



Supreme Court Nominations: Filling Justice Scalia's Seat and Beyond

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I. General Principles

Since the founding of this Republic 240 years ago, it has been understood that first and foremost governments are put in place to secure the inalienable rights bestowed upon us by God, our Creator. These rights cannot be taken away from any American by any government. Our Constitution was adopted to preserve these rights and to institute a just government that will also provide those benefits enumerated in the Preamble to the Constitution.

The primacy of law-making by our elected representatives and the adherence to the rule of law by the executive branch form the keystone of our governmental framework. Over the past two hundred years, the power of the judiciary has grown to the point that it now threatens the separation of powers between the branches. The power of the legislative branch to make our laws has been challenged most directly by the courts. We must now confront a crisis of governance created by our judiciary and, more specifically, by the Supreme Court, which have grasped powers they were never intended to possess. In the period since the New Deal era, the Supreme Court has become an almost unchallengeable, unreviewable super-legislature. The Founding Fathers did not risk their lives, their fortunes, and their sacred honor so that someday we would be ruled over by an oligarchic, self-aggrandizing body of lawyers.

The late Justice Antonin Scalia was one who was ever cognizant of the danger of an activist Court. Just last year when the Court imposed same-sex marriage on the nation in *Obergefell v. Hodges*, Justice Scalia wrote in dissent:

"I write separately to call attention to this Court's threat to American democracy ... Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court ... This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."¹

Justice Scalia himself would agree that outstanding judicial nominees should recognize limits to the judicial power created by Article III of the Constitution. Such nominees for all federal judicial positions, including the U.S. Supreme Court, should only be those who respect the judiciary's proper place within the Constitution's governmental framework – one that recognizes the irreducible role of the States (federalism) and the irreducible role of the Congress

and the President (separation of powers). We owe him no less than replacing his empty seat with a justice who holds to the same philosophy.

When interpreting the Constitution, members of the judiciary must look first to the text of the Constitution, and their decisions must conform to the Constitution's original meaning as understood at the time a constitutional provision's language was adopted. Similarly, those interpreting statutes and regulations must look to the text of the documents and assess them in light of their meaning at the time they were enacted or adopted.

The legitimacy of our government lies in the fact that it expresses the will of the American people through their elected representatives. Judicial activism undermines the sovereignty of the American people, the rule of law, and a proper understanding of the Constitution. This is true whether it occurs through an inappropriate reliance on foreign law, the Court's projections of "popular opinion," or some other means by which the Court imposes its policy preferences on the law.

Since the late nineteenth century, Congress has ceded ever-growing quantities of legislative authority to executive branch administrative agencies. Such governmental entities were never envisaged by the Framers, and it is only with their creation and continued existence that our vast administrative state would even be possible. These agencies now produce unfathomable quantities of costly rules that typically have the force of law on par with statutes enacted by Congress. Regulations can only be known by the regulated in some hypothetical sense, and enforcement actions are often arbitrary and excessive. In short, the due process rights of Americans have been gutted by the regulatory state as the courts have enunciated elaborate doctrines of "deference" that place bureaucratic judgments and actions beyond the reach of judicial review and any reasonable definition of justice.

With respect to the administrative agencies, the best judicial candidates will be those who seek to reduce the excessive levels of deference that federal courts have granted federal agencies in interpreting the statutes that pertain to them, especially provisions related to the jurisdiction or scope of the agency's power. Having no judicial check on bureaucratic self-assessments of their own legislative and regulatory jurisdiction provides a dangerous invitation for ever-expanding governmental expansion. What bureaucracy will limit its own power? To ask the question is to answer it.

Having briefly laid out a set of principles to guide a conservative-originalist assessment of judicial candidates, we will now examine those cases concerning FRC's issue set that will arise or are likely to arise at the Supreme Court in the near future – the outcome of which will be clearly affected by the judicial philosophy of Justice Scalia's replacement on the bench.

