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The Next Supreme Court Justice

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SCOTT PRUITT was elected Attorney General of Oklahoma in 2010. Prior to that, he served for eight years in the Oklahoma State Senate. A past president of the Republican Attorneys General Association, he established Oklahoma's Federalism Unit to combat unwarranted regulation and overreach by the federal government. Mr. Pruitt received his B.A. from Georgetown College and his J.D. from the University of Tulsa College of Law.

The following is adapted from a speech delivered on June 30, 2016, at Hillsdale College's Allan P. Kirby, Jr. Center for Constitutional Studies and Citizenship in Washington, D.C., as part of the AWC Family Foundation Lecture Series.

When Justice Antonin Scalia passed away this February, talk turned almost immediately to who would replace him—although in a large sense he is irreplaceable. Even those who disagreed with Justice Scalia acknowledge his profound impact. His scholarship and judicial opinions, through brilliance and wit, transformed how we think about the law and the Constitution. He inspired a generation of law students and lawyers. He provided a foundation for the work of judges and legislators, as well as attorneys general like myself. And all who knew him personally will attest that his brilliance was matched only by his warmth, cheer, and grace. He will be deeply missed.

In thinking about the kind of person who should take his seat on the Court, it is worth reflecting on Justice Scalia's principles of jurisprudence. One of the chief principles he championed, as a scholar and as a judge, is that the law, whether statutes or the Constitution itself, must be applied according to its text. In other words, judges should not apply the law based on what is good policy or what they suppose Congress may have intended (but did not express) in passing legislation.

In addition, Justice Scalia believed that the words of the law should be understood

as they were understood by the people when the law was enacted. For example, if you strike a bargain with someone, and later there is a dispute about that bargain, how do you interpret the words of your contract? Do you look to what the words of the contract meant at the time you agreed to them? Or do you look to what those words mean ten or 50 years after the fact? There are some who believe that the meanings of words change over time, untethered from any objective measure. Thus what is legal one day may be illegal the next without any textual changes to the law. Justice Scalia rejected this notion. He held fast to the idea that the meaning of laws is fixed by the meaning ascribed to their words at the time they were enacted.

These two principles, textualism and originalism, are rooted in a third characteristic of Justice Scalia's jurisprudence: an unwavering respect for the idea of popular government. Laws, including the Constitution, receive their legitimacy from the people. The Constitution is not an autonomously evolving document that spins out new "rights" and obligations to which the people have not given their consent. Rather than discovering new rights in the Constitution, judges should respect the constitutional prerogative of the people to pass laws through their representative legislatures, limited by the restraints imposed by the Constitution—which was itself ratified by popular means.

Along with this opposition to creative interpretation of the Constitution, a fourth characteristic of Justice Scalia's life work was a conviction that the rights actually guaranteed in the Constitution should be tenaciously defended, from the right of free speech to the rights of criminal defendants. Beyond these enumerated rights, Justice Scalia recognized that the Constitution's primary protection of liberty is its structure of checks and balances between branches and its division of powers between the federal government and the states.

In short, Justice Scalia rejected the judicial activism of inventing law while embracing judicial engagement by ensuring that the limits on government are strictly enforced.

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Ensuring that the next justice appointed to the Supreme Court is someone in the mold of Justice Scalia is surpassingly important. Not since the New Deal has the country had a conservative majority on the Supreme Court. For 60 years, the Court has been either decidedly liberal or split between liberals and conservatives. For 25 years, the Court's most controversial and closely-divided cases sometimes had a liberal outcome, sometimes a conservative one. At the time of Justice Scalia's death, the Court consisted of four unwavering liberals (Justices Ginsburg, Breyer, Sotomayor, and Kagan), three solid conservatives (Justices Scalia, Thomas, and Alito), a fourth who votes with the conservatives much of the time (Chief Justice Roberts), and one swing vote (Justice Kennedy). Replacing Justice Scalia with a

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liberal would fundamentally alter that balance, creating a solid majority of five liberal justices that would ensure liberal outcomes to all controversial decisions.

