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THE COURT AFTER SCALIA

Kevin C. Walsh surveys the 2015–2016 Supreme Court term.

The term's defining event was the February death of Justice Antonin Scalia. Everyone wonders how his successor will affect the future of the Supreme Court. Very soon after his demise, political controversy erupted when Senate Republicans announced that no nominee to replace Scalia would be considered until after the 2016 election. Given that three more seats are likely to become vacant over the next two presidential terms, we have every reason to think that the present high-stakes maneuvering around Supreme Court appointments will only intensify.

Instead of speaking of the Court's new trajectory, it makes more sense to think of the current Court in a holding pattern. All things

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considered, this might not be so bad. We may regret some of the present Court's decisions. The last term featured missed opportunities to get federal law moving in better directions. But given the current state of our constitutional politics, treading water could be as good as it gets, at least for a while. Those of us who care about cultivating a higher quotient of legal integrity and intellectual honesty in our constitutionalism ought to entertain a perhaps heretical thought: No new justices for a spell might be better than adding anyone who could make it through our rotten confirmation process.

We begin with three big cases in which Justice Scalia's absence made no difference to the outcome. The first was an abortion case, *Whole Woman's Health v. Hellerstedt*. By a 5–3 vote, the Supreme Court held unconstitutional a Texas law that required abortion facilities to meet the high standards of ambulatory surgical centers and to have on staff a doctor with admitting privileges at a nearby hospital. Justice Breyer authored the opinion, but Justice Kennedy supplied the deciding vote. And he would have done that whether or not Justice Scalia had been there.

In the Texas legislation at issue in *Whole Woman's Health*, pro-lifers had deployed a classic progressive approach to deterring socially undesirable activity: adding regulatory burdens. It is an irony that today's "progressives" cheer the judicial defeat of this tactic. Using the due process clause to accomplish deregulation through litigation is exactly what their Progressive forebears railed against in the early twentieth century.

Proponents of using the Constitution to destroy legal protections for unborn human life have hailed *Whole Woman's Health* as the most important abortion rights case in more than two decades. This is an overstatement, to say the least. The decision was very fact-specific. At issue was how to apply the "undue burden" standard from the Court's 1992 decision in *Planned Parenthood v. Casey*, under which abortion-related laws are unconstitutional if they have the purpose or effect of placing a substantial obstacle in the path of women seeking abortion. Justice Breyer's opinion for the Court (joined by Kennedy, Ginsburg, Sotomayor, and Kagan) focused on the effects of the Texas rules and concluded that the medical benefits were insufficient to justify the burdens. This decision does little to alter the constitutional law of abortion because the effects of other state abortion laws may differ, and the undue burden standard is mushy.

As long as the Court maintains the course charted in *Casey* and refuses to overturn *Roe v. Wade* in its

entirety, "the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*, must be disassembled door-jamb by door-jamb," as Justice Scalia once wrote. *Whole Woman's Health* did not dismantle any part of the mansion, but neither did it place the mansion on firmer foundations. Now, as before, our constitutional law of abortion rests entirely on the shoulders of the five in the *Whole Woman's Health* majority. And three are approaching the end of their time on the bench. Justice Breyer is seventy-eight; Justice Kennedy eighty; and Justice Ginsburg eighty-three. In the not-too-distant future, we should expect desperation to set in on the other side as abortion proponents eye actuarial tables. The *Roe* defenders are aging, not just on the Court, but in the wider society as well; younger generations are less supportive of abortion rights than when *Roe* was decided. As long as the five *Whole Woman's Health* justices remain on the bench, though, there is little hope for progress in undoing the Court's abortion extremism. And that means there is little upside right now in adding another abortion-law dissenter.

Justice Scalia's death also made no difference in the outcome of the affirmative action case *Fisher v. University of Texas*. This was a 4–3 decision in which Justice Kennedy voted with Ginsburg, Breyer, and Sotomayor, while Roberts, Thomas, and Alito dissented. (Kagan was recused because of earlier involvement with the case as a government lawyer.) The case was on its second trip to the Supreme Court, leading Court watchers to refer to it as *Fisher II*. A few years earlier, the Court seemed poised to hold unconstitutional the University of Texas's racial preference system. But after several months of post-argument gestation, the opinion in *Fisher I* sent the case back down to the appellate court for further consideration of the details of the university's admissions policies under a more demanding standard of review.

In *Fisher II*, the Court surprised many by upholding race-based affirmative action, with Justice Kennedy writing the opinion for the Court. Justice Kennedy's vote to approve racial preferences marked a turnabout from a track record of more than twenty-five years. What happened to the justice who wrote in 1989 that "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause"? Or the Justice Kennedy who blasted his colleagues' upholding of race-based affirmative action in the university law school setting in 2003, writing that "preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to

destroy confidence in the Constitution and in the idea of equality”?