II. Specific Cases and Issues

1. Cases and Issues Currently Before the Court

The Court has already agreed to hear cases concerning transgender rights and religious freedom; specifically, whether sex discrimination protections include transgender protections, and whether religious entities can be excluded from public programs just because they are

religious. The Court will decide these cases within the next six months, and they will be most immediately impacted by the new justice – many in a 5-4 vote.

Transgender Rights

In *Gloucester County School Board v. G.G.*, the Supreme Court will decide whether to allow the Department of Education’s specific interpretation of Title IX and 34 C.F.R. § 106.33, which provides that sex-separated facilities must “generally treat transgender students consistent with their gender identity,” and whether a federal agency letter on the same topic should receive deference.²

The case is more broadly about whether a local school board is free to determine that students must use the bathroom of their biological sex, and whether sex can be reinterpreted to include gender identity. The Obama administration has been hinting at the revocation of federal funds if localities such as Gloucester County take this course of action.³ While this case would become moot if President-elect Trump directs that such action must cease in his administration, attempts by legal activists to shoehorn “gender identity” into definitions of “sex” will persist. A justice who looks strictly at the text of the statute will not shoehorn “gender identity” into “sex” – and that is the type of justice we should have replacing the late Justice Scalia. It will be critical to have a justice of the same mold because this case will likely be a 5-4 decision with the replacement justice breaking the tie (assuming Justice Kennedy votes with the constitutional conservatives on the Court).

Religious Freedom – Participation in the Public Square

In *Trinity Lutheran Church v. Pauley*, the Court will decide whether the First Amendment permits a state to exclude a church from a state grant program just because it is religious.⁴ This case is important because the First Amendment does (and should) protect religious entities from being discriminated against when they play a part in the public square. Yet many academic and liberal elites (and judges) may think this should be permitted. It is important that we do not have such thinking on the Supreme Court.

Thankfully, President-elect Trump’s list of potential Supreme Court justices is composed of candidates who understand the First Amendment and the need to check government power against private citizens, and they will almost certainly rule for the church in this case (and positively affect others impacted by this ruling). While this case should be clear to the current justices, we can’t know for sure how they will rule. If they decide it as they did the similar case *Town of Greece v. Galloway* (which also concerned expressions of religion in the public square),⁵ the justice replacing Justice Scalia will be breaking the tie with his or her vote. Again, it is crucial we have a good justice replacing Justice Scalia.

2. Issues Which May Be Heard By the Court

While the Court has not yet decided to hear them, it may take up more religious freedom cases which involve questions of whether wedding vendors have a right to opt out of same-sex weddings (do First Amendment rights trump sexual orientation nondiscrimination laws?), and whether the federal Constitution bars states from prohibiting government aid to religious

schools under the “Blaine Amendments” to state constitutions – another example of religious entities being marginalized in the public square just because they are religious.

Religious Freedom – Wedding Vendors

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the issue is whether a state can force a small business owner to bake a cake for a same-sex wedding under sexual orientation nondiscrimination laws, or whether the baker’s First Amendment free speech and free exercise rights protect his ability to opt out of such forced compliance.⁶ Even if the Court does not take up this case, the issue will arise again in the future. There are multiple small business owners who have already been penalized by different states for refusing to use their talents to further same-sex weddings.⁷ They should be protected by the First Amendment’s free speech and free exercise protections, but lower courts too deferential to state authority and hostile to religious freedom have often ruled against them.

It will be very important to have a nominee with a high view of the First Amendment and healthy suspicion of government power replacing Justice Scalia’s seat and perhaps other seats. Such small business owners should be protected, and many more will need it in the years to come. We don’t know how the Court will decide this case, but if *Boy Scouts of America v. Dale* is any indication (where the Supreme Court decided in a 5-4 vote that First Amendment freedom of association protections prevailed over a state sexual orientation nondiscrimination law),⁸ the justice replacing Justice Scalia will once again be casting the tie-breaking vote.

