, the Court held that punitive damages cannot exceed compensatory damages in maritime cases, creating a new "1:1 ratio" rule[29]—and leaving tens of thousands of people affected by the oil spill with only a tenth of what the jury had awarded them. Dissenting in part, Justice Stevens wrote that "Congress, rather than this Court, should make the empirical judgments" expressed in the majority's opinion, rather than "embarking on a new lawmaking venture."[30] Justice Stevens maintained that evidence that Congress had affirmatively chosen not to restrict the punitive damages in this kind of case "favors adherence to a policy of judicial restraint"—but the majority failed to offer any justification for deviating from that policy and "ignore[d] the

---

[23] *Id.* at 2623 (Breyer, J., dissenting).
[24] *Id.* at 2620 (Breyer, J., dissenting).
[25] 547 U.S. 715 (2006).
[26] Charles Duhigg and Janet Roberts, "Rulings Restrict Clean Water Act, Hampering EPA," *The New York Times,* Feb. 28, 2010, *available at* http://www.nytimes.com/2010/03/01/us/01water.html?scp=3&sq=rapanos&st=cse.
[27] 547 U.S. at 799 (Stevens, J., dissenting).
[28] *Id.* at 810 (Stevens, J., dissenting).
[29] 554 U.S. ___, 128 S. Ct. 2605 (2008). Justice Alito did not participate in this case.
[30] 128 S. Ct. at 2635 (Stevens, J., dissenting).

particular features of maritime law that may counsel against imposing the sort of limitation the Court announces today."[31] Justice Ginsburg wrote a separate opinion dissenting in part, echoing Justice Stevens's comment on the "venturesome character of the Court's decision."[32] She also raised several questions prompted by what she described as the Court's "lawmaking," including a question that resonates in the wake of the 2010 oil spill in the Gulf of Mexico: "In the end, is the Court holding only that the 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed 'the constitutional outer limit?'"[33]

The Roberts Courts Reaches to Settle Questions Best Left to Factfinders

As a general principle of appellate review, the Supreme Court resolves questions of law and, when it decides that a lower court misapplied the law, it sends a case back to the lower court to review the facts of the case in light of the Supreme Court's decision. The Court's recent eagerness to decide factual issues that are more appropriately remanded to a lower court is another facet of its tendency to overreach.

- In ***Ricci v. DeStefano,*** the Court, in a 5-4 decision, went to unseemly lengths to guarantee a ruling in favor of the white plaintiffs asserting a Title VII employment discrimination claim.[34] Over the strong dissent of four justices, the conservative majority held that New Haven, Conn., engaged in intentional discrimination against white firefighters when it rejected the results of tests for firefighter promotions because they disproportionately excluded African American and Hispanic candidates. In a striking departure from principles that govern appellate review, the Court reversed the case outright, rather than following its usual practice of sending the case back to the lower courts to apply the facts to the new standard in the first instance. Although it announced a new standard that had never been applied in Title VII cases as the basis for its decision, it broke from its usual practice in such situations of sending the case back to the lower courts to apply the new standard to the facts of the case in the first instance. The majority appeared so eager to ensure that the white firefighters would prevail that it entered summary judgment itself, thereby denying New Haven the opportunity to produce facts that would satisfy the new standard.
- In ***Perdue v. Kenny A.,*** decided 5-4 in April 2010, the Court reviewed the legal question whether a certain measure of calculating attorney's fees may be increased due to superior performance only in extraordinary circumstances.[35] Although federal trial courts, not the circuit courts or Supreme Court, develop and decide the facts of a case, the majority in *Perdue* went on to consider the fact-intensive dispute over whether the circumstance of this case was in fact exceptional. In dissent, Justice Breyer called this factual determination outside the question presented and outside the institutional capacities of the Supreme Court, which cannot easily read the entire record. The Court, "which is twice removed from the litigation underlying the fee determination," Justice Breyer wrote, is not "properly suited to resolve the

[31] *Ibid.*
[32] *Id.* at 2639 (Ginsburg, J., dissenting).
[33] *Ibid.*
[34] 557 U.S. ___, 129 S. Ct. 2658 (2009).
[35] 559 U.S. ___, 130 S. Ct. 1662 (2010).

fact intensive-inquiry."[36] "Nor should we," he continued, "attempt to second-guess a district judge who is aware of the many intangible matters that the written page cannot reflect."[37]

- In another split decision issued in April 2010, ***Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,*** the dissenters accused the five conservative Justices of "prematurely tak[ing] up" an important question and "indulging in *de novo review,* overturn[ing] the ruling of experienced arbitrators."[38] In *Stolt-Nielsen,* a lower court had dismissed a class action claim because the parties' transactions were governed by contracts with arbitration clauses. Plaintiffs then filed a demand for class arbitration, and the arbitration panel unanimously decided that the contracts in this case permitted the group of plaintiffs to proceed as a class in arbitration. The Second Circuit affirmed the panel's decision to allow the class arbitration to proceed, but the five conservative Justices reversed. The majority appeared to be jumping at the chance to shut down a class arbitration. In dissent, Justice Ginsburg wrote that the majority "acts without warrant in allowing Stolt-Nielsen essentially to repudiate its submission" of the arbitration clause to the arbitration panel and "to gain, in place of the arbitrators' judgment, this Court's *de novo* determination."[39] She continued, "No decision of this Court, until today, has ever approved immediate judicial review of an arbitrator's decision as preliminary as the 'partial award' made in this case."[40]

Conclusion

In a striking number of cases, the Roberts Court has displayed a willingness to engage in "overreach" in order to favor powerful corporate interests at the expense of everyday Americans. By answering legal questions not properly asked or briefed by the parties and resolving factual questions more properly left to lower courts, the Roberts Court has appeared eager to issue decisions that protect powerful corporate interests. Despite their avowed public commitment to principles of judicial restraint, the Court's recent record of "overreach" suggests that certain Justices are willing to engage in judicial activism to fulfill their ideological goals.

For more information about the Roberts Court's pro-corporate agenda, see AFJ's report *Unprecedented Injustice: The Political Agenda of the Roberts Court,* available at http://www.afj.org/check-the-facts/supreme-court-watch/unprecedented-injustice-report-on-roberts-court-final.pdf.

****

For more information, or for questions about this report, contact the Alliance for Justice, www.afj.org, 202.822.6070

[36] *Id.* at 1678 (Breyer, J., dissenting).
[37] *Id.* at 1679 (Breyer, J., dissenting).
[38] 559 U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605, 626 (2010) (Ginsburg, J., dissenting).
[39] 176 L. Ed. 2d at 629 (Ginsburg, J., dissenting).
[40] *Ibid.*