SCOTUS AFTER SCALIA

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ABSTRACT: The sudden passing of Justice Antonin Scalia disturbed the Supreme Court’s predictable rhythm. This Foreword will analyze the contentious period from Justice Scalia’s death until President Trump’s inauguration, and draw four lessons about the Court, the Constitution, consistency, and Congress. First, this interregnum allows us to study how the short-handed Court engaged in self-help in the short term, and in the long run, how the Court may remain an evenly-divided Court for years at a time. Second, with a possible liberal replacement for Justice Scalia, the conservative legal movement’s faced a near-death experience. Part II analyzes how this brush with fate may impact the Roberts Court’s views on incrementalism, institutionalism, and originalism. Third, the change-in-administrations offers an opportunity to lay down markers and

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chart future movements on the left and right with respect to three important areas: federalism as a check on federal power, deference to the administrative state, and state-led litigation against the federal government. Part III discusses how constitutional consistency will evolve during the Trump Presidency with respect to federalism, administrative law, and state-standing to pursue nationwide injunctions.

Finally, Part IV considers how the unexpected outcome of the election—whereby the Presidency and Senate were both in Republican control—simply delayed the inevitable: at some point, the President and Senate will be of different parties, and they will not be able to agree on a Supreme Court nominee. Through a novel approach developed in this Foreword, the Senate can offer preliminary votes on several possible candidates to fill a Supreme Court vacancy. Though not bound by those resolutions, the President would be wise to consider the Senate’s counsel before making the nomination. By offering Senatorial “advice” before the President’s nomination is made, the “consent” process between the two branches becomes more collaborative and less antagonistic.

It is important, not to simply shrug off the past year as an outlier in the Court’s history. The atypical October 2015 term may, soon enough, become the new normal.
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INTRODUCTION

The Supreme Court had fallen into a predictable rhythm. Every year, on the first Monday in October, nine Justices emerged from behind the burgundy curtains to begin the new term. Over the following nine months, the proceedings were formulaic: petitions were regularly granted, arguments were systematically scheduled, and cases were eventually decided. The final decisions were handed down by the last week in June. Any retirements were announced over the summer, often with advance notice given to the President. Senate confirmation hearings were completed before the tradition began anew in October. It ran like clockwork. Until it didn’t.

The unexpected passing of Justice Scalia on February 13, 2016 jarred that complacency across all three branches of our government. Senate Republicans immediately announced that there would be no hearings during the 114th Congress. President Obama’s efforts to confirm Chief Judge Merrick B. Garland were unsuccessful. The Scalia seat would remain empty for over a year. During this time, the Supreme Court engaged in a form of self-help. Faced with a short-handed bench, the eight Justices quietly, but conspicuously altered their course. Fewer petitions for certiorari were granted. Certain oral arguments were delayed. Critical cases were simply not decided.

On Monday, October 3, 2016, only eight Justices took the bench, without a new colleague in sight. That delay could have become interminable. Had the forty-fifth President been of a different political party than the Senate majority, there was a realistic chance that the seat could have remained open for two years, four years, or maybe even longer. The election of Donald J. Trump, along with a Republican-controlled Senate, ensured that Justice Scalia’s seat would be filled in due course. It is important, however, not to simply shrug off the past year as an outlier in the Court’s history. The atypical October 2015 term may become the new normal. This Foreword will analyze the contentious period from Justice Scalia’s death until President Trump’s inauguration, and draw four lessons about the Court, the Constitution, consistency, and Congress.
First, this interregnum allows us to study the viability of an evenly-divided Court. It has become conventional wisdom that the most contentious social issues of our day—same-sex marriage, affirmative action, gun control, and voting rights—should be resolved by a razor-thin 5-4 majority. The desirability of this rule usually depends on whose ox is being gored: conservatives celebrate decisions that invalidate gun control laws and set aside provisions of the Voting Rights Act; liberals cheer decisions that nullify state marriage laws and strike down the Defense of Marriage Act. Such outcomes, however, are impossible on an even-numbered court, which requires five out of eight Justices to agree on a resolution rather than five out of nine. During the October 2015 term, the Justices divided evenly on near-landmark cases concerning labor unions and immigration, and punted on the lawfulness of the accommodation to the Affordable Care Act’s contraception mandate. Failing to resolve these case wasn’t all bad—these major questions were returned to the democratic process for further deliberation. And, with hindsight, the change-in-administrations held the potential to moot the latter two cases altogether. This part closes with an assessment of how future short-handed Courts may operate for extended periods of time.

Second, the conservative legal movement’s near-death experience offers a chance for reflection. During the summer and fall of 2016, by all accounts, it seemed that a President Hillary Clinton and a Democratic-controlled Senate would confirm a Justice who was more liberal than Justice Scalia. This appointment, more than any other in the last quarter-century, would push the Court’s ideological center to the left. Justice Kennedy, long the deciding “swing” vote on society’s most important issues, would be replaced by Justice Breyer. Chief Justice Roberts’s so-called “long game” would be prematurely cut short. Justices Thomas and Alito, the most conservative members of the Court, would be relegated to a lifetime in dissent. But then, in a shock that only Nate Silver hinted at, the outcome flipped. Now, a President Trump and a Republican-controlled Senate will confirm Judge Neil Gorsuch, whose originalism and textualism places him on par with Justice Scalia. Part II analyzes how this brush with fate may impact the Roberts Court’s views on incrementalism, institutionalism, and originalism.

Third, the change-in-administrations offers an opportunity to lay down markers and chart future movements on the left and right with respect to three important areas: federalism as a check on federal power, deference to the administrative state, and state-led litigation against the federal government. During the Obama Presidency, conservatives vigorously defended state sovereignty in federal court, opposed Chevron and Auer deference, and favored suits brought by the states to challenge executive overreach. In contrast, liberals challenged efforts by the states to resist federal power, embraced deference as a way to achieve progress in a gridlocked Congress, and opposed state-led litigation against the Obama administration. With the political tables about to turn, Part III discusses how constitutional consistency will evolve during the Trump Presidency with respect to federalism, administrative law, and state-standing to pursue nationwide injunctions.

Finally, Part IV considers how the unexpected outcome of the election—whereby the Presidency and Senate were both in
Republican control—simply delayed the inevitable: at some point, the President and Senate will be of different parties, and they will not be able to agree on a Supreme Court nominee. It is not a matter of if this will happen, but when. To avert this intractable conflict, the Constitution’s text provides guidance: the Senate must not only provide its “consent,” but also its “advice” of who should fill the vacancy. Through a novel approach developed in this Foreword, the Senate can offer preliminary votes on several possible candidates to fill a Supreme Court vacancy. Though not bound by those resolutions, the President would be wise to consider the Senate’s counsel before making the nomination. By offering Senatorial “advice” before the President’s nomination is made, the “consent” process between the two branches becomes more collaborative and less antagonistic.

I. The Short-Handed Court

On the afternoon of Friday, February 12, 2016, Justice Antonin Scalia checked into the “El Presidente” suite at the Cibolo Creek Ranch, a 30,000-acre resort outside of Marfa, Texas. That evening, he attended a private dinner with forty other guests. Toward the end of the meal, the Justice retired to bed. The next morning, when he did not arrive for breakfast, an employee of the ranch checked in his room. The 79-year old was found dead in his bed. A priest was called to administer last rites. He was survived by his wife Maureen, nine children, and thirty-six grandchildren. The Justice was seven months short of his third decade on the Supreme Court.

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10 Molly Hennessy-Fiske, Scalia’s Last Moments on a Texas Ranch – Quail Hunting to Being Found in ’Perfect Repose’, L.A. TIMES (Feb. 14, 2016), perma.cc/4CCR-2NCG.
11 Guillermo Contreras & Gary Martin, U.S. Supreme Court Justice Antonin Scalia Found Dead at West Texas Ranch, MY SAN ANTONIO (Feb. 16, 2016), perma.cc/ AGT3-TE72.
The news of Scalia’s passing broke on Saturday, February 13, 2016, at about 4:30 PM. One hour later, before consulting his caucus, Majority Leader Mitch McConnell released a statement: “The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new President.”

Four hours after Justice Scalia’s death was announced, President Obama addressed the nation. “For almost thirty years, Justice Antonin ‘Nino’ Scalia was a larger-than-life presence on the bench—a brilliant legal mind with an energetic style, incisive wit, and colorful opinions,” Obama noted, “Today is a time to remember Justice Scalia’s legacy.” However, he continued, “I plan to fulfill my constitutional responsibilities to nominate a successor in due time.”

No doubt aware of the rising Republican opposition, the President stressed that the Senate must “fulfill its responsibility to give that person a fair hearing and a timely vote,” so the Supreme Court can “continue to function as the beacon of justice that our Founders envisioned.” These responsibilities, the President concluded, “are bigger than any one party; they are about our democracy.”

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12 Leon Neyfakh, How the San Antonio Express-News Got the Scoop on Antonin Scalia’s Death, SLATE (Feb. 13, 2016), perma.cc/3Y4A-C2BY.
15 Id.
16 Id.
17 Id.
18 Id.
After some vacillation, the Republican leadership solidified its position. McConnell and Chuck Grassley of Iowa, the chair of the Senate Judiciary Committee, coauthored an editorial in the Washington Post expressing their shared strategy.19 “Given that we are in the midst of the presidential election process,” the Kentuckian and Iowan wrote, “we believe that the American people should seize the opportunity to weigh in on whom they trust to nominate the next person for a lifetime appointment to the Supreme Court.”20 As for a question of duty, they wrote that the “Constitution grants the Senate the power to provide, or as the case may be, withhold its consent.”21

Thirty-two days later, in the Rose Garden, Obama nominated Merrick B. Garland, the chief judge of the D.C. Circuit Court of Appeals, to fill Scalia’s seat.22 Obama had a simple message for Senate Republicans: “Give him a fair hearing, and then an up or down vote.”23 If they do not, “the reputation of the Supreme Court will inevitably suffer,” and “our democracy will ultimately suffer, as well.”24 Under the Constitution, the president has the duty to appoint officials—he “shall nominate . . . judges of the Supreme Court.” But the executive has this power only “by and with the Advice and Consent of the Senate.” Obama concluded, “I have fulfilled my constitutional duty. Now it’s time for the Senate to do theirs.” The Senate leadership held firm and refused to schedule a hearing for

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19 Chuck Grassley & Mitch McConnell, Democrats Shouldn’t Rob Voters of Chance to Replace Scalia, WASH. POST (Feb. 18, 2016), perma.cc/368E-624F.
20 Id.
21 Id.
22 Remarks by the President Announcing Judge Merrick Garland as His Nominee to the Supreme Court, White House (Mar. 16, 2016), perma.cc/9G96-WG8C.
24 Id.
Garland. His nomination expired at the conclusion of the 114th Congress.

For one month after Justice Scalia’s passing, the Court itself was in a state of mourning. Justice Scalia’s empty chair and the section of the bench directly in front of it were draped with a black wool crepe in remembrance. A black drape also hung over the entrance to the chamber. This tradition dates back to the passing of Chief Justice Salmon P. Chase in 1873. St. John’s law professor John Q. Barrett observed that the ritual is meant to “signify the existence of the office,” even though it is temporarily unfilled. Soon enough, the crepes, drapes, and empty chair were removed. By all outward accounts, the Supreme Court had returned to business as usual. On April 11, 2016, Chief Justice Roberts told the judicial conference of the U.S. Court of Appeals for the Federal Circuit, “We are completing our term in the shadow of an unexpected loss that has touched us deeply and in many ways.” This semblance of normalcy, however, was superficial. In four important respects, through its “shadow docket,” the Court tacitly signaled that things were far from normal by slowing down grants of certiorari, holding arguments in

25 Supreme Court of the United States, For Immediate Release (Feb. 16, 2016), perma.cc/M498-6D42.
26 Mark Walsh, Courtroom Draping for Justice Scalia, SCOTUSBLOG (Feb. 17, 2016), perma.cc/H6FR-FL7D.
27 Tony Mauro, Scalia’s Empty Chair Is Draped Black, Marking His Death, NAT’L LAW J. (Feb. 16, 2016), perma.cc/C6TJ-CULQ.
Abeyance, issuing evenly-divided decisions, and punting on undecidable cases.

A. Certiorari Slowdown

The uncertainty about when Justice Scalia’s replacement would be confirmed occurred alongside a slowdown in the pace of certiorari grants. The Justices hold three conferences per month (July through September excepted), when they decide which petitions for writs of certiorari to grant. Through January 2016, the Court was by all accounts keeping pace with its average grant-rate over the previous five terms. During the January 15, 2016 conference, for example, the Court voted to grant certiorari on twelve petitions. (No petitions were granted during Justice Scalia’s final conference, one week later on January 22, 2016).

After Justice Scalia’s passing, the pace of grants slowed down to a trickle. Between January 20 and May 1, 2016, the Court granted only five petitions. During that same period in the previous two terms, the Court had granted nine and thirteen petitions, respectively. By the end of the June, the Court had granted only 24 petitions. In comparison, the previous two years, the Court had agreed to hear 30 and 36 cases, respectively.

This slowdown did not go unnoticed. The Washington Post observed that “[t]he number of cases the justices have accepted has fallen, meaning that a docket that in recent years has been smaller

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31 Id.
32 Eight of these grants were announced in the January 15, 2016 orders. https://www.supremecourt.gov/orders/courtdorders/011516or_15gm.pdf. Four were announced in the Court’s January 19, 2016 orders. https://www.supremecourt.gov/orders/courtdorders/011916or_15gm.pdf
than what is traditional is shrinking still.” Analysts at a conference hosted by the progressive Constitutional Accountability Center suggested that the sluggish pace could be attributed to a “reluctance of the ideologically divided eight-member court to take on an issue in which it might not be able to provide a clear answer.”

John P. Elwood, a Supreme Court advocate who closely tracks the docket, explained that there may be several “defensive denials,” where Justices on the left and right wings united to vote against certiorari because they are uncertain of how the case would be resolved. Perhaps the Justices speculated that similar vehicles would return at a later date, when they had a full complement of members. Andrew J. Pincus, who regularly argues before the Court, rejected this reasoning as “a little self-interested,” contending that it was based on a “complete misperception of the real world impact of lower-court decisions that are out there for a long time that people in the real world have to comply with.”

According to FiveThirtyEight, the Court was on track for its lightest term in seven decades. This figure, however, overstates the decline, as the Vinson, Warren, and Burger Courts averaged over one hundred cases per term. Since 2010—when Justice Kagan was confirmed—the Court has heard on average 78 cases per term. As of

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34 Id.
35 Id.
36 Id.
37 Oliver Roeder, The Supreme Court’s Caseload Is On Track To Be The Lightest In 70 Years, FIVETHIRYTEIGHT (May 17, 2016), https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/.
the beginning of January—before the inauguration—the Court has
granted certiorari in only 58 cases.
This certiorari slowdown only affected new petitions—the Court
turned to other means to handle petitions that were already granted.

B. ARGUMENTS IN ABYANCE

Customarily, a case is argued about three months after the
petition for a writ of certiorari is granted. It takes roughly 90 days for
the case to be fully briefed and for the Justices to review the
pleadings. There is one important caveat: because the Court usually
stops hearing cases during the last week in April, if a petition is
granted after the second conference in January, oral arguments will
not be scheduled until the following term. When the Court deems
appropriate, however, it can move very quickly. For example, to
ensure a prompt resolution of the same-sex marriage cases during
the October 2014 term, the Court truncated the usual briefing
schedule.\(^38\) Yet during the October 2015 term, the Court did the exact
opposite: controversial cases that could have been heard before the
end of April were deliberately, and inexplicably, held in abeyance.

The Supreme Court held its pivotal second conference on
January 15, 2016. As noted in the previous section, at Justice Scalia’s
penultimate conference, twelve petitions for certiorari were
granted.\(^39\) On March 4, 2016, the Court announced that seven of those
cases would be argued during the April sitting: United States v.


\(^39\) Eight of these grants were announced in the orders list released later that day, and four more were announced the following Monday.
Texas\(^{40}\) on April 18; Encino Motocars v. Navarro\(^{41}\) on April 20; Kirtsaeng v. John Wiley & Sons\(^{42}\) and Cuozzo Speed Technologies v. Michelle\(^{43}\) on April 25; Dietz v. Bouldin\(^{44}\) and Mathis v. United States\(^{45}\) on April 26; and McDonnell v. United States\(^{46}\) on the final argument day of the term, April 27, 2016.