Religious Freedom – Participation in the Public Square

Additionally, multiple cases are pending before the Court that involve “Blaine Amendments” from several state constitutions, which are being used to discriminate against religious institutions in the use of state resources. Like in *Trinity Lutheran*, the issue in *Douglas County School District v. Taxpayers for Public Education* and *Colorado State Board of Education v. Taxpayers for Public Education* is whether such state level discrimination is barred by the federal Constitution.⁹ Indeed, it should be, and we should look for a nominee who will hold to a robust view of federal constitutional rights which prohibits the state from discriminating against religious entities in the public square. These cases may fall along the lines of the 5-4 vote in *Town of Greece v. Galloway*, which contained a similar issue. It is crucial to have a justice in the mold of Justice Scalia to see a win for religious freedom in these cases.

3. Issues Not Currently Before the Court but Which May Come Up

Of course, there are other issues which have been recently decided by the Court but which are likely to arise again in the near future. They include the ability to regulate abortion (and whether this right exists at all), religious freedom rights to opt out of the federal government’s Health and Human Services (HHS) contraceptive mandate which coerces involvement in providing drugs and services which can function as abortifacients, and whether pharmacies can be forced to dispense such drugs at the state level and violate their consciences despite the protections of the First Amendment. These issues are all likely to come before the Court at some point, and it will greatly matter what kind of philosophy is held by the justices who decide these issues.

Abortion

Just last year in *Whole Woman's Health v. Hellerstedt*, the court ruled 5-3 that a Texas law improving abortion safety standards at abortion clinics, and requiring abortion doctors to have hospital admitting privileges, was an unconstitutional violation of a woman's right to choose abortion.¹⁰ While replacing Justice Scalia with a justice of the same mold will still result in a 5-4 loss for the state here, if two justices are replaced from President-elect Trump's list, this result will almost certainly go the other way. Why?

Because not only would nominees from the list look at abortion as not a federal constitutional right at all under an originalist understanding, they would not read prior abortion cases like *Planned Parenthood v. Casey* inaccurately like the *Hellerstedt* Court did when it relied on *Casey* to claim the Texas law imposed an undue burden when it really didn't.¹¹ Nominees from the list will allow states much more leeway to regulate abortion given their federalist leanings (meaning they will err on the side of allowing the states more power and claiming less for the Court by reading rights into the Constitution).

Moreover, these nominees will interpret the Constitution according to its original plain meaning, which says absolutely nothing about abortion. If this original meaning is faithfully applied, given the opportunity, they will rule there is no federal constitutional right to abortion at all.

Religious Freedom – HHS Mandate

Just last year the Court decided *Zubik v. Burwell*, where religious nonprofits claimed the Religious Freedom Restoration Act (RFRA) entitled them to an exemption from being forced to violate their consciences by participating in the Obama administration's HHS contraceptive mandate. Actually, the Court punted the issue and told the government and parties to arrive at a solution themselves, and there has been no permanent resolution to this case.¹²

While the issue could be moot if President-elect Trump revises or eliminates the HHS contraceptive mandate, justices with a high view of religious freedom are important for this issue to be decided properly should it again arise. If the Court rules on *Zubik* right now, there is a real likelihood the case would be decided 4-4. Thus, it is crucial to have a justice in the mold of Justice Scalia, who would almost certainly have ruled for the religious nonprofits in that case.

This issue affects dozens of organizations involved in multiple lawsuits involving RFRA and First Amendment claims,¹³ to say nothing of the for-profit entities affected by the Court's 5-4 ruling in *Burwell v. Hobby Lobby*.¹⁴ In that case involving the same HHS contraceptive mandate, Justice Scalia voted with the majority.

Zubik involves the same HHS contraceptive mandate with additional regulatory-imposed accounting gimmicks the administration used to claim it accommodated the religious freedom of nonprofits. This issue could easily be decided in a way that violates religious freedom without the type of justice President-elect Trump has pledged to nominate.