The primary criticism Justice Kennedy leveled against his affirmative action–approving colleagues in that earlier case—that they refused “to apply meaningful strict scrutiny”—applies with equal or greater force to his opinion in *Fisher II*. A dissent from Justice Scalia in *Fisher II* could have blown Justice Kennedy’s rationale to pieces with Kennedy’s own words from more than twenty-five years of opinions criticizing government deployment of racial classifications. But if Justice Scalia had been on the Court for the decision of *Fisher II*, there almost certainly would have been the same result, although without any opinions. Justice Kagan’s recusal would have left the Court at eight justices, and the 4–4 division following from Justice Kennedy’s course-reversal would have resulted in affirmance of the lower court decision allowing the university’s affirmative action program to stand.

While *Fisher II* was a surprise given the content of Kennedy’s opinions on racial classifications throughout his judicial career, maybe it should not have been. According to Joan Biskupic’s reporting on the Court’s internal deliberations the first time around in *Fisher I*, Justice Kennedy had initially drafted an opinion holding the university’s admissions practices unconstitutional. But he retreated in the face of an impassioned, highly personal draft dissent about the role of race by Justice Sotomayor.

Although Sotomayor’s emotional appeal was successful in *Fisher I* and *Fisher II*, a similar tactic had no effect this year in *Utah v. Strieff*. By a 5–3 vote, with Justice Breyer leaving his normal voting bloc to vote with Roberts, Kennedy, Thomas, and Alito, the Court expanded an exception to the exclusionary rule known as the attenuation doctrine. The basic thrust of the exclusionary rule is that in criminal prosecutions, the government cannot use evidence that is illegally obtained. But this rule has exceptions. One is attenuation, which applies when the unlawful act by law enforcement is sufficiently remote from the finding of the evidence to diminish (attenuate) the unlawful act’s significance.

In the case before the justices, the police had stopped Edward Strieff in circumstances assumed by the Court to be unconstitutional. But after uncovering an outstanding warrant for his arrest during the stop, the officer arrested him on that warrant, and then discovered illegal drugs in a routine search that accompanied the arrest. The Court held that the discovery of the arrest warrant changed the nature of

the encounter, and the subsequently discovered illegal drugs could be used as evidence against Strieff.

Justice Kagan and Justice Sotomayor wrote dissents, which Justice Ginsburg joined. Kagan’s dissent once again reveals her mastery of the genre, which can be admired even by those who disagree with her vote. More notable, however, was a portion of Justice Sotomayor’s dissent that even Justice Ginsburg refused to join. “Writing only for myself, and drawing on my professional experiences,” Sotomayor wrote, “I would add that unlawful ‘stops’ have some consequences much greater than the inconvenience suggested by the name.” Although Strieff is white, “it is no secret that people of color are disproportionate victims of this type of scrutiny.” Sotomayor then charged that the Court’s decision “implies that you are not a citizen of a democracy, but the subject of a carceral state, just waiting to be cataloged.” She alluded to critical race theorists and the Black Lives Matter movement. Those routinely targeted by police “are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere,” and “until their voices matter, too, our justice system will continue to be anything but.”

To his credit, Justice Clarence Thomas did not take the bait but declined to respond in the opinion for the Court that he authored. An in-kind rebuttal would have served no purpose proper to the Supreme Court’s exposition of the law. Justice Sotomayor’s legally gratuitous—and gratuitously explicit—invocation of the distinctive language of a social reform movement is highly unusual for a judicial opinion. As it should be. More about signaling than suasion, such language says “I’m on your side”—to some, anyway. Sotomayor’s stance is perfectly acceptable for an activist, but not for a judge, who must strive for impartiality. A judge should be above the fray and under the law; she should not exaggerate to induce outrage in her audience. And one wonders: If the position adopted by the Court majority about the exclusionary rule truly implied the grave racial injustices announced by Justice Sotomayor in the solo portion of her dissent, why did the Obama administration argue as a friend of the court on Utah’s side in *Strieff*?