The Court’s scheduling order still left five cases in limbo. On July 13, 2016, the Court accounted for two more petitions: Manuel v. Joliet\(^{47}\) and Salman v. United States\(^{48}\) would be argued after the summer recess on October 5. It is not uncommon for petitions granted in the middle of January to be held over for argument the following term, to avoid a surplus of opinions being rushed out in June. What is quite uncommon, however, was that the Court did not promptly set for argument three petitions that were also granted on January 15, 2016: Murr v. Wisconsin,\(^{49}\) Microsoft v. Baker,\(^{50}\) and Trinity Lutheran Church

v. Pauley. The briefing in all three cases wrapped up by August, yet until January 2017, they still lingered in docket purgatory. Finally, after the nomination of Judge Neil Gorsuch, the Supreme Court at long last scheduled each case. On February 3, Murr and Microsoft were set for argument on March 20 and March 21, respectively. On February 17, Trinity Lutheran was set for argument on April 19.

Why did the cases linger so long? The Court could have been hesitant to hear a case that could yield a divided decision. Rather than risk splitting four-to-four, the Justices would prefer to let the cases—none of which present timely issues—cool their heels.

Using hindsight glasses, a possible explanation emerges as to why the Court scheduled only those seven cases—or at least six of them—for argument in April: they anticipated the Court would be able to reach a clear decision. Three of the cases—Cuozzo, McDonnell, and Kirtsaeng—were unanimous. Two of them, Encino and Dietz, split 6-2. Mathis yielded a 5-3 vote. Only Texas divided 4-4, but that case presented a timely and critical issue concerning the legality of the President’s executive action on immigration. The Justices could not delay Texas indefinitely.

The three cases left lingering present, important issues that were not timely, so they could be held much longer. Murr v. Wisconsin asks, “Whether, in a regulatory taking case, the ‘parcel as a whole’ concept as described in Penn Central Transportation Company v. City of New York, establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis

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52 136 S. Ct. 2131 (2016).
53 136 S. Ct. 2355 (2016).
55 136 S. Ct. 2271 (2016) (per curiam).
purposes.” Microsoft v. Baker considers, “Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.” Finally, Trinity Lutheran Church v. Pauley presents the question, “Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.”

Although predictions are always difficult, based on the Court’s past decisions concerning regulatory takings, class action review, and the Free Exercise clause, there is a plausible chance that each may divide 4-4. This is an outcome the Justices no doubt would want to avoid. The better option: hold the cases until a replacement is confirmed. The Washington Post observed that the Court’s decision not to schedule these three cases offers “reasons to think the court is storing cases in hopes of having a full membership of nine by the end of the year.” Specifically, “[i]t seems likely that the court fears it will be tied 4 to 4 on one or more of the cases and is hoping to have a tiebreaker on board by the time they are heard.” Amy Howe of SCOTUSBlog likewise observed that “it seems at least possible that the Court itself is responsible for the delay—perhaps seeking to maximize the chances that a ninth Justice will be able to participate

60 Id.
in the case and avoid a four-four tie.” Or, as it turned out, when a replacement was about to be confirmed. In the event the case ties 4-4, it can be reheard the following term.

If in fact the Court approached its scheduling with such an outcome determinative factor—through an informal or even formal counting of votes—it reveals a deep insight into how the Justices handled an extended absence on the Court. In contrast, the decision to slow down grants of certiorari is harder to ascribe to any specific internal practice, as grant rates often fluctuate based on the specific petitions before the Justices. But the decision to schedule some cases that yielded clear decisions, and deliberately hold in abeyance decisions that are most likely to yield a four-to-four tie, is far more perceptible. This thought experiment can be partially confirmed if *Murr, Baker,* and *Trinity Lutheran* yield 4-4 ties, and are ultimately resolved along a 5-4 basis, with Judge Gorsuch casting the decisive vote.

C. Equally Divided Court

The Court’s strategy of slowing down the pace of certiorari grants, and holding controversial cases in abeyance, did little to resolve cases already on the docket. In four cases, the Justices were unable to muster a fifth vote: *Hawkins v. Community Bank of Raymore,*

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62 As I’ve noted elsewhere, the decision to punt on Trinity Lutheran may obviate the challenge altogether, as the newly-elected Missouri Attorney General, Josh Hawley, had actually filed a brief in support of the church—there is a substantial chance the case settles. Ryan Lovelace, *GOP Wins Could Change Trajectory of Supreme Court, WASH. EXAMINER* (Nov. 9, 2016), http://www.washingtonexaminer.com/gop-wins-could-change-trajectory-of-supreme-court/article/2607040

63 136 S. Ct. 1072 (2016).
Friedrichs v. California Teachers Association,⁶⁴ and United States v. Texas.⁶⁵ In each case, which divided four votes to four, the judgment of the lower court was simply affirmed.

Hawkins, argued on the first Monday in October, 2015, presented a fairly technical question about whether a bank can require the spouses of the members of an LLC to guarantee a loan.⁶⁶ The Justices seemed divided on the permissibility of the Federal Reserve’s construction of the underlying statute—that is, whether the spouse could be deemed an “applicant,” rather than a “guarantor.”⁶⁷ At the conference the following Friday, the Justices split 5-4 on the case, and the majority opinion was assigned. But we would never find out how each Justice voted. On March 22, 2016, without any explanation, the Court issued an eight-word per curiam opinion: “The judgment is affirmed by an equally divided Court.”⁶⁸

Friedrichs was a far more high-profile case, decades in the making. In 1977, the Court held in Abood v. Detroit Board of Education that public sector unions could charge government workers an “agency fee.”⁶⁹ In the 2014 case of Harris v. Quinn, five Justices—including Justice Scalia—cast doubt on the ongoing validity of Abood, but stopped short of overruling the precedent.⁷⁰ Immediately after Harris was decided, Rebecca Freidrichs, a teacher in California who objected to paying the agency fee, filed suit seeking to overturn Abood.

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⁶⁴ 136 S. Ct. 1083 (2016).
⁶⁵ 136 S. Ct. 2271 (2016) (per curiam).
⁶⁶ 136 S.Ct. 1072 (2016).
⁷⁰ Harris v. Quinn, 134 S. Ct. 2618 (2014).
On June 30, 2015, the Court granted certiorari in *Friedrichs*, setting the case for argument on January 11, 2016. The argument did not go well for the unions. Veteran Supreme Court reporter Lyle Denniston predicted that the five members of the *Harris* majority seemed “ready to overrule” *Abood*, and the four dissenters in *Harris* “appeared to be headed toward dissent again.” Adam Liptak of the *New York Times* observed that “Justice Scalia’s questions” in particular, “were consistently hostile to the unions” and “the court’s conservative majority seemed ready to say that forcing public workers to support unions they had declined to join violates the First Amendment.”

At the conference the following Friday, the Justices split 5-4, and the majority opinion was assigned. Like with *Hawkins*, we would never find out (for sure at least) how each Justice voted. On March 29, 2016—one week after *Hawkins* was released—the Justices divided 4-4 on *Friedrichs*, and affirmed by an equally divided margin. Public sector unions dodged a bullet, as the Court was poised to overrule *Abood*. Justice Ginsburg breathed a sigh of relief in a post-term interview with the *New York Times*. “This court couldn’t have done better than it did,” she beamed. The challengers promptly filed a motion for reconsideration, which was ultimately denied on the final

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73 136 S.Ct. 1072 (2016).
day of the term. Though the Court didn’t resolve this challenge, the exact same issue will come back to the Court in vehicles from other circuits. If President Trump’s first appointee to the Court agrees with Justice Scalia, Abood may not abide.

While Hawkins and Friedrichs were promptly released as 4-4 affirmances, the other two deadlocked cases on the post-Scalia Court took far longer to announce. Dollar General Corporation v. Mississippi Band of Choctaw Indians presented the question of whether “Indian tribal courts have jurisdiction to adjudicate civil tort claims against” parties who are not members of the tribe. The case was argued on December 7, 2015. According to an analysis of oral arguments by Ed Gehres on SCOTUSBlog, the Justices seemed to fall along familiar lines. The questions of Justices Ginsburg, Breyer, Sotomayor, and Kagan “suggested varying degrees of confidence in tribal courts and support for the argument that tribal courts are endowed with at least a degree of clear civil jurisdiction over non-Indians.” In contrast, the questions of Justices Scalia, Kennedy, Alito, “and, to a lesser extent,” Chief Justice Roberts, “reflected skepticism of both the abilities of tribal courts and the constitutionality of allowing non-

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80 Id.
Indians to be subjected to civil jurisdiction for torts in tribal courts.”\textsuperscript{81} (Justice Thomas, as his practice, did not ask any questions). Reporter Mark Walsh noted that Justice Scalia, in particular, took Deputy Solicitor General Edwin S. Kneedler “to task, somewhat gently” for his reliance on the legislative of a 1993 federal statute concerning tribal courts.\textsuperscript{82} After Justice Sotomayor observed that the committee report was “very clear,” Justice Scalia “turn[ed] in her direction with a look of disbelief, then lean[ed] forward.”\textsuperscript{83} Projecting his ire from his colleague to the unfortunate lawyer at the podium, Scalia charged, “Does Congress vote on the committee report, Mr. Kneedler?”\textsuperscript{84}

The majority opinion in this 5-4 case would have been assigned the following Friday. But unlike \textit{Hawkins} and \textit{Friedrichs}, \textit{Dollar General} was not released in March, or April, or even May for that matter. Rather, the case was held till the penultimate week of the term. At the time, it was the longest pending case of the October 2015 term, “with six months and seventeen days having elapsed from its argument to the release of the Court’s single-page per curiam opinion.”\textsuperscript{85}

Why would the Court hold onto a case that was deadlocked for three months after \textit{Hawkins} and \textit{Friedrichs} were tossed? Perhaps there was some hope the Justices could reach a narrower decision that avoided the constitutional question. Ultimately, that hope was

\textsuperscript{81} Id.
\textsuperscript{82} Mark Walsh, \textit{A “View” from the Courtroom: Committee of the Whole}, SCOTUSBLOG (Dec. 8, 2015), http://www.scotusblog.com/2015/12/a-view-from-the-courtroom-committee-of-the-whole/.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
dashed, as the Court affirmed the lower court by an equally divided margin on June 23, 2016. Not a single Justice would budge one way or the other. Mr. Gehres hoped that “when the work papers of Justices sitting at the argument of this case are released, legal historians may be able to tell us why the Court took so long to announce a tie in this case.”

Moments before Dollar General was announced, the Court released its 4-4 affirmance in United States v. Texas. This landmark separation of powers case arose when Texas challenged the legality of President Obama’s executive action on immigration, Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”). This case arrived at the Court in a hurry. The Fifth Circuit Court of Appeals—perhaps mindful of the Court’s calendaring process issued its decision in favor of Texas on

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86 136 S. Ct. 496 (2016).
November 9, 2015. Had the Fifth Circuit waited much later, it would have been virtually impossible for the appeal to be heard during the October 2015 term, absent an expedited briefing schedule by the Court.

Only eleven days later—a blistering fast turnaround time—the United States filed a petition for a writ of certiorari, asking the Court for “immediate review.” Texas’s brief in opposition was due on December 21, 2015. Citing the need to complete briefs in other cases before the High Court, Scott A. Keller, the Lone Star State’s Solicitor General, requested a thirty-day extension. These sorts of extensions are usually granted pro forma by the Clerk, without the involvement of the Justices, with one important caveat: When the Justices want a case to be heard during the current term, extensions are not granted liberally.

Were Texas to have received an additional thirty days, it would have pushed the state’s filing deadline to January 20—past the pivotal January 15 conference. (I told you this conference was really important!) As a result, the earliest the case could have been “conferenced” would have been on February 19. Under normal circumstances, a case granted that late would could not be argued during the current term. Of course, the Court could severely truncate the briefing schedule, but this change would risk rushing an important separation of powers case. Alternatively, the Court could always set a special argument in May—barely a month before it

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809 F.3d 134 (5th Cir. 2015).
would have to announce its blockbuster ruling—but it has only created such a late-spring sitting three extraordinary times in the last quarter century, and never for petitions that simply fell on the wrong side of the January-February conference line.

The easiest solution would have been to simply deny Texas’s motion for an extension. The Court’s response, however, was far craftier. On December 1, 2015, the Court ordered Texas to file its brief in opposition on December 29, 2015. This nine-day extension allowed the petition to be circulated on December 30, 2015, just in time for the all-important January 15, 2016 conference. Had the Court given Texas ten days, the petition could not have been distributed in time for the January 15 conference. This order on the so-called “shadow docket” sheds light on how the Court coordinates extensions when it wants to promptly hear a case.

Wasting no time, the Court immediately granted the Solicitor General’s petition for a writ of certiorari on January 15, 2016. (The Court did not adhere to its recent tradition of considering a petition at least twice before granting it). The Justices realized that they had

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98 Id.
to resolve this important case right away. Not only did the Court take the case, but it also added an additional question presented that the Solicitor General did not suggest: “Whether the guidance violates the Take Care Clause of the Constitution, Article II, section 3.”102

On January 15, 2016—that date of cosmic significance—at least four Justices were gung ho on answering the difficult question, and at least one was keen on reaching a far broader constitutional question. With little doubt, Justice Scalia would have affirmed the Fifth Circuit’s ruling. His decision in Arizona v. United States rebuked the legality of President Obama’s 2012 executive action on immigration, Deferred Action for Childhood Arrivals (DACA), on which the DAPA was modeled.103 After the end of the term, Justice Ginsburg confessed to Adam Liptak of the New York Times that she was relieved that her late colleague did not participate. “Think what would have happened had Justice Scalia remained with us,” she said.104

Down to eight, the arguments were fiercely divided, and a fifth vote seemed unlikely.105 Two months later, on June 23, the Court’s deadlock become public: the judgment of the Fifth Circuit was affirmed by an equally divided margin.106 Two weeks later, the

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103 My contribution to the Cato Supreme Court Review imagines what could have been Justice Antonin Scalia’s concurring opinion in United States v. Texas, where he would have ruled that President Obama’s executive action on immigration violates the Take Care Clause of the Constitution. Josh Blackman, U.S. v. Texas (Scalia, J., concurring), 2015-16 CATO SUPREME COURT REVIEW 79 (2016).
United States filed a Hail-Mary petition for rehearing, perhaps hopeful that the Court could let the petition linger, until a ninth Justice—maybe Merrick Garland—was confirmed. The petition sat on the Court’s docket until it was formally denied following the “Long Conference” on October 3, 2016. The case would return to where it began, in federal district Court in Brownsville, Texas. The Justices were not banking on a fifth vote anytime soon.

D. All Tied Up

That the Court only deadlocked four times in a contentious term is remarkable. “On eight-person courts the justices reach far fewer 4-4 decisions than we would expect,” explained Lee Epstein, a law professor at Washington University in St. Louis.107 “They seem to work hard to minimize them because they’re so inefficient. They can hold over cases, cast strategic votes to avoid a decision down the road that may be even worse ideologically, write narrowly and dump cases on procedural grounds.” 108

Compared to previous periods with fewer than nine, the Roberts Court handled the shortfall with ease. Due to death, retirement or resignation—or recusal in individual cases—the High Court has often been short-handed. Since World War II there have been 15 periods when the Court had eight justices, and each time the court managed its docket without a hitch.109 Even in the rare cases when eight justices split evenly, 25 times the Court affirmed the lower-

108 Id.
court judgment without opinion (or precedential value) and 54 times the Court set the case for reargument. The former approach allowed the issues to be raised again in similar future cases. The latter allowed for proper resolutions once the ninth justice joined—and only 25 of those cases ended up 5-4, meaning the new justice made no difference in over half of the reargued cases. In other words, rather than making the judicial system grind to a halt, a Supreme Court vacancy merely delays rulings in a small number of cases.

In May 1945, President Truman selected Justice Robert H. Jackson to serve as chief prosecutor at the Nuremberg Tribunals. From then until Jackson’s return in October 1946, the Court set three cases for reargument. One was the landmark Adamson v. California, where the court held that the Bill of Rights placed no limits on state action. Adamson was originally argued in January 1946, while Jackson was abroad, then reheard in January 1947. It was finally decided in June 1947, with Jackson casting the tiebreaking vote.

The next significant short-handed court came when Justice Jackson died in October 1954. His replacement, John Marshall Harlan II, wasn’t confirmed until March 1955. The five-month vacancy required three cases to be reargued, including the important Toth v. Quarles regarding the relationship between military and civilian courts. Toth ended up 6-3, but Justice Harlan cast the deciding vote in the other two, including a precedent for lawsuits against the federal government, Indian Towing Co. v. U.S.

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110 Id.
111 332 U.S. 46 (1947).
112 Id.
The 1960s saw an extended period of Supreme Court understaffing as President Johnson played musical chairs with various high offices. LBJ’s machinations concluded when the Senate rebuffed Justice Abe Fortas’s promotion to chief justice in October 1968, leading to Fortas’s resignation in May 1969. That seat was empty for a year until Harry Blackmun, President Nixon’s nominee, was confirmed in June 1970. During this period, eight cases yielded 4-4 decisions, and 18 cases had to be reargued. Blackmun cast the tiebreaking vote in six of the reargued cases, including Baird v. State Bar of Arizona, which prevented states from excluding attorneys who belonged to the Communist Party.

