

## INTRODUCTION

### **Presidential Politics and the 113th Justice**

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They appear every four years: articles, op-eds, and blog posts warning readers that control of the Supreme Court (and, by implication, the fate of the Republic) hinges on the upcoming presidential election. The justices are getting older, the authors caution, and the next president could have the opportunity to appoint one, two, three, or even four new justices to the Court.<sup>1</sup>

To be fair, these Cassandra-esque warnings did, at least to some extent, prove correct in the past. During his two terms in office, President George W. Bush nominated, and the Senate confirmed, two new justices: Chief Justice John Roberts and Justice Samuel Alito. The same is true for President Barack Obama, who nominated Justices Sonia Sotomayor and Elena Kagan. But the ideological makeup of the Court remained more or less the same, because each justice who left the Court was replaced by a new justice with a similar, if not identical, approach to the law.<sup>2</sup>

Going into the 2016 presidential elections, it seemed as if this might actually be the year in which winning the race for the White House might also lead to victory in the battle for the Supreme Court. Justice Ruth Bader Ginsburg—who has spurned repeated calls for her to resign to allow Obama to appoint her successor—turned eighty-three this year. Justices Antonin Scalia and Anthony Kennedy would both be octogenarians by the time

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† Editor and reporter, SCOTUSblog. Thanks are due to Lisa McElroy for inviting me to participate in this symposium, and to the staff of *The University of Chicago Law Review* for their careful and excellent editing. All errors are, of course, mine.

<sup>1</sup> See, for example, Geoffrey R. Stone, *The Supreme Court and the 2012 Election* (HuffPost Politics, Aug 13, 2012), archived at <http://perma.cc/7KE8-Z67Y>; Steven G. Calabresi and John O. McGinnis, *McCain and the Supreme Court* (Wall St J, Feb 4, 2008), online at <http://www.wsj.com/articles/SB120209536777639949> (visited June 11, 2016) (Perma archive unavailable); Bill Mears, *Election Could Tip Balance of Supreme Court* (CNN.com, Oct 21, 2004), archived at <http://perma.cc/7FHY-WV3L>.

<sup>2</sup> To be sure, Alito has proven to be a more conservative justice than Justice Sandra Day O'Connor, whom he replaced, and the substitution of Alito for O'Connor shifted the Court slightly to the right. But the Court likely would have shifted much more to the left if O'Connor had retired and President Al Gore had nominated her successor.

the next president takes office in January 2017, commentators reminded us; Justice Stephen Breyer, who will be seventy-eight in August, is not far behind.<sup>3</sup>

And then the hypotheticals became reality. On February 13, 2016, Scalia died in his sleep at a Texas ranch. Within a few hours after the news became public, Iowa Senator Chuck Grassley, the chairman of the Senate Judiciary Committee, issued a statement in which he declared that “it’s been standard practice over the last nearly 80 years that Supreme Court nominees are not nominated and confirmed during a presidential election year.”<sup>4</sup> He continued:

Given the huge divide in the country, and the fact that this President, above all others, has made no bones about his goal to use the courts to circumvent Congress and push through his own agenda, it only makes sense that we defer to the American people who will elect a new president to select the next Supreme Court Justice.<sup>5</sup>

Ten days later, Grassley and his fellow Republicans on the Senate Judiciary Committee doubled down, sending a letter to Senate Majority Leader Mitch McConnell in which they indicated that their committee would “not hold hearings on any Supreme Court nominee until after our next President is sworn in on January 20, 2017.”<sup>6</sup>

Obama responded with a bold move of his own. On March 16, Obama appeared in the Rose Garden and announced that he would nominate Judge Merrick Garland, the highly respected chief judge of the United States Court of Appeals for the DC Circuit, to fill the vacancy created by Scalia’s death.<sup>7</sup> The choice was clearly not designed to rally the Democratic Party’s base in the upcoming elections: the sixty-three-year-old Garland is older, whiter, and more moderate than liberal groups would have liked—not to mention a man. Instead, the Garland nomination

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<sup>3</sup> See Paul Waldman, *Why 2016 Will Be a Supreme Court Election* (The Week, July 7, 2015), archived at <http://perma.cc/2PHN-F6KL>.

<sup>4</sup> *Grassley Statement on the Death of Supreme Court Justice Antonin Scalia* (Chuck Grassley: United States Senator for Iowa, Feb 13, 2016), archived at <http://perma.cc/JQC5-PK2D>.

<sup>5</sup> *Id.*

<sup>6</sup> Letter from Charles E. Grassley, Chairman of the Senate Committee on the Judiciary, et al, to Mitch McConnell, Senate Majority Leader, \*2 (Feb 23, 2016), archived at <http://perma.cc/FX5N-V8UZ>.

<sup>7</sup> Michael D. Shear, Julie Hirschfeld Davis, and Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court* (NY Times, Mar 16, 2016), online at <http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html> (visited June 11, 2016) (Perma archive unavailable).

seemed to signal that Obama had opted for a different tack, essentially daring Republicans to oppose a nominee whose qualifications are beyond cavil.