Make no mistake: the liberal justices on the Court nearly always vote as a bloc. Whereas the conservative justices occasionally depart for reasons of judicial philosophy from what some might consider the conservative outcome—as Justice Scalia often did—one is hard-pressed to find decisions where a liberal justice's vote is in question. To illustrate the point, in the Supreme Court's 2014-2015 term, the four liberal justices agreed with each other over 90 percent of the time—more agreement than between any two conservative justices. For example, Chief Justice Roberts agreed with Justice Thomas in only 70 percent of cases. If the liberal wing of the Court is given a five-justice majority, we should expect that no controversial decision of the Court will ever be in doubt.

* * *

Let me provide a survey of the important issues the Court might decide in coming years, once a ninth justice is appointed.

One of the issues coming before the Court will concern a basic liberty essential to democracy: freedom of speech. Under assault these days is the freedom to spend (or not spend) money on political speech. For example, before Justice Scalia's death, the Court voted to grant review of a case called *Friedrichs v. California Teachers Association*, in which public sector employees wanted the right not to pay compulsory union dues. This case raises an important question about free speech: can the government force you to contribute money to a political cause you oppose? Without Justice Scalia's vote, the Court split evenly, leaving the issue to be resolved by a future Supreme Court—the deciding vote to be cast by the future ninth justice.

On the other side of the free speech coin is the continued vitality of the Court's *Citizens United* decision. Let me clarify a common misconception: *Citizens United* did not hold that corporations are allowed to give unlimited amounts to political candidates. In fact, the laws limiting the amount of campaign contributions to a few thousand dollars are still valid and in place. Rather, in *Citizens United*, the Court held that the government may not limit the amount of money spent—whether by individuals, unions, or corporations—on their own independent political advocacy. This case was decided 5 to 4, with Justice Scalia in the majority. If he is replaced with a liberal, *Citizens United* will likely be overturned, and the right to free speech will be greatly diminished.

The First Amendment also protects religious liberty, another of our endangered core rights. Before Justice Scalia passed away, the Supreme Court granted review in *Trinity Lutheran Church of Columbia v. Pauley*, a case which will decide whether certain state laws called "Blaine Amendments" are constitutional. Blaine Amendments are provisions added to state constitutions during a time of anti-Catholic fervor—they date back to the 1870s—that prevent any state funds from being used to benefit a church or a religion for any reason. This means that states running programs that provide resources to private institutions must discriminate against religious institutions, even if the program being funded is not religious. In the *Trinity Lutheran* case, a Missouri program was providing scrap tires for flooring in playgrounds to make them safer for children. Because of a Blaine Amendment, the State refused to provide tires to church schools. With other attorneys general, I filed a brief supporting the effort to get these Blaine Amendments struck down. The new justice is likely to cast the deciding vote on whether to remove this legacy of legal hostility to religion.

Freedom of religious conscience also hangs in the balance. We have seen this in the *Hobby Lobby* case, where the Court protected the right of religious

employers not to fund abortions. So too in the *Little Sisters of the Poor* case, where the Court has, for now, narrowly avoided the question of whether Catholic nuns can be required to cover contraception in their health insurance plan. Other cases regarding freedom of conscience are on the horizon. The Court recently declined to review a case that upheld a Washington law that requires pharmacists to sell abortion drugs despite religious objections. Similarly, a case may soon reach the Court to decide whether civil rights laws can be used to force, for example, a Christian photographer to use her artistic skills to celebrate a same-sex wedding.

* * *

Moving to the Second Amendment, the next justice will likely cast the deciding vote on whether to continue to recognize an individual right to "keep and bear Arms," or whether to interpret that right so narrowly as to effectively do away with it. For example, just this month, the Ninth Circuit Court of Appeals in California held that the Second Amendment does not forbid laws that prohibit most people from carrying (i.e., bearing) a firearm in public. Without a justice willing to stand up for an effective right to bear arms, the Second Amendment might very well become a dead letter.

Other issues that hang in the balance include the death penalty, affirmative action, regulation of the abortion industry, and voting laws. But I want to focus on one final set of constitutional questions that have reached their tipping point in recent years—questions having to do with the structure of our Constitution.