When judges make emotional appeals to personal experience in their opinions, they also invite parties to make emotional appeals to personal experience in their arguments to the judges. Just this past term, *Whole Woman’s Health* featured no fewer than three amicus briefs built around personal abortion narratives gathered from more than one hundred legal professionals, four Texas legislators, and several

minors. The allure of emotivism explains much of the rise of emotional appeals in our culture generally. But in legal cases before the Supreme Court there is a special incentive. Justice Kennedy, often the swing vote in crucial cases, has shown himself susceptible to the sway of sentiment. This admittedly does not always send him in the same direction, which is unsurprising given the unprincipled nature of arguments based on personal experience. In his opinion upholding the federal partial-birth abortion law some years back, Justice Kennedy relied upon a friend-of-the-court brief containing personal testimonies about post-abortion regret. But by and large, appeals to personal experience send him further to the left (and higher into the atmosphere). Last year's same-sex marriage case, *Obergefell v. Hodges*, provides a vivid example.

For readers of this journal, the most salient case where Scalia's absence was decisive is *Zubik v. Burwell*. More commonly known as the Little Sisters of the Poor case, it was in fact a collection of cases consolidated for briefing, argument, and decision because they all involved the same issue: Does a federal statute known as the Religious Freedom Restoration Act (RFRA) prohibit the federal government from imposing severe financial penalties on religious nonprofits who do not provide coverage in connection with their employee benefit plans for the full range of FDA-approved contraceptive drugs and devices?

With Justice Scalia's death just over a month before oral argument, the Little Sisters of the Poor case went from a likely 5-4 decision favoring religious freedom to an 8-0 decision with a practical meaning still to be worked out. After oral argument, the Court issued an unusual supplemental briefing order asking the parties to address the possibility of a compromise. Then, upon considering the new material submitted to the Court, the justices said that the parties' supplemental briefs indicated some shifts from where the parties had started. This, in turn, led them to send the case back down to the lower courts for reconsideration. In essence, the Court's ruling erased lower court losses for the religious nonprofits while explicitly asserting that its decision set no precedent for the application of RFRA.

In the meantime, the federal government and religious nonprofits mull possible solutions while the cases stay on ice in the courts. As counsel for the Little Sisters of the Poor, I view this Supreme Court outcome as better than what otherwise could have been a 4-4 split leaving in place the bad decisions of the lower courts. And the supplemental

briefing procedure helped illustrate the government's unnecessary aggressiveness as litigation has dragged out for more than three years. The administration's supplemental briefing confirmed what has been obvious all along, which is that government hijacking of religious employers' employee benefit plans is unnecessary to accomplish what would be at most marginal advancement of the supposed government interest in easier access to contraception.

Another case in which the administration got off easier than it likely would have if Justice Scalia had been on the bench was *United States v. Texas*, which concerned executive power and illegal immigration. It ended in a 4-4 tie. Several states had brought suit against the Obama administration's policy of halting the deportation of certain classes of people who are in the United States illegally. The claim was that the administration did not have the authority to suspend the enforcement of existing laws. Lower courts found against the administration. Although these lower court decisions were made on fairly narrow, administrative law grounds, they prevented implementation of the administration's policies.

When the Supreme Court took the case, it expanded the issues for review, adding the constitutional separation of powers into the mix. Did the administration's policies of declining to enforce existing law amount, in effect, to a change in the law of the sort that only Congress can undertake? Were these policies inconsistent with the president's constitutional duty to take care that the laws are faithfully executed? There was also a serious question whether the states had legal standing to bring their case forward in the first instance.

Given the configuration of issues, it is hard to know for sure how the case would have been decided by the Court had Justice Scalia been alive. Some of the justices sympathetic to arguments that the Obama administration overstepped constitutional limits may have decided the states lacked legal standing to file suit in the first place. Or, in order to stitch together a majority, the decision might have turned on the administrative law grounds relied upon by the lower courts.

My best guess is that the Obama administration dodged a constitutional bullet. There's already a great deal of boundary-pushing lawmaking going on in the executive branch. A constitutional rebuke by the Supreme Court in this case would have indicated that the justices are willing to consider other challenges. Meanwhile, the states probably lost an opportunity to secure a ruling on state standing that

would have put them on firmer ground for future challenges to federal regulation. Each of these possible rulings would have been very significant for the longer term. For the short term, though, the evenly split vote maintains the lower court rulings, and the administration cannot go forward with its policies.

The last big 4–4 decision to consider, *Friedrichs v. California Teacher Association*, was a First Amendment challenge to compulsory union dues for members of public-sector labor unions. At issue were so-called “fair share” fees to cover costs of collective bargaining, which had to be paid even by employees who objected to the union’s advocacy. A new teacher, for example, would have to pay his “fair share” fee even if the teachers’ union argues for a “last in, first out” policy for eliminating positions. Although the compulsion to subsidize objectionable speech presents an obvious First Amendment problem, an earlier Supreme Court decision green-lighted such dues by saying the speech burdens were justified by the benefits of public-sector labor unions. In recent cases, a five-justice majority, always including Scalia, had raised very grave doubts about this precedent without overturning it. This time they appeared ready to do so. But Scalia’s death scuttled that outcome.