On September 17, 1971, Justice Hugo Black resigned, and six days later Justice Harlan died. From September 1971 through January 1972, the Court had seven justices. On December 13, 1971, the septet heard Roe v. Wade. The Court waited for reinforcements before deciding such a momentous case, though six of the seven justices would vote to invalidate a Texas abortion law. A second round of argument was scheduled for October 1972 with newly confirmed justices Lewis Powell and William Rehnquist. On January 22, 1973—303 days after the first argument—Roe was decided 7-2.

Justice William O. Douglas resigned on November 12, 1975, but his seat had effectively been vacant since New Year’s Eve 1974, when he suffered a stroke. His eight colleagues agreed to reargue any

117 Supreme Court Nominations, supra note 113.
120 Id.
121 Id.
cases where Douglas was the pivotal vote. After Justice John Paul Stevens was confirmed in December 1975, the Court reheard five such cases. One was the 5-4 decision in *National League of Cities v. Usery*, which held that the 10th Amendment stopped Congress from regulating state labor markets.

Fast-forward to the Reagan administration. Justice Powell announced his retirement on June 26, 1987, and on July 1 President Reagan nominated Robert Bork. On October 23 the Senate rejected Bork 58-42. Reagan announced Douglas Ginsburg as his next nominee, but he abruptly withdrew after his past marijuana use was revealed (that used to disqualify you from prominent positions in Washington). Reagan then nominated Anthony Kennedy, who was confirmed in February 1988. This contentious backstory prevents the Kennedy appointment from serving as a precedent for election-year confirmations. During the eight months between Powell’s departure and Justice Kennedy’s arrival, the Court affirmed three cases 4-4, and set four cases for reargument. In a preview of swing votes to come, Justice Kennedy broke ties in each of these later 5-4 decisions.

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126 Supreme Court Nominations, supra note 113.

The most recent relevant turnover occurred in 2005. Chief Justice Rehnquist died on September 3, 2005, and the Senate confirmed John G. Roberts as Chief Justice on September 29. Although Justice Sandra Day O’Connor had announced her retirement months earlier, she promised to stay on the Court until her replacement was confirmed. That ended up being Justice Samuel Alito, who was confirmed in January 2006. During her brief “lame duck” period, Justice O’Connor would have cast the tiebreaking vote in three cases, all of which were reargued instead. In all three cases— involving the death penalty, “knock-and-announce” warrants, and the First Amendment rights of public employees—Justice Alito cast the decisive vote.

The October 2015 term, with only four tied-votes, was perhaps proof of the Court’s coping skills. *Hawkins, Friedrichs,* and *Dollar General* presented issues that could come back to the Court with a different vehicle, and were not urgent. Justice Ginsburg praised the Chief’s stewardship during this period. “He had a hard job,” Ginsburg told the *New York Times.* “I think he did it quite well.”

*Texas* does not fall into this pattern, but in hindsight, passing on this landmark separation of powers case may have been the most prudent option: as fate would have it, due to the change in administrations, the Court will never have to decide it. I made just this argument in the amicus brief I coauthored on behalf of the Cato

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Institute: “[T]he leading Republican presidential candidates have announced that they would rescind DAPA in its entirety. If that happens, the Court will never have to resolve these contested questions. A decision not to decide now may be a decision not to decide ever.”

Shortly after the election, the Obama Justice Department agreed to hold the case in abeyance, pending the change of administrations. President-Elect Trump pledged to rescind DAPA, which will result in the case dropping off the docket indefinitely.

E. SCOTUS PUNTS

Not all of the Court’s evasive maneuvers during the October 2015 term, however, warrant praise. Two important decisions, which did not yield 4-4 affirmances warrant further examination. First, there is the curious case of Fisher v. University of Texas, Austin. In 2012, by a vote of seven-to-one (with Justice Kagan recused), the Court ruled that the Fifth Circuit failed to properly apply strict scrutiny in its consideration of the University of Texas’s affirmative action policy. On remand, the Fifth Circuit—perhaps calling the Court’s bluff—once again upheld the constitutionality of the University’s affirmative action plan. Fisher filed her petition for certiorari on February 10, 2015, and it was initially distributed for the

133 Cato Institute Brief, Texas (citing Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).
137 771 F.3d 274 (5th Cir. 2014).
May 21, 2015 conference. Then something peculiar happened—it was relisted five times. The Court’s practice in recent years is to relist a case once before granting. If a case is relisted more than once, that suggests a dissent from denial of certiorari is being drafted. But none was issued here. Finally, on June 29, 2015—the final day of the term—certiorari was granted.

The case was argued on December 9, 2005, before nine Justices. Justice Scalia, who made headlines for his question alluding to “mismatch theory,” seemed like a solid vote to rule against the University of Texas. In addition, Lyle Denniston noted that Chief Justice Roberts, along with Justices Thomas and Alito “have grown deeply skeptical, if not hostile, to affirmative action in general.” Justices Ginsburg, Breyer, and Sotomayor seemed to support the University’s policy. That breakdown left Justice Kennedy in his usual seat as the undecided vote. But with only eight Justices, at best Justice Kennedy’s fourth vote for the liberal wing could yield an affirmance by an equally-divided court. At the conference, presumably, a five-member bloc emerged. But after Justice Scalia’s death, the vote-count changed.

On June 23, 2016, the Court released its 4-3 opinion supporting the University of Texas. Justice Kennedy, writing on behalf of

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139 Id.
140 Id.
141 Id.
143 Id.
Justices Ginsburg, Breyer, and Sotomayor, found that the affirmative action policy passed constitutional muster. Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented. Had Scalia initially voted with the conservatives (as he almost certainly did), the vote would have been four-to-four. That would have resulted in an affirmance by an equally divided margin. Such a decision would have been released before Justice Scalia’s passing a month after arguments. But something happened here. The votes remained in flux long enough until the four-four affirmance was avoided.

There is reason to suspect that Justice Kennedy flipped his vote. According to Joan Biskupic’s account, in 2012 Justice Sotomayor prevailed on Justice Kennedy to hold off on invalidating the University of Texas’s policy altogether. Instead, seven members of the Court issued a somewhat odd opinion, which admonished the Fifth Circuit to take a stricter look at the case. Perhaps here, too, the liberal Justices persuaded Justice Kennedy to flip after Justice Scalia’s passing. In her end-of-term interview in the New York Times, Justice Ginsburg praised her moderate colleague. “I think he comes out as the great hero of this term,” she said. Earning her “notorious” nickname, Ginsburg also assured Liptak how her recused colleague would have voted. “If Justice Kagan had been there, it would have been 5 to 3,” she said. “That’s about as solid as you can

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145 Id.
146 Id.
148 Liptak, supra note 132.
150 Liptak, supra note 132.
151 Id.
Providing a hint to the future, Ginsburg concluded, “I don’t expect that we’re going to see another affirmative action case.” She paused, “at least in education.” 153

Finally, the Court’s decision in Zubik v. Burwell provided a fitting conclusion to the October 2015 term. 154 At issue was whether accommodation to the Affordable Care Act’s contraception mandate violated the free exercise rights of religious charities, such as the Little Sisters of the Poor. 155 After oral arguments, the Justices seemed conflicted on how the government could accommodate the various employers that used different types of insurance plans, which operate differently under the Employee Retirement Income Security Act (ERISA). 156 In an unprecedented order, the Court asked the parties for supplemental briefing about whether an alternate accommodation could be reached. 157 The plaintiffs and government agreed that tweaks could be made to how employers object to the mandate, but that for certain employers with “self-insured” ERISA plans, no accommodation could be reached. 158 How did the government treat that conflict? By pretending it didn’t exist.

Several weeks after the supplemental briefing was filed, the Court issued an eight-page per curiam decision that remanded the case to several courts of appeals, urging the lower courts to figure out the issue. 159 The import of the opinion was patent. The Zubik decision, noted Adam Liptak, “was the latest indication that the

152 Id.
153 Id.
155 JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER 520 (2016).
156 Id. at 521-22.
157 Id.
158 Id.
159 136 S. Ct. 1557 (2016).
eight-member Supreme Court is exploring every avenue to avoid 4- to-4 deadlocks.\footnote{Adam Liptak, Justices, Seeking Compromise, Return Contraception Case to Lower Courts, N.Y. TIMES (May 16, 2016), http://www.nytimes.com/2016/05/17/us/supreme-court-contraception-religious-groups.html} While the Court commendably avoided a four-to-four tie in this case, its decision was little more than a punt. The courts of appeals were asked, with strikingly little guidance, to resolve the question a short-handed Court could not. The punt could have been designed to permit enough time for a ninth Justice to be confirmed, thereby providing a fifth vote for either side. However, in hindsight, there was an additional value to this minimalist decision: by postponing a resolution until the change-in-administrations, the Court may have absolved the need to ever decide the difficult religious liberty question. If the Trump administration simply provides a broader accommodation or exemption for the religious charities—which it can do through a rulemaking—the appeal simply goes away. In this sense, Zubik served as a fitting conclusion to the October 2015 term: a potential landmark decision was granted with nine Justices present; with only eight Justices the Court reached a faux-compromise that did little to resolve the dispute, hoping that the election would obviate the conflict altogether.

II. THE CONSERVATIVE LEGAL MOVEMENT

The run-up to the 2016 presidential election served as a near-death experience for the conservative legal movement. All of the pundits predicted that Hillary Clinton would win in a landslide. She would appoint a replacement for Justice Scalia, and perhaps two or three more Justices, pushing the Court to the left.\footnote{Adam Liptak & Alicia Parlapiano, How Clinton’s or Trump’s Nominees Could Affect the Balance of the Supreme Court, N.Y. TIMES (Sept. 25, 2016), http://www.nytimes.com/interactive/2016/09/25/us/politics/how-clintons-or-trumps-nominees-could-affect-the-balance-of-the-supreme-court.html} Additionally,
with a Democratically-controlled Senate, no longer bound by the filibuster, Clinton could swell the ranks of the lower courts with progressive judges hand-picked by her administration. The decades-long projects promoting textualism, originalism, and federalism would suffer a premature demise. Hard-fought victories on the Second Amendment, the separation of powers, and religious liberty, would be in vain. Conservatives could no longer look to the federal judiciary to vindicate constitutional rights.

At the same time, the progressive legal movement was triumphant. Leading this irrational exuberance for a post-Clinton Court was Professor Mark Tushnet of Harvard Law School. In a candid June 2016 blog post, he urged that after Justice Scalia is replaced, progressives should “abandon” their “defensive crouch liberal constitutionalism.”162 Instead, they should go on offense with a scorched earth policy.163 His message to conservatives on their defeat in the culture wars: “You lost, live with it.”164 His message to the perennial swing Justice was far cruder: “Fuck Anthony Kennedy.”165 Advocates should stop trying to craft arguments for the Reagan nominee because his vote was “not so crucial anymore.”166 Rather, “Liberals should be compiling lists of cases to be overruled at the first opportunity on the ground that they were wrong the day they were decided.”167 Professor Rick Hasen called the Supreme Court “the most urgent civil rights issue of our time,” and predicted

162 Mark Tushnet, Abandoning Defensive Crouch Liberal Constitutionalism, BALKINIZATION (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html
163 Id.
164 Id.
165 Id.
166 Id.
167 Id.
“the next President could well shape the Supreme Court for the next generation.”

The “shadow docket” of the post-Scalia Court provided a preview of things to come. In Dunn v. Madison, Alabama sought emergency relief from the Supreme Court to vacate a stay of execution ordered by the Eleventh Circuit Court of Appeals. The application was denied, but “the Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito would grant the application to vacate the stay of execution.” Had Justice Scalia been present, there almost certainly would have been a fifth vote to allow the execution to proceed. To underscore the significance of this entry, it was only the third time the Chief Justice had dissented from the denial of an application to the Court.

In Gloucester County School Board v. G.G., the petitioner sought emergency relief to stay a decision of the Fourth Circuit concerning the application of Title IX to bathroom accommodations for a transgender student. The same four conservative Justices voted to grant a stay, but that was not enough; Justice Breyer “vote[d] to grant the application as a courtesy.” Without Breyer’s courtesy vote, the conservatives would have been helpless to stay the judgment as the case was appealed.

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174 Id.
On the final day of the tumultuous October 2015 term, the Supreme Court denied certiorari in *Stormans, Inc. v. Wiseman*.

Washington State enacted a regulation that required pharmacists to dispense various forms of contraceptives, even over religious objections. The Ninth Circuit upheld the constitutionality of the regulations. Justice Alito, joined by the Chief Justice and Justice Thomas, dissented from the denial of certiorari. The dissent’s first sentence conveys the state of mind of the conservative wing: “This case is an ominous sign.”

Had Justice Scalia still been on the bench, he would almost certainly have provided a fourth vote to grant certiorari. But with a glimpse into the future, the conservatives realized that the important value of religious liberty would not be protected by the Supreme Court. To underscore the significance of this decision, it was the *first* time the Chief Justice had ever joined a dissent from a denial of certiorari.

“If this is a sign of how religious liberty claims will be treated in the years ahead,” Alito wrote, in a not-too-veiled reference to the post-Scalia Court, “those who value religious freedom have cause for great concern.”

The Court’s conservatives were looking at a lifetime of perpetual dissent.

Had Justice Scalia been replaced by Judge Merrick Garland, or perhaps someone even further to the left, on the most pressing issues, the conservatives would have been unable to muster four votes for certiorari, five votes for a stay, or five votes for a majority opinion. The future looked bleak.

However, as election night wound to a close, and Hillary Clinton eventually conceded, those fears and hopes quickly reversed. To his

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177 A search on Westlaw for “dissenting from the denial of certiorari” within a sentence of “The Chief Justice” yielded zero returns.
credit, Professor Tushnet closed his outlandish post with a hedge: “Of course all bets are off if Donald Trump becomes President.”¹⁷⁹ For progressives, defeat was snatched from the jaws of victory. For conservatives, a once unthinkable victory salvaged their legal movement—and it may have done more. This part will analyze how this near-death experience may provide the conservative justices with a second lease on their legal lives, with respect to incrementalism, institutionalism, and originalism.

A. INCREMENTALISM

The cornerstone of the Roberts Courts’ approach to stare decisis could best be described as incrementalism. Rather than use a single case to issue a broad legal ruling, the Court prefers to use intermediary decisions to build legal principles leading up to the finale. In an insightful analysis of this “new twist” on constitutional avoidance, Richard M. Re, writes that over the past decade, “[i]nstead of avoiding constitutional questions whenever possible, recent Supreme Court majorities have tended to engage in avoidance just once before issuing disruptive decisions.”¹⁸⁰ Re calls this approach “the doctrine of one last chance,” which amounts to “avoidance on steroids, but with an expiration date.”¹⁸¹

The “most obvious” example of this trend, Re points out, was the SCOTUS two-step with respect to the Voting Rights Act (VRA). In 2009, the Court considered a challenge to the preclearance requirements of the VRA in Northwest Austin Mun. Utility Dist. No

¹⁷⁹ Mark Tushnet, Abandoning Defensive Crouch Liberal Constitutionalism, BALK INIZATION BLOG (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html
¹⁸¹ Id. at 174.
One v. Holder, affectionately known as NAMUDNO. Chief Justice Roberts’ opinion for eight justices sketched out, in great detail, why provisions of the VRA were unconstitutional: “The Act’s preclearance requirements and its coverage formula raise serious constitutional questions.” However, at the last moment, the Chief pulled the rug out from his own argument. “In assessing those questions,” he wrote, “we are keenly mindful of our institutional role.” Turning to the doctrine of avoidance, the Court chose to resolve the case based on the petitioner’s “statutory claim” that it could be “bail[ed] out” from the preclearance requirement. Having laid out the arguments for why the preclearance formulas were unconstitutional, the Court dodged the question. Only Justice Thomas dissented, writing that “the doctrine of constitutional avoidance is [not] applicable here.”

Despite its shortcomings, the Chief’s message across the street to Congress glowed in neon lights: “[T]he political branches were being given one last chance to update the VRA’s outdated coverage formula,” or else. Professor Rick Hasen wrote that “[t]he chief justice is a patient man playing a long game. He was content to wait four years to strike down a key provision of the Voting Rights Act. Apparently he likes to say I told you so.” Tom Goldstein wrote at SCOTUSBlog that NAMUDNO “seem[s] to lay down markers that

183 NAMUDNO, 557 U.S. at 204.
184 Id. at 204.
185 Id. at 205.
186 Id. at 212.
187 Re, supra note 180, at 175.
will be followed in later generations of cases.” 189 In this sense, Goldstein added, the Court “is reinforcing its own legitimacy with opinions that later can be cited to demonstrate that it is not rapidly or radically changing the law.” 190 And not just any opinion, but an opinion that was joined by eight Justices. NAMUDNO was a warning shot fired across the bow. Unsurprisingly, Congress did not take the Chief Justice up on his offer.