The jury is still out on the president's strategy. Despite efforts by the president, other Democrats, and interest groups to keep the issue alive,<sup>8</sup> public attention to the Garland nomination has flagged. It seems unlikely that Garland will get a hearing anytime soon—although some conservative pundits have suggested that Republican senators should go ahead and confirm him now, rather than run the risk that a President Hillary Clinton will nominate a younger, more liberal justice if the Garland nomination is withdrawn.<sup>9</sup>

But at some point in the not too distant future, someone—whether it is Garland or someone nominated by Clinton or Donald Trump—will get a hearing. And that prospect raises all kinds of interesting questions related to the nomination process and the impact that the next justice could have on the Court. For example, what forms should the nomination and confirmation processes take, and what will the change in personnel mean for the Court's jurisprudence?

This Symposium tackles, and seeks to answer, some of those questions, beginning with a threshold question: If the next justice is not Garland, what kind of justice *should* a Democratic president nominate? Professor Lisa McElroy takes a lighthearted approach to a serious topic, looking back at what the paragon of "presidential perfection"<sup>10</sup>—the fictional President Jed Bartlet, of *The West Wing*—did when he was confronted with a vacancy on the Court. When Obama nominated Kagan and Sotomayor, she suggests, "[t]he only way through the Senate . . . was to nominate someone palatable to liberals and not infuriating to conservatives."<sup>11</sup> But now, she continues, "the calculus [has] changed," and Republicans "can use an even more powerful tool: they can refuse to let any nominee even get to a vote."<sup>12</sup> Given this new reality,

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<sup>8</sup> Edward-Isaac Dove, *White House Allies Make New Push for Garland* (Politico, Apr 29, 2016), archived at <http://perma.cc/S9CZ-STEJ>.

<sup>9</sup> Callum Borchers, *Raising the White Flag: Conservative Blog Urges GOP to Cut Its Losses and Confirm Merrick Garland* (Wash Post, May 4, 2016), archived at <http://perma.cc/ARR3-GEXG>.

<sup>10</sup> Matt Shuham, *Waiting for Bartlet* (Harv Pol Rev, June 8, 2012), archived at <http://perma.cc/VC6D-9ZN5>.

<sup>11</sup> Lisa McElroy, *The West Wing, the Senate, and "The Supremes" (Redux)*, 83 U Chi L Rev Online 8, 14 (2016).

<sup>12</sup> *Id.*

she argues, Democrats in the future should go big or go home: “Nominate the most devoted liberal who’s qualified for the job.”<sup>13</sup>

Whoever the next justice turns out to be, he or she will not get there without a hearing. Supreme Court confirmation hearings are sometimes characterized “as a kabuki dance—a performance where nominees pretend to answer questions, and senators pretend to care what the answers are.”<sup>14</sup> Years before her own confirmation hearing, Kagan would describe hearings as “a vapid and hollow charade.”<sup>15</sup> Professors Randy Barnett and Josh Blackman bring their own classic television references to the discussion, referring to the hearings as—like *Seinfeld*—a “show about nothing.”<sup>16</sup> The problem with hearings, they contend, is that both sides focus on “trying to get nominees to tip their hand on how they will decide cases that each side cares about.”<sup>17</sup> “Instead of asking nominees how they would decide particular cases,” they argue, “senators should ask them to explain what they think the various clauses of the Constitution mean, separate and apart from *any* Supreme Court precedent.”<sup>18</sup> The nominees’ answers to these questions, they conclude, would provide enough concrete information to in turn allow senators to “vote, as they did with [Judge Robert] Bork, based on whether or not they agreed with the judicial philosophy of a nominee.”<sup>19</sup>

Reasoning that “the judicial appointments process is the last clear chance for the other branches to check judicial power,” Professor Michael Paulsen also urges the Senate to inject more substance into the process of examining nominees’ views.<sup>20</sup> He contends that, although there may be “a range of reasonable judgment as to the precise method” presidents and senators should use to evaluate a nominee, “one set of positions falls outside that range: complete deference to *any* views or interpretive philosophy a nominee might hold, or complete unwillingness to inquire into such views, on the ground that postconfirmation

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<sup>13</sup> Id at 15.

<sup>14</sup> Brian Fitzpatrick, *Confirmation ‘Kabuki’ Does No Justice* (Politico, July 20, 2009), archived at <http://perma.cc/M7X8-3TGP> (quotation marks omitted).

<sup>15</sup> Roger Simon, *‘Vapid’? ‘Hollow’? Kagan Nailed It* (Politico, June 30, 2010), archived at <http://perma.cc/583K-PRX3>.

<sup>16</sup> Randy E. Barnett and Josh Blackman, *Restoring the Lost Confirmation*, 83 U Chi L Rev Online 18, 21 (2016).

<sup>17</sup> Id at 19.

<sup>18</sup> Id at 22.

<sup>19</sup> Id at 26–27.

<sup>20</sup> Michael Stokes Paulsen, *The Constitutional Propriety of Ideological “Litmus Tests” for Judicial Appointments*, 83 U Chi L Rev Online 28, 29 (2016).

