

Cozen Currents: Is 2024 Going to be Déjà Vu All Over Again?

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President Biden launched his fourth and final campaign for president last week, this time as an incumbent. Biden's MO is to prove the naysayers wrong while pointing out he's the least worst option.

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This year has seen former President Trump expand his lead over the rest of the field in the GOP presidential primary. But there's still a lot of time left and there are still paths to victory for other candidates to exploit.

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The Supreme Court has concluded oral arguments for its current term, which means that more decisions will be coming soon, including in high-profile cases on environmental regulation, online speech, redistricting, and social issues.

Biden's Path to Reelection

Biden's Running. On the four-year anniversary of the launch of his 2020 campaign, President Biden last Tuesday released a campaign video launching his final campaign for president.

- Presidents have an incumbent advantage. Of the presidents who have run for re-election, 21 have won while 10 have lost.
- Biden's approval rating is below the threshold for recent incumbent victors. Dating back to President Truman, President George W. Bush had the lowest approval rating – 48 percent – for a winning incumbent. Biden's approval rating right now is in the low 40s.
- Presidential approval ratings can improve. Biden's approval rating is at a similar point as President Reagan and Obama at respective points in their first terms. Democrats may not fall in love with him, but they are largely falling in line to avoid a messy primary.
- Several macro dangers loom over the near term (e.g. government default, government shutdown, and economic recession). Biden also has to deal with the structural headwind of an Electoral College disadvantage. Despite Biden's 4.4-point popular vote victory over President Trump in 2020, just 44,000 votes in Arizona, Georgia, and Wisconsin separated the two from an Electoral College tie.

Biden's Proactive Case. When asked about his abilities, the 80-year-old Biden has a penchant for saying, "just watch me!" With a perennial chip on his shoulder, Biden is looking to prove his persona, politics, and policies can win re-election.

- Biden wants to prove he and his administration are competent. Goal number one is successful implementation of legislation like the Infrastructure Investment and Jobs Act, CHIPS and Science Act, and Inflation Reduction Act. Another goal is a robust regulatory agenda for populist wins to showcase on the campaign trail.
- Biden wants to prove small "d" democracy can work not just at home but abroad. Biden has a long-time personal interest in foreign policy and he has unfinished business in building and maintaining coalitions to deal with the war in Ukraine and the challenges with China.



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- Biden wants to present a vision for his second term besides how old he would be. To that end, it looks a lot like his first campaign, with the Build Back Better agenda being reprised in his FY24 budget proposal.

The Republican Negative Case. One of Biden's most repeated lines is "Don't compare me to the Almighty. Compare me to the alternative." He plans on saying that line many more times before Election Day next year.

- Incumbents, especially in times when economic sentiment is low, win re-election when they can frame the race as a choice, rather than a referendum on the last four years.
- Biden has found success in presidential politics after his first run in 1987 by being the least worst alternative. In 2020, he was the least worst alternative to Trump. In 2022, Democrats were the least worst alternative to several MAGA candidates. Early polls show Biden holds a double-digit advantage over Trump among voters who disapprove of both candidates.
- Trump's favorability ratings are just as low as Biden's, if not even lower. Biden and Democrats want to tag the GOP as "ultra MAGA." This is not just Trump but House Republicans, state-level Republicans, and the conservative courts. While MAGA squeezed out a win in 2016, it has proven an anchor for the GOP since with suburban voters and in parts of the Midwest and Sun Belt.

The Path to Beating Trump in the GOP Primary

Trumpism without Trump. So far, the primary path to beating former President Trump in the primary is to become Trump 2.0, someone with the same pizzazz but a little more polish.

- Trump flipped many traditional Republican positions on trade, foreign policy, and entitlements to help elevate his image of the GOP. Three-quarters of Republicans support either Trump or Governor Ron DeSantis (R-FL) for 2024, leaving the pre-Trump GOP in the minority.
- The current alternative to Trump is the Trumpy, populist candidate of DeSantis, who polls at about 24 percent, far ahead of any other non-Trump candidate.
- However, Trump still holds a commanding lead with white working-class voters, the beating heart of the party. DeSantis' recent difficulties in the national spotlight has raised the specter whether "Trumpism without Trump" is an oxymoron.

Can Reaganism Make a Comeback? Trumpism controls most of the base but not all of it. Some candidates are looking for an opening to provide an alternative GOP vision dating back to the halcyon days of Reaganism.

- Senator Tim Scott (R-SC), former UN Ambassador Nikki Haley, and former Vice President Pence are potential or current presidential candidates looking to catch fire with a different vision from Trumpism. It's a more optimistic vision, as well as one with pre-Trump priorities, like a more interventionist foreign policy, support for entitlement reforms, and an embrace of limited government.
- Scott and Haley are relative unknowns with GOP primary voters, giving them room to grow. But they need oxygen to catch fire, which is currently in short supply with Trumpism taking up all the space. Without a strategy to directly take on Trump, they are laying the groundwork for a traditional campaign with the hope of catching fire later in the election cycle if Trump and/or DeSantis falter.
- While the pre-Trump GOP struggles at the presidential level, it has more power in the traditional machinations of governing in Congress. Scott is a ranking member of the Senate Banking Committee and these figures have outsized power in developing legislation, holding committee hearings, and giving input to the regulatory process.

Outside Options. The Republican Party is not a monolith, and some candidates have hopes of capturing demographic segments with which they have connections.