Contrary to what many believe, the primary guarantee of our liberty in the Constitution is not the Bill of Rights. Rather it is found in the structure of government under the Constitution, which is designed to prevent accumulation of power and oppression of the people. The Constitution separates powers between the executive, legislative, and judicial branches of the federal government, and divides powers between the federal government and the states. Those who wrote the Constitution expected that members of the different branches would be zealous in defending their powers from other parts of government that attempted to encroach on them. They expected state legislatures to do likewise. These constitutional structures provide the greatest and broadest guarantee of liberty by limiting governmental power. And today they are under threat.

Since at least the New Deal, the executive branch has been accumulating more and more power, and the current administration has taken unilateral executive authority to new levels. President Obama has on numerous occasions effectively engaged in lawmaking—an activity strictly delegated to Congress by the Constitution—when Congress refused to pass laws that he desired. Last year, for example, the Environmental Protection Agency instituted a new "Clean Power Plan"—an attempt to put the coal industry out of business, in the name of combatting climate change—absent any authority granted by Congress. Oklahoma, along with 28 other states, sued to have this rule blocked. In his last act on the bench, Justice Scalia voted to put this Clean

Power Plan on hold while it is being litigated, providing a good indication that five of the justices thought it to be unlawful. With Justice Scalia gone, his replacement will likely determine the outcome of this case.

Along the same lines, the EPA and the Army Corps of Engineers recently rewrote the definition of the term "Waters of the United States" in the Clean Water Act to include almost every puddle and pond in the country, enabling a vast extension of federal regulatory authority at the expense of the states and the people. Again, this occurred without any grant of authority by Congress, which passed the Clean Water Act back in 1972. Again, Oklahoma and 26 other states have challenged this power grab.

Most recently, the President and his agencies have attempted unilaterally to mandate accommodations nationwide for transgender people by rewriting laws like Title IX, which prohibits discrimination based on sex. They are attempting to do so by redefining the word "sex" in the law—understood when Title IX was passed by Congress to refer to biological sex—to mean "gender identity," which the administration defines as a person's "internal sense of gender." A new justice will likely cast the deciding vote on whether courts should check this type of executive overreach as well.

Another way President Obama has expanded his power is by refusing to enforce laws he does not like, effectively repealing them. He has done this with immigration laws by designating entire classes of people as having "legal status," even though the law clearly states that they are unlawfully present. Similarly, his administration has effectively legalized marijuana in certain states by refusing to enforce federal laws prohibiting it. The extent to which presidents must follow their constitutional mandate to "take Care that the Laws be faithfully executed" is a hotly contested issue on which the next Supreme Court justice might provide the pivotal vote.

The next Supreme Court justice will not only decide the outcome in pending cases, he or she will also influence the type of cases that make it to the Court in the first place. Businesses are less likely to challenge exorbitant or unfair rulings against them knowing there is a majority of justices hostile to their interests. Conservatives will be less likely to put their time and resources into defending the Constitution if they know the Court won't enforce it. Meanwhile, liberal groups will be emboldened to bring cases that attempt to roll back First Amendment and Second Amendment freedoms, among others. They will also bring cases attempting to establish new "rights"—to government welfare payments, to free attorneys in civil cases, to increased funding for public schools, etc.—as well as things like a prohibition on racial disparities in criminal justice outcomes, an exception to the First Amendment for so-called "hate speech," and a prohibition on sex-segregated restrooms.

The appointment of the next Supreme Court justice could be the most legally significant event for our country in a generation. If the next justice is in the mold of Justices Ginsburg or Sotomayor, the rulings of the Court will shift dramatically to the left. If the next justice shares the principles and philosophy of Justice Scalia, the ideologically balanced Court that we have grown accustomed to in the last quarter century will likely remain. As someone whose job it is to defend the rights of the people of Oklahoma, this turning point is very important to me. But as I hope I have explained, the next Supreme Court justice will make decisions that touch on the rights of every American and that may come to define the nature of our government and our society for many years to come. ■