Between these sets of cases, there are at least 100 entities involved in the litigation alone,¹⁵ aside from the incalculable number of others affected by the Court's rulings. A nominee from President-elect Trump's list will take a high view of the private individual's rights protected by RFRA and the First Amendment's Free Exercise Clause, and will not so easily let the government trample those rights, as the Obama administration has done for the past eight years.

Religious Freedom – Pharmacists and Conscience

Moreover, the Court last year refused to take up *Stormans v. Weisman*, a religious freedom case in which pharmacies were barred from opting out of a coercive state law that forces them to dispense drugs they believe can function as abortifacients (despite exemptions being given for nonreligious reasons).¹⁶ The First Amendment's Free Exercise Clause should protect such pharmacies and their pharmacists, but the Court refused to take up the issue. If Justice Scalia had still been on the Court, there is a real likelihood the Court would have at least agreed to hear the case, with the possibility of a 5-4 ruling in favor of the pharmacies once it is heard. Filling Justice Scalia's vacant seat with someone in the same mold is crucial to the Court agreeing to hear such cases, and for keeping alive the chance for religious freedom to be vindicated.

In their dissent from the denial of certiorari in *Stormans*, Justices Alito, Roberts, and Thomas called the case an "ominous sign."¹⁷ They were not pleased at the Court's refusal to protect religious freedom, nor would Justice Scalia have been. We can expect nominees from President-elect Trump's list to likewise oppose such discrimination against religion and show far greater respect for a strong First Amendment in the face of coercive government power. We expect they will not miss an opportunity to declare the clear First Amendment protections for such pharmacists.

4. Other Cases Decided By One Vote and Showing the Importance of the Court to Conservatives

While not all of these cases involve FRC's set of issues, they are important to many people for a variety of reasons. The statutory and constitutional rights issues in these cases may not come up before the Court any time soon, but the close 5-4 votes (the several 4-4 cases remind us that Justice Scalia's replacement would cast the tie-breaking vote) which decided these cases (some favorably and some not) remind us of the importance of filling the Court's vacant seat with someone who holds the same legal philosophy as Justice Scalia.

4-4 Cases:

- *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016): A 4-4 decision left in place a lower court ruling holding that requiring non-union members to pay shop fees did not violate the First Amendment.
- *United States v. Texas*, 579 U.S. __ (2016): A 4-4 decision left in place a lower court ruling which had put the Obama administration's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) immigration program on hold because the challengers to the program would likely succeed on their claims that it was unlawful.

5-4 Cases:

- *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016): A 4-3 majority upheld a public university admissions program which considered race as a factor in admissions as lawful under the Equal Protection Clause (Justice Scalia had passed away and Justice Kagan recused herself).
- *Obergefell v. Hodges*, 135 S. Ct. 2584 (2014): A 5-4 majority imposed same-sex marriage on the nation over the objections of an overwhelming majority of states whose citizens had voted for man-woman marriage in state referenda.
- *NFIB v. Sebelius*, 132 S. Ct. 2566 (2014): A 5-4 majority upheld the Obamacare individual mandate forcing everyone to purchase a government-approved health insurance plan as a constitutional exercise of Congress's taxing power.
- *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014): A 5-4 majority protected the freedom of government bodies to choose to have a time of prayer before public meetings as long as it permitted expressions from all faiths equally.
- *United States v. Windsor*, 133 S. Ct. 2675 (2013): A 5-4 majority ruled that Congress could not define "marriage" in federal laws to mean man-woman marriage.
- *District of Columbia v. Heller*, 554 U.S. 570 (2010): A 5-4 majority ruled that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia.
- *Citizens United v. FEC*, 558 U.S. 310 (2010): A 5-4 majority restored the First Amendment protection of political speech, allowing non-profit corporations and others to come together with their donors and supporters to educate the American people.
- *Gonzales v. Carhart*, 550 U.S. 124 (2007): A 5-4 majority upheld a federal law restricting the use of the horrific partial-birth abortion technique.
- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002): A 5-4 majority held that parents could use public funds (in the form of vouchers distributed to needy families) to choose to send their children to religiously affiliated schools.
- *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000): A 5-4 majority ruled that the First Amendment's freedom of association protects the Boy Scouts from being forced to admit scout leaders who identify as homosexual under state laws barring discrimination on the basis of sexual orientation.
- *Rosenberger v. UVA*, 515 U.S. 819 (1995): A 5-4 majority upheld the right of religious student groups to receive university funding on an equal basis with other student groups.
- *Lee v. Weisman*, 505 U.S. 577 (1992): A 5-4 majority ruled that schools cannot sponsor a member of the clergy to conduct even non-denominational prayers at a graduation.
- *Rust v. Sullivan*, 500 U.S. 173 (1991): A 5-4 majority upheld Reagan Administration regulations providing that federal tax dollars could go to family planning but not to abortion counseling, referral, or advocacy.