- Evangelicals make up a majority of the GOP. Scott and Pence are open about their faith in connecting with this voting segment. But as of now, the less religious Trump holds a healthy lead with this group.
- Early state connections can give a boost in the primary cycle. Both Scott and Haley hail from

the early-voting state of South Carolina. Governor Chris Sununu (R-NH) is also taking a look at a run with New Hampshire being the first primary of the race. This gives them a place to shine, but also sets expectations high if they can't deliver the votes in their home state.

- There's a small contingency of anti-Trump voters in the GOP, but there's an outsized contingency of anti-Trumpers in the media and certain donor circles. Former Governor Asa Hutchinson (R-AR), a declared candidate, and former Governor Chris Christie (R-NJ), a potential candidate, are making the direct case against Trump and Trumpism. While that plays well in the media, "Never Trump" is not a winning mantra in today's GOP.

Decision Time for the Supreme Court

SCOTUS in the Home Stretch. The Supreme Court has reached the last phase of its 2022-23 term.

- Last week, the Court heard its last scheduled oral arguments of this term. Next, the Court will release decisions before breaking for the summer. As of April 30th, the Court has only decided 15 out of the 59 cases selected for oral argument this term, the lowest number of decisions reached at this point in the term in a century. Because so much work remains to be done, the Court will likely remain in session until just before the July 4th holiday. The justices typically wait to release opinions in the most high-profile cases until near the end of the term.
- This term is the Supreme Court's second with a 6-3 conservative majority. The confirmation of Justice Amy Coney Barrett to the seat formerly held by Justice Ruth Bader Ginsburg in October 2020 shifted the Court's composition from five justices appointed by Republican presidents and four appointed by Democrats to six and three, respectively. This ended Chief Justice John Roberts' role as a potential swing vote, a position on the Court he had occupied since the retirement of Justice Anthony Kennedy in 2018. Even if Roberts votes with Justices Elena Kagan, Sonia Sotomayor, and Ketanji Brown Jackson, considered the liberal faction, the conservative justices have enough votes to carry the majority.
- Conservatives' supermajority allows them to go farther in their rulings than what may have been possible in a 5-4 Court. For example, Roberts declined to join the majority opinion in *Dobbs v. Jackson Women's Health Organization* that overruled *Roe v. Wade*, instead arguing that he would have left *Roe* intact but allowed the Mississippi law restricting abortion at the center of the case to go into effect. The *Dobbs* decision suggests a willingness on the part of the conservative justices in the majority to overrule precedent when they believe it was wrongly decided.

Cases on the Power of the Federal Government. The right-leaning Court is considering several cases that provide opportunities for conservative justices to limit the power of federal agencies.

- *Sackett v. Environmental Protection Agency* will test the extent of the Clean Water Act's applicability to wetlands beyond rivers, lakes, and streams. Oral arguments last fall did not provide a clear picture of how the justices might rule. A majority of justices did not appear to back the Sacketts' lawyer's argument in favor of a narrow interpretation of the Clean Water Act. A majority of justices did raise the point that the government's reading of the law might be too vague, however.
- In *Axon v. Federal Trade Commission and Securities and Exchange Commission v. Cochran*, decided in April, the Court ruled that individuals can file legal challenges to these agencies' authority under the Constitution in federal court rather than going through the agencies' administrative processes first. This could make it easier for litigation targeting the administrative state to advance in the future.

Cases with Political Implications. Several cases on the Court's docket could reshape US politics for years to come.

- *Gonzalez v. Google* is the first Supreme Court case regarding tech companies' liability shield for user-generated content, known as Section 230. The case asks whether Section 230 covers only editorial decisions by platforms (e.g., removing content for violating standards) or algorithm-driven recommendations as well. In oral arguments in February, the justices appeared unlikely to issue a ruling that would broadly reshape Section 230. Justices from both

the conservative and liberal wings of the Court indicated confusion with the arguments offered by the plaintiffs' lawyer and questioned whether the Court should step in to change the interpretation of a law passed by Congress. This may only be the first major case on online speech for the Court, as justices are likely to consider cases about Texas and Florida laws next term.

- Two cases, *Moore v. Harper* and *Merrill v. Milligan*, could have huge ramifications for the 2024 election. In *Moore*, North Carolina GOP state lawmakers argued in favor of the "independent state legislature theory," which would allow state legislatures unchecked power over federal elections. Many fear that the independent state legislature theory would erode checks and balances in American government and introduce chaos. This case may be rendered moot by a recent North Carolina state Supreme Court decision, however. *Merrill* has to do with redistricting and the Voting Rights Act's ban on racial discrimination in voting. Oral arguments last fall suggested that justices may not go so far as to overrule past precedent on racial gerrymandering but may issue a narrower decision in favor of Alabama.
 - The Court is also considering cases on major social issues this term: *Students for Fair Admissions v. President and Fellows of Harvard College*, *Students for Fair Admissions v. University of North Carolina*, which deal with race-based affirmative action in college admissions, and *303 Creative LLC v. Elenis*, which focuses on LGBTQ rights, nondiscrimination rules, and religious liberty. The Court's conservative majority is likely to issue rulings that shift jurisprudence on these issues to the right. Such decisions could fuel a backlash that energizes voters on the left, as abortion proved to be a motivating issue for Democratic voters in last year's midterm elections and Wisconsin's state Supreme Court election last month. An ongoing legal battle over the Food and Drug Administration's approval of mifepristone, a drug used for abortion, is likely to reach the Supreme Court next term, just in time to become a major issue in the 2024 presidential election.
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