In 2013, the petitioners in Shelby County v. Holder asked the Court to finish the job it started four years earlier. 191 Left with no “other choice,” Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, invalidated the VRA’s coverage formulas. 192 The decision closely followed the roadmap that eight Justices joined in NAMUDNO. In the penultimate paragraph of the opinion, Roberts wrote that the Court does not “strik[e] down an Act of Congress . . . lightly.” 193 He noted, “That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds.” 194 In the aftermath of NAMUDNO, Roberts explained, “Congress could have updated the coverage formula at that time, but did not do so.” 195 Because of Congress’s “failure to act,” Roberts insists, the Court has “no choice but to declare § 4(b) unconstitutional.” 196 The Chief’s incremental approach to precedent was obvious. Adam Liptak observed in the New York Times that the

189 Tom Goldstein, Thoughts on This Term and the Next, SCOTUSBLOG (June 29, 2009), http://www.scotusblog.com/2009/06/thoughts-on-this-term-and-the-next/.
192 See id.
193 Id. at 2631.
194 Id.
195 Id.
196 Id.
Chief’s decisions in *Northwest Austin* and *Shelby County* “are an example of the long game Chief Justice Roberts seems to be playing.” 197 Indeed, in this case at least, the Chief’s “subtle, incremental plan to move the Supreme Court to the right” was successful.198

A similar dynamic played out in the three years between *FEC v. Wisconsin Right to Life (WRTL)*199 and *Citizens United v. FEC*.200 In *WRTL*, an advocacy corporation challenged the constitutionality of the “electioneering communications” provisions of the Bipartisan Campaign Reform Act (BCRA).201 Chief Justice Roberts, joined only by Justice Alito, ruled narrowly that the advertisements at issue in this case were protected by the First Amendment, but stopped short of reaching the broader question of whether express advocacy before an election may be prohibited altogether, and whether *McConnell v. FEC* should be overruled.202 Once again, in the penultimate paragraph of his opinion, Roberts wrote, “We have no occasion to revisit [McConnell] today.”203

Yet, the reasoning in Roberts’ opinion inexorably leads to the overruling of *McConnell*. Professor Re points out that *WRTL* was but a “means of postponing a grander revolution in the law” as “[p]roponents of campaign finance restrictions were being given one

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201 See 551 U.S. 449.
202 See id. at 480-82.
203 Id.
last chance to defend their signature legislative achievement.”\textsuperscript{204} To the surprise of no one, Congress did not touch BCRA.

With \textit{Citizens United v. FEC} in 2010, the Court finished what it had started in \textit{WRTL} three years earlier. Building on the roadmap the Chief set out three years earlier, Justice Kennedy writing for the Court overruled \textit{McConnell}.\textsuperscript{205} Chief Justice Roberts, joined by Justice Alito, concurred to “address the important principles of judicial restraint and stare decisis implicated in this case.” \textsuperscript{206} Roberts explained that unlike in \textit{NAMUDNO}, which eight Justices had joined the year before, \textit{Citizens United} could not be resolved on a statutory claim.\textsuperscript{207} Further, the majority proceeded with the “same order of operations” he adopted in \textit{WRTL}, starting with the “narrowest claim,” and moving to the “broadest claim” only where necessary.\textsuperscript{208} Unlike in \textit{WRTL}, where a “narrower constitutional argument” provided the rule of decision, for \textit{Citizens United}, there was “no way to avoid” the “broader constitutional argument.”\textsuperscript{209}

The doctrine of one last chance worked to incrementally move the law to the right with respect to voting rights and campaign finance reform. The long game, at least superficially, seems to have paid off. A closer analysis, however, reveals the myopia of this jurisprudential philosophy.

\textsuperscript{204} \textit{Re}, \textit{supra} note 180, at 176.
\textsuperscript{205} \textit{See} 558 U.S. at 324-25, 327, 329, 332-36 (2010) (“The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated.”).
\textsuperscript{206} \textit{Id.} at 373.
\textsuperscript{207} \textit{Id.} at 374.
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{Id.} at 374-75.
1. Legislative Inaction

As a threshold matter, a gentle nudge to Congress to repair a statute falls somewhere between faux humility and an empty gesture—especially if there is no realistic opportunity for Congress to actually amend the statute. Section 5 of the Voting Rights Act was reauthorized in 2006 by a vote of 98-0 in the Senate, and 390-33 in the House of Representatives. There was no political movement to amend the formulas after NAMUDNO. The supposition that Congress would actually take advantage of their “one last chance” was farcical. As with the VRA, there was absolutely no prospect for amending the BCRA. President Bush and a bipartisan majority in both houses supported the law. Even the most amateur political pundit could predict this “last chance” was illusory. A legitimate jurisprudential theory cannot be premised on such alternative facts. To take this proffer across First Street seriously is delusional.

2. Implausible Rationales

Second, for the intermediary setup cases—such as WRTL and NAMUDNO—the Court was forced to adopt implausible legal rationales, under the guise of minimalism. That is, where all signs point to a law’s unconstitutionality, and the only remaining remedy is for Congress to amend it, the Court must grasp at something—anything really—to resolve the case on narrow grounds. For example, in NAMUDNO, the Court made the case for why the coverage formulas were unconstitutional. However, to avoid striking

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them down, the Court had to turn to a statutory argument that even the VRA’s defenders thought was not “tenable” or “plausible.”

Professor Hasen explains that allowing the utility district to bail out of the preclearance requirement elided the “textual analysis offered by the district court,” disregarded the “legislative history showing Congress’s unambiguous intent to limit bailout to states and political subdivisions that register voters,” and “ignored the Department of Justice’s regulations stating that only jurisdictions that register voters may bail out, and refused to afford any deference to such regulations.” The majority’s only argument—that Congress’s amendments in 1982 served as an “express repudiation” of a Supreme Court opinion—was “not at all supportable by the text of the statute or the legislative history.” This “deus ex machina” provided no indication that the change was meant as an “express repudiation” of the case. It is utterly indefensible to ignore the text of a statute and instead fabricate legislative history in order to merely delay invalidating it. If the law is unconstitutional, strike it down. Drop the charade.

The narrow grounds in WRTL were similarly implausible. The advertisement at issue criticized Senator Feingold’s use of the filibuster for judicial nominees. The controlling opinion by Chief Justice Roberts concluded that because the advertisement was

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211 See Heather Gerken, The Supreme Court Punts on Section 5, BALKINIZATION BLOG (June 22, 2009), http://balkin.blogspot.com/2009/06/supreme-court-punts-on-section-5.html (“[T]he statutory argument is one that almost no one (save Greg Coleman, the lawyer who argued the case and who is now entitled to be described as a mad genius) thought was particularly tenable because of prior Court opinions.”).
213 Id.
214 Id. at 205.
215 See id. at 205-06.
216 WRTL, 551 U.S. at 459-60.
susceptible to an interpretation where it did not criticize Senator Feingold’s fitness for office, it was not the “functional equivalent” of express advocacy.217 In other words, the Court fashioned a test: Unless the advertisement was susceptible to “no reasonable interpretation” other than a commercial supporting or opposing an individual candidate, it was not covered by the law.218 Therefore, the controlling opinion ruled for WRTL, and gave it an “as-applied” exemption, and could fund the advertisement using funds from corporations.219

In partial dissent, Justice Scalia, joined by Justices Kennedy and Thomas, ridiculed this as-applied analysis, which it explained was “incompatible with McConnell’s holding that [the provision] is facially constitutional.”220 The government, always keen to find a narrow to avoid defeat, conceded “that any test providing relief to WRTL is incompatible with McConnell’s facial holding.”221 If WRTL’s advertisement is not covered under the controlling opinion’s “indefensible” and “unpersuasive” test, Justice Scalia concluded, “then McConnell cannot be sustained.”222 Indeed, he noted that seven Justices “having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules McConnell without saying so.”223 With his usual acerbic tongue, Justice Scalia wrote that the Chief’s “faux judicial restraint is judicial obfuscation.”224 The controlling opinion offered

217 Id. at 470-71.
218 Id.
219 Id.
220 Id. at 498.
221 Id. at 498-99.
222 Id. at 499.
223 Id. Set also id. at 526-27 (Souter, J., concurring) (“[The controlling opinion] stands McConnell on its head, and on this reasoning it is possible that even some ads with magic words could not be regulated.”).
224 WRTL, 551 U.S. at 498 n.7 (Scalia, J., concurring).
no response. Like in NAMUDNO, to avoid the constitutional question—which the Chief fully intended on resolving once Congress failed to act—the controlling opinion had to rely on an implausible construction of a recent precedent to provide WRTL with a temporary pass. This reasoning would only last until the finale, when McConnell would be jettisoned in its entirety.

Relatedly, in NFIB v. Sebelius, as part of a so-called “long-game” and through the use of a “saving construction,” the Chief found a way to uphold the Affordable Care Act’s individual mandate that he had already found was not justified by Congress’s commerce powers, and was not a tax. How? By construing it as a tax anyway. Putting aside for a moment of the validity of this saving construction, with little fanfare, the Chief’s analysis required him to carelessly break ground in an uncharted area of constitutional law.

The penalty to the Affordable Care Act’s individual mandate was not an income tax authorized by the 16th Amendment. Nor was it a direct tax apportioned among the states. Nor was it an indirect tax, such as duty or excise. So what is the constitutional basis of such an exaction? The joint dissenters acknowledge the “difficult constitutional question” of whether the exaction “is a direct tax that must be apportioned among the States according to their

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225 David L. Franklin, Why Did Roberts Do It?, SLATE (June 28, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/john_roberts_broke_with_conservatives_to_preserve_the_supreme_court_s_legitimacy.html (“A cynic might say that Roberts is keeping his powder dry for impending battles that are closer to his heart, such as the constitutionality of affirmative action. But I think Roberts is playing the long game.”).
227 JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).
228 U.S. CONST. art I, § 9 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”).
population,” a “question of first impression.” In language that could only have come from Justice Scalia’s pen, the dissenters lamented that the controlling opinion resolved this issue based on “the lick-and-a-promise accorded by the Government and its supporters.” The Government’s “opening brief,” the dissenters pointed out, “did not even address the question,” and the reply brief “devoted a mere 21 lines” to the issue, explaining that it was “not a direct tax,” but an excise.

How does the Chief Justice handle it? Like in NAMUDNO and WRTL, Roberts was forced to adopt an implausible argument, to avoid making the plausible argument he had already articulated. The Chief concluded, “The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.” Timothy Sandefur explained the issue directly (no pun intended): “The Court’s hasty rejection of the direct tax objection is all the more problematic given how little attention was paid to this matter in the briefing—and, of course, in the public deliberation that led up to either the adoption of the PPACA or the litigation over its constitutionality.”

But if it is not a direct tax, then it must be “uniform throughout the United States.” The ACA’s penalty is not uniform, because penalties are calculated based on the price of insurance policies,

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230 NFIB, 132 S. Ct. at 2655 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).
231 Id.
232 Id. (citing Petitioners’ Minimum Coverage Reply Brief at 25).
233 See Petitioners’ Minimum Coverage Reply Brief at 25 (“The shared responsibility payment is not a tax on property, and its imposition is contingent upon numerous factors, including income and the way an individual finances health care, i.e., ‘a particular use of property.’”).
234 NFIB, 132 S. Ct. at 2599.
236 U.S. CONST. art I, § 8, cl. 1.
which vary state-to-state. Roberts’ opinion makes no effort to address the uniformity required for indirect taxes. To save the Affordable Care Act, the Chief single-handedly botched an already-unclear clause of the Constitution. However, because this issue is unlikely to arise again, perhaps the “direct tax” clause was a worthy sacrificial lamb at the altar of judicial minimalism.

Like the imagined legislative history in NAMUDNO, or the inconceivably narrow as-applied relief in WRTL, the doctrine of one-last-chance amounts to the proverbial “railway ticket decision—good only for this day and station.” Or, as Ilya Shapiro has dubbed the NFIB exaction: a “unicorn tax—a creature of no known constitutional provenance that will never be seen again.” Fortunately, as Sandefur points out, the saving construction required “an implausible reading on the statute, which raises more constitutional problems than it resolves.” There is nothing minimalist about the Roberts twist on avoidance, as it requires the Court to rely on strained statutory arguments, imagine legislative purposes that are absent, and even—contrary to its mission—reach difficult constitutional questions. Any humility lies in the eyes of the beholder.

3. “Long Game,” Short Gain

Finally, the “long game” depends on a stable composition on the bench. Richard Re notes an inherent limitation in the doctrine of one last chance, as applied to the so-called long game: “judicial majorities must be stable over a period of time before they can issue major

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240 Sandefur, supra note 235, at 237.
decisions.”

During the periods from NAMUDNO to Shelby County, and from WRTL to Citizens United, the same five-vote blocks were present (considering that Justices Souter and Stevens were replaced by like-minded jurists in Justices Sotomayor and Kagan). This consistency is a historical outlier. The Supreme Court does not exist in a vacuum, where stasis is maintained. Everything changes. Even if the Chief Justice has a broad vision of what he wants to accomplish, had President Clinton appointed three new Justices, all of those plans would have vanished instantly. His first decade of planning and calculating would have been for naught, and the Chief Justice would have been in dissent for a generation. Even if a Republican President appoints two or three Justices, there is no way for Roberts to know how they’ll vote. Maybe those Justices will also have a different master plan, and will not agree with the Chief’s plan. Or maybe the nominee will turn out to be another Souter or Stevens. Or what if the plan falls apart much sooner?

Justice Scalia’s unexpected death brings this entropy into focus. As we discussed in Part I.C., the conservatives on the Court took a three-step approach to reigning in fees charged by public sector unions. First, in Knox v. SEIU, a 7-2 Court held that the First Amendment prohibits a union from charging public employees a fee without their affirmative consent. This was the narrow ruling that put unions on notice. Second, in Harris v. Quinn, the Court cast serious doubt on the ongoing validity of Abood v. Detroit Board of Education from 1977, but stopped short of overruling the precedent. Laurence Tribe opined that the Court’s “narrow holding” in Harris “moved the law haltingly to the right but left intact important

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On June 30, 2015, the Court granted certiorari in what was to be the final part of this trilogy. However, unable to issue the decision before Justice Scalia’s passing, the Court ultimately affirmed by an equally divided margin. The long-game was called off early.

Now, with a new Justice nominated by President Trump, perhaps the Roberts Court will feel reassured by its long-term strategy. But a deeper introspection is necessary. In the run-up to the election, where by all accounts it seemed likely that a democratic President would fill Justice Scalia’s seat, the three-step process to overrule Abood must have seemed foolish. If indeed the agency fees are unconstitutional, then this protracted dance, that would never draw to a conclusion, is inconsistent with the judicial role. Had the conservative justices simply overruled Abood in Harris, without going through the minimalism charade, they could have vindicated the Constitution, without concern about losing a fifth vote.

The two parts of Fisher v. University of Texas, Austin teach another lesson: even if the membership of the Court remains consistent, Justices may change their minds, and frustrate any efforts to engage in long-term strategy. As we discussed in Part I.E in Fisher I, Justice Kagan was recused. As a result, to cobble together a majority opinion, the University of Texas needed the votes of Justice Kennedy and at least one other Justice. (A 4-4 deadlock would have simply affirmed the judgment of the Fifth Circuit against Fisher).

According to Joan Biskupic’s account, after Fisher I was argued, the initial lineup was 5-3, with Justice Kennedy and the other conservative Justices voting against the University of Texas. 246


However, the votes changed over an “unusually long nine-month set of negotiations,” as Justices Sotomayor and Breyer persuaded Justice Kennedy to compromise. Ultimately, Justice Kennedy wrote an opinion for seven Justices, finding that the Fifth Circuit “did not apply the correct standard of strict scrutiny,” but stopped short of invalidating the University’s policy. Nina Totenberg of NPR wrote that the University’s “affirmative action policy was allowed to stand, at least for the near future.”

While all of the media accounts focused on Justice Kennedy’s changed vote, they failed to account for the fact that the other four conservative Justices also changed their votes. Initially, if Biskupic’s reports are accurate, Chief Justice Roberts, as well as Justices Scalia, Thomas, and Alito, were prepared to invalidate the University of Texas’s affirmative action policy. After the lengthy process of persuasion, they each now joined an opinion in full that stopped short of invalidating the policy.