The other 4–4 cases were *Hawkins v. Community Bank of Raymore* and *Dollar General Corporation v. Mississippi Band of Choctaw Indians*. *Hawkins* was about the legality of a federal regulation prohibiting lenders from requiring loan guarantees from the spouses of loan applicants. *Dollar General* was about the jurisdiction of tribal courts to decide civil tort claims against nonmembers. The Republic will endure without immediate Supreme Court resolution of these issues.

Justices also vote on whether or not to allow cases to come before the Court for final review. Here Scalia’s absence was painfully apparent when, after his death, the Court decided not to consider *Stormans, Inc. v. Wiesman*. A family pharmacy—Ralph’s Thriftway—and two individual pharmacists sought protection from regulations that require them to provide Plan B and other “emergency contraceptives” believed to have an abortion-inducing effect on a fertilized ovum. These petitioners sought the freedom to refer customers to other pharmacies or pharmacists. They won in the trial court, showing that the drugs are stocked by thirty other pharmacies within five miles of Ralph’s, that none of Ralph’s customers has ever been denied timely access to emergency contraceptives, and that pharmacists often refer customers to other pharmacists for

other reasons without customer inconvenience. But on appeal, the Ninth Circuit erased that win, holding that the pharmacists had no constitutional right to exemption from the regulations. This case tested the limits of free exercise jurisprudence because what looked on its face to be a set of neutral and generally applicable pharmacy regulations had in fact been designed to go after conscience-based objections.

The petitioners in *Stormans* came up just one vote short in seeking review, a vote Justice Scalia almost certainly would have supplied. The order denying review was accompanied by a notable dissent written by Alito, and joined by Roberts and Thomas. Alito’s dissent highlights the dangers posed by the Ninth Circuit decision: “If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.”

With the important religious freedom case of *Trinity Lutheran Church v. Pauley* set to be decided in the upcoming term, these are discomfiting words. Trinity Lutheran applied for a scrap rubber grant from Missouri to make its nursery school playground safer. The church met the criteria for the state-run scrap rubber grant program (yes, there is such a thing). But Missouri is one of more than thirty states with constitutional amendments prohibiting any aid to religious institutions, including some adopted largely for anti-Catholic reasons during the late nineteenth century. Thus, Trinity Lutheran’s application for a grant to subsidize the installation of shredded car tires in its playground was rejected. Legal challenge to that denial has thus far failed.

Generally speaking, the Supreme Court has held that when it comes to government benefits and burdens, states must be neutral toward religion. But in *Locke v. Davey* (2004), the Supreme Court said there was some “play in the joints.” A concern to prevent the establishment of religion could sometimes justify the exclusion of religious believers or institutions from certain government benefits without running afoul of the First Amendment’s protections. The *Trinity Lutheran* case probes the boundaries of this “play in the joints” concept, which lower courts have understood in varying ways. At issue is the extent to which states can disfavor religion without running afoul of the neutrality requirement of the free exercise clause.

Before Justice Scalia’s death, the prospects for Trinity Lutheran in this case looked more promising than they do now. Scalia was a dissenter in *Locke v. Davey* and, in this case, would likely have sought to construe

exception from the neutrality requirement narrowly. But perhaps even without Scalia the Court will rule in favor of Trinity Lutheran's nursery school and the kids who use its playground. Any such decision would probably be very narrow, however, as it will likely depend on obtaining the vote of Ginsburg, Breyer, Sotomayor, or Kagan. These four justices have tended to vote as a bloc in religious freedom cases.

In addition to voting on whether or not to hear cases, the justices vote on whether or not to issue stays. As the name suggests, a "stay" is an order that prevents something from happening while the matter is being adjudicated. The standards for obtaining a stay from the Supreme Court are stringent, and while a stay is not a ruling on the merits, at least five justices typically must agree that the case is likely to be decided in favor of the party seeking the stay.

One important grant of a stay application, decided 5–4 just a few days before Justice Scalia died, stopped the implementation of the Obama administration's Clean Power Plan while legal challenges to it remain under review in the D.C. Circuit. This stay protects utilities and others from having to invest hundreds of millions of dollars to begin complying with the regulations they are challenging in court. The 5–4 split among the justices tracked an ideological split we often saw on the Court in recent years.