‘judicial independence’ renders such inquiries improper.”<sup>21</sup> Thus, he continues, although presidents and senators cannot exact commitments about how a nominee might decide future cases, they “can and should put direct substantive ‘litmus test’ questions to judicial candidates and demand answers.”<sup>22</sup>

Professor Kermit Roosevelt III and Patricia Stottlemeyer take a deeper dive into the effect that Scalia’s eventual successor will have on the Court’s equal protection jurisprudence, while Dean Erwin Chemerinsky does the same for discrete issues like affirmative action and the death penalty. Roosevelt and Stottlemeyer characterize the “struggle over the Equal Protection Clause and the composition of the Supreme Court” as “a continuation of the struggle between Reconstruction and Redemption.”<sup>23</sup> “The Court pushed back against the first Reconstruction,” they contend, “in decisions like the *Slaughter-house Cases*, the *Civil Rights Cases*, *United States v Harris*, and *United States v Cruikshank*.”<sup>24</sup> And, they continue, the Court “is pushing back now against the Second Reconstruction, in decisions like *City of Boerne v Flores*, *Shelby County v Holder*, *United States v Morrison*, *Ricci [v DeStefano]*, *Parents Involved [in Community Schools v Seattle School District No 1]*, and *Fisher [v University of Texas at Austin]*.”<sup>25</sup> How far the pendulum will swing, they suggest, will depend on who fills the current vacancy.<sup>26</sup>

Chemerinsky draws stark contrasts in describing the effect that the 2016 presidential election could have on the future state of the law. If a Democratic president is elected and can appoint Scalia’s successor, he contends, a majority on the Court could then overturn any significant restrictions on affirmative action, and “affirmative action would continue and likely be allowed to be far more robust”;<sup>27</sup> however, he warns, if a Republican is elected in 2016 and can replace four of the older justices, affirmative action “surely would be at an end.”<sup>28</sup> And “a Court dominated by Democratic appointees” might be willing to reconsider the Court’s

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<sup>21</sup> Id at 31.

<sup>22</sup> Id at 32.

<sup>23</sup> Kermit Roosevelt III and Patricia Stottlemeyer, *The Fight for Equal Protection: Reconstruction-Redemption Redux*, 83 U Chi L Rev Online 36, 47 (2016).

<sup>24</sup> Id at 47–48 (citations omitted).

<sup>25</sup> Id at 48 (citations omitted).

<sup>26</sup> Id at 47–48.

<sup>27</sup> Erwin Chemerinsky, *The 2016 Election, the Supreme Court, and Racial Justice*, 83 U Chi L Rev Online 49, 54 (2016).

<sup>28</sup> Id at 58.

1987 ruling in *McCleskey v Kemp*,<sup>29</sup> in which the Court held that “proof of disparate impact in the administration of the death penalty was insufficient to show an equal protection violation.”<sup>30</sup>

Professor Marci Hamilton paints an equally stark portrait of the influence that the forty-fifth president could have on church-state relations. With the exception of foreign policy and terrorism, she suggests, “this is the most momentous issue that the next president will face.”<sup>31</sup> In particular, she explains, “so many of the recent Establishment Clause cases have been 5–4 decisions,” with the late Scalia among the five that drove the result.<sup>32</sup> As such, she concludes, “a Republican replacement for Scalia could cement the drive to set aside separation principles while a Democratic nominee could bring Establishment Clause principles back from the brink.”<sup>33</sup>

Finally, if your preferred candidate does not win the White House in November, don’t despair. Professor Michael Dorf explains that “appointments to the Supreme Court and the lower federal courts are not the only—and perhaps not even the most important—mechanism by which politics affects the course of constitutional law.”<sup>34</sup> Constitutional amendments, he notes, “can occur largely outside of presidential politics”;<sup>35</sup> even if amendments are not successful, he adds, “[t]he forces that place a proposed constitutional amendment on the political agenda” may still be “strong enough to impress a majority of the Supreme Court.”<sup>36</sup> And other factors are at play as well. “*Who* sits on the Supreme Court matters a great deal,” he concludes, “but *when* the Court decides a question also matters a great deal.”<sup>37</sup>

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As I write this, the presidential election is still several months away, and it may take even longer for the Senate to confirm a nominee to fill Scalia’s seat. We do not yet know how that process will play out, but we can be sure that the essays in the

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<sup>29</sup> 481 US 279 (1987).

<sup>30</sup> Chemerinsky, 83 U Chi L Rev Online at 58 (cited in note 27).

<sup>31</sup> Marci A. Hamilton, *Justice Scalia, the 2016 Presidential Election, and the Future of Church-State Relations*, 83 U Chi L Rev Online 61, 61 (2016).

<sup>32</sup> *Id.* at 64.

<sup>33</sup> *Id.* at 65.

<sup>34</sup> Michael C. Dorf, *Donald Trump and Other Agents of Constitutional Change*, 83 U Chi L Rev Online 72, 72 (2016).

<sup>35</sup> *Id.* at 73.

<sup>36</sup> *Id.* at 75.

<sup>37</sup> *Id.* at 78.

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symposium are thoughtful and much-needed contributions to the debate over that process.