Perhaps they viewed this as an application of the one-last-chance doctrine, although with a twist. The University was unlikely to change its policy, but perhaps the Court thought a stern warning to the Fifth Circuit would obviate the need to issue a sweeping ruling on affirmative action. And, if for whatever reason the Fifth Circuit did not change course, certiorari could be granted a second time to issue the final ruling. It would be fixed in the long term. And that is what happened—almost. When the case was initially argued in October 2015, the five skeptical votes from Fisher I seemed poised to strike down the affirmative action policy. But after Justice Scalia’s

247 Id. at 192.
249 Id.
death, down to only seven Justices, the votes changed. By a 4-3 margin, the University of Texas’s policy was upheld. Instead, for reasons that will only become clear when the archives are released, Justice Kennedy changed his mind. His decision in Fisher II is irreconcilable with his decision in Fisher I. Remarkably, in 2016, Justice Kennedy favorably cited from Justice Ginsburg’s 2014 dissent. It was a full 180. Had the five votes held firm in Fisher I, there would have been no possibility of a deviation in Fisher II. Had a democratic President appointed Justice Scalia’s replacement, affirmative action would have been forever maintained—with or without Justice Kennedy’s support. Now, perhaps the Court can give a second look to the doctrine of one-last-chance.

Only Justice Ginsburg saw through this long-game charade. She dissented in Fisher I, noted Richard Re, “perhaps in part because of her publicly expressed misgivings at having joined the admonitory majority decision in Northwest Austin.” Ginsburg hinted as much in a 2013 interview with Adam Liptak. When asked about Shelby County, she said she was “mistaken” in NAMUDNO. Indeed, during oral arguments in that case, Justice Ginsburg’s questions casted serious doubt on the validity of the bailout argument. Professor Rick Hasen wrote, “Justice Ginsburg must have swallowed hard before signing the opinion of the Court.” He was right.

250 Fisher v. University of Texas, 133 S. Ct. 2411, 2433 (Ginsburg, J., dissenting).
251 Re, supra note 180, at 178.
253 Id.
255 Id.
In hindsight, Ginsburg explained, she “should have distanced herself from the majority opinion’s language.” Liptak pointed out that Ginsburg’s solo dissent in Fisher I “may suggest that she is alert to the chief justice’s apparent strategy.” The conservative’s long-game failed. The liberals short-game succeeded.

Fisher and Harris illustrate the fundamental problem with a long game. The notion that a single Chief Justice can single-handedly shape the law over the course of decades, as if he were moving pieces around on a three-dimensional chess set, suffers from what F.A. Hayek referred to as the “fatal conceit.” Our society as a whole is infinitely more complex than any one person could ever possibly understand. It is the “fatal conceit” of central planners that they presuppose enough knowledge to control all aspects of human existence. Yet, analysts still think a long game is feasible. Shortly after NFIB v. Sebelius was decided, Adam Liptak endorsed this reasoning:

I think he’s an exceptionally smart, patient tactician who is playing a long game. He’s a young man by Supreme Court standards. He’s only 58. He’s going to be there for decades. And in incremental ways, he’s planting seeds in current decisions that will take root and allow him to move the Court in his preferred direction over time.

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256 Liptak, supra note 252.
257 Id.
259 Id.
No one (not even the Chief) can anticipate the constitutional black swans that will emerge in the future. It is impossible to know what sort of cases will make their way to the Court’s docket. Ruling a certain way in some cases, in the hopes that you can rule differently in others, totally mistakes that a third category of unforeseen cases can alter that calculus. Maybe the Chief Justice decides to uphold the Affordable Care Act so he can invalidate provisions of the Voting Rights Act (assuming everything else is equal), but what happens when the Court is called upon to decide whether a Canadian born to an American mother is a natural born citizen, or if excluding aliens from predominantly-Muslim nations is constitutional, or the legality of drone strikes on U.S. citizens. Horse trading one conservative decision for another liberal decision wreaks of an omniscience based on ceteris paribus, that is, all things remain equal. They do not. The notion that Roberts can forge a thirty-year plan—Stalin only tried for 5 years—to transform the law crumbles on inspection.

B. INSTITUTIONALISM

Early in his tenure, John G. Roberts, Jr. sat down for an in-depth interview with Jeffrey Rosen of the Atlantic. During the exchange, with remarkable clarity, the young Chief Justice articulated his

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261 See Randy E. Barnett & Josh Blackman, The Next Justices, WEEKLY STANDARD (Sept. 14, 2015), http://www.weeklystandard.com/the-next-justices/article/1024728 (“If you had been told in 2008 that the Supreme Court would soon be called upon to decide whether Congress could compel millions of Americans to buy health insurance, you would have chuckled. If you had been told in 2000 that the Supreme Court would hear a series of cases over the next decade deciding whether the president had the power to detain suspected terrorists in Guantánamo Bay, Cuba, you would have laughed. If you had been told two years earlier that a disputed presidential election in Florida would be appealed to the Supreme Court, you wouldn’t have believed it.”).

judicial philosophy. He worried that “the rule of law is threatened by a steady term-by-term focus on 5-4 decisions.”263 Roberts observed that under his stewardship, “I think the Court is also ripe for a similar refocus on functioning as an institution,” he told Rosen, “because if it doesn’t it’s going to lose its credibility and legitimacy as an institution.”264 Likewise, he praised the decision of his former boss, Chief Justice Rehnquist, to reverse his previous opposition to *Miranda v. Arizona*,265 and uphold the canonical case in the 2000 decision of *Dickerson v. United States*.266 “He appreciated that it had become part of the law,” Roberts said, “that it would do more harm to uproot it—and he wrote that opinion as chief for the good of the institution.”267 He added that judicial temperament involves a judge’s willingness to “factor in the Court’s institutional role,” to suppress his or her ideological agenda in the interest of achieving consensus and stability.”268

The Chief hoped his colleagues “should all be worried” about how the public views sharply divided opinions, and the resulting “effect on the Court as an institution.” 269 Whether or not his colleagues have embraced this philosophy, Roberts has remained committed to it during his decade on the Court. Justice Kagan has praised her Chief’s “concern[] about consensus building,” which he has “conveyed . . . in both his words and his deeds.” 270 In *NAMUDNO*, for example, he wrote that “[i]n assessing those

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263 Id.
267 Rosen, supra note 264.
268 Id.
269 Id.
questions” about the law’s constitutionality, “we are keenly mindful of our institutional role.” The effectiveness of this strategy, however, is another story.

At its heart, institutionalism is grounded not in the law, but in how the people perceive that law. “In most cases,” Roberts told Rosen, “I think the narrower [the opinion,] the better, because people will be less concerned about it.” It’s not that a narrow resolution is the better legal opinion, but that concern for public opinion serves as a motivating factor. The institutional theory views the Court as something like a checkbook: the Court can take a big withdrawal once in a while, so long it makes regular deposits. Indeed, Roberts has adopted such a fiduciary approach to judging. Back in 2007, he viewed the Court’s three-decade-long pattern of divisive 5-4 decisions as “eroding, to some extent, the capital that [Chief Justice] Marshall built up.” Thus, decisions can fall on either side of the ledger: deposits or withdrawals. By depositing “capital” in the narrow decisions — such as WRTL v. FEC, NAMUDNO v. Holder, NFIB v. Sebelius, and King v. Burwell — the Court can withdraw

272 Rosen, supra note 264.
273 Id.
275 See NAMUDNO, 557 U.S. at 204 (2009) (“In assessing those questions” about the law’s constitutionality, “we are keenly mindful of our institutional role.”).
276 See NFIB, 132 S. Ct. at 2608 (2012) (“The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.”).
277 See King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”).
that “capital” in the broad decisions like *Citizens United v. FEC*,278 *Shelby County v. Holder*,279 and cases yet to come.

Like the myopic “long game,” the checkbook approach to judging is premised on an unrealistic understanding of how the Court perceives popular opinion.280 First, the notion that a “liberal” deposit can offset a “conservative” withdrawal disregards the populaces’ motivated reasoning and short attention spans. For example, after the Chief Justice’s 2012 decision in *NFIB v. Sebelius*, his moderation was celebrated on the left. Linda Greenhouse praised the Chief’s “evolution,” in contrast with the “breathtaking radicalism of the other four conservative justices.” Barely a year later, after the Chief’s decision in *Shelby County*, the same Linda Greenhouse wrote a column titled, “The Real John Roberts Emerges.”281 The decision to invalidate the coverage formulas, she wrote, was “an exercise of pure will, fueled by a desire to change settled law.”282 Paul Barrett called

278 See *Citizens United v. FEC*, 558 U.S. 310, 385 (2010) (“We have had two rounds of briefing in this case, two oral arguments, and 54 amicus briefs to help us carry out our obligation to decide the necessary constitutional questions according to law. We have also had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues. This careful consideration convinces me that Congress violates the First Amendment when it decrees that some speakers may not engage in political speech at election time, when it matters most.”).
279 See *Shelby Cty.*, 133 S. Ct. at 2631 (2013) (“Striking down an Act of Congress ‘is the gravest and most delicate duty that this Court is called on to perform.’ We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds.”) (internal citations omitted).
280 For a discussion of how the Court, as a whole, reacts to public opinion in the long term, see BARRY E. FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2010).
282 Id.
the Chief’s bluff: “His stewardship over the last nine terms suggests he is less focused on consensus building than on leading an incremental, tactically savvy shift to the right.” Unironically, Greenhouse observed, “What a difference a Supreme Court term makes.” Unlike a bank, where a deposit may sit for several years—even earn interest—with Supreme Court decisions, the public’s reaction is what have you done for me lately?

Studies demonstrate that public support of the Supreme Court is divided along partisan lines, in large part based on the substantive outcomes of decisions. It’s not that a populace is irked that decisions split 5-4, but that decisions come out the wrong way. The following graph from the Pew Research Center illustrates how the favorability of the Court on the right and left fluctuates as a function of the Court’s decisions. The red (Republican) and blue (Democrat) lines are almost mirror images of each other.

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After Momentous Term, Widening Partisan Gap in Views of the Court

% viewing Supreme Court favorably...

Survey conducted July 14-20, 2015.

PEW RESEARCH CENTER

In 2010, after Citizens United was decided, Democratic favorability of the Court dropped as Republican favorability increased. In 2012, after NFIB v. Sebelius was decided, Republican support plummeted precipitously, while Democrat support increased by nearly as much. In 2013, when the Court decided both United States v. Windsor266 and Shelby County,267 Democratic support decreased roughly the same amount as Republican support

increased. In 2014, following a string of somewhat conservative
decisions in *McCutcheon v. FEC*, 288 *Schuette v. Coalition to Defend
Quinn*, 291 and *Town of Greece v. Galloway*, 292 *King v. Burwell*, 293 *Glossip
v. Gross*, 294 and *Obergefell v. Hodges*, 295 Republican support
plummeted, and Democrat support peaked. I concede that these
analyses demonstrate only correlation, not causation, but at a
minimum, they reject the supposition that alleged “deposits” have
yielded a relatively stable perception of the Court from year-to-year.
Even the average, independent voter line yields a palpable,
downward trend.

Further, deposits designed to keep the Court out of the limelight
can be quite short-lived. After the Affordable Care Act was upheld
in June 2012, President Obama did not make the Court an election
year issue—as some had warned he would.296 The Supreme Court
was not mentioned in any of the presidential debates.297 In the final
chapter of *Unprecedented: The Constitutional Challenge to Obamacare*, I
wrote that during the debates, “there were no attacks on the chief

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296 See Marvin Ammori, *Why Obama Should Run Against the Supreme Court*, THE
why-obama-should-run-against-the-supreme-court/255497/; see also Chris Cillizza &
Aaron Blake, *Could President Obama Run Against the Supreme Court?*, WASH. POST (June
25, 2012), https://www.washingtonpost.com/blogs/the-fix/post/could-president-
obama-run-against-the-supreme-court/2012/06/25/gQAVLTSIV_blog.html?utm_
term=b9c9538c0044.
297 See BLACKMAN, supra note 227, at 277.
justice, and no questions about the Court’s legitimacy. It was exactly as John Roberts would have wanted it.\footnote{Id.}

My conclusion was premature. Over the next four years, the validity of the Chief Justice’s judicial restraint and “saving construction” would seep into the conservative collective consciousness, and erupt during the GOP debates. I doubt that Roberts, or anyone else for that matter, could have predicted that it would be Donald Trump who brought the simmering conflict to the fore. During a GOP primary debate, Trump charged that Senator Ted Cruz of Texas told President Bush “that he wanted John Roberts to be on the United States Supreme Court,” and “he twice approved Obamacare.”\footnote{See BLACKMAN, supra note 94.} Cruz and Trump argued back and forth, but the implication was clear—Cruz was at fault for endorsing Roberts’s nomination. Indeed, Roberts became a model of the type of Justice Republicans should not endorse. Efforts to cast decisions to promote public opinion simply haven’t worked. To the extent that the Chief had any sort of long game, that would be accomplished by slow, incremental decisions, those plans may never come to fruition. Americans have very short attention spans—something difficult to perceive amidst the glacial pace at the monastic marble palace. The best laid schemes o’ mice an’ men, go oft awry.

More fundamentally, there is a jurisprudential cost to the checkbook approach. If people believe that certain decisions—\textit{NAMUDNO}, \textit{WRTL}, \textit{NFIB v. Sebelius}—are decided as some sort of credit-building exercise, and not the best possible legal reasoning, faith in the Court’s ability to impartially render decisions is diminished. Supporters of the decision, perhaps relieved with the outcome, will still have less confidence that the Court consistently
threw balls and strikes. Opponents of the decision will feel robbed or cheated. Neither side will be fully satisfied that the judicial process played out fairly.

Consider each “deposit” decision discussed above. With respect to the Voting Rights Act, supporters were no less angry or surprised at Shelby County, having been braced for it in NAMUDNO. Members of Congress who voted for the VRA were just as indignant, whether or not they were offered a meaningless chance to amend the law. For the bipartisan supporters of campaign finance reform, WRTL in no way made Citizens United more palatable, notwithstanding the fleeting “last chance” offered to amend the law. Indeed, in the massive public backlash, no one—not even President Obama when he criticized the Court at the 2010 State of the Union—was mollified by the 2007 intermediary decision.

Finally, regardless of whether the saving construction in NFIB v. Sebelius represented John Roberts’s finest moment of legal judgment, it was widely perceived on the right as illegitimate. Ilya Shapiro posited that the decision “increased cynicism and anger at play-by-the-rules conservatives and decreased respect for institutions across the board.” Perception is often reality for a populace that, as Ilya Somin reminds us, is rationally ignorant about the Supreme Court. In the short-term, liberals or conservatives may be happy with a


given ruling, but in the long term, both sides are forced to become more skeptical about the neutrality of the Court. Many may suspect that decisions are not made based on the law, but rather rendered based on some sort of ill-fated Machiavellian “long game” by life-tenured judges.303

Had Justice Scalia’s replacement been appointed by a Democratic president, all of the efforts to preserve the Court’s institutional credibility would have accomplished little, other than a few fawning columns by Linda Greenhouse. In 2007, Chief Justice Roberts told Jeffrey Rosen, “I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn’t it’s going to lose its credibility and legitimacy as an institution.”304 A decade later, the Court is ripe to a focus on functioning as a Court, because if it doesn’t it’s going to lose its credibility and legitimacy as a Court. The Justices should focus on throwing balls and strikes, not moving home plate, before their nine innings are up.

C. ORIGINALISM

After Justice Scalia’s passing, many of the left predicted the decline of originalism, the mode of constitutional interpretation that the late jurist had evangelized. Harvard law professor Noah Feldman called Justice Scalia “the last Originalist,” doubting that “the

303 See Paul Barrett, Right On: John Roberts Is Playing the Long Game, BLOOMBERG BUSINESSWEEK (Oct. 1, 2015, 5:00 AM), http://www.bloomberg.com/news/articles/2015-10-01/right-on-john-roberts-is-playing-the-long-game (“The chief justice’s majority opinion in last term’s Obamacare case revealed not a conservative-gone-wobbly, but a sophisticated steward of the court’s status as an independent institution. Roberts, 60, occasionally steps back from the ideological barricades, not for lack of spine but because he’s playing a savvy long game.”).

304 See Rosen, supra note 262.
philosophy [can] outlive the man." \(^{305}\) Feldman added that “the younger conservative justices” on the Court, Roberts and Alito, “aren’t originalists of the same stripe.” \(^{306}\) The Chief Justice, in particular, has shown a hostility to any jurisprudential theory, especially when the pursuing consistency conflicts with building consensus. In his 2006 interview with Jeffrey Rosen, Roberts carped, “A justice is not like a law professor, who might say, ‘This is my theory . . . and this is what I’m going to be faithful to and consistent with,’ and in twenty years will look back and say, ‘I had a consistent theory of the First Amendment as applied to a particular area.’” \(^{307}\) Instead, Roberts explained, “it would be good to have a commitment on the part of the Court to acting as a Court, rather than being more concerned about the consistency and coherency of an individual judicial record.” \(^{308}\) Though the Chief did not name names, Rosen pointed out “it was hard not to think of Clarence Thomas and Antonin Scalia, who seem more interested in demonstrating their jurisprudential consistency by writing opinions that read like law review articles than in finding common ground with their colleagues.” \(^{309}\) Likewise, during Justice Alito’s confirmation hearing, the former Third Circuit Judge did not even mention the phrase “originalism,” instead embracing principles of living constitutionalism. \(^{310}\)

University of Chicago professor Eric Posner contended that “[w]ith Scalia gone, only one originalist justice remains—Clarence

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\(^{306}\) Id.

