
Tilting the scales

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On February 13th, US Supreme Court Justice Antonin Scalia passed away, radically altering the makeup of the America's highest court and raising the stakes for the 2016 presidential election. Mr Scalia leaves behind a Court that would be almost unrecognizable as the one he joined when he was appointed by President Ronald Reagan in 1986. His death also leaves the Court with the potential to hand down 4-4 ties. In such cases the ruling of the lower court is upheld in its own jurisdiction but sets no precedent for future cases or for the jurisdiction of other courts. Indeed, the Court has already ruled 4-4 in a number of cases since Mr Scalia's death, most notably in a [case](#) concerning public sector unions in late March.

Mr Scalia's greatest legacy will perhaps be the diffusion of his constitutional interpretation theory, originalism. Originalism is a branch of textualism, and originalist judges are primarily concerned with the "[public meaning](#)" of the text of laws germane to their cases. In Mr Scalia's characteristically precise diction, the constitution is "enduring". Originalism was a loosely-organized set of interpretive principles when Mr Scalia began his law career; he codified the theory and brought it to its current prominence almost singlehandedly. Like all legal philosophies originalism has its flaws, and as Mr Scalia aged he sometimes

strayed from his philosophical grounding: Mr Scalia maintained that *Brown v. Board of Education* was decided correctly, despite that at the time of the 14th Amendment's authorship it surely held no bearing on school segregation; in *Bush v. Gore*, it is almost impossible to root a judgment in originalist theory given that the 14th Amendment (at its inception) was not understood to apply to voting at all. In cases such as these, Mr. Scalia sometimes skirted the questions raised about his theory, calling himself an "originalist and a textualist, not a nut".

Justice Scalia's death has triggered an incipient succession crisis, and his replacement will likely alter the political makeup of the Court more than any appointment since that of Justice Clarence Thomas in 1991. In theory, President Barack Obama now has the opportunity to appoint a left-leaning Justice and create a powerful liberal majority within the Supreme Court. Regardless of who Mr Scalia's eventual replacement is, they will almost certainly shift the Court to the left; there are few judges in America more conservative than Mr Scalia.

Any Supreme Court nominee must be approved by the Republican-controlled Senate. Even before Mr Obama nominated [Merrick Garland](#), Republican senators from Senate Majority Leader Mitch McConnell to presidential-hopeful Ted Cruz had formed a bloc against any Obama nominee, arguing that the 2016 presidential election should effectively serve as a referendum for the next Supreme Court justice. This would mean holding the appointment of the next justice until after the inauguration of the winner of the 2016 election, an unprecedented delay in American history. President Obama's nomination of Mr Garland is, as much as anything else, a calculated political move aimed at exposing the hypocrisy of the Republican position. Just days before the nomination, Orrin Hatch, a Republican senator, [lauded](#) Mr Garland as an example of a moderate President Obama would be too liberal to nominate.

Mr Scalia's death has already had profound reverberations in the Court's decisions this term and will deeply affect a number of major cases which are slated to be decided by June. In *Friedrichs v. California Teachers Association*, the Court [split 4-4](#) and allowed public sector unions to continue compelling public sector employees to pay union dues. Rebecca Friedrichs, a public school teacher in California, is not a member of a union and does not identify as a Democrat. However, she was compelled to pay mandatory union fees as a condition of her employment, an experience shared by many public sector employees. Ms Friedrichs argued that since over a third of the union dues she was compelled to pay were spent lobbying for Democrats, the government coercing her into paying these dues violated her right to free speech. The Supreme Court was expected to rule 5-4 in favor of Ms Friedrichs, but with Mr Scalia absent, the 4-4 decision upheld the lower court's ruling - continuing the practice of mandatory union dues.

Another major upcoming case is *Whole Woman's Health v. Hellerstedt*, which centers on whether the strict abortion restrictions in Texas constitute the “undue burden” that was expressly prohibited in *Planned Parenthood v. Casey*. In this case, the lower court ruled in favor of Texas, so a 4–4 tie will uphold the restrictions. However, it no longer sets a precedent – that is, the ruling will apply only to Texas, making no statement about similar abortion restrictions in other states.

Finally, the Court was set to hand down a definitive ruling on affirmative action this term by settling *Fisher v. University of Texas*. Mr. Scalia’s position was made known after he made [comments](#) arguing that underachieving students are better served at inferior universities, an idea known as the mismatch theory. The Supreme Court has already determined that racial quotas and numerical bonuses violate the 14th Amendment, but affirmative action is a permissible tool if it uses holistic criteria. Justice Elena Kagan recused herself from the case, and with Mr. Scalia’s conservative vote now gone, Justice Anthony Kennedy has the power to decide the future of affirmative action in the United States.

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