Another important stay, decided 5–3, concerned a lower court ruling requiring the Gloucester County (Virginia) School Board to allow a biological female with a male gender identity to use the high school's male restrooms during the upcoming school year. The decisive vote on this application was Justice Breyer's. He provided what is known as a "courtesy fifth." It takes only four votes for the Supreme Court to decide to review a case, but five votes to grant a stay. So, as a courtesy to the four justices likely to vote in favor of hearing the case (Roberts, Kennedy, Thomas, and Alito), Breyer supplied a fifth vote on the stay. This stay means the school board will not have to change its restroom policy heading into the new school year while the Supreme Court decides whether or not to take its case.

Breyer would probably not have joined with Roberts, Kennedy, Thomas, and Alito in this stay grant on a nine-justice Court that also included Scalia. But expect to see more of this kind of thing in the coming term. The Court must adjust to its circumstances, and the justices will entertain trade-offs that can break a potentially embarrassing 4–4 deadlock. The voting on this stay application gives us a clue about how the justices may operate with

an even number of them. There is no equivalent of a "courtesy fifth" when it comes to deciding cases and joining opinions, to be sure, but there are many tools for principled compromise available to the justices.

When we heard of Justice Scalia's unexpected death, we all knew its import for the future of our legal system. Liberals and conservatives alike recognized that without his presence, the Supreme Court's trajectory will change, especially if he is replaced by someone nominated by a Democratic administration. As we wait to see who survives the increasingly rancorous politics of judicial appointment, nobody really knows what this coming term will bring. I expect, though, that the eight-justice Supreme Court will operate well enough.

An eight-justice Court makes it harder to push through consequential rulings with narrow majorities. That's not so bad. As others have argued, less ambition for broad rulings, lower stakes, and the need for compromise in closely divided cases can be good for our law and for the Court. Sure, there may be some 4–4 decisions that frustrate us. But if this term is any indication, these split decisions will not be momentous in what they do to the law. If anything, an eight-justice Court and the possibility of split decisions that maintain the status quo could bring more stability to our law.

And we may be stuck with an eight-justice Court for a while because of the fraught politics that now attend Senate confirmation of Supreme Court nominees. On this subject, Justice Scalia has proven prophetic. On a number of occasions, he drew a direct connection between the Court's living constitutionalism—dependent as it is on perceived shifts in public opinion—and the deterioration of the confirmation process. "I hate to think what the next Supreme Court nomination hearings are going to be like," he said in 2003, "because what both sides are looking for are judges who agree with them as to what the new Constitution that they create ought to be. It's a very sad ending to the game."

Justice Scalia was far-seeing in other ways as well. Some of his signature opinions were dissenting jeremiads: lamentations about the state of the law, prophecies of decline due to unfaithfulness, and calls for renewal and turning back. But we have lost our judicial Jeremiah, and there is no replacing him.

Perhaps we should make a virtue of necessity, and just not try. Given that our next president will be Donald Trump or Hillary Clinton, an extended halt on Supreme Court confirmations may be the best

course of action. If nothing else, it could serve as a wake-up call to the justices on the Court to appreciate the political consequences of their legal formlessness on issues important to the American people.

Even better: Congress should move to reduce the size of the Supreme Court to seven. The Constitution leaves the number of seats on the Supreme Court up to Congress, which first set the size of the court at six. Our country went for almost fifty years before there were nine seats on the Court. For a short period, Congress moved the size up to ten, then back down to seven, before settling at nine in 1869.

It's unlikely that any president would sign legislation decreasing the size of the Supreme Court on his or her watch. But as a practical matter, simple refusal by the Senate to act could accomplish the same thing. Some might condemn this as obstruction. But in the wake of a presidential election like this year's, in which the main virtue of a vote for either candidate is that it is not a vote for the other one, nobody should

be permitted to claim a mandate to shape the future of the judicial branch. Inaction might be a fruitful way of using inertia to accomplish a reform agenda for the Court.

Going down to seven seats would take care of the Scalia vacancy. And the next vacancy would vanish as soon as it appears. There would be no problem of tie votes (to the extent that is a problem), and seven justices have the capacity to do the work currently done by nine. By historical standards, the number of decisions is at a record low and support staff is at an all-time high. The justices also pretty much take the whole summer off. Practicalities aside, one can hope that congressional action to impose a "cooling off" period on appointments to the Supreme Court would promote judicial introspection. And that, in turn, might lead the justices to cut back on finger-to-the-wind adjudication that discredits our legal system and contributes to our dysfunctional confirmation process. ■

THE TEN SUGGESTIONS

When Moses came down from the mountain and cloud
bearing the Ten Commandments in hand
and saw the calf adored by the crowd
and smashed the tablets of God's command
one of the Hebrews quick-witted and proud
bent and wrote the Ten down in the sand.

—*J. A. Gray*