\(^{307}\) Id.

\(^{308}\) See Rosen, *supra* note 262.

\(^{309}\) Id.

\(^{310}\) Id.

\(^{305}\) See Feldman, *supra* note 305.
Thomas,” as “the other seven justices don’t care about originalism.” As a result, Posner concludes, “the audience for originalist scholarship” will dry up, and “Supreme court litigants must now decide whether to fill precious space in their briefs with originalist arguments.” Feldman agreed, “Clever lawyers will keep on making originalist arguments to the courts—but they’ll stop if no one’s buying.” Political Science professor Scott Lemieux predicted the “death of originalism.”

If the liberal prophecy were to be fulfilled, living constitutionalism would return to reign supreme at the Supreme Court. Dean Erwin Chemerinsky sketched out his vision for a progressive Court. The new majority would allow “challenges to government practices that disadvantage racial minorities,” overrule Citizens United and reconsider Buckley v. Valeo’s distinction between contributions and expenditures, and hold that “discrimination against the poor is the basis for a constitutional claim.” Justice Scalia’s three-decade crusade to promote originalism would have been for naught. Perhaps Chief Justice Roberts and Justice Alito, who were never even “faint-hearted” originalists in the first place, could have been frightened by a return to the days of Brennan. Could this near-death experience have shocked them into taking a deeper look at originalism? I am doubtful, but hopeful.

312 Id.
313 Feldman, supra note 305.
316 Id.
In any event, the future of originalism on the Supreme Court depended on the outcome of the 2016 election. Three days after Justice Scalia’s passing, Eric Posner “doubt[ed] that a Republican president will expend any political capital to try to appoint an originalist.”\(^{317}\) Noah Feldman said, “Given our current confirmation practices, it’s hard to imagine a future conservative justice with [Scalia’s] combination of intellectual heft and desire to perform” could be selected.\(^ {318}\) (In hindsight, with the nomination of Judge Neil Gorsuch, both of these predictions were wrong).

The first question asked during the final presidential debate in October 2016 highlighted the significance of originalism and the future of the Supreme Court.\(^ {319}\) Chris Wallace, the moderator, asked Secretary Clinton what her view was “on how the Constitution should be interpreted? Do the Founders’ words mean what they say or is it a living document to be applied flexibly, according to changing circumstances?”\(^ {320}\) Clinton’s answer made no reference to the Framers, and offered only a passing reference to the Constitution itself. Rather, her ideal Justice was who was “on the side of the American people,” and “not on the side of the powerful corporations and the wealthy.”\(^ {321}\) Instead of addressing the methodological question, her answer focused on the ends: “[W]e need a Supreme Court that will stand up on behalf of women’s rights, on behalf of the rights of the LGBT community, that will stand up and say no to Citizens United.”\(^ {322}\)

\(^{317}\) Posner, supra note 311.
\(^{318}\) Feldman, supra note 305.
\(^{320}\) Id.
\(^{321}\) Id.
\(^{322}\) Id.
Wallace posed the same question to Donald Trump, and his answer would have made Justice Scalia proud. The businessman had previously released a “short list” of twenty-one names he would select from. (We will discuss the list in Part IV). Trump stressed that each jurist “will interpret the Constitution the way the Founders wanted it interpreted and I believe that’s very important.” Indeed, in one study of the short-list, scholars found that roughly a third of the jurists wrote opinions that invoked originalism. In a rough rebuke of living constitutionalism, Trump continued, “I don’t think we should have justices appointed that decide what they want to hear. It is all about the . . . Constitution the way it was meant to be.”

To keep originalism vibrant, it is not enough for the President to select originalist jurists. As I have written elsewhere with Randy E. Barnett, it is also essential for the Senate to make originalism a cornerstone of the confirmation process. “[T]o restore the lost confirmation hearing,” we wrote, “only a senator or two [would need] to focus their limited time on originalism.” They could grill the nominee on the original meaning of various provisions of the Constitution, such as the Commerce Clause or the Privileges or Immunities Clause, and interrupt any effort to cite precedent. “These questions,” we noted, “are especially critical given that the next nominee will fill the seat of Antonin Scalia, who ought to be

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323 Id.
325 See Politico Staff, supra note 325.
327 Id.
canonized as the patron saint of originalism." Even if President Trump’s nominee is “wounded” by his or her “lack of familiarity with the meaning of the Constitution’s text, all future nominees would seek to avoid the same embarrassment.” With a simple tweak, “executive-branch lawyers managing the nomination would insist that the nominees become versed in the sort of originalist questions,” we posited, and maybe, just maybe, these questions could “influence the judge’s jurisprudence once confirmed.”

In light of Judge Gorsuch’s nomination, the reports of originalism’s death were greatly exaggerated.

III. CONSTITUTIONAL CONSISTENCY

In a prescient blog post, Harvard law professor Adrian Vermeule imagines the future shifts of the conservative and progressive legal movements as if they were dancers at a ball in a Jane Austen novel: “two lines of dancers switch to opposite sides of the ballroom” and “the dance goes on as before.” After this switch, “[t]he structure of the dance at the group level is preserved; none of the rules of the dance change; but the participants end up facing in opposite directions.” In the Supreme Court after Justice Scalia, there are three primary shifts that can affect constitutional consistency: federalism as a check on federal power, deference to the

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328 Id.
329 Id.
330 Id.
333 Id.
administrative state, and state-led litigation against the federal government.

A. FEDERALISM AS CHECK ON FEDERAL POWER

Perhaps the swiftest reversal from the Obama Presidency to the Trump Presidency has concerned federalism. Two decisions from the Rehnquist Court’s federalism revolution will provide the greatest support for progressive states that seek to protect their unlawful aliens. First, New York v. United States established the rule that states cannot be commandeered by the federal government to take action, such as to take title of low-level radioactive waste.\(^{334}\) Second, Printz v. United States extended that doctrine so that local law-enforcement officials likewise could not be commandeered to enforce a federal gun-control law.\(^{335}\) At the time, both decisions were hailed as conservative victories, as they allowed states to resist federal environmental and firearm laws. However, almost immediately after the 2016 election, progressive states seized upon these precedents to use federalism as a cudgel against federal immigration enforcement.

Noah Feldman of Harvard Law School celebrated how Printz protects so-called “sanctuary cities,” because the federal government cannot force local officials to implement federal immigration laws.\(^{336}\) “Behold the revenge of conservative federalism,” he wrote.\(^{337}\) “Judge-made doctrines developed to protect states’ rights against progressive legislation can also be used to protect cities against

\(^{334}\) See 505 U.S. 144 (1992).

\(^{335}\) See 521 U.S. 898 (1997).


\(^{337}\) Id.
Trump’s conservative policies.”\textsuperscript{338} With a bit of smugness, Feldman jabbed, “Ain’t constitutional law grand?”\textsuperscript{339} In New York City, the progressive government immediately turned to federalism to resist President Trump’s policies.\textsuperscript{340} The Senate President Pro Tem in California promised that the state would “aggressively avail ourselves of any and all tools to prevent an unconscionable overreach by a Trump administration in California.”\textsuperscript{341}

While \textit{New York} and \textit{Printz} prevent the federal government from commandeering states and their officers, Congress has another cudgel at its disposal: the spending power. The executive branch could threaten to withhold federal money from jurisdictions that do not cooperate with immigration enforcement. Here too, conservative federalism cases may serve a liberal cause. In \textit{NFIB v. Sebelius}, Chief Justice Roberts’s opinion for seven Justices concluded that the threat to withdraw a significant amount of federal money may be so coercive as to violate the principles of federalism.\textsuperscript{342} In other words, Congress cannot negotiate by putting a “gun to the head” of the states. Here too, Feldman sees a victory: “Roberts’s doctrine applies with full force to Trump’s threat to pull cities’ existing funding if they remain sanctuaries by declining to cooperate with federal officials to enforce immigration law.”\textsuperscript{343} Federalism was bad for Obamacare,

\begin{flushright}
\textsuperscript{338} \textit{Id.}
\textsuperscript{339} \textit{Id.}
\textsuperscript{343} Feldman, \textit{supra} note 336.
\end{flushright}
and bad for immigration enforcement. Perversely, if Chief Justice Roberts’s decision in NFIB was designed to play the “long game” for federalism, it may serve to promote liberal causes. Perhaps this conclusion may explain, in part, why Justices Breyer and Kagan joined his spending-clause analysis. “What’s good for the goose,” Feldman boasted, “is good for the gander.”

So far, so good for the fair-weathered federalists. That is, until we get to Arizona v. United States. Arizona’s S.B. 1070 was designed to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” The Court ruled that several provisions of the law were preempted, noting that a “state law is preempted where it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” For example, § 5(C) “makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State.” Even though this provision “attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement.”

State laws designed to frustrate the federal enforcement of immigration laws—such as laws instructing local police to ignore

345 Feldman, supra note 336.
348 Id. at 2497.
349 Id. at 2505 (quoting Hines v. Davidowitz, 312 U.S. 52, 67).
350 Id. at 2494.
351 Id. at 2505.
federal immigration detainers—could very well be found to be an “obstacle to the regulatory system Congress chose” because it “can be fully as disruptive to the system Congress enacted as conflict in overt policy.” While Congress cannot conscript state officials to enforce immigration law, or withdraw money above a certain level such that it is coercive, the Trump Justice Department could sue states that are actively frustrating the enforcement of federal law. Here, a progressive victory of the Obama Administration that limited federalism, Arizona, could be used to constrain progressives who seek to use federalism to resist the Trump Administration.

Likewise, state-laws that legalized marijuana may suffer a similar fate. Under New York v. United States, states cannot be required to criminalize marijuana. Likewise, the supremacy clause does not prohibit states from legalizing controlled substances. Further, under Printz v. United States, state law officials cannot be commandeered to enforce federal drug laws. The federal government, as the Court recognized in Gonzales v. Raich, has the plenary power to criminalize marijuana, even if the plants had never

353 Arizona, 132 S. Ct. at 2505 (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 287 (1971)).
cross state lines. However, under *Arizona v. United States*, the Justice Department would have the ability to file suit to enjoin the enforcement of state laws that interfere with enforcement of the Controlled Substances Act. For example, if state law permits financial institutions to accept payments from marijuana dispensaries, the Trump Administration could challenge those laws as imposing an “obstacle to the regulatory system Congress chose” because it “can be fully as disruptive to the system Congress enacted as conflict in overt policy.” Permitting financial institutions to bankroll the production of controlled substances is far more disruptive to the federal government’s criminalization of an interstate drug market than Angel Raich’s green thumb. Once again, a progressive decision that limited federalism can now be turned around to constrain marijuana experimentation in the states.

### B. DEFERENCE TO ADMINISTRATIVE STATE

Defence to, or skepticism of, the administrative state seems to fluctuate depending on which political party is in power. Throughout the 1970s, judges on the D.C. Circuit Court of Appeals routinely flouted the decisions of administrative agencies,

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356 See Gonzales v. Raich, 545 U.S. 1 (2005).
357 See Jeffrey Rosen, *States’ Rights for The Left*, N.Y. TIMES (Dec. 3, 2016), http://www.nytimes.com/2016/12/03/opinion/sunday/states-rights-for-the-left.html?_r=0 (“These state marijuana legalization initiatives, however, may be challenged by the Trump Justice Department and the Supreme Court. And the tables may be turned as White House conservatives abandon their devotion to federalism to pursue a national war on drugs while progressives invoke states’ rights to defend local legalization efforts. In August 2013, the Obama Justice Department announced that while federal law continues to regulate marijuana as a controlled substance, it would conditionally waive its right to challenge Colorado and Washington State laws legalizing the drug. A Trump administration, however, might reverse this policy and enforce federal anti-marijuana laws.”).
substituting instead their own judgments. The Reagan Administration sought to cabin this skepticism, as it would frustrate its deregulatory agenda. As a result, the fairly mundane case of *Chevron v. NRDC* was briefed and argued as a separation-of-powers case. The Solicitor General urged the Court to lay down a rule that would prevent judges from second-guessing “reasonable” interpretations of ambiguous statutes. It worked. Throughout the 1980s, it became conservative de rigueur to support the *Chevron* doctrine and deference to administrative agencies. In a famous 1989 lecture, Justice Scalia endorsed “judicial acquiescence in reasonable agency determinations,” for “*Chevron* is unquestionably better than what preceded it.”

However, during the 1990s, the roles reversed. The Clinton Administration sought to direct the power of the administrative state to advance progressive causes. For example, the Food & Drug Administration sought to regulate tobacco, citing the ambiguous phrase “drug” in the Food, Drug, and Cosmetic Act. The regulation was challenged, and the Supreme Court invalidated it. Justice O’Connor, writing for the Chief Justice, and Justices Scalia, Kennedy, and Thomas, found that *Chevron* deference did not save the

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rule because the “actions [taken] by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products.”\textsuperscript{365} Through the so-called “major question doctrine,” introduced five years earlier by Justice Scalia in \textit{MCI Telecommunications Corp. v. AT&T Co.}, the conservatives on the Court stressed that Congress “does not, one might say, hide elephants in mouseholes.”\textsuperscript{366} These decisions carved a massive hole in the \textit{Chevron} doctrine.

As the administrations turned, so did administrative law. The Bush Administration was repeatedly sued by liberal groups, seeking court orders to compel the executive branch to issue and enforce various regulations. In 2003, the EPA relied on the major question doctrine to conclude that it lacked the authority to regulate greenhouse gas emissions under the Clean Air Act.\textsuperscript{367} In \textit{Massachusetts v. EPA},\textsuperscript{368} the Court disagreed. Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer held that the major question doctrine was inapplicable, and the agency’s reliance on \textit{Brown \& Williamson} was “misplaced.”\textsuperscript{369}

Once again, in the age of Obama, the roles seemed to reverse. Conservative Senators in Congress supported the Separation of

\footnotesize{\textsuperscript{365} Id. at 156. \textsuperscript{366} Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 468 (citing MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994); Brown \& Williamson, 529 U.S. at 159-60); see generally Josh Blackman, \textit{Gridlock}, 130 HARV. L. REV. 241 (2016). \textsuperscript{367} Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003) (emphasis added) (“[T]he [Clean Air Act] cannot be interpreted to authorize such regulation in the absence of any direct or even indirect indication of congressional intent to provide such authority. EPA is urged on in this view by the Supreme Court’s decision in Brown \& Williamson . . .”). \textsuperscript{368} Massachusetts v. EPA, 549 U.S. 497 (2007). \textsuperscript{369} Id. at 530.}
Powers Act, which would eliminate Chevron deference.\textsuperscript{370} Leading the charge on the Court was Justice Thomas—previously a supporter of deference doctrines\textsuperscript{371}—who openly called for the abandonment of Chevron altogether.\textsuperscript{372} During the final years of his tenure, many speculated that Justice Scalia was on the verge of repudiating \textit{Chevron} deference. Former Solicitor General Paul Clement, who clerked Justice Scalia, confirmed those rumors during the 2016 Federalist Society National Lawyers Convention: “although Justice Scalia was very much for much of his judicial career one of the foremost proponents of \textit{Chevron} deference, I think by the end of his career, that was much eroding and I think he was potentially on the verge of really reconsidering that in a pretty fundamental way.”\textsuperscript{373}

In addition to \textit{Chevron}, Justice Scalia expanded the scope of agency deference with his decision for the Court in \textit{Auer v. Robbins}, holding that courts should defer to an agency’s interpretation of its own regulations.\textsuperscript{374} However, in a pair of decisions in 2014 and 2015, Justice Scalia publicly distanced himself from a deference doctrine he previously supported. First in \textit{Decker v. Northwest Environmental Defense Center},\textsuperscript{375} and later in \textit{Perez v. Mortgage Bankers Assn.},\textsuperscript{376} Justice Scalia wrote that \textit{Auer} deference “contravenes one of the great rules of separation of powers” and must be abandoned.\textsuperscript{377} In October 2016, Justice Thomas recalled a humorous anecdote from the bench.

\textsuperscript{373} The Federalist Society, \textit{The Evolution of Justice Scalia’s Views on Administrative Law}, YOUTUBE at 43:40 (Nov. 19, 2016), https://www.youtube.com/watch?v=KMqTHf1nvQg.
\textsuperscript{374} See 519 U.S. 452 (1997).
\textsuperscript{375} 133 S. Ct. 1326 (2013).
\textsuperscript{376} 135 S. Ct. 1199 (2015).
\textsuperscript{377} \textit{Decker}, 133 S. Ct. at 1342.
During oral arguments, Justice Scalia leaned over and whispered, “Clarence, [Auer v. Robbins] is one of the worst opinions in the history of this country.” Thomas smiled, and replied, “[Y]ou wrote it.”

