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The court that could have been

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My guess is that relatively few voters in the Nov. 8 presidential election paid much attention to its impact on the Supreme Court, but that may well be its longest lasting effect. This is the election that likely will determine the ideological composition of the Supreme Court for decades to come.

Major ideological shifts on the Supreme Court are rare. The court became very conservative by the 1880s and remained that way until 1936, striking down over 200 progressive laws, such as those limiting child labor and imposing minimum wages and maximum hours in the workplace.

From the late 1930s through 1969, a majority of the justices were appointed by Democratic presidents. Especially under the leadership of Chief Justice Earl Warren, the court struck down laws requiring racial segregation, applied the Bill of Rights to state and local governments, and greatly expanded voting rights.

From 1969 until Feb. 13, when Justice Antonin Scalia died, there always have been at least five and sometimes as many as eight justices appointed by Republican presidents. But now there are four justices appointed by Republican presidents and four justices appointed by Democratic presidents. And it is not just about who replaces Justice Scalia. Since 1960, 78 years old is the average age at which a Supreme Court justice has left the bench. Three of the current justices - Ruth Bader Ginsburg, Anthony Kennedy and Stephen Breyer - are 78 or older.

Donald Trump replacing Justice Scalia with a conservative will restore the court to the ideological balance that it had before his death on Feb. 13. But if President Trump also gets to replace even one from among Ginsburg, Kennedy or Breyer, there will be a five-justice majority to move constitutional law in a far more conservative direction than it has been at any time since 1936.

Replacing just one of these three justices, along with Justice Scalia, with staunch conservatives will assure a majority to overrule *Roe v. Wade* and allow states to prohibit all abortions. There will be a majority to end all affirmative action and to further narrow civil rights laws. There will be a majority to strike down campaign finance laws and gun restrictions and allow far more religious involvement in government and government support to religion. With five justices in their 40s, 50s and 60s, this will be the law for decades to come.

But this is not the only cost of a Trump Supreme Court. What must not be forgotten is the opportunity that was lost on Nov. 8. What might it have meant to have a majority of justices on the court who were appointed by Democratic presidents?

A court that would have advanced racial justice. American society obviously remains deeply racially divided and racial discrimination persists. The Supreme Court, over the last 40 years, has made it very difficult to challenge government practices that have a discriminatory impact, even a severe discriminatory effect, against racial minorities. The court repeatedly has held that equal protection is violated only if there is proof that the government intentionally discriminated on the basis of race. Proving discriminatory intent is difficult; rarely will government officials express racist motives. As a result, the court has said that even overwhelming evidence of a racially discriminatory impact of government policies in employment, in voting, and in carrying out the death penalty were not sufficient to show constitutional violations. A progressive court could have changed this and allowed challenges to government practices that disadvantage racial minorities.

A court that would have lessened the control of the government by special interest groups and the extremely rich. For 40 years, the Supreme Court has held that people have a First Amendment right to spend unlimited amounts of money in election campaigns. *Citizens United v. Federal Election Commission*, in 2010, extended this to hold that corporations can spend unlimited sums from their corporate treasuries to get candidates elected or defeated. Large expenditures by rich individuals and corporations on behalf of candidates always raise the appearance of government officials beholden to those who spent the money to get them elected. Political races sometimes are decided by the money given, especially those of lower visibility where large expenditures can make a real difference. A progressive court not only could have overruled *Citizens United*, but could have reconsidered the earlier holdings that equate money with speech and allow unlimited expenditures by the rich in election campaigns.

A court that would have ended inhumane punishments. The United States is the only Western nation that still has the death penalty. In fact, an Amnesty International Report in 2014 documented that there are only nine countries in the world that still use the death penalty and the United States is in the company of nations like Iran, China, Libya, Somalia, Sudan and North Korea. I believe there are already four justices on the Supreme Court who would have voted to declare the death penalty unconstitutional as cruel and unusual punishment. The court also needs to address the inhumanity of prolonged solitary confinement, where prisoners are alone in a cell 22 to 24 hours a day, as is done in federal prisons and prisons in 44 states.

A court that would have advanced economic justice. One of the worst Supreme Court decisions in my lifetime was *San Antonio Board of Education v. Rodriguez*, in 1973, which held that great disparities in school funding in a metropolitan area did not violate the Constitution. The court ruled that education is not a fundamental right and that discriminating against the poor does not violate the Constitution.

At the very least, a progressive court could have held that every child has the right to an adequate education. Education is fundamental to the exercise of almost every constitutional right and to basic equality in society. Moreover, the court could have found that discrimination against the poor is the basis for a constitutional claim.

A court that would have opened the courthouse doors to those whose rights have been violated. For almost a half century, the Supreme Court repeatedly has restricted access to the courts so that those whose rights have been violated have no recourse. In recent years, the court has said that arbitration clauses in form contracts keep injured workers or consumers from getting to go to court. The court has made it very difficult to sue government and government officers. For example, a prosecutor who knowingly convicts an innocent person or a police officer who commits perjury are absolutely immune from civil suits. The court has made it often impossible to sue state and local governments even for egregious violations of rights.

We came so close last Tuesday to all of this being possible. I still believe that someday all of this will happen. But not for a long, long time to come.

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