III. Conclusion

During the presidential campaign, President-elect Trump produced a list of 21 potential judicial nominees, all of whom appear to be high-quality candidates. We will be using the criteria provided above to evaluate these candidates. As discussed, we will be looking for committed

originalists who interpret the Constitution for what it says rather than what they may want it to mean, and who understand the limited role of the judiciary. Nothing less will do for the justice who is to follow the late Justice Antonin Scalia.

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¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626-27 (2015) (Scalia, J., dissenting).

² Petition for a Writ of Certiorari, *Gloucester County School Board v. G.G.*, No. 16-273 (Oct. Term 2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/08/Gloucester-Cty-Cert-Pet-FINAL-w-APPX.pdf>.

³ Dear Colleague Letter, U.S. Department of Justice and U.S. Department of Education, May 13, 2016, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwinxv_umPfQAhWnwVQKHTc9A6gQFggmMAI&url=https%3A%2F%2Fwww.justice.gov%2Fopa%2Ffile%2F850996%2Fdownload&usq=AFOjCNFnsy-RHuW_kbcq5wgJ_Ojv3PQT4A&sig2=HgNoEAHGbs4L21SXnpfXOg&bvm=bv.141536425,bs.1,d.eWE.

⁴ Brief of Petitioner, *Trinity Lutheran Church v. Pauley*, No. 15-577 (Oct. Term 2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/04/TrinityLutheranPetitionersBrief.pdf>.

⁵ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

⁶ Petition for a Writ of Certiorari, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (Term TBD), available at <http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf>.

⁷ Travis Weber and Adam Burton, *Religious Liberty and the "Wedding Vendor" Cases*, Family Research Council (Dec. 2016), <http://downloads.frc.org/EF/EF16L23.pdf>.

⁸ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

⁹ See Petition for a Writ of Certiorari, *Doyle v. Taxpayers for Public Education*, No. 15-556 (Term TBD), available at <http://www.scotusblog.com/wp-content/uploads/2015/11/Families-cert-petition.pdf> (same issue as *Colorado State Bd. of Education v. Taxpayers for Public Education*).

¹⁰ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

¹¹ Travis Weber, "'Abortion Distortion' at work in *Whole Woman's Health v. Hellerstedt*," FRC Blog, June 28, 2016, accessed December 16, 2016, <http://www.frcblog.com/2016/06/abortion-distortion-work-whole-womans-health-v-hellerstedt/>.

¹² *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

¹³ "HHS Mandate Information Central," The Becket Fund for Religious Liberty, accessed December 16, 2016, <http://www.becketfund.org/hhsinformationcentral/>.

¹⁴ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

¹⁵ "HHS Mandate Information Central."

¹⁶ *Stromans v. Wiesman*, 136 S. Ct. 2433 (2016) (Alito, J., dissenting).

¹⁷ *Ibid.*