Now, as a new Republican administration begins, it remains to be seen whether we see yet another realignment on administrative law. Professor Adrian Vermeule sees two possible futures. First, both conservatives and progressives may agree that the Trump Administration’s executive actions go too far. On the Court, the Chief Justice, and Justices Kennedy and Breyer will unite as a “supermajority coalition to rein in administrative power” through an expanded use of the “major questions doctrine,” or scaling back Auer deference. The second approach—like the Jane-Austen-Ballroom scene discussed earlier—has both sides simply switching positions: “liberal lawyers become critical or suspicious of presidential administration under Trump, but the conservative lawyers will make their peace with the administration.”

Vermeule augurs that after the “Trumpification of the Court,” future appointments will determine whether there is a “bipartisan coalition” to reign in the administrative state. Perhaps one of the first markers is whether the Separation of Powers Restoration Act is passed and signed by the President—or, will conservatives now be

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379 Id.
380 See Vermeule, supra note 332.
381 See id.
382 Id.
383 Id.
384 Id.
content to have Republican-controlled agencies assume power without judicial oversight.

C. STATE-STANDING AND NATIONWIDE INJUNCTIONS

A final area to consider as the sides swap from Obama to Trump is how state attorneys general seek nationwide injunctions to halt executive actions. Throughout the Obama Administration, a coalition of state Republican attorneys general united to seek a series of nationwide injunctions to halt various progressive executive actions.385 Leading the charge was Texas, first under Attorney General (and now Governor) Greg Abbott, and later with Attorney General Ken Paxton.386 Abbot boasted about his job description: “I go into the office, I sue the federal government, and I go home.”387 Since President Obama took office, the Lone Star State has filed nearly fifty lawsuits against the executive branch, challenging policies affecting immigration, health care, the environment, labor, and countless other areas.388

It’s most momentous case came in December 2014. Texas filed suit in federal district court in Brownsville, Texas, seeking an injunction to halt President Obama’s not-yet-implemented executive action on immigration.389 Judge Hanen ruled for Texas, and enjoined officials in the Department of Homeland Security from enforcing the

386 See id.
policy, nationwide—even in states that supported the President’s actions.\footnote{See id.} The Fifth Circuit affirmed that injunction, and due to the short-handed bench, the Supreme Court affirmed 4-4.

Though nationwide injunctions came under vigorous criticism from some immigration advocates,\footnote{See Daniel Denvir, New Hope for Undocumented Immigrants: DAPA Might Not Be Dead – A Bold Legal Strategy Could Protect Millions from Deportation, \textit{SALON} (Oct. 13, 2016, 10:00 AM), http://www.salon.com/2016/10/13/new-hope-for-undocumented-immigrants-dapa-might-not-be-dead-a-bold-legal-strategy-could-protect-millions-from-deportation/.} they are not new.\footnote{See id.} Nina Perales of the Mexican American Legal Defense Fund, who represented intervenors in \textit{Texas v. United States}, was surprised at the outrage to the nationwide injunctions.\footnote{Id.} “A single case involving a single judge can issue an injunction against nationwide laws or policies and they have always done that,” she said.\footnote{Id.} “That’s the way our legal system works.”\footnote{Id.} What has changed, she noted, is that “conservatives figured this out after progressives did. . . . It’s really not new.”\footnote{Id.}

After January 20, 2017, the roles would reverse once again. Shortly after the election, \textit{Reuters} reported, “Democratic attorneys general and civil rights groups are already busy preparing legal arguments to try to stop Trump’s executive actions” with approaches “similar to the challenges Obama faced from Republican attorneys

\footnote{See id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
general.” Rep. Xavier Becerra, appointed as California Attorney General to replace Senator-elect Kamala Harris is, according to BuzzFeed, “to play an outsized—and adversarial, if necessary—role during the Trump Administration.” California is the new Texas. Liberal states, who quite recently doubted that Texas suffered an injury in the immigration challenge, now assert broad theories of standing to contest deregulation.

The progressive states may also borrow another page from Texas’s playbook: seeking out favorable venues. In an insightful new article about nationwide injunctions, Professor Samuel Bray observes that “[i]t is no accident which courts have given the major national injunctions in the last three administrations. In the George W. Bush administration, it was California courts. In the Barack Obama administration, it was Texas courts.” He points out that “[t]he pattern is as obvious as it is disconcerting.” But unlike suits filed in the Northern District of California, or the Southern District of New York, where liberal litigants have better-than-chance odds of finding a friendly forum, a number of divisions throughout Texas are staffed


\[400\] See Massachusetts v. EPA, 549 U.S. 497, 519 (2007).

by a single judge. This structure allowed the Attorney General to decide who will decide his case.

In December 2014, when the challenge to the President’s executive action on immigration was filed, only two district judges were assigned to the Brownsville Division of the Southern District of Texas, Judge Andrew S. Hanen and Senior Judge Hilda G. Tagle. The odds were quite strong that the case would be assigned to the conservative Judge Hanen. The Attorney General quite deliberately did not select the Austin Division of the Western District of Texas. Texas employed this same successful strategy several other times. The single judge in the Northern District of Texas, Lubbock Division, appointed by President Reagan, entered a preliminary national injunction against the Labor Department’s “persuader rule.” The single judge in the Northern District of Texas, Wichita Falls Division, appointed by President George W. Bush, entered a preliminary injunction against the Department of Education’s Title IX “Dear Colleague” letter, as well as the Affordable Care Act’s

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403 See id.
404 See id.
405 Similar forum shopping was employed when the Florida Attorney General chose to file the challenge to the constitutionality of the Affordable Care Act in federal district court in Pensacola, rather than in Tallahassee. JOSH BLACKMAN, UNPRECEDEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 81-83 (2013).
LGBT mandate for hospitals. This strategy, however, is by no means limited to conservatives. In 2013, a series of groups challenged the recently-enacted Voter ID law in the Southern District of Texas, Corpus Christie Division, over 200 miles from the state capital in Austin. At the time, only two judges were in active service: both nominees of President Clinton.

One way to mitigate against such forum shopping is to eliminate single-judge divisions, where the parties can reliably predict who a case will be assigned to. Perhaps following this lead, on December 1, 2016, Chief Judge Barbara M.G. Lynn of the Northern District of Texas, whose usual duty station was in Dallas, assigned to herself 15% of all civil cases from the Wichita Falls Division.

IV. ADVICE BEFORE CONSENT

Between October 2014 and January 2015, I gave four lectures concerning the selection of the next Supreme Court Justice. During each presentation, I considered a hypothetical vacancy on the High Court, where a Democratic-controlled Senate blocks any nomination made by a Republican President. In my alternate reality, President Cruz sought to fill Justice Ruth Bader Ginsburg’s seat with Judge Diane Sykes of the Seventh Circuit Court of Appeals. Senate

Democrats then refuse to confirm anyone to the right of Justice Ginsburg, and strategize to hold the seat empty until Elizabeth Warren wins the White House in 2020. I called this posture the Clint Eastwood Effect, in honor of the conservative director’s primetime address to the 2012 Republican National Convention, where he used an empty chair as a metaphor for President Obama.414

But the White House had a countermeasure at its disposal.415 President Cruz could then roll the dice: keep the seat empty for two years, and hope the Republicans take the Senate in 2018, when the electoral map looked far more favorable for the GOP. If the gambit pays off, the Senate Republicans could then eliminate the filibuster for the Supreme Court, and confirm the President’s nominee of choice. In each lecture, I made a very similar prediction: in the event of a Supreme Court vacancy when the President and Senate are controlled by different parties, there is a distinct possibility that a seat on the Court will remain empty for two years, possibly four years, and maybe even longer.416

My prediction was correct, but came to fruition much quicker than I had anticipated. As we discussed in Part I, in February 2016, the GOP-controlled Senate refused to provide President Obama’s nominee with a hearing. That impasse, however, lasted only 11

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months until the White House and Senate came under one-party rule, and Judge Gorsuch was nominated. Had the election come out differently, however, the Clint Eastwood Effect may have persisted. A Republican-controlled Senate could have refused to confirm anyone President Clinton nominated. Anyone to the left of Justice Scalia would have been voted down.

Were the tables turned, the outcome would be the same. A Democratic-controlled Senate could have similarly refused to confirm anyone President Trump nominated. Josh Earnest, the White House press secretary, hinted at this empty-seat strategy during his April 14, 2016 briefing. “[W]hat’s to stop Democrats who are in charge of the Senate when a Republican is in office from saying,” Earnest speculated, “well, we’re just going to wait four years to fill the vacancy.” The press secretary explained, “there’s no material difference in that argument. That would represent a breakdown of the process.” A reporter asked if the Democrats would “do that” because Earnest’s comment made it “seem[] like . . . they would do that.” Earnest’s candid response is revealing: Democrats “would be justified in doing it based on what Republicans have done so far.” He continued to articulate a possible Clint Eastwood Effect. “If a Republican wins the White House in 2017, so

419 Id.
420 Id.
421 Id.
422 Id.
long as Senate Democrats hold the gavel, Justice Scalia’s seat will remain empty. So long as the Senate and Presidency are not controlled by the same party, no nominations will be possible.”

If I had to speculate, the replacement for Justice Kennedy—the Court’s lynchpin—will occasion a battle the likes of which we have never seen. If the White House and Senate are controlled by different sides, both parties may be willing to dig in their heels, and hope an intervening election will resolve this dispute. The Court may operate with eight, or fewer, Justices for some time. The battle between Republicans and Democrats over the courts can perhaps best be described as mutually assured confirmation. This gridlock, I fear, is the new normal. It is not a matter of if, but when such a conflict will arise. Fortunately, the text of the Constitution provides a way to deescalate this tension: “advice” comes before “consent.”

A. “ADVICE” AND “CONSENT”

*Marbury v. Madison* has taught countless generations of law students that the Constitution prescribes a three-step appointment process. First, “the President . . . shall nominate” a person to fill an office. Second, through “the Advice and Consent of the Senate,” the person “shall [be] appoint[ed].” Third, after the final act by the President—in *Marbury*, it was the President’s signature on the commission, not the delivery—the appointment is confirmed to the position. This framework follows from the sequencing of Article II, Section II, but reads a critical word out of the Constitution:

423 Id.
426 Id. at 155.
427 Id.
428 Id. at 157.
“advice.”429 This process focuses exclusively on when the President “shall nominate” and when the Senate gives its “consent.” But when does the Senate offer its “advice” to the President? If “advice” is merely another word for the Senate voting on the nominee, then it is but a “mere surplusage,” is redundant for “consent,” and adds nothing to the Constitution. A more thorough construction of “advice and consent” must take account of both provisions.430

As Samuel L. Bray explains in another thought-provoking piece, our Constitution is filled with a “largely forgotten figure of speech” known as a “hendiadys, in which two terms separated by a conjunction work together as a single complex expression.”431 The examples are legion: “necessary and proper,” “cruel and unusual,” “piracies and felonies,”432 “powers and duties,”433 and as relevant here, “advice and consent.”434 Bray posits that the “two terms in a hendiadys are not synonymous, and when put together their meanings are melded.”435 For example, with respect to “cruel and unusual,” “the second term in effect modifies the first.”436 Thus, Bray contends, the Eighth Amendment prohibits “punishments that are innovative in their cruelty.” 437 With respect to “necessary and proper,” Bray suggests that the “proper” modifies “necessary,” such “that congressional action need not be ‘strictly necessary’ it must only be ‘properly necessary,’ something like ‘appropriately necessary.’” (Chief Justice Marshall placed this Hamiltonian

429 Id.
431 Id. at 688.
432 U.S. CONST. art. I, § 8, cl. 10.
433 U.S. CONST. art. II, § 1, cl. 6.
434 U.S. CONST. art. II, § 2, cl. 2.
435 Bray, supra note 431, at 688-89.
436 Id. at 690.
437 Id.
construction on Congress’s Article I powers, rejecting the “strictly” Madisonian framework).438

Bray’s thoughtful and unusual (hendiadys intended) article does not address the “Advice and Consent” clause, but his framework offers some insights into how the phrase should be understood. Rather than two abstract concepts, the word “consent” should be understood to modify the word “advice.” That is, the Senate is not being asked to offer its advice in vacuum, but in the context of exercising its power to consent to a nominee. The word “advice” has independent meaning—it is not enough to merely vote “yea” or “nay” on a nominee. The President will always make the ultimate decision of whom to select, but the Senate does have some role on advising him before the nomination is made, for once the nomination is made, the Senate’s role is reduced to consent: “yea” or “nay.”

B. SENATORIAL “ADVICE”

Since the dawn of our Republic, the divided Senate has endeavored to provide the unitary Executive with advice—often unsuccessfully. One of the earliest such exchanges occurred in August 1789. This stranger-than-fiction account was narrated in the journal of Senator William Maclay of Pennsylvania.439 On August 22, 1789, President Washington arrived in the Senate Chamber. “He rose and told us bluntly,” Maclay wrote, “that he had called on us for our advice and consent to some propositions respecting the treaty to be held with the Southern Indians.”440 President Washington’s message was barely heard over the din of the carriages outside. Senator Robert Morris of Pennsylvania rose and carped that “the noise of the

438 McCulloch v. Maryland, 17 U.S. 316, 418 (1819).
440 Id. at 128.
carriages had been so great that he really could not say that he had heard the body of the paper which had been read, and prayed that it might be read again.” 441 After President Washington’s letter was re-read, Vice President Adams asked, “Do you advise and consent, etc.” 442 There “was a dead pause.” 443

Senator Maclay broke the awkward silence, and asked that the treaty be studied further “to inform ourselves as well as possible on the subject.” 444 Maclay wrote that he “cast an eye at the President of the United States” and “saw he wore an aspect of stern displeasure.” 445 Senator Robert Morris, also of Pennsylvania, asked that President Washington’s proposal “be referred to a committee of five.” 446 Senator Pierce Butler of South Carolina objected that “Committees were an improper mode of doing business,” and “it threw business out of the hands of the many into the hands of the few.” 447 Maclay defended the use of committees, and suggested the vote be postponed until Monday, even if it results in “possible inconvenience.” 448

In a scene too remarkable to imagine, President Washington “started up in a violet fret.” 449 In words emphasized in Maclay’s journal, the General barked, “This defeats every purpose of my coming here.” 450 Washington had visited the Senate with Henry Knox, the secretary of war, who could “give every necessary information.” 451

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441 Id. at 129.
442 Id.
443 Id.
444 Id.
445 Id.
446 Id. at 130.
447 Id.
448 Id. at 131.
449 Id.
450 Id. (emphasis added).
451 Id.
After Washington “cooled, however, by degrees,” he did not object to a delay until Monday, “but declared he did not understand the matter of commitment” to a committee. 452 Washington then “withdrew” with a “discontented air,” that could be described as “sullen dignity.” 453 On Monday, the Senate reconvened, with President Washington wearing “a different aspect” from his previous visit.454 After a “tedious debate,” and several modifications to the language of the treaty, the Senate provided its advice and consent.455 “This closed the business. The President of the United States withdrew, and the Senate adjourned.” 456 Presidential frustration with indecisive congresses is as old as the Republic.

Perhaps stemming from Washington’s experience, it is unheard of in the modern era for the President to personally visit the Senate to seek its advice before proposing a treaty, or nominating an officer. However, Butler’s objection was well-founded. Often, the White House works informally with certain Senators before making an appointment. For executive branch officials, it is customary to consult with the chairs and ranking members of the relevant committee. But this advice is very informal. With good reason, the selection of certain principal officers within the executive branch should be solely within the discretion of the President to ensure that he can “take care that the laws are faithfully executed.”457 For judicial officers, however, the dynamics are different. Rather than serving the Executive at his pleasure, judges serve everyone during “good behaviour.” 458 The Senate has a far greater vested stake in the

452 Id.
453 Id.
454 Id.
455 Id. at 132.
456 Id.
457 U.S. CONST. art. II, § 3, cl. 5.
458 U.S. CONST. art. III.
selection of judges than in the selection of principal officers in the executive branch.

With respect to the inferior courts, the Senate provides “advice,” albeit informally. The Congressional Research Service (CRS) observed that “U.S. Senators of the state in which the judicial districts are located” identify candidates for district court positions according to a “well-established custom” that stretches back to the “early 19th Century.” The White House “rarely initiate[s] the search for district court candidates,” CRS noted, “but instead defer[s] to, and consider[s] only the candidate recommendations made by, home state Senators.” This tradition continued through the Obama administration.

For circuit court nominees, Senators have a far less influential “advice” role. The recommendations from the Senators “typically compete with names . . . generated by the Administration on its own.” The Reagan Presidency maintained a “tight administration control over the screening process” for circuit judges. During the Clinton Presidency, Senators were free to “suggest [circuit] candidates to the White House,” but the President was “traditionally not bound by such suggestions.” In the George W. Bush White House, “instances of Senators having President Bush select their

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460 Id. at 9.
462 RUTKUS, supra note 459, at 12.
463 Goldman et. al., Obama’s First Term, supra note 461, at 291.
464 DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL34405, ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES 23 (2013).
candidates for circuit judgeships [were] exceptions to the rule."\textsuperscript{465} This tradition continued into the Obama administration. According to CRS, by April 2010, of 18 circuit court nominees, only six were recommended by the home state Senators.\textsuperscript{466}

Yet, Senators maintain a trump card to fulfill their role of advising the President: the so-called "blue slip" process.\textsuperscript{467} CRS explains that, "as a courtesy, a state’s Senators, no matter what their party affiliation, will be consulted by the Administration prior to the President nominating persons to U.S. district judgeships in the state as well as to U.S. circuit court judgeships historically associated with their state."\textsuperscript{468} If that Senator does not "return a positive blue slip," the Senate Judiciary Committee will not allow the candidate to receive a hearing or a vote. As a matter of course, the executive branch is "well advised, before it selects a nominee, to consult with both home state Senators."\textsuperscript{469} During the Bush administration, the blue slip process became an extremely powerful cudgel to ensure circuit nominees conformed with the home-state Senator’s advice.\textsuperscript{470} In 2008, President Bush withdrew nominees for circuit court positions in Michigan,\textsuperscript{471} Pennsylvania,\textsuperscript{472} and Virginia\textsuperscript{473} after Democratic Senators from those states refused to return positive blue slips. Replacement nominees were made based on those Democratic Senators’ advice.

\textsuperscript{465} Id. at 24.
\textsuperscript{466} Id.
\textsuperscript{467} Id. at 10.
\textsuperscript{468} Id.
\textsuperscript{469} RUTKUS, supra note 459, at 11.
\textsuperscript{470} See id. at n.51.
\textsuperscript{472} RUTKUS, supra note 464, at 24 n.84.
\textsuperscript{473} Id.
For the Supreme Court, there have also been informal modes of advice prior to the nomination. Senator Orrin Hatch (R-UT), who served as the Chairman of the Senate Judiciary Committee, recalled in his autobiography that President Clinton called him in 1993 “to talk about the [Supreme Court] appointment and what he was thinking of doing.” 474 Hatch told Clinton that confirming Bruce Babbitt, an unpopular Secretary of the Interior, “would not be easy,” as it would receive “a great deal of resistance from the Republican side” and “at least one [western] Democrat.” 475 Hatch suggested that Clinton consider Judges Stephen Breyer of the First Circuit or Judge Ruth Bader Ginsburg of the D.C. Circuit. 476 “President Clinton indicated he had heard Breyer’s name,” Hatch wrote, “but had not thought about” Ginsburg. 477 Hatch advised the President that either Carter nominee “would be confirmed easily,” because though they were “liberal, they were highly honest and capable jurists and their confirmation would not embarrass the President.” 478 Clinton ultimately appointed Judge Ginsburg to replace Justice White in 1993, and the following year tapped Judge Breyer to replace Justice Blackmun. True to Hatch’s advice, Breyer was, in the words of White House counsel Lloyd Cutler, “the one with the fewest problems.” 479

The advice process between President George W. Bush and the Democratic-controlled Senate was far less conciliatory. In June 2003, Senator Patrick Leahy (D-VT), who chaired the Judiciary Committee, delivered a speech titled “Supreme Court Preview: It Doesn’t Have

475 Id.
476 Id.
477 Id.
478 Id.
479 Gwen Ifill, The Supreme Court: President Chooses Breyer, An Appeals Judge in Boston, for Blackmun’s Court Seat, N.Y. TIMES (May 14, 1994), nyti.ms/1SGhOIV.
To Be Armageddon.” In what he described as a “modest proposal,” Leahy asked “the President to consult with leaders in the Senate on both sides of the aisle in advance of any Supreme Court nomination” to select “consensus nominee” who could be unanimously confirmed. Leahy explained that the “Constitution divides the appointment power between the President and the Senate and expects Senators to advise the President, not just rubber-stamp his choices.” Leahy contended that “the Senate’s role in the process is not secondary and is not confined simply to a vote. The Constitution expressly speaks of the Senate's authority to ‘advise’ as well as the power to ‘consent,’ which includes the power to withhold such consent.” Two weeks earlier, Leahy wrote to President Bush, “I stand ready to work with you to help select a nominee or nominees to the Supreme Court.”

The Executive Branch swiftly rejected this modest proposal. Alberto R. Gonzales, the White House Counsel, insisted the President would nominate someone, and only then would the Senate “have an opportunity to assess the president’s nominee and . . . to vote up or down.” Ari Fleischer, the White House press secretary, criticized Leahy’s idea as a “novel new approach to how the Constitution guides the appointment process.” To invert the process, Fleischer

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480 Patrick Leahy, *Supreme Court Preview: It Doesn’t Have to Be Armageddon*, VOTE SMART (June 25, 2003), https://perma.cc/XB6B-6H6X.
481 Id. (emphasis added).
482 Id.
483 Id.
484 Id.
486 See id.
487 Id.
suggested, would require the “Constitution [to] be altered.”

Senate Republicans also balked. “Few things would politicize our judiciary,” noted John Cornyn of Texas, “than to hand over control of the process for selecting Supreme Court justices to individual members of the Senate.” Cornyn insisted that “Presidents, not politicians, nominate justices.” These responses are hyperbole. The Constitution would not have to be altered for the Senate to offer its advice prior to the nomination, so long as the President maintains independence over who to select. However, as Judge Posner explained in his “realist” style, “There are no rules or principles that govern appointment of a federal judge or justice. The president appoints, the Senate confirms or rejects.”

Despite these protestations, in July 2005, after Justice O’Connor’s announced retirement, President Bush met with several Democratic Senators, including Minority Leader Harry Reid (D-NV) and Leahy, who was then the ranking member on the Judiciary Committee. In addition, the White House contacted nearly sixty Republicans and Democratic lawmakers before announcing the nomination. According to an unnamed Senior Democratic Aide, Reid and Leahy suggested that President Bush nominate then-Judge Sonia Sotomayor of the Second Circuit. However, the White House did not offer any names, and spokesman Scott McClellan reaffirmed,
“No individual should have veto power over a president’s selection.”

In September 2005, after President Bush had already nominated Judge John G. Roberts to replace the late Chief Justice Rehnquist, key Senate leaders attended a breakfast at the White House. According to Jan Crawford’s account in Supreme Conflict, Reid suggested that the President nominate his Counsel. “If you nominate Harriet Miers, you’ll start with fifty-six votes,’ Reid said, suggesting he would join Republicans right out of the box in supporting her.” Crawford wrote that “Reid’s assurances gave him every reason to think Democrats would support her, and other senators,” as well. Ultimately, Bush nominated Miers, but after a Republican outrage, she withdrew. In this sense, Republican advice after the nomination obviated the need to seek consent for Miers. Bush’s second appointment of Judge Samuel Alito was confirmed.

C. Senatorial “Short List”

Individual Senators, when they have the President’s ear, have had been able to offer “advice” to the President. For example, in January 2017, President Trump met with Senate leadership, including minority leader Charles E. Schumer (D-NY) and ranking member of the Judiciary Committee, Dianne Feinstein (D-CA), to

494 Id.
495 See JAN CRAWFORD GREENBURG, SUPREME CONFLICT 256 (2007).
496 Id.
497 Id.
498 Id.
499 Id. at 288.
discuss his upcoming Supreme Court nomination. Both advised the President about what they were looking for in a Justice. The Senate, as a body, however, has been utterly ineffective at giving the President “advice” before a Supreme Court nomination has been made. For this “advice” to be truly that of the Senate, and not of individual members, the body as a whole must do what they were elected to do: vote.

In the immediate aftermath of a vacancy—whether due to death or retirement—the Senate should immediately begin its “advice” process. For this “advice” to be meaningful, it must come quickly. Over the past three decades, on average, thirty-two days elapsed from the President learning about a Justice’s plan to retire, and when a nomination was submitted to the Senate. Keeping with this time

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502 Justice Stevens announced his retirement on April 9, 2010, and Solicitor General Kagan was nominated thirty-one days later on May 10, 2010. Justice Souter announced his retirement on May 1, 2009, and Judge Sotomayor was nominated thirty-one days later on June 1, 2009. Justice O’Connor announced her retirement on July 1, 2005, and Judge Roberts was nominated to fill her seat twenty-eight days later on July 29, 2005. (Roberts’s nomination was withdrawn after the death of Chief Justice Rehnquist’s passing on September 3, 2005). Justice Blackmun announced his retirement on April 6, 1994, and Judge Breyer was nominated forty-one days later on May 17, 1994. Justice White announced his retirement on March 19, 1993, and Judge Ginsburg was nominated eighty-seven days later on June 14, 1993. Justice Marshall announced his unexpected retirement at a press conference on June 28, 1991, and Judge Thomas was nominated only ten days later on July 8, 1991. Even more unexpectedly, William Brennan announced his retirement on July 22, 1990, and Judge Souter was nominated three days later on July 25, 1990. Judge Powell announced his retirement at a press conference on June 26, 1987, and Judge Bork was nominated five days later on July 1, 1987. (Bork was not confirmed). Chief Justice Burger told President Reagan privately that he would retire on May 27, 1986, and Justice Rehnquist was nominated for the Chief seat twenty-four on June 20, 1986. Finally, Justice Stewart announced his retirement on June 18, 1981, and Justice O’Connor was nominated sixty-two days later on August 19, 1981. See List of Nominations to the Supreme Court of the United States,
frame, it took exactly thirty-two days for President Obama to nominate Judge Garland after the passing of Justice Scalia, and for President Bush to nominate Harriet Miers after the passing of Chief Justice Rehnquist. 503 During a February 29, 2016 briefing, White House press secretary Josh Earnest explained that “previous Supreme Court vacancies have taken about 30 days or so to fill.” 504 The magic number is thirty-two days. For the Senate’s “advice” to be useful, it must be provided in advance of this thirty-two-day mark.

After the vacancy opens up, the majority and minority leaders, in conjunction with the chair and ranking member of the Judiciary Committee, should each propose a slate of possible candidates. Ideally, the majority would propose more names than the minority—maybe five and three, or seven and five. The actual number is far less important than putting forward the names quickly.

This tradition, I suspect, will be forever changed by the campaign of Donald Trump. His decision to announce twenty-one possible Justices prior to the election set an important, and in my opinion, positive precedent. As a result, once a Justice dies or retires, the majority and minority leader can simply publicize their already-vetted short-list. The Senate can even request FBI investigations of the nominees to unearth any possible problems—the “Little Supremes” will be all too keen to comply to secure their spot on the list.

It is tempting to allow the Senate Judiciary Committee to cogitate over the names for some time, but for the reasons Senator Pierce Butler recognized two centuries ago, assigning the advice process to a committee does “throw business out of the hands of the many into the hands of the few.” For this approach to be the “advice” of the Senate, it must be the “advice” of the whole Senate. To achieve this plenary review, each candidate on the list would be brought for a full vote on the Senate in a staggered format: first the majority, then the minority, then the majority, etc. The majority and minority leadership can decide which order the nominees come up for a vote in. These votes could not be filibustered, but would be limited to a certain number of speeches for and against a nominee. After all the votes are completed, they would be transmitted to the White House.

Perhaps the single most salutary effect of this framework would be to break up the President’s monopoly on selecting who will serve as a Supreme Court justice. Further, this approach—thankfully—decreases the importance of who is elected President, and increases the importance of the 100 Senators elected. Donald Trump made clear to Republican voters that even if they hated him, they had to

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vote for him because of the Supreme Court. At a rally in Iowa, Trump explained (in the third person), “If you really like Donald Trump, that’s great, but if you don’t, you have to vote for me anyway. You know why? Supreme Court judges, Supreme Court judges.”

He was right. The Edison Research exit polling firm found that about 25% of voters said that the Supreme Court “was the most important factor in their vote.” (56% of Trump voters cited the Court as “the most important factor,” while only 41% of Clinton supporters viewed the Court as pivotal). The President has this awesome power in his hands, and his hands alone. A far more representative approach would soften this authority based on the antecedent advice of all 100 Senators.

Prompt Senate pre-approval of a list of names democratizes the process, and avoids the intractable logjam that confronted the Senate in the aftermath of Justice Scalia’s passing. If the President selects someone who was not on the Senate’s short list, it is well within the body’s powers to vote down the nominee. Or, if the President selects someone who did not receive adequate support, the Senate is well within its power to vote down the nominee. In any event, this approach boxes in the President—inertia will nudge him to pick someone who already enjoyed majority support. If he does so, there will be no bruising confirmation hearings, and he would not need to burn political capital. This approach also obviates the President making a nomination his party utterly rejects, such as Harriet Miers.

509 Byrnes, supra note 507.
On a similar note, perhaps President Obama could have avoided the tepid response in his own party to Merrick Garland. If the members of the Senate could have offered their advice in advance, it is unlikely either would have been selected. Putting advice before consent sheds some much-needed sunlight on the black box that is the nomination process. Though it remains the President’s constitutional prerogative to nominate, the Senate will have provided its “advice,” with teeth, before “consenting.”

The objections to this proposal, I concede, are legion, but not insurmountable. First, as illustrated by President Washington’s frustration in 1789, the Senate has always been an indecisive body unable to provide the President with timely and helpful “advice.” Due to the tragedy of the commons, it is far too easy for Senators to do nothing and let someone else make the tough decisions. This apathy is heightened by the risk-averse representatives, who fear being blamed for bad decisions. It is much easier, and all too commonplace, for Senators to shrug. Is it really surprising then, for the President to completely ignore the Senate when making nominations? If the leadership is disciplined and requires their members to vote, this apathy can be overcome. In many respects, the most consequential vote a Senator casts is for the Supreme Court. Had Democrats not united in 1987, we would have had Justice Bork instead of Justice Kennedy. If two Senators switched their votes in 1991, Justice Thomas would have never been confirmed. In 2005, had fifteen more Democrats joined Barrack Obama, there would have been enough members to filibuster Samuel Alito’s nomination to the Supreme Court. In 2016, had enough Republicans broken ranks with Leader McConnell, perhaps Justice Merrick Garland could have been confirmed. While Senators may punt and dally on inconsequential legislation that no one will remember, discipline is important for the all-important Supreme Court.

A second objection is that the Senators will simply vote with their parties, and this pre-vote will reveal nothing. Here, the strategy of the majority and minority rewards identifying jurists with cross-
party appeal. Senators often have specific issues that they, or their constituents, care deeply about, and nudge them to vote against their party’s interest. For example, Democratic Senators from western states may be averse to a Justice whose jurisprudence may be harmful to mining or farming concerns. Or Republican Senators from blue states may be hesitant to support a would-be justice who has narrowly construed abortion precedents. If a few votes can be peeled off in either direction, that provides a valuable insight into the President. This approach would minimize the incentives for the President to appoint a nominee far from the median voter in the Senate. This moderating influence on the nomination process would limit polarization on the Supreme Court and perhaps push back against its politicized reputation. Further, by voting on eight or twelve possible jurists, the pressure is alleviated somewhat, because the President still has a range of options. This approach would be akin to a modified form of the Missouri Plan.510

Third, this analysis deliberately elides over the requisite level of support. The constitutional consent of the Senate requires but a mere majority, but under the Senate’s current rules, sixty votes are required to invoke cloture. However, if the filibuster is eliminated for the Supreme Court, then the magic number becomes fifty. Whatever that level of support is should apply to this framework. Such a reading yields a collaborative effort between the President and the Senate. While the President maintains the prerogative, and perhaps even duty, to appoint whomever he or she chooses, the Senate’s role in providing “advice” cannot be ignored. This is, for sure, a lot of extra work for the Senate, but for a lifetime nomination, it is worth

the labor at the outset. If done in a timely manner, putting advice before consent could dramatically improve the confirmation wars.

Finally, I am not naïve. The President will not want the Senate to play any formal role in his selection of a Supreme Court justice—especially if the Senate is controlled by the opposite party. As a result, this proposal is unlikely to be considered in 2017, or for the foreseeable future. Rather, it would only arise under a specific set of circumstances: the President and the Senate are controlled by opposite parties, and are deadlocked on who will fill a vacancy. (This could have happened if Hillary Clinton won the White House and Republicans controlled the Senate). If the President and the Senate are controlled by the same party, members of the President’s own party will likely go along and support his nominee. But if the President nominates a Justice-to-be, and the Senate votes that person down, a proposal along the lines I address here could be brought up as an alternate. The Senate votes on a roster of names, and gives the President counsel of who will sail through confirmation. I am all too happy to let this idea sit, germinate, and perhaps be useful when it is necessary.